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## Back to the Basics: Lessons from U.S. Property Law for Land Reform

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## Back to the Basics: Lessons from U.S. Property Law for Land Reform

# BACK TO THE BASICS: LESSONS FROM U.S. PROPERTY LAW FOR LAND REFORM

SHELLEY CAVALIERI<sup>†</sup>

## ABSTRACT

Redistributive land reform programs are a central development approach in nations of the global south. For proponents of land reform, land redistribution is an obvious strategy, designed to reduce hunger and poverty, to bolster citizens' ability to support themselves and their families, and to shape the future of burgeoning democracies worldwide. But for land reform skeptics and opponents, land reform is something of a puzzle. While states routinely redistribute money, the choice to distribute land seems somewhat peculiar. On its face, it is not obvious why land is worthy of a separate, strange approach, when this is not how nations consider the allocation of many other crucial non-monetary resources. To invest money in reducing the concentration of land by purchasing from some in order to give or sell land to others seems far more complex than simply redistributing financial resources. Yet those who think about property know that land is different—land is unique and culturally important. It therefore warrants specific consideration as nations contemplate how to create the good society.

Essential theoretical insights about property should form the foundation of land reform efforts, but these too often go unstated, leaving land reform efforts' theoretical underpinnings unexplored. This Article serves to fill this gap, grounding market-compatible land reform in property's animating principles. The Article considers five different sources of lessons that property theorists can teach those implementing land reform. First, it observes that land is unique and therefore worthy of special treatment as a social good due to its rivalrous and nonfungible character. Second, it argues that land reform must recognize the shifting nature of

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land as a contextual, contingent resource that bears separate meanings in different communities, social classes, and nations. Third, it recognizes that land reformers must understand the role of land in constituting individual identity and personhood. Fourth, the Article examines the historical role of land in constructing social status and creating wealth. Fifth, the Article considers how land constitutes citizenship, both by shaping the individual and the relationship of the individual to the nation. The Article then makes two key arguments about how these lessons are useful in the context of land reform. First, the Article argues that these property lessons can explain why redistributive land reform matters. Second, the Article leverages these property lessons to make land reform more effective. The Article concludes by observing that these lessons about land will fundamentally alter the way land reform is undertaken, contributing essential knowledge to those eager to enact redistributive land reform initiatives.

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## INTRODUCTION

Land reform has evolved as a key development strategy for nations in the developing world. The term “land reform” describes an array of public policy approaches including formalization of land titles and land tenure, resolution of land-related conflicts, and the provision of land to those who are landless. This Article will focus on the latter of these policies, known broadly as redistributive land reform initiatives. Redistribution of agrarian land to landless rural people serves central societal purposes including poverty eradication,<sup>1</sup> food security improvement,<sup>2</sup> wealth accrual,<sup>3</sup> and community development goals.<sup>4</sup> I have previously written on the purposes of land reform, arguing that the key pragmatic and expressive goals of land reform, which are designed to serve the needs of poor people in the developing world, are best served by crafting a land reform approach that does not wildly undermine the existing land market.<sup>5</sup>

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1. Krishna B. Ghimire, *Land Reform at the End of the Twentieth Century*, in LAND REFORM & PEASANT LIVELIHOODS 1, 1 (Krishna B. Ghimire ed., 2001); Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction, and Growth: Evidence from India*, 115 Q.J. ECON. 389, 392–94 (2000).

2. Thembela Kepe & Danielle Tessaro, *Integrating Food Security with Land Reform: A More Effective Policy for South Africa*, CIGI-AFR. INITIATIVE POL'Y BRIEF SERIES, Aug. 2012, at 1–2.

3. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 39–40 (2000).

4. See generally Besley & Burgess, *supra* note 1, at 392–94. The international community has recognized the role of land reform in addressing development deficits and has dedicated resources to encouraging land access as a way of assisting with development goals. See, e.g., SATURNINO M. BORRAS JR. & TERRY MCKINLEY, INT'L POVERTY CTR., *THE UNRESOLVED LAND REFORM DEBATE: BEYOND STATE-LED OR MARKET-LED MODELS* 1, 3 (Nov. 2006) (Policy Research Brief No. 3).

5. See Shelley Cavalieri, *Grounding Land Reform: Toward a Market-Compatible Approach to Land Reform*, 89 ST. JOHN'S L. REV. 1, 21–22 (2015).

Unfortunately, land reform efforts are often politically divisive and plagued by an array of problems. Even in the single instance when land reform was meaningfully undertaken in the United States—in Hawaii in the 1980s—it was subject to a serious legal challenge from prior owners that ultimately landed the program in the U.S. Supreme Court, which validated Hawaii's land redistribution program.<sup>6</sup> In other places, land reform programs lack an underlying rationale for why they are worthwhile. Such programs face strong opposition not only from landowners who fear that their land may be taken through eminent domain, but also from other members of privileged classes.<sup>7</sup> Land reform proponents struggle to persuasively articulate why land is a unique resource that is worthy of being treated differently than money or any other social good.

To a property scholar, it might well appear that those implementing land reform have never learned the essential lessons from property law when they contemplate how to create programs that broaden access to the key resource of land. They forget that land is scarce and that its meaning shifts depending on the culture and community where the land is situated. They ignore land's relationship to social status. They overlook its centrality to the stable functioning of a nation's economy. They disregard its important relationship to citizenship and national identity. They neglect the role of land ownership in helping to stabilize societies that have struggled with civil and political unrest. To the extent that land reform programs are enacted without considering these profound meanings of land, they run the risk of failure. The refusal to properly theorize land reform and to analyze its roots in property law can prevent land reform programs from serving their central goal of eradicating poverty.<sup>8</sup>

This Article sets forth to offer property law solutions to some of the basic problems plaguing land reform initiatives. While land redistribution might be framed as a repudiation of basic private-property values, this Article suggests instead that property law and theory are crucial sources of insights to help land reformers succeed in their efforts to broaden access to land. In this Article, I prove both how key principles of property law apply to land reform and how property theory can explain much of the unstated significance of land reform. In Part I, I describe five key frameworks that emerge from property law and policy. I then argue that these property frameworks teach two kinds of lessons. First, in Part II, I argue that property theory reveals why the effort to redistribute land through land reform programs is worthwhile. Second, in Part III, I argue that property law can offer insights into how to make land reform programs more successful.

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6. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (challenging land reform as a violation of the Takings Clause of the U.S. Constitution).

7. AJ VAN DER WALT, *PROPERTY IN THE MARGINS* 3–4 (2009).

8. I have previously discussed this aspect of redistributive land reform at length. See Cavalieri, *supra* note 5, at 6–8.

Property principles, therefore, are useful in this context by demonstrating both the value of redistributive land reform initiatives and how to make such programs more effective. Without these central theoretical insights, land reform is rootless and suggests that land is just another social good that a society might decide to redistribute. But rooted in property law, the profound import and difficulty of broadening access to land become clear. Prudentially, knowledge of these theories is essential to crafting effective land reform programs. This Article proves why land is different, and as a result, why land reform programs must reflect the meaning of land to succeed. All of these lessons reveal why property insights into the nature of land are integral to understanding the profound value of land reform as a focus of antipoverty, development, and human rights efforts.<sup>9</sup>

### I. PROPERTY'S BASICS PROVIDE LESSONS FOR LAND REFORM

In this part of the Article I identify and explain five sources of lessons within property law. Section I.A describes how property law has come to address land's nonfungible nature and finite quantity. Section I.B explains how property scholars understand the shifting nature of land as a contextual, contingent resource whose meaning communities, social classes, and nations might comprehend in divergent ways. Section I.C sets forth the role of land in constituting individual identity and personhood. In Section I.D, I first examine the historical role of land in constructing social status and creating wealth; I then analyze the evolution of mechanisms in the Anglo-American legal system to prevent the establishment of dynastic wealth. Finally, in Section I.E, I consider these role land plays in constituting citizenship.

#### *A. Property Rights are Rivalrous and Land Itself is Scarce, so Law Evolved to Treat Land Differently*

Real property is one of a group of resources known as rivalrous goods—those that “[i]f one person owns and controls them, others do not.”<sup>10</sup> Rivalrous goods are characterized by the fact that they are typically under the control of only one person at a time. When one person owns the property, it means that another person cannot have the same property right. In the context of land, rivalrousness requires “recognizing [that] a property right necessarily has the effect of limiting other property

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9. This project specifically undertakes to engage with scholars and policy makers in an effort to improve land reform. An important but separate project is a deeper engagement with the communities formed by land reform efforts, to invite those communities to contribute their own perspectives on how land reform might better meet their needs. Despite this Article's focus on using property law to speak to scholars and policy makers, my previous fieldwork interviewing recipients of redistributed land in Guatemala deeply informs the property insights I here invoke. For an incisive analysis of the importance of subaltern voice in property discourse, see generally Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1727–32 (2014).

10. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1049 (2005).

rights.”<sup>11</sup> This statement reveals a profound truth about rights to land as they contrast with many other legal rights.<sup>12</sup> Professor Timothy Mulvaney observes that recognition of speech rights, for example, probably will not lead to the denial of others’ right to speak.<sup>13</sup> But granting a person property rights over a parcel of land usually limits the rights of others over the same land.<sup>14</sup> Land ownership therefore creates a zero-sum-game scenario, in which one person’s exclusionary property right denies others rights to that same parcel.<sup>15</sup>

While most tangible goods are rivalrous, land’s rivalrous nature poses a particular problem because land is also scarce. Land is arguably the only visibly finite resource in the modern world. Although the supply for many resources is elastic, the supply of arable land is finite in practical terms.<sup>16</sup> With most kinds of rivalrous goods, society or the market

11. Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CAL. L. REV. CIR. 349, 360 & n.47 (2014); see also Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2029 (2013) (“Property in physical, finite, nonsharable resources is inherently rivalrous in nature.”).

12. This trait is of course not characteristic of all kinds of property, especially with regard to intellectual property. The recognition of a property right in intellectual property does not necessarily limit the rights of others to use it, even though permitted widespread use of the intellectual property might reduce its economic value. An entire movement of intellectual property law and policy focused on creating a valuable commons has developed around spreading the value of intellectual property more broadly in society; it manifests a reluctance to overly protect intellectual property rights. See, e.g., Molly Schaeffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23, 23 (2007) (analogizing the open access movement to environmentalism’s focus on protecting access to resources for the public good).

13. Mulvaney, *supra* note 11, at 360 n.47; see also Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038–39 (1996) (characterizing property rights as distinct because “they allocate rights to particular individuals in finite, non-sharable resources”).

14. This claim is true insofar as title is held in the atomistic fashion that typifies Western models of landownership. However, collective forms of ownership or the creation of usage rights that are distinct from ownership may create forms of property that are less rivalrous than those that dominate most discussions of property rights. A group of contemporary property scholars are starting to focus on the burgeoning sharing economy, revealing that exclusivity need not be an inherent aspect of property regimes. See, e.g., Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 266–71 (2015); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 562 (2016) (observing that “sharing can temper the rivalrous nature of property to some extent” although “exclusivity of use or possession is necessarily embedded into property-sharing activities”).

15. See Laura S. Underkuffler, *Lessons from Outlaws*, 156 U. PA. L. REV. PENNUMBRA 262, 267 (2007) (“When we are considering the fate of external, physical, finite resources, such as land and all that it yields, property is a zero-sum game. If we acknowledge the ‘rights’ of some individuals in these resources, we deny the ‘rights’ of others. When we decide (and decide we must) who owns a building, who will farm the land, and whose mouths are fed, we are making distributive decisions, whether we like it or not. Property law design and enforcement cannot avoid this. It is a continual process of serious, deliberate, distributional decision making.”).

16. Joyo Winoto, *Taking Land Policy and Administration in Indonesia to the Next Stage, in INNOVATIONS IN LAND RIGHTS RECOGNITION, ADMINISTRATION, AND GOVERNANCE* 15 (Klaus Deininger et al. eds., 2010) [hereinafter *INNOVATIONS IN LAND RIGHTS*] (“While . . . [land supply] is seldom completely inelastic, the potential to increase its availability at the extensive margin is either non-existent or involves high costs.”). In contrast, many other kinds of social goods that could be subject to redistribution are not inelastic. For example, nations can increase the availability of health care or education through policymaking and subsequent investment. Even situations of temporary, severe deprivations of social goods, such as the unavailability of food during a famine, are due not to inelasticity but to distribution problems. Douglas C. Long & Donald F. Wood, *The Logistics of Famine Relief*, 16 J. BUS. LOGISTICS 213, 213 (1995).



resolves problems associated with rivalrousness by creating more of the good—in essence, by ensuring that the good will not also be scarce. For example, that food is rivalrous is not a problem, so long as food is not scarce. It is only under conditions of scarcity that food's rivalrousness becomes problematic.

Responding to the fact of land's rivalrousness and scarcity, real property law evolved to treat land as special by providing an extraordinary remedy for instances where property contracts are breached. The tradition of specific performance as the remedy for conflicts about land contracts reflects the reality of land's scarcity.<sup>17</sup> Notions of property have long reflected this fundamental nature of land as different from other kinds of property because no two acres, or even lots, are identical; American property law has evolved to embrace this presumption.<sup>18</sup> Likewise, the truly finite amount of land that is suitable for specific purposes, such as cultivation, only deepens the collective awareness that land is unusual. In the legal context, the rivalrousness and scarcity of land make it unique and therefore worthy of different treatment than other resources.<sup>19</sup>

### *B. Land is Contextual and Contingent*

Property scholars similarly recognize that land's nature is not monolithic. While land is only one kind of property, real property's situatedness<sup>20</sup> means that it is distinct because it cannot be removed from a par-

17. Specific performance has long been the traditional remedy for breach of land contracts. JOSEPH WILLIAM SINGER, PROPERTY 521 (3d ed. 2010) (observing that “[a]lthough damages are the usual remedy for breach of contract, specific performance is routinely awarded in land sale contracts because land is unique”); see also Tanya D. Marsh, *Sometimes Blackacre is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 NEB. L. REV. 635, 649–50 (2010) (reviewing sources to explain why the equitable remedy of specific performance is appropriate for land). This may be changing as fungible housing has become more common, in some cases subverting the legal presumption that real property is nonfungible. A minority of American courts has concluded that the identical nature of condominiums defeats the presumption of the non-fungibility of land. See, e.g., *Centex Homes Corp. v. Boag*, 320 A.2d 194, 198 (N.J. Ch. 1974). But see *Giannini v. First Nat'l Bank of Des Plaines*, 483 N.E.2d 924, 933–34 (Ill. App. Ct. 1985) (rejecting *Centex*).

18. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (AM. LAW INST. 1979) (“A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.”).

19. SINGER, *supra* note 17.

20. The concept of situatedness is used by legal scholars to define the concurrent facts of location and context. For example, in her illuminative reflection on the confirmation hearings of Justice Sonia Sotomayor, Professor Kathryn Abrams employs the concept of situatedness to describe social location within a community. Her exposition is worth quoting at length:

When Judge Sotomayor, in her writings, lectures, or public statements, acknowledges the effect of her experience or group affinities on her adjudication, she is identifying judges as socially-situated beings. They are situated in a community or communities, and they are shaped by the perspectives and norms that structure life and relations in those communities. This situatedness militates against the notion that judges should be objective—that is, they should take a God's eye view of any given controversy by holding themselves at a distance not only from the case before them, but from any kind of affiliation that might prevent them from seeing all aspects of the dispute. If a judge is situated, this argument suggests, she may view a case through a particular kind of lens, thus limiting her ability to approach it in other ways or to grasp all dimensions of the controversy. Sit-

ticular location. In this regard, real property differs from other social goods because it bears unavoidably contextual and contingent characteristics.<sup>21</sup> Understanding land as a purely market commodity disregards the role of physical, temporal, and cultural location in creating the meaning of land. Land's situatedness means that it belies simplistic market definition.

Two implications of this characteristic of property emerge as particularly relevant for helping policymakers construct effective, publicly accepted forms of land reform. First, property scholars work under the knowledge that property rules are not inevitable but rather are value laden and reflective of a particular society at a particular moment.<sup>22</sup> Alterations to property systems therefore can reflect an evolution of a society's values over time.<sup>23</sup> Second, once society comes to acknowledge that property systems are infinitely varied, society must likewise recognize that the meaning of property itself will vary as well; well-ordered property systems therefore must not be based on the presumption of shared meanings. Rather, they must operate with complete recognition of the potentially multivalent cultural implications of land in a specific context.

### 1. Land is Value Laden

The most traditional view of property law suggests that property regimes are static, fixed, and inevitable.<sup>24</sup> This is in part rooted in the nature of property as bearing some characteristics of a market commodity.<sup>25</sup> If property is just another good for the economy to distribute, redistributive intervention is simply disruptive of the current distribution. One common critique of redistributive policies is that existing distributions of property are settled and therefore should not be interrupted, largely because legal systems are most stable when they confirm citizens' expecta-

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uatedness also threatens the kind of detachment, or even insularity, which is often valued in American adjudication.

Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 269 (2010) (footnotes omitted).

My use of the word "situatedness" follows from this strain of thought in critical legal scholarship, that land, like people, has a social location and context.

21. See Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1248 (2007) (arguing that U.S. law mythologizes property as an absolute individual right, while in reality it is a "socially contingent and obligated right").

22. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 110 (2013) (arguing that progressive property scholars seek to "create more space to contest values" inherent in property systems).

23. See *id.* (suggesting that progressive property focuses on "the underlying values that property serves and the social relationships it shapes and reflects" (quoting Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009))).

24. Laura Underkuffler refers to this as the common conception of property. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY* 37–51 (2003).

25. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 1–2 (1997) (positing that our property norms are bifurcated by a dual meaning that is based in property's status as a market good and its role as the basis of social order).

tions.<sup>26</sup> Yet the presumption baked into this view is that the current system is just.

In the last twenty years, a robust alternative view of property has emerged, rooted in the recognition that the market-good characterization of property is far too simplistic since property bears many separate meanings and “resists generalization.”<sup>27</sup> Known under the general framework of progressive property, this movement has generated a voluminous literature focused on several key aspects of property. Most notable for purposes of this Article is progressive property’s fundamental intuition that “[p]roperty implicates plural and incommensurable values.”<sup>28</sup> Progressive property as a movement attempts to expose the values imbued in and hidden within a property system, and the social relationships that the property system reflects.<sup>29</sup> Implicit in this effort is the goal to reject the characterization of property distributions as static or fixed. Instead, progressive property seeks to unearth alternative values hidden within the existing system, values that might support the possibility of new property allocations that decentralize the importance of stability and its resulting commitment to the status quo, and instead foreground considerations of distributive justice.<sup>30</sup>

This movement within property scholarship reflects an operative conception of property in which property is a site for expressing other social values and priorities, rather than existing in a separate, value-free system.<sup>31</sup> Under this conception, property is more than a mere market commodity because it plays roles in humans’ economic, social, and physical lives.<sup>32</sup> Once the value-laden nature of the property regime is unmasked, it becomes obvious that any given system is reflective of the values of the society in which it operates.<sup>33</sup>

## 2. Because Land Is Situated, its Meanings Are Multiple and Divergent

Contingency has even greater import when contemplating differences in the meaning that land bears across societies. Localized property

26. VAN DER WALT, *supra* note 7, at 3–4, 17–18 (describing opposition to post-apartheid redistribution as rooted in respect for existing rights and desires for stability and security, as well as in “the ‘normal’ tendency of law to entrench the status quo and protect existing property holdings”).

27. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 828–29 (2009).

28. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

29. Rosser, *supra* note 22, at 111.

30. Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 400 (2015) (describing progressive property as working “with property, showing how doctrine supports expanding property law to reach those who would otherwise be excluded and highlighting areas in which social values have created exceptions that deviate from an exclusion-centric understanding of property law” (emphasis added)).

31. UNDERKUFFLER, *supra* note 24.

32. Peñalver, *supra* note 27.

33. Rosser, *supra* note 22.

regimes exist worldwide, both in formal and informal systems.<sup>34</sup> As progressive property scholars have shown, property itself is socially defined and open to shifting, evolving meanings even within the same nation.<sup>35</sup> These intuitions about land are more than theoretical—they have deeply practical aspects. Those who study land rights as they evolve in societies worldwide acknowledge that land is both an asset and “an issue of ‘wealth, power, and meaning.’”<sup>36</sup> Questions of land rights “have to do with heritage, identity, citizenship, and governance.”<sup>37</sup> Land therefore invokes some of the deepest questions facing a state.

Profound variation in the understanding of land’s significance is even more pronounced in developing countries. In such places, there are two divergent realities about land, with a growing cultural divide between them.<sup>38</sup> Less privileged rural citizens who have spent their lives working on the land, whether their own property or that of an employer, occupy one side of this schism.<sup>39</sup> For such people, land is crucial to overcoming problems of poverty and food insecurity<sup>40</sup>—land is the source of income and livelihood.<sup>41</sup> Even within a rural community that might share some fundamental understandings of the social role of land, dramatic power differences divide traditional leaders, who form their own rural elite class, from the landless poor, who form the bulk of the same com-

34. Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 517–18 (2013).

35. See, e.g., JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* 22–29 (2000).

36. Philippe Lavigne Delville, *Registering and Administering Customary Land Rights: Can We Deal with Complexity?*, in *INNOVATIONS IN LAND RIGHTS*, *supra* note 16, at 28, 28 (quoting Parker Shipton & Mitzi Goheen, *Understanding African Landholding: Power, Wealth and Meaning*, 62 AFR.: J. INT’L AFR. INST. 307, 307 (1992)).

37. *Id.*

38. Professor Johanna Bond has made a more global observation about the rural–urban divide beyond the issue of land, noting in the context of her discussion of the drafting of the Convention on the Elimination of Discrimination Against Women (“CEDAW”), that urban elites dominate the drafting of most supranational agreements, and highlighting the fact that the divide between sophisticated, urban elites and poorer rural people is very real. She further observes that even trying to involve organizations that work with rural populations is often insufficient to overcome this urban, elite bias. See Johanna E. Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 509, 540–41 (2010). Professor Ezra Rosser has made a similar point about the metaphorical and sometimes physical distance that lies between rich and poor people and the racialized aspects of this gap. See generally Ezra Rosser, *Getting to Know the Poor*, 14 YALE HUM. RTS. & DEV. L.J. 66, 81–88 (2014).

39. My own qualitative research during 2006 and 2010, interviewing landless Guatemalan peasants about their experiences of land reform, demonstrated repeatedly the central role that land played in their lives. Having spent their lives hoping to gain access to arable land, the opportunity to own property and build stability for their families was a dream realized. For some who gained that land through occupation based in their religious beliefs in Catholic Liberation Theology, land symbolized literal and spiritual liberation from poverty. For others who had been guerilla fighters in the civil war, land meant that the struggle had served a purpose. But the land was paramount for all of them.

40. Besley & Burgess, *supra* note 1.

41. See Sam Moyo, *Land and Natural Resource Distribution in Zimbabwe: Access, Equity and Conflict*, 4 AFR. & ASIAN STUD. 187, 188–90 (2005).

munities' populations.<sup>42</sup> On the other side exist the privileged but largely landless educated, urban elites who often occupy positions of influence and power in the government; paragonmental organizations, such as the United Nations; or nongovernmental organizations.<sup>43</sup> The contemporary reality of different lived experiences in relation to land dwarfs any historically shared cultural understandings of the meaning of land, as the lives of individuals in developing countries increasingly differ based on some individuals' privilege afforded by education and family social station.<sup>44</sup> This urban–rural divide exists worldwide<sup>45</sup> but is perhaps most pronounced in the developing world, where access to education and other aspects of modern life remain largely absent from rural communities.<sup>46</sup>

The anthropological literature on land further demonstrates how variation in meaning of land reaches far deeper than the urban–rural divide. Concrete examples illustrate how the meaning of property is not monolithic, even within a single nation. A few examples can help elucidate this distinction in practice.

In Central American nations, land has traditionally served the role of the generator of the stuff of life. For example, the Maya, the indigenous peoples of Guatemala and parts of Mexico, Belize, and Honduras, esteem land of adequate quality to grow corn and beans as the wellspring of their cultural and religious identity.<sup>47</sup> Yet as modern economic development has come to Central America, more and more people are moving to urban areas, destroying these traditional attachments to real property as the source of foodstuffs and cultural identity.<sup>48</sup> For urban people, food

42. See Bond, *supra* note 38, at 568 (noting in the context of writing about CEDAW that this dynamic has a particular, gendered aspect, as “[t]raditional leaders represent an elite, largely male group that has benefited from considerable influence at the local level even in the postcolonial period,” while “[r]ural women in many parts of Africa generally do not enjoy the same status within the community”).

43. See *id.* at 540–41.

44. Professor Lisa Pruitt has observed that an array of differences animates the schism between urban and rural places: the presence of local sources of authority in rural areas, “relative social and cultural stasis” in rural communities, and the lack of penetration of law. Lisa R. Pruitt, *Migration, Development, and the Promise of CEDAW for Rural Women*, 30 MICH. J. INT’L L. 707, 751–52 (2009).

45. Martha Nussbaum has observed the relative lack of interest in the rural–urban divide and how this division reveals inequality in access to power. See MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 225 (2006).

46. But see U.N. Conference on Trade and Development, *Information Economy Report 2010: ICTs, Enterprises and Poverty Alleviation*, 14–21 (observing that the penetration of cellular telephones into communities in rural parts of developing nations has significantly changed how these communities function). See generally Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. OF SOC. 447, 447, 455–56 (2006) (arguing that “global penetration of law will require at least four elements—actors, mechanisms, power, and structures [or] arenas”).

47. EDWARD F. FISHER, *CULTURAL LOGICS AND GLOBAL ECONOMIES: MAYA IDENTITY IN THOUGHT AND PRACTICE* 143, 147, 256 n.9 (2001) (documenting that mother’s milk, semen, and maize are “animizing substances” to the Maya and describing a Maya creation myth in which the “world tree” is a maize plant that is at the center of the cosmos but remains grounded in the land); JIM HANDY, *GIFT OF THE DEVIL: A HISTORY OF GUATEMALA* 46 (1984).

48. See SHELDON ANNIS, *GOD AND PRODUCTION IN A GUATEMALAN TOWN* 33–37 (1987) (describing traditional peasant reliance on the “milpa” as a source of food and how the role of the

comes from markets, not the land; land and agriculture are the purview of people perceived as backward, parochial country residents.<sup>49</sup> As a result, while there remains the historic cultural definition of the role of land, modern understandings of land have diverged, with some individuals remaining dedicated to a traditional vision of land and others viewing real property in an urban setting as more or less fungible, detached from its role in human sustenance.<sup>50</sup>

In Zimbabwe, substantial racialized differences in the meaning of land contribute to ongoing land conflicts.<sup>51</sup> Black Zimbabwean culture understands land to belong to the ancestors, to be allocated to households and then returned to community leaders to be reallocated to another family when the original head of the household dies.<sup>52</sup> Within Black Zimbabwean society, there is no cultural tradition of individual property rights; individuals cannot own land in a manner cognizable through Western property norms.<sup>53</sup> Land holds sacred meaning because it comes from the ancestors.<sup>54</sup> Even Zimbabwe's war of independence reflected this meaning, with the fighters referred to as "children of the soil."<sup>55</sup> In contrast, White Zimbabweans' culture of land derives from European legal rules, whereby parcels of fenced land are held with titles that demonstrate the existence of market-alienable individual property rights.<sup>56</sup>

This Zimbabwean example reveals a deeper aspect of the problem with land rules. In many instances, property regimes serve to protect existing structures of privilege. In Zimbabwe, fencing practices reflect the importation of European usage of land distribution to establish social hierarchy.<sup>57</sup> While the system appears on its face to be neutral, it in fact

"milpa" has changed as the population of towns has increased); cf. FISHER, *supra* note 47, at 4 (documenting that while rural elders who relocated to cities during the civil war missed their fields, young people quickly adapted to indoor urban life).

49. See FISHER, *supra* note 47, at 159–60, 178 (discussing how rural Mayan communities view non-market food exchange at the hearth as central to identity; urban elites view villages as backwards).

50. See *id.* at 111, 113 (describing a ceremony celebrating the transfer of rural land within a family as well as indigenous identity groups working to strengthen connections to land and reestablish communally held land after the civil war).

51. Andre Degeorges & Brian Reilly, *Politicization of Land Reform in Zimbabwe: Impacts on Wildlife, Food Production and the Economy*, 64 INT'L J. ENVTL. STUD. 571, 573 (2007).

52. *Id.* This set of norms too frequently renders widows, women whose marriages or relationships have ended, and single, never married women deeply vulnerable as they lack access to the primary source of income and stability in their rural communities. Rudo Gaidzanwa, *Women's Land Rights in Zimbabwe*, ISSUE: J. OPINION, Summer 1994, at 12, 12. Even outside of this particular cultural context, the landlessness of women is a pervasive development problem worldwide. See Sofia Monsalve Suarez, *Gender and Land*, in PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM 192, 198 (Peter Rosset et al. eds., 2006).

53. Degeorges & Reilly, *supra* note 51.

54. *Id.*

55. DAVID LAN, GUNS AND RAIN: GUERILLAS AND SPIRIT MEDIUMS IN ZIMBABWE 171–72 (1985).

56. Degeorges & Reilly, *supra* note 51.

57. See *infra* note 84 and accompanying text.

reflects the interests and values of the dominant portion of the population that already owns property. But it overlooks the needs of people with weaker property claims—what Professor Andre van der Walt called the people on the margins<sup>58</sup> or Professor Mark Roark would call under-propertied persons.<sup>59</sup> The rules are value laden; the property system reflects the existing set of social priorities.

### C. Land Can Constitute Identity

In her seminal article *Property and Personhood*, Margaret Jane Radin posited the key insight that property can be central to individual identity.<sup>60</sup> While Radin has her critics,<sup>61</sup> at its core the concept of personhood and property reveals that property ownership is intimately tied to our conceptions of ourselves, an argument that is based on a continuum of property that ranges from personal to fungible.<sup>62</sup> Radin defines personal property as “a class of objects or resources necessary to be a person or whose absence would hinder the autonomy or liberty attributed to a person.”<sup>63</sup> In contrast, fungible property is purely instrumental in nature, and it “is perfectly replaceable with other goods of equal market value.”<sup>64</sup> This continuum “generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”<sup>65</sup> As a result, while the state owes deference to personal property rights, under appropriate circumstances the state may override fungible property rights to serve other purposes.<sup>66</sup>

Complicating this continuum is fetish property, which is a relationship to property that “hinder[s] rather than support[s] healthy self-constitution.”<sup>67</sup> While owners may perceive their fetish property to capture their personhood, Radin rejects the ascription of personal, protected status to fetish property.<sup>68</sup> Instead, though she recognizes that fetish property is entitled to status as property, she argues that fetish property should be treated as fungible.<sup>69</sup> Implicit in the refusal to defer to fetish property rights is Radin’s adoption of the Marxist analysis of the “fetish-

58. VAN DER WALT, *supra* note 7, at 23–24 (2009).

59. See Marc Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL’Y (forthcoming Fall 2017) (manuscript at 6), <https://ssrn.com/abstract=2918598>.

60. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982).

61. See, e.g., Mary L. Clark, *Reconstructing the World Trade Center: An Argument for the Applicability of Personhood Theory to Commercial Property Ownership and Use*, 109 PENN. ST. L. REV. 815, 816, 821–22 (2005); Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin’s Imagery of Personal Property as Inviolable Feminine Body*, 79 MINN. L. REV. 55, 110 (1994).

62. See Radin, *supra* note 60, at 959–60.

63. *Id.* at 960.

64. *Id.*

65. *Id.* at 986.

66. See *id.*

67. *Id.* at 969.

68. *Id.* at 970.

69. *Id.* Distinguishing fetish property is a challenge, however, for Radin, who appears to suggest that, like insanity, fetishism can be perceived through its deviance. *Id.* at 969.

ism of commodities,” which means that an excessive obsession with the “control over a vast quantity of things” will “destroy[ ] personhood rather than foster[ ] it.”<sup>70</sup>

Radin is not without her detractors. Some suggest that she may have overstated her account of connection to the home,<sup>71</sup> or that these attachments have more to do with connections people form with their communities and social networks than to property itself.<sup>72</sup> Most relevant to the question of land reform, others have critiqued her reluctance to recognize personal attachment to fungible property<sup>73</sup> or to commercial property.<sup>74</sup> Despite these critiques, Radin’s work helps elucidate the fact that, while property as a category bears important connections to identity, property can be further divided into classifications that warrant different levels of state protection. The result of the distinction between personal and fungible property is that state protection is more appropriate for personal property but often invalid for fungible property. Because the existence of fetish property may be harmful to society, a state may actually have to actively work to disaggregate it.

#### *D. Property Law Reflects the Fact that Land Has a Historical Function of Creating Wealth and Status*

Property law tells us that land serves different functions than money serves. Throughout history, land has played a substantial role as a primary source of wealth and social status. In some instances, this had negative, dynastic aspects, but it also served the function of establishing households’ autonomy. Yet urbanization in many nations has led rural property to play a much more trivial current role in establishing substantial wealth. But in nations of the Global South today, land’s significance as a source of wealth and stability is a far more substantial contemporary construct than it is at this point in most communities in developed nations.<sup>75</sup> While this largely bygone character of property continues to re-

70. *Id.* at 970.

71. *See, e.g.*, D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 277–82 (2006).

72. *See* Mulvaney, *supra* note 11, at 370–71.

73. *See* Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 391 (1993) (criticizing Radin for overlooking the role of fungible property in self-constitution); Schroeder, *supra* note 61, at 110 (suggesting that Radin does not appreciate “the subjective experience of empowerment and satisfaction owners have in controlling fungible property and the feelings of pain they experience at the loss of control”). *But see* Radin, *supra* note 60, at 1008 (“While I have argued that personal property should be specially recognized, I do not argue that there is no personhood interest even in fungible property.”).

74. *See* Clark, *supra* note 61, at 821–22. *But see* Radin, *supra* note 60, at 960 n.6 (“The distinction is not simply between consumer property and commercial property. While it is likely that most commercial property is not property for personhood but rather held instrumentally, a great deal of consumers’ property is also not property for personhood in the special direct sense I am trying to bring out.”).

75. This is largely due to the fact that only in 2008 did the global population become essentially evenly split between rural and urban communities. *See* Pruitt, *supra* note 44, at 709 (citing Lisa R. Pruitt, *Did the World Become More Urban than Rural Yesterday?*, LEGAL RURALISM BLOG (Dec.



verberate even today in rural communities in the developed world,<sup>76</sup> its strongest domestic resonance is in U.S. history.<sup>77</sup> Considerations of the historical role that land ownership has played in the United States and of the way that the law has served to recognize this role reveal that land can be an important and distinct form of social support for poor and disenfranchised persons.

The early English roots of the American property system and the subsequent evolution of that system demonstrate the initial source of land's meaning—one of wealth and status—in the United States.<sup>78</sup> The entire American system of conveyancing real property is an outgrowth of the English model, which began with the monarch owning great tracts of land and individuals having few permanent land rights.<sup>79</sup> As the feudal system evolved into the modern English property system, tenants gained more substantial control of their property.<sup>80</sup> The ownership of large tracts

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17, 2008, 7:38 PM), <http://legalruralism.blogspot.com/2008/12/yesterday-was-one-of-those-days.html> (discussing listserv report of Professor Ronald C. Wimberley to the Rural Sociological Society regarding United Nations data on rural and urban populations)). In contrast for example, in the United States, only one in five citizens today lives in a rural community. See Lisa R. Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 STAN. L. & POL'Y REV. 359, 361 (2009) [hereinafter Pruitt, *The Forgotten Fifth*]. In the United States, the nation has been more urban than rural since the 1920 Census. See *id.* at 362 n.9 (citing Ken Deavers, *What is Rural?*, 20 POL'Y STUD. J. 184, 184 (1992)). As a result of this divergence, the reality of rurality has disappeared from the view of policy makers in developed countries like the United States, who are oblivious to the "rural manifestations of social problems." *Id.* at 362.

76. Yet it is still the case that land remains an important productive resource and symbol of economic stability for people who are otherwise cash-poor in contemporary rural U.S. communities. See JENNIFER SHERMAN, *THOSE WHO WORK, THOSE WHO DON'T: POVERTY, MORALITY AND FAMILY IN RURAL AMERICA* 30 (2009) (discussing how one rural community's "economy has always been mostly land based" and how "[e]lements of their subsistence lifestyle endure there, as the local culture still highly values hunting, fishing, and gardening for food, building one's own housing, and gathering one's own wood for heat"). In the popular media, this meaning has most poignantly been captured in the film *Winter's Bone*, in which a family's timber lands were to be sold if they otherwise could not cover a substantial debt to a bail bondsman. The film's protagonist, a teenage girl, willingly subjected herself to violence and the risk of death, in order to prevent the loss of the family's timber lands and home; she even participated in the dismemberment of her father's corpse in order to prove that he was dead and avoid the loss of her land, which she perceived to be the only way she had to support her young siblings and mentally ill mother. *WINTER'S BONE* (Roadside Attractions 2010).

77. But see Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 159 (2006) (observing that to the extent today's courts discuss rural people and places, it is often with an idealized, nostalgic image of rurality in mind, including such assumptions that rural areas are safe, that rural people are neighborly, and that rural communities are largely self-contained, so the law should play less of a role in rural lives and livelihoods).

78. See NANCY ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* 19 (2016) ("Whether barren or empty, uncultivated or rank, the land [in colonial America] acquired a quintessentially English meaning.").

79. Property rights under such a system were largely illusory; services rendered to the crown could result in accumulating a tract of land as a response to fealty, but the land was held subject to royal whim. See THOMAS F. BERGIN & PAUL G. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* 3 (2d ed. 1984).

80. *Id.* at 7–9. This change included the establishment of heritable land rights. The evolution of the language needed to convey an estate in fee simple absolute demonstrates how this change occurred. At early common law, a conveyance was presumed to be only for the duration of the grantee's life. Somewhat later, the right to convey to heirs became part of the fee simple estate so

of land within this system and in colonial America<sup>81</sup> came to signify wealth, status, and control of the practical resources necessary to securely maintain a position of privilege in society.<sup>82</sup> As a result, the incentive for individuals to keep their land and pass it onto their children and other descendants became a pronounced means of entrenching privilege for generations.<sup>83</sup>

In both the American and English contexts, land was even more useful than money to establish intergenerational wealth because the kinds of restraints that could be placed on land could prevent spendthrifts of future generations from squandering the family's accumulated wealth.<sup>84</sup> Owners constrained their property in these ways so they could encumber their descendants' ability to sell, segment, or otherwise disrupt the integrity of the entire assembled parcel.<sup>85</sup>

Evolving democratic norms against dynastic wealth entrenched in land led to today's American property law rules, which have significantly limited the rights of owners to control property for generations.<sup>86</sup> These laws initially evolved as a means of liberating land from family-imposed constraints, instead shifting power into the hands of the present owner and away from the preferences of deceased prior owners.<sup>87</sup> These changes have substantially reduced the role of real property as the basis of dynastic wealth in the United States.<sup>88</sup> They are part of a more general

long as the appropriate language was used. Modern law now presumes, barring other indication, that heritability is the nature of the default estate.

81. ISENBERG, *supra* note 78, at 37 (describing the appeal of landed widows as marriage partners because they permitted men in Jamestown to "increase their acreage"). "Land held power because of its extent, potential for settlement, and future increase." *Id.* at 41.

82. Marsh, *supra* note 17, at 647-48 (explaining that land meant political authority, social status, and food security in feudal England and colonial America).

83. J.H.C. MORRIS & W. BARTON LEACH, *THE RULE AGAINST PERPETUITIES* 11-14 (1956) (explaining the social and legal climate in which the rule against perpetuities evolved).

84. Owners could bind land to the family lineage with some degree of permanence via the fee tail, whereby ownership of the land could be restricted to lineal heirs for generations into the future, barring any of those heirs from selling even a portion of the land. *See* BERGIN & HASKELL, *supra* note 79, at 30-31. This of course led to its own set of problems, namely the existence of land-poor gentry, saddled with expensive estates to maintain without the cash resources to cover the related costs. Alternatively, owners could attach restrictions for future generations to allow only certain permissible uses and bar impermissible ones. For example, defeasible fees grant fee simple title that can endure forever, so long as a specified event does not occur. SINGER, *supra* note 17, at 304. Failure to obey the conditions would result in the forfeiture of the property.

85. SINGER, *supra* note 17, at 324 ("If enforced, the fee tail could ensure the perpetuation of a landed estate and protect the family somewhat against a child who might squander the family fortune.").

86. *Id.* at 325 (explaining the abolition of the fee tail); MORRIS & LEACH, *supra* note 83, at 11 (defining the purpose of the rule against perpetuities).

87. MORRIS & LEACH, *supra* note 83, at 3 ("From very early times the common law judges have shown a strong bias in favour of the free alienability of land."); SINGER, *supra* note 17, at 324-25 (noting the ways that modern law furthers alienability and why it does so).

88. SINGER, *supra* note 17, at 325 (explaining the public policy behind the abolition of the fee tail); *see also* MORRIS & LEACH, *supra* note 83, at 11 ("[T]he Rule Against Perpetuities and its kindred succeeded in preventing enormous concentrations of land in the hands of a very few and thereby brought it about that England never suffered unbearably from those conditions which else-

contemporary shift toward broadening land ownership throughout society, in which the law supports freer conveyancing of land and policies that further the alienability of real property.<sup>89</sup>

Beyond these arcane rules regarding estates, U.S. history is replete with additional examples of the centrality of land ownership, showing how the law helped people gain access to land as a primary source of wealth and social status. The U.S. government privileged land ownership throughout its history, originally associating the rights of citizenship with the ownership of property and not merely with residence in the nation.<sup>90</sup> Later, the federal government prioritized land ownership as a value underlying many of its central policies. In nineteenth-century American society, the import of land ownership was a driving force behind much of the westward population push.<sup>91</sup> Government recognition of land rights through homesteading sought to harness Americans' desires to own property as a means of populating the western states.<sup>92</sup>

This trend of government support of real property ownership extends past the early days of the nation. Into the twentieth century, the system of tenant farming in the American South was widely recognized as a site of entrenched inequality, and the federal government responded by initiating a program of subsistence homesteading.<sup>93</sup> This governmental support of land ownership continues today. Scholars have documented the role of even modest home ownership as the source of most Ameri-

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where have produced violent social revolution—land hunger, a class of serfs or peons and widespread destitution.”).

89. SINGER, *supra* note 17, at 281–86, 324–25.

90. See generally Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 357–58 (1989).

91. The Homestead Act of 1862 was part of a century-long series of government acts designed “to create a stable society whereby broad-based land ownership would provide individuals with a stake in the economy.” Gary D. Libecap, *Bureaucratic Issues and Environmental Concerns: A Review of the History of Federal Land Ownership and Management*, 15 HARV. J.L. & PUB. POL’Y 467, 470 (1992). Congress initially intended homesteading to raise funds through land sales, but later focused on small-scale farming by creating 160-acre limits on claims; this policy shift also involved broadening access by allowing improvements instead of purchase as the basis of title. *Id.* at 469–70, 473.

92. *Id.* at 470–71; see also Dana May Christensen, *Securing the Momentum: Could a Homestead Act Help Sustain Detroit Urban Agriculture?*, 16 DRAKE J. AGRIC. L. 241, 251 (2011) (noting that homesteading served “to promote development in the Western United States” and also played a substantial role as a centerpiece of government efforts to extirpate Native American tribes by treating land historically under native control as if it were unoccupied). But see ISENBERG, *supra* note 78, at 90 (documenting how Virginia, during the colonial era, “was content to dump the poor into the hinterland” by allowing squatters on unclaimed land in western Virginia and Kentucky to gain a right of priority for purchase, but that this harmed rather than helped the poor families who attempted to gain property because without the resources to purchase, they became trapped as tenant farmers).

93. ISENBERG, *supra* note 78, at 214. When this program faced legal challenge, the New Deal Roosevelt administration issued an executive order to start a new bureau, the Resettlement Administration, which was charged with helping the rural poor by buying submarginal land, resettling tenant farmers, helping drought victims, restoring damaged land, and offering camps for migrant workers, all with a central goal of “help[ing] tenant [farmers] obtain better living conditions and learn how to become farm owners. *Id.* at 218.

can families' accumulated wealth.<sup>94</sup> The federal government continues to prioritize property ownership by subsidizing it through federal first-time homeowner programs<sup>95</sup> and advantaged tax status.<sup>96</sup>

Yet as the primary locus of American life has shifted from rural communities to urban population centers within the last hundred years,<sup>97</sup> the land itself has lost much of its meaning as a principal signifier of wealth and social status in the United States.<sup>98</sup> Instead, education is perhaps the best analog to the prior function of land. Today, education functions as the central social good used to equip one's descendants to be

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94. The history of racial redlining demonstrates just how this kind of wealth developed in the United States. A formal policy of providing federally backed mortgages and mortgage insurance only for homes in white neighborhoods meant that African American families could not qualify to purchase homes on the same terms as white families of similar economic means. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 63–66 (2017). Worse yet, the federal government would only insure houses that were subject to racially restrictive covenants, thereby guaranteeing that the neighborhood could never be integrated, since the covenants barred sales to African Americans. *See id.* at 77–91; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 9–10 (describing African Americans as “[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history”). Research has clearly documented redlining as a significant historical root of the racial disparity in wealth between white and African American families in the United States. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 4–5 (2006); ROTHSTEIN, *supra*, at 184–85.

95. *See Buying a Home*, U.S. DEP’T OF HOUS. & URBAN DEV., [https://portal.hud.gov/hudportal/HUD?src=/topics/buying\\_a\\_home](https://portal.hud.gov/hudportal/HUD?src=/topics/buying_a_home) (last visited Sept. 12, 2017) (listing federal programs that encourage homeownership such as FHA loans for first time homebuyers (lower interest rates), the Good Neighbor Next Door program (discounted housing to certain professions to revitalize areas through homeownership), homeownership for public housing residents (allowing public housing authorities to sell portions of public housing and convert rent payments into mortgage payments to create ownership), and Indian Home Loan Guarantee Program (program to “facilitate home homeownership and increase access to capital in Native American Communities”).

96. Scholars view federal tax code provisions that allow for the deduction of interest paid on debt incurred to purchase primary residences, I.R.C. § 163(h)(3) (2012), and state and local real property taxes, *id.* § 164(a)(1), as motivated entirely by Congress’s desire to promote homeownership. Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1352 (2000); Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157, 174 (2005). These deductions are also subject to substantial criticism as tax expenditures targeted to favor upper-income households while leaving struggling households without meaningful housing assistance through the tax system. Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 396 (1970).

97. Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 290 (2003); *see also* Pruitt, *The Forgotten Fifth*, *supra* note 75, at 359, 361 n.9 (observing that the 1920 Census was the first to document a more urban than rural nation).

98. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 732–33 (1988). *But see supra* note 76 and accompanying citations (discussing the continued role of land as a source of wealth in rural American communities). Even if land itself does not currently signify status as it once did in many communities in the United States, the reality is that historical patterns of land ownership as the source of wealth and social status have been reified into a historically stagnant class structure in which whole groups of people are expendable in service of creating wealth for others. Nancy Isenberg has recently made this argument in a sustained and compelling fashion, where she notes that colonial America was typified by “waste people [who] wasted away, fertilizing the soil with their labor while finding it impossible to harvest any social mobility.” ISENBERG, *supra* note 78, at 42. The remainder of her book offers a damning history of the maintenance of a poor white class throughout American history.

self-supporting and privileged individuals who could maintain their social status into the future.<sup>99</sup> In the modern, knowledge-based American economy, land ownership can seem nearly irrelevant because farming as a way of life is so far removed from the current economic reality of the vast majority of Americans.<sup>100</sup> But the law continues to reflect this historical role of land as the source of wealth and power and its role in constituting social status.

### *E. Land Creates Citizenship*

Property law and theory also reflect the role of land in constituting citizenship, likewise a strain of popular political theory running through American history. At the founding of the United States, citizenship largely equated with landownership.<sup>101</sup> With few exceptions, suffrage rights were available solely to those who owned property during the colonial era.<sup>102</sup> Only some decades later would newly founded states enter the

99. Langbein, *supra* note 98, at 732–34; see also Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN. ST. L. REV. 417, 428 (2008) (“The modern American Dream is far more focused on the availability of education, health care, job opportunity, retirement security, and a general sense of social mobility, rather than on the concrete goal of ownership of productive resources.”); Thomas B. Edsall, Opinion, *How the Other Fifth Lives*, N.Y. TIMES, Apr. 27, 2016, at 1 (marshaling substantial evidence that Americans in the upper socioeconomic quintile have effectively self-segregated from the other 80% of society).

100. Marsh, *supra* note 17 (land is not about food security, but sentimental attachment in modern America); see also Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1282–83, 1315–16 (1996) (documenting how the system of entitlements generated by agricultural lawmaking continues to exist within a tradition of broad public support that increasingly has little relationship to most Americans’ lived reality, while noting that “[s]tatutes providing price and income support for farmers epitomize the sort of legislation generated when the potential benefits are concentrated and the potential costs are distributed”). To the extent that farming is embraced as a political cause through the continued support for farm subsidies, the reality is that a large amount of these subsidies do not serve to bolster rural communities or family farms, but are provided to already-wealthy individuals who are usually urbanites. See Ron Nixon, *Billionaires Received U.S. Farm Subsidies, Report Finds*, N.Y. TIMES, Nov. 7, 2013, at A23 (noting that 50 billionaires received farm subsidies totaling \$11.3 million from 1995 to 2012, including Paul G. Allen, co-founder of Microsoft, Charles Schwab, investment magnate, and S. Truett Cathy, owner of Chick-fil-A). The fifteen members of Congress who received \$237,921 in farm subsidies in 2012 became widely publicized during the 2013 battle over the Farm Bill, due to political efforts to substantially reduce funding levels for the Supplemental Nutrition Assistance Program for needy families. See Envtl. Working Grp., *Members of Congress Received \$238K in Farm Subsidies*, EWG (June 3, 2013), <http://www.ewg.org/release/members-congress-received-238k-farm-subsidies>.

101. ISENBERG, *supra* note 78, at 14 (“It was the stigma of landlessness that would leave its mark on white trash from this day forward.”). While her use of the pejorative phrase “white trash” is jarring, Isenberg’s book persuasively argues that the American colonies were entirely predicated on wasteland being occupied by the discarded humanity of English society. See *id.* at 2–3, 22. The terminology of white trash evolved somewhat later. *Id.* at 135–36.

102. This requirement had evolved since the seventeenth century, when all freemen and adult male housekeepers had been eligible to vote. Steinfeld, *supra* note 90, at 339 n.13. In the eighteenth century, twelve of the thirteen colonies denied the franchise to those who lacked property. *Id.* at 339. Exceptions were provided in some colonies for residents of certain towns, householders, or tradesmen of long duration. *Id.* at 339 n.12. These eligibility criteria would not be abolished until far later—for example, 1834 in Tennessee, 1845 in Louisiana and Connecticut, 1851 in Virginia, and 1857 in North Carolina. ISENBERG, *supra* note 77, at 130.

Union without property qualifications for voting;<sup>103</sup> thereafter, existing states eliminated property restrictions on suffrage.<sup>104</sup>

This evolution of land-related citizenship ties directly to the writings of Thomas Jefferson, which have come to play an outsize role in the American polity's conversations about land, access to property, and democracy. Despite an array of serious and damning critiques of Jefferson,<sup>105</sup> Jeffersonian property is a frequently appearing trope in legal scholarship,<sup>106</sup> and scholars continue to invoke Jeffersonian notions of property to represent a variety of positions. Some posit that Jefferson stood for strong private property rights,<sup>107</sup> protected against the actions of a despotic state.<sup>108</sup> Others suggest that Jefferson was a populist who sought to empower a wider range of people with the rights and privileges of citizenship through access to land.<sup>109</sup> As is often the case, the most

103. Peter Onuf, *Thomas Jefferson: The American Franchise*, MILLER CTR., <http://millercenter.org/president/jefferson/the-american-franchise> (last visited Sept. 2, 2017). Of course, they replaced property-based restrictions on suffrage with new requirements, usually based on taxpayer status. Steinfeld, *supra* note 90, at 335, 353. In many instances, these were accompanied by pauper restrictions that denied suffrage to "persons in receipt of poor relief" or who were inmates of poorhouses. *Id.* at 335, 353 n.59; *see also* ISENBERG, *supra* note 78, at 130. Some other states granted universal white manhood suffrage, with or without a pauper exclusion. Steinfeld, *supra* note 90, at 353 n.59.

104. Onuf, *supra* note 103; *see also* Steinfeld, *supra* note 90, at 353.

105. Jefferson's hypocritical and racist actions regarding the ownership of enslaved people cast substantial doubt on the quality of his judgment as a legal thinker, but Jefferson's property writings remain an important modern touchstone in theoretical considerations of land and citizenship even today. *See, e.g.*, Monica Eppinger, *Property and Political Community: Democracy, Oligarchy, and the Case of Ukraine*, 47 GEO. WASH. INT'L L. REV. 825, 845 (2015) (noting that Jefferson is out of fashion in part due to "repugnance at the contradiction between his views on property, virtue, and democracy and his own practices in using enslaved labor to cultivate his agricultural land"); Peter Onuf, *Thomas Jefferson: Impact and Legacy*, MILLER CTR., <http://millercenter.org/president/jefferson/impact-and-legacy> (last visited Sept. 2, 2017); *see also* DARREN STALOFF, HAMILTON, ADAMS, JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 245 (2005) ("Slavery was Jefferson's personal bête noire; it would haunt him throughout his career."). Nevertheless, because his thought remains influential in the field of property, Jeffersonian property warrants exploration.

106. *See, e.g.*, Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 201, 235–39 (2007) (analyzing the approach of Jefferson, among other framers, as the basis of constitutional property law); Eppinger, *supra* note 105, at 843–47 (invoking Jeffersonian property as a coherent account of property and political community in her consideration of the role of property in the political evolution of Ukraine). Similarly, Jefferson is also often invoked in the context of intellectual property as an early progenitor of patent law. *See, e.g.*, *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 7–11 (1966) (noting that Thomas Jefferson "was not only an administrator of the patent system under the 1790 Act, but was also the author of the 1793 Patent Act"); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 958–67 (2007) (explaining "the birth of the Jeffersonian story of patent law in Supreme Court decisions and how many intellectual property scholars today have adopted Jefferson's views of patents as a historical axiom").

107. JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 55 (1998).

108. *Id.* at 99 (observing that some followers of Jefferson advocate adoption of "a libertarian economic program of low taxes and minimal government"); *see also* CHARLES A. MILLER, *JEFFERSON AND NATURE* 179 (1988) ("On balance, Jefferson chose to protect property.").

109. YARBROUGH, *supra* note 107, at 99 (noting that others who invoke Jefferson do so to "urg[e] the expansion of government power to enforce a moral vision of greater social and economic equality"); Carol Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL.

accurate view is probably one between these oversimplified and instrumentalist perspectives.<sup>110</sup> While Jefferson has come to mean all things to all people, this Article attempts to articulate a modest, textually supported Jeffersonian conception of property and to consider how that vision might shape contemporary considerations of land distribution.

The central aspect of Jeffersonian property ideals originates in the role of land ownership in constituting the virtuous citizen. Jefferson relied heavily on the image of the farmer as the idealized citizen of the agrarian republic,<sup>111</sup> whose status as a cultivator of the land<sup>112</sup> demonstrated his virtuous character and moral superiority.<sup>113</sup> Jefferson, among many others of his day, believed human endowments of independence and freedom resulted from property ownership.<sup>114</sup> According to Jefferson, land ownership allowed citizens to develop the kind of industry and thrift that would be the hallmark of the new American nation,<sup>115</sup> rendering men independent and self-sufficient.<sup>116</sup> Landownership was so important to this American vision that without it even free white men were denied suffrage.<sup>117</sup> Jefferson believed that the combination of owning

L. REV. 561, 591 (1984) (arguing that Jefferson viewed agrarian land as fostering “civic character” and therefore rejecting extreme inequality in land because of the potential for corruption of the republic); see also MERRILL PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 359 (1960).

110. See YARBROUGH, *supra* note 107, at 99 (“[I]n so doing, each side simplified and, to some extent, betrayed the distinctive moral vision that underlay Jefferson’s economic program.”).

111. ISENBERG, *supra* note 78, at 86–88; see YARBROUGH, *supra* note 107, at 57; see also STALOFF, *supra* note 105, at 283–84 (referencing repeatedly “Jefferson’s agrarian idyll”).

112. ISENBERG, *supra* note 78, at 88 (discussing Jefferson’s preoccupation with those who were cultivators: “To cultivate meant to renew, to render fertile, which thus implied extracting real sustenance from the soil, as well as good traits, superior qualities, and steady habits of mind.”).

113. YARBROUGH, *supra* note 107, at 57–59. Yarbrough notes that Jefferson never meaningfully expounded on these virtues, but he spoke highly of Adam Smith’s 18th century tome of political economy, *The Wealth of Nations*. There, Smith postulated that industrial labor’s repetitiousness atrophied men, while cultivation of one’s own property made men their own independent masters. ADAM SMITH, 3 *THE WEALTH OF NATIONS* 160–64 (New York, P.F. Collier & Son 1909).

114. YARBROUGH, *supra* note 107, at 63–69 (on Jefferson’s belief in the virtue-enhancing power of land ownership); Steinfeld, *supra* note 90, at 335, 338, 350 (discussing the ubiquity of belief in the transformative power of property ownership as the source of independence, which bestowed the right of suffrage and self-governance on individuals). This perspective stood in marked contrast to the fundamental value of human equality enshrined in the Declaration of Independence and the U.S. Constitution, both of which were drafted in this era. The evolution of who held the franchise in the early years of the republic demonstrates the crucial shift from suffrage for those deemed worthy to suffrage as a universal right.

115. YARBROUGH, *supra* note 107, at 91–92.

116. STALOFF, *supra* note 105, at 283; YARBROUGH, *supra* note 107, at 65–69. Jefferson assumed that land alone would create self-sufficiency for the newly landed. Of course lost in this assumption was the reality that in order to cultivate the land, these new landowners would need adequate capital to afford “slaves, overseers, draft animals, a plough, nearby mills, and waterways to transport farm produce to market.” ISENBERG, *supra* note 78, at 90. In reality, failed smallholders would often sell to planters, deepening the concentration of land in the hands of the few. See *id.*

117. Robert J. Steinfeld has carefully documented how individual independence was central to the allocation of the right to vote in the early republic. See generally Steinfeld, *supra* note 90, at 335. In the early years of the nation, because land was viewed as creating independence, most states limited suffrage to white males who owned at least fifty acres. Onuf, *supra* note 103. For example, as late as 1829, Virginia still required voters to own either twenty-five acres with a house, or fifty unsettled acres. Steinfeld, *supra* note 90, at 355. Evolution of suffrage rights was underway in this era. Most new states eliminated the role of landownership and taxpayer status in granting suffrage.

property and education would allow citizens to cultivate personal virtues that would lead to the virtuous development of his agrarian republic,<sup>118</sup> advocating in his private correspondence for “as few as possible [to] be without a little portion of land because [t]he small landholders are the most precious part of a state.”<sup>119</sup> To enact this plan to create the upright, landowning citizen, Jefferson drafted a new state constitution for Virginia, in which he advocated “his boldest constitutional proposal [of] government-mandated land reform” through the provision of fifty acres or enough land to create a fifty-acre estate for all men.<sup>120</sup>

Despite the failure of these direct efforts to redistribute property, Jefferson did succeed in other legal reforms designed to broaden access to land within the new nation.<sup>121</sup> Scholars have been quick to emphasize that the successful reforms “were less about promoting equality or democracy than moderating extremes” of ownership;<sup>122</sup> the reforms were

Yet some revolutionary-era constitutions had included free African Americans in the franchise, and New Jersey had even granted women the vote, so long as the individual owned property. Changes to voting rules would universally remove property-related qualifications to vote, but simultaneously limit the franchise to white men. Onuf, *supra* note 103.

118. ISENBERG, *supra* note 78, at 87, 91. Jefferson’s effort to codify these rights to education in even a limited fashion never came to fruition because the landed gentry of Virginia refused to fund such programs.

119. THE PAPERS OF THOMAS JEFFERSON, 1:133, 8:683 (Julian P. Boyd et al., eds., Princeton Univ. Press, 1950) (quoted in DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 83 (1994)).

120. STALOFF, *supra* note 105, at 255; see also ISENBERG, *supra* note 78, at 89–90 (observing that this reform would provide the vote to all newly-landed men). Later, in an era of legal reform within the state, Jefferson again proposed land reform, this time as a seventy-five-acre distribution of property to all landless citizens, which likewise never came to pass.

121. Some of this work included efforts to abolish the role of hereditary title to land and to eliminate the role of primogeniture and entail in Virginia, YARBROUGH, *supra* note 107, at 94, thereby guaranteeing that all children, not merely firstborn sons, would take property equally from their fathers. MILLER, *supra* note 108, at 206. Jefferson perceived these “rules of inheritance as purely conventional and utilitarian.” DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 78 (1994). This and other ways in which Jefferson presented flexible approaches to property rights demonstrates that while there is substantial scholarly debate over whether Jefferson believed property to be a natural right, at a minimum Jefferson did not view property rights as absolute. See *id.* at 77–80. These reforms led to more people owning land, but of course the resulting conveyances occurred as inheritances from landed parents; they therefore reified the existing class structure since only the children of landowners would receive property. While Jefferson often spoke of the new nation as a classless society, ISENBERG, *supra* note 78, at 98, this kind of effort should not be viewed as demonstrative of a radical egalitarianism. In fact, he advocated for his reforms in terminology that belied his egalitarian ideals, referring to those he intended to benefit from his educational scheme as “raked from the rubbish.” *Id.* at 91. He embraced an ideology of natural differences among people and advocated careful breeding to solve the problems of slavery. *Id.* at 99–100. Isenberg has noted that Jefferson arguably personally undertook such a program of interbreeding, well-documented through the lineage he established with Sally Hemings, who Jefferson owned as an enslaved woman. *Id.* at 100. He further bred enslaved persons as chattels, much as he focused on breeding his livestock. *Id.* To pretend that Jefferson believed in human equality is factually inaccurate.

122. ISENBERG, *supra* note 78, at 91.



not suggestive of a broader effort to enact a radical egalitarianism through widespread property redistribution.<sup>123</sup>

Yet perhaps the most profound aspect of Jefferson's reforming instinct toward property law had to do with his derision for intergenerational transfers of land. In correspondence with James Madison, Jefferson asked serious questions about whether nations may change land allocations that were established in perpetuity.<sup>124</sup> He noted that these arise from hereditary rights and "perpetual monopolies" and then argued that reimbursement for such reallocations is "a question of generosity and not of right."<sup>125</sup> Professor Ben Barros has argued that Jefferson's words can be read to suggest that "the state can make [changes to hereditary ownership of property] with or without [compensating] the owners because there is no right to pass these entitlements from generation to generation."<sup>126</sup> But Professor Barros also maintains that in other contexts, Jefferson believed that "property owners were entitled to compensation for taken property as of right."<sup>127</sup> Yet in her research on legal protections of real property from creditors, Professor Claire Priest argues that Jefferson embraced "the English perspective that land was a natural family endowment and ideally a source of family prosperity through the generations," interpreting Jefferson's writings on usufruct to "reveal[ ] his assumption that real property, at least according to 'natural right,' involved not just the fee simple ownership of one person, but also the claims of family members."<sup>128</sup> While the precise contours of Jefferson's opinions are contested, it is abundantly clear that he advocated for some broadening of land ownership to foster citizenship.

This concern with how the lack of access to property hinders the lives of impoverished persons animates the work of contemporary property theorists and land use scholars, who have more directly addressed the role of land ownership in constituting citizenship today. While this is one strain in the progressive property school discussed above, concerns about the role of property in creating citizens are not limited to scholars within this school. Professor Jeremy Waldron has posited that property ownership is central to the development and exercise of liberty.<sup>129</sup> His theory of private property goes even further, however, to argue that it is

123. STALOFF, *supra* note 105, at 259 ("Much of Jefferson's legal revision was also decidedly moderate. Primogeniture and entail were rarely invoked in Jefferson's day . . ."); YARBROUGH, *supra* note 107, at 95.

124. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), [http://lcweb2.loc.gov/service/mss/mjtj/mjtj1/011/011\\_0912\\_0958.pdf](http://lcweb2.loc.gov/service/mss/mjtj/mjtj1/011/011_0912_0958.pdf).

125. *Id.*

126. Ben Barros, *Thomas Jefferson's Property Theory*, PROPERTYPROF BLOG (Nov. 9, 2006), [http://lawprofessors.typepad.com/property/2006/11/thomas\\_jefferso.html](http://lawprofessors.typepad.com/property/2006/11/thomas_jefferso.html).

127. *Id.*

128. Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385, 450–51 (2006).

129. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 329 (1990).

wrong for some individuals to have no private property at all,<sup>130</sup> which is a resounding statement in favor of a radical reconsideration of who gets to own property and who does not, and of how the state might intervene to rearrange property allocations. Urban planning scholar Ananya Roy has likewise considered how property structures modern citizenship, rendering the propertyless “marginal in the discourses and practices of citizenship.”<sup>131</sup>

Along these same lines, progressive property scholar Professor Joseph Singer has expansively maintained that property rights must be understood to encompass not only “the right of owners to exclude others from their property,” but also “rules that protect the liberty of persons to acquire property and thereby become owners.”<sup>132</sup> Elsewhere, Singer has compellingly argued that everyone deserves to have the right to private property because of its role in constituting the self.<sup>133</sup> More recently, he has taken up the relationship between freedom and property, noting the role of property ownership in providing the freedom that is a precondition for equality of citizenship.<sup>134</sup>

## II. PROPERTY’S BASICS DEMONSTRATE WHY LAND WARRANTS REDISTRIBUTION

### A. *Property Theory Reveals the Nature of Property and Property Systems*

One of the key challenges facing those who advocate for broadening access to land is answering the central question of why this is a valuable public policy initiative. Redistribution of any kind is often subject to critique as an invalid denial of private property rights, while other opponents who may support redistributive governmental efforts in general remain skeptical of land as the focus of such programs, as Professor Andre van der Walt has compellingly revealed about the post-apartheid redistribution in South Africa.<sup>135</sup> A central reason for this skepticism is the fact that land is harder to redistribute than other goods because land is scarce and because its scarcity makes redistribution complicated. Yet property law can help conceptualize the nature of this scarcity, its social consequences, and possible methods to rectify these problems when conducting land reform.

130. *Id.*

131. Ananya Roy, *Paradigms of Propertied Citizenship*, 38 URB. AFF. REV. 463, 464 (2003).

132. Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 272 (2006).

133. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 167–71 (2000) (asserting that everyone deserves the right to private property).

134. Joseph William Singer, *Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society*, 1 J.L. PROP. & SOC’Y 1, 12 (2014) (“[B]ecause we also believe in equality, we must enable every person to become an owner so every person can be free.”).

135. VAN DER WALT, *supra* note 7, at 6–9; see also UNDERKUFFLER, *supra* note 24, at 121 (discussing the social and political issues of redistributive policies).

1. Existing Maldistributions of Land Reflect Tacit Acceptance of Injustice Yet Are Unlikely to Be Rectified Without State Involvement

Land is the paradigmatic scarce and rivalrous resource, as discussed in detail above. There is only so much land available, and it cannot be effectively shared in any meaningful way that resolves the problems of rivalrousness or scarcity. Even where land can be owned with a collective title or with a formal mechanism like a cooperative, in which the same piece of land is owned by a group of people, scarcity and rivalrousness remain. Those holding collective title still have the right to use the property to the exclusion of others, who may be entirely landless. That more than one person can collectively hold title to the land does not mean that all people have simultaneous rights to the land. This fact of rivalrousness combined with scarcity is one of the primary justifications for land reform—multiple people or groups cannot own land simultaneously and there is not enough to go around so that all have rights to land. When the market alone does not provide widespread land access, redistributive land reform provides one method to address the consequences of land's scarcity and rivalrousness by ensuring that more people gain rights to land. Yet the market alone, without state engagement, is unlikely to generate redistribution; state involvement is necessary to facilitate and subsidize these transfers.

2. Since Property Systems Are Value Laden and Property Rights Contingent, Redistribution Demonstrates State Support for Justice

Land redistribution is an implicit state recognition that existing property rules are not inevitable but rather are value laden and reflective of a particular society at a particular moment.<sup>136</sup> As a result, redistributive land reform policies both alter a property regime and can signify a change in underlying values as well.<sup>137</sup> One common critique of redistributive land reform policies is that the existing distributions of land are settled and therefore should not be interrupted, largely because legal systems are most stable when they confirm citizens' expectations.<sup>138</sup> Of course, to suggest in a postcolonial state that the current status quo should not be disrupted, while that allocation is reflective of the disruption caused by colonization, is the height of absurdity. Land reform,

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136. Rosser, *supra* note 22 (arguing that progressive property scholars seek to “create more space to contest values” inherent in property systems).

137. *See id.* at 110–11 (suggesting that progressive property focuses on “the underlying values that property serves and the social relationships it shapes and reflects”).

138. *See generally* Rosser, *supra* note 30, at 427 (describing the status quo property system as successful and favored by a “status quo bias observable in celebrations of existing rules without regard either to how those rules are experienced by those excluded from enjoying property or to the possibility of improving on the existing structure,” while arguing that property systems should be destabilized to address inequality).

however, assumes that the current distribution is unjust and seeks a new, fairer distribution, one that grasps the deeper meaning of land within a society. Properly conceptualizing the instrumentalist view of property therefore suggests that law can evolve in the interest of the public.<sup>139</sup> Without change to the property system, any preexisting injustice in distributions will endure through the continuation of the property system itself.<sup>140</sup> Property theorists can help explain the contested meanings of land and of its distribution, allowing those engaged in land reform to offer stronger arguments for why land warrants redistribution. Reconfiguration of the property system, therefore, is a necessary corrective of the ways that the property regime reflects misallocations of property. When land reform opponents suggest that stability should be the primary goal of a property system, they implicitly argue that continued injustices in distribution are less important than people's fixed expectations.<sup>141</sup> Or, it is possible that they instead intend to suggest that the current distribution itself is just, though in the current state of economic inequality, this is not such a common perception.

Against this backdrop, the justification for land reform is simple: the current distribution is a maldistribution, and some of the rights currently held by landowners should justly be extended instead to the landless.<sup>142</sup> As a result, property law should be used to promulgate government actions that rectify these injustices by reallocating property rights. While this observation may shake our traditional notions of what qualifies as a property right,<sup>143</sup> insofar as it is not fixed but subject to change, regulations of land are not unique in this regard. Government actions often limit the freedoms of some to protect the freedoms of others. Land reform presumes that the insights of progressive property are true, that property rights should be allocated to serve social values, not just to reify existing, fixed distributions that are also value laden.

## *B. Property Theory Reveals the Importance of Owning Land*

### 1. Land Creates Sites for Self-Constitution

Radin's crucial work helps explain both why land is a much-desired social good in many poor, rural communities in the developing world and also why any efforts to disrupt existing property allocations, even by democratically legitimate means, can evoke suspicion and hostility with-

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139. Mulvaney, *supra* note 11, at 364 n.66.

140. *Id.* at 364 n.67.

141. VAN DER WALT, *supra* note 7, at 7.

142. To state this concept more fully in the language of property theory: "[S]ome of [the] sticks in the bundle are in fact owned by others and not the person we conventionally think of as the owner of the property." Singer, *supra* note 132.

143. That property regimes and land distributions are not valueless, but instead are value laden with the priorities and inequalities inherent throughout a society is a central tenet of the progressive property movement. See Alexander et al., *supra* note 28.

in the political and social order. Radin's concept of personhood and its relationship to property help to illuminate the importance of land reform and its complexity as a matter of social hierarchy and individual identity. Three different kinds of property owners warrant discussion. First, redistribution affects landless people who lack personhood connections to property but who could form them if land reform occurred. Second, land reform may also formalize the personhood connections of tenant farmers by giving them title to land that they have historically tilled but not owned. Third, land reform may be perceived as harming the personhood of those who own the land that is potentially subject to redistribution.

If the goal is for land reform to serve the needs of landless people, the central insight of Radin's theory is that an impoverished and landless individual's gaining rights to property under a land reform program might well represent something more significant than simply the receipt of a material good. In this way, land differs from other fungible resources that the state could provide, such as food, health care, or money.<sup>144</sup> Land ownership may more profoundly stand as a poignant symbol of one's humanity, of improving one's value and demonstrating one's status as a person in the community. In places where this set of claims rings true, the creation of a new right to property can bring about a shift in self-conception from a landless peasant who labors in a short-term fashion on the land of others, subject to the whims of the landed, to a new identity as a property-owning individual. Property owners may therefore qualify as more fully realized, autonomous individuals in a society that connects personhood to land ownership.<sup>145</sup>

These insights are similarly applicable to the second category: tenant farmers who labor on a particular parcel of land owned by others, perhaps over generations, but never establish a legal interest in it. When land reform provides tenant farmers title to the land that they know and love, the redistribution of title serves to affirm and enhance the personhood connections that existed even without legal title. This was ultimately what occurred in the only U.S. Supreme Court case that considered

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144. UNDERKUFFLER, *supra* note 24, at 121 (observing that redistribution of money and other fungible property is far less contested than redistribution of land).

145. I have seen this firsthand in Guatemala, where recipients of land through land reform were eager to tell me about the sense of pride and self-determination they derived from owning land for the first time. See Radin, *supra* note 60, at 968. This idea also connects in important ways to the capabilities approach, which is a model of development economics, as articulated by Amartya Sen, AMARTYA SEN, DEVELOPMENT AS FREEDOM 4, 10–11 (1999) and moral philosophy, as developed by Martha Nussbaum, MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH xiii, 5–6 (2000). The capabilities approach “posits that poverty alleviation depends on the expansion of the freedoms that people have to use their capacities in ways that satisfy their personal objectives.” Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory for Community Economic Development*, 42 HOFSTRA L. REV. 839, 884 (2014). Access to land may well serve as a capability that allows people to shape their own lives with an increased level of autonomy, an idea that I have previously explored. Cavalieri, *supra* note 5, at 10–12.

land reform. In *Hawaii Housing Authority v. Midkiff*,<sup>146</sup> the Supreme Court considered the decision by the government of Hawaii to enact a land reform program that took title from owners and gave it to the residential tenants of the property to reduce the concentration of land ownership and disrupt oligarchic distributions.<sup>147</sup> In such an instance, where landowners have lived on or farmed land for years, land reform supports the deepening of their personhood identified with specific land.

But the corollary of the relationship between land and personhood for the first two groups, who gain access to land and therefore personhood through a land reform initiative, is that those who lose their property might perceive land reform to rob them of a core aspect of their personhood.<sup>148</sup> If land is linked to identity for those who are recipients of land through a land reform program, it is likely even more so the case for people who have already established identity-based connections to their land.<sup>149</sup> The loss of land would cut still closer to identity in instances where the land qualifies as property that Radin would categorize as personal, not fungible. But even large-scale agricultural holdings that are mostly commercial in nature may evoke personhood connections for the owner, despite qualifying as fungible in Radin's typology.<sup>150</sup>

The difficulty, of course, is in distinguishing personal land from fungible land. Problems arise because most landowners would consider their own land to be personal—to be part of their identity and therefore worthy of the kind of protection that Radin articulates as proper for property that constitutes personhood.<sup>151</sup> The owner of a plantation might well demand deference to plantation-based wealth as personal property in which the owner's identity is bound.<sup>152</sup> But attachment to the social status that land provides is not the same thing as attachment to the land itself. Allowing the law to privilege this kind of landownership, while others suffer in poverty, is a grotesque mischaracterization of Radin's

146. 467 U.S. 229 (1984).

147. *Id.* at 231–33.

148. Jeffrey M. Riedinger, *Everyday Elite Resistance: Redistributive Agrarian Reform in the Philippines*, in *THE VIOLENCE WITHIN: CULTURAL & POLITICAL OPPOSITION IN DIVIDED NATIONS* 181, 206 (Kay B. Warren ed., 1993) (“[I]t is an article of faith among landowners that the land is theirs—not simply in legal terms but in a more metaphysical sense.”).

149. Andre Sawchenko, *Choosing a Mechanism for Land Redistribution in the Philippines*, 9 PAC. RIM L. & POL'Y J. 681, 714 (2000) (discussing how landowner attachment to property “transcends [purely] economic concerns”).

150. See Clark, *supra* note 61, at 821–22; see also Schnably, *supra* note 73, at 350–51, 361–62.

151. See Radin, *supra* note 60, at 988.

152. That people almost universally look at the resources they control and perceive them to be insufficient is a well-documented phenomenon. As a result, the notion of giving up even a fraction of one's wealth or possession is essentially anathema to the human condition. See Kennon M. Sheldon & Sonja Lyubomirsky, *The Challenge of Staying Happier: Testing the Hedonic Adaptation Prevention Model*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 670, 670 (2012). Yet voluminous economics research demonstrates that “the correlation between income and life satisfaction is evidently negligible”—income above a certain threshold has a diminishing marginal utility in creating human happiness. Samuel Alexander, *The Optimal Material Threshold: Toward an Economics of Sufficiency*, 61 REAL-WORLD ECON. REV. 2, 5 (2012).

theory because such property would at a minimum qualify as fungible and unworthy of special protection from the state.<sup>153</sup> To call large-scale agricultural holdings fungible is not to denigrate their importance to their owners. Instead, it is to recognize that fungibility means that those property rights warrant less deference to ensure that others can gain sufficient property in which to constitute themselves as well.

## 2. Land Creates Opportunities for Individuals to Establish Economic Stability and Social Status

Land reform skeptics also argue that, even if redistributive efforts are worthwhile, investing government funds and effort into redistributing land is inefficient.<sup>154</sup> In the last decade, focus within the international-aid community has shifted toward the redistribution of money in lieu of other social goods.<sup>155</sup> Monetary redistributive efforts take the form of guaranteed basic income, which grants cash to poor individuals with no strings attached<sup>156</sup> or as conditional cash transfers that incentivize the performance of socially desirable conduct.<sup>157</sup>

But the historical centrality of land in establishing and supporting wealth and status manifests a deeper truth about land's meaning in modern developing societies and about the fact that redistributing land has its own import. For the average citizen of a first-world country today, land ownership feels almost like a relic of a bygone time. Recalling land's historical centrality within the United States familiarizes the contemporary reader in the first world with the importance of land in rural communities in the developing world today. Land still maintains this historical relationship to power in nations of the developing world.<sup>158</sup> But land

153. See Radin, *supra* note 60.

154. See, e.g., Tim Hanstad, Roy L. Prosterman & Robert Mitchell, *Poverty, Law and Land Tenure Reform*, in ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 22 (Roy L. Prosterman, Robert Mitchell & Tim Hanstad eds., 2009) [hereinafter ONE BILLION RISING].

155. Annie Lowery, *The Future of Not Working*, N.Y. TIMES MAG., Feb. 23, 2017, <https://www.nytimes.com/2017/02/23/magazine/universal-income-global-inequality.html> (discussing guaranteed basic income as an alternative to other kinds of redistributive development programs).

156. See *id.*

157. These models pay cash when heads of household demonstrate, for example, that family members have received vaccines and other forms of preventative health care or that their children have regularly attended school with minimal absenteeism. The underlying principle is that paying cash to encourage otherwise positive conduct pays dividends into the future, since children will grow into healthy, literate, and numerate adults. Ariel Fiszbein et al., *CONDITIONAL CASH TRANSFERS: REDUCING PRESENT AND FUTURE POVERTY*, WORLD BANK [WBG], at 1 (2009), [http://siteresources.worldbank.org/INTCCT/Resources/5757608-1234228266004/PRR-CCT\\_web\\_noembargo.pdf](http://siteresources.worldbank.org/INTCCT/Resources/5757608-1234228266004/PRR-CCT_web_noembargo.pdf).

158. Sawchenko, *supra* note 149 (observing how in the Philippines, political power is related to the accumulation of vast tracts of land, and how current landowners are anathema to give up their land, and with it, their power); see also JAMES PUTZEL, *A CAPTIVE LAND: THE POLITICS OF AGRARIAN REFORM IN THE PHILIPPINES* 60–61 (1992) [hereinafter PUTZEL, *CAPTIVE LAND*] (documenting the role of land in entrenching political power); James Putzel, *The Politics of the Aquino Agrarian Reform Programme: Influence of Bilateral and Multilateral Donors*, in *Agrarian Reform and Official Development Assistance in the Philippines: Four Papers* 7, 9 (Ctr. South-East Asian Studies, Occasional Paper No. 13, 1990) [hereinafter Putzel, *Influence of Bilateral and Multilateral*

also serves two deeper functions related to fostering security that can be conveyed to future generations.<sup>159</sup>

First, land is symbolically representative of security. Devising land to children in the developing world can have a meaning much like that of the family farm in the United States—a symbol of family and roots in a particular place and context.<sup>160</sup> Much as American farmers remain intent on passing their property onto subsequent generations,<sup>161</sup> so too do smallholders in developing countries attach emotional value to the ability to pass their land onto their children.<sup>162</sup>

But the perhaps more substantial purpose of land ownership, and the one of far greater interest when contemplating the function of land reform efforts in today's developing countries, is its role in establishing economic security. The intergenerational transmission of land is a means of creating socioeconomic stability.<sup>163</sup> When parents in developing nations have the ability to leave land to their children,<sup>164</sup> it is the analog of contemporary American parents educating their children. Having the means to prepare one's children in this way is not about maintaining social position or demonstrating conspicuous wealth in the same way that leaving a large amount of land to heirs might have signified status and privilege in the early American or English context. Rather, land is about survival; it is a fortification against future social strife and instability.<sup>165</sup> For families with the technical knowledge of how to cultivate subsistence

*Donors*] (observing that “[g]enuinely redistributive agrarian reform is a complex and painful process because it involves a challenge to the entrenched power and privilege of landowning and merchant families”).

159. Winoto, *supra* note 16, at 5 (describing land as a “transfer of wealth across generations”).

160. FISCHER, *supra* note 47, at 111 (documenting the importance of land to families by describing a ceremony celebrating the transfer of rural land within a family).

161. See generally Hannah Alsgaard, *Rural Inheritance: Gender Disparities in Farm Transmission*, 88 N.D. L. REV. 347, 347 (2012) (highlighting the importance placed on passing on the family farm, while noting the role of gender in shaping who receives control of it). To observe the centrality of this trope in American life, one needs to look no further than the relatively recent discussions about the inheritance tax, commonly referred to as the death tax, and its rejection because of fears of disrupting transmission of the family farm. See generally Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 189–92 (2012). This role of inherited land has been part of the American landscape since the colonial era. See ISENBERG, *supra* note 78, at 34 (“What separated rich from poor was that the landless had nothing to pass on.”).

162. This function of land as the transmitter of intergenerational, land-based identity strongly resonates with the personhood and identity strains of property theory. See *supra* Section II.B.1.

163. Winoto, *supra* note 16, at 5 (describing land ownership as “livelihood security”).

164. The converse is also true: the inability to provide land for one's family can be perceived as an absolute failure. In India, male heads of smallholder households often seek out illegal private moneylenders to obtain loans secured by their land after they have exhausted official avenues for funds to pay for farming capital, education for children, children's marriage expenses, or health care. Gowri Janakiraman, *Protecting the Living Victims: Evaluating the Impact of India's Farmer Suicide Crisis on Its Rural Women*, 20 WM. & MARY J. WOMEN & L. 491, 493 (2014). The inability to repay these loans has led to a recent, dramatic wave of suicides; at least 13,754 people in the self-employed agriculture sector killed themselves in India in 2012. *Id.* at 492. That such debt often results from the obligation to pay the dowries that permit their daughters to marry only further complicates the image of a parental responsibility to equip children with the resources needed to be self-supporting into the future. *Id.* at 511–12.

165. Ghimire, *supra* note 1, at 2.



crops, having land on which to raise staple grains or legumes provides reassurance that no matter what happens with the government, barring a rural scorched-earth campaign, the family should be able to eke out a survival, even if a very modest one.<sup>166</sup> In essence, in a developing country where unemployment insurance, disaster aid, and other aspects of a social safety net are absent, ownership of land represents the best insurance policy to which poor people have access.<sup>167</sup>

Land therefore functions to create social status—not purely in a hierarchical sense of establishing status over others but in a binary sense of avoiding indigency as well. Land can secure a stable existence for its owners and their descendants. But land’s historical and contemporary, cross-cultural role in constituting social status is too easily ignored by both privileged urban citizens of developing societies and outsiders from other nations, all of whom are squarely situated in a more-or-less knowledge-driven economy today. That land might bear some greater import than just being dirt; that it might be valued as a substitute for insurance; and that it might have a culturally contingent meaning, based on one’s perspective as a peasant and as a citizen of a developing nation, is well beyond the apparent surface value of land reform as a development project. These layered connotations cannot be ignored when the topic of land reform is under consideration.

This set of observations about the divergent meanings of land for rural and urban populations can play an important role when it comes to developing a land reform program. To policy makers in a national capital or officials in international-aid programs, land likely appears to be just another fungible resource. From that vantage point, redistribution of land or money would serve similar ends, so a program to redistribute land probably does not seem meaningfully more important than a program to redistribute cash in the minds of even benevolent bureaucrats and legislators in capital cities. To the extent that land reform may cause social turmoil due to the identity-based threat of land redistribution,<sup>168</sup> distributing money might even appear as a more appealing form of redistribution; policy makers may not grasp land’s deeper meanings but recognize land

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166. Scholars of land reform have observed that land access plays a central role in addressing poverty in developing nations. See, e.g., Hanstad, Prosterman & Mitchell, *supra* note 154, at 19 (“[A] decrease in land concentration by one-third leads to a one-half reduction of the poverty level within 12 to 14 years.”); see also Kepe & Tessaro, *supra* note 2. This trope of land conferring independence was an aspect of the Jeffersonian colonial property norms, discussed in detail *infra* Section II.B.3, which justified a requirement of property ownership to gain the franchise; without land, a man was “powerless and dependent.” Steinfeld, *supra* note 90, at 340.

167. See PUTZEL, CAPTIVE LAND, *supra* note 158, at 20, 22 (noting that “[i]n a predominantly agricultural society, the ‘landless’ – or tenants, marginal farmers, farmworkers and other rural poor groups who enjoy no secure access to land – can never be certain of meeting their basic needs for survival”); Moyo, *supra* note 41, at 188 (“[Land and national] resources are the key direct source of livelihood and wealth for the majority [of Africans]. They are also the means through which the poor pay for their education, health services, and hence a critical means to attain non-agricultural employment.”).

168. See *infra* Section II.B.4 (discussing class identity and land reform).

reform's contentiousness. As a result, money might seem to suffice as a far lower risk form of poverty reduction. But for the beneficiaries of land reform programs, land reform is redistribution with a much more profound significance. Receiving land through such a program is not merely another form of social welfare, such as a food assistance program or a cash transfer program. Rather, it functions more like a long-term social-insurance program, one that guarantees a safety net over generations for its beneficiaries and equips families to care for themselves for an extended period of time.<sup>169</sup> For those charged with initiating land reform programs, it is important to remember this distinction. Receipt of land means more than the receipt of other resources, and among an array of possible poverty eradication programs, it should be prioritized accordingly.

### 3. Land Creates Opportunities for Democratic Political Citizenship

Property scholars know that ownership of real property has played a substantial role in transforming people within a society into actual citizens of that community. Even two hundred years later, Thomas Jefferson's democratizing push toward broadening access to land, and with it, suffrage and citizenship, remains a compelling vision of the role of land in constituting an individual's political identity. Today's property scholars have built on these ideas, conceptualizing how land ownership has become a factor in the contemporary constitution of citizenship.<sup>170</sup>

Exactly how much direction Jeffersonian property theory provides regarding contemporary land reform is ambiguous. At a minimum, Jefferson's repeated reforming efforts focused on two broad themes. First, Jefferson thought it necessary for the government to provide a modest amount of land to those who were landless, largely due to the importance of property for good citizenship.<sup>171</sup> While he did not succeed in enacting this reform, he clearly and repeatedly advocated for redistribution of property to the landless because he believed land endowed individuals with independence that was necessary for citizenship.<sup>172</sup> At a fundamental level, then, Jeffersonian property theory supports some version of land redistribution. Jefferson's beliefs that land should not lie fallow,<sup>173</sup> that the wealthy do not efficiently use their property,<sup>174</sup> and yet that for-

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169. This kind of social insurance safety net is not especially familiar to those in the U.S., though the Supplemental Security Income program, available "to help aged, blind, and disabled people, who have little or no income . . ." *Supplemental Security Income Home Page—2017 Edition*, SOC. SECURITY ADMIN., <https://www.ssa.gov/ssi> (last visited Aug. 26, 2017). Tax revenues, not personal contributions, support this program, so it differs from the more-familiar Social Security system. *Id.*

170. See SINGER, *supra* note 133, at 9; WALDRON, *supra* note 129.

171. STALOFF, *supra* note 105, at 255.

172. See Steinfeld, *supra* note 90, at 338, 350.

173. STALOFF, *supra* note 105, at 283.

174. *Id.* at 258–59.

mal equality of land distribution will never occur<sup>175</sup> suggest some guiding Jeffersonian principles for land redistribution. Fallow lands warrant redistribution. The usage pattern of vast tracts of ownership should be scrutinized to ensure that wealthy owners are using them efficiently. Landless rural laborers have a legitimate claim to a modest parcel of land. However, formal equality of land distribution is an unrealistic, and therefore inappropriate, public policy goal.

Second, Jefferson successfully enacted reforms that abolished state-sanctioned protection of hereditary and familial property privileges.<sup>176</sup> Jeffersonian property theory can therefore be relied on to legitimate legal reforms that help dismantle dynastic wealth held in real property. Yet given that Jefferson did not embrace formal equality in the distribution of real property, the impact of this reforming thrust could be viewed as limited. It might most accurately be invoked to show that Jefferson sought to refuse the mobilization of coercive state power to reify existing patterns of land ownership. What is not entirely clear is how far this can extend. One circumscribed application might be a historically grounded skepticism about the legitimacy of hereditary titles themselves and the attachment of rights thereto as the means of allocating land.

A broader vision of Jefferson might claim that, while it is true that Jefferson was not a social radical, his democratizing, anti-aristocratic, and prorepublican tendencies demonstrate a deeper commitment to opening the political system to more people than were involved at the time.<sup>177</sup> In essence, this argument suggests that what Jefferson proposed was radical republicanism within the confines of the limited and not yet democratic Enlightenment vision of the 1700s.<sup>178</sup> By analogy then, this kind of radicalism in the name of investing more people in the republicanism of the era can serve as an example for today of fostering land reform that can yield a more decidedly democratic future. If this analogous interpretation is correct, then invoking Jefferson might serve to justify efforts to democratize access to land even today; now, these democratic efforts may involve state refusal to support efforts of the wealthy and landed to maintain their control over vast expanses of property.

Finally, while Jefferson suggested that land redistribution may not require compensation, it is unclear how far this would extend in practice. Broader consideration of the themes present in Jeffersonian property theory suggests that a radical, uncompensated redistribution would be

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175. See Steinfeld, *supra* note 90, at 342.

176. ISENBERG, *supra* note 78, at 94.

177. This thrust towards more citizenship rights for more people stands in marked contrast to what Professor Atiba Ellis has observed is a push to circumscribe citizenship today. Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549, 549 (2015).

178. Many thanks to Professor Atiba Ellis for helpful ongoing conversations that led to the crystallization of this point.

inconsistent with the moderation that typified Jefferson's actions in this realm. It is likely that a compensated redistributive land reform of modest scale, designed to further the citizenship of the landless, and legislative reforms that remove state support for vested property interests, are what Jeffersonian property theory would mandate today.

Likewise, contemporary theorists' approach to the role of property in creating citizenship can offer important insights into the values that might motivate a nation to engage in redistributive land reform efforts today. Land reform can improve the status of poor individuals. But through the lens of citizenship, it can also, and perhaps more importantly, signify something crucial about the values of a society that rejects the establishment of monopolistic forms of wealth and their perpetuation over generations. Allowing extreme concentrations of property ownership in the hands of the few, while the many lack access to a resource that constitutes citizenship, degrades the democratic functioning of a nation. A truly engaged democracy is an impossibility in a society that has terribly unequal land ownership.<sup>179</sup>

Yet far too often, land reform is viewed as a form of corruption or cronyism.<sup>180</sup> Instead of conceptualizing land reform as playing a significant role in building democracy, this kind of cynical viewpoint considers land redistribution as a simple means of rewarding political allies.<sup>181</sup> But if land is reframed as constitutive of citizenship, then programs designed to democratize land access could instead be viewed as part of a broader push to build democracy.<sup>182</sup> Land reform thus might be the opposite of

179. See SINGER, *supra* note 133, at 162; SINGER, *supra* note 35 at 1–3; VAN DER WALT, *supra* note 7.

180. No doubt this is because some of the most notorious modern land reforms have done precisely this. That Mugabe's land reform efforts in Zimbabwe rewarded political allies and punished opponents is well-documented. Although this set of traits is not unique to expropriation-based land redistributions, transfers of expropriated land at times demonstrate gratitude for political patronage. See, e.g., Degeorges & Reilly, *supra* note 51, at 574–76 (noting that Zimbabwe's land reform programs possessed land but that cronyism meant that “[m]uch of the best land . . . ended in the hands of [ruling party] leaders and Government officials, military officers and many leading judges” instead of in the possession of the poor and landless); HUMAN RIGHTS WATCH, ZIMBABWE: FAST TRACK LAND REFORM IN ZIMBABWE 2–3 (March 2002) [hereinafter FAST TRACK LAND REFORM] (documenting “party-political control of access to the forms for applying for land[,] and partisan discrimination in the allocation of plots,” and the role of the same violent political party militias that intimidate political opponents in implementing land reform); see also *Freedom in the World 2017: Zimbabwe Profile*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2017/zimbabwe> (last visited Aug. 26, 2017) (“In the meantime, rampant corruption . . . as well as repercussions of land-reform policies and an unclear indigenization policy, continued to hamper economic recovery.”). But it does not need to be this way. Successful land reform efforts have managed to redistribute massive amounts of land in nations worldwide, creating substantial bulwarks against poverty and human suffering. Roy L. Prosterman & Jennifer Brown, *Tenancy Reform, in ONE BILLION RISING*, *supra* note 154, at 57, 62–66 (documenting successful redistributive land reforms in Japan, South Korea, Taiwan, South Vietnam, Kerala State of India, and El Salvador).

181. The Zimbabwean fast-track land reform is the archetype of politically motivated land distribution. See FAST TRACK LAND REFORM, *supra* note 180.

182. Joseph Singer and Jack Beermann have moved one step beyond this claim, noting that in some instances, even uncompensated regulation can enhance democracy, because such regulations that are adverse in the short-run may in the long-run “be democracy-enhancing because it better

corruption or cronyism—it could solidify the operation of a newly democratic nation, rather than undermining it. Land reform might thus create a more equal and democratic society by improving the lot of the worst off and by reducing the concentration of wealth.<sup>183</sup>

Comprehending that land ownership is constitutive of citizenship can help government officials grasp the stakes of land reform programs. Efforts to democratize access to land are not just about situating individuals and families who are the beneficiaries in a better economic position than they occupied prior to receiving land. At a deeper level, land reform represents the democratic drive for liberty, by giving people a site on which to live as freely as they can, and equality, through its rejection of the concentration of land wealth in the hands of the few. Democratizing access to land can signal a change in the social status of program beneficiaries.<sup>184</sup> It may also demonstrate a shift in the nature of the government itself, away from a plutocratic system and towards one that prioritizes a stronger version of equality.<sup>185</sup>

Further supportive of the democratic potential of land redistribution is the possibility that land reform can reduce unrest. Conflict over land and the lack of widespread access to agrarian land are central reasons for civil unrest and social revolution.<sup>186</sup> Political theorists have posited that land reform can play an important role in stabilizing societies, functioning as a “substitute for revolution in the countryside.”<sup>187</sup> In theory, democratizing land access could appease peasant concerns about economic inequality and give landless people a stake in the maintenance of the existing government.<sup>188</sup> In some instances, this has been documented.<sup>189</sup> For example, El Salvador’s land tenure reform, which transferred ownership to around thirty percent of tenant farmers, is believed to have contributed to the defeat of the Communist insurgency.<sup>190</sup>

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approximates the decisions that would be collectively reached by rational judgment free from the cognitive distortions caused by excessive focus on short-run costs.” Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 239–40 (1993).

183. See *id.* at 243–44 (arguing for an “ongoing commitment” to increasing access to productive resources).

184. See discussion *supra* Section II.B.2.

185. Redistributive land reform can also serve important expressive goals, especially in post-colonial states. For a longer discussion of the expressive goals of land reform, see Cavalieri, *supra* note 5, at 16–21.

186. Riedinger, *supra* note 148, at 181.

187. T. David Mason, “Take Two Acres and Call Me in the Morning”: Is Land Reform a Prescription for Peasant Unrest?, J. POL., Feb. 1998, at 199, 200.

188. See JEFFERY M. PAIGE, *AGRARIAN REVOLUTION* 122 (1975) (observing that “the peasant’s enthusiasm for a social movement is likely to dissipate as soon as his immediate hunger for land has been satisfied”); Mason, *supra* note 187; see also Michael Albertus & Oliver Kaplan, *Land Reform as a Counterinsurgency Policy: Evidence from Colombia*, 57 J. CONFLICT RESOL. 198, 199 (2013) (identifying land reform as a potential remedy for unrest).

189. Mason, *supra* note 187.

190. Prosterman & Brown, *supra* note 180, at 65. However, other examples of successful land-to-tiller programs, such as those in South Vietnam, Kerala State of India, and China, were not generated in moments of notable unrest. See *id.* at 62–65.

#### 4. Land Redistribution Reorders Social Hierarchies

Beyond the role of land in constituting individuals' personhood and identities, land reform may have the potential to alter the ordering of society. Radin's theory of fetishistic property may reveal something far more insidious about the meaning of land to plantation owners in nations with deeply unequal access to land. Substantial concentrations of wealth may create the kinds of unhealthy identity development in which the wealthy landowner conceptualizes identity solely through acquisition and not in light of other kinds of community roles. Worse yet, maintenance of fetish property may exhaust the supply of property entirely—in part due to the scarcity problems identified previously<sup>191</sup>—such that an insufficient amount of property remains for others to use to constitute themselves in property.<sup>192</sup> As a result, the state may actually need to take affirmative steps to dismantle fetish property for the well-being of its citizens, both those who have excess property and those who are unable to obtain sufficient property to constitute themselves.

Some states have attempted to legally establish the amount of property that warrants protection as personal by codifying the amount of land that an owner can retain following a land reform initiative. The state thereby indicates as a matter of law the threshold quantity of land that should be treated as personal.<sup>193</sup> Such a program can operationalize Radin's central insight: personal property requires deference from the state, so land that qualifies as personal property is exempted from redistribution through land reform. In a crude way, this approach is designed to identify land to which people have deep personal connections. In contrast, excess quantities of land are either fungible property that is outside state deference or it is fetish property, which Radin views as affirmatively harmful to a reasonable constitution of the self. Under a land reform program that caps the acreage of land an individual may own,<sup>194</sup> land reform can transfer fungible property without causing harm to the own-

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191. See discussion *supra* Sections I.A, II.A.1.

192. See Radin, *supra* note 60, at 990 (“[G]overnment should rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property.”).

193. See Riedinger, *supra* note 148, at 207–08 (describing the Filipino land reform initiative that allowed landowners to retain no more than five hectares of land, plus another three for each child over the age of fifteen). However, this threshold of permissible retention led to over 75% of the total farm area being exempt from redistribution. See *id.*

194. A number of countries have adopted what some researchers refer to as ceilings on ownership, that limit either the total amount of land an individual may own, or in some instances, may control through the rental market. See Prosterman & Brown, *supra* note 180, at 91. These have at times been unsuccessful because the ceilings were extremely high, or because landowners would transfer the property in anticipation of the enactment of the law, using partitions to family members or fictitious transfers to evade the ceiling. Tim Hanstad & Robin Nielsen, *Land Tenure Reform in India*, in ONE BILLION RISING, *supra* note 154, at 235, 244. Tightening guidelines for the operation of the ceilings has made them somewhat more effective. See *id.* At the same time, using aggressively low ceilings to capture more land is believed to foster opposition and to offer limited success. Roy L. Prosterman, *Redistributing Land to Agricultural Laborers*, in ONE BILLION RISING, *supra* note 154, at 107, 138–39.

er's essential personhood. Moreover, land reform initiatives might even intensively focus on redistributing fetish land to reduce the idolatry of property within the state. Another option would be to increase compensation to owners based on duration of ownership to recognize personhood connections to land.<sup>195</sup> This approach would make prior owners more whole, while still permitting the state to identify and purchase sufficient land to accomplish its land reform goals, even if there was insufficient fungible or fetish property to seize. Increased compensation would serve as the protection of personhood interests in this case.

If the concept of personhood and property is broadened by one level of abstraction to a class-based analysis, Radin's insight into personhood may capture a far more insidious aspect of the opposition that land reform can cause. Radin's theory of personhood and property is primarily based on the role of property in constituting individual identity, but there may be a more systemic explanation for why the loss of property through a land reform program offends fundamental notions of identity.<sup>196</sup> When, for example, numerous plantation owners in an agricultural region decide voluntarily to sell their land and are replaced by groups of smallholders,<sup>197</sup> significant social upheaval would predictably result, affecting the lives of both sellers and their neighbors alike. Such a substantial change in the constitution of the landowning class in an isolated, rural place may well feel analogous to a revolution. Despite the absence of violence and the voluntariness of transfers, such programs alter society in ways that have identity-based consequences. This sense of social upheaval will be even more pronounced where the transfers occur involuntarily.

If land's role in constituting identity is both individual and class based, the creation of land rights for landless rural people—even without the state exercising its power of eminent domain—could threaten the identity and station of individuals high within the existing social hierar-

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195. This approach has primarily been advocated in the context of eminent domain of homes, as a method to both fully compensate those whose property is taken and to discourage governments from taking homes except in cases of necessity. See John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 791, 804–05 (2006). But see Brian Angelo Lee, *Just Under-compensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 647 (2013) (arguing that fair market value does include a measure of sentimentality). Arguably, this kind of premium should be less necessary for agricultural land, which is less personal than homes, though duration of ownership may still increase personhood connections in a fashion that warrants increased compensation.

196. Radin, *supra* note 60.

197. The International Fund for Agricultural Development defines “smallholder farms” as those that cultivate less than two hectares of agricultural land. *Conference on New Directions for Smallholder Agriculture: Introduction and Conference Overview*, INT'L FUND AGRIC. DEV., at 1 n.2, <https://www.ifad.org/event/past/tags/2107053#2> (last visited Sept. 27, 2017). The term “smallholders” is commonly used in development theory in a less technical way to refer to individuals who own and cultivate small tracts of land; this is typically viewed in contrast to plantation owners or other kinds of large-scale agricultural production. See, e.g., ROBERT MCC. NETTING, *SMALLHOLDERS, HOUSEHOLDERS: FARM FAMILIES AND THE ECOLOGY OF INTENSIVE, SUSTAINABLE AGRICULTURE* 1–4 (1993).

chy.<sup>198</sup> By expanding the landed classes of citizens, land reform programs reveal that the state is concerning itself with the needs and preferences not merely of the wealthy, but also of the destitute and landless. The threat to the perceived social order is profound, demonstrating an elevation in the personhood of previously low-status citizens.<sup>199</sup> This is precisely the central goal of redistributive land reform: to use land to alter preexisting social conditions. Improving the social status of the landless poor puts them on an upward trajectory; it therefore risks threatening the class-based status of landed individuals who no longer occupy reified social space that excludes the poor and marginal.<sup>200</sup> To the extent that social status rooted in property rights has historically been an essentially static and immutable aspect of personhood, land reform causes dramatic changes in the structure of reforming societies and the identities of their citizens. If social status is conceptualized as a zero-sum game that at least partially constitutes the identity of individuals and classes, then elevating the personhood of those at the bottom of the hierarchy through land reform threatens the personhood of those at the top.<sup>201</sup> Paradoxically, Radin's theory of personhood might explain why there can be substantial social backlash to democratically legitimate, market-compatible land reform programs, even when they occur through a willing-buyer, willing-seller approach. This, of course, is the predictable response to appropriate levels of redistribution of fetishized property.

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198. The ugly history of racially restrictive covenants in the United States evidenced a similar, hierarchical notion, creating an unmistakable message that land in some places should only be owned by certain groups of people. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1848–49 (1994) (describing racially defined spaces as the hierarchy created by restrictive covenants).

199. See Radin, *supra* note 60.

200. Winoto, *supra* note 16 (“Historically, many agrarian reforms have attempted to fundamentally change the social relationship of property ownership, wealth, social status, and political power. These tend to be contested in the political sphere between reformers and those often powerful interests who expect to lose from it.”).

201. This phenomenon is not just about land reform's effect on dismantling existing social hierarchies. That people derive identity from, and fight to maintain, their position in the social hierarchy is well-documented. For example, legal scholars have tracked the role of poor whites in maintaining and enforcing the racial hierarchy in the United States. Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 L. & CONTEMP. PROBS. 57, 62 (2009) (arguing that “the distinction between White servitude and Black bondage was sizable. . . and the psychological benefits it afforded even the poorest Whites, may have impeded the development of cross-racial coalitions that could have significantly ameliorated the sharp effects of economic and racial dominance in seventeenth- and eighteenth-century America.”). This theme in American racial history is not limited to scholarly consideration; a recent popular press article examines the contemporary construction of whiteness as an experience of racialized dispossession. See Hua Hsu, *White Plight?*, NEW YORKER, July 25, 2016 (revisiting the photographs documenting the integration of Little Rock High School by noting that an enraged white student “wanted at least to maintain her status somewhere between the upper-crust white and largely disadvantaged black worlds”) (reviewing ISENBERG, *supra* note 78), <https://www.newyorker.com/magazine/2016/07/25/the-new-meaning-of-whiteness>. See generally MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE LIMITS OF WHITENESS 53, 53 n.13 (2006) (discussing the role of racial hierarchy in preventing poor whites from developing a robust class consciousness).



### 5. Land Redistribution Can Create Political Stability

Land reform may also broaden a form of property ownership that might increase individuals' sense of investment within their society. Fostering engagement may produce its own positive consequences<sup>202</sup> and might therefore serve as an additional justification for land redistribution efforts. This kind of investment within a society may not be sufficient to stop a revolution<sup>203</sup> or prevent a revolution from occurring.<sup>204</sup> More perniciously, property ownership might render people more vulnerable to less extreme forms of social upheaval, such as recessions or natural disasters, insofar as owning land or a house means people are less able to move to seek work.<sup>205</sup> But gaining access to land might build individuals' sense of investment within their communities, which may be enough to change the way that people think about what role they play and how they conduct themselves within society. Importantly, this possible feature of land reform contradicts the standard ideological framework of redistributive programs. While most who advocate for land reform do so for progressive motives rooted in social justice and concerns with inequality, land reform's potential as a stabilizing force within a society could supply a conservative justification for this kind of social investment. Instead of supporting liberalizing instincts toward social change, land reform may create a newly established class of people who have a sudden, deep investment in social stability.

### III. PROPERTY'S BASICS OFFER GUIDANCE ON HOW TO MAKE LAND REFORM EFFECTIVE

Yet even if those implementing land reform understand all of these reasons why land is worthy of redistribution, this alone does not create the circumstances for a successful land reform program. Property law and theory also offer an array of insights into problems that may affect the implementation of land reform initiatives and explain how land reform programs can be made more effective.

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202. As alluded to above in Section I.E., Jefferson posited property ownership's role in promoting personal industry and autonomy from others. Jefferson scholars have suggested that encouraging home ownership and acquisition of private property may continue to foster these values in American society. See YARBROUGH, *supra* note 107, at 98–99.

203. See Mason, *supra* note 187.

204. See Prosterman & Brown, *supra* note 180, at 63–65.

205. Property ownership renders the labor force less mobile, creating gluts of labor in some regions where the economy is stagnant and unemployment is high, and at times shortages of labor in other regions where the economy is booming and adding jobs. See David G. Blanchflower & Andrew J. Oswald, *Does High Home-Ownership Impair the Labor Market?* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 19079, 2013) (finding that rises in the homeownership rate in a U.S. state are a precursor to eventual sharp rises in unemployment in that state).

*A. Property's Basics Suggest How to Mitigate Popular Opposition to Land Reform*

That land is scarce and rivalrous means that its redistribution through land reform will almost inevitably lead to a sense that the program has created winners and losers, in two different ways.<sup>206</sup> First, rivalrousness means that those who lose a specific, perhaps beloved, parcel of land through land reform will know that they lost their own property to someone else. In such a rivalry, the prior owner lost and the new owner won. Second, scarcity means that, more broadly, land reform uses government intervention to truncate the rights of prior owners as a class in favor of creating property rights for others. Land reform therefore creates groups of winners and losers because there is not enough land to go around.

What is crucial for policy makers to grasp is that opposition to land reform is a predictable result of shifting the existing property rights regime that governs a resource with a limited supply. The reality is that land's rivalrous and scarce nature almost inevitably fosters resentment and distrust when it is redistributed through land reform. Or, at an even earlier stage, those who anticipate losing through a new land reform program may instead attempt to leverage their political power to forestall its implementation.<sup>207</sup> Disapproval are foreseeable responses to land reform precisely because scarcity and rivalrousness are both reasons that land reform is needed. As a result, those initiating land reform programs should anticipate public disapprobation without allowing it to undermine an otherwise legitimate and effective program.

One way of minimizing negative responses to land reform programs is to time the launch of a new program to coincide with politically opportune situations. Legal scholars have developed a robust theory of the role of moments of crisis and the resulting social upheaval in creating the conditions in which an existing, static property system can actually change.<sup>208</sup> Such moments may offer unusual circumstances in which those who stand to be the losers of land reform may be willing to break from the political status quo and support, or at least tolerate, redistribution to accomplish other shared goals. During such periods, if many people across the society are winning and losing in various ways, those who

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206. Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 UC IRVINE L. REV. 1091, 1096 (2011) ("Changes in property regimes create losers as well as winners.").

207. Doremus somewhat cynically observes that those who might lose from a change can use their political power to prevent it from occurring, even if it would be an efficient change that theories of evolutionary property rights would predict should occur. *Id.*

208. See, e.g., VAN DER WALT, *supra* note 7, at 9 (end of Apartheid in South Africa); Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1621–23 (2010) (United States Great Depression); Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 22 (2003) (climate change).

lose land may be less likely to feel singled out to suffer a unique form of publicly imposed loss.

Guatemala's post-civil-war land reform provides an example of how this strategy worked in practice. While reified concentration of land in the hands of wealthy people was a reality of Guatemala's colonial and postcolonial situation, its post-civil-war peace accord provided a clear route to land ownership for landless peasants after decades of rural violence.<sup>209</sup> Rather than being created in a vacuum, Guatemala's land reform was part of a broader reconfiguration of many aspects of public life.<sup>210</sup> Yes, land was still rivalrous and scarce in Guatemala during this time, just as it was and always will be. But those who stood to lose because of land's rivalrousness and scarcity could contextualize their losses in the midst of widespread social change. Such change rendered many people winners and losers across an array of axes—political power, criminal consequences for war crimes, land ownership, and rights to primary social goods, among others.<sup>211</sup> That the peace accord negotiations occurred outside of the standard political process only heightened the sense of disruption—the land reform was insulated from the usual political forces that would have prevented its passage in a typical legislative setting. When peace negotiators acceded to demands from the rural peasants' union, rendering landless peasants the winners and previously landed rural people the losers of scarce and rivalrous resources, it was in a broader setting in which all political factions were simultaneously winning and losing.<sup>212</sup> The negotiators could not face electoral recrimination in subsequent elections and as a result, they were willing to take political risks that electoral politics would make impossible during another moment.<sup>213</sup> Land's scarcity and rivalrousness will create winners and losers when land reform happens, but skillful public officials can leverage social upheaval to accomplish land reform in moments that minimize opposition.

In theory, direct, market-based transfers from voluntarily selling owners to beneficiaries of a land reform initiative who have received subsidies or other government assistance in purchasing property should minimize the level of opposition because they are less intrusive into personal property that constitutes identity.<sup>214</sup> When the state supports and

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209. See SUSANNE JONAS, OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS 79 (2000).

210. See *id.* at 78–79.

211. See *id.* at 80.

212. See *id.* at 79–80.

213. *Id.* at 79–80; cf. Susana Gauster & S. Ryan Isakson, *Eliminating Market Distortions, Perpetuating Rural Inequality: An Evaluation of Market-Assisted Land Reform in Guatemala*, 28 THIRD WORLD Q. 1519, 1519–20 (2007).

214. Many commentators in the international development field believe the key distinction between land reform programs is whether they are market-led agrarian reforms or reforms led by the government, known as state-led agrarian reform. SATURNINO M. BORRAS JR., PRO-POOR LAND REFORM: A CRITIQUE 54 (2007). However, I have elsewhere observed that the more important legal

possibly facilitates market-based transfers between willing buyers and willing sellers,<sup>215</sup> the conveyance avoids the taint of involuntariness. Owners who transfer their property voluntarily cannot legitimately complain that the state is stripping them of a central aspect of their identities without their agreement; the willing seller in this kind of transaction has obviously consented.

But the sense of loss of personhood and identity could be especially profound in instances where an owner relinquishes property involuntarily, such as through uncompensated expropriation or even through compensated eminent domain. In such cases, the situation becomes substantially more complicated because the state takes land in contravention of the wishes of the private landowner. Where the state elects to take privately owned land for redistributive purposes but fully reimburses the private owner for that property<sup>216</sup> through compensated eminent domain,<sup>217</sup> it may pose the threat to personhood that Radin has identified. The loss of one's land for purposes of state transfer to a landless rural citizen might well be identity shaking for the former owner, despite it being a lawful event.<sup>218</sup> Radin's work exposes the possibility that these

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distinction for purposes of poverty reduction or eradication is based on whether or not the land reform program undermines the value of land in the nation and generates externalities that accrue to the detriment of the poorest members of the nation. I refer to redistributive land reform programs based either on voluntary sale or a compensated involuntary sale as market-compatible land reform programs. I contrast this kind of market-compatible reform to expropriation-based involuntary takings, in which the state takes private property for redistribution but either entirely refuses to compensate the prior owner for the taken land or undercompensates the prior owner. These expropriation-based programs often set forth with a goal of poverty reduction, but can both devalue the very resource being redistributed and create other consequences, such as dramatic increases in food commodity prices that harm the real or intended beneficiaries of these kinds of programs, who typically control fewer resources that they can use to weather instability. For a broader discussion of this issue, see Cavalieri, *supra* note 5, at 21–42.

215. Some land reform programs have adopted a different language, instead referring to market-led agrarian reforms as “willing-buyer, willing-seller” programs; commentators and organizations have embraced this terminology as well. *See, e.g.*, FAST TRACK LAND REFORM, *supra* note 180, at 6.

216. This kind of process aligns closely with that articulated in the Takings Clause of the U.S. Constitution. Under Fifth Amendment jurisprudence, the government may take property for public use so long as just compensation is paid. U.S. CONST. amend. V.

217. In other cases, the state takes private property but refuses to compensate the private individual, or only partially pays compensation, processes that I refer to as uncompensated expropriation. Elsewhere, I have rejected the legitimacy of uncompensated expropriation as the basis of redistributive land reform initiatives because of its likely negative effects on poor people in the developing world. The distinction is important when considering the democratic legitimacy of the taking, and importantly, the economic effects of the government's action on the nation in question. *See Cavalieri, supra* note 5, at 25–32.

218. The eminent domain power has long been conceptualized as one of the central powers of the sovereign. *See BERGIN & HASKELL, supra* note 79 (observing that any act of disloyalty to the throne could lead to the loss of one's land); *see also* William R. Vance, *The Quest for Tenure in the United States*, 33 YALE L.J. 248, 270 (1924) (describing the powers of the sovereign). The state's obligation to pay compensation to the owner of taken land is a relatively recent legal phenomenon, but one that is not unique to the Fifth Amendment to the U.S. Constitution. The Spanish Constitution makes similar provision. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978 (Spain). France does likewise. *See GREGORY ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 310 n.160 (2006). Germany does as well. *See id.* at 115. South Africa also requires compensation,

kinds of involuntary, legally permissible transfers might threaten the individual sense of personhood that is rooted in the ownership of land. As a result, the involuntary loss of property, even if compensated, may be profoundly difficult for individuals to suffer.<sup>219</sup> Of course this is not a reason to avoid such unpopular but democratically necessary and justified forms of involuntary redistribution. But it can be helpful to understand the roots of opposition to such programs.

Oligarchs' opposition to land reform clearly has substantial fetishistic aspects. No reasonable reading of Radin's theory could permit vast tracts of property to be protected in order to shelter the wealthiest of a nation from their own sense of injury when they lose land to which they are unhealthily attached. Indeed, the central thrust of Radin's theory of personhood as applied to land reform is that the redistribution of fungible property is a legitimate state action. Radin therefore can help nations distinguish legitimate personal attachment to property from attachments that do not warrant state deference. But these observations about the structural aspects of personhood and property as related to the wealthy class of landowners have substantial explanatory value for the depth of opposition that accompanies even modest versions of land reform. While nations ought not be solicitous of oligarchs' attachment to their property, anticipating it may matter for the success of land reform.

Beyond individual opposition, social conflict often accompanies the implementation of land reform programs.<sup>220</sup> Insights into personhood and its meaning for redistributing land can contribute important knowledge to those implementing land reform programs. As a result, "designers of land tenure reforms . . . must make informed and reasonable efforts to take the interests of existing landowners into account."<sup>221</sup> Personhood theory helps explain how those landowners think of their interests.

### *B. Property Law Helps Show How to Address Inflationary Effects of Land Reform*

The finite supply of land and the uniqueness of particular parcels can complicate the initiation of land reform programs by muddying appraisals of property transferred through a land reform initiative. These features of real property have the potential to artificially inflate the value

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though it may be for less than the entire market value of the property if certain criteria are satisfied. *See id.* at 171–72.

219. Gauster & Isakson, *supra* note 213, at 1520 (observing that state-led land redistribution is "likely to incite protests from powerful landowners").

220. *See* Gerrit Huizer, *Peasant Mobilization for Land Reform: Historical Case Studies and Theoretical Considerations*, in *LAND REFORM & PEASANT LIVELIHOODS*, *supra* note 1, at 164, 194 (noting the kinds of conflict that result from efforts to mobilize for reform, including landowner and elite efforts to undermine organizations).

221. *See, e.g.*, Prosterman, *supra* note 194, at 127.

of farms, a critique frequently leveled against land reform programs.<sup>222</sup> Land is, as always, only worth what someone will pay.<sup>223</sup> But land reform can dramatically alter the market for land, creating a sudden surge in demand that drives up prices<sup>224</sup> at the same time it attempts to provide poor people with property.<sup>225</sup> Government action or subsidies with public funds enable conveyances facilitated by land reform that may create a greater demand than would have occurred without the involvement of the state.<sup>226</sup> In essence, the finite quantity of land combined with increased demand for land during implementation of a land reform program means land reform can cause prices to rise.<sup>227</sup> These concerns are particularly acute in instances of market-assisted land reform, where willing buyers negotiate with willing sellers.<sup>228</sup> In such cases, because the market is ostensibly supposed to guide the transactions and the role of the state is relatively minor, the program may permit prices to rise even higher, unless the government intervenes.<sup>229</sup> Where land reform occurs through state exercise of some form of eminent domain, the state's more robust role may mitigate some of the most severe pricing consequences.<sup>230</sup>

Rising land prices result in the same sum of money purchasing less land and making it harder for other land reform beneficiaries to access property, for numerous reasons. Public funds dedicated to subsidy programs do not extend as far in a rising land market. Any private savings

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222. See Medicine Masiwa, *The Fast Track Resettlement Programme in Zimbabwe: Disparity Between Policy Design and Implementation*, 94 ROUND TABLE 218, 224 n.1 (2005) (observing that land prices in Zimbabwe increased sixfold between 1980–81, right at the time of independence, and from 1987–88, during the era of continued compensated land reform); see also Prosterman, *supra* note 194, at 128 (detailing reasons why land prices rose as well as the consequences of this increase).

223. See Lee, *supra* note 195, at 599 (noting that while fair market value is what a buyer would pay, the property may be worth more as an idiosyncratic matter to the seller).

224. This is especially the case when the compensation for such land is not based on fair market value of the land immediately prior to the initiation of a land reform. See Prosterman, *supra* note 194, at 128. This can be even more severe where expropriation is hampered by land acquisition processes that increase transaction costs so severely that the government will negotiate an overpayment to avoid extended litigation. See *id.*

225. See Masiwa, *supra* note 221, at 224 n.1.

226. See Prosterman, *supra* note 194, at 128. A similar critique has been leveled against tax subsidies for homeowners in the United States, arguing that these kinds of subsidies distort behavior, encouraging housing prices to inflate and beneficiaries of subsidies to purchase more expensive housing than they otherwise would choose to buy. Cf. Snider, *supra* note 96.

227. Cf. Masiwa, *supra* note 223, at 224, n.1.

228. See Prosterman, *supra* note 195, at 128–29.

229. This can be even more severe in instances where the local land market is relatively inactive; large-scale redistribution through voluntary transactions would require a substantial increase in sale activity, which “is highly unlikely unless the existing ‘market’ price increases greatly.” See *id.* at 129.

230. While price controls in many cases outside of the land reform context are documented to create market distortions that have negative long-term consequences, it is important to note that here, price controls would be implemented to prevent the market distortions caused by land reform itself. Rather than viewing the controls as the source of distortion, the controls are instead a response to the problems that result from land reform. However, in some instances, the state will permit prices to rise artificially as part of the land reform itself, in order to mitigate the anger of elites at the loss of their land. See Putzel, *Influence of Bilateral and Multilateral Donors*, *supra* note 158, at 8.

the beneficiaries might have amassed will cover less of the purchase price of a given parcel of land under these circumstances. Where the state wishes to obtain property for a land reform program via its eminent domain power, rising prices mean that compensating prior owners will cost the state more money. This is exacerbated further by the fact that land reform programs facing these obstacles may move away from transferring high-quality cultivated land, instead electing to transfer marginal public lands.<sup>231</sup> Inflationary pressures on land prices can undercut the ability of a land redistribution initiative to reduce poverty and are therefore worthy of mitigation efforts.<sup>232</sup>

Addressing inflationary effects can also increase the democratic legitimacy of a land reform program. Rising prices accrue to the personal benefit of the landowners who sell their property as part of a land reform program.<sup>233</sup> Land worth a modest price before the initiation of a land reform effort can surge in value as the initiative creates greater demand, while supply stays fixed due to land's nonfungible nature, the relative inelasticity of the supply of land, and the unwillingness of large-scale owners to sell property. This can invite the perception that the real beneficiaries of land reform are not the poor who receive the redistributed land but the wealthy individuals who stand to earn a healthy profit due to a rapid, dramatic rise in the value of their property just as they prepare to sell.<sup>234</sup>

Property law's knowledge of pricing in eminent domain can help mitigate inflationary effects of land reform. The eminent domain literature idealizes fair market value as the price that would be reached in an arm's length transaction.<sup>235</sup> Any negotiated price or fair market valuation reached in the shadow of a land reform program—which is designed to encourage or facilitate transfer—is therefore generated from a distance far more intimate than arm's length. Those implementing a land reform initiative should therefore take care to enlist mechanisms to prevent negotiations from resulting in runaway land prices, both for the practical reason of stretching available funds as far as possible and for the mainte-

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231. See Prosterman, *supra* note 194, at 128.

232. Development experts at the Rural Development Institute have identified a number of strategies to use in attempting to control the price of land. For example, offering to pay a lump sum immediately instead of allowing beneficiaries to pay over time may incentivize sellers to reduce the price. Offering benefits such as infrastructure improvements that benefit the owner who retains a portion of the original parcel may also lead to lower prices. Robert Mitchell, Tim Hanstad & Robin Nielsen, *Micro-plots for the Rural Poor*, in *ONE BILLION RISING*, *supra* note 154, at 153, 175.

233. See Prosterman, *supra* note 194, at 128; see also Sawchenko, *supra* note 149, at 700 (documenting that Filipino landowners of property redistributed through the Comprehensive Agrarian Reform Program demanded higher compensation rates than even those provided in the statute, despite the fact that statutory rates already exceeded market rates).

234. See Sawchenko, *supra* note 149, at 713 (observing that in the instance of market-led land reform efforts, characterized by willing-buyer, willing-seller negotiations, the knowledge that land reform is ongoing can increase demand and raise prices).

235. See Keliannie Chamberlain, *Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings*, 14 WYO. L. REV. 77, 84–85 (2014).

nance of democratic legitimacy. How to best accomplish this goal will depend on the mechanism of the land redistribution. If the state is engaged in a low-intervention land reform, attempting to democratize land access by supporting market transactions between willing buyers and willing sellers, the state has largely truncated its possible role. However, articulating specific conditions under which public subsidies will be provided may help prevent these pricing problems. For example, limiting the availability of public funds to instances where the negotiated price is confirmed through an independent appraisal may stem the worst of price hikes.

The state can more directly limit price increases if it plays a substantial role in the reform through activities such as identifying privately owned property for redistribution, exercising its eminent domain powers, or compensating owners for the deprivation of their property. Using legislation or regulation to set a permissible range for land prices may help avoid some of the worst price inflation that can result from rising demand for land.<sup>236</sup> Careful drafting of land reform legislation to include a measure for valuing land sold during a land reform program can mitigate some of these concerns. One possible approach is to legislatively mandate prices equivalent to a fair market value set prior to initiation of the reform.<sup>237</sup> Another option would be to include a schedule or formula for pricing in legislation creating a land reform program, thereby avoiding any recourse to the judiciary and creating greater efficiency.<sup>238</sup> Alternatively, the legislature may establish a quasi-judicial administrative mechanism to determine market value, which may reduce the likelihood of runaway prices. Likewise, where land reform is part of a broader set of legal reforms, there may be factors inherent in those reforms that can limit inflation in the price for agricultural lands. For example, in nations that are moving away from a state-supported economy towards a freer market, the abolition of artificial price supports for crops can reduce the profitability of farming. Depressed crop prices may increase the debt burden of farmers, as they make less money from the sale of their crops. Under such circumstances, more farmers may elect to sell their property voluntarily, and some may be unable to pay on outstanding loans, increasing the odds of lender foreclosure. Either possibility results in more property being listed for sale, thereby increasing supply.<sup>239</sup>

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236. Such a schedule could also include premiums for land held for a long duration, thereby addressing the personhood compensation concerns at the same time. *See* Fee, *supra* note 195, at 791–92. *But see* Lee, *supra* note 195, at 648 (observing that where such a schedule is created on a percentage basis, it ends up treating wealthy people's sentimental attachment as worth more money than the personhood concerns of people with less expensive homes).

237. Sawchenko, *supra* note 149, at 713 n.266.

238. *See* Fee, *supra* note 195, at 815–16.

239. Klaus Deininger et al., *Implementing 'Market-friendly' Land Redistribution in South Africa: Lessons from the First Five Years* 6–7 (1999) (Glob. Dev. Network Working Paper Series),



Whatever the approach, officials initiating land reform must be cognizant that the scarcity of land can inflate land prices, resulting in a host of problems, including undermining the legitimacy of land reform and eroding the value of public funds invested in land reform. But they can draw on property law and policy insights to anticipate and respond to these problems before they undermine the overall success of the land reform initiative.

*C. Recognizing that Land's Meanings Are Divergent Can Render Land Reform More Effective*

For land reform advocates, the recognition that a property regime captures social values and at the same time represents potentially divergent meanings is crucial to understanding the nature of conflict that land reform creates. It is not only that property's meaning diverges across subcultures within a nation. It is that the existing rules embody one set of values related to land, and any alteration to those rules represents a shift in the implicitly expressed meaning of land. One might naively presume that as an outgrowth of a relatively similar set of cultural values, the citizens of a nation might share an understanding of the meaning of land. Instead, the cultural contextuality and contingency of land's meaning, and the fact that these divergent meanings relate to allocations of power and resources, reveal how land reform efforts themselves become sites of conflict and discord. Even within a single relatively small nation that might be anticipated to have a more cogent, unitary vision of the meaning of real property, divergent meanings of real property raise the question of how a state can realistically attempt to democratize land access without exacerbating the tensions that result from the conflict-laden meaning of land in that state. But once it is acknowledged that property systems are infinitely varied, complete recognition and understanding of differences in land's meaning can determine whether a land reform initiative will ultimately succeed or fail. What works in one setting may not work in another, so those advocating for land reform must have a firm grasp of the potentially multivalent cultural implications of land in their context.

When a nation undertakes a land reform initiative, the shifting, contingent meaning of land across populations within the country can become an obstacle to its successful implementation. If land reform programs are enacted in a place with heterogeneous meanings of property, social conflict can result.<sup>240</sup> Where dissent is widespread, it may preclude a state from reaching an adequate level of social accord to support a new

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240. See Sawchenko, *supra* note 149 (observing how passage of land reform legislation led to law-breaking by elites who wanted to avoid the loss of their property); see also Albertus & Kaplan, *supra* note 188, at 202 (connecting land reform to some increases in social unrest).

land reform program. Therefore, any discussion of the goals or purposes of a particular land reform effort realistically can only offer a partial representation of the public opinion and belief system about land reform in a particular setting. But those undertaking land reform programs should seek to understand the varied meanings of land within their nation before implementing any such initiative. Those multiple meanings must include not only historical meanings of land but also the contemporary and potentially shifting significance of land as understood by members of both dominant and minority groups in rural and urban communities. To the extent that land reform beneficiaries come from a single cultural group within a nation, while those who lose their land in a land reform program come from a distinct cultural group, even more safeguards are needed to ensure that there is buy in across the full array of subcultures present in the state.

Progressive property's understanding of land's contextual, contingent nature helps highlight why a monolithic land reform program established by members of a ruling social class or racial, ethnic, religious, or linguistic group will likely fail to engage all members of the society. Instead, cognizance of this divergent set of possible meanings of land must lead decision makers to be intentional in their efforts to involve members of all affected social groups. At a minimum, officials charged with implementing land reform must be culturally diverse and culturally competent to communicate clearly with a wide array of citizens. Those tasked with implementing land reform must establish mechanisms to engage with and listen to both poor communities of land reform beneficiaries and wealthy landowners, though a third group of citizens comprised of those not directly affected are also implicitly important as well.

First, government officers must know the history of land struggles in their nation and work to avoid invoking painful episodes of the past, while also attempting to rectify prior injustices. Beneficiaries of land reform can help decision makers orient a program within the framework of cultural meanings that land may bear in an agrarian society. They can ensure that the method of titling used in a redistributive effort aligns with communities' traditional values about how land should be held and by whom.<sup>241</sup> The social meaning of land within the landless community must be understood, but because land reform implicitly seeks to embody

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241. While private landownership by an individual or family is often envisioned as ideal, a substantial literature exists that extolls the virtues of collective ownership, for reasons of both cultural history and efficiency. See S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 12 (2002) (cultural tradition); see also Rick Welsh, *Farm and Market Structure, Industrial Regulation and Rural Community Welfare: Conceptual and Methodological Issues*, 26 AGRIC. HUM. VALUES 21, 22 (2009) (efficiency).

this meaning, it may be easier to embrace the contingency of land's meaning to the poor than some other aspects of land reform.<sup>242</sup>

Second, those who stand to lose their land through a land reform initiative must be heard to prevent a sense of illegitimacy from permeating the program.<sup>243</sup> Where context and contingency create divergent meanings of land, those who stand to lose theirs must have an opportunity to engage with the program.

Third, citizens who neither gain nor lose land can be crucial to creating public support for the initiative. As taxpayers whose contributions underwrite a land reform program, seeking their input from their own meanings of property can foster the program's legitimacy. Because they are not directly affected by the program, it is easy to pretend that their interests do not matter. But if only those directly affected are engaged, often the beneficiaries will support a program and those who lose land will oppose it. This group of uninvolved citizens can shape the perceptions of a program, however, and therefore warrant engagement.

#### CONCLUSION: LESSONS EXCHANGED BETWEEN LAND REFORM AND U.S. PROPERTY LAW

This Article has highlighted five key lessons from American property law and theory and has argued that these lessons can help improve land reform programs in the future. First, land reform is necessary because land is different than other kinds of property since it is rivalrous and scarce, creating a need for state intervention to ensure a just distribution. Second, property is contextual and contingent, so its distribution is not fixed but rather can be changed to reflect the evolving values of a nation. Third, land reform is a site for deeply felt conflict because people construct their identities in their property. Fourth, land reform can be socially disruptive because land itself signifies social status, but reform matters as a means of ensuring status for marginalized people. Fifth, land reform offers conditions that can foster democracy because land access allows people to become citizens and to have a stake in their society.

These lessons expose the theoretical roots of land reform, which can then be leveraged to shape future land reform programs. Property law reveals why land reform is a valuable public policy intervention. Property law also offers interventions to make land reform more effective. Land reform that is developed cognizant of these lessons will reflect an understanding of the importance of the program, the reasons landless people

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242. Still, these voices cannot be pressured into conformity with policy makers' goals and expectations. See Dyal-Chand, *supra* note 9, at 1687–88 (discussing processes for engaging subaltern voices in property discourse and ensuring that their potentially fragmentary perspectives are incorporated).

243. See *supra* Sections I.C. and I.D. discussing at length some of the concerns of those who lose land.

are desperate for land, and the reasons that the majority of society is reluctant to alter extant land distributions.

At its heart, the goal of this Article is to help address global poverty by offering support to land reform programs in their effort to reduce inequality in land distribution. But to accomplish these ends, land reform programs must address widespread opposition to this particular form of redistribution. Grasping how land forms a web of social status relationships and is entrenched within the established hierarchy of social class in a nation can explain why even those who do not stand to lose their land may still perceive land reform as a personal threat. Effective, widespread land reform signals deep change within the values that animate a nation. Awareness of this meaning is crucial for decision makers.

Looking forward, perhaps the most interesting question is what lessons American property law can learn from the experience of land reform. In particular, land reform offers one site for exploring the possibilities of applying progressive property scholarship. Land reform's lessons for property theory in the United States today include insights about both the need for more equal property distributions to ensure a functioning democracy and the possibility that current unequal property arrangements make it impossible for some citizens to constitute themselves in property. That the existing distribution of property is reified to confirm the status of already privileged citizens may be an insight that the United States can more fully absorb by looking to the Global South.