

## Grounding Land Reform: Toward a Market-Compatible Approach to Land Reform

Shelley Cavalieri

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# ARTICLES

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## INTRODUCTION

Land reform has become a commonplace development strategy in nations around the world. Agrarian reform is an attractive method of doing development work because it focuses on land as one of the primary social goods available within every state. Some land reform programs set forth to provide clear legal title to landowners who occupy land under customary land tenure agreements. Other models of agrarian reform attempt to resolve land-related disputes in an effort to clarify land rights. Yet another array of programs broadens access to arable land; this redistributive variety of land reform is the focus of this Article.

While it is tempting to think of these programs as a panacea, they can fail for an array of reasons. Failed land reform undermines all land reform efforts because it creates a fundamental skepticism about why nations should even bother to attempt to broaden access to land. Land reform's typically inchoate goals likewise compound this effect of leaving initiatives rootless, resulting in an open question as to whether land reform is a worthwhile endeavor. But the reality is that land reform is a

noble, valuable cause. Properly executed land reform reduces poverty, permits families to accrue wealth, and helps nations fulfill their human rights obligations.<sup>1</sup> It also builds human capacity, which endows developing<sup>2</sup> nations with the most valuable resource: citizens capable of solving the toughest problems their countries face.<sup>3</sup> In addition, land reform can achieve expressive goals, giving citizens a sense of identity and a nation a sense of pride in its own potential as a competent, autonomous, modern state.<sup>4</sup> These practical and expressive goals are many and real, and they can have a significant impact on the shape of land reform programs. But they too often go unstated, and the result is a land reform program that is detached from its own aspirations.

This Article begins the project of constructing a unified account of land reform. This model consists of two central aspects. First, it articulates a set of goals, both practical and expressive, that redistributive land reform efforts can forward. Second, it offers a pragmatic theory of land reform, one that simultaneously achieves the progressive, poverty-eradication goals of land reform proponents and satisfies neoliberal demand for stable land markets. In this regard, the project offers a fresh way of thinking of the intractable conflict in land reform policy: how to redistribute land without destabilizing the nation. In addressing this problem, the Article brings a conversation about land reform that primarily exists in development studies into the legal literature and informs that discussion with legal insights.

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<sup>1</sup> See *infra* Parts I.A.1, 2, and 4.

<sup>2</sup> The language of developed and developing is a contested shorthand to describe distinctions among nations with regard to gross domestic product. Many alternatives exist, such as first-, second-, and third-world, industrialized and unindustrialized, or global north and global south, but all of these are plagued with problems. This Article mostly refers to developing countries, or occasionally countries of the global south, but acknowledges the awkwardness of choosing a shorthand for these descriptions. Dayo Olopade, Op-Ed., *The End of the 'Developing World'*, N.Y. TIMES Mar. 2, 2014, at SR4 (advocating for the use of the terms “fat” and “lean”). Martha Nussbaum has observed that “[a]ll countries are ‘developing countries,’ although that phrase is sometimes used to refer to poorer countries: every nation has a lot of room for improvement in delivering an adequate quality of life to all its people.” MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH*, at x (2011).

<sup>3</sup> See *infra* Part I.A.3.

<sup>4</sup> See *infra* Part I.B.

This Article proceeds in three parts. Part I briefly defines what redistributive land reform is before moving on to identify and discuss land reform's pragmatic and expressive goals. Part II takes on the controversial problem of redistribution. It differentiates between expropriation-based models of land reform and market-compatible models, explains how expropriation can undermine development goals, and reveals how market-compatible approaches maintain the economic stability needed for meaningful development. Part III fleshes out how land reform programs operate, distinguishing among different land reform strategies. The Article concludes by observing that while market-compatible land reform makes good sense, both logically and theoretically, it will rise or fall based on whether enough land is made available to address the problem of rural poverty; it calls upon legal scholars of many doctrines to help shape policies and laws that support robust land reform initiatives.

### I. GOALS OF LAND REFORM

Land reform programs operate with a multifaceted approach to resolving public policy problems regarding agricultural lands, including, first, efforts to formalize title<sup>5</sup> and, second, dispute resolution processes to quiet title conflicts.<sup>6</sup> A third kind of agrarian reform is based on redistributive efforts designed to democratize land access.<sup>7</sup> All of these programs are typically pursued as one component of a larger movement to reform land tenure, access, and security. While titling and land conflict resolutions are important agrarian reform topics, they are

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<sup>5</sup> Formalization of title is the topic of a broad literature, both from legal and development scholars. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 46–62 (2003) (discussing the benefits of titling and other aspects of a formal property system). While this topic is discussed further in the analysis of the value of title for land reform beneficiaries, see *infra* Part I.B.2, this Article focuses on land reform initiatives dedicated to redistribution of lands, not formalization of title.

<sup>6</sup> For example, Indonesia's agrarian reform program includes dispute resolution, in light of more than 7,000 significant land disputes and conflicts in 2007. Joyo Winoto, *Taking Land Policy and Administration in Indonesia to the Next Stage*, in *INNOVATIONS IN LAND RIGHTS RECOGNITION, ADMINISTRATION, AND GOVERNANCE* 1, 2–3, 7 (Klaus Deininger et al. eds., 2010) [hereinafter *INNOVATIONS IN LAND RIGHTS*].

<sup>7</sup> SATURNINO M. BORRAS, JR., *PRO-POOR LAND REFORM: A CRITIQUE* 1 (2007) (stating that redistribution of land is a current issue in international development).

peripheral to this Article, which focuses on redistributive efforts. For the remainder of this Article, the term “land reform” denotes this kind of program designed to broaden access to land.

In order to critically analyze this kind of redistributive land reform and the mechanisms used to accomplish it, it is crucial to grasp the logic that underlies efforts to redistribute lands and understand why a government might want to pursue land reform. Land reform is one of the most practical forms of modern international development work in the global south. The possession of land is a bulwark against food insecurity,<sup>8</sup> poverty,<sup>9</sup> and social upheaval.<sup>10</sup> The ability to borrow against land may provide poor persons in many countries with access to a previously unknown level of financial security through the ability to purchase additional real property, develop small businesses, or support children in their pursuit of higher education.<sup>11</sup> In these regards, land reform serves the deeply practical goal of improving the concrete well-being of a country’s population. Coupled with these pragmatic functions, democratizing real property ownership in developing countries demonstrates the rise of democratic regimes and the retreat of colonialist governance models.<sup>12</sup> Within countries accustomed to wealth concentration in the hands of few, land reform signifies a shift from colonialist values to the reality of a more egalitarian state, one in which the nation’s wealth accrues to a wide array of citizens instead of only the privileged, foreigners, and outside investors. Land reform thus represents popular hopes in poor countries: that average people, too, may have access to their homeland’s patrimony. This Part of the Article serves to identify and explain the many goals that nations may attempt to accomplish by investing public money and effort into land reform programs. These goals are what make land reform a cause worthy of public support and additional scholarly consideration.

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<sup>8</sup> Thembela Kepe & Danielle Tessaro, *Integrating Food Security with Land Reform: A More Effective Policy for South Africa*, CIGI-AFRICA INITIATIVE POLICY BRIEF SERIES, Aug. 2012, at 1, 1–2.

<sup>9</sup> Krishna B. Ghimire, *Land Reform at the End of the Twentieth Century*, in LAND REFORM & PEASANT LIVELIHOODS 1, 1 (Krishna B. Ghimire ed., 2001).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> DE SOTO, *supra* note 5, at 48, 216.

<sup>12</sup> Cherryl Walker et al., *Introduction to LAND, MEMORY, RECONSTRUCTION, AND JUSTICE: PERSPECTIVES ON LAND CLAIMS IN SOUTH AFRICA* 1 (Cherryl Walker et al., eds., 2010).

### A. *Pragmatic Goals of Land Reform*

Land reform is most valuable because it can improve the lives of actual poor people who live in rural parts of developing countries. This simple statement belies the multifaceted complexity of what land reform might accomplish in poor rural communities. Articulating these pragmatic goals serves multiple purposes. First, it offers a practical justification for efforts to democratize land access. A social welfare program that serves no meaningful purpose in society is arguably pointless and probably even poses problems of moral hazard.<sup>13</sup> Second, providing a public rationale for investing public resources in programs to democratize land access legitimizes social safety net programs. Understanding what a nation is trying to accomplish with land reform and why that is socially relevant and valuable is a crucial first step in being able to evaluate the relative successes and failures of various approaches to these programs.

#### 1. Land Reform Reduces Poverty and Its Worst Consequences

Land ownership can play a significant role in solving the problem of rural poverty. For the landless rural poor, lacking meaningful access to their own land to cultivate means they are constantly dependent on wage labor to support their families. In rural places where the economy is based on small family businesses that provide few employment opportunities to strangers, scarce wage labor can be a recipe for constant economic insecurity.<sup>14</sup> Gaining access to land allows a steadier

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<sup>13</sup> Land reform initiatives that do not tangibly improve the lot of the intended beneficiaries often saddle poor people with debt and unproductive land while potentially providing benefits of electoral popularity and support to the elected officials who initiated the programs. States are unlikely to avoid these kinds of flawed land reform initiatives, unless the state is actively paying to support them, and the state is protected against risks associated with these programs by shifting them onto indebted participants in land reform programs. Thus, this scenario poses a moral hazard which effectively leads to the subsidization of a larger amount of ineffective land reform than would typically be justified. Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 138–39 (2000) (discussing with skepticism moral hazard and its use to reject social assistance programs). However, because the worst consequences of failed land reform programs land squarely on poor people, advocates for the rural poor should be skeptical of ill-conceived redistributive land reform programs that worsen the lot of the rural poor.

<sup>14</sup> Sam Moyo, *Land and Natural Resource Redistribution in Zimbabwe: Access, Equity and Conflict*, 4 AFR. & ASIAN STUD. 187, 190 (2005) (“Formal employment is

form of economic support that offers food, money, and security, because land is the primary source of livelihood for rural citizens.<sup>15</sup> Land has historically signified security to families that own it;<sup>16</sup> modern land reform efforts are predicated in no small part on an attempt to provide economic security to the rural poor who rely on access to land as a form of wealth and stability. Gaining land through land reform can help poor rural families achieve economic and food security that was unavailable to them as landless rural farmworkers.

Development economists and social scientists have documented these important development consequences of land reform.<sup>17</sup> Well-respected development organizations, including the United Nations Development Program, have acted on these findings by dedicating substantial effort to encouraging land reform initiatives.<sup>18</sup> Countries instigating land reform efforts therefore are often choosing to do so for purposes of poverty eradication.<sup>19</sup> However, unlike other important public assistance models, such as cash transfers, land reform is envisioned as a form of social welfare policy that relies on individual engagement to be successful; it equips families and individuals in poverty

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unable to absorb the numerous unemployed, land-short, landless and homeless.” (citation omitted).

<sup>15</sup> *Id.* at 188 (“[Land and national] resources are the key direct source of livelihood and wealth for the majority [in Africa]. 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.”). Legal scholar Lisa Pruitt has observed that, in 2012, the United Nations Commission on the Status of Women featured as its theme “the empowerment of rural women and their role in poverty and hunger eradication, development and current challenges,” but that even though women and girls reinvest ninety percent of their income in their families, they own less than two percent of land. See Lisa Pruitt, *Rural Women and the Limits of Law: Reflections on CSW 56*, JURIST (Mar. 23, 2012, 1:00 PM), <http://jurist.org/forum/2012/03/lisa-pruitt-un-women.php#U1VkcYnL1o> (internal quotation marks omitted). Providing women with access to land is therefore a promising strategy for increasing food security and eradicating hunger and poverty.

<sup>16</sup> See Shelley Cavalieri, *Theorizing Land Reform* (July 9, 2015) (unpublished manuscript) (on file with author) (discussing at length the role of land in signifying social status).

<sup>17</sup> See generally Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction, and Growth: Evidence from India*, 115 Q.J. ECON. 389 (2000).

<sup>18</sup> Saturnino M. Borrás Jr. & Terry McKinley, *The Unresolved Land Reform Debate: Beyond State-Led or Market-Led Models*, UNITED NATIONS DEV. PROGRAMME, Nov. 2006, at 1, 3, available at <http://www.ipc-undp.org/pub/IPCPolicyResearchBrief2.pdf>.

<sup>19</sup> See Besley & Burgess, *supra* note 17, at 392–94.



with the means to overcome their own economic deprivation without requiring continuous infusions of government funds to do so.<sup>20</sup>

## 2. Land Reform Can Provide Title, Which Allows Families To Accrue Wealth

Land reform may also lead to the kind of land titling that economists have demonstrated helps poor families accumulate adequate economic resources to engage more meaningfully in the modern economy of developing nations. Hernando de Soto's work on the topic of titles to land has argued that lack of access to a stable, marketable land title denies poor families entrée to the economic opportunities that capital provides.<sup>21</sup> Land with secure title, against which families are able to borrow, can help smallholders obtain capital that can be used to achieve other goals.<sup>22</sup> Such capital can be a source of financial security to purchase real estate, develop small businesses, or support children's education.<sup>23</sup> De Soto's work has documented the capital-generating aspects of titling and how titles can provide families with greater economic security than they possessed prior to obtaining land and stable title; he has argued that this creates long-term change within a society.<sup>24</sup> As a result of this body of scholarship, many nations have undertaken efforts to clarify title to property.<sup>25</sup>

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<sup>20</sup> Of course, in the instance of land reform accomplished by means of state-led distribution of land, this claim is somewhat misleading. If the state transfers land to the poor instead of transferring money to the poor, it has in essence made a wealth transfer in either instance. The only distinction, of course, is that conveying land may equip those who are poor to be able to address their own poverty without continued government involvement through repeated cash transfers. Cash transfers are an important poverty-eradication strategy, but they require a steadily funded government to continue to provide them. Despite this potential problem, development economists remain focused on the possibility of conditional cash transfers as a means of incentivizing the creation of human capital. *See generally* Julia Johannsen et al., *Conditional Cash Transfers in Latin America: Problems and Opportunities* (Inter-Am. Dev. Bank, Working Paper, 2009), available at <http://publications.iadb.org/handle/11319/2530>.

<sup>21</sup> HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 159–61 (June Abbott trans., 1989).

<sup>22</sup> DE SOTO, *supra* note 5, at 48, 216.

<sup>23</sup> *Id.* at 39–40.

<sup>24</sup> *Id.*

<sup>25</sup> *See, e.g.,* Rita Sinha, *Moving Towards Clear Land Titles in India: Potential Benefits, a Road Map, and Remaining Challenges*, in *INNOVATIONS IN LAND RIGHTS*,

This discussion of the benefits of land titling is not without its critics. Development and legal scholars alike have critiqued this individualized approach to land ownership by noting that it destroys communal and historic models of land tenure<sup>26</sup> and observing that it may not generate the “security of tenure, investment and increased productivity” that are the hallmarks of de Soto’s approach.<sup>27</sup> Yet even though communal ownership of property may preclude community members from accessing this range of possible benefits, indigenous communities that are well-versed in the consequences of losing indigenous lands due to sale by individual owners may instead prefer to hold land communally, with restraints on alienation.<sup>28</sup> Though such restraints clearly limit individuals’ abilities to alienate the property or borrow against it, the American Indian experience of allotment has underscored the fact that distributing communal lands to individuals too often leads to the sale of the property,<sup>29</sup> and with it, the loss of the site of communal identity.<sup>30</sup> The identifiable benefits of land titling, therefore, should be considered as one of the range of possible goals that land reform could achieve; however, alternative models of reform might instead prioritize goals of poverty eradication that can be accomplished while title is held in a communal fashion in order to prevent the destruction of traditional land tenure practices.<sup>31</sup>

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*supra* note 6, at 14–20 (describing the system India initiated in 2008 to create clear property titles).

<sup>26</sup> Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 503, 527–28 (2011).

<sup>27</sup> See Philippe Lavigne Delville, *Registering and Administering Customary Land Rights: Can We Deal with Complexity?*, in INNOVATIONS IN LAND RIGHTS, *supra* note 6, at 26. See generally D. BENJAMIN BARROS, HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed., 2010).

<sup>28</sup> See JOSEPH WILLIAM SINGER, PROPERTY 763 (3d ed. 2010) (observing how American Indian tribal governments often attempt to put newly acquired tribal lands under the trust status in which tribal title is held).

<sup>29</sup> See Ann E. Tweedy, *Unjustifiable Expectations: Laying To Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 134–35 & n.29 (2012) (discussing how the reduction of government support of Indians and changes in agriculture left individual Indian allotment owners in desperate economic straits and thus willing to sell their allotments).

<sup>30</sup> See Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POLY & L. 381, 394–95 (1997).

<sup>31</sup> See *infra* Part III.C.

### 3. Land Reform Builds Human Capability

The shift from life as a landless rural peasant to living as a smallholding farmer is not merely a quantitative increase in income but a dramatic qualitative change in kind for the lifestyle of land reform beneficiaries. Landless rural peasants earn wages while performing the tasks assigned to them by the owner or crew chief in the fields that belong to others. In some instances, this role can be a steady, year-round form of employment. Far more commonly, the historically stable relationship between a landowner and farmhands, through which an owner would employ and house an entire family, has eroded into a seasonal role, day labor, or even piecework.<sup>32</sup> For landless peasants, this kind of temporary labor relationship means that workers maintain relatively little day-to-day control over the tasks that comprise their work or decision-making authority to determine how and when work is performed. Instead, owners or their hired crew chiefs decide what agricultural tasks need to be performed on a daily or weekly basis and assign those tasks to the workers.<sup>33</sup> Worse yet, the contingent nature of the work situations reduces landless peasants' abilities to plan for steady income or to structure their time while waiting for work to materialize.

In contrast, land reform can transform the lives of its beneficiaries. When land reform puts agricultural property in the possession of former farm workers, management decisions become the responsibility of the individual smallholder or the leadership body of a farm held collectively.<sup>34</sup> Such a dramatic

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<sup>32</sup> This is certainly the case in Guatemala, where the traditional ongoing relationships that farmworkers formed with the owners of the land on which they worked and lived have disappeared. While there is far less paternalism endemic to the new relationships, landowners no longer have obligations for social insurance, holiday pay, medical expenses, and other costs that historically would have been shifted onto the property owner. David McCreery, *Coffee and Indigenous Labor in Guatemala, 1871-1980*, in *THE GLOBAL COFFEE ECONOMY IN AFRICA, ASIA, AND LATIN AMERICA, 1500-1989*, at 191, 199 (William Gervase Clarence-Smith & Steven Topik eds., 2003).

<sup>33</sup> *Id.* at 196-97.

<sup>34</sup> See *infra* Part III.C for a discussion of individual and collective models of land ownership.

increase in autonomy can be both terrifying and empowering for individuals who have previously spent their lives working the fields of other landowners.<sup>35</sup>

This facet of land reform demonstrates how it likewise serves the pragmatic goal of building human capacity. As articulated by the human capabilities approach to development, a theory of international development most closely associated with economist Amartya Sen and legal philosopher Martha Nussbaum,<sup>36</sup> state actions should focus on increasing individuals' ability to achieve the ends they wish to pursue.<sup>37</sup> Although this theory has its roots as an economic model in Sen's version,<sup>38</sup> and an Aristotelian approach to philosophy in the work of Nussbaum,<sup>39</sup> the capabilities approach to human development has subsequently attracted a substantial following in the field of development economics and has taken meaningful root in the international arena.<sup>40</sup>

Land reform responds to the fundamental concern of the capabilities approach to development, which is how to provide individuals with capability, defined as "the substantive freedom to achieve alternative functioning combinations."<sup>41</sup> Functionings

<sup>35</sup> Land reform can serve to reduce the constraints on autonomy experienced by poor rural citizens of developing nations. Although constrained autonomy is not unique to those at the bottom of social hierarchies, since all people operate with some limitations on their array of choices, those with fewer privileges commonly have the most circumscribed set of options before them, though this should not be viewed as preventing them from exercising their own agency. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 813–16 (discussing limited sets of options and embracing the self-determination rights of persons with fewer choices in the context of domestic violence). To the extent that technical assistance can improve land reform beneficiaries' odds of success by increasing their skills set, many governments undertaking land reform initiatives offer these kinds of programs. See *infra* Part III.D for a discussion of the range of possible government involvement in land reform efforts.

<sup>36</sup> Shelley Cavalieri, *Capabilities Approach*, in THE WILEY-BLACKWELL ENCYCLOPEDIA OF GENDER AND SEXUALITY STUDIES (Nancy A. Naples et al. eds., forthcoming 2016).

<sup>37</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 18 (1999).

<sup>38</sup> MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 11 (2000).

<sup>39</sup> SEN, *supra* note 37, at 24.

<sup>40</sup> See UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2013, at 64 (2013), available at [hdr.undp.org/sites/default/files/reports/14/hdr2013\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/14/hdr2013_en_complete.pdf) ("[G]iving primacy to state investment in people's capabilities—especially their health, education and nutrition," combined with increasing their resiliency, "has paid human development dividends.").

<sup>41</sup> SEN, *supra* note 37, at 75.

are “the various things a person may value doing or being,” and they can range from health and well-being to the pursuit of life goals and purpose.<sup>42</sup> But functionings themselves are not the purpose of the capabilities approach; instead, it is the capacity that the functionings provide to individuals so they can pursue their own life ends and their own vision of the good.<sup>43</sup> Land may well be the kind of good that capacitates individuals to access an array of other functionings, including the income to pay for food, health care, and education, as well as the intangibles of dignity, self-respect, and a sense of autonomy. Land reform may thus be responsive to this kind of concern by providing a means to access other life purposes, as opposed to simply allowing the state to directly provide the raw materials.<sup>44</sup>

One aspect of the capabilities approach that is particularly applicable in the land reform context is that this model does not mandate a particular set of life choices.<sup>45</sup> The capabilities approach offers a helpful framework for contemplating land reform because it demands that individuals have meaningful options available to them in life.<sup>46</sup> Land reform satisfies the basic requirements of the capabilities approach because it addresses the root source of rural poverty in the developing world: the lack of meaningful options for sources of income for landless peasants. But it also honors the other key aspect of the capabilities approach by allowing individuals a great degree of freedom in living with this solution and thereby augmenting the variety of options available to individuals. Under the capabilities approach, access to land can be part of the range of goods that an individual can use to pursue his or her own life goals. Participation in market-compatible land reform is voluntary insofar as states do not mandate that individuals partake. But the capabilities approach does not only give individuals a set of goods with which to pursue their own ends. It also enables people to develop increasingly sophisticated capacity to attempt further goals and outcomes. The capacities that land reform

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<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> This is also true in the context of interventions in trafficking for sex work. *See* Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1457 (2011).

<sup>45</sup> *See* SEN, *supra* note 37, at 75–81.

<sup>46</sup> *See id.*

builds are not purely provided by the set of primary social goods that land reform can offer through economic security; they also are a set of skills that result from building the autonomy of land reform beneficiaries. Learning to run a small business and to operate with authority over their own labor represents a substantial increase in the human capital of those who receive land.

#### 4. Land Reform Helps Nations Fulfill Their Human Rights Obligations

Land reform can also serve the important function of furthering the stated goals of human rights treaties, including ensuring the rights of all people to participate in cultural life<sup>47</sup> and to earn a living through work,<sup>48</sup> thereby bringing states that are implementing these kinds of programs into closer compliance with their treaty obligations. While the International Covenant on Economic, Social and Cultural Rights provides only for the progressive realization of its mandates,<sup>49</sup> land reform can accomplish some aspects of this ongoing, progressive approach to development.<sup>50</sup> Rights to work<sup>51</sup> and to remuneration, which provides a decent living,<sup>52</sup> are supported by government efforts to broaden the base of land ownership in a nation. When the landless rural poor spend their lives as temporary employees on the farms owned by others, they rarely have the ability to earn adequately to support their families. But land ownership provides what functions as a small business opportunity, allowing individuals to work for themselves. Likewise, rights to food<sup>53</sup> and housing<sup>54</sup> are furthered by land, which gives individuals access to subsistence-level farming and to a place to

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<sup>47</sup> See International Covenant on Economic, Social and Cultural Rights art. 15, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>48</sup> See *id.* art. 6.

<sup>49</sup> See *id.* art. 2.

<sup>50</sup> *Id.* (requiring state parties to take steps toward, not achieve, the rights established in the covenant).

<sup>51</sup> *Id.* art. 6.

<sup>52</sup> *Id.* art. 7.

<sup>53</sup> *Id.* art. 11.

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

build housing for their families. States that offer land reform as a means of reducing rural poverty are simultaneously fulfilling their treaty obligations.

More recent human rights conventions have treated land reform as its own topic worthy of consideration. Article 14(2)(g) of the Convention on the Elimination of Discrimination Against Women ("CEDAW") specifically mentions agrarian reform in the context of women's human rights:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right... [t]o have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes . . . .<sup>55</sup>

While this article of CEDAW is focused on creating equality in access to land reform initiatives among men and women, inclusion of land reform in this relatively recent human rights convention suggests that land reform is increasingly a substantial topic of discussion in human rights and international development circles. Furthermore, that Article 14 specifically enumerates the needs of rural women as a distinct category of women suggests that rural populations warrant human rights and international development interventions that are targeted to their circumstances and unique needs.<sup>56</sup>

## 5. Land Reform Responds to the Hierarchy of Human Needs

The pragmatic goals described thus far build progressively one upon the other. At the first order, without basic food and economic security, no other development goals are possible. Second-order outcomes of access to the kinds of goods only available to those with capital become possible through formal titling, including improved housing, small business ownership,

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<sup>55</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 14, § 2(g), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

<sup>56</sup> Lisa R. Pruitt, *Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference*, 17 WM. & MARY J. WOMEN & L. 347, 352 (2011) (arguing that Article 14 of CEDAW is "an example of rural exceptionalism" because it "moves beyond the implicit focus on urban populations that characterizes a great deal of contemporary law making").

and access to education. Third-order development of individual capacity equips individuals with the skills and abilities they need to pursue their own vision of the good, whatever that might be. This kind of capacity-building changes communities for the better, as they develop a critical mass of individuals dedicated to and capable of improving the situation of the whole community. And, finally, groups of individuals who have achieved a basic modicum of economic well-being and are working to improve their own communities in directed and focused ways have the ability to help their nation achieve the kinds of development goals that are the basis of the economic, social, and cultural rights treaties.

This ordering of the pragmatic goals of land reform resonates strongly with Maslow's well-known hierarchy of needs, which conceptualizes human development as occurring in a hierarchical fashion.<sup>57</sup> Starting with physiological needs, such as food and water, Maslow theorized that once these baseline needs were met, people could instead focus on physical safety and security, then community, belonging, and affection, followed by esteem, and ultimately self-actualization.<sup>58</sup> These steps correlate closely to the interconnected pragmatic goals just discussed. Food security and income allow individuals to achieve this first level of physiological needs. Titling of land provides intergenerational security. Capacity-building serves ends of community, individual esteem, and self-actualization for beneficiaries of land reform. Achieving compliance with human rights goals accomplishes

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<sup>57</sup> A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 370 (1943).

<sup>58</sup> *Id.* at 375–76, 380–82; see also Charles K. Ten Brink, *Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class*, 28 GA. ST. U. L. REV. 789, 799–800 (2012) (discussing Maslow's theory in the context of the provision of public goods and noting that “[m]unicipalities have not typically been thought to be in the business of providing esteem and self-actualization, but in fact they often do so without openly recognizing that goal”). Some legal scholars, working in concert with labor organizers, have posited that cooperative work models—similar to those found on collectively owned farms—can achieve at least the first stages of Maslow's hierarchy of needs, though the transformative aspects are not experienced by all involved. See Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 BERKELEY J. EMP. & LAB. L. 65, 96 (2013).



esteem and self-actualization for the nation as a whole in a postcolonialist quest for identity and place in the world community.<sup>59</sup>

Despite the potential for these many valuable outcomes, while land reform can have a transformative effect on the lives of its beneficiaries and the states in which they reside, it is not a singular solution. Land reform, like other strategies to address poverty, is expensive to implement. Although the international community now has significant knowledge about what approaches can reduce extreme poverty in the developing world, the reality is that the lack of funds precludes nations from actually eradicating poverty. Even if there were the political will, the scarcity of land<sup>60</sup> means that land reform cannot be the route out of poverty for all poor persons. But these limitations on what land reform can achieve does not discredit all land reform. Rather, these limitations highlight the fact that land reform is one of many development strategies that can be used in concert to address global poverty.

### *B. Expressive Goals of Land Reform*

Beyond these practical purposes that land reform can accomplish, nations can also initiate these programs to achieve expressive goals. Expression may appear at first examination to be an insufficient justification for initiatives that democratize land access, easily dismissed as a vacuous, feel-good waste of resources or mere propaganda designed to bolster support for an embattled government. However, expression has a powerful role in shaping the evolution of nations. Coupled with pragmatic goals, expressive goals can demonstrate the advent of meaningful changes in the culture of a nation. In its most aspirational form, land reform can signal a shift towards a government that is more responsive to and engaged with its own people; it can demonstrate how the state's resource allocation model is at least partially dedicated to improving the conditions in which its citizens live.

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<sup>59</sup> See *infra* Part I.B.

<sup>60</sup> See Cavalieri, *supra* note 16 (discussing the role of the scarcity of land in shaping land reform programs).

Yet land reform that serves purely symbolic ends can highlight the presence of a government that views corruption, cronyism, and favoritism as legitimate government purposes and that is willing to use redistributive efforts such as land reform to prop up an otherwise struggling or illegitimate system.<sup>61</sup> Where land reform founded only on expressive goals bolsters an otherwise threatened regime, it stands for an unjustified system that undermines the democratic ends of land reform programs. While this section articulates the array of expressive purposes that land reform programs might serve, these goals only make sense when coupled with pragmatic ones as well. Although expressive goals of land reform can capture an important aspect of the culture of land access, a program based on symbolism but devoid of substance dedicated to improving the status of a nation's poorest citizens is fundamentally illegitimate. This limitation on the role of expression does not, however, diminish the importance of knowing what kinds of purposes land reform can represent in the national imagination. Shared meaning has long been an important aspect of legal and social change,<sup>62</sup> and it likewise can be in the context of land reform.

Many nations implement land reform as part of a postcolonialist effort to broaden poor citizens' access to arable land.<sup>63</sup> Whether independence has been achieved from rule of a

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<sup>61</sup> Although this set of traits is not unique to expropriation-based land redistributions, transfers of expropriated land in gratitude for political patronage is a well-documented phenomenon. See, e.g., HUMAN RIGHTS WATCH, FAST TRACK LAND REFORM IN ZIMBABWE 2 (2002), available at <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf> (describing "party-political control of access to the forms for applying for land and partisan discrimination in the allocation of plots" and "the key role of the [ruling political party] militias in distributing and allocating land, [which are] the same militias that are responsible for violence and intimidation against many who might otherwise apply for a plot"); 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, 574, 576 (2007) (noting that when Zimbabwe undertook its radical land reform programs, it already possessed a great deal of land but failed in redistribution and resettlement due to "cronyism, nepotism and corruption" and observing that "[m]uch of the best land ha[d] ended in the hands of [ruling party] leaders and Government officials, military officers and many leading judges").

<sup>62</sup> One example of this would be the role of the National Health Service in solidifying British national identity after World War II. See Donald W. Light, *Universal Health Care: Lessons from the British Experience*, 93 AM. J. PUB. HEALTH 25, 26 (2003).

<sup>63</sup> WALKER ET AL., *supra* note 12.

colonial government<sup>64</sup> or a puppet government,<sup>65</sup> in the postcolonial context land reform signals a shift away from colonialist values of resource extraction and depletion for the enrichment of the colonizing nation. It demonstrates investment in the provision of economic and material support to the citizens of a nation. Prioritizing the use of national resources to eradicate poverty and improve the lives of a nation's own people is both a practical and an emblematic change. Implementation of land reform marks a moment where property as personhood ceases to be a theory and becomes lived reality.<sup>66</sup> Land reform after independence signifies the aspiration of the nation to achieve a more egalitarian state where wealth accrues to citizens instead of foreigners.<sup>67</sup>

For land reform beneficiaries in this kind of a system, ownership of land represents the deepest hopes of the poor to have access to the stability that land signifies and a share of the wealth they believe to be the promise of independence from colonial powers.<sup>68</sup> But it also captures the belief that farming the

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<sup>64</sup> In nations where colonial powers formally governed, independence involved the formation of an autonomous government, though in the Zimbabwean case, race-based rule did not fall until a later date. JOSEPH HANLON ET AL., *ZIMBABWE TAKES BACK ITS LAND* 36 (2013).

<sup>65</sup> In other instances, puppet governments were ostensibly comprised of citizens who were controlled and shaped through colonial action. JIM HANDY, *GIFT OF THE DEVIL: A HISTORY OF GUATEMALA* 85–88 (1984) (describing the relationship of Guatemalan government to the United Fruit Company and the United States government).

<sup>66</sup> Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 957–58 (1982); see also Cavalieri, *supra* note 16 (arguing that personhood might play a robust role in shaping land reform initiatives).

<sup>67</sup> For example, in Guatemala, coffee farms were traditionally operated by the families of German immigrants that settled in the highlands and maintained large plantations. Since the implementation of Fondo de Tierras, the most recent iteration of Guatemalan land reform, many former farmworkers on those same plantations are now purchasing the land. The identities of these new smallholders as farmers coincides with their burgeoning identities as citizens of a postwar Guatemala, with an elected government that does not commit rural genocide. In Zimbabwe, colonial expropriation created tenure patterns where white farmers own large farms in fertile areas, “while black rural dwellers barely subsist.” HUMAN RIGHTS WATCH, *supra* note 61, at 4.

<sup>68</sup> The scholarship on law and hope is growing, and land reform efforts fit squarely as an example of what it means when legal systems not only resolve legal wrongs but provide citizens with hope. See Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 *CALIF. L. REV.* 319, 346–56, 363–71 (2007) (articulating five elements of efforts to cultivate hope in others, including communicating recognition and vision, allowing individuation, providing resources, supporting

land involves a claim to the nation's patrimony, that tilling soil is an investment in the continued success and prosperity of the nation.<sup>69</sup> Land ownership and the personal investment of time, sweat, and money into its cultivation is proof of social citizenship.<sup>70</sup> Individuals who work the land under postcolonialist circumstances do so in part as a statement of autonomy and dignity following years of struggle and oppression.

Land reform is imbued with expressive meaning, and not only for the individual new land owner in postcolonialist nations; it also has important expressive meaning for the nation itself. In some instances, when land reform is implemented after years of violence or government brutality,<sup>71</sup> land reform can serve as a form of reparations and provide a clear path forward—not as a public airing of truth but as a form of reconciliation nonetheless.<sup>72</sup> Broadening access to land by government action is concrete evidence of the postcolonial identity of the nation as independent and capable of economic stability, aligning with a shift towards national self-direction and agency as an actor in the international arena. Land reform puts land in the hands of the native peoples or their descendants in many countries and is a manifestation of the nation's self-reliance and capability following years or perhaps centuries of external rule that undermined these capacities. Democratizing land access and the

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agency, and fostering solidarity, as well as identifying Head Start as a programmatic effort that uses the law to cultivate hope).

<sup>69</sup> This sense of place and belonging is not unique to the developing world. In the United States, the century farm movement identifies and honors farmers who can demonstrate that their farm has been in the family for at least 100 years. In such instances, land ownership is not only about livelihood but also about identity, a sense of place, and "honor[ing] a family's multi-generational relationship with the land." Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. REV. 375, 416 (2007).

<sup>70</sup> The failed American postbellum promise of forty acres and a mule—land and the materials necessary to work it—is still viewed by rural African Americans as demonstrative of the refusal to grant the nation's patrimony to freed formerly enslaved persons. See Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 505–06, 530, 532 (2001).

<sup>71</sup> Guatemala's most recent land reform was founded as part of the 1996 Peace Accords after a thirty-six-year civil war. SUSANNE JONAS, OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS 11, 79–80 (2000). South Africa began a serious land reform effort at the end of apartheid. WALKER ET AL., *supra* note 12.

<sup>72</sup> See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 91–117 (1998) (discussing the importance of reparations after mass human rights atrocities).

intensive farming of arable land within a postcolonialist state can also lead to complete food autonomy within a nation, or realistic steps toward it, exhibiting the nation's ability to care for and increasingly sustain its own people without reliance on external assistance.

Finally, from an international vantage point, land reform can offer concrete evidence that the broad anti-poverty efforts of transgovernmental organizations like the United Nations Development Program<sup>73</sup> and nongovernmental organizations like the Gates Foundation<sup>74</sup> are taking root. The work of these organizations might be best viewed through a theoretical lens such as the Capabilities Approach<sup>75</sup> or from the vantage of Rawlsian justice as fairness.<sup>76</sup> They are dedicated to improving the lot of the worst-off people in the world, though they do not advocate a formal equity in distributing resources throughout society. The anti-poverty initiatives of these kinds of organizations exhibit a broadening, worldwide commitment to the eradication of extreme poverty and the reduction of poverty overall.<sup>77</sup> Nations making domestic commitments towards the same goals demonstrate that the poorest countries in the world are not merely beneficiaries of external international development efforts, but are instead agents engaged in a shared purpose of improving the standard of living of their poorest citizens.

Of course, these expressive goals are not limitless in their scope. That land is contextual and contingent<sup>78</sup> suggests that it will continue to mean different things to different people in

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<sup>73</sup> See UNITED NATIONS DEV. PROGRAMME, *supra* note 40, at 3 (“[M]easures and analytics are needed that broaden the human development concept. . . . [Human development measures] must meet this challenge by moving beyond a focus on measuring individual capabilities to incorporate society-level capacities, concerns and perceptions. Individual achievements in health, education and income, while essential, do not guarantee progress in human development if social conditions constrain individual achievements . . .”).

<sup>74</sup> See *What We Do*, BILL & MELINDA GATES FOUNDATION, <http://www.gatesfoundation.org/What-We-Do> (last visited Aug. 5, 2015).

<sup>75</sup> See discussion *supra* Part I.A.3.

<sup>76</sup> See discussion *infra* Part II.B (considering how redistributive land reform fares when analyzed under John Rawls's approach to justice, articulated in his seminal work, *A Theory of Justice*).

<sup>77</sup> See *A World of Development Experience*, UNITED NATIONS DEV. PROGRAMME, [http://www.undp.org/content/undp/en/home/operations/about\\_us.html](http://www.undp.org/content/undp/en/home/operations/about_us.html).

<sup>78</sup> For a more thorough discussion of the relationship between land reform and the contingent meaning of property, see Cavalieri, *supra* note 16.

different places and times. Land reform thus can never bear only one expressive meaning. But this should not preclude policy-makers from contemplating what a land reform program can say to all citizens of a nation in addition to what it can do for some citizens of a nation. Indeed, it is possible that the expressive message of land reform is broader in its impact within a nation than the material effects of the reform. Respecting expressive purposes thus remains an important consideration when shaping a land reform initiative and can help analysts understand why a particular program may succeed or fail.

## II. MARKET-COMPATIBLE LAND REFORM PROGRAMS: A PRAGMATIC LEVEL OF REDISTRIBUTION

Designed to democratize land access, redistributive land reform necessarily involves land changing hands because these programs are intended to increase the number of people with rights to arable land.<sup>79</sup> Land reform accomplishes its many important goals<sup>80</sup> by creating a new group of people with rights to land. Critics of land reform decry these initiatives as wealth redistribution, claiming that such efforts grossly overstep permissible government actions. But these critics assume incorrectly that all reallocation of property is unjust. The problem is the imprecision inherent in the term redistribution; its meaning is imbued with contempt, but redistribution is a common, even pedestrian, government function.<sup>81</sup> At the heart of this critique is the mistaken assumption that because some redistribution of private property might go too far, all redistribution is an unwarranted frustration of private property rights.

This Article argues that redistributive land reform can be compatible with the operation of a market for land, and furthermore that it should be structured to avoid massive disruption to the land market in order to most directly reduce the

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<sup>79</sup> It is of course possible to simply transfer land rights from one party to another without increasing the number of people who have access to land. But this kind of effort would not democratize access and, therefore, does not qualify as land reform in the sense in which the term is used in this Article.

<sup>80</sup> See *supra* Part I.

<sup>81</sup> Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 22–23 (2000).

incidence of poverty in the nation. A market-compatible land reform program avoids uncompensated state taking of private property, but adopts as necessary compensated eminent domain to achieve the public good of democratized access to land.<sup>82</sup> While uncompensated taking exceeds reasonable bounds because it generates externalities that can undermine the goals of land reform itself, the kinds of market-compatible land reform programs that are the centerpiece of this Article strike an appropriate balance, since states are concerned with, and at least partially responsible for, the well-being of their people. This Article focuses on land reform programs that avoid uncompensated state taking of private property, which I refer to as market-compatible land reform programs. Although uncompensated taking warrants its own detailed scholarly consideration as a method by which states alter the system of land ownership, this Article focuses explicitly on why land reform programs designed to further development-based national and international goals make sense. To that end, this Section briefly defines expropriation in the context of land reform, explains how expropriation runs the risk of undermining land reform as a development initiative, and shows how market-compatible land reform balances economic efficiency with the achievement of a greater degree of equity in a nation.

To be clear, this Article does not idealize the land market as the solution to problems of poverty. Rather, this Article argues that if some market for land is accepted as a given in nations' political arrangements, expropriation can cause economic

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<sup>82</sup> The distinction drawn here between market compatible land reform programs and expropriation-based land reform programs differs from the distinctions development scholars often draw among land reform initiatives. Their common parlance refers to market-led agrarian reform which relies on market mechanisms to provide land to landless people and only distributes "the land of landlords who voluntarily sell . . . [L]andlords who do not want to sell are not compelled to do so." BORRAS, *supra* note 7, at 54. Elsewhere, this kind of reform is called a willing-buyer, willing-seller program. See, e.g., HUMAN RIGHTS WATCH, *supra* note 61, at 6. In contrast, state-led agrarian reform is coercive land reform in which landlords are either unpaid for land taken or are paid at a below market price. See BORRAS, *supra* note 7, at 58. However, this Article departs from this distinction, arguing instead that the key for policymakers is to distinguish land reform programs that compensate the landlord, which risk less economic destabilization, from land reform programs based on uncompensated or undercompensated expropriation. Focusing on the maintenance of stability as the key distinction among land reform programs is an important contribution that the legal scholarship and its analysis of expropriation can make to discussions of land reform.

destabilization that disproportionately harms the poorest citizens. This is neither a normative nor a philosophical critique of expropriation, but a pragmatic one due to its consequences under a certain set of circumstances. Thus, while this Article argues that expropriation is problematic, this is a contextual and consequentialist claim based upon expropriation's ill effects in the situation of a system of private property in land. One could envision a different property system in which these consequences would not accrue in the same fashion, but that is a different project than the one that this Article undertakes. This Article aims to show the most plausible route from the current market for land to a robust program of land reform.

A. *Distinguishing Uncompensated Expropriation from Compensated Eminent Domain*

Expropriation is the government taking of private property.<sup>83</sup> The term “expropriation” can be imprecise because it does not clarify whether or not the government compensates the landowner for the taken property.<sup>84</sup> For the purposes of this Article, the term “expropriation” is used to refer to takings that occur without compensation. Land reform programs can be based upon this kind of taking, whereby the state expropriates the private property that will be involved in a land reform initiative. Although the power of the sovereign to take property has long been considered an inherent aspect of sovereignty,<sup>85</sup> unjustified or uncompensated expropriation today violates the

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<sup>83</sup> “[E]xpropriation’ refers to an act by which governmental authority is used to deny some benefit of property.” Barry Appleton, *Regulatory Takings: The International Law Perspective*, 11 N.Y.U. ENVTL. L.J. 35, 40 (2002).

<sup>84</sup> See, e.g., SINGER, *supra* note 28, at 672 (noting that “[o]utright expropriation of property clearly requires compensation” in light of the U.S. Constitution’s Fifth Amendment Takings Clause).

<sup>85</sup> THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO *ESTATES IN LAND AND FUTURE INTERESTS* 3 (2d ed. 1984) (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). Additionally, some exercises of government authority over private property may serve goals other than land reform. For example, U.S. federal law provides for the government to confiscate private property that has been used in illegal drug transactions. 21 U.S.C. § 881 (2012). The critique offered here of expropriation is based purely on its use for accomplishing land reform goals in the contemporary world and is neither a historical critique of the evolution of the sovereign’s power of eminent domain nor a contemporary critique of other reasons that a state might confiscate private property.



domestic law of many nations<sup>86</sup> and international human rights norms.<sup>87</sup> Under expropriation-based models of land reform, the state seizes privately owned land while refusing to compensate the owner; it can then redistribute the property by providing another individual or group with title or access to the seized land.<sup>88</sup> In the absence of compensation, the state's decision to expropriate for land reform is simply a choice to exercise its sovereign power in favor of certain kinds of owners over other kinds of private owners without regard for making the prior owners economically whole.

But expropriation is not the only way that the state can obtain land for land reform when the market itself offers insufficient property. The state can exercise its eminent domain powers to compel individuals to sell their property to the state. Both domestic and international legal systems have provided for a model of justified and compensated eminent domain. Some nations' constitutions have defined permissible justifications for the state's exercise of eminent domain, such as public use<sup>89</sup> or

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<sup>86</sup> For example, the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, the Spanish Constitution provides that "[n]o one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law." CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 33, § 3.

<sup>87</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III)A, art. 17, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."); African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 248 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."); American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 150 ("(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954) ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.")

<sup>88</sup> BORRAS, *supra* note 7, at 4. See discussion *infra* Part III, which considers these various mechanisms of redistribution.

<sup>89</sup> U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.")

public interest,<sup>90</sup> and have required the payment of just<sup>91</sup> or fitting<sup>92</sup> compensation as well. When land reform is based on this kind of justified compensated exercise of eminent domain, the state is again expressing a preference that land title or access be provided to a new private owner instead of the prior owner. But the government's use of the eminent domain power to deprive some owners of their property rights in order to bestow those private property rights on others also includes an effort to make the prior owner financially whole for the loss of the property; this process recognizes and attempts to ameliorate the deprivation that the prior owner suffers.<sup>93</sup>

### *B. Why Expropriation-Based Land Reform Is Self-Defeating*

While the unlawfulness of expropriation raises legitimate legal concerns,<sup>94</sup> for this discussion of land reform, expropriation-based land reform is most problematic because of the ways that it undercuts the other key goals of land reform initiatives.<sup>95</sup> Land reform based on expropriation raises serious risks for nations struggling to ensure basic livelihoods for their people, which would include the bulk of countries interested or engaged in land

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<sup>90</sup> C.E., B.O.E. n. 311, Dec. 29, 1978, art. 33, § 3 (Spain) ("No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law.").

<sup>91</sup> U.S. CONST. amend. V.

<sup>92</sup> C.E., B.O.E. n. 311, Dec. 29, 1978, art. 33, § 3 (Spain).

<sup>93</sup> Questions about the sufficiency of compensation can muddy this dichotomous model. Challenges to the adequacy of compensation indicate that there is a conflict about whether the taking is expropriation or an exercise of the state's powers of eminent domain. When the land allocated in land reform is acquired through insufficiently compensated eminent domain actions, the resulting program is an unfortunate hybrid of expropriation and government-initiated purchase through the exercise of eminent domain. To the extent that insufficiently compensated eminent domain actions raise the same problems as full-fledged expropriation, this type of land reform warrants categorization as a less severe form of expropriation instead of a market-compatible variety of land reform. The problems of expropriation are the topic of the next Section.

<sup>94</sup> See *supra* note 87 (discussing the variety of international human rights legal norms and domestic laws that bar expropriation without justification or compensation).

<sup>95</sup> See *supra* Part I. It would also be possible to offer a noninstrumentalist critique of expropriation which would challenge the state's refusal to honor private property rights, not just the negative externalities that expropriation generates. But this approach is extrinsic to the current discussion which is focused on achieving the goals of land reform and international development, not on a broader critique of government takings of private property.

reform initiatives.<sup>96</sup> Expropriation provokes individuals' and businesses' fears of the complete loss of private property to the state. As a result, land reform based on expropriation can threaten efforts to encourage outside investment in a nation, as private investors are far less likely to begin the kinds of ventures that would create economic growth and jobs.<sup>97</sup> In the absence of security of ownership against government expropriation, purchases of real property can be viewed as an irrational economic act that few individuals or businesses would be willing to undertake.<sup>98</sup> Without maintaining confidence that the market for land will remain reasonably steady and stable, the looming threat of uncompensated expropriation can lead to dramatic social upheaval, which benefits neither pre-existing landowners, beneficiaries of the land reform program, nor other poor citizens in the nation in question.

The American property law doctrine of marketability of title helps elucidate this economic reality. The central term of any American land contract is the clause in which the seller warrants that he or she will convey "good and marketable title" to the buyer. Marketable title is "a title that is reasonably free from such doubts as will affect the market value of the estate; one which a reasonably prudent person with knowledge of all the facts and their legal bearing would be willing to accept."<sup>99</sup> In the American property system, it is typically viewed as the central term of the land contract, such that the failure of the seller to convey good and marketable title provides the buyer the right to rescind the land contract, among other remedies.<sup>100</sup> The key insight that the doctrine of marketable title highlights is that most property owners prefer land that does not invite litigation

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<sup>96</sup> The problems discussed in this Section are an accurate portrayal of the destabilizing forces of expropriation in the context of a nation with a relatively free market for land. Importantly, this kind of property regime is not the only plausible system of ownership and titling of land. A nation could embrace a land tenure system based upon state-held title and long-term grants of access to individuals without providing for private, alienable title to real property.

<sup>97</sup> Bernadette Atuahene, *Property Rights & the Demands of Transformation*, 31 MICH. J. INT'L L. 765, 771-72 (2010).

<sup>98</sup> See *id.* at 814.

<sup>99</sup> DAVID A. THOMAS, 11-91 THOMPSON ON REAL PROPERTY § 91.09(a)(1) (Thomas Ed. 2013).

<sup>100</sup> WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 776 (3d ed. 2000).

or the possibility of the loss of the property.<sup>101</sup> Expropriation raises similar risks, not that title will be challenged by a private owner with a paramount claim, but that the state will assert its right over the property without making the owner whole. The threat of expropriation thus tarnishes all land transfers, insofar as all land in an expropriating nation is held cognizant of the real possibility that the land may be lost.<sup>102</sup> Where this fear is pervasive, it depresses land prices and affects how landholders use their property as well.

Even the looming specter of expropriation thus functions to undermine land's marketability, in the doctrinal sense, generating an array of negative concomitant consequences for the land market and the entire economy. Demand for property can decline due to the reluctance of potential buyers to make purchases they perceive as risky. This drop in demand can be so precipitous as to threaten the operation of a market for the sale and purchase of real property.<sup>103</sup> Without prices being maintained through continued demand for property, the market for real property essentially disappears, rendering the land itself largely devoid of market value.<sup>104</sup> These consequences accrue to all landowners, both those who held land prior to the land reform and those who were the beneficiaries of the land reform.

Diminution in the value of land not only affects the present operation of the market for land purchases, but also can alter how long-term landowners invest in and maintain their

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<sup>101</sup> India's 2008 land titling law attempted to account for the issue of security and marketability of title by building into conclusive titles a title guarantee that "indemnif[ies] the property holder against any losses that may result from inaccuracies" in the title system. Sinha, *supra* note 25, at 20.

<sup>102</sup> Precious Zikhali, *Fast Track Land Reform Programme, Tenure Security and Investments in Soil Conservation: Micro-Evidence from Mazowe District in Zimbabwe*, 34 NAT. RESOURCES F. 124, 135 (2010) (comparing perceptions of security of tenure of smallholders who received their land through expropriation and who held their land based on traditional communal land holdings and observing that those who benefited from expropriation believed their own tenure to be far less secure).

<sup>103</sup> Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1551–52 (2011) (discussing the decline in capital in the U.S. housing market).

<sup>104</sup> See ROBERT B. COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 30–33 (4th ed. 2004). Notably, land in a title-insecure nation retains other kinds of value, discussed *supra* in Part I.A., including its crucial role as a contributor to food security.

property.<sup>105</sup> Where expropriation is a threat, owners fear the inability to recoup their ongoing reinvestments in the upkeep of their land; they therefore will lack one of the primary motives to continue improving the condition of their property.<sup>106</sup> Even the recipients of expropriated land have been shown to question whether their title is stable in a nation that legitimates expropriation.<sup>107</sup> Both long-term owners and beneficiaries of land reform might wish to mortgage their property in order to obtain capital, either to improve the property or to pursue other goals,<sup>108</sup> but the threat of a pervasive decline in the land market can freeze the availability of loans secured by private property.<sup>109</sup>

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<sup>105</sup> Economists have posited three distinct ways that land rights are linked to investment. First, individuals do not invest if they fear their investments will be seized by others. Second, more stable rights make land easier to use as collateral to fund improvements. Third, stable rights to alienate property encourage investments. See Timothy Besley, *Property Rights and Investment Incentives: Theory and Evidence from Ghana*, 103 J. POL. ECON. 903, 906–07 (1995); see also Zikhali, *supra* note 102, at 124–25 (describing these three models as the “security argument,” the “collateral-based view,” and the “gains-from-trade perspective”) (internal quotation marks omitted). In the United States, one key factor that led to the decline in investment following the housing crash was the reduction of funds available through home equity lines of credit due to the loss of property value. Thomas J. Cunningham et al., *Litigation Over the Reduction of Home Equity Lines of Credit: Hickman and Beyond*, 64 CONSUMER FIN. L.Q. REP. 35, 35 (2010).

<sup>106</sup> See Nick Dancaescu, Note, *Land Reform in Zimbabwe*, 15 FLA. J. INT'L L. 615, 635 (2003) (“The consequence of attacking a minority . . . may inadvertently be that all citizens with property rights ask: what is to stop the government from seizing my land? With this fear in their minds, people are less likely to invest capital or even sweat equity into the land if their interest is de facto unsecured. Simply put, insecurity in land discourages investment in that land, and leads to a meltdown of the agribusiness section of a country, and the economy.”). Following the passage of laws permitting the government to confiscate lands, set land prices, and prevent appeals of compensation paid, MARTIN MEREDITH, MUGABE: POWER AND PLUNDER IN ZIMBABWE 122 (2002), one farmer noted, “Farming is a long-term business. If I can't be sure that I will still have my land in five to ten years, why should I waste my time and money on it?” RUTH WEISS, ZIMBABWE AND THE NEW ELITE 192 (1994) (internal quotation marks omitted).

<sup>107</sup> HUMAN RIGHTS WATCH, *supra* note 61, at 2 (“Even those people allocated plots on former commercial farms appear in many cases to have little security of tenure on the land, leaving them vulnerable to future partisan political processes or eviction on political grounds, and further impoverishment.”).

<sup>108</sup> DE SOTO, *supra* note 5, at 48.

<sup>109</sup> Ernest Aryeetey & Christopher Udry, *Creating Property Rights: Land Banks in Ghana*, 100 AM. ECON. REV. 130, 130 (2010) (“Insecure property rights reduce the ability of borrowers to pledge land as collateral and thus tighten credit constraints.”). This reality is not limited to the land reform context. Where the value of property is dropping, loans secured by real property become less available, as seen in the United States during the Great Recession. Not only was it increasingly

Instead of increasing economic equality by raising the relative position of landless rural people, expropriation-based land reform thus can undermine the entirety of a nation's economy, threatening the economic stability of individuals in all socioeconomic strata.<sup>110</sup>

Some scholars suggest that these consequences of instability are minimized because the benefits of expropriation accrue to the most vulnerable who receive the expropriated land;<sup>111</sup> this approach considers the losses suffered by wealthy individuals to be a legitimate means to provide land access for poor people. But this presumption misapprehends how widespread destabilization differentially affects members of different social classes. In reality, the wealthy often have the resources to ride out the social and economic disruptions that expropriation causes. The destabilizing collateral effects of expropriation disproportionately harm the individuals who are the beneficiaries of the land reform program. If the central goal of land reform is to provide land to the rural poor as a means of improving those individuals' economic positions and increasing social equality in the state,<sup>112</sup> expropriation devalues the very resource that has been transferred to the formerly landless. In so doing, expropriation

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difficult for buyers to obtain purchase-money loans, the availability of home equity lines of credit likewise decreased. Cunningham et al., *supra* note 105.

<sup>110</sup> In Zimbabwe, many of the farms in the most productive agricultural zones of the country lie fallow because of the inexperience of the land reform beneficiaries, unwillingness to invest in agriculture at a time of hyperinflation, costs of fertilizers and diesel, machinery shortages, and departures of experienced farm managers for higher wages. These facts, combined with a twenty-five percent HIV/AIDS infection rate in the working-age population, now mean that Zimbabwe, once the breadbasket of Africa, is struggling to feed its youngest and oldest, who cannot work. See Degeorges & Reilly, *supra* note 61, at 577, 579.

<sup>111</sup> Tom Lebert, *An Introduction to Land and Agrarian Reform in Zimbabwe*, in PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM 40, 54 (Peter Rosset et al. eds., 2006) [hereinafter PROMISED LAND].

<sup>112</sup> Notably, this is not consistently the goal of land reform, particularly land reforms conducted for nonpragmatic reasons. In some instances, land reform is really a mask for gifts based on political patronage, whereby a party or individual in power takes land from members of the opposition, or perhaps persons simply uninvolved in the political process, and transfers it to supporters of the party. In other situations, the entire expressive purpose of the purported land reform is to show the Robin Hood-esque bona fides of the government, taking from the rich without compensation and giving to the poor. In still other situations, the government might make a show of force against either individuals or business interests, demonstrating its own power through its ability to deprive owners of their rights to their own property.

therefore undermines one central purpose of the land reform program itself: offering the advantages of land ownership to previously poor individuals.<sup>113</sup> Crucial benefits to the new landowner, such as the ability to borrow against valuable property, are lost when expropriation leads to fundamental devaluation of land.<sup>114</sup>

Destabilization not only harms landowners, it also causes grave consequences for other poor persons in the nation. In many instances, where expropriation reduces investment in and cultivation of land,<sup>115</sup> food production also decreases, driving up food prices and threatening food security within a nation.<sup>116</sup> Although land reform beneficiaries often cultivate their own subsistence crops and may not experience hunger as a result of the destabilization, expropriation-based land reform can harm both the urban and rural poor of a nation who are not the recipients of the redistributed land, risking greater overall poverty and food insecurity as a cost of the reform.<sup>117</sup> Again, wealthy individuals have access to sufficient private resources to

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<sup>113</sup> See *supra* Part I.A (discussing this range of benefits).

<sup>114</sup> As highlighted earlier in Part I.A.2, one of the benefits of land reform can be the fact that a title to property provides collateral against which a family might borrow, offering a source of capital to previously poor individuals. DE SOTO, *supra* note 5, at 48, 216. Yet even if this benefit of land reform is lost as a consequence of expropriation, food security goals can often still be realized.

<sup>115</sup> See Dancaescu, *supra* note 106; Besley, *supra* note 105, at 906.

<sup>116</sup> By 2007, following the implementation of widespread expropriation based land reform, annual inflation in Zimbabwe reached two thousand two hundred percent, and food production was approximately sixty-five percent below food needs for the country and thirty-four percent below average production from the prior decade. Due to inflation, what little food was available in the food markets was priced out of reach for even the average family, and twenty-five percent of Zimbabwe's population was receiving food aid from the United Nations, though this aid was at times preferentially distributed as a form of political favoritism for Mugabe's supporters. Degeorges & Reilly, *supra* note 61, at 579.

<sup>117</sup> See *id.* (noting that inflation rendered food unaffordable for the average family, not just the very poorest); see also HUMAN RIGHTS WATCH, *supra* note 61 (describing how farm workers have been generally excluded from the benefits of land redistribution); Medicine Masiwa, *The Fast Track Resettlement Programme in Zimbabwe: Disparity Between Policy Design and Implementation*, 94 ROUND TABLE 217, 221-22 (2005) (documenting massive unemployment following Zimbabwe's expropriation-based Fast Track Resettlement Programme because many farms stopped hiring farm workers).

avoid the worst consequences of this destabilization, whether by leaving the country or by spending private funds to smooth over the most serious effects to the household economy.<sup>118</sup>

To the extent that land reform often, but not always, represents one facet of a more general effort towards democratization of formerly dictatorial or colonialist regimes, expropriation also contravenes the underlying value of individual human rights within the nation.<sup>119</sup> Where land reform is conducted via expropriation, it can still democratize land access by broadening the class of landowners to include poor landless individuals as well as traditional elites, but through undemocratic means.<sup>120</sup> In a postcolonial nation that may struggle to enact the democratic rule of law, expropriation threatens democratic progress in the name of economic equality.<sup>121</sup> As land reform ideally reflects a shift toward democracy, the rejection of individual rights that is inherent in expropriation can undermine democratic evolution.

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<sup>118</sup> Political violence has been documented as one consequence of certain models of expropriation. See HUMAN RIGHTS WATCH, *supra* note 61, at 10. This differential ability to respond to social instability is not just about land reform and expropriation. Worldwide, poor people lack the resources to care for their families when society is upended while their wealthier counterparts can use their own wealth to avoid the worst effects of unrest. The crisis situation in Syria presented one obvious example of this, whereby wealthy Syrians escaped before the sieges began, and the poorest were those trapped by warfare. Ruth Sherlock & Carol Malouf, *Rich Refugees Pay Thousands To Flee War-Torn Syria in Luxury*, TELEGRAPH (Nov. 14, 2013, 8:28 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10450787/Rich-refugees-pay-thousands-to-flee-war-torn-Syria-in-luxury.html>.

<sup>119</sup> It is for this reason that human rights conventions protect property rights. See *supra* note 87 (identifying various human rights treaties that enshrine some protection of the individual's right to own property).

<sup>120</sup> In Zimbabwe, the earliest forms of postindependence land reform in the 1980s provided land to the black elite, including ministers, members of parliament, senior civil servants, and police and defense officials, who received eight percent of the commercial farmland in the country. By 2000, only 75,000 black families had been resettled on land reform lands out of a total black population of approximately twelve million. Degeorges & Reilly, *supra* note 61, at 574–75.

<sup>121</sup> The recent thrust of development efforts has shifted away from demands for redistribution, including radical or extensive land reform, and towards governance questions. See Moyo, *supra* note 14, at 197. To the extent that this shift is a real change in development priorities, perceptions that land reform undermines governance and democratization goals may lessen the already scant support available for these programs.



Nevertheless, expropriation still has its supporters. Many scholars concerned with the problem of rural poverty in the developing world reject the notion of market-compatible land reform because it is insufficiently aggressive in addressing inequality.<sup>122</sup> Instead, they consider expropriation to be the only viable source of adequate quantities of land to make a meaningful difference in the lives of landless peasants.<sup>123</sup> Such advocates of expropriation focus on the urgent pursuit of a more robust equality and are not concerned about the loss of property by the wealthy or with the consequences of expropriation; they seek a revolutionary approach to alter land tenure patterns. While this Article is sympathetic to the goal of poverty reduction, its aspiration is not to design a new market system for land. Rather, its purpose is to articulate the benefits of land reform and lay out a broadly palatable approach for realizing those benefits soon. As a result, this Article adopts a pragmatic orientation toward the land market and accepts that it will continue; the Article thus seeks to overcome the worst of rural poverty under current market conditions.

A philosophical examination of this principled demand for a more robust model of equality in the distribution of land, accomplished through expropriation, also evidences exactly how expropriation achieves the wrong balance under current market conditions. Beyond the practical problems just discussed, application of John Rawls's difference principle likewise shows why the instability that differentially harms those at the bottom of the socioeconomic hierarchy makes expropriation an unjustifiable option. Rawls's theory of justice as fairness does not require formal equality, so long as any inequality does not merely improve the social lot of those in privilege, but also improves the situation of the least well-off.<sup>124</sup> Rawls undoubtedly preferred equality, so long as it actually improved the lives of the

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<sup>122</sup> This was the situation that led to expropriation in Zimbabwe, where first generation reforms, requiring willing buyers and willing sellers, and second generation reforms, mandating the payment of compensation calculated apart from market forces, did not generate sufficient land to provide to poor people. As a result, the Fast Track Resettlement Program shifted to a model that did not require compensation for seized land. See HUMAN RIGHTS WATCH, *supra* note 61, at 6.

<sup>123</sup> See Saturnino M. Borrás, Jr., *The Underlying Assumptions, Theory, and Practice of Neoliberal Land Policies*, in PROMISED LAND, *supra* note 111, at 99, 114.

<sup>124</sup> JOHN RAWLS, A THEORY OF JUSTICE 13 (rev. ed. 1999) (rejecting aggregate well-being as the measure of justice).

poor.<sup>125</sup> But he was concerned that efforts toward formal equality would reduce the total well-being of society,<sup>126</sup> thereby further harming those lacking privilege.<sup>127</sup> According to his theory, “inequality . . . is permissible only if lowering it would make the working class even more worse off.”<sup>128</sup> Not all land reform is equal if Rawlsian justice is the goal, because while formal equality of outcome is not necessary, the program must advance the position of those at the bottom of the social hierarchy.

A Rawlsian framework for land reform, therefore, reveals important distinctions among different modes of land reform. A land reform program need not mandate a formally equal distribution of land divided evenly among all citizens, or even undertake a widespread redistribution, to satisfy the difference principle.<sup>129</sup> In fact, such approaches may violate the difference principle if those at the bottom of the hierarchy are rendered relatively better off, in comparison to their privileged counterparts, but also absolutely worse off, because the amount of wealth or privilege available to poor persons has been diminished or because the general state of society has changed to the detriment of the poor.<sup>130</sup> A land reform program must, therefore, not only improve the relative position of the poor at the bottom of the hierarchy, closing the gap between the rich and the poor; it must also improve their absolute position in terms of their overall well-being.

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<sup>125</sup> *Id.* (“It may be expedient but it is not just that some should have less in order that others may prosper.”).

<sup>126</sup> Economists in general have been skeptical of the value of redistribution because of its potential inefficiency. *See generally* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975). But recent scholarship has suggested that equality may have an important role in driving higher and more sustainable growth. *See generally* Jonathan D. Ostry et al., *Redistribution, Inequality, and Growth*, INT’L MONETARY FUND STAFF DISCUSSION NOTE, Feb. 2014, at 1.

<sup>127</sup> RAWLS, *supra* note 124, at 67–69.

<sup>128</sup> *Id.* at 68.

<sup>129</sup> *See id.*

<sup>130</sup> This is not a purely philosophical point. The United Nations Development Program (“UNDP”) has rejected the standard development approach which it describes as “focused on getting economic fundamentals right as a precondition for economic growth, [and] arguing that other human development improvements would follow.” UNITED NATIONS DEV. PROGRAMME, *supra* note 40, at 69. In contrast, it advocates “[a] human development approach . . . [which] demands that improvement in poor people’s lives not be postponed.” *Id.* Thus, the UNDP also appears to be concerned about the distribution of growth, not merely the fact of growth’s occurrence, and focused on improving poor people’s lives while economic growth happens.

This is another version of the concern about the destabilizing effects of expropriation. Expropriation appears, on the face of it, to improve the lot of the poor by providing them with land. But the resulting instability not only threatens the well-being of the beneficiaries of the land reform program,<sup>131</sup> but also the lot of the other poor members of society, including the urban poor.<sup>132</sup> Application of the Rawlsian difference principle, which allows for continued inequality if its elimination would worsen the conditions of life for those at the bottom of the social structure, indicates that there are good reasons of justice, not merely expediency, to avoid undermining the stability of the economic system on the whole. A Rawlsian approach to land reform, therefore, cannot countenance rampant expropriation because the negative consequences of the resulting social instability would most onerously affect the very poorest in a nation.<sup>133</sup> But note also that this concern with stability should always favor a situation in which the system “maximize[s] the expectations of those most disadvantaged.”<sup>134</sup> To this end, stability is not a goal because the status quo maintains the social position of wealthy land owners. Rather, stability is an acceptable goal only to the extent that it prevents even worse harm from accruing to the most disadvantaged in the nation. Land reform may disrupt the existing hierarchy insofar as it “maximize[s] the expectations of those most disadvantaged”;<sup>135</sup> it becomes problematic if it causes destabilization so extensive that it renders them worse off.

*C. Market-Compatible Land Reform Balances Land-Reform Goals and Economic Stability*

For these many reasons, both practical and philosophical, expropriation-based land reform goes too far in its redistributive efforts. Due to these problems that result from expropriation, this Article focuses instead on land reform efforts conducted through market-compatible mechanisms, which this Article

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<sup>131</sup> Masiwa, *supra* note 117 (documenting that the local currency sharply depreciated and inflation sharply increased following the expropriation based Fast Track Resettlement Programme in Zimbabwe).

<sup>132</sup> *Id.* at 221 (documenting that following the expropriation based Fast Track Resettlement Programme, the resulting decline in agricultural production led to a substantial increase in food shortages in Zimbabwe).

<sup>133</sup> RAWLS, *supra* note 124, at 68.

<sup>134</sup> *Id.* at 70.

<sup>135</sup> *Id.*

defines as those based on methods consistent with the stable operation of a market for land within the nation. The key characteristic of a market-compatible land reform is that the uncompensated loss of private property is not the source of the land that is subject to redistribution.

Avoiding expropriation is crucial because market-compatible land reform is far more likely to maintain a critical level of social stability, in which individuals and businesses remain willing to invest in land because they do not fear that the government will take it for the government's own ends. Market-compatible land reform allows the beneficiaries of a land reform effort security in their right to land in the foreseeable future, thereby increasing their willingness to expend the money and effort to improve their land. The resulting social stability benefits current landowners and the beneficiaries of land reform, as just described, as well as poor persons outside of the land reform system whose lives are not disrupted by social upheaval.

A land reform initiative that values the maintenance of stability in the land market would be predicated on either private sales, whether subsidized or not, or the state's exercise of compensated eminent domain. Under market-compatible conditions, localities, regions, or nations that decide to implement land reform are making a fundamentally rational economic decision based on careful cost-benefit analysis. In the instance of a private transaction facilitated by the state, the land reform beneficiary will only decide to buy if the benefits of land rights are worth the price paid.<sup>136</sup> If the buyer's purchase is subsidized by the state, then the state is making a calculation that the reform's benefits to the state are worth the cost of paying the subsidy for the property.<sup>137</sup> If the state is the purchaser, with the intention of giving land to beneficiaries, then again, the state is determining that the purchase is worthwhile.

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<sup>136</sup> See *infra* Part III for a detailed discussion of these mechanisms of land reform.

<sup>137</sup> This model raises some questions because it shields the land reform beneficiary, who may put up part of the money, from the complete cost of the decision to acquire the property. Under these facts, such a buyer may be insulated from making a thorough cost-benefit analysis since the buyer does not contemplate the entire price of the property when deciding whether to purchase it only partially with personal resources. This is not a strong argument against subsidizing land reform programs but rather a simple observation of one of its potential downsides.

As described above, only in a relatively stable market will buyers be willing to invest their money in land—this is the key insight that animates the doctrine regarding the marketability of title.

The allocation of the benefits and harms of land reform is one of the key reasons why a market-compatible approach is a far more desirable means to achieve the goals of land reform<sup>138</sup> than an expropriation-based approach. Expropriation decouples the risks of governmental takings of property from the benefits of those actions. Where expropriation drives land reform, the myriad benefits of land reform accrue to the recipients of the land, who do not suffer an immediate loss, and to the state, which gains a measure of populist credibility. But under these same circumstances, neither the beneficiaries of the land reform nor the state put any financial skin in the game. Instead of spending either the beneficiaries' private financial resources or funds from the public fisc to obtain land for transfer, the costs of the land reform are all borne by the owner whose property the state expropriated while the benefits remain with the recipient and the state. This can make land reform appear peculiarly attractive to the state, since under these circumstances it only stands to benefit from a program on which it expends no state funds.

In contrast, market-compatible land reform unifies the benefits and risks of land reform in the same parties. In market-compatible land reform, land is obtained by either a private group of individuals purchasing the land for their own use, the government purchasing the land to distribute to citizens through gift or purchase, or a hybrid purchase funded jointly by the beneficiaries and the state. In any of these cases, the prior owner is compensated. Consequently, the purchaser must decide whether the best use of the available funds is to purchase land, or for other possible uses. The land reform should only occur where the purchasers view the benefits of the purchase as meeting or exceeding the cost of obtaining the land. If the potential benefits of the land reform do not meet or exceed the actual monetary costs of implementation, it thereby follows that the purchase should not occur.<sup>139</sup>

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<sup>138</sup> See *supra* Part I for an exhaustive discussion of the goals of land reform.

<sup>139</sup> Land reform also might create sufficient positive externalities that the state could encourage and support the purchases, even if the private benefit to the beneficiary is less than the purchase price. Much like domestic investments in Head

This is of course the economically rational course of action which may not be followed as people and states are not perfectly rational actors.<sup>140</sup> But even if an irrational purchase is made without a clear cost-benefit analysis—such as where the state and the beneficiary each pay part of the cost so neither conducts a complete cost-benefit analysis—it does not decouple the benefits and the harms of the conveyance. The risks and benefits are still unified in the state and the beneficiary, both of whom pay some money and achieve some of their goals. As a result, though poorly designed programs may still exist, by avoiding expropriation, the appearance of costlessness will not encourage the state to take private property.

But the most legally interesting land reform scenario occurs when the land reform program suffers for want of land to distribute, usually because the owners of property appropriate for redistribution do not wish to sell their land. In such moments, one option would be for the state to simply postpone land reform, deferring to the desires of private owners to decide whether they want to sell or not. This can undermine the purposes of a land reform effort.<sup>141</sup> The other primary option would be for the state to conclude that privately owned land should be distributed in contravention of the wishes of the individual owner who does not wish to sell. This outcome could be accomplished by expropriation, but for the reasons explored above, the preferable alternative that maintains economic stability is for the state to exercise its eminent domain powers against a landowner who is unwilling to sell. Again, that the state or beneficiaries must pay money means they bear both the risk and the benefit, reducing the likelihood of unwarranted risk-taking. The key question is how such a transaction can be structured in a market-compatible fashion that does not destabilize the land market specifically and the economy generally.

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Start, for example, which generate substantial returns on investment throughout the lives of children who participate, land reform may similarly generate returns over a long period of time.

<sup>140</sup> The basic presumption of economics is that all actors behave in an economically rational fashion. COOTER & ULEN, *supra* note 104, at 3. This presumption has of course been broadly critiqued.

<sup>141</sup> To the extent the program is based upon the desire of the state to accomplish the goals set out in Part I, the failure to obtain sufficient land for the program can frustrate a valuable purpose.

D. *Eminent Domain Jurisprudence Generates Market-Compatible Land Reform*

The market-compatible land reform proposed here is rooted in a variety of existing eminent domain frameworks. International human rights norms' approaches to protecting private property rights against the state's exercise of eminent domain are fashioned to try to reach this outcome. The American Convention on Human Rights strikes this balance by providing that while individuals have "the right to the use and enjoyment" of their property, "[t]he law may subordinate such use and enjoyment to the interest of society."<sup>142</sup> However, this subordination can only occur under specific circumstances. First, the taking must be reimbursed by the "payment of just compensation."<sup>143</sup> Second, the taking must be justified as serving "public utility or social interest."<sup>144</sup> Third, the deprivation must be done "in the cases and according to the forms established by law."<sup>145</sup>

Likewise, domestic laws of various nations require that takings must be compensated and justified as well. The Spanish Constitution seeks a similar equilibrium by requiring takings to be justified on "grounds of public utility or social interest and with a proper compensation in accordance with the . . . law."<sup>146</sup> The U.S. Constitution also offers its own analogous approach requiring justification and compensation. The Fifth Amendment takings doctrine states that the government shall not take private property except for public use.<sup>147</sup> Even when the public use rule is satisfied, the government still must provide just compensation to the owner whose land has been taken.<sup>148</sup>

Understanding the operation of Fifth Amendment jurisprudence offers an example of how market-compatible land reform options strike their careful economic balance. The state must justify its exercise of eminent domain as serving a public use, which is defined broadly as a use validated by the legislature

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<sup>142</sup> American Convention on Human Rights, *supra* note 87.

<sup>143</sup> *Id.* art. 21(2).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 33, § 3.

<sup>147</sup> U.S. CONST. amend. V.

<sup>148</sup> *Id.*

as serving the good of the general public.<sup>149</sup> The just compensation requirement obligates the government to pay the fair market value of the taken property, which in theory is the same as what the private owner would have received had the property been sold on the private market.<sup>150</sup> The Fifth Amendment, therefore, sets up a process in which the government must actually decide whether the expenditure of funds on land is a worthwhile use of public monies to serve the good of the public, as compared to other possible uses of the same funds. To the extent that the public fisc is not bottomless, economic reality will always limit the kinds of takings that the government can realistically pursue, even for properly articulated public uses.

The United States Supreme Court's only land reform case suggests how this model of justified, compensated eminent domain as the source of property for land reform plays out in practice.<sup>151</sup> In *Hawaii Housing Authority v. Midkiff*,<sup>152</sup> the U.S. Supreme Court upheld a land reform initiative in Hawaii that permitted condemnations and transfers of ownership of residential property from landlords to tenants "in order to reduce the concentration of ownership of fees simple in the State."<sup>153</sup> The Court determined that this kind of land reform satisfied the public use doctrine because through this program, "[t]he people of Hawaii . . . attempted . . . to reduce the perceived social and economic evils of a land oligopoly."<sup>154</sup> In so holding, the Court concluded that this program did not merely further the interests

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<sup>149</sup> *Berman v. Parker*, 348 U.S. 26, 31–32 (1954); *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (noting that this definition is expansive and highly deferential to the legislature) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

<sup>150</sup> *United States v. Miller*, 317 U.S. 369, 374 (1943) (stating that fair market value means that the owner should be paid "what a willing buyer would pay in cash to a willing seller"). *But see United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) ("[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards.").

<sup>151</sup> *See Midkiff*, 467 U.S. at 230–31.

<sup>152</sup> 467 U.S. 229.

<sup>153</sup> *See id.* at 231–32, 241–42.

<sup>154</sup> *Id.* at 241–42; *see also Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 422 (1992) (citations omitted) (citing *Midkiff* approvingly for holding that transferring ownership of land from one private party to another in order to reduce the oligarchic control of property satisfies the public use requirement of the Takings Clause).



of some individuals, but accomplished a social good by reducing the harms of oligopoly, even though the state conveyed the land from one private individual to another.<sup>155</sup>

Further consideration of *Midkiff* reveals how land reform can satisfy the conditions of market-compatibility. Exercising eminent domain over property for a public use justifiable under the Fifth Amendment is only a rational state action if the benefits from the taking are worth the amount of the obligatory just compensation that must be paid for such a program to survive constitutional scrutiny. Because the government must pay to exercise eminent domain, it only does so if the land reform is a worthwhile public policy action as compared to competing government priorities. This is about more than the Fifth Amendment to the U.S. Constitution—it is also about all other market-compatible land reforms in other countries. The same economic reality should logically control whether those nations undertake market-compatible land reform, even if their constitutions do not require this approach. If the government wishes to obtain land to do land reform and hopes to avoid destabilizing the economy, but the open market lacks the necessary property, it needs to compensate the prior owners rather than expropriating land to redistribute. When it does so, the government is making a fundamentally rational economic decision; the government only does this after performing a cost-benefit analysis in which the nation considers whether it is worth spending public monies to dismantle the concentration of land in the hands of relatively few people.<sup>156</sup>

As a result, market-compatible land reform differs significantly from the uncompensated land seizures that typify expropriation. For market-based land reform to occur, the government makes a public decision that the financial hit to the public fisc is a worthwhile investment of public resources, a private actor performs the same calculus, or both decide to act and expend resources in a cooperative purchase. This suggests

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<sup>155</sup> See *Midkiff*, 467 U.S. at 241–42.

<sup>156</sup> The only residual question is the justification process. Without having a legal obligation to justify the purchase for the good of the public, it is possible that the state could choose to obtain land for purposes that are unjustified from a democratic standpoint. However, this is a problem for compensated eminent domain in general, not just for land reform. Land reform designed to destroy oligopoly is justified on this basis, as the U.S. Supreme Court found in *Midkiff*. See *id.*

that there is a substantial difference between the kinds of expropriation that create public alarm and market-compatible reform that provides opportunities for citizens to become small-scale landowners while still maintaining economic stability.

*E. Market-Compatible Land Reform Is Consistent with Central Government Functions*

The primary remaining critique of the kinds of land reform programs here espoused is that these more modest, market-compatible approaches still go too far. Even the kind of land reform programs central to this Article have been criticized as instances of excessive government intervention that come too close to functioning as uncompensated taking of private resources for public purposes<sup>157</sup>—in essence, as a form of redistribution that goes too far, much like expropriation is redistribution that goes too far.<sup>158</sup>

The reality is that redistribution is one of the primary functions of the modern nation. While such programs are the subject of critique by those who reject the idea of taxing some citizens to provide for the needs of others,<sup>159</sup> they are extremely common and can be viewed as part of a nation's effort to ensure a basic quality of life to its people.<sup>160</sup> Public resources are used worldwide to provide for education, health care, food, and income for individuals who cannot provide these necessities for themselves; these goods are the substance of essential human rights to which most countries have agreed their citizens are entitled.<sup>161</sup> Taxation to support any public good is, after all, redistribution. Tax-supported standing armies provide for the public good of national defense; tax-supported diplomatic corps

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<sup>157</sup> M. RIAD EL-GHONEMY, *THE CRISIS OF RURAL POVERTY AND HUNGER* 30–31 (2007) (discussing sources of neoliberal critique of redistributory land reform programs).

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See* Fineman, *supra* note 81.

<sup>161</sup> *See* Helen Clark, *Foreword to UNITED NATIONS DEV. PROGRAMME*, *supra* note 40, at iv (“[E]conomic growth alone does not automatically translate into human development progress. Pro-poor policies and significant investments in people’s capabilities—through a focus on education, nutrition and health, and employment skills—can expand access to decent work and provide for sustained progress.”). *See generally* ICESCR, *supra* note 47.

provide for the public good of international negotiation and conflict resolution. Such functions are redistributive; without taxation to support them, the wealthy could privately finance defense or diplomacy, and the poor and middle classes would be left without these services. Although some might assert that there is a difference between redistribution to allocate greater resources to some private interest and redistribution to allocate funds to a public good, whenever the former involves achieving positive externalities for the whole of society, it becomes a public good. Such is the case for market-compatible land reform.

The purpose of this Article is not to offer a defense of the modern welfare state. But to the extent that the other linchpins of the modern welfare state are considered to be legitimate, this Article argues that land reform properly deserves a place with other widely accepted social insurance and support programs. If one accepts redistribution for goods, such as education, food, or health care, or of the proceeds of taxation through national defense, it is illogical to reject redistributive efforts whose beneficiaries receive land, provided that the redistribution of the land reform does not go too far, which is avoided in the model just described.

### III. THE MANY FORMS OF CONTEMPORARY LAND REFORM PROGRAMS

Redistributive aspects of land reform programs typically serve to democratize access to the agricultural lands of a country, by providing land rights to previously landless individuals or groups. Yet that this Article has thus far focused on arguing for the validity and usefulness of a market-compatible redistributive land reform masks the fact that such reforms can take myriad shapes. It further hides important distinctions among land reform programs that may be connected to their ultimate success or failure. Building a typology of market-compatible land reform initiatives accomplishes two main ends. It offers clarification of the robustness of the market-compatible model, which is not a one-size-fits-all policy approach, but rather a wide array of possible adaptations of a program to meet government mandate and national need in states around the world. Additionally, it suggests that those working to initiate a land reform initiative can shape its future success by customizing the program within the umbrella of market-compatibility.

The characteristics of such programs can be mapped along four central axes. First, programs can vary according to the means by which land rights are transferred to a new party via gift or purchase. Second, land reform programs differ based on whether the right created is access or title to land. Third, the beneficiaries can hold this right individually or collectively. Fourth, the state can play an array of different roles in facilitating the transfer of land. Each of these dimensions is continuous, rather than binary—in other words, a particular land reform program could be situated, relative to other programs, on each measure according to its key characteristics. The combination of these four factors produces a fairly comprehensive operational description of a land reform program. The level of public support for a particular land reform and, relatedly, the possibility of controversy surrounding it, and potentially undermining its success, correspond to these central traits of land reform programs.

#### A. *Beneficiaries Can Receive Land Rights by Gift or Purchase*

In some cases, conveyances of land involved in land democratization efforts take the form of purchase, with beneficiaries buying land either from a private owner or from the state<sup>162</sup> with any of a number of levels of state assistance.<sup>163</sup> In other instances, the state can make a gift of land rights to the new owner, without requiring the new owner to pay for the right received. In the most complex cases, the conveyance involves a combination of a gift and a purchase. In these situations, the state can absorb part of the purchase price of the land,<sup>164</sup> either by paying or forgiving part of the principal of the loan. Likewise, a loan that the government subsidizes at below-market rates can also be considered a form of a gift and purchase combination, with the state providing a gift of an interest rate subsidy on what

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<sup>162</sup> State purchase and then resale to land reform beneficiaries was one of the tenets of Guatemala's recent land reform. JONAS, *supra* note 71.

<sup>163</sup> See discussion *infra* Part III.D.

<sup>164</sup> In the case of the community of La Florida in Guatemala, the government provided the community with a relatively low-interest loan and then forgave approximately thirty percent of the loan principal at the time of initiation. Interview with Community Board of La Florida (June 17, 2010).

would otherwise be a more costly, market-rate loan.<sup>165</sup> The key distinction here is who is paying for the right obtained: the state, the beneficiary, or both parties together.

*B. Beneficiaries Can Receive Title or Access to Land*

Land reform programs can provide land to beneficiaries based on titular rights or access rights. In many instances, land reform programs help individuals gain formal legal title to property.<sup>166</sup> These beneficiaries hold their rights to the land in what American property scholars might refer to as fee simple absolute. In some cases, the state may restrict the right of these fee simple owners to alienate the property. In other cases, the land is alienable, whether immediately or after some waiting period designed to prevent land reform from serving as a quick cash scheme.

It is also possible for land reform to occur without formally conveying title to new owners.<sup>167</sup> In these cases, democratization of rights to arable land can be accomplished through provision of access, but not title, to property.<sup>168</sup> The state would typically retain the title, permitting individuals to farm state lands.<sup>169</sup> In

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<sup>165</sup> 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, 1520–21 (2007) (noting the necessity of subsidized lending to provide purchase money to poor Guatemalan farmers who are not creditworthy). Most home purchases in the United States could also be characterized as falling into this category, as backing by Fannie Mae or Freddie Mac likewise reduces interest rates. See About Fannie Mae & Freddie Mac, FED. HOUSING FIN. AUTHORITY, <http://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae---Freddie-Mac.aspx> (“By packaging mortgages into [mortgage backed securities] and guaranteeing the timely payment of principal and interest on the underlying mortgages, Fannie Mae and Freddie Mac attract to the secondary mortgage market investors who might not otherwise invest in mortgages, thereby expanding the pool of funds available for housing. That makes the secondary mortgage market more liquid and helps lower the interest rates paid by homeowners and other mortgage borrowers.”).

<sup>166</sup> As the formalization of individual titles to property is often another goal of land reform, see discussion *supra* Part I.A.2., generation of formal title pursuant to redistribution can serve these two goals of agrarian reform simultaneously.

<sup>167</sup> Winoto, *supra* note 6, at 6 (describing how peasants historically accessed land by tenancy or customary tenure, not ownership).

<sup>168</sup> *Id.*

<sup>169</sup> This is distinct from a leasehold with the state as landlord and the farmer as tenant; these rights involve formalized access without paying rent. PIERO GLEJESSES, SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944–1954, at 151 (1991) (describing life tenure on state owned lands, with

granting a right to cultivate a specific tract of land without holding title, the resulting land reform initiative separates ownership rights from usage rights.<sup>170</sup> Where this occurs, individuals may not obtain some of the key benefits associated with property ownership, such as the ability to mortgage property for purposes of obtaining loans.<sup>171</sup> Yet this kind of arrangement can offer many of the food security<sup>172</sup> and poverty reduction benefits that land reform ideally provides for landless peasants.<sup>173</sup> Modern states are also considering more creative hybrids of title and access rights, such as the registration of land certificates that formalize local tenure practices and can be sold or used as collateral but are not recognized by the state as carrying the significance of a title.<sup>174</sup>

### C. *Beneficiaries Can Hold Land Rights Individually or Collectively*

Land reform programs can also differ on the basis of how recipients of land hold their rights. In many instances, land reform initiatives provide land on an individual basis, permitting individual owners or families to obtain title or access to small

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trivial payments of three percent of farm output per year for twenty-five years following parcelization).

<sup>170</sup> Put another way, some land reform initiatives separate certain incidents of ownership from the traditional bundle of rights and bestow them on parties other than the title owner. Vance, *supra* note 85 (stating that absolute ownership in the Anglo-American law of real property consists of a “bundle of rights, powers, privileges and immunities”). While common American perceptions of property rights center on individual ownership, access rights without title are not entirely foreign in the American context. Recent scholarship has documented the rise of sharing economy programs through which individuals use others’ property without gaining title, such as car sharing initiatives. James A. Kushner, *Car-Free Housing Developments: Towards Sustainable Smart Growth and Urban Regeneration Through Car-Free Zoning, Car-Free Redevelopment, Pedestrian Improvement Districts, and New Urbanism*, 23 UCLA J. ENVTL. L. & POL’Y 1, 11 (2005) (“Although the concept appears anathema to American culture, car-sharing activity has increased in the U.S.”).

<sup>171</sup> For further discussion of this point, see *supra* Part I.A.2.

<sup>172</sup> “Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.” AMNESTY INT’L, ZIMBABWE: POWER AND HUNGER—VIOLATIONS OF THE RIGHT TO FOOD (2004), available at <https://www.amnesty.ie/reports/zimbabwe-power-and-hunger---violations-right-food>.

<sup>173</sup> See *supra* Part I.A.1.

<sup>174</sup> See Delville, *supra* note 27, at 28–29 (describing this system in Benin and noting that it is a hybrid between a formal, title-driven land system and the system of local or customary rights to land).

tracts of land for their own use.<sup>175</sup> These approaches most resemble dominant modern norms of property ownership,<sup>176</sup> with individuals, nuclear families, or perhaps extended family units holding rights autonomously.

Efficiency concerns may justify deviating from these norms in the design of land reform. Because lands that are redistributed have often been used for large-scale commercial production, the property may not be easily susceptible to cultivation by individual smallholders.<sup>177</sup> In some instances, this is because the parcel covers a variety of terrain with some portions appropriate for cultivation of commercial crops or grazing of animals, other sections suitable for small-scale subsistence production of staple food, and other segments offering infrastructure such as housing, roads, or crop processing and storage facilities.<sup>178</sup> Given that individual recipients of property through land reform may want access to land for all of these purposes, including use of the centralized infrastructure and facilities, dividing an existing plantation and generating individual title to small tracts of land may not be the most efficient approach.

Furthermore, existing large-scale infrastructure may be essential for cultivation. For example, in many arid places in the world, complex irrigation systems or chemical inputs make cultivation possible; in the absence of large-scale coordination to make these supports available, productive farming may be difficult.<sup>179</sup> In other cases, while the land may be cultivable on a

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<sup>175</sup> GLEJESES, *supra* note 169, at 150, 160 (describing parceling of land and the rejection of collectivization as contrary to the land tenure practices in Guatemala in the 1940s).

<sup>176</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (explaining the modern preference for individual title).

<sup>177</sup> "Smallholder" is a term used commonly in the development literature to refer to individuals who cultivate small tracts of land. See generally ROBERT MCC. NETTING, *SMALLHOLDERS, HOUSEHOLDERS: FARM FAMILIES AND THE ECOLOGY OF INTENSIVE, SUSTAINABLE AGRICULTURE* (1993).

<sup>178</sup> The community of La Florida in Guatemala uses the former plantation house as a guesthouse for its ecotourism business and has maintained all of the centralized facilities for processing and storage of coffee. Interview with Community Board of La Florida, June 17, 2010.

<sup>179</sup> In 1986, prior to the implementation of Zimbabwe's land reform programs, Zimbabwe's grain production alone was sufficient to compensate for the 1.6 million ton shortfall of eighteen sub-Saharan African countries. After the more radical reforms of the late 1990s, access to inputs was lost. Zimbabwe's commercial farmers who lost their land in the late 1990s could have fed Zimbabwe and "many of the

small scale, large-scale mechanized facilities on the property permit farmers to process their agricultural products, adding value by generating a processed, market-ready crop instead of an unprocessed raw material.<sup>180</sup> Farmers with access to such facilities are able to obtain higher prices for their commodity crops, since they internalize additional steps in the processing of the crop and reduce the number of actors to be paid for performing discrete steps in the production of the commodity.<sup>181</sup>

In some cultures, traditional patterns of land tenure have involved communities exercising their land rights collectively.<sup>182</sup> Customary land rights in many parts of the world have evolved in parallel with systems of formal titling; these customary rights are based on local practices and administration, but not formal rules and processes for registering legal claims of rights to property.<sup>183</sup> When indigenous groups or other organizations of people are the beneficiaries of land reform, generating land rights in a collective fashion is consistent with existing land usage practices and may produce desirable efficiencies.<sup>184</sup> The traditional Mexican *ejido* system offers one example of land reform in which individuals receive access rights and communities hold titular rights.<sup>185</sup>

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millions of people risking starvation in Angola, Lesotho, Malawi, Mozambique and Swaziland.” See Degeorges & Reilly, *supra* note 61, at 573.

<sup>180</sup> For example, large coffee plantations include centralized processing facilities for depulping, fermenting, drying, and milling coffee, resulting in green coffee, which is a stable commodity ready for shipping. Stephen G. Bunker, *Coffee and the Guatemalan State*, in GLOBALIZATION ON THE GROUND: POSTBELLUM GUATEMALAN DEMOCRACY AND DEVELOPMENT 129, 138–40 (Christopher Chase-Dunn et al. eds., 2001).

<sup>181</sup> Rick Welsh, *Farm and Market Structure, Industrial Regulation and Rural Community Welfare: Conceptual and Methodological Issues*, 26 AGRIC. HUM. VALUES 21, 22 (2009).

<sup>182</sup> 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, 3 (2002).

<sup>183</sup> See Delville, *supra* note 27, at 29.

<sup>184</sup> In some instances, this model runs into conflict with the role of the state in redistributing land because the power to assign land access has been a key aspect of local, often traditional, authorities in the conduct of customary tenure models. Moyo, *supra* note 14, at 189.

<sup>185</sup> William D. Signet, *Grading a Revolution: 100 Years of Mexican Land Reform*, 16 L. & BUS. REV. AM. 481, 515–17 (2010) (describing post-Revolution *ejido* land, and restrictions on alienation and mortgaging). Contemporary American Indian tribal land is often held in this model. The tribe holds all rights to the property consistent with fee simple ownership but subject to “an absolute restraint on alienation to every grantee other than the United States.” SINGER, *supra* note 28, at 762. The



As a result of these characteristics inherent in certain forms of agricultural production or resulting from historic land usage patterns, holding title in some collective manner may be preferable to individual title. Collective forms of title are complex and varied; they can take forms as simple as a loose association of individuals who are affiliated for practical purposes, appear as complex as a formal cooperative structure in which individuals hold shares in a collective entity, or assume a variety of other, locally determined models.<sup>186</sup> There are also differences in how that owner collective functions as a legal entity in the state.<sup>187</sup> What rights the individual maintains within the collective can also distinguish forms of collective ownership. In some situations, individuals may be able to sell their property on the open market,<sup>188</sup> while in other cases, the title may bar individuals from selling their shares of the property.<sup>189</sup> Where title is held collectively but private individual sale is barred, individual rights are analogous to those in situations where the state grants access to state-owned property; the individual possesses rights of use and access without holding the right of market alienation.<sup>190</sup>

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tribe can distribute usage rights among its members and otherwise protect individuals' property rights to the use of that land, but individuals likewise cannot alienate the property since they hold subject to the tribal title. *Id.* However, the rights of American Indians to exercise authority and jurisdiction over Indian Country continues to be influenced by the repudiated U.S. policy of allotment, *see* Tweedy, *supra* note 29, at 137–39, in which the United States “attempt[ed] to forcibly assimilate Indians by breaking up tribal land holdings and distributing allotments of the land to individual Indians,” who thereby gained the right to alienate their allotments of previously tribal land. *Id.* at 133.

<sup>186</sup> These models of collective ownership are susceptible to many of the typical critiques of common property ownership. *See generally* Hardin, *supra* note 176. Individual communities have crafted interventions to resolve some of these problems, such as informal division of the land for purposes of cultivation and residence, with collective processing and use of common facilities.

<sup>187</sup> *See* Delville, *supra* note 27, at 28–40 (discussing customary land rights and observing that such rights often have complex, collective aspects).

<sup>188</sup> Since 1992, Mexican law has permitted voluntary privatization by *ejidos*, if its members wish to do so. The decision is left with individuals about whether to privatize their share or not, but other *ejido* members have a preferential right to purchase. Signet, *supra* note 185, at 524–25. This model is similar to co-op apartment buildings in New York City, which permit individual owners to buy and sell their apartments as shares in the building.

<sup>189</sup> SINGER, *supra* note 28, at 762 (stating that individual American Indians who possess usage rights to tribal lands lack the right to alienate).

<sup>190</sup> In these cases, formal conveyance occurs from the state or a private owner to a collective entity, such as an ethnic group or cooperative. The members of that

*D. State Involvement Can Range from Minimal to Extensive*

It is the state's role in land reform that can most crucially shape the success of the land reform initiative and the long-term stability of the nation in which the reform is occurring.<sup>191</sup> State involvement in redistributing land can vary widely across a whole continuum of interventions differing in their public legitimacy. At the simplest level, the state could serve as a facilitator of private transfer, operating as a clearinghouse to organize landless individuals to collectively purchase a plantation and helping to connect would-be buyers with willing sellers.<sup>192</sup> The state could either itself offer or contract with outside organizations to provide technical support to landless individuals so that once they become the beneficiaries of a land reform program, the formerly landless are more likely to succeed as farmers.<sup>193</sup> Alternatively, the state can provide subsidized loans to buyers or loan guarantees to help buyers obtain loans on the private market.<sup>194</sup> In a more robust land reform initiative, the state might combine these and other possibilities in creative ways to try to increase the likelihood that a particular individual or group will succeed in farming, by helping to provide both rights to land and the technical knowledge necessary to operate a small agricultural business.<sup>195</sup>

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collective obtain the right to cultivate or otherwise use land but personally receive none of the other rights of control or management of the property; they might exercise these rights as members of the collective body but not autonomously as individual land owners. Signet, *supra* note 185 (describing historical *ejido* practices in Mexico).

<sup>191</sup> Winoto, *supra* note 6, at 13.

<sup>192</sup> Though this model would be possible, because of the typical goal of land reform programs to transfer lands to poor persons, such programs usually lack the private resources necessary to purchase property independently.

<sup>193</sup> Indonesia has included access to agricultural inputs and other needed assistance as part of its program to change the structure of agrarian ownership. Winoto, *supra* note 6, at 6–7. Guatemala's most recent land reform program, *Fondo de Tierras*, adopted this approach, offering the services of agronomists to help farmers. Gauster & Isakson, *supra* note 165, at 1524 (discussing marketing and technical assistance).

<sup>194</sup> Guatemala's most recent land reform program provided subsidized loans to beneficiaries of its recent land reform initiative. Gauster & Isakson, *supra* note 165, at 1523.

<sup>195</sup> Zikhali, *supra* note 102, at 126 (farmer support services).

In another model of state support, the state could transfer public land to private landless individuals. This property could be land that is already public.<sup>196</sup> Or it could be idle or abandoned parcels that are unclaimed.<sup>197</sup> It is also possible that the state instead could obtain privately held land with the intent to provide it to land reform beneficiaries. In some instances, this could occur through a free market negotiation.<sup>198</sup> In other cases, it could involve the use of various state powers to incentivize the sale or donation of land.<sup>199</sup> Or, the property could be obtained through an exercise of eminent domain to take land that is privately held, with just compensation paid for the property in question, combined with a future conveyance to other private individuals.<sup>200</sup> Finally, the state could obtain the land by

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<sup>196</sup> GLEJESES, *supra* note 169, at 151 (describing the redistribution of national plantations during the post-Revolution land reform).

<sup>197</sup> Winoto, *supra* note 6, at 7 (optimizing use of idle land is a central aspect of Indonesia's land reform program).

<sup>198</sup> The original postindependence land reform program in Zimbabwe set out to purchase land from white farmers in voluntary transactions using funds from the international community through the willing buyer, willing seller model. HUMAN RIGHTS WATCH, *supra* note 61, at 6; Zikhali, *supra* note 102, at 125.

<sup>199</sup> One obvious example of this would be to tax fallow land more heavily than productively cultivated land. Such a taxation regime would either incentivize owners to return land to productive use, thereby increasing employment opportunities in rural areas, or to sell fallow property, which would increase the amount of land available for redistribution through land reform efforts. In the United States, the modern land bank serves an analogous purpose. In the passive land bank model, land banks can act as holding entities for abandoned properties. Thomas J. Fitzpatrick IV, *Understanding Ohio's Land Bank Legislation*, FED. RES. BANK CLEVELAND POL'Y DISCUSSION PAPERS, Jan. 2009, at 1, 2, available at <https://www.clevelandfed.org/en/Newsroom%20and%20Events/Publications/Discontinued%20Publications/Policy%20Discussion%20Papers/pdp%200925%20understanding%20ohios%20land%20bank.aspx>. Or, land banks can adopt a more proactive approach by actively using tax foreclosures to acquire vacant or abandoned land. *Id.* at 5, 7. By clearing tax liens, providing low-cost properties to productive users, and returning property to the productive tax rolls, the active land bank model can similarly help facilitate the transfer of privately held property. *Id.* at 2.

<sup>200</sup> This is what occurred in the one case on land reform that has come from the U.S. Supreme Court. In *Hawaii Housing Authority v. Midkiff*, private landowners challenged the state's land reform statute, which was designed to reduce the presence of oligopoly in the state's land tenure patterns by using compensated eminent domain to broaden the class of land owners. 467 U.S. 229, 241–42 (1984). It was also the model undertaken in Zimbabwe's second iteration of post-independence land reform, in which the 1992 Land Acquisition Act gave the government power to acquire land by paying fair compensation set according to nonmarket guidelines. HUMAN RIGHTS WATCH, *supra* note 61, at 6.

expropriating private property without paying compensation, though this leads to all of the problems discussed in detail in Part II.

#### CONCLUSION: LEVERAGING LEGAL INSIGHTS TO ENCOURAGE LAND REFORM

This Article set forth to argue for the value of a certain kind of redistributive land reform program as a model of international development. It first grounded land reform squarely in its pragmatic and expressive goals, arguing that land reform can make a substantive difference in the lives of real people and developing nations, and therefore is a worthwhile endeavor for governments to undertake. Next, it argued that market-compatible land reform is the most pragmatic approach for eradicating poverty because it generates the fewest negative externalities that accrue to the worst-off members of society. Finally, it explained the wide range of programs that qualify as redistributive, market-compatible land reform, highlighting the fact that market-compatibility is an umbrella designation that encompasses a whole variety of programs.

Only one problem remains: Land reform programs still do not make available enough land to serve the crucial goal of eradicating poverty.<sup>201</sup> Although this Article advocates for market-compatible land reform, the reality is that resource limitations have denied such programs the quantities of land needed to offer the kind of social change that poor, rural people need.<sup>202</sup> There is “a political and social vacuum in the leadership of the land reform agenda” that results from civil society organizations advocating neoliberal approaches based on willing buyers and willing sellers, while land occupation movements

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<sup>201</sup> Simon Granovsky-Larsen, *Between the Bullet and the Bank: Agrarian Conflict and Access to Land in Neoliberal Guatemala*, 40 J. PEASANT STUD. 325, 328 (2013) (documenting problems with market-led agrarian reform, defined as programs that “encourage a shift away from state-led land distribution and towards market transactions intended to assist landless workers and small farmers in purchasing land” through “willing seller, willing buyer” approaches (internal quotation marks omitted)).

<sup>202</sup> Moyo, *supra* note 14, at 198 (arguing that rule of law conversations about human rights have led to critiques of methods of acquisition and expropriation, without offering alternatives or mobilizing resources for more extensive land reform).

continue to be shunned.<sup>203</sup> Though this Article does not advocate for land occupation, such movements reveal the desperation with which landless peasants face their poverty.

The solution to this problem has multiple parts. First, market-compatible land reform programs that leverage the state's eminent domain power present one major potential source of land for the rural poor; providing this land through market-compatible eminent domain mechanisms does not threaten the destabilization that rightly concerns policymakers. Second, in order to properly conceptualize land reform at the intersection of property law and international development, these ideas require testing in the field and application to particular land reform programs. One future project in this series will refine this work by analyzing the successes and failures of particular land reform programs according to the framework articulated here.

Third, legal scholarship can propose many alternative ways to put more resources—land and money—into land reform programs. The best insights of legal scholars can improve dramatically the way that land reform programs operate, which only can assist in the realization of the goals here articulated. How to put rural lands into productive use to address the kinds of poverty here discussed remains a pressing problem. Legal scholars can help identify methods by which nations can support the kinds of programs explained in this Article. Capping the percentage of assets an individual can hold in real property is one possible approach.<sup>204</sup> Or, governments can force large-scale landowners to choose between being taxed at full market value for their property or selling to the government at below market rates.<sup>205</sup> The government can attempt to shift the paradigm of land use by creating incentives to bring fallow, underutilized lands,<sup>206</sup> often held by elites,<sup>207</sup> into the productive economy.

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

<sup>204</sup> GEORGE COOPER & GAVAN DAWS, *LAND AND POWER IN HAWAII* 6 (1985).

<sup>205</sup> *Id.* at 7.

<sup>206</sup> JONAS, *supra* note 71, at 181 (indicating that Guatemala's post-Civil War peace accords provided for a tax on unused land).

<sup>207</sup> Moyo, *supra* note 14, at 189 ("Discriminatory land use policies and practices, and land tenure laws have tended to encourage underutilization of land or inefficient land use among large-scale farmers . . .").

These are an initial set of starting points that highlight how legal scholarship is a source of solutions and interventions. This project thus is an invitation to others, particularly American legal scholars, for whom poverty and human suffering is a preoccupation to bring their methods and theories to bear on global poverty and inequality. The insights of many doctrinal areas can be leveraged to build upon and improve the framework laid here.