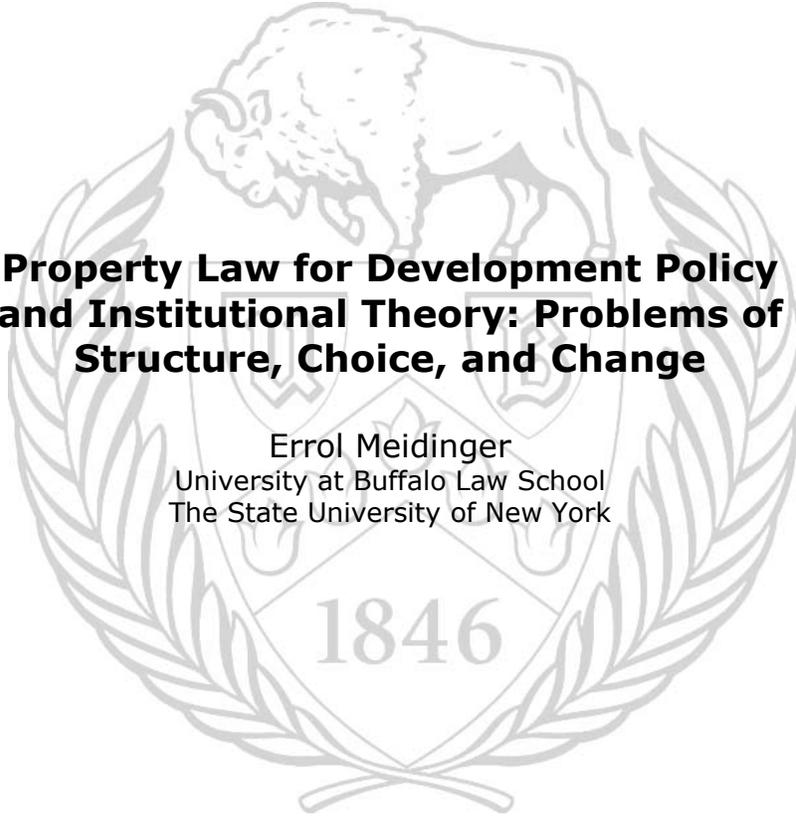


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**Property Law for Development Policy  
and Institutional Theory: Problems of  
Structure, Choice, and Change**

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# Property Law for Development Policy and Institutional Theory: Problems of Structure, Choice, and Change

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## 1. Introduction

**Overview** Hernando De Soto argues that the less developed countries of the world should reform their property systems to recognize and incorporate the 'extra-legal' property rights that exist in their various squatters' settlements, rural enclaves, and other

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suppressed social fields. By doing this, he says, they will establish the institutional environment necessary to support economic growth. In making this argument, De Soto draws not only on development studies, but also on western property law and institutional ontology. He does not argue for the simple importation of Western property institutions, but rather for the recognition, codification, and integration of indigenous ones in a way that will support economic development. To do this he draws upon the ontology of John Searle to discern the essential elements of social institutions. He also draws on the history and structure of western property law to try to discern basic institutional characteristics which may be essential to economic development.

De Soto's amalgamation of these three fields is unusual. Assessing his argument requires a broader than usual academic compass. At the same time, it is not possible in one writing to respond from all three perspectives. This article joins the discussion from the perspective of modern, primarily Anglo-American, property law. It aims to render property law in a way that speaks to both De Soto's development policy and Searle's ontology. Because few people are familiar with all three fields, Sections 2 and 3 provide concise summaries of Searle's and Desoto's positions. Readers already familiar with them can read these sections quickly, focusing on the key points made to set up the subsequent discussion of property.

Section 4 examines modern property law with a view to questioning and prompting further developments in De Soto's development prescriptions and Searle's ontology. It makes several arguments. First, while modern property law has incorporated many innovative forms of property rights, and has allowed them to operate in multiple configurations, it has simultaneously limited their number and form. This suggests that there may be important, but only dimly understood, constraints on the incorporation of additional forms of property rights in modern legal systems. Second, western property law has always exhibited a certain amount of indeterminacy and changeability, thus leaving the exact contents of many property rights and duties open to doubt. Meaningful ontology and development policy, therefore, may be well advised to deal with the persistence of normative reasoning and multiple decisional forums in property institutions. Third, modern property law has often excluded or suppressed property rights based in indigenous institutions. Thus, there may be implicit limits on incorporation. Fourth, the boundaries of the communities that define property rights in the modern system seem to be expanding outward. Thus, some property rights within nation states are effectively being defined by international organizations such as the WTO, while others are being defined by private transnational networks of NGOs. Finally, Section 5 suggests that these elements of the modern system, taken

together, raise questions about an ontology and development policy that focus on relatively static definitions of rights and duties. A satisfactory understanding of property systems may have to incorporate processual elements which are not reducible to existing rights and duties.

**Background** The essence of De Soto's prescription is that less developed countries should create integrated property systems incorporating informal or extralegal property rights into their official legal systems. He believes that this institutional adjustment will facilitate economic growth because the resultant general understanding of who has what property rights will allow formerly 'dead' capital to metamorphose into 'live' capital supporting investment, mortgages, utility hookups, etc., and thereby economic growth.

One of De Soto's primary empirical bases for this prescription is the history of western property systems, and particularly the U.S. system, which he argues laid the necessary institutional conditions for rapid economic growth in the late 19<sup>th</sup> century by incorporating informal rights in a unified property system. One of his primary theoretical bases is Searle's social ontology, which stresses the importance of widely accepted symbolic representations of well defined rights and duties for functional institutions.

De Soto's emphasis on institutions is neither unique nor unusual in modern policy discussions. Institutional analysis enjoys renewed currency across a variety of academic disciplines. Institutions are increasingly treated as a subject of analysis in their own right, and not as mere derivatives of other variables (e.g., economic efficiency or political power). Part of what makes institutions an appealing subject is that they can be characterized as distinct, yet important and durable shapers of human behavior, and that they can be discussed without insisting upon a larger social-theoretical apparatus. Since institutional analyses operate in a fairly open ended theoretical field, they can be relatively pluralistic and consider a broad array of institutional forms. In all then, it is not surprising that reform proposals from across the ideological spectrum focus on developing better institutions.

To say that there is a convergence of interest in institutions is not to say that there is unanimity on what they are or why they are important. Yet, at a general level there is fairly broad agreement: institutions refer to widely accepted conventions that define the roles, rights, powers, and duties of specific types of social actors in specific settings.<sup>1</sup>

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<sup>1</sup> E.g., North, 1990, Powell and DiMaggio, 1991; Scott, 1987; March and Olsen, 1989.

Institutions shape and give meaning to behavior, provide predictability to social actors, and play a large role in determining the resources and life chances of specific individuals. While some institutions take the form of law, others do not.<sup>2</sup> Which institutions one focuses on depends on what questions one wishes to answer.

Property is a standard verity of institutional discourse. So conventional is the identification of institutionalism and property, ironically, that some disciplines tend to treat property as requiring no particular analysis.<sup>3</sup> That repose has recently been disrupted by the growing influence of institutional economists on global development policies, particularly through the International Monetary Fund and other lending agencies. These agencies have maintained, often in a rigid, non-empirical way, that adoption of certain Western institutions is a precondition to economic growth in third world and former Eastern block countries.<sup>4</sup> De Soto's work, while occasionally identified with these positions, is more sophisticated. Rather than the wholesale 'cookie cutter' adoption of Western institutions, he advocates the clarification and solidification of indigenous ones in ways likely to support economic growth. He seeks to draw lessons from the essential characteristics of western institutions, rather than from their substantive details. It is thus fair to say that he is more interested in the ontology – the fundamental characteristics, categories, and relationships – of property institutions, than in their content.

## **2. Searle's Ontology of Institutions and Property**

Probably the most influential ontological perspective on social institutions is that of John Searle. Like most empirically oriented philosophers who discuss social phenomena, Searle seeks to describe the distinctive features of social relationships, features which are implicitly not reducible to deterministic workings of atomic and sub-atomic phenomena. In contrast to the efficiency driven institutional analysis of economics which has shaped most institutional analysis of property, Searle's ontological analysis is self-consciously indifferent to substantive social goals. While he seems to assume that institutions in general are a good thing (presumably because they facilitate social

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<sup>2</sup> There is, however, little careful analysis on where the line between law and non-law falls. Compare, for example, the relatively unexamined distinction between state and non-state rules in the 'law and norms' literature (e.g., Posner 2000) with the more inclusive definition of law in the 'institutional theory of law' literature (e.g., MacCormick and Weinberger, 1986).

<sup>3</sup> In one of my own home disciplines, sociology, property has not been a focus of significant empirical or theoretical concern for three quarters of a century.

<sup>4</sup> See Stiglitz (2002) for a summary and critique of the position.

order) and acknowledges that in practice they function to promote certain values, he eschews commitments to those values. He seeks to describe the essential elements of institutions regardless of the values they might promote.

***Institutional Facts*** Searle builds his ontology on two fundamental categories of facts: brute and social. Brute facts are those which exist independent of human intentionality, such as mountains, molecules, and tides. They exist and are facts whether humans regard them as such or not, indeed whether humans exist or not. Social facts, in contrast, depend on human intentionality for their existence. The simplest examples are physical tools. A screwdriver, for example, may exist as a collection of materials with certain properties, but it is not a screwdriver unless conscious agents regard it as one. Tools do not exhaust the category of social facts, however. There is another, arguably more interesting sub-category, which Searle labels institutional facts. His paradigmatic example is money. Like the screwdriver, money must be regarded by conscious agents as such in order to function as money. Unlike the screwdriver, however, what can function as money is not limited to a specific set of physical characteristics. For Searle this is the hallmark of an institutional fact: it cannot perform its function solely by virtue of its physical structure, but only through collective acceptance. Still, Searle insists, such facts are objective in that, for example, there is a real set of functions that money can perform, and others that it cannot. Institutional facts are thus 'ontologically subjective and epistemologically objective.'

Searle posits three essential attributes of institutional facts: (1) collective intentionality, (2) assignment of function, and (3) constitutive rules.

**Collective Intentionality** Social behavior, both among humans and among animals, involves and indeed requires collective intentionality – e.g., a shared intention to engage in a transaction or not to interfere with a certain kind of behavior.<sup>5</sup> Collective intentionality for Searle thus involves both a shared mental directedness and a capacity to coordinate behavior. But it is not enough by itself to establish institutions such as money, property, marriage, or government.

**Assignment of Function** Social institutions also require the crucial process of assignment of a function to a specific thing. As noted above, such functions are never intrinsic to the thing, but always assigned, and therefore always relative to interests of users and

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<sup>5</sup> Searle also argues that collective intentionality is not reducible to the sum of individual intentions (1995:26) but that is not important to this discussion.

observers. Thus, a piece of paper with certain physical features and origins can be assigned the function of money in a certain political jurisdiction and can function that way due to collective acceptance by the relevant actors. The same goes for a group leader.

**Constitutive Rules** The assignment of a function is itself based on constitutive rules, which create the very possibility of certain types of institutional behavior. They do this by specifying the circumstances under which a particular thing or actor counts as having a specific function. The exact nature of constitutive rules is only partially worked out in Searle's scheme, as Searle acknowledges,<sup>6</sup> but he stresses several important features. First, constitutive rules are to be distinguished from mere regulative rules, which regulate 'antecedently occurring activities.' Thus, a speed limit is mere regulative rule for driving a car, rather than a constitutive one. Second, constitutive rules often require 'performative utterances,'<sup>7</sup> e.g., saying (1) "know ye that I give Blackacre to Ethelbert" before witnesses and handing over an actual piece or product of the soil or (2) "I thee wed" before someone empowered to marry people or (3) "I declare this meeting in session" before a groups of people who are gathered for a meeting. Third, each of these constitutive rules is dependent on a web of other constitutive rules, such as those defining whether the grantor actually had the power to convey Blackacre, the bride and groom to marry, the chairman to call the meeting to order, etc.

**General Form** Searle posits that all constitutive rules have the form, "X counts as Y in context C," where X refers to the thing being given the special status (e.g., Blackacre, the bride and groom, the gathering), Y to the status (Ethelbert's property, being married, an official meeting), and C to the conditions in which that status applies.

The above summarizes Searle's theory of institutions. With it he seeks to account for the distinctive structures and processes which organize human society. It has several important attributes for purposes of further discussion.

**Positivism** Searle's account is determinedly empirical as opposed to normative. It seeks to describe the nature of things – institutional things – in the world. These things have the status of facts, and may involve brute facts, but cannot be explained in terms of them. While Searle argues that every institutional fact must have some physical manifestation, he also accepts that they may continue to exist after the physical manifestation (e.g., the performative utterance) no longer

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<sup>6</sup> Searle 1995 p. 29.

<sup>7</sup> Ibid p. 34.

exists in any physical form.<sup>8</sup> He seeks to avoid asking whether one should accept a particular obligation, or whether a particular kind of property should be allowed, and prefers to focus on whether one 'is' under an obligation or 'has' property. These, to him, are 'epistemologically objective' matters, although they depend on 'ontologically subjective' states.

**Collective Acceptance** The above summary of Searle's theory emphasizes the importance of collective acceptance to the persistence of social institutions. "The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts."<sup>9</sup> If people no longer collectively accept an institutional status it will no longer be a fact. Yet Searle has not undertaken to develop a theory of collective acceptance (legitimacy). While nodding to the efforts of Durkheim, Simmel, and Weber he neither elaborates nor spends much time on them.<sup>10</sup> Indeed, he argues it is not feasible to develop a theory that explains the granting or removal of collective acceptance.<sup>11</sup> Even at a lower theoretical level, Searle does not discuss how to ascertain what constitutes a 'sufficient number' of acceptors, nor what is the 'relevant community.'

**Iterative Institutions** The reasons for Searle's neglect of the bases for collective acceptance of institutions are not entirely explicit, but part of his reasoning appears to rest on the proposition that collective acceptance is often explained by the prior existence of collective acceptance of related matters. This reflects the iterative and interlocking nature of institutional facts in Searle's scheme. For example, the bride and groom are treated as married after the completion of the ceremony because many of the elements of the process already enjoy collective acceptance. These include the authority of the official to marry the couple, the authority of the couple to choose to marry, the general rights and duties of marriage, the elements of the ceremony, and so on. Thus, acceptance of a given institutional fact is largely assured by prior acceptance of many related institutional facts. Moreover, there appears to be no limit on the lateral and iterative growth of institutional facts.

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<sup>8</sup> See generally, B. Smith 2003.

<sup>9</sup> 1995, p. 117.

<sup>10</sup> Searle 2003, p. 5. Indeed, Searle argues that the classical social theorists fall short of the mark by failing to describe the attributes which separate persistent social institutions from mere social facts. Similarly, while acknowledging the influential efforts of Plato and Rawls to develop normative standards for institutions, Searle eschews that project in favor of developing an empirical account of the institutions that exist.

<sup>11</sup> 1995, p. 92.

**Plural Origins** Institutional facts thus appear to be ‘turtles all the way down’ (decisions by authorized actors) in most cases, but Searle also acknowledges that institutions can also derive from unintentional evolution and custom<sup>12</sup> as well as from occasional unilateral acts, such as constitution producing revolutions or adverse possession of property.<sup>13</sup> Again, the problem of why these facts receive collective acceptance is not treated at a theoretical level. Rather, Searle seems to assume that the collective acceptance speaks for itself, and indeed is good at least in that stability and predictability are better than disorder.<sup>14</sup>

**Status Indicators** Because institutional facts depend on collective acceptance and are not derivable from brute facts, they often include specific status indicators, such as passports, drivers’ licenses, wedding rings, property titles, uniforms, etc. While some of these indicators may be necessary to constituting an institutional fact, they also have independent importance in communicating the status. Communication of institutional status is necessary to its effective functioning in Searle’s scheme. What is not clear, however, is how much information such indicators should or do communicate. If a title indicates that Blackacre is “Ethelbert’s property,” that does not necessarily communicate much information about what it means for Blackacre to be Ethelbert’s property. As is discussed in Section 4, this is currently an important question in debates about the structure of modern property law.

**Process Orientation** Searle argues that the central importance of institutional facts is not their existence *per se*, but rather the potential they create for social action.

Social objects are always . . . constituted by social acts; . . . the object is just a continuous possibility of the activity. . . . A twenty dollar bill is the standing possibility of paying for something.<sup>15</sup>

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<sup>12</sup> His account here parallels that of Hume, 1739.

<sup>13</sup> 1995, p. 116, 118.

<sup>14</sup> “One of the most fascinating – and terrifying – features of the era in which I write this is the steady erosion of acceptance of large institutional structures around the world. The breakdown of national identification in favor of ethnic tribalism occurs in places as various as Bosnia, Canada, the former Czechoslovakia, Turkey, and many American universities. . . . several African Countries . . . . Russia . . . . The temptation in all these cases is to think that in the end it all depends on who has the most armed might, that brute facts will always prevail over institutional facts. But that is not really true. The guns are ineffectual except to those who are prepared to use them in cooperation with others and in structures, however, informal, with recognized lines of authority and command. And all of that requires collective intentionality and institutional facts.” (1995, p. 117).

<sup>15</sup> 1995, p. 36

What we think of as . . . governments, money, and universities, are in fact just placeholders for patterns of *activities*. . . . [T]he whole operation of agentive functions and collective intentionality is a matter of ongoing activities and the creation of the possibility of more ongoing activities.<sup>16</sup>

Thus, institutional facts are resources for collective action, and either are or can be designed so as to make certain kinds of actions possible. Creativity and change in Searle's model generally grow out of authorizations to act in a certain way, however. He does not focus on how people may act creatively to reshape those authorizations.

***Rules, Rights, and Duties*** A hallmark of institutional facts in Searle's scheme is that they are capable of codification, whereas other social facts (like walking together in a park) are not. Institutions thus have a rule-like or law-like form, regardless of whether their underlying rules are in fact codified.<sup>17</sup> Codification will only be done if it is worth doing to achieve some social end.

Moreover, institutional statuses generally take a 'deontological' form – that is, one composed of powers and duties. These powers and duties are socially constructed and recognized, but have a simple and pervasive internal logical structure according to Searle. The elements are (1) collective acceptance (2) that a given individual or group (3) may do something or must refrain from doing something (4) the doing of which is then realized in social interaction.<sup>18</sup> Searle divides these into enablements and requirements (powers and duties hereafter), which have the following general forms:<sup>19</sup>

We accept (S is enabled (S does A))  
We accept (S is required (S does B))

Powers and duties in Searle's account also exhibit the kind of logical consistency relished and promoted by philosophers. Thus, S is enabled to perform act A if and only if it is not the case that S is required not to perform act A. And, S is required to perform act B if and only if it is not the case that S is enabled not to perform act B. While this proposition does not seem troubling as a logical matter, depending on how far it is taken it may have serious implications in a world of epistemological objectivity, for it seems to assume that the rights and duties of social actors can be clearly and accurately ascertained in

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<sup>16</sup> 1995, p. 57

<sup>17</sup> 1995, p. 87-88.

<sup>18</sup> This is as close as Searle seems to come to discussing the problem of implementation of legal powers and duties. It follows from collective acceptance and recognition.

<sup>19</sup> 1995, p. 105

advance of their action. The question is, to what extent are property rights specified, and to what extent are they left undefined. If one makes the assumption that they are relatively completely specified, and that they can only be changed through predetermined processes, then one has the considerable problem in dealing with real world legal systems, wherein much uncertainty is experienced. If one makes the assumption that rights are often only partially defined, then one may need an additional kind of theory to explain how they are further defined.

**Property** Although Searle frequently cites property as an archetypical institution, he provides little specific analysis of property institutions. Following a tradition going back to Grotius, he maintains that while property often begins in sheer physical possession of things (a brute fact) it becomes an institutional fact when that possession is recognized by society.<sup>20</sup> Possession may continue to serve as the primary signifier of property status for many kinds of personal property, but some kinds of personal property and all property in land gradually receive other kinds of signifiers, often in the form of registration or title documents issued by governments.

Eventually institutional structures for “buying and selling, bequeathing, partial transfer, mortgaging, etc.,”<sup>21</sup> are developed which typically require specific speech acts to signify the changed status of the property. But this concept of status change is largely limited to changes in ownership. It barely extends to changes in the types of interests – rights and duties – which might be created (mortgages being the sole example), and seems to imply a model of property which is greatly limited by the brute facts of things to the questions of which actor owns them. As will be seen below, this may be a significant limit in Searle’s conception of property, one which lags well behind the structure of property law in practice. Nonetheless, from within his framework it is possible to express the general form of Searle’s concept of property as follows:

Blackacre (X) counts as Ethelbert’s Property (Y) in New York State (C)  
We accept (Ethelbert is enabled (Ethelbert farms Blackacre))  
We accept (Ethelbert is required (Ethelbert pays real estate taxes))

As already noted, this general form fails to address many questions about property, including: (1) what the full list of rights and duties is, and whether it can be completely known, (2) whether there are

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<sup>20</sup> Grotius, 1625, § II.2.ii.1. There is a powerful contrary position holding that property rights are better understood as growing out of preexisting social relationships. E.g., Milsom, 1976.

<sup>21</sup> 1995, p. 84-5.

inherent limits to structure or complexity of rights and duties, (3) how property rights and duties change and whether there are any limits to change, (4) how new types of interests or rights and duties are created, and (5) how competing claims to property rights based in different collectivities are reconciled with each other.

**Summary** Searle envisages society as a complex architecture of institutions built out of a huge number of iterated and interrelated rights and duties. Their content varies greatly among different types of social actors. Institutionalized rights and duties are important because they enable future oriented collective action, often in the form of complex cooperation. Rights and duties have a general, simple, and logically consistent structure. In many cases, holders of rights and duties carry a specific status indicator, which apparently plays an important role in effectuating their rights or duties. Searle's overall approach means that many questions which are often cast as normative ones by others are cast as empirical ones: what rights or duties one has are questions of fact in the specific situation. Although rights and duties depend for their existence on collective acceptance, Searle does not describe what conditions constitute collective acceptance – neither what is a 'sufficient number of members' nor what the 'relevant community is, nor how acceptance is achieved.

### **3. De Soto's Concepts of Property and Capital**

While he does not discuss all of Searle's basic premises, Hernando De Soto seems to accept most of them, with the possible exception of logical consistency in rights structures. De Soto however, is addressing a different question. Rather than 'what are the essential attributes of social institutions?' he is asking 'why are third world and former eastern block countries consistently failing to achieve economic prosperity?' As is noted above, De Soto finds the answer in institutions. Based on extensive research and analysis of economic activity in third world countries, he rejects several conventional explanations. The problem according to De Soto is not a lack of assets. In fact enormous wealth exists in the informal urban sectors of all of these economies – typically 2/3 to 4/5 of total wealth.<sup>22</sup> Nor is it a lack of markets. In fact, markets are everywhere in the third world, and new ones regularly crop up. The problem is not a lack of individual initiative or entrepreneurship. De Soto finds enormous entrepreneurial creativity and energy in many impoverished urban areas. Finally, the problem is not culture. Many areas of the developing world have well developed

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<sup>22</sup> 2000, p. 15-37

cultural traditions of effort, coordination, hard work, and so on. Moreover, the cultures of the developed countries vary enormously, as is illustrated by the contrast among Japan, Switzerland, and California, for example. The reason for persistent poverty, according to De Soto, is a lack of institutions that facilitate the creation of capital:

Walk down most roads in the Middle East, the former Soviet Union, or Latin America, and you will see many things: houses used for shelter, parcels of land being tilled, sowed, and harvested, merchandise being bought and sold. Assets in developing and former communist countries primarily serve these immediate physical purposes. In the West, however, the same assets also lead a parallel life as capital outside the physical world. They can be used to put in motion more production by securing the interests of other parties as “collateral” for a mortgage, for example, or by assuring the supply of other forms of credit and public utilities.<sup>23</sup>

***Divided Property Systems*** De Soto maintains that the fundamental obstruction to economic growth in poor countries is the lack of a uniform set of representations of assets which would allow them to function as capital – i.e., the lack of a unified property system. Instead, the developing and former eastern block countries are characterized by multiple, often conflicting property systems. In one social sphere, the “bell jar,” are the official state property systems. These are highly formal and cumbersome. Their high costs and complexity make them accessible only to the upper classes – impenetrable to the poor. Moreover, De Soto argues, the official systems are out of touch with social reality; they are not attuned to the types of relationships and transactions that they should be able to facilitate.

In a separate sphere are the neighborhood or ‘informal’ or ‘extralegal’ property systems. These exist in virtually all large neighborhoods surrounding the centers of third world cities, as well as in most rural areas. In these places, excluded from the bell jar legal systems, self-organizing communities have created their own property systems, often borrowing some institutional practices from the official legal system and mixing them with inventions or traditions of their own. According to De Soto, local consensus almost invariably exists on ‘who owns what property and what each owner may do with it.’<sup>24</sup> In fact, in most urban neighborhoods these interests have been committed to

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<sup>23</sup> 2000 p. 39.

<sup>24</sup> 2000, p. 186.

paper.<sup>25</sup> But, recognition of neighborhood property rights is limited to small groups and there are often plausible competing claimants.

The problem with extralegal social contracts is that their property representations are not sufficiently codified and fungible to have a broad range of application outside their own geographical parameters. Extralegal property systems are stable and meaningful for those who are part of the group, but they do operate at lower systemic levels and do not have representations that allow them to interact easily with each other.<sup>26</sup>

Consequently, unremitting and largely unproductive politicking is necessary to maintain that recognition. The uncertainty, confusion, conflicts, and wasted energy resulting from the cacophony of property systems and interests make thriving capitalism impossible.

***Unifying Property Systems*** De Soto maintains that the solution to the problem of conflicting and incomplete property systems is rather simple. Since property systems already exist in the informal sectors, the first step is to do field work on them. The systems have a structure, and it is not hard to uncover and document that structure. The second step is to fuse the informal property system with the official one. This is ordinarily not very difficult as a conceptual matter, according to De Soto, first because the informal systems have borrowed heavily from the formal one and operate within a common culture, and second because they are reasonably similar to most western systems.

“[M]ost extralegal social contracts about property are basically similar to national social contracts in Western nations. Both tend to contain some explicit or tacit rules about who has rights over what and the limits to those rights and to transactions; they also include provisions to record ownership of assets, procedures to enforce property rights and claims, symbols to determine where the boundaries are, norms to govern transactions, criteria for deciding what requires authorized action and what can be carried out without authorization, guidelines to determine which representations are valid, devices to encourage people to honor contracts and respect the law, and criteria to determine the degree of anonymity authorized for each transaction.<sup>27</sup>

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<sup>25</sup> Ibid, p. 184.

<sup>26</sup> Ibid, p. 181

<sup>27</sup> Ibid, p. 180.

While this position may seem an oversimplification, since incorporating informal rights will often involve taking away officially recognized property rights,<sup>28</sup> De Soto does not dwell on it as a conceptual matter, presumably because he assumes that the expropriated properties could not have been enjoyed by their official owners in any event. He argues that the national governments should undertake the job. They have the capacity, and doing so is in their interest since the resultant economic development will increase their revenues and organizational capacities. He stresses that open and reform-minded lawyers – rather than hide-bound ones with their attention focused on formal western legal systems – will have to be found to do the job.

The resulting unified property system should then allow the effective creation of capital. The economic potential of each asset will be fixed in a formal representation, and there will be a single system of formal representations. Individual asset holders will become accountable beyond their families and neighbors to a much larger sphere of potential partners. Physically differentiated interests will become fungible. Secure transactions will become possible. And ultimately the property systems will create “a network through which people can assemble their assets into more valuable combinations.”<sup>29</sup>

***The Western Model*** Since unified property systems have not been tested in the developing world, how can De Soto be so confident that their establishment will lead to dynamic capitalism? Much of the empirical basis for his argument is drawn from his reading of the history of western property systems, particularly the U.S. He argues that in the 18<sup>th</sup> and 19<sup>th</sup> centuries the U.S. was the equivalent of a modern third world country, with large amounts of extralegal land settlement (squatting) and development. It suffered from divided, competing property systems, with the imported English property system confronting many localized squatter systems with their own titles, rules, and rights. After the systems grated on each other for decades, a broad unification process occurred late in the 19<sup>th</sup> century, culminating in harmonized property laws effectively recorded in registry systems.

The American legal system obtained its energy because it built on the experience of grassroots Americans and the extralegal arrangements they created, while rejecting those English common law doctrines that had little relevance to problems

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<sup>28</sup> King, 2003, p. 470. This article assesses alternative ways of making these transfers in practice and argues generally the best way to do it is for the state to act as a developer which formally takes the rights (most often with compensation) and then reallocates them.

<sup>29</sup> Ibid, p. 61.

unique to the United States. In the long and arduous process of integrating extralegal property rights, American legislators and jurists created a new system much more conducive to a productive and dynamic market economy. This process constituted a revolution born out of the normative expectations of ordinary people, which the government developed into a systematized and professional formal structure.<sup>30</sup>

**Summary** For De Soto, creating a workable property system capable of supporting economic growth is largely a technical and empirical problem, one that can be solved with the application of skill and effort. The task is first to ascertain and codify the property rights that already exist in the informal sectors of developing countries, and then to integrate them into the formal legal systems in ways that are sensitive to local context. Once the institutional apparatus and the representations necessary to effectuate existing property rights are in place, dynamic capitalism can flourish.

De Soto thus shares a number of key assumptions with Searle. First, property rights are largely an empirical rather than a normative question. This is partly because, as the quotations above indicate, De Soto maintains that ‘social contracts’ are already in place in the informal and ‘extralegal’ sectors, and that integrating the rights and duties thereby established into the official legal system should not be seen as a normatively controversial policy. It is probably also because he believes that there is little doubt that poor people in the less developed economies want economic growth through capitalism. He is thus not prone to spend much argumentative time on the question of what would be a good property system. Like Searle, therefore, he relies heavily on collective acceptance as a foundation for institutions.

Also like Searle, De Soto stresses the importance of institutions as resources for future oriented collective action. Better property systems are important not in their own right, but because they will allow people to engage in more productive economic transactions. Again like Searle, De Soto sees institutions as built up of rights and duties and ways of signifying them. Perhaps even more than Searle, however, he stresses the central role of formal representations, and suggests at least that clear property representations may have a constitutive role in creating stronger property rights.

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<sup>30</sup> Ibid, p. 150.

## 4. The Institutional Ontology of Property Law

This section aims to describe the structure and dynamics of modern property law in a way that tests and develops some of the key arguments made by De Soto and Searle. It does not directly address De Soto's historical account of the unification of U.S. property law or his causal argument regarding the role of property law in U.S. economic development, much less his argument about the nature of property rights in less developed countries. Nor does this paper attempt to give a full account of the institutional ontology of property law. Its goal, rather, is to give an account of modern property law which bears upon the central propositions in De Soto's policy prescriptions and Searle's ontology in a way that might prompt intellectual progress in all three fields.

Before specific problems can be discussed, however, it is necessary to provide a basic overview of the modern property system. This is more important than it might seem because there appears to be some disparity between 'common sense' concepts of property and formal legal definitions of property rights in the legal system.<sup>31</sup> Additional caution is in order because there is a real question whether property is a meaningful category. A common quip among property professors is that "the subject is held together mainly by the covers of the textbook." At a more abstract level, moreover, there are strong arguments that property is not a coherent concept.<sup>32</sup> Nonetheless, given that property is a category employed in a huge number of institutional arrangements, this section proceeds on the assumption that property is a fruitful subject of analysis.

**Definition and Scope** The most elemental idea of property is that it refers to control over a thing by a person. "That thing is mine – I can do what I want with it." This idea also tracks a core legal understanding, which is that property involves rights to things; indeed, this seems to be the conventional definition of the term in civil legal systems.<sup>33</sup> But 'rights' also inherently refer to other people; to have a right is meaningless unless there are other people who are obligated to respect it. My right to control a thing thus depends on other people abiding by that right and not acting to interfere with it or take it away from me. So, a basic legal definition of property would be that it refers to 'relations among people with respect to a thing.'<sup>34</sup> However, each of the basic terms in this definition raises some interesting questions.

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<sup>31</sup> See, e.g., Ackerman, 1977.

<sup>32</sup> Perhaps the sharpest presentation of this thesis is Grey, 1980.

<sup>33</sup> Zaibert, 1999, p. 88.

<sup>34</sup> "The word 'property' is used . . . to denote legal relations between persons with respect to a thing." Restatement of Property, First. 1936, at 3.

**Objects of Property** Taking the last term first, what kinds of ‘things’ are covered by property? Most Western property systems have traditionally focused on two primary categories of objects: land and other things (real and personal property in the Anglo-American system, immovables and moveables in Civil law systems). But the distinctions have never been simple, nor the categories exhaustive. Thus, real property in the Anglo-American system has included things like door keys, title deeds, uncollected loose minerals, and things connected to buildings which, while moveable, were intended to stay (‘fixtures’). Conversely, personal property included things attached to buildings but not intended to stay with them, buildings raised off the ground, and rights to possess land defined to last for a lesser duration than a human life (e.g., a term of 30 years).<sup>35</sup>

My purpose is neither to argue that traditional categories are arbitrary nor to find a deep structure in them. Rather, it is to point out that they were determined not so much by the things involved as by human assignments of rights with regard to the things. Those rights were shaped by human goals and relationships. This point is driven home by another fact of property: many of the ‘things’ covered by property rights are hard to describe as ‘things’ at all. Traditional Anglo-American examples include the real property rights of advowsons (rights of certain land owners to nominate clergy), franchises (exclusive rights of certain land holders to operate specified types of markets or to take royal revenues such as treasure trove), and offices (e.g., exclusive rights to bear the king’s armor).<sup>36</sup> More obvious contemporary examples are so-called intellectual property rights – exclusive rights to use certain technologies, processes, word patterns, or images. These are not things in any conventional sense of the word, yet we talk about property in them. Similarly, many other modern property interests, such as shares of corporate stock, bonds, bank accounts, insurance policies, and interests in ‘commercial paper’ (various kinds of documents promising the payment of money) cannot be characterized as rights to specific things.

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<sup>35</sup> Baker, 1990, p. 428. This distinction between leasehold and life estates in land requires some explanation. In the traditional Anglo-American property system, a life estate was viewed as inherently greater than a term of years, despite the fact that any particular life might go on for a shorter time than a given term of years. This can be partly understood from a modern perspective because a life is at least capable of lasting more than any typical term of years. More important from a pre-modern perspective, however, was that fact that the holder of the interest would not lose it so long as he was alive; his ownership was guaranteed absent treasonous behavior or other highly unlikely occurrences.

<sup>36</sup> Baker, 1990, p. 283, 428. There are many other examples of such “incorporeal hereditaments,” including seignories, tithes, easements, dignities, etc.

The loose to disappearing connection between property and things has two possible implications: either some ‘property’ should not be called property at all, or the concept of property should be expanded beyond things. Modern property law has largely settled upon the second course, readily incorporating rights such as those to obtain certain kinds of revenues or to exclusively use certain techniques or patterns of symbols as forms of property.<sup>37</sup> Accordingly, the definition of property has gradually been adjusted to refer to ‘resources’ rather than things. Joseph Singer, for example, writes that property “concerns legal relations among people regarding control and disposition of valued resources.”<sup>38</sup> If this expanded definition is appropriate, I doubt it is because there is a shared underlying nature in the ‘objects’ involved, one just waiting there to be elucidated by a particularly insightful lawyer or philosopher. Rather, it seems more likely that what qualifies as an object of property depends on how society is organized, what it values, and especially how it structures relationships with regard to what it values.

**Relations of Property** What are the relations of property? As Searle and De Soto assume, modern property interests are conventionally defined in terms of rights and duties.

**Rights** At an elementary level, property rights can include powers to take the following kinds of actions with regard to a resource:

1. use it, including:
  - a. manage it
  - b. derive profits from it
  - c. alter it (including changing it to produce more revenue or possibly even destroying it)
2. exclude others from it
3. transfer it, including:
  - a. convey it to someone else during the owner’s life

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<sup>37</sup> Although there is a continuing discussion among scholars of intellectual property about whether theirs is really a field of property or one of regulation, this fact does not undermine the point I am making here, which is that intellectual property is treated and structured in the same way as other property. All property law can be conceived as a form of regulation. Thus, my right to have exclusive use of a house can be understood as nothing more than a governmentally made and enforced regulation that others may not enter my house without my permission.

<sup>38</sup> Singer, 2001, p. 2. Jeremy Waldron goes part of this distance, and defines property as “a system of rules governing access to and control of material resources” (1988:31) Waldron’s use of the vague modifier “material” perhaps indicates his caution in extending the definition. Those who cling to thingness in property can see the term as ratifying their views. Conversely, those who think property can include non-physical assets such as techniques and symbols can draw on its other meaning (“having real importance or great consequence” – Websters New Collegiate Dictionary, 1974) to see it as ratifying theirs.

- b. bequeath it to someone else after death through a will
    - c. leave it to legal heirs at death by operation of law
- 4. divide it
  - a. in space
  - b. in time
  - c. in interest (i.e., divide the various rights listed above among different holders)

Indeed, some commentators argue that all of these powers more or less follow from the idea of property as control, and therefore are logically entailed in each other.<sup>39</sup> As I discuss below, however, it also follows from the idea of control that an owner should be able to separate and even further divide these rights, placing them in different people, possibly at different times. When this happens property can get very complicated. First, however, a note on duties.

**Duties** When rights are defined as above in terms of powers over resources, the duties all appear to fall on non-property owners, who are simply obliged to respect whatever rights owners choose to exercise. Property owners, however, typically also are under duties, such as not to use their property in a way that unreasonably damages the property of others, to let others access it under certain circumstances, to keep it from deteriorating into an ‘attractive nuisance,’ to restrain vermin, to pay taxes, etc.<sup>40</sup> Certain such rights of other persons in the owner’s property, e.g., to gather *profits à prendre* (the right to take something from the land of another), to use easements, to restrain nuisances, to prevent development, etc., also have the formal status of property rights. Thus the property rights in any given resource can be held by multiple people and can connect them in a variety of ways.

**People** Relatively unexamined in the discussion thus far, and to some extent in property law as a whole given its focus on powers and duties regarding resources, is what kinds of people are the holders and subjects of property rights. They could in principle range from those who directly use, control, or transfer property to a much broader set of people who benefit from or are precluded from benefiting from property – conceivably as broad as society at large. There is a deep echo of this range in one area

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<sup>39</sup> E.g., Honoré, 1961.

<sup>40</sup> Hohfeld, 1913, 1917. Hohfeld used an eight-fold system of rights and their correlatives of categories (right/duty, privilege/no-right, power/liability, and immunity/disability) to classify the various kinds of rights and duties that can exist, but there is no need to go into them here.

of modern property scholarship, which focuses on the ‘property/contract interface.’<sup>41</sup> Merrill and Smith, for example, argue that a central distinction between contract and property rights is that contract rights refer to very specific arrangements between particular people whereas property rights refer to very general rights relative to the world as a whole. This is an insightful argument which will be discussed further in the next section, but for now I want to suggest that it partially obscures a key element of property, which is the idea that property relationships persist through time as well as space.

**Time** An important old decision serves to illustrate both the role of time in property rights and several problems of change and choice discussed below. In 1808 Tulk sold a vacant piece of land in Leicester Square (a “square garden and pleasure ground”) to Elms but retained a number of houses around the square. In addition to giving Tulk money for the garden, Elms promised that he, as well as his “heirs and assigns” would refrain from building on it, would keep it in good repair, and would allow Tulk’s tenants to walk there for a reasonable fee. Over the next several decades the square changed hands several times. Around 1840 it came into the ownership of Moxhay, who made known his intention to build on the lot in violation of Elm’s promise. Thus the overall set of transactions can be diagrammed as in Figure 1:<sup>42</sup>

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<sup>41</sup> Merrill and Smith, 2001.

<sup>42</sup> This is the form that has become conventional among property scholars, and that serves as the basis for discussions of “horizontal” (Tulk and Elms) and “vertical” (Elms to Moxhay) privity. It should be noted, however, that perhaps a more logically consistent diagram would simply continue in a horizontal line such as follows:

Tulk → Elms → X → Y → Moxhay

This second approach better illustrates the conceptual difficulty of subjecting subsequent purchasers to duties undertaken by earlier ones. But it should also be noted that this difficulty inheres in most duties respecting property, which were typically worked out when predecessors were owners.

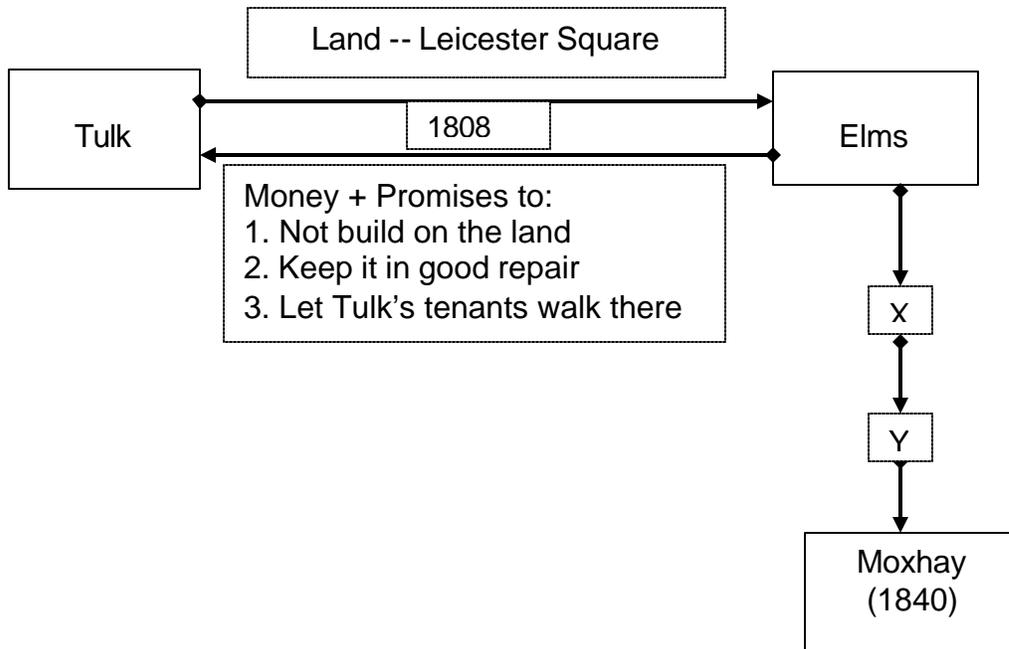


Figure 1. *Tulk v. Moxhay*

No restriction on building was included in the property deed Moxhay received, but he was aware of the promise that Elms had made to Tulk. Tulk sought an injunction to prevent Moxhay from building on the lot. Moxhay, of course had not made the promise; Elms had. More importantly, the longstanding view of the English courts was that regardless of whether the promise not to build bound Elms it did not bind Moxhay under the circumstances of the case. This was quite clear to the law courts, which had primary responsibility for adjudicating property rights; there was not a sufficient relationship between the two estates – no ‘horizontal privity’<sup>43</sup> – to justify imposing the burden on Elm’s successors. The equity courts had long followed the law courts, although one or two decisions in the late 1830s had enforced such covenants on successors.<sup>44</sup> Thus, Moxhay had good reason to believe that he held the land free of the burden, and may have paid more for it as a result of that belief.

Tulk’s lawyer took the case to the equity courts and ultimately obtained an order to Elms not to carry through with his building plans. The Chancellor rested his decision on a traditional equity doctrine that

<sup>43</sup> This term refers to the kind of relationship between the two parties thought necessary to establish an obligation that would stay with the land as it passed from the original promisor to successors. At English law, the only relationship which qualified was a landlord-tenant relationship.

<sup>44</sup> Simpson, 1986, p. 257-62.

promises should be enforceable against subsequent purchasers with notice. He supported it with the arguments that (1) Tulk should be able to sell part of his land without the risk of rendering the remainder worthless; (2) it would be inequitable to allow Moxhay to escape the covenant when the Elms had probably paid a lower price for the property due to the covenant; and (3) Elms could not sell what he did not have (i.e., the right to build on the property). The Chancellor concluded that Tulk had “attached . . . an equity” to the property, and the decision established an important new species of property right, the equitable servitude.

***Structure: Fragmentation and Bundling*** The Tulk case illustrates the ability of property owners to fragment not only their physical assets, but also their rights to them. When Tulk sold Leceister Square, he sought to withhold the rights to build on it, to exclude his tenants, and not to keep it up,<sup>45</sup> thus giving Elms a custom tailored set of rights and duties to the land. This case only begins to suggest the potential ability of property owners to rebundle rights to resources, however. Tulk could also have divided rights to the square in time, for example selling a thirty year interest to Elms, giving the remainder to his own grandchildren, and possibly retaining a right to retake the property if certain conditions were violated. He could also transferred the property to a trustee, to manage in specified ways and to pay the income to designated people who could vary over time and under different conditions. All of the interests of the managers and beneficiaries would qualify as property rights under modern law. The trustee is said to have legal title to the property while the beneficiaries have equitable title, which itself can be divided into a variety of interests.

While all of the above interests are property rights, however, they vary greatly from each other, and one package of rights can vary greatly from the next. The meaning of property, therefore, no longer looks much like the commonsensical one described above – “that thing is mine and I can do what I want with it.” Rather, rights to important resources are often distributed among a number of different people, and in a number of different rights configurations. About the only thing common to property rights is that they involve a legal right to draw a benefit from a valuable resource (and correlative duties to respect those rights). Indeed, this is the predominant view of the definition of property rights developed over the past century, first by the legal realists<sup>46</sup> and then by the economists of law.<sup>47</sup> This concept of property

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<sup>45</sup> The imposition of an affirmative duty on the buyer to keep the property in good repair probably was not possible in English law at the time, but would be possible in American law today, provided Tulk’s lawyer was careful in creating the interests.

<sup>46</sup> E.g., Cook, 1919; Cohen 1935. See generally, Grey 1980.

as a potentially infinite set of rights to draw benefits from resources accords with the models of De Soto and Searle, who both seem to assume that people will develop whatever rights and duties they choose to develop.

U.S. Property law, however, has never gone all the way down this road. While it has facilitated the development of some new types of property rights over time, it still has strictly limited the total number.<sup>48</sup> Legions of property teachers still teach their students on a daily basis that property interests must fall within a fixed number of categories.<sup>49</sup> Property owners are thus generally denied authority to fragment and rebundle their interests in more than a limited number of ways, and this despite the fact that the power to do so can be seen to follow from power to control and dispose of property.<sup>50</sup> Although new categories of property interests are occasionally established, as was the equitable servitude in the case of *Tulk v. Moxhay* described above, such developments are quite rare. The same general conditions apply in civil law systems under the *numerus clausus* principle, although the details are different and the total number of property interests tends to be smaller.<sup>51</sup>

What does the general limitation of types of allowable property rights in Western systems mean for institutional theories of property? The standard perspective in North American scholarship is a functionalist one: the limitation in the number of estates is assumed to reflect efficiency needs. If new interests cannot be created, it is because the social costs of allowing them would exceed the benefits.<sup>52</sup> The general assumption is that transactions costs (i.e., costs of information gathering, negotiation, and enforcement) are the primary problem. Thomas Merrill and Henry Smith have developed a more specific version of this perspective, which focuses on information costs. Their basic argument, as suggested above, is that because property rights are rights against the world, their complexity must be sufficiently limited so that the costs of gathering information on them do not become too high for them to function effectively. Contract rights, by contrast, are rights against particular persons which can be tailored to specific situations, and can therefore efficiently be far more complex.<sup>53</sup>

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<sup>47</sup> E.g., Coase, 1960; Demsetz, 1967.

<sup>48</sup> Merrill and Smith, 2000.

<sup>49</sup> Much of the practical content of property courses involves learning how to use recognized property interests to achieve the highly variable ends of property holders, and how to deal with interests do not fall readily into the permitted categories.

<sup>50</sup> E.g., Heller, 1999; Merrill and Smith, 2001.

<sup>51</sup> Merryman, 1974.

<sup>52</sup> Following Demestz, 1967.

<sup>53</sup> Merrill and Smith, 2001.

Smith is reworking this perspective based on information theory. He focuses on the limitations on rights definitions that derive from the need to communicate effectively to the duty holders who will be obliged to respect that right. His basic argument is that the complexity of property rights is inversely related to the size and diversity of the audience which must receive the communication of the right.<sup>54</sup> Audiences will vary with the nature of the specific right, and therefore the communication limits on rights and their symbolization will vary as well. As Ed Rubin points out, however, the audience may not be the same as the group obliged to respect the right, since professionals hired to interpret property interests are often the effective audiences.<sup>55</sup>

There is also a relatively undeveloped functionalist-oriented argument against fragmentation from an environmental perspective. It argues that the natural resources to which property rights attach are both unique and uniquely interconnected. Therefore property law must either limit fragmentation<sup>56</sup> or require coordination.<sup>57</sup>

While functionalist justifications of finite property rights structures are highly influential, they do not have the field to themselves. A libertarian school of thought argues that bundles of property rights must be limited so as to preserve the ability of owners to manifest their freedom through property. The limitation derives from the survival of assets through time as described above. If one owner were able to exercise freedom so as to disaggregate rights to resources to a great extent, that would preclude future owners from exercising comparable freedom. Therefore the property system constrains the liberty of specific owners to rebundle property rights to resources in order to preserve a high level of liberty for all.<sup>58</sup>

Finally, there are possible explanations which also refer to effects in society, but are less benign. First, of course, it is possible that property rights are established not because they will make society as a whole better off, but rather because they will make certain powerful social groups better off. Saul Levmore (2003), for example, argues that property rights arrangements often reflect the organizational advantages and established power of well-off groups, who often manage to further adjust property rights to make themselves better off. James Scott (1998) provides a lengthy, well documented argument that property rights have typically been systematized not to recognize

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<sup>54</sup> H. Smith, 2003.

<sup>55</sup> Rubin forthcoming.

<sup>56</sup> Arnold, 2002; Freyfogle, 2002.

<sup>57</sup> Meidinger, 1998.

<sup>58</sup> E.g., Epstein, 1995. This argument assumes that it is significantly more difficult to reaggregate property rights than it is to disaggregate them in the first place, thereby incorporating a transactions cost perspective.

existing social relationships, but to allow nation states to control and reshape them – i.e., to exercise and stabilize political power. In the process of doing so, states have frequently acted to simplify and homogenize property rights by eliminating the complexities of traditional property rights.

The above explanations are basically instrumental and cultural. It would be nice if institutional ontology could shed some additional light on limitations in property rights institutions. If there is something about the fundamental nature of institutions, or of rights, which helps explain the limited number of property interests, this would be illuminating both for property rights theorists and for practitioners like De Soto. At present, however, institutional ontology seems to have little to say about this issue. It is raised here in the hope of spurring further discussion among ontologists. The obvious areas to be explored are whether there is something inherent in the nature of rights, or perhaps in their symbolization, which contributes to such limits in the number of species.

Even without a better ontology, the numerus clausus principle has direct implications for a property focused development theory like De Soto's. First, those in charge of integrating informal with formal property systems in less developed countries will have to pay attention to how many types of interests are involved. If there are not significantly more than exist in property systems generally, they do not face a particularly complicated fragmentation/bundling problem, and can proceed to deal with the other issues before them. It would still be important to have this information reported to property and other institutions scholars, however, since it would suggest that there is a general cross-cultural pattern to be explained. If, however, property law unifiers find a great profusion of potential interests they will be faced with a difficult question of how many and which ones to recognize. If they follow the functionalist analysis offered by Merrill and Smith, they will have to deal with questions of transactions costs and interpretability. If they follow the more culturally based libertarian perspective offered by Epstein, however, they will at least in principle be free to recognize a much larger profusion of interests on grounds that different levels and types of freedom through property are appropriate in different cultures. This could be an important learning opportunity for institutional theory if information is compiled on what kinds of property interests are ultimately recognized in the less developed countries, and how they fare over time.

**Choice** The essentially quantitative numerus clausus problem may be one of the simpler problems facing institutional theories of property. There are also important questions of choice involved in (1) defining

the contents of specific rights and (2) choosing among competing property rights based in different cultural systems.

**Competing Definitions** Many property interests are only partially defined, and are subject to sometimes surprising elaborations over time. Whether Tulk had the legal right to prevent Elms' successors from building on Leicester Square, for example, was questionable at best when he sold Elms the land. Assuming he had good legal advice, Tulk essentially gambled that a court in the future might see things his way. Elms, on the other hand, may have been confident that his promise was not enforceable against his successors, but if well advised would also have realized there was some risk that it might eventually be enforced. For present purposes what is important is that a certain amount of indeterminacy seems to be the general attribute property rights.<sup>59</sup> New possibilities, problems, costs, opportunities and understandings inevitably arise which put them in question. Thus, between the right and the duty in any specific property interest may reside a considerable amount of uncertainty.

Partial indeterminacy of rights may not be a significant problem for De Soto's development policy, since no system can avoid it, but it creates a conceptual gap that a satisfactory rights-based institutional ontology can be expected to address. One approach, of course, is simply to say that definitions of rights and duties are subject to the inherent limits of language and leave it at that. But that approach may fail seriously short of comprehending the institutional dimensions of the problem.

An alternative approach would be to try to analyze rights indeterminacy and the institutions which address it in practice. The *Tulk* case, for example, illustrated two interesting institutional legal phenomena. First, two distinct decisional forums, the law courts and the equity courts, both had the capacity to define and elaborate the contents of property rights. This is a common condition in legal systems, and one which Searle's model does not really address. It may violate what I called the condition of logical consistency in Section 2. This is because it is the case that both the law and the equity courts were empowered to answer the same question of rights, and in effect to answer it differently. One could try to sidestep this problem by noting that in the end the equity court's answer prevailed, but this would then further

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<sup>59</sup> There were many other such questions. Could one of Tulk's tenants have enforced Elm's promises? Perhaps, but it is difficult to be sure. Could a married woman have enforced them? No then, but yes later. Thus, who could hold the right was changed from outside the context of the right. If tenants had affirmative rights to walk in the square, did they have the right to bring their guests? Could Moxhay have killed song birds on the land? One could go on, but the point should be clear enough.

enfeeble institutional ontology's capacity to illuminate widespread phenomena of great practical importance.

A second striking feature of the *Tulk* case was that in deciding it the equity court took a general principle which it had been applying in other lines of cases – that a purchaser with notice of an obligation should take the property subject to that obligation – and applied it to the question of when a 'real covenant' should run with the land. This too is an extremely common characteristic of legal decision making. Courts, and for that matter legislatures, are constantly asked to treat one claim as certain others are treated (and not as still others are treated). Often these requests call on general principles, such as fairness, efficiency, or moral rectitude. It is difficult to describe this process adequately in terms of a rights based, deontological model – at least if rights are not conceived at least as part containing or being subject to further normative argument. Addressing this phenomenon may require ontology to incorporate certain hermeneutic or discursive elements.<sup>60</sup>

**Competing Systems** When Europeans arrived in North America they found functioning native property systems,<sup>61</sup> although they often did not recognize them as such. Those property systems were inconsistent with the Europeans' own, and generally inconsistent with their claims to resources in the 'new world.' When the inevitable conflict between rights based in the two systems reached the U.S. Supreme Court in the early 19<sup>th</sup> Century, Chief Justice Marshall ruled for the unanimous Court that land rights obtained from the U.S. trumped those obtained from Native Americans.<sup>62</sup> The U.S., he said, had acquired by treaty the rights held by the British under European legal principles. The 'doctrine of discovery' gave the first European nation to discover land 'then unknown to Christian peoples' the right to take possession of and impose its law on it, which the British had done in much of eastern North America. The U.S. courts, according to Marshall, had no choice but to follow the law of the U.S. system. Neither Britain nor the U.S. Congress had made any effort to recognize and incorporate Indian land rights, and the Court thus felt bound to recognize their decision to override Indian title.<sup>63</sup> Far from incorporating indigenous property systems, the U.S. system sought to override them.

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<sup>60</sup> For a pragmatic hermeneutic perspective, see Rose, 1994.

<sup>61</sup> Cronon, 1983.

<sup>62</sup> *Johnson v. M'Intosh*, 1823.

<sup>63</sup> "The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold,

At the same time, however, the Supreme Court did not go as far in overriding Indian property rights as might have been expected. The Court limited its holding to the proposition that discovery gave the U.S. the exclusive right to extinguish Indian title. Until the U.S. did that, native tribes retained a right of occupancy to their lands, a right which could be elaborated or strengthened through treaty and other negotiations. Moreover, the decision tried to limit the U.S. policy to what Marshall presented as the particular difficulties of dealing with Indians:

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them. . . .

Where incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers. . . .

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.<sup>64</sup>

As overwrought as the language about the savage nature of Indians might seem to the modern reader, the overall thrust of the opinion was to ratify the U.S. power to extinguish Indian title, but also to keep alive the discussion appropriate limits on that power. This discussion has continued in the U.S. legal system for nearly 200 years since the decision, and the issue of Indian land rights still has not been conclusively settled.<sup>65</sup> This suggests several points about property

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originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it." *Ibid*, pages 588-89.

<sup>64</sup> *Johnson v. M'Intosh*, p. 589-90.

<sup>65</sup> This unsettled question is part of a larger legacy of plural legal systems. Indian legal systems, although greatly altered by the colonial experience, remain in effect in

rights for ontology and development policy. First, of course, not all informal rights were incorporated in the U.S. property system during the 19<sup>th</sup> century. The U.S. system refused to give many Native American based property claims the status of institutional facts, yet it retained them as normative problems to be addressed. This raises the question of what kinds of rights are and should be incorporated in modern property systems. Like the process of elaborating existing rights, the choice of which rights to incorporate is hard to describe as a purely factual question, particularly when the official decision process continues a normative dialogue on the proper respect for rights originating outside the system.

Development policy has no choice but to address the problem of which rights to incorporate. For example, when if at all should state systems incorporate informal property systems that seriously disadvantage women?<sup>66</sup> Similarly, when should informal property rights deriving from violence or the threat of violence be incorporated? Making such decisions will at a minimum require some sort of normative analysis. But the problem might also be more ontologically complex. For there is also a body of scholarship suggesting that there are fundamental incompatibilities between traditional and modern legal systems, and that translating traditional relationships into a modern system will alter both of them.<sup>67</sup> If so, the challenges to development policy and institutional ontology are great indeed.

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large parts of the country, creating many complicated questions of rights and identity. See, e.g., Mcsloy 1994.

There are also numerous other property rights systems operating inside the U.S. that are neither incorporated nor effectively suppressed by the official legal system. For example, lobster fishermen working in public waters typically organize into groups that define and enforce boundaries to their fishing areas, as well as other rules for catching lobsters. These property systems are outside the official system, and are occasionally challenged by U.S. officials when the lobstermen's enforcement systems become too aggressive. But for the most part they are allowed to continue without either incorporation or suppression. Acheson, 1988.

Some systems seem more directly at odds with the official system, but also continue to persist. One of my colleagues, for example, relates the story of how his father bought a window washing business in New York City. The father needed a loan, but had no real property with which to secure the loan. He obtained a loan from a private financier, with the clear understanding that if he defaulted on the loan several of his limbs would be broken. We could say that the borrower gave the lender a security interest in his physical well being. The lender in turn provided capital (at extremely high interest rates) but also protected his borrower's 'territory,' ensuring that competitors would not enter the area so as to drive down prices and reduce the value of the loan. This was a common arrangement for certain kinds of small business loans in New York City for several decades, and might still be.

<sup>66</sup> This is a very real question in development policy. See, e.g., Mukopadhyay, 2001.

<sup>67</sup> E.g., Zerner, 2003; Engle, 1978.

**Externally Driven Change** One of the most interesting current developments is that definitions of property rights in national legal systems are increasingly subject to transnational influences. Two types of developments exemplify this process. The first is the growth of 'regulatory expropriations' law through international trade treaties. The second is the definition and enforcement of standards for property management by non-governmental organizations.

**Regulatory Expropriations** The North American Free Trade Agreement provides that no country may "directly or indirectly expropriate an investment of an investor" from another country, or "take a measure tantamount to . . . expropriation," unless it meets a number of conditions, including the payment of just compensation.<sup>68</sup> The provision has close analogues in other trade treaties, and is being vigorously promoted as a desirable trade provision by many transnational business organizations and developed countries.

A NAFTA tribunal recently found Mexico to have violated the provision in the case of a U.S. corporation which had planned to build a hazardous waste landfill in the country.<sup>69</sup> A Mexican company had obtained state and local permits to build a hazardous waste landfill. During the same period the Mexican company was negotiating to sell its assets, including the permits (arguably another example of intangible property rights), to U.S. based Metalclad Corporation. Shortly after the sale was consummated the state issued a 'stop work' order on grounds that the company lacked a necessary construction permit. There were also ongoing local demonstrations against the plant. Mexican federal officials assured Metalclad that it had all of the necessary permits, but urged it to apply for the additional permit and to continue negotiations with the state and local governments. The city continued efforts to block the project, and Metalclad eventually filed a NAFTA claim. Thereafter the state governor declared a large area including the plant site as a natural area for the purpose of protecting rare cacti, precluding construction of the landfill there.

While it appears extremely unlikely that this sequence of events would have been treated as a compensable taking under Mexican law, the NAFTA tribunal found the Mexican state and local governments to

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<sup>68</sup> North American Free Trade Agreement, Article 1110(1): "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law . . . and (d) on payment of compensation . . . ."

<sup>69</sup> *Metalclad v. United Mexican States* (2001)

have violated the expropriation provision. It ruled that expropriation under NAFTA includes

. . . not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state [emphasis added].

The Mexican government was ordered to pay Metalclad U.S.\$16.7 million plus interest.

Most notably, the standard for defining the expropriated property interest was not Mexican law, but rather the reasonable expectations of business owners as defined by the NAFTA tribunal. Thus property rights of foreign investors are coming to be defined not by the national legal system of the country, but rather by international business tribunals authorized to accept complaints by foreign corporations against individual countries.<sup>70</sup>

**Non-Governmental Rights Definition** A second process of transnational property rights definition operates largely outside the realm of government, and is practiced by transnational civil society organizations seeking to set global standards for proper business behavior. A good example is the Forest Stewardship Council (FSC), which sets and implements global standards for forest management. These standards are formally voluntary, but companies that meet them can claim to be meeting the highest standards of propriety. Products derived from their forests can carry the FSC logo, which brings with it the approval of transnational environmental, labor, and social justice organizations.

The standards set by the FSC include protections for communities, indigenous groups, laborers, and biodiversity, among other things.<sup>71</sup>

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<sup>70</sup> The ironic result is that, at least in some cases, the property rights of a foreign investor will be greater than those of a domestic one, and that in any event they will not be defined solely in reference to national law.

<sup>71</sup> Sample standards include the following:

Principle 2. Long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established.

Principle 3. The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

For example, certified forestry operations are required to respect customary use rights such as traditional hunting and gathering rights. In many national legal systems these rights are either not recognized or not protected. One of the main goals of the FSC process is to gain them recognition, and thereby to raise the level of protection of customary property rights. Its goals are similar with regard to indigenous peoples' rights, labor rights, and environmental protection. The basic assumption is that if enough public demand for meeting these standards can be established through a formally voluntary certification program, they will eventually become institutionalized duties applicable to forestry operations in general. Perhaps they will be adopted into formal legislation, which has happened in some places, but perhaps not. So long as the duties become established and accepted expectations, property rights will have been redefined to include them.

While it is too early to say that the FSC process has been a thoroughgoing success, it is already clear that it has had a tremendous influence. The center of opinion among practicing foresters seems to have moved from vigorous resistance to grudging acceptance to a near embrace of certification system duties. The FSC process has given rise to a number of competing non-governmental standard setting processes, some of them industry based and intended to blunt the demands of the FSC. But they have ended up placing a broad array of forest management operations under public scrutiny, and appear to be stimulating a gradual rise in standards for acceptable forest management. Thus neighbors, indigenous groups, laborers, and even various exemplars of biodiversity are gaining an institutionalized right to better treatment by forestry management operations, and that right is being constructed in a global process of dialogue and contestation. Property holders are gradually coming under a concomitant duty. The processes in which these rights and duties are being redefined extends well beyond the local polities which have traditionally been seen as the source of property rights, and again, it is hard to see as entailed in any way in the original definitions of rights and duties attendant on property holding.

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Principle 4. Forest management operations shall maintain or enhance the long-term social and economic well-being of forest workers and local communities. . . .

Principle 6. Forest management shall conserve biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest. . . .

(Forest Stewardship Council, 1993.)

The kinds of property rights redefinition discussed in this section can only be partially accounted for within the frameworks of De Soto and Searle. On one hand, they are both open to non-governmentally created rights and duties, and the FSC process is an example of this. On the other hand, the process is happening at a global, rather than a local level. For De Soto, this at least raises questions of where to look for institutionalized property rights. Some of them are apparently being negotiated among transnational communities. For Searle, these processes raise questions about both who an authorized actor is and what the relevant community is. Authorized actors in the NAFTA case were created by the national governments. But it is not clear that those governments had authority to give those actors the power to redefine property rights within their jurisdictions; indeed it is quite unlikely in most cases. Thus, if those actors are exercising that power, they may be seizing it to some extent, or perhaps creating it, in the course of doing so.

## 5. Conclusion

This paper's discussion of modern property institutions has focused largely on features that seem not to be well accounted for in Searle's ontology and De Soto's development prescriptions. These include: (1) the tendency of modern property systems to constrain the available structures of rights and duties to a limited set of forms; (2) the partial indeterminacy and changability of all property rights definitions; (3) the existence of competing decision makers and principles for elaborating property rights in modern legal systems; (4) the selective incorporation and suppression of indigenous legal arrangements by modern legal systems; (5) the shifting and contested boundaries of the institutional systems – the relevant communities – that define and implement property rights, and (6) overarching these all, a tendency of rights and code-based models of legal institutions to underplay or ignore the open ended and creative elements of institutional processes for adjudicating and elaborating property rights.

This of course has been a selective rendering of property law. A different one might have focused more on what the perspectives of De Soto and Searle can teach us about property. Yet, this approach may be the more productive one in the end. First, of course, it offers Searle and De Soto some material which might be useful to them in further developing their perspectives. And it may turn out to be the case that their work will shed significant light on the appropriate level of fragmentation of property rights, the role of indeterminacy in property rights definitions, and choices among alternative communities in recognizing property rights. That remains to be seen.

Either way, however, the composite picture that emerges from this exercise may indicate some important areas for further development in Searle's and De Soto's perspectives on institutions. Perhaps the most fundamental is that perspectives which focus on rights and duties as facts tend to draw attention away from some of the processes involved in creating, maintaining, elaborating, revising, and contesting those facts. If rights and duties are seen as largely the creation of authorized actors exercising rights and duties that they already have, we have no account of non-reductive exercises of power and politics. Normative arguments and contestation are hard to see as anything other than outcomes. And the process of choice among alternative claims of right will be seen as nothing more than a result of collective acceptance. This will be seriously shortsighted to the degree that that the institutional facts of rights and duties involve provisional allocations of the power to act and make arguments in an institutional framework subject to continuing renegotiation and frequent, sometimes abrupt change.

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