Brazilian Regularization of Title in Light of *Moradia*, Compared to the United States Understandings of Homeownership and Homelessness

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Brazilian Regularization of Title in Light of Moradia, Compared to the United States Understandings of Homeownership and Homelessness

Marc R. Poirier*

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I. INTRODUCTION

This Essay is the first fruit of a project arising from observations made during a week-long study trip to Rio de Janeiro in July, 2010. It considers in a preliminary way some cultural resonances of a program of regularizing title (regularização) to dwellings in Rio’s favelas, comparing them to recent and ongoing understandings of the cultural significance of homeownership and homelessness in United States property jurisprudence. Given the space limits here, the Essay focuses mostly on an exposition of some generally shared United States approaches to homeownership and homelessness in comparison to a very pared-down version of (somewhat) analogous Brazilian concepts and concerns. A truly detailed exploration of regularização in Rio, the right to

3. This study week, attended by professors and graduate students from several disciplines and several countries, was part of a series of study weeks called “Study Space”, produced by Professor Colin Crawford, until recently of Georgia State University College of Law and now of Tulane University Law School. The Rio de Janeiro 2010 Study Space was co-organized by Professors Romulo Sampaio and Maria Clara Dias. The participants attended lectures and participated in activities concerning the subjects of land use, the environment, and issues of wealth and poverty in Rio.
5. In making my comparison, I focus on formalization of title. Edéssio Fernandes explains that regularization may in fact encompass several types of legal rights. “The definition of the nature of the rights to be attributed to dwellers has varied greatly, ranging from titles (such as freehold and leasehold) to contracts (such as social rent and other rental mechanisms) and precarious administrative permits (such as
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housing or moradia,6 the “right to the city”,7 and the “social function of property” as applied in Brazil,8 and of cidadania9 generally,

temporary licenses and certificates of occupancy).” Edésio Fernandes, The Influence of de Soto’s The Mystery of Capital, LAND LINES (Lincoln Institute of Land Policy), January, 2002, at 5; see Edésio Fernandes, Regularization of Informal Settlements in Latin America 38-39 (Lincoln Inst. Land Pol’y 2011) (cataloguing several different types of titles or enforceable rights that can provide security of tenure). Moreover, Fernandes identifies two basic, intertwined goals of regularization programs: “to recognize security of tenure and to promote the sociospatial integration of informal communities within the broader urban structures and society.” Fernandes [2002], supra, at 5. Some Latin American countries have focused solely on formalization of title, while Brazil has sought to provide legal security of tenure within a set of integrated social and legal interventions. Fernandes [2011], supra, at 26-27.

6. This right is typically expressed in English as a “right to housing” or “right to shelter.” It is expressed in Portuguese by a right to moradia. The root word morar means to dwell someplace. Colin Crawford criticizes the standard English translation of moradia. “[T]he translation of ‘moradia’ as ‘housing’ is a highly imperfect one because in Portuguese the word connotes more than mere habitation but also the basket of social services, for example, roads, utilities, access to recreation and other services, that typically accompany planned communities.” Crawford, supra note 4, at 1102. Article 11(1) of the International Covenant on Economic, Social, and Political Rights provides for a right to adequate housing. International Covenant on Economic, Social, and Political Rights, Dec. 19, 1966, S. TREATY DOC. No. 95-19 (1978), 993 U.N.T.S. 3 [hereinafter Economic Covenant]. An important interpretation of this right may be found at General Comment 4 of the United Nations Committee on Economic, Social, and Political Rights. United Nations Committee on Economic, Social, and Political Rights, General Comment 4, U.N. Doc. E/1992/23 (12/13/1991), available at http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/469f4d91a9378221c12563ed0053547e?Opendocument.

7. The term was coined by French philosopher Henri Lefebvre. HENRI LEFEBVRE, LE DROIT À LA VILLE (1968); see also Henri Lefebvre, The Urban Revolution (Robert Bononno trans., U. Minn. Press 2003). It is quite nebulous. As one true adherent to Lefebvre observes, “the density of Lefebvre’s style can at times obscure his message.” Chris Butler, Critical Legal Studies and the Politics of Space, 18 SOC. & LEGAL STUD. 313, 327 (2009). Ngai Pindell provides a helpful introduction to the Brazilian law, history, and practice on the right to the city. Pindell, supra note 2, at 440-59. Whatever the term means, Brazil takes the right to the city seriously. See Edésio Fernandes, Constructing the “Right to the City” in Brazil, 16 SOC. & LEGAL STUD. 201, 202 (2007).

8. The social function of property is also part of Brazilian law and practice, though perhaps more problematically. See generally Alexandre dos Santos Cunha, The Social Function of Property in Brazilian Law, 80 FORDHAM L. REV. 1171 (2011). Sometimes a “social function of the city” is identified and discussed separately from the “social function of property”. See, e.g., Pindell, supra note 2, at 437. Pindell writes that the social function of the city is “not . . . succinctly summarized” and “[i]n part provides a context for the exercise of the social function of property.” Id. This sounds accurate to me, and I am not treating the social function of city at length separately from the social function of property here. The concepts overlap at a cultural level.

9. Cidadania is the Portuguese word for citizenship. I find significant the Portuguese focus on citizenship deriving from the city (Portuguese cidade) as opposed to the English focus on citizenship applying to the individual citizen (though to be sure citizen in English is also derived from “city”).
will have to await further research. Some of these concepts are explored briefly in Section II.B.¹⁰

In a broad sense, what United States property theory and popular culture typically lack is the sociolegal context that Brazilian jurisprudence and custom supply. My initial observation at the end of my study week in Rio¹¹ was that the desire of the favela-dweller to obtain regularized title has a very different inflection than the longstanding focus in the United States on the importance of achieving homeownership. In the United States, homeownership signifies achieving both a certain status and a certain economic security, on an individual and family basis.¹² Homeownership, long part of “the American Dream,”¹³ does not expressly focus on the raft of interconnected services and interpersonal relations that may come with security of tenure. Nor does it typically focus immediately on the way in which dwelling as a homeowner encourages a different relationship to land, community, and local government.¹⁴ Security and community also seem to be behind Rio’s titling program.¹⁵ During the Study Space discussions, however, the concerns were expressed more in terms of reliable stability of connection, availability of services, and citizenship. Regularizing title did not seem to me to have a principal signifi-

¹⁰. See infra Section II.B.
¹¹. See the conversations described infra Section II.A.
¹². See infra Section III. Americans from historically oppressed groups, such as African-Americans and Latino-Americans, will likely understand their personal success in achieving homeownership against a backdrop of race relations, and may therefore have a different appreciation of the way in which their individual efforts and achievements are shaped by larger group and class dynamics.
¹³. See, JIM CULLEN, THE AMERICAN DREAM: A SHORT HISTORY OF AN IDEA THAT SHAPED A NATION 134-57 (2003) (chapter addressing the dream of owning a detached house). I use the term “United States” here, rather than “America” and “American”, whenever possible, as there are two continents of “American” countries. However, sometimes an idiomatic phrase or quotation such as “the American Dream” has to be invoked.
¹⁴. There is certainly a cogent argument within United States jurisprudence that homeowners behave differently than renters because of their long-term commitment to dwelling on property in a particular place, and that that commitment shapes their interaction with the community. See generally WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES (2001). This analysis, inflected through a lens of individual behavior, self-interest, and public choice mechanisms at the level of local government, is not so much about what homeownership means as about what it incentivizes. Fischel provides an economic account of how homeownership affects the construction of community. But cf. Stephanie M. Stern, Reassessing the Citizen Virtues of Homeownership, 111 COLUM. L. REV. 890 (2011) (critiquing and reassessing the notion of citizenship effects of homeownership).
¹⁵. See infra Section II.
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cance of an individual’s achieving a certain status or gaining access to a wealth-preserving mechanism.¹⁶

Some of the concerns that seem to be expressed in this particular Brazilian cultural understanding of providing regularized formal title to the dwelling appear more clearly in United States discussions of homelessness.¹⁷ These include, for example, achieving overnight shelter, privacy, protection by police, and access to basic social services. However, much of the United States discourse on homelessness is attuned to questions of individual responsibility for homelessness and to compassionate social and legal responses to homelessness on an individual basis. Alternatively, the homelessness discourse questions the responsibility of specific institutions, such as hospitals and prisons, recommending policy changes to redirect institutional behavior. The dimension of interconnection, both in terms of actual services and of psychological citizenship, is not as often expressed or considered.¹⁸

One contribution of this Essay will be to identify Jane Baron’s critique of United States discourse around homelessness¹⁹ and suggest that it could also apply, in reverse, to homeownership and informal security of tenure. Baron argues that United States homelessness discourse lacks a consideration of the role of property and its connecting, socializing, and citizenship functions.²⁰ Baron argues that we need to understand the homeless as having the opposite of property, as having “no property.”²¹ She is correct. Baron could go further, though. To my mind, the issue is not “no property” as such, but having no place to dwell, to take root. Security of home/housing/shelter facilitates the web of relationships and obligations that Baron correctly identifies as a consequence of “property.”

In the penultimate Section of this essay, I advance five possible explanations for the different resonances of homeownership

¹⁶. The interpretation of regularization that conforms to Hernando de Soto’s theory of freeing up informal wealth by formalizing ownership is not discussed in any detail in this Essay. See infra the brief discussion at the end of Section I.

¹⁷. See infra Section IV.

¹⁸. To be sure, claims of constitutional citizenship are mobilized, for example in order to argue that the homeless are constitutionally protected from criminalization. But homelessness is not thereby conceived of as deserving citizenship in the sense of cidadania, full participation in community.


²⁰. Id. at 286-87.

²¹. Id.
discourse in the United States and Brazil. One factor is surely the two countries’ different histories around the distribution of public land, and thus, of concentration of land ownership. A second is different legal traditions around the basic account of property, with contemporary Brazilian discourse relying heavily on a certain conception of the social function of property.

Third, the process of regularization of title in Brazil is colored by the incontrovertible presence of immense populations of visible squatter communities. Thus, in Brazil regularization of title becomes part of the discourse as to where millions of people have a right to dwell, if anywhere. As things stand, the inhabitants of informal communities are neither homeless nor altogether secure. In contrast, squatter communities in the United States are perhaps less evident. Perhaps for this reason too, United States discourse often proceeds on a level that fails to engage the political dimensions of homelessness on the one hand, and of homeownership on the other; and it may also be especially thin on race and

22. See infra Section V.
23. See infra Section V.A.
24. See infra Section V.B.
25. See infra Section V.C.
26. Jane Larson argues that the presence of large irregular populations in colonias, principally in Texas, provides the primary example of squatter communities at a large scale in the United States; and further that these communities are understudied. See Jane E. Larson, Informality, Illegality, and Inequality, 20 Yale L. & Pol’y Rev. 137, 140-41 (2002). It is certainly true that colonias have not become a central feature of the shared United States understanding of homelessness or homeownership. Tent cities are another type of informal community whose presence and visibility in the United States waxes and wanes with the economy. See, Zoe Loftus-Farren, Comment, Tent Cities: An Interim Solution to Homelessness and Affordable Housing Shortages in the United States, 99 Calif. L. Rev. 1037 (2011). These too are understudied. Id. at 1057.

Michelle Wilde Anderson makes a persuasive case that poor communities living in unincorporated areas in the urban fringe, typically Black or Latino (and including colonias as one type), are similarly misunderstood and understudied. See, e.g., Michelle Wilde Anderson, Mapped Out of Local Democracy, 62 Stan. L. Rev. 931 (2010); Michelle Wilde Anderson, Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe, 55 UCLA L. Rev. 1095 (2008). Many of her recommendations for addressing the hardships of these communities systematically, once they are understood systematically, involve community empowerment through reform of county government—not an argument about formal title, to be sure, but surely one about effectively belonging to a political community. Also, Anderson’s underlying concerns around living conditions in the poor urban fringe and her desire to enhance human flourishing have much in common with concerns about informal communities, and her solutions in a way propose a kind of enhanced localism. See discussion of localism as an underlying issue in understanding informal settlements, infra Sections V.E and VI.
class analysis. Another potential source of the difference is that United States jurisprudence typically rejects broad aspirational principles such as a right to housing as “law.” This may be especially true as to principles generated from foreign and international sources. “Progressive realization” of broad aspirational principles, a common understanding applied to some of the more far-reaching assertions of international human rights law, may also be outside the mainstream of United States concepts of law.

In the Section V.E, I observe that suspicions about broad aspirations as law combine with a characteristic reluctance in mainstream United States property jurisprudence to see property as processual, rather than fixed by stable principles. The dominant approach to law is abstract, universal, and monist. Consequently, United States property jurisprudence may obscure or seriously discount the vague, always-in-flux qualities of both broad aspirations for housing for the poor and pragmatic informal property arrangements that sometimes achieve these goals outside a strictly legal framework.

The Essay concludes with a few suggestions for some next
steps. These include pursuit of further specific investigations of informal communities in both the United States and the developing world; reflections on the role of the local (not so much the specifically informal or private, but the local) in making informal settlements work at all; and problematizing unduly universal, individualistic, classical liberal property theory. Abstract property discourse, by masking the local, may in itself have a political function and foster injustice. It may treat land as just another commodity, appropriately subject to one set of rules, rather than as involving particularized arrangements about dwelling in local contexts that implicate class and often race.

One important approach to regularizing title is given short shrift in this Essay. Hernando de Soto famously proposed that great wealth resided in informal poor communities in cities around the world, and that it could be unleashed to create more wealth through a formalization of title that would enable that wealth to function as capital. Whether de Soto’s argument is correct is subject to much ongoing discussion; at best it seems to be a sufficient condition for economic improvement of the welfare of the poor only under certain conditions. Whatever the merits of de

31. See infra Section VI.
33. “Far from being a panacea, regularization and titling programs possess advantages and disadvantages which must be evaluated on a case by case basis.” Carmen G. Gonzalez, Squatters, Pirates, and Entrepreneurs: Is Informal Housing the Solution to the Urban Housing Crisis?, 40 U. MIAMI INTER-AM. L. REV. 239, 251 (2009). Michael Trebilcock and various co-authors reach similar conclusions about the contingency of the benefits of formalizing property rights in land. See Jamie Baxter & Michael Trebilcock, “Formalizing” Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform, 7 INDIGENOUS L.J. 45 (2009); Michael Trebilcock & Paul-Erik Veel, Property Rights and Development: The Contingent Case for Formalization, 30 U. PA. J. INT’L L. 397 (2008). Alan Gilbert quips that the policy is popular with the right because “Legalized self-help housing permits people to become proper citizens; they can borrow money against their homes . . . . Ironically, you are not recognized as a full citizen in modern society until you have been in debt and have a credit rating.” Alan Gilbert, Love in the Time of Enhanced Capital Flows: Reflections on the Links between Liberalization and Informality, in Urban Informality: Transnational Perspectives from the Middle East, Latin America, and South Asia 13, 57 (Ananya Roy & Nezar Alsayyad eds., 2004); see also Ray Bromley, Poverty & Power: Why de Soto’s “Mystery of Capital” Cannot Be Solved, in Urban Informality: Transnational Perspectives from the Middle East, Latin America, and South Asia 271 (Ananya Roy & Nezar Alsayyad eds., 2004) (critiquing de Soto); Dyal-Chand, supra note 27 (evaluating de Soto’s hypothesis by reference to homeownership among poor and minority cohorts in the United States; they have access to the property rights de Soto recommends for the Global South, but remain poor); Edésio Fernandes, An Evaluation of Hernando de Soto’s Agenda, lecture at the Lincoln Institute of Land
II. THE BACKGROUND OF THE INQUIRY

A. One Fine Day in Rio de Janeiro

In one morning study session during our Study Space week, the topic was *regularização*, the regularization of title in Rio’s *favelas*. These settlements, many on public land in Rio, have been in existence for generations, and house more than a million of Rio’s poor and many millions more throughout Brazil.34 Favela Policy, March 25, 2009, available at https://www.lincolninst.edu/pubs/video/ee0da0420c214e44a9ece95de677b5539/An-Evaluation-of-Hernando-de-Soto-s-Agenda (comprehensive and accessible critique of de Soto’s theory) (hereinafter “Fernandes lecture”); Fernandes [2002], supra note 5, at 8 (de Soto is correct to question the legitimacy of exclusionary legal systems, but misunderstands the economic processes of ownership as well as to some extent the legal processes); Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto: What Difference Does Legal Title Make?*, 24 INT’L DEV. PLAN. REV. 1 (2002); HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed., 2010) (offering a variety of authors’ assessments of De Soto’s arguments); Tayyab Mahmud, “Surplus Humanity” and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession, 14 CHAP. L. REV. 1, 60 - 65 (2010) (critiquing de Soto’s thesis and the neoliberal intellectual and political matrix in which it emerged and has been tested); Jean-Louis van Gelder, Legal Tenure Security, Perceived Tenure Security and Housing Improvement in Buenos Aires: An Attempt towards Integration, 33 INT’L J. URB. & REG. RES. 126, 142 (2009) (“scholars have drawn attention to the face that legalization can diminish rather than increase the tenure security or certain groups of dwellers”); Ann Varley, *Private or Public: Debating the Meaning of Tenure Legalization*, 26 INT’L J. URB. & REG. RES. 449 (2002); Peter M. Ward, Flavio de Souza, Cecilia Giusti, & Jane E. Larson, El Título en la Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias, 36 LAW & SOC. INQ. 1 (2011) (questioning de Soto’s thesis in light of the impact of formal titling on low-income housing in Texas colonias).

Disagreement among scholars and policymakers over whether regularization of title will assist those living in so-called informal housing arrangements or rather destabilize their security of tenure predates de Soto’s books by a couple of decades. See, e.g., Varley, supra note 39, at 449 (“Although de Soto writes as though he invented the idea of giving the poor access to property in order to combat poverty, international debate about regularization dates back to the 1960s, and in particular to the work of John Turner. . . .”) (referencing J.F.C. Turner, *Housing Priorities, Settlement Patterns, and Urban Development in Modernizing Countries*, 34 J. AM. INST. PLANNERS 354 (1968)).

34. “[F]or some time now Brazil’s process of informal urban development has not been the exception, but the main socio-economic effect was to produce urban space in
dwellers do not have formal title to the land they live on nor to their houses. One member of the panel presenting on this topic, a Brazilian law professor, explained a program to supplement the informal ownership of the dwellings in *favelas* with formal legal title to them. He pointed out, however, that registration of title would trigger a title registration fee equal to four months’ basic income, as well as a subsequent obligation to pay taxes. Thus, it was very likely that as a result of titling, many of the *favela* residents would lose their dwellings instead of having their tenure made more secure by regularization of title.

A second panel member, an inhabitant of the Cantagalo *favela*,

then explained the importance to him of acquiring title: it would bring him and others in his community into fuller and more regular participation within the larger community. In the ensuing question and answer period, the resident was asked whether he was concerned about the potential loss of his property through failure to pay fees and taxes, or other costs such as utility bills. He insisted that it was most important to him to acquire the status of owner and to secure a “place on the map.” Others in the room joined the conversation. They explained that in fact many *favelas*, those located on government land, did not appear on certain official maps at all, for they had been built on what was still the country.” Fernandes, supra note 7, at 203. All cities with more than 500,000 inhabitants have *favelas*, as do 80 per cent of cities with 100,000 to 500,000 inhabitants, 45 per cent of those with a population of 20,000 to 100,000, and 20 per cent of cities with less than 20,000 inhabitants. *Id.* In 2009, Rio de Janeiro had a population of 6 million, with 1.25 million living in *favelas* and other informal settlements. Fernandes [2011], supra note 5, at 14. There are 1200 *favelas* in Rio. *Id.* at 32. In Latin America generally, in 2000 some 75% of the total population lived in urban areas, making it the most urbanized region in the world. . . . It is estimated that between 40 and 80 percent of the population lives illegally because they can neither afford nor gain legal access to land near employment centers. As a result, illegal tenure arrangements have become the main form of urban land developments.

Fernandes [2002], supra note 5, at 6.

35. Similarly, David Harvey predicts that if *regularização* proceeds in Rio, by 2023 “all those hillside areas in Rio now covered by *favelas* will be covered by high-rise condominiums with fabulous views over the idyllic bay, while the erstwhile *favela* dwellers will have been filtered off into some remote periphery.” David Harvey, *The Right to the City*, 53 New Left Rev. 23, Sept.-Oct. 2008.

36. “[T]he Cantagalo project represents the first formal effort to give land titles to slum dwellers in one of the oldest *favelas*” in Rio de Janeiro. Crawford, supra note 4, at 1105.

37. Electricity and drinking water are often pirated in *favelas*, and regularization of title might make it easier for the utilities to identify who is using their services and bill them, and perhaps cut off service.
officially public forest land; that the concern of the Cantagalo resident was in part about acquiring an increased ability to negotiate for social services such as utilities, sanitation, transportation, and police protection, based on the newly confirmed ownership status; that these were all part of moradia, roughly translated as a right to housing, shelter, or dwelling; and that this in turn was part of a right to the city and of citizenship (cidadania).

It is this dialogue that I seek to explore here. I entered that session thinking that regularization of title would be similar in cultural significance to the transition a United States citizen makes from renter to homeowner, a kind of confirmation of access to the middle class and its engine of wealth. Formal ownership might or might not facilitate borrowing and commerce à la Hernando de Soto; but that analysis did not seem to be important for anyone. I did not expect to encounter so much emphasis on connection, community, and a large and unfamiliar constellation of attributes associated with the right to moradia, nor such an emphasis on citizenship linked to an ability to dwell securely in a place.

My puzzlement was amplified during the field trip we took that afternoon to Cantagalo, which rises on the steep hillside behind the Copacabana and Ipanema districts and their beaches. The Cantagalo favela was subject to the new “pacification” program in December 2009, pursuant to which the drug lords are driven out of a favela and a community police force is installed permanently on-site. In our interview with the resident police captain, he explained that there was a three-part process for pacification. First, he said, dominate the land. Then, drive out the drug lords. Finally, establish the community force and work with the residents.

Professor Crawford, serving as our translator, hesitated as he translated the first step, and then did so literally. Afterwards, he confirmed that the captain had said “Primeira dominar a terra.” This might be translated variously along the lines of controlling the terrain or territory. But to my ear “terra” leapt out – an

emphasis on brute control of land as the basis for establishing a safer and more functional and more secure community. The two conversations, morning and afternoon, resonated with one another, and suggested to me that the assumptions I as an American brought to the relationship of property, place, community, and citizenship needed to be reexamined in light of what seemed to be a different way of understanding what it means to own property (land) in a troubled and marginal community.

Authorities who have studied the impact of legalization in various informal settlements elsewhere in Latin America sometimes echo the concerns expressed in the Rio study sessions I have described, regarding the attractiveness of regularization of title, even though “in some cases it may adversely affect people’s security of tenure.”\footnote{Ann Varley, \textit{The Relationship between Tenure Legalization and Housing Improvements: Evidence from Mexico City}, 18 \textit{Development \\& Change} 463, 477 (1987); accord, van Gelder, \textit{supra} note 33, at 129-30.} Varley, for example, points out that residents’ subjective sense of security is not linked only to legalization of title, but often more importantly to the provision of services, regardless of title,\footnote{Varley, \textit{supra} note 39, at 465-67. Ward et al. found a similar sense of belonging through homeownership expressed in focus groups they convened to study the effects of formalizing title in colonias in Texas inhabited by Mexicans. Ward et al., \textit{supra} note 33, at 18.} and to the length and stability of the community.\footnote{Varley, \textit{supra} note 39, at 468.} Nevertheless, becoming the real owner of one’s home produces an additional satisfaction.\footnote{\textit{Id.} at 476.} Varley also notes that various additional costs may come with legalization, depending on the exact legal classification of the land: legal title may be refused because of the location; legalization may increase tax assessment; and legalization may undermine community’s political solidarity.\footnote{\textit{Id.} at 477-78.}

In a recent article, Jean-Louis van Gelder writes:

There appears to be something inherently paradoxical about legalization, as it has been shown capable of producing effects opposite of the ones intended. Legalization may improve the efficiency of land markets and lead to capital gains as a consequence of increases in the value of dwellings, but it can simultaneously make land inaccessible for the low(est) income groups and push them out of settlements as a consequence of market forces. Additionally, the intention of providing tenure security can be strengthened by property rights, but also be undermined when service
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charges and property taxes turn out to unaffordable for the beneficiaries.44

Speaking generally about Latin American regularization programs, Edésio Fernandes opines that they have been “more successful in upgrading settlements through public investments and urban infrastructure and service provision than in legalization programs.”45

Unless titling is undertaken within the context of a broader set of public policies that address urban, politico-institutional and socioeconomic conditions, legalization programs may actually aggravate the processes of exclusion and segregation. As a result, the original beneficiaries of the programs might not be able to remain on the legalized land, although that should be the ultimate objective of regularization programs, especially on public land.46

In another recent article, van Gelder reports from a focus group discussion with inhabitants in an informal barrio in Buenos Aires that, “[f]or residents, having a property title, realistically or not, implies inclusion in a society that has systematically denied them entry. As one resident put it: ‘Without papers it’s like we don’t exist either.’”47 My Cantagalo resident is not alone in expressing this sentiment, then. Legal ownership equals existence, a place on the map. Even if it imperils security of tenure.

B. The Brazilian Terms That Circulated That Day

The understanding of regularização articulated in my Study Space discussions seems to be linked to moradia; to the right to the city; to conception of the social function of property, which is of constitutional dimension in Brazil; and to a certain conception of citizenship (cidadania) via full participation in the city. I explore two of these terms more here, the right to the city and the social function of property. Concerning moradia, as Pindell points out, both the right to the city and the social function of property

45. Fernandes [2002], supra note 5, at 5.
46. Id.
involve some sort of increased access to housing.\footnote{Pindell, supra note 2, at 439, 444-45. For what more I have to say on the difference between a right to \textit{moradia} and right to housing, see supra note 6. And I am not treating the social function of the city as a separate matter from the social function of property. \textit{See supra} note 9.}

The “right to the city” is derived in various ways from Henri Lefebvre’s \textit{oeuvre}.\footnote{\textit{See}, \textit{e.g.}, Butler, supra note 7, describing its origins and providing an interpretation referring to the critical legal geography movement in the United States and Canada; Fernandes, supra note 7, at 205-08 (providing a derivation of the right to the city from Lefebvre’s \textit{oeuvre}); Pindell, supra note 2, at 440-41 (discussing Lefebvre); Mark Purcell, \textit{Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant}, 58 GeoJOURNAL 99, 101-03 (2002) (providing an “extrapolation” of Lefebvre to modern conditions, \textit{id.} at 101). A volume of short essays exploring the contours of the right to the city is available from UNESCO. \textit{International Public Debates: Urban Policies and the Right to the City} (2005), \url{http://unesdoc.unesco.org/images/0014/001461/146179m.pdf}.} Chris Butler, interpreting Henri Lefebvre, describes the right to the city as a “right to urban life”\footnote{Butler, supra note 7, at 325.} that involves a right to occupy physical space,\footnote{\textit{Id.} at 326.} a right not to be expelled,\footnote{\textit{Id.}} a right not to suffer segregation,\footnote{\textit{Id.}} and a right to participation in all levels of decision-making.\footnote{\textit{Id.}} It also involves access to all urban services. So it involves both habitation and participation.\footnote{Id.}

Tayyab Mahmud distills a similar list,\footnote{Mahmud, supra note 33, at 69 (using “right to the city” to describe claims upon adequate urban services, full use of urban space, rights against segregation and expulsion, and active participation in all decision-making leading to the control of social space).} and also stresses that the “right to the city” is to be understood as “more than an individual liberty to access urban resources, and [must] be seen instead as a collective right to reshape the process of urbanization.”\footnote{\textit{Id.} at 70.}

Edésio Fernandes, an important Brazilian urban planner and jurist, agrees. In discussing the “right to the city,” he lists a number of concerns that Lefebvre identified as necessary to update eighteenth-century Rousseauian civil rights.\footnote{Fernandes, supra note 7, at 207-08. Some of these updates include “the right to information; the right of expression; the right to culture; the right to identity in difference and in equality; the right to self-management, that is, the democratic control of the economy and politics; the right to public and non-public services; and above all the ‘right to the city.’” \textit{Id.} at 208.} Zeroing in on the right to the city, Fernandes articulates an overall right to habitation—that is, “to fully enjoy urban life with all of its ser-
ervices and advantages," and a right to participation—that is, “taking direct part in the management of cities.” Fernandes sees “a vital link between cities and citizenship . . . given the escalating urbanization of society at a global level.” David Harvey likewise argues that the right to the city must be understood in terms of the contemporary global phenomenon of urbanization and consequent dispossession of the poor in vast numbers. Mark Purcell points out that the participation aspect of the right to the city necessarily involves adjusting the scale of politics to include the urban local.

Fernandes contends that law plays a crucial role in profound legal reform leading to social inclusiveness and sustainable development, and that Lefebvre’s political and theoretical writings on the right to the city did not chart out any of this territory. But Latin American countries have. Fernandes identifies the incorporation of the “right to the city” into the Brazilian legal system, in particular through Brazil’s 2001 federal City Statute as well as the draft World Charter on the Right to the City. These laws have led to important institutional reforms in Brazil, including the creation of a Ministry of Cities in 2003, establishment of the National Council of Cities; the National Program to Support Sustainable Urban Land Regularization; and the National Campaign for Participatory Municipal Master Plans. A separate initiative resulted in a constitutional amendment providing a social right to housing in 2000, with an implementing law enacted in 2005.

Fernandes situates the City Statute within an emerging new urban-legal order characterized by intertwined collective rights; an emerging right to participation characterized by increased rep-

59. Id. at 208.
60. Id.
61. Id.
63. Purcell, supra note 49, at 103-07.
64. Fernandes, supra note 8, at 208.
66. Id. at 202, 215-17 (discussing the World Charter on the Right to the City).
67. Id. at 215; Fernandes, supra note 1, at 9-12.
68. Fernandes, supra note 7, at 215; Fernandes, supra note 1, at 12-13.
69. Fernandes, supra note 1, at 9-10.
70. Id. at 10.
71. Id. at 7.
72. These include “the right to urban planning; the social right to housing; the right to environmental preservation; the right to capture surplus value; and the right to regularization of informal settlements.” Fernandes, supra note 7, at 211.
representative democracy; decentralization of decision-making processes, especially at the municipal level; and clearer legal-administrative frameworks.\footnote{73} The City Statute builds on the chapter on urban policy included in the 1988 Brazilian Federal Constitution.\footnote{74} Prior to 1988, “the lack of attention to urban and territorial jurisdiction in the Constitution led, in the context of Brazil’s contradictory federal system, to endless legal controversies and institutional conflicts between federal, state and local administrations as to which had the power to enact urban legislation and implement urban policy.”\footnote{75} The 1988 Constitution contained a specific short chapter on Urban Policy.\footnote{76} Fernandes and Rolnik identify some of the strengths of the 1988 Constitution, including the requirement that the city’s social functions be developed through a municipal master plan;\footnote{77} a clear balance between the right to private property and limitations imposed by the social function doctrine, including compliance with city planning;\footnote{78} and a type of adverse possession (\textit{usucapião}) tailored to urban squatters.\footnote{79} Fernandes and Rolnik stress the importance of the new \textit{usucapião} right “with regard to programmes for the regularization of \textit{favelas}, since it probably applies, in theory, to more than half the existing \textit{favelas}.”\footnote{80}

\footnote{73. \textit{Id.}}
\footnote{74. \textit{Id.}}
\footnote{75. Edélio Fernandes & Raquel Rolnik, \textit{Law and Urban Change in Brazil}, in \textit{ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES} 141, 143 (Edélio Fernandes & Ann Varley eds., 1998); \textit{see also} Leonard Avritzer, \textit{Living Under a Democracy}, 45 \textit{LATIN AM. RESEARCH REV.} 166, 167 (2010 Special Issue) (Although at the end of the 20th century more than seventy percent of Brazil’s population were urban dwellers, “Brazilian cities grew in an unfair, disorganized, and illegal way. Unfairness was the result of a process of modernization without any kind of planning—even when cities were planned, no space was reserved for the poor population . . . .”\textsuperscript{75})
\footnote{76. Constitution of the Federative Republic of Brazil October 5, 1988, tit. VI, ch. II. (consists of arts. 182 and 183).}
\footnote{77. \textit{See} Fernandes & Rolnik, \textit{supra} note 75, at 147-48 (discussing art. 182 I).
\footnote{78. \textit{Id.}}
\footnote{79. \textit{Id.}}
\footnote{80. Fernandes & Rolnik, \textit{supra} note 75, at 147.}
This framework was implemented in the 2001 City Statute. Fernandes identifies four dimensions to the City Statute: conceptual articulation of the constitutional principle of the social function of urban property and of the city; regulation of legal, urbanistic and financial instruments for building a new urban order; democratic processes for management of cities; and comprehensive regularization of informal settlements in private and public urban areas. With specific regard to land-tenure regularization, the City Statute established new legal forms for transferring ownership of private land (that urban squatter-specific form of usucapião, adverse possession) and a legal form for the concession of a real right to use public land (a specialized form of lease). Fernandes notes that as to informal settlement regularization, the City Statute and the 1988 constitutional provisions behind it “fundamentally differ[]” from the Hernando de Soto-inspired formalization policies that have been given wide support internationally, not least by international banks, ideological think-tanks and development agencies.

Whatever its legal force, the broadly worded, aspirational World Charter on the Right to the City is also instructive here as a textual source for the concepts at play in Brazil and elsewhere in Latin America and the Global South. Fernandes stresses that this draft charter represents an international mobilization led, to a considerable extent, by NGOs and urban movements from Brazil and other Latin American countries. Among general principles of the right to the city that the World Charter articulates are the social function of the city (Article II.2) and the social function of property (Article II.3). The proposed Charter’s broad guarantees include access to and supply of domestic and urban public services.
such as drinking water, electric power, light and heating, health, hospitals, schools, garbage disposal, sanitation facilities, and telecommunications (Article XII); a right to transport and public mobility (Article XIII); a right to habitable housing (Article XIV.1); regularization of land ownership and improvement of precarious neighborhoods and informal housing settlements (Article XIV.3); and security of tenure (Article XIV.6).

The contours of the doctrine of the social function of property are nebulous, especially if one tries to generalize across countries and time periods. Colin Crawford discerns a common theme of emphasis on the use of property to promote human flourishing.87 Crawford expressly refers to the work of Martha Nussbaum and of Amartya Sen on the development of human capabilities,88 in addition to the work of Gregory Alexander and Eduardo Peñaalver.89 The concepts of human flourishing articulated by these authorities are very open-ended and context-specific, but nonetheless do provide, as they are implemented over time in specific contexts, some kind of guiding principle or direction.90 In May 2011, Fordham Law School held a symposium on the social function of prop-

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87. Crawford, supra note 4, at 1089; id. at 1094-97 (discussing the concept of human flourishing).
88. Id. at 1094, 1097 (discussing Martha Nussbaum, Creating Capability: The Human Development Approach (Belknap Press, 1st ed. 2011) and Amartya Sen, The Idea of Justice (Belknap Press, 2009)).
89. Id. at 1093, 1095-98 (discussing Gregory S. Alexander & Eduardo M. Penalver, Properties of Community, 10 Theoretical Inquiries in Law 127 (2009)).
90. On the social function of property, see generally Thomas T. Ankersen & Thomas Ruppert, Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America, 19 Tul. Envtl. L. J. 69, 89 (2006) (explaining the relationship of the social function doctrine to land reform in various Latin American countries); Daniel Bonilla, Liberalism and Property in Colombia: Property as a Right and Property as a Social Function, 80 Fordham L. Rev. 1135, 1154-55 (2011) (explaining Duguit’s conception of the social function of property); Fernandes, supra note 7, at 204-06; Sheila R. Foster & A. Daniel Bonilla, The Social Function of Property: A Comparative Perspective, 80 Fordham L. Rev. 101, 102-05 (2011) (discussing the contours the social function of property according to its original exponent, Léon Duguit); M.C. Mirow, Latin American Law: A History of Private Law and Institutions in Spanish America 205 (2004) (describing the origins of the “social function of property” doctrine in Latin American constitutions in late nineteenth century Catholic concerns to counter a Marxist critique of property; and its deployment as part of land reform efforts); Flávia Santonini Vera, The Social Function of Property Rights in Brazil (2006), http://escholarship.org/uc/item/0tp371xs#page-1. Santonini Vera’s work explores the introduction of the “social function” into the Brazilian Constitution of 1988 and its subsequent role in managing land invasions organized by the Movimento Sem Terra (MST). MST is a landless worker movement that organizes occupations followed by very quick squatter settlement, and is a different squatter issue legally and socially than that presented by favelas and the possibility of regularization of ownership of parcels in them. For
property, bringing together Latin American and United States property scholars to generate comparative perspective.91 This seems to be the most recent overview of “the social function of property” in the United States law review literature. It is remarkably heterogeneous.92

Historically, the propagation of the concept that the state protects property only to assure that property provides a social function is attributed to French jurist Léon Duguit.93 Duguit introduced it to Latin America in one of a series of lectures given in Buenos Aires in 1911.94 “In South America, Duguit’s lectures in Buenos Aires served to link his work and ideas to the legal development of the region. Based on Duguit’s work, drafters of Latin American constitutions changed the way property was defined in the first decades of the twentieth century.”95 Beginning with Mexico in 1917, most Latin American and some European countries incorporated the Duguitian idea of the social function of property in their constitutions.96 Its reception in Brazil did not follow the same path as in other Latin American countries, however, and Brazil was not at first influenced by Duguit.97 The social function of property was proposed but omitted from the text of Brazil’s first Civil Code in 1916 and remained a “mere legal principle” until the

more on MST, see, e.g., Kevin E. Colby, Brazil and the MST: Land Reform and Human Rights, 16 N.Y. INT’L L. REV. 1 (2003).


92. See infra discussion in Section V.B as to whether the social function of property doctrine actually means much of anything.


94. Mirow, supra note 93, at 196.

95. Id. at 195; see also M.C. Mirow, Origins of the Social Function of Property in Chile, 80 FORDHAM L. REV. 1183 (2011) (detailing the politics of the adoption of a social function limitation on property in Chile in 1925).

96. Ankersen & Ruppert, supra note 90, at 95-96, 108; see also Gregory Alexander, Property as a Fundamental Constitutional Right? The German Example, 88 CORNELL L. REV. 733 (2003) (describing the German constitutional application of “social obligation” to property); Rebecca Lubers, The Social Obligation of Property Ownership: A Comparison of German and U.S. Law, 24 ARIZ. ST. J. INT’L & COMP. L. 389 (2007); Mirow, supra note 95 (origin of the social function doctrine in Chile); Mirow, supra note 90, at 205-06 (addressing the social function doctrine in Spanish-speaking Latin America).

97. Alexandre dos Santos Cunha cautions that Duguit’s conception was not the source of the social function of property doctrine in Brazilian law, and in his view Brazilian social function of property doctrine has only recently and partially begun to assume some of the broad contours of Duguit’s conception. dos Santos Cunha, supra note 8, at 1171.
Constitution of 1934. Brazil’s 1946 constitution articulated the concept of social function, but it became truly operational only after the end of military government in 1985; the 1988 constitution makes several explicit references to the social function of property. Alexandre dos Santos Cunha considers it especially strong since the adoption of the 2002 Civil Code. Nowadays, the social function doctrine is powerful in Brazil.

III. THE UNITED STATES CULTURAL TAKE ON HOMEOWNERSHIP IS NOT LIKE BRAZILIAN REGULARIZAÇÃO AND MORADIA

This Section argues that in United States property rhetoric—both popular rhetoric and to a considerable extent legal academic rhetoric—the themes of individual benefit, concern, and economic or personal satisfaction dominate the discussion of homeownership. Themes of community and communal interest such as those expressed in moradia, the social function of property, and the right to the city are largely absent or are masked.

All agree that “[i]n the United States, home and homeownership are held in high esteem. . ..” Here are typical reasons why. “Households desire homeownership for many reasons: it delivers a stable stream of housing consumption, a large degree of personal control over the residence, access to superior housing stock and

98. Id. at 1175; see also Fernandes & Rolnik, supra note 75, at 154.
99. See Constituição Federal [C.F.] [Constitution] art. 5(XXIII) (Braz.) (individual and collective rights and duties, providing that “property shall fulfill its social function”); art. 170(III) (general principles of economic activity); art. 182(2) (urban policy); art. 184 (agricultural and land policy and agrarian reform); art. 185 (expropriation for agrarian reform); art. 186 (defining the social function of rural property). Reference to the social function of property also appeared in the original 1988 version of art. 156(I) (authorization for municipal taxes). This provision was amended in 2000, although the sense of authorization to tax for progressive purposes remains. Constituição Federal [C.F.] [Constitution] art. 156(I) (Braz.). I am working from an English translation of the Brazilian constitution that is available at http://www.v-brazil.com/government/laws/constitution.html. See also Lee J. Alison, Gary D. Libecap, & Bernardo Mueller, Titles, Conflict, & Land Use: The Development of Property Rights and Land Reform of the Brazilian Amazon Frontier 51-52 (1999) (discussing the importance of the “social function” doctrine in plans for land reform at the time of the drafting of Brazil’s 1988 constitution).
100. dos Santos Cunha, supra note 8, at 1171, 1197-80.
101. Ankersen & Ruppert, supra note 90, at 118; dos Santos Cunha, supra note 8, at 1181 (“the social function of property is not only well known and acknowledged by both legal professionals and the general public in Brazil, but is also a structural element of that country’s legal order”).
public services, important tax advantages, and unparalleled social and status benefits.”

In significant part, “[h]omeownership is said to be a fundamental part of the American Dream because of the economic security it gives homeowners.” Indeed, homeownership is “the only effective form of wealth accumulation for Americans with modest incomes.”

In addition to the perceived financial benefits of homeownership, “for people with long-term tenure in their homes, home is a source of feelings of continuity, stability, and permanence.” Home is also the center of individual social networks and provides a physical tie to one’s workplace, school, and so on.

In 2006, sixty-eight percent of all American households owned their homes. But there are major class and race disparities in homeownership. Indeed, because of their generally more precarious position in society, Blacks and Latinos may be particularly concerned about achieving homeownership.

Recent examinations of the value of American homeownership have been inspired both by the rhetoric over eminent domain when deployed against homeowners in the wake of *Kelo v. City of New London*, and by the mortgage foreclosure crisis, in which millions of households have been foreclosed upon or are at risk of foreclosure, and many of them may have been lured into homeownership precisely because of the cultural values attributed to it. Rachel Godsil and David Simunovich, for example, set out to explore “why homeownership is so highly valued” as a predicate

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105. Williams, supra note 104, at 326.
106. Barros, supra note 102, at 279; accord, Dickerson, supra note 104, at 191. Indeed, Akhil Amar sees long roots to this aspect of living in a house, identifying dwelling as typical of an unenumerated right with a long constitutional past, both in terms of privacy and of protection through the Takings Clause. Akhil Reed Amar, *America’s Lived Constitution*, 120 YALE L.J. 1734, 1768-77 (2011).
107. Barros, supra note 102, at 279.
109. *Id.* at 958.
110. *Id.* at 959.
111. 545 U.S. 469 (2005).
112. For example, Barros, supra note 102, is motivated in part by *Kelo*. Dickerson, supra note 104, is motivated by the mortgage foreclosure crisis. Godsil & Simunovich, supra note 108, are motivated by both, as well as the issue of the value of homeownership raised in the wake of the Katrina flood in New Orleans in 2005.
to asking whether and how loss of homeownership should be protected against or compensated. They point out that the home is an enormous financial asset and a principal source of wealth creation. In contrast, renting is viewed as throwing wealth down the drain. For these authors, homeownership also has psychological benefits and secures the locus of family and community. While the home provides some emotional value, Godsil and Simunovich focus on what they call the status achieved by homeownership. Their notion of status is dual – partly about ownership itself, partly about establishing an individual-qua-owner's greater worth in society at large. The community ties that they identify as associated with homeownership involve increased civic activity, market transactions linked to home, better living conditions, and economic activity – all coalescing to make a more cohesive community.

Without in any way deprecating Godsil's and Simunovich's sophisticated analysis, I contend that it is nevertheless constructed around an individualistic conception of what it means to own a home or lose a home. Even the aspects that involve participation in community are articulated in terms of individual incentives and disincentives that have aggregate effects. The same is true for other authors in the mainstream of United States scholarship who write about homeownership, for example, Mechelle Dickerson, Lee Anne Fennell, and William Fischel. To be sure, authors such as these ultimately are looking for solutions to various problems on an individual, case-by-case basis: when, if ever, should individual owners receive additional compensation for eminent domain takings of their homes qua homes (Godsil & Simunovich); how to prevent individual losses of homes due to mortgage foreclosure (Godsil & Simunovich; Dickerson); and how to provide alternatives to unnecessarily precarious homeownership (Dickerson; Fennell). Missing in these analyses and others

114. Id. at 954, 970.
115. Id. at 970.
116. Id. at 954. Margaret Radin famously articulated this personhood function of property, including the home. Margaret Jane Radin, Property and Personhood, 34 STAN L. REV. 957 (1982).
118. Id. at 954.
119. Id. at 952, 969-73.
120. See, e.g., Dickerson, supra note 104, at 191-92; Fennell, supra note 103; FISCHEL, supra note 14.
121. Godsil and Simunovich, towards the end of their article, also explore Fennell's suggestion for designing legal instruments of homeownership that would split off the
is communitarian rhetoric around having a place, belonging, and entitlement to participation. Theirs is not at all an incorrect approach, but one very different from the articulation of moradia and right to the city that was put forward that fine day in Rio as an explanation of the Cantagalo resident’s understanding of the effects of regularization of title.

To be sure, homeownership as an ideal has come under critical scrutiny in United States academic property discourse, especially in the wake of the recent and ongoing mortgage foreclosure crisis. Dickerson writes that “for many, attempting to become a homeowner is a painfully short and ultimately unwise investment.” She ultimately proposes a number of policy approaches—some dealing with unsound mortgages, others serving to provide housing in forms not influenced by an obsession with homeownership. Fennell’s innovative effort suggests to a way to split off legally some of the investor’s potential financial risks and rewards of homeownership from the consumption benefits. Critiques of this type, however, sound in the same mode. That is, they ask what is advantageous for the individual as an investor or for the investor’s personal security.

Joan Williams’ fine and classic article on the rhetoric of property in the United States provides a different sort of critique of homeownership. She discusses at some length “the romance of the single-family house,” but she also calls this rhetoric a “trance” and an “American obsession with homeownership.” Although Williams praises the egalitarian republicanism expressed in the United States myth of homeownership, she argues that it is suspect in a number of ways. She suggests, without exploring her argument fully in this particular article, that the homeownership myth reinforces a gendered sphere of domesticity, and that the prototypical suburban single-family house ideal is exclusionary.

value of the home attributable to off-site local factors such as schools, crime rates, neighborhood amenities, as well as systemic factors. Godsil & Simunovich, supra note 108, at 996-97.


123. Dickerson, supra note 104, at 207.
124. Id. at 220-36.
125. Fennell, supra note 103, at 1063-70.
126. Williams, supra note 104, at 326.
along lines of race and class.\textsuperscript{127} Elsewhere in the article, she suggests that using an overarching concept of strong protection of property rights puts the widely accepted and generally justifiable notion of homeownership in the service of protecting large capitalist investments in property.\textsuperscript{128}

Some United States accounts of homeownership do get a bit closer to \textit{moradia} and a right to the city. I will briefly describe here Tim Iglesias’ account of housing ethics, and will also note a discussion of housing in the progressive property theory work of Greg Alexander and Eduardo Peñalver.\textsuperscript{129} The astute reader might note that the works discussed ultimately focus on providing housing for those who don’t have it—a prelude to the discussion of homelessness rhetoric assessed in the following section.\textsuperscript{130}

Tim Iglesias presents a complex and sophisticated picture of housing and homeownership in his description of five “housing ethics” that have historically shaped United States housing law and policy.\textsuperscript{131} They are (1) housing as an economic good, (2) housing as home, (3) housing as a human right, (4) housing as providing social order, and (5) housing as one land use in a functional system.\textsuperscript{132} Iglesias argues that each of these ethics is a stable part of United State housing policy, and that none is dominant.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 328-29.
\item \textsuperscript{128} As Williams writes, “it remains to be proven that the need for a high level of protection for the working class homeowner justifies an equally high level of protection for the fondest dreams of [General Motors].” \textit{Id.} at 294. I agree, and have argued elsewhere that there is a persistent dissembling about the nature of property by advocacy groups sponsored by large landholders and industry. Marc R. Poirier, \textit{The Virtue of Vagueness in Takings Doctrine}, 24 CARDOZO L. REV. 93, 189 (2002).
\item \textsuperscript{129} See \textit{GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY} (2012) (advocating an Aristotelian approach to property, based on capabilities and human flourishing); Gregory S. Alexander & Eduardo M. Peñalver, \textit{Properties of Community}, 10 THEORETICAL INQUIRIES IN LAW 127 (2009); see also Eduardo M. Peñalver, \textit{Land Virtues}, 94 CORNELL L. REV. 821 (2009) (critiquing as incomplete, misleading and problematic the self-interest model of homeowner behavior, and offering a model based on virtue ethics). I also find persuasive Lorna Fox’s accounts of the meanings of homeownership. \textit{See, e.g., LORNA FOX O’MAHONEY, CONCEPTUALIZING HOME: THEORIES, LAWS AND POLICIES} (2007); Lorna Fox, \textit{The Meaning of Home: A Chimerical Concept or a Legal Challenge?}, 29 J. L. & Soc’y 580 (2002); see also \textit{The Idea of Home in Law; Displacement and Dispossession} (Lorna Fox O’Mahoney & James A. Sweeney eds., 2011). But Fox is British, and all but one of the authors in the anthology are other than American; therefore these works are beyond the scope of this essay’s inquiry.
\item \textsuperscript{130} See \textit{infra} Section IV.
\item \textsuperscript{131} Tim Iglesias, \textit{Our Pluralist Housing Ethics and the Struggle for Affordability}, 42 WAKE FOREST L. REV. 511 (2007).
\item \textsuperscript{132} \textit{Id.} at 511, 514-15.
\item \textsuperscript{133} \textit{Id.} at 516-17.
\end{itemize}
first two of his categories, housing as economic good and housing as home, clearly belong to the individualistic, classic liberal core of United States property rhetoric. The last two in contrast display some of the characteristic concern with interconnectedness and function expressed in the Brazilian colloquy over regularization of title, moradia and the right to the city. In recognizing a rhetoric of housing as “providing social order,” Iglesias expressly discusses the creation of community; though he properly notes that by the same token housing also often creates exclusion along race and class lines, and argues that this tendency must be combated. In discussing an ethic of “housing as one land use in a functional system,” Iglesias posits the kind of interconnectedness and right to the city that seem to have been expressed in the dialogue with the Cantagalo resident and the seminar participants. There are “functional relationships” between housing and other land uses (e.g., shopping, water, open space, transportation, schools, and medical facilities) and the goal is to “design[] and promot[e] the development of a workable, livable land use system.” Notably, Iglesias adverts to planning and environmental modes of analyses. Both disciplines are often in tension here with absolutist visions of private property ownership as they account for positive and negative externalities generated by land use that affects that community.

Iglesias also presents housing as a basic human right. He begins by quoting a Catholic policy statement to the effect that housing is not a commodity but a basic human right. This argument “focuses attention on the fact that decent, safe, and affordable housing is critical to proper human development.” Here we do find some resonance with the broader implications of moradia—not surprisingly, as both are human rights discourses. And it is surely not an accident that a Catholic articulation of a

134. Id. at 553-69.
135. Id. at 589.
136. Iglesias, supra note 131, at 569-83.
137. Id. at 569-70.
138. Id. at 570.
139. Id. at 570-71.
140. For an account of the inevitable tension and negotiation around property, environment, and community, see Marc R. Poirier, Property, Environment, Community, 12 J. ENVTL. L. & LITIG. 43 (1997).
142. Id. at 540.
human right to housing would resemble the Brazilian approach to some degree, as both recognize the social function of property, and as one might expect Brazilian legal discourse to be influenced by Catholic teaching. All the same, in his discussion, Iglesias notes the focus of human rights discourse on individual entitlements and not on social policy that conceives of housing as one use in a functional system.

The right to housing receives a different inflection, and one fairly close to Brazilian moradia, in the course of recent theoretical writing by Gregory Alexander and Eduardo Peñalver. Alexander and Peñalver derive their overarching conception of property neither from utilitarian premises nor from classic liberal premises, but from what they call Aristotelian premises. The core concept is attention to human flourishing. As an example of their theory in practice, they examine the case of Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd., which involved a squatter invasion of private property in light of the South African constitution’s dual commitments to protect private property and to provide the homeless squatters with housing. Alexander’s and Peñalver’s argument is not mainstream United States property theory at all, but an explication of their progressive, quasi-communitarian critique of other theories of property ownership in light inter alia of this specific South African example.

IV. UNITED STATES HOMELESSNESS RHETORIC: THE FUNCTION OF PROPERTY OWNERSHIP AND OF “NO PROPERTY”

At some point in my reflection on the gap between regularização and moradia on the one hand and United States property

143. See Miron, supra note 90, at 205 (noting the origins of the social function of property doctrine in Latin American law as a nineteenth-century Catholic response to a Marxist critique of property).
144. Iglesias, supra note 131, at 540.
145. Id. at 541 n.143.
147. Alexander, supra note 146, at 753-73; Alexander & Peñalver, supra note 129, at 130-45.
150. Alexander, supra note 146, at 786-91; Alexander & Peñalver, supra note 129, at 154-60.
jurisprudence’s assessment of the meaning of homeownership on the other, it occurred to me that many of the concerns voiced by the Cantagalo resident and the Study Space seminar participants were in fact parallel to those addressed in the United States homelessness advocacy literature from the 1980s onward.\footnote{Iglesias, supra note 131, discussed in Section III infra, basically makes an affordable housing argument.} Perhaps I was looking in the wrong place.

It turns out that the United States homelessness advocacy literature also tends to focus on homeless individuals, not societal patterns of formally landless communities. Thus, it debates whether individuals are responsible for their homelessness (in which case perhaps we ought not to help them); or whether institutions are responsible for individual homelessness (in which case perhaps we ought to reform those institutions).\footnote{For a variety of perspectives within these general parameters, see, e.g., Robert C. Ellickson, The Untenable Case for an Unconditional Right to Shelter, 15 Harv. J. L. & PUB. POL’Y 17 (1992); Maria Foscarinis, Downward Spiral: Homelessness and Its Criminalization, 14 Yale L. & Pol’y Rev. 1 (1996); Jonathan L. Hafetz, Homeless Legal Advocacy: New Challenges and Directions for the Future, 30 Fordham Urb. L.J. 1215 (2003).} Writing in 2000, homelessness advocate Maria Foscarinis described two decades of homelessness advocacy as follows:

In broad outline, early legal advocacy focused on addressing immediate basic needs of homeless persons, such as shelter and food, through both litigation and then legislation. Later legal advocacy focused on prevention, such as discharge planning and transitional housing, and on establishing political and civil rights, again through both legislation and litigation. Current legislative efforts are focused on longer-term solutions, such as housing and access to mainstream programs; current litigation is focused on access to mainstream programs as well as challenges to efforts to “criminalize” homelessness.\footnote{Maria Foscarinis, Homelessness and Human Rights: Towards an Integrated Strategy, 19 St. Louis U. PUB. L. Rev. 327, 329 (2000).}

The connection between homelessness, housing, place, and integration into the full workings of community—which I might call full citizenship—is rarely articulated. Instead, much of the homelessness literature seems to address piecemeal causes, desert, and stopgap measures to get individuals food and places to sleep and urinate other than the street. The whole matter is approached in terms of individuals and institutional reforms.

That is not always the case, to be sure. Foscarinis argues for
using a right to housing to address homelessness, even if such a right was long ago denied recognition by the United States Supreme Court.\textsuperscript{154} Relying on a right to housing articulated in a number of United Nations documents, most notably those related to Habitat I\textsuperscript{155} and Habitat II,\textsuperscript{156} Foscarinis does place homelessness in larger contexts of proximity to work, social services and transportation, economic and community development, housing, and jobs.\textsuperscript{157} The human rights approach seems to allow both an individual articulation and a community-regarding one.

Many of the threads I have been following about the possible blind spot in United States homeownership and homelessness discourse are pulled together in an insightful essay by Jane Baron. In \textit{Homelessness as a Property Problem}, Baron argues that because homelessness has been formulated as a problem of poverty, we have asked “a limited, almost formulaic set of questions concerning the depth of the problem . . .; the scope of the problem . . . ; and the cause of the problem (‘Is homelessness a product of individual weakness or of structural forces beyond any individual’s control?’).”\textsuperscript{158} Baron argues that:

\begin{quote}
[t]he literature on homelessness is structured roughly around two competing hypotheses. The first is that homelessness is mostly the result of personal failures such as substance addiction, mental illness, or inability to hold a job. The second competing hypothesis is that homelessness is mostly the result of institutional forces beyond any individual’s control such as a mismatch between the supply and demand for low cost housing or global changes in the job market that have all but eliminated well-paying entry level jobs.\textsuperscript{159}
\end{quote}

\textsuperscript{154} Maria Foscarinis, \textit{The Growth of a Movement for a Human Right to Housing in the United States}, 20 HARV. HUM. RTS. J. 35 (2007); Foscarinis, supra note 153, at 342-54. The case she refers to is \textit{Lindsey v. Normet}, 405 U.S. 56 (1972). This case was actually about a tenant’s security of tenure, but is widely understood to negate any argument for a Substantive Due Process right to housing.


\textsuperscript{157} Foscarinis, supra note 153, at 345.

\textsuperscript{158} Baron, supra note 19, at 273.

\textsuperscript{159} Id. at 279.
Baron also describes a synthesis of these first two approaches, a “vulnerability” argument in which some combination of personal failure and structural forces causes homelessness. But this synthesis analysis, just as much as its two component analyses, is grounded in a “rhetoric of individual responsibility” that “may be affirmatively harmful” in understanding homelessness. Baron suggests that an important element is missing from these modes of analyzing homelessness. I agree.

Baron proposes to look at the deprivations of the very poor—no protection from hunger and cold, uncertainty about where they will sleep, no place to bathe—not in terms of poverty as such, but in terms of what they do not own. This “no property” state of affairs subjects them to “a complex set of disabilities.” Baron here elaborates on the well-known argument made by Jeremy Waldron, in an essay entitled Homelessness and the Issue of Freedom, that the homeless are not free because they have no place to perform freedom. Baron essentially argues that the homeless have no place in which to perform a large number of basic human functions. Noting that the United States Supreme Court has held there is no constitutional right to housing, and that wealth is not a suspect class justifying judicial intervention under a strict scrutiny standard, Baron argues that “the ‘no-rights’ add up: no right to be anywhere, no right to have anything, no right to keep what you do have, etc.” The homeless end up in “a complex legal state in which one is literally a shadow, a photographic negative of the complex constellation of qualities and attributes that constitute wealth.”

I do take issue with Baron on her last point, as I think she has committed a minor misstatement. It is not only wealth that the homeless lack, but place. To borrow Virginia Woolf’s phrase, they...
lack “A Room of One’s Own.” And, as a consequence of a lack of a place to dwell that they own, the homeless lack stable relationships to neighbors, to various public services, and to the city itself, and therefore they lack a foundation for full citizenship.

Baron does make a gesture in this general direction. Having a secure place for one’s body, personal possessions, and bodily functions (part of owning property in the sense I think Baron intends to direct us towards) is also about securing one’s relationships. In a short, tantalizing paragraph, Baron refers to Wesley Hohfeld’s seminal theoretical work portraying property not as things owned but as sets of correlated relationships between people around things. Baron argues that “[a]s non-owners in a world of owners, the homeless have many duties to respect the rights of others, and liabilities to the powers of others, without themselves having property that would give rise to duties and liabilities on the part of others towards them.” This condition renders the homeless distinctly vulnerable.

Baron explores her important argument about “no property” as paucity of secure relationships at somewhat greater length in a later essay, Property and “No Property.” She posits that property is social, and involves relationships with others, and therefore necessarily implicates politics. Baron asserts that “[p]ersons owning very few things inhabit a realm of severe social and legal vulnerability, susceptible to the power of many (and, of course, the government) without having (m)any reciprocal power(s) over others.”

In her concept of the problem of “no property,” Baron articulates much of what motivated the Cantagalo informant to desire legal title despite its perils, and what seems to inhere in moradia as it was discussed that day in Rio and as I understand it. I would like to examine further the idea that having a place to live is an essential element in personal, social, and political relationships. One can get there by understanding human beings as relational in a number of ways—the material basis of society, but also the cultural. The communitarian framing of property comes to mind,

170. Baron, supra note 19, at 287 (discussing Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 15 (1913)).
171. Id.
172. Id.
174. Id. at 1427.
with its emphasis on networks, dependence, and interdependence as the basis for both human flourishing and citizenship. Greg Alexander, in his social-obligation account of property, touches on this. Human beings engage in social networks not because we choose to and could walk away, but because our human condition is in fact utterly dependent on them.\footnote{175} And Andrea Brighenti’s illuminating essay on territory as relationship is also helpful here.\footnote{176} Brighenti argues that, “[w]hereas the most widespread view takes territory as the hard fact which provides the visible support or backup of invisible social ties, it may be more interesting to explore how every type of social tie can be imagined and constructed as territorial.”\footnote{177} Territory has to do with basic human functions, such as defense, control, reproduction, and access to resources.\footnote{178} But territory is not simply about access to land, the ability to be seen to be on land, but about “processes of inclusion and exclusion in the construction of social groups. . . .”\footnote{179} It is about identity formation as well as access to

\footnote{175. Alexander, supra note 146, at 765. I wish I could also rely here on Eduardo Peña\ntaver, Property as Entrance, 91 Va. L. Rev. 1889 (2005), as the title is so wonderfully suggestive of an argument that acquiring property (especially in order to dwell on it) can generate entrance into community, something like the right to the city. And indeed, Peña\ntaver contrasts and critiques “property as exit”, the use of a right to exclude and other property rights to withdraw. Id. at 1895-938. But Peña\ntaver’s examples of “property as entrance” do not line up with the moradia/ right to the city/citizenship concerns particularly well. He describes “strong entrance” that can be used to construct an alternative “normative community”, id. at 1940-47; and “weak entrance,” which is about participation in markets and socialization. Id. at 1948-55. His assessment of how homeownership functions to generate community will be familiar to United States readers, as it develops the notion that ownership of a home ties one down to the community and generates the need for more participation, both politically and through markets. Id. at 1949-51. None of these arguments seem to me particularly resonant with using property ownership to achieve entrance into the complex of rights and relationships articulated by moradia and the right to the city. Peña\ntaver is not wrong in what he says; it’s just a missed opportunity. Baron does better here in her 2006 essay. It demonstrates the connection between ownership and citizenship by analyzing a recent novel whose plot often turns on certain characters’ exclusion from property ownership. Baron, supra note 173, at 1431-38 (analyzing Valé\r
erie Martin, Property (2003)). Neither the married woman character (in an age of coverture) nor the slave character has much room to maneuver, because they cannot be property owners. And owning a house plays a role too, as the wife inherits a house, which of course immediately belongs not to her but to her husband. Id. at 1433. But this example is not all that close to the apparent cultural significance of formal title to a home to the Cantagalo resident.}

\footnote{176. Andrea Brighenti, On Territory as Relationship and Law as Territory, 21 No. 2 Can. J. L. & Soc’y 65 (2006).}

\footnote{177. Id. at 66-67.}

\footnote{178. Id. at 68.}

\footnote{179. Id.}
resources.\textsuperscript{180}

Zoe Loftus-Farren’s very fine student comment on tent cities provides an excellent catalog of the benefits afforded by tent cities, one type of informal community. It also illustrates why Waldron’s account of homelessness and property is insufficient, and what Baron’s and Brighenti’s theories could be understood as pointing towards.\textsuperscript{181} Loftus-Farren notes that “[b]ecause academic literature on tent cities is sparse, many of these benefits have not been extensively documented or studied.”\textsuperscript{182} She is starting her description fresh, a good thing. To begin her catalogue, she notes “community and autonomy,” including stable access to friends and neighbors, the ability of couples without children to live together (an arrangement not typically permitted in homeless shelters, which are usually sex-segregated), autonomy of schedule, and safety of person and possession.\textsuperscript{183} Well-functioning tent cities develop self-governance, in terms of security, services, health concerns, and so on,\textsuperscript{184} in turn fostering the “self-reliance, determination, and capability” of most of their residents.\textsuperscript{185} Tent cities “can also foster increased political mobilization and participation,”\textsuperscript{186} “put[ting] a spotlight on the lack of affordable housing and challenges faced by the homeless in the United States.”\textsuperscript{187} This inevitable visibility of the underlying political and economic plight of tent city residents can generate media attention, advocacy, volunteerism, and political response.\textsuperscript{188}

\textsuperscript{180}. Id. at 71.

\textsuperscript{181}. Loftus-Farren, \textit{supra} note 26, at 1050-57. Another very helpful account is Sheila Foster’s analysis of the construction of hundreds of community gardens on vacant lots, and havoc wreaked in the New York neighborhoods when those lots were converted to other purposes. \textit{See} Sheila R. Foster, \textit{The City as an Ecological Space: Social Capital and Urban Land Use}, 82 \textit{Notre Dame L. Rev.} 527 (2006). The community gardeners were squatters whose relations over time generated additional important, nurturing, stabilizing relations (Foster describes them as social capital) because of their land use in proximity to one another.

\textsuperscript{182}. Loftus-Farren, \textit{supra} note 26, at 1057.

\textsuperscript{183}. Id. at 1050-51.

\textsuperscript{184}. Id. at 1052-54, 1055-57.

\textsuperscript{185}. Id. at 1054.

\textsuperscript{186}. Id. at 1051.

\textsuperscript{187}. Id. at 1054.

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As Loftus-Farren writes in introducing the benefits section of her Comment, “Tent cities provide a number of benefits to homeless individuals that are absent in homeless shelters or life on the streets. Specifically, encampments can provide residents with community, potential for self-governance, security, stability, and increased self-reliance and autonomy.”189 To my mind, all of the important benefits she catalogues derive from a stable community that is providing individuals a place to live or dwell. It’s not just about individual autonomy, increased choice, and self-reliance—one way of reading Waldron. Informal settlements that function well provide community and connection, in just the way indicated theoretically by the Brazilian concepts of moradia, the right to the city, and cidadania. Loftus-Farren has provided an excellent illustration without using the Brazilian theory. But of course, as she, Larson, and others point out, United States jurisprudence largely fails to account for informal communities at all.

V. POSSIBLE EXPLANATIONS FOR THE DIFFERENCE BETWEEN BRAZILIAN AND UNITED STATES ARTICULATIONS OF HOMEOWNERSHIP AND HOMELESSNESS

There are several possible reasons for the differences explored in the preceding sections between the two cultures’ discourses on homeownership, homelessness, and property more generally. Each of these hypotheses is brief and invites further research.

A. Differences in Land Ownership and the History of Land Distribution

One factor in explaining the difference in current United States and Brazilian sensibilities around squatter communities and property surely is the different histories of the United States and Brazil concerning land distribution, from colonial times forward. This difference has historical and ideological dimensions. From the outset of Western property practices in Brazil, most people living in Brazil had no land to call their own, and consequently, no place they could call their own. As one account noted, “Brazilian colonial history resulted in large latifundios.”190 This concentration of land ownership continues to this day.191 “At the

189. Loftus-Farren, supra note 26, at 1050.
190. Ankersen & Ruppert, supra note 90, at 102; see dos Santos Cunha, supra note 8, at 1172-74 (providing a brief history of Brazilian land law).
191. In contemporary Brazil, one percent of the population of Brazil owns 46% of the land. Ankersen & Ruppert, supra note 90, at 102.
end of the twentieth century, Brazil [stood] as the prime global example of the largest concentration of land in the fewest hands.192

In contrast, the settler society in the many colonies that came to comprise the United States often did distribute land widely one way or another, at least to White settlers.193 Moreover, early on the United States embraced an explicit policy of distributing land to settlers who used it, through 19th century preferences, and homesteading laws beginning in 1862.194 It is immaterial for our limited purposes here exactly how this United States policy developed or whether it always functioned—for example, how much of it can be attributed specifically to Thomas Jefferson’s vision of a nation of yeoman farmers. It was an ideology of widely-shared land ownership. Also, certainly the liberal, anti-royalist ideology of individual rights linked with individual property ownership articulated by James Harrington, John Locke, and William Blackstone informed United States public lands policy in a way that would later result in wide distribution of land.195 Such distribution would in turn reinforce an individualistic cultural understanding of property in land and an assumption that ownership of one’s place and dwelling was a norm of citizenship to be aspired to.


195. See Opie, supra note 194, at 29-31 (discussing the influence of the natural rights philosophies of Harrington and Locke on the United States approach to private property).
Depression-era federal policies to encourage homeownership (at least among some populations—minorities were, notoriously, rigorously excluded) were a natural successor to these policies. And the current United States rhetoric would follow.

I must underscore that this account of United States land policy and its ideological traces apply to whites. Aziz Rana’s *The Two Faces of American Freedom* analyzes United States land policy and ideology in the framework of white settler theory and persuasively argues that the ideology of ownership and freedom maintained and transformed throughout much of United States history suppressed both ownership and citizenship for non-Whites. Anthony O’Rourke’s astute review essay on *The Two Faces of American Freedom* suggests that Rana’s analysis can be carried forward to explain the current role of homeownership in American politics, with its race and class disparities. O’Rourke’s suggestion is worth exploring.

**B. The Social Function Doctrine and the Right to the City**

The difference between the dominant United States discourses on homeownership and homelessness and the Brazilian approach to homeownership in the context of *regularização* is likely also related to the prevalence of the doctrine of the social function of property in Brazilian law and social theory and its absence in United States property discourse, as well as the cognate concept of the right to the city.

One could legitimately ask how much content the social function of property can be relied on to have. In this regard, an interesting debate broke out toward the conclusion of Fordham Law School’s 2011 symposium on the social function of property. As I recall it, two United States scholars took the position that the

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199. This discussion is not reflected in the published papers, with the possible exception of some doubts expressed by dos Santos Cunha at the conclusion of his published symposium piece. *dos Santos Cunha, supra note 8*, at 1181. The reader will have to trust the author’s recollection of what happened.
social function doctrine was important, at the very least in order to broaden the concerns understood to be encompassed within the concept of property, and therefore to legitimate the participation of various stakeholders in articulating their claims about resources and human flourishing. Two Brazilian authorities disagreed. Alexandre dos Santos Cunha took the position that the meaning of the doctrine was variable, country- and case-specific. Edésio Fernandes maintained that it had no meaning at all.

Each of the participants in this little colloquy had a point, in my view. There is little predictable content ex ante and in the abstract in the notion of the social function of property. Perhaps the best one can do is, like Colin Crawford, to assess a number of examples and discern a common theme of emphasis on the use of property to promote human flourishing. This would not be the only example of a broad and differentially interpreted principle modifying classical liberal property rights.

So Brazil and other Latin American jurisdictions share a social function doctrine, though it takes different forms. In contrast, the United States, in practice and in jurisprudence, continues to operate with a classical liberal-era constitution drafted in 1789 and an individualistic conception of property; it has never expressly reformed its key articulation of property protection in light of subsequently-emerging conceptions of social and economic rights. Ankersen & Ruppert note this lack of evolution, and find

200. Crawford, supra note 4, at 1089; see also id. at 1094-97 (discussing the concept of human flourishing).


One article that explores this connection is Hanno Kube, Private Property in Natural Resources and the Public Weal in German Law – Latent Similarities to the Public Trust Doctrine?, 37 NAT. RESOURCES J. 857 (1997).

202. Ankersen & Ruppert, supra note 90, at 6-98. Ankersen & Ruppert note that the United States constitution provides for eminent domain power for “public use” if “just compensation” is paid, U.S. CONST. amend. V. They argue that expropriation in Latin America is different in scope under the “social function” doctrine than in the United States under “public use.” Ankersen & Ruppert, supra note 90, at 97-98. I would argue that the concept of private property in general may be understood somewhat differently in light of the broader claim of supervening need made by the
it “remarkable that a doctrine so fundamental to private and public law in many countries in the world has received so little attention in comparative legal literature in the United States.”203 Foster and Bonilla write that “the conventional account in U.S. law and theory situates the individual owner as insulated from the demand by others in society and owing no further obligation to them, except for the duty not to cause harm to others and their property.”204 The classical liberal approach identifies “the ‘core’ of property rights with individual autonomy and . . . relegate[s] the limitations on autonomy to the ‘periphery’ of property rights.”205 It is against this still dominant classical liberal background that social-obligation theorists of property—Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler among them—have sought to shift the discourse.206

C. Invisibility of Squatter Communities in the United States

Jane Larson, in the second of her articles describing Mexican colonias in Texas, asserts that large informal communities are basically understudied in the United States.207 In the process of
commenting, often critically, on an earlier article by Larson about colonias, Richard Delgado observes that informal settlements most certainly are ubiquitous, but they are also ignored. And indeed surely they will be visible to the subordinated communities themselves and to an academic such as Delgado, whose identity and career are intimately linked with tracking and explicating the plight of such groups. Several types of informal squatter communities, past and present, have appeared in United States history – in addition to colonias, tent cities in times of economic trouble, for example. And one might argue that large cohorts of undocumented workers living six, eight, ten, or twenty to an apartment, illegally (that is, in violation of housing codes), collectively comprise an informal settlement. Nevertheless, Larson and the others have a point. Our public and legal discourse on land ownership, homeownership, and property has been insufficiently attentive to informality and hence to informal community.

To some extent this may be an effect of race and class segregation in the United States, which geographically produces invisibility. Colonias and tent cities, especially in peripheral and rural areas, may stand outside the literal view of the powerful, just as they appear to do in United States property theory. In contrast, during my week in Rio the favelas of the South Zone were visible everywhere on the slopes that surround the more prosperous asphalt streets and the beaches. A country that has always had massive populations with no secure place to live, no place on the map, may experience pressure to develop property law in practice and theory that addresses the needs of those populations.

that in the 1960s and 1970s Texas cities ignored peripheral colonias because they were relatively distant; id. at 108 (arguing that more recently Texas cities have addressed colonias in terms of disaster relief, water, and wastewater services, but have not viewed them as a structural problem of modes of housing production and of poverty). Indeed, Ward points out that Texas only responded to the conditions in colonias as a result of visibility in the form of international criticism for cholera and other Third World conditions in a First World country. Id. at 119-20, 131, 242.


209. See, e.g., Loftus-Farren, supra note 26; see also NATIONAL COALITION FOR THE HOMELESS, TENT CITIES IN AMERICA: A PACIFIC COAST REPORT (2010).

210. Larson, supra note 26, at 158.

211. Cariocas sort themselves and their territory into those who live no asfalto – on the level, asphalt-paved, wealthier areas near the beaches – and those who live no morro – on the hill, that is, in the favelas.

212. To be sure, the large favelas of the North Zone weren't discussed much, and I got the sense they were off limits, beyond the reach of favela tourism. Not so picturesque, perhaps, or riskier.
One could take Gregory Alexander once again as an example of a minority thread. Alexander does write in an impassioned way about the plight of squatter communities and the need to bend protection of private property with a right to housing to address the needs of these communities. He links landless communities and tenure, in a way reminiscent of the Cantagalo informant that fine day in Rio. As he and Peñalver point out, the squatter communities described are ubiquitous, visible everywhere in South Africa. Whether Alexander’s social-obligation conception of property was influenced by such vast homelessness, or simply confirmed by it, is unimportant. In a planet with a billion squatters, our property conceptions could well take note of the right to dwelling as a claim to inclusion in community. In United States property jurisprudence, for the most part, they do not.

There may also be a politically (to me) unacceptable elision in United States property discourse, in the way it favors thinking about home, homeownership, and place in terms of the individuals who either own homes, rent, or are homeless. In the United States, as abroad, there are vast disadvantaged populations who collectively have “no property” as Baron articulated the concept. As Carmen Gonzalez has pointed out in her critique of the de Sotoist assumption that formalized property ownership is better because it will create wealth, perhaps United States jurisprudence needs to deal with squatter settlements on their own terms. Gonzalez writes:

> Far from representing a failure of formal law, informality constitutes a parallel and intersecting system of law developed by the urban poor in the face of daunting economic hardship. Formal and informal property systems coexist and influence one another.

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What matters in the end is guaranteeing that every member of society has adequate shelter, decent jobs, a good education, and access to health care.\footnote{Gonzalez, \textit{supra} note 33, at 258-59.}

Gonzalez suggests that some of the condemnation of informal systems is mistakenly attributed to the notion that the Global South has a generically failed legal system, when the cause is actually a failed economic system brought about by neoliberal reforms and massive rural-to-urban migration.\footnote{Id. at 254-56; \textit{see also} Jorge L. Esquirol, \textit{The Failed Law of Latin America}, 56 \textit{AM. J. COMP. L.} 75 (2008) (presenting and critiquing the notion of generally failed law in Latin America).}

Larson similarly suggests that the informality of squatter communities itself is in tension with United States legal theory—there appears to be no law there to analyze—and that this is part of the explanation for inattention to informal communities.\footnote{Larson, \textit{supra} note 26, at 158-59.}

Rather, as Peter Ward points out, \textit{colonia}-type housing production in the United States – as elsewhere in the world – is invariably highly rational given prevailing socioeconomic constraints that prevent people from homesteading normally. In short, there is little about \textit{colonias} that is “strange”, or even surprising. The only strange thing, perhaps, is that the phenomenon has not been more widely recognized.\footnote{Peter M. Ward, \textit{Informality of Housing Production at the Urban-Rural Interface: The “Not So Strange Case” of the Texas Colonias}, in \textit{Urban Informality: Transnational Perspectives from the Middle East, Latin America, and South Asia} 243, 243 (Ananya Roy & Nezar Alsayyad eds., 2004).}

\section*{D. United States Jurisprudence Treats as Suspect Vague Principles of Human Rights (Especially Those of Foreign Origin) and Disdains “Progressive Realization” of Them}

Some of the United States property jurisprudence’s reluctance to engage with the law of informal communities stems from the fact that high-level human-rights principles are vague and also of foreign origin, and that the on-the-ground solutions in informal communities are \textit{ad hoc} and often non-transferable. Both of these circumstances run up against a preference in United States property theory to see property rules as fixed and stable and universal, even when they may in fact be situation specific and re-negotiated regularly. For the first observation, discussed...
in Section V.D., I rely on Jane Larson; for the second and third, discussed in Section V.E, I rely on Carmen Gonzalez, Daniel Bonilla Maldonado, and an assortment of property theorists, including Joan Williams, Laura Underkuffler, and my own writings.

In looking to describe a mechanism to improve over the long term the lot of those living in informal colonias, Jane Larson looks beyond an immediate complete resolution, turning instead to the notion of “progressive realization” that is used to structure the working of some human rights principles, especially positive social and economic rights. Larson relies specifically on the Covenant on Economic, Social, and Political Rights, which articulates a currently un-implementable right to adequate housing. She points out that United States jurisprudence typically does not regard any of this as law, but rather as economic and social policy. “In general, negative rights provide the norm of legal rules in our tradition rather than positive rights.” Yet the gravamen of the cultural understanding of regularization of title we have been exploring sounds precisely in a broad, vague, not yet fully implementable right. No wonder United States discourse, with its different and narrower tradition as to what counts as human rights law, might assess things differently.

So the problem is not simply a question of a gap between human rights law and enforcement, a charge sometimes made about Latin American legal systems generally. It is whether aspirational human rights law counts as law.

220. Larson, supra note 26, at 178-81. Larson writes that “‘[p]rogressive realization’ provides a regulatory conception for imposing aspirational standards while calibrating compliance obligations to available economic resources.” Id. at 179.

221. Id. at 177-78 (discussing the Economic Covenant, supra note 6).

222. Id. at 177-79.


224. Id. at 177-78.

225. See, e.g., Mirow, supra note 90, at 235; van Gelder, supra note 44, at 454 (“In Latin American countries, . . . which historically have poor human rights records and strong liberal traditions of their Constitutions and Civil Codes, human rights approaches are particularly vulnerable from an enforcement point of view.”).
E. Is an Extralegal Legal System Legitimate Law? 

The Problem of Legal Monism

In her assessment of formal and informal property approach to the global housing crisis, Carmen Gonzalez makes a different but convergent point to Larson’s. For Gonzalez, holding a debate between formality versus informality is a “red herring.”\footnote{Gonzalez, supra note 33, at 258.} “Informality constitutes a parallel and intersecting system of law developed by the urban poor in the face of daunting economic hardship.”\footnote{Id.} Gonzalez’s own study and other studies responding to de Soto’s claims show that informal property solutions are pragmatic, \textit{ad hoc}, and likely each one to be \textit{sui generis}.\footnote{See supra note 33 and accompanying text; see also Neuwirth, supra note 215, at 25-173 (discussing squatter communities in Rio de Janeiro, Nairobi, Mumbai, and Istanbul, some of which are successful without the tool of formal title to property).} Yet many of them function adequately to provide security of tenure and markets in property. As Gonzalez writes, “[t]he advantages and disadvantages of formal and informal title must be evaluated on a case by case basis.”\footnote{Gonzalez, supra note 33, at 258.} But this \textit{ad hoc}, improvisatory quality may make the whole issue of managing communities informally seem not a proper topic for a law professor or advocate. Our old, familiar, individualistic, liberal discourse of law and property may seem a better-fashioned legal tool. Even if it doesn’t particularly fit.

As van Gelder, among others, points out, a simplistic legal/illegal dichotomy masks inquiry into “\textit{de facto} and/or perceived tenure security, which are both empirical issues.”\footnote{Van Gelder, supra note 44, at 454; see also van Gelder, supra note 33, at 132-40 (presenting an example of one kind of empirical study).} Characterizing the question of security of tenure in informal communities as one of legal pluralism, as some authorities do, may be helpful;\footnote{Van Gelder, supra note 44, at 454 (citing, \textit{inter alia}, two classic studies: Boaventura de Sousa Santos, \textit{The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagardar}, 12 L. & Soc’y Rev. 5 (1977); Kenneth L. Karst, \textit{Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas}, 19 Am. J. Comp. L. 550 (1971)).} but to me it also threatens to re-inscribe a desire to discern a clear one-size-fits-all \textit{alternative} legal system, another set of rules, rather than particularized inquiry into what are, as Gonzalez insists, always local conditions.\footnote{See van Gelder, supra note 47, at 242 (agreeing, at least in part, by stating: “Applying legal pluralism to informal settlements requires envisioning them as...”)}
Daniel Bonilla Maldonado provides a magnificent theoretical framework for this underlying concern in his important article *Extralegal Property, Legal Monism, and Pluralism*. His theoretical argument about the shortcomings of a one-size-fits-all approach to property and land law was developed in the course of a six-month study of how informal property transactions functioned on the ground in the community of Jerusalén, in Ciudad Bolívar, Colombia. In this article, theory meets practice.

Bonilla Maldonado defines legal monism as “the idea that there must be one and only one centralized hierarchical legal system in each state.” Indeed, he argues, “[p]roperty in the West has conceptually depended on legal monism.” The supposed virtues of legal monism in property include principles of equality, legal security, legality, political unity, and maintaining social and political order. Supposedly, legal monism in property offers unity, clarity and simplicity, facilitating individuals’ decision making processes. A unified system also contributes to overall legitimacy. And—notably from my point of view—Bonilla Maldonado writes that “legal monism is necessary for the consolidation of a modern market economy,” as it promotes “[t]he circulation of capital.”

Having proper normative systems with a ‘law’ that is different from and somehow resident outside that of the state legal system.”). But cf. id. at 242-43, where van Gelder posits another set of dichotomous norms- a legal/illegal within the informal settlement. Van Gelder among others also suggests an additional way of approaching informal property arrangements in various communities, conceding of a continuum with chaos at one end and full formal legal order at the other. Id. at 240-41. I find this proposal also problematic, for it still privileges the formal, legal approach when many informal approaches function as effective property law within their communities.


234. Id. at 213 n.1. The case study itself appears in the second half of the article. Id. at 226-38. Bonilla Maldonado writes that the case study “illustrate[s] the descriptive and normative shortcomings of legal monism, as well as the usefulness of certain tools provided by legal pluralism for comprehending the reality of property as it actually exists in the Global South.” Id. at 215.

235. Id. at 213; see id. at 216 (expanding on this argument).

236. Id. at 213.

237. Id.; see id. at 217-18 (expanding on this argument).


239. Id.

240. See id. (citing DE SOTO [2000], supra note 32, at 7, 10). The question about whether facilitating sales of land is good for an informal community proved the occasion of a spirited discussion in the Q & A session at Edésio Fernandes’s 2009 lecture at the Lincoln Institute of Land Policy. A questioner pointed out that a hotel owner anxious to buy hillside *favela* property would require formal title, not just
Carol Rose provides one kind of account of what is going on here.

[T]he clarification of formal title is useful precisely because it makes the status of property knowable to outsiders, that is, to strangers to the community. . . . Formal title gives assurances to any stranger at all who may want to purchase the property. Thus, formal title potentially introduces strangers into the community, through a form of property assurance that is not at all “natural” to a close-knit community.241

Exposure of the community’s land (and thus the community) to a market consisting of a world of strangers raises concerns of the kind associated with anti-globalization.242 There is a loss of a sense of local or national control243 because “formal title puts a barrio house into play in an economy that is much larger than the local community”244.

To Rose’s view one might juxtapose Ann Varley’s. She emphasizes that the local nature of extralegal property systems makes them resistant to the full force of the market.245 But these local systems do reflect the investment and social capital involved in self-help housing. She notes “incredulity” when she asked informal residents whether they would be likely to sell their homes.246 For them, the effort in building from scratch, the sacrifice, was great. “In these circumstances, housing means more to people than shelter or an economic asset. It has become part of their life informal property arrangements that might suffice within the favela community. Fernandes countered that the questioner was relying on an absolute sole ownership model of property, when in fact collective ownership, and thus collective sale, were also possible. Fernandes alluded to Islamic models of collective land ownership in Egypt, which he claimed functioned well in those local contexts. The host contributed the recollection that a particular congressman from Rio de Janeiro who advocated regularização also had said publicly that once formal titling was accomplished, he stood ready to buy hundreds of parcels. There followed further discussion about whether collective ownership really would facilitate free market transfers of property and whether, to the extent that it impeded it, that might well be a good thing. It was pointed out that cooperative and condominium models of ownership actually account for a significant portion of United States property ownership. Fernandes lecture 2009, supra note 33, at 71:30-76:00.

242. Id. at 704.
243. Id. at 704-05.
244. Id. at 705.
245. Varley, supra note 33, at 455 (questioning whether this local aspect is a defect, as de Soto maintains); see also de Soto [2000], supra note 32, at 5.
246. Varley, supra note 33, at 457.
story—and not only their own story, but the story of their family.”247 So they were less likely to want to sell.

Ngai Pindell makes a related point here. “Because favela residents obtain legal title to their property as a result of [titling] programs, these residents are able to make economic choices that may negatively impact neighbors.”248 Part of the issue is unrestrained fee simple ownership. To be sure, one could address these issues to some extent by imposing accumulation and exit restraints.249 Also, as Fernandes and others point out, title need not be established in fee simple form.250

But Bonilla Maldonado is actually more concerned about something else. One of his principal disputes with legal monism is that it is simply inadequate to describe the way real property works in the Global South.251 Vast populations in these regions live in informal settlements.252 “[I]f we want to understand the way in which property is interpreted and exchanged in a large part of the Global South, we must question the supposed unity, homogeneity, and exclusivity of state property law.”253 Official state law and parallel extralegal systems are paired, dynamic, and interactive.254 Any account that omits extralegal systems is woefully inadequate as a descriptive matter, he asserts.255 Two fundamental theses of legal pluralism are that “it is an error to identify rights with state law because the center of gravity in law is not the State, but the society;”256 and that in fact a plurality of legal systems co-exist and need to be studied as such.257

For extralegal systems, which are “created from the bottom...
up, they may adequately reflect and protect the interests of those directly affected by the informal system—a question which cannot always be predicated on the state property regime. In addition, extralegal systems are “flexible, adaptable, and sensitive to context.” They may also be more accessible to local residents than the formal property scheme, conceptually and practically, and thus have an egalitarian function.

Edésio Fernandes’s critique of de Soto strongly parallels Bonilla Maldonado’s argument about the flaws of legal monism in accounting for law in informal settlements. Fernandes critiques de Soto’s work because it “has failed to qualify the discussion on property rights; . . . he seems to assume that there is a universal, ahistorical, ‘natural’ legal definition of such rights.” Throughout Latin America and the developing world, Fernandes writes, “the state has treated differently the different forms of property rights . . . and the social relations around them, allowing for varying degrees of state intervention in the domain of economic property relations.” Land and real estate however are often treated differently, under a “dominant individualistic approach” applied universally, rather than under the notion of the social function of property. Fernandes argues that any analysis that sees formal property rights as a sine qua non for security of tenure is flawed. In many developing countries under certain conditions, “residents in informal settlements can share an effective perception of security of tenure, have access to . . . credit and public services, and invest in housing improvements, even without having legal titles.”

One source of this misleading focus on the formal and universal is the legal academy. A short paragraph in Bonilla Maldonado’s article castigates Latin American academics for “teach[ing] and writ[ing] their books as if legal monism was the rule and not the exception.” Extralegal property’s existence is typically not even mentioned in courses and books on property rights, a situa-

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258. Id.
259. Id. at 225-26.
260. Id. In a related argument, Bonilla Maldonado writes that extralegal systems can serve to address cultural diversity. Id. at 226.
261. Id. at 225-26.
263. Id.
264. Id.
265. Id. (internal citation omitted).
266. Id. at 222.
tion he deplores.\textsuperscript{267} Bonilla Maldonado’s point here overlaps quite directly with my project in this Essay, inasmuch as I have identified a rather a significant gap in mainstream United States property jurisprudence where certain accounts of the function of property in informal communities ought to be. His criticism about excessive focus on a monistic concept and the consequent lack of attention to description of on the ground practice is telling.\textsuperscript{268}

There is something about United States property discourse in general that is especially averse to informality, situation specificity, and fluidity. This partly is about nothing more than a generic compulsion of our legal authorities to try to articulate broadly applicable rules.\textsuperscript{269} Property law may be especially susceptible to this tendency to oversimplify and rigidify, as we think and hope that property is prototypically about owning things (solid, unchangeable, to achieve stability, but also fungible so that they can be bought and sold) rather than managing community relationships, however that may occur. A rigid concept of property as object of ownership generates a rigid property rhetoric.\textsuperscript{270} Savvy property theorists can take account of the need to change rules by acknowledging that property is fixed, then changes, and then is fixed again.\textsuperscript{271}

One strand of United States property theory recognizes that

\textsuperscript{267.} Id. at 223.

\textsuperscript{268.} Ann Varley makes a similar point in her interesting article critiquing analyses of formal title versus informal housing arrangements for excessive reliance on dualisms, because dualisms abstract from context. Varley, supra note 33. She invokes a feminist critique of abstract dualisms. For Varley, understanding why residents of informal housing behave the way they do, why they attempt to sell or do not attempt to sell, what their house means to them, is always inflected by their personal experience and by the local conditions. For Varley, “[t]he logic that leads to dichotomy `flees from the sensuous particularity of experience, with its ambiguities, and seeks to generate stable categories.’” Id. at 459 (quoting Iris Marion Young, \textit{Justice and the Politics of Difference} 98 (1990)).


\textsuperscript{270.} See, e.g., Poirier, supra note 140, at 43-44 (deploring the use of the “property rights encomium” to laud unchangeable property rights when in fact some adjustment has become grievously necessary in light of changed environmental conditions).

\textsuperscript{271.} The classic treatment is Carol M. Rose, \textit{Crystals and Mud in Property Law}, 40 Stan. L. Rev. 47 (1988); see also Carol M. Rose, \textit{Property and Expropriation: Theme and Variations in American Law}, 2000 Utah L. Rev. 1. I have argued that the promise of fixed value during regulatory transition, if believed and acted on in good faith, invites folks to participate in an ongoing negotiation about property and community. Poirier, supra note 128, at 172-73.
two approaches to property coexist, one formal, rigid, and naturalized, the other repeatedly negotiated. Joan Williams calls the former the “intuitive” model and seeks to expose it, encouraging instead a conversation about the welfare of the community.\footnote{272} Similarly, Laura Underkuffler identifies an absolute view of property and an overall more wide-ranging, comprehensive view.\footnote{273} As she points out, the first version of property is ultimately individualistic and self-regarding, while the second is both self- and other-regarding.\footnote{274} Both Williams and Underkuffler argue for getting past the absolute or rigid approach, in order better to accomplish the broader social goals served by property.\footnote{275} As Underkuffler points out, the concept of property is “of central, almost emotional importance.”\footnote{276} The stakes in renegotiating the concept of property are deep and at once personal and political; they implicate who we are as individuals and what it is that society promises us. So while the second, pragmatic account is undoubtedly a more accurate description of property practice, there may be advantages to dissembling.\footnote{277} Maintaining a façade of stable property is socially useful.\footnote{278}

Property theorists in the United States may have in the backs of their minds a suspicion of straying too far from a rhetoric of property as generally applicable rules about individuals and what they do and do not own. In Brazil, we are looking at a different rhetoric, of vague rights to dwell, of property ownership as a gateway to community, unenforceable as a whole, implementable only piecemeal and ad hoc. This rhetoric may seem inadequate, perhaps even incomprehensible, as law. In short, it may be in part a clinging to a particular formal, universalizing, and ultimately narrow version of what property law is about—an allegiance to legal monism—that accounts for the difference in United States property rhetoric on regularizing title and homeownership.

\footnote{272. Williams, supra note 104, at 278-879.} \footnote{273. See generally Laura Underkuffler, On Property: An Essay, 100 Yale L.J. 127 (1990).} \footnote{274. Laura Underkuffler-Freund, Takings and the Nature of Property, 9 Can. J. L. \& Juris. 161, 167-68 (1996); see Poirier, supra note 128, at 112 n.76 (collecting sources on this point).} \footnote{275. Indeed, Underkuffler writes “[t]he Supreme Court’s ostensible use of an absolute approach to property results in a kind of patent dishonesty . . . .” Underkuffler, supra note 273, at 143.} \footnote{276. Id.} \footnote{277. In a concluding section of an article on vagueness in takings doctrine, I raised the question, “Can We Talk About Property As Process? Should We?” Poirier, supra note 128, at 186-91.} \footnote{278. Id. at 187-89.}
VI. Conclusion

My investigations in this Essay have turned out to be an affirmation of localism, specificity, and complexity in property law theory and practice. They suggest that we should approach with considerable wariness the kind of generalized claims for property, and in particular for homeownership, that are a stock in trade for many property rights advocates, among them many legal academics.

To understand properly the impact of *regularização* in Rio (or a similar formalization of title in any other megacity of the Global South) requires a sophisticated and case-specific analysis of law, social and cultural context, and what Bonilla Maldonado calls extralegal property. To the case of the Rio *favela* dweller, homeownership is informed by the broader concepts I encountered—a right to housing/moradia/dwelling, a right to the city, a social function of property, and a kind of participatory notion of citizenship/cidadania. As we have seen, these concepts themselves are variously articulated in various settings. And, one should note, they are not always extralegal—implementation will often involve municipal law by design, as Edésio Fernandes so strongly points out is the case in Brazil. Municipal law is of course local, varied, and potentially can be more democratic and participatory than a distant and in some cases autocratic national government.

Meanwhile, back at the ranch in the United States, I do sense an increasing interest in legal academia in exploring what it means to own a home in analyses that are more nuanced, for example by taking into account race, class, and also gender. This strand of property scholarship has always existed, but the recent mortgage foreclosure crisis, the differential impacts of homeownership in the aftermath of Hurricane Katrina and other storms, the general hard times, and a substantial increase in class differentiation seem to have prompted more and more varied studies.

279. Bonilla Maldonado, *supra* note 133, at 213; *see* Fernandes [2011], *supra* note 5, at 9 (“[T]he evidence indicates that successful regularization initiatives have to be designed to fit the facts and history of the particular informal settlement and country context”); *id.* at 46 (recommending a customized approach to regularization policies). One aspect of this variability may also be to consider different types of legal rights aimed at producing security of tenure and preserving communities for their current inhabitants. *Id.* at 41-42 (discussing possibilities).
281. In the case of Brazil, advances in regularization and general devolution of authority over urban areas to municipalities have occurred in the context of an overall process of democratization.
282. *See, e.g.*, Carole Necole Brown, *supra* note 27 (describing her theory of the
In addition, historical and demographic studies of how ownership works and doesn’t work for cohorts considered separately and specifically as to race, class, and gender are also extraordinarily important. Effectively, this scholarship critiques legal monism as to the identity characteristics of the homeowner. It is not an

283. See, e.g., BENDER, supra note 193; DAVID CORREIA, PROPERTIES OF VIOLENCE: LAW AND LAND GRANT STRUGGLE IN NORTHERN NEW MEXICO (2013) (a history of the land grant struggle in northern New Mexico); Gomez, supra note 193 (describing and challenging the U.S. court system’s treatment of land grant disputes in the American Southwest, effectively converting what were once communal lands into the public domain of the U.S. sovereignty); Luna, supra note 193 (analyzing and challenging the internal logic of the land grant doctrine in the context of Chicano/Chicana land dispossession in the American Southwest, and calling for international law remedies to this dispossession pursuant to the Treaty of Guadalupe Hidalgo); McFarlane, supra note 27, at 890-907 (presenting a history of instability in Black and Latino homeownership); MARIA E. MONTUYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840 – 1900 (2005) (a history of the land grand dispute in northern New Mexico). See generally ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY, LAW & RACE (2010).

284. Another aspect of the emerging scholarship prompted by the mortgage foreclosure crisis and the Great Recession is to take seriously alternatives to fee simple home ownership as a long-term approach to security of tenure, whether this be renting, community ownership, or more novel models. This project is not altogether new – especially perhaps in the context of how to manage the equity in low-income housing. But we can see better how important a piece of the puzzle it is. See generally Arlo Chase, RETHINKING THE HOMEOWNERSHIP SOCIETY: RENTAL STABILITY ALTERNATIVE, 18 J. L. & POL. 261 (2009); James J. Kelly, Jr., Maryland’s Affordable Housing Land Trust
abstract “A” who owns Blackacre. In Audrey McFarlane’s words, these studies reveal, in contrast to the general assertion that homeowner confers stability, “an alternate reality of property ownership: a reality of recurring instability.”

It would also behoove United States property scholars to consider regularly and systematically various instances of more-or-less stable informal communities and their uses of legal and extra-legal property. This might well take the form of Elinor Ostrom-like case studies. Some such scholarship exists. In addition to colonias, tent cities are emerging (again) in these hard times, and perhaps in response a study of tent cities is emerging as well. Stable community gardens are also possibly relevant to the matter at hand. Michele Anderson’s project on unincorporated urban edges is also useful. Typically undisciplined by a general law, or at least less so, these informal dwelling arrangements in some sense share the characteristics of favelas and other types of informal communities in Latin America and the Global South. More study of various informal dwelling arrangements in the United States and their uses of property language might also better inform the ongoing theoretical debate about where property comes from and how it lives, breathes, and functions.

Act, 19 J. Affordable Housing & Comm. Development L. 345, Spring/Summer 2010; Pindell, supra note 2, at 473-78 (considering land banks as a United States analog to Brazilian right to the city measures).

285. McFarlane, supra note 27, at 860.


287. See, e.g., Larson, supra note 26; Jane E. Larson, Free Markets Deep in the Heart of Texas, 84 GEO. L.J. 179 (1995); Ward et al., supra note 33; Ward, supra note 219; WARD, supra note 207.


289. See, e.g., Foster, supra note 181.

290. Anderson [2010], supra note 26; Anderson [2008], supra note 26. For example, one might productively compare Peter Ward’s observations a decade or so earlier of the way in which poor living conditions in Texas colonias were maintained and ignored because they were not incorporated into cities but remained part of peripheral country jurisdictions. Ward, supra note 219, at 255 (observing that the weakness, lack of effective process, and failure to provide services of county governments contribute to the development of informality in Texas colonias); WARD, supra note 207, at 118 (same).

291. See, e.g., Dyal-Chand, supra note 27 (using United States poor and informal housing to test de Soto’s hypothesis as to the effect of formal title on informal communities in the global South); Ward et al., supra note 33 (comparing inhabitants of colonias along the Texas/Mexico border to those living in informal communities in Mexico and Latin America).
Often, United States jurisprudence fails to pay any attention at all to informal communities. Moreover, it may well dismiss a general, aspirational rights framework that might validate why we should care how such informal communities function—including *moradia*, right to the city, social function of property, and so on.\(^{292}\) One of the purposes of the social-obligation theorists is and should be to remedy that gap in our account of property. They should tell us about how dwelling works, not just formal ownership. Sheila Foster’s accounts of the functions and perils of urban commons might be one place to start.\(^{293}\) The resources managed by informal arrangements could well be thought of in property terms.

A fundamental theoretical question is whether property law and jurisprudence are to be local and concrete or universal and abstract. If anything is to be gleaned generally from this Essay, it is that accounts of housing, homes, homelessness, and dwelling require attention at the local level, not beginning with some abstract account of property ratified by a legal monist approach.\(^{294}\) Property jurisprudence around homeownership requires study *in situ*, and being aware of what has been called the “interlegality” of formal and informal property systems.\(^{295}\) What is required strikes me as not unlike the work that Elinor Ostrom and those working with her have produced when they study varied ways of managing common pool natural resources by a local community, from the bottom up, as it were.\(^{296}\) And indeed Sheila Foster has argued that informal property housing systems often are, precisely, bottom-up solutions to managing urban commons of the sort addressed by concepts like *moradia* and the right to the city.\(^{297}\) Accurate descriptions of informal property systems will help us better to

\(^{292}\) Cf. Iglesias, *supra* note 131 (discerning several strands in homeownership jurisprudence, some of which incorporate connectedness and others of which reflect classical liberal views).


\(^{294}\) See generally Bonilla Maldonado, *supra* note 233.


\(^{297}\) Foster [2009], *supra* note 293; see also Foster [2011], *supra* note 293 (articulating an account of local community responses to managing shared urban resources, using Ostrom’s general approach). Foster’s argument goes a good ways towards establishing that inquiry into the management of urban resources has to
understand the solutions devised by communities who rely on informal property in their attempts to achieve the many aspects of human flourishing that a secure dwelling situated within a similarly secure community can provide. Occasionally we may then be able to improve on them. These are the benefits Bonilla Maldonado argues for in criticizing legal monism in favor of description and careful, focused prescription. In contrast, a one-size-fits-all account, such as that provided by de Soto, is hardly sufficient, and may often be counterproductive.

The stakes here are large. For “[p]roperty theory determines how lawyers and policymakers think about urban issues and imagine solutions.” A systematic failure to examine critically the dominant individualistic approach to homeownership and homelessness will “foreclose serious consideration of alternative property arrangements.” As vague as they are, moradia, the right to the city, the social function of property, and a certain notion of cidadania help us to understand the concept of property in the home. To be sure, the Brazilian matrix within which regularização occurs has its own abstractions, exotic to an American ear not trained in them. But these abstractions do not function standing alone. As Ngai Pindell writes, “With its sometimes chaotic, sometimes ethereal overlay of formal, legal property rules atop the lived experiences of urban dwellers using, possessing, building, and speculating on land, Brazil’s property system presents the chance to see more clearly the underlying, universal tensions in property law.” Similarly, in the United States, an abstract account of the virtues and meaning of homeownership should not ignore concreteness and context, or it will mislead, with potentially serious consequences. A unitary theory is likely to miss the complexities of property ownership, especially homeownership. The unexamined discourse, by its very abstractness, masks political and social truths that would better be uncovered

account for what Bonilla Maldonado calls the extra-legal in addition to the formally legal, and that this must be a local inquiry.

298. See Baron, supra note 19; Crawford, supra note 4; Iglesias, supra note 131; Waldron, supra note 164.
300. See de Soto [2000], supra note 32.
301. See sources cited in note 33.
302. Pindell, supra note 2, at 460.
303. Id.
304. See supra the discussion of the Fordham symposium dialogue about whether there is content to the social function of property, text at note 199.
305. Pindell, supra note 2, at 449.
and discussed. Ignoring these truths may, for example, deliver informal communities unawares to the realities of a market in land, which, for all its benefits, is also perilous. Ownership may not be the same thing as a right to *moradia*.

306. See, e.g., Blomley, *supra* note 168 (discussing how a focus on property disguises property's political function in creating and maintaining homelessness).

307. *Compare* Rose, *supra* note 241, at 703-05 (not viewing these perils as overly grave), with McFarlane, *supra* note 27 (detailing the perils to people of color, resulting in a systematic instability of homeownership).