

NOTE

PROPERTY LAW AND ECONOMIC DEVELOPMENT IN THE INFORMAL COMMUNITIES OF ARIZONA AND SONORA, MEXICO

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I. INTRODUCTION

An invisible legal web controls every American. Far from the courtroom, this web influences the norms of human interactions, impacting how individuals do business and how they relate to one another. It impacts beliefs as to what is right and what is wrong. But the web extends even further. Beyond its control over human behavior and thought, it shapes the physical nature of our human empire.

A brief drive down a busy street will showcase the product of countless laws and regulations that influence our physical environment. Laws dictate the width of streets and the size, color, and shape of traffic signals. They require that buildings maintain a certain setback from those streets. They delineate zones where commercial activity can take place and set aside zones where residents may live in peace. They regulate the buildings themselves in the form of codes that influence the building materials, engineering, structure, and the labor used during construction.

Arizona cities such as Phoenix and Tucson abound with these laws. They play an invaluable role in engineering the cities. But drive South on Interstate 10 for several hours, merge onto Interstate 19 and speed toward the U.S.-Mexico border, and a casual observer will discover that many of these rules, so often taken for granted, begin to decay. Dotted along the interstate, off in the hills or hovering along the outskirts of more developed city centers are communities called *colonias*.¹ *Colonias*, as defined by the U.S. Department of Housing and Urban Development, are communities “located within 150 mi of the [U.S.-Mexico] border . . . that lack adequate infrastructure or housing and, possibly, other basic services.”² Many *colonias* in Arizona and New Mexico also

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1. “The reporting of social and economic data can mask the distinctive character of colonias and give the false impression that they are a homogeneous group of communities. For example, poverty and deprivation apply to most colonias, but several have done quite well and others have been successful in promoting community development.” ADRIAN X. ESPARZA & ANGELA J. DONELSON, *COLONIAS IN ARIZONA AND NEW MEXICO: BORDER POVERTY AND COMMUNITY DEVELOPMENT SOLUTIONS* 40 (2008).

2. LAURA M. NORMAN ET AL., U.S. GEOLOGICAL SURVEY, *COLONIA DEVELOPMENT AND LAND USE CHANGE IN AMBOS NOGALES, UNITED STATES – MEXICAN BORDER* 4 (2006) [hereinafter U.S. GEOLOGICAL SURVEY].

have limited access to health care and educational opportunities.³ The term *colonia* has a different meaning in Mexico, describing a much broader range of communities. But to avoid confusion, this Note will use the same definition to describe both U.S. and Mexico *colonias*.

In 2008, Adrian X. Esparza and Angela J. Donelson published a comprehensive evaluation of *colonias* in Arizona and New Mexico, as informal settlements in this region have received little attention.⁴ Esparza and Donelson provided a vivid description of these communities:

Many families in the poorest *colonias* still live in condemned trailers or homes constructed with salvaged materials. Some *colonia* residents still have no local water service and are forced to truck in water at exorbitant costs. Children in several *colonias* regularly miss class when the school bus cannot cross their flooded, muddy roads.⁵

A pair of sister cities called Ambos Nogales, for example, straddles the U.S.-Mexico border. In 2006, a report published by the U.S. Geological Survey documented a total of twelve American *colonias* in and around Nogales, Arizona.⁶ This same survey documented twenty-nine of these communities on the Mexican side of the border in Heróica, Nogales.⁷ While the number of communities that lack sufficient infrastructure in Ambos Nogales may be alarming, the *colonias* in this border town represent only a few of the more than 1,400 similar communities that were identified in Arizona, New Mexico, and Texas in 2001.⁸

Although federal regulations in the 1990s made some progress toward providing infrastructure through loans, land grants, and mandates to require some state expenditures, the number of *colonias* has continued to increase into the twenty-first century.⁹ In Arizona alone, an estimated 363,585 individuals live in communities that resemble *colonias*.¹⁰ Perhaps even more important, *colonias* are growing. Since 1990, the population of incorporated *colonias* grew 56%, and the population of unincorporated *colonias* grew 69% during the same time period.¹¹ The median income of these Arizona communities is \$33,891 as compared with the statewide median of \$47,067.¹²

3. ESPARZA & DONELSON, *supra* note 1, at 91.

4. *See generally id.*

5. *Id.*

6. U.S. GEOLOGICAL SURVEY, *supra* note 2, at 35.

7. The term *colonia* is widely used in Mexico to refer to neighborhoods, whether they have adequate infrastructure or not. In Mexico, the term *colonias marginales* better describes neighborhoods with infrastructure problems. *Id.* at 4.

8. *Id.* at 7.

9. *Id.*

10. ESPARZA & DONELSON, *supra* note 1, at 45.

11. *Id.* at 43–45.

12. *Id.* at 45.

Colonias are, by definition, communities that lack adequate infrastructure. However, this simple definition does not sufficiently encompass the great diversity among *colonias* and does little to identify the underlying causes of *colonias*. This Note approaches the issue from the broader perspectives of economic development and informal markets. Informal markets are those that operate outside established legal systems.¹³ *Colonias* are examples of informal markets because they are often unplanned communities that do not comply with building codes or lack regulation altogether. In this sense, they are an extension of the informal market. Kathleen Staudt, who has written extensively on informal economies along the U.S.-Mexico border, views “self-help housing construction and improvement as income-stretching activities that constitute one dimension of informality.”¹⁴ Informality is not always a negative thing. Staudt points out that activities such as a do-it-yourself home remodel serve to stretch income.¹⁵ However, individuals who save money by not hiring a contractor may fail to follow building regulations.

To have a reasoned discussion about the causes of and solutions to informal developments, it is critical that scholars refrain from lumping these illegal activities, which are better characterized as noncompliant activities, with other illegal acts involving drugs, violence, or other exploitation. As Staudt recognizes, “literature on informality in the United States is narrow and sparse, based on the assumption that informality is . . . minimal, criminal, or segregated within immigrant and poverty enclaves.”¹⁶ Indeed, the difficulty of compiling data on *colonias* may also explain why there is “little published research that documents the quality of life in Arizona and New Mexico *colonias*.”¹⁷ While many *colonia* homes exist informally, one cannot assume there exists a criminal mens rea associated with informal settlement or development. Rather, the problem is that this lack of formality may, in some cases, hinder economic development.

This Note applies economist Hernando De Soto’s theory regarding capital growth and liquidity to the issue of *colonia* expansion and development in Arizona and Sonora, Mexico. The second section of this Note summarizes De Soto’s theory and its relation to informal economies. The Note’s third section discusses Arizona’s gradual and somewhat rocky development of a formal land-use system. It also examines many of Arizona’s current laws and discusses how these laws facilitate transactions and capital liquidity. It then describes how certain loopholes in Arizona law provide fertile soil for *colonia* growth and expansion. The fourth section repeats this process on the Mexican side of the

13. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 30 (2000).

14. KATHLEEN STAUDT, *FREE TRADE? INFORMAL ECONOMIES AT THE U.S.-MEXICO BORDER* 99 (1998).

15. *Id.*

16. *Id.* at 3.

17. ESPARZA & DONELSON, *supra* note 1, at 41.

border.¹⁸ The fifth section addresses several general criticisms of De Soto's thesis and adds some much needed, though unavoidably incomplete, caveats to the theory. The sixth section presents policy considerations and recommendations for policy change and further research.

This Note concludes that, while *colonias* in both Arizona and Mexico are similar phenomena, they have different underlying causes. While overly lax regulation contributes to *colonia* growth in Arizona, overcentralization likely has a similar effect in Mexico. Many scholars have produced excellent work documenting the evolving physical nature of Arizona *colonias*, but little data documents the economic character of these communities. Most importantly, a poorly tailored federal definition of what constitutes a U.S. *colonia* causes governing bodies to overlook economic factors, including the limitations of an informal economy, that may perpetuate Arizona *colonias*. Ultimately, further on-the-ground research will be needed to determine the extent to which some of these Arizona communities, if any, may be the product of an informal economy.

II. DE SOTO'S THESIS ON THE INFORMAL ECONOMY

De Soto argues in *The Mystery of Capital* that the primary impediment to economic development in many underdeveloped communities is not a lack of education, infrastructure, or technology, but a lack of legal rights.¹⁹ He reasons that impoverished individuals control vast amounts of capital in the form of land and property that could serve as an engine for development, but for the fact that so little of it is legally recognized.²⁰ Developed countries grant assets an abstract legal representation, allowing individuals to use these assets "to put in motion more production by securing the interests of other parties as 'collateral' for a mortgage, for example, or by assuring the supply of other forms of credit and public utilities."²¹

This process is one necessary step toward allowing property owners, through mortgages, to convert physical capital into fungible liquid assets. Before a bank will use physical property to secure a loan, however, the bank must know that the property is represented abstractly through legal representation and that the law will enforce its claim to the property in the event of default. These liquid assets can then be put toward entrepreneurial endeavors. Small startup entrepreneurs, for example, can use their homes as collateral to secure loans. This is a critical source of capital, as in the United States, small businesses account for about 50% of private-sector output and employ more than half of private-sector

18. Examination of the Mexican code is more limited due to a language barrier, and much of the comparison with U.S. law took place through secondary sources.

19. DE SOTO, *supra* note 13, at 16.

20. *Id.*

21. *Id.* at 39.

workers.²² As De Soto summarizes, “It is formal property that provides the process, the forms, and the rules that fix assets in a condition that allows us to realize them as active capital.”²³

While it might be easy to accept the premise that there exists a stark difference between an economy that recognizes property rights and one that does not, this characterization is not realistic. Most countries do, in fact, recognize property rights.²⁴ But the legal systems in underdeveloped countries are often complicated and impose significant costs on those who seek legal representation of their property.²⁵ Individuals must either accept these costs or, alternatively, operate outside the legal system. De Soto refers to those who operate outside the legal system as participants in an extralegal economy, although this Note uses the terms “extralegal” and “informal” interchangeably.²⁶

While an informal economy necessarily exists outside the scope of established law, this does not mean that its participants operate in a state of lawlessness.²⁷ Thomas Hobbes presented a dismal view of such a lawless state, referring to mankind’s life under those conditions as “solitary, poor, nasty, brutish, and short.”²⁸ From the Hobbes viewpoint, a state of nature precludes private property in the modern sense:

[I]f any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies . . . [a]nd from hence it comes to pass that where an invader hath no more fear than another man’s single power, if one plant, sow, build, or possess a convenient seat, others may probably be expected to come prepared with forces united to dispossess and deprive him, not only of the fruit of his labour, but also of his life or liberty.²⁹

Thus, property in the modern sense is a social construction.

But informal communities do not operate in a complete state of lawlessness as Hobbes would suppose, and residents of those communities do possess private property. While much of the property of the poor is not legally recognized, it does functionally belong to them in that they physically occupy a piece of real estate or use the property on a daily basis. Furthermore, there often

22. George W. Haynes & James R. Brown, *An Examination of Financial Patterns Using the Survey of Small Business Finances*, in U.S. SMALL BUSINESS ADMINISTRATION, A COMPENDIUM OF RESEARCH BY THE SMALL BUSINESS ADMINISTRATION’S OFFICE OF ADVOCACY 39 (2009).

23. DE SOTO, *supra* note 13, at 46.

24. *Id.* at 153.

25. *See id.* at 18–28.

26. *See id.* at 30.

27. *Id.* at 71.

28. THOMAS HOBBS & J.C.A. GASKIN, *LEVIATHAN* 84 (A.P. Martinich ed., Oxford University Press 1998) (1651).

29. *Id.* at 83.

exist certain norms of conduct that govern individual interactions and allow informal economies to function.³⁰

Even assuming that participants in an informal economy initially operate under a Hobbes-like “state of nature,” cooperative behavior can evolve spontaneously in an environment where it did not previously exist.³¹ The caveat, of course, is that the probability of repetitive interactions between individuals must be great enough to discourage an individual from usurping another’s property to gain a benefit in the short run.³² Provided such repetitive interaction does take place, however, this cooperative behavior tends to displace the non-cooperative behavior described by Hobbes.³³ De Soto’s argument, therefore, is really an argument favoring formal legal systems over the informal norms, built and enforced through repeat interactions and the discouraging of wrongful behavior that communities develop. In a formal legal system, complete strangers can transact, secure in the knowledge that each holds title to what she claims, and in the belief that the courts will provide a remedy if one of the parties fails to perform.

In the United States, courts often refer to property ownership as a “bundle of rights.”³⁴ While the individual components of this bundle may be numerous and varied, four of these rights are fundamental as they relate to formal and informal economies. First, an individual must acquire property. Second, he must prove to the rest of the world that he owns property, presuming that others already recognize his right to exclude them. Third, an individual must be able to transfer property to another. Fourth, an individual must have recourse to an enforcement system or mechanism if his property rights are disturbed. Both formal and informal economies must enforce rules in some fashion to maintain this conception of property. While the first three components define property in both formal economies and in the informal economic context of *colonias*, the last component regarding manner of enforcement of these rights is fundamentally different. As described above, actors in an informal economy must rely on repeat interaction to deter bad behavior.

III. ARIZONA

A. History of Property Rights in Arizona

United States citizens often take for granted the integrated legal property system that they enjoy simply by virtue of the nation’s relatively well-established

30. DE SOTO, *supra* note 13, at 21, 28.

31. Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390, 1394 (1981).

32. *See id.*

33. *Id.*

34. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

laws and regulatory systems. This was certainly not always the case. De Soto notes that “[b]etween 1785 and 1890, the United States Congress passed more than five hundred different laws to reform the property system.”³⁵ However, the procedures within these laws were complicated and often hampered the goal of placing land into the hands of individual property owners.³⁶ Some individuals even derived their land security from the confusion over ownership and would not assert their rights for fear of having to pay fines.³⁷ During the eighteenth century and early nineteenth century, for example, it was difficult to determine title.³⁸ De Soto characterizes this as a fundamental failure on the part of the United States to deal effectively with a rapidly growing migrant population.³⁹ Despite these protracted starting difficulties, property specialists have not written extensively about the difficult transition that the United States underwent as it evolved from a system of largely extralegal rights to a formal property system.⁴⁰

The first efforts to formalize land ownership in Arizona were problematic and faulty. Following the outbreak of the Mexican-American War of 1846, President James K. Polk formed and executed a plan to gain control of New Mexico and California.⁴¹ The resulting territory that the United States successfully conquered also included a portion of what is now Arizona.⁴² On September 22, 1846, Stephen W. Kearny, Commander of the Army in the West, established a civil government for the conquered territory of New Mexico.⁴³ To maintain order, he also created what came to be known as the “Kearny Code.”⁴⁴ Kearny found himself in a very difficult position. Not only was the territory largely unsettled at this point, at least from Kearny’s perspective, but he also faced potential conflicts between land claimants from Mexico and the United States.

In response to these concerns, the “Kearny Code” created the Office of Register of Lands and required any person who claimed land through a Spanish or Mexican grant to file papers in that office.⁴⁵ Those who had no written evidence had to submit an affidavit within five years that showed the extent of their claim, how much land was under cultivation and inhabited by the claimant, and the length of time the claimant had held the land, or face forfeiture of their claim.⁴⁶ At a minimum, Kearny recognized the importance of maintaining an accurate

35. DE SOTO, *supra* note 13, at 128.

36. *Id.*

37. *Id.*

38. *Id.* at 128–29.

39. *Id.*

40. DE SOTO, *supra* note 13, at 109.

41. J.J. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 467 (1973).

42. *Id.* at 468.

43. *Id.*

44. *Id.*

45. *Id.*

46. Bowden, *supra* note 41, at 468.

registration system, although successfully implementing such a system would prove a very difficult task.

Shortly after the establishment of the code, Mexico signed the Treaty of Guadalupe Hidalgo, which ceded what are now the states of California, Nevada, Utah, part of Arizona, New Mexico, Colorado, and Wyoming to the United States.⁴⁷ While this was no doubt a blow to national pride, Mexico did manage to protect the rights of its own individual property owners by inserting two provisions to protect already valid land grants located within the ceded area.⁴⁸ The first of these was Article VIII, a major victory for private landholders, which required the United States to protect the property rights of Mexicans who held valid land claims in the ceded territory, whether or not those Mexicans chose to emigrate from the area.⁴⁹ The second provision was Article X, requiring the United States to recognize several land grants that Mexico had made prior to the war, although this provision was later removed.⁵⁰

In 1854, Congress granted the Surveyor General the responsibility of examining Mexican land grants so the United States could perform its treaty obligations.⁵¹ Unfortunately, in contrast to the Kearny Code, the Treaty did not require individual grant claimants to present their claims within a specified time, and it did not require the surveying of a grant once filed.⁵² These claims presented intricate questions of law concerning the validity of a grant and the required procedures to follow under both the Spanish *and* Mexican land systems,⁵³ which the Surveyor General was not equipped to solve. This made it difficult to determine land rights. Furthermore, it restrained the development of the Southwest.

This dysfunctional process continued for thirty-seven years, until 1891, when, in response to President Grover Cleveland's urging, Congress established the Court of Private Land Claims.⁵⁴ The court was tasked with the adjudication of land claims in the Mexico Territory, excluding California.⁵⁵ The formal property system at this point was so dysfunctional that this court also had to adjudicate one of the most outlandish and notorious hoaxes in Arizona history.

In 1882, James Addison Reavis, a Confederate veteran who defected to the Union Army after the fall of Vicksburg, brought forth what he claimed was legal title to a 1758 land grant from the King of Spain.⁵⁶ The alleged land grant totaled 7,500 square miles and conveniently included the cities of Phoenix,

47. DE SOTO, *supra* note 13, at 128.

48. Bowden, *supra* note 41, at 469.

49. *Id.*

50. *Id.*

51. *Id.* at 473.

52. *Id.*

53. Bowden, *supra* note 41, at 473.

54. *Id.* at 485.

55. *Id.*

56. Donald M. Powell, *The "Baron of Arizona" Self-Revealed: A Letter to His Lawyer in 1894*, in 1 ARIZONA AND THE WEST 161 (1959).

Florence, Globe, Clifton, and Safford, as well as rights to water, agricultural lands and minerals.⁵⁷ To support his claim, Reavis produced masses of faded documents from Mexican and Spanish archives, wills, other papers, and even a gallery of ancestral pictures.⁵⁸ Despite the cartoonish nature of Reavis' claim, this rumor persisted for thirteen years.⁵⁹ The Court of Private Land Claims did not disprove the fraud until 1895.⁶⁰ This dispute was one of many during the long and complicated process of establishing and adjudicating land rights after the treaty.⁶¹ The Court continued this messy process until 1904, when it finally cleared its docket.⁶²

After the United States signed the Treaty of Guadalupe Hidalgo, it took a total of fifty-six years, or nearly two generations, to properly allocate land rights. This is important to keep in mind when evaluating both formal property laws in the United States and the informal systems that are so prevalent in developing countries. This specific history is consistent with De Soto's more general observations regarding the messy and complicated process of allocating formal property rights. De Soto addresses this transition when he observes that "[b]y ultimately embracing many of the extralegal arrangements of the settlers, formal law . . . legitimized itself, becoming the rule for most people in the United States rather than the exception."⁶³ Since then, Arizona's formal legal system has come a long way.

B. Modern Property Law in Arizona

This section summarizes the modern legal mechanisms that Arizona has implemented so private individuals can signal to one another their rights with respect to a given piece of real property, as well as their liabilities. As De Soto writes:

By making assets fungible, by attaching owners to assets, assets to addresses, and ownership to enforcement, and by making information on the history of assets and owners easily accessible, formal property systems converted the citizens of the West into a network of individually identifiable and accountable business agents.⁶⁴

Arizona law facilitates this process. It marks a substantial departure from the myriad of long and complicated disputes that prevented development in the

57. *Id.*

58. *See* Powell, *supra* note 56, at 161.

59. *Id.*

60. *Id.*

61. *See* Bowden, *supra* note 41, at 485–97.

62. *Id.* at 497.

63. DE SOTO, *supra* note 13, at 148.

64. *Id.* at 58.

Southwest following the Treaty of Guadalupe Hidalgo. This Note divides Arizona's property laws into two categories: 1) those that prove ownership, and 2) those that facilitate transfer of ownership.

1. Proof of Ownership

Arizona uses a recording system to facilitate and standardize signals of ownership between private individuals.⁶⁵ A party's interest in a parcel of property is not legally recognized unless he or she formally records that interest.⁶⁶ The statute goes so far as to say that "no instrument affecting real property gives notice of its contents . . . unless recorded as provided by law in the office of the county recorder of the county in which the property is located."⁶⁷ Given the importance of formally recording an interest in a piece of property, it is also necessary that there exists a standardized means by which to map that property and connect it to its owner.

Under the Arizona recording system, land is categorized under a system of plane coordinates that have been established by the National Geodetic Survey (NGS).⁶⁸ The NGS facilitates mapping and charting in the United States.⁶⁹ Revisions to this coordinate system must also follow the standards and specifications of the Federal Geodetic Control Committee.⁷⁰ Furthermore, these changes must be published with the appropriate federal department and be open to the public through the county recorder's office.⁷¹ One important caveat, however, is that regional land survey descriptions trump the coordinate system if there is a conflict.⁷²

2. Transfer of Ownership

A formal legal system that proves ownership must also keep track of changes in ownership. Failure to do so would lead to large transaction costs, as individuals would not know with whom to bargain. As De Soto writes, "[O]ne important reason why the Western formal property system works like a network is that all the property records (titles, deeds, securities, and contracts that describe

65. ARIZ. REV. STAT. ANN. § 9-253 (2009) (West).

66. *Id.* § 33-411(A).

67. *Id.*

68. *Id.* § 33-131(A).

69. *National Geodetic Survey: What We Do*, NGS, <http://www.ngs.noaa.gov/INFO/WhatWeDo.shtml> (last visited Dec. 31, 2011).

70. ARIZ. REV. STAT. ANN. § 33-137(A) (2009).

71. *Id.* § 33-137(B)-(D).

72. *Id.* § 33-136.

the economically significant aspects of assets) are continually tracked and protected as they travel through time and space.”⁷³

Arizona law is structured to accomplish this end in a variety of ways. First, it decentralizes its recording system, relying on county recorders to maintain the records, as well as the clerks of cities and towns.⁷⁴ But the law further states that while counties may not accept any plat or map for filing unless the plat complies with statutory requirements, it provides a specific exception if a city or town fails to project the future lines of its streets.⁷⁵ This provides a back door to a developer frustrated by a local bureaucracy’s inability to provide the information necessary for him to comply with regulations.

There are also several fail-safe devices that encourage property transfer in the event that an error occurs with respect to the definition of rights and responsibilities. As a general rule, title 33, section 412 of the Arizona Revised Statutes states that the interests of all individuals and creditors must be recorded if the interests are to survive transfer to another party.⁷⁶ For example, individuals must record court decisions that impact their rights to a property.⁷⁷ This provides a powerful incentive for individuals to record their interests. It also allows a purchaser, who may have less information about a property than the seller, to safely rely on the recorded information. However, to deter abuse, if a purchaser has notice of the interest, then it is binding, even without recording.⁷⁸ Arizona case law goes further, holding that a person who does not exercise due diligence cannot deprive others of their interests under this statute.⁷⁹

The formal legal system also serves to maintain agreements once individuals have made them. It places the burden of recording on the transferor, stating that he must record the transfer within sixty days or, alternatively, indemnify the transferee in any legal action that subsequently challenges the transferee’s interest in the property, “including costs, attorney’s fees and punitive damages.”⁸⁰ In this way, the law clearly assigns the responsibility to record to the transferor and protects a transferee who might worry that a transferor will not live up to his obligations.

The law also permits private individuals to engage in activities that facilitate property transfer. Title 33, section 423(A) of the Arizona Revised Statutes states that a buyer or seller of real property may provide a disclosure report to evaluate other qualities that might impact the value of a property, including everything from flood hazard areas to military training routes and

73. DE SOTO, *supra* note 13, at 61.

74. ARIZ. REV. STAT. ANN. § 9-253 (2009).

75. *Id.* § 9-478.

76. *Id.* § 33-412(A).

77. *Id.* § 33-414(A).

78. *Id.* § 412.

79. *Davis v. Kleindienst*, 169 P.2d 78, 83 (Ariz. 1946) (holding that a person who fails to exercise due diligence to avail himself of information within his reach is not a bona fide purchaser) (citing *Univ. of Richmond v. Stone*, 139 S.E. 257 (Va. 1927)).

80. ARIZ. REV. STAT. ANN. § 33-411.01 (2009).

special tax assessment areas.⁸¹ This explicitly allows private individuals to specialize in researching these factors and provide their services to those who would transact. The statute requires that these third parties base their reports on readily available governmental maps or information.⁸² It further states that these third-party information providers must carry errors and omissions insurance.⁸³

3. Cumulative Effect of Modern Property Law

The cumulative effect of these policies is a formal legal structure that allows parties with no prior history with one another to engage in property transactions with relative certainty that each has title to the property he or she claims. These parties may be individuals directly transacting between themselves. However, the same principle is true for indirect transfers, such as when a bank and an individual use property to secure a loan. Large business entities can rely on these laws, secure in the knowledge that if another party has failed to disclose encumbrances on their property, sufficient legal protections exist to eliminate or minimize the damage. They also can employ specialized third parties to uncover other factors that may impact the value of the property. Because the parties know they can rely on the legal system to enforce their contracts, this also reduces the transaction costs they face when dealing with one another.

C. Arizona Colonias

1. Cause of Colonias in Arizona

Prior to 2000, Arizona law did not have infrastructure disclosure requirements for real estate subdivisions that split land into fewer than six lots.⁸⁴ Since then, Arizona implemented the Growing Smarter Plus Act, which gives counties some authority to regulate developments that do not conform to their minimum zoning requirements.⁸⁵ However, the law still places a burden on the county government with respect to compliance enforcement. Arizona still requires that a county approve a lot-split under two conditions. First, a county must approve a lot-split of fewer than five lots if:

81. *Id.* § 33-423(A).

82. *Id.*

83. *Id.* § 33-423(B) (stating that third-party providers shall carry errors and omissions insurance coverage with limits of at least \$1 million per occurrence and \$10 million in aggregate).

84. Paul Christensen, Sherry Haskins, Jamie Hogue & Jess Koldoff, *Lot-splitting and Development Regulation: The Information Asymmetries and Free Rider Issues Associated with Arizona's Wildcat Development*, 3 PERSPECTIVES IN PUB. AFFAIRS 37, 40 (2006).

85. *Id.* at 41.

1. The lots, parcels or fractional interests each meet the minimum applicable county zoning requirements of the applicable zoning designation.
2. The applicant provides a standard preliminary title report or other acceptable document that demonstrates legal access to the lots, parcels or fractional interests.
3. The applicant provides a statement from a licensed surveyor or engineer, or other evidence acceptable to the county, stating whether each lot, parcel or fractional interest has physical access that is traversable by a two wheel drive passenger motor vehicle.
4. The applicant reserves the necessary and appropriate utility easements to serve each lot, parcel or fractional interest created by the land division.⁸⁶

It is important to note that, while this policy requires a subdivider to meet certain criteria that lay the foundation for later infrastructure development, it also makes it possible for the subdivider to divide and convey a parcel without actually requiring him to install that infrastructure first. As such, the county must shoulder the burden of making sure that future owners, if they choose to place a structure on the property, comply with regulations.

Second, a subdivider can bypass all the aforementioned requirements with a signed affidavit. Subsection C states:

An application to split a parcel of land that does not comply with one or more of the items listed in subsection B shall still be approved if the applicant provides an acknowledgment that is signed by the applicant and that confirms that no building or use permit will be issued by the county until the lot, parcel or fractional interest has met the requirements of subsection B. The county may grant a variance from one or more of the items listed in subsection B.⁸⁷

However, subdividers automatically get approval unless the county acts within thirty days, and the county must grant approval if the subdivider provides a disclosure affidavit.⁸⁸ But an affidavit alone does not have to include important information the county would need to make an informed authorization.

The ultimate effect of this Act is that Arizona law still does not require sellers to add basic infrastructure such as roads, plumbing, and electricity, provided that sellers limit their lot-splits to fewer than six parcels. These policies allow each owner and subsequent owner to divide his lot into five parcels, leading to an exponential expansion in the number of lots and a similar reduction in lot

86. ARIZ. REV. STAT. ANN. § 11-809(B) (2009).

87. *Id.* § 11-809(C).

88. *Id.* § 11-809(E).

size. The resulting communities grow quickly and are often referred to as “wildcat subdivisions.” This process forms the foundation of modern *colonia* expansion and is one example of the loose land-use laws referred to by Esparza and Donelson.⁸⁹

Although it might be true that on the face of Subsection C, individuals shall not receive any use permit unless they satisfy the minimum requirements the county puts forward, one must also consider the burden of enforcement on the county. Although an individual may not receive a permit to build a structure, informal economies do not require a permit to build at all. As such, for informal *colonia* actors, failure to receive a permit will not be a deterrent to development, although that development may not be formally recognized. For the county to enforce its rules, it would be necessary to physically visit these sites to ensure that structures comply with their codes and verify that residents hold permits. Constant first-person monitoring places a serious burden on counties and, as such, the monitoring may not take place at all.

Another concern is that the policy itself is based on raw numbers rather than the size of the parcels involved. Under some circumstances, a landowner may hold a large amount of residential property that he wishes to subdivide. Provided that each plot of land is larger than what an individual homeowner would be willing to purchase, it is unlikely that informal development would take place on a large scale. But at the moment, lawmakers haven’t tied infrastructure development requirements to a parcel’s actual size.

Although lax legislation and enforcement seem to be the mechanism by which many *colonias* take shape, there remains the question of why individuals would choose to live in a *colonia*-type community. Peter M. Ward, a sociologist at the University of Texas, has applied several development theories to *colonias* of a similar nature along the U.S.-Mexico border in Texas. Regarding Texas *colonias*, Ward argues that the origin is largely “rapid urban and population growth, a context of little or no public housing supply and low state support for other low-income housing opportunities.”⁹⁰ He further observes that “[a]lthough illegal, they are effectively the only route that poor households have if they are to embark upon home-ownership, build a home and create a family patrimony, all within a context of poverty and low-wage economies, without access to low-interest formal lending institutions.”⁹¹

From Ward’s perspective, the problem is therefore twofold. First, individuals make a financial decision to engage in informal development because they simply do not have the money to participate in formal development. This is an interesting and important caveat to what is often a straightforward economic analysis. For a transaction to take place, a traditional economist will simply state

89. ESPARZA & DONELSON, *supra* note 1, at 109–11.

90. Peter M. Ward, Flavio de Souza & Cecilia Giusti, ‘*Colonia*’ *Land and Housing Market Performance and the Impact of Lot Title Regularisation in Texas*, 41 URB. STUD. 2621, 2624 (2004).

91. *Id.* at 2624–25.

that the benefits to each party must be equal to or greater than the costs to each party. While this is a quite obvious theory, the *colonia* phenomenon requires policymakers to also consider the context in which individuals weigh those costs and benefits. In other words, this transaction can take place formally or informally. There is always an alternative economy. Therefore, while costs may prohibit transactions in a formal economy, an individual may still choose to operate outside of that formal system if she perceives the benefits to outweigh the costs.

Second, Ward highlights the importance that formal lending institutions play in the formal housing market. Few middle-class homeowners have the capital on hand to pay for a home without the support of a loan. Low-wage earners have an even more difficult time, and without a loan, they cannot likely invest in a formally owned property. Additionally, it is important to note the long-term lending consequences of an individual's decision to invest in an informal home. De Soto would likely argue that, because their property is informal, they cannot use its value as collateral to help them purchase formal property at a later date. This risks creating a negative feedback loop that prevents those individuals from integrating into the formal economy, at least with respect to real property.

Here, a policymaker runs into one of the classic disputes regarding policies that may have a beneficial effect on a community, but which also may have a paternalistic bent. One might argue that, should an individual choose to live in a structure that is not legally recognized, he ought to have the right to do so, especially since he may not have the income to own his own land or house in the formal economy. Indeed, preventing such *colonia*-style development does appear paternalistic in that it assumes the government knows more about the needs and desires of an individual than the individual himself. That said, one must consider the collective action problem that arises in the De Soto context. An individual may be better off when he chooses to live informally, and his choice to be part of a formal economy has only a marginal impact on the formal economy's functionality. But a problem arises when multitudes of individuals face this same scenario. This starts to undermine the availability and fungibility of capital in the formal economy, which has a negative impact on the individuals collectively. To effectively avoid this scenario, a policymaker must ensure that each individual participates in the formal economy and abides by its laws, regardless of whether it is in the individual's singular best interest to do so.

2. Application of De Soto's Thesis to Arizona Colonias

In 2004, Ward published a study that evaluated how the *colonia* housing market performed after a program granted formal title to property owners.⁹² He conducted the study in Texas *colonias* on the U.S. side of the border.⁹³ In Texas

92. *Id.* at 2621.

93. *Id.* at 2624.

alone, an estimated 500,000 people live in more than 1,600 informal settlements along the border.⁹⁴

Contrary to what one might expect, Ward argues that the informal land market in many less-developed countries is dynamic, as both land and housing are freely traded between individuals.⁹⁵ This also sheds some light on why individuals would choose to live in informal settlements in the first place. Ward points out that “the very informality and poorly serviced nature of the land makes housing affordable in the first place.”⁹⁶ Contrary to the De Soto thesis, however, he argues that the informal developments do not exist outside the marketplace, but can be commoditized within a less regulated marketplace.⁹⁷ He further argues that using titled property to secure credit is primarily a middle-class phenomenon, as most low-income individuals do not utilize credit.⁹⁸

Ward also criticizes what he perceives as De Soto’s double standard, which argues for the creation of formal markets while simultaneously arguing for deregulation to ensure that formal market operations are not restricted. However, this is hardly contradictory or “perverse.”⁹⁹ When De Soto argues for formalization, it does not serve to restrict market operations, but to reduce transaction costs that may otherwise limit those operations. When individuals can rely on a legal system to enforce agreements for them, they should be more willing to engage in transactions without wasting resources to determine the credibility of their bargaining partners or trying to enforce the contracts themselves. Furthermore, it allows those same people to bargain with those whom they may not see again, because an individual is not likely to honor a contract if he expects no future interactions with that same person. As such, the creation of an enforcement system is hardly a severe restriction on market operations and is entirely consistent with De Soto’s position that decision makers should not enact superfluous regulations, which themselves create transaction costs that restrict market operations. Whether Ward perceives particular policies, such as tax rates or environmental regulation, as positive or negative is a separate question altogether.

Ward does make an important finding with respect to certain predictions about the way in which land title impacts the value of informal property. De Soto, among others, predicts that one effect of holding official title to a piece of land is that the value of the land itself will increase.¹⁰⁰ Ward did not observe such an effect. Surprisingly, Ward did not find that granting some form of regularized title significantly increased land prices. He did find that informal *colonia* land markets function poorly, and he observed only modest increases in real land

94. *Id.*

95. Ward, de Souza & Giusti, *supra* note 90, at 2623.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Ward, de Souza & Giusti, *supra* note 90, at 2623.

values from one decade to the next.¹⁰¹ As Ward writes, “intervention to provide clear title to lot owners [does not] appear to make much difference, although it is arguably still too soon to use the data to hand to gauge accurately the impact of CRG’s intervention in the *colonias* outside [the study area].”¹⁰² Furthermore, the level of services provided and relative location of the lots did not provide good explanations for the difference in land prices.¹⁰³ Instead, Ward concluded that the price-setting behavior that land developers engaged in over the years best explained the market prices.¹⁰⁴ This does make sense, as Rio Grande City, the study location, was far from a competitive market.¹⁰⁵ As Ward observes, “Two principal land developers controlled and oversaw most of the peri-urban settlement outside Rio Grande City [They] were not unlike others in Texas, selling unserviced land with vague promises of later providing services, at prices and on terms that were affordable.”¹⁰⁶ With several competing developers in the land market, one would expect this effect to deteriorate; as these developers would not be able to leverage their market share to fix prices.

Ward suggests that his findings call into question the veracity of De Soto’s thesis and predictions about market behavior after informal property owners receive title to their land.¹⁰⁷ De Soto predicts that property values will increase once informal property owners receive title to their land, which did not happen. Ward may be right with respect to *colonia*-type areas where one or two developers control the majority of the housing market, but it does not seem that this alone debunks or is even inconsistent with De Soto’s thesis. First, in an uncompetitive market, one would expect housing suppliers to exploit their market share and increase prices above the market rate in a competitive economy. Although the *colonia* land in Ward’s study was cheaper than that which residents would use in a formal development, it may still have been more expensive than similar land in a competitive economy. As such, one should consider the possibility that the land prices were already artificially inflated before the owners received official title. Second, it is important to remember that economic development is not the same as capital appreciation. Although the value of a piece of land may increase, this does not necessarily mean that any new capital is being created, only that more individuals now have access to capital because it is tradable in the formal economy. Third, the major benefits of a formalized economy are tangential to the value of a piece of land. As referenced before, De Soto emphasizes the ways in which formalized rights to capital support the growth of businesses. These businesses create the real economic growth, and Ward’s study does not take into consideration the tangential impact of formalized title. It

101. *Id.* at 2642.

102. *Id.*

103. *Id.*

104. *Id.*

105. Ward, de Souza & Giusti, *supra* note 90, at 2625.

106. *Id.* at 2625–26.

107. *Id.* at 2642.

would be useful to know how many of the individuals utilized their now-formal property to support other economic activity.

This is not to say that De Soto's thesis necessarily explains *colonia* growth or can alone predict how policies will impact residents of these communities. Nor should a reader draw the conclusion that De Soto is the undisputed authority on the topic of informality and economic development.¹⁰⁸ To be sure, this is a complicated topic to which this Note can devote only cursory examination. However, it is certainly too soon to state conclusively that the principles outlined by De Soto and others are inapplicable to Arizona *colonias*. An approach that considers informal economies and the long-term effects of informality on development within *colonias* may lead to yet unexplored or unconsidered solutions to the problem.

IV. MEXICO

A. The History of Property Rights in Mexico

Mexico's land-use laws exist in an entirely different political context than those of the United States. A comprehensive evaluation of the differences between these social contexts should start with a discussion of *ejidos*, as these unique legal entities not only hold title to a tremendous amount of land, but they also embody foundational tenants of the Mexican Revolution, as well as modern political tensions. An *ejido* is customarily communal land at the edge of a town.¹⁰⁹ Under the law, however, an *ejido* is a community with its own legal identity and estate.¹¹⁰ In 2001, more than half of all land in Mexico was owned or controlled by *ejidos* or other agrarian communities.¹¹¹ This is an important difference from the United States, as one does not bargain with an individual when bargaining with an *ejido*, but the community as a whole.¹¹²

The creation of *ejidos* was largely a reaction to social upheaval among peasants who had lost their land rights by the end of the nineteenth century.¹¹³ The Mexican Constitution prevented the concentration of land in private hands or the re-emergence of land barons by stating that *ejido* lands could not be bought,

108. See, e.g., Boris Kozolchyk, *Modernization of Commercial Law: International Uniformity and Economic Development*, 34 BROOK. J. INT'L L. 709 (2009).

109. George R. Gonzalez & Maria Elia Lopez-Gastélum, *Doing Business with Ejidos in Mexico* (2007), NAT'L LAW CTR. FOR INTER-AM. FREE TRADE, <http://natlaw.com/interam/mx/rp/sp/spmrxrp00010.pdf>.

110. *Id.*

111. *Id.*

112. See *id.*

113. DANA MARKIEWICZ, *THE MEXICAN REVOLUTION AND THE LIMITS OF AGRARIAN REFORM, 1915–1946*, at 2 (1993).

sold, rented, or leased.¹¹⁴ Individuals who worked on *ejidos* had to live on the land and could not be absent for an extended time without permission from the *ejido*'s general assembly, as no individual could claim a parcel on an absentee basis.¹¹⁵ This policy also made foreign investment in half of Mexico's farmland illegal.¹¹⁶ The battle over land rights was a driving force during the Mexican Revolution.¹¹⁷ Since then, land reform has followed a pattern of pressure and government response, sometimes leading to reform favorable to peasant interest and sometimes to reforms that favor private farmers.¹¹⁸ The Mexican government has often used land as a means of securing political support.¹¹⁹

In 1991 then-president Carlos Salinas modified the Mexican Constitution to allow the rental and sale of lands held by *ejido* peasant communities.¹²⁰ This 1991 shift under the Salinas presidency marked the end of the agrarian reform initiated in 1915 within the context of the Mexican Revolution.¹²¹ Prior to the Salinas reforms, land rights in the *ejido* context were severely restricted with respect to the property right of transferability. *Ejidors* were land parcels in common that could not be sold or divided and could be transferred only by succession.¹²²

With the Salinas reforms, *ejido* rights now more closely resemble individual rights.¹²³ The privatization program, called *Procede*, required each *ejido* to vote to accept or reject privatization.¹²⁴ By 2000, in Sonora, nearly all *ejidos* were in the process of obtaining certificates to grant individual ownership of parcels.¹²⁵ While few owners have obtained clear title, sales are brisk in the informal market.¹²⁶ Despite these changes, one must recognize the cultural and political context of these reforms, as well as current property law. As David Yetman writes:

114. David Yetman, *Ejidors, Land Sales, and Free Trade in Northwest Mexico: Will Globalization Affect the Commons?*, 41 AM. STUD. 211, 215 (2000).

115. *Id.*

116. *Id.*

117. "The impulse to regain community lands lost during the nineteenth century to the expanding great estates drove tens of thousands of peasants to war against the dictatorship of Porfirio Díaz (1876–1910), the Porfirian restorationists of the Huerta government (1913–1914), and the anti-Porfirian bourgeoisie and petty bourgeoisie of the Carranza government (1917–1920)." MARKIEWICZ, *supra* note 113, at 13.

118. SUSAN WALSH SANDERSON, LAND REFORM IN MEXICO: 1910–1980, at 149 (1984).

119. *Id.*

120. MARKIEWICZ, *supra* note 113, at 1.

121. *Id.*

122. JUAN CARLOS PÉREZ CASTAÑEDA, EL NUEVO SISTEMA DE PROPIEDAD AGRARIA EN MÉXICO 115 (2002).

123. *Id.*

124. Yetman, *supra* note 114, at 220.

125. *Id.* at 223.

126. *Id.*

One hundred years earlier, those conditions—welcoming foreign investment and ownership of lands, disciplining the work force with an iron hand, and lodging political power in the hands of a small number of landowning elites—created such vast social discrepancies that the Mexican Revolution became virtually inevitable. The critics contended that the changes to Article 27 [the Salinas reforms] would initiate a return to those same conditions.¹²⁷

In this way, Mexico's political history is torn between the pressure to promote economic growth and a struggle to remain true to the revolutionary ideals of social welfare.¹²⁸

From the standpoint of economic development, it must be kept in mind that these privatization reforms are still relatively recent. As such, it is to be expected that one of the major challenges to utilizing capital according to De Soto's theory is the social pushback to the possible threat of foreign takeover of lands that have traditionally been part of this community-owned system. Liz Alden Wily, a political economist, stated in her evaluation of land formalization and privatization in Sub-Saharan Africa that the danger with privatizing land that was once communally owned and handing that title to individuals is that it suddenly creates an additional market for the land that exists outside the geographic region.¹²⁹ Foreign investors cannot claim land they do not physically occupy unless there is a legal mechanism for them to do so. Creating title, while possibly securing the claim of current occupants, also provides this legal mechanism for foreign investors. Privatizing *ejidos*, while moving a step closer toward making land fungible, also poses the risk that local landowners may lose their land, which may be consolidated by foreign interests. This runs counter to the principles of the Mexican Revolution.

Traditionally, there are several ways to justify the imposition of laws that restrict or further define the property rights of an individual. One is the externality justification, which reasons that individual uses that benefit an owner may impose costs or benefits on a third party that the owner does not take into consideration when deciding how or whether to act.¹³⁰ The other justification derives from transaction costs. If property rights are not well-defined or allocated, then individuals must expend additional resources to determine what those rights

127. *Id.* at 221.

128. STEVEN E. SANDERSON, *AGRARIAN POPULISM AND THE MEXICAN STATE, THE STRUGGLE FOR LAND IN SONORA* 203 (1981).

129. See Liz A. Wily, *Formalizing the Informal: Is There a Way to Safely Unlock Human Potential Through Land Entitlement? A Review of Changing Land Administration in Africa*, in *LINKING THE FORMAL AND INFORMAL ECONOMY* 263–64 (Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom eds., 2006).

130. Sergio Peña, *Land Use Planning on the U.S.-Mexico Border: A Comparison of the Legal Framework*, 17 *J. OF BORDERLANDS STUD.* 1, 3 (2002).

are.¹³¹ This not only increases the cost of a transaction, but also may prevent the transaction from occurring at all. Thus, land-use planning serves a dual purpose. But, as with any policy aimed toward safeguarding the poor, a counterargument is that such a policy is overly paternalistic. After all, if an individual owner of what was once *ejido* land thinks she can make better use of the land by borrowing against it or selling it entirely, then it is hard to say that a distant government would necessarily know better. Furthermore, unlike the paternalism argument regarding *colonias* in the United States, it is unlikely that the *ejido* system remedies a collective-action problem. But regardless of whether the *ejido* system is or was a necessary government measure, this is a political consideration that underscores current Mexican legislation, and it will have to be addressed whenever political actors undertake land reforms. Even if *ejidos* themselves cease to exist, the political ideas rooted in the Mexican Revolution will likely persist for some time, and this may even make some individual landholders hesitant to borrow against property. Conversely, it may make banks that fear a reversion to *ejido*-style ownership hesitant to lend in the first place.

B. Comparison of U.S. and Mexican Property Law

The extent to which the United States and Mexico codify similar or different legal principles is important in that such a discussion may help readers determine the causes of *colonias* in their respective countries. While much of the discussion in this section is abstract, it serves to demonstrate that the *colonia* phenomenon in Mexico probably does not have its roots in a national failure to recognize private property. In fact, Mexican law provides many of the same property rights outlined in the U.S. Constitution. Despite these similar rights, land-use planning in Mexico is highly centralized. Many forces are undeniably at work, but this centralization is likely one major factor that contributes to the *colonia* phenomenon in Mexico.

The U.S. Constitution defines the scope of government power by delegating certain rights to private property owners.¹³² The Tenth Amendment also delegates jurisdiction over land use to local governments, stating that those powers not expressly allocated to the federal government are reserved to the respective states.¹³³ The Mexican Constitution also reserves not expressly federal powers to its respective states.¹³⁴ But in Mexico, the principle of checks and balances is weak, and the executive branch holds most of the power.¹³⁵ Furthermore, the judiciary in Mexico does not play as active a role as in the

131. *Id.*

132. *Id.* at 5.

133. *Id.*

134. *Id.*

135. Peña, *supra* note 130, at 8–9.

United States.¹³⁶ This colors the enforcement mechanisms that each legal system employs.¹³⁷

The Mexican Constitution allows the government to impose property regulations for the public good and defines property in a similar fashion.¹³⁸ For example, the legal code in Sonora, Mexico, defines property as a real right that awards a person the legal power to use, enjoy, and dispose of a thing, but within the limits of the law.¹³⁹ It explicitly codifies the right to exclude persons from property, as it states that property cannot be occupied against the will of its owner unless for the public good.¹⁴⁰ The code does place limits on these rights. It states that a property owner must exercise his property rights when a failure to act would cause harm to a third person.¹⁴¹ It further states that the government can impose limitations on an individual's property rights for the public good.¹⁴² Examples of the public good include the acquisition of property to preserve national heritage and construct homes to rent to the poor.¹⁴³ The state also can exercise eminent domain to acquire property.¹⁴⁴

While each country employs similar eminent domain and police power laws from a constitutional perspective, the primary difference between the two is the federal government's role in local land-use decisions.¹⁴⁵ In the United States, land-use policy tends to be decentralized, and local governments are empowered to make these decisions.¹⁴⁶ The federal government has had some impact through the Federal Housing Administration, which gives tax advantages to homeowners to promote private home ownership.¹⁴⁷ The federal government also has invested in larger infrastructure projects, such as the interstate highway system, and imposes some environmental regulations.¹⁴⁸ These policies, however, tend to involve several states geographically and, because they cross state lines, are the proper subject of federal rather than state investment and intervention.

136. *Id.*

137. While a U.S. government policy that decreases land value generally does not amount to a taking, in 2006, Arizona passed a law that departs from this principal. The statute provides that local governments must pay just compensation to private property owners who suffer even a reduction in property value as a result of a local land use law. ARIZ. REV. STAT. ANN. § 12-1134 (2009).

138. Peña, *supra* note 130, at 1, 8.

139. Código Civil Para el Estado de Sonora [Civil Code for the State of Sonora], Artículo 1001, 20 de Agosto de 1949 (Mex.).

140. *Id.* at Artículo 1002.

141. *Id.* at Artículo 1001.

142. *Id.*

143. *Id.* at Artículo 1003.

144. Código Civil Para el Estado de Sonora, Artículo 1006.

145. Peña, *supra* note 130, at 1, 8–9.

146. *Id.* at 4.

147. *Id.* at 9.

148. *Id.*

Nevertheless, land-use planning has, by constitutional decree, been the jurisdiction of states.¹⁴⁹

Conversely, the Mexican approach has been to delegate only certain functions to local municipalities, such as waste treatment and other public services.¹⁵⁰ However, it reserves the right to set local parameters for land use, so local plans are “nested” within parameters set by state governments, which are in turn “nested” in a federal plan.¹⁵¹ As such, in Mexico the federal government maintains stronger, more direct control over the local land-use plans.¹⁵² Aside from political control, the federal government also retains financial control over these local governments because the federal government still collects and administers sales tax revenue, and local governments have only recently gained the ability to retain its own property tax revenue.¹⁵³ During the economic crisis of the 1980s, reform of the Mexican Constitution did allocate more power to municipalities to regulate land use.¹⁵⁴ But while the Mexican constitution recognizes a federalist form of government, the constitution gives power to the executive branch to create and coordinate national planning.¹⁵⁵ Thus, great power is centralized in a single executive position.

The *Ley General de Asentamientos Humanos* (LGAH) provides the general framework for this “nesting” relationship.¹⁵⁶ The LGAH addresses four themes:

- I. Concurrency among the plans of the different levels of government for the organization and regulation of cities.
- II. Determination of the basic norms and regulations of land use planning.
- III. Establishment of general principles for the determination of open space and land use regulation.
- IV. Determination of the bases upon which the population will participate in the planning process[.]¹⁵⁷

Where the federal government in the United States plays an indirect role in the planning and development of urban settings, the federal government of Mexico acts proactively to set standards that states and municipalities must follow.¹⁵⁸

149. Peña, *supra* note 130, at 9.

150. *Id.* at 4.

151. *Id.*

152. *Id.*

153. *Id.*

154. Peña, *supra* note 130, at 6.

155. *Id.* at 9–10.

156. *Id.* at 1, 10.

157. *Id.* at 10.

158. *Id.*

Historically, border planning by the federal governments in Mexico and the United States has focused primarily on water rights and boundary issues.¹⁵⁹ That said, along with the North American Free Trade Agreement, the federal governments in each country began to grant some management responsibilities to state and local governments to handle municipal issues, such as waste treatment, and water and air quality.¹⁶⁰ These measures have followed a model of “‘administrative decentralization’ where federal governments grant some administrative and planning function to a sub-unit . . . while at the same time maintaining some degree of control through regulation and financial links.”¹⁶¹ That said, these measures were meant primarily to deal with environmental spillover concerns.¹⁶² They do not directly address the economic development concerns that are central to this Note.

The LGAH authorizes Mexican states to be involved in the coordination of urban policy. It attempts to coordinate the three levels of government, as well as coordinate measures between states and municipalities.¹⁶³ States on the U.S. side of the border develop statewide land-use plans.¹⁶⁴ Statewide growth management strategies in U.S. border states vary greatly.¹⁶⁵ While California has taken a proactive approach to growth management, Texas has adopted a more laissez-faire approach.¹⁶⁶ Arizona also has chosen not to make land-use planning a particularly strong focus, as discussed earlier in connection with wildcat developments and *colonias*. In 1998, Arizona voters rejected an initiative to set statewide growth management standards, instead approving the Growing Smarter Act, which uses state funds to buy or lease land for open space.¹⁶⁷ The act also authorized local communities to adopt their own growth management policies.¹⁶⁸ But, as discussed earlier, counties still face some serious challenges to implementing and enforcing their own local growth policies.

Communities on both sides of the border face different challenges when it comes to financing additional infrastructure.¹⁶⁹ Mexico has few sources of revenue upon which local communities can draw.¹⁷⁰ This is largely because the federal government directly controls local policy, as well as much of the local tax revenue. For this reason, even if De Soto’s thesis applied directly to Nogales, it is

159. Peña, *supra* note 130, at 10.

160. *Id.*

161. *Id.* at 11.

162. *Id.*

163. *Id.*

164. Peña, *supra* note 130, at 11 (“Since the 1970s, there have been efforts to pass statewide mandates and laws to develop comprehensive plans to deal with urban sprawl in states such as California, Florida, Oregon, Hawaii, Vermont, and Georgia.”).

165. Peña, *supra* note 130, at 11.

166. *Id.* at 11–12.

167. *Id.* at 12.

168. *Id.*

169. *Id.* at 17.

170. Peña, *supra* note 130, at 17.

unlikely that much of the tax revenue from a formalized economy would trickle directly down to the local community. As such, when faced with the decision to either formalize or remain informal, individuals within that community will have less of an incentive to endure the additional costs of formalization if they do not directly see the benefits. In the United States, alternatively, local governments have access to many sources of revenue, such as property taxes, sales taxes, user fees, impact fees, and bonds.¹⁷¹ But local Mexican communities cannot assume debt, and local governments cannot tax.¹⁷² Without additional revenue from the Mexican federal government, it would be difficult to fund additional infrastructure. Peña argues that these limitations ought to be reevaluated and that local Mexican governments should be given the ability to take on debt.

In Mexico, although the federal government maintains control over local land-use planning, the recent trend has been to increase the role of local municipalities.¹⁷³ The benefit of the U.S. approach is that it allows local governments to tailor their land-use approach to local economic needs and preferences.¹⁷⁴ The centralized approach in Mexico makes it more difficult for local communities to adopt regulations that fit their needs. On the other hand, it also may limit the collective action problems so often associated with environmental protections, as all parties answer to a central authority.

C. Mexican Colonias

1. Possible Causes of Colonias in Mexico

Informal housing in Latin America generally has its roots in the region's history of rapid urbanization.¹⁷⁵ Since the 1950s, import-substitution industrialization has contributed greatly to the migration of young men and women to city centers, generating city growth rates of 3% to 5% each year.¹⁷⁶ Many Latin American countries possessed a large supply of cheap labor, and this drew foreign attention and investment in many manufacturing industries.¹⁷⁷ Complicity between both state actors and private interests meant it was necessary to keep wage levels low to sustain profit margins.¹⁷⁸ This in turn meant that investment in social needs such as medicine, education, and food also had to

171. *Id.*

172. *Id.*

173. *Id.* at 13.

174. *Id.* at 14.

175. Peter M. Ward, *The Lack of "Cursive Thinking" Within Social Theory and Public Policy: Four Decades of Marginality and Rationality in the So-Called Slum*, in *RETHINKING DEVELOPMENT IN LATIN AMERICA* 271 (Charles H. Wood & Bryan R. Roberts eds., 2005).

176. *Id.*

177. *See id.*

178. *Id.*

remain low.¹⁷⁹ This included shelter, another particularly important good needed to support a growing labor force. Thus, the state learned to turn a pragmatic blind eye to informal housing developments.¹⁸⁰

These policies had two important consequences. First, urban centers grew quickly and without much planning. The *laissez-faire* approach was the principal means by which low-income households become homeowners, regardless of whether they held official title to the land or their housing met code regulations. Second, local state actors treated these communities as sources of political power and enforced their residents' informal rights to land and housing.¹⁸¹

2. Application of De Soto's Thesis to Mexican *Colonias*

While rapid population growth in areas such as Heróica Nogales is one cause of the informal *colonia* phenomenon in Mexico, one must consider that each rational individual makes a choice to participate in the informal economy as opposed to the formal one. In the case of a Mexican individual, one must consider that informal workers will not likely have to pay taxes. Like *colonias* in Arizona, there is a collective action problem in that any single individual will gain more by not paying taxes than he will gain through his marginal contribution to the formal economy. As such, it will probably require action on the governmental level to create incentives that will induce a rational individual to participate in the formal economy.

In Mexico's case, however, its centralized federal system creates yet another disincentive. Individuals who contribute local property taxes will not see the direct benefits of their collective contributions. Rather, those funds will be sent to a centralized federal coffer, and local influence over those funds will be largely diffused. Add to that the fact that the centralized policy-setting body is the executive, rather than a congress, and it becomes unlikely that local municipalities will have direct control over how those funds are spent. Even more difficult is the fact that local governments do not set their own land-use policy. Thus, local communities are largely unable to set their own tax rates or create other policies tailored to their regional needs. This means that for local communities, creating the optimal set of incentives to encourage formal market participation may prove beyond their power.

179. *Id.* at 271.

180. Ward, *supra* note 175, at 272.

181. *Id.*

V. GENERAL CRITICISM OF DE SOTO'S THESIS

Not everyone agrees with De Soto. Social systems are complex, and poverty may have many origins. Alan Gilbert, from the University College London, challenges at least part of De Soto's thesis.¹⁸² Gilbert argues that De Soto's perspective simply amounts to granting property titles to make land holdings official.¹⁸³ Gilbert states that once poor individuals have title, De Soto thinks "the world is their oyster."¹⁸⁴ Rather, Gilbert argues, illegality is not often the principal problem for these individuals.¹⁸⁵ In fact, most informal landholders know they will not be removed because they have the backing of a powerful political patron.¹⁸⁶ Furthermore, many illegal holdings were not taken from a third party, but were bought and lack title for other reasons.¹⁸⁷ Gilbert refers to communities in Mexico, highland Colombia, Peru, and Ecuador, stating that these settlements simply "offend the planning regulations but are not illegal in the sense that the land has been taken from the owner."¹⁸⁸ In this way, these communities resemble *colonias*, which may be illegal due to a lack of infrastructure, but residents do not have to worry about maintaining ownership.

Gilbert further argues that illegality does not usually stop a market from developing but rather impacts prices in the market.¹⁸⁹ With drugs, illegality increases the price, but with low-income land, illegality decreases the price.¹⁹⁰ The impact of title is to simply offer additional guarantees that should increase the value of the land, as the transfer process is simplified and the transaction can be financed by a formal loan.¹⁹¹ Gilbert states, however, that title is not enough to obtain a formal loan in most cases, as mortgage lenders also have to verify an individual's income, which they often cannot do based simply on tax returns.¹⁹²

182. 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 (Feb. 2002).

183. *Id.*

184. *Id.* at 4.

185. *Id.* at 7.

186. *Id.*

187. Gilbert, *supra* note 182, at 7 (citing William A. Doebele, *The Private Market and Low-Income Urbanization in Developing Countries: The 'Pirate' Subdivision of Bogotá* (Harvard University Department of City and Regional Planning, Discussion Paper D75-11, 1975); Alan Gilbert, *Pirates and Invaders: Land Acquisition in Urban Colombia and Venezuela*, 9 WORLD DEV. 657 (1981); ALAN GILBERT & PETER M. WARD, *HOUSING, THE STATE AND THE POOR: POLICY AND PRACTICE IN THREE LATIN AMERICAN CITIES* (1985); Frans Beijgaard, *Rental and Rent-Free Housing as Coping Mechanisms in La Paz, Bolivia*, 7 ENV'T & URBANIZATION 167 (1995)).

188. Gilbert, *supra* note 182, at 7.

189. *Id.* at 11.

190. *Id.*

191. *Id.*

192. *Id.* at 15 (citing Bruce Ferguson, *Micro-Finance of Housing: A Key to Housing the Low or Moderate-Income Majority?*, 11 ENV'T & URBANIZATION 187 (1999)).

Gilbert incorrectly characterizes De Soto's thesis as simply an argument on behalf of land title. While title does tend to occupy center stage, De Soto advocates for full legal representation of an economy in all its forms. In this sense, De Soto is arguing for an integrated economic system facilitated through legal representation.¹⁹³ Gilbert's assertion that title only impacts price rather than economic development fails to recognize that prices often prohibit transactions in their entirety. Thus, a reduction in transaction cost may cause the birth of an entirely new industry, or at the very least, it may cause additional participants to enter an already existing market. In fact, reducing transaction costs is likely one of the policy objectives underlying the previously discussed Arizona statutes, which serve to streamline transactions.

Gilbert makes a valid point when he states that banks may find it hard to finance individuals who hold title because they cannot verify their income. In the city of Nogales, Mexico, more than half of the economically active population receives no wages or salaries because they participate in the informal economy.¹⁹⁴ However, De Soto also addresses the obstacles that business entities often face when attempting to gain abstract legal representation. Just like tangible assets, businesses with legal identities can be bought and sold. A reduction in the cost of incorporation encourages informal business to become legal. As a result, legal businesses allow mortgage lenders to project a worker's future income based on tax returns because the business must withhold taxes.

De Soto's thesis, at its core, is about integrating informal economy participants into a formal economic system with legal representation. A reader must be careful not to focus on any single aspect of De Soto's thesis as a silver bullet that will, in isolation, foster economic development. De Soto explicitly states that using one's house to borrow money to finance an enterprise requires a "very complex process."¹⁹⁵ One benefit of a formal property system, he states, is that it makes tangible assets fungible, allowing them to be "easily combined, divided, mobilized, and used to stimulate business deals."¹⁹⁶ He characterizes title as "the visible sign of a *vast hidden process* that connects all these assets to the rest of the economy."¹⁹⁷ Thus, while De Soto does devote a great deal of discussion to the benefits of title, one must remember that the primary end he has in mind is an abstract property *system*, and titles are only the first step toward creating that abstraction. In this respect, Gilbert makes a very good point when he argues that if policymakers think that all it takes to integrate individuals into a formal economic system is granting title to their property, they will not likely address the additional economic factors that require legal representation if individuals are to fully integrate.

193. DE SOTO, *supra* note 13, at 6.

194. Vera Pavlakovich-Kochi, *The Arizona-Sonora Region: A Decade of Transborder Region Building*, 14 ESTUDIOS SOCIALES 25, 44 (2006) (Centro de Investigación en Alimentación y Desarrollo, Universidad de Sonora 2009).

195. DE SOTO, *supra* note 13, at 40.

196. *Id.* at 56.

197. *Id.* at 6 (emphasis added).

A more valid caveat to the De Soto thesis is that formalized property systems do not always result in improved conditions for the poor. In 2004, the World Institute for Development Economics Research and Expert Group on Development Issues at the Swedish Ministry of Foreign Affairs held a major conference in Helsinki that called into question what are often perceived as the inherent benefits of a formal economic sector, as opposed to an informal one.¹⁹⁸ Indeed, this is the core of De Soto's thesis. In a series of papers presented at the conference and later published in *Linking the Formal and Informal Economy*, the participants argued that it is not accurate to say that formalizing an informal economy will inevitably lead to economic development that benefits the poorest members of a community.¹⁹⁹ Rather, development economists must seek to understand "the realities of economic activities in poor countries, and to design policies that benefit the poor."²⁰⁰ In other words, formalizing property rights is not enough, and policymakers must make targeted efforts to ensure that the poor receive equitable treatment. This is critical, as a series of case studies demonstrate that formalization in economies throughout the world does not alone create economic development that benefits the poor.

For example, in sub-Saharan Africa, formalization of land holdings has long been a goal to promote economic growth, even before De Soto popularized this approach.²⁰¹ That said, the actual implementation of this process has encountered several setbacks. Today, less than 1% of the land area of sub-Saharan Africa has been surveyed and formalized, and most of this formalized land is in South Africa.²⁰² Furthermore, more than 90% of Africans in this region continue to own their property informally.²⁰³ Thus, the argument that individuals should want to obtain formal title to provide greater security to their claim does not seem to apply in this case. Worse yet, the process by which land ownership has been formalized in this region has often caused the poor to lose community-owned properties to those with the means to influence the political process.²⁰⁴ When land possession is only recognized informally, local landholders may not need to worry about foreign investors taking over their property because they are physically present on the land. After the transition to a formal system, foreign investors, who must have legal title to lay claim to a piece of land, are more able to do so.²⁰⁵ Most individuals in Kenya have not collected title deeds that were issued as long as thirty years ago.²⁰⁶

198. Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom, *Beyond Formality and Informality*, in *LINKING THE FORMAL AND INFORMAL ECONOMY* 1-2 (Guha-Khasnobis, Kanbur & Ostrom eds., 2006).

199. *Id.*

200. *Id.*

201. Wily, *supra* note 129, at 263–64.

202. *Id.* at 264.

203. *Id.*

204. *Id.* at 265–66.

205. *Id.* at 266.

206. Wily, *supra* note 129, at 264.

Wily argues that two processes would likely facilitate land tenure security for the poor in sub-Saharan Africa, which in turn supports the conversion of so-called dead capital into live capital.²⁰⁷ Parties will not bother to register transactions if “distances, costs, or complexity are too great.”²⁰⁸ So rather than extending bureaucracies to incorporate informal economic actors, she instead argues that governments should decentralize their power and allow local authorities to oversee land-use decisions and ownership.²⁰⁹ This has the potential to reduce costs associated with recording transactions. Wily also argues that secondary customary rights associated with community-owned property should be taken into account.²¹⁰

VI. POLICY CONSIDERATIONS

A. The Limited Focus of this Note

The primary limitation of this Note is that it approaches the question of *colonia* development from strictly legal and theoretical perspectives. As previously mentioned, informal economies or activities of any kind are difficult to study, and a theoretical approach is most likely inadequate to reach concrete or conclusive policy recommendations. As stated earlier in this article, Kathleen Staudt recognizes that “[l]iterature on informality in the United States is narrow and sparse, based on the assumption that informality is . . . minimal, criminal, or segregated within immigrant and poverty enclaves.”²¹¹ Indeed, the difficulty of compiling data on *colonias* also may explain why there is “little published research that documents the quality of life in Arizona and New Mexico *colonias*.”²¹² From a strictly theoretical perspective, it is nearly impossible to effectively evaluate the specifics of a phenomenon that has little reliable data to represent it.

Part of the problem is that, in Arizona at least, policymakers are only just beginning to define this phenomenon in the context of local communities. The federal government began to take action and require states to do the same starting in the 1990s.²¹³ Despite this, the number of *colonias* has continued to grow into the twenty-first century.²¹⁴ The *Colonias* Monitoring Project, tasked with monitoring *colonia* growth along the U.S.-Mexico border did not take shape until 2002.²¹⁵ It did not expand to include binational *colonias* in areas such as Nogales

207. *Id.* at 266–67.

208. *Id.* at 267.

209. *Id.*

210. *Id.*

211. STAUDT, *supra* note 14, at 3.

212. ESPARZA & DONELSON, *supra* note 1, at 41.

213. U.S. GEOLOGICAL SURVEY, *supra* note 2, at 7.

214. *Id.*

215. *Id.* at 8.

until 2006.²¹⁶ While monitoring programs such as these are important and positive steps toward addressing *colonia* concerns, the U.S. Geological Survey's 2006 report that is central to this Note deals primarily with identifying *colonia* boundaries so that these *colonias* can take advantage of federal infrastructure funding.²¹⁷ Because *colonias* are still in the process of being identified, it is difficult to formulate policy recommendations for them because the particular nature of the *colonia* is not fully understood. This must change.

Thus far, this Note has not addressed the fairly apparent inconsistencies between its discussion of infrastructure development and economic development as supported by formal legal mechanisms. While somewhat interrelated, building roads and creating a functioning formal economic system are two very different goals. There are in fact *colonias* that are clear examples of informal economies. On the other hand, some *colonias* may simply be functioning economic systems that face problems with infrastructure. Unfortunately, the current definition that the U.S. Department of Housing and Urban Development (HUD) employs does not distinguish between the two. It simply states that *colonias* are communities "located within 150 mi[les] of the [U.S.-Mexico] border . . . that lack adequate infrastructure or housing and, possibly, other basic services . . ."²¹⁸ Perhaps this broad definition serves a purpose in that it allows a broader range of communities to apply for much needed federal funding. However, it also frames the debate over *colonia* policy in terms of infrastructure alone, without deeper investigation into the underlying causes of and possible solutions to this problem.

There are nearly 230 formally recognized *colonias* in Southern Arizona and New Mexico alone.²¹⁹ The characteristics of these *colonias* vary greatly due to the federal government's broad definition. While inadequate infrastructure might be an apparent symptom of the *colonia* phenomenon, it may or may not be the underlying problem. As Esparza and Donelson found, in some cases, "*colonia* residents are dependent on the regional urban system and . . . often commute over long distances, especially those who live in small and remote *colonias*."²²⁰ This may curtail the relevance of a *colonia*'s internal economy, as most of its residents depend on an external economy.

Many critics also argue that the sweeping definition enables wealthier communities to access federal funds when they have only minimal infrastructure deficiencies.²²¹ They argue that the definition "should be limited to the image popularized by the media and nongovernmental organizations, that of poor settlements of Mexican Americans living in shoddy housing, without clean water, electricity, and indoor plumbing."²²² This criticism does illustrate the limitation of the current government definition of a *colonia*.

216. *Id.* at 1.

217. *Id.* at 8.

218. U.S. GEOLOGICAL SURVEY, *supra* note 2, at 4.

219. ESPARZA & DONELSON, *supra* note 1, at 40.

220. *Id.* at 74.

221. *Id.* at 42.

222. *Id.*

B. Policy Recommendations

First, it is absolutely critical that policymakers and scholars conduct further on-the-ground research into *colonias* in Arizona and do so with a focus on economic development. Regardless of whether the federal government chooses to incorporate nuances into an alternative *colonia* definition, it is essential that *colonia* scholars work to categorize different types of *colonias* and document the specific challenges that they face. To the extent that municipal or state entities can incorporate some of these differences into the census data they routinely collect, this ought to be done. In those *colonias* that do represent largely informal economies, it is doubtful that simple infrastructure investment will sufficiently address the underlying cause of the communities' problems. Basic information on the extent to which formal title accurately reflects the physical occupancy of a property would prove valuable in assessing the types of *colonias* and tailoring development approaches to their specific needs. Those *colonias* with restricted development caused by informality need to receive special attention beyond infrastructure development.

Second, the loopholes that Arizona law leaves open to wildcat developments must be closed. As it stands, lax regulation effectively acts as a subsidy for both subdividing landowners and those who later purchase the land and build dwellings and neighborhoods that lack infrastructure. Rather than incorporating the reasonable infrastructure costs into the transaction between the subdivider and the purchaser, local and federal governments are left to deal with those infrastructure problems at a later date. As such, the subdivider and the purchaser both avoid the infrastructure costs. The subsidy should cease. This Note has already addressed one possible alternative to the raw six-or-less parcel exemption to infrastructure requirements, which involves tying infrastructure requirements to lot size. An even better alternative, however, would be to grant individual counties greater oversight powers and the ability to determine appropriate growth patterns.

The *colonia* challenge in Nogales, Mexico, is without doubt an economic development issue. As previously stated, in the city of Nogales, Mexico, for example, more than half of the economically active population receives no wages or salaries, as they participate in the informal economy.²²³ Also, the problem of informality is ingrained in a larger systemic challenge. As previously discussed, the highly centralized land-use planning laws of Mexico make it more difficult for rational actors to directly see the benefits of participating in a formal economy, and local governments may not be able to optimize their own land-use laws to fit the needs of their population. Rapid urban growth exacerbates the challenges inherent in this centralized system. Reform to address the *colonia* phenomenon would likely implicate larger political questions. Because Arizona's *colonias* are largely caused by laissez-faire state attitudes toward development, many of those problems can be dealt with on the local level.

223. Pavlakovich-Kochi, *supra* note 194, at 44.

VII. CONCLUSION

Because this Note approaches the *colonia* phenomenon on a legal and theoretical level, it does not contribute hard data to current scholarship on Arizona *colonias*. That said, the aim of this Note is primarily to provide a framework within which future scholarship can further discuss these issues. This Note identifies some of the possible legal and theoretical causes of *colonias* in both Arizona and Mexico. It also illustrates the need for further research that not only identifies *colonia* boundaries, but also creates a more nuanced picture of the economic realities in *colonias*. Only when policymakers look beyond the overly broad definition that paints every *colonia* with the same brush can they hope to address the underlying economic problems that many *colonias* face.

Despite the complexities of studying and defining a phenomenon that occurs outside the formal economy, one thing is certain: both the number and size of *colonias* are growing. If Arizona does not address this issue, the word “slum” may cease to be a derogatory term reserved for inadequate third-world urban settlements. It may become an accurate reflection of our own failed growth policies.

