
PREVENTING A *FAVELA* WHITEWASHING: HOW A TAX CODE REVISION CAN MITIGATE THE DANGER OF BARE TITLE RIGHTS TO RIO DE JANEIRO’S SLUM RESIDENTS

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For decades, government officials in Rio de Janeiro, Brazil have fought to remove favelas from the public view and displace their residents to new or existing favelas at the periphery of the city. The displacement of Rio de Janeiro’s urban poor poses a human rights dilemma where people who have lived on a plot of land for generations are forced to uproot their lives and start anew in areas where city resources to which they previously had access are no longer available. This Note discredits one posited solution to this pervasive issue: vesting favela residents with real title in the land upon which they are living. Although the idea is that vestment would result in the empowerment of slum residents by increasing their rights and providing a weapon against displacement efforts, this Note argues that a vestment solution fails when it is blindly applied without considering the city’s social, political, and economic histories and current climate of the city. Adopting this theory in Rio de Janeiro would increase gentrification and thus result in the same end result of human displacement. This Note posits that for title vestment to be successful, Rio de Janeiro city officials must accompany vestment with a revamping of its current property taxation code, zoning law, and title registration process.

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I. INTRODUCTION

The 2014 FIFA World Cup (“World Cup”) and the 2016 Summer Olympics helped bring to light a glaring problem in Rio de Janeiro, Brazil: the lack of property ownership that those living in the shantytowns (*favelados*) have with respect to property they have inhabited, in some cases, for decades.¹ The former mayor of Rio de Janeiro, Eduardo Paes, viewed an opportunity in the World Cup that went beyond economic and touristic growth—he believed the World Cup presented a unique opportunity to “moderni[z]e and create a legacy for future generations.”² In addition to the extensive refurbishing of the Maracanã stadium, the city embarked upon what is known by the affected as a “social cleansing,” in which thousands of families were forcibly removed from their homes in the *favelas* into new settlements.³

The removals were not graceful, as is suggested by their description of having been “forced.”⁴ Residents did not leave all at once, as many were reluctant to leave homes in which their families had been living for decades, and so families remained while rubble from leveled homes surrounded their own.⁵ In planning for the World Cup and the 2016 Olympics between 2009 and 2015, the government displaced more than 22,059 families.⁶ For these tens of thousands of people, displacement did not simply mean being forced from homes that they built with their families and inhabited for decades; even more significantly, it resulted in being relocated to new *favelas* that were far from their original neighborhoods and vastly different in environment.⁷ Robbed of their ocean views in the hilltops, those who were forced to move found themselves in the lowlands at the periphery of the city, far from their original communities, occupations, and schools.⁸

As unjust as this may appear, it is often absolutely in compliance with the law: the Brazilian Constitution of 1988 allows the “government to take private property in the case of public danger, while requiring the government to provide

1. See Gregory Dolin & Irina D. Manta, *Parallel State*, 38 CARDOZO L. REV. 2083, 2084–86 (2017) (“When events such as the Olympics or World Cup motivate the state to engage in large-scale architectural planning that includes the exercise of eminent domain, the absence of title allows the government to seize land and disburse the compensation at its discretion.”).

2. Owen Gibson & Jonathan Watts, *World Cup: Rio Favelas Being ‘Socially Cleansed’ in Runup to Sporting Events*, GUARDIAN (Dec. 5, 2013, 12:58 PM), <https://www.theguardian.com/world/2013/dec/05/world-cup-favelas-socially-cleansed-olympics>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Dolin & Manta, *supra* note 1, at 2085.

7. *Id.*

8. *Id.* at 2128.

adequate compensation as well.”⁹ It should be noted that this is a very general provision, affording governmental officials with significant power in making the decision to displace citizens of the *favelas*.¹⁰

Those who are unfamiliar with what constitutes *favela* are not without company. *Favela* directly translates to “shanty town,”¹¹ which is defined as a “poor town or section of a town consisting mostly of shanties,” which in turn are “small[,] crudely built dwelling[s].”¹² To end the definition here, however, would paint too general a picture of what the term *favela* encapsulates and would not allow for a full understanding of why there is so much controversy around these neighborhoods. To create a better understanding of the term *favela*, it is helpful to compare it with the understanding of a slum in the United States context.

In the United States, shantytowns—or “slums,” as we know them today—have formed as the recent result of a phenomenon known as “white flight,” in which white residents of suburbia moved to farther-out suburbs once middle-class minorities began to inhabit those same suburbs.¹³ As an increasing amount of wealthy and middle-class citizens left the cities, urban areas were left with a dwindling tax base offering few resources to the urban poor.¹⁴

Even if the urban poor wanted to move to the suburbs where there would be better economic resources for them, strict zoning ordinances that “prohibited the construction of affordable-housing units or the construction of apartment buildings in general,” or even neighborhood covenants that made building a house too expensive, made it impossible for them to make such a move.¹⁵ This left the lower socioeconomic class with few choices of where they could establish a living space, leaving them in highly concentrated neighborhoods within cities.¹⁶

Unlike the shantytowns described above, the *favelas* of Rio de Janeiro formed dependent upon location—either on the periphery of the city, where no one else wanted to live, or within the massifs sprinkled throughout the city, where it was difficult to settle.¹⁷ Part II will give a much more detailed look into the history of *favelas* in Rio de Janeiro, but one common feature of slums across Latin America is that they are situated in plots where the inhabitants have no legal title, often have “significant levels of soil and water contamination,” are

9. *Primary Housing and Property Laws in Brazil – Rio de Janeiro’s Favelas*, CATCOMM, <http://catcomm.org/law-housing/> (last visited Jan. 16, 2019).

10. *See id.*

11. *Favela*, OXFORD NEW PORTUGUESE DICTIONARY (2008).

12. *Shanty*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2007); *Shantytown*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2007).

13. *See* Alana Semuels, *The Resurrection of America’s Slums*, ATLANTIC (Aug. 9, 2015), <https://www.theatlantic.com/business/archive/2015/08/more-americans-are-living-in-slums/400832/>.

14. *Id.*

15. *Id.*

16. *See id.*

17. Sebastian Galiani et. al., *Shelter from the Storm: Upgrading Housing Infrastructure in Latin American Slums* 5–6 (Nat’l Bureau of Econ. Research, Working Paper No. 19322, 2014).

built precariously with few resources, and often “lack connections to basic services such as water and sewer systems.”¹⁸

The same can be said for *favelas* in Rio de Janeiro, except that they are unique in their geographic location: they lie atop the beautiful massifs of the city, overlooking the Atlantic Ocean.¹⁹ The local government officially recognized *favelas* in Rio de Janeiro as “area[s] of irregularly constructed housing, without roads, without urban planning, without sewage systems, without water, and without electricity.”²⁰

Although *favela* residents technically could file quitclaim suits under adverse possession theories in order to gain title to their land, scholars suggest that more satisfying solutions exist.²¹ One would be to vest *favela* residents with real title in the land they are living on regardless of whether they have met the requirements of adverse possession.²² Hernando de Soto, a scholar who specifically asserts this theory, believes that vesting title in those who lack it would result in empowering slum residents with more rights and would result in fewer displacements of residents.²³

This Note argues that de Soto’s theory does not apply as universally as it purports and that adopting it in Rio de Janeiro would result in gentrification and displacement if the title vestment was unaccompanied by other important changes.

Simply vesting title in the *favelados* is not enough to result in the sort of empowerment that would protect them from future displacement. If title is to be vested, the current system of property taxes to which *favelados* are subjected must be revised, along with changes in the title registration process.

This Note begins by discussing the evolution of *favelas* in Rio de Janeiro in Part II. The way in which *favelas* developed is crucial in understanding why this problem is so complex. It also helps to distinguish it from other examples—importantly, those examples from de Soto’s work.²⁴ Hernando de Soto’s work analyzes the property systems of five different cities he classifies as “Third World” in order to “gauge the value of the possessions of those people who have been locked out of the capitalized economy by discriminatory laws.”²⁵ Understanding the differences between these examples will shed light upon why the

18. *Id.*

19. See Dom Phillips & Gavin McOwan, *Favelas of Rio de Janeiro—in Pictures*, GUARDIAN (Nov. 4, 2013, 5:38 AM), <https://www.theguardian.com/travel/gallery/2013/nov/04/favelas-rio-de-janeiro-in-pictures>.

20. See ALBA ZALUAR & MARCOS ALVITO, *UM SÉCULO DE FAVELA 1* (5th ed. 2006) (translating “Mas a favela ficou também registrada oficialmente como a área de habitações irregularmente construídas, sem arruamentos, sem plano urbano, sem esgotos, sem água, sem luz.”).

21. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT’L L. REV. 1109 (2004); Dolin & Manta, *supra* note 1; John C. Martin, *Bringing Dead Capital to Life: International Mandates for Land Titling in Brazil*, 31 B.C. INT’L & COMP. L. REV. 121 (2008).

22. DE SOTO, *supra* note 21, at 67.

23. *Id.*

24. See *id.* at 30.

25. *Id.*

solution cannot be applied to Rio de Janeiro in an isolated manner—that is, by only vesting title absent any other changes.

Part III closely examines de Soto's book, *The Mystery of Capital*,²⁶ to provide the framework this Note aims to critique. Part IV critiques arguments both in favor of and against titling, and Part V sets forth the proposed changes in property taxation and title registration processes that must accompany title vestment in order obtain the goals title vestment aims to achieve.

II. BACKGROUND

A. *Historical Perspectives*

The plight of Rio de Janeiro's *favela* residents unfortunately began long before the presence of mega sports events. When Rio de Janeiro was founded in 1565, its dichotic geography posed serious challenges in the settlement of what would eventually become the nation's capital.²⁷ The mounts and massifs interspersed throughout the city continue to contribute to Rio's picturesque image today, but the problematic swamps and marshes found in the valleys between the mountains and hills made the lowlands of the city nearly impossible to settle.²⁸ To facilitate settlement, public authorities began the mass drainage of lakes and swamps along with the leveling of smaller hills during the mid-seventeenth century.²⁹

With the Portuguese settlers came a system of property rights with its foundation in the simple concept of a *sesmaria*, which is an "inheritable land-use grant."³⁰ The first *sesmarias* were granted by the Portuguese Crown to either churches or the municipality, which in turn divided the plots between the city's socially "prominent" citizens.³¹ With the grantors of the *sesmarias* located so far from Brazil, formal, legal descriptions of these land grants were lacking, resulting in a vague understanding of the boundaries of these grants.³² The *sesmarias* were also often too large for the grantees to effectively preside over, making them susceptible to use by nongrantees.³³

Another problem with the *sesmaria* system is that once the original grantee died, often times there was no heir, or the individual's claim had "lapsed."³⁴ Rather than revert back to the Portuguese royalty, squatters of all social classes took over the land.³⁵ Other *sesmaria* plots were problematic because they were in "surplus," meaning they were distributed but the grantees did not occupy the

26. *Id.*

27. BRODWYN FISCHER, A POVERTY OF RIGHTS: CITIZENSHIP AND INEQUALITY IN TWENTIETH-CENTURY RIO DE JANEIRO 19–21 (2008).

28. *Id.*

29. *Id.*

30. *Id.* at 221.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

land.³⁶ In these cases, the grantees allowed others an informal right to the land in exchange for labor or loyalty.³⁷

When even more settlers and members of the Portuguese royal court arrived to the city in the early nineteenth century, Rio experienced a population boom that it was incapable of accommodating.³⁸ The city's poor were subsequently forced to create impromptu living spaces in order to make room for the royalty and new immigrants, often by creating small, informal shacks in both the swamps and the rocky hills.³⁹

Brazil achieved independence from Portugal in 1822, and this marked the collapse of the *sesmaria* system.⁴⁰ Subsequently, the Brazilian people began to effectuate land rights "grounded in *posse*, or simple possession."⁴¹ The *posse* system was later reinforced by the *Lei da Boa Razão* of 1769, which allowed property held for a "long" period of time to "acquire the force of law."⁴² This informal right became so widely accepted that "even when legal titles existed, the consensual and customary recognition of someone's possession rights depended ultimately on their effective power over those lands."⁴³

Brazilian independence from Portugal in 1822 rendered the *sesmaria* system moot, which resulted in "a legacy of unclear boundaries, contested claims, and extensive extralegal settlement."⁴⁴ Although *sesmaria* grants retained their validity after this time, all new land grants going forward were "made on the basis of the simple *posse*."⁴⁵ After 1850, however, all land that was formerly obtained via *posse* or *sesmaria* was still recognized if the owners had formal registration connected to the title, even though any land transfer subsequent to 1850 was performed via public auction.⁴⁶

The informal settlements within Rio de Janeiro grew over time and housed free slaves, rural migrants, foreign immigrants, and slaves-for-hire.⁴⁷ These areas were widely void of any sort of urban services, and so the government was quick to blame the *favelas* for the rampant spread of yellow fever, plague, and cholera during the 1850s in Rio de Janeiro.⁴⁸ This outbreak of disease served as the justification for what were the first displacement efforts.⁴⁹ Many of these displaced

36. *Id.*

37. *Id.* at 219–21.

38. *Id.* at 21.

39. *Id.*

40. *Id.* at 222.

41. *Id.*

42. *Id.*

43. *Id.*; HEBE MARIA MATTOS DE CASTRO, *DAS CORES DE SILÊNCIO: OS SIGNIFICADOS DA LIBERDADE NO SUDESTE EXCAVISTA-BRASIL SÉCULO XIX* 82 (1995).

44. FISCHER, *supra* note 27, at 222.

45. *Id.*

46. *Id.*

47. *Id.* at 33.

48. *Id.* at 32–33.

49. *Id.* at 33.

residents, which consisted of around 4,000 people, established new homes in the hills, thus forming the first modern-day *favelas*.⁵⁰

B. Favelas as “Other”

An overwhelming sense of disconnect between the Rio population at sea level, which was the developed part of the city, and the residents of the *favelas* in the hills emerged and resulted in a severe lack of urban services due to inferiority complexes projected onto the *favela* societies by the urban elite.⁵¹ This rhetoric became institutionalized via publication into official documents—one example being when the police chief of Rio de Janeiro in 1900 published a document noting that one particular *favela* (*Providência*) was “infested with vagabonds and criminals that are an assault” to local Rio families.⁵²

In addition to this disconnect was a certain level of precariousness surrounding the issue of title. In 1916, a municipal code provision was passed that allowed ownership after a period of peaceful adverse possession.⁵³ At the same time, 1934’s new constitution stated that “the right of property could ‘not be exercised against the social or collective interest.’”⁵⁴ These two local and federal provisions combined with the preexisting *posse* possession system resulted in confusion as to which system of property rights governed.⁵⁵

An individual’s right to downtown leaseholds that the municipality granted to the early settlers in the form of “emphyteusis leaseholds” were technically not transferrable; however, people bought and sold them as if they were private property.⁵⁶ This extralegal practice further muddled the ability to determine the boundaries of legal claims due to too many counterclaims existing at once, whether in the form of an emphyteusis leasehold, a *sesmaria*, or the *terras devolutas*⁵⁷ that had become occupied by squatters once the original grantees of the property died.⁵⁸

Inequality entered the fabrics of urban policy in 1937, when Rio public officials created laws that divided the city into zones dedicated to commercial, maritime, industrial, residential, and rural sects, and provided rules regarding the

50. *Id.*

51. ENRIQUE DESMOND ARIAS, DRUGS AND DEMOCRACY IN RIO DE JANEIRO: TRAFFICKING, SOCIAL NETWORKS, AND PUBLIC SECURITY 22–23 (2006).

52. ZALUAR & ALVITO, *supra* note 20, at 2 (translating Police Chief Dr. Enéas Galvão: “...ontem me dirigiu relativamente a um local do *Jornal do Brasil*, que diz estar o morro da Providência infestado de vagabundos e criminosos que são o sobressalto das famílias no local designado...”).

53. FISCHER, *supra* note 27, at 222.

54. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 113 (Braz.).

55. FISCHER, *supra* note 27, at 222.

56. *Id.* at 223.

57. *Terras devolutas* translates to “returned lands.” These land plots had originally been *sesmarias* but, upon the death of the original holder of the *sesmaria*, the land technically was to revert back to the Portuguese Crown due to the lack of any heir. Instead, often times the land remained titleless and squatters occupied the land instead.

58. FISCHER, *supra* note 27, at 221–23.

construction standards, aesthetic requirements, and sanitary practices, all depending upon the zone.⁵⁹ The strictness of the standards of development can be considered in a scalar way, with the prosperous lowlands experiencing the strictest urban development requirements, thus ensuring their superior aesthetics, the working-class neighborhoods with looser regulations, and the poor, suburban regions subject to the loosest regulations of all of Rio's zones.⁶⁰

With these codes emerged a dichotic city where affluent areas are kept well maintained and the poorer zones are left largely unregulated, setting the grounds for urban inequality.⁶¹ One serious repercussion of the lack of regulation is that the *favelas* grossly lacked access to basic urban rights such as sewers, running water, public transportation, electricity, and pavement.⁶²

The image of the *favela* continued to be negative throughout the Old Republic (1889–1930), with the common conception being that its inhabitants were “*vagabundos e criminosos*”⁶³ that were accepting of their lives without basic urban services.⁶⁴

The subsequent political period, the *Estado Novo* (1930–1945), was a time lacking in urban reform as well, and so the *favela* communities continued to be viewed as separate from the rest of the city.⁶⁵ The government not only continued their attempts at forced removal but also refused to include the neighborhoods in their city maps, making evident their belief that the slums were not truly part of the city.⁶⁶

City officials became increasingly concerned about the aesthetics of their prized city, believing the *favelas* were “ugly, sickly, unsanitary, and horrible.”⁶⁷ This concern led them to create *parques proletários*, or proletariat parks, as destinations for *favela* residents after the destruction of the *favelas* began.⁶⁸ These parks enforced strict curfews and codes of conduct for its residents, and were not free—*cariocas*, the Portuguese word for natives of Rio de Janeiro who lived there, had to pay the government for the land based on whether they were considered “certifiably poor” or not.⁶⁹ Even after paying, however, residents were not exempt from urban inequalities, evident from the eventual expulsion of residents from the parks as well in order to make way for higher-income housing.⁷⁰

The Second Republic (1945–1964) experienced yet another immigration boom, resulting in an increased proportion of Rio's population housed within its

59. *Id.* at 45.

60. *Id.*

61. JANICE PERLMAN, THE MYTH OF MARGINALITY: URBAN POVERTY AND POLITICS IN RIO DE JANEIRO 30–31 (1976); FISCHER, *supra* note 27, at 45.

62. PERLMAN, *supra* note 61, at 28.

63. Vagabonds and criminals (my own translation).

64. ARIAS, *supra* note 51, at 22.

65. *Id.* at 23.

66. *Id.*

67. FISCHER, *supra* note 27, at 48–49.

68. ARIAS, *supra* note 51, at 23.

69. FISCHER, *supra* note 27, at 48.

70. Marcelo Baumann Burgos, *Dos parques proletários ao Favela-Bairro: as políticas públicas nas favelas do Rio de Janeiro*, in UM SÉCULO DE FAVELA 25–60 (eds. Alba Zaluar & Marcos Alvito, 2004).

favelas.⁷¹ Between 1940 and 1960 alone, over 417,000 new households were recorded within Rio de Janeiro's census data.⁷² Of these households, only 192,387 licenses were recorded, according to the *Anuário Estatístico*, revealing that the majority of households were obtained outside of the legal system.⁷³

Although the state's chief concerns regarding the *favelas* continued to involve their removal throughout the Second Republic, the increased population within the *favelas* resulted in interest from the Catholic Church, which began to play an active role in the regulation of home building and in the providing of assistance to the *favelados* as it grew weary of its increased autonomy.⁷⁴ Whether or not the Catholic Church's role in mobilizing the *favela* residents directly inspired the following or not, as the *favelas* enjoyed community organization for the first time, they established the *Associações de Moradores*, or Neighborhood Associations, resulting in stronger internal governance.⁷⁵

As Brazil accustomed itself to the norms of democracy, and the mobilization of the *favelas* became more widely established, Rio's local politicians realized the voting potential of the citizens of the *favelas* and thus decided to use them as tools for gaining power.⁷⁶ In the wake of this realization, the 1950s marked the beginning of the widespread use of clientelism in obtaining votes from the *favela* residents.⁷⁷ Local presidents of Neighborhood Associations worked with local politicians to obtain minor improvements within the *favelas*.⁷⁸ These improvements were often as simple as building a soccer field, providing building materials for shacks, or paving streets.⁷⁹

Politicians provided these basic services in exchange for votes.⁸⁰ Significantly, *favela* residents sought the help of their Neighborhood Association presidents when they were in danger of eviction since local politicians were often "willing to use the mechanisms of personal influence and legislative morass to block the laws' enforcement."⁸¹

The fact that the poor living in the *favelas* resorted to these means in order to remain in their houses flags the serious ineffectiveness of housing law within Rio de Janeiro. Although many politicians viewed their role in this clientelistic manner as "temporary measures in the absence of a more genuinely democratic municipal policy," no permanent changes to the system of housing law were ever designed and implemented.⁸²

71. ARIAS, *supra* note 51, at 23–24.

72. FISCHER, *supra* note 27, at 55.

73. *Id.*

74. ARIAS, *supra* note 51, at 24.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 24–25; FISCHER, *supra* note 27, at 60–61.

79. FISCHER, *supra* note 27, at 61.

80. ARIAS, *supra* note 51, at 24–25.

81. FISCHER, *supra* note 27, at 61.

82. *Id.*

Efforts to remove *favela* residents returned to the same, if not greater, levels that were present during the early twentieth century. In 1968, during Brazil's military dictatorship, the federal government established *Coordenação de Habitação de Interesse Social da Área Metropolitana do Grande Rio* ("CHISAM," Coordination Agency for Habitation in the Social Interest of the Greater Rio Metropolitan Area), which had the main goal of removing the *favelas* in order to promote full integration between the *favela* residents and the city dwellers.⁸³ Between 1968 and 1975, seventy *favelas* were "forcibly removed," displacing 100,000 residents.⁸⁴

Favela residents found it more and more difficult to settle land disputes through the formal court system, since the government widely recognized their homes as squatter establishments and thus invalid.⁸⁵ As a result, Neighborhood Associations created their own local, neighborhood jurisprudence and settled land disputes internally, outside of the formal property system entirely.⁸⁶

The return of Brazil to democracy after the dictatorship ended in 1978, however, resulted in the weakening of the agency system created by the Neighborhood Associations within the *favelas* as politicians noted the potential to use the *favelas* as an opportunity to obtain large amounts of votes.⁸⁷ A champion of the clientelistic method was Leonel Brizola. Brizola won the following gubernatorial election and subsequently worked to improve "urban services."⁸⁸ He gained the trust of *favela* residents by providing them with schools, facilitating better relations between the police and the *favela* residents, and by implementing water and electricity service.⁸⁹

Although this appeared to be a largely positive change to the former clientelistic measures that dominated Rio de Janeiro politics, it came at a cost—Brizola, rather than abolishing clientelism altogether, strategically "took [it] to its logical extreme by co-opting into his personalist government the very *favela* leaders who could have demanded the continuation of his policies after he left office."⁹⁰ The rapid decline in effectiveness of the Neighborhood Associations' leadership left the *favelas* weaker and resulted in the increased agency that drug traffickers within the *favelas* enjoyed.⁹¹

83. ARIAS, *supra* note 51, at 25.

84. *Id.*; see also PERLMAN, *supra* note 61, at 195.

85. ARIAS, *supra* note 51, at 25–26.

86. *Id.*

87. *Id.* at 27.

88. *Id.*

89. *Id.*

90. *Id.*; Robert Gay, *Popular Incorporation and Prospects for Democracy: Some Implications of the Brazilian Case*, 19 *THEORY & SOCIETY* 447, 452–54 (1990).

91. ARIAS, *supra* note 51, at 28.

C. *Current Property Law*

In Brazil as a whole, property rights are considered to be a right *in rem*, which means that “a person or entity has total control over the possessed property, and can enjoy and use it” at his or her discretion.⁹² The right *in rem* of property ownership must operate at the benefit of both the individual and the community as a whole.⁹³ On the other hand, if a person is in physical possession of the land but has no physical title to it, that person only has possession and lacks any *in rem* right to the property.⁹⁴

Adverse possession in Brazil requires that a person possess *private* real estate property for between ten to fifteen years⁹⁵ and that the property was held without interruption or opposition.⁹⁶ Importantly, Brazilian federal law allows title to be obtained regardless of whether the adverse possession occurred in good or bad faith.⁹⁷ Once the prescriptive adverse possession period has passed, the possessor must request title via judicial proceedings.⁹⁸

Under Brazilian law, “each parcel of real property has its own land title with its respective record number registered with the relevant Land Registry.”⁹⁹ The title must operationally include the following:

- (i) the description of the real property, its plot and the buildings;
- (ii) the name and identification of the first owner and their successors through the current owner;
- (iii) the liens and encumbrances on the real property; and
- (iv) if the property is owned by a corporation, the corporation’s actions, such as incorporation, spin-offs, change of denomination, among others, which have affected the real estate.¹⁰⁰

If the real estate is located within city limits, the landowner must pay an annual property tax.¹⁰¹

There are several Rio de Janeiro municipal programs already in existence that attempt to remedy the stark social injustices housed in the city’s *favelas*. *Morar Carioca*¹⁰² was created in 2010 with the main goal of “promot[ing] social inclusion through the complete urban and social integration of all *favelas* in Rio de Janeiro by 2020.”¹⁰³ *Morar Carioca* plans to meet this goal via the following

92. Memorandum from Mattos Filho Advogados on Primary Housing and Property Laws in Brazil—Rio de Janeiro’s *Favelas* to Cyrus R. Vance Center and Catalytic Communities (Jan. 24, 2014) (on file with author) [hereinafter Mattos Filho Advogados Memorandum].

93. *Id.* at 3.

94. *Id.*

95. The default adverse possession prescriptive period is fifteen years under Brazilian federal law. This period, however, can be reduced to ten years if the possessor is using the adversely possessed property for habitual housing or if the possessor “has undertaken any productive work or services to improve the land.” *Id.* at 6.

96. *Id.* at 5.

97. *Id.* at 4–5.

98. *Id.* at 5–6.

99. *Id.* at 6.

100. *Id.*

101. *Id.* at 7.

102. Translated to, “Live Carioca.” Please note that a *carioca* is a person native to Rio de Janeiro. *Carioca*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2007).

103. Mattos Filho Advogados Memorandum, *supra* note 92, at 12.

guidelines: “(a) guaranteed participation of the community in all stages of planning; (b) accompanying social work; (c) elimination of troubled areas and resettlement of inhabitants; (d) building-up and upgrade of housing units in and around the *favelas*.”¹⁰⁴

Significantly, it also provides a new “legal regime” to aid in the regulation of the construction sector—specifically, how and where real property can be built.¹⁰⁵ Between 2010 and June of 2016, the *Morar Carioca* program had benefited approximately 500 million residents of the *favelas* by bringing 122 million new homes to 226 different communities within Rio de Janeiro.¹⁰⁶

III. THE MYSTERY OF CAPITAL

In his book *The Mystery of Capital*, Hernando de Soto, an economist, explores the question of why the Third World has failed to reap the benefits of capitalism and why it appears to be unable to produce capital effectively.¹⁰⁷ By not producing capital independently, foreign economies are unable to participate in a capitalist system, which he dubs as being “the foundation of progress.”¹⁰⁸ He argues that the reason Third World countries are unable to produce their own capital is because they do not own the resources necessary to produce capital, mainly, resources available through land ownership.¹⁰⁹ This Part introduces the logic of *The Mystery of Capital* by explaining the fieldwork he performed in exploring his research questions.

The lack of agency of the urban poor is an issue that is not unique to Rio de Janeiro.¹¹⁰ One of the cities that de Soto examines is Lima, Peru.¹¹¹ Two years after gaining independence from Spain, the revolutionaries made sure that the Peruvian constitution “clearly stated that the poor . . . were the legitimate owners of their land.”¹¹² Despite this explicit effort to afford the urban poor with property rights, the upper class continued to enjoy success in dispossessing them of their land.¹¹³

The government did not turn a blind eye to the issue but instead enacted statutes asserting the same—that the land legally belonged to them.¹¹⁴ This is where the problem of property rights lies, according to de Soto—in countries like

104. *Id.*

105. *Id.*

106. *Morar Carioca: Conheça o Programa*, PREFEITURA DO RIO DE JANEIRO (Jan. 22, 2015, 8:21 AM), <http://www.rio.rj.gov.br/web/smhc/conheca-o-programa> [hereinafter *Morar Carioca*] (“De 2010 a junho de 2016, o Morar Carioca já levou seus benefícios a cerca de 500 mil moradores de 122 mil domicílios de 226 comunidades e loteamentos de toda a cidade”).

107. DE SOTO, *supra* note 21, at 5.

108. *Id.*

109. *Id.* at 5–6.

110. *See id.* at 166.

111. *Id.* at 167.

112. *Id.* at 166–67.

113. *Id.* at 167.

114. *Id.*

Peru, “most legal procedures [] creat[ing] formal property are not geared to process extralegal proofs of ownership that lack any visible chain of title.”¹¹⁵ The problem with this is that in countries without stable property systems, there are many obstacles that prevent an individual from obtaining title, even when that person performs all of the necessary steps.¹¹⁶

Throughout his book, de Soto uses property rights as a vehicle to address the issue of the failure of formal capital markets in developing countries.¹¹⁷ Central to his argument is the idea that an overwhelming amount of capital is actually already in possession by the urban poor in the form of land.¹¹⁸ The capital possessed, however, is “dead capital,” which is de Soto’s term for land that is extralegally held.¹¹⁹ The capital is dead because these countries lack the processes to formalize individuals’ rights to that property, which severely hinders the individuals’ ability to create capital using that property.¹²⁰ These individuals “have houses but not titles; crops but not deeds; businesses but not statutes of incorporation.”¹²¹

Historically, residents of little means in developing countries have secured their property through neighborhood associations or drug organizations.¹²² The informal means of obtaining land makes it impossible to use the land as collateral to create businesses or procure loans.¹²³ This is problematic because in order to use personal property as collateral, “the land must be subject to seizure by the bank;” but in the case of informal settlements, it is difficult for banks to seize the land.¹²⁴

The problem with this extralegal system is that it renders the capital “invisible” to people outside of the neighborhood in which the asset sits.¹²⁵ “Nobody really knows who owns what or where, who is accountable for the performance of obligations, who is responsible for losses and fraud, or what mechanisms are available to enforce payment for services and goods delivered.”¹²⁶

Another issue de Soto asserts in his book is that developing countries are prone to implementing multiple property systems that are overseen by various different organizations, both formal and informal.¹²⁷ This is of course not unique to Latin America, and de Soto astutely points out an example within the United States.

115. *Id.*

116. *Id.* at 18–20.

117. See generally Christopher Woodruff, *Review of de Soto’s The Mystery of Capital*, 39 J. ECON. & LIT., 1215 (2001).

118. DE SOTO, *supra* note 21, at 5–6.

119. *Id.* at 39–40.

120. *Id.* at 6–7.

121. *Id.*

122. Woodruff, *supra* note 117, at 1215.

123. *Id.*

124. *Id.* at 1216.

125. DE SOTO, *supra* note 21, at 32.

126. *Id.*

127. *Id.* at 52.

After the Gold Rush of 1849 led settlers across the entirety of the United States, there were over 800 separate property jurisdictions in effect.¹²⁸ Each one of these jurisdictions had its own records, rules, regulations, and even elected its own officials.¹²⁹ It took over one-hundred years for the government to integrate and formalize the property system after this eruption of property law, but it was able to do just that—“integrate into one system the informal property rules created by millions of immigrants and squatters.”¹³⁰ De Soto suggests that developing countries do the same.

To try to better understand the negative effects of a lack of integration of these property systems, de Soto and his team of ethnographic researchers performed surveys of five of what de Soto calls “Third World” cities: Cairo, Egypt; Lima, Peru; Manila, Philippines; Mexico City, Mexico; and Port-au-Prince, Haiti.¹³¹ The ultimate goal was to “gauge the value of the possessions of those people who have been locked out of the capitalized economy by discriminatory laws.”¹³²

In Lima, de Soto’s team had the project of creating a new, legal business in the outskirts of the city—in this case, a “garment workshop.”¹³³ It took 289 days to obtain the certification.¹³⁴ On each of those days, the team spent six hours in both travelling to Lima and in going through the process to obtain the certification required.¹³⁵ Even more disturbing was the cost of establishing this humble business: the registration alone cost US\$1,231, which was thirty-one times the monthly minimum wage.¹³⁶ To obtain the legal authorization necessary to build a house on state-owned land, it took six years and eleven months through a process involving 728 steps.¹³⁷

In a system that operates as slowly as this, it should become very clear why it is so appealing to obtain property rights extra-legally. In Peru alone, 53% of individuals residing in the city and 81% of people living in the countryside do not have formal property rights to their homes.¹³⁸ The value of real estate in general, both in urban areas and in the city, represents approximately US\$74 billion.¹³⁹

Considered in the aggregate across all third world and former communist nations, de Soto estimates the total value of real estate that is held extralegally at about US\$9.3 trillion.¹⁴⁰

128. *Id.* at 53.

129. *Id.*

130. *Id.*

131. *Id.* at 30.

132. *Id.*

133. *Id.* at 18.

134. *Id.*

135. *Id.*

136. *Id.* at 20.

137. *Id.*

138. *Id.* at 33.

139. *Id.*

140. *Id.* at 35.

When land cannot be used as collateral, there is a severely limiting effect on the network with which the landowner can trade or enter into transactions.¹⁴¹ This results in fewer profitable trading opportunities and a limited ability to divide labor.¹⁴² Evidence supporting this notion has been witnessed in Brazil as recently as 1996, when studies performed on settlers of the Brazilian Amazon found that “having title is perceived as an advantage by settlers, as it broadens the range of potential purchasers.”¹⁴³ Further, individuals boasting formal title “internalize[] some of the gains,” such as “an increase in land value” and “increased access to credit.”¹⁴⁴ In addition to these internalized gains, others “are external to the person receiving title.”¹⁴⁵

De Soto states that in order to instill a formal property rights system in developing countries, the government must be involved in “two fronts.”¹⁴⁶ After determining who owns a particular property, that property then must be registered within an information system that makes formal property rights both official and known to other people.¹⁴⁷

In an attempt to legitimize this claim, de Soto performed anthropological-like field studies of farms and cities throughout Asia, Africa, Latin America, and the Middle East, studying the way informal property systems work and how they could be transformed into formal systems.¹⁴⁸ De Soto argued that the key in forming formal property systems was to formalize the informality present in the current systems of underdeveloped countries.¹⁴⁹

De Soto further bolsters his argument of formalizing property markets by performing a comparison analysis with the property system of the United States.¹⁵⁰ He begins by drawing a parallel to the squatters of early United States society with the squatters of Latin America.¹⁵¹ In the settlement of the Western United States, there was a serious lack of formal property rights, resulting in the large presence of squatters.¹⁵² Rather than spinning out of control, miners associations mobilized to assert right of title, and property owners also sought claims of title formally.¹⁵³

Although the British law precedent strictly protected true owners of land rather than squatters, politicians “pushed for recognition of squatters’ rights,” and they eventually developed a formal property system in an attempt to take

141. Woodruff, *supra* note 117, at 1216.

142. *Id.* See generally Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POLIT. ECON., 912 (1994).

143. Lee J. Alston, Gary Libecap & Robert Schneider, *The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier*, 12 J. LAW ECON. ORG. 25, 28–29 (1996).

144. Woodruff, *supra* note 117, at 1217.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*; DE SOTO, *supra* note 21, at 5.

149. Woodruff, *supra* note 117, at 1218.

150. See DE SOTO, *supra* note 21, at 105–51 (discussing “The Missing Lessons of U.S. History”).

151. Woodruff, *supra* note 117, at 1218.

152. *Id.*

153. *Id.*

advantage of votes they would receive from those new property owners.¹⁵⁴ De Soto essentially argues that developing countries should do the same to involve politicians and the government in creating a formal property system, rather than depending on economics for justification.¹⁵⁵

IV. MOVING BEYOND DE SOTO: WHY HIS THEORY CANNOT BE BLINDLY APPLIED

As novel as de Soto's work may have sounded at the time, the idea of vesting *favelados* with title to their residential property is something that has been so engrained in the fabric of Rio de Janeiro that it was mentioned in the newest version of the Brazilian Constitution, adopted in 1988.¹⁵⁶ In its chapter on urban policy, the Constitution states that its aim is to "ordain[] the full development of the social functions of the city and ensur[e] the well-being of its inhabitants."¹⁵⁷ Although this is seemingly broad, the article goes on to state that "[u]rban property performs its social function when it meets the fundamental requirements for the ordainment of the city as set forth in the master plan."¹⁵⁸

Although the second clause does not appear to clarify the vagueness, it is significant in that it, "[for] the first time . . . provide[s] . . . detail as to how the social function of property w[ould] be achieved. The 1988 Constitution ties the social function of property to the scope of, and participation in, the master plan process," which requires cities with a population greater than twenty thousand to develop a plan.¹⁵⁹

The next article in the 1988 Constitution states that "[a]n individual who possesses an urban area of up to two hundred and fifty square meters, for five years, without interruption or opposition, using it as his or as his family's home, shall acquire domain of it . . ."¹⁶⁰

Although the Constitution itself is vague, the City Statute, which is a "national legislation with authority over state and municipal affairs," sheds light upon how cities are to achieve this goal of the Constitution's: to ensure the social functions through the vehicle of residential property.¹⁶¹ The City Statute sets forth sixteen ways in which cities are to go about achieving this goal—the most pertinent of which to this Note is the "regularization of land ownership and urbanization of areas occupied by low-income populations."¹⁶²

154. *Id.*

155. *Id.*

156. Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and the United States*, 39 VAND. J. TRANSNAT'L L. 435, 452–53 (2006).

157. *Id.* at 453; CONSTITUIÇÃO FEDERAL [C.F.] art. 182 (Braz.).

158. CONSTITUIÇÃO FEDERAL [C.F.] art. 182 (Braz.); Pindell, *supra* note 156, at 453.

159. Pindell, *supra* note 156, at 453.

160. *Id.* (quoting CONSTITUIÇÃO FEDERAL [C.F.] art. 183 (Braz.)).

161. Pindell, *supra* note 156, at 454.

162. *Id.*

Since the enactment of the 1988 Constitution and the publication of de Soto's work in 2000,¹⁶³ Rio de Janeiro has developed housing programs that seek to achieve the goals set forth in both the Constitution and the accompanying City Statute.¹⁶⁴ The programs created afford residents of the *favelas* homes that are not only affordable but that also come with an accompanying title.¹⁶⁵

As mentioned in Section II.C, *Morar Carioca*¹⁶⁶ is the largest-scale housing program that has been seen anywhere in Brazil.¹⁶⁷ Created in 2009, *Morar Carioca* has the goal of both urbanizing and integrating *all* of the neighborhoods of the city of Rio de Janeiro, which was an ambitious goal considering that an estimated 1.4 million residents would be in need of benefiting from such a program.¹⁶⁸

To an outsider, the program's statement of purpose might sound contradictory: although it claims to aim to move beyond simply promoting urbanization and adding roads to neighborhoods, its asserted cure is to improve sanitation and health, education, and other basic services, which sounds just like that it is claiming to move beyond.¹⁶⁹ *Morar Carioca*, however, goes on to include a goal that is much more explicitly socially oriented than the statement of purposes seen in the United States. It states that the program aims to "bring citizenship and dignity to a significant portion of [Rio's] population that still lives in a precarious state."¹⁷⁰

Significantly, another reason for implementing the program was to afford title to residents living in the *favelas*, finally allowing their property to be known in a proper, juridical manner.¹⁷¹ Between January of 2010 and June of 2016, around 500,000 people in 226 communities reaped the benefits of 122 living spaces.¹⁷²

Another housing program in Rio de Janeiro is *Minha Casa, Minha Vida*.¹⁷³ This program is essentially a subsidized housing program that requires its participants to make no more than R\$6,500 each year, or approximately US\$1,986.¹⁷⁴ What is important to note, however, is that this program does not directly result

163. CONSTITUIÇÃO FEDERAL [C.F.] art. 182 (Braz.); DE SOTO, *supra* note 21.

164. *Morar Carioca*, *supra* note 106; *Minha Casa, Minha Vida*, PREFEITURA DO RIO DE JANEIRO (Sept. 22, 2015), <http://www.rio.rj.gov.br/web/smhc/minha-casa-minha-vida>.

165. *Morar Carioca*, *supra* note 106.

166. Translation: Life as a native Rio resident.

167. *Morar Carioca*, *supra* note 106.

168. *Id.*

169. *Id.*

170. *Id.* (translating "esse processo vai além de promover urbanização de ruas e áreas de lazer, agregando um leque de melhorias em saúde, educação e outros serviços públicos básicos, e levando cidadania e dignidade a uma parcela significativa da população que ainda mora de forma precária").

171. *Id.*

172. *Id.*

173. *Minha Casa, Minha Vida*, *supra* note 164.

174. *Id.* ("[O] programa tem como meta a construção de moradias para famílias que ganham até R\$6,500, com prioridade para os que ganham de até R\$1.800,00, faixa que concentra 90% do deficit habitacional.").

in title to the homes of *favelados*. Instead, *Minha Casa, Minha Vida* creates new homes for those that apply to its program.¹⁷⁵

This is significant because absent from the discussion is what becomes of the home that was vacated when the person moves into the newly constructed product of *Minha Casa, Minha Vida*. Who are the individuals or families choosing to leave their own homes to enter these new constructions? Where are the housing developments located—are they located within any of the centrally located *favelas*, or do they lie in the periphery of the city?

Quite telling is the format of the prefecture's website itself in relaying this information. In the section describing *Mora Carioca*, there is a separate subsection containing the data for all of the neighborhoods that have already benefited from the program.¹⁷⁶ This data describes the number of housing units constructed along with the other types of social and urbanization upgrades that the neighborhoods experienced.¹⁷⁷ On the other hand, *Minha Casa, Minha Vida* has no information on its website about where the subsidized housing units can be found, nor does it explain how to get to them.¹⁷⁸

This certainly suggests the possibility that the subsidized housing options are not within *favelas* that are centrally located, since this is information that would surely be widely advertised because it would attract more applicants.

This point should be heavily stressed because, although it appears to be in compliance with the Brazilian Constitution of 1988 by providing housing options for its citizens, the idea of displacing citizens strays far from the original goal of the urban policy section of the Brazilian Constitution of 1988.¹⁷⁹ The Constitution “explicitly adopt[s] the concept of a right to the city articulated by French philosopher Henri Lefebvre.”¹⁸⁰ The right to the city, as conceptualized by Lefebvre, is one that is in “direct[] opposi[tion] [to] the right to private property.”¹⁸¹

The right to the city directly opposes a right to private property mainly because it concerns itself with “the right of all citizens to the ‘use-value’ of the space for their needs, for housing, for play, for festivals, and crucially, for social interchange.”¹⁸² De Soto's conceptualization of capital as being tantamount to success directly contradicts the 1988 Brazilian Constitution's emphasis placed on the need for all citizens to have a “right to the city,” because “[t]he right [to the city] also includes the right to break free from the control of urban spaces exerted by *capitalism's* imperatives.”¹⁸³

175. *Id.*

176. *See Morar Carioca*, *supra* note 106.

177. *Id.*

178. *See Minha Casa, Minha Vida*, *supra* note 164.

179. *See* Alan M. White, *Market Price, Social Price, and the Right to the City: Land Taxes and Rates for City Services in Brazil and the United States*, 44 U. MIAMI INTER-AM. L. REV. 313, 316 (2013).

180. *Id.* at 313.

181. *Id.* at 315–16.

182. *Id.* at 316.

183. *Id.*

If de Soto's theory of affording title has the explicit goal of remedying the failure of capitalism in the Third World, how could that solution possibly work in a country where the Constitution endorses a theory looking to free itself from the bounds of capitalism? This contradiction illustrates that de Soto's theory is incapable of simply being blindly applied to the slum communities of other cities. Rather than giving title to *favelados* without making other substantive changes, the city of Rio de Janeiro should implement other changes related to zoning and tax provisions that will keep the current residents of Rio's *favelas* living in their neighborhoods. Simply giving title could have serious implications, the most troubling of which would be gentrification due to stifling property taxes, as discussed in Part V.

V. RECOMMENDATION

De Soto claims in *The Mystery of Capital* that politicians should be more involved in the procurement and development of formal property systems in developing countries, and that doing so will necessarily afford the urban and rural poor more agency via the means of internalized and externalized capital.¹⁸⁴

This analysis is overly broad. As mentioned in Part I, the shantytown communities throughout Latin America differ vastly in their form due to the geographical variety within the city.¹⁸⁵ In that same vein, the slums throughout Latin America are subject to different housing laws, tax codes, and social makeups that necessarily differentiate them from one another. Because of the large amount of differentiation between slum communities of different countries, it is irresponsible and naïve to believe that de Soto's solution would automatically work well for the *favelas* of Rio de Janeiro.

The solution is largely theoretical and ignores important factors that would necessarily affect its implementation. One of these factors is politics. De Soto's argument, as it stands presently, blatantly ignores the fact that politicians' interference in the development of *favelas* has only made it more difficult for *favelados* to obtain agency through their property, meaning that simply providing title to *favelados* in a system that is already constrained by hierarchical structures may not afford much more agency to individuals.¹⁸⁶

This Part begins by explaining how political influence mutes the agency of the *favela* residents, thus discounting de Soto's assertion that title is positive because it paves the way for governmental involvement.¹⁸⁷ The discussion continues with an explanation of the current municipal property tax system and how that too poses challenges to de Soto's solution of simply granting title blindly

184. Woodruff, *supra* note 117, at 1217–18.

185. *See supra* Part I.

186. *See generally* ROBERT GAY, POPULAR ORGANIZATION AND DEMOCRACY IN RIO DE JANEIRO: A TALE OF TWO FAVELAS (1994); BRYAN MCCANN, HARD TIMES IN THE MARVELOUS CITY: FROM DICTATORSHIP TO DEMOCRACY IN THE FAVELAS OF RIO DE JANEIRO (2014).

187. Woodruff, *supra* note 117, at 1215.

with no other alterations. Finally, the Part finishes by suggesting minor changes to title registration systems to further accommodate the vestment of title.

A. *Political Interference Clouding the Path to Agency*

In Rio de Janeiro, property taxes imposed on dwellings for the first time in the residents' lives will result in amplified gentrification as residents are left with little choice but to move to more affordable areas of the city. This, instead of achieving integration, provides a catalyst for further segregation of the middle and upper classes from the lower class that has already historically been pushed to spaces of otherness within the city.

One argument in support of giving title to squatters that de Soto gives is that in doing so, residents will enjoy the government's more active role within their communities.¹⁸⁸ While this is certainly true in the sense that the Municipality will need to invest back into the *favelas* more since the *favelados* would formally be paying taxes upon registering their title, it is important to acknowledge that the *favelados* may not see this governmental oversight as a positive relation due to past experiences with politicians.

In his book *Popular Organization and Democracy in Rio de Janeiro: A Tale of Two Favelas*, Brazilianist scholar Robert Gay closely examines the developmental trajectory of Vila Brasil and Vidigal, two *favelas*, between 1945 and 1993 and reports on how each engages with politics in order to satisfy their urbanization needs.¹⁸⁹ Vidigal is located between two of Rio de Janeiro's most affluent neighborhoods: Leblon and São Conrado.¹⁹⁰ Because of this, Vidigal enjoyed high visibility and attracted the support of organizations sympathetic to their private property rights.¹⁹¹

In 1977, a private realty company attempted to relocate and demolish Vidigal in order to construct luxury apartments.¹⁹² Due to its close proximity to Zona Sul, however, it attracted the attention of representatives from the State Assembly and Municipal Chamber in Rio, The Brazilian Institute of Architects, the Brazilian Bar Association, and the Catholic Church.¹⁹³ The support of these organizations in tandem with the mobilization of Vidigal's community halted the plans for demolition.¹⁹⁴ Vidigal's close proximity also led the then mayor, Chagas Freitas, to begin a number of public works projects to further urbanize the *favela*, since it was an area Pope John Paul II was planning to visit.¹⁹⁵ Although Vidigal did enjoy urbanization thanks to its visibility, the government's role in

188. *See id.* at 1218.

189. *See generally* GAY, *supra* note 186.

190. *Id.* at 61.

191. *See id.*; MCCANN, *supra* note 186, at 86.

192. GAY, *supra* note 186, at 61.

193. *Id.* at 73.

194. *Id.*

195. *Id.* at 80.

its development was ultimately for its own gain, not for the gain of the *favelados*.¹⁹⁶

Gay contrasts the story of Vidigal with that of Vila Brasil, which is located “in the middle of a poor, nondescript, working-class neighborhood” far from the glamour of *Zona Sul*.¹⁹⁷ Vila Brasil is no stranger to the government’s manipulative efforts, and Gay claims that it is the “manipulation of the opportunities provided by political competition that explains Vila Brasil’s spectacular success” with regards to urbanization.¹⁹⁸ Specifically, in return for votes, political candidates promised that they would provide various urbanization improvements, such as paved roads, public lighting.¹⁹⁹ Even more disturbing, politicians did not begin to capitalize on this clientelistic relationship until the early 1990s; until that point, “Vila Brasil had no public lighting, no water supply, and no paved roads, and raw sewage ran through the favelas in open ditches.”²⁰⁰

It should be clear, then, why *favelados* have reason to be highly distrusting of the government. Although they have experienced the benefits of urbanization, the urbanization efforts were never produced in order to provide the *favelados* with basic human rights that had long been available to the rest of the city’s inhabitants; rather, the City of Rio de Janeiro only engaged in urbanization efforts when it was useful to politicians specifically or to the city’s greater image.²⁰¹

Therefore, de Soto’s assertion that title will pave the way for a governmental relationship with the *favelas*, although true, might not actually be understood as a positive result to *favelados*. This is not a reason to discount de Soto’s titling argument, but it is something that should be considered when understanding the reactions of *favelados* to the idea of governmental engagement with their communities in general.

B. Taxes Serving as a Bar to Agency

Additionally, and perhaps even more importantly, de Soto’s argument for title ignores the effect that tax systems already in place would have on the title. In Brazil, there are three taxes shared by all municipalities in the country, and one of these three is the *Imposto sobre a propriedade predial e territorial urbana*, or Building and Urban Property Tax (IPTU).²⁰²

Property owners must pay the IPTU, a municipal tax, if they own urban real estate for housing, a business, or other purposes.²⁰³ There are exemptions to paying the IPTU if the property owner is “physically disabled, [a] World War II

196. *See id.*

197. *Id.* at 41.

198. *Id.* at 40.

199. *Id.* at 55–56.

200. *Id.* at 44.

201. *See supra* Part II.

202. Marcelo Possato, *Most Common Taxes in Brazilian Municipalities*, BRAZ. BUS. (Feb. 27, 2018), <http://thebrazilbusiness.com/article/most-common-taxes-in-brazilian-municipalities>.

203. *Id.*

veteran[], [or] elderly persons above sixty years of age earning up to two minimum salaries, a level considerably above the poverty line.”²⁰⁴ Finally, some cities allow an initial exemption period where a lower-income taxpayer is not obligated to pay the tax.²⁰⁵ This yearly tax is calculated based on the value of the area in which the property falls.²⁰⁶

The problems that arise from *favela* residents having to pay the IPTU upon the granting of property rights emerge in an interrelated but dichotic fashion. The major issue here is the manner in which the tax is calculated. By looking at the sole factor of the value of the land in which the property falls, the IPTU fails to take into account the fact that shantytowns across Brazil are formed in starkly contrasting areas—the land on which a *favela* residence is built, say, the outskirts of Rio de Janeiro, will necessarily be lesser in value than the land on which the inner-city *favelas* are found, which sit atop mountain peaks and often have views of the Atlantic.

The Municipal Code appears to address this issue on its face by placing each of its formally recognized neighborhoods into three taxable categories, marked “A,” “B,” and “C.”²⁰⁷ At the very end of the code is the table explaining which neighborhood falls into each of the three categories. Instead of categorizing the neighborhoods by considering who lives there now, the legislators simply lumped the neighborhoods that are in close proximity into the same tax category.²⁰⁸

This is hugely problematic. For example, in the same category as Rio de Janeiro’s most affluent neighborhood, Leblon, is the *favela* Vidigal, whose residents lie at the opposite end of the income spectrum.²⁰⁹ Rio de Janeiro’s other *favelas* are also distributed across the other two categories, meaning that there is no single category for the *favelas*.²¹⁰ This categorization system also does not protect those *favelados* living in *favelas* that are not formally recognized as a neighborhood by the Rio de Janeiro zones since they might legally be classified as falling within a neighborhood with a higher average income of its residents.²¹¹

204. White, *supra* note 179, at 323.

205. *Id.* at 323–24.

206. See Decreto No. 14.327, de 1 de Novembro de 1995, DIÁRIO OFICIAL DO RIO DE JANEIRO [D.O.E.R.J.] de 6.11.1995 (Braz.) (available at <http://www2.rio.rj.gov.br/smf/fcet/legislacao.asp>, under the “Download do Arquivo” column, click the icon on the far right in the row “REGULAMENTO DO IPTU” [hereinafter Civil Decree No.14.327] (“A base de cálculo do Imposto sobre a Propriedade Predial e Territorial Urbana é o valor venal da unidade imobiliária, assim entendido o valor que esta alcançaria para compra e venda a vista, segundo as condições do mercado,” which translates to: The base of calculation for the IPTU is the market value of the unit of property, which is understood as the value a third party would pay at sight for the property, according to market conditions); Possato, *supra* note 202.

207. Civil Decree No.14.327, *supra* note 206, art. 4, § 1 (“§1º Os bairros serão distribuídos em regiões fiscais denominadas ‘A’, ‘B’ e ‘C’, conforme disposta na Tabela I.”).

208. *Id.* at Tabela I (available in the *Anexo*).

209. *Id.*

210. See *id.*

211. See ILOVERIO.COM, <https://iloverio.com/rio-de-janeiro-neighborhoods-copacabana-ipanema-leblon-bairros-guide/unofficial-neighborhoods/rio-de-janeiro-neighborhoods-fazenda-botafogo-unofficial-sub-bairro3.htm> (last visited Jan. 16, 2019).

Sprinkling *favelas* within the same categories as other more affluent neighborhoods of course means that the residents of those *favelas* will have to pay a much higher percentage of their income towards their property taxes than their middle- and upper-class counterparts living in the same IPTU category pay.²¹² This would constitute a huge blow to *favelados* since, as squatters, they have never had to budget for that expense and may not be able to going forward, at least not at the same rate as Rio de Janeiro's middle and upper class citizens pay.

The fear, then, is that high costs represented in this tax and in addition to utility costs and registration fees that the *favelados* would have to pay to obtain title in the first place will drive them to leave their homes, resulting in the exact ill that De Soto's title vesting solution intended to cure.²¹³ Instead of the government vesting its citizens with agency through title, the government would be burdening *favelados* with an oppressive property tax. This actually serves to strip *favelados* of agency, because it leaves them with little choice but to sell their property to individuals that can afford to live there or business-owners that can afford to operate there. In other words, the IPTU oppresses, rather than empowers, *favelados* in its current form.

That said, eliminating the IPTU completely is not an option either. The act of being taxed the IPTU expresses to *favelados* that they do in fact form part of the Rio's citizenship and are seen as more than just a "slum-dweller," which is significant considering the past rhetoric towards those living in the slums.²¹⁴ *Favelas*, as explained above in Part II, have experienced a history of marginalization at both the societal and governmental level.²¹⁵ Part of this infamously lies in the way in which *favelas* came to be—they are precarious, often created with scrap materials, and are not conventionally attractive.²¹⁶ Stereotyped as being "unclean and polluting," *favelas* are "symbolically constituted as spaces of crime, spaces of anomalous, polluting, and dangerous qualities."²¹⁷ Thus, requiring *favelados* to pay the IPTU is an express recognition that they form part of the community in a formal manner.

Taking this tax away strips *favelados* of the unique agency power of paying into the community in which they are living, a way that *favelados* can truly be community members. By paying property taxes, residents of *favelas* are investing in their neighborhoods by providing a base from which the local government would be able to pour back into the *favela* not only basic amenities, like sewage and water systems and roads, but also more community-building amenities, like parks, plazas, and schools. It then becomes clear that the solution is not so simple as simply eradicating the IPTU altogether.

212. See Possato, *supra* note 202.

213. See generally DE SOTO, *supra* note 21.

214. White, *supra* note 179, at 323.

215. See *supra* Part II.

216. See TERESA P. R. CALDEIRA, CITY OF WALLS: CRIME, SEGREGATION, AND CITIZENSHIP IN SÃO PAULO 79 (2000) ("Moreover, in favelas houses are often made from discarded materials and are usually quite small (again lacking the separations and space allocations of a proper home).").

217. *Id.*

This argument only works, however, assuming that the quality of the public works that go into the *favelas* is such that the residents themselves view the investment as having been cost-effective. The state of Brazilian taxes is already widely considered as being highly regressive, with unusually steep taxes placed on basic items for survival like food, clothing, cooking gas, electricity, and other “products utilized by the working poor.”²¹⁸ Additionally, all incomes greater than R\$49,051 are equally taxed at a rate of 27.5%.²¹⁹ “Translated to U.S. dollars this means a person who makes US\$15,000 per year is taxed at the same rate as a person who makes \$15 million;”²²⁰ the idea being that the system already works against the urban poor in the regressive tax sense, and so this class of people might not feel so inclined to be forced into providing an additional tax base via the IPTU.

This Note suggests, then, that instead of taking the drastic measure of eliminating the tax, the way in which the IPTU is calculated must be reevaluated. A reevaluation that considers the socio-economic position of the *favelados* instead of simply eliminating the tax entirely would be hugely beneficial towards the *povo* itself, thus falling well in line with the ultimate goals of the 1988 Brazilian Constitution and the City Statutes—it would afford the *favelados* agency without depleting them completely of any economic means that they have at their disposal.²²¹

The simplest way to do this would be to add a fourth category “D” to the preexisting three categories. Doing so would achieve two very important goals. First, *favelados*, who have been chronically exiled from the rest of Rio de Janeiro, would formally be recognized as part of the greater community. Instead of being the marginalized recipient of public goods, *favelados* would be contributing to funds that could be reinvested into their very community. Second, it would prevent *favelados* from paying tax rates that are unfair or impossible in comparison to that of the others within the same tax category. Knowing that the paying the IPTU is financially viable would also give *favelados* more of an incentive to register for title in the first place.

An area for further research in this same area would be to examine the current system of zoning laws in Rio de Janeiro and suggest a reform to best serve the *favelados* as they adapt to life with title. A tentative suggestion would be to implement restrictions on zoning laws in the *favelas* for a limited number of years to residential uses and small business use. This would ensure that the neighborhoods retain a similar function to that which they have now, which is to serve the needs of its current community.

Restrictions on the size and height of new constructions would further this goal as well. Keeping restrictions such as these for a limited number of years

218. Eli Nemzer, *The Deep Inequality of Brazil's Tax Code*, RIOONWATCH: COMMUNITY REPORTING ON RIO (Sept. 28, 2016), <http://www.rioonwatch.org/?p=30710>.

219. *Id.*

220. *Id.*

221. See CONSTITUIÇÃO FEDERAL [C.F.] arts. 182–83 (Braz.).

would at least allow the opportunity for the *favelados* living in the *favelas* currently to experience how their *own* investment into their community through the payment of the IPTU can inform their microeconomies.

C. Title Process Changes

De Soto points out that one of the many factors leading the urban poor to obtain their property in an extralegal fashion is the fact that obtaining title through the formal processes intact often involves substantial amounts of time and money.²²² Especially when *favelas* lie high in the mountains or far out in the periphery of the city, travelling to Rio de Janeiro's center via public transportation can be difficult, taking precious time away from work or other responsibilities, which could in effect make citizens less likely to travel in order to formally obtain title.

Surely, the process that de Soto is thinking of is not an automatic vestment; there must necessarily be some sort of process involved. But at the same time, an automatic vestment of title would also be unreasonable since it would be a burden (or simply impossible) for the government to keep track of land as it changes hands. Therefore, a change here must also occur if title vestment is going to actually occur in a lasting way.

As of today, citizens must pay a registration fee and a general fee in order to obtain title to property.²²³ The processing fee for the registration of title costs a total of R\$20.21, which is only US\$5.44.²²⁴ The costs begin to increase once the actual registration of title is taken into account.²²⁵ For property without a known value, the cost is R\$133.11, or US\$35.83.²²⁶ This would be where one would intuitively look to register property of the *favelados* since they would not have ever bought their land. Without having bought land, it might appear reasonable to assume that there has not yet been a value assigned to that property.

This, however, is not the case. The supplemental notes after the table point out that when the value of a plot of land is unavailable or undeclared, the registrar will assume the land's worth to be the highest value assigned to the land by the

222. See *supra* Part III.

223. See *Tabela de Custas e Emolumentos do Estado do Rio de Janeiro do ano de 2018*, 12° REGISTRO DE IMÓVEIS DO RIO DE JANEIRO, Tabela 04, 05 (2018) (available at <https://www.12registro.com.br/?pG=X190YWJlbGFz>, click "Tabela de Custas e Emolumentos do Estado do Rio de Janeiro do ano de 2018" and download the pdf) [hereinafter *Tabela de Custas e Emolumentos*].

224. *Id.* at Tabela 04 ("1. Distribuição, registro, retificação, averbação, exclusão, inclusão, na distribuição de ato notarial, habilitação de casamento, título ou documento."); see *Currency Converter: BRL to USD*, XE, <http://www.xe.com/currencyconverter/convert/?Amount=20.21&From=BRL&To=USD> (last visited Jan. 5, 2019).

225. See *Tabela de Custas e Emolumentos*, *supra* note 223, at Tabela 05 (explaining the costs to register title in Rio de Janeiro, depending on the value of the property being registered).

226. *Id.*; see *Currency Converter: BRL to USD*, XE, <http://www.xe.com/currencyconverter/convert/?Amount=133.11&From=BRL&To=USD> (last visited Jan. 5, 2019).

city.²²⁷ It becomes clear then that the injustice of the IPTU's categories goes beyond property taxes but extends also to the simple act of registering property. Although a mere forty dollars might not appear like a substantial cost, but for the 16.2 million people (in all of Brazil, granted) living on less than R\$70 a month, this would be a substantial cost.²²⁸

The cost would be absolutely impossible once the IPTU values are considered, since the *favelas* are grouped in with more affluent neighborhoods within the IPTU tables.²²⁹ The remaining costs depending on value of the property range from R\$187 to R\$1,615, or US\$50 to US\$435.²³⁰

A fourth category of the IPTU costs, as suggested above, for *favelados* would alleviate this issue. Further, a flat, reduced fee would also make the registration process more affordable for *favelados*, which might encourage them to take the legal steps to actually obtain title once they are able to.

VI. CONCLUSION

Vesting *favelados* with title is important because it affords them a right of power that they have never had before. With title comes the responsibility of property taxes, which would allow *favelados* to reap the benefits of governmental investment into their communities in a more formal way. Importantly, title vestment and the payment of property taxes would mean that *favelados* would finally be able to enjoy urbanization efforts and public works projects for the simple reason that they are citizens of Rio de Janeiro, a much more humanizing reason than obtaining the same benefits either in exchange for votes or to promote a better image of Rio de Janeiro to the rest of the world.

That said, de Soto's theory of title vesting would not apply in a constructive manner to the *favelas* of Rio de Janeiro without including accompanying changes. Specifically, in order to avoid the inevitable gentrification that would come with title vesting, the city of Rio de Janeiro would need to revise the IPTU's

227. *Tabela de Custas e Emolumentos*, *supra* note 223, at Tabela 05 ("Quando o valor não for declarado, valerá o maior valor do imóvel atribuído no lançamento fiscal pelo Poder Público, como na hipótese do valor venal atribuído pelo Município em sua planta de valores para a cobrança de tributos, como o IPTU e o ITBI," which translates to, "When the value is undeclared, the property will be worth the highest value attributed to the fiscal determinations of the Public Power, for example, the market value assigned by the Municipality within the IPTU or the ITBI.").

228. Sarah de Sainte Croix, *Brazil Strives for Economic Equality*, RIO TIMES: NEWS IN ENGLISH FOR RIO DE JANEIRO AND BRAZIL (Feb. 7, 2012), <http://riotimesonline.com/brazil-news/rio-business/brazil-strives-for-economic-equality/>. More recent estimates are much lower, at only R\$140 (US\$38) per month. Peter Prengaman, Sarah Dilorenzo and Daniel Trielli, *Em 2 anos, milhões ficam abaixo de pobre no Brasil e ganham menos de R\$ 140*, UOL ECONOMIA (Oct. 24, 2017), <https://economia.uol.com.br/noticias/redacao/2017/10/24/pobreza-miseria-brasil-recessao.htm?mobileDev&width=280.8> ("Mas a entidade também avalia que, em 2016, entre 2,5 milhões e 3,6 milhões de pessoas voltaram a viver abaixo do nível de pobreza—com menos de R\$ 140 por mês," which translates to "But the entity [the World Bank] also determined that, in 2016, between 2.5 and 3.6 million people returned to living below the poverty line—earning less than \$140 reais per month.").

229. See White, *supra* note 179, at 323.

230. *Tabela de Custas e Emolumentos*, *supra* note 223, at Tabela 05; see *Currency Converter: BRL to USD*, XE, <http://www.xe.com/currencyconverter/convert/?Amount=187&From=BRL&To=USD> (last visited Jan. 5, 2019).

mode of assessing property value by including a fourth category of property to encompass all *favelas*. Keeping the IPTU categories as they are unjustly forces *favelados* to pay taxes that are highly disproportionate to the amount of money they earn and essentially punishes them for having been forced to settle in the *favelas* in decades past.

A separate category housing the *favelas* would enable *favelados* to pay the IPTU tax and contribute to their own communities without being forced out of their communities due to stifling tax rates. Additionally, zoning laws would need to be adopted to protect the *favelas* from seeing an increase in high rises and other sorts of commercial structures that would result in uses that are not in line with the communities' needs.

Including these accompanying reforms alongside the vestment of title would allow for a community of citizens that has been systemically marginalized to remain in their neighborhoods with the added protection of formal title, all the while contributing to society through property taxes as all other citizens do, thus truly incorporating this group of individuals into the city.

