

THE RESOURCE STATE: DECONSTRUCTING THE CAUSALITY OF POVERTY, BAD GOVERNANCE, AND NATURAL RESOURCE RIGHTS

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ABSTRACT

The deeply engrained yet rarely discussed legal principle of state ownership of natural resources is a primary contemporary driver of global poverty, conflict, poor governance, and undemocratic states. While there is now wide consensus on the existence of the natural resource curse - the phenomenon that developing countries with an abundance of natural resources tend to have slower economic growth, weaker democracies, and poor governance - there has been little progress in identifying its cure. Poor institutions are a strong contributing factor to the resource curse, but the conditions under which strong institutions are created is largely overlooked. Underpinning the weak institutions in most developing countries is a historical, structural legal condition of direct state ownership of all natural resources - termed the "resource state" - that creates a political environment for direct, central capture of resource-related rents and disincentives to protect individual and community land rights. This central control of resource rents then further erodes incentives to invest in weak institutions and accountable mechanisms of revenue generation, instead encouraging corruption and patronage, and low investment in human capital, which hampers economic growth and can foment internal conflict. When this theory is applied to include the prevailing policy of broad state ownership and/or control of land in developing countries, it also explains under-development, poor governance and inequality across the developing world. This article links theories on land and resource rights and the resource curse by examining recent literature, expanding the scope and identifying an inverse causal relationship for the resource curse, and proposing a bold, alternative global economic model to reverse the curse.

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I. INTRODUCTION

Land grabbing and natural resource extraction has become a global flash point. Africa is in the midst of a resource boom characterized by conflict over land grabs between national governments and local communities. Oil and mineral extraction in Latin America continues to contaminate the natural resources people depend upon. Meanwhile, ownership over massive oil and gas fields fund dangerous, undemocratic regimes in Russia, Iran and elsewhere. And despite the largest oil reserves in the world, Venezuela is falling apart. Around the world extractive activities in resource-rich countries have not led to prosperity and good governance, but to inequality, autocracy, conflict, corruption, and poverty, a phenomenon known as “the resource curse”¹ Over the next decade even more low- and middle-income countries, particularly in Africa, will become dependent on natural resource exports, increasing the need to understand the origins of the “curse” and identify solutions for its reversal.

Extensive resource curse literature has been produced since the 1990s, largely focused on economic symptoms, including the “Dutch Disease”

¹ R.M. AUTY, RESOURCE-BASED INDUSTRIALIZATION: SOWING THE OIL IN EIGHT DEVELOPING COUNTRIES, (1990).

theory, but few have identified the structural causes. Even fewer propose policy solutions. This article argues that a seldom-discussed structural legal principle is the cause of the resource curse, and its reform has the potential to cure the curse, drastically reducing global poverty, poor governance, and instability, including for a range of poor countries not normally considered as resource rich but that suffer from a land-based variant of the curse.

Behind the curse lies a fundamental question: what is the proper relationship between state, citizen and sovereign natural resources in a modern, prosperous, democratic, and egalitarian society? The predominant contemporary model provides that all natural resources, often including land, are the sovereign right of the country, with ownership and control vested in the government as steward for the people. This article terms this model of governance the “the resource state”. In the resource state natural resource extraction is a primary source of revenue for governments and often the defining characteristic of their economic and political systems. The resource state is well-documented in countries such as Saudi Arabia and Kuwait, but it is also the prevailing model, with varying degrees, across Africa, Asia, and Latin America. Developing countries and non-democratic states almost universally claim legal ownership and sovereign control over all natural resources – subsurface minerals, forests, water, oil and gas, and often even land. This state ownership of resources subjugates the weaker surface land use rights of communities and individuals and erodes democratic principles of governance, preying on weak institutions, with corresponding dramatic impacts across a range of issues including corruption, public service delivery, ethnic fracturing, economic stagnation, and the creation of authoritarian regimes. The resource state is the result of the confluence of multiple factors – pre-colonial, feudal and customary land ownership patterns; colonial-era land grabs and societal reorganization; and post-colonial principles of self-determination, national sovereignty over resources, and centralized economies.

The resource state is in fact so pervasive across the developing world that its appropriateness to modern democracies is rarely questioned and commonly condoned and funded by the World Bank, IMF, and other international institutions. This is not, however, the only economic governance model for states with significant natural resources intermixed with population centers and is certainly not the most effective. Historical lessons from the U.S. states and other countries and related development theory points to a preferred model of devolved ownership, control and revenue generation.

As part of a larger ongoing cross-country empirical study, this article lays the theoretical foundation for the cause of the resource curse and the creation of an alternative, sustainable, long-term solution founded on strong local individual and community land rights and devolved natural resource

ownership. In this article, I argue that the resource state is a failed model for the majority of countries and that it has outlived any original post-colonial sovereignty utility. It is now the principle factor behind the inability of many states to become functioning democracies with resilient, inclusive economies and prosperous societies. The academic literature and policies of multi-lateral institutions, however, rarely question the continued prominence of the resource state as the dominant contemporary economic and governance model. In this article, I begin to build the evidence base to question the current assumption that the resource state is an effective basis of sovereignty and economic governance by using an interdisciplinary analysis of weak states, international human rights law, and development theory. Section II reviews recent literature on the resource curse; Section III looks at the current structure of the resource state, including national constitutions and state concession systems established for resource extraction; Section IV discusses the pre-colonial and colonial forms of governance that created a foundation for the resource state and reviews the post-colonial international doctrine on sovereignty over natural resources; Section V identifies leading structural causes of the curse and proposes an ambitious human rights-based policy agenda to create a new resource governance model that devolves ownership to the local level to strengthen sovereignty, improve governance, reduce internal conflict, and unlock sustainable economic growth.

II. THE RESOURCE CURSE LITERATURE

Academic analysis on the resource curse abounds, particularly since the evolution of the petro-state in the Middle East in the 1960s. Mahdavy first coined the term “rentier state” to describe the creation of powerful, oil-rich and largely autocratic nation states in the Middle East - a term which has often since been extended to any government that obtains a substantial portion of their national revenue from the rent of indigenous resources.² The Economist coined the “Dutch Disease” phenomenon after discovery of a large gas-field in the Netherlands in the 1970s created a monetary shock where exports of natural resources lead to foreign exchange inflows, which drove up the value of the currency. The overvalued currency made domestic manufacturing, agriculture, and other exports less competitive.

The evolution of the relatively new academic field of international development has since broadened the lens of resource extraction analysis from petro-states in the Middle East to developing countries and other forms of resource extraction activities. Analysis has focused on the policies of poor

² Hossein Mahdavy, *Patterns and Problems of Economic Development in Rentier States: The Case of Iran*, in *STUDIES IN THE ECONOMIC HISTORY OF THE MIDDLE-EAST* 428, 428-29 (M.A. Cook ed., 1970).

country governments that depend so heavily on revenue from primary commodity exports that it is largely their defining economic identity.³ A series of articles around the 1990s, including Auty,⁴ Gelb,⁵ and Sachs and Warner⁶ confirmed the adverse effects of high volumes of extractive activity income on economic growth. Gelb⁷ identified under-performance in mineral economies, especially oil exporters, but focused on monetary shocks described in the Dutch disease phenomenon. Auty first used the term the “resource curse” in his 1990 book to describe the apparent paradox of resource-rich countries suffering from poor growth. Auty argued that the uneven economic performance of six industrializing countries was a result of the adverse effects of natural resource abundance.⁸ Mahon, in turn, looked at the poor economic performance of Latin America, as compared with East Asia, and identified differences in abundance of natural resources as a precipitating adverse cause.⁹

Sachs and Warner produced one of the more robust studies on evidence of the natural resource curse, showing abnormally slow growth rates between 1971-1989 across a set of 97 countries with high natural resource exports.¹⁰ They demonstrated that countries with high ratio of resource-based exports to GDP have a lower growth rate, even after controlling for other economic characteristics such as income level and trade policies.¹¹

Economists now largely accept the inverse relationship between natural resources and GDP (see Figure 1).¹² Growth losers, such as Sierra Leone, Angola, and Venezuela, are all resource-rich, while the Asian tigers: Korea, Taiwan, Hong Kong and Singapore, are all resource-poor. On average, resource abundant countries lag behind countries with fewer resources.¹³

With the academic community now largely in consensus that the natural resource curse exists, more recent academic analysis has instead focused on

³ DEBORAH BRAUTIGAM, TAXATION AND STATE BUILDING IN DEVELOPING COUNTRIES (Deborah Brautigam, Odd-Helge Fjeldstad, & Mick Moore eds., 2008).

⁴ AUTY, *supra* note 1.

⁵ A.H. GELB, OIL WINDFALLS: BLESSING OR CURSE?, (1988).

⁶ J.D. Sachs & A.M., Warner, *Natural Resource Abundance and Economic Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1995; revised 1997, 1999).

⁷ GELB, *supra* note 5.

⁸ AUTY, *supra* note 1.

⁹ J. Mahon, Jr., *Was Latin America too Rich to Prosper? Structural and Political Obstacles to Export-Led Industrial Growth*, 28 J. DEV. STUD. 241 (1992).

¹⁰ Sachs & Warner, *supra* note 6.

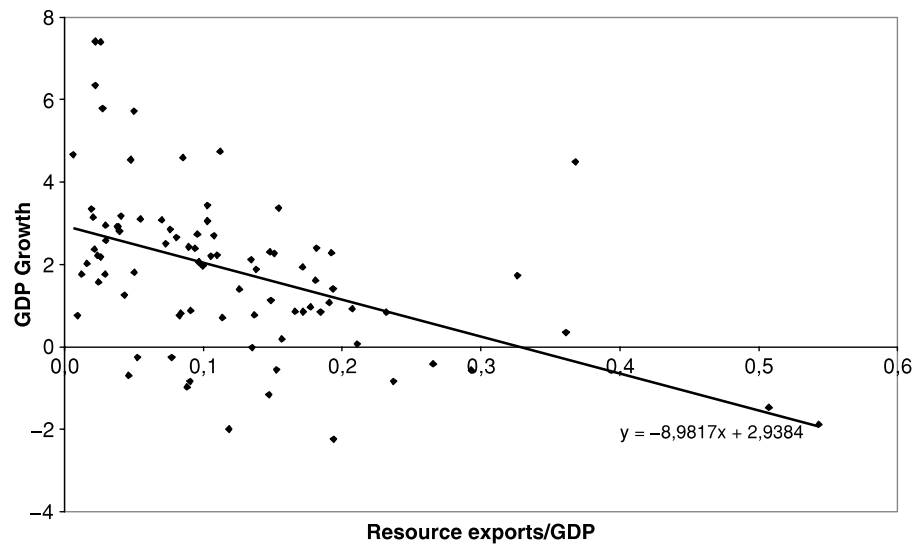
¹¹ *Id.*

¹² Ragnar Torvik, *Why Do Some Resource-Abundant Countries Succeed While Others Do Not?*, 25 OXFORD REV. OF ECON. POL'Y 241, 243 (2009).

¹³ Halvor Mehlum, Karle Moene, & Ragnar Torvik, *Institutions and the Resource Curse*, 116 THE ECON. J. 1, (2006).

identifying causes and expanding understanding of the symptoms. In this article I endeavor to expand this analysis further by looking at literature in two areas: 1) the effects of the resource curse on democratic governance and institutional performance in developing countries, with corollary impacts on public services and economic growth, and 2) consideration of a more complete array of natural resources and their relative impacts on symptoms and causes of the resource curse.

Figure 1



A. *Effects on Democratic Governance*

Only five of the world's 20 top oil-producing countries are "free" as measured by Freedom House's 2016 Freedom in the World Index.¹⁴ A glance at the top of the list of countries most economically dependent on natural resource extraction reads like a who's-who in democratic dysfunction – Democratic Republic of the Congo, Equatorial Guinea, Libya, Mauritania, Iraq, Azerbaijan, Turkmenistan, Papua New Guinea, Venezuela.¹⁵ While initial research on the resource curse focused on direct impacts to economic growth and prioritized economic theories such as the Dutch disease, more

¹⁴ And one of those five, Brazil, is ensnared in the worse oil-based corruption scandal in its history. See generally Freedom in the World, Freedom House, available at <http://www.freedomhouse.org>;

¹⁵ *Wealth Accounting*, WORLD BANK, <http://data.worldbank.org/data-catalog/wealth-accounting> (last updated June 3, 2016) (provided statistics based on 2014 data).

recent analysis has turned to institutional quality as a prominent factor in the resource curse - attempting to differentiate Norway from Venezuela, Botswana from Sierra Leone. Ross surveyed advances in knowledge of the curse and the increasing focus, since 2001, on the 'political resource curse', concluding there is now a strong and growing consensus that institutions drive the resource curse, which in turn hampers sustained economic growth.¹⁶ Research on the impacts of natural resources on governance tends to follow three trajectories: 1) prolonging the staying power of autocratic regimes, 2) effects of institutional quality as both an impact and a cause of the resource curse, and 3) its contribution to inflaming ethnic tensions and fomenting conflict.

i. Autocratic rule

The "rentier state" concept¹⁷ provides that an abundant flow of oil revenues enables rulers to increase patronage and public goods without having to raise taxes, thus avoiding greater public accountability. Oil wealth became a hindrance to democratic transitions around the 1970s, when governments expropriated production to directly capture the oil rents.¹⁸ Other researchers, such as Wright et al., showed that increases in oil wealth help autocratic regimes ward off challengers;¹⁹ Ahmadov used statistical meta-analysis to conclude that oil had a negative effect on democracy²⁰; and Pritchard et al. used cross-national data on resource revenues to demonstrate that government revenues from natural resources have a large, statistically robust effect on autocratic persistence and to confirm the existence of a "political resource curse".²¹ Ross' work, as demonstrated in Figure 2, maps the effects of petroleum wealth on the durability of authoritarian regimes and as a trigger of violent conflict in developing countries, particularly where there are ethnic divisions.²²

Theories on the governance impacts of the resource curse focus on how

¹⁶ Michael Ross, *What Have We Learned about the Resource Curse?*, 18 ANN. REV. POL. SCI. 239 (2015).

¹⁷ See BRAUTIGAM, *supra* note 3.

¹⁸ J. J. Andersen & S. Aslaksen, "Oil and Political Survival", 100 J. DEV. ECON. 89 (2013).

¹⁹ JOSEPH WRIGHT & BARBARA GEDDES, OIL AND AUTOCRATIC REGIME SURVIVAL (2013).

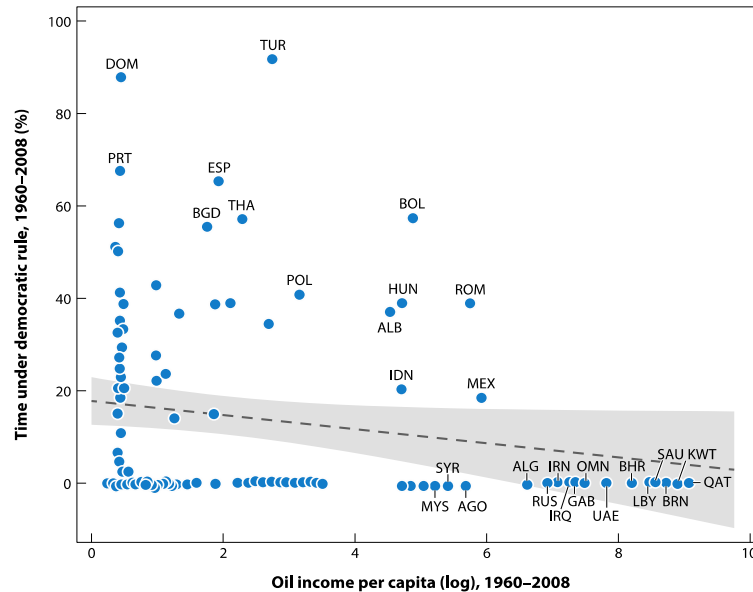
²⁰ A.K. Ahmadov, *Oil, Democracy, and Context: A Meta-Analysis*, 47 COMP. POL. STUD. 1238 (2014).

²¹ Wilson Pritchard, Paola Salardi, & Paul Segal, *Taxation, Non-Tax Revenue and Democracy: New Evidence Using New Cross-Country Data* (Int'l Ctr. for Tax and Dev., Working Paper No. 23, 2014).

²² Ross, *supra* note 16, at 244.

dependence on natural resource extraction, as opposed to public taxation for revenue generation, gives disproportionate, largely unchecked power and budget to the central government, which in turn erodes important checks and balances. Brautigam, et al. showed that tax revenues and nontax revenues have different effects on authoritarian stability because tax revenues are met with demands for greater accountability.²³

²³ BRAUTIGAM, *supra* note 3.

Figure 2²⁴

A parallel theory advanced by multiple researchers on the effect of the resource curse on non-democratic rule emphasizes less the accountability of rulers and more the powerful incentives it creates for the ruling elite to try to

²⁴ “Oil and transitions to democracy, 1960–2008. The figure shows all countries that could have made transitions from authoritarianism to democracy during the period—including the 61 countries that were under authoritarian rule in 1960 plus the 43 countries that became independent after 1960 and were under authoritarian rule in their first year of independence. The values on the horizontal axis represent each country’s mean oil income per capita between 1960 and 2008; the values on the vertical axis denote the percentage of the time (since either 1960 or the first year of independence) that these initially authoritarian countries dwelt under a democratic government. Those that were continuously authoritarian have scores of 0%, whereas those that transitioned to democracy early and stayed democratic have scores approaching 100%. The dotted line shows the predicted values from a linear regression, and the shaded area represents the 95% confidence interval. Data on oil income per capita are from Ross (2012), and data on democratic transitions are from Cheibub et al. (2010). Abbreviations: AGO, Angola; ALB, Albania; ALG, Algeria; BGD, Bangladesh; BHR, Bahrain; BOL, Bolivia; BRN, Brunei Darussalam; DOM, Dominican Republic; ESP, Spain; GAB, Gabon; HUN, Hungary; IDN, Indonesia; IRN, Islamic Republic of Iran; IRQ, Iraq; KWT, Kuwait; LBY, Libya; MEX, Mexico; MYS, Malaysia; OMN, Oman; POL, Poland; PRT, Portugal; QAT, Qatar; ROM, Romania; RUS, Russian Federation; SAU, Saudi Arabia; SYR, Syria; THA, Thailand; TUR, Turkey; UAE, United Arab Emirates.” Michael Ross, *What Have We Learned about the Resource Curse*, 18 ANN. REV. POL. SCI. 239, 244 (2015).

stay in power.²⁵ The availability of resource rents makes incumbency more valuable, particularly where access to the unregulated revenue stream allows for greater patronage support to reinforce ethnic or other divisions of power. Goldberg, et al, even demonstrated the effect of oil wealth in producing autocratic tendencies in politicians in the US states of Louisiana and Texas.²⁶

Related to the observed decrease in accountability and autocratic tendencies is a series of research that has drawn correlation between natural resource wealth and high rates of corruption. Brollo et al. concluded that a 10% rise in resource transfers in Brazil from federal to municipal governments was associated with a rise of 10 to 12 percentage points in corruption as measured by the federal government's random audit program.²⁷ Caselli and Michaels showed that while increases in oil revenues in Brazil increased spending on public goods and services, most of the money was embezzled by top officials.²⁸

ii. Institutional quality

A separate, but related vein of research focuses on the impact of resource rents on institutional quality, as a better measure for effective democratic governance, and as an indirect cause of economic stagnation. As summarized by *The Economist* when discussing the effectiveness of Statoil, Norway's national oil company:

Most countries with national firms used their oil wealth to develop the authority of the state, rather than the other way around. So NOCs (National Oil Companies) sprang up before their countries had institutions strong enough to regulate them, or to manage the money they generate—a recipe for inefficiency and corruption. These feeble governments, in turn, look to NOCs to perform tasks that would normally fall to the bureaucracy. Many oil-rich states rely on them to bankroll their budgets, rather than bothering to collect any tax. . . .No wonder then that Statoil, Norway's NOC, is generally thought to be the

²⁵ See James A. Robinson, Rangar Torvik, Thierry Verdier, *Political Foundations of the Resource Curse*, 79 J. DEV. ECON. 447 (2006); Caselli, Francesco and Cunningham, Tom. *Leader Behaviour and the Natural Resource Curse*, 61 OXFORD ECON. PAPERS 628 (2009).

²⁶ Ellis Goldberg, Erik Wibbels, & Eric Mvukiyeye, *Lessons from Strange Cases: Democracy, Development, and the Resource Curse in the U.S. States*, 41 COMP. POL. STUD. 477 (2008).

²⁷ Fernanda Brollo, Tommaso Nannicini, Roberto Perotti, & Guido Tabellini, *The Political Resource Curse*, 103 AM. ECON. REV. 1759 (2013).

²⁸ Francesco Caselli & Guy Michaels, *Do Oil Windfalls Improve Living Standards? Evidence from Brazil*, 5 AM. ECON. J.: APPLIED ECON. 208 (2013).

best of the lot. Norway, after all, was a rich, efficiently administered country long before Statoil produced its first drop of oil. It had plenty of educated citizens to help staff and regulate the company, a free press, well-funded police and impartial courts to guard against corruption. Norway also had demanding voters to limit waste and inefficiency.²⁹

Michael Ross was one of the early researchers to address the political economy of the natural resource curse, advancing the theory that windfalls from resource extraction can weaken the institutions necessary for long-term growth.³⁰ A series of subsequent research has expanded findings. Leite and Weidmann showed an impact of resource extraction on corruption, which, in turn, had an important indirect negative affects on economic growth.³¹ Busse and Gröning used an extensive dataset of governance indicators to show a robust negative impact of natural resource extraction on corruption, for developing countries only.³² Sala-i-Martin and Subramanian demonstrated that countries with an abundance of resources but a low level of institutional quality experience negative direct impacts on growth.³³

Harford and Klein summarize in their World Bank paper three prevailing potential impacts of the resource curse – “1) volatility in government revenues which creates boom-and-bust cycles in government spending, 2) foreign currency earnings that can raise the real exchange rate, undermining the competitiveness of other sectors, 3) damage to governance and legal institutions by reducing incentives to improve infrastructure or efficiency, which undermines the need to develop an effective tax-collection bureaucracy and can provoke fights to control the resource rents.”³⁴ They cite growing evidence that the third impact is the most severe.

Mehlum, et al.³⁵ contrasted the rent-seeking and Dutch Disease model

²⁹ *Oil's Dark Secret*, THE ECONOMIST (August 10, 2006), <http://www.economist.com/node/7270301>.

³⁰ Michael Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297 (1999).

³¹ C. Leite & J. Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth*, in GOVERNANCE, CORRUPTION, AND ECONOMIC PERFORMANCE 159 (G. Abed & S. Gupta eds., 2002).

³² Matthias Busse & Steffen Gröning, *The Resource Curse Revisited: Governance and Natural Resources*, 154 PUB. CHOICE 1 (2013).

³³ Xavier Sala-i-Martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria*, (Int'l Monetary Fund, Working Paper No. 03/019, 2003).

³⁴ Tim Harford & Michael Klein, *Aid and the Resource Curse: How Can Aid Be Designed to Preserve Institutions?*, THE WORLD BANK GROUP: PUBLIC POLICY FOR THE PRIVATE SECTOR, Note No: 291 (2005).

³⁵ Mehlum et al., *supra* note 13.

advanced by Sachs and Warner³⁶ to conclude that institutions are decisive for the resource curse, using a hypothesis that resource abundance leads to a deterioration of institutional quality that in turn lowers economic growth. They argued that the effects of natural resources on economic performance are conditional on the quality of state institutions: where institutions are “grabber friendly” (more prone to corruption), resource wealth tends to reduce income; where they are “producer friendly” (less prone to corruption), it raises aggregate income.³⁷ They conclude that the resource curse puts institutional arrangements to a test, such that the resource curse only appears in countries with inferior institutions.³⁸

Karl in his seminal book *The Paradox of Plenty: Oil Booms and Petro States* was an early proponent of the view that natural resource discovery is worse for a country if its institutions are not yet fully developed.³⁹ Acemoglu, et al., subsequently demonstrated that countries that industrialized early had an institutional apparatus in place that prevented the negative growth effects of resources, while those that used their resources at a later stage did not have such institutions in place.⁴⁰ Boschini, et al. showed the impact of natural resources on economic growth to be ‘non-monotonic’ and that countries rich in minerals are cursed only if they have low quality institutions.⁴¹ The curse is reversed if institutions are sufficiently good. Ross discussed the resource curse in several Southeast Asian countries, where timber booms incentivized politicians to destroy institutions.⁴²

While these and other studies document the link between the resource curse and institutional quality, few endeavor to explain the intricacies of any causality. Karl identifies that high levels of resource revenues could forestall a state’s capacity to extract taxes from its citizens, leaving the government “weak,” vulnerable to rent-seeking, and unable to develop sound economic policies.⁴³ Besley and Persson concur that resource rents discourage politicians from investing in the state’s bureaucratic capacity.⁴⁴

³⁶ Sachs & Warner, *supra* note 6.

³⁷ Mehlum et al., *supra* note 13, at 3.

³⁸ *Id.*

³⁹ T.L. KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO STATES* (1997).

⁴⁰ D. Acemoglu & J.A. Robinson, *Economic Backwardness in Political Perspective* (Nat’l Bureau of Econ., Working Paper No. 5398, 2002); D. Acemoglu, S. Johnson, & J.A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, (2011).

⁴¹ Anne D Boschini, Jan Pettersson & Jesper Roines, *Resource Curse or Not: A Question of Appropriability*, 109 THE SCANDINAVIAN J. ECON. 593 (2007).

⁴² M.L. ROSS, *TIMBER BOOMS AND INSTITUTIONAL BREAKDOWN IN SOUTHEAST ASIA* (2001).

⁴³ KARL, *supra* note 39.

⁴⁴ Timothy Besley & Torsten Persson, *State Capacity, Conflict, and Development*, 78

Moss, et al describes the affect of “unearned income,” such as oil revenue, as disrupting the establishment (or preservation) of a social contract, especially in young or fragile nations still in the process of building capable institutions.⁴⁵ “Resource rents poured directly into state coffers reduce the state’s need to levy taxes to raise revenue for public spending. Without this need to raise funds from their citizens, governments are released from their duty to be responsive to their needs.”⁴⁶ States become dependent on a narrow economic base that is not accountable to their citizens. “Conversely, stripped of the power of the purse, citizens are unable to exert leverage on the government for public service provision and responsible management.”⁴⁷

Wiens suggests a more complicated causal dynamic between institutional quality, good governance, and resource rents, which is echoed by the theory advance in this article.⁴⁸ Resource revenue, argues Wiens, undermines any impetus to establish good or effective institutions, while helping perpetuate the continued poor functioning of “bad” institutions. This means that simple calls for domestic institutional reform, as often summarily proposed by researchers, are unlikely to be effective.⁴⁹ Ross also concludes that a policy dilemma exists that developing countries need strong and effective institutions to avoid the curse, yet these vary same institutions are damaged by resource windfalls, making an escape from the resource curse that much more difficult.⁵⁰

iii. Conflict and Instability

A third set of theories examines the effect of economic dependence on resource extraction on conflict and instability. Philippe Le Billon extensively profiles contemporary resource-based conflicts and the role of resources in shaping and expressing social relations, but stops short of offering a causal model.⁵¹ Collier and others have identified dynamics and incentives for both rebels and the government that can foster conflict.⁵² Where resources are

ECONOMETRICA 1 (2010).

⁴⁵ TODD MOSS, CAROLINE LAMBERT, & STEPHANIE MAJEROWICZ, *OIL TO CASH: FIGHTING THE RESOURCE CURSE WITH CASH TRANSFERS* (2015).

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 5.

⁴⁸ David Wiens, *Natural Resources and Institutional Development*, 26 J. THEORETICAL POL. 1 (2014).

⁴⁹ *Id.* at 2.

⁵⁰ Ross, *supra* note 16.

⁵¹ Philippe Le Billon, *Wars of Plunder: Conflicts, Profits, and the Politics of Resources*, (2012).

⁵² Paul Collier & Anke Hoefler. *On the Economic Causes of Civil War*, 50 OXFORD

located in ethnically marginalized regions of a country, yet those communities do not benefit, due to central control and rents, resistance movements could be formed, motivated by the prospect of gaining more control over local resources, or even establishing an independent state.⁵³ Collier, however, focuses less on the damage and disenfranchisement of local communities by resource extraction itself and more on the allure of rents as an incentive for their forceful taking— either through looting or extorting money from extractive companies with concessions – and as a means to finance the costs of rebellion.⁵⁴

My theory on conflict drivers differs from Collier and much of the literature by emphasizing not the incentives for looting, but the creation of an environment of local resentment through lack of self-determination of local populations by the centralized control of resource extraction and rents. The resource state economic and governance model described in this article is a centralized political power structure whose co-optation is the only mechanism for local/ethnic self-determination. This results in a high-stakes political battlefield for central control of resources. This central control in turn creates a state based solely on juridical sovereignty that ensures continued ease of access to resources and economic power, at the expense of empirical sovereignty, local self-determination, and sustainable consensus-based democratic governance.

Creation of a decentralized governance model that divests ownership of resources to individuals and local communities would solve this sovereignty deficit and foster more transparent, effective governance. Further support for this argument is provided by recent evolutions in the understanding of state's obligations to protect human rights in the context of land and resource ownership and the need to improve governance outcomes as a means to decrease instability, fight poverty, and promote growth, detailed further in Section IV.

B. Not all Resources are Created Equal

The true impact of the resource curse is likely underestimated by a failure to consider the entire range of resources that fall prey to state capture and their varying impacts on governance and diffuse economic activity. Land, in particular, often manifested in the form of state plantation crops schemes (such as cotton, palm oil, or rubber), is a critical resource that has been controlled directly by elites from the feudal to colonial to post-colonial periods, and that still remains as an easily accessible resource for direct state

ECON. PAPERS 563 (1998).

⁵³ *Id.*

⁵⁴ *Id.*

revenue generation activities throughout the developing world. Yet land largely falls outside of the resource curse analysis. States without resource abundance, such as Uzbekistan and Ethiopia, still suffer from the resource curse due to broad state ownership of land and reliance on its leasing for direct rents from plantation crops. Similarly, countries with large tracts of forest have long controlled this resource at the national level for economic revenue generation, despite resident indigenous and other communities. In this article I suggest expanding consideration of the resources that constitute the curse to include land, forests and other resources that are treated as exclusive state territory. Unfortunately, the current lack of data measuring state land ownership in rural areas, as opposed to broader property rights indices, which normally measure urban or non-land property, makes statistical analysis difficult.⁵⁵

There is considerable variance in the characteristics of natural resources - their location, dispersion, mode of extraction and vulnerability to rent-seeking. Early studies by Sachs & Warner and Collier & Hoeffler looked at broad measures of resources that included petroleum, other minerals, and agricultural commodities.⁵⁶ Torvik found that while an array of natural resources have a negative impact on growth, oil and minerals have a stronger negative effect, which is in turn exacerbated further when institutions are bad.⁵⁷ Yet according to Lujala countries with offshore oil fare better than countries with onshore oil. Onshore oil increases the risk of violent conflict in a country, whereas offshore oil has no effect.⁵⁸

Lujala's study raises another area of important differentiation when examining resources - their location vis-à-vis local populations. Offshore oil, for example, creates little collateral impact on local populations (except when transported and processed to onshore facilities), while oil in areas such as the Amazon basin have created long-standing conflicts with local and indigenous communities. Similarly, minerals located in barren interiors tend to have less impact on local populations and thus cause less conflict and destroy other land-based economic activities than minerals extracted from underneath pastures or farms. This spatial relationship between resource, local community and the owner of the resource - the central government - is an important factor in analyzing impact and causes of the resource curse.

Woolcook et al. and Isham et al. stressed the difference between "point source" resources, such as plantation crops and minerals and "diffuse"

⁵⁵ The author is developing a global land index which will measure rural land tenure security, resource ownership and other sub-categories across the bundle of property rights.

⁵⁶ See Sachs & Warner, *supra* note 6; see also Collier & Hoeffler, *supra* note 52.

⁵⁷ Torvik, *supra* note 12.

⁵⁸ Päivi Lujala, *The Spoils of Nature: Armed Civil Conflict and Rebel Access to Natural Resources*, 47 J. PEACE RES. 15 (2010).

natural resources, such as rice, wheat and animals to predict varying levels of impact. They conclude that countries with plantation crops, oil or diamonds are more likely to have bad outcomes than those with rice, wheat, and livestock. It is important to note the inclusion of “plantation crops” in their analysis and that the resource this represents is not crops, but land.⁵⁹

Boschini, et al. use four different measures of resources and find that the ‘lootability’ of resources, along with institutional quality, is a primary determinant of impact on growth.⁶⁰ Countries with diamonds and bad institutions have the worst performance (See Figure 3).⁶¹ Adding more granularity, Andersen and Aslaksen find that the type of diamond has a controlling effect on authoritarian regimes: kimberlitic diamonds support the longevity of authoritarian regimes, but alluvial diamonds and other alluvial minerals, characterized as more diffuse, can reduce the longevity of authoritarian regimes.⁶²

⁵⁹ Michael Woolcock, Lant Pritchett & Jonathan Isham, *The Social Foundations of Poor Economic Growth in Resource Rich Economies*, in RESOURCE ABUNDANCE AND ECONOMIC DEVELOPMENT (R.M. Auty ed., 2001); J. Isham, M. Woolcock, L. Pritchett, & G. Busby, *The Varieties of Resource Experience: Natural Resource Export Structures and the Political Economy of Economic Growth*, 19 WORLD BANK ECON. REV. 141 (2005).

⁶⁰ Boschini et al., *supra* note 41.

⁶¹ *Id.* at 3.

⁶² Andersen & Aslaksen, *supra* note 18.

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Figure 3

	Growth 1975-1998	Main resource ^a	Institutional quality ^b
Botswana	4.99	Diamonds	0.706
Chile	3.71	Copper	0.668
Norway	2.82	Crude Petrol	0.966
Australia	1.97	Minerals	0.932
Canada	1.73	Minerals	0.974
<i>Sample Average</i>	1.53		0.638
Ecuador	-0.79	Crude Petrol	0.592
Niger	-1.45	Minerals	0.520
Zambia	-1.94	Copper	0.434
Sierra Leone	-2.05	Diamonds	0.406
Congo, Democratic Rep.	-5.39	Ores and Metals	0.232

^a The listing of main resources is based on UNCTAD data on export structure in 1975.

^b The measure of institutional quality is a "Property Rights Index" based on data from Keefer and Knack (2002). The index score for a country is between zero and one where higher scores mean better institutional quality. See Appendix Table A2 for details.

Plantation crops largely serve as a proxy for inequitable land distribution patterns, including state-owned land, and have a "point-source" resource curse effect in many countries, similar to oil or minerals. Birdsall, et al discuss the similarities between economies with mineral resources and large, inequitable land distribution, particularly regarding access to concentrated resource rents, as a disincentive for governments to invest in human capital and education.⁶³ Countries with equal land distribution have tended to adopt "more unimodal agricultural strategies that create income equality and greater investment in education".⁶⁴ Auty underscores the diffuse nature of crop production as triggering a more diverse set of linkages rather than the purely fiscal linkages of mining.⁶⁵ This argument on the benefits of diffuse production functions could apply to mineral and other resource extraction if the ownership structure was devolved and thus a more

⁶³ Nancy Birdsall, Thomas Pinckney, & Richard Sabot, *Natural Resources, Human Capital, and Growth* (Carnegie Endowment for Int'l Peace, Working Paper No. 9, 2000).

⁶⁴ *Id.* at 10.

⁶⁵ R.M. Auty & A.H. Gelb, *Political Economy of Resource Abundant States* (World Bank, Working Paper No. 28750, 2000).

diverse set of local linkages developed.

III. THE RESOURCE STATE: CONSTITUTIONS AND CONCESSIONS

The resource state concept introduced by this article focuses on state ownership of all natural resources and land, as provided for by national constitutions and laws. In the resource state the central government has direct control and receives direct revenue from the leasing of use rights to these resources, known as concessions. This legal and economic framework is ubiquitous, almost universal, across the developing world, but has much less prominence in developed nations. I contend that the legal framework that creates the resource state is the precipitating cause of a broad resource curse that afflicts the developing world. The concession system is its method of execution.

The resource state concept focuses on the dynamic between individual/community and state ownership, which often pits the states' *de jure* legal status as owner with the individual/community *de facto* status as possessor and user, a context defined by colonial-era property systems that were created to run in parallel and often conflict to generations of customary and indigenous land use. The concept also draws distinction between onshore and offshore resources and other scenarios where state ownership of the resource does not conflict with the land-based use or occupation by individuals and communities. In both cases resource rents have potential Dutch Disease effects, but where the resources are onshore and in conflict with land use and ownership by resident communities the effects are more pronounced as they subvert alternative human capital-based economic activity and often generate conflict.

The concession system is the prevailing mechanism that has been established by countries to harvest their sovereign natural resources. Constitutions and national legal frameworks, many written in the last 20 years, vest ownership of natural resources in the state. The language that vests ownership in the state is often disguised as being "owned by the people", or "constituting the national wealth", with the state as steward and protector (See Figure 4).

*Figure 4****Examples of Resource State Constitutions*****South Sudan Constitution, 2011**

Article 170: All land in South Sudan is owned by the people of South Sudan and its usage shall be regulated by the government in accordance with the provisions of this Constitution and the law.

Article 171(4): Regardless of the classification of the land in question, rights over all subterranean and other natural resources throughout South Sudan, including petroleum and gas resources and solid minerals, shall belong to the National Government and shall be regulated by law.

Peru Constitution, 1993, (Amendments through 2009)

Article 66: Natural resources, renewable and non-renewable, are patrimony of the Nation. The State is sovereign in their utilization.

Uzbekistan Constitution, 1992

Article 55: The land, its minerals, waters, fauna and flora, other natural resources shall constitute the national wealth and shall be rationally used and protected by the state.

Cambodia Constitution, 2008

Article 58: State property comprises land, underground mineral resources, mountains, sea, undersea, continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other buildings determined as State property.

Implementing legislation, such as mining, forest or development acts, then divide all state resources on a map into blocks and the state enters into contracts, or concessions, with firms to extract. Concessions have historically applied to oil and gas, minerals, timber, but are also commonly used to lease rich agricultural lands under the guise of state ownership. International lending institutions have supported and even funded this

extension as a means to increase state revenues, decrease debt, increase economic production, and expand public service offerings, while ignoring the long-term negative impacts on communities, strong property right regimes, and democratic governance.

The pervasiveness of the concession system is profound, particularly in developing countries. According to recent research by the Munden Project over 40% of land in Peru was allocated for forest, mining, and oil and gas concessions; in Liberia 35% of land was conceded for agriculture and timber production; and in Indonesia, 30% of the country is part of some sort of concession.⁶⁶ The research found people living within 93-99% of these concession territories, with no difference between sectors or regions.⁶⁷ (See Figure 5). Property rights in concessions are non-existent to the extent that ownership of land can be granted to an operator without the tens of thousands of people who live or depend on that land knowing about it.

⁶⁶ ANDREA ALFORTE, JOSEPH ANGAN, JACK DENTITH, KARL DOMONDON, LOU MUNDEN, SOPHIA MURDAY, & LEONARDO PRADELA, COMMUNITIES AS COUNTERPARTIES: PRELIMINARY REVIEW OF CONCESSIONS AND CONFLICT IN EMERGING AND FRONTIER MARKET CONCESSIONS (2014), *available at* <http://www.rightsandresources.org/publication/communities-as-counterparties-preliminary-review-of-concessions-and-conflict-in-emerging-and-frontier-market-concessions/>.

⁶⁷ *Id.*

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Figure 5

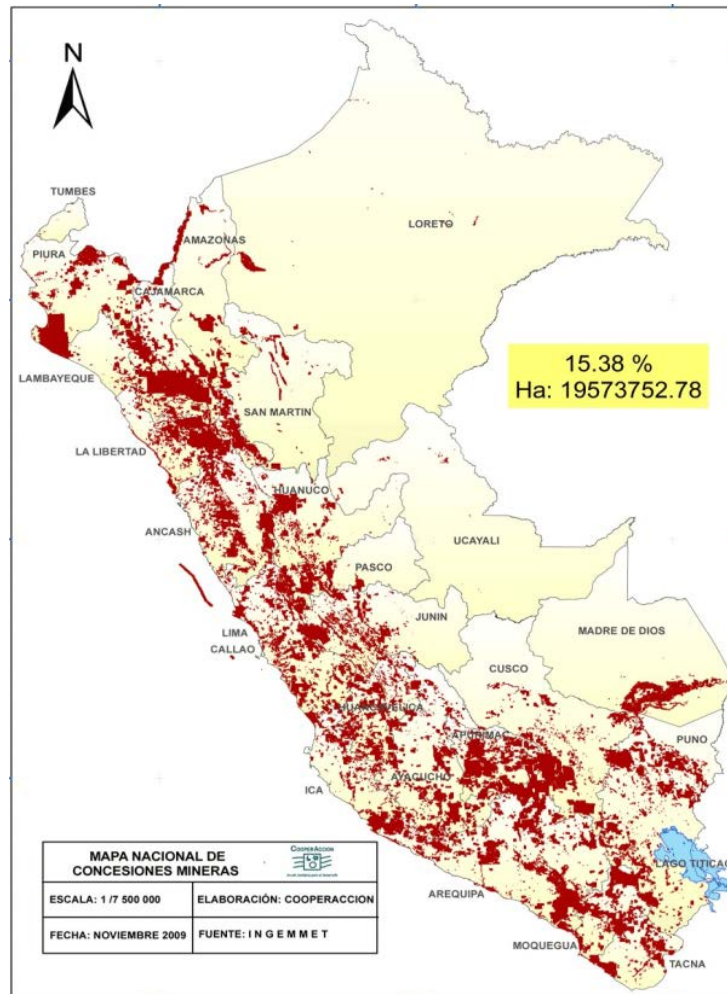
PRESENCE OF POPULATIONS IN CONCESSION AREAS IN EIGHT COUNTRIES					
<i>Country</i>	<i>Concession</i>	<i>Area (km2)</i>	<i>Total number of concessions</i>	<i>% of concessions with people in it (Landscan)</i>	<i>% of concessions with people in it (SEDAC)</i>
Brazil	Forest	59,130.02	13	100%	100%
	Oil and gas	239,832.62	115	96%	100%
Cambodia	Palm oil, rubber, cassava, sugar	21,700.00	225	99%	100%
	Mining	3,944.64	15	93%	100%
Colombia	Mining	53,181.67	9,464	97%	99%
	Oil	155,903.06	229	100%	98%
Indonesia	Palm oil	155,245.18	1,845	99%	98%
	Logging	302,505.81	557	96%	98%
	Wood fiber	128,829.03	570	98%	100%
Liberia	Agriculture	6,911.93	15	100%	100%
	Logging	32,758.16	222	100%	100%
Mozambique	Agriculture (biofuel)	30,585.04	374	100%	100%
Peru	Forest	79,351.73	105	98%	100%
	Mining	269,894.01	59,159	92%	100%
	Oil and gas	203,258.17	70	97%	97%
Philippines	Timber	5,052.82	22	100%	100%
	Mining	14,867.64	35	100%	100%

Figure 6

Peru Concession Maps
Oil & Gas



Mining



As can be seen in the Peru concession maps in Figure 6⁶⁸ covering three distinct extractive state-owned resources – oil and gas, mining, and forests -

⁶⁸ *Peru: Protected Areas and Logging Concessions*, THE LAUNDERING MACHINE, <https://launderingmachine.wordpress.com/box-vii-map/> (last visited Dec. 17, 2016); *Peru*, Clontarf Energy PLC, <http://www.clontarfenergy.com/projects/peru.aspx>; <http://iopscience.iop.org/article/10.1088/1748-9326/2/4/045006/fulltext/> (last updated Apr. 24, 2015); *The Overlapping Geographies of Resource Extraction*, REVISTA HARV. REV. OF LATIN AM., <http://revista.drclas.harvard.edu/book/overlapping-geographies-resource-extraction>; <https://newint.org/features/2011/10/01/peruvians-mines-protests-puno-mining-company/> (last visited Dec. 17, 2016).

concessions cover virtually the entire territory of Peru, yet within these concessions are numerous unmarked towns, villages, houses and family farms. The practice of accessing resources in these concessions creates conflict as most are attached to land already in use, often with tenuous legal security, but long-term, multigenerational possession. The only way to access the resource is to displace communities and people either directly or indirectly through the negative byproducts of extractive activities that contaminate the environment, damage health, or destroy livelihoods.

Laws on eminent domain exist in many countries to compensate owners for expropriation of land for use in the public interest, but in developing countries they are either not enforced or do not protect communities with informal legal ownership over their land.

Legal frameworks for eminent domain usually provide for some form of “just compensation” to affected landowners for expropriation “in the public interest”. Much eminent domain legislation is weak or has been weakened by subsequent interpreting regulations that, for example, define “in the public interest” as applying to concessions and extractive activities, or consider “just compensation” as the provision of alternate land or housing, even if in inferior locations and without complete execution. The issue of compensation to land owners is further complicated by the lack of official land records and maps and the colonial history of official, but extra-legal land grabs.

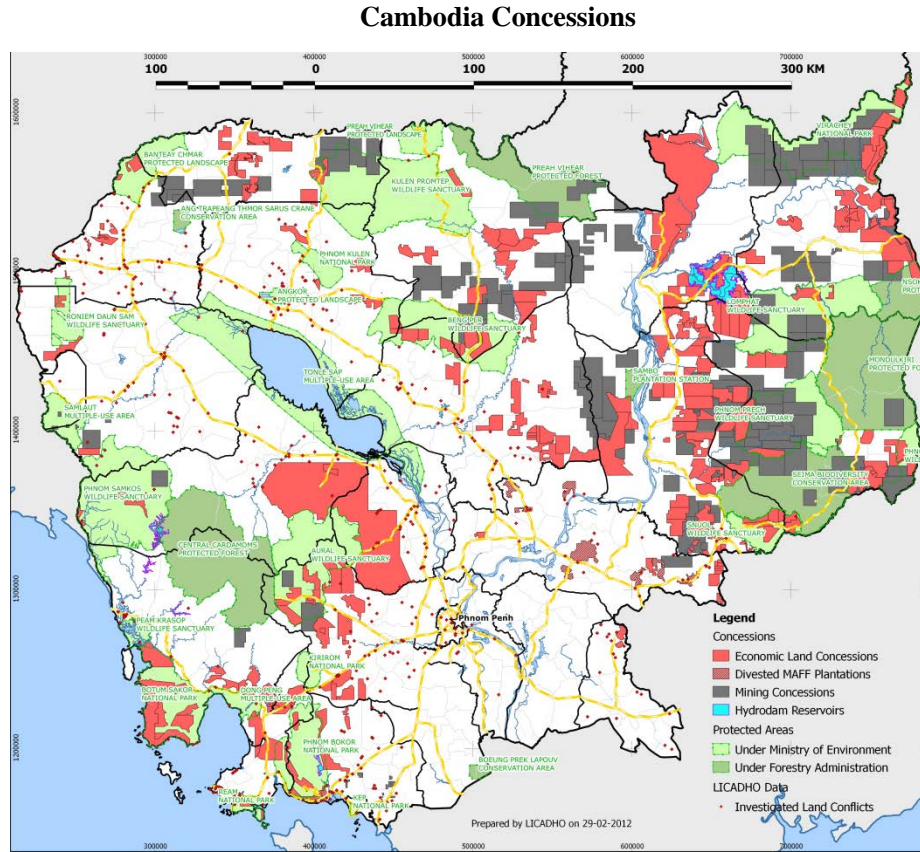
The use of concessions has expanded beyond natural resources in many countries to include state-driven investment in agriculture, including, *inter alia*, palm oil plantations in Colombia, rubber plantations in Liberia, and rice farms in Ethiopia. In Cambodia for example, the Cambodia’s Constitution of 1981, like those of many other developing countries, establishes all land and other natural resources as property of the State. The Land Law of 1992 confirmed state ownership of all land and established two new mechanisms for use of land by the state - Economic Land Concessions (ELCs) and Social Land Concessions (SLCs).⁶⁹ According to the Law, ELCs and SLCs can be established by the state to grant concessions for “industrial agricultural” use of land such as tree plantations (rubber, teak, etc.) or large-scale production of food or to “*facilitate economic development; . . . and develop areas that have not been appropriately developed*”.⁷⁰ The practice of granting land, forestry, and mining concessions has led to widespread conflict in Cambodia over land and accusations by civil society and community of land grabbing

⁶⁹ CAMBODIA CENTER FOR HUMAN RIGHTS (CCHR), CAMBODIA: LAND IN CONFLICT, AN OVERVIEW OF THE SITUATION (2013).

⁷⁰ CCHR at 14; Cambodia, Sub-Decree No.19 on Social Land Concession, ANK/BK (2003).

by the government. The map in Figure 7⁷¹ illustrates the Cambodia government's recent economic land concessions, mining concessions, divested plantations, protected areas, and hydro-electric activities.

Figure 7



As the various Cambodian governments over the past century neglected to develop, or destroyed, formal records of property ownership, much of rural Cambodia continues to rely on the use-based approach to ownership, where common understandings between neighbors and villagers are believed to be sufficient in demarcating boundaries. As a consequence, millions of Cambodians still lack documentation and the full recognition of their rights

⁷¹ *Carving up Cambodia: One Concession at a Time*, THE CAMBODIA DAILY, Mar. 10 2012, at 4-11.

that comes with a land title.⁷² Lacking documented title to land creates greater insecurity and vulnerability to land grabbing and forced evictions. With no land titles, populations are left defenseless when authorities or companies come to claim their land.

As the owner of all land and resources, the Cambodian government can grant a contract or concession for the use and development of all state property. In recent years the Cambodia government has done this in abundance and often with wanton disregard for the local inhabitants that live on the land. Current estimates are that over 4 million hectares - 22 percent of Cambodia's surface area - have been granted as mining and economic land concessions to foreign and domestic companies, as well as wealthy political elites for industrial development.⁷³ In 2012, the area controlled by agro-industrial companies jumped more than 2 million hectares nationwide and mining companies received concessions to explore 1.9 million hectares of land for gold, iron ore, copper and other precious minerals.⁷⁴ According to reports by local and international NGOs, companies employ soldiers or military police to protect their land concessions and have used violence to remove people from land obtained by concession.⁷⁵ In the Oddar Meanchey province, sugar cane companies have employed the services of the Royal Armed Forces of Cambodia to set up road blocks, burn and bulldoze villages, kill livestock, loot crops, and beat, intimidate, and arrest villagers.⁷⁶

The Cambodia example is a stark illustration of the contemporary application of the resource state. The origins of the resource state are complex and intertwined with different historical layers. Pre-colonial feudal and colonial legal and political structures concentrated wealth in the ruling elite, while the necessities of post-colonial economic sovereignty and competing ideologies of state-centered economic models strengthened the rationale for the resource state. Increasingly citizens are questioning the legitimacy of state ownership of resources as an expression of sovereignty. They cite centuries of community use and occupation that predate

⁷² Surya P. Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, U.N. Doc. A/HRC/21/63/Add.1 (2012).

⁷³ See *Cambodia*, CIA WORLD FACT BOOK, <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/cb.html> (last updated Dec. 12, 2016).

⁷⁴ *Supra* note 71, at 81.

⁷⁵ See GLOBAL WITNESS, RUBBER BARONS: HOW VIETNAMESE COMPANIES AND INTERNATIONAL FINANCIERS ARE DRIVING A LAND GRABBING CRISIS IN CAMBODIA AND LAOS (2013), available at http://www.globalwitness.org/sites/default/files/library/Rubber_Barons_lores_0.pdf; Mu Sochua & Cecilia Wikström, *Land Grabs in Cambodia*, N.Y. TIMES, (July 18, 2012), available at http://www.nytimes.com/2012/07/19/opinion/land-grabs-in-cambodia.html?_r=1&>; CAMBODIA CENTER FOR HUMAN RIGHTS, CAMBODIA: LAND IN CONFLICT, AN OVERVIEW OF THE SITUATION 27 (2013).

⁷⁶ CCHR at 27.

constitutions and a refusal by the state, and colonial administrations before them, to formally recognize their historical ownership. Recent successful challenges in international tribunals have eroded the presumption of state ownership of timber, minerals and ancestral land.⁷⁷

IV. ORIGINS OF THE RESOURCE STATE

To understand the modern day context and model of state-led resource extraction it is necessary to trace the historical evolution of legal frameworks around land and resources that led to the concession system. This analysis will also allow for better comparison and analysis of states that followed a different historical trajectory.

A. *Colonial and Pre-Colonial Resource Ownership*

The current paradigm of state ownership of vast swaths of territory and all natural resources derives largely from colonial history. As described below, the concept of state and feudal ownership of land and natural resources prevalent during colonization remained embedded in colonies long after it was dismantled in Europe. Frameworks for individual ownership and market-based systems of property were being developed in Europe but not in colonies and newly independent states. The independence of European colonies in the Americas in the 1700 and 1800s offer case studies in decidedly different approaches. The United States enshrined principles of self-determination of people and the private, individual ownership of land and all resources attached to the land. Former Spanish and Portuguese colonies, however, largely passed principles of crown ownership of land and natural resources to the governments of the new states.⁷⁸

Land and resource tenure systems in many pre-colonial societies were often based in community and inter-personal relationships that were more concerned with people's obligations towards one another with regards to

⁷⁷ See e.g. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case 79, Inter-Am. Comm'n H.R., Report No. 79, Ser. C. (2001); *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors*, Civil Suit No. MTI-21-314-1996 (Malaysia High Ct. 2002); Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya ("Endorois" case), No. 276.03, African Comm'n on Peoples & H.R. (2009); *Mabo v. Queensland, No.2*, 175 CLR 1, 39 (Australia High Ct. 1992).

⁷⁸ The high-profile nationalization of mining and other extractive sector companies in countries such as Venezuela, Bolivia and Ecuador is a different issue, but which has similar resource curse effects. These companies were operating based on long-term leases for state-owned resources negotiated with previous governments. New governments cancelled the leases and nationalized their operations based on arguments that they were not favorable terms for the country. This dynamic between state-owned resources, private company activity, and nationalization will be explored in greater depth in future research.

property, rather than individualized notions of people's interest in property itself. Customary or indigenous land tenure systems in Sub-Saharan Africa, India, Indonesia, Afghanistan, and Latin America persist today, but often in a legal purgatory where land and resource rights and uses have been subjugated to colonial-derived frameworks that consciously dispossessed local populations.

In pre-colonial South Africa, for example, local populations in many areas had abundant land for farming and herding but environmental factors such as rainfall, topography, soil and the availability of water created homesteads and decentralized structures of political authority. On the Highveld sparse water and harsh climate meant that homesteads were concentrated around whatever water was available, and created centralized political authority in villages.⁷⁹ At the time of colonization local systems of land and resource tenure in Africa were overrun by new European-imposed law. This is not because African indigenous law property systems are inherently insecure, but rather due to "the dislocation of these systems from the social and institutional context that defines and sustains them".⁸⁰

By comparison, in pre-colonial Cambodia the King had ownership rights over all of the land in the country and Cambodia operated under a traditional feudal system in which the majority of Cambodian citizens were peasants living in rural areas and subsisting on rice farming.⁸¹ After independence in 1953 the Lon Nol regime advanced some formal titling programs, but most farmers did not have formal ownership records by the time Pol Pot and the Khmer Rouge defeated Lon Nol on 17 April 1975.⁸² The Khmer Rouge sought to create an agrarian society and forced eviction of people from the cities, systematically destroyed all property records, and annulled ownership rights. All housing, property and land then belonged to "Angkar" or the "State".⁸³ In 1979, the People's Republic of Kampuchea (the "PRK") created a new Constitution that stated that the land and other natural resources were property of the State.⁸⁴ Currently, most rural land is held informally with largely undocumented use rights and no ownership rights.

Feudal land systems dominated the early history of many countries and customary forms of communal property, also referred to as "the commons," continue to exist in all societies. England was characterized as a feudal

⁷⁹ T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 371 (2004).

⁸⁰ H.W.O. Okoth-Ogendo, *Some Issues of Theory in the Study of Tenure Relations in African Agriculture*, 59 AFR.: J. INT'L AFR. INST. 6 (1989).

⁸¹ CCHR at 1.

⁸² *Id.*

⁸³ *Id.* at 2.

⁸⁴ *Id.*

system through the 17th century. Feudal law was established in England after the Norman Conquest and essentially turned landowners into tenants of the feudal lord and ultimately, the King.⁸⁵ This principle formed the basis of an important concept, the Doctrine of Tenures, which was later applied to colonies. It is now legal fiction in England. Subsequent English legislation and common law developments in the 1700s changed the traditional power of the Crown over private property in England. Under modern British constitutional law the Crown cannot cede territory without assent of local inhabitants or Parliament's approval.⁸⁶

The perpetuation of feudal land ownership systems in the colonies and the creation of new doctrines to justify land acquisition by the colonizers resulted in uniform legal dispossession of local inhabitant's land and resources. Despite its increasing irrelevance in England, British colonizers applied the original feudal principle of the Doctrine of Tenures to their new possessions. Common law jurisprudence from the colonies then further entrenched this principle.⁸⁷ Applicable doctrines of land title were routinely interpreted in a false manner to reach an end result that ultimately granted property rights to the Crown or its subjects. An underlying notion that indigenous populations did not have the social systems or sophistication to possess a title right to land was used as a justification for these varying and faulty interpretations.⁸⁸

The new role of the Crown and her subjects as colonizers stimulated a renewed examination of property definitions in a foreign context. The main schools of property philosophy that developed from this period were focused more on justifying colonization rather than objectively examining property and did not incorporate comprehensive, cross-cultural approaches. Philosophers such as Locke, Grotius and Vattel developed their theories amidst massive European colonization and in response to questions of the morality of colonization. The theories that developed were not all a blind

⁸⁵ KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 84 (1989) (arguing that the rationale that the land originally belonged to the King and was granted out to the tenants was not supported by the prior Anglo-Saxon history of land possession before the Norman conquest, nor could William I have acquired possession of all the land by conquest since the feudal land laws from the Norman period have thus been viewed as a mere justification of the feudal system and not as proper legal precedent).

⁸⁶ *Id.* at 90 (stating that the 1939 Act and others have limited the control of the Crown individual property).

⁸⁷ Important cases from the colonies include: *Cooper v. Stuart* 14 App. Cas. 286 (1889); *Secretary of State of India v. Kamachee Voye Sahaba* (1859) 13 Moo PC 22; (1971); *Secretary of State for India v. Bai Rajbai*, LR 42 IA 229 (1915); *Wi Parata v. Bishop of Wellington* 1877 3 NZ Jur. (NS) 72

⁸⁸ Tiernan Mennen & Cynthia Morel, *From M'Intosh to Endorois: Creation of an International Indigenous Right to Land*, TULANE J. INT'L & COMP. LAW, Volume 21 (2012).

endorsement of colonization, but, nevertheless, were commonly used to justify native land expropriation. Vattel in the *Law of Nations* states that nations are not given an unabashed license to claim all unoccupied territory in its sight, but instead “will only recognize the *ownership* and *sovereignty* of a nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them”.⁸⁹

These popular theories on property rights and early colonial jurisprudence led to the creation of general principles in colonial land and resource dealings. During the period of British and European colonization, four basic methods of acquiring colonial land were recognized –

- (1) conquest
- (2) persuading indigenous populations to submit to the colonizer’s rule,
- (3) purchasing some or all of the land from indigenous populations, or
- (4) discovering and possessing “unoccupied” land first – the doctrine of *terra nullius* and discovery.⁹⁰

As exploration and colonization continued, Europeans began settling in lands already occupied, and use of the *terra nullius* and the discovery doctrine became more common. European powers eventually expanded the doctrine to include lands occupied by indigenous populations considered too primitive to have an organized society. This occurred despite early commentators’ inability to justify such expansion.⁹¹

The *Royal Proclamation* of 1763 was another key doctrine to the British approach to colonization and land and resource ownership acquisition. The Proclamation granted exclusive title to the Crown by essentially eliminating all private interests to land and establishing the exclusive purchase and control of land by the Crown itself. Native people were viewed as having a Crown grant to possess and use the land, subject to future expropriation, but not inalienable title. The Proclamation was grounded in a largely paternalistic attitude to indigenous populations to “protect” them from unfair transactions with European settlers.⁹² While there were numerous instances of fraud by settlers against natives in purchasing their land, it is difficult to say that the Proclamation was created solely as a means to combat unfair transactions.

Reviewing this colonial history of legal dispossession demonstrates the

⁸⁹ EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR, THE PRINCIPLES OF NATURAL LAW* 156 (1758).

⁹⁰ ANN MCGRATH, *A NATIONAL STORY, IN CONTESTED GROUND: AUSTRALIAN ABORIGINES UNDER THE BRITISH CROWN* (1995).

⁹¹ Mennen & Morel, *supra* note 88, at 9.

⁹² Kent McNeil, *Self-Government and the Inalienability of Aboriginal Title*, 47 MCGILL LAW J. 473, 478 (2002).

historical basis of the current inequitable distribution between community, person and state, through dispossession of the land and resources of native people through the creation of special categories of land vested in the crown and other colonial powers. That ownership was then passed on to post-colonial governments, where it persists to this day.

B. Permanent Sovereignty Over Natural Resources – Post Colonial Doctrines

The independence and creation of new nations in the 1900s, largely post World War II, brought the resource state to global predominance. Amidst movements for economic independence and the right of self-determination, new nation states advocated for full resource sovereignty. Most of these former colonies were domains for resource extraction by colonial powers and were characterized by significant, vested interests of multinational and colonial powers, including colonial parastatal resource extraction companies (i.e., British Petroleum, Royal Dutch Petroleum, etc.). Upon independence, the newly formed states needed to break this economic dynamic and assert sovereignty over their natural resources.

Three historical processes in particular have shaped the original contours of the doctrine of permanent sovereignty over natural resources: (1) the decolonization of overseas territories, (2) the recognition of peoples' human right to self-determination, and (3) the recognition of developing states' claims for a New International Economic Order.⁹³ In 1962, the United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources responded to this need for economic sovereignty. It established the principle that, "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."⁹⁴ The principle of permanent sovereignty over natural resources that emerged in the 1950s during the process of decolonization is considered "a fundamental principle of contemporary international law", "a basic constituent of the right to self-determination and an essential and inherent element of state sovereignty" and as a mechanism for avoiding the inequitable and onerous arrangements imposed by former colonial masters upon the unwary and vulnerable new

⁹³ Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VANDERBILT J. TRANSNAT'L LAW 785, 792-793 (2012).

⁹⁴ G.A. Res. 1803 (Dec. 21, 1952), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/NaturalResources.aspx>.

governments in the immediate aftermath of the colonial period.⁹⁵

Debates resurfaced in the 1970s regarding the right of developing states to own and control their natural resource wealth vis-à-vis potential entitlements by states and corporate actors in the developed world. In the context of such debates, developing countries reactivated a call for permanent sovereignty over their natural resource wealth as a means of securing better prospects for economic growth.⁹⁶ A series of UN declarations championed by newly independent states further established the principle of natural resource sovereignty. The Declaration on the Establishment of a New International Economic Order (NIEO) was passed on May 1, 1974 established:

...full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State.⁹⁷

In December 1974 the UN General Assembly supplemented the NIEO Declaration with the Charter of Economic Rights and Duties of States, which declares that ‘every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities’.⁹⁸

The concept of permanent sovereignty over natural resources is not without debate or controversy. Although initially fueled by the need to preserve the rights of people during decolonization and independence, the right of the state to ownership of natural resources became the dominant paradigm for expressing sovereignty. But this state-centered approach to sovereignty is changing.⁹⁹ New international theories and jurisprudence by regional human rights bodies have expanded interpretation of the meaning and content of “well-being” as contained in the principle, to emphasize the state’s duties to its citizens and human rights obligations over land and economic self-determination in connection with natural resources

⁹⁵ Franz Xaver Perrez, *The Relationship between ‘Permanent Sovereignty’ and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENVIRONMENTAL LAW 1190 (1996).

⁹⁶ Miranda, *supra* note 93.

⁹⁷ G.A. Res. 3201(May 1, 1974).

⁹⁸ NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (2008).

⁹⁹ Miranda, *supra* note 93.

management (See Section V).

The economies of most former colonies were driven by resource extraction and other economic activities. New governments therefore allowed for this activity to continue as a means to contributing to their consolidation of power and establishment of basic governance activities. Natural resource ownership by the state and continued extractive activities through contracts with the state supported the establishment of sovereignty in new, independent states by providing an easily accessible, existing revenue source to fund state functions. This source of revenue allowed governments to readily consolidate power and establish the attributes of juridical sovereignty - to create armies, demarcate borders, form international diplomatic corps, and, to the extent necessary, fund public services that established the legitimacy of their governments.

The juridical sovereignty of newly formed nations was supported by international society, including former colonial and current world powers with vested interests in maintaining access for resource extraction. The continued control and access to these valuable resources was a primary mechanism by which local elites stayed in power. In the case of communism, the nationalization of all resources was part of the economic model and supported by prevailing theories of utopian state-run orders and backed politically by the Soviet Union.¹⁰⁰

The state-centric resource ownership model is a questionable foundation for building domestic sovereignty. It has eroded incentives for effective democratic governance, as residents do not hold an ownership interest in the resources and thus do not directly benefit from the extractive activities. Meanwhile communities are either physically displaced from their homes or have their economic activities interrupted by contamination or destruction of resources, such as forests or pastures, that are the basis of their livelihoods.

This pattern of state-community relationship has produced numerous local conflicts between the state and its citizens that undermine state legitimacy. It has been the direct cause of protracted civil strife (see the civil wars in Mozambique, Angola, Liberia, Sierra Leone) and the indirect basis of political and economic systems that foster internal power grabs, ethnic divisions and conflict. Moreover, the central control over resources and the revenue stream that results from their extraction pits central government powers against the communities that are displaced from extractive activities. In ethnically diverse nations this denial of self-determination has resulted in ethnic favoritism or predation by the government against those communities

¹⁰⁰ Robert H Jackson & Carl G Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 *WORLD POL.* 1, 9 (1982).

in line with or in the opposition. For minority ethnic communities the central government rarely represents local interests, often leading to increasingly antagonistic relationships.

V. REVERSING THE CURSE

Policy solutions for the resource curse are the most important, but least developed area of current analysis. In this section I examine policy solutions from the literature and present the proposals of this article. As often pointed out, not all resource rich countries are cursed. Countries such as Canada, the U.S., Australia, and Norway are rich in resources and have experienced positive, sustained growth for decades. The United States and Canada produce more oil than Africa, but have strong governance ratings and the lowest resource rents as a share of GDP. While oil-dependency has destroyed the Venezuelan economy, Norway is near the top of the United Nations Human Development Index. According to annual cross-country data from the World Bank a number of countries annually rank in the top 15 of both natural capital wealth and per capita income.¹⁰¹ How then did these countries avoid the curse, while it has plagued others?

Countries such as Canada and Norway have two unique traits: 1) they developed much of their resource rent base after broader economic and institutional development and 2) most of it occurs in remote (Canada's tundra, Australia's outback) or offshore (Norway's North Sea oil) areas, meaning resource extraction did not create an immediate revenue dependence by the state and did not occur at the expense of diffuse economic activity by the rest of the populous. Botswana is another commonly cited example of a country that has avoided the resource curse, while harvesting its diamond wealth for social benefit. But its political history of enlightened, one party rule is too *sui generis* to offer much policy insight. The lessons from these countries are not particularly instructive for the creation of policy solutions for the majority of resource curse-affected states that have resources co-located with populations or have discovered and begun extracting resources before creating strong institutions. There are however, more analogous, historical examples from the United States, particularly in the early extractive economies of certain states, such as the coal mines of Pennsylvania, oil fields of Texas and gold prospecting of California.¹⁰²

¹⁰¹ *Wealth Accounting*, WORLD BANK, <http://data.worldbank.org/data-catalog/wealth-accounting> (last updated June 3, 2016).

¹⁰² The author will be completing a comparative, historical analysis of resource extraction, economic growth and governance in these US states and other countries that had an early economic dependence on resource extraction.

A. Strengthen Institutions

Recent resource curse literature has shown that resource extraction does not necessarily produce poor governance outcomes, if strong, effective and transparent institutions already exist.¹⁰³ Boschini, et al (2007), found institutional strength at the core of the resource curse through regression analysis of various institutional quality data sets (including the Rule of Law Index and World Bank Governance Matters Index).¹⁰⁴ Their results were conclusive - when institutions are bad, countries with fewer natural resources have better economic growth than those with plenty of natural resources, but when countries have good institutions, the effect is reversed.¹⁰⁵ However their policy advice, similar in a lack of specifics to much of the contemporary academic analysis, is simply to “get your institutions rights, especially if you have plenty of diamonds and precious metals.”¹⁰⁶ This lack of actual solutions on how to strengthen institutions is far too common when examining resource curse literature and belies the difficulty of designing policies to strengthen weak institutions mired in a resource curse context.

Theories on the resource curse generally point to two outcomes from strong institutions – 1) diversified economies where resource extraction is a smaller % of GDP and public revenue compared to direct taxation, and 2) resilient checks and balances to absorb shocks of increased revenue generation without the accountability mechanisms of direct taxation. Acemoglu and Robinson authored a series of papers examining the historical and contextual evolution of good and bad institutions that points to the role of local elites in undermining the creation of institutions that would draft sound policies.¹⁰⁷ The wider analysis on institutional quality and growth by leading theorists such as Douglass North, Dani Rodrik and Paulo Mauro coincides with resource curse theories that countries with better “institutions,” more secure property rights, and less distortionary policies tend to invest more in physical and human capital and use these factors more efficiently to achieve a greater level of income.

Wiens, however, introduces a twist into the classic causality argument by suggesting institutional strength is endogenous.¹⁰⁸ Most theoretical models, he states, “typically investigate the ways in which existing institutions condition the incentives generated by resource rents, but rarely

¹⁰³ E.g., Mehlum et al., *supra* note 13.

¹⁰⁴ Boschini et al., *supra* note 41.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 28.

¹⁰⁷ Acemoglu & Robinson, *supra* note 40; D. Acemoglu, S. Johnson, & J.A. Robinson, *An African Success: Botswana*, in ANALYTIC DEV. NARRATIVES 80 (D. Rodrik ed., 2002).

¹⁰⁸ Wiens, *supra* note 48.

consider the ways in which resource rents affect the determinants underlying the nature of the institutional environment itself.”¹⁰⁹ This suggests that an important dimension of the problem posed by resource wealth is that its persistence further undermines the institutions that can cure the resource curse, creating a vicious circle.

This article supports Wiens’ distinction on the potential endogeneity of institutional quality, particularly because it has important implications for policy efforts and suggests the need for an alternate causal model for the resource curse and institutional quality.¹¹⁰ The key question then becomes: how does a state achieve strong institutions if it is already economically dependent on resource extraction and its institutions already weakened and vulnerable to resource rents?

States that suffer from the resource curse tend to have overly centralized governance and economic structures, due to the centralized control and revenue from resource rents. State ownership of resources and direct contracts for its extraction places large sums in the account of the central government without any embedded checks and balances. In many countries this constitutes the majority of economic activity. The ramifications are numerous¹¹¹, but can be traced back to the incentives this creates for opaque governance that centralizes power, increases political battles over access to this revenue, and reduces government efficiency in the provision of basic public services.

The central control of a large unregulated revenue source dissolves the social contract between the state and citizen. Rather than depending on taxation of income to raise revenue, the state can largely bypass its citizens to gain more revenue by increasing extractive activity. As a result, governments do not increase their governance mandate through increased legitimacy in the eyes of the citizens and permission to raise taxes, but instead through greater capture of state-owned assets. The population becomes secondary to the resources.

Citizens are also not easily able to monitor the use of central funds from extractive contracts. Numerous international initiatives such as the Extractive Industries Transparency Initiative (EITI) and Revenue Watch Institute (now Natural Resource Governance Institute) strive to improve resource governance through voluntary standards for the improved collection and use of extractive-based revenue. While these international

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.* at 5.

¹¹¹ There are other governance and economic ramifications of the resource state that this article will not focus on, such as “Dutch disease”, which artificially inflates currency values to the level it makes other sectors uncompetitive, thus increasing a country’s reliance on the extractive sector.

efforts have some potential to improve the transparency of large extractive state contracts, they have had little impact on wider governance outcomes as they do not address issues of *de facto* state ownership that underlies the curse.

Instead, I argue here that the only way to sustainably improve governance in a resource curse context is to re-establish the social contract between state and citizen based on a revised economic model that removes state control and direct operating revenue from resource extraction in favor of taxation of devolved resource extraction income. In addition to the economic benefits of devolving land and natural resource asset ownership to the local level, the governance benefits are potentially profound. Direct taxation of citizen income increases oversight of public spending that can improve efficiency and re-establish the connection of citizens to government expenditures and service provision. It also fosters an incentive structure for improved public services and responsiveness of the government to its citizens. The early experience of individual resource ownership and extraction in the early 1900s in the US and the subsequent development of strong institutions lie in stark contrast to the post-independence experience of Latin America countries that universally maintained centralized, state ownership. This difference in resource ownership has been the determining factor in the divergent development trajectories since colonial independence, yet the Latin America approach is the model the rest of the developing world has adopted. While more analysis is needed (and is being conducted), the change of ownership structure over resources, such that the revenue generated from their extraction is derived from taxes on production, has the potential to dramatically reverse the curse and foster sustainable development in chronically fragile countries.

B. Strengthen Land and Resource Rights

There is increasing empirical recognition of the link between economic growth, institutional quality and property rights. Deininger and Squire identify the distribution of assets (wealth) as more important than income distribution in determining economic growth.¹¹² Lipton finds that land redistribution to small farmers make more productive use of scarce land and employs more labor-intensive methods than larger farms.¹¹³ This causal relationship between strong property rights, institutional quality and economic growth extends to the resource curse phenomenon, but has largely

¹¹² Klaus Deininger & Lyn Squire, *A New Data Set Measuring Income Inequality*, 10 WORLD BANK ECON. REV. 565 (1996).

¹¹³ MICHAEL LIPTON, *LAND REFORM IN DEVELOPING COUNTRIES: PROPERTY RIGHTS AND PROPERTY WRONGS* (2000).

been unexplored by the literature.

Birdsall, et al, have detailed the East Asian industrialization experience and the role a series of successful land reforms played in helping restructure and democratize economies, subsequently incentivizing government investment in human capital.¹¹⁴ The two case studies of Korea and Brazil are particularly instructive. Korea enacted extensive land reform post-WWII and quickly outpaced Brazil in economic growth and social indicators. After completion of land reform Korean revenue generation and governance was more closely linked to the economic outcomes of its population and thus the government had incentives – fiscal and democratic - to develop policies that invested in the labor force. Brazil, on the other hand, continued land ownership structures descended from Portuguese-colonial rule and thus depended more on revenue from large plantations and state-led activities, discouraging investment in its human capital.¹¹⁵

Weinthal and Luong is one of the few studies to explore policy solutions to the resource curse through consideration of alternative structural models of resource ownership.¹¹⁶ Their study of five petroleum-rich states of the former Soviet Union (Russia, Azerbaijan, Kazakhstan, Turkmenistan, and Uzbekistan) concluded that oil wealth leads to weakened state institutions only when the government has a dominant role in the petroleum industry. When the private sector and foreign investors have a more prominent role, governments are likely to have stronger fiscal institutions. Their analysis considers the role of private investors in strengthening property rights regimes and introducing some form of responsive and transparent revenue generation through the extraction of rents from the private sector, as opposed to direct production, but does not explore devolution of resource ownership as I do here.

In the same region, while relatively resource-poor, compared to its neighbors, Tajikistan and Uzbekistan's land ownership and plantation crop (cotton) dependence has had similar resource curse effects. Cotton farms were nominally privatized in the immediate post-Soviet period, but the state has maintained continued control of cotton production and export, which accounts for a substantial portion of GDP.¹¹⁷ The Uzbekistan Constitution and Land Code, similar to other Central Asian nations, affirm the state as the owner of all land, with the ability to allocate use to individual and families,

¹¹⁴ Birdsall et al., *supra* note 63.

¹¹⁵ *Id.*

¹¹⁶ Erika Weinthal & Pauline Jones Luong, *Energy wealth and tax reform in Russia and Kazakhstan*, 27 *RESOURCES POL'Y* 215 (2001).

¹¹⁷ Aygul Ismailova & Elmurod Baynazarov, *Analysis of the Agrarian Land Reform in Uzbekistan During the Soviet Era and After Transition*, 3 *EU AGRARIAN LAW* 61 (2015).

but with planting restrictions and no rights of alienability or transfer.¹¹⁸ The government also imposes compulsory quotas for cotton sowing acreage that is enforced at the provincial, district and farm level.

The link between land rights and institutional quality and economic growth is strong, but often under-measured given that national indices for property rights are often not granular enough to distinguish between the property rights of international investors or urban residents (a common focus for such indices) and rural community and individual land rights. In most developing countries, however, as cited above, there is a long history of parallel land tenure systems – a formal one for the urban elites and an informal one for the poor.

The logical progression of the argument that strong property rights improve economic and democratic performance is that centralized ownership of resources, and therefore the complete lack of property rights of natural resources, will erode institutional quality and undermine economic performance. Thus, one of the factors in the calculus for combatting the resource curse is to reform and implement legal frameworks on land and resource ownership that currently create insecurity in land and resource tenure. This will in turn foster a climate for investing in human capital and creating the strong institutions needed for long-term, inclusive economic growth.

The comparative experience of various states in the U.S. is particularly instructive and will be the focus of upcoming empirical research by the author. The U.S. is one of the few developed nations with a long history of democratic economic governance and sustainable economic growth based on resource extraction linked to devolved land and natural resource ownership. Due to this devolution of rights over natural resources, many communities and sub-national governments in the U.S. have historically avoided the natural resource curse despite having economies dependent on resource extraction.¹¹⁹

¹¹⁸ CONSTITUTION Dec. 8, 1992, art. 55 (Uzb.) (“The land, its minerals, waters, fauna and flora, other natural resources shall constitute the national wealth and shall be rationally used and protected by the state.”); LAND CODE art. 16 (Uzb.) (“Land ownership in the Republic of Uzbekistan. Land is the property of state and the basis for national wealth, it ought to be used rationally, protected by the state and it is not liable to sale, exchange, give as a present, mortgage with the exception of cases established by the legislative acts of the Republic of Uzbekistan.”).

¹¹⁹ There are significant gaps in the academic literature exploring the historical trends of devolved resource rights, democratic governance and economic growth. The author will help fill this gap with upcoming research.

C. A Sequenced Policy Proposal

The final puzzle of the resource curse is identifying policies that can reverse the curse. While many scholars and policy makers have developed ideas for stabilization and savings funds, improved extractive contract negotiation, greater transparency, cash payments to citizens, and alternative tax and royalty systems¹²⁰, few have addressed the fundamental structural issues and related, sustainable reforms that go to the root cause of economic governance and underdevelopment – in short, what separates Norway from Venezuela.

Various scholars have proposed central monetary and trade policy prescriptions, similar in tenor to the reforms the IMF and other investment banks have encouraged for developing countries with poor results over the last three decades. One such policy prescription by Auty is for central bankers to create a capital development fund for resource rents, which should be invested offshore to assist in sterilization, but this is primarily to turn finite resource rents into a sustainable source of revenue.¹²¹ Other suggestions, such as a central bank commodity stabilization fund, treat symptoms rather than causes of the curse and under development more generally. None of the solutions addresses the institutional quality problem that has been identified as the primary driver of the curse.

Other resource curse policy solutions from the international community focus on transparency, centralized economic models, and investment standards (mostly voluntary), while largely ignoring on-the-ground power dynamics. Besides the EITI and Kimberly Process, the World Bank and other multilateral lenders have created the Equator Principles (EP), a voluntary program that requires borrowers to adhere to social and environmental standards before they will be given loans, including for extractive activities. The G20, United Nations, and various NGOs have also started similar global initiatives, although most all focus on concession contract transparency and standards with little consideration of the prevailing local conditions that drive the curse in the first place. Initiatives for improved transparency focus on external oversight without binding enforcement mechanisms and often fail to address government actions that respond to existing internal financial incentives and a lack of local demand for transparency.¹²²

¹²⁰ E.g., ESCAPING THE RESOURCE CURSE, (M. Humphreys, J.D. Sachs, J.E. Stiglitz, eds., 2007); Paul Collier, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT, (2007); Moss et al., *supra* note 45.

¹²¹ R.M. Auty, *Resource Abundance and Economic Development, Improving the Performance of Resource-rich Countries*. 44 UNU/WIDER 1 (1998).

¹²² Moss et al., *supra* note 45.

While ample research now demonstrates the link between institutional quality and the resource curse, there are few viable policy prescriptions to strengthen institutions in this context, taking into account the strong existing incentives and power structures. Research by Birdsall et al and Ding and Field, for example, has demonstrated statistical correlation between natural resource export dependence and poor development of human capital as a primary cause of slow economic growth, but do not provide policy recommendations for how to avoid this.¹²³

One of the more promising policy alternatives to address the resource curse has been proposed by Todd Moss at the Center for Global Development, and echoed by a few others.¹²⁴ They advocate for a cash transfer system for resource curse rents, a concept that borrows from largely successful, recent public cash transfer programs in Mexico, Brazil, and elsewhere, and similar to a fund Alaska set up in the 1970s to handle expected revenue from the discovery of oil on federal and state land.¹²⁵ A fund for resource rents would provide direct cash transfers to citizens, which would then be treated like normal income by the state and taxed accordingly, rather than simply bypassing the taxpayers by relying solely on rents.¹²⁶ In advocating for this policy, Moss identifies important governance and institutional dynamics that are unaddressed by most policy proposals for the resource curse, such as the role of taxation in strengthening the state-citizen social contract that is the basis of good governance.

Direct cash transfer is a positive proposal that has particular implications for countries with offshore resources, or resources located on large tracts of unsettled, barren land. But when applied to the majority of countries that have land-based resources, such as forests, minerals, and farmland, it does not address the underlying economic and governance conditions that cause the curse, while continuing to subjugate communities and land holders to the state's extractive activities. It also potentially pits cash transfer-receiving urban populations against rural, land-dependent producer communities that would be the most affected by extractive activities. This could in turn create perverse incentives to turn farmland or forests into more lucrative mines without benefits to those living on the land.

Rather than focus on central government and economic policy prescriptions, such as global transparency initiatives and fund creations, I propose legal and policy reforms that will ultimately strengthen the local

¹²³ Birdsall et al., *supra* note 63; N. Ding, B.C. Field, *Natural Resource Abundance and Economic Growth*, 81 LAND ECON. 496 (2005).

¹²⁴ Moss et al., *supra* note 45; Larry Diamond & Jack Mosbacher, *Petroleum to the People: Africa's Coming Resource Curse and How to Avoid It*, FOREIGN AFF. (2013).

¹²⁵ The Alaska fund now provides 3-6% of average household income in Alaska.

¹²⁶ Moss et al., *supra* note 45.

institutions that cause and fall prey to the resource curse, drawing from the fields of taxation, decentralization, and land tenure administration. The proposal consists of three, sequenced, interconnected, long-term strategies for reversing the resource curse and tackling underdevelopment and global poverty more generally. The proposal is sequenced to avoid elite capture and protect local land rights.

i. Strengthen Community and Individual Land and Resource Rights

Land is perhaps the singular most important asset in most economies. Yet, throughout the developing world individuals and communities have weak or non-existent land rights. The impacts on inequality and economic growth are well documented and discussed by a range of authors - Douglass North, Richard Auty, Hernando De Soto - but are potentially even more severe when linked to the resources attached to the land that drives the resource curse afflicting many countries.¹²⁷ Despite the importance of land rights to economic growth, institutional quality and democratic governance, it is only a minor point on the global development agenda. Governments, multi-lateral development institutions and bilateral donor efforts chronically underemphasize and underfund land reform initiatives. In fact, numerous countries continue to have constitutional provisions and laws that do not recognize land ownership or alienability rights by anyone other than the state. Further, in countries across Africa, Latin America and Asia, indigenous, customary or traditional land tenure systems are not recognized, placing millions in legal purgatory.

Land tenure insecurity in most developing countries is a direct byproduct of global forces from the past two centuries. As cited in previous work by the author,¹²⁸ years of colonial occupation established elite-based land tenure systems that replaced and continue to bypass native forms of land tenure. Subsequently, the ideological struggle between communism and capitalism, played out in newly independent countries further compounded legal frameworks that centralize land ownership at the expense of communities. This centralized land ownership structure undercuts the type of responsible land reform and redistribution programs that other countries, such as Korea and Taiwan, underwent when successfully transitioning to democratic economic governance.

Chronic insecurity around land ownership has tremendous implications

¹²⁷ See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000); Douglass C. North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 *J. ECON. HISTORY* 803, (1989).

¹²⁸ AUTY, *supra* note 1.

for individual economic activity and economic growth, due to both the inaction of economic actors that have tenuous security, but also the lack of ability to harness its capital for other economic uses. Getting land tenure systems right should be a global priority that receives considerably more attention from major global institutions and donors. Much more international commitment is needed for research, analysis and approaches to executing large-scale land tenure regularization that does not harm communities, particularly customary and indigenous, that have tenuous legal status. Additionally, more multilateral political will is required to incentivize states that lag behind in recognizing the land rights of their citizens and communities. Significant wide-scale land tenure regularization programs need to be designed and implemented, with international donor assistance, particularly from former colonial powers that created the elite-based dual tenure systems in the first place. All land tenure strengthening programs need to be carefully designed and executed to include robust, local grievance and dispute resolution mechanisms that help local communities counter elite capture. Land tenure regularization will also need to occur in a context of revised legal frameworks that recognize indigenous land ownership and customary forms of land tenure, including necessary constitutional reforms that dissolve *de facto* state ownership of all land. As with many of the past successful, land reform and restitution efforts, programs will need to include creation of funds that compensate good-faith purchasers.

Creating effective and just land tenure strengthening programs is an exceedingly complex endeavor, but is not an unsolvable problem. Past efforts, such as the World Bank-funded Cambodia Land Administration and Management Project¹²⁹, have often created more harm than good and adversely affected vulnerable populations. To be effective, considerably more attention, research, funding and long-term commitment is needed from the international community than presently exists in order to identify and support promising approaches.

ii. Devolve Governance and Taxation

Land and resources are inherently local. Their definition, use and

¹²⁹ See Emma Rumney, *World Bank Sanctions More Funds for Contentious Cambodian Land Reform Project*, PUB. FINANCE INT'L (May 20, 2016), <http://www.inclusivedevelopment.net/cambodiacasestudy/>; <http://www.publicfinanceinternational.org/news/2016/05/world-bank-sanctions-more-funds-contentious-cambodian-land-reform-project>; Coalition for Human Rights in Development, *Lessons from Cambodia: Forced Evictions and the Limits of World Bank Accountability*, HUMAN RIGHTS AND THE WORLD BANK SAFEGUARDS REV. (2013), available at <http://rightsinddevelopment.org/wp-content/uploads/2015/08/Human-Rights-and-the-World-Bank-Cambodia-Case-Study.pdf>.

protection is often best determined and sustained by local communities themselves. An important aspect for ensuring continued administration and protection of land rights is a mixed governance system that gives greater control and rights of self-determination to local communities, while ensuring national protection of community land rights and effective enforcement and prosecution of violations.

Some policy literature has identified the gap in attention and research on the relationship between state-building and taxation in the developing world. Brautigam et al, use social contract theory to identify taxes as the foundation of accountability between the state and its citizens.¹³⁰ In line with this theory, devolving land rights and taxation of land will enhance the social contract between local governments and their constituents and the democratic process more generally, as local revenue will be derived more directly from the voting populous rather than through hierarchical political structures and central revenue streams.

Developed countries offer many lessons on the subject of resource extraction and governance. In pre-industrial France the property rights of peasants developed from the feudal system as the monarchical state evolved into an independent collector of tax and had the power to draw revenues from the land. The state had an interest in curbing the rents of landlords, so that peasants could pay more in taxes. The state was interested in revenue from peasant taxation and as a result often intervened to secure peasant freedoms and property. This idea also traces its roots to the development of democratic institutions in England and France, where cash-strapped governments had to negotiate with taxpayers in order to raise the revenue to finance expensive wars.¹³¹ In exchange for taxes, citizens demanded public services, rights and greater voice in government actions.¹³² The concept of taxation as a means to strengthen governance is also supported by the theory behind the resource curse cash transfer proposal.

Many developing countries have already started on a path toward greater decentralization of governance and service provision, recognizing that centrally controlled economies are less likely to experience sustained growth, and that public service provision is more effective when managed locally. But where it occurs these reforms are normally limited and maintain the existing structure of centralized taxation and revenue generation, with only the allocation of centrally controlled funds to the local level, reinforcing vertical systems of political patronage. International donors have also provided some support to decentralization reforms, but largely within

¹³⁰ BRAUTIGAM, *supra* note 3.

¹³¹ North & Weingast, *supra* note 127.

¹³² Robert H. Bates & Da-Hsiang Donald Lien, *A Note on Taxation, Development, and Representative Government*, 14 POL. & SOC'Y 53 (1985).

this same framework and more as a means to improve local service delivery, rather than to strengthen institutions more broadly.

The effectiveness and sustainability of the first step of this proposal to regularize land tenure depends on the establishment of local incentives to keep land administration records accurate and up to date. Devolving revenue generation authority through the local taxation of land creates this incentive. Local governments will be given both responsibility for some public service provision and revenue generation authority to support it, which in turn will create incentives for them to invest in locally appropriate and effective land administration systems that keep property records up to date to facilitate local revenue generation.

iii. Reform Legal Frameworks on Resource Ownership

The third step of the proposal is the critical, final step for solving the resource curse. It depends on effective completion of steps 1 and 2, so as to avoid elite capture and harm to land-holding communities with insecure tenure. States should reform their constitutions and/or legal frameworks to eliminate automatic state ownership of natural resources, in favor of devolved ownership according to stronger systems of land tenure, including differentiated individual/community and national and local government owned land. On land owned by the state (such as sovereign waters, national parks, or national forests) the resources rights would devolve to the state itself. Resource extraction rights would then be leased by landowners to companies for the purpose of extraction, with the income of the landowner and company taxed by the state. This removes the state from its current primary role as a heavily invested direct beneficiary of resource rents, in favor of its more appropriate role of regulator and tax collector, including the review and regulation of leases to ensure fairness. As the state would no longer be a primary revenue recipient it would have less financial incentive to overlook environmental and human rights abuses that have become commonplace in large resource-based investment schemes, including those funded by the multilateral banks.

This reform is akin to a redistributive land or agrarian reform policy, except rather than the state having to redistribute land from private owners it only has to transfer its own rights to landowners. Once land tenure systems have been strengthened (Steps 1 and 2), the mechanisms for this next step would be relatively easy compared to much more complicated agrarian reforms that many countries have attempted. There would be, of course, significant political and fiscal barriers to the reform, but with the establishment of a wide international consensus on its necessity, governments could be pressured by both their constituency and the international community. As this step is dependent first on the effective

completion of land tenure regularization and devolved governance, it will also occur in a context where greater local revenue generation and public service provision have reduced the pressure on national budgets. The reduction in direct revenue will also be mitigated by continued state control of offshore resources and, ideally, increased revenue from taxation of more formalized (and therefore more valuable) landholdings and related, formal economic activity.

The precedent for this change in national legal frameworks also has growing support from international law. International legal concepts of state sovereignty and self-determination established around the time of African and Asian independence movements had long been interpreted to include a *de facto* right to ownership of all natural resources. However, international human rights scholars are increasingly questioning this interpretation, instead identifying a local right to self-determination to control natural resources from a human rights perspective. Miranda details this argument in depth:

This argument revolves around the intersection of two human rights principles: 1) states' obligations to their citizens under the principle on permanent sovereignty over natural resources and 2) the right of self-determination, a core, founding human right principle contained in many of the defining human rights conventions of the 20th century. Viewed in the context of states' human rights obligations there is a growing argument that the only human rights-compliant approach to natural resource sovereignty is the devolution of ownership rights of land and resources from the state to the people that live on and have a historical connection to the land.¹³³

International law has traditionally prioritized state sovereignty in the governance of natural resources, largely due to the post-colonial context of needing to break colonial power control and determination of former colonies. International law, however, also recognizes a strong human rights corpus for peoples' right to self-determination, which is increasingly being seen to incorporate the natural resources on which local communities depend. The right of self-determination is proclaimed in numerous UN resolutions and confirmed in both the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic

¹³³ Miranda, *supra* note 93; The author recognizes the extreme complexity of determining rightful possession, use, and ownership of land and resources, but defers these pragmatic considerations to the substantial existing research and the need for more research as called for by this article.

Social and Cultural Rights (ICESCR).¹³⁴

The origins of the modern concept of self-determination can be traced to early UN General Assembly resolutions that clearly established the right of people to participate in decisions regarding the disposal of their natural wealth. A 1960 resolution affirms that peoples—as opposed to states—may “freely dispose of their natural wealth and resources”; and a 1962 resolution includes strong language indicating that natural resources must be used in the interest of the people. These two concepts—“free disposition” in the “interests of the people”—became central features of article 1 of the ICCPR and ICESCR.¹³⁵

The principle of permanent sovereignty, as understood today, is as much an issue of state duties as one of state rights. Communities and civil society across the developing world have seized on this principle to increasingly demand self-determination in the use of their resources.

CONCLUSION

The current pervasive model of national ownership and control of land and resources has roots in colonial legal constructs and post-colonial principles of sovereignty and economic independence. Its continued, almost universal application across the developing world is often justified by perceived economic needs and outdated notions of sovereignty. Contemporary history demonstrates, however, that economic dependence on natural resource extraction is destabilizing and a recipe for economic and governance disaster. In light of the growing evidence and continued intransigence of the resource curse and the potential for even greater future conflict, it is necessary to reconsider the old model of *de facto* state control of resources. This article proposes a new model of economic governance that calls for the devolution of natural resource ownership to communities and individuals through secured land rights. This alternative model is even more essential when you consider the broader applications of resource curse

¹³⁴ Alice Farmer, *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries*, 39 INT'L LAW & POL. 417, 428 (2006).

¹³⁵ *Id.* (“Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”).

theory to include the wide-scale, contemporary trend of state ownership and grabbing of land across the developing world. A growing understanding of the human rights obligations of governments to protect self-determination creates an additional argument that natural resource ownership should be devolved from the central level to the individual and community level.

Devolution of natural resources depends on secure tenure and clear title to the land the resources are attached to. However, the prevailing uncertainty of land ownership rights in most former colonies prevents the contemporary application of devolution policies. In the immediate, international development, state-building and other foreign and domestic policy efforts need to focus on reversing the uncertainty of land rights and the aggregation of land holding caused by colonial structures and actions and Cold War-era policies. Improving participatory governance and thus creating strong states depends on reconstructing the relationship between state and citizens based on consent to govern rather than mandate to extract.

The proposal of this article is ambitious, but after tracing historical and theoretical analyses of the resource curse it is the logical conclusion. Devolved resource and land rights have enormous potential in the effort to promote global sustainable development and human rights, but further empirical research is needed to inform discussion and build consensus. This article hopes to accelerate this discussion.