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ARTICLE 27 AND MEXICAN LAND REFORM: THE LEGACY OF ZAPATA'S DREAM^{*}

by James J. Kelly, Jr.^{**}

Notlac ximomanaca! Nehuatl onacoc; oncuan on ipc tepoztli ihuan nochantlaca niquinhuicatz. Ipampa in Totazin Díaz aihmo ticnequi yehuatl techixotiz. Ticnequi occe altpetl achi cuali. Ilhuan totlac ximomanaca ipampa amo nechpactia tlen telaxtlauhia. Amo conehei ica tlacualo ica netzotzomatiloz. Noihiqui ninnequi nochtlatatl quipiaz ital: oncuan on quitocaz ihuan quipixcaz tlaoli, yetzintli ihuan ocequi xinachtli. Tlen nanquitoa? Namehan totlac namomanazque?^{***}

I. INTRODUCTION

The Mexican Revolution began as an anti-reelection campaign but ended as a struggle for land. In 1910, Porfirio Díaz was elected to his eighth presidential term after having his principal opponent, Francisco I. Madero, jailed. After his release, Madero declared the

* This Note is dedicated to my wife, Lisa Buonaccorsi Kelly, who encouraged me to write on this subject and whose love and patience have made it possible. I would like to acknowledge the inspiration provided by the lawyers and staff of the Despacho de Orientación y Asesoría Legal in Mexico City with whom I had the great pleasure of spending the summer of 1992.

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*** Michael C. Meyer & William L. Sherman, *The Course of Mexican History* 507-08 (1991) (quoting Fernando Horcastias, *De Porfirio Díaz a Zapata: Memoria Náhuatl de Milpa Alta* 105 (1968)).

Join me. I rose up. I rose up in arms and I bring my countrymen. We no longer wish that our Father Díaz watch over us. We want a much better president. Rise up with us because we don't like what the rich men pay us. It is not enough for us to eat and dress ourselves. I also want everyone have his piece of land so that he can plant and harvest corn, beans, and other crops. What do you say? Are you going to join us?

Id. at 508 n.4 (translation from Náhuatl in original). Zapata, a horse trainer from Morelos, organized a peasant army soon after the Mexican Revolution (the Revolution) began in 1910. See generally Roger Parkinson, *Zapata: A Biography* (1975).

election null and void and called for open, armed rebellion.¹ In the chaos that followed, several armies arose; among them was one led by Emiliano Zapata,² who fought "so that the people will have lands, forests and water."³

The previous fifty years had witnessed the virtual obliteration of communal ownership of rural land.⁴ Indigenous villages lost their land to speculators in transfers made possible by several laws designed to promote the use of agricultural land.⁵ The simmering resentment of indigenous *campesinos*⁶ exploded in the armed struggle touched off by the reelection controversy.⁷ The revolutionary war raged on for nearly seven years until a new constitution was enacted in 1917.⁸

Article 27 of the Mexican Constitution of 1917,⁹ the cornerstone of land tenure law in Mexico, outlined the agrarian reform demanded by the peasant armies of the Revolution. Article 27 declared all land, water, and mineral rights to be the property of the people of Mexico.¹⁰ It also gave the government a mandate and the requisite authority to expropriate land from large landholders and to give it to

1. More precisely, Madero's Plan de San Luis Potosí called for the revolution to begin on Sunday, November 10, 1910 at 6:00 p.m. Charles C. Cumberland, *Mexico: The Struggle for Modernity* 243 (1968); Michael C. Meyer & William L. Sherman, *The Course of Mexican History* 495, 498-500 (1991); Ramón E. Ruiz, *Triumphs and Tragedy: A History of the Mexican People* 315 (1992).

2. Cumberland, *supra* note 1, at 244; Meyer & Sherman, *supra* note 1, at 506-08; Ruiz, *supra* note 1, at 316-17.

3. Ruiz, *supra* note 1, at 317 (quoting Zapata's Plan de Ayala, in which Zapata rejected Madero for his failure to support land reform). For the complete Spanish text of the Plan de Ayala, see Manuel Fabila, *Cinco Siglos de Legislación Agraria en México 1493-1940*, at 214-17 (1941).

4. *See infra* part II.D.

5. *See infra* notes 62-64 and accompanying text.

6. Spanish for "peasant(s), countrym(e)n; farmer(s)." Carlos Castillo & Otto F. Bond, *The University of Chicago Spanish Dictionary* 75 (1987).

7. As Díaz left the country after having resigned, he was quoted as saying, "Madero has unleashed a tiger; let us see if he can control him." Cumberland, *supra* note 1, at 241.

8. Ruiz, *supra* note 1, at 338.

9. Const. art. 27 (Mex.), *translated in* 12 *Constitutions of the Countries of the World, Mexico*, at 23-32 (Albert P. Blaustein & Gisbert H. Flanz eds., 1988) [hereinafter 12 *Constitutions*].

10. Article 27 of the Mexican Constitution states that "[o]wnership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has the right to transfer title thereof to private persons, thereby constituting private property." Const. art. 27, para. 1 (Mex.), *translated in* 12 *Constitutions, supra* note 9, at 23.

eligible agrarian communities.¹¹ Over the next sixty years, administrations sporadically redistributed land of varying quality.¹² By 1988, more than three million households lived in over 28,000 rural communes called *ejidos*.¹³

From 1940 to 1965, Mexico experienced a "rapid and sustained growth"¹⁴ in food production. In the 1960s and 1970s, however, the expansion of the agricultural sector slowed drastically¹⁵ and could not keep pace with Mexico's population growth.¹⁶ Mexico began to import an increasingly large amount of grains and beans.¹⁷ Because subsidies that were given to growers to convert to these badly needed staples failed to remedy the situation,¹⁸ Mexican governmental officials began to criticize Mexico's progressive system of land tenure as preventing

11.

The Nation shall have at all times the right to impose on private property such limitations as the public interest may demand as well as the right to regulate the development of natural resources, which are susceptible of appropriation, in order to conserve them and equitably to distribute the public wealth. For this purpose necessary measures shall be taken to divide large landed estates; to develop small landed holdings; to establish new centers of population with such lands and waters as may be indispensable to them; to encourage agriculture and to prevent the destruction of natural resources, and to protect property from damage detrimental to society. Settlements, hamlets situated on private property and communes which lack land or water or do not possess them in sufficient quantities for their needs shall have the right to be provided with them from the adjoining properties, always having due regard for small landholdings. Wherefore all grants of lands made up to the present time under the decree of January 6, 1915, are confirmed. Private property acquired for the said purposes shall be considered as taken for public utility.

Const. art. 27, para. 3 (1917) (amended 1992) (Mex.), *reprinted in Fabila, supra* note 3, at 307-08.

12. Susan R. Walsh Sanderson, *Land Reform in Mexico: 1910-1980*, at 71-105 (1984).

13. John R. Heath, *Evaluating the Impact of Mexico's Land Reform on Agricultural Productivity*, 20 *World Dev.* 695 (1992). *Ejidal* lands comprise "roughly one-third of national territory and two-thirds of the nation's cropland . . ." *Id.*

14. *Id.*

15. John R. Heath, *An Overview of the Mexican Agricultural Crisis, in The Mexican Economy* 129 (George Phillip ed., 1988).

16. *Id.* at 131.

17. Sanderson, *supra* note 12, at 117.

18. Heath, *supra* note 13, at 696.

agriculture's stable and efficient growth.¹⁹ Reverence for the *ejido* system's contribution to economic growth and social stability in the postwar era rapidly gave way to plans to dismantle it through privatization.

On November 7, 1991, President Carlos Salinas de Gortari formally proposed to Mexico's federal legislature that Article 27's guarantees of land for landless rural communities, as well as its prohibitions on the ownership of rural land by corporations, be deleted.²⁰ More importantly, under the proposal members of *ejidos*, called *ejidatarios*, would be able to mortgage, rent, or sell their individual plots.²¹ Both houses of the federal legislature overwhelmingly approved the President's proposal.²² These constitutional revisions not only ended redistribution of land to the *ejidos* but also paved the way for mass transfer of rural land from indigenous communities to multinational food corporations.²³

This redistribution occasioned by the Salinas counter-reform will have serious consequences both for Mexico's Indians²⁴ as individuals and for the integrity of their cultural traditions. Those Indians who give away their land rights or have them taken from them will flock to the already overburdened inner cities of the United States and Mexico. The villagers they leave behind will see the *ejidal* lands for which their ancestors fought and died broken up and handed over to outsiders. The opening of a speculative market in *ejidal* land will contribute to the breakdown of Mexico's indigenous traditions.

On January 1, 1994, a group of armed Indian peasants, calling themselves the Zapatista Army for National Liberation (the

19. *Id.*

20. Jane Bussey, *Mexico Turns Its Back on Agrarian Reform; 'Land to the Tiller' is Still an Issue in the 81-Yr. Old Revolution*, *Writes Jane Bussey in Nueva Italia*, *The Independent*, Nov. 14, 1991, at 6; Damian Fraser, *Mexico Launches Agricultural Revolution*, *Fin. Times (London)*, Nov. 12, 1991, § 1, at 34; Marjorie Miller & Juanita Darling, *Mexico Seeks Land Reform, Bigger Farms*, *L.A. Times*, Nov. 8, 1991, at A1.

21. Bussey, *supra* note 20, at 6; Miller & Darling, *supra* note 20, at A1.

22. *Mexican Lawmakers Pass Controversial Land Reform Bill*, *Reuters*, Dec. 7, 1991, available in LEXIS, Nexis Library, Current File; *Mexico Passes Controversial Land Reform Bill*, *Christian Science Monitor*, Dec. 8, 1991, at 6; Marjorie Miller, *Changing Lifestyles; Confusion, Fear on Mexican Land. The Government Says It Has a Land Reform Plan, But Farmers Are Again Skeptical*, *L.A. Times*, Dec. 10, 1991, at 6.

23. For discussion of consequences of the constitutional changes, see *infra* part III.D.

24. The Spanish word for the indigenous inhabitants of Mexico is *indios*. I will use the English equivalent, "Indians," to refer to them and their culture.

Zapatistas), rang in the new year by seizing control of several towns in Chiapas, the southernmost state of Mexico.²⁵ Their struggle has brought international attention to the Mexican *campesinos'* quest for land justice.

This Note will argue that the *ejido* is the past, present, and future of the Mexican indigenous control of the land. Article 27 and the agrarian reform program that followed from it revived an indigenous system of land tenure that had survived the four centuries following the arrival of the Spaniards in 1519.²⁶ The Salinas administration's 1992 counter-reform opens up a speculative market in agricultural land that threatens to destroy the communal way of life of Mexico's Indians.²⁷ By restricting commerce in land to *ejidatarios* only, the Mexican government could allow market forces within the *ejido* to foster productivity while preserving the integrity of the indigenous culture.²⁸

Parts II, III, and IV of this Note will attempt to develop the three aforementioned assertions about the past, present and future of the *ejido*. Part II will trace the survival of communal indigenous land tenure and its rebirth through the agrarian reform established under Article 27 of the Constitution of 1917. Part III will analyze the 1992 amendments to Article 27 and their likely impact on communal indigenous land tenure. Part IV will discuss the benefits of a restricted market in land and the window of opportunity opened by the Zapatista uprising.

II. HISTORICAL DEVELOPMENT OF THE *EJIDO*

A. Introduction

Three major conflicts punctuate Mexican history: the Spanish Conquest of 1519,²⁹ the War for Independence in 1810,³⁰ and the

25. Tim Golden, *Mexican Troops Battling Rebels; Toll at Least 57*, N.Y. Times, Jan. 3, 1994, at A1.

26. See *infra* part II.

27. See *infra* part III.

28. See *infra* part IV.

29. See generally Meyer & Sherman, *supra* note 1, at 95-130. Hernán Cortés led the Spanish forces of conquest and became the first military governor. *Id.* See generally Richard Lee Marks, Cortés (1993).

30. See generally Meyer & Sherman, *supra* note 1, at 285-89.

Mexican Revolution.³¹ Each event had a significant, if not immediate, impact on indigenous land tenure.³² At the time of the Conquest, an Aztec-controlled feudal structure dominated Mexico.³³ With the defeat of the Aztecs by Cortés, some Indian lands came under the direct control of the conquerors, while others remained essentially as they were before the Conquest — paying the Spanish crown the tribute they had been giving the Aztec Emperor.³⁴ The communal nature of the land tenure of the surviving Indians³⁵ remained undisturbed until the Constitution of 1857 required that all communal lands be divided into plots under private ownership.³⁶ The next fifty years witnessed a huge loss in the amount of lands owned by Indians,³⁷ thus laying the foundation for Revolution.³⁸

B. Aztec Land Tenure

Although nomadic Indian tribes roamed the north of Mexico³⁹ and remnants of the Mayan civilization survived in the south,⁴⁰ the Aztecs controlled the greater part of Mexico at the time of Cortés' arrival. The Aztecs established a feudal system of land tenure.⁴¹

31. See *id.* at 483-569; see also *supra* notes 2-3 and accompanying text.

32. See *infra* parts II.B-E.

33. See *infra* part II.B.

34. See *infra* part II.C.

35. More than half of the Indians living in Mexico at the time of Cortés' arrival died in the first century of the Colonial period. Ruiz, *supra* note 1, at 77.

36. See *infra* part II.D.

37. See *infra* part II.D.

38. See *infra* part II.E.

39. The nomadic tribes of the largely arid north lacked any form of structured agrarianism. George M. McBride, *The Land Systems of Mexico* 11 (1923).

40. By the beginning of the sixteenth century, the Mayan culture of the Yucatan Peninsula and Chiapas was only a shadow of the great civilization that had dominated that area. Meyer & Sherman, *supra* note 1, at 43-50. The Mayan system of land tenure was completely devoid of the notion of private property. The precariousness of climactic conditions in the Yucatan required the Mayans to move from area to area and prohibited the formation of long-term individual or even small group ownership of land. Lucio Mendieta y Nuñez, *El Derecho Precolonial* 48 (1937).

41. The Aztec agrarian system set up six different classes of Aztec land tenure: the *tlatlocalli*, the *pillalli*, the *mitchimalli*, the *teotlapan*, the *capullalli*, and the *atlepetlalli*. The *tlatlocalli* and *pillalli* were the names given to the land set aside for the support of the emperor and his nobility, respectively. These high level aristocrats did not work these lands themselves. Instead, citizen-farmers called *macechuales* would fulfill their obligations by periodically working these lands as tribute to their superiors. The *mitchimalli* and *teotlapan* were rented out to sharecroppers to benefit the army and the

Peasant farmers called *macechuales* lived in districts that were originally formed along blood lines and thus still bore the Aztec name for kinship groups — *capulli*.⁴² Each *capulli* had its own agricultural property called a *capullalli*.⁴³ Although this land belonged to the community as a whole, the rights to farm the land and keep its crops were individually allotted to the various families.⁴⁴ Families could not sell these rights.⁴⁵ Indeed, the right to farm the land personally was also a duty: if a particular household did not fulfill it in any given two-year period, the elders of the community would award the plot to another newly formed family.⁴⁶

Aztec feudalism emphasized social order over individual initiative. One's class determined one's relationship to the land. One could not buy another's land, although certain types of land could be rented. This made for a very stable system in which market forces were not permitted to maximize the use of land. The *capulli* tackled the problem of idle lands by redistributing unused plots to those within the *capulli* who would work them. The legacy of Aztec land tenure endured at this basic level even after Cortes' arrival.

C. The Colonial Era, Sixteenth Through Eighteenth Centuries

In the colonial era, the conflict between the Spanish throne and its own conquistadors resulted in laws that revealed the tension between social order and individual enterprise. In the West Indies, the Spanish crown had rewarded its military explorers with *encomiendas*, or plantation franchises. This system, which included the forced labor of the inhabitants, had contributed to the decimation of the indigenous population in the area.⁴⁷ King Charles I gave Cortés orders not to introduce the destructive franchise system onto the mainland. Cortés, however, frustrated in his search for Aztec gold, granted his lieutenants, as well as himself, vast *encomiendas* from which the crown

temples of the various gods, respectively. The *capullalli* were the *macechuales'* parcels. See *infra* notes 46-49 and accompanying text. The *atlepetlalli* were lands that belonged to the *capulli* as a whole and were not parcelled out. Mendieta y Nuñez, *supra* note 40, at 42-46.

42. *Id.* at 44.

43. *Id.* at 46.

44. *Id.*; Frank Tannenbaum, *The Mexican Agrarian Revolution* 3 (1929).

45. Tannenbaum, *supra* note 44, at 3.

46. Mendieta y Nuñez, *supra* note 40, at 45; Tannenbaum, *supra* note 44, at 3.

47. McBride, *supra* note 39, at 44; Meyer & Sherman, *supra* note 1, at 131-32.

received only a fourth of the tribute.⁴⁸ The *encomienda* grant extinguished all communal Indian property rights within the district granted to the *encomendero*. The King fought the spread of the *encomienda* by giving legal protection to the remaining communal lands.⁴⁹

Many Indian villages remained outside the *encomienda* system. These were directly subject to the Spanish crown.⁵⁰ Early in the sixteenth century, royal administrative bodies in Madrid enacted laws to regulate the lives of the King's new subjects. This legislation recognized the Indians' rights to communal lands.⁵¹ In addition to a town site called a *fundo legal*, each town was to have an *ejido*.⁵² The laws not only gave royal sanction to the indigenous practices in existing Indian villages, but also provided for their continued spread by allowing Indians to form new villages, or *pueblos*, by gathering a minimum number of persons in an unoccupied rural area.⁵³

Although legal recognition of *encomiendas* threatened to destroy all communal property rights, royal laws preserved the legitimacy of indigenous control over the *capullalli*. The colonial struggle between *capulli* and *encomienda* became the nineteenth century conflict between the Indian *pueblo* and the *hacienda*.⁵⁴ Legal support for the *pueblo* continued until the middle of the nineteenth century, when the privatization schemes of the Liberal Reform⁵⁵ (the Reform) set in motion the great decline of indigenous land tenure.

48. Cumberland, *supra* note 1, at 66-67. This was not, however, the end of the struggle. See Ruiz, *supra* note 1, at 54-62; see also *infra* notes 52-56 and accompanying text.

49. McBride, *supra* note 39, at 123-27; Ruiz, *supra* note 1, at 64.

50. McBride, *supra* note 39, at 123; Ruiz, *supra* note 1, at 64-65.

51. Fabila, *supra* note 3, at 16-19; McBride, *supra* note 39, at 123; Ruiz, *supra* note 1, at 64.

52. McBride, *supra* note 39, at 124. "The *ejido* included within its bounds the agricultural plots of the inhabitants, the common wood lots, and the pasture land for the cattle of the village. These were all inalienable and were to be administered by the town council." *Id.*

53. *Id.* at 126-27.

54. *Id.*

55. The Reform was the period of creole bourgeois ascendancy in Mexican history. See generally, Ruiz, *supra* note 1, at 220-41. It should not be confused with the Article 27 land reform instituted after the Mexican Revolution.

D. The Republic and the *Porfiriato* of the Nineteenth Century

Although Mexico's War of Independence in 1810 expressed indigenous peoples' desires for agrarian justice,⁵⁶ there was very little immediate change in Mexico's land tenure system.⁵⁷ In the 1850s, Liberals led by Benito Juárez ushered in the historical period known as the Reform. While Mexicans consider the Reform as the birth of democracy in their country, it was a disastrous period for Indian *pueblos*.⁵⁸

The *Ley Lerdo* or Law of June 25, 1856,⁵⁹ attempted to build an agrarian middle class. The law gave individuals who worked plots held by the Church or by Indian communities a three-month period in which to purchase their plots.⁶⁰ The purchase price was calculated by adding a hefty transaction tax to the rent regularly paid. After three months elapsed, third parties could purchase the land for a premium of one-eighth of the set price.⁶¹ Although the law specifically exempted *ejidos*, it was superseded by the Constitution of 1857, which contained no such exemption in its call for the privatization of communal lands.⁶²

In the midst of a five-year war against French invaders,⁶³ Juárez, desperate for cash, authorized the sale of "vacant" national lands that the Republic had inherited from the Spanish crown.⁶⁴ Many Indian communities had settled and farmed these lands with and without title.⁶⁵ Before the crisis was over, more than four and a half million acres of communal lands had passed into private hands.⁶⁶

56. The War for Independence was sparked by *El Grito*, the speech of a rebellious Mexican priest named Miguel Hidalgo. In addressing his indigenous parishioners, the priest enjoined them "to recover the lands stolen three hundred years ago from your forefathers by the hated Spaniards." Meyer & Sherman, *supra* note 1, at 287.

57. Cumberland, *supra* note 1, at 113-30; Ruiz, *supra* note 1, at 157; Tannenbaum, *supra* note 44, at 8.

58. Cumberland, *supra* note 1, at 165-66; McBride, *supra* note 39, at 129.

59. Ley de 25 de junio de 1856, art. 11, *reprinted in* Fabila, *supra* note 3, at 109-15.

60. Ley de 25 de junio de 1856, art. 9, *reprinted in* Fabila, *supra* note 3, at 111.

61. Ley de 25 de junio de 1856, art. 11, *reprinted in* Fabila, *supra* note 3, at 111.

62. McBride, *supra* note 39, at 130; Ruiz, *supra* note 1, at 232.

63. This period of French domination, known as the Intervention, took place from 1861 to 1867. See generally Meyer & Sherman, *supra* note 1, at 387-401.

64. Cumberland, *supra* note 1, at 165.

65. *Id.*

66. *Id.*

The election of Porfirio Díaz in 1876 brought four decades of relative stability known as the *Porfiriato*, named after the man who would not leave office.⁶⁷ Despite the absence of armed conflict, the process of Indian dispossession accelerated.⁶⁸ In 1883, the government authorized the survey of the rest of the "vacant" national lands and offered one-third of the land to the surveyors as compensation for their efforts.⁶⁹ Immediately, these *compañías deslindadoras* went about the countryside denouncing indigenous title to national lands.⁷⁰ Much of the communal land had already found its way into the estates of large landowners by 1870. The legally sanctioned, coercive expropriation of indigenous land aggravated a festering bitterness among rural Indians. This resentment later exploded when Díaz was forced to leave office in 1910.⁷¹ The lawmakers, by their attempts to spur development and encourage investment, had ignored for too long the social resentment building in the countryside. Revolution would bring a total reworking of Mexican agrarian land tenure law.

E. Revolutionary Mexico, 1910-1917

The goals of the Mexican Revolution quickly moved from effective suffrage to land justice. The eruption of the Revolution in the countryside indicated that no person or coalition would hold office long without addressing the need for land.⁷² Venustiano Carranza emerged from six years of chaos as the leading political figure.⁷³ His presidential decree of January 6, 1915, outlined the mechanisms by which large landed estates would be dismantled and returned to the villages.⁷⁴ This decree became the basis for Article 27,⁷⁵ the longest and most important article of the revolutionary Constitution of 1917. Article 27 began by declaring that: "The ownership of the lands and waters comprised within the limits of the national territory is vested

67. See *supra* note 1 and accompanying text.

68. Cumberland, *supra* note 1, at 198-204.

69. *Ley de Terrenos Baldios*, reprinted in Fabila, *supra* note 3, at 183-189.

70. Cumberland, *supra* note 1, at 199-200.

71. *Id.* at 243; Ruiz, *supra* note 1, at 307-09.

72. Cumberland, *supra* note 1, at 241-47; Meyer & Sherman, *supra* note 1, at 544.

73. Cumberland, *supra* note 1, at 244; Meyer & Sherman, *supra* note 1, at 545-50.

74. Guillermo Floris Margadant S., An Introduction to the History of Mexican Law 268 (1983); Tannenbaum, *supra* note 44, at 171; Ruiz, *supra* note 1, at 333-34.

75. Margadant S., *supra* note 74, at 268; Ruiz, *supra* note 1, at 336; Tannenbaum, *supra* note 44, at 171.

originally in the Nation, which has had, and has the right to transmit thereof to private persons, thereby constituting private property."⁷⁶

After describing the source and limits of private property, Article 27 limited the ability of foreigners, churches, charities, corporations, and banks to own land.⁷⁷ Status, not contract, was the foundation of land tenure in revolutionary Mexico.

Article 27 also provided for the sources and methods of land redistribution.⁷⁸ In addition to reasserting the government's right to take back title to land (with indemnification to its former owner) at any time in the public interest, it outlined a program of land reform.⁷⁹ All transfers of indigenous property made under Juárez's *Ley Lerdo* were declared void; only those owners who had held less than fifty hectares⁸⁰ for more than ten years were to be exempt from this restitutionary provision.⁸¹ In addition to restoring land to indigenous communities that could establish their recent loss of it, Article 27 provided for the expropriation of large private holdings in order to supply the remaining landless *pueblos* with the land they required.⁸²

In 1917, a year remembered much more for the beginning of the Marxist revolution in St. Petersburg than the culmination of the indigenous one in Querétaro,⁸³ the Mexican Constitutional Congress

76. Const. art. 27, para. 1 (1917) (amended 1992) (Mex.), translated in Tannenbaum, *supra* note 44, app. at 518.

77. Section I differentiated between two groups of people — Mexicans and foreigners. The latter came to own substantial land and mineral rights under Porfirio Díaz. With the adoption of Article 27, however, only the former had a constitutional right to acquire land. Foreigners now had to receive clearance from the Department of Foreign Affairs and under no circumstances could they own territory "[w]ithin a zone of 100 kilometers from the frontiers and of 50 kilometers from the sea coast." Section II forbade religious institutions from acquiring, holding, or administering any real property or even a security interest therein. Section III limited the ability of secular, non-profit organizations to take mortgages on land as security for loans they might make. Section IV put rural properties beyond the reach of commercial stock companies. Section V limited the quantity and term of the land tenure of banks to "that absolutely necessary for their direct purposes." Const. art. 27, §§ I-V (1917) (amended 1992) (Mex.), translated in Tannenbaum, *supra* note 44, app. at 520-23.

78. Const. art. 27, § VII (1917) (amended 1937) (Mex.), reprinted in Fabila, *supra* note 3, at 309-11.

79. *Id.*

80. One hectare, 10,000 square meters, is approximately 2.47 acres.

81. Const. art. 27, § VII (1917) (amended 1937) (Mex.), reprinted in Fabila, *supra* note 3, at 307-11.

82. *Id.*

83. Querétaro was the site of the Mexican Constitutional Congress in 1917. Cumberland, *supra* note 1, at 259, 271.

outlined a system of tenure based more on feudalist legal traditions than on either capitalist or communist notions of property. Zapata's army of Indian *campesinos* had inspired the drafters of Article 27 to reclaim Mexico's indigenous heritage as they outlined the future of the Mexican countryside.⁸⁴

F. The Rise of the *Ejido* Structure, 1917-1940

As powerful as the demands for social justice that propelled the passage of Article 27 were, land reform languished under the early presidents of revolutionary Mexico.⁸⁵ The golden era of land distribution began with the inauguration of Lázaro Cárdenas in 1934.⁸⁶ In the pre-Cárdenas era, advocates of free investment persuaded administrations to give what little land they expropriated to private farmers.⁸⁷ With Cárdenas came not only the rapid acceleration of land redistribution,⁸⁸ but also an emphasis on collective holdings reflected in changes to Article 27 itself. The resulting legal framework of the *ejido* bore a striking resemblance to that of the Aztec *capullalli*.

Although the *ejido* became the embodiment of Mexico's agrarian reform program, original Article 27 anticipated the division of indigenous communal lands into individual, even alienable, parcels.⁸⁹ Revolutionary presidents preceding Cárdenas did not differ

84. Meyer & Sherman, *supra* note 1, at 507.

85. Cumberland, *supra* note 1, at 296-98; John M. Hart, The Agrarian Reform, in *Twentieth Century Mexico 11-13* (W. Dirk Raat & William H. Beezley eds., 1986); Meyer & Sherman, *supra* note 1, at 576, 592; Ruiz, *supra* note 1, at 356-59. Zapata, unsatisfied by the results of the land reform program, continued to wage war on the government; Carranza's followers had him assassinated in 1919. Ruiz, *supra* note 1, at 341.

86. Cumberland, *supra* note 1, at 298-99; Meyer & Sherman, *supra* note 1, at 598-600.

87. Ruiz, *supra* note 1, at 357-59.

88. Meyer & Sherman, *supra* note 1, at 600-02.

89.

Properties held in common by co-owners, hamlets situated on private property, pueblos, tribal congregations and other settlements which, as a matter of fact or law, conserve their communal character, shall have legal capacity to enjoy in common the waters, woods and lands belonging to them, or which shall be restored to them according to the law of January 6, 1915, until such time as the manner of making the division of the lands shall be determined by law.

greatly from the reformers of the nineteenth century in that they, too, favored the small private farm over any collective form of ownership.⁹⁰ The Cárdenas administration, however, not only rapidly accelerated the pace of land redistribution, but also made bold changes to the agrarian regulations and to Article 27 that reasserted the communal nature of indigenous land ownership.

In 1937, the relevant section of Article 27 was amended. Unlike the earlier provision, the new provision dealing with the status of restored lands did not anticipate dividing the communal lands into individual pieces of private property.⁹¹ The agrarian regulations adopted during the Cárdenas period reflected this renewed commitment to communal ownership.

Although the federal legislature enacted several laws pertaining to agrarian reform in its first two decades,⁹² the first complete Agrarian Code was not promulgated until 1934.⁹³ It provided for complete inalienability of *ejidal* lands.⁹⁴ This prohibition applied to both the rental and sale of *ejidal* land.⁹⁵ The Code, reviving the law of the Aztecs, prescribed forfeiture of plots as the penalty for persons who did not personally work them for two consecutive years.⁹⁶ Federal agrarian laws enacted pursuant to Article 27 also effectively forbade the use of *ejido* parcels as collateral for mortgages.⁹⁷

The adoption of restrictions on the alienation of *ejidal* lands brought the history of Mexican agricultural law full circle. The Aztecs had formally proscribed all transfers of the commoners' farm plots.⁹⁸

Const. art. 27, § VI (1917) (amended 1937) (Mex.), *translated in* Tannenbaum, *supra* note 44, app. at 523 (emphasis added).

90. See *supra* part II.D. and note 87.

91. "The centers of population which, by law or in fact, possess a communal status shall have legal capacity to enjoy common possession of the lands, forests, and waters belonging to them or which have been or may be restored to them." Const. art. 27, § VII (1937) (amended 1992) (Mex.), *translated in* 12 Constitutions, *supra* note 9, at 27.

92. Código Agrario, D.O., July 3, 1934, *reprinted in* Fabila, *supra* note 3, at 566-614.

93. Lucio Mendieta y Nuñez, *El Problema Agrario de México* 245 (1982).

94. Código Agrario arts. 117, 140, D.O., July 3, 1934, *reprinted in* Fabila, *supra* note 3, at 593-94.

95. *Id.*

96. Código Agrario art. 144, D.O., July 3, 1934, *reprinted in* Fabila, *supra* note 3, at 603. See *supra* note 46 and accompanying text.

97. Sanderson, *supra* note 12, at 110.

98. See *supra* notes 44-46 and accompanying text.

While the twentieth century Mexican agrarian reform still provided for the existence of small, private farms, which could be transferred freely, Article 27 and the Agrarian Code protected the *ejido* from the theft and speculation that had plagued them in the four hundred years since the Spanish Conquest.

III. THE CURRENT CRISIS AND THE SALINAS SOLUTION

A. The Perceived Failure of the *Ejido*, 1940-1992

Mexico saw a sustained growth in its agricultural output from 1940 to 1965.⁹⁹ The expansion did not last, however, and by the mid-1970s, Mexico was importing a great deal of its food.¹⁰⁰ Government economists, looking for explanations, blamed the restrictions on the transfer of *ejido* lands. The prohibition on mortgaging land did make obtaining private financing virtually impossible. As a result, *ejidatarios* were very dependent on the government for credit. Obstacles other than the transfer restrictions also made development of the *ejido* difficult. Because they lacked certificates of title, *ejido* farmers had to work lands under the cloud of possible dispossession. Both insecurity of title and lack of access to credit held back the *ejido*.

1. *Ejidatarios'* Access to Credit

Ejido farmers found it extremely difficult to obtain private financing.¹⁰¹ Since *ejido* parcels could not be transferred,¹⁰² private lenders could not look to the land as security for loans. Formalistic interpretations of the Agrarian Code's restrictions on the alienation of land had prohibited farmers from using their own future harvests as collateral for loans.¹⁰³ What little credit there was went to the purchase of seed,¹⁰⁴ hence, important tools and machinery were generally unavailable to the average *ejidatario*.

99. See *supra* note 14 and accompanying text.

100. See *supra* note 15 and accompanying text.

101. Sanderson, *supra* note 12, at 110-11.

102. See *supra* part II.F.

103. Since the harvest was to come from the land, it was deemed part of the land and thus subject to the same restrictions. Kenneth L. Karst & Norris C. Clement, *Legal Institutions and Development: Lessons from the Mexican Ejido*, 16 UCLA L. Rev. 281, 291 (1969).

104. Sanderson, *supra* note 12, at 110-11.

Public sector lending proved inadequate to fill the tremendous need for development capital.¹⁰⁵ Most of those peasants fortunate enough to receive government loans already had larger, irrigated farms.¹⁰⁶ Over the years, *ejidos* lost control over decisions about what to plant as the *ejidal* credit system became an instrument of the ever changing, national food policy.¹⁰⁷

2. *Ejidatarios'* Lack of Security of Tenure

Many *ejido* members faced the possibility of losing their land throughout the entirety of the reform period.¹⁰⁸ The overwhelming majority of *ejidatarios* worked lands they knew to be theirs but lacked the certificates of title to prove it.¹⁰⁹ Typical bureaucratic inefficiency explains part of the delay, but much of the dearth of documentation was by design. By denying Indian farmers title to their lands, local political bosses fostered a sense of dependency among the *ejidatarios* that became valuable at election time.¹¹⁰ Corruption within the *ejido*¹¹¹ also caused uncertainty among *ejidatarios* as to whether the

105. *Id.* at 110-16.

106. *Id.* at 115.

107. *Id.* at 116.

108. Karst & Clement, *supra* note 103, at 293-97.

109.

In about 10 percent of the *ejidos*, there has never been a final decision by the national government granting the land to the *ejido*. And of the 90 percent that do have a final grant of land to the community, only about 5 percent have had a distribution to their individual members of what are called "titles."

Id. at 293 (footnotes omitted) (emphasis added).

110. "The political utility of this insecurity is easy to see. The *ejidatarios* were kept dependent on the agencies of the government, and that dependency was readily converted into political support." *Id.* at 297.

111.

In El Bajo [an *ejido*], this uncertainty of tenure rights has in fact been exploited by a dishonest *ejido* leadership group, which sought to oust some *ejidatarios* from the parcels they had been working, and to replace them with the leaders' friends. In 1966, after the harvest, the president of the *ejido* . . . held a ceremony in his home. In exchange for some cartons of beer, he purported to transfer the rights to work several parcels of land. When the victims complained, an official of the Agrarian Department telephoned the President, informed him that his actions were illegal, and told him to return the parcels of land to their former occupants. Since the regular *ejido*

work they put into a parcel of land in any given year would end up benefitting someone else the following season.¹¹²

In addition to corruption inside and outside the *ejido*, many *ejidatarios* feared legal dispossession of their land because their own violations of the agrarian law had exposed them to its selective enforcement. *Ejidatarios* often lacked the economic and human resources to cultivate and harvest their plots; therefore, many would rent their parcels out to other *ejidatarios*¹¹³ or hire others to help them work the land.¹¹⁴ Although the law prescribed forfeiture as the penalty for such offenses,¹¹⁵ loss of land was by no means automatic.¹¹⁶ Nevertheless, by operating outside the letter of the law, *ejidatarios* could not develop lands without fearing for the security of their title.

Despite their dependence on governmental authorities for credit and security of ownership, *ejidatarios* proved themselves to be just as productive as small, private farmers.¹¹⁷ Nevertheless, overly broad restraints on alienation, combined with local political oppression, prevented the *ejido* from contributing more to Mexico's food production system. As that system's crisis worsened in the 1970s and 1980s,¹¹⁸ the need for change in Mexico's agricultural policies became more apparent.

B. The Proposed Solutions

Since President Salinas took office in 1988, most public and political attention to the rural sector has focused on possible structural changes in the system of agrarian reform.¹¹⁹ Salinas wrote his

elections were to be held within a month, no punishment was visited on the president

Id. at 294.

112. *Id.* at 297.

113. Jesús C. Morrett S., *Alternativas de Modernización del Ejido 81-88* (1992).

114. *Id.* at 80-81.

115. Karst & Clement, *supra* note 103, at 295 n.52.

116. *Id.* at 295.

117. Heath, *supra* note 13, at 700-02; Heath, *supra* note 15, at 149.

118. *See supra* note 15 and accompanying text.

119. *See* Morett S., *supra* note 113; *see also* *Legislación y Modernización Rural* (Rosa Isabel Estrada Martínez ed., 1990).

Harvard doctoral dissertation on the subject¹²⁰ and has made the modernization of the rural sector the focus of his political agenda in much the same way that President Clinton has put the spotlight on the health care system in the United States. The increased attention has provoked a lively exchange of proposals ranging from renewed support for the *ejido* to the complete elimination of all forms of communal ownership.¹²¹

While some private sector advocates have called for the complete privatization of the *ejido*,¹²² others have realized the central place that the *ejido* occupies in Mexico's collective historical consciousness and have proposed more moderate changes.¹²³ Under one such plan,¹²⁴ private persons, businesses, and *ejido* members would come together to form Associations of Agroindustrial Participation.¹²⁵ These new entities would arrange with the *ejidatarios* to rent the land for periods of up to thirty years.¹²⁶ In addition to financing operations, investors would have the obligation to ensure that the *ejidatarios'* remuneration amounted to the equivalent of Mexico's minimum wage.¹²⁷

Campesino organizations have rejected this proposal because it would overturn one of the greatest achievements of the Revolution — peasant control of the land.¹²⁸ One of these groups, the National Union of Regional Autonomous Campesino Organizations,¹²⁹ has called for increased public attention and support for the *ejido*,¹³⁰ and

120. *All Things Considered: Mexican Farm Co-ops to be Privatized* (NPR radio broadcast, Mar. 31, 1992) [hereinafter *All Things Considered*].

121. Rosa Isabel Estrada Martínez, *La Política Moderna de Desamortización Rural*, in *Legislación y Modernización Rural*, *supra* note 119, at 76-79; Morett S., *supra* note 113, at 127-38.

122. Morett S., *supra* note 113, at 129.

123. *Id.*

124. The proponents of the plan at first attempted to remain anonymous but were soon discovered to be economists within the Salinas administration. Estrada Martínez, *supra* note 121, at 77.

125. *Id.*

126. *Id.*

127. *Id.* Mexico's minimum wage amounts to \$4.20 a day. Damian Fraser, *No Such Thing as a Free Treaty: NAFTA Will Not Solve the Deep-Seated Structural Problems Facing the Mexican Economy*, *Fin. Times* (London), Nov. 11, 1993, at 19.

128. *Id.*

129. Its proposal is outlined in Luis Meneses Murillo & Bárbara Zamora López, *Legislación y Modernización Rural*, in *Legislación y Modernización Rural*, *supra* note 119, at 15-25.

130. *Id.* at 16.

an end to judicial recourse for persons whose lands have been selected for redistribution.¹³¹ Another group, the National Campesino Confederation,¹³² has stressed the importance of increased autonomy for the *ejidos* as to what they should grow and how they should grow it.¹³³ Neither group, however, has favored any major step toward privatization.¹³⁴

Academic experts in agricultural affairs have offered options that lie between the two extremes. One commentator has called for the creation of an agrarian patrimony¹³⁵ of twenty hectares.¹³⁶ An *ejidatario* would be free to put a certain amount of his land at risk for investment purposes, but the twenty hectares encompassed by the patrimonial provision would be immune from attachment or transfer.¹³⁷ Another more moderate solution would allow *ejidos* to collectively choose either to remain under some slightly modified form of *ejidal* regulation or to move towards privatization.¹³⁸

Although the various proposals address a number of concerns, including public sector support for the *ejido* and the domination of *ejidatarios* by local political figures,¹³⁹ the controversy has centered on the restrictions placed on the transferability of *ejido* land. Therefore, before evaluating the different approaches to this complex issue, this Note will examine the advantages and disadvantages of alienation restrictions in general. Setting out a theoretical framework will facilitate a critique of the actual changes made in 1992, and the consideration of corrections.

131. *Id.* at 20.

132. The National Campesino Confederation (CNC) was formed during the Cárdenas administration and is now the rural branch of the Revolutionary Institutional Party, the dominant political party in Mexico. Ruiz, *supra* note 1, at 397, 423. Since the 1940s, the CNC has opposed the party line to defend only the most urgent of *campesino* concerns. Gustavo Esteva, *The Struggle for Rural Mexico* 89-90 (1983).

133. Estrada Martínez, *supra* note 121, at 76.

134. *See id.* at 78-79 (contrasting the two groups' proposals with other proposals calling for varying degrees of private ownership).

135. Morett S., *supra* note 113, at 137.

136. 11 U.S.C. § 522 (1988) (providing for the exemption of certain assets from creditors' claims in bankruptcy proceedings). *See* Douglas G. Baird, *The Elements of Bankruptcy* 47-49 (1992).

137. *Id.*

138. *Id.* at 146-47. This is the view that the author supports as the most viable.

139. *See supra* part III.A.

C. Theoretical Framework

In the United States, Law and Economics scholars have debated the advantages and disadvantages of restraints on alienation.¹⁴⁰ Although debates over specific instances of transferability restrictions have tended to deal with contemporary controversies such as residential rent control,¹⁴¹ the sale of body parts,¹⁴² and paid adoptions,¹⁴³ one author, Robert Ellickson, has recently published an article evaluating the desirability of restrictions on the transfer of agricultural land. In *Property in Land*,¹⁴⁴ Ellickson examines several advantages and disadvantages of an unfettered speculative market in agricultural land.¹⁴⁵

Ellickson begins with a list of three advantages of free commerce in land. First, the uninhibited sale of agricultural property would tend to redistribute land to those who could make the most

140. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1111-15 (1972); Richard A. Epstein, *Why Restrain Alienation?*, 85 Colum. L. Rev. 970 (1985); Margaret J. Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum. L. Rev. 931 (1985).

141. See, e.g., Curtis J. Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 Brook. L. Rev. 1239 (1989); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741 (1989); Margaret Jane Radin, *Residential Rent Control*, 15 Phil. & Pub. Aff. 350 (1986).

142. See, e.g., Roger D. Blair & David L. Kaserman, *Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 Yale J. on Reg. 403 (1991); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 Geo. Wash. L. Rev. 1 (1989).

143. See, e.g., Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59 (1987); J. Robert S. Prichard, *A Market for Babies?*, 34 U. Toronto L.J. 341, 347-57 (1984).

144. Robert Ellickson, *Property in Land*, 102 Yale L.J. 1315 (1992).

145. *Id.* at 1375-80. Ellickson's thesis, in this section, is primarily historical. He argues that while cultures find wholesale bans useful in their primitive phase, as they progress they turn toward the economic advantages of free commerce in land. The twentieth century revival of Aztec alienation restraints in Mexico appears to contradict this thesis. Ellickson responds that the widespread pattern of violations of the prohibition against rental, see *supra* notes 113-16 and accompanying text, demonstrates "how doggedly members of a post-literate society are likely to resist imposition of restraints on alienation." Ellickson, *supra* note 144, at 1380.

profitable use of it.¹⁴⁶ Second, the ability to sell land would provide an incentive for owners without cherished heirs to take care of the land.¹⁴⁷ Third, free transferability of land would be necessary if the property is to serve as collateral for a loan.¹⁴⁸ Despite these advantages, Ellickson recognizes the appropriateness, at least in "preliterate societies," of restraints on alienation.¹⁴⁹

Ellickson acknowledges that an unrestrained market in land would tend to break down communal ties.¹⁵⁰ As new purchasers replace long-time residents, social institutions, such as common defense, which are based on kinship ties, would no longer be able to function.¹⁵¹ Close-knit societies would feel these externalities — that is, the effects of a transaction upon persons not party to the transaction — more severely.

Ellickson, however, neglects to mention two other sets of arguments for restraining alienation, neither of which focuses explicitly on externalities. The first group of arguments promotes the prohibition of certain commercial transactions that harm one or more of the parties themselves. The contract law principle of unconscionability,¹⁵² for instance, flows from such considerations. Paternalistic justifications reject the notion that a given individual always knows what is best for him or her.¹⁵³ The second group makes

146. "Blackstone concisely stated the basic rationale for consensual alienability of land: '[I]t was found that what became inconvenient or useless to one man was highly convenient and useful to another Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale'" *Id.* at 1375 (quoting 2 William Blackstone, Commentaries *9).

147. This particular argument for alienability builds on an earlier argument for perpetual title as a means of providing incentives to a landholder to take care of her land. As the landholder reaches the end of her life, this motivation continues insofar as she has loved ones to whom she can transfer the land upon her death. If she has no such "bequest motive," as Ellickson calls it, she can still reap the long-term benefit of her care of the land only if she is allowed to sell the land and convert it to cash which she can use during her lifetime. *Id.* at 1368-71, 1375.

148. *Id.* at 1375.

149. *Id.*

150. *Id.* at 1376, 1378.

151. *Id.* at 1376.

152. U.C.C. § 2-302(1) (1981). Karl Llewellyn, the drafter of article 2 of the Uniform Commercial Code, borrowed this concept from Native American notions of fair dealing. See Karl N. Llewellyn, *The Cheyenne Way* (1941).

153. *But see* Calabresi & Melamed, *supra* note 140, at 1113 (arguing that certain notions of paternalism are completely compatible with the maximization of individual interests).

no explicit reference to the consequences of the transaction. Instead, this deontological critique rejects certain kinds of commerce because they degrade that which is being sold.¹⁵⁴

The legal literature provides an analysis of both the efficiency considerations favoring free trade as well as the possible harms occasioned by an unfettered market. Anyone formulating a policy on the proper role, if any, of alienation restraints must weigh the advantages of the market against its disadvantages. Inevitably, there will be trade-offs. In restructuring the *ejido*, the Salinas administration opted to eliminate many of the protective restrictions on the alienability of *ejidal* land. In so doing, it has exposed indigenous communities to the hazards of a speculative market in land.

D. Salinas' Counter-Reform: The 1992 Revisions to Article 27

The sweeping changes of Article 27 can be grouped into two categories: first, the end of land redistribution to landless communities, and, second, the opening of a market in agricultural land. The first set of revisions consisted of the deletion of all sections promising and regulating the future redistribution of agrarian land.¹⁵⁵ The second involved the lifting of restrictions on both *ejidatarios'* ability to transfer rural land and commercial entities' capacity to own it.¹⁵⁶ The first group of changes formally ended a program of land redistribution that

154. These arguments are most frequently put forward in debates over the propriety of a market in human body parts or the legalization of baby-selling. *See supra* notes 142, 143.

155. Const. art. 27 §§ X-XIV, XVI (repealed 1992) (Mex.).

156. The Decree of January 3, 1992, reversed the longstanding prohibition of ownership of rural lands by private, for-profit corporations. The new corporate restrictions read:

Commercial stock companies may be owners of rural lands but only to the extent necessary for their purpose. The regulatory law will establish the limits of territorial property that corporations engaged in agricultural, livestock and forestry activities will be allowed to have, as well as the capital structure and the minimum number of stockholders, and the extent that the corporation's property per stockholder may be adjusted in relation to the limits of small property

Const. art. 27 § IV (Mex.). For an analysis of the remaining restrictions on corporate land ownership, see Adriana de Aguinaga, *The New Agrarian Law — Mexico's Way Out*, 24 St. Mary's L.J. 883, 890-93 (1993).

had substantively ended with the departure of Cárdenas in 1940.¹⁵⁷ The second set of amendments, on the other hand, made possible a market in agricultural land that might ultimately destroy Indian culture in Mexico.

Pursuant to this second category of 1992 amendments to Article 27, *ejidatarios* are able to transfer their land in any one of three ways. First, they can rent or even sell their land to other persons in the *ejido*.¹⁵⁸ Second, they can enter into joint venture agreements with multinational food corporations.¹⁵⁹ Finally, they can offer the rights to work their parcels as security for agricultural loans.¹⁶⁰ Each of these forms of transfer can be analyzed in terms of the theoretical arguments advanced against unrestrained alienability: externalities, paternalistic considerations and violations of dignity. While the first set of transfers — those within the *ejido* community — substantially avoid these criticisms, the second and third group of transactions create serious problems by involving outsiders.

1. Voluntary Transfer to Other *Ejidatarios*

The current agrarian regulatory scheme imposes the fewest restrictions on *ejidatarios'* ability to sell or rent to other residents of the *ejido*. Like the two types of transfer that involve persons outside the communities, sales between *ejidatarios* might offend those who claim that land is too sacred to be traded for money.¹⁶¹ Since both parties, however, would be members of the same indigenous

157. Morett S., *supra* note 113, at 27-31.

158. Const. art. 27, § VII (Mex.); Ley Agraria arts. 79, 80, D.O., Feb. 26, 1992 (Mex.).

159. Const. art. 27, § VII (Mex.); Ley Agraria arts. 125-33, D.O., Feb. 26, 1992 (Mex.).

160. Const. art. 27, § VII (Mex.); Ley Agraria art. 46, D.O., Feb. 26, 1992 (Mex.).

161.

The president in Washington sends word that he wishes to buy our land. But how can you buy or sell the sky? The land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of water, how can you buy them?

Paul S. Wilson, *What Chief Seattle Said*, 22 *Env'tl. L.* 1451, 1458 n.36 (1992) (letter from Chief Seattle, head of the Duwamish & Squamish Indians of Puget Sound to President Franklin Pierce (1855)) (No original letter has ever been located. Although other quotes attributed to Chief Seattle actually originated decades after his death, this particular passage is believed to be original.).

community, it seems less likely that their behavior would be out of step with community values than if one of them represented business interests outside the community. Although *ejidatarios* do not need to seek approval from the leaders of the *ejido* in order to rent their parcels,¹⁶² these community authorities would be involved in any sale from one *ejidatario* to another¹⁶³ and thus could obstruct the process if it violated communal norms *per se*.

The possibility that the transferring *ejidatario* might be coerced or tricked into an unconscionable transaction also seems more remote. Since persons within the same *ejido* would tend to have comparable financial resources and similar approaches to commercial affairs, transfers among *ejidatarios* would not give rise to strong paternalistic objections. Acknowledging that the possibility of oppression from within the community still exists, the law, at both the statutory and constitutional levels, limits the amount any one *ejidatario* can own to five percent of the total land of the *ejido*.¹⁶⁴

In the same manner, transfers among *ejidatarios* would not threaten the integrity of the community as would sales to outsiders. By preserving the homogeneity of the community, a sale from one *ejidatario* to another would allow the transferor to sell an otherwise useless piece of land without breaking up the close social ties of the community.

Thus, the first of the three groups of transactions allowed by the 1992 revisions gives necessary flexibility to the *ejido* system without sacrificing the basic stability and integrity of the community. An intracommunal market can provide many of the economic benefits that Ellickson associates with commerce in land.¹⁶⁵ Only when the law opens that market to a vastly different commercial reality does the indigenous culture of the *ejido* community necessarily suffer.

2. Voluntary Transfer to Joint Ventures

Proponents of the possibilities of *ejidal* development through joint ventures with agribusiness point to the example of San José de

162. Ley Agraria art. 79, D.O., Feb. 26, 1992 (Mex.).

163. Ley Agraria art. 80, D.O., Feb. 26, 1992 (Mex.).

164. Const. art. 27, § VII (Mex.); Ley Agraria arts. 125-33, D.O., Feb. 26, 1992 (Mex.).

165. For a list of Ellickson's benefits, see *supra* notes 144-51 and accompanying text. For a discussion of the ability of an intracommunal land market to provide them, see *infra* part IV.A.

Vaquérias. Vaquérias was once an *ejido* wrestling with the same problems of lack of credit for seed and machinery that other *ejidos* faced. In 1990, however, Alberto Santos, the former head of Gamesa, Mexico's largest cookie manufacturer, invested six million dollars in Vaquérias.¹⁶⁶ Under a joint venture agreement, farmers who opted in would grow wheat, beans, and sorghum, splitting the profits fifty-fifty with the investor. The government, far from condemning the arrangement as contrary to law, agreed to match the private investment.¹⁶⁷ Production rose seventy percent in the first year. The sale of the first wheat crop earned Vaquérias more than a million dollars, half of which went to the 340 *ejidatarios* who joined the venture.¹⁶⁸

While Vaquérias seems to hold the promise of good times to come, the realities of agrarian development show the vision to be somewhat illusory. The government's matching subsidy was the key to the success of the project. Critics of the reform have pointed out that international food companies will court only those *ejidos* that have the access to water, roads, and power necessary to turn a profit.¹⁶⁹ *Ejidos* with little to offer potential investors may be able to secure joint venture agreements only by accepting considerably less attractive terms. Such joint venture agreements would most likely be little more than work agreements in which the former owners would turn over their rights to farm their parcels for the opportunity to receive the minimum wage allowed by law.

These new ventures would resemble the *haciendas* of the pre-Revolution period. Indians would live and work on land essentially controlled by others. The vast gap — both in financial resources and commercial sophistication — between the *ejidatarios* and the representatives of agricultural investors would raise grave concerns over the substantive justice of the resulting contracts. As part of such arrangements, *ejidatarios* might, for instance, use chemical pesticides previously unavailable to them; these noxious chemicals could have grave consequences for *ejidatarios* who do not enter into the ventures, as well as for those who do. Associations between *ejidatarios* and agribusiness expose the former to dangers inherent in the encounter

166. Dudley Althaus, *Mexico Woos Seed Money Back to Farm*, Houston Chron., Nov. 24, 1991, (Business), at 1.

167. *Id.*

168. *All Things Considered*, *supra* note 120.

169. *Id.*

between radically different cultures with radically different resource levels.

3. Involuntary Transfer to Creditors

For each *ejidatario* who transfers his land voluntarily, many more will lose their lands by defaulting on agricultural loans. Credit is an absolute necessity in agricultural production; without it, farmers cannot buy seed and other necessary production materials, or even sustain themselves and their families until harvest. Before *ejidal* lands became alienable, the penalties for default were slight.¹⁷⁰ Although an *ejidatario* could lose his land for violating some provision of agrarian regulation, such as the prohibition against renting or hiring labor,¹⁷¹ he would never have lost it for failure to pay a debt. Now, *ejidatarios* will get their loans at the risk of their lands. The resulting forfeitures will have grave consequences for both the defaulting *ejidatarios* and their neighbors.

Technically, under the new scheme, an *ejidatario* seeking money for seed or tools could pledge the right to work his parcel as security for a loan.¹⁷² If he failed to repay the loan, the creditor would be able to claim only the right to farm the property and sell its crops. An Indian forced off his land would lose his vital link to the community.¹⁷³ Faced with the prospect of being essentially landless for up to thirty years, a *campesino* in default would most likely abandon his reversionary interest and move to the city.

The other members of the *ejido* community would also suffer from the loss occasioned by the securitization of *ejidal* land use rights. Even an *ejido* that lost only a relatively small amount of its land to creditors could find its way of life disrupted and the integrity of its indigenous institutions broken by the presence of outside commercial

170. Heath, *supra* note 117, at 700.

171. See *supra* notes 113-16 and accompanying text.

172. *Id.*

173.

A plot of land or "milpa" has been described as an Indian's "symbol of the right to live." For many Ch'ol, Tzeltal and Tzotzil Indians in Chiapas, land ownership is a condition of "Indian-ness." Those without usually leave their villages, severing ancestral ties, religious customs and languages to begin the process of "mestizaje" — Westernization.

interests. Villages once completely comprised of and controlled by a people of common traditions and beliefs would become a checkerboard of plots still owned by villagers and those controlled by banks.

In studying the likely consequences¹⁷⁴ of the legalization of all three types of transactions — transfers among *ejidatarios*, joint venture agreements with agribusiness, and mortgages to private financiers — the critical issue that arises is not the *ejidatarios*' ability to transfer land, but rather who should be allowed to take it from them. Insofar as it allows enterprise within the *ejido* community, the Salinas administration's counter-reform permits reasonable adjustments among *ejidatarios* without creating serious threats to indigenous culture or land tenure. By allowing private banks and multinational food corporations to come into the *ejidos* to make business arrangements with certain *ejidatarios* and compete with others, however, the 1992 amendments open the door to unconscionable arrangements that will ultimately result in the dispossession and migration of Indians from the rural areas and the subjugation of those who remain behind.

IV. INDIGENOUS LAND TENURE AFTER THE 1992 COUNTER-REFORM

A. A Sustainable Market in *Ejido* Land

While the financing schemes made possible by the 1992 counter-reform will destroy communal indigenous land tenure in favor of agribusiness,¹⁷⁵ a less drastic revision would make possible alternative methods of capital infusion that would develop *ejidos* without destroying their essential nature. For instance, *ejidatarios* who take out loans using the subsequent harvest as collateral neither endanger the long-term security of their landholdings nor threaten the communal stability of the *ejido*. Even those transactions that involve transfer or risk of transfer of actual land interests need not wreck the lives and culture of *ejidatarios*. In order to prevent these disastrous communal consequences, however, *ejidal* regulation must limit such commerce to the *ejido* community itself. This restricted market in land

174. Although the changes in policy with regard to *ejidal* alienability are already two years old, their implementation requires the distribution of new certificates of title, which — unsurprisingly, see *supra* note 108 and accompanying text — has “gone much slower than many expected.” Damian Fraser, *Survey of Mexico*, *Fin. Times* (London), Nov. 10, 1993, at IX.

175. See *supra* part III.D.

would still allow for the three benefits listed by Ellickson: redistribution of land from those who do not want it to those who do, incentives for childless owners to care for and develop the land, and the ability to use the land as collateral for a loan.¹⁷⁶

By legalizing rental among *ejidatarios*, the agrarian law allows for efficient redistribution within the *ejido* community. As described above,¹⁷⁷ many *ejidatarios* have been unable to develop their plots singlehandedly because they lacked vital resources. Others rented their land out to fellow *ejidatarios* despite the formal illegality of that practice.¹⁷⁸ Now that the rental market within the *ejido* has been legitimated, *ejidatarios* can make work and sharecropping arrangements among themselves without aggravating their insecurity of title.¹⁷⁹ An *ejidatario* who is considering a move to the city will make that choice in the context of the common good of the *ejido*. If other members of the *ejido* can make better use of the land than he, the market within the *ejido* will encourage him to rent it. Legalized rental arrangements will increase the efficiency of the community's use of resources without allowing those vital resources to pass out of the community into the hands of outside commercial interests.

Sale of land within the *ejido* will solve problems associated with intergenerational transfers of land. By being allowed to sell his land to another member of his community, an *ejidatario* without children to whom he can leave his land will still be able to realize some gain for the investment of his labor in developing the parcel. The proceeds of the sale can serve as a form of annuity for him in his old age.¹⁸⁰ Thus, even though he has no "bequest motive"¹⁸¹ to take care of his land, his ability to convert it to his benefit while he lives will give him the incentive to develop his property. The ability to purchase land from older *ejidatarios* will offer younger members of the community who cannot look to inherit sufficient land the chance to remain as farmers in the *ejido*. In cases where an aging *ejidatario* has too many potential heirs to permit efficient yet fair distribution of his

176. See *supra* notes 145-48 and accompanying text.

177. See *supra* part III.A.

178. See *supra* notes 113-15 and accompanying text.

179. See *supra* part III.A.2.

180. Ellickson, *supra* note 144, at 1375.

181. *Id.*

land,¹⁸² sale of the land and division of the proceeds among the beneficiaries will allow the next generation to avoid the trap of excessive subdivision of land.

Thus far, this Note has discussed how rental and sales between *ejidatarios* respectively address the first two of Ellickson's considerations — efficient redistribution and incentive to develop. A non-destructive market in land will not be able to realize the third benefit of transferability, the owner's capacity to mortgage it, as easily.

Pursuant to the 1992 amendments to Article 27, the new Agrarian Law permits the mortgage of *ejidal* lands. The costs to defaulting *ejidatarios* and their communities are sure to be significant.¹⁸³ If, however, the debtor default remedies available to outside creditors were restricted to transfer of the debtor's land to a paying *ejidatario*, then access to private financing might be available without destroying the community.

Under such a revised regulatory scheme, an *ejidatario* could pledge the right to farm his land over a certain period as he can under the current law. If he were to default, however, the lending bank would acquire only the right to transfer the land to another *ejidatario* at the market rate within the community. Thus, while forfeiture would still hurt defaulting *ejidatarios*, the community would not suffer the social upheaval involved in seeing its property go to outsiders.

Under the revision to the legal framework of the *ejido* suggested here, both *ejidatarios* and creditors would be able to liquidate the value of *ejidal* land. The cash or in-kind¹⁸⁴ value of the land would be set within the community according to the land's utility to other members of the community. This restriction on the potential list of transferees protects the community's close-knit social structures from eradication by the agroindustrial culture of multinational food corporations.

182. Excessive subdivision of lands might render them too small to sustain any one family. A family that received land from several sources could have its plots in different parts of the *ejido*.

183. See *supra* part III.D.3.

184. Sharecropping, in which a tenant farmer offers some share of the harvest to the landlord as rent, is the most common form of in-kind rental agreement.

B. ¡Viva Zapata!¹⁸⁵ — *Campesino* Demands for Land Justice

Although the Zapatistas' military occupation of major towns in Chiapas was short-lived,¹⁸⁶ their uprising has become a dialogue of public opinion¹⁸⁷ and has inspired nonviolent direct action by peasant groups.¹⁸⁸ Some have suggested that Zapata rides again in this election year of 1994¹⁸⁹ and that, after sixty-five years of uninterrupted control, the Institutional Revolutionary Party may finally be turned out of power in Mexico.¹⁹⁰

Indigenous groups in Chiapas, having perceived the threat to their lifestyle, have demanded a reversal of the Salinas administration's modernization program. Some of these peasant farmers have expressed their concern by joining the Zapatista army. Many, however, have taken advantage of the opportunity presented by the guerilla uprising to make it clear, through nonviolent means, that only fundamental economic and political change will bring peace to the countryside. The heritage of the indigenous farmer stretches back for centuries. If, through privatization, the international agricultural market is to destroy this legacy now, it will not do so quietly.

V. CONCLUSION

The *ejido* structure, as established by Article 27 and the agrarian regulation prior to 1992, represented the reemergence of the Aztec *capullalli*. This ancient indigenous tradition of communal relationship to the land survived four centuries of assault by private forms of ownership. Although the *encomienda* threatened to displace indigenous landholdings completely, Spain enacted effective protections; the struggle between the indigenous *pueblo* and the *hacienda*, successor to the *encomienda*, continued until legislation in

185. Spanish for "Long live Zapata!"

186. Wearne, *supra* note 173, at 15.

187. Tim Golden, *The Voice of the Rebels Has Mexicans in His Spell*, N.Y. Times, Feb. 8, 1994, at A3.

188. Tim Golden, 'Awakened' Peasant Farmers Overrunning Mexican Towns, N.Y. Times, Feb. 9, 1994, at A1.

189. Anthony DePalma, *In the War Cry of the Indians, Zapata Rides Again*, N.Y. Times, Jan. 27, 1994, at A4.

190. Nancy Nusser & Arthur Brice, *Did Mexican Rebellion Open Door to Political Turnover? Ruling Party Faces Real Test*, Atlanta Const., Feb. 5, 1994, at A13.

the latter half of the nineteenth century tipped the scale in favor of the large private landholdings.

More than a mere legacy of an ancient farming system, the *ejido* serves as the only means by which indigenous *campesinos* will be able to participate meaningfully in Mexico's agricultural future. The 1992 revisions to Article 27 have marked the return to the privatization policies embodied in the *Ley Lerdo* and the Constitution of 1857. The removal of the legal restraints on a speculative market in agricultural property will result in the dispossession of hundreds of thousands of indigenous farmers who will emigrate to the cities of Mexico and the United States. The loss of the *ejido* will effectively mean the end of indigenous agriculture — and, thereby, the end of the indigenous way of life — in Mexico.

The communal nature of *ejidal* lands must be protected by means of appropriate restraints on alienation. A market in land confined to the limits of the communities themselves would allow *campesinos* important flexibility in arranging production without exposing them to dispossession by outside interests. At the beginning of 1992, when the Salinas counter-reform became law, these changes to the nature of the *ejido* seemed irrevocable. The uprising in Chiapas, however, has brought new attention to the concerns of indigenous *campesinos* throughout Mexico, and Zapata's struggle for land justice continues.