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ORIGINS OF THE SOCIAL FUNCTION OF PROPERTY IN CHILE

*M.C. Mirow**

One may say that in fact the concept of property as a subjective right disappears, to be replaced by the concept of property as a social function.

Professor Léon Duguit, 1923¹

One may say that in fact the concept of property as a subjective right disappears, to be replaced by the concept of property as a social function.

President Arturo Alessandri, 1925²

INTRODUCTION

These identical passages indicate the influence that the thought of Léon Duguit had on President Alessandri as he guided the drafting of the Chilean Constitution of 1925 and its provision on property. Since the 1920s, numerous countries in Latin America have promulgated constitutions that adopt a definition of property that incorporates a social function or social

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1. “*On peut dire qu’en fait la conception de la propriété droit subjectif disparaît pour faire place à la conception de la propriété fonction sociale.*” 3 LÉON DUGUIT, *TRAITE DE DROIT CONSTITUTIONNEL* 618 (2d ed. 1923).

2. “*Se puede decir que en el hecho el concepto de la propiedad como derecho subjetivo desaparece, para ser reemplazado por el concepto de la propiedad como función social.*” MINISTERIO DEL INTERIOR, *ACTAS OFICIALES DE LAS SESIONES CELEBRADAS POR LA COMISIÓN Y SUBCOMISIONES ENCARGADAS DEL ESTUDIO DEL PROYECTO DE NUEVA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA* 116 (1925) [hereinafter *ACTAS*] (citing Léon Duguit, as emphasized in the reported text).

obligation norm.³ Scholars familiar with the sweeping social legislation of the Mexican Constitution of 1917 have speculated that it served as the intellectual source for other Latin American constitutions that define property in terms of a social function.⁴ In fact, the origin of these provisions in the Southern Cone was not an intellectual imposition from the North, in this case Mexico, but rather was the product of the transmission of European, notably French, ideas about the social function of property. The main source of these ideas was Duguit, a law professor from Bordeaux, who wrote and lectured extensively on law and constitutional theory in the early 1900s.⁵ Duguit's lectures in Buenos Aires in 1911 and their

3. See M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 205 (2004).

4. For example, Article 27 of the Mexican Constitution of 1917 was aimed squarely at the expropriation of large estates and at mining companies who owned subsoil rights. It led the way to widespread agrarian reform in Mexico. See GUILLERMO FLORIS MARGADANT S., *INTRODUCCION A LA HISTORIA DEL DERECHO MEXICANO* 194, 197 (1990); see, e.g., David S. Clark, *Judicial Protection of the Constitution in Latin America*, 2 *HASTINGS CONST. L.Q.* 405, 415 (1975) (noting the importance of the Mexican Constitution of 1917 in the region's constitutional development and its adoption of the "concept that private property must serve a social function"). Clark, however, does not jump to the conclusion that the Mexican Constitution directly influenced the Chilean Constitution on this point. Thomas Ankersen and Thomas Ruppert imply a closer causal relationship between Mexico and the other countries of Latin America adopting social function language. Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 *TUL. ENVTL. L.J.* 69, 95–96 (2006) ("In Latin America, the Mexican Revolution coincided with this era and its 1917 constitution . . . represents the world's first example of what has been called 'social constitutionalism.' Following Mexico, other states in Europe and Latin America explicitly incorporated the Duguitian idea of social function in their constitutions."). Mexico is "where the Social Function Doctrine has its Latin American roots." *Id.* at 116. Ankersen and Ruppert are incorrect when they speculate that the Mexican Constitution of 1917 "did not use the phrase 'social function' since it was not until two years later, in 1919, did Léon Duguit use the term in his writing." *Id.* at 101 n.190; see M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT'L L.* 191, 199 (2010). There is even mention of a Spanish translation of Duguit's *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* from Madrid in 1915. Charles A. Hale, *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 *LAW & HIST. REV.* 257, 276 n.45 (2000). Abelardo Levaggi notes a Spanish translation from 1912. Abelardo Levaggi, *Catedráticos Europeos en la Facultad de Derecho Alrededor del Centenario* 17 n.65 (2011) (unpublished manuscript) (on file with the Fordham Law Review). For a discussion of Spanish editions of Duguit's work, including mention of a Spanish edition of *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON*, see Tomás-Ramón Fernández, *Duguit lu, l'Espagne*, in *AUTOUR DE LÉON DUGUIT: COLLOQUE COMMÉMORATIF DU 150E ANNIVERSAIRE DE LA NAISSANCE DU DOYEN LÉON DUGUIT, BORDEAUX, 29–30 MAI 2009*, at 255–63 (Fabrice Melleray ed., 2011) [hereinafter *AUTOUR DE LÉON DUGUIT*]. The reason for Mexico not adopting this phrase in this constitution must lie elsewhere, perhaps even in the mere unavailability of Duguit's work. Indeed, even after the Mexican Constitution of 1917, Mexico was subject to European thought on socializing its law. See José Ramón Narváez Hernández, *El Código Privado-Social: Influencia de Francesco Cosentini en el Código Civil Mexicano de 1928*, 16 *ANUARIO MEXICANO DE HISTORIA DEL DERECHO* 201, 201–26 (2004) (Mex.); Juan Carlos Marín G., *Ochenta años desde la publicación del Código Civil del Distrito Federal: un Código privado-social (1928–2008)* (2011) (unpublished manuscript) (on file with the Fordham Law Review).

5. See *DICTIONNAIRE HISTORIQUE DES JURISTES FRANÇAIS (XIII-XXE SIÈCLE)*, at 271–72 (Patrick Arabeyre et al. eds., 2007); José Luis Monereo Pérez & José Calvo Gonzáles, *Léon Duguit (1859–1928): Jurista de una Sociedad en Transformación*, 4 *REVISTA DE DERECHO*

subsequent publication are the earliest structured exposition of the social function of property.⁶ These lectures spread the idea of the social function of property to many areas of the world and they produced direct effects in the Southern Cone. In 1925, Chile was one of the first countries in Latin America to adopt a social function limitation on property.⁷

This Article traces the importance of Duguit's work in the construction of the property provisions of the Chilean Constitution of 1925. It concludes that Duguit was the most important source for the idea of the social function of property in Chile. From the moment of its introduction into Chile, Duguit's terminology was appropriated and expanded beyond its original scope for political purposes. This redefinition of the social function of property continued throughout the Chilean use of the term in the twentieth century and was used for political ends by leaders as diverse as Salvador Allende and Augusto Pinochet.⁸

CONSTITUCIONAL EUROPEO 483, 483–85 (2005) (Spain). See generally AUTOUR DE LÉON DUGUIT, *supra* note 4. Others have noted, in passing, the influence of Léon Duguit on President Alessandri. See, e.g., Joseph R. Thome, *Land Rights and Agrarian Reform: Latin American and South African Perspectives*, in GOOD GOVERNMENT AND LAW 201, 209 (Julio Faundez ed., 1997).

6. Duguit developed the idea of the social function of property from a number of French antiformalist thinkers who advanced the field of sociological jurisprudence. He borrowed substantially from the work of French doctoral student Henri Hayem. See Mirow, *supra* note 4, at 216–19. Duguit came to the Law Faculty of the University of Buenos Aires as part of a series of invitations to European law professors to celebrate the centenary of the May Revolution during the first decades of the twentieth century. Others in the series, also leaving their mark on Argentine law, were Italian penalist Enrico Ferri, Spanish legal historian Rafael Altamira y Crevea, and Spanish public law specialist Adolfo Posada. Levaggi, *supra* note 4, at 1. For Duguit's influence in the United States, see Carol Harlow, *The Influence of Léon Duguit on Anglo-American Legal Thought*, in AUTOUR DE LÉON DUGUIT, *supra* note 4, at 227–54; Mirow, *supra* note 4, at 196.

7. Reading the text of Article 38 of the Peruvian Constitution of 1920, I disagree with Ankersen and Ruppert's assessment that "[t]he Social Function Doctrine first appeared in Peru's 1920 constitution, and was maintained in its 1933 Constitution." Ankersen & Ruppert, *supra* note 4, at 115. The provision from 1920 states, "Property is inviolable, whether it is material, intellectual, literary or artistic." ("*La propiedad es inviolable bien sea material, intelectual, literaria o artística.*"). CONSTITUCIÓN PARA LA REPÚBLICA DEL PERÚ (1920) art. 38. This guarantee is followed by standard language concerning expropriation. See *id.* I agree that the Peruvian Constitution of 1933 contains a clear adoption of the social function of property in its Article 34: "Property ought to be used in harmony with the social interest. The law shall fix the limits and extent of the right of property." ("*La propiedad debe usarse en armonía con el interés social. La ley fijará los límites y modalidades del derecho de propiedad.*"). CONSTITUCIÓN POLÍTICA DEL PERÚ (1933) art. 34. The Ecuadorian Constitution of 1929 is another early example. Article 151(14) of this constitution reads that it protects "[t]he right of property with the restrictions that necessity and social progress require." ("*El derecho de propiedad, con las restricciones que exijan las necesidades y el progreso sociales.*"). CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR (1929) art. 151(14). For the social function in Colombia's Constitution of 1936 and later developments, see David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-liberal Constitutionalism*, LAW & CONTEMP. PROBS., Autumn 2000, at 83, 91–99.

8. Similar contradictory or politically self-serving definitions of the social function of property in other countries of Latin America may be noted in Daniel Bonilla, *Liberalism and Property in Colombia: Property as a Right and Property as a Social Function*, 80 FORDHAM L. REV. 1135 (2011).

I. CHILEAN POLITICS AND THE CONSTITUTION OF 1925

The constitutional perceptions of property experienced a profound shift from the beginning of the Republic in the early nineteenth century to the early decades of the twentieth century. The Chilean Constitution of 1833 provided a classically liberal conception of inviolable private property. Under the Constitution of 1833, the state could only take property for a public purpose and with prior just indemnification.⁹ Perceptions of property had changed drastically by 1925 when the Chilean Constitution was debated and promulgated. While repeating the guarantees of private property, new language in the constitution submits property to “the maintenance and progress of the social order.”¹⁰

In many ways, the debate over the social function norm of property was only one instance of both regional and global trends towards “The Social” in law and legal thought in this period.¹¹ These issues found full expression in Chilean politics and the country’s attempt to describe property on a constitutional level. Indeed, the debate over the social function of property

9. The relevant provision from the Constitution of 1833 reads:

Artículo 12. La Constitución asegura a todos los habitantes de la República:

.....

(5) *La inviolabilidad de todas las propiedades, sin distinción de las que pertenezcan a particulares o comunidades, i sin que nadie pueda ser privado de la de su dominio, ni de una parte de ella por pequeña que sea, o del derecho que a ella tuviere, sino en virtud de sentencia judicial; salvo el caso en que la utilidad del Estado, calificada por una lei, exija el uso o enajenación de alguna; lo que tendrá lugar dándose previamente al dueño la indemnización que se ajustare con él, o se avaluare a juicio de hombres buenos*

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1833) art. 12(5). For a translation of the text into English, see *infra* text accompanying note 47.

10. The text from the Constitution of 1925 reads:

Artículo 10. La Constitución asegura a todos los habitantes de la República:

.....

(10) *La inviolabilidad de todas las propiedades, sin distincion alguna. Nadie puede ser privado de la de su dominio, ni de una parte de ella, o del derecho que a ella tuviere, sino en virtud de sentencia judicial o de espropiacion por razon de utilidad pública, calificada por una lei. En este caso, se dará previamente al dueño la indemnización que se ajuste con él o que se determine en el juicio correspondiente.*

El ejercicio del derecho de propiedad está sometido a las limitaciones o reglas que exijan el mantenimiento y el progreso del orden social, y, en tal sentido, podrá la ley imponerle obligaciones o servidumbres de utilidad pública en favor de los intereses generales del Estado, de la salud de los ciudadanos y de la salubridad pública

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1925) art. 10(10). Later developments in Chile led to an even stronger assertion of the social function of property. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(24). For the text of Article 19(24) of the 1980 Chilean Constitution, see *infra* note 230.

11. Mario Diaz Cruz, *Rule of Law—Quo Vadis? Vim Vi Repellere Licet*, 5 COMP. JURID. REV. 249, 256–266 (1968); Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 648–74 (2003); Farid Lekéal, *Entre droit civil et droit social: antimonie ou complémentarité? Quelques décennies d’incertitudes*, 88 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 523, 523–61 (2010) (Fr.); Moises Poblete Troncoso, *The Social Content of Latin American Constitutions*, 21 SOC. FORCES 100, 101–02 (1942–1943) (surveying limitations on *latifundias* and uncultivated lands in Latin American constitutions).

was one of the primary battlegrounds in an ideological war over the political direction of the entire country. Three major aspects guided political development in Chile during the decades leading to the Constitutional Convention of 1925. First, electoral reforms led to a parliamentary form of government that produced a period of political stalemates and ministerial intransigence. Second, workers organized and created effective unions and a new class mentality. Third, the military intervened in the political process and President Alessandri was both ousted and returned to power through military force in a short period.

Electoral reforms in 1891 led to a parliamentary system of democracy in which the president and the ministers were elected through a parliamentary majority. With stronger power in the Congress, this parliamentary system often replaced ministers and no particular minister could expect to stay in office more than a year.¹² One scholar has noted that during this parliamentary period, “congress forced an average of twenty ministerial changes per president.”¹³ This uncertainty in the political leadership of the country was accompanied by party empowerment and entrenchment resulting in one group of parties known as the “Coalition,” led by the Conservatives, and another group of parties known as the “Alliance,” led by the Radicals.¹⁴ Between the Radicals on the left and the Conservatives on the right, the Liberal Party took something of a middle position during the period. While the Conservatives apparently avoided any substantial splintering, the Radical party produced offshoots: Democrats in the 1890s, Socialist Workers in the 1910s, and Communists in the 1920s. In similar fashion, the Liberal party produced the Liberal Democrat party in the 1890s.¹⁵

This was also a period of substantial labor and social unrest. Unions of workers gained strength and effectively went on strike to gain concessions from management.¹⁶ Strikes or protests over prices sometimes became violent and at times the military needed to step in to subdue them.¹⁷ Deadlocked in its own internal political squabbles, the parliamentary government remained for the most part unresponsive.¹⁸ Although parties representing workers increased in power during the period, Conservatives and their allies were effective in stalling legislation to address aspects of what was broadly called “the social question.”¹⁹ The underlying concerns of these proposals were to re-emerge in the context of the debates on the

12. JOHN L. RECTOR, *THE HISTORY OF CHILE* 130 (2003).

13. *Id.*

14. *Id.*

15. SIMON COLLIER & WILLIAM F. SATER, *A HISTORY OF CHILE, 1808–2002*, at 193 (2d ed. 2004).

16. *Id.* at 195–96.

17. *Id.* at 196.

18. *Id.*

19. RECTOR, *supra* note 12, at 131.

social function of property and included systems of social welfare, workers' housing, and public health facilities.²⁰

Arturo Alessandri emerged as President in 1920, after being supported by one of two Liberal nominating conventions. Composed of Liberals, Radicals, and Democrats, the Alliance convention put Alessandri forth as a candidate.²¹ The Liberal Union convention, composed of Liberals, Liberal Democrats, and Nationals, selected Luis Barros Borgoño.²² When the Conservatives joined the Liberal Union, it took on the name National Union to support Barros Borgoño.²³ When Alessandri advanced to the presidency, he had been a Liberal deputy for Curicó and had been elected to the Senate for Tarapacá in 1915.²⁴ His presidency brought the hope of a stronger executive, the promise of social reform, responsive legislation, and a new constitution.²⁵ Although Conservatives in Congress effectively blocked these reforms, Alessandri was re-elected in 1924, but the impasse between President and Congress continued.²⁶ The election in 1924 realigned Congress along lines more amenable to the Alliance, but in September 1924, the military, with Conservative backing, stepped in to topple Alessandri's rule and to govern Chile.²⁷ Alessandri resigned, and a military and Conservative junta took control of the government.²⁸

At the beginning of 1925, a second coup led by junior officers who were more politically sympathetic to Alessandri and to the middle classes took power, and Alessandri returned to Santiago and the presidency on March 20, 1925.²⁹ Following his return to Chile, President Alessandri moved forward with his plan to address the "social question" and to draft a new constitution.³⁰ The social function of property was an important issue in the new constitution, but it was not the only pressing issue. Other main issues addressed were the structural problems resulting from the parliamentary system, the political stasis of the system, the socioeconomic aspects of Chile's cyclical nitrate industry, the relationship between the church and the state, and the creation of an electoral tribunal.³¹ These various issues surrounded property and its social function.

20. See Kimberly Stanton, *The Transformation of Political Regime: Chile's 1925 Constitution* 4 n.8 (Apr. 17–19, 1997) (paper delivered at meeting of the Latin American Studies Association, Guadalajara, Mexico), available at <http://lasa.international.pitt.edu/LASA97/stanton.pdf>.

21. See COLLIER & SATER, *supra* note 15, at 201.

22. See *id.*

23. See *id.*

24. See *id.*

25. See *id.* at 207, 209.

26. See *id.* at 209; RECTOR, *supra* note 12, at 131–32.

27. See COLLIER & SATER, *supra* note 15, at 209, 211.

28. See RECTOR, *supra* note 12, at 132.

29. See COLLIER & SATER, *supra* note 15, at 211–12; RECTOR, *supra* note 12, at 132.

30. ACTAS, *supra* note 2, at 11.

31. See Stanton, *supra* note 20, at 2–3, 12, 19.

II. CONTENT OF THE DEBATES OVER THE SOCIAL FUNCTION OF PROPERTY

In less than three weeks after his return in March 1925, Alessandri appointed a commission to reform the constitution.³² This consultative commission grew from about 50 to about 100 members with those having particular party allegiances identified as follows: 26 Radicals, 16 Liberals, 14 Conservatives, 14 Democrats, 10 Liberal Democrats, 6 Communists, and 2 Nationals.³³ Subcommittees, ranging from approximately 12 to 15 members with President Alessandri participating and presiding, carried out the actual work of examining the extant constitution and suggesting reform. The subcommittees met regularly from April 18, 1925, to August 3, 1925, and 33 of the sessions were published.³⁴ The published sessions run approximately 500 pages in length,³⁵ with over 50 of these pages dedicated to debates concerning the social function of property. These debates cover five full sessions and span about two weeks of deliberations.³⁶ The constitutional definition of property was one of the core areas of debate during the process of constitutional reform.

From 1833 until 1925, the constitutional status of property remained the same.³⁷ Property under the Constitution of 1833 was inviolable, and any taking of property by the state required a public purpose and indemnification.³⁸ This provision followed the classically liberal notions of property found in both the Anglo-American and Continental traditions. It is a view of property enshrined in the French Declaration of the Rights of Man,³⁹ in the French Civil Code of 1804 (Code Napoléon),⁴⁰ and in the writings of William Blackstone.⁴¹ It was this concept of property that

32. ACTAS, *supra* note 2, at 5. Although a fuller constituent assembly was contemplated, this body never met. Alessandri created two subcommittees. One subcommittee met three times and left no records. The other, the Subcommittee of Constitutional Reforms, carried out the drafting of the constitution. It appears that this method of proceeding was influenced by the military. See Stanton, *supra* note 20, at 7–10.

33. See COLLIER & SATER, *supra* note 15, at 213 n.6.

34. ACTAS, *supra* note 2, at 81–137.

35. *Id.* at 46–527.

36. *Id.* at 81–137.

37. ENRIQUE EVANS DE LA CUADRA, ESTATUTO CONSTITUCIONAL DEL DERECHO DE PROPIEDAD EN CHILE: LA LEY 16.615 DE 20 DE ENERO DE 1967, MODIFICATORIA DE LA CONSTITUCION POLITICA DEL ESTADO, at 11–12 (1967).

38. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1833) art. 12(5).

39. “Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.” DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 17 (Fr. 1789) (translation obtained from YALE LAW SCHOOL, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Nov. 16, 2011)).

40. “*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les réglemens.*” CODE CIVIL [C. CIV.] art. 544 (Fr.) (1804). “Property is the right to enjoy and to dispose of things in the most absolute manner, provided that one does not undertake a usage prohibited by law.” JOHN G. SPRANKLING, RAYMOND R. COLETTA & M.C. MIROW, GLOBAL ISSUES IN PROPERTY LAW 27 (2006).

41. Mirow, *supra* note 4, at 193–95. Chilean liberalism was informed by the liberalism of the Spanish Constitution of 1812 (the Constitution of Cádiz) and by French and English

French theorists Henri Hayem and Duguit rejected through their application of sociological approaches to law.⁴² Indeed, Duguit's lectures in Buenos Aires setting out the social function of property bore the title *General Transformations of Private Law Since the Code Napoléon*.⁴³ This title reveals that the French Civil Code was the starting place from which Duguit would chart the important changes in law, including property's shift towards its social function. On the level of Chilean civil law, the French Civil Code of 1804 was reflected in Andrés Bello's Civil Code for Chile of 1855. Bello's notes indicate that his Article 582 of the Chilean Civil Code corresponded to the French provision.⁴⁴ Bello's language is more elaborate, but asserts the same absolutist nature of property. It reads: "Dominion (which is also called property) is the real right in a corporal thing to enjoy and dispose of it arbitrarily, provided it is not against a law or against another right."⁴⁵ This definition of property in the Chilean Civil Code was the same in 1925 when the constitutional definition of property became a subject of scrutiny.⁴⁶ Thus, until the debates concerning the constitutional definition of property in 1925, views on the topic had remained stable, and property provisions in both public and private law had been subject to little examination. President Alessandri's return and the constitutional convention provided the moment for property to be reexamined in light of recent academic work on the topic and recent political events around the globe.

The Chilean Civil Code's idea of the owner's absolute right to use or not to use property was consistent with the provision on property found in the Chilean Constitution of 1833. This provision on property provided the springboard for debates concerning the nature of property for the Constitution of 1925. Article 12 of the Constitution of 1833 states:

The Constitution assures all inhabitants of the Republic:

....

writers. María Rosaria Stabili, *Jueces y Justicia en el Chile Liberal*, in *CONSTITUCIONALISMO Y ORDEN LIBERAL: AMÉRICA LATINA, 1850–1920*, at 228 n.5 (Marcello Carmagnani coord., 2000).

42. Mirow, *supra* note 4, at 200, 216.

43. LÉON DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* (2d ed. 1920).

44. Cód. Civ. art. 582 (Chile) (1855), in 12 ANDRÉS BELLO, *CÓDIGO CIVIL DE LA REPÚBLICA DE CHILE* 409 (1954).

45. "El dominio (que se llama también propiedad), es el derecho real en una cosa corporal, para gozar y disponer de ella arbitrariamente; no siendo contra ley o contra derecho ajeno." *Id.* For the influence of the Code Napoléon on Bello's work in codification, see M.C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 *LA. L. REV.* 291 (2001).

46. An edition of the Chilean Civil Code estimated to be from 1920–1929 contains the same language for Article 582. Cód. Civ. art. 582 (Chile) (1920–1929) in *CÓDIGOS DE CHILE* 213 (Eulojio Rojas Mery ed., 1st ed. n.d.) (estimated date obtained from OCLC catalog entry). The official version of the Chilean Civil Code from 1937 contains the same language for Article 582 with a footnote referring the reader to Art. 10(10) of the Constitution of 1925. Cód. Civ. art. 582 (Chile) (1937) in *CÓDIGOS DE LA REPÚBLICA DE CHILE* 80 (Edición oficial, Sociedad Imprenta y Litografía Universo, Valparaíso, 1937).

(5) The inviolability of all properties, without distinction of whether they belong to individuals or communities, and without which no one may be deprived of the property of his dominion, nor a part of it however small, or of the right which belongs to it, unless by virtue of judicial sentence; except in the case of the utility of the state, defined by statute, requiring the use or transfer of some of it; which will happen giving previously indemnity to the owner to compensate him or as valued by the judgment of good men.⁴⁷

Thus, until the debates on property commenced on May 12, 1925, there was a conceptual cohesion in Chilean law concerning property as expressed in the Civil Code and the Constitution of 1833.⁴⁸ Property was inviolable and subject to the arbitrary exercise of the owner. Takings of property by the state had to be for a public purpose and with just compensation to the owner.

The debates shattered this conceptual uniformity. Radicals sought to redefine the nature of property by appealing to the idea of property's social function.⁴⁹ Conservatives sought to maintain the language of the Constitution of 1833 by expressing their concerns about the consequences of a change.⁵⁰ Other members of the subcommittee sought some compromise. Members espousing property as a social function were Ramón Briones Luco (Radical), Nolasco Cárdenas (Democrat), Enrique Oyarzún (Radical), Manuel Hidalgo (Communist), and José Guillermo Guerra (Liberal Democrat). Members seeking a middle position were Arturo Alessandri Palma (President), Luis Barros Borgoño (Union Liberal), Guillermo Edwards Matte (Union Liberal), and Eliodoro Yáñez (Alliance Liberal). Members who were property absolutists were Romualdo Silva Cortés (Conservative), Domingo Amunátegui Solar (Alliance Liberal), and Francisco Vidal Garcés (Conservative).⁵¹ Over half of all members were aligned with the Liberal Alliance that backed President Alessandri in 1920.⁵²

A. Proponents of the Social Function of Property

President of the Radical Party and lawyer Ramón Briones Luco was the first to suggest changing the constitutional definition of property in Chile.⁵³

47. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1833) art. 12(5). For the Spanish text, see *supra* note 9.

48. ACTAS, *supra* note 2, at 81.

49. See *id.* at 81–137.

50. *Id.*

51. *Id.* Party affiliations are from Stanton, *supra* note 20, at 16 n.35. For a slightly different division of members into reformers and non-reformers, see ENRIQUE BRAHM GARCÍA, PROPIEDAD SIN LIBERTAD: CHILE 1925–1973, at 34–35 (1999). For general biographical information, see JORDI FUENTES & LIA CORTES, DICCIONARIO POLITICO DE CHILE (1810–1966), at 74 (1967) (Briones Luco); *id.* at 84 (Cardenas Avendaño); *id.* at 368 (Oyarzun Mondaca); *id.* at 237 (Hidalgo Plaza); *id.* at 24–27 (Alessandri Palma); *id.* at 56 (Barros Borgoño); *id.* at 164 (Edwards Matte); *id.* at 527 (Yáñez Ponce de Leon); *id.* at 465 (Silva Cortes).

52. Stanton, *supra* note 20, at 16.

53. ACTAS, *supra* note 2, at 85–86.

His first words asserted that property had already been modified by new social realities and that the constitution should be changed to reflect that “the idea of property is a social function.”⁵⁴ Briones left no doubt that his aim was squarely set on large estates (*latifundios*) and uncultivated land (*la propiedad inculta*).⁵⁵ Two aspects of this attack on the absolutist definition of property are noteworthy. First, Briones adopted the exact same method of arguing for a definition of property limited by a social function that Duguit had advanced.⁵⁶ Duguit’s conclusion that property is a social function was not, for him, an assertion of a new approach or theory of property. Instead, Duguit argued that through scientific observation of the use and function of property in society, he had discovered that property had indeed become a social function. Thus, the definition was, in Duguit’s view, nothing more than an accurate description of what had already happened.⁵⁷ For both Briones and Duguit, grounding the social function of property as an observable *fait accompli* was a convenient method of advancing a more complicated normative project.

Second, Briones saw the adoption of the social function definition as a way of moving against the perceived problems of large landed estates and uncultivated farmland.⁵⁸ In urging for legislation to address the problem of *latifundios*, Briones appealed to the example of rural legislation in Entre Ríos seeking to provide inexpensive housing in Argentina to the north of Buenos Aires. In Briones’s estimation, the legislation increased property ownership among farmers and improved agricultural production.⁵⁹

There was already an extant literature on the problems of *latifundios*.⁶⁰ While some of the authors Duguit relied on in developing his theory of the social function of property saw it as a means of attacking large estates, Duguit claimed that the social function doctrine did not lead him to redistributist conclusions or class struggle analysis.⁶¹ Duguit, however, saw uncultivated lands as a problem requiring a solution that would put the common good before the exercise of property.⁶² Furthermore, Maurice Hauriou, cited by Duguit, used the term *latifundia* as one example of where property revealed its economic function in society. Hauriou was also apparently not concerned about the unproductive holding of land because in his view, the market itself would handle unproductive property.⁶³ Nonetheless, as a subcommittee member, Briones was able to tie a social

54. *Id.*

55. *Id.*

56. *Id.*

57. Mirow, *supra* note 4, at 208, 212, 217–18 (same observations by Henri Hayem). The work of Joseph Charmont seems to have been particularly influential on this point for Duguit. *Id.* at 219–20 (citing JOSEPH CHARMONT, *LES TRANSFORMATIONS DU DROIT CIVIL* (1912)).

58. ACTAS, *supra* note 2, at 86.

59. *Id.* at 102.

60. Mirow, *supra* note 4, at 215.

61. *Id.* at 207, 211.

62. *Id.* at 208, 215.

63. *Id.* at 215–16 (citing MAURICE HAURIOU, *PRINCIPES DE DROIT PUBLIC* 39 (1910)).

function norm of property to descriptive accuracy and expand its scope to attack the propriety of large landed estates and uncultivated lands.

Enrique Oyarzún, another member of the subcommittee, supported Briones's attack on *latifundios*, but refrained from supporting the definition of property as a social function.⁶⁴ Oyarzún sought to distinguish between *property* as a social function and the *exercise* of property as a social function. In this way, Oyarzún was sensitive to an original difficulty with the translation of Duguit's words, "[m]ais la propriété n'est pas un droit; elle est une fonction sociale."⁶⁵ In French, *propriété* can mean both "ownership" (the exercise of property) and "property" (the thing itself).⁶⁶ Jurists have translated the French *propriété* to Spanish *propiedad* and to English *property*, when rendering terms such as "the exercise of the right of property" (*el ejercicio del derecho de propiedad*), and "ownership" would have been more faithful to Duguit's meaning.⁶⁷ Oyarzún correctly noted this distinction in his comments, but throughout the debates on the topic, this distinction was somewhat too subtle to be a point of real contention.

If Briones felt he was pushing the subcommittee too far towards a new definition of property, his social function norm of property did not go nearly far enough for another speaker, Manuel Hidalgo, who lamented the fact that his communist ideas would not guide the meeting. For Hidalgo, Briones's social function definition represented only an "acceptable minimum."⁶⁸ Indeed, Hidalgo was the only member explicitly to deny a "right of property."⁶⁹ Hidalgo also equated unproductive factories to uncultivated lands, urging their inclusion on the list of problems to be addressed.⁷⁰ He suggested that a social function definition of property would lead to a very different economic structure for Chilean society.⁷¹ He even argued for a definition of property that reached beyond land and took cognizance of work and labor as a kind of industrial property.⁷² He urged that the following language be included in the constitution: "Property is a social function. The State ought to foster an economic structure that assures each individual and his family what is necessary for his life and for his complete development."⁷³ With Hidalgo's comments, momentum was

64. ACTAS, *supra* note 2, at 86.

65. "But property is not a right, it is a social function." DUGUIT, *supra* note 43, at 21.

66. See EDGARD LE DOCTE, DICTIONNAIRE DE TERMES JURIDIQUES EN QUATRE LANGUES 566-67 (1987); see also JEAN-LOUIS HALPÉRIN, HISTOIRE DE DROIT DES BIENS 341 (2008); OXFORD-HACHETTE FRENCH DICTIONARY 1591 (Marie Hélène Corréard ed., 2d ed. 1997).

67. Mirow, *supra* note 4, at 197.

68. ACTAS, *supra* note 2, at 86.

69. "El señor HIDALGO (don Manuel) declara que él niega el derecho de propiedad." *Id.* at 120.

70. *Id.* at 86.

71. *Id.*

72. *Id.* at 106.

73. "La propiedad es una función social. El Estado debe atender a una organización económica que asegure a cada individuo y a su familia lo necesario para su vida y para su desarrollo integral." *Id.* at 86. This idea of property goes significantly beyond Duguit's thought towards the idea of social property. See Mirow, *supra* note 4, at 223-25; see also ROBERT CASTEL & CLAUDINE HAROCHE, PROPRIÉTÉ PRIVÉE, PROPRIÉTÉ SOCIALE, PROPRIÉTÉ DE SOI: ENTRETIENS SUR LA CONSTRUCTION DE L'INDIVIDU MODERNE 76-79 (2001);

clearly building against *latifundios*. The adoption of a social function definition of property was an instrumental step along the way to the redistribution of land in Chilean society.

José Guillermo Guerra continued the assault on *latifundios*. He affirmed the consistent opinions of the other speakers and appealed to the social reforms brought about in England by Prime Minister David Lloyd George after World War I. Guerra viewed these reforms as having resulted in wider distribution of land in smaller estates in the country.⁷⁴ Guerra wanted the subcommittee to focus pragmatically on the problem at hand, the large landed estates, and he asserted that the debate over whether property was a social function or not was merely semantic quibbling (“*un juego de palabras*”).⁷⁵ Guerra was one of the few subcommittee members to mention Mexico in the context of its resolution of *latifundios* and suggested that uncultivated land be taxed out of existence as the reforms of Lloyd George accomplished in England.⁷⁶

Guerra noted that there might be inconsistencies between the protection of property under the Constitution of 1833 and the many limitations on private property that already existed under the Chilean Civil Code, such as servitudes, and that these limitations would not withstand present scrutiny if subjected to a determination of constitutionality by a court charged with reviewing such legislation.⁷⁷ He also suggested expanding the underlying reasons for expropriation from public utility to social utility, local interest, or private projects for public good, such as a road or railroad.⁷⁸ Guerra’s suggested provision was that the Constitution would protect:

The inviolability of the right of property, with the limitations established by law.

In cases required by the utility of the State or social utility, a law may authorize the expropriation of kinds or types of certain property, the price of previous payment as agreed to by the owner or as determined by the courts.

HALPÉRIN, *supra* note 66, at 341; Robert Castel, *Emergence and Transformations of Social Property*, 9 *CONSTELLATIONS* 318, 324 (2002); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

74. *ACTAS*, *supra* note 2, at 86–87.

75. *Id.* at 87. Similarly, Edwards Matte, when arguing for the inviolability of property, also found this a question of semantics. *See id.* at 110. Vidal Garcés too rejected any distinction between property and the exercise of the right of property. *See id.* at 114.

76. *See id.* at 87.

77. *See id.* at 94. A number of members of the subcommittee noted the importance of this new power in the judiciary to review the constitutionality of legislation. This concern about the Supreme Court’s power of judicial review reveals the deep-seated belief in the members that the constitution would serve to guide both structural elements and individual rights in the Chilean government. Alessandri also noted the importance of providing a definition of property in the constitution that was consistent with practice and the modern trend. BRAHM, *supra* note 51, at 56–57. Indeed, the definition of property under the Constitution of 1925 was the basis for claiming the unconstitutionality of legislation before the Supreme Court. *Id.* at 58–66.

78. *See ACTAS*, *supra* note 2, at 94–95.

Congress shall enact laws that facilitate the subdivision of real property and that charge special taxes on uncultivated lands.⁷⁹

Guerra's argument followed Briones and Duguit's ideas by asserting that the modern conception of property had changed and that a definition of property as a social function was most appropriate. He was one of the few members of the subcommittee to suggest that the drafters follow the German Constitution's definition of property as a social function.⁸⁰

Similar to Guerra's approach, comments by subcommittee member Nolasco Cárdenas humorously asserted that he was not against property, but rather so much in favor of property that he wanted everyone in Chile to have some. Thus, the division of the *latifundios* was a necessary step. Guerra, like others on the subcommittee, believed that society had changed, and social changes had led to new ideas of distributive justice. According to Cárdenas, these changes had occurred in Germany, England, France, and Russia.⁸¹ This led to a redefinition of property as a social function.⁸²

As expressed in the debates of the subcommittee, the Radical party and its allies were the principal proponents of redefining the nature of property in the Constitution of 1925. Radical literature after the Constitution of 1925 indicates that obtaining a newer, social definition of property was an achievement of the party.⁸³ For Radicals, replacing a classically liberal definition with one that hinged on the newer theories of the social function would have been a great victory in the battle between two different views of property from the perspective of the party. Radicals saw a strict divide between a Catholic-Conservative construction of property that maintained absolute rights, and a modern, scientific perception that adopted the

79. The Spanish language text reads:

5. *La inviolabilidad del derecho de propiedad, con las limitaciones establecidas por las leyes.*

En los casos en que lo requiera la utilidad del Estado, o la utilidad social, una ley podrá autorizar la expropiación de especies o cuerpos ciertos determinados, previo el pago del precio que se ajustare con el dueño o fuere determinado por los Tribunales de Justicia.

El Congreso dictará leyes que faciliten la subdivisión de la propiedad raíz y que graven con contribuciones especiales las tierras sin cultivo.

Id. at 95.

80. *See id.* Article 153 of the Weimar Constitution of August 11, 1919, reads, in part "Property is guaranteed by the Constitution. Its extent and limits are defined by the laws. . . . Property implies duties, and the use to which it is put should be over service to the welfare of all." DIE VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION] (1919) art. 153 (Ger.) (British & Foreign State Papers trans., 1919).

81. ACTAS, *supra* note 2, at 101. The omission of Mexico is notable.

82. *See id.*

83. *See* PEDRO EDUARDO GONZÁLEZ GARCÍA, REFORMAS RELIGIOSAS, SOCIALES, ELECTORALES, ECONÓMICAS Y POLÍTICAS DE LA CONSTITUCIÓN DEL AÑO 33 PROMULGADAS EL 18 DE SEPTIEMBRE DE 1925: EFECTOS DEL PARLAMENTARISMO EN CHILE, at 131–70 (1927). González García was a member of the Radical Socialist party whose doctoral dissertation at the University of Chile analyzed the Constitution of 1925. *Pedro Eduardo González García, HISTORIA POLÍTICA LEGISLATIVA DEL CONGRESO NACIONAL DE CHILE*, http://historiapolitica.bcn.cl/resenas_parlamentarias/wiki/Pedro_Eduardo_González_Garc%C3%ADa (last visited Nov. 16, 2011). The first social reform he lists for the Constitution of 1925 is the change to the concept of property. *See* GONZÁLEZ GARCÍA, *supra*, at 131.

limitations on property through the social function doctrine.⁸⁴ This strict dichotomy probably pushed both positions to extremes that were not inherent in the original expressions of these ideas. While anti-clericalism was most certainly a part of the Radical position, Catholic social thinkers had addressed social concerns and the papal encyclical *Rerum Novarum* of 1891 not only affirmed the right to private property, but also noted that owners and employers had obligations.⁸⁵ Nonetheless, the convergence of interests between Roman Catholics and the Conservative party led Radicals and others to characterize the Catholic position on private property as being completely contrary to the social function doctrine.⁸⁶ Similarly, it is not clear that the French concept of the social function of property as developed by Duguit and Hayem would necessarily lead to the sweeping reforms Radicals had in mind. Duguit was careful to distance himself from socialism and redistributist policies. He did not adopt an analytical method of class struggle.⁸⁷ Nonetheless, these finer points of the social function doctrine and its origins were lost in the politically saturated process of constitutional reform.

In the course of the debates, those advancing reform of the property provision of the Constitution of 1833 were not wedded to the conceptual or terminological elegance of the phrase “social function” and, in fact, as the debates progressed, they abandoned attempts to incorporate this term to impose defined limitations on property. Oyarzún, for example, used the term “social function” in his speeches, but later opted for limitations that promoted “social utility.”⁸⁸ Most subcommittee members on the “social” side of the fence asserted the descriptive accuracy of property having some sort of social limitation or social function. For them, this assertion did not mark a radical departure from reality or from the present state of affairs; the constitutional definition had to catch up to what had already happened and what could be observed. This, of course, comported with the observations that Duguit and others had made about the shift of property’s characterization in the modern world.

B. Opponents of the Social Function of Property

Luis Barros Borgoño advised against any change in the definition of property because in his view, the wealth of the country and the stability of

84. GONZÁLEZ GARCÍA, *supra* note 83, at 152.

85. PETER LESTER REICH, *MEXICO’S HIDDEN REVOLUTION: THE CATHOLIC CHURCH IN LAW AND POLITICS SINCE 1929*, at 148 n.41 (1995); *see also* BRAHM, *supra* note 51, at 28–29 (1999); JAY P. CORRIN, *CATHOLIC INTELLECTUALS AND THE CHALLENGE OF DEMOCRACY* 73–76 (2002); CHARLES E. CURRAN, *CATHOLIC SOCIAL TEACHING 1891–PRESENT: A HISTORICAL, THEOLOGICAL AND ETHICAL ANALYSIS* 174–79 (2002). For a contemporary discussion of the Church’s view on property and its obligations, *see* JESÚS PABÓN S. DE URBINA, *POSITIVISMO Y PROPIEDAD: ESTUDIO SOBRE LA IDEA DE PROPIEDAD FUNCIÓN SOCIAL* 75–94 (1925).

86. GONZÁLEZ GARCÍA, *supra* note 83, at 152.

87. Mirow, *supra* note 4, at 211.

88. ACTAS, *supra* note 2, at 86, 93.

foreign investment were tied directly to a stable property regime.⁸⁹ This was the only way to avoid the capital flight that would occur from tinkering with definitions of property on the constitutional level. Thus, Barros Borgoño put pragmatic economic considerations to the forefront of his comments and his resistance to changing the constitution.⁹⁰ Furthermore, in his view, steps towards dividing large farms and selling parcels to small farmers could be accomplished without changes to the constitutional text.⁹¹

Agreeing with Barros Borgoño that the language of the Constitution of 1833 should not be touched on the topic of property, subcommittee member Romualdo Silva Cortés directly rejected any notion of property as a social function, instead asserting that property was “a natural right . . . an extension of human personality.”⁹² For him, the definition of property as found in the Constitution of 1833 was of the highest importance to the country. To play with it would lead to a litany of uncertainty in industry, agriculture, and investment.⁹³ Nonetheless, later in the debates, Silva Cortés expanded on his original position. While he insisted on keeping the original language of the Constitution of 1833, he also wanted to make additions that addressed various broad social aspects.⁹⁴ Joined by Francisco Vidal Garcés, Silva Cortés suggested draft language that would ensure the protection of work, health, minimum wage, necessary rest, compensation for injured workers, peaceful resolution of labor disputes, the creation of economic and hygienic housing, and the security of each person’s life, morality, and education.⁹⁵ Echoing Barros Borgoño, Vidal Garcés indicated that redistribution of the *latifundios* by the state had already occurred under the language holding property inviolable in the Constitution of 1833, and therefore increasing the number of small farm owners did not depend on redefining property in the constitution.⁹⁶

Eliodoro Yáñez agreed with Silva Cortés that property could not be a social function because it was a natural right.⁹⁷ His argument was grounded in the Roman law of dominion, a view of property in his view worthy to be enshrined in the Constitution.⁹⁸ Yáñez, however, noted that the concept of a Roman owner’s right to “use and abuse” property had been modified by modern legislation such as the Chilean Civil Code’s requirement that the exercise of property rights comport with existing law and the rights of others.⁹⁹ Yáñez also rejected the idea that England could serve as a model. Any parallel to England was illusory because of the differences between Chile and England in capital, production, and

89. *See id.* at 88.

90. *Id.*

91. *Id.* at 103–04.

92. *Id.* at 88.

93. *Id.* at 88–89.

94. *Id.* at 105–06.

95. *Id.*

96. *See id.* at 113.

97. *See id.* at 90–91.

98. *See id.* at 98–99.

99. *Id.*; *see also supra* notes 45–46, 77 and accompanying text.

transportation.¹⁰⁰ Furthermore, the free market (“*libre juego de las leyes económicas*”) and increases in work and production were the best way to stimulate the cultivation of land.¹⁰¹ Yáñez’s proposed language provided for the inviolability of property, but continued with a limitation, although not one evoking the term “social function”: “The exercise of the right of property is subject to the duties that by reason of public utility the laws determine.”¹⁰²

Domingo Amunátegui, another opponent to changing the property provision of the constitution, gave the example of Russia, where large landed estates had been divided among small farmers as owners without the abolition of private property.¹⁰³ As a result, Russia lost its place as the bread basket of Europe and had been replaced by the United States.¹⁰⁴ Amunátegui addressed Guerra’s desire to subdivide *latifundios* by noting that changes intended to increase the distribution of land such as the abolition of entails (*mayorazgos*) and limitations in the Chilean Civil Code were possible even under the earlier language of the Constitution of 1833.¹⁰⁵ Thus, several members believed some form of redistribution of agricultural land was possible without changing the constitutional definition of property.

Pedro N. Montenegro was another opponent to changing the text of the constitution. His objection was milder than that of others who spoke of property as a natural right or of the need to maintain foreign investment and a growing economy. Indeed, he seems to have welcomed some of the reforms suggested by Guerra concerning the division of lands and encouraging more broadly the cultivation of land, but Montenegro did not believe that a system of punitive taxes was the way to achieve this. These steps did not require a change in the constitutional language defining property. Concerning parallels to England, a recurring theme, Montenegro pointed to factual differences between the countries and concluded that “what is good for England may not be for us.”¹⁰⁶

In sum, as a counterpoint to the Radical social function view, Conservatives sought to maintain the inviolability of an absolute right to property. Some, such as Barros Borgoño, based their arguments in favor of leaving property’s constitutional status untouched on pragmatic economic concerns.¹⁰⁷ Others, such as Silva Cortés, were girded by a philosophical conception of natural property rights. Finally, other members held steadfast

100. See ACTAS, *supra* note 2, at 91, 97.

101. *Id.* at 97.

102. “*El ejercicio del derecho de propiedad, está sujeto a los deberes que por razón de utilidad pública las leyes señalen.*” *Id.* at 100.

103. See *id.* at 92.

104. *Id.*

105. See *id.* at 96. For the abolition of *mayorazgos* in Chile and possible conflicts with absolutist concepts of property, see Mirow, *supra* note 45, at 316–21.

106. “[*L*]o que en Inglaterra es bueno, puede no serlo entre nosotros.” ACTAS, *supra* note 2, at 100.

107. *Id.* at 88.

in their desire to maintain the property provision of the Constitution of 1833 as it stood without making the particular underpinnings clear.

C. *Middle Positions on the Social Function of Property*

Guillermo Edwards Matte sought a definition that would both maintain the inviolability of property and establish duties on owners. Apparently seeking to harmonize positions, he stated that adopting a definition of property that included “social function” would lead to confusion.¹⁰⁸ Edwards Matte observed agreement in the course of the debates on the idea of the inviolability of property as well as agreement on the idea that the right of property imposes some duties towards society.¹⁰⁹ Thus, Edwards Matte saw Silva Cortés’s proposal as an acceptable compromise.¹¹⁰ Edwards Matte was also strongly influenced by the examples of other South American countries he perceived to be of similar levels of progress to Chile. He quoted the recent legislation from Entre Ríos, Argentina, and the Constitution of Uruguay of 1917, noting their characterizations of property as either “inviolable” or “sacred and inviolable.”¹¹¹

Combining these absolute views of property, Yáñez’s language, and his own drafting, Edwards Matte produced another formulation for consideration. His text begins with the constitutional protection of the inviolability of property with unremarkable provisions concerning takings for a public use with prior compensation.¹¹² It continues with some compromise between absolute rights in property and a social function:

108. *Id.* at 91–92.

109. *Id.* at 108.

110. *Id.* at 108–09.

111. *Id.* at 109.

112. Edwards Matte’s text reads:

5. *La inviolabilidad de todas las propiedades.*

Ninguna persona natural o jurídica podrá ser privada de la de su dominio, ni de parte de ella o de su derecho sino en virtud de sentencia judicial, salvo el caso en que por razón de utilidad pública, declarada por ley, se resuelva por ésta la expropiación, la que se efectuará dándose previamente al dueño la indemnización que con él se ajuste o que fijen los Tribunales. No podrá en caso alguno imponerse pena de confiscación de bienes.

El ejercicio del derecho de propiedad está sujeto a los deberes que las leyes señalen por razón de utilidad pública. En ese sentido podrán las leyes regular de un modo equitativo las relaciones de empleadores y empleados u obreros, velando por la solución pacífica de sus conflictos, creando instituciones obligatorias de retiro y previsión social, exigiendo razonable indemnización por los accidentes del trabajo, cuidando de la salubridad de los talleres de los métodos y horarios de labor, estableciendo un régimen justo y prudente de sueldos y salarios mínimos y, en general, dictando medidas que faciliten la armonía del capital y el trabajo. Podrán también establecer servidumbres legales, prohibir la usura y las industrias contrarias a las buenas costumbres y asegurar el cumplimiento del deber que corresponde al propietario de cultivar el suelo en conformidad a lo que permitan sus condiciones naturales y económicas.

El Estado deberá legislar con la finalidad de conseguir la difusión de la pequeña propiedad y especialmente, con la de obtener que cada familia chilena llegue a poseer una habitación propia y sana.

Id. at 110–11.

“The exercise of the right of property is subject to the duties that the laws establish for the purpose of public utility.”¹¹³ Edwards Matte’s text then continued with many additional social rights including labor relations, social security, workers’ compensation, minimum wages, harmony between capital and labor, the required cultivation of land, and safe and individually owned housing.¹¹⁴ Many of these social rights reflected legislative goals that had not been accomplished during Alessandri’s first term.¹¹⁵ Indeed, goals such as providing security for workers through minimum pensions and housing were based on a notion of property that went far beyond the ideas of the social function of property as set out by Duguit and of redistributing land through agrarian reform.¹¹⁶ Aspects of “social property” were also to find expression in the final text of the constitution.¹¹⁷

Concerning a right to housing, Edwards Matte indicated that he was influenced by the German Constitution.¹¹⁸ Oyarzún, who supported the idea of the social function doctrine, but rejected the debate over the term as semantic quibbling, supported Edwards’s proposal, perhaps because it got to the substance of social reform while sidestepping the definitional issue of the exact nature of property under the constitution.¹¹⁹

Another member of the subcommittee, Héctor Zañartu, called for a clear definition without indicating his preference on the question of the social function. His call for precision was placed in the context of structural governmental functions because another portion of the new constitution would require a supreme court to determine the constitutionality of statutes.¹²⁰ This concern had also been raised by Guerra.¹²¹

D. Alessandri Invokes Duguit

On the first day of debates, President Alessandri attempted to build some consensus by suggesting that there was general agreement on the inviolable nature of property as reflected in the text of the Constitution of 1833. Nonetheless, Alessandri also saw some room for establishing limitations on property that reflected the social good. His examples of this social good were restricted to the sort of narrow limitations that already existed under established Chilean law, such as expropriation for public use and servitudes under the civil law. He chose not to address *latifundios* and uncultivated land, the main areas referred to by those speaking before him.¹²² Even if there seemed to be some consensus on limiting property, the exact path to new language was difficult to navigate as it wandered through the various

113. “El ejercicio del derecho de propiedad está sujeto a los deberes que las leyes señalen por razón de utilidad pública.” *Id.*

114. *Id.* at 111.

115. Stanton, *supra* note 20, at 4.

116. *See supra* note 43 and accompanying text.

117. *See infra* note 155 and accompanying text.

118. ACTAS, *supra* note 2, at 112.

119. *Id.*

120. *Id.* at 92.

121. *See supra* note 77 and accompanying text.

122. ACTAS, *supra* note 2, at 89–90.

proposals of the subcommittee members.¹²³ Then, for several days, Alessandri appears to have sat quietly listening to the debates without offering more guidance on the topic.

On the third day of full debate, Alessandri attempted to find agreement on certain areas. Noting the uneasiness of some members when debating the right of property, Alessandri offered calming words from an unlikely source:

To diminish a little the fears that some feel when the right of property is treated, please permit me to read some paragraphs of a text of Constitutional Law written by Léon Duguit, Dean of the Law Faculty of the University of Bordeaux, an author who is considered in Europe the leading authority on questions of Constitutional Law.¹²⁴

Alessandri quoted Duguit on the French Revolution and its unthinking adoption of an inviolable right to private property that flowed from the desire of the members of the Constituent and Convention to guarantee their interests in property as members of the bourgeois class.¹²⁵ Duguit then recounted the French Constitution of 1848's enshrinement of a natural right theory of property.¹²⁶ From here, Alessandri, quoting Duguit, noted that the quality of property in modern society had changed: "Immovable property, capitalistic and inheritable, cannot be explained except by its *social utility*; and it will not be able to demonstrate that it is legitimate without at the same time demonstrating that at a certain point it is *socially useful*."¹²⁷ These observations led Alessandri to quote even more from Duguit's passages regarding the nature of property in modern society:

Property is not an untouchable and sacred right, but rather a right that is constantly evolving and that ought to adapt itself to the social necessities to which it responds.

. . . .

One may say that in fact the concept of property as a subjective right disappears, *to be replaced by the concept of property as a social function*.¹²⁸

123. BRAHM, *supra* note 51, at 50.

124. The Spanish language version reads as follows:

Para ir disipando un poco los temores que algunos sienten cuando se trata del derecho de propiedad, se va a permitir leer algunos párrafos de un texto de Derecho Constitucional escrito por León Duguit, Decano de la Facultad de Derecho de la Universidad de Burdeos, autor que es considerado en Europa como la primera autoridad en cuestiones de Derecho Constitucional.

ACTAS, *supra* note 2, at 114.

125. *See id.*

126. *See id.* at 115.

127. "La propiedad inmueble, capitalista y hereditaria no puede explicarse más que por su utilidad social; y no se habrá demostrado que es legítima, si no se demuestra al mismo tiempo que en una época determinada es socialmente útil." *Id.*

128. The Spanish language version reads:

La propiedad no es un derecho intangible y sagrado, sino un derecho que está continuamente evolucionando y que debe adaptarse a las necesidades sociales a que responde.

Having extensively quoted his European expert, Alessandri continued with his own gloss on Duguit's work. Alessandri asserted that this was an opportune moment to follow science and the modern world by modernizing the constitution according to scientific principles. In his and Duguit's view, the inviolability of property had to give way to the legal reality (*la verdad jurídica*) of property with limitations.¹²⁹ According to Alessandri, these changes were necessary to provide an accurate description of property in light of the Supreme Court's power of judicial review of legislative acts and in light of the just limitations that may now be placed on property considering the "state in which the right of property finds itself today."¹³⁰ Greatly in favor of the draft changes proposed by Yáñez and by Edwards Matte, Alessandri's country in his view had a pivotal opportunity to "adjust the right of property to the reality of things, to modernize the Constitution a bit," and to unite Chileans.¹³¹

There was little doubt where Alessandri stood on the issue. Alessandri sought reform. After Alessandri spoke, it was agreed that a drafting commission composed of Alessandri and his former opponent for the presidential nomination, Barros Borgoño, would undertake the preparation of a text for consideration.¹³² Alessandri sought a drafting partner who would represent the more conservative thinkers on property and who would be flexible on the matter. His selection of Barros Borgoño cleverly fulfilled these needs. A deeply held philosophical belief about the nature of property, such as that held by Silva Cortés, could not be so easily subjected to the political demands of the moment, but Barros Borgoño's pragmatic approach could be won over.

The day after being appointed to the drafting commission, Alessandri returned with a draft.¹³³ It was, in Alessandri's words, the exclusive work

. . . .
Se puede decir que en el hecho el concepto de la propiedad como derecho subjetivo desaparece, para ser reemplazado por el concepto de la propiedad como función social.

Id. at 115–16.

129. *See id.* at 116.

130. "[E]l estado en que el derecho de propiedad se halla hoy día . . ." *Id.* at 117.

131. "[A]justar el derecho de propiedad a la realidad de las cosas, modernizando un poco la Constitución . . ." *Id.* at 117–18.

132. *Id.* at 118.

133. Alessandri's draft reads:

Artículo . . . La Constitución asegura a todos los habitantes de la República:

5. La inviolabilidad de todas las propiedades sin distinción alguna.

Nadie puede ser privado de la de su dominio ni de una parte de ella o del derecho que a ella tuviera sino en virtud de sentencia judicial o de expropiación por razón de utilidad pública, calificada por una ley. En este caso, se dará previamente al dueño la indemnización que se ajuste con él o que se determine en el juicio correspondiente.

El ejercicio del derecho de propiedad está sometido a las limitaciones o reglas que exigen el mantenimiento y el progreso del orden social.

En tal sentido podrá la ley imponerle obligaciones o servidumbres de utilidad pública en favor de los intereses generales del Estado, de la salud de los ciudadanos y de la salubridad pública.

. . . .

of Barros Borgoño.¹³⁴ Alessandri said that his participation was merely to accept everything Barros Borgoño suggested.¹³⁵ The draft had achieved the goal of defining “with clarity and precision the modern scientific concept of property.”¹³⁶ While maintaining the inviolability of property and the expropriation for public use with prior indemnification, the draft added new language responding to the social function norm without stating the contested words “social function.”¹³⁷ The new constitutional definition of property was expressed this way: “The exercise of the right of property is subject to the limitations or rules that the maintenance and progress of the social order require.”¹³⁸ Thus, Alessandri sought to assure the assembly that he only wanted to limit, and not to attack, the right of property.¹³⁹

Barros Borgoño commented after presenting the draft that the inviolability of property was maintained and his examples of limitations on property under the new text, such as limitations under the Civil Code or for servitudes under public law, were quite narrowly construed.¹⁴⁰ For Barros Borgoño, there was no mention of *latifundios* or uncultivated land, clearly indicating that the constitutional text had reached a quiet and momentary truce on these pressing issues. Stating that the language did nothing more than reflect the present state of social evolution, Alessandri also construed these provisions to address a situation of particular shortage or national need, such as gasoline.¹⁴¹

The proposed language now formed a new focal point for discussion and all involved in the debate stepped forward to voice their views. Edwards Matte returned to the theme of ensuring that the constitution was clear in light of the new responsibilities of the Supreme Court to determine the constitutionality of legislation, and he provisionally approved the draft.¹⁴²

As one might have expected, Hidalgo objected that the proposed language did not go nearly far enough.¹⁴³ Silva Cortés and Vidal Garcés were apparently satisfied that the draft had at least kept the inviolability of

6. *La protección al trabajo y a las obras de previsión social, especialmente en cuanto se refieren a la habitación sana y a las condiciones económicas de la vida en forma de proporcionar a cada ciudadano un mínimum de bienestar, adecuado a la satisfacción de sus necesidades personales y a las de sus familias. La ley regulará esta organización.*

Id. at 121–22 (first omission in original). Later in the drafting process, the second and third paragraphs of section 5 were joined and section 6 was moved to a position in Article 10 where it followed the constitutional protections of intellectual property, the home, and correspondence. *Id.* at 135–36, 138; see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1925) art. 10(10)–(14).

134. ACTAS, *supra* note 2, at 121.

135. *Id.*

136. “[C]on claridad y precisión el concepto científico moderno de la propiedad.” *Id.*

137. *Id.* at 121–22.

138. *Id.* at 121.

139. BRAHM, *supra* note 51, at 46.

140. ACTAS, *supra* note 2, at 122–23.

141. *Id.* at 123.

142. *Id.* at 124–25, 127.

143. *See id.* at 125–26.

property and approved the text.¹⁴⁴ Yáñez made a structural argument in opposition to the draft, arguing that the constitution should provide the structure and institutional balance of government.¹⁴⁵ He argued that defining exactly what property was, beyond its inviolability, should be in the hands of legislators.¹⁴⁶ To this argument, Alessandri responded that it was difficult to see where the right of property ends and the economic and social aspects of public law begin; they were related and needed to be addressed together.¹⁴⁷

Edwards Matte agreed with Alessandri that there was no clear line, and he expressed concern that without establishing clear boundaries on the legislative power to limit property rights, broad language in the constitution would go beyond what all appeared to agree on: labor legislation, an existing regime of servitudes, prohibiting usury, and creating a duty to cultivate land.¹⁴⁸ Focusing still on the inviolability of property, Yáñez got right to the heart of the matter when addressing the types of limitations on property permitted under the constitution:

The sensitive disagreement in which one is found with Mr. Edwards Matte and, in part, with the proposition read in this session, is due to that it is thought, by this way, limitations are placed on future congresses, thinking of the fear that in them Marxist or Communist tendencies may come to dominate. But for his part he thinks that if such thing occurs, if the country organizes its public powers on this base and adopts this regime, the Constitution itself will be a dead letter and nothing established today will be considered.¹⁴⁹

Yáñez asserted that Edwards Matte was opening the door to the very tendencies he hoped to avoid.¹⁵⁰ Other members commented on minor points and concerns. Alessandri and Barros Borgoño responded with substantive debate on Article 10(5) and its definition of property, evidently ending the debate on May 26, 1925.¹⁵¹ The portions of Article 10 addressing property were later approved without modification on July 7, 1925.¹⁵² There were a few subsequent unsuccessful attempts to substitute language in the draft, and some final technical questions of numbering and

144. *Id.* at 127–28.

145. *Id.* at 128–30.

146. *Id.*

147. *Id.* at 130.

148. *See id.* at 131.

149. The Spanish language text reads:

El sensible desacuerdo en que se encuentra con el señor Edwards Matte y, en parte, con la proposición leída en esta sesión, es debido a que se cree que de ese modo se ponen limitaciones a los futuros Congresos, ante el temor de que en ellos puedan llegar a dominar tendencias marxistas o comunistas. Pero por su parte piensa que si tal cosa ocurre, si el país organiza sus poderes públicos sobre esa base y adopta ese régimen, la Constitución misma sería letra muerta y nada de lo que hoy se establezca sería considerado.

Id. at 134.

150. *Id.*

151. *Id.* at 136–37.

152. *Id.* at 337.

of exact location and order of the text.¹⁵³ The draft was submitted to a national plebiscite on August 30, and was promulgated on September 18, 1925.¹⁵⁴ The final version included in the Constitution of 1925 read:

Article 10. The Constitution assures all inhabitants of the Republic:

. . . .

(10) The inviolability of all property without any distinction.

No one may be deprived of the property of his dominion, or any part thereof, or of the right to which he has, unless by virtue of judicial sentence or of expropriation for reason of public utility, described by law. In this case, prior indemnification shall be paid to the owner that he agrees to or that is determined by corresponding judgment.

The exercise of the right of property is subject to the limitations or rules that the maintenance of the progress of the social order require, and in this sense, law may impose on it obligations or servitudes of public utility in favor of the general interests of the State, of the health of citizens and of the public well-being¹⁵⁵

The first section maintains the language of the Constitution of 1833 and the theory of property as an inviolable or absolute right. The next sections incorporate the social function doctrine, without, however, mentioning the term “social function” itself. Thus, in conscious self-conflict, the provision maintains two disparate concepts of property in the same text. Conservatives got their language; Radicals got theirs. Nonetheless, as the debates leading to the text and the text itself reveal, a social function definition of property had gained a beachhead in an established land of absolute property rights. Ideas of duty and obligation to the state and to society were now found in the constitution itself. For the future of property in Chile, both in terms of terminology and ideology, a purely absolutist liberal concept of property had been rejected. Although a right, property was now clearly a limited right and, of course, anything other than an unyielding line on the absolute right of property meant that the battle to continue the liberal absolute construction of property had been lost.¹⁵⁶ The only question left would be how far the limitations on property would run and, even though the term “social function” was not incorporated into the constitutional text, future debates on the nature of property in Chile would appeal to and expand the social function construction of property.

III. THE LEGACY OF THE SOCIAL FUNCTION OF PROPERTY IN CHILE

The idea of property yielding to social obligations had been established. With the new definition of property in the constitution, lawyers and politicians worked to shape their particular interpretation of the language.

153. *Id.* at 480–82; BRAHM, *supra* note 51, at 42.

154. Stanton, *supra* note 20, at 5, 22.

155. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (1925) art. 10(10). For the Spanish text, see *supra* note 10.

156. BRAHM, *supra* note 51, at 44, 52.

The trajectory for the next nearly fifty years would be the gradual expansion and remolding of limitations on property, often done under the broadly accepted principles of the social function norm. Later politicians and legislators read the language of limitation found in the property provision of the Constitution of 1925 as a social function norm that would be aggressively expanded under President Allende to a policy of state ownership of property and socialism until General Augusto Pinochet's coup on September 11, 1973.¹⁵⁷

In his study of reforms in the Constitution of 1925, Radical Socialist Pedro Eduardo González García noted several places where the new constitution adopted a social function definition of property as developed by Auguste Comte and Léon Duguit.¹⁵⁸ Despite the absence of clear language on the question of large estates and uncultivated land, González García found that this new view of property provided the basis for legislation to limit aspects of ownership.¹⁵⁹ He cited, for example, a law of 1926 incrementally taxing undeveloped urban property to encourage building.¹⁶⁰ Nudging the constitutional text towards the political aims of his party, González García sought to place the new Chilean conception of property into the context of the Russian Soviet Constitution of 1918, the Union of Soviet Socialist Republics Constitution of 1923, the German Constitution of 1918, the Polish Constitution of 1921, and the Yugoslav Constitution of 1921.¹⁶¹ González García also took special note of the Mexican Constitution of 1917. Citing the Mexican Constitution's famous Article 27, he characterized the document as the only other American constitution that adopted a social function definition of property.¹⁶² Thus, González García sought to place the Chilean Constitution within the group of constitutions that sought to limit property substantially. He also asserted that the language of the Constitution of 1925 was sufficient to bring about the land reforms central to his party's platform.

The contemplated structures of the Constitution of 1925 were not long-lived. In October 1925, Colonel Carlos Ibáñez, who had been an important figure in the second coup restoring Alessandri, forced Alessandri's resignation.¹⁶³ In 1927, Ibáñez, then Minister of Interior, imposed military control over the government and forced President Emilio Figueroa, Alessandri's successor, to resign.¹⁶⁴ Colonel Ibáñez succeeded Figueroa through a plebiscite.¹⁶⁵ Following the social function interpretation of the property provision of the Constitution of 1925, legislation that would have been unheard of under the absolutist position of the Constitution of 1833

157. *See id.* at 261–62.

158. GONZÁLEZ GARCÍA, *supra* note 83, at 145, 147, 149–51, 161, 163. For Comte, see Mirow, *supra* note 4, at 202.

159. GONZÁLEZ GARCÍA, *supra* note 83, at 164–65.

160. *Id.* at 164.

161. *Id.* at 141, 142, 166, 167.

162. *Id.* at 167.

163. RECTOR, *supra* note 12, at 148.

164. *Id.*; Stanton, *supra* note 20, at 5.

165. RECTOR, *supra* note 12, at 148; Stanton, *supra* note 20, at 5.

was now possible. From the late 1920s and during the Great Depression of the 1930s, Ibáñez's government, the middle class, and the army advanced social projects that implicated a view of the social function of property.¹⁶⁶ Enrique Brahm Garcíá has noted a number of these activities. First, there were "colonization" projects, effected through the Ministry of Southern Property, for acquiring and distributing land in the vast and sparsely populated southern areas of Aysén and Magallanes. These projects required owners to build on and exploit the land allotted to them.¹⁶⁷ Ibáñez also sought an increase in expropriations through the Board of Agricultural Colonization (*Caja de Colonización Agrícola*).¹⁶⁸ Second, the social function norm also provided a basis for the creation of statutes regulating urban construction and development.¹⁶⁹ Third, laws creating utility easements and public rights of way for roads and sewers grew to encroach on the private property of Chileans to advance the common good.¹⁷⁰ Fourth, taxes and price fixing both allocated resources in the market and concretized policy goals.¹⁷¹ Fifth, bolstering Ibáñez's interventionist approach to the economy, ministries and departments of the government fostered protectionism and the development of industry.¹⁷² These undertakings were all based on the new social function definition of property.

In 1932, Chile entered a short-lived "Socialist Republic" under Air Force Commander Marmaduke Grove. For our purposes, this period of several months was not so important for its shift in government, but rather for the legislation it produced. Laws established during this period would have a lasting effect in the decades to come.¹⁷³ After two months of laws advancing state control and planning towards socialism, the "Socialist Republic" came under the guidance of Carlos Dávila.¹⁷⁴ Dávila moved forward with a program of the "socialization of property," which included expropriation, subdivision, and collective exploitation of land through the Board of Agricultural Colonization.¹⁷⁵ Regulations touched staples such as wheat, flour, and bread and brought mining under state control.¹⁷⁶ Perhaps the most lasting institution of this short-lived period was the creation of a General Commissary of Livelihood and Prices (*Comisariato General de Subsistencias y Precios*) under the Ministry of Work that continued to control many aspects of economic life, including the production, manufacturing, importation, exportation, distribution, and transportation of

166. BRAHM, *supra* note 51, at 68.

167. *Id.* at 69–70.

168. *Id.* at 82–85.

169. *Id.* at 72–75.

170. *Id.* at 75–77.

171. *Id.* at 77–78, 80–82.

172. *Id.* at 78–80.

173. *Id.* at 87–91; COLLIER & SATER, *supra* note 15, at 222–26.

174. BRAHM, *supra* note 51, at 90.

175. *Id.* at 92. The Board stopped its activities in 1962 and had settled about 4,000 families during its existence. Thome, *supra* note 5, at 209.

176. BRAHM, *supra* note 51, at 94–95.

necessary goods in Chile until the early 1970s.¹⁷⁷ Dávila and the “Socialist Republic” fell on September 12, 1932, but their legislation was to be dusted off frequently over the next forty years in relation to the socialization of property.¹⁷⁸ The forceful socialist agenda of Dávila was followed by a more moderate second presidency of Arturo Alessandri, who continued the General Commissary, supported industry, and advanced a program of agrarian reform rooted in the property provision of the Constitution of 1925.¹⁷⁹

After Alessandri’s second presidency, Chile’s policy on property was guided by the Radical party, which maintained control from 1938 to 1952.¹⁸⁰ Private property was linked to the evils of capitalism and slated for substantial reformation. Mining, agriculture, industry, and commerce were all subject to additional scrutiny, particularly under the *Consejo de la Corporación de Fomento de la Producción*, charged with planning the Chilean economy.¹⁸¹ Laws and institutions of the “Socialist Republic” were invoked in the process.¹⁸² With reinterpretations of the constitutional property provision as a foundation, a law from this period enacted in 1944 would later form the basis for an even farther reaching agrarian reform program.¹⁸³ Indeed, Briones’s attacks on *latifundios* and uncultivated land in 1925 continued to have voice in the 1950s with calls in draft legislation to replace *latifundios* with mid-sized properties and to transform the Board of Agricultural Colonization into a “true Institute of Agrarian Reform.”¹⁸⁴

Beginning in 1952, the second government of Carlos Ibáñez brought heightened statist control of all aspects of the economy built on the structures in place from the “Socialist Republic.” These efforts included price controls, new taxation regimes, expropriations, and attempts to reduce the payments for expropriated property.¹⁸⁵ The new compensation schemes were so aggressive they failed constitutional scrutiny by the Supreme Court.¹⁸⁶

Despite such setbacks, property had been recharacterized sufficiently to permit sweeping legislation that limited its exercise according to the dictates of the state. Although the Constitution of 1925 did not adopt the term “social function” in relation to property, posterity read this concept into the language of Article 10(10). This led to proposals to limit large landed estates, to ensure the exploitation of agricultural lands, and to direct urban development. The social function norm of property had won the day. As examples, Enrique Evans notes acts and codes on water, urbanization in

177. Decreto Ley No. 520, Agosto 30, 1932, DIARIO OFICIAL [D.O.] (Chile); BRAHM, *supra* note 51, at 95–96.

178. BRAHM, *supra* note 51, at 97.

179. *Id.* at 99–105.

180. *Id.* at 107–09.

181. *Id.* at 109.

182. *See id.* at 112–15.

183. *Id.* at 116.

184. *Id.* at 122.

185. *Id.* at 123–35.

186. *Id.* at 134.

cities, railroads, roads, electrical services, aviation, and the important law of agrarian reform of 1963.¹⁸⁷ Indeed, Chile's constitutional provision on property was amended in 1963 to provide sweeping agrarian reform of rural lands with a system of indemnification that was greatly favorable to carrying out such reforms.¹⁸⁸ The reforms were enacted under President Jorge Alessandri Rodríguez, President Arturo Alessandri's son.¹⁸⁹

The 1960s proved to be a particularly active decade for agrarian reform.¹⁹⁰ Although characterized by a liberal tendency, Jorge Alessandri's presidency brought forth a substantial plan for agrarian reform.¹⁹¹ At the time, it was estimated that over one half of all the private land in Chile was owned by 375 families in *latifundias*.¹⁹² The law, yet again, asserted a limited conception of property, particularly agricultural property, under an attendant theory of property's social function. Thus, agricultural property was obligated to be cultivated.¹⁹³ Compensation for expropriation was to be made over time and land was to be worked directly by the owner.¹⁹⁴ The state was to take the lead in controlling, planning, and creating institutions to bring about this change.¹⁹⁵ As might be expected, the regime for expropriation and methods of compensation to owners was the most difficult to establish and there were various proposals to loosen the constraints of Article 10(10) of the Constitution of 1925.¹⁹⁶ The required constitutional changes would come some five years later, in 1967.¹⁹⁷

The eventual success of these changes flowed from a confluence of interests, on both international and institutional levels. Land reform was no longer just a part of the agenda of the Radical party. In the early 1960s, President Kennedy and Alliance for Progress pushed for land reform in Chile to ameliorate what was still a greatly unbalanced distribution of land in the country.¹⁹⁸ The Charter of Punta del Este established land reform as one of the linchpins of institutional and economic reform in the region.¹⁹⁹ The United Nations Economic Commission for Latin America (CEPAL), under the direction of Raúl Prebisch, and the United Nations Food and Agriculture Organization both supported such undertakings on the

187. EVANS, *supra* note 37, at 25–26.

188. *Id.* at 26–27.

189. *Id.* at 27; ROBERT R. KAUFMAN, *THE POLITICS OF LAND REFORM IN CHILE, 1950–1970*, at 45–76 (1972).

190. KAUFMAN, *supra* note 189, at 4–5.

191. Ley No. 15020, Noviembre 15, 1962, DIARIO OFICIAL [D.O.] (Chile); BRAHM, *supra* note 51, at 144. This law eliminated the Board of Agricultural Colonization and replaced it with two institutions guiding agrarian reform until 1973: the *Corporación de Reforma Agraria* (CORA) and the *Instituto de Desarrollo Agropecuario* (INDAP). Thome, *supra* note 5, at 209–10.

192. Note and Comment, *The Chilean Land Reform: A Laboratory for Alliance-for-Progress Techniques*, 73 YALE L.J. 310, 312 (1963) [hereinafter *The Chilean Land Reform*].

193. BRAHM, *supra* note 51, at 144–45.

194. *Id.* at 148–49.

195. *Id.* at 146–47.

196. *Id.* at 172–77.

197. See *infra* note 209 and accompanying text.

198. *The Chilean Land Reform*, *supra* note 192, at 312.

199. BRAHM, *supra* note 51, at 157.

international plane.²⁰⁰ The church, which Chileans have historically associated with the Conservative party and an absolutist, natural-rights based conception of property, now called for land reform as part of a newly expressed social mission.²⁰¹ In fact, even the Conservative party recognized it had to accommodate land reform, as Enrique Brahm García quotes Fernando Ochagavía in the debates of the new legislation:

We believe in the social function of land. The Conservative Party, inspired by the social doctrine of the Church, expressed through the Encyclicals “Rerum Novarum,” “Quadragesimo Anno,” and “Mater et Magistra,” the base and foundation of its program, has not been able to stay away from this legal initiative of urgent necessity²⁰²

Thus, by the 1960s, the social function of property was no longer an issue for debate; it was an accepted view of the place of property in the Chilean legal framework.²⁰³ The theoretical underpinning for agrarian reform was the social function of property, the social function of land, and the social obligation that property carried with it.²⁰⁴ This was particularly true for agricultural land, which was “subject to the limitations that national economic development and in general the maintenance and progress of the social order require.”²⁰⁵ Nonetheless, Jorge Alessandri, like his father approximately forty years earlier, saw himself walking a difficult line to harmonize and to incorporate “the concepts of property as an exclusive right and of property as a social function.”²⁰⁶ Nonetheless, Brahm correctly notes that Duguit’s thought was still active in, for example, Article 1 of the draft of agrarian reform presented by the Radical party in 1959, which reads:

Rural or agricultural property constitute a social function whose exercise remains subject to the obligations of cultivating it, conserving its fertility and increasing its production in accordance with the advances of agricultural techniques. The owner ought to provide a just distribution of the profits of the land between all those who intervene in the process of its exploitation.²⁰⁷

In the mid-1960s, President Eduardo Frei Montalva of the Christian Democrat party turned his attention to obtaining agrarian reform that targeted the large estates, and would dramatically increase individual ownership by those working their own land.²⁰⁸ The legal theory of property behind the new law of agrarian reform stayed the same; property was subject to social regulation. Under the new legislation, in addition to

200. *Id.* at 154–55.

201. *Id.* at 158–65.

202. *Id.* at 165 (omission in original) (quoting Sesiones del Congreso, Cámara de Diputados [S.C.D.] de 4.7.1962, at 1408).

203. *See id.* at 202.

204. *Id.* at 167.

205. *Id.* at 166 (quoting S.C.D. de 29.5.1962, at 12).

206. *Id.* (quoting Mensaje de S.E. El Presidente de la República Don Jorge Alessandri Rodríguez de 21 de Mayo de 1962, at 287).

207. *Id.* at 168 (quoting S.C.D. de 14.9.1959, at 3988).

208. *Id.* at 179–81; KAUFMAN, *supra* note 189, at 79–144; Thome, *supra* note 5, at 210.

poor exploitation of land, the mere expanse of one tract of land under one owner was enough to merit expropriation and, indeed, almost all agrarian land became subject to expropriation under one or another provision of the new law.²⁰⁹ The legislation set its sights on both *latifundias* and *minifundias*, smaller tracts of land in private hands that were not economically viable.²¹⁰ Furthermore, it established an Agrarian Reform Corporation (CORA) and a Supreme Council of Agricultural Development to undertake the mechanics of redistribution.²¹¹ Expropriation became an administrative matter, rather than a procedure supervised by the courts.²¹² Using a new system of compensation based on bonds and payment over time, the state could rapidly expand its acquisition of land through means that mirrored outright confiscation.²¹³ The new regime of property and land reform meant reforming the constitution, a protracted process of intense political debate that led to the successful amendment of the constitution in 1967.²¹⁴ Ancillary legislation provided for the reversal of conveyances done in contemplation of the agrarian reform act in order to defeat its application, state control of basic resources, state direction of commerce, a plan for housing, and a taxation scheme designed to support these goals.²¹⁵ Frei's interpretation of the social function of property provided the basis for such regulation:

Property should be maintained and respected. However, it should be socially regulated. No property rights should be allowed to exist which, in their implementation, damage the common well-being and rights of the community. . . .

The agrarian reform will guarantee and respect the property rights of those persons who meet the social functions these rights demand. The social functions are: not to have accumulated vast properties, to have adhered to the existing social legislation, to have included the peasants in the benefits acquired from the land, and to have created conditions of stability, justice, and well-being.²¹⁶

From 1970 to 1973, President Salvador Allende declared socialism as the primary structure for his government.²¹⁷ In Allende's view, private property should be the exception, and the state should hold property as a means of production.²¹⁸ Industries were requisitioned, businesses were expropriated, and general services were placed under government

209. Ley No. 16640, Julio 16, 1967, DIARIO OFICIAL [D.O.] (Chile); BRAHM, *supra* note 51, at 182–84.

210. *The Chilean Land Reform*, *supra* note 192, at 318.

211. *Id.* at 315.

212. BRAHM, *supra* note 51, at 186–87.

213. *Id.* at 188–89.

214. The constitutional reform is addressed in detail in EVANS, *supra* note 37. *See also* KAUFMAN, *supra* note 189, at 147–255; Thome, *supra* note 5, at 210–11.

215. BRAHM, *supra* note 51, at 195–224.

216. Thome, *supra* note 5, at 210 (translating and quoting Eduardo Frei and Hugo Trivelli, *Mensaje del Ejecutivo al Congreso Proponiendo la Aprobación del Proyecto de Ley de Reforma Agraria*, in ANTONIO VODAVONIC, *LEY DE REFORMA AGRARIA 13 (1967)*).

217. BRAHM, *supra* note 51, at 230–43.

218. *Id.*

supervision and control.²¹⁹ The government began to buy shares of private banks to nationalize, de facto, the banking industry.²²⁰ Concerning agrarian reform, a new law sought to increase peasant ownership and to guard estates under forty hectares from expropriation, but there appeared to be insufficient popular support immediately to move forward with these changes.²²¹ Nonetheless, while expropriations in the late 1960s were measured in the 100,000s of hectares on a yearly basis, under Allende, they reached the millions of hectares per year.²²²

Allende and his program of change came to an abrupt end on September 11, 1973, when General Augusto Pinochet and his fellow military commanders launched a coup that would place Chile under Pinochet's control until 1990 when Patricio Aylwin took office as the first elected President of Chile in two decades.²²³ Pinochet immediately set to reverse the political and economic direction of the country. As Brian Loveman writes: "Press censorship, suspension of civil liberties, the fierce repression of leading politicians, labor leaders, academics, and other supposed Marxist sympathizers merged into a 'holy war' against what the military called the 'Marxist cancer.'"²²⁴

From the perspective of ideas concerning property in Chile, the Pinochet dictatorship is famous for its neo-liberal, free-market reforms under the external guidance of the "Chicago boys."²²⁵ Nonetheless, Pinochet embraced the social function doctrine of property. On September 11, 1976, in Constitutional Act Number 3, Pinochet's Ministry of Justice sought to revise certain rights as expressed in the Constitution of 1925 to "incorporate contemporary constitutional doctrine and its international acceptance."²²⁶ In fact, the preamble to the Decree Law states that one of the factors leading to these changes was that "economic and social development ought to be based on a clear definition and adequate protection of the right of property and its social function."²²⁷ Thus, in 1976, Pinochet's Constitutional Act

219. *Id.*

220. *Id.* at 253–55.

221. *Id.* at 244–47.

222. *Id.* at 248.

223. BRIAN LOVEMAN, CHILE: THE LEGACY OF HISPANIC CAPITALISM 257, 308 (3d ed. 2001). Pinochet continued as commander of the army until 1998 when he became a "Senator for Life." *Id.* at 325. During his rule, "disappearances, torture, and murder were . . . to recur at regular intervals until almost the end of the military regime." COLLIER & SATER, *supra* note 15, at 361. Abuses are chronicled in 2 REPORT OF THE NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip E. Berryman trans., 1993). He died in 2006. Jonathan Kandell, *Augusto Pinochet, 91, Dictator Who Ruled by Terror in Chile, Dies*, N.Y. TIMES, Dec. 11, 2006, at A1.

224. LOVEMAN, *supra* note 223, at 261.

225. *Id.* at 279–85, 291.

226. "[I]ncorporar nuevas garantías acordes con la doctrina constitucional contemporánea y su consagración internacional . . ." Preamble para. 3, Decreto Ley No. 1552, Septiembre 11, 1976, DIARIO OFICIAL [D.O.] (Chile).

227. "Que el desarrollo económico y social debe fundarse en una clara definición y adecuada protección del derecho de propiedad y su función social . . ." Preamble para. 8, Decreto Ley No. 1552, Septiembre 11, 1976, DIARIO OFICIAL [D.O.] (Chile).

incorporated the term “social function” into a Chilean constitutional text for the first time:

The right of property in its varied forms in all classes of corporeal and incorporeal property.

Only the law may establish the modes of acquiring property, of using, enjoying, and disposing of it and the limitations and obligations that allow ensuring its social function. The social function of property includes as much as required by the general interests of the State, national security, utility and the public well-being, the best use of the sources of productive energy for the service of the collective and the elevation of the conditions of the common life of inhabitants.²²⁸

On October 21, 1980, Decree Law 1150 established a new Constitution of Chile that further entrenched many of the political, social, and economic goals of General Pinochet.²²⁹ The malleability of the social function doctrine was not lost on General Pinochet, and the Constitution of 1980 repeated the same social function definition of property as found in Constitutional Act Number 3.²³⁰ As in Constitutional Act Number 3 of 1976, the Constitution of 1980 contains extensive provisions regarding expropriation and appropriate compensation, the protection of small holdings, and the state’s power to explore and to exploit natural resources.²³¹ There is no small degree of irony that the social function norm of property found its strongest and most explicit form in the constitution of the Chilean leader most aligned with economic liberalism and despotic rule. One would have expected Pinochet’s economic project

228. The Spanish language text reads:

El derecho de propiedad en sus diversas especies sobre toda clase de bienes corporales o incorporales.

Sólo la ley puede establecer el modo de adquirir la propiedad, de usar, gozar y disponer de ella y las limitaciones y obligaciones que permitan asegurar su función social. La función social de la propiedad comprende cuanto exijan los intereses generales del Estado, la seguridad nacional, la utilidad y la salubridad públicas, el mejor aprovechamiento de las fuentes de energía productiva para el servicio de la colectividad y la elevación de las condiciones de vida del común de los habitantes.

Art. 1(16), Decreto Ley No. 1552, Septiembre 11, 1976, DIARIO OFICIAL [D.O.] (Chile).

229. LOVEMAN, *supra* note 223, at 290–91.

230. The text from the Constitution of 1980 reads:

La Constitución asegura a todas las personas:

...

24. — *El derecho de propiedad en sus diversas especies sobre toda clase de bienes corporales o incorporales.*

Sólo la ley puede establecer el modo de adquirir la propiedad, de usar, gozar y disponer de ella y las limitaciones y obligaciones que deriven de su función social. Esta comprende cuanto exijan los intereses generales de la Nación, la seguridad nacional, la utilidad y la salubridad públicas y la conservación del patrimonio ambiental.

Nadie puede, en caso alguno, ser privado de su propiedad, del bien sobre que recae o de alguno de los atributos o facultades esenciales del dominio, sino en virtud de ley general o especial que autorice la expropiación por causa de utilidad pública o de interés nacional, calificada por el legislador.

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] (1980) art. 19(24).

231. *Id.*

to point in the direction of a conception of property as an unassailable, absolute natural right. Instead, the language of the Constitution of 1980 perfectly co-opts the long-standing Chilean tradition of the social function of property and defines social function in such terms as to provide for almost complete state control over property as may be necessary for the goals of General Pinochet. And Pinochet worked actively to reverse the redistribution of land that had occurred in the preceding decades. Indeed, it is estimated that after 1973 only a little more than half the land distributed stayed in the hands of those who had received it either cooperatively or individually under recent regimes of agrarian reform.²³²

By 1989, on the eve of democracy's return to Chile, the constitution maintained the concept of the "social function" of property and defined its scope this way:

The right of property in its varied forms in all classes of corporeal and incorporeal property.

Only the law may establish the modes of acquiring property, of using, enjoying, and disposing of it and the limitations and obligations that allow ensuring its social function. The social function of property includes as much as required by the general interests of the State, national security, utility and the public well-being, and the conservation of the environmental patrimony.²³³

This language and definition governs today.²³⁴

Democracy returned to Chile in 1990 with Presidents mostly following the neo-liberal model established during the Pinochet era.²³⁵ Over the next decade, funding for public housing, health care, and education increased substantially.²³⁶ In the past ten years, claims for land have come from Chile's indigenous population, notably the Mapuche, but there has been little inclination to engage in expansive agrarian reform programs.²³⁷

CONCLUSION

The writings of Duguit were the primary and almost exclusive source of the social function norm of property in Chile during the debates leading to the Chilean Constitution of 1925. On the theoretical level, Duguit's thought was the guide, his work defined the debate, and his terminology provided the focal point around which debate travelled. Although the Constitution of 1925 did not adopt the term "social function," its text reflected the idea and in this sense it may be considered one of the earliest Latin American

232. PETER DORNER, *LATIN AMERICAN LAND REFORMS IN THEORY AND PRACTICE* 39 (1992).

233. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(24). For the Spanish language text, see *supra* note 230. For the environmental function, see Ankersen & Ruppert, *supra* note 4, at 110–13.

234. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(24).

235. RECTOR, *supra* note 12, at 213–14.

236. COLLIER & SATER, *supra* note 15, at 396–97.

237. *Id.* at 401.

constitutions to adopt this new definition of property. Duguit supplied the idea.

Other foreign models and ideas related to property also touched on the debate, but to a much lesser extent. The second most important foreign influence appears to have been England and its social legislation following World War I.²³⁸ Germany and Russia were also mentioned in passing.²³⁹ Other anticipated sources for these ideas, such as the Mexican Constitution of 1917 or the German Weimar Constitution of 1919, played only a very minor or non-existent role in the construction of the social function norm in Chile during the 1920s.

The lack of references to the Mexican Constitution of 1917 is unexpected and runs counter to some established scholarly interpretations of the spread of the social function of property in Latin America. One recent study of the growth of the social conception of property in Chile from 1925 to 1973 notes the influence of the Weimar Constitution, but does not even mention Mexico in its introductory pages setting out the main themes.²⁴⁰ Thus, the place of Mexican thought and the Mexican Constitution of 1917 in relation to the dissemination of the social function doctrine of property in Latin America must be reassessed.

Chilean hesitance to invoke the Mexican Constitution may have followed from a sense that the Southern Cone's cultural and legal development was more aligned with Europe than with the large Spanish-speaking country to the north. Duguit effectively raised this intellectual and cultural connection in his lectures in Argentina.²⁴¹ The years leading up to and following the Mexican Constitution of 1917 were hardly a period that would call for emulation by other countries. It was a period of intense civil wars, United States military intervention, and political assassinations.²⁴² Indeed, in Mexico, "[w]hen Plutarco Calles won the presidential elections in 1924 and was inaugurated later that year, the ceremony marked the first time in forty years that the office was handed over peacefully from one chief executive to the next."²⁴³ Furthermore, by 1925, land reform in Mexico under Article 27 had "not yet benefited the overwhelming majority of rural Mexicans."²⁴⁴ It is quite possible that the broad-reaching race and class implications of the Mexican Revolution's formative period, the strong rhetoric of land redistribution, and even the milder language of the Constitution of 1917 made the Mexican Constitution a rather distant model for the Chilean drafters. Perhaps the social implications of the Mexican Revolution and its constitution were considered too destabilizing for these Chilean politicians

238. ACTAS, *supra* note 2, at 86–87, 91, 93, 97, 100–01, 119.

239. *Id.* at 95, 101.

240. BRAHM, *supra* note 51, at 11–32.

241. DUGUIT, *supra* note 43, at 4–7.

242. MICHAEL C. MEYER ET AL., *THE COURSE OF MEXICAN HISTORY* 493–519 (6th ed. 1999); *see also* THOMAS BENJAMIN, *LA REVOLUCIÓN: MEXICO'S GREAT REVOLUTION AS MEMORY, MYTH, AND HISTORY* 49–77 (2000).

243. MEYER ET AL., *supra* note 242, at 560.

244. *Id.* at 556.

who were drawn to Europe in their search for models.²⁴⁵ Supporting the idea that a particular political disposition may affect the willingness to cite or not to cite the Mexican Constitution is the study by González García, a Radical Socialist, who made connections between the Mexican Constitution of 1917 and the Chilean Constitution of 1925.²⁴⁶

Although some members of the subcommittee thought that precise labeling of property as a social function or making distinctions between “property” and “the exercise of property” were merely semantic quibbles, the text as approved actually maintains this distinction. In this way, the constitutional text addresses some of the conceptual problems that had crept (and continue to creep) into the discussion of property as a social function. Indeed, adopting the phrase “exercise of property” much more closely matches the ideas that Duguit must have had in mind. In the context of Duguit’s work, the French “*propriété*” can be defined as either “ownership” or “property.” As Duguit’s works were translated into Spanish and English, “*el ejercicio del derecho de propiedad*” and “ownership” would have made more sense, but translators were drawn to the word “*propiedad*” and “property” instead. “Ownership” is, of course, “the exercise of property,” and thus, this formulation seems truer to Duguit’s intent.²⁴⁷

With President Allende, the history of the idea of private property had reached the left side of the continuum. In the course of Chilean constitutional history, private property had been: (1) an absolute, natural right; (2) a right limited by obligations; (3) a social function; and (4) under Allende, a basic pillar of the capitalist structure to be dismantled.²⁴⁸ While the text of the Constitution of 1925 speaks of property limited by particular obligations and never uses the term “social function,” Chileans after the Constitution of 1925 quickly interpreted the constitution to include the full panoply of obligations implied by the social function definition and even beyond the ideas set out originally by Duguit. Although not in the Constitution of 1925, the term “social function” was extensively used during the debates of the text and afterwards by Chileans attempting to define property for various kinds of legislation. The language of the Constitution of 1925 easily permitted the kinds of legislative projects sought by those trying to limit large landed estates, uncultivated agricultural lands, and undeveloped urban parcels. It is not clear that Duguit, the main proponent of the social function doctrine, would have agreed with all of these extensions of the nature of property. It is clear that Duguit’s writings do not support the socialization of property contemplated and advanced by President Allende.

Duguit would have been even more surprised by Pinochet’s willing adoption of the term “social function” in the Constitution of 1980. Nonetheless, by carefully designing what constituted a social function,

245. I thank Tanya K. Hernandez for discussing this possibility with me. Research on the Chilean perceptions of the Mexican Revolution would shed light on this idea.

246. See *supra* note 83 and accompanying text.

247. Mirow, *supra* note 4, at 197.

248. BRAHM, *supra* note 51, at 225–27.

Pinochet was able to use the ambiguity of the term in his favor, and herein lies a telling weakness of the social function doctrine itself. Allende was able to push property's social function far to the left and Pinochet was able to push property's social function far to the right. The median position once sought by Duguit had been lost even before Allende and Pinochet. As soon as the term "social function" was debated and invoked in relation to particular political projects, it was quickly construed beyond its original scope. The original meaning of Duguit's concept became even more obscure as both Allende and Pinochet applied ideas of property to the politics of the day.