The Social-Obligation Norm of Property: Duguit, Hayem, and Others

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THE SOCIAL-OBLIGATION NORM OF PROPERTY:
DUGUIT, HAYEM, AND OTHERS

M.C. Mirow*

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I. INTRODUCTION

“[P]roperty is not a right; it is a social function,”¹ wrote the French
law professor Léon Duguit in 1912 when publishing a famous series of
lectures he delivered in Buenos Aires the year before. This statement
and Duguit’s work signaled a transformation in the way that property

¹. “Mais la propriété n’est pas un droit; elle est une fonction sociale.” LÉON DUGUIT,
LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLEON 21 (2d ed.
1920) [hereinafter DUGUIT, LES TRANSFORMATIONS].
would be understood in the Euro-American world. The statement led to the idea of what is now commonly called the “social-obligation norm” or the “social-function norm” of property. In essence, the idea of the social-obligation norm of property is that “[p]roperty rights should have their share of social responsibility.” These ideas contrasted with the dominant conception of property as an absolute right in which the owner is free to do or not to do whatever the owner likes with the property. Duguit’s characterization of private property limits it by requiring a minimum level of social utility beyond which property no longer exists. The scope of the social-obligation norm has varied in practice and has been subject to the personal or political interests of those charged with administering programs rooted in its understanding of property. Notions of the norm have been used to justify the expropriation and redistribution of property through land reform programs, the reshaping of cities through urban planning, the imposition of rent controls on landlords, and other limitations on the use of property by its owner.

Today, scholars frequently cite Duguit as the founder of the social-function norm. These references, however, seldom go beyond a quick cite to his foundational work on the topic. It seems that little is known about the genesis of his ideas, the sources he employed, and how some of these ideas eventually migrated into contemporary legal systems around the world. This Article seeks to explore the origins of Duguit’s

4. Historians of law and politics in Europe are so familiar with the notion of property’s social function that the topic seems to them better suited to a set piece for undergraduate examination rather than an area to be re-examined and explored. The early sources and ideas concerning broadly what is “the social” are the building blocks of the modern European social welfare state. They are viewed as teleology rather than history, and to study them places the scholar, particularly the foreign scholar, within the camp of apologists for the modern European social welfare state and its policies. Likewise, in Latin America, the social-function norm of constitutional property is so common and so familiar that it has received little notice as a regional phenomenon.
thought on the topic as some necessary background work to the current debate concerning the social function of property.

Duguit’s redefinition of property is one instance of the wider trend of the globalization of “The Social” within law and legal thought noted by Duncan Kennedy. This view of property has led to many offshoots, including the reconsideration of intellectual property rights in relationship to the needs of society, the World Charter of Rights to the City, and Ugo Mattei’s ideas of a Latin American resistance to neoliberalism through a redefinition of property. Brazil has been particularly active in expanding these ideas. It has created an “environmental-function” norm of property in its Civil Code of 2002, as well as developing a social-function limitation on, not property, but contract.

The social-obligation norm of property stands in stark contrast to the classically liberal notions of property found in the Anglo-American tradition. This classical view is expressed well by F.H. Lawson and Bernard Rudden who write:

In principle, owners can do anything they like with what they own: use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on. Furthermore the owner is perfectly free to do nothing at all with the thing: in principle, the law of property imposes no positive duties on an owner.

For modern property scholars, William Blackstone is often viewed as the predominant spokesperson for a conception of property in which

the owner has “sole and despotic dominion” over property.\textsuperscript{9} Blackstone has become inextricably linked to this definition of property despite recent scholarship revealing the complexity of Blackstone’s ideas on the topic.\textsuperscript{10}

The idea of the social-obligation norm of property is experiencing a renaissance in American legal thought.\textsuperscript{11} Gregory Alexander, a forceful advocate of the social-obligation norm, sounds a clarion call, “[t]he time has come for property scholars to come to grips with the social-obligation norm. . . . It is high time for property scholars to begin developing a social-obligation theory.”\textsuperscript{12} As a corollary to the call, a recent “Statement of Progressive Property” asserts that “[w]e must look to the underlying human values that property serves and the social relationships it shapes and reflects.”\textsuperscript{13} This Statement and the accompanying articles that form a law review symposium on the topic mark an important step in work of many scholars on the topic. They seek to appreciate and to strengthen this social-obligation understanding of property and to replace conceptions of property derived from an absolutist view and the economic analysis of legal institutions.\textsuperscript{14} In fact,

\begin{itemize}
\item \textsuperscript{9} See supra note 10, at 819.
\item \textsuperscript{10} Alexander, supra note 10, at 819.
\item \textsuperscript{11} Alexander, supra note 10, at 819.
\item \textsuperscript{12} Alexander, supra note 10, at 819.
\item \textsuperscript{13} Alexander et al., A Statement of Progressive Property, 94 Cornell L. Rev. 743 (2009).
\item \textsuperscript{14} Special Issue on Property and Obligation, 94 Cornell L. Rev. 743-1071 (2009). Among these scholars, Gregory Alexander has been at the forefront of the effort. His fullest treatment of the topic entitled The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence has been received with acclaim. Gregory S. Alexander, The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence (2006) [hereinafter Alexander, The Global Debate]; see M.C. Mirow, [Dear Justice Scalia], 58 J. Legal Educ. 147-55 (2008) (reviewing Alexander, The Global Debate). The term “constitutional property” sits between the worlds of public law and private law for those schooled in civil law systems prevalent in Europe and Latin America. The very phrase “constitutional property” indicates the liminal quality of the inquiry: “constitution” signals public law; “property” signals private law. Those trained in the common law will be less concerned about the term and its apparent self-contradictory aspects. The coinage, however, is appropriate because in much of the common law world, the social-function obligation of property is largely unknown. While questions of property’s social function often arise in the
these efforts offer a well-considered response to the dominant law and economics analysis that so many property professors and lawyers were raised on.\textsuperscript{15}

So fully developed is the modern dialogue on the social-obligation norm that scholars working in the field are apt to forget that the idea has a long intellectual history, and in 2010, we are celebrating the centennial of the clearest articulation of property’s social function. This new way of looking at property, the social-function model of property, was introduced in 1910 by the French doctoral student Henri Hayem, and a few years later, it was widely disseminated by Duguit. As Blackstone represents “despotic ownership,” so Duguit has come to represent property’s “social function.”

The idea of property’s social function travelled the world following Duguit’s lectures in 1911 and their subsequent publication. In South America, Duguit’s lectures in Buenos Aires served to link his work and ideas to the legal development of the region. Based on Duguit’s work, drafters of Latin American constitutions changed the way property was defined in the first decades of the twentieth century. Before this regional shift, most constitutions followed classically liberal definitions of property as expressed in the French Civil Code and as found in the United States. Under this earlier view, property was absolute and subject only to the absolute power and arbitrary whim of the owner. The newer view considers property as having or as being defined by a social function.\textsuperscript{16} For example, evincing the influence of Duguit, the Chilean Constitution of 1925 states that “[t]he exercise of the right of property is subject to the limitations or rules that the maintenance of the progress of the social order require.”\textsuperscript{17} A more recent example is the Bolivian Constitution of 1993 which provides that everyone has a fundamental right to “private property, individually or collectively, as long as it fulfills a social function.”\textsuperscript{18} Similarly, the Constitution of El Salvador of

\textsuperscript{15} Any first-year student of property reading Dukeminier’s standard text will have been exposed to the law and economics framework. The most recent edition is \textit{Jesse Dukeminier et al., Property} (6th ed. 2006). \textit{See generally Mattei, supra} note 2. For the social-obligation norm as a response to law and economics, see Alexander, \textit{supra} note 10, at 750-51.

\textsuperscript{16} M.C. Mirow, \textit{Latin American Law: A History of Private Law and Institutions in Spanish America} 205-06 (2004) \textit{[hereinafter Mirow, Latin American Law]}. The book’s text is wrong in stating that the Colombian Constitution of 1886 declared that “Property is a social function that implies obligations.” It was, in fact, the 1936 amendment to the Constitution of 1886 that added this language. Artículo 10, Acto Legislativo No. 1, Aug. 5, 1936.

\textsuperscript{17} Chilean Constitution (1925), art. 10(10).

\textsuperscript{18} Bolivian Constitution (1993), art. 7(1).
1983 provides “[t]he right to private property in its social function is recognized and guaranteed.”19 The idea has found expression throughout the world,20 the Constitutions of Germany and South Africa are prime examples of modern documents that embrace the social function.21

In North America, Duguit’s ideas became known to the legal community when some of his work was translated and published by Harold Laski, an important English professor of political thought who lectured widely at McGill, Yale, and Harvard from 1914 to 1920.22 In fact, Laski’s translations of Duguit were published in New York.23 Other works by Duguit were also translated and published in the United States.24 Through Laski and on their own, the works of Duguit found their way into the main body of American jurisprudence as ideas to be considered and reckoned with.25 Recent scholars working on this idea of property and related aspects in the United States include Gregory Alexander, Eric Freyfogle, Rebecca Lubens, Eduardo Peñalver, Jedediah Purdy, Joseph Singer, and Laura Underkuffler, among others.26 Although the social-obligation norm has not been a dominant strand of understanding property in the United States, the idea that property has a civic or public side has been present in the United States since its founding.27

26. Alexander, supra note 10, at 747-48 nn.6 & 7. See also Lubens, supra note 21, at 389.
Before turning to Duguit and his theory, a brief mention concerning terminology and translation is necessary. The roots of the social-function norm lie in France. Writing in English about French ideas presents some difficulties in legal terminology and comparative law. “Propriété” in French can mean both “ownership” and “property.”28 The most common word for “property” in its legal sense in French is “les biens.”29 When translating French writers, the sense of particular phrases would often dictate that it would be better to render the word as “ownership;” thus, the phrase “ownership is a social function” is more easily understood than “property is a social function” to most English speakers. Indeed, Joseph Singer captures the French idea nicely when he writes, “Owners have obligations; they have always had obligations.”30 Nonetheless, the developed English secondary literature on the topic prefers the term “property” to render the French word “propriété.” For consistency, particularly consistency in ideas, I have decided to perpetuate this somewhat minor error or ambiguity. In English, the social-function norm or the social-function obligation has been tied to the word “property” and recently to the phrase “constitutional property.” To write more correctly about the French ideas of the “social function of ownership,” would convey a clearer meaning of the idea. If we were to focus on “ownership” rather than “property,” the human instrumentality of ownership would more clearly connect the activity of owning property to societal obligations. Nonetheless, the term “social function of property” is used here because the English-language scholarship has already settled on “property” and to introduce the minor correction of “ownership” would, I think, create needless confusion.

II. LÉON DUGUIT

Léon Duguit was born in 1859 in Libourne, France, about 20 miles northeast of Bordeaux, where he spent his early years. He then studied law at the University of Bordeaux and rose swiftly in the academic world. By 1880 he had obtained his first law degree, a doctorate through competition, and had received a dispensation for his young age to begin preparing for the agrégation which he later obtained in 1882. His first teaching position was at the University of Caen, where he taught legal

history. With Edmond Villey, he founded a review on political economy at the University of Caen, *Revue d‘économie politique*. In 1886, he returned to the University of Bordeaux, his academic home for the next forty years.

In Bordeaux, Duguit held regular meetings with academic friends. Importantly for our study of Duguit’s social thought, Émile Durkheim was among these close friends from whom Duguit borrowed and applied various approaches to law. Establishing his place as a professor of constitutional law, Duguit published his first article in 1896 in the *Revue de droit public*. It was, however, his two-volume publication on the state, *l‘État*, in 1901 and 1903, that gave him national prominence and set the structure for his future works. Over the next decade, he held various positions at the University of Coimbra, the University of Cairo, and at the École des Hautes Études Sociales and continued to publish regularly. From 1911 forward, he published several major works including his lectures in Buenos Aires and a five-volume work on constitutional law, *Traité de droit constitutionnel*. He was active in university life, local politics, and for social causes within the city and region. He was a member of the Union for Truth, a Dreyfus society, and attended meetings of the Cercle Voltaire.

During the First World War, Duguit served as an administrator in the army and ran a military hospital. He lost one of his two sons in the war. In the 1920s, Duguit continued with his academic work and with several visiting positions abroad: Columbia University in New York in 1920 and 1921, the University of Coimbra in 1923, and the University of Bucharest in 1925. In 1926, with Hans Kelsen and Franz Weyr, he founded an international review of legal theory, the *Revue internationale de théorie du droit*, and in 1927, he participated in the founding of the International Institute for Public Law. He died in 1928.

In 1911 over the course of two months, Léon Duguit, this well-known French law professor and author, delivered a series of lectures in Buenos Aires, Argentina. The topic, how the civil law had changed since the *Code Napoléon* of 1804, was an opportunity for Duguit to bridge the intellectual traditions of France and Argentina and of Europe and America. He flattered his audience of Argentines by noting that they were the professional elite of the country and that the topic was

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31. *Dictionnaire Historique des Juristes Français XIIe-XXe Siècle* 271 (Patrick Arabeyre et al. eds., 2007) [hereinafter DHJF].
32. *Id.* at 271-72.
33. *Id.* at 272.
appropriate because their respective countries had come, more or less, to the same level of civilization. One might speculate that this was exactly what a room full of Argentines at the beginning of the twentieth century would have delighted in.

The lectures were an opportunity of another sort. Duguit used the series to expound and advocate a new view of private law and of property. Duguit’s discussion of property, the sixth and final lecture in the series, was the most important, controversial, and lasting part of the lectures. Duguit transcribed and published the lectures in Paris just a few months after their delivery in Buenos Aires; a second Paris edition appeared in 1920. In his preface to the second edition, Duguit summarized the argument he proposed: “In the sixth lecture, I have developed the idea that capitalist property, and particularly real property, is increasingly less of a subjective individual right and more of a social function.”

He repeated the essential language of the sixth lecture this way: “Property is no longer the subjective right of the owner; it is the social function of the possessor of wealth.” He coined two hyphenated words to describe the old notion of property or ownership and the new: right-property (propriété-droit) and function-property (propriété-fonction).

This lecture and its subsequent circulation in France, the United States, and Latin America provided the most important source by Duguit concerning the social function doctrine of property, now commonly called the social-obligation norm of property. North American scholars examining the nature of property referred to it. Latin American constitutionalist reconsidering the definition of property in their constitutions also referred to it. Writing later in 1923, Duguit made it clear that he considered this lecture in 1911 as the origin of his assertions concerning the social function of property. Although other

35. DUGUIT, LES TRANSFORMATIONS, supra note 1, at i.
36. Id. There were also editions of the work in Spanish published in Madrid in 1915 and 1926. Hale, supra note 3, at 276, n.45. Another author mentioned a Spanish translation from 1921. Pérez & González, supra note 34, at 488 n.15, 546.
37. “J’ai, dans la sixième conférence, développé cette idée que la propriété capitaliste, et particulièrement la propriété foncière, cesse de plus en plus d’être un droit subjectif de l’individu pour devenir une fonction sociale.” DUGUIT, LES TRANSFORMATIONS, supra note 1, at iv.
38. “La propriété n’est plus le droit subjectif du propriétaire; elle est la fonction sociale de détenteur de la richesse.” Id. at v.
39. Id. at vi.
40. See supra text accompanying notes 23-28.
41. An early example from Chile, ACTAS OFICIALES DE LAS SESIONES CELEBRADAS POR LA COMISIÓN Y SUB-COMISION ENCARGADAS DEL ESTUDIO DEL PROYECTO DE NUEVA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA 114-19 (1925).
42. LÉON DUGUIT, 3 TRATÉ DE DROIT CONSTITUTIONNEL 619 (2d ed. 1923) (Paris, Fontemoing & cie, 1911) [hereinafter DUGUIT, DROIT CONSTITUTIONNEL].
works of Duguit and French thinkers contributed to the shift, this sixth
lecture transplanted the French roots of the social function of property
into foreign soil in many countries around the world.

This radical, new definition of property was not an isolated
statement but arose in the context of Duguit’s life work, and it must be
read in the context of both the six lectures he delivered in Argentina and
of his work on the social function up to its dissemination abroad.

Duguit’s view of the state was that its goal was not to exercise
imperium, but rather to fulfill its social function to collective service.43
All other lesser institutions, such as legal obligations or property, should
also fulfill this general function. Duguit’s assertions about the social-
function norm of property were, in fact, a very small slice of his much
larger life’s work on the nature and function of the state. It was not,
however, a deviation or detour from this work. Duguit’s view of
property fit in with his overall theory of the state. His ideas also took on
a later significance that neither Duguit nor his contemporaries could
have expected.44

Duguit can be correctly viewed as one of the French anti-formalists
who rejected the deductive science of an autonomous law so prevalent
in nineteenth-century Europe.45 With the aim of establishing the limits
of the state by law, he sought to apply the more empirically based
analyses of the social sciences to law.46 The writings of Herbert Spencer
strongly influenced his early writings on the law and state, and Duguit
used such biological and organic approaches to analyze the function and
change of law and the state. Although he later left this school of
thought, Duguit kept certain central aspects of this approach throughout
his academic life. These included an empirically based scientific
methodology and a core belief in the value of sociological modes of
understanding law and the state.47

Despite its assertions of realist and scientific approach, the body of
Duguit’s work to the modern reader appears to be deeply imbedded in
the late nineteenth- and early twentieth-century philosophical

43. DHJF, supra note 31, at 273.
44. Roger Bonnard, Léon Duguit: Ses Oeuvres, Sa Doctrine, 46 REVUE DU DROIT PUBLIC
ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L’ÉTRANGER 5, 16-17 (Marcel Giard ed., 1929).
45. Mauricio García-Villegas, Comparative Sociology of Law: Legal Fields, Legal
Scholarship, and Social Sciences in Europe and the United States, 31 LAW & SOC. INQUIRY 349-
56 (2006); Duncan Kennedy, Two Globalizations of Law & Legal Thought, 36 SUFFOLK U. L.
REV. 648-51 (1993). With Saleilles and Hauriou, Duguit is considered one of the great theorists
of the French school of legal objectivism. Pérez & González, supra note 34, at 543 n.150 (citing
G. Gurvitch, L’idée du Droit Social, Notion et Système du Droit Social. Histoire
Doctrinale Depuis XVII Siècle Jusqu’à la Fin du XIX Siècle 591-710 (Paris, Recueil Sirey
1932)).
46. DHJF, supra note 31, at 272; Pérez & González, supra note 34, at 508-09.
47. Bonnard, supra note 44, at 8-11.
discussions of the nature of law and of the nature of the state. It was this work that his contemporaries found most important and interesting. Indeed, on Duguit’s death, one of his colleagues, Roger Bonnard also of Bordeaux, stated of him: “I am persuaded that the day will come when one will think of two great periods in the science of the law: one before him, the other after him.” While not attached to Duguit’s name, this was certainly a transformative period in methodological approaches to law, and in some ways, Bonnard’s prophesy was correct. Duguit was at the center of a critique and reconceptualization of the commonly held ideas about both public and private law.

Thus, using his positivist, realist approach, most of Duguit’s work can be characterized as critiquing existing theories and understandings of the law and the state. In many respects, Duguit’s targets were defined by the existing literature. Duguit took on what he considered the metaphysical assumptions, rather than the scientific conclusions, about law expressed in contemporary works by Rudolf von Ihering and Georg Jellinek. Notions of subjective rights were not supported by the conclusions Duguit obtained through his positivist method. In addition to rejecting the accepted idea of subjective rights, Duguit also reconsidered the predominant idea that juridical acts were the result of assertions of the wills of the authors of the act, or what was commonly called the Willenstheorie. In Duguit’s view, metaphysical ideas about the law and critiques of them had to follow from empirical scientific observations about the law, rather than precede such observations.

Thus, Duguit’s realist approach critiqued the current notions of subjective rights, the will theory of juridical acts, the auto limitation of the state, and the schools of natural and contractarian law as represented in divine will and social contract theories of the state and law. Following Émile Durkheim, the preeminent French sociological thinker of the period, Duguit sought legal rules that reflected social rules and social interdependence, or solidarity, leading to his analysis of the social state and the rule of law—the true legitimacy for government.

Duguit’s thought in general and on the social function of property in relationship to social solidarity and social interdependence was guided strongly by the works of Comte and Durkheim. In fact, France was
fertile ground for the development of Duguit’s ideas related to the social function of property. The fifty years leading up to Duguit’s work had witnessed the rise of a school of social thinkers and writers. The broad ideas of “solidarity,” stemming from the writings of the Swiss religious philosopher Charles Secrétan were added to social aspects by the French jurist and political philosopher Léon Victor Bourgeois who more fully developed the idea of “social solidarity” around the turn of the century.\(^{55}\) Charles Gide was also instrumental in the development of these ideas.\(^{56}\) Thus, in addition to maintaining a sociological approach borrowed from Durkheim, Duguit also adopted Durkheim’s idea of “social solidarity” as a central principle for his ideas concerning the law and the state.\(^{57}\) Nonetheless, his unwillingness to adopt the idea of the collective conscience, an important aspect of Durkheim’s approach, was a substantial departure from Durkheim’s thought.\(^{58}\) Duguit also cited and quoted Comte as a central influence on his development of the social-function norm.\(^{59}\) Indeed, Duguit’s very method of observation and continued observation has its origin in Comte’s positivism.\(^{60}\)

One aspect of such an approach was the collapsing of the traditional distinction between private and public law, a set feature of the civil law since Roman times.\(^{51}\) Just as assumptions concerning subjective rights could not be supported in the area of public law, they could not be supported in private law.\(^{62}\) This idea was not widely accepted, and Duguit received criticism from those who defended the more traditional German doctrine, such as Raymond Carré de Malberg, and from classical jurists, such as the legal historian Adhémar Esmein and his colleague at Bordeaux, Julien Bonnecase.\(^{63}\) His debates on the nature of law with Maurice Hauriou of Toulouse, who upheld more traditional objective notions of law, have been chronicled.\(^{64}\) Because he refused to

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\(^{56}\) Id. at 172-73; Pérez & González, supra note 34, at 539-40.

\(^{57}\) Bonnard, supra note 44, at 36.

\(^{58}\) Id.

\(^{59}\) DUGUIT, LES TRANSFORMATIONS, supra note 1, at 159; DUGUIT, DROIT CONSTITUTIONNEL, supra note 42, at 268 (citing AUGUSTE COMTE, SYSTÈME DE POLITIQUE POSITIVE 156 (Paris, Larousse 1892)); DUGUIT, DROIT CONSTITUTIONNEL, supra note 42, at 618-19 (quoting a passage from COMTE, supra).

\(^{60}\) POUND, supra note 25, at 186-87.

\(^{61}\) DHJF, supra note 31, at 273; Pérez & González, supra note 34, at 495-96.

\(^{62}\) Bonnard, supra note 44, at 16.

\(^{63}\) DHJF, supra note 31, at 273.

\(^{64}\) Id. See C. Eisenmann, Deux Théoriciens du droit: Duguit et Hauriou, REVUE PHILOSOPHIQUE 231-79 (1930); M. Milet, L. Duguit et M. Hauriou: Quarante ans de Controverse Juridico-politique. Essai D’analyse Socio-rhétorique (1889-1929) in LES JURISTES FACE AU POLITIQUE : LE DROIT, LA GAUCHE, LA DOCTRINE SUR LA TROISIÈME RÉPUBLIQUE 85-
accept the notion of a collective conscience, Duguit was even pushed aside by other disciples of Durkheim, who otherwise would have made up his natural intellectual circle. Duguit’s positions on the law were not static throughout his life; for example, after 1914 he amended his ideas concerning the goals of positive law to include the attainment of justice, a shift that led some to categorize his views as espousing ideas of natural law. Despite his sometimes controversial positions, he left an important mark on the teaching of public law at Bordeaux from whence several of his students went on to academic distinction. When Duguit delivered and published these lectures in 1911 and 1912, he was already well established as a law professor at the University of Bordeaux and as one of France’s premiere minds in the area of public law. Thus, the lectures reflect the confident work of a maturing scholar, then in his early fifties.

III. THE BUENOS AIRES LECTURES

The lectures provide us the best window into Duguit’s thought on the social function of property. In his Buenos Aires lectures, Duguit argued that private law had recently undergone a transformation from a metaphysical and individualist system to a realist and social (réaliste et socialiste) system. He effectively and repeatedly returned to this theme in the course of his six lectures entitled: (1) Subjective Rights and the Social Function; (2) The New Conception of Liberty; (3) The Autonomy of the Will; (4) The Juridical Act; (5) The Contract and Responsibility; and (6) The Social Function of Property. Although it is unlikely Duguit would have expected the sixth lecture on property’s social function to have created the most interest, by the time of the second publication of the lectures in 1920, Duguit’s preface to the second edition focused on this topic. He used the second preface to restate his case for the social-function norm and to set out several examples of laws enacted after his lecture, from 1916, 1918, and 1919, to illustrate the growth of the norm. One set of laws, the loi Méline required the cultivation of farmland when the owners of the land refused to grow crops. Aimed at farmers who had been mobilized for war, the

121 (Carlos Miguel Herrera ed. 2003); M. Waline, Les Idées Maîtrisses de deux Grand Publicistes Français: Léon Duguit et Maurice Hauriou, L’ANNÉE POLITIQUE 16 (Nov. 1929).
For a recent discussion of their differences, see Pérez & González, supra note 34, at 505-08.
65. DHJF, supra note 31, at 273.
66. DUGUIT, LES TRANSFORMATIONS, supra note 1, at 8-9. To avoid an ambiguity Duguit himself addressed, I use the term “social” to translate his term “socialiste” which he made clear was not aligned with the socialist party and its political and economic aims. Id. at 8.
act reflected Duguit’s ideas of the social function. The implementation of the law, however, appears to have been impractical. Another law forced the continuation of urban leases and required a limitation on increases of rents. In hindsight, the lectures can be read as leading to this final and most important topic within the context of the series, and Duguit might have planned that the series would culminate in the lecture on property as a new and controversial topic.

The first lecture was both an introduction to the general theme of the transformation in the law and an introduction to Duguit’s method. Duguit asserted that his approach embodied a scientific, impartial observation of the law without predetermined conclusions. He stated that the changes making up this transformation were more or less universal to all American and European countries “at the same level of civilization, and in any case all the countries of Latin America.”

In Duguit’s story of legal development and change in these countries, the Declaration of Rights of Man (1789) and the Code Napoléon (1804) were not heroes. Instead, these formative documents of western law enshrined a metaphysical, individual, and resultant formalist approach to law based on the power of the individual will and subjective rights. They enshrined this approach to law by making property a right and by making the enjoyment of that right the most absolute possible. The new transformation, the social function of law, was a reaction against the concept of law found in these documents. Duguit’s new, realist, social view of law and legal institutions shunned these earlier notions of rights found throughout Europe, and, as mentioned by Duguit, in the Argentine Civil Code of the period. Under the former framework, the state became the protector of individual rights. In Duguit’s view, this obscured the more important function of the state to promote the place of humans in society. Instead, Duguit suggests that subjective rights should have been and were replaced by the social function. The first lecture concluded with

67. *Id.* at vii-ix.
68. HALPÉRIN, *supra* note 29, at 308.
69. DUGUIT, *Les Transformations, supra* note 1, at 9, 12.
70. *Id.* at 2.
71. “[C]e sont tous les pays américains et européens parvenus au même degré de civilisation, et en tout cas tous les pays d’origine latine.” *Id.* at 4.
72. *Id.* at 8-11.
73. *Id.* at 14.
74. *Id.* at 6.
75. *Id.* at 15.
76. *Id.* at 16.
77. *Id.* at 18.
78. *Id.* at 19.
brief examples demonstrating how the social function redefined liberty and property.\textsuperscript{79}

The second lecture developed the idea of liberty. Repeating the tropes of social function and a realist and social conception of law, Duguit called on the work of his “eminent colleague and friend” Durkheim to emphasize the importance of social solidarity and social interdependence.\textsuperscript{80} The individual was properly placed as a member of society and was to carry out his or her social function. Drawing on Comte to assert this idea, Duguit expanded on these ideas to situate law and legal institutions in society.\textsuperscript{81} To describe the social function further, Duguit first set out more fully the elements of the traditional civil system that he hoped was being abandoned. According to Duguit, the essential elements of this traditional system also provided the overall general structure of his lectures. The four element are individual liberty, an inviolable right of property, contract, and individual responsibility for fault.\textsuperscript{82} Against this structure, Duguit placed the individual’s role in society.\textsuperscript{83} Using examples drawn from laws regarding suicide, dueling, and regulating working hours, Duguit demonstrated that the social function had modified or limited more established notions of liberty and freedom of contract.\textsuperscript{84}

In his third lecture, Duguit attacked the relationship of the autonomy of the will theory of law to juridical acts.\textsuperscript{85} Such a theory might have worked for individualist societies like ancient Rome or Europe and America in the early nineteenth century, but Duguit saw European and American societies of the early twentieth century as defined by their social and associational character.\textsuperscript{86} He critiqued a substantial body of French and German writings on legal personality to argue that the social reality no longer reflected such assumptions.\textsuperscript{87} Duguit’s world now was filled with corporations, associations, societies, and public utilities all easily carrying the fiction of juridical persons.\textsuperscript{88} Just as individuals must fulfill social missions, so too must these various groups serve a social function.\textsuperscript{89} Duguit found that the autonomy of their collective wills,
really an individual will in Duguit’s thought, was inconsistent with the new realist and social function he observed. In the fourth lecture, Duguit turned to the juridical act as an expression of the autonomy of will. His first examples were taken from contract law and how the social function had modified the traditional understanding of contractual relationship. Duguit stated that internal acts of the will were not protected by law; only those declarations of will that produce social acts were protected. Therefore, when codes enforce only licit contracts, an element of the social is introduced to limit the will of the individual. Duguit used contracts to establish brothels, loans for betting, and bequests contingent on not marrying as examples where the social function voided the will of the individual. In the other direction, he found examples where bequests that would normally be void were enforced as valid because of their clear social purposes. These included the founding of hospitals and the famous case of Edmond de Goncourt’s will that established a literary society in the Goncourt name.

Duguit continued to address contracts in the fifth lecture and added a discussion of torts, or civil responsibility for negligent acts. The famous French civilian Planiol is introduced as a staunch defender of an individualist, autonomist will approach to contract. To counter this view of contract, Duguit noted the rise of contracts of adhesion, the ambiguous legal nature of posting a letter, collective contracts for work, and government concessions, all as instances that increasingly challenged the traditional two-wills theory of contract. For Duguit, these new contractual relationships were best seen as representing the social function. In the area of tort law, Duguit also asserted a shift from individual to group responsibility reflecting the new social function of law. Here, Duguit pointed to workers’ compensation schemes that functioned irrespective of fault and the new areas of responsibility assumed by public services when damages occurred.

90. Id. at 81.
91. Id. at 82-83.
92. Id. at 92-93.
93. Id. at 96-100.
95. DUGUIT, LES TRANSFORMATIONS, supra note 1, at 117-19.
96. Id. at 121-35.
97. Id. at 138-39.
98. Id. at 140-44.
IV. THE SOCIAL FUNCTION OF PROPERTY IN THE BUENOS AIRES LECTURES

These five lectures laid the groundwork for the sixth lecture, on property, the most important for our purposes and, perhaps, the most controversial in the course of Duguit's presentation. Duguit noted that, like other fundamental areas of law, property had become socialized.\(^9^9\) For Duguit, this meant two things. First, individual property was no longer an individual right but had become a social function.\(^1^0^0\) Second, aggregates of collective wealth protected by law were becoming more numerous.\(^1^0^1\)

Duguit first outlined the idea of property found in Roman law and expressed in the Declaration of Rights of 1789, the Code Napoléon, and the Argentine Civil Code.\(^1^0^2\) The consequences of this absolute conception of property included lands being left without cultivation, city lots without construction, vacant and unmaintained houses, and unproductive capital goods.\(^1^0^3\) For Duguit, these consequences were unacceptable in the modern context of social interdependence. Thus, Duguit concluded for property: "Property is no longer the subjective right of the owner; it is the social function of the holder of wealth."\(^1^0^4\)

Duguit found this new definition of property in the work of Auguste Comte who, in 1850, wrote of the public function of each citizen and the concomitant idea that property carries with it an "indispensable social function."\(^1^0^5\) Duguit also extrapolated this definition from Jean Gustave Courcelle-Seneuil who wrote of the social functions of the capitalist, owner, and trader.\(^1^0^6\) In addition to these authors, Duguit cited four other works to develop the idea of the social-function norm of property.\(^1^0^7\)

Duguit was emphatic that the adoption of this definition of property did not make him a redistributionist or someone analyzing property and

\(^9^9\) Id. at 148.
\(^1^0^0\) Id. at 148-49.
\(^1^0^1\) Id. at 149.
\(^1^0^2\) Id. at 152.
\(^1^0^3\) Id. at 153.
\(^1^0^4\) "La propriété n’est plus le droit subjectif du propriétaire ; elle est la fonction sociale du détenteur de la richesse.” Id. at 158.
\(^1^0^5\) "[U]ne indispensable fonction sociale.” Id. at 159 (quoting COMTE, supra note 59, at 156).
\(^1^0^6\) Id. at 159-60.
\(^1^0^7\) Id. at 159 (citing ADOLPHE LANDRY, L’UTILITÉ SOCIALE DE LA PROPRIÉTÉ INDIVIDUELLE (Paris, Société Nouvelle de Librairie et d’Édition 1901); MAURICE HAURIOU, PRINCIPES DE DROIT PUBLIC 39 (1st ed., Paris, Sirey 1910) (2d ed., Paris 1916); HENRI HAYEM, ESSAI SUR LE DROIT DE PROPRIÉTÉ ET SES LIMITES (Thèse pour le doctorat, Université de Dijon, Faculté de Droit 1910); JOSEPH CHARMONT, LES TRANSFORMATIONS DU DROIT CIVIL 204 (A. Collins ed., Paris 1912).
ownership in the context of class struggle. He stated that he was not advocating or predicting the disappearance of individual property. He was only chronicling a modification in its nature that he had observed.108

Duguit next addressed the scarcity of legislation effecting a social-function definition of property. In other words, there were no laws that created obligations to farm uncultivated lands, to maintain houses, or to make capital productive.109 Despite the lack of such legislation, Duguit noted some aspects of the social-function norm attaching to property in the case law of France.110 Furthermore, by the time of the second edition, 1920, Duguit could point to some legislative examples as well.111 These cases illustrated, in his view, property responding to the common good.112 Recent cases prohibited land owners from erecting screens, false chimneys, or excavating on their lands without reason.113

Scientific progress and social solidarity resulted in legislation affecting property in another way. Laws requiring the running and maintenance of electric and telephone lines without payment for expropriation indicated that individual property was being limited by its social function. Duguit reveled in the contradiction with Article 522, section 1 of the Code Napoléon: “Ownership of the land implies ownership above and below it.”114 Duguit’s final example of the increasingly social function of property was taken from recent developments concerning the church use of lands that formally had been confiscated and owned by the state.115

Although Duguit’s views on property were concentrated in this sixth lecture, these ideas were also woven through the course of the lectures. For example, when addressing the two express rights under the Declaration of Rights, liberty and property, Duguit repeated the central idea another way: “[P]roperty is not a right; it is a social function.”116 Similarly, property came into the lectures again when Duguit discussed the autonomy of will: “The subjective right of property does not exist more than the other rights. I will only say that if certain property is put to a common use recognized as conforming to social solidarity, this use

108. DUGUIT, LES TRANSFORMATIONS, supra note 1, at 160-61.
109. Id. at 162.
110. Id. at 165.
111. Id. at vii-xiii.
112. Id. at 165-66.
113. Id. at 167.
114. “La propriété du sol emporte la propriété du dessus et du dessous.” Id. at 168-70.
115. Id. at 171.
116. “Mais la propriété n’est pas un droit; elle est une fonction sociale.” Id. at 21.
ought to be protected." 117 Thus, although the theme of the social function of property was most pronounced at the end of the lectures, Duguit introduced these ideas from the beginning and repeated them throughout the series of talks.

In sum, the series of lectures both described certain changes in law that Duguit observed and argued for a different foundation for the understanding of law and legal systems. Ideas of social solidarity and social interdependence were used to wipe out the prevalent notion of subjective rights and the autonomy of the will in maintaining private law institutions such as contract and property. Duguit’s analysis and prescriptive suggestions were increasingly specific and brought him finally to a complete reconsideration of the nature of property, a perspective he was to leave in Latin America after the lectures and disseminate in Europe and North America.

V. THE BUENOS AIRES LECTURES IN THE CONTEXT OF DUGUIT’S WORK

Duguit’s lectures must also be placed in the context of his other works, particularly his writings leading up to the lectures in Buenos Aires in 1911. The work that established Duguit’s place as a national and international academic was his two volumes on the State, l’État: le droit objectif et la loi positive published in 1901 and l’État: les gouvernants et les agents published in 1903. 118 Duguit’s study and exposition of the state and his lectures on the changes in private law are complementary. Each work begins with the idea of social solidarity, subjective rights, and juridical acts, but where l’État turned away from law per se to examine governments, their structures and actions, the lectures turn toward the private law to examine the effects of this characterization on them. Thus, in their beginning sections these works are similar in content, although the level of discourse and analysis is deeper in the books and easier to follow in the lectures.

In passages from l’État, Duguit presented and questioned ideas that later gained greater force and clarity of expression in the lectures. For example, early in l’État, Duguit critiqued the current state of affairs concerning the positive law by noting that all present legislation in codes was based on the idea of the individual right, but rights were, in

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117. “Le droit subjectif de propriété n’existe pas plus que les autres droits. Je dirai seulement que si des biens sont affectés à un but collectif reconnu conforme à la solidarité sociale, cette affectation doit être protégée.” Id. at 72.

his analysis, exclusively social. The themes later repeated in the lectures are discussed at length, but somewhat more tentatively, in *l’État*: social solidarity, solidarity as a division of work, the tendency of groups and associations to increase in number in recent times, and the lack of an essential difference between private and public law. The text of *l’État* indicates that for these areas of thought, Duguit was again strongly influenced by Comte’s ideas of social dynamism and Durkheim’s treatise from 1893. As in the lectures, Duguit included a section on the juridical act in his work on the state. The analysis is similar; in *l’État*, Duguit critiqued the notion of subjective rights. Later, he began to question the nature of property and if the individual will to create property was a subjective right of the individual. In *l’État*, Duguit did not come to the social function solution he read in his lectures, but determined that it was an objective power that implicated the social rule of the time, a rule that changed as the elements of social solidarity changed. This earlier work gives the reader a glimpse into Duguit’s formative though on property. It reveals, for example, Duguit combining notions of ownership, property, and the social function through the social role of the owner.

Thus, *l’État* demonstrates Duguit’s earlier thought on many of the same themes he later presented in his lectures: the failure of subjective rights, limitations on law when read through a lens of social solidarity, and underlying social function limitations on legal acts and rights. The bulk, however, of the two volume work headed in a substantially different direction from the lectures. Most of *l’État* addresses the nature and will of government, the legislative will, the general nature of positive law, nations and sovereignty, representative government, parliaments, chiefs of state, government agents and delegation, and decentralized governments.

Overall, *l’État* provides little information on Duguit’s ideas on property which were so well presented in the lectures. Nonetheless, the reader of *l’État* observes some nascent ideas regarding property that took fuller and clearer form in the lectures. To repeat the central language on property by Duguit in 1911, we find in the lectures:

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119. 1 DUGUIT, L’ÉTAT, supra note 118, at 13.
120. *Id.* at 16, 47, 58-62, 187.
121. For Comte, *id.* at 17; for Durkheim, *id.* at 23 (citing E. DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL (F. Alcan ed., Paris 1893)). For ideas of the social, Duguit also makes considerable use of RUDOLF VON IHERING, DER ZWECK IM RECHT (1877). *Id.* at 170.
122. *Id.* at 141-43.
123. *Id.* at 152.
124. *Id.* at 153.
125. *Id.*; 2 DUGUIT, L’ÉTAT, supra note 118.
“Property is no longer the subjective right of the owner; it is the social function of the possessor of wealth.”

Ten years earlier, his formulations were less direct and more reserved. At one point in *l’État*, Duguit wrote: “Property is not a subjective right, it implies an ensemble of juridically possible intentions, indefinitely renewable; it is, in fact, a *state*."

Repeating the same formula for interrogating the idea of property, Duguit a bit later in the same study wrote: “Property is not a subjective right; it is a fact condition of objective powers, and this [is so], however it might be constituted.”

Thus, by 1901, Duguit had clearly developed his critique of subjective rights as related to property, and indeed, the law in general, but he had not yet developed a clear way to express the social function norm as it related to property.

*L’État*, however, also provides a window into the development of the social-function norm of property. When discussing functionaries of the state, Duguit noted that judges, professors, officers, and ministerial officers like notaries held something like a property right in their positions. The irremovable qualities of these offices made their holders have a subjective right that was similar to a property right. The social function of these positions made them important and irremovable. This was done to protect the holders in their public function. Thus, it may have been in the context of public servants and office holders that Duguit first began to construct the social-function norm of property, or at least, where he first began to connect the two ideas. The public service link is certainly easier to see in this example when Duguit began to construct property-based arguments for these state positions.

Duguit in *l’État* also distanced himself from socialism. While he recognized that property or ownership created at least two class owners and non-owners, Duguit did not believe that this necessarily led to class struggle between the two. Thus, although the work that was to establish Duguit’s position in the French and European intellectual world did not advance his later ideas of the social-function norm of property later found in the lectures, it indicated some of his nascent ideas about subjective rights, property, and the social function that were to come about in fuller form in 1911 in Buenos Aires.

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127. “Le propriété n’est pas un droit subjectif; elle implique un ensemble de vouloirs juridiquement possible, indéfiniment renouvelables; elle est en vérité un *état*.” *Duguit, L’État*, supra note 118, at 205.

128. “Le propriété n’est pas un droit subjectif; elle est un fait condition de pouvoirs objectifs, et cela, quel que soit le mode de constitution de la propriété.” *Id.* at 210-11.

129. *Id.* at 581-82.

130. *Id.* at 205-06.
Other works before the Buenos Aires lectures are even less useful in tracing Duguit’s thought about property. In 1908, Duguit published a series of three lectures given to the École des Hautes Études Sociales. Similar themes of social solidarity and the problem of subjective rights led to a discussion in his third lecture on classes and syndicalism. Duguit was again careful to distance himself from both socialists and orthodox jurists. Nonetheless, these lectures from 1908 begin to reveal the greater influence of Comte and Durkheim in Duguit’s thought and writings, particularly as he built his ideas of social solidarity and social interdependence.

To complete a review of Duguit’s other works related to property, we must also consider Duguit’s treatise on constitutional law. By its second edition, this five-volume study published in the early 1920s served as an opportunity for Duguit to bring his previous work together and to provide newer insights and explorations of certain topic. Property and its nature, of course came up at several points in the study. Duguit repeated his assertions that property is not a subjective right and is a social function. Indeed, he noted that since World War I, recent events had proved him right as property owners, as capitalists, became social producers invested with a social function. A portion of the treatise on the relationship of the state to rights afforded Duguit the opportunity both to repeat and to expand his central thesis concerning property.

For example, Duguit analyzed in much greater depth than the Buenos Aires lectures afforded him the problems stemming from the enshrining of property as a right in the documents of the French Revolution, including the Declaration of 1789 and the Declaration of 1793. This work also gave Duguit the opportunity to discuss the social function of property quite broadly noting that property has a social role, and that limitations on property can only be explained adequately through ideas of social utility. Duguit repeated much of his earlier work here: The owner of property has a social function, and property has a social function. Duguit noted that he first asserted this theory in his lectures in 1912.

132. Id. at 1-5.
133. Id. at 24, 115.
134. Duguit, Droit Constitutionnel, supra note 42, at 267.
135. Id. at 608-11.
136. Id. at 608-10.
137. Id. at 614, 618.
138. Id. at 618-19.
responded with the examples he provided in the second edition of his lectures as well as with some newer examples.  

The treatise on constitutional law added little to Duguit’s earlier theory and assertions about the nature of property. If anything, they confirm that he was comfortable in the statements he made concerning property in the Buenos Aires lectures, and, in fact, he referred to them as being the source for his views on the subject. One benefit of the treatise was that it offered up-dated bibliographic materials on Duguit’s idea of the social-function norm. In addition to confirming his reliance on Comte, the treatise offers two other sources available to Duguit concerning the social function of property that he did not cite in the Buenos Aires lectures, works by Gide and Marguery. It is likely these works also influenced, in some way, Duguit’s development of the social-function norm.

VI. WRITERS ON PROPERTY WHO INFLUENCED DUGUIT’S CONSTRUCTION OF THE SOCIAL FUNCTION OF PROPERTY

There were also existing writers more narrowly focused on the social-function norm of property or ownership available to Duguit as he constructed his ideas on the topic. One likely influence was his friend and colleague Raymond Saleilles. In writing about rights, Saleilles had noted that an abuse of a right occurred when it was exercised contrary to its economic and social function.

Saleilles wrote that “from a social view point, any right is relative and there are no rights, not even property rights, which are absolute.” Saleilles was born in Beaune in 1855 and died in 1912. After studying law in Paris and obtaining his agrégation in 1884, he taught in Dijon for almost ten years before returning to teach in Paris. He was an open, ardent Catholic and an advocate of reforms for women and workers. His work often bridged French lay republican ideas and Catholic social thought. Saleilles considered law to be a social science and stated that the two elements of sociology were law and history. In this light, Saleilles thought that doctrinal writings on the law should lead to

139. Id. at 620-24.
142. Id. at 364 n.44 (quoting and translating RAYMOND SALEILLES, ETUDE SUR LA THÉORIE GÉNÉRALE DE L’OBLIGATION 371 (3d ed. 1914). The first edition was published in 1890.).
143. DHJF, supra note 31, at 694.
144. Id. at 695.
145. Id.
changes in law by reflecting social facts and by keeping the collective conscience of the time in mind. His influence on his friend Duguit can be noted not only in Duguit’s work generally, but also when Duguit turns to particular areas studied by Saleilles as examples, such as the abuse of right, contracts of adhesion, and foundations.\footnote{146}

According to Duguit, his own construction of an idea of the social-function norm of property was built on the work of others. We know that for the general proposition, Duguit cited and quoted Comte.\footnote{147} He then pointed the reader to four other works by the following authors: Aldolphe Landry, Maurice Hauriou, Henri Hayem, and Joseph Charmont.\footnote{148} Each work must be considered in Duguit’s construction of the social-function norm of property, and each provides important insights into the way Duguit came to the social-function definition.

The earliest work Duguit cited was Adolphe Landry’s \textit{L’utilité sociale de la propriété individuelle}.\footnote{149} Despite its promising title in relationship to our interests, the work is an economic analysis of individual ownership that only addressed the relationship between property and society in the broadest sense. The work is really about profits from production, capitalization, productivity, the distribution of wealth and economic inequality.\footnote{150} At several points in the book, Landry noted that private property created opposition between private interests and social interests and that a change in the regime of private ownership might produce social benefits.\footnote{151} Although he theoretically advocated a shift toward collective property, Landry argued against the complete socialization of production.\footnote{152} Duguit probably gave too much credit to Landry in his construction of the social-function norm of property. Some important ideas concerning property’s relationship to society are found in Landry’s work, but Duguit’s ideas are clearly much more definite and more fully constructed than Landry’s passing comments. Despite the title of Landry’s work, it must have contributed little to Duguit’s work in constructing the social function of property.

Duguit also cited the work of his intellectual sparring partner, Maurice Hauriou, to construct his vision of the social-function norm of property. Hauriou addressed property in a general discussion of rights in his textbook on public law, \textit{Principes de droit public}.\footnote{153} Hauriou stated

\begin{footnotes}
\item[146] Id.
\item[147] DUGUIT, LES TRANSFORMATIONS, supra note 1, at 158-59.
\item[148] Id. at 159.
\item[150] Id. at xii, 407.
\item[151] Id. at xii, 107-08, 148-49, 250-51, 405.
\item[152] Id. at 130, 153, 250, 408-09.
\item[153] MAURICE HAURIOU, \textit{PRINCIPES DE DROIT PUBLIC} (Paris, Sirey 1910).
\end{footnotes}
that rights were a combination of three elements: interest, power, and function. The particular balance of these elements was worked out in relationship to society. Indeed, Hauriou expanded the term “function” at points in his writing to the term “fonction sociale” and stated that this aspect was also tied to public function. Hauriou used this three-element scheme to analyze various rights such as being a witness and voting. He left his discussion of the right of property, “the most individualist of rights,” for last.

Concerning property, Hauriou stated that the element of function was hidden. His work then explored the possibilities of finding the function aspect of property. Like Duguit, Hauriou noted that the legislature did not seem too concerned that owners of farm lands did not cultivate them. Nonetheless, Hauriou argued, lands were subject to equal inheritance and could not be subject to entails. Such lands were widely distributed and were easily transferrable. Therefore, the function element of property was provided by the market; all these things were part of property’s function of economic production. Hauriou even drew on the term latifundia to drive home this economic function of property. Hauriou used less common examples to demonstrate further the economic or social function of property. These included property subject to expropriation, Algerian concessions requiring exploitation of the property, and literary and artistic rights.

If Landry’s work pointed Duguit in the direction of the social, Hauriou might have led Duguit in the direction of a function. Hauriou’s work left off at defining property’s function as economic, rather than fully social, and his reliance on the market and the economic function of property within the market is a significant difference from Duguit’s approach. Although he recognized that the function of rights could be, at times, social or public, he did not extend this analysis to property. Several other aspects, however, of Hauriou’s analysis are similar to Duguit’s exposition on property. The theme of uncultivated farmland in itself and in the face of legislative inaction was repeated by Duguit as a possible critique of the social-function norm. Hauriou was not bothered

154. Id. at 36.
155. Id.
156. Id. at 38.
157. Id.
158. Id.
159. Id.
160. Id. at 38-39.
161. “On ne redoute même pas, à raison de cette préoccupation, les latifundia qui se vendraient très mal; chacun a intérêt à entretenir son domaine en rapport et il en est qui se ruinent à cet entretien. Donc, tout a été fort habilement calculé pour que la fonction économique de la propriété fût assurée par la seul jeu de la liberté.” Id. at 39.
162. Id.
by the unproductive holding of land, because he settled on property having an economic function and decided that other legislation ensured that the market would handle such unproductive property. This, however, created problems for Duguit’s concept of property as a social function because uncultivated farmland produced social harms, even if the market would eventually force the property into production.

It is likely that the third source listed by Duguit, a doctoral dissertation of Henri Hayem was the most influential work on Duguit’s construction of the social function of property. The work is a clear, in-depth study of the topic, and even provided a summary of Duguit’s own writings on the topic until 1910, the date of the dissertation. The president of Hayem’s committee was Professor Delsandres, and the two other examiners were Professors Eugene Gaudemet and Ernest Champeaux.163

Hayem’s work linked ownership with a social function and mentioned Duguit in connection with this idea. Hayem did not cite any particular work of Duguit’s, but it seems clear that these ideas were drawn from the passages on property from l’État discussed above. With attribution to Duguit, Hayem wrote: “Property is not an object of a right. It the object of a duty. The owner exercises a social function.”164

Hayem’s main point in the study was that the right to property was becoming more and more relative and that an absolute right of property should be rejected.165 The work attempted to chart this change through French and European legal history from feudalism to the present.166 The first section of the work addressed feudalism and concluded that it provided a period of absence of limitations on property leading to waste.167 Importantly, for the work and for Duguit’s conclusions, Hayem noted the early conflation of public and private rights to property.168

The second section of the work set out the shift from absolute to relative rights to property.169 Here, Hayem provided a detailed study of property rights during the French Revolution and how they became absolute. Hayem paid particular attention to the sources of this principle

163. HENRI HAYEM, ESSAI SUR LE DROIT DE PROPRIÉTÉ ET SES LIMITES cover page (Thèse pour le doctorat. Université de Dijon, Faculté de Droit. 1910).
164. “Le propriété n’est pas l’objet d’un droit. C’est l’objet d’un devoir. Le propriétaire exerce une fonction sociale.” Id. at 425 (emphasis in original).
165. Id. at v.
166. Id. at v-vi.
167. “De l’absence de limites à l’émiettement.” Id. at 3-163.
168. Id. at 16, 149, 162-63.
169. Id. at 165-439.
and the competing schools of philosophical thought that attempted to characterize property as in the period.\footnote{Id. at 165-250.}

Even in the period attributed to the creation of absolute rights, Hayem found some evidence that some revolutionary thinkers were planting a social-function norm for property. Hayem quoted the revolutionary legal thinker Hentz to reveal this other trend about property: “Property is the fundamental social law, but the rights that it gives should be seen less in relation to the one who enjoys them than [in relation to] those in society for whose benefit it was created.”\footnote{Id. at 217-18 (citing Hentz, Rapport (1793), Arch. nat., AD, xviii, c. 326).} This passage gave Hayem the opportunity to discuss the idea of property being instituted for social utility and how this idea conflicted with the absolute nature of property constructed in the Declaration of the Rights of Man.\footnote{Id. at 218.}

Just as Duguit moved from the Declaration to the Code, Hayem next discussed the absolute nature of property under the \textit{Code civil} stating that “[t]he French civil code represents the most comprehensive expression of the absolutist theory of the right of property.”\footnote{Id. at 250.} He then explored the underlying nature of property expressed in the code and noted that Portalis’s view of property as a natural right was established in line with the influences of Locke and Grenier.\footnote{Id. at 52-253.} Portalis authored the language creating the absolute right to property in the Code, found in article 544, “as the right to enjoy and to dispose of things in the most absolute manner.”\footnote{Id. at 252 (citing Exposé de motifs du projet du Code Civil, tit. II, liv. II in 8 LOCRÉ, LA LEGISLATION CIVILE DE LA FRANCE 151).} Hayem asserted that while Portalis’s view, and thus Locke’s view, established the natural law foundations of property in the code, it was Rousseau’s social origins view that was used in interpretation of the code provision on property after its enactment.\footnote{Id. at 253.}

Various examples of limitations on property by the state, such as expropriation, taxation, and restrictions on succession, led Hayem to his hypothesis of a relative right.\footnote{Id. at 260-98.} He expressed the relative right theory this way: “It is, on the contrary, a relative doctrine, since property as a
private right finds itself limited by property as a public right and is subordinated to the latter."

Keeping to the philosophical trends concerning property throughout its history, Hayem next turned to the different schools of thought related to property as of 1910. This approach provided him the opportunity to discuss the views of, among others, Bentham, Mill, Savigny, Ihering, Comte, socialist thinkers, the Catholic Church, and Herbert Spencer.

At several points in the text, Hayem drew the connection of property and its social function. For example, after citing a passage by Ihering on expropriation, Hayem wrote: "Thus, the right of property, like all other private rights, is not a natural right, not an individual right, but a social right."

Hayem also noted the development of a school that attacked these questions from a different or newer manner in terms of property’s relationship to the state. Here, the main influences were Comte, Saint-Simon, Spencer, Durkheim, Courcelle-Seneuil. His summary of this section led Hayem to ask a question in similar terms to Duguit: "If, then, property imposes a social function, what is the importance of this social function?"

After noting various legislative limitations on property, Hayem then asked the political question of the day: does all this lead to socialism? He answered by saying that it was difficult to see the future, and although certain elements of the social platform had come to pass, such as the expropriation of church holdings, he believed the means of production would stay in private hands.

He then discussed the expansion of social property (propriété sociale) in this light. Nonetheless, like Duguit and others working on a middle way between absolute property rights and socialism, Hayem indicated that a social-function norm was not necessarily the path to socialism: "And so, a point to be emphasized again: the possibility of socializing property, without thereby adopting socialist doctrines."

178. "C’est, au contraire, une doctrine relativiste, puisque la propriété de droit privé s’y trouve limitée par la propriété de droit public et même subordonnée à cette dernière." Id. at 321.
179. Id. at 325-56.
180. Id. at 325-47.
181. "Ainsi, le droit de propriété, comme tous les autres droits privés, est non un droit naturel, un droit individuel, mais un droit social." Id. at 333 (emphasis in original).
182. Id. at 347-56.
183. "Si, en effet, la propriété impose une fonction sociale, quelle sera l’importance de cette fonction sociale?" Id. at 355.
184. Id. at 418.
185. Id. at 418-19.
186. Id. at 420-22.
187. "Enfin, un point est à retentir encore: c’est la possibilité de socialiser la propriété, sans adopter pour cela les doctrines socialistes." Id. at 438.
It is at this point in his study, near its end, that Hayem offers Duguit’s analysis and conclusions about property presented at the beginning of this section. The idea of the social function of ownership was advanced by Hayem through brief discussion of the idea of the owner as social functionary (fonctionnaire social). Hayem concluded his work with ideas that very closely follow what Duguit was to propose. In part, he concluded: “And so, from fight to fight, and from transformation to transformation, one moves toward a form of society where private property really is the object of a social function.”

In Hayem’s dissertation we find many of the ideas on property Duguit presented in his lecture. They are set out clearly and often in substantial detail. Indeed, Hayem’s summary of Duguit’s work on property until the date of the dissertation is an important link between the two authors. Hayem, the student, read and cited Duguit, and, in turn, Duguit, and established professor, cited Hayem, author of a well-executed dissertation.

Of the works cited by Duguit, Hayem’s dissertation is by far the closest and fullest source for the philosophical background on property and the rise of property as an absolute right out of the French Revolution, the important observations concerning the public and private law in relation to the conception of property, and the fullest and most similar statements linking property to a social function. In Hayem’s dissertation, the reader finds what must have been a useful and influential source in Duguit’s lectures.

The final work Duguit cited as contributing to his construction of the idea of the social function norm was by Joseph Charmont. In a book dedicated to Salies, Charmont tackled the same general topic of Duguit’s lectures. Charmont’s approach was, however, quite different. Charmont focused on changes in the civil law in the areas of marriage, family, and children. The work also addressed property in a chapter entitled “The right of private property since the code civil: More and more restrictions on the right of the owner.” Far from expounding a social-function norm of property, Charmont linked these restrictions to the fact that owners did not live alone, but must co-exist with others. Over the next thirty or so pages of the book, Charmont provided a list of examples where the absolute use of property is limited by some sort of

188. Id. at 425-28.
190. Id. at 438 (emphasis in original) (“Et ainsi, de combat en combat, et de transformation en transformation, on s’acheminerait vers une forme de société où la propriété privée serait vraiment l’objet d’une fonction sociale . . .”).
192. Id.
restriction. His examples included: maintaining walls, garbage dumps, unhealthy releases of materials, piles of dirt from landslides, construction waste, dangerous animals, brothels, and excavations without reason. He used these examples to demonstrate that ownership is not absolute, as propounded by Ihering, and that when such uses are balanced, as in the doctrinal writings of Demolombe, Aubry and Rau, Blondel, and Baudry-Lancantinerie, the public use or purposes usually won the day. Charmont continued the book with more in-depth discussions of building restrictions that Paris and other large cities had since 1902, restrictions on cultivation, expropriations, mining, and water rights, particularly in relationship to their use for industrial power. Charmont’s work is, in essence, an inventory of limitations on the use of property. He provided no general conclusion tying these restrictions to public use or a social function for property. Thus, the work provided plenty of examples, some of which might have supported a shift towards a social-function norm of property, but other than the general observation that property was no longer absolute, the work gave no theoretical guidance, language, or suggestions to Duguit for the construction of his new characterization of property.

Of the four works cited, Hayem’s dissertation must have been, by far, the most influential as Duguit sat down to write his lecture on property for Buenos Aires. Hayem’s historical and philosophical analysis must have been particularly useful to Duguit. Hayem, like Duguit, linked property to a social function, without the directness of expression one finds Duguit’s words. The other works cited indicate that various parts of Duguit’s concept of the social-function norm were being developed and thought about by others at the time. The works of Landry, Hauriou, and Charmont played supporting roles in the construction of the idea. Hauriou tied property to a social function that was economic. Charmont provided numerous examples indicating that property had been restricted by various social demands.

Two other works were likely used by Duguit in the construction of his theory. These works were not mentioned in the published version of the lectures, but were cited in 1923 when Duguit published his ideas

193. Id. at 201-32.
194. Id. at 204.
195. Id. at 205.
196. Id. at 206-07.
197. Id. at 209-10.
198. Id. at 210-11.
199. Id. at 212-16.
200. Id. at 217-19.
201. Id. at 220-32.
about property in the *Traité de droit constitutionnel*. For works pointing to the social foundations of individual property published before his book of the Buenos Aires lectures, Duguit cited Charles Gide and E. Marguery in addition to the works by Landry and Hayem.

Gide’s work provided a broad study of political economy for university students. In his discussion of ways of acquiring property and other general principles concerning property, Gide briefly touched on property’s social utility. He wrote: “Only if such is the basis of the right of property, it follows that the individual is not the owner for himself, but for society, in that property is, in both the most august and literal sense, a public function.” Within this context, Gide examined the prevailing views of property and described how socialist and communist structures consider property. He also spent considerable space to discuss owners of agricultural land (propriétares fonciers) and their place in political economics.

Gide’s contribution to Duguit’s construction of the social function norm of property must have been limited. He repeated the ideas of public function and social utility for property in its relationship to society, but did not expand on these ideas in a way that would help Duguit build his theory. Gide’s work was, at best, general support for the ideas Duguit developed fully in his lectures.

The second extant work Duguit cited in the constitutional treatise of 1923 but did not cite in the publication of the lectures was a book by Marguery on the right of property and its relationship to democracy. In addition to the work of Comte, this is another early work cited by Duguit that used the phrase “social function” (*fonction sociale*), which Marguery used in connection with the cultivation of land. Marguery’s main concern was to move property towards serving democratic institutions, and in studying the possibilities for property, he recognized many of the recent changes and restrictions on property. Thus, writing in 1906, Marguery thought that it was “time to investigate the social advantages of the right of property.”

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203. GIDE, supra note 140.
204. Id. at 468.
205. “Seulement si tel est le fondement du droit de propriété, il en résulte alors que l’individu n’est pas propriétaire pour lui-même mais pour la Société, que la propriété est, dans le sens le plus auguste et le plus littéral à la fois de ce mot, une fonction publique.” Id. at 468 (emphasis in original).
206. Id. at 465-522.
207. Id. at 523-72.
208. MARGUERY, supra note 140.
209. Id. at 17.
210. Id. at 181.
211. “Il est temps de rechercher les avantages sociaux du droit de propriété.” Id. at 29.
Like Duguit, Marguery saw problems in the absolutist construction of property rights. Marguery criticized the present constructions of property rights where every owner of property considered himself “not as the holder of social capital, but as a king of an independent province where he uses and abuses it at his whim.”

In Marguery’s view, legislative change was not necessary to effect change because under recent French law, the owner of property was already far from being someone who enjoyed absolute rights. Marguery, like his contemporaries, rallied examples to demonstrate that, in some situations, the private interest had to yield to the general interest. His examples included water rights; forests; taxes on wine, alcohol, and tobacco; municipal rules requiring the maintenance of property, rights to light and air, and construction restrictions. The work then presents short chapters treating some other areas where property was pushed in the service of democracy: hunting, fishing, mining, forests, waters, and farmland. The final portion of the book addressed early land reform efforts to limit the size of large estates in favor of smaller estates. His examples here were drawn from European law and legislation, but they reveal the then nascent possibility of tying social function to agrarian reform that was to flourish later in the century.

It is interesting that Duguit did not cite Marguery in the publication of his lectures as a source for the social function of property. Although the work tried to move property in the direction of democratic institutions, it did so by generally asserting the social function of the property in various contexts. Indeed, Marguery appears to have been one of the first writers, along with Comte, to use the term social function in connection with property. His rejection of absolutist constructions of property and his use of examples to demonstrate the supremacy of the public interest concerning property rights were significant steps in ideas Duguit later presented in the Buenos Aires lectures.

Duguit’s social-function theory of property was the product of several French scholars who thought and wrote about property in the first decade or so of the twentieth century. Duguit was able to construct his clear and forceful exposition of the social-function norm out of a

212. “Le propriétaire d’une terre, d’une mine, d’une chute d’eau se considère non comme le dépositaire d’un capital social, mais comme le roi d’une province indépendente dont il use et abuse à son gré.” Id. at 42.
213. Id. at 85.
214. Id. at 89.
215. Id. at 85-87.
216. Id. at 95-140.
217. Id. at 141-80; MIROW, LATIN AMERICAN LAW, supra note 16, at 219-27.
body of work that had recently developed. In many ways, Duguit’s contribution was to synthesize these ideas and craft them into his own unified approach to modern property. These were fresh and new ideas with a very short intellectual history. New sociological approaches to law and methods based on the observation of law in action in recent decisions by courts and legislatures led to Duguit’s construction of the social-obligation norm. Duguit credited this approach to the work of others. He was a careful and sometimes generous scholar attributing his idea to the many contemporary works around him. Duguit did not construct the social-function norm of property out of whole cloth. He did, however, give it a clarity of form built from various sources, and he strongly advocated its descriptive utility. His Buenos Aires lectures were the most coherent expression of the idea, and their publication can properly be thought of as a milestone in the history of the idea. The lectures, because of their author, their clarity in advocating an idea, and their wide availability in French, English, and Spanish were key to the spread of the social-function norm of property.

VII. BEYOND DUGUIT AND THE SOCIAL-FUNCTION NORM: SOCIAL PROPERTY

As Duguit viewed the social-function norm as a limitation on private property and as a defining aspect of private property itself, other thinkers of the period were using the idea of “the social” to expand traditional ideas of what property was. These thinkers created a modern, broad conception of “social property” to mean “security” for workers through mandated contributions to a government system providing minimum funds for benefits such as pensions or social housing. These new concepts of social property went far beyond the ideas of limiting unused land or even socializing land through agrarian reform programs. The conception of this kind of property was not yet known in the eighteenth century or even during most of the nineteenth century. It was the kind of property labeled “new property” by Charles Reich in a well-known and influential article published by Yale Law Journal in 1964.


220. Castel & Haroche, supra note 218, at 44.

Although much more assertive in their socialization of property and in their expansive definition of property, these ideas were not more recent expansions from the work of Duguit. This social property was not individual property limited by social function following Duguit’s view, but was rather an analogue of private property for non-owners.\textsuperscript{222} Despite the collective burden placed on this type of property, it was not social property in the sense of a socialist call to reappropriation the products of work.\textsuperscript{223} Instead, like Duguit’s view, this kind of social property sought to strike a middle way between capitalist liberalism and collectivism.\textsuperscript{224}

Perhaps the most eminent of the thinkers and writers to advance this notion of “social property” was Durkheim himself.\textsuperscript{225} As Castel and Haroche have pointed out, there was most likely a link between Durkheim’s creation of the field of sociology and this new kind of property.\textsuperscript{226} For Durkheim, the modern conditions of the division of labor, urbanization, and the wage-earning society led to the need for social solidarity.\textsuperscript{227} The proper role of the state, then, was to maintain social cohesion.\textsuperscript{228} This kind of social property was a late nineteenth- and early twentieth-century response to the modern pauperism of the nineteenth century.\textsuperscript{229} Although eighteenth-century precursors like Locke and Rousseau hinted at the relationships between property, the individual, and society, this notion of social property was produced as a response to nineteenth-century economic and social conditions.\textsuperscript{230}

This idea of social property was a parallel and related development to Duguit’s ideas about the social-function norm. As early as 1884, Alfred Fouillée’s \textit{La propriété sociale et la démocratie} advanced this kind of social property by suggesting that the state could demand from workers minimum amounts so that a proletarian class of individuals sentenced to servitude and prone to rebellion would not form.\textsuperscript{231} Considering its title and its relation to Duguit’s and our topic, it is deliberate construction of society.” Id. at 771; see Adam Mossoff, \textit{The Use and Abuse of IP at the Birth of the Administrative State}, 157 U. PENN. L. REV. 2001-50 (2009). For the impact of Reich’s work, see Erwin Chemerinsky, \textit{Why Write?}, 107 Mich. L. Rev. 893 (2009); see also Karen M. Tani, Fleming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,” 26 LAW & HIST. REV. 379 (2008).

\begin{itemize}
  \item \textsuperscript{222} Castel & Haroche, supra note 218, at 74.
  \item \textsuperscript{223} Id. at 76.
  \item \textsuperscript{224} Id. at 76-79.
  \item \textsuperscript{225} Id. at 80.
  \item \textsuperscript{226} Id. at 100-01.
  \item \textsuperscript{227} Id. at 80.
  \item \textsuperscript{228} Id. at 81.
  \item \textsuperscript{229} Id. at 73.
  \item \textsuperscript{230} Id. at 14-24, 53-55.
  \item \textsuperscript{231} Castel, supra note 219, at 324.
\end{itemize}
noteworthy that Duguit did not use this work as a source for his ideas of the social-function norm. Fouillée’s work is similar to Duguit’s in its rejection of socialism and in its attempt to find a middle way between purely capitalist and purely socialist property. Fouillée characterized this as property’s individual and social function. For Fouillée, both forms of property lead to democracy and in this context he made an early use of the term “propriété sociale” or “social property.” From this point, Fouillée critiqued socialism but then moved on to an in-depth analysis of social assistance programs, the right to work, and insurance. Instead of moving back to the question of property in relationship to these elements, Fouillée next addressed the democratic process, universal suffrage, and the place of education in democracies. Thus, considering its early treatment of the topic, its mention of social property, and its similar middle-way approach to capitalism and socialism, it is somewhat odd that Duguit did not list Fouillée work as a source for his ideas of the social-function norm. Perhaps Duguit found Fouillée went too far in his description of social property and the programmatic aspects of property that Fouillée’s work advocated. Even among writers putting forth a middle ground between the individual and the social, there were differences in approach, analysis, and goals that may have led to their exclusion from Duguit’s initial works.

VIII. CONCLUSION

Although Duguit was the most articulate speaker on behalf of the social-obligation norm of property and his position as a well-respected law professor aided in his efforts to disseminate the idea, he was not the only person involved in the construction and study of the idea. Until now, Henri Hayem’s work has been underappreciated in the development of the idea. Much of Duguit’s approach and analysis of the idea of property’s social function followed Hayem’s work. Duguit was not a plagiarist; he cited Hayem as one of his sources. Nonetheless, Hayem should be restored as a central influence on Duguit’s thought and as one of the main proponents of the idea of the social-function norm.

Other contemporary thinkers on property and its social aspects also left their mark on Duguit’s work and formulation. A constellation of

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232. ALFRED FOUILLÉE, LA PROPRIÉTÉ SOCIALE ET LA DÉMOCRATIE vi (1884).
233. Id. at v.
234. Id. at ix.
235. Id. at 1-153.
236. Id. at 155-282.
thinkers including Saleilles, Landry, Hauriou, and Charmont also shaped Duguit’s work on property. Still other writers, such as Comte, Durkheim, and Gide, provided modern, general approaches to observing and writing about law in a social context. They added to Duguit’s understanding of rights, property, and the social function.

The social-function norm influenced ideas of property around the world since its formulation in the early twentieth century. It was to have profound importance in European and Latin American constitutional thought. In the United States, the idea has experienced a recent rebirth as an alternative discourse to a long tradition of absolute property rights. The social-function norm of property, as expounded and advanced by Duguit, Hayem, and others, continues as an important theory of property today, especially as property rights are defined and enshrined in constitutions or in civil codes. A full understanding of the idea’s historical development and of its proper attribution is essential for further scholarship in the field. Such an understanding is also essential for those who would seek to implement the social-function norm of property in legal systems or use it as a point of departure for critiquing legal systems in which absolute rights-based approaches are dominant.