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Rerum Novarum: New Things and Recent Paradigms of Property Law

M.C. Mirow

Florida International University College of Law, mirowm@fiu.edu

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***Rerum Novarum*: New Things and Recent Paradigms of Property Law**

*M.C. Mirow**

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I. INTRODUCTION

In science, when someone discovers a new beetle, detects a new particle, or isolates a new element, we get tweets, blog posts, and articles in the *Sacramento Bee*, the *Süddeutsche Zeitung*, the *London Free Press*, and the *Miami Herald*.¹ There are medals, large cash awards in foreign currency, trumpet blasts, and somehow Scandinavian royalty is involved. In law, Professor Sprankling, I am sorry to say, equivalent accomplishments are recognized by a symposium. But we are lawyers, and this is how we do it.

Anyone who has carefully read Thomas Kuhn’s *The Structure of Scientific Revolutions* does not use the terms “paradigm shift” or “change in paradigm” lightly.² New paradigms are created when the pressure of new data builds so that former explanatory models are no longer adequate. A new model or paradigm is needed, and this redefines the field. Kuhn notes great books in the history of science as being paradigmatic—Aristotle’s *Physica*, Newton’s *Principia*, Franklin’s *Electricity*, and Lavoisier’s *Chemistry* are among the works he mentions.³ These works established paradigms because, in Kuhn’s words, they share two essential characteristics: “Their achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing

* McCormick Fellow, Edinburgh Law School, University of Edinburgh, Scotland; Professor of Law, Florida International University College of Law, Miami, Florida. This contribution is an extended version of the keynote address delivered at the symposium “The Promise and Perils of an International Law of Property” hosted by the Global Center at McGeorge School of Law on March 6, 2015. I thank Dean Francis J. Mootz III, Professor Rachel E. Salcido, Ly Lee, Kayla Cox, and Sarah Kanbar for their hospitality at the University of the Pacific, McGeorge School of Law, and for their organization and publication of the symposium.

1. The newspapers listed are hometown papers of some of the participants at the symposium. See Associated Press, *Scientists Now Know More About the ‘God Particle,’* SACRAMENTO BEE (Sept. 1, 2015), <http://www.sacbee.com/news/nation-world/world/article33151692.html>; Tom Miles, *Scientists Find Pentaquarks*, LONDON FREE PRESS (July 14, 2015), <http://www.lfpress.com/2015/07/14/scientists-find-pentaquarks>.

2. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 1 (2d ed., enlarged 1970).

3. *Id.* at 10.

modes of scientific activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve.”⁴ A community’s paradigms are set out in textbooks, lectures, and research exercises, and shared rules emanate from established paradigms.⁵ New paradigms spring from the observation of anomalies that do not fit within an established paradigm.⁶ Anomalies create crises in existing paradigms that lead to discoveries that in turn, lead to new paradigms. This is Kuhn’s model of scientific revolutions and progress.⁷ Anomalies, new things, lead to paradigm shifts.

It is against this backdrop that I wish to assess Professor Sprankling’s accomplishment. Does Sprankling’s *The International Law of Property* belong on the bookshelf (perhaps in the “law” section) with Newton’s *Principia* and Darwin’s *The Origin of Species* (a few steps down in the “science” section) of paradigm-changing works?⁸ I understand that it is not a modest question, and we know that Professor Sprankling is a very modest person. He would say no, but I think the legal community will agree with me that the correct, scientific answer is that the work marks an important shift in our thinking about property. Professor Sprankling’s accomplishment is not just “remarkable”—a word too often associated with any achievement—it is “paradigmatic.”

In this contribution, I hope to briefly do three things. First, by describing the content and assertions of Sprankling’s book, I shall set out my case for its inclusion on the Great Bookcase of Paradigms. This we can call the paradigm of “international property.” Second, as a legal historian, I will describe the immediately preceding paradigmatic moment in property that we can call the paradigm of “social property” and its relationship to *Rerum Novarum*. Third, I shall conclude with comments relating these two paradigmatic moments in the development of property law.

II. SPRANKLING’S THE INTERNATIONAL LAW OF PROPERTY

One does not have to read far into *The International Law of Property* to uncover that the work establishes a new paradigm in property law.⁹ In the first five sentences of the preface, Sprankling argues for a new paradigm.¹⁰ He writes, “The conventional wisdom was that property rights were almost exclusively governed by municipal law. . . . Yet over time it became apparent that the

4. *Id.*

5. *Id.* at 42–43.

6. *Id.* at 52–65.

7. *Id.* at 66–173.

8. JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* (2014).

9. See generally John G. Sprankling, *The Emergence of International Property Law*, 90 N.C.L. REV. 461–590 (2012) (exploring the contours of international property law).

10. SPRANKLING, *supra* note 8, at vii.

traditional view was simply wrong.”¹¹ Later in the work, he states, “[t]he time has come to recognize international property as a discrete subject.”¹²

Sprankling delivers a complex idea in a simple package. The core of the work is found in Parts Two and Three. Part Two, called “components,” is organized around the various component rights of international property.¹³ The chapter on tangible objects covers art, diplomatic property, aircraft, hazardous substances, household possessions, human body parts, and wild animals, among others.¹⁴ The chapter on intangibles includes cultural heritage, cyberspace, genetic material, intellectual property, judgments, and plants.¹⁵ The chapter on land and immovables discusses global commons, housing, indigenous claims, nature preserves, and refugees.¹⁶ The chapter on water deals with fresh water, oceans, archeology, fisheries, genetic material, navigation, minerals, icebergs, submarine cables, and vessels.¹⁷ The chapter on airspace and outer space includes celestial bodies, intellectual property, ownership of outer space, and space objects.¹⁸ For all these things, Sprankling examines not the property itself, but the international law related to these interests. He also provides a myriad of sources related to these topics drawn from various legal traditions: Roman law, civil law, common law, Asian law, and international law itself serve to illustrate his analysis.¹⁹

The “components” part of the book, Part Two, presents an astounding array of property rights in international law.²⁰ Sprankling got out his particle accelerators, microscopes, telescopes, and deep-space exploration modules to scour the universe, from the tiny to the giant for property, for property subject to international regimes of one sort or another. Observing that all of this coalesces into one general idea of international property, Sprankling defines the core attributes of this idea, which he calls “the global right,” in Part Three.²¹ Here, Sprankling employs the traditional tools of treaties, customary international law, and general principles of law to argue that these sources recognize an international law of property. The next step is to define it. Using traditional categories familiar to property professors, lawyers, and students, Sprankling finds that the global right is composed of the right to acquire, the right to use, the right

11. *Id.*

12. *Id.* at 347.

13. *Id.* at 39–199.

14. *Id.* at 52–81.

15. *Id.* at 82–115.

16. *Id.* at 116–149.

17. *Id.* at 150–170.

18. *Id.* at 171–199.

19. *See generally id.*

20. *See generally id.* at 39–199.

21. *Id.* at 201–344.

to destroy, the right to exclude, and the right to transfer—the titles of chapters ten to fourteen respectively.²²

Framing the core chapters on “components” and “the global right” are a beginning part, “foundations,” and a concluding part, “outlook.”²³ A few observations about these parts are in order. Chapter one outlines the former paradigm in which the sovereignty of individual states regulates property and in which states, and only states, are the subject of international law.²⁴ It then sets out the anomalies that challenge this paradigm particularly as the unlikely bedfellows of international human rights and international investment law recognize property on the international plane, and as international law increasingly absorbs individuals as valid subjects of international law.²⁵ We have seen these two very distinct areas of law act in concert in other areas of international law as well, such as in the areas of institution building and transparency. These themes are repeated as Sprankling surveys the kinds of rights a person may have in a thing and the kinds of things that may be the subject of rights. This work of summary is done in chapter two.²⁶

From here, skipping over the core of the book to the end, we find the part entitled “outlook.”²⁷ Sprankling cautiously admits that the jigsaw puzzle of an international law of property has areas that remain to be completed, but he has amassed persuasive evidence for the recognition of the concept. What then, speculates Sprankling, are the consequences of an international law of property? Here, Sprankling—ever the lawyer, ever seeking the practical application of a new idea—suggests that a unified idea of international property will inform and harmonize the work of international tribunals and arbitral panels, intergovernmental organizations, and private actors.²⁸ An international law of property will help regimes of law manage global commons and shape municipal property law.²⁹ An international law of property recognizes the decreasing importance of borders and will help establish global minimum standards for property in a host of arenas.³⁰

Let us return to Kuhn’s definition of a paradigm-changing work. Such work has to be sufficiently unprecedented to attract others to the field and sufficiently open-ended to leave problems for a new community to resolve.³¹ *The International Law of Property* satisfies this test. On March 6, 2015, a group of

22. *Id.* at 221–344.

23. *Id.* at 3–38, 345–360.

24. *Id.* at 3–20.

25. *Id.* at 9–14.

26. *Id.* at 21–38.

27. *Id.* at 345–360.

28. *Id.* at 349–350.

29. *Id.*

30. *Id.* at 340–353.

31. KUHN, *supra* note 2, at 10.

property scholars gathered at McGeorge School of Law to interrogate the idea of an international law of property, and there are still plenty of questions for us to consider. Of course, filling in the puzzle pieces Sprankling mentions will be one of the tasks the community of international property law scholars will need to address. And I am sure the bounds, scope, and depth of international property will continue to challenge us. Nonetheless, the work has charted out the new terrain, from the microscopic to the intergalactic. It has woven a new field from a vast assortment of property law anomalies, new things that did not fit or were not recognized to fit the new field of international property. International property is, indeed, a new thing, and property law has entered a new paradigm.

Although the final section of Sprankling's book looks forward, it is appropriate to mark Sprankling's achievement in property by examining the last great paradigm shift in the field. To get to where we are today, western property and property law have passed through several notable phases and influences. These include the creation of feudalism and its subsequent recasting into economic relationships, the effect of the Enlightenment and liberalism establishing rights to property, the abolition of human property expressed in slavery, the Marxist rejection of private property, and a turn toward the "social" that challenged absolute rights in property. Duncan Kennedy explored this turn toward the "social" in several works marking globalizations in law and legal thought.³² Kennedy's periodization of the last 150 years or so is as follows: The first globalization was the rise of Classical Legal Thought from 1850 to 1914, the second globalization was socially oriented legal thought from 1900 to 1968, and an ill-defined third globalization was characterized by policy analysis, neoformalism, and adjudication from 1945 to 2000.³³ If we accept Kennedy's characterization of the third globalization, perhaps—with an international law of property as but one example—we are on the cusp of a new period, a fourth globalization.³⁴ If we do not accept his characterization of the third globalization, this is the dawning of the age of a third globalization. As either the third or fourth globalization, this next change is a globalization of globalization in which law and legal scholars recognize "the international," as they formerly recognized "the social," as the second global paradigmatic shift.

Thus, Sprankling's recognition of an international law of property is consistent with a larger shift. As human dignity and the individual attain legal subjectivity in international law, it is not surprising that property enters the

32. See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19-73 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter *Kennedy Three Globalizations*]; see also, Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850-1968*, 36 *SUFFOLK U. L. REV.* 631, 648-674 (2003) (also marking the second globalization as "the social").

33. Kennedy *Three Globalizations*, *supra* note 32, at 19.

34. See Catharine P. Wells, *Thoughts on Duncan Kennedy's Third Globalization*, 3 *COMP. L. REV.* 1, 1-10 (2012) (discussing the difficulties in defining Kennedy's Third Globalization).

international sphere. As explained by Rafael Domingo, in *global law*, the person is the center of the global legal order.³⁵ It is perfectly appropriate that property is a component of this new order. Number eighteen of Domingo's twenty rules of global law is *unicuique suum*, explained and translated by Domingo as follows: "Ulpian's definition of justice remains valid in our time. To each, what is his. This is the best way to live in peace. But this *ius suum* cannot become an absolute and unlimited property over persons, animals, or things. Solidarity is a social commitment that burdens any property law."³⁶

This, of course, brings us to new things, *Rerum Novarum*, the defining document in the last great paradigm shift in property law.

III. LEO XIII'S *RERUM NOVARUM*

If Sprankling's *The International Law of Property* represents a foundational document in a paradigm shift in property law at the beginning of the twenty-first century, then the document that served as an example of paradigmatic shift towards the idea of "the social" and the construction of the social function of property at the beginning of the twentieth-century was the late nineteenth-century document *Rerum Novarum*, sometimes called the *encyclical on capital and labor*.³⁷

By 1912, the ideal of "the social" had established its presence in defining property. In that year, French law professor Léon Duguit famously wrote, "property is not a right, it is a social function."³⁸ It marked a change in paradigm that permitted the reevaluation of property in light of its social role. The social-function doctrine of property permitted widespread programs of agrarian reform as its concepts were enshrined in constitutions and implemented in the developing world.³⁹ It was a cornerstone of modern progressive notions of property as expressed in the works of Gregory Alexander.⁴⁰ And Duguit was such an influential legal and constitutional scholar that his colleague Roger Bonnard of Bordeaux wrote, "I am persuaded that the day will come when one will think

35. RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 123–144 (2d ed. 2010).

36. *Id.* at 192–193.

37. According to Charles Reid, "The encyclical has often been called 'the Magna Carta of Social Catholicism' . . . The Latin term *De Rerum Novarum* is translated literally as 'of new things.' The 'new things' referred to by the encyclical were the changed conditions brought about by the Industrial Revolution." Charles J. Reid, Jr., *The Three Antinomies of Modern Legal Positivism and their Resolution in Christian Legal Thought*, 18 *REGENT U. L. REV.* 53, 73 n.113 (2005) (citing JOE HOLLAND, *MODERN CATHOLIC SOCIAL TEACHING: THE POPES CONFRONT THE INDUSTRIAL AGE 1740-1958*, 176 (2003)).

38. M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT'L L.* 191, 191 (2010) (citing LÉON DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* 21 (2d ed. 1920)).

39. GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006).

40. *Id.*; Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 *CORNELL L. REV.* 743 (2009).

of two great periods in the science of the law: one before him, and the other after him.”⁴¹ Duguit’s work was paradigmatic in the eyes of Bonnard.

Attributed with establishing the social-obligation norm of property or the social-function doctrine of property, Duguit was greatly influenced by the development of French sociology and a group of social thinkers including Émile Durkheim, Auguste Comte, and Charles Gide.⁴² There was a closer group of writers on property whose names are less known, among them a French doctoral student in Dijon, Henri Hayem, from whom many of Duguit’s thoughts originated. Hayem commented on the position of the Roman Catholic Church in his thesis entitled *Essay on the Right of Property and its Limits* published for his doctorate from the University of Dijon in 1910.⁴³ It appears one other member of the giants upon whose shoulders Duguit stood was particularly attuned to the wave of Catholic social sensibilities that was to influence Duguit’s formulation of property; this was Raymond Saleilles (1855–1912), an ardent and outspoken Roman Catholic who advocated reforms for women and workers.⁴⁴ Although there is some work to be done on this point, I believe they brought *Rerum Novarum* to Duguit’s intellectual table.

By addressing the effects of industrialization on modern society, the pontificate of Leo XIII (1878–1903) has properly been characterized by Charles Reid as “the first modern pontificate.”⁴⁵ A central document in the response to the social crisis wrought by industrialization, *Rerum Novarum* was a foundational document in Catholic social thought.⁴⁶ Reid describes its importance this way:

Catholic thinkers would come to understand *Rerum Novarum* as the starting point of a set of ideas that would be grouped together under the rubric of the “social teachings of the Church.” Popes came to mark various anniversaries of *Rerum Novarum* by issuing their own encyclicals, expanding upon and deepening Leo’s original insights, exploring the integral connections between law, the state, and justice in the modern world.⁴⁷

41. 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, 24 (1929).

42. Mirow, *supra* note 38, at 201–202.

43. HENRI HAYEM, ESSAI SUR LE DROIT DE PROPRIÉTÉ ET SES LIMITES 340–342 (Thèse pour le doctorat. Université de Dijon, Faculté de Droit, 1910).

44. DICTIONNAIRE HISTORIQUE DES JURISTES FRANÇAIS XIII-XXE SIÈCLE 694–696 (Patrick Arbeyre, Jean-Louis Halpérin, and Jacques Krynen, eds., 2007).

45. Reid, *supra* note 37, at 72. For brief biographical details of Leo XIII’s life, see William Murphy, *Rerum Novarum*, in A CENTURY OF CATHOLIC SOCIAL THOUGHT: ESSAYS ON “RERUM NOVARUM” AND NINE OTHER KEY DOCUMENTS 2–7 (George Weigel & Robert Royal, eds., 1991); see also OWEN CHADWICK, A HISTORY OF THE POPES 1830-1914, 273–331 (1998).

46. There is a fluidity to the documents comprising Catholic social thought. As Charles Curran writes, “There is no canonical or official list of the documents belonging to Catholic social teaching.” Charles E. Curran, “Preface,” in ROGER AUBERT, CATHOLIC SOCIAL TEACHING: AN HISTORICAL PERSPECTIVE 15 (David A. Boileau ed., 2003).

47. Reid, *supra* note 37, at 75.

Thus, the encyclical *Rerum Novarum* was written in the atmosphere of industrialization and the Marxist critique of capitalism and private property, an earlier important paradigm. It spoke to the conditions of the working classes and urged them not to be swept up in violent protests and socialist conspiracies advanced by “crafty agitators.”⁴⁸ The encyclical is best known by legal scholars tracing the intellectual history of workers’ rights and the labor movement.⁴⁹ It appears as a frequent reference in articles on these topics.⁵⁰

Rerum Novarum was not the first of Leo XIII’s encyclicals to refute socialism and, in this context, to defend private property. Socialism was, in the words of Joe Holland, Leo XIII’s “primary strategic enemy,” and Leo XIII did not wait long to oppose it.⁵¹ Thirteen years before *Rerum Novarum* and in the first year of his pontificate, Leo XIII found it necessary to refute socialism, communism, and nihilism in *Quod Apostolici Muneris*.⁵² The encyclical sets out one of the dangers of these ideologies as it relates to property:

[T]hey assail the right of property sanctioned by natural law; and by a scheme of horrible wickedness, while they seem desirous of caring for the needs and satisfying the desires of all men, they strive to seize and hold in common whatever has been acquired either by title of lawful inheritance, or by labor of brain and hands, or by thrift in one’s mode of life.⁵³

To this threat, the encyclical responds:

Catholic wisdom, sustained by the precepts of natural and divine law, provides with especial care for public and private tranquility in its doctrines and teachings regarding the duty of government and the distribution of goods which are necessary for life and use. For, while the socialists would destroy the “right” of property, alleging it to be a human invention altogether opposed to the inborn equality of man, and claiming

48. LEO XIII, *RERUM NOVARUM*, para. 2.

49. See, e.g., Kevin A. Doyle, *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work*, 33 SETON HALL L. REV. 641 (2003); Ken Matheny, *The Disappearance of Labor Unions and the Social Encyclicals of Popes John Paul II and Benedict XVI*, 23 S. CAL. INTERDISC. L.J. 1 (2014); Theodore J. St. Antoine, *Keynote Address: The Moral Dimension of Employment Dispute Resolution*, 86 ST. JOHN’S L. REV. 391 (2012); Michael J. White, *Homo Labrans: Work in Modern Catholic Social Thought*, 58 VILL. L. REV. 445 (2013); R. George Wright, *Towards a Federal Constitutional Right to Employment*, 38 SEATTLE U. L. REV. 63 (2014).

50. See *supra* note 50.

51. JOE HOLLAND, *MODERN CATHOLIC SOCIAL TEACHING: THE POPES CONFRONT THE INDUSTRIAL AGE 1740–1958* 116 (2003); see also, ABDON MA. C. JOSOL, *PROPERTY AND NATURAL LAW IN RERUM NOVARUM AND ST. 2-2, Q. 66, AA. 1, 2, 7: AN EXPOSITORY AND COMPARATIVE STUDY* 57 (1985) (providing additional examples of encyclicals from the 1880s refuting socialism).

52. LEO XIII, *QUOD APOSTOLICI MUNERIS*, *ENCYCLICAL ON SOCIALISM* (1878); see MATTHEW HABIGER, *PAPAL TEACHING ON PRIVATE PROPERTY 1891-1981* 19–22 (1990).

53. LEO XIII, *supra* note 48, at para. 1.

a community of goods, argue that poverty should not be peacefully endured, and that the property and privileges of the rich may be rightly invaded, the Church, with much greater wisdom and good sense, recognizes the inequality among men, who are born with different powers of body and mind, inequality in actual possession, also, and holds that the right of property and ownership, which springs from nature itself, must not be touched and stands inviolate.⁵⁴

The encyclical explores this concept of property with discussions of theft and charity.⁵⁵ This encyclical's refutation of socialism and affirmation of private property in 1878 were to find a fuller and more developed exposition in *Rerum Novarum* in 1891.

There were numerous intellectual antecedents to Leo XIII's project of establishing the Roman Catholic Church's modern social teachings.⁵⁶ Among the most important influence on Leo XIII was Bishop Wilhelm Emmanuel von Ketteler (1811-1877) who is credited with establishing the theological foundations of Leo XIII's thought in *Rerum Novarum*.⁵⁷ Leo XIII called Bishop Ketteler "my great predecessor."⁵⁸ Ketteler was instrumental in urging that the social thought of the Roman Catholic Church find practical outlets in social action.⁵⁹ Leo XIII's concern for workers and industrialization can be traced to his episcopate before 1878 in Perugia and as pope after 1878. In 1882, he established a working group of scholars, priests, and nobles who prepared reports on work, child labor, and ownership.⁶⁰ The work of academic theologians supplying background studies for Roman Catholicism's social program gravitated toward two somewhat competing schools, Fribourg and Liège.⁶¹ Substantial scholarly works and other related encyclicals preceded *Rerum Novarum*.

Rerum Novarum is about twenty-five single-spaced pages in length, long by the standards of Leonine encyclicals.⁶² It was one of, and the most well-known of, approximately eight social encyclicals issued by Leo XIII between 1878 and

54. *Id.* at para. 9.

55. *Id.*

56. See generally ROGER AUBERT, CATHOLIC SOCIAL TEACHING: AN HISTORICAL PERSPECTIVE 75-111 (David A. Boileau ed., 2003); HOLLAND, *supra* note 51, at 30-104.

57. HABIGER, *supra* note 52, at 46.

58. Murphy, *supra* note 45, at 9.

59. AUBERT, *supra* note 56, at 23-28, 184-85; CHADWICK, *supra* note 45, at 311-312; HOLLAND, *supra* note 51, at 134-135; Murphy, *supra* note 45, at 11. His ideas about property were also influential. Roger Aubert writes of Ketteler preaching in 1848, "[i]nspired by Thomist doctrine, at the time almost forgotten, he condemned as a 'perpetual crime against nature,' the modern conception that makes an owner the absolute master of his property, cut off from all social function, excused from all social responsibility." AUBERT, *supra* note 56, 24.

60. *The Coming of Rerum Novarum*, THE TABLET, Vol. 177, No. 5270, May 10, 1941, p. 365-66, available at <http://archive.thetablet.co.uk/article/10th-may-1941/5/the-coming-of-rerum-novarum>.

61. AUBERT, *supra* note 56, at 190-93; HABIGER, *supra* note 52, 46-47 (on the Union of Fribourg).

62. HOLLAND, *supra* note 51, at 176-77.

1891.⁶³ The encyclical was the product of several drafters who worked under the supervision of Leo XIII.⁶⁴ These drafters were part of a close circle of priests and theologians who were linked to the intellectual project of reestablishing Thomas Aquinas as the foundational theologian of the Roman Catholic Church.⁶⁵ Matteo Liberatore prepared the initial draft of *Rerum Novarum* in Italian.⁶⁶ Liberatore, a Jesuit, was himself central to the revival of Thomist thought.⁶⁷ Liberatore was likely influenced by Taparelli d'Angelo, a prominent figure in the Thomist revival and a former teacher of Leo XIII's.⁶⁸

Unsatisfied with Libertore's draft, Leo XIII sent the document for revision to Francisco Tommaso Maria Zigliara (1833-1893), a Dominican and philosophy professor from the College of St. Thomas in Rome, later known as the *Angelicum*.⁶⁹ Zigliara was known for leading Leo XIII's revival of Thomas Aquinas' thought; it seems he received his position to revise the draft through his friendship with Leo XIII, who was formerly Cardinal Pecci, the Archbishop of Perugia, where Zigliara had studied.⁷⁰

One source indicates that there was also a notable English side to drafting *Rerum Novarum*.⁷¹ In 1941, *The Tablet* commented that in addition to Zigliara, Henry Edward Manning (1808-1892), a famous English convert to Roman Catholicism during the Oxford Movement and a cardinal, was also involved in drafting the text.⁷² Cardinal Manning empathized with workers and labor, successfully mediated the London Dock Strike of 1889.⁷³

Various hands worked on the text, and, although it was initially drafted in Italian, its authors faced the challenges of rendering modern ideas into Latin and producing a final text that had a tone acceptable to Leo XIII.⁷⁴ Scholars report debates concerning positions on a family-sustaining salary, professional associations, and the state's right to intervene in economic matters, although

63. *The Coming of Rerum Novarum*, *supra* note 60.

64. HABIGER, *supra* note 52, at 41.

65. See HOLLAND, *supra* note 51, at 118–123 (explaining the Thomist revival).

66. JOSOL, *supra* note 51, at 37–44 (discussing Liberatore's draft sections of *Rerum Novarum* on property).

67. CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING 1891-PRESENT: A HISTORICAL, THEOLOGICAL, AND ETHICAL ANALYSIS 178 (2002). See also HABIGER, *supra* note 52, at 41–42.

68. HOLLAND, *supra* note 51, at 119; see also AUBERT, *supra* note 56, at 100.

69. *The Coming of Rerum Novarum*, *supra* note 60; see also HOLLAND, *supra* note 51, at 143; JOSOL, *supra* note 51, at 45–53 (discussing Zigliara's draft sections of *Rerum Novarum* on property). Camillo Mazella (1833-1900), a Jesuit also linked to the Thomist revival, assisted Zigliara with the second draft. JOSOL, *supra* note 51, at 45 n.1.

70. *The Coming of Rerum Novarum*, *supra* note 60; see also AUBERT, *supra* note 56, at 100; HABIGER, *supra* note 52, at 42.

71. *The Coming of Rerum Novarum*, *supra* note 60.

72. *Id.*

73. *Id.*

74. AUBERT, *supra* note 56, at 100–101, 193–194; HABIGER, *supra* note 52, at 41; JOSOL, *supra* note 51, at 45.

much less debate appeared about the encyclical's definition of property.⁷⁵ Zigilara, Liberatore, and Massela's drafts were left to define property.⁷⁶

Thus, the intellectual project of establishing Aquinas as the premier theologian of Roman Catholicism went along with the social project of *Rerum Novarum*.⁷⁷ Leo XIII restored Aquinas as the Roman Catholic Church's lead theologian in 1879 in the encyclical *Aeterni Patris*.⁷⁸ As Charles Curran observed: "Even a cursory glance at *Rerum Novarum* shows that the encyclical heavily depends on Neo-Scholasticism and its natural law approach. Nine of the thirty-nine footnotes refer to Thomas Aquinas; all but two of the others refer to Scripture."⁷⁹ Thus, the Thomist revival and social doctrine went hand in hand in the encyclical. The connection between Aquinas and social thought was lasting. In 1941, *The Tablet*, a Roman Catholic newspaper in England, observed, "In the history of the latest phase of Catholic social activity we meet the name of St. Thomas on every page."⁸⁰ Leo XIII brought the intellectual strength and consistency of Aquinas's theology to the task of responding to highly demanding present social questions.

Although less famous than other sections of *Rerum Novarum* that deal with labor, working conditions, fare wages, unions, and the right to strike, the first portion of the work is our focus. It is, importantly for us, a defense of private property and a refutation of socialism's rejection of the concept.⁸¹ Possession of property was based on natural law, a law that precedes the state. The natural right to possess precedes the state and the analysis of the encyclical followed a traditional labor theory of property along with other justifications.⁸² As a colleague of mine familiar with the encyclical said with a bold intellectual leap, "Oh yes, John Locke as read by Thomas Aquinas."⁸³ And this summary certainly encapsulates the spirit of the encyclical. Defending private property, *Rerum*

75. AUBERT, *supra* note 56, at 101–105, 194–195; JOSOL, *supra* note 51, at 10–73.

76. JOSOL, *supra* note 51, at 37–53.

77. See generally CHADWICK, *supra* note 45, at 281–283; CURRAN, *supra* note 67, at 8–9.

78. LEO XIII, AETERNI PATRIS, ENCYCLICAL ON THE RESTORATION OF CHRISTIAN PHILOSOPHY (1879); see *The Coming of Rerum Novarum*, *supra* note 60; HOLLAND, *supra* note 51, at 160–163.

79. CURRAN, *supra* note 67, at 25–26.

80. *The Coming of Rerum Novarum*, *supra* note 60.

81. The encyclical's statements on private property are less frequently invoked by U.S. legal academics. But see Paul J. Griffiths, *The Natural Right to Property and the Impossibility of Owning the Intangible: A Tension in Catholic Thought*, 10 U. ST. THOMAS L.J. 593 (2013); Eduardo Moises Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 194 (2000); Reid, *supra* note 37, at 83. For a brief description of *Rerum Novarum*'s content, see Murphy, *supra* note 45, at 13–26.

82. See HABIGER, *supra* note 52, at 8–26 (addressing the consistency of Leo XIII's idea of private property as a product of natural law with Aquinas's constructions of private property); see also JOSOL, *supra* note 51, at 54–76 (describing the encyclical's approach toward property rights and natural law).

83. Conversation with Professor Thomas A. Baker, Florida International University College of Law (Mar. 2015).

Novarum rhetorically asks, “Is it just that the fruit of a man’s own sweat and labor should be possessed and enjoyed by anyone else?”⁸⁴

At this point, though, there is an unexpected turn. Instead of asserting an absolute right to property in the vein of Lockean classical liberalism, *Rerum Novarum* limits the concept of property. Quoting the encyclical, rights in property must be “considered in relation to man’s social and domestic obligations.”⁸⁵ Property must serve the family and, by extension, society. “It is right that extreme necessity be met by public aid,” states the encyclical, but continuing, “it is clear that the main tenet of socialism, community of goods, must be utterly rejected, since it only injures those whom it would seem meant to benefit, is directly contrary to the rights of mankind, and would introduce confusion and disorder into the commonweal. The first and most fundamental principle, therefore, if one would undertake to alleviate the condition of the masses, must be the inviolability of private property.”⁸⁶ Similarly rejecting the socialist doctrine of property, *Rerum Novarum* states elsewhere, “The right to possess private property is derived from nature, not from man; and the State has the right to control its use in the interests of the public good alone, but by no means to absorb it altogether.”⁸⁷

Leo XIII’s construction of property in *Rerum Novarum* was surrounded by the broader social questions the encyclical addressed. As Bruce Duncan noted:

In *Rerum Novarum* Leo offered his systematic attempt to answer the Social Question. He attacked both capitalism and socialism, the former for reducing workers almost to slavery, and the latter for attacking the basis of social order in private property, the State, religion and the hierarchical nature of society. Curiously, though, his defence of property

84. LEO XIII, *supra* note 48, at para. 10; *see also* JOSOL, *supra* note 51, 216–218 (noting the similarity of the encyclical’s language on property with the work of John Locke).

85. LEO XIII, *supra* note 48, at para. 12.

86. LEO XIII, *supra* note 48, at para. 14–15. For an overview of the development of this idea within subsequent encyclicals of the Roman Catholic Church, *see* Reid, *supra* note 37, at 83.

87. LEO XIII, *supra* note 48, para. 47; *see generally* HABIGER, *supra* note 52, at 10–13. Josol provides a good summary of Leo XIII’s construction of private property in the encyclical:

According to the encyclical *Rerum Novarum* man has the exclusive and inviolable right to private property based on natural law for the following reasons:

1. From the nature of man as an animal endowed with reason; he must have not merely the temporary use of things but “to have and to hold in stable and permanent possession” private property in order to provide for his present and future needs.
2. From man’s exercise of labor; since man through the activity of his mind and the strength of his body leaves as it were the impress of his personality on the product of his work, he should possess it as his very own; he has the right to hold it without anyone being justified in violating that right.
3. From the nature of man as the head of the domestic society, the family; he is bound by the strictest law of nature to provide for the needs of his children and this cannot be done “except by the ownership of productive property.”

JOSOL, *supra* note 51, at 75–76.

was generally in terms of the wage earner or peasant farmer, since he drew from a labour theory of value strongly influenced by the thought of John Locke, though he also conceded the title of inheritance which was necessary to secure family life.⁸⁸

Charles Curran also found the construction of property in *Rerum Novarum* lacking in scope and applicability to the challenges of the time:

The emphasis on agrarian labor does not deal with the reality of the situation in the midst of the Industrial Revolution. . . . Leo XIII's reasoning deals well with the problem of the plight of the industrial worker. He does not directly address another aspect of the problem that is even greater, however: abuse of private property on the part of owners and capitalists.⁸⁹

Thus, some scholars note that the limited pre-industrial characterization of private property and ownership was not fully matched to all the problems of the day that *Rerum Novarum* sought to address. Nonetheless, Catholic Europe at the time was still predominantly agricultural and rural despite the growth of new urban industrial centers and their conditions that spawned the socialist challenge.⁹⁰

With the importance of Thomist thought in the drafting of *Rerum Novarum* in mind, we may at first suspect that this limited, pre-industrial, and agrarian construction of private property is the result of strict adherence to medieval constructions of property imported from Aquinas. Nonetheless, scholars have demonstrated that the purely natural law construction of private property propounded by *Rerum Novarum* was inconsistent with traditional Thomist teachings on private property.⁹¹ After considering God's ownership of everything, Aquinas found three aspects from which private property originated. First, individuals will take care of things they own and neglect commonly held property, now often called "the tragedy of the commons." Second, private property leads to a more orderly human existence. And third, private property leads to a more peaceful existence for humans.⁹² Curran concludes, "The three reasons Aquinas proposes in his defense of the strict right to private property all result from human sinfulness. If there were no sin, these reasons would not be

88. Bruce Duncan, *Strengths and Weaknesses of the Tradition around "Rerum Novarum,"* 25 COMPASS: A REVIEW OF TOPICAL THEOLOGY 9 (1991).

89. CURRAN, *supra* note 67, at 175; *see also* AUBERT, *supra* note 56, at 196, 213.

90. CHADWICK, *supra* note 45, at 307308.

91. CURRAN, *supra* note 67, at 175–179 (citing HABIGER, *supra* note 52 (stating that Habiger argues for greater consistency between Aquinas and Leo XIII on property than Curran asserts); *see also* JOSOL, *supra* note 51, at 203–214 (amply exploring the relationship between Leo XIII's concept of private property and the writings of Aquinas on property). The work provided a two-column comparison of the distinct positions.

92. CURRAN, *supra* note 67, at 175–176.

present.”⁹³ Leo XIII’s construction of property in *Rerum Novarum* as an absolute right that flows from natural law appears to have been the work of Taparelli d’Azeglio, an Italian Jesuit and major force in the nineteenth-century Neo-Scholasticism.⁹⁴ D’Azeglio collaborated with Matteo Liberatore, who produced the first draft of *Rerum Novarum*, and Curran hypothesizes that this was the means of d’Azeglio’s revised Thomist position on property entering the encyclical.⁹⁵ Habiger has also noted Liberatore’s guiding influence and Zigliara’s consistent contributions on the property provisions of *Rerum Novarum*.⁹⁶

From the fundamental principle of private property, the encyclical then addressed work, social aid, and charity within this framework. Thus, in 1891, *Rerum Novarum* charted out a middle ground between absolute rights in property under classical liberalism and the abolition of private property under socialism. This document represents an early and key source, a paradigmatic source, in the development of the idea of the social function of property.

It is somewhat difficult to trace a direct line from *Rerum Novarum* (1891) to Henri Hayem’s thesis (1910) to Léon Duguit’s definitive statement of the social function of property in his work *The Transformation of Private Law since the Code Napoléon*. Hayem’s thesis mentions the Catholic approach and its rejection of classical liberalism’s absolute rights, but without a direct reference to *Rerum Novarum*.⁹⁷ Nonetheless, *Rerum Novarum* was the first in a series of documents to crack open monolithic liberal property and to temper ownership with social obligations. In this sense, its reformulation of property was sufficiently unprecedented and sufficiently open-ended to serve as the beginning of a paradigm shift.

IV. SOME CONCLUDING OBSERVATIONS

What then can be said about these two texts, Sprankling’s *The International Law of Property* and Leo XIII’s *Rerum Novarum*? Each signaled a paradigm shift in our understanding of property. While neither alone was the necessary instrument of change to a new paradigm, each work signaled or was emblematic of a new way of thinking about property. Each also responded to international events and recognized anomalies that required or called for responses. Thus, in this sense, the most immediately past paradigm shift—“the social”—and the one recognized at the symposium in Sacramento—“the international”—were, in fact,

93. *Id.* at 177.

94. *Id.*

95. *Id.* at 178; see also HABIGER, *supra* note 52, at 10, 41–42; see JOSOL, *supra* note 51, at 22–36 (analyzing Liberatore’s position on the natural law foundations of private property).

96. HABIGER, *supra* note 52, at 41–45; see JOSOL, *supra* note 51, at 10–22 (analyzing Zigliara’s position on the natural law foundations of private property).

97. HAYEM, *supra* note 43, at 340–342.

both international. Neither shift was based on purely domestic law or changes in domestic ideas of property.

Nonetheless, every paradigm shift in property has been international. Feudalism and its subsequent recasting into economic relationships occurred transnationally or pre-nationally. The Enlightenment and classical liberalism establishing absolute rights in property were international phenomena. The abolition of slavery was an international moment. Marxism was international. And this brings us back to the two most recent paradigm shifts: the social and the international. All these paradigm shifts, all these new things, were really new visions of things that were already there, shifts that had already occurred, and so it is with an international law of property. Sprankling has given students of property something new: a new volume in the property canon that we all must ponder, just as we all have taken account of earlier new things.