Notre Dame Law Review

Volume 28 | Issue 3 Article 8

5-1-1953

# Book Reviews

John Paul Stevens

Roger Paul Peters

Thomas Broden

The court, in the instant case, however, not only distinguished *Hagerman v. City of Seattle, supra,* on its facts, but also adopted the dissenting opinion in that case as the correct rule for the future guidance of Washington courts. That dissent declared that the immunity to be extended to municipal corporations in their operations on streets and highways should be limited to fire apparatus, police cars, and ambulances responding to emergency calls.

Washington, through this decision, has joined a strong minority that opposes municipal immunity for torts committed in the course of garbage collection and many other municipal functions. It will be interesting to note whether the trend in this direction is limited to that state, or whether the future will not produce new decisions in other jurisdictions in the same vein.

*John W. Houck.*

## BOOK REVIEWS

AMERICAN BAR ASSOCIATION — SECTION OF ANTITRUST LAW: Proceedings at the Annual Meeting San Francisco, California, September 17-18, 1952. Chicago: American Bar Association, 1952. Pp. 163. $1.50. — The initial sessions of the American Bar Association's new Section of Antitrust Law were devoted largely to a discussion of the topic: "The Robinson-Patman Act — Is It in the Public Interest?" The distinguished first chairman of the Section expressed the hope, in his opening remarks, that the Section will be instrumental in improving the body of antitrust law to "bring it in line with sound economic principles." [1] One may infer from the proceedings that members of the Section do not consider it sound economic policy for the law to require businessmen to bring their prices into line.

The criticisms of the Robinson-Patman Act [2] at the symposium were of three principal kinds. First, the poor draftsmanship of various provisions of the statute, together with the consequences of those provisions, was singled out for special attack. Perhaps the most concise and complete comment on the quality of the legislative draftsmanship was made by Dean Levi of the University of Chicago Law School. He stated: [3]

> The trouble with the Robinson-Patman Act is not merely that it possesses the ambiguities and accidential defects which are to be found in any statute. The Robinson-Patman Act has a great many of these. Among blemishes of this order one may include, for example, (1) the failure to

[1] Text at 12.

[2] 49 STAT. 1526 (1936), 15 U.S.C. §§ 13-13b, 21a (1946), as amended. 52 STAT. 446 (1938), 15 U.S.C. § 13c (1946).

[3] Text at 61.

include the words "commerce" and "competing" in section 2(e); (2) the failure to spell out for that section the burden of the cost difference defense; (3) the misleading aspect of the now meaningless phrase "except for services rendered" in section 2(c); (4) the failure to provide substance for the invented term "proportionately equal" in sections 2(d) and 2(e), and to spell out the relationship between these terms and the possible effect of the cost difference or meeting competition defenses; (5) the unintegrated status of section 3 both within its three parts and within the larger statute as a whole; and (6) the latent uncertainties which once existed and to some extent still continue with respect to the defense of meeting an equally low price of a competitor. It is unfortunate that an Act which was passed partly to correct errors of draftsmanship and construction of prior legislation should itself be so imperfect, but these and other slips and uncertainties can be clarified by judicial interpretation. The basic conflict with the Act goes beyond such errors to a basic conflict within the Act itself, and between this Act and the Sherman Act.

Other speakers concentrated largely on specific problems under the Act. The remarks of James E. O'Brien of San Francisco, for example, dealt chiefly with the illusory requirements of proving injury to competition. He noted that this vague provision enables the Commission to exercise " a discretion so subjective as to render it impossible to forecast the legality of business conduct." [4] Much of Mr. O'Brien's criticism of the Act was really a criticism of its administration by the Federal Trade Commission. Since an administrative agency has such broad discretionary powers, this second type of criticism, namely of the administration of the Act by the Commission, is certainly relevant in a discussion of whether the Act itself is in the public interest.

Professor Robert W. Austin of the Harvard School of Business Administration severely condemned the Act "as it is now being interpreted," and took the position that the confusion engendered by its present interpretation by the Commission certainly was not in the public interest.[5] Moreover, he differed fundamentally with the viewpoint expressed by officials of the FTC that the hardest kind of competition is the kind "which places upon sellers the necessity of lowering prices generally in order to sell at all." [6] Professor Austin regards the Commission's one-price philosophy as a deliberate reversal of the intention of Congress in enacting the statute in 1936. Accordingly, his strong criticism of Commission economics is not inconsistent with his flat statement that he "would not for the moment advocate the repeal of the Robinson-Patman Act." [7] Like Mr. O'Brien, Professor Austin would like to have the whole problem of competition thoroughly and objectively studied before any specific legislative remedy for Robinson-Patman is suggested.

The difficulty of determining exactly how to square Robinson-Patman with the competitive philosophy of the Sherman Act was per-

4 *Id.* at 80.
5 *Id.* at 92.
6 *Id.* at 105.
7 *Ibid.*

haps unintentionally indicated by Judge Yankwich, Chief Judge of the United States District Court for the Southern District of California. In a brief but most enlightening review of the history of the monopoly problem — under the title "Competition, Real or Soft — Or What Have You?" — Judge Yankwich pointed up the opposition between the philosophy of the Sherman Act and the purpose of statutes such as the Webb-Pomerene Act of 1918,[8] the Capper-Volstead Act of 1922,[9] and the Reed-Bulwinkle Act of 1948.[10] Resale price maintenance was selected for special comment. As he put it: [11]

> Above all towers the Millers-Tydings Fair-Trade Act of 1937, [12] which allows the fixing of resale prices on trade-marked or brand products, and is as antipodal to the anti-monopolistic philosophy of the antitrust acts as any legislation could be.

Despite the fact that Judge Yankwich was reviewing the basic philosophy of the various statutes which are often considered members of the antitrust flock, he had not a word to say about the stray sired by Robinson and Patman. Although this silence may merely have reflected a feeling that the topic had already been thoroughly explored by preceding speakers, it may also indicate that Judge Yankwich, like many other competent lawyers and economists, is not sure that there is enough light on the subject to enable him to decide whether this particular sheep is white or black.

There are few antitrust students who will not contribute something to the first two kinds of criticism made of Robinson-Patman; that it is poorly drafted, and that confusion has been compounded, at least on occasion, by poor interpretation and administration. Nor are there many such students who squarely face up to the fundamental problem of whether the Act itself, or any act of this type, is in the public interest. Dean Levi, however, is such a student. In his view, the many inconsistencies and problems of confused interpretation and administration stem from the basic fact that the Act itself is a contradiction of the competitive philosophy it was supposed to implement; it therefore has found, and can find, no philosophy of its own.[13] His thorough and penetrating analysis of the Robinson-Patman problem is certainly worthy of careful study, perhaps more so than anything else which has heretofore been written on the subject. His reasoning cannot be adequately summarized in the space of this review, but there is no doubt about his conclusion that Robinson-Patman is a wolf in sheep's clothing.

*John Paul Stevens**

---

8 40 STAT. 516 (1918), 15 U.S.C. §§ 61-65 (1946).
9 42 STAT. 388 (1922), 7 U.S.C. §§ 291-2 (1946).
10 62 STAT. 472 (1948), 49 U.S.C. § 5(b) (Supp. 1952).
11 Text at 137.
12 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946).
13 Text at 63.
* Member of the Chicago Bar Association.

COMMENTARIES ON THE CONSTITUTION 1790-1860. By Elizabeth Kelley Bauer,[1] New York: Columbia University Press, 1952. Pp. 400. $4.75. —Four objectives are listed by Mrs. Bauer in the preface to her book: [2]

> . . . to place the commentaries on the Constitution in their historical setting, to trace the lives of the men who wrote them, to compare them with respect to a few major theories, and to sketch the uses to which they were put when men were aware of their existence.

These tasks the author has admirably fulfilled within the limits carefully expressed at the outset. As the title page indicates, only pre-Civil War commentaries are covered, and of these only works in book form by American authors. Only incidental treatment is given to the *Federalist* papers and the works of Webster and Calhoun. The author's chief concern is with materials in which the Constitution was expounded in a systematic manner.

The historical setting is provided in a comparatively short chapter, which follows a preliminary one on the nature of the commentaries. There were no published American law reports at the time of the adoption of the Constitution,[3] and for many years thereafter the need for commentaries on law in general was of great practical importance to the legal profession.[4]

The second major portion of the book consists of biographies of the commentators. Thirteen of these are set forth in the text, but a number of other commentators are given biographical footnotes. These brief accounts of the lives of each of the men in this select company are distributed into three groups, which are indicated in the footnote.[5] This portion of the book is far from dull and contains a number of curious anecdotes. One of the most amusing of these is related of Peter Stephen DuPonceau, who came to this country from France in the entourage of Baron von Steuben while the Revolution was in progress.[6]

> DuPonceau visited Boston with Steuben and met there some of the leaders of the American Revolution. He was paid a rather singular compliment by Sam Adams, who asked him where he had learned his amazing republican principles. "In France," said DuPonceau. "In France! that is impossible." Then recovering himself, Adams added, "Well, because a man was born in a stable, it is no reason why he should be a horse." "I thought to myself," notes DuPonceau in his account, "that in matters of compliment they ordered things better in France."

---

1 Recently Lecturer in American History, Barnard College.

2 Text at 11.

3 *Id.* at 20.

4 *Id.* at 24.

5 "Commentators of the Middle States"; James Wilson, William Rawle, Stephen DuPonceau, James Kent, William Alexander Duer, David Hoffman: "The New England Nationalists"; Nathaniel Chipman, Nathan Dane, Joseph Story, Timothy Walker: "The States Rights School of the South"; St. George Tucker, John Taylor of Caroline, Henry St. George Tucker.

6 Text at 68.

It will be noticed from the foregoing that the discussion of the contents of the commentaries is separated from the biographical part of the book. In fact, the author summarizes the doctrine of the various commentaries with respect to only two matters, that is, sovereignty and the compact theory of government. A special exception to this treatment is made in the case of Story's *Commentaries on the Constitution,* an extended summary of which is given. The numerous quotations, carefully selected by the author make this third part of the book of great value, especially since many of the works quoted are not readily accessible to all students. The author states: [7]

> In this part of our study, we are concerned not with the rightness or wrongness of any one man's conception of the Union, but with the expositions of the nature of the Union as seen by many men. . . . Judgments based upon hindsight are avoided, and when descriptive adjectives are used, it is solely for the purpose of clarifying the opinion of the man whose ideas are under discussion at the moment.

In most instances the author maintains very well the detached point of view she has thus set for herself, but this reviewer has a suspicion that in a few places the author has betrayed a slight bias in favor of the particularists. Consider the following: [8]

> Directly opposed to the nationalists who seemed to argue more forcibly as time went on that "whatever is, is right," the states rights school of the South presented a doctrine which was more carefully elaborated by each succeeding commentator.

The accuracy of this statement is not questioned here, but this reviewer fears that many readers might get the impression that the writers from the South had the edge on their opponents in the matter of reason as contrasted with experience, or, in other words, that the strictly legal arguments, on the whole, favored the particularist view of the Constitution. One suspects that the author may herself entertain this erroneous view. The tone of other passages indicated that such may be the case.[9]

The final part of the book gives an interesting account of the uses to which the various commentaries were put. Before the adoption of the case-method instruction they were used not only in colleges and schools generally, but also very extensively for professional studies. The commentaries were also very heavily relied upon by both the bench and bar. The author has collected data on the number of times the books in question have been cited in Supreme Court opinions.[10] The influence of these books, especially those of Story and Kent, was very great in the early part of the last century both at home and abroad.[11]

---

7 *Id.* at 211.

8 *Id.* at 260.

9 For example, on page 285; "Evidently, Story considered that if he could properly demolish the compact theory, nullification and secession would no longer rear their ugly heads."

10 Text at 343 *et seq.*

11 *Id.* at 351, 356.

The volume concludes with an extensive bibliography of works cited, a table of cases, and an index. The value of the table of cases is somewhat diminished by reason of the fact that it furnishes no page references to the text. It is to be hoped that in the forthcoming volume by Mr. Charles E. Larsen, *Commentaries on the Constitution, 1865-1900*,[12] page references will be given in the table of cases.

Mrs. Bauer's work is of great interest to law students and members of the legal profession, especially with regard to constitutional law and the history of law and the legal profession in the United States. The reader, however, must make his own evaluation of the ideas of the various commentators discussed in the book. Indeed, the conflicting theories expressed therein would probably cause a great deal of confusion to one untutored in the sophistries that are rife in the field of constitutional law. With this caution the book is recommended to all American law students.

*Roger Paul Peters**

---

FREEDOM THROUGH LAW: Public Control of Private Governing Power. By Robert L. Hale.[1] New York: Columbia University Press, 1952. Pp. xi, 591. $7.50. — The title of this book is significant. Professor Hale's main point is that human freedom can be in great measure promoted by law. This point seems obvious. Few would deny that traffic regulations and criminal laws, for example, can clearly promote human freedom. Yet the nineteenth century fable of laissez faire has deluded some into belief in the myth that *economic* freedom is inevitably impeded rather than promoted by legal intervention. Hale destroys this myth completely.

His main premise destroys the myth. He points out that property rights have always been defined by human laws, *i.e.*, constitutions, statutes, executive and judicial action, etc. Only a true anarchist, one who would abandon all constitutional and other legal invasions, is a true believer in the myth. Its destruction clears the air. The debate can then go on around the sound question: How can our law best promote human and economic freedom? This is the important contribution of the book.

Hale, mainly concerned with economic liberty in our present-day society, presents the following thesis: Our freedom to enjoy the material goods of life depends ultimately on the kind of laws we have; we are free to consume either goods we own or goods we have the owner's consent to consume; if we consume others' goods we can be criminally punished

---

12 *Id.* at 358 n.1.

* Professor of Law, University of Notre Dame.

1 Professor Emeritus of Law and Lecturer in Law, Columbia University.

for theft or become civilly liable to whomever the law has designated as the proper owner or possessor. In an anarchial society, *i.e.*, one truly governed by the mythical principle that economic freedom is inevitably impeded rather than promoted by legal intervention, this would not be so. We could consume all the goods we could grab. But we have a system of private property not anarchy. And we have this system of private property because of legal intervention — because of legal "interference." Our law thus plays a vital role in promoting the economic freedom of the owner of private property. Private property and the myth are mutually exclusive.

In our complex society each of us has a certain amount of power — bargaining power, Hale calls it — on which we depend for our livelihood. We must bargain with others to acquire consumer goods and the wherewithal to acquire them. Furthermore we can only exert our bargaining power in lawfully approved channels. At the bottom of all bargains are threats. One party agrees to give up that which he has a legal right to withhold, *e.g.*, wages or goods, if the other party agrees to give up that which he has a legal right to withhold, *e.g.*, services or payment. Each threatens to withhold unless the other agrees to give up.[2] "And market values reflect the relative force of the threats which buyers and sellers of goods or services can make." [3]

It is apparent that each of us is able to exert varying degrees of force in any bargain. For example, if I have no money or goods and can perform only unpleasant jobs, I am forced by economic necessity to submit to the threat of unemployment on a much less satisfactory basis than the independently wealthy and talented job-seeker. Furthermore the laws of theft and other property laws prohibit my satisfying my economic demands by other than lawfully prescribed bargaining processes. Therefore my economic inequality is embodied in legal rights which the government enforces.

This is not to say that the laws are necessarily unjust. It is merely the statement of an economic and legal fact. And it exposes the fallacy of the "freedom and equality of contract" which devotees of the myth and their fellow-travelers assert.[4] In any system of private property, non-owners are never treated equally with owners.[5] The point is that we must then

---

[2] Text at 9. This is an account of economic liberty as it exists in much of our factual economic society. It is not so much a statement of what economic liberty should be as of what it is. Hale accurately states that at the bottom of most bargains are "threats" to disadvantage another. One might agree that all persons *should* willingly cooperate for the common good, and that the desire to serve should inspire our actions, but as a matter of fact such an inspiration is rare, *e.g.*, clergyman, teachers, social workers, some doctors and lawyers, etc.

[3] Text at 9.

[4] *Id.* at 14.

[5] *Id.* at 15.

(1) justify our legally imposed inequalities, (2) eradicate them, or (3) abandon our claim that each human person is of equal worth in the eyes of our law.

Hale rejects the third alternative.[6] To him the welfare of every person is equally sacred. This is so regardless of race, origin, class, virtue, or natural ability. There is no ethical requirement that the law favor any of these groups. However it may be prudent, expedient and for the common good to give added incentive to one capable of rendering great service. "If we would pay him more, it is only because we do not see how otherwise to prevent him from withholding the service which he ought to be rendering." [7] The added incentive is a means to the end of fuller production for the benefit of all.

This justifies different costs for different services. "Much of the income derived from the ownership of property, as well as income in the form of salaries and wages, measures the market value of services rendered." [8] Some of it does not, *e.g.*, inherited property, artificially high prices received by a monopoly or oligopoly, income to industrialists over and above recompense for actual services rendered, wages received where feather-bedding is involved. Although such income may be justified on some other grounds, it is not justifiable as the market value of services rendered for the common good. Hale's desire is that there be an open-minded, scientific analysis of such income on the one hand and the fact of much poverty on the other. He believes "there is room for the more equal distribution of wealth in a manner which would not significantly impair the incentives to productive service and would enlarge the economic freedom of those who have least." [9]

Since it is the law which defines and enforces economic inequalities, it is the law and, today, primarily legislation which must be looked to for whatever change, if any, is desired. But Hale is no wild-eyed economic iconoclast. Far from it. He strongly believes that common law property rights "are important ingredients in whatever freedom each individual has from restraints imposed upon him by other individuals." [10] Wise legislation should eradicate only the unjustifiable inequalities. But there is no guarantee that all change will be wise. For this reason democratic government is important to economic freedom. Hale says wiser and more just legislation can be expected from a democratic government than from a government controlled by any small group.[11] And our constitutions, both state and federal, if properly interpreted, contain sufficient safeguards against grievous obstructions of democratic government, *e.g.*, re-

6 *Id.* at 35-36.
7 *Id.* at 35.
8 *Id.* at 34.
9 *Id.* at 35.
10 *Id.* at 542.
11 *Id.* at 543.

strictions on the right to vote, to hold office, to freely discuss public issues, etc. Finally Hale recognizes that: [12]

> Popularly elected legislatures, however, do not furnish an absolute guaranty that the best choices between liberties will be made. . . . The best institutional machinery depends on men of character and intelligence for its successful operation.

This in essence is Hale's thesis. He conveys it in Part One, consisting of thirty-five pages, and Part Five, consisting of ten pages. The intervening 504 pages amount to documentation of these general principles. His thesis is flawless. His documentation is adequate. I say the documentation is adequate but not as well done as the thesis because one would expect, among other substantiation, an analysis of the way the law has defined certain interests in property and thus has raised them to the status of property rights. After all, present property rights are different from the property rights of early English feudal society and other historical systems of property. They are different because we have so ordained through changes in our law. This is Hale's point. Likewise one would expect analysis of the way powerful private individuals have unduly restricted the liberty of others and the way the law has, for the common good, restrained or could restrain such action. This would involve discussion of the antitrust and unfair competition laws and related matters. Hale does not venture extensively into these areas.

There is probably justification for his limited analysis. The present book grew out of a course, "Legal Factors in Economic Society," Professor Hale has been giving at the Columbia Law School. Curriculum problems being what they are, he could not cover everything. The history of property law and antitrust and unfair competition problems were undoubtedly covered in other courses. This book probably represents the subject matter it was advisable for him to cover. In any event what he does cover provides adequate documentation of his thesis and excellent material for classrom presentation of legal factors in economic society.

In fact the very thing which makes these materials excellent for classroom use militates against their completeness as documentation of his thesis. He takes a great amount of time and space to cover very basic aspects of just what the common law is and just how the Supreme Court of the United States is able to apply the constitutional guarantees of economic freedom. A more rapid and broader coverage of all the ways in which law fosters economic freedom would have increased his documentation but would have presupposed knowledge of much of the very simple legal processes he wishes to teach his students. In other words, instead of blanketing all the fields in which law fosters economic freedom, he has selected some pointed examples from among the many ways in which law is a factor in economic society. Hale says as much in his preface:

---

[12] *Id.* at 550.

". . . there are many vital problems of public economic policy with which this book does not pretend to deal." [13]

Moreover, the very fact that this was a course in law school requiring the case book approach militates against complete documentation of Hale's thesis. It is only the unique and borderline situations that get into case books. However the well accepted, non-litigated attributes of property rights are the most striking evidence supporting Hale's thesis. For example our law now gives legal power to pass goods by will. "The law did not always do so. In feudal times property passed on death to those whom the law thought most fitting to acquire it, and the wishes of the former owner could not affect the transmission." [14] However, seldom, if ever, would a case involve such a simple question. But the basic fact important to Hale's thesis is that it was the change in the law and the adoption and presence of a new law that accounts for whatever freedom there is to pass property by will. Such striking evidence could be heaped on one-hundred fold.

Hale begins his documentation in Part Two. Here he gives examples of how certain interests in property have been raised by the common law method to the status of property rights. A person suffers some loss. We all know he cannot always get a court to shift this loss to someone else. For example, a businessman loses money because of stiff competition. Most often this loss may not be shifted because in tort law, competition is usually "legal justification" for loss or injury inflicted on competitors.[15] But some business losses can be shifted. For example, some judges have held a strike to gain recognition of a union to be an "unlawful purpose" — not "legal justification" — and have enjoined the strike.[16] In the latter example the law raised the employer's interest to the status of a property right; it did not do so in the first example. Hale shows how common law judges similarly defined property rights and thus introduced economic policy into tort cases involving the theories of prima facie tort, respondeat superior, and the effect of malice, and also in contract cases where extortion and duress are involved.

In Part Three Hale shows ways in which the Constitution of the United States affords protection to economic liberty and equality. He first explains the basic doctrine concerning the power of the United States Supreme Court in enforcing the Constitution. Congress has extensive authority in defining the jurisdiction of the Supreme Court. There must be a "case" or "controversy" before the Court. Parties must have "standing" to challenge the validity of legislation. The Court will not act where a "political right" is asserted, where there is a "political ques-

---

13 *Id.* at x.
14 *Id.* at 29.
15 *Id.* at 56.
16 *Id.* at 72-74.

tion" before it, or where the "remedy sought involves the use of 'political' rather than judicial power." [17]

Professor Hale then discusses the very intriguing cases involving federal criminal legislation protecting constitutional rights. Although very interesting, most of this extended discussion has little direct bearing on Hale's thesis. Not so however with the excellent material on slavery and involuntary servitude. The discussion of the constitutional prohibition against state laws impairing the obligation of contracts is fine. His conclusion that the Supreme Court permits "reasonable" legal modifications of contracts and that therefore the Due Process Clauses have made the Contract Impairment Clause superfluous[18] seems indisputable. What is a "reasonable" limitation, of course, requires judgment about economic matters. It is clear in these cases that economic liberty is defined by law. This is further documentation of Hale's thesis.

The discussion of privileges and immunities[19] will tax to the breaking point the understanding of any layman who might read the book. This is the fault of the Supreme Court, not of Professor Hale. To protect "states' rights" the Court has interpreted the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment almost all the way out of the Constitution. In the process, and to add to the confusion, individual justices have made inconsistent and contradictory statements. According to one line of dictum the clause of Article IV should be interpreted to allow congressional prohibition of certain discriminations by private individuals as well as by states. This could be a most significant legal factor in our national economic society. Professor Hale wisely says that it is highly likely that the last word has not been said by the Supreme Court on the whole subject.[20]

Following this is a presentation of some of the basic doctrines concerning the Due Process and Equal Protection Clauses. Life in society abounds with restrictions on liberty and property. Professor Hale shows how the Constitution protects some of these restrictions and prohibits others. In chapters nine, ten, and eleven he shows that the same restriction may be constitutional if effected by one method, *e.g.*, private contract, but unconstitutional if effected by another method, *e.g.*, direct state legislation.[21] Furthermore constitutionality of state restriction may depend upon the method by which it is effected. Where the state may not directly regulate in an area, it may grant a privilege or money on

---

17 *Id.* at 151.

18 *Id.* at 209.

19 *Id.* at 210.

20 *Id.* at 227.

21 Professor Hale also examines with understanding the converse of these examples, *i.e.*, some regulation is improper if done privately but proper if done by the state. This is the situation where courts hold "legislative power" may not be delegated to private groups. Text at 349-66.

condition that the recipient meet certain stipulations. Or it may merely levy a tax. The method of direct legislation may be unconstitutional where the latter methods may not be.

Another example offered by Hale on this topic concerns the exercise of private coercive power. He analyzes the requirement of "state" action for Fourteenth Amendment cases.[22] His most interesting discussions here are about the activity of courts as "state action." If this general proposition were expanded beyond the "extreme cases" in which it has been employed,[23] Fourteenth Amendment requirements might be considered whenever a party sought to protect a contract or property right in a state court. But Hale neither anticipates nor recommends such an expansion.[24] These cases are weighty evidence, however, supporting his thesis that various rules of law define our property rights.

In Part Four Hale discusses cases concerning the obvious regulation of economic society by minimum and maximum price, minimum wage and maximum hour, and rate-making legislation. For the most part he has selected those cases that pass on the constitutionality of such legislation. It is an excellent chronicle of the advance from the lassez faire atmosphere of the late nineteenth century to the modern Court's philosophy of social justice.

Some of the extensive quotations from the early cases read today almost as a satire. This is particularly true of the pompous pronouncements about "freedom of contract." [25] Professor Hale traces the philosophy of the Supreme Court from the view that prices could be fixed only on so-called businesses "affected with a public interest" to the abandonment of this limitation in *Nebbia v. New York*.[26] In *Nebbia* the majority of the Court announced the modern view that price fixing legislation was valid if reasonable and discarded the view that the business involved had to be somehow specially "affected with a public interest." Likewise Hale traces the advance from the absurd majority views of *Lochner v. New York*,[27] and *Adkins v. Children's Hospital*,[28] striking down minimum wage and maximum hour legislation to the momentous over-ruling of the latter case in the midst of the sensational "court-packing" fight in *West Coast Hotel v. Parrish*.[29]

The extended analysis of the constitutionality of rate-making is undoubtedly well done and is solid documentation for his thesis that law defines property rights. But its near-labyrinthian detail becomes almost

22 *Id.* at 318-49.
23 Shelley v. Kraemer, 334 U.S. 1 (1948).
24 Text at 380.
25 *Id.* at 391-2.
26 291 U.S. 502 (1934).
27 198 U.S. 45 (1905).
28 261 U.S. 525 (1937).
29 300 U.S. 379 (1937).

tedious. Hale traces at length the confusion that the "rule of *Smyth v. Ames*" [30] has contributed to the law of rate-making and suggests that all courts follow the lead of the federal government in abandoning this rule. He suggests that henceforth rates should be upheld if they provide earnings equal to those realized from a prudent investment.[31] This basis includes whatever amount is necessary to insure the attraction of necessary capital.[32]

Hale does not shrink from the ultimate conclusion of his material in Part Four. Price, wage and rate fixing imply a judgment by the government concerning the distribution of wealth. These measures and the use of taxation to correct economic maladjustments involve "a scrutiny of our present unequal distribution of economic power and a determination of what economic inequalities are justified and what are not." [33] This reviewer is sure that Hale would apply to all those whose gains are limited by law, his views on corrective taxation: [34]

> The purpose of corrective taxation is not to punish the taxpayer. The only objection to his deriving what enjoyment he can from all the material goods which his income enables him to buy is that he may be unduly diminishing the share of goods available to others. The corrective tax is justified only in so far as what is taken from the person with "excess" income is used so as to spread the material benefits more widely or to those more in need of them. A dictatorial government might merely divert the excess wealth of some to increase the excess wealth of another class in favor with the dictator or to build up armaments for aggressive purposes or a secret police to repress the liberties of all its people. But if the proceeds of a tax on excess wealth are employed to promote public health, or to conserve natural resources, or to reduce unemployment, or to provide educational opportunities to those whose latent abilities would otherwise be undeveloped and who would thus be barred from making the economic contributions of which they are inherently capable, or for a thousand other useful purposes, then the corrective tax, while reducing somewhat the liberty of those who pay it, will enhance the economic freedom of others who now have less of it — freedom in the choice of their work and freedom to enjoy the material products of society. *It will bring about a net increase in individual liberty.* [Italics mine].

Hale's significant contribution is in showing that the present economic inequalities are protected and promoted by our present laws. The statement that economics is an area for businessmen and that the politician should keep out, has no meaning. Law, the ultimate product of politicians, is fully *in* our economic society. The question is; Are the present laws the most fair and equitable ones or is there room for improvement? The question answers itself.

In conclusion a word should be said about the philosophy underlying Professor Hale's book. It is not beyond possibility that some would

---

30 169 U.S. 466 (1898). Text at 460 *et. seq.*
31 Text at 531.
32 *Id.* at 512-13.
33 *Id.* at 535.
34 *Id.* at 536-7.

consider his thesis that law defines property rights as sheer positivism. Nothing, of course, could be further from the truth. Hale expressly states his position that the human person has ultimate value in his own right.[35] Implicit in all he writes is his belief that persons have rights to property through their humanity and not through grant from the state. The very fact that we each have a right to the ownership of private property by our humanity alone, requires that there be some rationally devised rules by which we each know what property is mine and what property is thine. We must have property laws. And these laws should promote the common good. Proper regulation of human society (including economic affairs) requires human positive law.[36] Laws (including property laws) which promote indefensible inequalities are bad laws. He, along with all other believers in ultimate values higher than positive laws, condemns such unjust laws and recommends a change to more just laws.[37] It is the standpatter — the one who claims government has no place in business and that law should stay out of economics; in short, the one who thinks the status quo is somehow inevitably right — who teeters on the brink of legal and economic positivism.

*Thomas Broden, Jr.**

---

35 *Id.* at 35.

36 ST. THOMAS, SUMMA THEOLOGICA, I. II, quaest. 95, art. 1. Pope Leo XIII, *The Condition of Labor* in FIVE GREAT ENCYCLICALS 1, 15 (1939): "The first duty, therefore, of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as to produce of themselves public well-being and private prosperity. This is the proper office of wise statesmanship and the work of the heads of the State." Pope Pius XI, *Reconstructing the Social Order* in FIVE GREAT ENCYCLICALS 125, 154 (1939): "Free competition and still more economic domination must be kept within just and definite limits, and must be brought under the effective control of the public authority, in matters appertaining to this latter's competence. The public institutions of the nations must be such as to make the whole of human society conform to the common good, *i.e.*, to the standard of social justice. If this is done, the economic system, that most important branch of social life, will necessarily be restored to sanity and right order."

37 ST. THOMAS, SUMMA THEOLOGICA, I. II, quaest. 97, art. 1.

* Assistant Professor of Law, University of Notre Dame Law School.

# BOOKS RECEIVED

*American Bar Association — Section of Antitrust Law. Proceedings at the Annual Meeting, San Francisco, California, September 17-18, 1952. Chicago: American Bar Association, 1952. Pp. 163. $1.50.

*Commentaries on the Constitution 1790-1860. By Elizabeth Kelley Bauer. New York: Columbia University Press, 1952. Pp. 400. $4.75.

Conduct of Judges and Lawyers: A Study of Professional Ethics Discipline and Disbarment. By Orie L. Phillips and Philbrick McCoy. Los Angeles: Parker and Company, 1952. Pp. xiii, 247, XIV. $5.00.

Democracy in the United States. By William H. Riker. New York: The Macmillian Company, 1953. Pp. xiv, 428. $3.50.

Effective Legal Writing. By Frank E. Cooper. Indianapolis: Bobbs-Merrill Company, Inc., 1953. Pp. x, 313. $5.00.

*Freedom Through Law: Public Control of Private Governing Power. By Robert L. Hale. New York: Columbia University Press, 1952. Pp. xvi, 591. $7.50.

Handbook of Law Study. By Ferdinand F. Stone. New York: Prentice-Hall, Inc., 1952. Pp. xi, 164. $2.95.

Law of Municipal Contracts with Annotated Model Forms. By Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1952. Pp. 192. $7.50.

Psychiatry and The Law. By Manfred S. Guttmacher and Henry Weihofen. New York: W. W. Norton & Company, Inc., 1952. Pp. viii, 476. $7.50.

Successful Jury Trials; A Symposium. By John Alan Appleman. Indianapolis: Bobbs-Merrill Company, Inc., 1952. Pp. xiii, 586. $15.00.

*Reviewed in this issue.