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Hale's Legacy: Why Private Property is Not a Synonym for Liberty

ILANA WAXMAN*

INTRODUCTION

In the decades since the Reagan Revolution of 1980, conservative libertarians have launched a concerted attack on the modern regulatory and welfare state as a tyrannical intrusion on the individual liberty of property owners. The contemporary Republican Party has been remarkably successful in portraying labor laws, environmental regulation, and state-sponsored income redistribution programs as an illegitimate restriction on property owners' basic freedom to use their property as they see fit. Indeed, the laissez-faire belief that the state should not interfere with private property manifests itself in a wide array of Bush Administration policy proposals, from the elimination of the estate tax to the privatization of Social Security.

The idea that property rights are synonymous with individual liberty has been particularly influential within the legal academy. In its most extreme form, the prominent legal scholar Richard Epstein has argued that under the Fifth Amendment, property owners should be compensated any time a government regulation or entitlement program diminishes the value of their property. So far, Epstein's suggestion has proved too radical even for the conservative Rehnquist Court. While the Court did apply the Takings Clause as a significant brake on government

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[1009]
regulatory power in the 1980s and 1990s, more recently it has upheld the government's ability to regulate in a variety of circumstances without compensating the affected property owners. The laissez-faire view of regulation as an illegitimate intrusion on the rights of property owners, however, has not disappeared. Notably, it remains influential within the Federalist Society, a powerful right-wing legal organization whose members include the newly confirmed Chief Justice John Roberts and Justice Samuel Alito.

These property-rights arguments are not new. During the late nineteenth and early twentieth centuries, it was legal orthodoxy that property owners had a natural right to use their property as they wished, and that state interference with that prerogative threatened the very basis of individual liberty. Federal courts of the so-called *Lochner* era routinely struck down legislative efforts to regulate or redistribute existing wealth as an unconstitutional intrusion on the "Substantive Due Process" rights of property owners. However, at a time of widespread

5. The primary cases in which the Rehnquist Court established the takings clause as a significant limitation on government regulatory power are *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-20 (1992) (holding it to be a per se taking where an environmental regulation eliminates all economically beneficial use of a parcel); *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–39 (1987) (limiting the power of state and municipal governments to impose conditions on a building permit); *Dolan v. City of Tigard*, 512 U.S. 374, 391–92 (1994) (further limiting the power of state and municipal governments to impose conditions on a building permit); *Palazzolo v. Rhode Island*, 533 U.S. 606, 628–30 (2001) (holding that a landowner may assert a taking claim for a regulation that was already in place when he acquired title). For an analysis of the Rehnquist Court's takings jurisprudence as a substantial restriction on state regulatory power, see Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. Rev. 713, 714–15 (2002); Molly S. McUsic, *The Ghost Of Lochner: Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. Rev. 605, 626 (1996); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1 (2003). However, the Rehnquist Court's more recent jurisprudence limited the scope of the earlier takings cases. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 335–38 (2002), the Court declined to extend the per se takings rule in *Lucas* to a temporary moratorium on building. In *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2086–90 (2005), the Court held that the Takings Clause did not require federal courts to review regulations of general application to determine whether they "substantially advance" a legitimate public interest. Likewise, in *Kelo v. City of New London*, 125 S. Ct. 2655, 2663–64 (2005), the Court made it clear that it would defer to the judgment of the legislature in determining whether the condemnation of private property through eminent domain is for a legitimate "public purpose."


unemployment, labor unrest, and dramatic inequality of wealth, this single-minded protection of property rights generated widespread public outrage and was ultimately discredited, thanks in part to a group of progressive legal scholars who systematically critiqued the Court's underlying conception of private property as a sacrosanct sphere in which the government should not interfere.

For those of us who are dismayed by the growing political dominance of this libertarian conception of property, it seems particularly important to understand the historical fate of these progressive critiques. This Note will explore that fate by sketching a brief history of the legal and academic influence of Robert Hale, a progressive law professor and economist of the 1920s-1940s who has proved to be one of the most enduring of the Lochner-era critics. Although Hale's critique of private property and the free market fell into obscurity after his retirement in 1949, it was revived in the 1970s, and has been the subject of considerable scholarly interest for the past two decades.

Indeed, Richard Epstein recently described Hale as "one of the most formidable and persistent foes of laissez-faire" who "has long been an intellectual thorn in the side" of laissez-faire's defenders.

This Note seeks to explore how Hale's arguments about the nature of property were received and used by his peers, and how they have been used (or ignored) since his death by left-leaning legal thinkers and economists who favor strong state regulation and redistribution of wealth to ensure a more egalitarian society. Part I gives an overview of Hale's alternative conception of property rights. Part II discusses some of the ways that Hale's contemporaries drew upon his critique of property during the 1920s-1940s to undermine the conservative property-rights inspired Justice Holmes' famously acerbic dissent on the grounds that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Id. at 57. Lochner has given its name to a period roughly between 1890 and 1937 when federal courts became notorious for striking down Progressive worker and consumer protection laws on the grounds that they interfered with due process rights to property and contract. The Lochner era and the doctrine of economic substantive due process came to a decisive end in 1937 when the Supreme Court began to uphold Roosevelt's New Deal legislation. See Molly McUsic, Redistribution and the Takings Clause, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 617, 619-21 (David Kairys ed., 3d ed. 1998).


11. FRIED, supra note 10, at vii-viii.

arguments against the emerging regulatory and social welfare state. Part III traces the decline of Hale’s prestige in the face of the Cold War liberal consensus of the 1950s and 1960s, beginning with the publication of his 1952 post-retirement opus, Freedom Through Law, and culminating with Charles Fried’s leftist call for a “new property.” Part IV describes Hale’s revival in the 1970s, and analyzes a number of the arguments that Hale’s critique of property has been used to support since. By examining this history, I attempt to explore the rise and fall of left-wing legal arguments about property, liberty, and the role of the state over the course of the twentieth century, and suggest some reasons for these arguments’ broader decline.

I. Hale’s Conception of Property

Robert Lee Hale taught at Columbia Law School from 1922 to 1949, where he was part of a community of progressive, reform-minded law professors and economists. While he was perhaps best known among his peers for his technical studies of public utility regulation, he is remembered today for a series of works challenging the laissez-faire understanding of private property, contract, and the free market as zones of individual liberty and free choice. The most famous and influential of these were his 1923 article Coercion and Distribution in a Supposedly Non-Coercive State, his 1943 article Bargaining, Duress, and Economic Liberty, and his career-crowning magnum opus, Freedom through Law: Public Control of Private Governing Power.

Throughout these works, Hale rejected the libertarian conception of property as a bulwark of individual liberty against a coercive state. Instead, Hale characterized property as a form of “private governing power” which gives property owners tremendous coercive power over non-owners. Hale pointed out that “any person, in order to live, must induce some of the owners of things which he needs, to permit him to use...
them.””17 This is not a problem for “those who own enough property,” because their property gives them “sufficient liberty to consume, without sacrificing any of their liberty to be idle.”18

For property owners, the state’s protection of their property essentially gives them a “right to squeeze income out of the community” by living off the income from their capital assets.19 In addition, “the owner of every dollar has, by virtue of his law-created right of ownership, a certain amount of influence over the channels into which industry shall flow” and “the individuals with the most dollars exercise the most control over the channels.”20 Those who lack extensive property, on the other hand, have relatively little influence in the marketplace. Moreover, since “the law which forbids [the non-owner] to produce with any of the existing equipment, and the law which forbids him to eat any of the existing food, will be lifted only in case he works for an employer,”21 the law of property essentially “coerces [non-owners] into working for factory owners.”22 Where there are extreme inequalities of wealth and property-ownership, therefore, the private governing power granted to property owners is “as capable . . . of destroying individual liberty as is public government itself.”23

Hale’s most fundamental insight was that the coercive power exerted by private property owners is itself a creature of state power. The effective meaning of a property right, Hale argued, is that the owner “can insist on other people keeping their hands off” his property and “the government will back him up with force.”24 By protecting the owner’s property right, Hale noted, the government is coercing the non-owner by “forcing [him] to desist from handling it, unless the owner consents.”25 As a consequence, Hale contended, “the government’s function of protecting property serves to delegate power to the owners” over non-owners, so that “when the owners are in a position to require nonowners [sic] to accept conditions as the price of obtaining permission to use the property in question, it is the state that is enforcing compliance, by threatening to forbid the use of the property unless the owner’s terms are met.”26

Given that all property essentially constitutes a delegation of state power to the property owner, Hale argued, laws that alter the scope and

18. Id. at 627.
20. Id. at 490-91.
21. Id. at 473.
22. Id.
distribution of property rights cannot be rejected as an illegitimate intrusion of the state’s coercive power onto the liberty of the property owner. On the contrary, state coercion is already present in every property relationship and economic transaction "in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by government." As a result, Hale argued, existing property rights may be an illegitimate form of "unplanned government intervention which restricts economic liberty . . . drastically and . . . unequally." Accordingly, Hale called upon legal thinkers to question the legitimacy of existing property rights, and to seriously explore alternative property arrangements that might better serve the common good. Rather than attacking government regulation and redistribution as an a priori infringement of the liberty of property owners, therefore, Hale urged his peers to analyze such laws to determine whether they enhance "the sum total of worthwhile individual liberty" in society as a whole.

II. HALE IN HIS TIME: THE SUCCESSFUL ASSAULT ON LAISSEZ-FAIRE

A. THE EARLY ASSAULT: LAYING THE GROUNDWORK FOR THE NEW DEAL

When Hale published Coercion and Distribution in a Supposedly Non-Coercive State in 1923, the laissez-faire conception of property had been under attack for decades by a broad array of progressive, populist, and socialist political movements. The economic dislocation and inequality of late-nineteenth-century industrialization led many American workers and farmers to believe that the existing economic structure was fundamentally unjust, and they responded by demanding new forms of state intervention in the economy ranging from a graduated income tax to the outright abolition of private property. This outrage only grew when the federal courts struck down early attempts at labor regulation and redistribution as unconstitutional intrusions on the sanctity of private property. Indeed, the recurring waves of labor conflicts and social unrest that rocked American society between the 1890s and the 1920s made it seem entirely plausible that there could be a

28. Id.
29. Id.
31. Hale Papers, Folder 91-4 at 2, quoted in Samuels, Economy as a System of Power, supra note 14, at 357–66. See also Samuels' discussion of Hale's concept of "net enlargement of liberty." Id. at 357–68.
33. See Alexander, supra note 10, at 134–36.
34. Friedman, supra note 9, at 1394.
socialist uprising in this country.\textsuperscript{35}

In light of this massive social upheaval, Hale’s generation of progressive legal scholars and economists found the laissez-faire conception of property to be outmoded and inadequate.\textsuperscript{36} As one scholar put it, in the face of “an unplanned and undirected industrialism, and its imminent hazards to life, liberty, and property,” the courts of the Lochner era were attempting to “fix the current limits of... government” according to a Lockean conception of property that was developed in eighteenth-century England to provide “safeguards against... the kind of stuff the Stuart kings used to pull.”\textsuperscript{37} Throughout the 1920s and 30s, therefore, Hale’s peers mounted a broad assault on the idea that the law should automatically protect the rights of property owners without regard to broader social consequences.\textsuperscript{38} Hale’s characterization of property as a state-enforced form of private governing power was incorporated into this ongoing progressive challenge to existing conceptions of property.

Probably the most comprehensive adoption of Hale’s ideas came in John M. Clark’s influential economics textbook on the Social Control of Business, published in 1926.\textsuperscript{39} Echoing Hale’s Coercion and Distribution, Clark argued that in a modern industrial society, “the property owner’s right to exclude others... serves mainly as a basis of the bargain with them for their services.”\textsuperscript{40} Accordingly, the “formal liberty” of the property owners “needs to be limited in order to prevent substantial economic coercion.”\textsuperscript{41} To defend individual liberty in the face of these new forms of economic coercion, Clark contended, society must develop new “rights of persons, not of property,” even if the growth of these rights comes “at the expense of some of the former rights of property owners to use their property as they saw fit.”\textsuperscript{42}

Other scholars drew upon other aspects of Hale’s work to argue that the law of property should be more responsive to contemporary social needs. Underhill Moore, for example, used Hale’s Coercion and Distribution to call for greater experimentation in the rules governing property.\textsuperscript{43} Moore, one of Hale’s peers at Columbia, chided the more

\textsuperscript{35} See Horwitz, supra note 10, at 25–26; Alexander, supra note 10, at 134–36.

\textsuperscript{36} See Alexander, supra note 10, at 134–35; Rutherford, supra note 11, at 174; Morton Horwitz, History and Theory, 96 YALE L.J. 1825, 1828 (1987).

\textsuperscript{37} Walton Hamilton, Property—According to Locke, 41 YALE L.J. 864, 880 (1932).

\textsuperscript{38} See Alexander, supra note 10, at 134–35; Horwitz, supra note 36, at 1828; Rutherford, supra note 13, at 174.

\textsuperscript{39} John M. Clark, Social Control Of Business (2d ed. 1939). For a discussion of Hale’s influence on Clark, see Samuels, Economy as a System of Power, supra note 14, at 267.

\textsuperscript{40} Clark, supra note 39, at 115.

\textsuperscript{41} Id. at 111.

\textsuperscript{42} Id. at 119.

\textsuperscript{43} Underhill Moore, Rational Basis of Legal Institutions, 23 COLUM. L. REV. 609 (1923).
orthodox scholars of his day for failing to recognize that, as Hale argued, "the policy of laissez-faire is the policy of maintaining existing institutions... and that of necessity it commits the government to opposition to changes in them." This failure to recognize the state's role in defining property rights, he argued, led these scholars to treat "the institution of property as a single problem to be settled a priori" through a policy of non-intervention with the rights of property owners. Moore roundly criticized this "rationalization of the existing" at a time when legal scholars should be seeking out "existing and potential means of initiating rational manipulations" of property law to adapt to "changes in material culture."

Felix Cohen, on the other hand, used Hale's conception of property to call for a brake on new forms of property that were not in the public interest, arguing that courts should not grant corporations a property right over their trademarks unless they could demonstrate such recognition would truly benefit society. Cohen cited Hale's *Coercion and Distribution* for the proposition that "what courts are actually doing" by recognizing these new property rights was "creat[ing] and distribut[ing] a new source of economic wealth or power" by establishing "inequality in the commercial exploitation of language." He suggested rather ironically that the protection of trademark "might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization."

Hale's call for a fundamental rethinking of the nature of property was echoed by other legal scholars of the period who did not cite Hale directly. Morris Cohen's 1927 masterpiece, *Property and Sovereignty*, for example, characterized property as a form of state-delegated coercive power in a way that closely paralleled Hale's characterization of property in *Coercion and Distribution*, published in 1923. Cohen, like Hale, noted that to the extent that things "which the law calls mine" are "necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want," so that "the primary effect of property on a large scale is to limit freedom." Once property is properly viewed as a law-derived form of coercive power,
Cohen argued, "we can no longer maintain Montesquieu's view that private property is sacrosanct and that the general government must in no way interfere with or retrench its domain." Instead, echoing Hale, Cohen argued that "if the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest."

B. THE TRIUMPH OF THE NEW DEAL AND THE TURN TOWARD CONTRACT LAW

With the election of Franklin Roosevelt and the Supreme Court's 1937 decisions upholding the New Deal, it appeared that the progressive assault on the laissez-faire conception of property had been successful. Indeed, by the early 1940s, Hale's peers began to treat it as an accepted fact that "the whole regime of property, as my friend Professor Hale has long pointed out, is a system of legitimized coercion." Ironically, however, even as Hale's ideas about property entered the mainstream, his peers shifted their focus away from the aspect of his work that questioned the underlying legitimacy of existing property rights.

After all, not all of Hale's peers in the 1920s and 1930s had shared his original idea that "to champion the cause of the economically underprivileged they had to drastically revise the laws of ownership." As one recent scholar noted, the goal of most progressive attacks on the laissez-faire concept of property was merely to lay "the theoretical groundwork to justify... the emergence of the regulatory and welfare state," not to call for a "wholesale restructuring of the American economy." With the New Deal firmly established, Hale's peers in the 1940s were no longer interested in using his work to fundamentally question the law of property itself. Instead, Hale's ideas about property and coercion were used almost exclusively to argue for modifications in contract law to allow the weaker party to escape enforcement where economic inequality between the parties was unduly great.56

51. Id. at 21.
52. Id. at 26.
53. Edwin W. Patterson, Compulsory Contracts in the Crystal Ball, 43 Colum. L. Rev. 731, 742 (1943).
54. Fetner, supra note 13, at 522.
56. Of course, this use of Hale's work to attack laissez-faire contract doctrine was not new. From the beginning, Hale's work was recognized as critiquing both property and contract law as twin aspects of the legal basis of economic coercion. See, for example, Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704 (1931), which cited Coercion and Distribution as one of the works that influenced Llewellyn's own thinking in his influential 1931 disquisition on contract doctrine. Id. at 706 n.8. See also Note, The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law, 35 Colum. L. Rev. 1090 (1935), which cited Hale to support the
John Dalzell, for example, cited Hale in his 1942 article on *Duress by Economic Pressure*, which argued that "no basic difference exists between economic duress and physical duress." In making this argument, he described Hale’s *Coercion and Distribution* and *Force and the State: A Comparison of Political and Economic Compulsion* as foundational articles which, "when enough research and analysis have been done to make the problems in the field of economic duress reasonably understandable, . . . will be given the credit which they deserve for calling attention to some major errors in our ideas of contract."

John Dawson likewise paid homage to Hale in his seminal 1947 article on economic duress, in which he argued that since "the freedom of the ‘market’ was essentially the power of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself," courts should invoke the doctrine of economic duress where a contract results in "excessive and unjustified gains that are directly traceable to disparity in bargaining power." Like Dalzell, Dawson cited Hale’s *Coercion and Distribution* as a foundational article, noting that "the present article draws heavily on his analysis" and that it was "a pleasure to record the writer’s great indebtedness to him."

Judge Jerome Frank of the Second Circuit showed a similar appreciation of the importance of Hale’s theory of property to the doctrine of economic duress in Frank’s withering dissent in *M. Witmark & Sons v. Fred Fisher Music Co.* Frank argued that in upholding the grant of an injunction against a lyricist who had assigned away his right to renew his copyrights at a time when he was "notoriously inexperienced in business, and . . . in desperate financial straits," the majority was behaving "as if, today, laissez-faire were still in fullest bloom." He then treated his audience to a brief critique of laissez-faire rooted in Hale’s conception of property as a delegation of state power to property owners:

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proposition that "the freedom from regulation postulated by laissez-faire adherents is demonstrably non-existent and virtually inconceivable," given that "bargaining power exists only because of government protection of the property rights bargained" and that inequality of bargaining power "can scarcely be eliminated in a capitalist economy which must enforce the inequalities of property rights that produces those results." *Id.* at 1091–92, 1096. Indeed, *Bargaining, Duress, and Economic Liberty* was published in 1943 as part of a Columbia Law Review symposium on The Future of Compulsory Contract.

58. *Id.* at 239 n.5.
60. *Id.* at 253.
61. 125 F.2d 949, 954 (2d Cir. 1942) (Frank, J., dissenting).
62. *Id.* at 955, 962.
The theory of laissez-faire was that the state, the government, was not to interfere beyond a bare minimum. That such was not the actual practice, even when laissez-faire was in its zenith, has been brilliantly shown in the writings of Robert Hale, beginning in 1923. His thesis may be paraphrased thus: In outward appearance, under let-alone-ism, the extensive use of state power is rejected. In fact, however, there is a transference of much of the State's power to individuals. . . . [T]he individual has a right to refuse to sell or use his property on any terms or except on his own terms. If someone else tries to make him sell or use it except on those terms, the State, through its courts and sheriffs, will protect him from such intrusions. . . . Laissez-faire does not mean that the State has given up most of its "interferences," but that the State is used to "interfere" in new ways at the demand of individuals. 63

Within the realm of contract law, then, Hale's conception of property as a form of state-delegated coercive power had become a part of the mainstream legal doctrine of the 1940s. Somewhere along the way, however, legal scholars had abandoned the more radical implications of his work. While the above works powerfully employed Hale's critique of property to argue that contract law should not be blind to economic inequality, their arguments no longer called for a fundamental rethinking of property rights. As it turned out, this presaged a near-total decline of Hale's ideas about the nature of property in the Cold War legal academy of the late 1950s and 1960s.

III. COLD WAR LIBERALISM AND HALE'S DECLINE

A. THE 1950S AND COLD WAR LIBERALISM: HALE BECOMES IRRELEVANT

By the time Hale retired from Columbia in 1949, his arguments about property were beginning to seem like relics from an earlier era. In part, this was a result of the state-interventionist consensus that he had helped to build. To most mainstream legal scholars, the legal and moral legitimacy of the welfare state seemed unassailable, and they saw no need to go on justifying the government's right to interfere with the rights of property owners. Indeed, in the last years of his teaching career, Hale's courses were considered somewhat "outdated," since "many of the crucial issues—particularly those related to government regulation of business—no longer sparked the controversy and enthusiasm that they had" in the 1920s and 1930s. 64 At the same time, the rise of Cold War anti-Communism gave renewed vigor to the idea that private property was a bulwark of American liberty, and made it much more difficult to question the underlying legitimacy of existing property rights. This emerging Cold War liberal consensus, and the accompanying decline in scholarly interest in Hale's ideas about the nature of property, are very

63. Id. at 963.
64. Fetner, supra note 13, at 508-09, 519-25.
evident in the reception to Hale’s 1953 opus, *Freedom Through Law*.\textsuperscript{65}

Lon Fuller, for example, praised Hale’s “strong sense of social justice,” and emphasized that he did not disagree with Hale’s “practical conclusions . . . (such as the desirability of a steeply graduated income tax).”\textsuperscript{66} However, he characterized Hale’s critique of laissez-faire property rights as “saying that since the rich man could not hold his own against the mob without the aid of the law, the law, having been *particeps criminis* to an economic inequality, may properly salve its conscience by taking something from the rich and giving it to the poor.”\textsuperscript{67} While Fuller noted that this critique of property “no doubt . . . had its origin in a desire to refute a line of reasoning found in certain decisions of the ‘old’ Supreme Court according to which property, being a ‘natural’ institution, should be left alone by the legislature,” he argued that this conception of property threatened to undermine “the essential distinction between our regime and that of Russia.”\textsuperscript{68} Ultimately, therefore, Fuller found that Hale did not “offer a system of thinking about law and economics that can profitably be applied to the solution of problems now confronting us.”\textsuperscript{69}

Frank L. Knight, former president of the American Economics Association, was even more explicit in linking Hale’s arguments to the threat of communist totalitarianism. While he recognized the “need for some provision—beyond voluntary charity—for having the strong, or fortunate, share the burdens of the weak, or relatively unlucky,” he argued that the free market “has been shown to represent the utmost in free association” and that the state should only “exceptionally . . . interfere with market freedom by coercive regulation.”\textsuperscript{70} In Hale’s “general dislike for freedom in business enterprise,” and tendency to make freedom “interchangeable with equality,” Knight found a dangerous “pretense . . . that any great or rapid change in society can be artificially brought about without at the outset destroying freedom and gambling on some dictatorship.”\textsuperscript{71} Libertarian economist Ludwig von Mises went even further, directly asserting that Hale’s critique of property rights would lead to “totalitarianism of the type of the Hitler Zwangswirtschaft.”\textsuperscript{72}

The book did receive a few unconditionally positive reviews. A

\textsuperscript{67} Id.
\textsuperscript{68} Id. at 73–74, 80.
\textsuperscript{69} Id. at 70.
\textsuperscript{71} Id. at 873–74 & n.5.
\textsuperscript{72} Ludwig von Mises, *Freedom is Slavery*, THE FREEMAN, Mar. 9, 1953, at 410, 410–11.
reviewer in the overtly radical *Lawyers Guild Review*, found the book “painsstakingly and skillfully done . . . some of the best legal analysis that has been done in recent legal writing.” 73 A Notre Dame professor found Hale’s thesis “flawless,” noting the considerable theological support for Hale’s arguments that property laws “should promote the common good,” and that “[l]aws (including property laws) which promote indefensible inequalities are bad laws.” 74 Another reviewer praised Hale for opposing “the tyrannies of private government in the same spirit in which free men are wont to resist official tyranny,” approvingly citing Hale’s argument that since property owners can behave “like petty sovereigns . . . every lawful economic power becomes a type of political power . . . .” 75 Even the more positive reviews, however, generally found that “in a sense [the book] is dated” by Hale’s discussion of government regulations “concerning which there is now no debate.” 76 As one reviewer put it, Hale’s critique of property rights “was iconoclastic in the days when the American bar seemed near success in attempting to write Herbert Spencer into the constitution,” but was not of great interest to the generation of the 1950s. 77

B. The 1960s: New Property as Both Liberty and Economic Justice

As the reviewers of *Freedom Through Law* might have predicted, Hale’s arguments about property were virtually abandoned by the legal academy for the remainder of the 1950s and 1960s. 78 Hale was still occasionally cited in discussions of economic duress and unconscionability in contract law. 79 Even there, however, his ideas were often reduced to such mundane propositions as the fact that all contracts

78. Barbara Fried notes Hale’s lapse into obscurity in FRIED, supra note 10, at vii. See also Frank Michelman & Duncan Kennedy, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 751 (1980) (lamenting that Hale’s work had “sunk into oblivion”). This was confirmed by my own research. A JSTOR search and a systematic examination of a number of major law journals not in JSTOR failed to turn up a single article discussing or citing Hale’s ideas about property between 1954 and 1971.
79. See, e.g., Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 501 n.49 (1967) (citing Hale as “somewhat peripheral for our purposes, but of great interest on the general problem of duress and quasi-duress in a contract context”); see also Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 532–33 & n.27 (1969) (citing Hale to argue that the compulsory character of collective bargaining agreements does not render the union contract “so unique that it should be considered a thing apart, for many other contractual relations are creatures of legal compulsion or are pressed upon the parties by compelling economic forces”).
involve some form of "bargaining power," that "unequal bargaining power does not, in itself, make the contract invalid," and that under the doctrine of duress an entire contract is voidable if the free will of one party was overcome by threats.

In part, this lapse into obscurity is probably due to the simple fact that Hale and his peers had retired and been replaced by a new generation of scholars. Moreover, as described above, the Cold War liberal consensus made his critique of property appear unnecessary, in that the legitimacy of the welfare state was no longer in doubt, and at the same time, suspiciously close to communism in its more radical implications. However, there was another factor that made it particularly unlikely that Hale’s critique of property would be revived.

In 1964, one of the most influential left-wing legal scholars in the country published an article attacking the efforts of Hale’s generation of reformers to justify “the triumph of society over private property” and arguing that their “idealistic concept of the public interest [had] summoned up a doctrine monstrous and oppressive.” Charles Reich, in The New Property, argued that the laissez-faire thinkers were fundamentally correct to define private property as “the very foundation of individuality.” Indeed, he echoed Knight and von Mises in arguing that the denial of the “absolute character of property” was one of the defining traits of feudalism, Nazism, and Soviet communism.

For Reich, however, this conception of property as the guarantor of liberty was not an argument against government regulation and redistribution of wealth. Indeed, he believed that there could and should be “no retreat from the public interest state” which “promises the best life that men have ever known.” Rather, Reich revived the laissez-faire argument to argue that welfare entitlements should be treated as a vested property right. Only by extending property rights in this way, he argued, could the state provide the necessary “property base for civil liberties” in “the highly organized, scientifically planned society of the future” in which “the misery and injustice of the past” have been replaced by

84. Id. at 733.
85. Id. at 770.
86. Id. at 778, 786.
87. Id. at 785–87.
“prosperity, leisure, knowledge, and rich opportunity open to all.”

For Reich and the generation of young progressive legal scholars that he inspired, property rights would, after all, be the source of both liberty and economic justice. Hale’s critique of property, therefore, would have seemed irrelevant or even counterproductive.

IV. HALE REVIVED

A. THE 1970s: LAW AND ECONOMICS UPSETS THE LIBERAL CONSENSUS

Within less than a decade of the publication of The New Property, it became evident that Reich’s vision of a property-based social welfare state would not be realized. Instead, by the early 1970s, the most dynamic force in the law proved to be a laissez-faire philosophy that used the language of economics to attack the welfare and regulatory state as an inefficient, unjustified intrusion on the rights of property owners. In the face of the libertarian tendencies of the Law and Economics movement, Hale suddenly seemed relevant again. Certainly, it seemed that way to Warren J. Samuels, a progressive economist who responded to these Law and Economics arguments by reviving Hale’s analysis of property rights as a form of coercive state intervention in the economy.

Samuels’ first attempt to reanimate Hale’s analysis of property came in a 1971 article for the Journal of Law and Economics. Samuels used Hale’s conception of property to discuss Miller v. Schoene, a 1928 case which found no unconstitutional taking of property where the plaintiffs’ cedar trees were destroyed under state statute to protect neighboring apple orchards from cedar rust. Samuels noted that Justice Stone had defended the statute on the grounds that “it would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards.” He argued that the Miller Court had essentially recognized that “government is present in either case: it is present with respect to the already existing law of property,” which would have allowed the cedar owner to injure the apple orchard owner, “and it is present under the new, altered law of property” which protected the apple orchards by injuring the cedar
Echoing Hale, Samuels argued that this operation of property law in *Miller* exemplifies "an ubiquitous economic decision-making process" where "market forces emerge and take on shape only within the pattern of, inter alia, legal choices as to relative rights, relative exposure to injury, and relative coercive advantage or disadvantage."95 Legally recognized property rights, therefore, "are in effect capacities to participate in the economic decision-making process as a coercive force; they define and delineate loci and conditions of power."97 Ultimately, then, Samuels argued, the question of whether or not the state should compensate property owners for a regulation that harms their property comes down to a policy choice as to which interests should be left exposed "to costs shifted by others," and which interests should be protected by the state.98

Samuels elaborated on this argument in a 1974 article which drew upon Hale's ideas to develop a more systemic critique of the idea that "eminent domain principles" could be "consistently applied to regulation . . . so as not to adversely affect preexisting economic value."99 Samuels noted that "potentially compensable losses are virtually infinite," given that nearly every change in the law has an adverse effect on the value of someone's property rights.100 Moreover, as Hale argued, legal rights "do not exist in isolation, but always relative to other persons who may bear the negative externalities of the rightholder's choices or actions."101

This "dual nature" of property rights means that "for Alpha to have a new right is for Beta to have an additional exposure to Alpha's decision-making."102 For Samuels, "the legal significance of these economic realities is that every change of the law enhances some and restricts other opportunity sets and therefore both benefits and injures the economic value of pre-existing rights."103 Government regulation of Alpha, therefore, "only alters the patterns of exposure and loss and of interests which the law protects," since Alpha's prior right to use his property free of regulation "also created injury" to Beta.104 Given "the elements of arbitrariness and sacrifice which are necessarily involved in

95. Samuels, *supra* note 92, at 441.
96. Id. at 440.
97. Id.
98. Id. at 442.
100. Id. at 116-17.
101. Id. at 122.
102. Id.
103. Id.
104. Id. at 122-23.
the reconciliation of competing interests," Samuels argued, the question as to whether a property owner should be compensated for a regulation that causes economic loss "is a matter of public choice" whose policy implications should not be evaded through "the legal pretense that rights have an abstract antecedent existence that government is obligated to protect."\(^{105}\)

Samuels also made a more direct attempt to bring Hale's arguments about property to the attention of the legal academy through a mammoth law review article on Hale's life and work.\(^{106}\) He described Hale's work as a call for

the correction of the gross disparities of power, both within the market and without it, in the form of rights and wealth acquired through legal inequality... but with cautious regard that sacrifice of the intensive margin not lead to retrogressive disincentive effects or further, though different, tyrannies.\(^{107}\)

In this spirit, Samuels urged his readers to take up Hale's "refusal to accept the status quo on its own terms alone" and "to analyze the forces out of which it developed and not merely take them for granted non-deliberatively."\(^{108}\)

B. THE 1980S: HALE TAKES HIS PLACE IN THE CRITICAL LEGAL STUDIES CANON

Despite Samuels' best efforts, however, the legal academy did not truly revive Hale's analysis of property until the early 1980s. Hale's critique made its next appearance in a pioneering attack on the "economic justifications for the legal institution[ ] of private property" by Duncan Kennedy and Frank Michelman, two left-leaning Harvard professors.\(^{109}\)

Hale's influence on their argument is not immediately apparent, as the bulk of the article consists of a series of law-and-economics style thought experiments through which Michelman and Kennedy set out to refute the idea that private property is the most efficient way to maximize wealth and social welfare.\(^{110}\) In the course of this analysis, however, they noted "the style of thought we are urging, and the skeptical conclusions to which it leads, were commonplace for a

\(^{105}\) Id. at 118, 134.
\(^{106}\) Samuels, Economy as a System of Power, supra note 14.
\(^{107}\) Id. at 367.
\(^{108}\) Id. at 371.
\(^{109}\) Michelman and Kennedy, supra note 78, at 712.
\(^{110}\) After comparing the contemporary private property regime with such hypothetical alternatives as a rights-free state of nature, a forced-sharing property regime, and a regime of universal common ownership, they concluded that given the right factual circumstances, any of these regimes could be an equally efficient way for economic actors to rationally maximize their satisfactions. Id. at 715-39.
preceding generation of legal scholars... culminating in the work of Robert L. Hale, a highly distinguished precursor of the contemporary school of economics-inspired legal policy analysts.” Indeed, they went to far as to say that Hale’s work “virtually anticipates our thesis; had it not sunk into oblivion, there would have been no occasion for this paper.”

Within a few years of Michelman and Kennedy’s article, a group of left-wing legal scholars who called themselves part of the Critical Legal Studies (CLS) had taken up Hale’s critique as one of the “cornerstones” of their critique of the economic status quo. One strand of this CLS critique, pioneered by Kennedy, took an extremely theoretical approach to Hale’s ideas, emphasizing his affinities with the post-modern “deconstructive” philosophies of Michel Foucault and Jacques Derrida.

Another strand of CLS, more interesting for my purposes, used Hale’s ideas as a basis for proposing concrete modifications in the rules of property law that would have a dramatic effect on the distribution of social power. In what he later called an “effort to impersonate Robert Hale,” a young professor named Richard Michael Fischl caused considerable stir by proposing one such modification that would fundamentally alter the nature of economic relations in a capitalist economy. With a simple change in the law of property, he suggested, every factory worker could be legally presumed to own the products of her labor and be entitled to sell them at a profit after “tender[ing] to her boss an amount in cash equal to the cost of the necessary materials and their procurement, the reasonable rental value of her workspace ... and the apportioned cost of other managerial expenses.”

Joseph William Singer, another CLS professor, proposed a more practical application for Hale’s ideas in The Reliance Interest in

111. Id. at 751.
112. Id.
113. Neil Duxbury, Robert Hale and the Economy of Legal Force, 53 MOD. L. REV. 421, 422 (1990). Hale has come to play such a central role in left-wing legal thought that Duncan Kennedy has said, “I sometimes think my epitaph will be: ‘One of those who, beginning in the late 1970s, initiated the revival of Hale.”’ Id. at 441 n.168.
114. See, e.g., Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151, 1236-37 (1985). Indeed, by 1990, Duncan Kennedy found Hale’s assertion that our “particular legal regime” of private property “is responsible for the distribution of income that we actually get” to be “uncontroversial but also not very interesting.” Rather than critiquing property law in his most extensive essay on Hale, Kennedy chose to focus on “non-class distributive conflicts” such as “conflicts between blacks and whites and between men and women” by combining Hale’s ideas with the “post-structuralist methodology” of the French philosopher Michel Foucault. DUNCAN KENNEDY, The Stakes of Law, or Hale and Foucault!, in SEXY DRESSING, ETC. 83, 97, 100, 124 (1993).
116. For a discussion of the public response to this proposal, see id. at 475-79.
Singer had previously argued that Hale’s conception of “property rights as delegations of public power” meant that questions about the proper scope of government regulation of property “can be answered only by reference to moral and policy considerations; they cannot be answered merely by reference to the general principles of private property.”119 In *The Reliance Interest in Property*, he attempted to apply this idea to the plant closings that have been ravaging America’s industrial heartland since the 1980s.120

Singer discussed *Local 1330, United Steel Workers v. United States Steel Corp.*,121 a case in which the steelworkers union sued U.S. Steel in an attempt to prevent the company from shutting down its Youngstown plant.122 The court in *Steel Workers* had rejected the union’s claim that a property right had been created by U.S. Steel’s long relationship with the community of Youngstown.123 Drawing on his analysis of Hale, Singer argued that “the courts should have recognized the workers’ property rights arising out of their relationship with the company,” because “property rights are more often shared than unitary, and rights to use and dispose of property are never absolute.”124 Essentially, he argued, “as Hale tried to teach us . . . the definition, allocation, and enforcement of [property rights] represent social decisions about the distribution of power and welfare,” and “at the core of every private action is an allocation of power determined by the state.”125

Given that such governmental policy decisions lie at the heart of all property relationships, Singer argued, there is no reason that owners should not be required to “take into account the interests of others when they decide how to use their property.”126 The *Steel Workers* court, therefore, was not required to hold that U.S. Steel was the unitary owner of the plant or to define its property rights to include “the legal power to use it in a way that destroys a community.”127 Instead, he argued, the *Steel Workers* court should have recognized that the workers and the community of Youngstown had a legally enforceable reliance interest in the U.S. Steel plant.128 In the end, he argued, “creation of this new property right would be a modest contribution toward the effort to curtail the illegitimate concentration of power” that is currently vested in

121. 631 F.2d 1264 (6th Cir. 1980).
124. *Id.* at 621–22.
125. *Id.* at 650–51.
126. *Id.* at 659.
127. *Id.* at 637.
128. *Id.* at 635–38, 662.
the large industrial corporations that control the economic fate of communities all over the country. 129

C. THE 1990S AND BEYOND: HALE'S ARGUMENTS IN A POST-COMMUNIST WORLD

These attempts to use Hale's theory as a basis for concrete suggestions about new property rules took on a new significance after the fall of the Berlin Wall in 1989. The end of communism in Eastern Europe was widely interpreted to mean that the U.S. system of free markets and private property was the world's ultimate form of political and economic organization, and should be implemented worldwide as soon as possible. 130 In response, left-leaning legal scholars have begun to use Hale's analysis of property to criticize the libertarian conception of property underlying this free-market triumphalism. 131

These scholars have emphasized Hale's insight that the legal rules used to define the rights of property owners are policy determinations that have a dramatic effect on the distribution of social power. 132 Accordingly, they have begun to argue that if private property is the universal system in the post-communist world, the ground rules of property should be set in a way that takes into account the broader social welfare rather than merely maximizing the ability of property owners to do as they wish with their property.

Some of the more interesting and extensive of these arguments include Karl E. Klare's Legal Theory and Democratic Reconstruction: Reflections on 1989, which argued that the new legal frameworks being constructed in Eastern Europe should focus on new forms of employee ownership, 133 and Michael Robertson's Reconceiving Private Property, which proposed a form of "market socialism" that would create two sets of property rights, with more extensive ownership rights for personal property and less extensive ownership rights for productive and commercial property. 134

129. Id. at 650.
131. See Klare, supra note 130, at 69-72; Robertson, supra note 130, at 465-66; see also Note, Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law, 107 Harv. L. Rev. 859, 867 (1994) ("[S]ocial reform should include reconfiguration of basic property rules, as well as tax- and-transfer redistribution... Changes in property rules... can resituate people in positions that allow them greater freedom...").
132. See Klare, supra note 130, at 79-82; Robertson, supra note 130, at 471-74.
133. Klare, supra note 130, at 84-90.
134. Robertson, supra note 130, at 465-76.
Conclusion

In some respects, the durability and influence of Hale’s critique of property have been truly impressive. After a period of decline amidst the Cold War liberal consensus of the 1950s and 1960s, his ideas have been revived and adapted to contemporary circumstances as a way to combat the renewed dominance of the laissez-faire view of property that he attempted to refute in his own time. Thus far, however, his critique has not proved to be a particularly effective weapon against the new generation of laissez-faire property-rights advocates. While the revival of Hale’s ideas has sparked a number of interesting academic debates and proposals, it has yet to influence the courts, much less the tenor of public opinion. Legal scholars who have been inspired by Hale would do well to remember that Hale’s assault on property rights was supported by broad grassroots organizations of Populists, Progressives, Socialists, and labor unions. If we truly want to use Hale’s critique of property to counteract the recent libertarian turn in the law, we must find a way to bring his ideas to an audience that reaches beyond the readers of law journals, present company included.