WESLEY HOHFELD A CENTURY LATER

Wesley Hohfeld is known the world over as the legal theorist who famously developed a taxonomy of legal concepts. His contributions to legal thinking have stood the test of time, remaining relevant nearly a century after they were first published. Yet, little systematic attention has been devoted to exploring the full significance of his work. Beginning with a lucid, annotated version of Hohfeld’s most important article, this volume is the first to offer a comprehensive look at the scope, significance, reach, intricacies, and shortcomings of Hohfeld’s work. Featuring insights from leading legal thinkers, the book also contains many of Hohfeld’s previously unseen personal papers, shedding new light on the complex motivations behind Hohfeld’s projects. Together, these selected papers and original essays reveal a portrait of a multifaceted and ambitious intellectual who did not live long enough to see the impact of his ideas on the study of law.

Shyamkrishna Balganesh is the Sol Goldman Professor of Law at Columbia Law School.

Ted M. Sichelman is a Professor of Law at the University of San Diego School of Law, where he founded and directs the Center for Computation, Mathematics & the Law and directs the Center for Intellectual Property Law & Markets.

Henry E. Smith is the Fessenden Professor of Law at Harvard Law School, where he directs the Project on the Foundations of Private Law. Smith served as the President of the Society for Institutional and Organizational Economics and is the Reporter for the American Law Institute’s Fourth Restatement of Property.
Wesley Hohfeld A Century Later

EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES

Edited by

SHYAMKRISHNA BALGANESH
Columbia Law School

TED M. SICHELMAN
University of San Diego School of Law

HENRY E. SMITH
Harvard Law School
# Contents

*List of Figures*  
*List of Tables*  
*List of Contributors*  

## Introduction: Hohfeld at the Crossroads
Shyamkrishna Balganesh, Ted M. Sichelman, and Henry E. Smith  

## Some Fundamental Legal Conceptions as Applied in Judicial Reasoning
Edited and Annotated by Ted M. Sichelman  

## Selected Personal Papers of Wesley Newcomb Hohfeld
Edited by Ted M. Sichelman  

## Commentaries

### PART I PHILOSOPHY OF JURAL RELATIONS

1. **Hohfeld on Legal Language**  
   Frederick Schauer  
   99

2. **Rights Correlativity**  
   David Frydrych  
   112

3. **Hohfeld and Rules**  
   Andrew Halpin  
   138

4. **Logic and the Life of the Law (Professor): A Logocratic Lesson from Hohfeld**  
   Scott Brewer  
   157
PART II  HOHFELD AND PROPERTY  221

5 Property’s Building Blocks: Hohfeld in Europe and Beyond  223
Anna di Robilant and Talha Syed

6 The In Rem/In Personam Distinction and Conceptual Partitioning for Persistence  258
Shyamkrishna Balganesh and Leo Katz

7 Hohfeld and the Theory of In Rem Rights: An Attempted Mediation  273
Christopher M. Newman

PART III  HOHFELD AND EQUITY  293

8 Hohfeld’s Equity  295
J. E. Penner

9 The Essential Nature of Trusts and Other Equitable Interests: Two and a Half Cheers for Hohfeld  312
Ben McFarlane

10 General and Particular Jural Relations  331
Emily Sherwin

PART IV  HOHFELDIAN COMPLEXITIES  343

11 Very Tight “Bundles of Sticks”: Hohfeld’s Complex Jural Relations  345
Ted M. Sichelman

12 Hohfeldian Analysis and the Separation of Rights and Powers  366
John C. P. Goldberg and Benjamin C. Zipursky

13 Immunity Rules  386
John Harrison

14 Scaling Up Legal Relations  419
Andrew S. Gold and Henry E. Smith

PART V  HOHFELD AND SOCIETY  439

15 Hohfeldian Analysis, Liberalism, and Adjudication (Some Tensions)  441
Pierre Schlag

© in this web service Cambridge University Press & Assessment www.cambridge.org
Contents

16 The Contingent Politics of Legal Formalism
   Aditi Bagchi
   467

17 Religious Liberty and Public Accommodations: What Would
   Hohfeld Say?
   Joseph William Singer
   478

18 Wesley Newcomb Hohfeld: On the Difficulty of Becoming a Law
   Professor
   John Henry Schlegel
   494

Index
   518
Figures

3.1 A triple-level analytical scheme
6.1 Persistent Partitioning

page 156
264
# Tables

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1 Jural correlatives</td>
<td>122</td>
</tr>
<tr>
<td>2.2 Jural absences</td>
<td>122</td>
</tr>
<tr>
<td>4.1 Claim right is correlative to duty</td>
<td>168</td>
</tr>
<tr>
<td>4.2 Liberty (privilege) is correlative to no-right</td>
<td>168</td>
</tr>
<tr>
<td>4.3 Power is correlative to liability</td>
<td>169</td>
</tr>
<tr>
<td>4.4 Immunity is correlative to disability</td>
<td>170</td>
</tr>
<tr>
<td>4.5 Corbin’s “giant” rulifications of Hohfeld opposites jural relations</td>
<td>217</td>
</tr>
<tr>
<td>15.1 Hohfeld’s jural correlatives and jural opposites</td>
<td>443</td>
</tr>
</tbody>
</table>
Contributors

The Editor-Contributors
List of Contributors


The Contributors

Aditi Bagchi is Professor of Law at Fordham University School of Law, where she teaches Contracts and Labor Law. She writes about the nature of contractual obligation, contract interpretation, and questions in political and moral philosophy as they arise in contract. She has a related interest in the comparative political economy of contract, labor, and corporate law. Professor Bagchi has been a visiting professor at Columbia Law School and Yale Law School and, prior to joining Fordham, she taught at the University of Pennsylvania Law School. Before teaching, she clerked on the Third Circuit Court of Appeals and was a litigation associate at Cravath, Swaine & Moore LLP. She obtained her JD from Yale Law School, an MSc in Economic and Social History from Oxford University, and an AB in Government and Philosophy from Harvard College.

Scott Brewer is a Professor of Law at Harvard Law School. He specializes in Contract Law, Evidence Law, Jurisprudence, eudaimonistic ethics, and the philosophical analysis of arguments. His work on the theory of argument is his Logocratic Method, which is the subject of his contribution to this Hohfeld volume and focuses on the epistemic, logical, and axiological structures of arguments, including – but not limited to – legal arguments. He is cofounder and coadministrator of the annual Summer School on Law and Logic, jointly sponsored by Harvard Law School and the European University Institute, in Fiesole, Italy. He delivered the Walter F. Murphy Lecture in the James Madison Program, Princeton University (“Arguing Excellence: A Logocratic Approach to Measures of Virtue,” December 2021), was the Kwa Geok Choo Distinguished Visitor, National University of Singapore (lecture, “Arguing the World: A Logocratic Explanation of ‘Post-Truth’ Law and Politics,” August 2018), and will be the Astor Visiting Lecturer at Oxford University in 2022. He has taught courses and workshops around the world, including Brazil, Singapore, Austria, Italy, Germany, Spain, and France. His writings include: The Logics of Precedent: A Logocratic Analysis, in Philosophical Foundations of Precedent (forthcoming Oxford University Press); First Among Equals: Abduction in Legal Argument from a Logocratic Point of View, in New Essays on the Nature of Legal Reasoning (M. McBride & J. Penner eds., Hart 2022); Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis, 28 Artificial Intelligence & L. 151 (2020); Indefeasible Analogical Argument, in Analogy and Exemplary Reasoning in Legal Discourse.
List of Contributors


David Frydrych is a Lecturer (Assistant Professor) at Monash University’s Faculty of Law in Melbourne, Australia, where he teaches legal philosophy, property, and trusts. His jurisprudential scholarship to date mostly focuses on rights and legal realism. David’s monograph, The Architecture of Rights: Models and Theories, was published by Palgrave in 2021. Other representative publications include: Down the Methodological Rabbit Hole, 49 Crítica 41 (2017); Hohfeld vs. the Legal Realists, 24 Legal Theory 291 (2018); The Case Against the Theories of Rights, 40 Oxford J. Legal Stud. 320 (2020); Legal Realism and “Working” Rules, 35(2) Can. J.L. & Juris. (forthcoming 2022); and Realism and Positivism, Juris: Int’l J.L. & Pol. Thought (forthcoming 2022). Before joining Monash, David was a postdoctoral fellow at both the University of Singapore Faculty of Law and New York University School of Law. He earned an Honours BA with Distinction.
List of Contributors

and LLM from the University of Toronto, a JD from the Benjamin N. Cardozo School of Law, and a DPhil in Law from the University of Oxford. A Canadian, he is admitted to practice in New York and Victoria, Australia.


Andrew Halpin is formerly a Professor of Law and Director of the Centre for Legal Theory in the Faculty of Law at the National University of Singapore. His research interests fall mainly within legal theory, broadly conceived. Previous work related to Hohfeld is found in his book, Rights and Law: Analysis and Theory (Hart 1997); a number of articles – Hohfeld’s Conceptions: From Eight to Two, 44 Cambridge L.J. 435 (1985); More Comments on Rights and Claims, 10 Law & Phil. 271 (1991); The Concept of a Legal Power, 16 Oxford J. Legal Stud. 129 (1996); Fundamental Legal Conceptions Reconsidered, 16 Can. J.L. & Juris. 41
List of Contributors

xvi  List of Contributors


Ben McFarlane is Professor of English Law at the University of Oxford and a Fellow of St John’s College, Oxford. He was formerly Professor of Law at University College London. He is the author of The Law of Proprietary Estoppel (Oxford University Press 1st ed, 2014; Oxford University Press 2nd ed. 2020) and The Structure of Property Law (Hart 2009), is one of the authors of Land Law: Text, Cases and Materials (Oxford University Press 1st ed. 2009; Oxford University Press 5th ed. 2021), and is one of the contributing editors of Snell’s Equity. He is an Honorary Senior Fellow of the Melbourne Law School and a Visiting Professor at the Université Panthéon-Assas Paris II.

Chris Newman is an Associate Professor of Law at George Mason University School of Law whose scholarship focuses on the relationship of property theory to intellectual property. His key papers in this area include: A License Is Not A “Contract Not To Sue”: Disentangling Property and Contract in the Law of Copyright Licenses, 98 Iowa L. Rev. 1101 (2013); Transformation in Property and Copyright, 56 Vill. L. Rev. 251 (2011); and An Exclusive License is Not An Assignment: Disentangling Divisibility and Transferability of Ownership in Copyright, 74 L.A. L. Rev. 59 (2013) (selected as one of year’s best by Intellectual Property Law Review).

James Penner is Kwa Geok Choo Professor of Property Law at the National University of Singapore. He is one of the world’s leading experts in the law of trusts and the philosophy of property, and writes more widely in the areas of private law and the philosophy of law. He has been a visiting professor in China, Canada, Belgium, and Australia, and most recently at Harvard Law School in the autumn semester of 2019. His numerous publications include: The Idea of Property in Law (Oxford University Press 1997); Property Rights: A Re-Examination of the Privileges or Immunities Clause of Article IV (University of Chicago Press 1992).
Anna di Robilant is Professor of Law at Boston University School of Law. She is a property law scholar trained in both Europe and the United States. She writes and teaches in the areas of property law, property theory, legal history, and comparative law. Di Robilant’s scholarship focuses on two main themes. The first theme is to question the idea, long shared by comparative law experts, that property law in Europe and the United States is fundamentally different. By contrast, di Robilant’s work suggests that modern Western property is the product of a “transatlantic dialogue” shaped by intellectual, professional, social, and economic factors. For example, in her article, *Abuse of Rights. The Continental Drug and the Common Law*, 61 Hastings L. J. 687 (2010), Professor di Robilant challenges the idea that the doctrine of “abuse of rights” is a peculiarity of civil law systems, absent in the common law, and explores the reasons for the parallel, yet different, development of the doctrine in the two systems. Similarly, in *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 86 (2013), Professor di Robilant questions the idea that the “bundle of sticks” image of property is an American invention and examines the intellectual, political, and economic concerns that led European jurists, in the first half of the twentieth century, to develop a new conceptualization of property as a “tree” that shares many of the intuitions of the “bundle of rights” approach and yet differs from it in significant ways. The second theme in di Robilant’s property scholarship is designing property law institutions that reflect the values of a free and democratic society, committed to making access to fundamental resources, such as housing, water, cultural, or natural resources, more equitable. In *Common Property and Equality of Autonomy*, 58 McGill L. J. 263 (2012), di Robilant analyzes the challenges involved in the design of common ownership institutions, such as conservation land trusts, affordable-housing cooperatives, community gardens, neighborhood-managed parks, and proposes refocusing the design work on promoting greater “equality of autonomy.” Similarly, in *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 Am. J. Comp. L. 367–416 (2014), di Robilant examines a selection of recently created property forms which establish mechanisms of democratic and deliberative governance for resources as diverse as natural resources, scarce urban land, historic landmarks, or cultural institutions. Professor di Robilant is the chair of the Property section of the “Common Core of European Private Law,” a project that has brought together more than 200 legal scholars and practitioners to analyze and map the connections and underlying similarities in contract, property, and torts laws across Europe. She received her JD from the University of Torino, Italy; her PhD in Comparative Private Law from the University of Trento, Italy, and her LLM and SJD from Harvard Law School.

Frederick Schauer has been David and Mary Harrison Distinguished Professor of Law at the University of Virginia since 2008. Previously he was Frank Stanton Professor of the First Amendment at Harvard University, and, earlier, Professor of Law at the

Pierre Schlag is University Distinguished Professor and Byron R. White Professor at the University of Colorado Law School. A broad-ranging legal theorist, his most recent works include: How to Do Things with Hohfeld, 78 Law & Contemp. Probs. 185 (2015); L’Autonomie des Avocats (Une Conception Problématique Parmi Des Développements Démoralisants), in L’AUTONOMIE DES AVOCATS (Jean Louis Assier ed., Dalloz 2015); and Coase Minus the Coase Theorem: Some Problems with Chicago Transaction Cost Analysis, 99 Iowa L. Rev. 175 (2013). His other works include: The Dedifferentiation Problem, 42 Continental Phil. Rev. 35 (2009); The Aesthetics of American Law, 115 Harv. L. Rev. 1047 (2002); Formalism and Realism in Ruins (Mapping the Logics of Collapse), 95 Iowa L. Rev. 195 (2009); The Enchantment of Reason (Duke University Press 1998); Law and Phrenology, 110 Harv. L. Rev. 877 (1997); and The Empty Circles of Liberal Justification, 96 Mich. L. Rev. 1 (1997). His works have been translated into French, Russian, Ukrainian, Italian, and Spanish.

John Henry Schlegel is the U.B. Distinguished Professor and Floyd H. and Hilda L. Hurst Faculty Scholar at the University at Buffalo School of Law. He joined the SUNY Buffalo Law faculty in 1973 where he teaches courses in corporate finance, commercial law and regional economic development. For over twenty years, Schlegel’s scholarship was focused on the history of legal education, legal theory, and the activities in the 1920s and 1930s of a group of scholars at Columbia, Yale, and
List of Contributors

Johns Hopkins universities known as the American Legal Realists. These efforts resulted in a book entitled *American Legal Realism and Empirical Social Science* (University of North Carolina Press 1995), which described and analyzed Wesley Hohfeld’s life and work. While he continues to publish regularly on these topics, his most recent project is a book titled *While Waiting for Rain: Community, Economy and Law in a Time of Change* (forthcoming from the University of Michigan Press in 2022). This book focuses on changes in the U.S. economy and in the local, Buffalo one since the Civil War. It attempts to explain the decline in both and, using the economic theory of the urbanist Jane Jacobs, tries to suggest what communities might sensibly do that might make them as attractive to economic actors today as they were in the years after that war.

**Emily Sherwin** is Professor of Law at Cornell Law School. She specializes in jurisprudence, property, and remedies. She is the author of four books: *Ames, Chafee, and Re on Remedies* (West Academic 2019) (with Samuel Bray); *Advanced Introduction to Legal Reasoning* (Edward Elgar 2021) (with Larry Alexander); *Demystifying Legal Reasoning* (Cambridge University Press 2008) (with Larry Alexander); and *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke University Press 2001) (with Larry Alexander). She is also an editor of *The Oxford Handbook of The New Private Law* (Oxford University Press 2020) (with Andrew Gold, John Goldberg, Daniel Kelly & Henry Smith). She has published numerous book chapters, articles, and reviews in her subjects of specialty. She was a member of the advisory committee for the ALI’s Restatement (Third) of Restitution and Unjust Enrichment, and is currently a member of the advisory committee for the Restatement (Third) of Torts (Remedies). She continues to be a regular participant in the Analytical Legal Philosophy Conference.

**Joseph Singer** has been a Professor of Law at Harvard Law School since 1992. He was appointed Bussey Professor of Law in 2006. He began teaching at Boston University School of Law in 1984. Singer received a BA from Williams College in 1976, an AM in political science from Harvard in 1978, and a JD from Harvard Law School in 1981. He clerked for Justice Morris Pashman on the Supreme Court of New Jersey from 1981 to 1982 and was an associate at the law firm of Palmer & Dodge in Boston, focusing on municipal law, from 1982 to 1984. He teaches and writes about property law, conflict of laws, and federal Indian law. He also writes about legal theory with an emphasis on moral and political philosophy. He has published more than eighty law review articles. He is one of the executive editors of the 2012 edition of *Cohen’s Handbook of Federal Indian Law* (with 2015 Supplement; LexisNexis). He has written a casebook and a treatise on property law, as well as *Persuasion: Getting to the Other Side* (Carolina Academic Press 2020); *Choice of Law: Patterns, Arguments, Practices* (Carolina Academic Press 2020); *No Freedom Without Regulation: The Hidden Lesson of the Subprime
Crisis (Yale University Press 2015); Entitlement: The Paradoxes of Property (Yale University Press 2000); and The Edges of the Field: Lessons on the Obligations of Ownership (Beacon Press 2000).

Talha Syed teaches at the University of California, Berkeley School of Law. His research focuses on law and political economy, with applications to intellectual property, property, torts, antitrust, and theories of distributive justice. His principal publications include: Reconstructing Patent Eligibility, 70 AM. U. L. REV. 1937 (2021); Educational Accommodation and Distributive Equity: The Principle of Proportionate Progress, 50 CONN. L. REV. 485 (2018); The Wrongs of Copyright’s Statutory Damages, 98 TEX. L. REV. 1219 (2020) (with Oren Bracha); The Continuum of Excludability and the Limits of Patents, 122 YALE L.J. 990 (2013) (with Amy Kapczynski); Beyond Efficiency? Consequence-Sensitive Theories of Copyright, 29 BERKELEY TECH. L. J. 229 (2014) (with Oren Bracha); Beyond the Incentive-Access Paradigm? Product Differentiation and Copyright Revisited, 92 TEX. L. REV. 1841 (2014) (with Oren Bracha); A Prize Alternative as a Partial Solution to the Health Crisis in the Developing World, in Incentives for Global Health (Thomas Pogge et al. eds., 2009) (with William W. Fisher III); and Global Justice in Healthcare: Developing World Differentiation and Copyright Revisited, 40 U.C. DAVIS L. REV. 581 (2007) (with William W. Fisher III). He has two forthcoming books: From Patents to Public Utility: Pharmaceutical Innovation Policy; and A War Not Easily Won: Curbing Infectious Diseases in Developing Countries (with William W. Fisher III). He received his JD from the University of Victoria, Canada, where he graduated as the Gold Medalist, and an LLM from Harvard University. He is a fellow at the Institute for New Economic Thinking and his academic honors include a fellowship at the Harvard Petrie-Flom Center for Health Law, Biotechnology, and Bioethics; the Canadian Bar Association’s national Viscount Bennett Fellowship; and a Social Sciences and Humanities Research Council of Canada fellowship.

Benjamin C. Zipursky is Professor of Law at Fordham Law School, where he holds the James H. Quinn ’49 Chair in Legal Ethics. A member of the Fordham faculty since 1995, he has taught as a visitor at Columbia Law School, Harvard Law School, University of Pittsburgh Law School, and Vanderbilt Law School, and in the Department of Philosophy at New York University. Professor Zipursky is a leading scholar in torts, jurisprudence, and legal ethics, and has published more than eighty articles and chapters on subjects ranging from punitive damages and conflicts of interest in mass tort litigation to the varieties of pragmatism within legal philosophy. He has lectured extensively in the United States and abroad and is the coauthor of a leading casebook, Tort Law: Responsibilities and Redress (Wolters Kluwer 5th ed. 2021) as well as The Oxford Introductions to U.S. Law: Torts (Oxford University Press 2010). His most recent book – Recognizing Wrongs (Harvard University Press 2020) (coauthored with John Goldberg) – is a sustained defense of civil recourse theory in the law of torts.