

HOW TO DO THINGS WITH HOHFELD

PIERRE SCHLAG*

I. INTRODUCTION	186
II. SOME PRELIMINARY OBSERVATIONS.....	187
A. Legal Conceptions as Relations of Form	188
B. The Strands of Hohfeldian Thought	190
C. The Practicality of the Hohfeld’s Approach	191
III. ERRORS OF TRANSPOSITION	192
A. Of Ambiguity, Slippage, and Blending	192
B. The Economic Import of Errors of Transposition	198
C. The Political Import of Errors of Transposition.....	199
IV. HOHFELD’S FUNDAMENTAL LEGAL RELATIONS	200
V. ABUSE OF DEDUCTION—DERIVING RIGHTS FROM PRIVILEGES.....	204
A. Missing the Excluded Middle—Eclipsing the Privilege–No Right Relation.....	206
B. Conceptual Abuse as Distorting Moral, Policy, and Political Argument.....	207
C. Distinguishing Injurious Interference in the Nonlegal and the Legal Senses	207
D. Errors of Asymmetry	208
E. The Economic Import of Distinguishing Between Rights and Privileges.....	210
F. The Political Import of Distinguishing Between Rights and Privileges.....	211
VI. THE RECOGNITION OF PRIVILEGE–NO RIGHT AS A “REAL” LEGAL RELATION	212
A. The Economic Import of Treating Privilege–No Right as a Real Legal Relation	212
1. Cooperative–Adverse Relations	213
2. Competitive Relations.....	214
3. Third-Party Effects	215
B. The Political Import of Treating Privilege–No Right as a Real Legal Relation	215
VII. THE POLITICS OF HOHFELD’S PLATFORM	216
VIII. DECOMPOSITION AND RECOMPOSITION	217
A. Legal Analysis: The Virtues of Formal Atomism	218
B. The Economic Import of Decomposition	220
C. The Political Import of Decomposition.....	221
IX. JURAL COMPOSITES AND THE BUNDLE OF RELATIONS.....	222

X. SOME LIMITATIONS OF THE HOHFELDIAN PARADIGM	230
A. Indeterminate Individuation and Endless Atomism	230
B. Dedifferentiation and the Legal Concept	231
XI. CONCLUSION.....	233

I

INTRODUCTION

Wesley Newcomb Hohfeld's 1913 *Fundamental Legal Conceptions as Applied in Judicial Reasoning* is a brilliant article.¹ A thrilling read it is not—more like chewing on sawdust. The arguments are dense, the examples unwieldy, and the prose turgid. As for Hohfeld's project—the identification of fundamental legal conceptions—it seems to promise all the aesthetic charm of standard nineteenth-century juristic science.² Taxonomic activity will be happening. There will be classification. And jurisprudence by subdivision.

Oh, joy.

Yes. It's *that* article. And yet, conceding all this (in fact, insisting on it), I hold to my claim: The full significance of Hohfeld's article is hardly evident upon a first (or even second) read. And yet, as I try to show here, it can fundamentally alter the way one thinks about law.

The taxonomic ambitions of Hohfeld's style render his work suspect—at least to those who consider themselves postrealist or postmodern or post-whatever. I get it. I too am generally put off by this sort of thing. In my case, the aversion is a result of getting burned once too often: a legal philosopher proposes to offer a new classification scheme; he assures that great things will follow (the achievement of conceptual clarity is almost always involved); then after much arduous reading and repeated encounters with ethereal abstractions, nothing happens. Well, Hohfeld is not like that. Hohfeld redeems his

Copyright © 2015 by Pierre Schlag.

This article is also available at <http://lcp.law.duke.edu/>.

* University Distinguished Professor & Byron R. White Professor of Law, University of Colorado Law School. For comments and criticisms, my thanks to Kristen Carpenter, Nestor Davidson, Justin Desautels-Stein, Michael Fischl, Heather Hughes, Jack Schlegel, Ted Sichelman, and Joseph Singer. Kyle Moen provided excellent research assistance.

1. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, 1913]. The sequel is Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, 1917].

2. Some have accordingly described it as a formalist work. One commentator, for instance, writes that the article “seems to belong to a genre of formalist legal scholarship that is now virtually extinct.” Nigel E. Simmonds, *Introduction*, in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (David Campbell & Philip Thomas eds., Dartmouth Publishing Co. Ltd. 2001). Others, however, reject the characterization of Hohfeld's work as formalist. See, N. E. H. Hull, *Vital Schools of Jurisprudence, Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910–1919*, 45 J. LEGAL. EDUC. 235, 257 (1995) (arguing that Hohfeld's work was pragmatic). See *infra* note 3.

conceptual taxonomy at great, though admittedly not always reader-friendly, length. He repeatedly shows the practical usefulness and theoretical power of his analyses even if he does not fully recognize or exploit all of their ramifications.³

One of the most striking aspects of Hohfeld's work is how much its architecture and arguments remain relevant—even biting so—today. Here I want to celebrate Hohfeld's work and show how his thinking remains a powerful corrective to common errors in contemporary legal thought. More than that, I want to show how his work continues to serve as an extremely useful platform for intellectual, economic, and political insight into contemporary law. Where the full usefulness and power of Hohfeld's analyses are not explicit, I will be pushing hard to show what can be done with his platform—specifically as regards its economic and political implications for law.

Strikingly, even the most objectionable aspects of Hohfeld's work, for instance, his atomism, nonetheless yield extremely useful insights. Like any truly great work of legal scholarship, Hohfeld's work not only helps us understand what it sets out to explore, but also serves to map out the problems it leaves unresolved. The upshot is that we learn not just from its successes but from its limitations. Hence it is that, more than a hundred years after its publication, there are many implications to Hohfeld's work yet to be fully elaborated.

To put it trenchantly, without Hohfeld, one simply misses a lot. In my view (and no, this is not the occasion in which I come out as a pragmatist), the great virtue of Hohfeld's approach is not so much that Hohfeld's analyses are right, but rather that they are useful and thought-provoking.

II

SOME PRELIMINARY OBSERVATIONS

At the outset it seems helpful to make a few observations about Hohfeld's project so as to avoid misunderstandings. Hohfeld's approach is unusual and requires a reorientation of the reader's expectations. It is very much an example, as Walter Wheeler Cook observed, of analytic jurisprudence.⁴ But its implications, as the young and clearly exulted Arthur Corbin noted, are far from limited to that particular scholarly precinct.⁵

3. Whether Hohfeld ever contemplated the more critical uses of his work by legal realists and others is a matter of some contention. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 55 (1995). Not being a historian, I am really interested in *not* adjudicating that question beyond stating that (1) Hohfeld developed one hell of a platform, and (2) some legal realists used the platform to answer questions it did not address (and not surprisingly could not answer.) *See supra* text accompanying note 1.

4. Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 *YALE L.J.* 779, 785 (1918).

5. Arthur Corbin's summary of Hohfeld's work for the Yale Law Journal is so unrestrainedly enthusiastic one wonders whether, given the chance, Corbin would not have wanted to mandate observance of Hohfeld's approach by his Yale colleagues. *See* Arthur L. Corbin, *Jural Relations and*

A. Legal Conceptions as Relations of Form

Hohfeld, by his own account, was out to clarify the uses of basic legal conceptions in case law and legal scholarship— notions such as rights, immunities, duties, and the like. His effort was less an attempt to elucidate the conceptions of others than to expose their confusions and to establish his own taxonomy— what I call Hohfeld’s “platform.” Hohfeld was interested in setting forth a set of different possible legal relations which he saw instanced, albeit in muddled form, in case law and legal scholarship. Hohfeld did not argue for his taxonomy. He simply offered it up and put it to work uncovering muddled thinking. Hohfeld’s enterprise can thus easily seem dogmatic. But this dogmatism is redeemed by the light it sheds on the recursive confusions and errors of other legal thinkers.

Hohfeld’s general strategy (this too is a departure from standard legal scholarship) was to describe these basic legal conceptions as *relations of legal form*— that is to say, stripped so far as possible of *substantive content*. This attempt to isolate legal conceptions into pure relations of form is what gives his approach its austere, formalist, almost mathematical aura. Indeed, Hohfeld himself likened his jural relations to “lowest common denominators” and claimed for them both universality and irreducibility.⁶

How, then, is Hohfeld’s platform to be understood as *relations of legal form*? Perhaps the easiest response here is to turn directly to the platform. Hohfeld described four kinds of entitlements (rights, privileges, powers, and immunities) and four kinds of disablements (duty, no right, liability, and disability).⁷ For each entitlement there is always a unique and distinct correlative disablement and *vice versa*. Thus, for every right in A, there must be a correlative duty in B. For every privilege in A, there must be a correlative . . . (and so on and so forth). The correlatives thus form four distinct dyads of legal relations. In this article, when these legal relations are actualized in law (as opposed to mere thought) I call them “legal regimes” or simply “regimes,” (as opposed to legal relations). Here then are Hohfeld’s famous jural correlatives:

JURAL CORRELATIVES

Right $\leftarrow \rightarrow$ Duty
 Privilege $\leftarrow \rightarrow$ No Right
 Power $\leftarrow \rightarrow$ Liability
 Immunity $\leftarrow \rightarrow$ Disability

Their Classification, 30 YALE L.J. 226 (1921).

6. Hohfeld, 1913, *supra* note 1, at 58.

7. The terms “entitlement” and “disablement” are not Hohfeld’s and can be misleading. Thus, Hohfeld points out that what he calls a “liability” can sometimes be “agreeable” in the sense that one can have a liability to receive a benefit. Hohfeld, 1913, *supra* note 1, at 59 n.90.

Hohfeld explicitly declines to provide any specific definitions for his eight conceptions. They are *sui generis*. Instead, he accords meaning to these conceptions by articulating their relations, by demonstrating their instantiation in case law and legal scholarship, and by showing how they can be used to reveal sloppy thinking and faulty analyses. Three kinds of relations are crucial:

1. Each conception has its *unique correlative*. (Each conception is another way of stating its correlative.)

2. Each conception has its *unique opposite*. (It would be nonsense to accord opposites to the same party for the same act.)

3. Each conception is *never any of the others*. (Each conception is distinct, though, of course, they can be aggregated in a variety of ways into some greater whole as *jural composites*—for instance, the fee simple, the corporation, the . . . and so on.)

As others have noted, Hohfeld's approach is Saussurian.⁸ For Hohfeld, each conception gains meaning from its specified relations with the others.⁹ Hohfeld adds meaning to these rather spare legal relations by providing examples in case law and legal scholarship.

If Hohfeld's approach seems formalistic (and undeniably it does) then it is a very different sort of formalism from the sort we usually encounter.¹⁰ Hohfeld's work might best be read as a contribution about *how* to think, not *what* to think. Arthur Corbin, one of Hohfeld's early legal realist enthusiasts, was on to this. After a rousing endorsement of Hohfeld's method, Corbin cautioned as follows:

In all our discussions of legal analysis, in all our attempts at defining terms or at coining them, we should never cease to bear in mind and give warning that *mere legal analysis does not by itself enable us to tell what the law is in a single case*. The ability to recognize and to define rights and duties, powers and privileges, and the other relations, does not tell us whether or not they exist in a given case or what facts operate to create them. *Rules of law are not constructed by mere analysis and mere logic*. As a basis for such construction the judges may appeal to "natural justice" or some similar abstraction, to public policy, to "eternal" justice, to the "right" as opposed to wrong, to the settled convictions of the community, to business and social custom, to the *mores* of the time.¹¹

I mention this at the outset in part to guard against certain criticisms that have been made of Hohfeld. In my view, some of these criticisms get off their particular dime by seizing on overly enthusiastic transformations of Hohfeld's work into *a substantive theory* of this or that and then concluding, not surprisingly, that Hohfeld's platform is inadequate for the task at hand.¹² But

8. DUNCAN KENNEDY, *LEGAL REASONING (COLLECTED ESSAYS)* 96–101 (2008); Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1121–22 (1990); Karl Olivecrona, *Legal Language and Reality*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 151, 152–53 (E. Newman ed., 1962).

9. For an interesting effort to specify additional relations among the jural conceptions, see Mark Andrews, *Hohfeld's Cube*, 16 AKRON. L. REV. 471 (1983).

10. Hull, *supra* note 2, at 257.

11. Corbin, *supra* note 5, at 237–38 (emphasis added). As Stephen Munzer puts it, "an analytical vocabulary does not dictate an answer . . ." STEPHEN MUNZER, *A THEORY OF PROPERTY* 21 (1990).

12. See *infra* text accompanying note 14.

Hohfeld does not offer a *substantive theory* of law or entitlements or property or contracts or anything of the sort.¹³ All he offers is an *analytical method*.¹⁴ If one unreflectively morphs Hohfeld's method into a substantive theory about how "property" or any other jural composite is constructed, difficulties will ensue—fast.¹⁵

B. The Strands of Hohfeldian Thought

If one delves broadly into the literature on Hohfeld, the experience can be jarring because one encounters a lot of different, and frequently discordant, expositions of his thought. In part that is because Hohfeld's work has proven interesting to different strands of legal thought, each of which seems to pursue its agenda largely in isolation from the others. The result is that, over time, each strand has constructed its own "Hohfeld." For those readers who arrive on the scene expecting to find just one Hohfeld, it's all rather bewildering.

Three important, self-contained strands warrant mention at the outset. The "analytical strand" consists of those analytical thinkers who strive to clarify and ascertain whether Hohfeld's tables of fundamental jural conceptions are right or not.¹⁶ The "property strand" consists of property theorists who have enlisted Hohfeld's thought to help theorize property. These theorists, (e.g., Thomas C. Grey) generally view Hohfeld as the author of the "bundle of sticks" conception of property¹⁷—an approach that, in its most extreme versions, denies

13. Jane Baron, *The Contested Commitments of Property*, 61 HAST. L.J. 917, 936 (2010) (noting that Hohfeld's project was not aimed at developing "a definitive idea of property").

14. Henry Smith calls it a useful "theoretical construct" and likens it to the Coase Theorem. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1696 (2012). The suggestion is provocative, but there is a difference: the Coasean zero-transaction-cost world is a kind of thought experiment that is in no way descriptive of any actual state of affairs (save the current state of the neoclassical model used in Chicago law and economics). A rigorous attempt to imagine such a zero transaction costs world should yield a cognitive tailspin. Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 189–94 (2013) [hereinafter Schlag, *Coase Minus the Coase Theorem*]. Hohfeld's atomistic platform, by contrast, is descriptive of an actual state of affairs—it is just that it is a very *incomplete* description. See *infra* text accompanying notes 151–55.

15. See Smith, *supra* note 14, at 1697 (distinguishing the use of the "bundle of rights" notion as an analytical device from its deployment as a substantive theory of "how the world works").

16. More specifically: Are there any conceptions missing? Are they the lowest common denominators of the system or can we do with fewer? Can we, through dint of refinement, produce better, more nuanced conceptions? Was Hohfeld right? These are the kinds of questions that drive the research agenda of the analytical strand. See, e.g., JONATHAN GORMAN, RIGHTS AND REASON: AN INTRODUCTION TO THE PHILOSOPHY OF RIGHTS 83–99 (2003) (clarifying the senses in which Hohfeld's "correlatives" are correlative); ANDREW HALPIN, RIGHTS & LAW: ANALYSIS & THEORY 27 (1997) (arguing that Hohfeldian privileges are not fundamental legal conceptions).

17. See, e.g., Thomas C. Grey, *The Disintegration of Property*, in XXII NOMOS 69, 85 n.40 (J. Roland Pennock & John W. Chapman eds., 1980). Hohfeld did not actually use the bundle term in the 1913 and 1917 articles. Hohfeld did, however, speak of property in terms of a "complex aggregate of jural relations," Hohfeld, 1917, *supra* note 1, at 746. As for the exact expression "bundle of rights," it antedates Hohfeld's work. See *infra* note 130. Hohfeld did describe property as an "aggregate" of jural relations and a number of legal realists picked up on that notion, elaborating it into a theory of property that came to be widely accepted in property-law circles. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 365 (2001) (noting

that property has any essential aspects and must instead be seen as a mutable aggregation of different entitlements and disablements.¹⁸ Finally, the “critical strand” consists of those legal realists (e.g., Arthur Corbin, Walter Wheeler Cook, Karl Llewellyn, Robert Lee Hale) and critical thinkers (e.g., Joseph Singer and Duncan Kennedy), who view Hohfeld as having provided an analytical framework that reveals tendentious legal reasoning flaws and that exposes the inexorably practical, moral, policy, and political aspects of law.¹⁹

As mentioned, each of these three strands seems to have developed its particular Hohfeldian (or occasionally anti-Hohfeldian) agenda without paying too much attention to the other strands. In pursuing their different scholarly projects, the various strands have at times yielded different noncompatible interpretations of Hohfeld. If I dwell on this, it is because I would very much hope to avoid such misunderstandings here.

C. The Practicality of the Hohfeld’s Approach

My approach to Hohfeld is encapsulated in the title of this piece: “How to Do Things With Hohfeld.” I take my cues largely from Hohfeld himself, who announced that his efforts to clarify our legal conceptions were not to pursue some ethereal philosophical inquiry into the law, but rather to “emphasize certain oft-neglected matters that may aid in the understanding of *practical, every-day problems of the law*.”²⁰ I am thus deliberately choosing the Hohfeld that seems most useful and interesting—at least to my mind.²¹ For me, this is the

Arthur Corbin’s and Max Radin’s endorsement of the bundle of rights notion). Corbin early on described a shift in the conception of property away from “a res or object of sense” to “merely a bundle of legal relations.” Arthur S. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922).

18. In the past two decades, the bundle notion has encountered some interesting objections and challenges. See *infra* text accompanying notes 129–55. The property theorists have been extremely important to the development of Hohfeldian analysis (despite the narrowing substantive focus on property) because they have debated the issues and problems so intensely and extensively. Having cast Hohfeld as the progenitor of the bundle of rights theory, thinkers in the property strand either celebrate or disparage Hohfeld. Either way, Hohfeld’s platform is viewed as an important, though for some, a wrongheaded, contribution to the attempt to theorize property (and its various subclasses). See *infra* text accompanying notes 129–55.

19. Hohfeld and his platform are viewed as a crucial prelude to the identification of the character and limits of conventional legal reasoning. Hohfeld on this account is the godfather of the more interesting versions of both the legal realist as well as critical accounts of the ineluctable policy, moral, and political character of law. See generally, KARL LLEWELLYN, *THE BRAMBLE BUSH* 90 (2008); Walter Wheeler Cook, *Hohfeld’s Contributions to the Science of Law*, 28 YALE L.J. 721 (1919); Arthur S. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919); Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WIS. L. REV. 975 (1982); Duncan Kennedy, *The Stakes of Law or Hale and Foucault!*, 15 LEG. STUD. F. 327, 328–41 (1991) [hereinafter Kennedy, *The Stakes*].

20. Walter Wheeler Cook, one of the early realist enthusiasts of Hohfeld’s work, emphasizes the point in his famous tribute to the work. Walter Wheeler Cook, *Hohfeld’s Contributions to the Science of Law*, 28 YALE L.J. 721, 721–22 (1919).

21. For a helpful exploration of the uses of Hohfeld in contemporary teaching, see Curtis Nyquist, *Teaching Wesley Hohfeld’s Theory of Legal Relations*, 52 J. LEG. EDUC. 238 (2002).

Hohfeld of the “critical” strand. Though all three Hohfeldian strands have something to contribute to readers generally (and to my specific efforts here), my approach is very much influenced by the work of Kennedy, Singer, and Hale, which will feature prominently herein.

Crucially important to understanding Hohfeld, as I will try to show here, is not simply that his analysis helps dispel confusion, but that, in dispelling this confusion, his analysis reveals pervasive problems in legal reasoning. More than that, in revealing these pervasive problems, Hohfeld’s analysis opens up worlds of legal possibilities, of choices to be made in fashioning legal regimes, that we would otherwise pass by.

III

ERRORS OF TRANSPOSITION

Hohfeld begins his 1913 article by noting a tendency among jurists and scholars to make two very similar kinds of mistakes in the legal analysis of concepts like property, contracts, trusts, and the like.²² This part of Hohfeld’s article is valuable in and of itself, but importantly it also functions as a ground-clearing for the presentation of his platform. In other words, Hohfeld has to expose these errors in legal reasoning to show why and how his platform is needed. Indeed, so long as we fail to recognize the errors targeted by Hohfeld, we will have a tough time understanding why Hohfeld’s platform is necessary or even useful. The kinds of mistakes that Hohfeld sought to uncover were extremely common back in his day. More surprising perhaps is that they remain pervasive today.

A. Of Ambiguity, Slippage, and Blending

One mistake identified by Hohfeld involves confusing the physical or mental facts that bring a certain legal relation into being with that legal relation itself. It is easy to make this mistake because, as Hohfeld notes, we frequently use the same term to refer to very different matters.²³ Consider the term “contract.” Sometimes it refers to the mental agreement reached by the parties (e.g., the mental state); at other times to the physical embodiment of that agreement, (e.g., the document); and, at other times, to the various rights, duties, and powers brought into being in virtue of reaching the agreement (e.g., the legal relations).²⁴ The fact that we use the term “contract” to refer to all these things (and then some) would not be a problem if we could be sure which was which when. But, as Hohfeld notes, there is an inveterate tendency among jurists and scholars to confuse the legal relations with the mental and physical facts that bring them into being, to slip from one to the other without noticing, and even

22. Hohfeld, 1913, *supra* note 1, at 19.

23. *Id.* at 44–45.

24. Arthur Corbin, Book Review, 29 YALE L.J. 942, 943 (1920) (noting that the popular notion of contracts is broad enough to include the acts of the parties, the paper document, and the legal relations brought into being).

to blend the two in unspecified ways.

The second kind of mistake—very similar to the one above—lies in confusing and conflating legal “concepts” with the nonlegal “objects” to which they ostensibly apply. The classic example here is “property”—a term which refers both to a set of legal relations, (e.g., the fee simple) as well as to its object (e.g., the land owned).²⁵ Again, both are called property, and thus we are invited to confuse the two even though, as Hohfeld insists, they are distinct.

These mistakes, according to Hohfeld, both spring from and engender ambiguity, slippage, and blending. *Ambiguity* arises when we do not know which referent we are talking about. So, to pick the contract example above, when the court refers to “the contract,” is it talking about the agreement, the document, or the legal relations brought into being by the agreement? Which is it? *Slippage* arises when the courts shift from one referent to another without noticing. Thus, in one sentence, the court is discussing the agreement between the parties (“the contract”), and in the next, unbeknownst to itself and perhaps to the reader, the court has switched to a discussion of the legal relations established (also “the contract”). Over time, with sufficient repetition of such vagaries, what we get is *blending*—the case law entrenchment of substantive legal concepts that are confused blends of the legal relation and its object as well as the physical and mental events that brought it into being (to wit, “the contract”).

Why are these mistakes of ambiguity, slippage, and blending so problematic for Hohfeld? Well, on one level, they produce confusion—both in the object to be analyzed and in the conceptual tools to be used in performing the analysis. This confusion is bad enough, but, as Hohfeld shows, there is worse: These mistakes make it seem as if we are performing legal analysis successfully when we are not. Furthermore, these errors are extremely common: What has just been said above about “contract” and “property” could also be said of “corporations” or “common carriers” or “the state” or, indeed, any number of legal concepts.²⁶

These errors—I will call them “errors of transposition”—involve the *unreflective* ascription of qualities of the physical, the mental, or the social

25. Part of the reason for this conflation is historical. Much of the law governing transfers of property, for instance, was first conceptualized in terms used to designate the physical transfer of things. Hohfeld, 1913, *supra* note 1, at 24. Thus, a successful legal transfer required delivery—for instance, “livery of seisin”—the sort of act that might be expected in the physical transfer of a thing. Over time, as the legal concept of property transfers came to be conceptualized in terms appropriate to the physical transfer of things, it became easy for the legal analyst to conflate the legal concept of transfer with the physical acts of transfer. This conflation, in turn, allowed the legal analyst, often unbeknownst to himself, to effectively elaborate the meaning of a legal concept by exploring the physical or mental objects or events with which it is associated.

For my part, I have no hard and fast objection to the use of rituals and ceremonies in law. They can be performatively useful and perhaps even socially necessary. It is a concern, however, when the rituals and ceremonies become a *sub rosa* source domain for the analysis of legal concepts.

26. On Hohfeld’s treatment of corporations, see Wesley Newcomb Hohfeld, *Nature of Stockholders’ Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909).

object to the legal concept itself in ways that often go unnoticed. It is easiest to think of the error as involving a two-step procedure.²⁷ In the first step, ambiguity, slippage, and blending enables some characteristics of the social, the physical, and the mental to be *sub rosa* transposed into the legal concept. In the second step, when legal analysis is consciously performed—when ratiocination takes center stage, so to speak—lo and behold, the law derived from this reasoned analysis turns out to be the logic of the social, the physical, and the mental that has been transposed! What we have here is a kind of *concept-packing*: Juridical concepts are cast *sub rosa* in the image of the physical, mental, or social objects and then, in the moment of reasoned analysis—deduction, exegesis, elaboration—this social form and content are unpacked as the dictates of law itself. Hence it is that the logic of things becomes the things of legal logic.²⁸

These errors of transposition can happen at a fairly abstract level, as when legal concepts are analyzed as if they were spatialized objects existing in two- or three-dimensional space.²⁹ Hence it is that legal thinkers, even today, will speak un-self-consciously about legal concepts as “covering certain areas” or as having certain “boundaries” that must be established through “line-drawing” exercises, lest the concepts “overlap” with each other or become “fuzzy.” These spatializations of legal concepts are so routine that one can easily forget that they are transpositions.³⁰ It is true, of course, that conscious spatial representation of legal concepts (e.g., formal space) may yield useful insights for legal analysis. But the generalized unconscious presumption that legal concepts partake of the qualities of space is an invitation to error.³¹ Indeed, *a priori*, there is no reason why such spatializations should inform, let alone govern, the legal conclusions inferred or deduced from conceptual analysis and

27. The error of transposition might be deemed a kind of reification. The latter term has become rather vague and capacious and so it is not used here. See Hannah Fenichel Pitkin, *Rethinking Reification*, 16 SOC. & THEORY 263 (1987) (describing the multiple meanings of reification).

28. Perhaps the most famous example of this point is Felix Cohen’s excoriation of the New York Court of Appeals for asking “Where is a corporation?” in the context of a long arm–statute issue. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809–12 (1935). For discussion, see *infra* text accompanying notes 32–41.

29. Consider this in connection with Kocourek’s efforts in the 1920’s to convince his cohort that legal relations considered as concepts do not exist in space.

Where does a concept exist? That answer seems to be plain enough—a concept can have no unique position in space; *it is not even clear that it has any limits, or indeed, any connection with space at all* . . . That a legal relation considered as a concept has no unique position in space may be accepted in practical reasoning when *once the unavoidable novelty is made familiar that juridical law is entirely a matter of concepts and not of material objects*.

ALBERT KOCOUREK, *JURAL RELATIONS* 234 (1927) (emphasis added). See generally *id.* at 228 (discussing and criticizing attribution of physical qualities, i.e., position, mobility, partibility to legal relations). See also Albert Kocourek, *Attribution of Physical Qualities to Legal Relations*, 19 ILL. L. REV. 542 (1925); Albert Kocourek, *Basic Jural Relations*, 17 ILL. L. REV. 515 (1922).

30. There is an aesthetic at work here—namely, the aesthetic of the grid. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1049 (2002) [hereinafter Schlag, *The Aesthetics*].

31. For some of the aesthetic entailments of the more simplistic spatializations common to classic legal formalism, see *id.* at 1055–70.

reasoning. The problem is compounded here by the fact that jurists and scholars often remain unaware of errors of transposition—thereby allowing spurious conclusions to appear persuasive nonetheless.

Errors of transposition can also happen at a more concrete level as when a judge models his decision by importing specific qualities of the social object in question into the legal concept. This seems to be precisely what the legal realist Felix Cohen complained about in his famous “Where Is a Corporation?” critique of the decision by the New York Court of Appeals in *Tauza v. Susquehana Coal Co.*³² In that case, the court was called upon to decide whether or not a foreign corporation was amenable to suit in the state of New York. In distinguishing a set of cases cited by the defendant, the court stated as follows:

[T]he problem which now faces us is. . . one of jurisdiction, of private international law. We are to say, not whether the business is such that the corporation may be prevented from *being here*, but whether its business is such that it *is here*. If in fact it is *here*, if it is *here*, not occasionally or casually, but with a fair measure of *permanence and continuity*, then, whether its business is interstate or local, it is within the jurisdiction of our courts. . . . Unless a foreign corporation is engaged in business *within* the state, it is not *brought within* the state by the *presence* of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is *here*. . . If it is *here* it may be served.³³

Cohen takes the New York Court of Appeals to task for attempting to decide whether a foreign corporation can be sued in New York by asking, “*Where* is a corporation? Is it *in* New York?”³⁴ The problem, as Cohen notes, is that a corporation qua legal concept is not anywhere.³⁵ So asking whether a corporation qua legal concept is in New York is not a question capable of yielding a cogent answer.

It is, of course, possible for the question to be answered in a noncogent manner—namely, by conflating and blending the corporation qua legal concept with the corporation qua thing or physical person. One can then slide from the observation that the corporation qua thing or physical person is present in New York (just look—it has desks, chairs, and offices in New York!) to the conclusion that the corporation is there as a legal matter. This line of reasoning appears to give an answer. But not only is the conclusion reached undemonstrated (and thus possibly wrong) but the blending of the legal and the social succeeds in eliding precisely the question Felix Cohen wants answered—namely, the legal question: Should the court render the corporation amenable to suit in a foreign state and, if so, on what terms?³⁶ The court appears to answer

32. *Tauza v. Susquehana Coal Co.*, 115 N.E. 915 (N.Y. 1917). Cohen, *supra* note 28, at 809–12 (discussing *Tauza v. Susquehana Coal Co.*).

33. *Id.* at 915, 918 (emphasis added).

34. Cohen, *supra* note 28, at 810.

35. *Id.* at 810–11. For discussion, see *infra* text accompanying note 41.

36. Note that it would not run afoul of Hohfeld’s or Cohen’s point for the Court to decide that a corporation can be sued in a foreign state if the corporation has offices or furniture located in that state. That may or may not be a good rule. One could arrive at that rule legitimately by deciding that the presence of physical assets in the foreign state *should* count as a reason for amenability to suit. Later

that question by asking whether the corporation is present in the state. Is it *here*? Is it *present*? Has its presence been *permanent and continuous*? Is it *within* the state? But asking such questions in this way is precisely what succeeds in eliding the moral, policy, and political issues as well as the practical questions.³⁷

Note that the problem here is not in looking at social objects to figure out an appropriate legal regime. On the contrary, Cohen makes clear in his article that he would like his readers to do exactly that.³⁸ What Cohen does not want is to elide that inquiry as well as the moral, policy, and political inquiry by an *unreflective transposition* of the qualities of the object—the corporation as a physical or social entity—into the legal concept. This, of course, is precisely an error of transposition of the sort uncovered by Hohfeld.³⁹

Cohen is no doubt right in thinking that errors of transposition can effectively eclipse the “should question” that we want answered. Clearly, images and metaphors can both prime and substitute for ethical and political judgments. And, clearly, jurists and scholars are sometimes taken in by the aesthetic logic of strikingly inapt images and metaphors. What is less clear is whether it is possible to avoid errors of transposition altogether.⁴⁰ In this regard, Cohen and perhaps Hohfeld may have overstated their argument. But for now, let’s leave that be. We will return to it later.⁴¹

Instead, consider another example of the error of transposition—this one offered by Hohfeld himself and much more complicated.⁴² In the following contract law example, Hohfeld takes Christopher Columbus Langdell to task for a flawed argument, ostensibly proving the “legal impossibility” of an irrevocable offer.⁴³ I offer this complicated example to illustrate not only the kind of error that Hohfeld is trying to reveal, but also to demonstrate how well-hidden such errors can be and thus how difficult they can be to discern. Indeed, as you read Langdell’s argument in the next paragraph, consider how easy it is to miss the error.

Langdell’s argument—please assume the subjective theory of contracts still

on, of course, one would want to worry about the *legal* meaning of “*physical assets*.”

37. Cohen, *supra* note 28, at 812.

38. Specifically, he would like us to ask and answer the kinds of practical and political questions that a legislature would ask. *Id.* at 810.

39. Felix Cohen was not particularly charitable in his interpretation of this opinion written by Cardozo, and one can readily imagine defenses for Cardozo’s reasoning. But the example, at least as rendered by Cohen, nonetheless illustrates the general point: What we have here is a kind of juridical “concept-packing.” Juridical concepts are marked *sub rosa* with social form and content and then, in the moment of reasoned analysis, this social form and content is unpacked as the logic of the law itself.

40. *See infra* text accompanying note 92.

41. *See infra* text accompanying notes 163–71.

42. Hohfeld, 1913, *supra* note 1, at 50–51.

43. Langdell concedes the legal possibility of an option contract and the availability of damages for its breach. The only question broached by Langdell is whether a party can get specific performance on the “irrevocable offer”—something which Langdell denies since he views it as legally impossible. Hohfeld, for his part, appears less concerned with the result reached by Langdell than with the fallacy of Langdell’s reasoning. CHRISTOPHER COLUMBUS LANGDELL, SUMMARY OF CONTRACTS § 178 (1880).

holds—aims to show that an option contract cannot succeed in making an offer irrevocable because, well, there is no such thing as an irrevocable offer. The latter is, as Langdell quaintly puts it, a “legal impossibility.”⁴⁴ Langdell begins his argument by stating, “An offer is merely one of the elements of a contract; and it is indispensable to the making of a contract that *the wills of the parties do, in legal contemplation, concur at the moment of making it.*”⁴⁵ It follows, for Langdell, that there can be no irrevocable offer because if there were, it might produce (and we would have to contend with) a nonsensical situation. What situation? Well, to spin out Langdell’s reasoning, if there were such a thing as an irrevocable offer, then an offeror wishing to revoke would nonetheless be bound if the offeree accepted, even though there had been no “meeting of the minds.” This state of affairs—being bound by an agreement in which there can be no meeting of the minds—is, as Langdell says, a “legal impossibility.”⁴⁶ Ergo, there can be no such thing as an irrevocable offer.⁴⁷ Voilà.

Langdell’s argument turns on the observation that, at the point the offeror wishes to revoke, he is no longer in a “meeting of the minds” with the offeree. Therefore, it makes no sense to have an irrevocable offer. Initially this might seem decisive, at least under the subjective theory of contracts. As Hohfeld points out, however, this could be true of any offer, revocable or not, in which there is a time lag between offer and acceptance.⁴⁸ As Hohfeld argues, any offer, revocable or not, already brings about a change in the legal relation of the parties. Specifically, the offer gives to the offeree *a power* to bind the offeror in a contract. The offeror is under what Hohfeld calls a *liability*—here, the possibility that the offeree will oblige the offeror by accepting the offer.⁴⁹ It is that jural relation (power–liability) that persists over time—irrespective of whether the offer is revocable or not. Langdell has gone astray by confusing the legal and the nonlegal aspects of the “meeting of the minds.” He has forgotten that any offer *ipso facto* creates a new legal relation that persists over time. It follows that so far as the “meeting of the minds” is concerned, the persistence of the new legal relation is no more problematic in the case of an irrevocable offer than in the case of a revocable offer. Hohfeld could well have added that Langdell gets confused because he conflates the “meeting of the minds” conceived as a legal concept, with the “meeting of the minds” as an actual mental event occurring among the parties. Langdell has forgotten that the “meeting of the minds” of the subjective theory of contracts is a legal fiction and that, even in the case of ordinary revocable offers, it is quite possible that at

44. *Id.* at 241.

45. *Id.*

46. Moreover, as Langdell is quick to note, if an offer truly could be made irrevocable, then it would be impossible to breach the contract making it so and a contract that cannot be breached is also a legal impossibility. *Id.*

47. And if a party reneges on a contract for an irrevocable offer (i.e., what we call an option), then the only available remedy, according to Langdell, can be for damages on that option contract.

48. Hohfeld, 1913, *supra* note 1, at 51.

49. *Id.* at 50–51.

the precise moment the offeree accepts an outstanding revocable offer, the offeror may well be blind drunk, sucking ether in a foreign port, or otherwise quite incapable of meeting any mind—save the fictional legal kind that is sometimes ascribed to contracting parties under the subjective theory of contracts. Hohfeld concludes that, if one avoids Langdell's muddled thinking, there is no difficulty reaching the conclusion that an option contract can indeed create an irrevocable offer that the offeror is powerless to extinguish.⁵⁰

B. The Economic Import of Errors of Transposition

When jurists and scholars commit errors of transposition, the resulting legal regimes are built up by reference to the qualities and characteristics of existing socioeconomic objects. From a pragmatic standpoint, such reference points may seem perfectly sensible. Indeed, one can imagine legal pragmatists asking here with incredulity, "Well, of course, legal concepts should refer to existing socioeconomic objects! What else would they refer to?" But a moment's reflection shows that this response misses the nature of the difficulty. The question is not whether a legal concept should at some point *refer* to a socioeconomic object of some kind. Rather, the question is whether that *reference* should occur unconsciously through errors of transposition?⁵¹

From an economic standpoint, the unreflective transposition of the qualities of the socioeconomic object to the legal concept is quite problematic: legal regimes are not supposed to be designed strictly for already existing socioeconomic objects but rather to enable, permit, or forbid all sorts of economic activities to take place, whether or not these activities are already socioeconomically extant. Fashioning legal regimes unconsciously around existing socioeconomic objects might result in unexamined and inappropriate subsidies or penalties to extant activities to the detriment or benefit respectively of those yet to be created.⁵² To use the corporation example again: the corporation as a legal concept should be fashioned not simply with regard to visible present socioeconomic uses of the corporate form but with regard to the uses (desirable and not) that *might be made* of that form.

The point here is an interesting and suggestive one, worthy of further exploration: our "conceptual economy" (the metaphors and images that we invest in our legal concepts and our legal architecture) translates into consequences for the "real economy." To put the implications in the *lingua franca* of economics: Costs and benefits will attach. Subsidies and penalties will ensue.⁵³ It would be unfortunate if these subsidies and penalties were the mindless result of unreflective errors of transposition.

50. *Id.* at 51.

51. See *infra* text accompanying note 171–72.

52. Schlag, *Coase Minus the Coase Theorem*, *supra* note 14, at 217–20.

53. *Id.* at 209–17 (showing how "operational" conceptualizations of transaction costs effectively result in subsidies and penalties to discrete economic activities in ways that are not clearly efficient).

C. The Political Import of Errors of Transposition

The critical Hohfeldian work in exposing errors of transposition is already a useful contribution on its own. But, arguably, and beyond anything Hohfeld suggested, there is a political aspect as well.

In discussing the economic import, we saw that errors of transposition enable extant socioeconomic forms to be transposed unreflectively into legal concepts. The possibilities for structuring legal regimes will thus be curtailed and some possibilities foreclosed entirely *at the level of the legal concept* before legal analysis can even begin. This curtailment and foreclosure will sometimes occur before we can even say anything deductive, inductive, or prescriptive about how the legal concept ought to be construed, interpreted, and applied. Often this will happen unconsciously, without the jurist or the scholar noticing.

This is bad enough in itself, but there is more. What is transposed is not simply the extant socioeconomic forms, but these forms *as they are experienced, apprehended, and represented by jurists and scholars*.⁵⁴ The point here is that errors of transposition frequently have a political valence shaped by the perspective and experiences of those who have the power to enforce these errors. The political problem is thus twofold: It is not only a status quo bias, but a political selectivity bias as well.

Neither of these points should be taken too far. Although it seems clear that we should avoid unreflective and politically selective concept-packing, it is not obvious that cogent legal analysis is possible without introducing some socioeconomic determinations into the legal concept.⁵⁵ One cannot, for instance, decide cogently on what terms a corporation should be amenable to suit in a foreign state without some idea of what a corporation generally is and does as a socioeconomic matter. Some degree of *concept-packing* may thus be unavoidable. The important point to recognize here is that before we can get to policy, principle, or value-based reasoning (the conventionally accepted vehicles of political and normative contestation) the legal concepts and the conceptual architecture we deploy have already been invested with political and normative content.

These critical insights are already useful on their own. But in Hohfeld's work, they serve as a propaedeutic: They prepare the ground for a more significant contribution—namely, the identification of his fundamental legal conceptions *as relations of form*. The analysis of errors of transposition is a prelude to this contribution. Indeed, without an appreciation that jurists and scholars are routinely deriving legal conclusions through errors of transposition, the need for Hohfeld's platform might well remain mysterious. It's a nice taxonomy and all—clean and tidy—but why would we need it?

A big part of the answer is precisely that the platform is Hohfeld's way of

54. This is, of course, one way in which the aesthetics of law (and the selection of one aesthetic instead of another in *this* context and not *that* context) can effectuate or frustrate certain political projects. On the aesthetics of law more generally, see Schlag, *The Aesthetics*, *supra* note 30.

55. *Id.* at 1092–99.

avoiding errors of transposition. Hohfeld insists on distinguishing clearly and precisely between legal and nonlegal relations. His description of legal conceptions like rights, privileges, and duties in terms of pure relations of form allows him to do just that. These relations are stripped, so far as possible, of substantive nonlegal content.

IV

HOHFELD'S FUNDAMENTAL LEGAL RELATIONS

Hohfeld's idea of treating legal concepts as relations of form between persons was not entirely new.⁵⁶ Hohfeld was not the first in this regard, but he went further than his predecessors. The latter had, in committing various errors of transposition, failed repeatedly in articulating a cogent analytical scheme—a point that Hohfeld did not hesitate to illustrate with copious quotes throughout his 1913 article.

Hohfeld's bid to get us to accept his fundamental legal relations is not particularly inviting. The article does not provide a whole lot of rhetorical inducement—there's not much charm to speak of, and apparently, no effort at seduction at all. What Hohfeld demands is submission of the reader. (This would be you.)

Now is the time. Surrender. You can always reconsider later.

So first thing: give up on seeing rights, duties, powers, and so forth as discrete identities. Instead, start viewing them as relations:

JURAL CORRELATIVES

Right \leftrightarrow Duty

Privilege \leftrightarrow No Right

Power \leftrightarrow Liability

Immunity \leftrightarrow Disability

A Hohfeldian jural relation is always a relation between two persons—*A* and *B*—with regard to a specific act (*X*). If we change the parties, for instance, substitute *C* for *B* or if we change the specified act (*X*), we need to do a separate analysis.⁵⁷

So now, let's start with rights. To say that *A* has a right against *B* to have *B* stay off Blackacre is to state a particular legal relation between *A* and *B*. What legal relation is that? Well, it's the relation where *A* has a right that *B* stay off

56. See, e.g., JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 18 (1909) (asserting a man's legal right is the "power which he has to make a person or persons do or refrain from doing a certain act or acts, so far as the power arises from society imposing a legal duty upon a person or persons").

57. See generally, John Finnis, *Some Professorial Fallacies about Rights*, 4 *ADEL. L. REV.* 377 (1972).

and *B* has a correlative duty to stay off. How do we know that *B* has a duty towards *A* to stay off Blackacre? We know because *B*'s duty to *A* to stay off Blackacre is exactly what it means to say that *A* has a right that *B* stay off. It is not so much that rights "imply" or "give rise" to duties.⁵⁸ Rather, one's rights *are* duties in someone else just as one's duties *are* rights in someone else. As Karl Llewellyn observed, rights and duties are simply different ways of talking about the same legal relation.⁵⁹ The same is true of the other jural correlatives (privilege–no right; power–liability; and immunity–disability).

Suppose now that *A* has a right that *B* stay off Blackacre. What does this say about whether *A* can enter Blackacre? In Hohfeldian analysis, the answer is: nothing. *B* staying off the land and *A* being able to enter the land are two different acts. We have changed the specified act (*X*) and so a separate analysis is required.

Now imagine that the law permits *A* to enter Blackacre. Does *A* have a right to enter the land? No—in Hohfeldian terms this is a privilege, not a right. A right in *A* is always a duty that *B* do or not do something. Here, the law's permission that *A* can enter the land does not mean that *B* has a duty. *B* simply has what Hohfeld calls a no-right. *B* has no right that *A* shall not enter the land. If *B* goes to court to get a ruling that *A* shall not enter the land, the court will properly dismiss the complaint.

Does this mean that *B* is at least under a duty to refrain *from interfering* with *A*'s efforts to enter the land? Well, no, it doesn't. A privilege in *A* to do *X* does not resolve the different question of what *B* may or may not do by way of interfering with the exercise of that privilege. Again, that is a separate question. It is quite possible that *A* has a privilege to enter the land and that, in addition, *A* has a right that *B* not interfere with the exercise of *A*'s privilege to enter the land. But it is equally plausible that all *A* has is the privilege to enter the land unattended by any right that *B* not interfere.

This gets us to the crux of the matter with regard to the difference between rights and privileges. The former establishes the predicate for a legal remedy, namely a duty in *B*. It is of course conceivable that, for any number of reasons, there may be no available remedy.⁶⁰ One would need to do, among other things, a Hohfeldian analysis of "remedial relations," in order to know.⁶¹ Nonetheless, a

58. Stephen R. Munzer, *A Bundle Theorist Holds On to His Collection of Sticks*, *ECON. J. WATCH* 265, 267 (2011).

59. Karl Llewellyn, *supra* note 19, at 85. *But see* Ronen Perry, *Correlativity*, 28 *LAW & PHILO.* 537 (2009) (arguing by way of counter-example that Hohfeld's correlativity claim does not hold up).

60. Finnis, *supra* note 57, at 380.

61. One would want to do a separate Hohfeldian analysis to see just what remedy is available for the primary breach of duty. Wesley Newcomb Hohfeld, *The Relations Between Law and Equity*, 11 *MICH L. REV.* 537, 554 (1913) (discussing secondary (remedial) relations and tertiary (adjectival law) relations). *See also* Finnis, *supra* note 57, at 380 (Noting that Hohfeld leaves the relevance of remedies to the platform undetermined). I am grateful to Ted Sichelmann for pointing this out. This view of the matter is not only faithful to Hohfeld's views, but more fecund as well—insofar as it refocuses our attention on the range of remedies available (and their differing economic consequences) to enforce rights. Thus, Hohfeld's platform paves the way for Calabresi's and Melamed's early canonical work.

right in *A* with a correlative duty is a necessary predicate for a legal remedy. If all we are talking about is *A*'s privilege to do *X*, then that privilege, in and of itself, does not afford a legal remedy when *B* does something that interferes with *A* doing *X*. It may well be, of course, that other legal relations preclude certain types of interference by *B* (e.g., *B* cannot shoot *A*). But again, those are different relations requiring their own separate analyses.⁶²

One might reasonably ask here: what about those kinds of rights that do not specify duties? Well, yes . . . but therein lies what Hohfeld sees as the problem. Hohfeld wants us to stop talking that way. Why? Because if we start talking about rights without duties, it is not clear at all what we are talking about.⁶³ This is precisely one of the reasons why Hohfeld wants to introduce his more discriminating jural correlatives.

What about the power–liability and immunity–disability relations? Both of these pertain to “control” over the alteration of legal relations. If *A* has a power *vis-à-vis* *B*, then *A* upon satisfying certain specified conditions (“super-added facts”) can bring about a specified change (*X*) in their relations. In such a case, *B* has a liability in that *B*'s relations are susceptible to being changed by *A*. Now consider the immunity–disability relations. If *B*'s relations to *A* cannot be legally altered by *A* with regard to some specified change (*X*), then *B* has an immunity and correspondingly, *A* is under a disability. As Hohfeld states, “a power bears the same general contrast to an immunity that a right does to a privilege.”⁶⁴

In this article I will not make too much of power–liability and immunity–disability relations. But that is a choice rather than an intimation of lack of importance.

Going back to rights and privileges, it is important to recognize that the two are very different legal entitlements with different economic and political implications.⁶⁵ To illustrate the point, imagine that a court has to decide upon how to recognize *A*'s interest that *B* not enter Blackacre. Two options immediately present themselves. The court could grant *A* the right that *B* shall not enter the land. *B* would thus be under a duty not to enter the land—an obligation, which lays a necessary predicate for judicial enforcement. The second obvious option is to say that *A* has a privilege to keep *B* from entering the land. As a practical matter, this would amount to allowing *A* some sort of self-help against *B*, circumscribed by whatever other relations *A* might have in regards to *B*. Importantly, *A*'s privilege, in and of itself, would not entitle *A* to obtain judicial enforcement to keep *B* from entering the land.

See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

62. Finnis, *supra* note 57, at 379.

63. One can detect here in embryonic form the structure of Robert Lee Hale's later arguments: Hohfeld's right–duty relation is the more formal precursor of Hale's freedom–coercion relation. See Kennedy, *The Stakes*, *supra* note 19, at 368 n.8.

64. Hohfeld, 1913, *supra* note 1, at 55.

65. See *infra* text accompanying note 87.

Notice that *A*'s privilege is not nothing: *A* could demand from *B* a payment to refrain from exercising the privilege: "Pay me, and I won't use self-help to keep you out." Moreover, things could be far worse for *A*. If *A* had neither a privilege nor a right, *A* could well find himself under a duty to allow *B* to enter the land, and that, from *A*'s perspective, would be far worse than having a privilege. Granting *A* *nothing more* than a privilege is a way of saying, "Sorry guy, you do not get a right that *B* not enter your land. All we're giving you is a privilege to keep *B* off your land." At the same time, of course, granting *A* the privilege to keep *B* off his land, is also a way of saying, "You have just lucked out, guy. Look—at least you're not under a duty to refrain from trying to keep *B* off your land."⁶⁶

This last point introduces us to Hohfeld's jural opposites. Hohfeld organizes the same eight conceptions into a table of jural opposites. In contrast to jural correlatives, which pertain to the relations between *A* and *B*, the jural opposites concern just one party. Hence, when activity *X* is involved, *A* must either have a right or a no-right that *B* act in a certain manner. *A* cannot have both at once. The same thing is true of privileges: if *A* has a privilege to do *X*, then he cannot have a duty to refrain from doing *X*. The same goes for powers and immunities. Here then are the jural opposites:⁶⁷

JURAL OPPOSITES

Right / No Right
Privilege / Duty
Power / Disability
Immunity / Liability

These jural opposites are useful to the extent that they allow us to recognize the necessary negative implication of imposing an entitlement or disablement on a party. It is precisely this logic of negation that enabled us to recognize in the example above, that if *A* has a privilege to do *X*, then he cannot be under a duty to refrain from doing *X*. Why? Because that is what it means to have a privilege to do *X*.

Now if upon reading the last three paragraphs, you have gained the sense that the Hohfeldian conceptions (right, duty, privilege, etc.) belong to a small self-referential world of legal form in which each legal conception acquires meaning through its relations to the others, then you've got it. This is the structuralist world of jural form that Hohfeld offers. Hohfeld's endeavor will be successful to the extent that you recognize (1) that the correlative dyads, as relations of form, do yield different legal regimes and (2) that these legal

66. Hohfeld, 1913, *supra* note 1, at 39 (privilege as the negation of duty). For the sake of simplicity here, I am bracketing any discussion of power–liability and immunity–disability as options.

67. *Id.* at 30.

regimes are in fact instanced throughout our law even if they are seldom articulated with the precision of the Hohfeldian nomenclature.

If provisionally we can accept Hohfeld's platform, it now becomes possible to explain what can be done with it. Note here that what can be done with it is yet one more way in which Hohfeld's platform acquires meaning.

V

ABUSE OF DEDUCTION—DERIVING RIGHTS FROM PRIVILEGES

One of Hohfeld's major objectives in the 1913 article was to describe a particular kind of reasoning error—namely, the confusion of rights and privileges and the abusive deduction or derivation of one from the other.⁶⁸ This error was, and continues to be, pervasive and deeply patterned.⁶⁹ The pattern typically goes something like this:

1. We, the court, think the liberty to do *X* is important and worthy of legal protection.
2. Accordingly, we believe *A* has a legally protectable interest in doing *X*.
3. In other words, *A* has a right to do *X*.
4. Because *A* has a right to do *X*, others like *B* are under a corresponding duty not to interfere with *A*.
5. Here inasmuch as *B* is interfering with *A* doing *X*, *B* should be enjoined or pay damages, or the like.

Now, for Hohfeld, this argument is badly flawed.⁷⁰ A shift occurs somewhere in the move from proposition 2 to proposition 4. It simply does not follow, according to Hohfeld, that because *A* has or ought to have a legally protectable interest in *X*, that this yields a duty in *B* not interfere. To find or impose such a duty would mean that *A* has some sort of right that *B* not interfere. But per Hohfeld, we cannot get that merely from the recognition that *A* has a protectable interest. Why not? Because we have per Hohfeld two major options to choose from:

1. We could say *A* has a privilege to engage in *X* and that independently, *B* is under some duty not to interfere with that privilege. In other words *A* has both a privilege and a supporting right.
2. In the alternative, we could say that *A* has a privilege to engage in *X* but that *B* simultaneously has a privilege to interfere in *A*'s pursuit of *X*. In

68. On "abuse of deduction" see DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* xviii (2006).

69. We typically accuse nineteenth-century formalists of engaging in (specious) deductive reasoning. It is not clear to me, however, that what we routinely characterize as deduction is not simply classification or subsumption. For an excellent discussion of "subsumption" as a key operation in legal reasoning, see ALEXANDRE LEFEBVRE, *THE IMAGE OF LAW: DELEUZE, BERGSON, SPINOZA* 1–49 (2008) (a sophisticated discussion of Deleuzian thinking on "subsumption" in law).

70. This is the formal structure of the argument that Hohfeld dismantles in Lord Lindley's opinion in the case of *Quinn v. Leatham*. Hohfeld, 1913 *supra* note 1, at 36–37. See *infra* text accompanying notes 71–79.

other words, *A* has a privilege to practice the trade of butcher, but no right to prevent interference by *B*.

The two options are very different. While in either case, *A* finds himself with a privilege to do *X*, with the first option, he also benefits from a right that *B* will not interfere with that privilege. With the second option, *A* has no such protection (he has a no-right) and thus *A* has to contend with *B* who has some privilege to interfere. Meanwhile, on *B*'s side of things, the first option imposes some duty on *B* not to interfere with *A* doing *X*. The second option, by contrast, allows *B* some privilege to interfere. The regimes are thus very different—for both *A* and *B*.

What then is wrong with the five-part argument above? Well, put most simply, it confuses and conflates the two options and combines them into a single mess. In his 1913 article, Hohfeld illustrates these points with an opinion by Lord Lindley in the then-famous case of *Quinn v. Leathem*.⁷¹ In that case, the defendant, Quinn, a union organizer, sought to have a butcher replace his employees with union labor.⁷² Quinn and his fellow organizers threatened to strike one of Leathem's customers, another butcher, if the latter did not stop buying meat from Leathem.⁷³ This other butcher, a certain Munce, complied with Quinn's threat, and Leathem sustained losses, thus leading to his lawsuit against Quinn.⁷⁴ Hohfeld uses this case and Lord Lindley's opinion to illustrate the fallacious conflation of rights and privileges. Lord Lindley's reasoning goes as follows:

The plaintiff had the ordinary *rights* of a British subject. He was *at liberty* to earn his living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This *liberty* involved *the liberty* to deal with other persons who were willing to deal with him. *This liberty is a right* recognized by law; its *correlative* is the general *duty* of every one not to prevent the free exercise of this *liberty* except so far as his own liberty of action may justify him in so doing. But a person's *liberty* or *right* to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him.⁷⁵

For Hohfeld, this last paragraph exhibits serious errors, all stemming from a lack of rigor in the use of the concepts of “rights” and “liberties.”⁷⁶ To start at the beginning: when Lord Lindley says that Leathem the butcher has a liberty to earn a living, what precisely does this mean? For Hohfeld, all Lord Lindley means to say in the first three sentences is that butchery is a lawful calling that

71. Hohfeld, 1913, *supra* note 1, at 36–37.

72. *Quinn v. Leathem*, [1901] A.C. 495 (H.L.) 503 (appeal taken from Ir.) My account here is but a brief variant of a lengthier and more nuanced discussion of the case found in Thomas D. Perry, *A Paradigm of Philosophy: Hohfeld on Legal Rights*, 14 AM. PHIL. Q. 41, 44–45 (1977). Perry makes clear that Hohfeld's own discussion simplifies a more complex, and possibly more justifiable, account of Lord Lindley's opinion. That does not detract, however, from Hohfeld's general point. Here, I follow Hohfeld's conclusory interpretation of Lindley's opinion.

73. *Quinn v. Leathem*, [1901] A.C. 495 (H.L.) 496 (appeal taken from Ir.)

74. *Id.* at 496.

75. *Id.* at 534.

76. Hohfeld, 1913 *supra* note 1, at 36–37.

Leathem can practice if he wants. In other words, Lord Lindley is saying that Leathem is legally permitted to carry on his butchery business in the *limited sense* that others have no right that Leathem not practice his trade. Does it then follow that Leathem has a right in the sense used by Lord Lindley in the fourth sentence—namely, that others are under some duty not to interfere with Leathem in the practice his trade?

It is here that Hohfeld's jural conceptions kick in as it becomes clear that there are two major ways of conceptualizing Leathem's legal interest. We could say that all Leathem has is a privilege of a pursuing the trade of butcher, in which case Quinn and others would have no right that Leathem not ply his trade. Or we could say that Leathem has, in addition to the aforementioned privilege, some supporting right that Quinn and others not interfere. Those are two different legal regimes.

From Lord Lindley's language, two things seem relatively clear.

First, Lord Lindley's words give no indication that he understands the availability of the two different regimes. His loose usage of "liberty" and "rights" indicates that for him there is only one regime of entitlements. The substantive choice, as he presents it, thus seems to be a single either/or: Either Leathem gets no protection from the law, or Leathem has a right, which means that Quinn is under a duty not to interfere.

Second, Lord Lindley seems to have speciously derived a right from a privilege. Thus, according to Hohfeld, in the first part of the paragraph, Lord Lindley argues for the existence of a privilege, not a right.⁷⁷ Then Lord Lindley moves illegitimately in the second part of the paragraph to the conclusion that Quinn has a duty not to interfere.⁷⁸

It is hard to be sure whether Lord Lindley has in fact made *precisely* this second mistake because Lord Lindley's language is so loose. This, by the way, is one of the perennial difficulties in trying to apply Hohfeldian analysis to legal texts: Because courts and scholars frequently use muddled concepts, it is often a real interpretive challenge to figure out exactly what they are trying to say. The arguments made by jurists and scholars are sometimes so muddled that it is nearly impossible to translate them into Hohfeldian terms.⁷⁹

What precisely is so objectionable about Lord Lindley's reasoning errors? Below I offer a brief diagnostic of the errors—various ways of thinking about the character and implications of these errors. As will be seen, these errors are stylized, recursive, and consequential. (The stakes are high.)

A. Missing the Excluded Middle—Eclipsing the Privilege—No Right Relation

First, Lord Lindley, like many jurists and scholars, has overlooked the

77. *Id.* at 36–37.

78. *See supra* text accompanying note 75.

79. Even then, the effort to translate their thinking into Hohfeldian terms remains worthwhile because when the translation fails, it becomes apparent just how muddled the arguments tendered actually are.

privilege–no right dyad as a possible legal regime. Simply because *A* has a protectable legal interest (one which arguably merits some sort of legal recognition) does not mean ipso facto that this interest ought to be conceptualized as a right in *A* that *B* not interfere with *A*'s practice of butchery. There is a more modest approach available—namely, to recognize merely a privilege in *A* to engage in the lawful calling of butchery and a no-right in *B* that *A* shall not do so.

Overlooking the possibility of a privilege–no right regime matters tremendously. Yet this oversight happens frequently and not just to Lord Lindley. Indeed, even today, some jurists and scholars go straight from a recognition that *X* is an important interest of *A* to the conclusion that *B* is thus under a duty not to interfere with *A* doing *X*. Overlooked in the process is the possibility that all *A* has is a privilege with *B* having some *counterposed privilege*. This is the great excluded middle where both *A* and *B* have privileges enabling them to carry out their activities with neither having a right that the other shall not do so. Neither side is under a duty not to interfere. Leathem can carry out his butcher trade in ways that interfere with Quinn's union organizing. Quinn can carry out his union organizing in ways that interfere with Leathem's butcher trade.

B. Conceptual Abuse as Distorting Moral, Policy, and Political Argument

A second way of reading the Hohfeldian objection (and I am pushing hard on Hohfeld here) is that sometimes jurists and scholars seek the recognition of a right but nonetheless offer up the kind of argument sufficient to justify only a privilege. That is to say that the authorities, reasoning, policies, and principles they muster for their positions are sufficient only to infer a privilege. Yet, as a result of flawed reasoning or sloppy language, we let parties get away with asserting a right that others not interfere when the justifications they offer suffice only to justify a privilege.⁸⁰ The lack of conceptual rigor effectively compromises moral, policy, and political arguments.

Thus, in *Quinn v. Leathem*, it's one thing to say we are going to permit Leathem to carry out the trade of butcher. It's quite another thing (and would seem to warrant additional justification) to say that we are going to protect Leathem by imposing a duty on others not to interfere. The burden of justification is arguably higher in the second case. But if no distinction is made between the two cases, the need to meet the higher burden of justification goes unrecognized.

C. Distinguishing Injurious Interference in the Nonlegal and the Legal Senses

There is a third kind of mistake in Lord Lindley's reasoning above, which is not mentioned explicitly in Hohfeld's discussion of *Quinn v. Leathem*, but is nonetheless related to his critique of errors of transposition. Lord Lindley

80. See *infra* text accompanying note 88.

correctly notes that the efforts of Quinn to get Leathem's customer to stop buying meat is, in a socioeconomic sense, an interference.⁸¹ The problem in Lord Lindley's reasoning is that he slides from the observation that there is interference in the *socioeconomic sense* to the notion that there is an interference in a *legally cognizeable* sense. That, however, is a non sequitur wrought of an error of transposition—a confusion of the legal and the nonlegal.

Consider that in business—or, as here, in labor–capital relations—interference in the socioeconomic sense is ubiquitous. The question for law then lies in conceptualizing what kinds of interference will be deemed legally actionable as distinct from those kinds of interferences that will not. It follows that the mere observation that there is some socioeconomic interference going on—“Geez, seems like interference to me”—is quite inadequate to draw legal conclusions.⁸² Legally cognizable interference is not something one can simply read off by observing socioeconomic realities, and particularly not when many of the cooperative–adverse relations we typically examine in law (landlord–tenant, seller–buyer, employer–employee, polluter–resident) are themselves characterized by reciprocal interference and coercion.⁸³

D. Errors of Asymmetry

For now, consider a fourth and related kind of mistake in Lord Lindley's reasoning. Again, this one is not identified by Hohfeld specifically in the context of the *Quinn v. Leathem* discussion, but it is prompted by Hohfeld's platform. The problem might be described as an *error of asymmetry*. Stated simply, the problem is that, in cases of conflicting interests, courts and commentators frequently (and without argument) deploy one side's interest as the frame to analyze the other's entitlements and disablements. This can be

81. *Quinn v. Leathem*, [1901] A.C. 495 (H.L.) 537 (appeal taken from Ir.) (“This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended.”).

82. Lord Lindley's words on this score are somewhat lengthier. See Perry, *supra* note 72. Notice the slippage nonetheless, as the actions of the union are made to cross over figuratively from persuasion to coercion through a conflation of the socioeconomic with the legal:

What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is *a form of coercion, intimidation, molestation, or annoyance* to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

Quinn v. Leathem, [1901] A.C. 495 (H.L.) 538 (appeal taken from Ir.) (emphasis added).

83. To be sure, sometimes “interference” or “coercion” is socially manifested with gentility (“I'm afraid that, at that price, I will have to forego your services and look elsewhere . . .”) and sometimes not (“Look, buddy, if you continue to resist, then I'm going to . . .”). Either way, coercion is an aspect of the negotiation. Kennedy, *The Stakes*, *supra* note 19, at 334–45.

seen readily in Lord Lindley's opinion.

Lord Lindley begins by identifying the liberty of employers to carry out a lawful business. This starts as a banal observation about liberty, but then, by dint of confusion, morphs into the recognition of a right, which is then deployed as the framework to decide whether Quinn has unlawfully interfered with Leathem. The problem is that this movement (unidirectional in its trajectory from employer's interests to employee's obligations) institutes *sub rosa* a moral and political asymmetry.

Perhaps the easiest way to see the point is to reverse the direction of the analysis by asking: what about Quinn's liberty to organize and to press demands on the employer? That too surely must be a "liberty" of British subjects, yes? What then if we started with that premise, turned that liberty of the employee into a right of some kind, and used it as a settled framework for analysis? We would end up with a reverse mirror image of Lord Lindley's argument—fallacies and all—that might go something like this:

1. The right to form a union, strike, and press demands on an employer is undoubtedly a liberty of British subjects.
2. Here Leathem claims that the attempts of Quinn to persuade Leathem's customer not to deal are a breach of duty.
3. But Quinn did nothing more than to try to persuade Leathem's customer not to deal with Leathem, and that customer indeed chose not to deal with Leathem.
4. Leathem remained free at all times to try to persuade his customer otherwise, and in no way did Quinn interfere with Leathem's ability to persuade his own customer to continue their contract or financial dealings.
5. If we recognize a duty on the part of unions to refrain from persuading customers and suppliers to stop their business with the employer, it would render the right to organize and strike nugatory. Accordingly . . .

This last argument, of course, is no better than Lord Lindley's—indeed, I have tried to replicate roughly the same errors. But the juxtaposition of this argument with the original reveals the unidirectionality and asymmetry in Lord Lindley's own reasoning. In my reverse mirror-image argument, we start with a privilege in the union, we entrench that as the frame of analysis, and then we proceed to conclude that the union has no duty because if it did, the duty would interfere with its liberty to organize and press demands against the employers. Again, this is a really bad argument. But that is exactly my point: as a matter of form, this really bad argument parallels in reverse the argument Lord Lindley's opinion makes on behalf of Leathem. Like the flawed reasoning of many jurists and scholars, Lord Lindley morphs a liberty interest into a right (abuse of deduction), entrenches the latter as the frame of analysis (fails to recognize how the arguments might be flipped), and proceeds unidirectionally to the imposition of a duty. In Lord Lindley's argument, the unidirectionality of the movement and the resulting asymmetry leave the union's interests analytically

and rhetorically underrepresented. Not surprisingly, the union loses.

E. The Economic Import of Distinguishing Between Rights and Privileges

Hohfeld's 1917 sequel to his 1913 article makes it clear that there is a tremendous economic import to the distinction between a right and a privilege.⁸⁴ Indeed, one of Hohfeld's reflections on the economic significance of the right–privilege distinction is almost an anticipation of the opportunity cost notion as used by Coase in *The Problem of Social Cost*.⁸⁵ Hohfeld's words are worth the read:

Not only as a matter of accurate analysis and exposition, but also *as a matter of great practical consequence and economic significance*, the property owner's rights, or claims, should be sharply differentiated from his privileges. It is sometimes thought that A's rights, or claims, are created by the law for the sole purpose of guarding or protecting A's own physical use or enjoyment of the land, as if such physical use or enjoyment of the land were the only economic factor of importance. A moment's reflection, however, shows that this is a very inadequate view. Even though the land be entirely vacant and A has no intention whatever of personally using the land, his rights or claims that others shall not use it even temporarily in such ways as would not alter its physical character *are, generally, of great economic significance as tending to make others compensate A in exchange for the extinguishment of his rights, or claims, or in other words, the creation of privileges of user and enjoyment.*⁸⁶

Here, Hohfeld insists on differentiating a property owner's privilege to use his land from his right to exclude others. Once differentiated, we can see per Hohfeld that the economic significance of ownership is not only use and enjoyment of the resource by the owner (a privilege) but the withholding of access by others (a right). The economic exchange value of ownership is thus not simply a function of using or exploiting a resource but of withholding access to others except in exchange for payment of some kind.

It's not hard to see, then, that the recognition of a privilege coupled with a supporting right will be generally more valuable to its holder than the recognition of the same legal interest as a privilege without a supporting right.⁸⁷ In the "real" world, of course, all of this will be much more complex. *A* and *B*'s jural relations will be specified by a whole range of different entitlements and

84. See also JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 89–118 (2012) (elaborating on the economic implications of Hohfeld's platform).

85. Ronald Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960).

86. Hohfeld, 1917, *supra* note 1, at 747 (emphasis added).

87. It might be tempting to say that a right is generally more valuable than a privilege. But once we go Hohfeldian, we have to take into account that a right always refers to *someone else* doing or not doing something, whereas a privilege pertains to one's own activity. See Finnis, *supra*, note 57, at 378–79 (explaining the Hohfeldian notion of privilege). Accordingly, in a strict Hohfeldian sense, rights and privileges cannot be translated into the other. Indeed, it is precisely the supposition that they can that underwrites the great confusion of rights and privileges. The upshot is that if we were to judge whether a right is more valuable than a privilege, we would in effect have to answer vexing questions like the following: Suppose you had to choose as an owner of Blackacre between one (and only one) of the following entitlements: a right to exclude or a privilege to enjoy. Which would you prefer? Which is more valuable? It's not hard to see that this question can only be answered if one knows something about the social and economic character of Blackacre as well as the relevant entourage of entitlements and disablements.

disablements. And the value of any given entitlement or disablement will depend *inter alia* upon the *jural entourage* of related entitlements and disablements. Synergistic effects will have to be evaluated and multiplier effects assessed. It will be complicated.

F. The Political Import of Distinguishing Between Rights and Privileges

The confusion of privileges with rights is, as we have seen, a conceptual error, but not just: It is an error with consequences. Confusing privileges with rights presages a breakdown of moral, policy, and political argument, and doing so enables whichever party is able to justify the existence of a privilege to get from a court, without offering additional justifications, something of clear added value—namely, a supporting right.⁸⁸

Now, the interesting question is whether this particular impairment of practical, moral, policy, and political analysis has an ideological valence or implication. Hohfeld does not address this point. But, as will be seen from his assessment of the reasons for the conflation of rights and privileges, we can tease out a kind of ideological slant. For now, we may note that, in a general and deliberately vague sense (I can claim no more than that), the slippage from privileges to rights will tend to favor entrenched legal interests. Indeed, if a relatively low justificatory burden for recognizing privileges is combined with a unidirectional and asymmetrical analysis, as in *Quinn v. Leathem*,⁸⁹ then it seems likely that the slippage from privileges to rights will tend to favor those interests already legally or socially recognized at the expense of their opposed, or as yet, unarticulated or unrecognized interests.⁹⁰ Why? Because it is those already recognized legal interests or socioeconomically powerful interests that are likely to be featured as the frame, framework, baseline, or starting point for analysis.⁹¹ Moreover, the habitual tendency of jurists to begin analysis on the entitlement side of things (rights, privileges, powers, and immunities) rather than on the disablement side (duties, no rights, liabilities, and disabilities) will exacerbate this tendency insofar as the cost of recognizing entitlements is treated as secondary, or, worse, not treated at all.⁹² What goes unrecognized

88. This will not be invariably true. It will depend *inter alia* upon the remedial options available for the vindication of the right (these may be paltry) and the actual substance, so to speak, of the specified act (*X*) in question.

89. See *supra* Part IV.A–D (applying Hohfeldian reasoning to *Quinn v. Leathem*).

90. I am hedging a lot here because an asymmetrical and unidirectional analysis might advantage interests for a number of different reasons: (1) prior legal recognition, (2) social acceptance, (3) economic and social power, (4) material inscription in social practice, (5) cultural familiarity, and so on. Meanwhile there is no reason to suppose that these reasons will always coincide.

91. By way of example, consider Jerrold Long, *Waiting for Hohfeld: Property Rights, Property Privileges and the Physical Consequences of Word Choice*, 48 GONZ. L. REV. 307, 329–35 (2011) (describing the rhetorical and political tilt resulting from an asymmetrical positing of landowner rights as the frame).

92. Legal analysts are not alone in this tendency. Consider that Coase's famous argument in *The Problem of Social Cost* about the reciprocal nature of harm was directed at a Pigouvian economic approach committed to a unidirectional and asymmetrical analysis of conflicting resource use—specifically, the notion that a party creating negative externalities must be disciplined through legal

when these kinds of errors occur is both the fact of, as well as the magnitude of, the correlative disablements imposed on others.⁹³

VI

THE RECOGNITION OF PRIVILEGE—NO RIGHT AS A “REAL” LEGAL RELATION

Hohfeld insists that the privilege—no right relation is a “real” legal relation.⁹⁴ As for the tendency to think otherwise, Hohfeld ascribes this to the fallacious tradition of viewing law “as consisting of ‘commands,’ or imperative rules.”⁹⁵ Hohfeld will have none of that: “a rule of law that permits is just as real as a rule that forbids”⁹⁶

Hohfeld’s insistence that privilege—no right relations are real legal relations is thus based on the notion that there is no good reason to exclude the privilege—no right regime from the ambit of law and legal analysis. But there is perhaps a more profound reason to recognize the privilege—no right regime as a real legal relation—namely, the formally intertwined relation of the privilege—no right regime with the meaning of the other legal relations. One obvious example is offered by Hohfeld: as between two parties, the privilege—no right relation is precisely the opposite of the duty—right relation. Why then regard one as a real legal relation and the other not? Similarly, given that the granting of a privilege in *A* to do *X* means that *A* is under no duty to refrain from doing *X*, it would seem passing bizarre to claim that the latter relation is a real legal relation while the former is not.

Beyond these clearly Hohfeldian reasons for treating privilege—no right regimes as real legal relations, we can articulate other important reasons. We turn then to the economic and political import of privilege—no right regimes.

A. The Economic Import of Treating Privilege—No Right as a Real Legal Relation

Privilege—no right regimes are not costless. The point becomes clear if we

remedies that internalize the costs of those externalities. See Coase, *supra* note 1, at 28–29 (summarizing Pigou’s argument for government intervention in the economic system). Coase’s argument against that view is structurally similar to Hohfeld’s insight here. See Schlag, *Coase Minus the Coase Theorem*, *supra* note 14, at 195 n.66 (citing Merrill & Smith, *supra* note 17, at 359–60) (noting that Coase’s view of property is steeped in the realist bundle of rights notion that derives from Hohfeld); see also Coase, *supra* note 1, at 29–34 (arguing that Pigou’s position that railroads should be forced to compensate those whose woods they burn down fails because Pigou fails to consider whether a regime that does not force compensation would be socially desirable given the *total social product* yielded by each arrangement).

93. Robert Lee Hale’s work is key in demonstrating this point. Hale, *supra* note 19, at 472–73 (showing that the grant of property entitlements is economically and politically significant not only in bestowing entitlements on the owner but in its visitation of disablements on others).

94. As Joseph Singer shows, Hohfeld’s articulation of the privilege—no right regime bears some similarity to Henry Terry’s “permissive rights” notion discussed in Henry T. Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 189–93 (1903). For a discussion of the differences and implications, see Singer, *supra* note 19, at 1035–40.

95. *Id.*

96. Hohfeld, 1913, *supra* note 1, at 42 n.59 (emphasis added).

work through the legal consequences of privilege–no right regimes.⁹⁷ Consider, then, three classic scenarios involving privilege–no right regimes. The first such scenario is that of cooperative–adverse parties. These are situations in which two or more potentially cooperative parties have, at least in part, adverse interests (landlord–tenant, seller–buyer, employer–employee, polluter–resident). The second such scenario is that of competitive parties—situations in which two or more parties are, in an economic sense, competitors. The third scenario involves third-party effects. In all three cases, the privilege–no right regime has significant political and economic implications.⁹⁸

1. Cooperative–Adverse Relations

The classic case of an adverse privilege–no right regime is one in which we have potentially cooperative parties who, nonetheless, have adverse interests. Conflicting resource-use situations are great examples: the rancher wants to let his cattle roam free; the farmer would prefer not. The factory owner would like to continue emitting smoke; the residents would prefer not. The . . . and so on.

How does the grant of a Hohfeldian privilege matter in these contexts? Consider two possibilities. The first possibility is that *A* has a privilege to do *X* (when *X* is unpleasant to *B*). The second possibility is that *A* has a privilege not to do *X* (when *X* is pleasant to *B*). In both situations, *A* can exact something from *B* in exchange for doing or refraining from doing the *X* in question. For example, *A* can say to *B*, in a precociously Coasean, opportunity cost sort of way: If you give me something, I won't . . .

let my cattle roam freely;
 create smoke pollution in your neighborhood;
 build my house next to your property line;
 establish a competing business within five miles;
 build a reservoir next to your coal mine;
 and so on.

A privilege is, thus, not nothing. It has value to its holder.⁹⁹ This is true whether the privilege at issue is one in which *A* is authorized to do *X* (when *X* is something *B* doesn't like) or *A* is authorized to withhold *X* (when *X* is something *B* wants). Either way, *A*—by having a privilege—can exact something from *B* for its surrender (i.e., *A*'s taking on of a duty). If, instead, we were dealing with a situation where *B* had a right to compel *A* to deal, or even a minimal procedural right that *A* engage “in good faith negotiations,” then that

97. This work has already been done in considerable detail by Robert Hale and Duncan Kennedy. See Hale, *supra* note 19, at 471–73 (answering the question, “What is the government doing when it ‘protects a property right?’”); Kennedy, *The Stakes*, *supra* note 19, at 333 (contrasting legal permissions with prohibitions).

98. See Coase, *supra* note 85, at 27–28.

99. I am assuming throughout that the privilege is *not* accompanied by a duty of the same tenor. If that were the case, it would complicate the analysis. I am also assuming no proscriptions on alienation and transfers.

would weaken *A*'s bargaining position.¹⁰⁰

Law and economics analysts understand this point implicitly in their notion of "threat value."¹⁰¹ The deals struck among cooperative–adverse parties (employers–employees, landlord–tenant, men–women, parent–child, etc.) are *inter alia* functions of the next best option that each party could get if they exited the negotiation. But, and this is the important point, the threat values in any cooperative–adverse relation come, in part, from the kinds of legal entitlements and disablements that (1) *A* and *B* have vis-à-vis each other; (2) the entitlements and disablements *A* and *B* have vis-à-vis third parties (as illustrated in the *Quinn v. Leathem* scenario);¹⁰² and (3) the availability or nonavailability of procedural mechanisms to engage law, courts, and other official law declarants.¹⁰³

Of particular significance here is Duncan Kennedy's argument that *even small alterations* in the bargaining procedures or in the grant or denial of substantive entitlements and disablements can greatly affect the distributive outcomes of bargaining and competition over wealth and power.¹⁰⁴ Moreover, in terms of economic performance and outcomes, the grant, denial, and conceptualization of privilege–no right regimes affects the magnitude and identity of production factor costs—a point recognized explicitly in Coase's *The Problem of Social Cost*.¹⁰⁵ Thus, in terms of wealth and power distribution as well as economic performance, the recognition and fashioning of privilege–no right regimes matter.

2. Competitive Relations

The classic case of competitive privilege–no right regimes is one where competitors are permitted to vie for some service or good made available by a third party—for instance, suppliers and customers. Examples include employees searching for a job, applicants seeking admission to medical school, contractors

100. Kennedy, *The Stakes*, *supra* note 19, at 330.

101. Robert Cooter & Thomas Ulen, *LAW AND ECONOMICS* 78–80 (5th ed. 2007) (discussing threat value in the context of bilateral bargaining). For a discussion of the law's impact on the credibility of threats in negotiation, see Saul Levmore & Ariel Porat, *Credible Threats* (Coase-Sandor Inst. for Law and Econ. Working Paper No. 692).

102. In *Quinn v. Leathem*, the butcher, Leathem, had a privilege to choose whom to hire. Quinn had a privilege to try to strike and get the highest wages possible. Did Quinn have the additional privilege to threaten a strike against Leathem's customer by way of secondary boycott? Lord Lindley said no. See *supra* text accompanying notes 71–79. Now, if Lord Lindley had said yes, Quinn's privilege to try to increase wages would have been dramatically increased by the recognition of this second privilege. For elaboration of this point, see *infra* text accompanying note 108.

103. See generally Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

104. Kennedy, *The Stakes*, *supra* note 19, at 334, 335, 337, 340. And, as Justin Desautels-Stein reminds, even a field as ostensibly "permissive" as contract law is effectively coercive—putting state power behind the desiderata of one party or the other. See Justin Desautels-Stein, *The Market as Legal Concept*, 60 *BUFF. L. REV.* 387, 473–77 (2012) (discussing Morris Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553 (1933)).

105. Schlag, *Coase Minus the Coase Theorem*, *supra* note 14, at 194–98 (showing that Coase's work delineates how law affects the magnitude and identity of production factor costs).

seeking to obtain jobs, and manufacturers trying to sell products. Again this scenario is ubiquitous.

Consider by way of example a hypothetical situation where competitors *N* and *M* are precluded (i.e., duty) from publishing derogatory information about each other on the net. Now assume a legal regime change enabling both *N* and *M* to publish derogatory information about the other. This opens up a new realm of competition. The result is that competition between *N* and *M* is now occurring in a new venue (the Internet) and on new terms (the gathering and dissemination of derogatory information). If it should turn out that *N* has a comparative advantage over *M* in opposition research and information dissemination, then *N* will gain from the regime change. It's not hard to see then that there are clear economic effects in the recognition of privilege–no right regimes. Privilege–no right regimes like all the other jural regimes, effectively help establish *the terms* on which *N* and *M* will compete: It may affect variously terms such as price, quantity, quality, product differentiation, marketing, sales, reputation, after-market service, and more.

3. Third-Party Effects

The exercise of privileges by competitive parties can yield significant third-party effects. For instance, consider how potential employees sometimes try to secure jobs by voluntarily providing valuable personal information about themselves on the internet. Over time, this kind of practice can create a situation in which all potential employees, in order to compete effectively, must provide such information.¹⁰⁶ Consider more generally how the tremendous reduction of transaction costs through the perfection of cyber technology now enables potentially cooperative parties to conduct transactions possibly harmful to the reputational, commercial, and privacy interests of third parties.¹⁰⁷ These are all problematic instances in which the establishment of privilege–no right regimes affect outcomes for third parties.

B. The Political Import of Treating Privilege–No Right as a Real Legal Relation

One way to think about the privilege–no right regime is to see it as an instance where other entitlements and disablements held by the same parties (*A* and *B*), as well as third parties, can be leveraged to augment value. If *A* has a privilege to farm his land, the value of that privilege will be greatly augmented if *B* has a duty to supply seeds and fertilizer, if *C* is precluded from diverting water, if *D* is obliged to police the perimeter, if . . . (and so on). In other words, consider that in practice a privilege–no right regime is not some isolated relation in which the deployment of other legal entitlements and disablements is

106. Scott Peppet, *Unraveling Privacy: The Personal Prospectus & The Threat of a Full Disclosure Future*, 105 NW. U. L. REV. 1153, 1176–90 (2011) (showing how the capacity to compete for employment by providing personal information to employers risks the unraveling of privacy).

107. See Harry Surden, *Technological Cost as Law in Intellectual Property*, 27 HARV. J.L. & TECH. 136, 169–82 (2013) (arguing that the lowering of the costs of technology has enabled transactions previously too costly to now occur in ways that affect explicit and implicit societal values).

precluded. On the contrary, what happens in privilege–no right regimes is that the parties are enabled to leverage their own entitlements and each other’s disablements to gain advantage.

In the case of counterposed privileges in *A* and *B*, the outcomes reached in negotiations (to the degree these are permitted) will be a function, inter alia, of the other entitlements and disablements in their jural entourage. Now, of course, depending upon the identities of these other legal entitlements and disablements, they may be more or less useful, more or less powerful, in *A* and *B*’s efforts to exercise their various privileges. But that is the point: That is what we have to examine. Thus, although it is clear that Hohfeld’s jural relations are atomistic, discrete, and fixed at the *formal* level, their legal and economic effects once deployed are anything but.

It is thus wrong analytically to think of privilege–no right regimes as non-legal. Not only is a legal permission itself a legal regime, as we saw earlier, but it also functions as a kind of extension of *other legal entitlements and disablements that enables these to be brought into play*.¹⁰⁸ As a practical matter, then, privileges act as important multipliers for other entitlements and disablements in the jural entourage of the contending parties.

VII

THE POLITICS OF HOHFELD’S PLATFORM

One interesting implication of Hohfeld’s jural relations is that they point to the elusiveness, if not impossibility, of neutrality in the fashioning of legal regimes. Two features of his platform are key to this conclusion.

First, note that all the possible jural relations described in Hohfeld’s platform have some distinct political and economic implications and effects relative to all the others. Accordingly, within the platform, there is no option that we could safely label “neutral” in the sense of having no political or economic effect relative to the others. It is wired into Hohfeld’s *conceptual economy* that any selection of a legal regime will have differential distributive implications for the *real economy*.

Second, each jural relation is cast in the form of a double entry: for every entitlement granted, there must be a correlative disablement (and *vice versa*).¹⁰⁹ This entitlement–disablement structure need not, of course, produce a zero-sum game. Indeed, there is no reason to suppose that what law takes from *A* and gives to *B* will always (or even frequently) have the *same value* to *A* as it does to *B*. Moreover, in changing a legal regime, real socioeconomic benefits will sometimes accrue to both *A* and *B* relative to the present arrangement. But

108. It is this sort of insight that leads some thinkers to note that the criminal law is often an adjunct to labor policy—namely disciplining the work force and a factor in setting wages. See generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

109. Frank Michelman & Duncan Kennedy, *Are Property and Contract Efficient*, 8 HOFSTRA L. REV. 711, 760 (1980).

what is nonetheless clear is that, in a *formal sense*, the enhancement of *A*'s entitlements yields disablements in *B*.¹¹⁰

Given these two features of the Hohfeldian scheme, it is not at all apparent how neutrality might be achieved. It's true, of course, that we cannot rule out the existence of some Archimedean point "outside" Hohfeld's platform that might secure neutrality, but it is hard to imagine what it might be, let alone how it would work. This becomes all the more evident the more we take cognizance of the pervasiveness of reciprocal interference in our cooperative socioeconomic ventures.

Hohfeld did not go into any of this. The full articulation of these kinds of arguments would have to await the arrival of Robert Lee Hale and Duncan Kennedy.¹¹¹ But the general point is hardwired into the structuralism of Hohfeld's platform. That is to say that the elusiveness of neutrality in selecting and shaping legal regimes as well as the inexorability of conflict are ineradicable aspects of the very form of Hohfeld's platform. Law, viewed in this way, does not so much "resolve conflict" as delineate the terms and channel the pathways through which conflict is conducted. The conceptual architecture of law not only allocates the stakes explicitly, but *in conceptualizing, formalizing, and naming the stakes in the first instance, it has already enacted an allocation*.¹¹² And notice that all this work has already happened before we arrive on the conventionally accepted scene of political contestation in law (namely, deliberate policy, principle, or value-based argument).

VIII

DECOMPOSITION AND RECOMPOSITION

Hohfeld's platform, as we have seen, can be put to lots of different uses. Among the most important is one to be discussed in this section—namely, the analysis of everyday legal concepts such as property, sovereignty, contract, and the like in terms of the legal relations. One of Hohfeld's insights is that these legal concepts can be seen as jural composites—aggregates of different jural relations running to different parties concerning different acts. Indeed, one of the key roles of Hohfeld's platform is to show how these legal concepts can be decomposed, reshuffled, and recomposed into novel jural composites.

Hohfeld's primary example is the concept of the fee simple. As Hohfeld puts it in his 1917 article, this legal concept can be broken down into "a complex aggregate of rights (or claims), privileges, powers, and immunities," and, of course, their correlatives.¹¹³ To give just a few examples, a fee simple owner has

110. See Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1218–19 (1991) (arguing that Pareto optimality is not a plausible standard to guide the construction of legal regimes given that just about any change in any legal regime can be counted upon to make someone worse off).

111. Hale, *supra* note 19, at 474–77; Kennedy, *The Stakes, supra* note 19.

112. Kennedy, *The Stakes, supra* note 19.

113. The passage in full:

rights that others not enter the land and that they not harm the land (those others have correlative duties). The owner has privileges of entering upon and using the land (others have correlative no rights). The owner has powers to alienate or extinguish his own interests in the land (others have correlative liabilities). The owner has immunities from others extinguishing or alienating his own interests (others have correlative disabilities).¹¹⁴

The fee simple here is only one example. Hohfeldian decomposition can be practiced on any number of legal concepts: the trust, the corporation, and so on. All these legal concepts and many more can in principle be broken down into elaborate sets of Hohfeldian legal relations.

A. Legal Analysis: The Virtues of Formal Atomism

I am not generally a fan of atomism—methodological or otherwise. Nonetheless, the Hohfeldian insight into the decomposition of legal concepts has considerable virtues. For one thing, it helps restrain us from false inferences. It forces us to specify the legal relations between types of persons, kinds of acts, and identifiable jural relations. For another thing, once one views legal concepts (e.g., the fee simple) as composites of different jural relations running to different parties regarding different actions, it becomes possible to question which jural relations should (or should not) be included in these jural composites.¹¹⁵ Decomposition, reshuffling, and recomposition of jural composites thus become analytically possible.

Many complex substantive legal concepts can be broken down—one

Suppose, for example, that A is fee-simple owner of Blackacre. His “legal interest” or “property” relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. *First*: A has multital legal rights, or claims, that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. *Second*: A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons. *Third*: A has the legal power to alienate his legal interest to another, i. e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to create a reversion in himself; also the legal power to create a privilege of entrance in any other person by giving “leave and license”; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons,—this meaning that the latter are subject, *volens volens*, to the changes of jural relations involved in the exercise of A’s powers. *Fourth*: A has an indefinite number of legal immunities, using the term immunity in the very specific sense of non-liability or non-subjection to a power on the part of another person. Thus he has the immunity that no ordinary person can alienate A’s legal interest or aggregate of jural relations to another person; the immunity that no ordinary person can extinguish A’s own privileges of using the land; the immunity that no ordinary person can extinguish A’s right that another person X shall not enter on the land or, in other words, create in X a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of other persons in general.

Hohfeld, 1917, *supra* note 1, at 746–47 (footnotes omitted).

114. *Id.* at 746–47.

115. Corbin, *supra* note 5, at 237–38.

Hohfeldian jural relation at a time—into different jural relations. In this regard, Hohfeld’s platform gives us three major parameters to consider:

1. *The jural relation* can be changed into one of the others (i.e., transform a right that *B* shall not enter into a no right that *B* shall not enter), extinguished (i.e., snuff out a privilege to exploit by creating a trust), or supplemented (i.e., tack on a new duty to an existing duty).
2. *The substantive act* (i.e., *X*) can be redefined. A power to transfer, for instance, can be subdivided into powers to transfer profits, income, time-shares, and so on.
3. *The persons* can be redefined. We have been dealing with *A* and *B* throughout in this article as if they were constants, but we could multiply the jural relations by partitioning the *As* into *A-1s* and *A-2s*, or decide that it would be better not to deal with *A* and *B* at all but instead redefine the field in terms of persons ! and ★.¹¹⁶

These, of course, are merely *analytical* possibilities. Whether it is advisable or helpful to decompose, reshuffle, and recompose in any given context is a different matter—one about which Hohfeld has precious little to say.¹¹⁷ Moreover, Hohfeld’s platform lays out only a few of all the possible parameters along which decompositions, reshufflings, and recompositions are analytically possible.¹¹⁸

Nonetheless, one of the virtues of Hohfeldian decomposition is that it allows us, at the analytical level, to consider how our current jural composites might be reconfigured by tinkering with this or that constituent jural relation. Absent the Hohfeldian insights into the composition of legal concepts, we tend to be under the sway of a primitive or closet essentialism that casts legal concepts, such as property or tort, as consisting of unitary essences that resist modification and that invite, even if they do not compel, the kind of abuse of deduction wrought of errors of transposition. It is, of course, possible that a primitive or closet essentialism is in some ways functional (more on this later), but, for legal analysis, this ought not to be presumed.¹¹⁹

At the same time, there are limits—in fact severe limits—to the legitimate use of Hohfeldian analysis: one should not think that the analytical susceptibility of jural composites to recomposition implies the practical possibility or the wisdom of such recomposition. Remember: all Hohfeld provides is a platform for legal analysis. The derivation of conclusions about

116. There are, of course, all sorts of other aspects that are beyond Hohfeld’s platform.

117. In a sense, that ought not to be surprising. In the same way that a structuralist analysis of *langue* cannot tell us what *parole* to say to whom, where, or when, Hohfeldian analysis cannot tell us whether it’s worth our while to decompose, reshuffle, and recompose any given substantive legal concept.

118. Hohfeld was well aware of this—as is clear from his sequel in which he outlines a number of other determinations of jural relations (and promptly leaves them unexplored). Hohfeld, 1917, *supra* note 1, *passim*.

119. See *infra* text accompanying notes 141–43. The Hohfeldian insights also serve as a safeguard against drawing substantive conclusions about the world from mere conceptual analysis.

what substantive jural composites to create, or how, *solely on the basis* of Hohfeldian analysis, is immediately suspect.¹²⁰ While Hohfeld gives us the tools to decompose legal concepts into constitutive legal relations, he gives us almost nothing in the way of help in terms of recomposition. Nor does he offer criteria to decide when to recompose and when to follow the rules laid down.

Moreover, even when we are convinced that recomposition is warranted, we get only a few bits of explicit advice:

1. Do not allocate jural opposites to the same party with regard to the same act (that way lies incoherence).¹²¹
2. Deciding which entitlements and disablements to recognize requires consideration of practicalities, justice, and policy.¹²²
3. Insofar as the jural relations traverse across substantively different subjects, these relations help identify unseful analogies and enable borrowing from one area to another.¹²³
4. The choice or selection of legal regimes will yield political and economic consequences.¹²⁴

This is not much in the way of help for synthesizing or constructing jural composites or legal regimes. Hohfeld urges us to engage with the practical, policy, or justice considerations, but he does not show us how to do so nor when. We are on our own.

B. The Economic Import of Decomposition

As mentioned, the possibility of decomposition effectively allows us to dissolve the primitive or closet essentialism that typically haunts our jural composites. We are thus positioned to identify this essentialism and assess its value, or lack thereof, in economic terms. We are positioned, in other words, to ask about the economic functions served by having jural composites in general, as well as the particular composites we have. Indeed, the crucial economic considerations that go under the names of “bundling,” “architecture,” “transaction cost analysis,” “indivisibility,” “lumpiness,” and “individuation” are thus placed front and center in virtue of Hohfeldian analysis.¹²⁵ These

120. Some thinkers used the bundle of sticks theory to conclude that the concept of property yields virtually no restriction on reshuffling or recomposition. See Merrill & Smith, *supra* note 14, at 1697 (describing the traditional realist formulation in which there are no restraints on the contents of bundles). Perhaps the extreme in this nominalist position is Walton Hamilton’s suggestion that “[p]roperty is a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.” Walton Hamilton, *Property*, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (Edwin R. A. Seligman et al. eds., 1935).

121. Singer, *supra* note 19, at 986.

122. Hohfeld, 1913, *supra* note 1, at 58.

123. *Id.* at 58–59.

124. See *supra* text accompanying notes 96–112.

125. To give but one example, Coase’s original analysis in *The Problem of Social Cost* is implicitly Hohfeldian in its understanding of legal concepts. See Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S83 (2011) (noting that Coase “adopted the picture of property as a list of permitted and proscribed uses imposed by the authoritative institutions

concepts are all ways of initiating inquiries about why and how we happen to have and ought to keep (or jettison) our jural composites.¹²⁶

C. The Political Import of Decomposition

In the American legal academy, it has often been liberals and leftists who have championed the possibilities of Hohfeldian decomposition. Crudely summarized, the general liberal or left idea is that once we see that legal concepts can be unbundled into constituent jural relations that can be reallocated, the classic *cri de coeur* of the laissez-faire or free market champion against redistribution—“but it’s my property!”—loses much of its presumptive force. Indeed, the possibility of decomposition challenges the notion that there is some sort of already established natural or neutral baseline conception of what constitutes “property” or indeed any jural composite.¹²⁷ Similarly, the possibility of decomposition challenges the presumption that any tinkering with this or that part of a jural composite will inevitably compromise the whole.

This embrace of decomposition as a method, or even a theory, is compatible with liberal or left projects to the extent that (1) the liberal or left projects are committed to legal change and (2) the honoring of extant jural composites are experienced as obstacles to that change. That is indeed the way in which the liberal and left American legal academy has apprehended and described the political situation throughout much of the twentieth century. It may well have been an apt political strategy, but it is important to recognize that decomposition does not in and of itself bear a liberal or left orientation. On the contrary, the troubling or undermining of baseline conceptions is, in principle, open to all political orientations. Consider, by way of example, the following baseline notions that have been successfully troubled by the right in the United States in recent years:

The notion that the state should finance higher education.

The notion that public schools should be free and of high quality.

The notion that law is a public good.

Decomposition is politically indiscriminate: one can decompose in the service of the Right as well as the Left.¹²⁸ As the United States has turned sharply right during the last three decades, decomposition has been vigorously exploited in various legislative and executive precincts.

In fact, looking to those particular precincts, what seems evident is that the laissez-faire and neoliberal right has de facto pursued a policy of decomposing

of the state”).

126. *Id.*

127. For a Hohfeldian take on the First Amendment, see Frederick Schauer, *Hohfeld’s First Amendment*, 76 GEO. WASH. L. REV. 914 (2008).

128. For one recent endorsement of the bundle of relations on the right, see Richard A. Epstein, *Bundle of Rights Theory as Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223, 233 (2011) (arguing that the bundle of sticks theory might well be used to block state confiscations of property).

the state—breaking down all sorts of jural composites that define the relations between the individual and the state. Three classic strategies have been prominent:

1. Decompose and privatize! Delegate or relegate discrete functions to market actors. The idea here is basically to contract out state functions to private parties so that these functions at some point cease to be recognized as state functions (e.g., private police, private military, private prisons).
2. Decompose and charge user fees! Decompose entitlements and charge user fees (e.g., toll roads, tuition, user taxes, special districts, school vouchers).
3. Decompose and corporatize! Create new public–private partnerships (e.g., capital-financing agreements, joint government–private sector ventures, etc.).

The point is relatively simple: once jural composites are broken down into constituent jural relations, various recompositions of all sorts of political flavors can be imagined and conceivably implemented. The politics of decomposition and recomposition are thus more ambivalent than they might initially seem.

IX

JURAL COMPOSITES AND THE BUNDLE OF RELATIONS

Because legal concepts can be seen as aggregations of different jural relations, many legal thinkers have invoked the bundle of relations idea as a theory to help explain why we have jural composites in general as well as to explain why we have the particular ones we do. Whether dubbed the “bundle of relations,” “bundle of rights,” or “bundle of sticks,” the idea has been applied to numerous legal concepts.¹²⁹

It is in property theory that the bundle of relations idea has received its most sustained and sophisticated treatment. In part this has meant that the bundle of relations idea has been developed in ways inflected by a desire to produce property theory. As we will shortly see, however, what Hohfeld offered (a mode of analysis) was not entirely suitable for what the property theorists generally seemed to want (a theory of property). We will be exploring both.

Begin with Hohfeld. He never actually mentioned the “bundle” in his two articles.¹³⁰ But he did use the term “aggregate,” and, as we saw earlier, his 1917

129. Hohfeld understood that his fundamental jural relations could be used to analyze a great number of legal concepts. Hohfeld, 1913, *supra* note 1, at 20. As he put it:

[T]he present article and another soon to follow will discuss, as of chief concern, the basic conceptions of the law,—the legal elements that enter into all types of jural interests. A later article will deal specially with the analysis of certain typical and important interests of a complex character,—more particularly trusts and other equitable interests.

Id.

130. The bundle of sticks metaphor antedates Hohfeld’s work. Morton Horwitz identifies John Lewis as important in the transformation of a physicalist conception of property to the “bundle of rights” notion. Lewis wrote that even “[t]he dullest individual among the *people* knows and

article contained a lengthy passage effectively disaggregating the fee simple into its constituent jural relations.¹³¹ What he gave us was a useful list of the various jural relations that make up the fee simple. Inspired by this analytical description, various scholars developed what might be called a *positive theory* of property. They morphed Hohfeld's *description* into an *explanation* of property (of how and why it is what it is).¹³²

This metamorphosis—from description to explanation and from analysis to theory—was, arguably, unfortunate. However apt the bundle idea may have been as an analytical description or as a prelude to theory, there were a number of reasons it might not have worked so well as a complete positive theory. This, as it turned out, was exactly what a number of “bundle critics” pointed out, enlisting along the way a rich and instructive array of conceptual, philosophical, functionalist, and normative perspectives.

From a *conceptual perspective*, James Penner objected that Hohfeldian decomposition effectively liquidates the conceptual architecture of law and thus provides no theory of property.¹³³ He notes that the bundle of rights notion is not a theory of property but rather a name for an absence of such a theory.¹³⁴ The bundle idea substitutes the parts (the jural relations) for the whole (property), but the parts are not unique to this particular whole (property), and the whole seems to play no role in determining its parts.¹³⁵

Penner has a point here, and it is one that is applicable generally to atomistic explanations. Here is the problem: If one is looking for a theory of *Z* (of how or why *Z* is what it is), the classic atomistic answer that *Z* is an aggregation of many smaller parts is unlikely to satisfy.¹³⁶ Not only will such an atomistic answer fail to explain, but along the way it will have a striking tendency to liquidate the putative object of inquiry from the scene. The classic atomistic strategy tends to substitute one object of inquiry (the parts) for another (the whole) and then to offer up the former as if it were an explanation of the latter. But that is nothing more than the substitution of an atomistic architecture (the part-whole structure) for whatever conceptual architecture

understands that his *property* in anything is a bundle of rights.” MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 147 (1992) (citing JOHN LEWIS, *A TREATISE OF ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* (Collaghan ed. 1888)). Stuart Banner notes that George Sweet, a British barrister declared that proprietorship is a “bundle of rights,” in 1873. STUART BANNER, *AMERICAN PROPERTY* 58 (2011).

131. See *supra* note 113.

132. For an excellent historical step-by-step account of the transformation of Hohfeld's approach, see Jane B. Baron, *Rescuing the Bundle of Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 61–79 (2013).

133. James Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. Rev. 711, 714 (1996).

134. *Id.* As Penner points out, the more extreme versions of the bundle of rights theory of property effectively means that “property has no meaning, and is therefore useless in any discussion about property, funnily enough.” *Id.* at 777.

135. *Id.*

136. And, in fairness, some bundle theorists say considerably more. See, e.g., Munzer, *supra* note 58 (responding to Merrill and Smith).

may already be in place. In law, the atomistic strategy thus often leads to a kind of extreme nominalism in which the legal concept becomes nothing more than a label used to designate a set of things—leaving the why and the how of its assembly and organization unspecified.

True enough. Nonetheless, to push back ever so slightly on Penner's view, one might respond in a deconstructive vein that there is a preliminary underlying question to be asked here about the identity of the *Z* in issue—to wit, property. To what extent are we out to explain a social institution, a stable legal concept, a nominalist artifact, a legal chimera, a juridical mnemonic device, a political mystification, some or all of these things, glommed onto and into each other (with perhaps a few more thrown in)? This is not an easy question: not only do we confront an inquiry about whether property has a there (there), but also of what kind and how much so and with what degree of endurance? These are difficult issues, but they have direct implications for Penner's point. Indeed, consider that, just as it would be misguided to presume that "property" is merely a nominalist label of convenience, so too would it be misguided to presume that property is an institution wholly responsive to its own self-announced functional or normative integrity. To put it differently: there is a preliminary and very difficult inquiry to confront about the identity and the character of what one is trying to explain—to wit, the *Z*.

Speaking as an outsider here, the rich controversies among the property theorists seem to me, at least in part, informed by an unarticulated-but-shared presumption that they are all somehow talking about roughly the same *Z* and that they have a pretty good shared grasp of its character. One wonders, though, whether property is not to property theory as—brace yourself, this is not nice—what "the Constitution" is to constitutional theory?¹³⁷ Just to put a fine point on it: one wonders whether the discussion among the property theorists is perhaps less a disagreement about the nature of a shared object of inquiry—property—as it is a set of different claims about different objects of inquiry—property₁, property₂, . . . up to, say, . . . property₁₄.¹³⁸

Arguing from a different *philosophical tradition*, Jeanne Schroeder deploys the thought of Hegel and Lacan to suggest that the bundle of rights notion fails to provide a theory of the jural composite we call property. The bundle of sticks analysis, as she argues, does not "solve the metaphysical problems these scholars purport to identify in the unitary, possessory, tangible concept of property."¹³⁹ Why not? Well, because it merely postpones and replicates the problem. Property is composed of a bundle of sticks. But once you've got the

137. See generally Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681 (1996).

138. Just to be clear: I am not dissing the property theory conversations. On the contrary, I am duly envious. Would that my fields be so intellectually vital.

139. Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 243 (1994). See also JEANNE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* 161–80 (1998) (arguing that Hohfeld trivializes the object of property by failing to recognize that the object is not equivalent to physical things).

sticks down, the focus of attention turns to the individual sticks which turn out to be their own little bundle of sticks and so on *ad infinitum* in the bad infinite regress of “turtles all the way down.”¹⁴⁰

In a sophisticated and sustained argument too complex to summarize here, Schroeder makes a powerful case that it is precisely the failure to take the object of property seriously as a unifying principle that constantly constricts the more extreme bundle theorists into invoking images and metaphors of things—most topically, the *sticks* in the *bundle*. To put the point more generally: the attempt to *explain a legal concept* in terms of pure relations of form pretty much guarantees that, at some point, substantive identity will have to be reintroduced into the theory to provide content. Often enough, this substantive identity will be reintroduced in a way not regulated or disciplined by the specified relations of form. That in turn will have a real tendency to vex the integrity of the explanation offered.

Schroeder’s observations are useful, but again, I am not sure that Hohfeld is the proper target here. On the contrary, and to stretch things a bit, perhaps the foregrounding of these difficulties ought to be credited to Hohfeld’s work rather than pressed against him. It was, after all, Hohfeld who insisted that the pure relations of form are insufficient to choose among legal regimes, and that one must instead inquire into practicalities, justice, and policy—matters for which he gave no account.

Meanwhile, we have other bundle critics to consider. From a *functional perspective*, Henry Smith notes that the bundle of rights notion cannot account for the functional architecture of jural composites such as property—especially the ways in which this functional architecture cuts down on information costs: “The problem with the bundle of rights is that it is treated as a theory of how our world works rather than as an analytical device or as a theoretical baseline.”¹⁴¹ Smith blames this excess on legal realist enthusiasm: “In the realist era, the benefits of tinkering with property were expressed in bundle terms without a corresponding theory of the costs of that tinkering.”¹⁴² This too seems right. Tinkering with a going legal regime and its cognitively and institutionally embedded architectures is not costless, at least not if the results of tinkering migrate from a legal theory into an actual legal regime. Smith also seems right to suggest that baselines are necessary, that mnemonic devices are useful, and that traditions are not an unqualified evil. In fact, all of these things seem right. Of course, none of them tells us when to tinker and when not, nor how much, nor how long. Again, this is not an easy question. The main problem here, as I see it, is that the achievement of cogent legal analyses on the one hand and workable legal regimes on the other are in many respects antithetical ideals:

140. *Id.* By way of caution, Schroeder’s objection here is not that Hohfeld’s formal jural relations can be further subdivided. Rather, her argument is that as soon as we identify a substantive stick in the bundle, it too needs to be subdivided into other substantive ministicks.

141. Smith, *supra* note 14, at 1697.

142. *Id.*

what we need for the one to work well frequently interferes with the performance of the other. Although it is surely right that, if legal regimes had to follow the precise dictates of analytical probity, their efficacy and usefulness would suffer greatly, the converse is also true: if legal analysis had to hew to the semantics and grammar of the official judicial idioms, intellectual endeavor would be greatly compromised.

From a *normative perspective*, we have, among others, Joseph Singer, who argues that we must move beyond Henry Smith's functional-information-cost approach to recognize the political and social aspects of property. Singer argues convincingly that property is deeply implicated in the possibility and realization of democracy: "Property law establishes a *baseline for social relations compatible with democracy*, both as a political system and a form of social life."¹⁴³ Recalling that we have abolished feudalism, slavery, primogeniture, racial segregation, debtors' prison and more, Singer argues that "[b]asic democratic values limit the *kinds* of property rights that the law will recognize, and they define particular bundles of rights that cannot be created."¹⁴⁴

Again, this seems right. And, again, this is one of the insights that can be prompted by reflecting on Hohfeld's work—namely, that legal concepts, such as the fee simple and their internal architecture already enact a complex value-laden jurisprudential world. Practicalities, policy, principle, politics, aesthetics, do not operate solely on "the outside" of legal concepts. On the contrary, the internal architecture of legal concepts is already invested with and organized by the effects and implications of practicalities, policy, principles, politics, and aesthetics. A legal concept—e.g., the fee simple, bankruptcy, corporation—is a microworld of jurisprudence in the very broadest senses of the term.

Penner's, Schroeder's, Smith's, and Singer's objections to or modifications of the extreme bundle of relations theory seem to be persuasive. But, in the context of an article that focuses on Hohfeld (this one), two cautionary points bear noting.

First, to the extent that these legal thinkers are criticizing the bundle of rights theory, it is in its capacity as *a theory* of property. What these legal thinkers seek is a positive or normative theory of property. This, of course, is not the view from nowhere: the property theorists take property as a largely cogent category. Given that starting point, it is not surprising that they would be skeptical of any approach that, like the bundle of relations theory, appears to make the very object of their inquiry—i.e., property—disappear or at least slim down considerably.¹⁴⁵

143. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L. J. 101, 118 (2014). See generally Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005) (describing property regimes as a social institution that set the terms on which people are able to recruit each other for social cooperation).

144. Singer, *supra* note 143, at 118.

145. Thomas Grey noticed this early on: "The substitution of a bundle of rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory." Grey, *supra* note 17, at 81.

Hohfeld's platform certainly seems to effectuate that vanishing act—albeit only in the first instance. I am thus only partially in agreement with Schroeder when she writes, “[t]he fact that Hohfeld cannot distinguish between property and torts suggests more about the weakness of Hohfeld's analysis than it does about the incoherence of property.”¹⁴⁶ Agreed: Hohfeld's approach does not distinguish between the two. And true as well: his failure to do so suggests that his approach cannot alone provide a positive theory of property, or torts, for that matter. But, nonetheless, there is virtue in Hohfeld's approach to jural composites—namely, that it calls for us to think about why and how certain jural relations are condensed into what we call a property regime as opposed to a tort or contract or some other regime.¹⁴⁷ It is precisely the incompleteness or, more charitably, the austere formal minimalism of Hohfeld's approach, that creates the motivation and the intellectual space necessary to inquire into the how and the why of our extant legal concepts—the principles of their organization and assembly.

Upon reflection, the platform allows us to recognize that, if we are interested in figuring out what property or torts or contracts is, does, or means in any given legal system, we have to ask how and why each is not the other.¹⁴⁸ And we have to ask as well, in a juridical, critical, political, moral, and economic spirit, why and how certain socioeconomic domains have been allocated to one kind of law (e.g., property) as opposed to the others (e.g., torts). A good theory of property will perforce have to ask those questions and answer them not merely in terms of the internal architecture of property (though that is part of it), but in terms more external as well—that is to say, in terms of the particular roles played by property in light of contracts, torts, and criminal law.¹⁴⁹ Indeed, it seems obvious that property law is the way it is, at least in part, because contracts, torts, criminal law, and so on are the way they are and *vice versa*. It

146. Schroeder, *supra* note 139, at 178.

147. Joseph William Singer makes the point elegantly, by noting that a great deal of “property law” could be delegated away to these other kinds of law. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1020–21 (2009). This positions him to ask importantly: What could not be delegated away from property to these other kinds of law? Such a trans-subject matter approach is precisely the sort enabled and facilitated by Hohfeld's platform precisely because that platform shows no respect for, indeed cuts across, subject matters. That was the point!

148. An alternative approach would be comparativist in character—namely, to identify and describe the ways in which property systems differ (or not) from one legal system to another. See generally Stephen R. Munzer, *Property and Disagreement*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW (James Penner et al. eds., 2013). The problems of cultural and legal “translation” strike me as daunting, and what is more, they seem unavoidably dependent upon answering the sort of inquiry suggested in the text to this footnote. It is not signifiers, but the signs, that we are after. And, of course, the signs mean in virtue and as a function of their roles in some greater wholes—such as national law, national culture, etc.

149. Joseph Singer begins modestly by recognizing that if we want to understand property in its modern forms, we need to go beyond simply looking at the common law of property and include in addition statutes governing fair housing, mortgages, zoning and so on. Joseph William Singer, *Essay: Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1052–53 (2009).

seems evident as well that each kind of law (e.g., torts) has its own “coy” version of the others (e.g., property).

Confronting these challenges seems to be incumbent upon us. For now, it seems that, as a stand-alone construct, the extreme version of the bundle of relations can hardly be a theory of property nor any other jural composite—unless, of course, we are talking about the kind of jural composite that is more a label than an idea, more an epiphenomenon than a phenomenon, more an incantation than a concept. At the same time, it is not clear how we could get very far with the legal analysis of property or any other legal concepts without something like Hohfeld’s platform and its attendant bundle of relations idea. With just about any jural composite it is necessary to confront—even if we cannot satisfyingly answer—the questions of how much there (there) we are dealing with. It is quite conceivable that some legal concepts, (e.g., freedom of speech) are to be understood in largely nominalist terms, whereas others (e.g., fee simple) should perhaps be viewed as having a more robust and structured legal identity. One ought to concede the possibility that some legal concepts have greater architectural integrity, purchase, depth, and staying power than others—and that all those dimensions of the concept are subject to change as well. The task at hand is less a question of academic philosophy than one about philosophically informed practical observation about how legal concepts actually function in the various practices of law.

Put more strongly, it seems to be a perennial mistake of legal theorists to suppose that the status of individual legal concepts must be understood in terms of a singular philosophy of the concept, whether nominalist, realist, essentialist, fuzzy, ludic, radial, or whathaveyou. Whatever may be the outcome of the philosophical disputes among these various contending traditions (I am not holding my breath) there is no particular reason to suppose that the philosophical winner will *ipso facto* have jurisdiction, let alone any authority, over law or even legal analysis. Nor is it obvious that this is a competition where winner takes all. Then, too, it is necessary to wonder about the degree to which the identity of a given legal concept is conceptual, cognitive, institutional, ideological, mythic, aesthetic, or phantasmic in character. One also has to decide how much sense or nonsense to make of legal concepts. This is a matter of orientation, intellectual tradition, professional self-identification, career ambition, political project, and so on.

These are all fundamental questions. They are part of the canon. They are corrosive. They are interesting. And they do not go away.

There is a second point to urge in response to the property theory critics of Hohfeld. And it is this: The property theory critics are, in many ways aptly, criticizing a well-established bundle of rights theory developed principally by the legal realists and their followers. But, as mentioned earlier, there is a distinction to be made between the Hohfeldian *analysis* of jural concepts as aggregates on the one hand and a substantive bundle *theory* of legal concepts on

the other.¹⁵⁰ I do not think that Hohfeld's platform should be held to account for the possible excesses of the bundle of rights theory developed principally by some overly enthusiastic realist followers and property theorists.¹⁵¹ For one thing, Hohfeld did not advance a positive theory of property.¹⁵² It was not his doing.¹⁵³ We must also recognize that Hohfeld was writing against a well-ensconced tradition given over to the sort of naïve essentialist conceptualism that confuses and conflates different jural relations and repeatedly commits errors of transposition. The work that had to be done in Hohfeld's time lay in showing that substantive legal concepts could be decomposed. When the bundle of relations concept developed into orthodoxy, it became at once possible and desirable to ask—functionally, politically, morally, economically—why certain jural relations are aggregated and condensed into specific jural composites and not others. In short, why these packages and not others?

I want to suggest, then, that the perspicuous work done in a variety of intellectual registers by Penner, Schroeder, Smith, Singer, and others owes more to the Hohfeldian platform than might initially seem. Their work supplements or deviates from the bundle of relations *theory*, but it is motivated and enabled by the bundle of relations *analytic*. Indeed, Hohfeld himself provides support for their projects. Hohfeld was aware that, where legal concepts like property are concerned, they cannot be treated as simply the sum of their parts. As Hohfeld put it in his 1917 article, "It is important, in order to have an adequate analytical view of property, *to see all these various elements in*

150. Cf. Munzer, *supra* note 148, at 317 (noting that bundle theories need not be of the fully disintegrative kind).

151. Again though, it is not entirely clear to me that these flaws or objections are to be laid at Hohfeld's door as opposed to his more enthusiastic legal realist followers. The early Felix Cohen, in particular, seems like a good suspect here. Cohen seems to have been overly enthralled with the atomistic idea that we should do without legal concepts, such as title or bankruptcy and instead develop a science of law based upon their redefinition in terms of function and the decisions of legal officials. See Cohen, *supra* note 28, at 828–29 (noting that Hohfeld has offered "a logical basis for the redefinition of every legal concept in empirical terms, i.e. in terms of judicial decisions"). Cohen seems to have underrecognized the unavoidable dependence of functionalism on some sort of conceptualism. Cf. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 217 (2009) (noting that a realist approach must partake in some formal architecture).

152. See Baron, *supra* note 13, at 936 (noting that Hohfeld's project was not aimed at developing "a definitive idea of property"). See also *supra* note 132.

153. To the extent then that some legal realists got carried away with Hohfeld's atomism, it was a failure to carry their own realist insights far enough. Indeed, on realist terms alone there is reason to consider why we would want to have jural composites at all as well as why we might (or might not) want to have the particular ones we do. This I take to be a central and helpful aspect of the work by Penner, Schroeder, Smith, Singer, Merrill, Fennel, Bell, and Parchomosky. See Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1015 (2008) (theorizing property in terms of number of owners, scope of owner's dominion, and asset design); Lee Ann Fennel, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1956–57 (2012) (noting the importance of lumpiness or indivisibility in the creation of legal categories for property); Merrill & Smith, *supra* note 17; Penner, *supra* note 134; Schroeder, *supra* note 139; Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2099 (2012) (noting that simplicity in the articulation of legal concepts cuts down on information costs and facilitates transactions).

the aggregate."¹⁵⁴ And in his 1913 article, Hohfeld was even more explicit: Inasmuch as the jural relations are the same—the “lowest common denominators”—across different doctrinal precincts of law, it becomes possible to discern “common principles of justice and policy” that underlie the jural composites found in those various doctrinal precincts.¹⁵⁵ Hohfeld left this work undone. But he seems to have been quite aware that it needed doing.

X

SOME LIMITATIONS OF THE HOHFELDIAN PARADIGM

That last section might have been a good place to end, but some unfinished business remains. There is a connection that still needs to be made between some parts of Hohfeld’s work presented in this article. To be sure, we have seen how the critique of errors of transposition relates to—it both enables and motivates—the articulation of Hohfeld’s platform. We have also seen how Hohfeld’s platform relates to and enables decomposition and recomposition. But now comes the question—how are decomposition and recomposition related to the critique of errors of transposition, or are they related at all?

Here, I think we encounter some challenges for a Hohfeldian approach. Two such challenges have been identified by Penner and Schroeder.¹⁵⁶ Both challenges are informed by a central question—one very close to Hohfeld’s critique of errors of transposition. The question is this: When we engage in Hohfeldian decomposition of concepts into discrete jural relations, do we break down the relevant acts in terms of socioeconomic or legal categories? No matter which approach we take, we will encounter difficulties.

A. Indeterminate Individuation and Endless Atomism

If we try to describe the relevant acts (e.g., what *A* can do) in socioeconomic categories, then we run into a kind of individuation problem: what are the acts into which the jural relations break down? Human activity does not break down into a schedule of natural kinds, and we have no clear template available to perform the subdivision. This is a point made by Penner when he attacks the bundle of rights theory in property.¹⁵⁷ Although Penner’s argument is aimed explicitly at the bundle of rights, Hohfeld’s platform itself does not emerge unscathed. Penner writes:

One essential difference between the substantive bundle of rights thesis and a unified concept of property turns on what might be called the question of individuation. There is a difference between breaking a club up into its members and slicing a cake into pieces: Members of a club naturally come in units called persons, but this is not so of the pieces of a cake which can be sliced in any way we wish.¹⁵⁸

154. Hohfeld, 1917, *supra* note 1, at 747 (emphasis added).

155. Hohfeld, 1913, *supra* note 1, at 59 (emphasis added).

156. Penner, *supra* note 133; Schroeder, *supra* note 139.

157. Penner, *supra* note 133.

158. *Id.* at 754 (footnote omitted).

Penner then goes on to say that if the bundle of rights theory is to make sense, then the object of the theory—property—must be like the club, not the cake.¹⁵⁹ The trouble is: unmodified, the bundle theory apprehends property as a cake.¹⁶⁰ We are thus left with a problem of indeterminate individuation.

If, instead of specifying the acts in terms of socioeconomic categories, we use legal categories, we will encounter a similar problem.¹⁶¹ As Schroeder puts it, once we break down a jural composite into a bundle of legal sticks, we will discover that each legal stick, in turn, can be broken down into its own constitutive elements and so on and so forth.¹⁶² This a classic problem with atomism as an analytical strategy: where does it end?

Indeterminate individuation and endless atomism are challenges to the deployment of Hohfeld's platform and to decomposition and recomposition in particular. But they are no more than that. They may frustrate or complicate Hohfeld-inspired projects, but they do not defeat them and they certainly do not impugn Hohfeld's platform itself. Ironically, however, the juxtaposition of Penner's and Schroeder's critiques here does suggest a more disturbing problem to which we now turn.

B. Dedifferentiation and the Legal Concept

The juxtaposition of Penner's and Schroeder's arguments have led us to wonder whether, in pursuing Hohfeldian decomposition, we should state the jural relations in terms of socioeconomic acts or legal acts. This bifurcation is wholly consonant with Hohfeld's critique of errors of transposition: we ought not confuse legal concepts with their object or with the mental and physical events that bring them into being.

But now a pause: why should we think that a distinction between the socioeconomic and the legal can hold? True, legal thinkers, from Hohfeld on, have been intensely preoccupied with keeping the two distinct so as to describe the relations between the two. But now comes a rude and impertinent question: What makes us think that the initial decoupling of the two is itself a plausible move?¹⁶³

I mention this because I have argued that it is not—that this initial decoupling is not plausible. Put differently, it is not clear at all what would allow us to distinguish the legal and the socioeconomic—at least not in any intellectually respectable way.¹⁶⁴ If this is right—if the socioeconomic and the

159. *Id.*

160. And to the extent that we have “club theories” of human activity available—and we do in anthropology, economics, cognitive science, linguistics, etc.—their domains, their reach, depth, and their purchase remain contested.

161. Schroeder, *supra* note 139, at 243.

162. *Id.*

163. See Pierre Schlag, *The Dedifferentiation Problem*, 41 *CONT. PHIL. REV.* 35 (2009) (arguing that “identities previously thought separate and distinct (e.g. law and culture) turn out to be inextricably intertwined,” which means, if we are being serious, that they cannot be decoupled).

164. *Id.*

legal are already inextricably intertwined—then that is truly problematic and not just for bundle of relations theories, nor merely for the application of Hohfeld’s platform, but much more seriously for the integrity, indeed, the very idea, of the legal concept itself.¹⁶⁵ How so? Well, we know that errors of transposition are a kind of analytical mistake.¹⁶⁶ And yet, if the socioeconomic and the legal are inextricably intertwined, then we are dealing with hybrid concepts and errors of transposition will be unavoidable.¹⁶⁷

Can this be?

Yes, it can.

Return for a moment to Cohen’s *Where Is a Corporation?* critique and his Hohfeldian approach.¹⁶⁸ Cohen would like courts facing the jurisdictional issue to avoid an error of transposition—namely, the *sub rosa* investment of the concept of corporation with thinghood or personhood and then the derivation from that concept-packing of conclusions about whether the corporation is present or not in this or that state.¹⁶⁹ Cohen wants the court to face the following legal issue: Is the corporation, as a distinct set of legal relations, the sort of legal identity that should be rendered amenable to suit in foreign states?¹⁷⁰ Cohen recommends that this question be answered by examining the question the way a legislature would, namely by looking to the practices of modern corporations, the way they do business, the difficulties posed for plaintiffs in suing and defendants in defending, and so on and so forth.¹⁷¹ Notice that, at this point, Cohen himself has abandoned the concept of the corporation as a set of legal relations; his concept of corporation now has a socioeconomic presence. We are back to introducing physical socioeconomic aspects into the corporation concept. Concept-packing is back!

Now, I am not offering this illustration to criticize Cohen (though we could go there). Instead, I am offering this point to say, and this bites hard on the practical application of Hohfeld’s approach, that if we are going to figure out what to do, or how to tinker, with a jural composite like the corporation, we will perforce have to operate with a conceptualization that includes not just the legal, but the socioeconomic, the linguistic, the political, and so on. In other words there is no way for our legal analyses to get off the ground, let alone finish, unless the concept of a corporation is infused with content of a socioeconomic, linguistic, political (and so on) character, so that we might have

165. See *id.* at 38 (arguing that the “implications of dedifferentiation are, if taken to heart, catastrophic for the ways in which legal thinkers have usually thought about established theories and research agendas in law”).

166. See *supra* Part III.

167. The reason, of course, is that avoiding errors of transposition would require us to render that which is inextricably intertwined, separate (which, of course, cannot be done). If it could, then, the intertwining would not have been inextricable.

168. See *supra* text accompanying notes 32–41.

169. Cohen, *supra* note 28, at 810.

170. *Id.*

171. *Id.*

some sense of what a corporation is or might be used for. There is quite literally nothing useful to be said about the amenability to suit of a corporation in a foreign state unless we are deploying a concept of a corporation that goes beyond a simple statement of the formal jural relations that make up the corporation. If the corporation is nothing but a set of legal relations, then it might as well be amenable to suit anywhere.

What I would like to urge, then, is a kind of corollary to Hohfeld's caution against errors of transposition. Hohfeld wanted us to avoid conflating a legal concept with its object and with the mental or physical acts that bring it into being. That is surely a worthy endeavor to the extent it can be accomplished. But therein lies the rub: When it comes down to deciding a legal issue, such a stripped-down juridical model—one that strives to liquidate all nonlegal worldly knowledge from the legal concept—is insufficient. And the effort to try to develop a legal concept that is decisionally useful while simultaneously bereft of socioeconomic content seems like an impossible task.

None of this, of course, is a reason to castigate Hohfeld's platform or his analyses. On the contrary, it is the work of Hohfeld, among others, that helps foreground these difficulties for us. It would be truly perverse to blame the current difficulties of the legal concept on one of the thinkers (Hohfeld) who has done so much to reveal its dire state.

My very modest suggestion, then—the Hohfeldian corollary—would be to pay attention to precisely what it is we are already assuming about the identity of the legal concept (e.g., corporation). What socioeconomic, political, and aesthetic markers have we unconsciously “packed” into a legal concept? What intuitive views have we implicitly adopted as to what the legal concept characteristically designates for, what its ostensible referent could be used for, and so on? This is what we should think about. That such an effort will itself unavoidably involve concept-packing of its own is not a decisive objection, but simply an observation on our condition.

XI

CONCLUSION

Hohfeld's platform is useful and thought-provoking. Its great virtue for critical thought, economic analysis,¹⁷² and legal theory is that the aesthetic underlying the Hohfeldian platform frames law as the scene of conflict, mediated and administered through the law's allocation of wealth and power.

172. Coase's most famous work, *The Problem of Social Cost*, bears the imprint of Hohfeld's thought. For one thing, Coase's analysis seems to adopt the bundle of relations notion of legal entitlements. Merrill & Smith, *supra* note 17, at 359–60 (noting that Coase “gave rise to a conception of property as a cluster of in personam rights and hastened the demise of the in rem conception of property”). Additionally, in advocating the conceptualization of factors of production as legal entitlements rather than physical goods, Coase effectively detects in the economist precisely the error of transposition Hohfeld detected in jurists and scholars. More importantly, both Hohfeld and Coase recognize, against their respective disciplinary orthodoxies, that the law is often hugely important in shaping economic outcomes—allocation and distribution.

Equally appealing is that his platform allows the momentary displacement of extant legal concepts and matrices so as to enable thinking to begin.¹⁷³

173. For a demonstration of the classic moves through which American constitutional theory unconsciously repeats its unreflective exercises in circular legitimation, see generally Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1 (1997).