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Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law

Allen Thomas O'Rourke

REFUGE FROM A JURISPRUDENCE OF DOUBT: HOHFELDIAN ANALYSIS OF CONSTITUTIONAL LAW

ALLEN THOMAS O'ROURKE*

I. INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt,"[1] the Supreme Court has said. Courts must therefore clearly delineate the rights, liberties, and other

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* B.A., Columbia University, 2004; J.D., Harvard Law School, 2008; Harvard Law Post-Graduate Research Fellow 2008–2011; Law Clerk to the Hon. Allyson K. Duncan, U.S. Court of Appeals for the Fourth Circuit 2009–2010; Law Clerk to the Hon. Anita B. Brody, U.S. District Court for the Eastern District of Pennsylvania 2008–2009. I thank Professors Scott Brewer, Bradford Clark, Richard Fallon, Charles Fried, Martha Minow, and Joseph Singer for their helpful comments. I also thank the *South Carolina Law Review* editors for their valuable assistance and hard work. Finally, I am most indebted to my wife, Alexandra O'Rourke, for her careful editing, insightful feedback, and constant support. This Article could not have been written without her.

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

constitutional protections that they recognize. Doing so requires carefully defining the term *right* and other concepts referring to constitutional protection. Despite this need for clarity, the Supreme Court has used *right* with many different meanings. For example, in the "'woman's exercise of the right to choose,'"[2] the term implies a freedom to do something; in "[t]he right not to be discriminated against based on one's race,"[3] it implies that someone cannot do something; and in "'the right of privacy must reasonably yield to the right of search,'"[4] the term implies a broad category of constitutional interests. Using *right* without a clear meaning not only confuses legal doctrine but also obscures the nature of constitutional rights. In response, this Article provides an analytical framework designed to resolve such ambiguity and uses that framework to clarify the nature of constitutional rights.

The analytical framework offered here elaborates on Professor Wesley Hohfeld's "canonical" theory about legal rights developed in 1913.[5] He famously noted, "[T]he word 'right' is used . . . indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity."[6] By the twenty-first century, Hohfeldian analysis had become an uncontroversial and widely used theory in private law scholarship.[7] Legal scholars had generally assumed, however, that constitutional law fell outside its scope.[8] Recently, that

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2. Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting *Casey*, 505 U.S. at 877).

3. Johnson v. California, 543 U.S. 499, 510 (2005).

4. Groh v. Ramirez, 540 U.S. 551, 575 (2004) (Thomas, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

5. David Kennedy, *Wesley Hohfeld*, *in* THE CANON OF AMERICAN LEGAL THOUGHT 45, 51 (David Kennedy & William W. Fisher III eds., 2006) [hereinafter THE CANON]. For Hohfeld's seminal work, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*], and Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]. These articles were reprinted in WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 23 (Walter Wheeler Cook ed., 1919). This Article cites to this book.

6. HOHFELD, *supra* note 5, at 71.

7. *See* Kennedy, *supra* note 5, at 51 (deeming Hohfeld's article "canonical"); *see also* Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 115 (1989) (Kennedy, J., dissenting) (mentioning "the familiar Hohfeldian terminology").

8. *See* John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 340 (1998) (calling Hohfeld "a theorist of private law"). David Kennedy and William Fisher, III, review the secondary literature about Hohfeld's theory in *The Canon on American Legal Thought*. *See* THE CANON, *supra* note 5, bibliog. at 52–54. Their account indicates that from the 1910s through the 1930s, scholars extensively applied Hohfeld's theory to common law topics. *See id.* at 52–53 (citing Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917)). Furthermore, their account shows that when the Critical Legal Studies movement revived Hohfeld's theory after the Second World War, scholars continued to confine Hohfeldian analysis to common law topics. *See id.* at 53 (citing Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient*, 8 HOFSTRA L. REV. 711 (1980); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV.

assumption may have begun to change. Scholars are now invoking Hohfeld with surprising frequency in discussing constitutional issues.[9] They are doing so, however, without tackling the essential question of how Hohfeldian analysis, although intended and long understood to clarify only private law, can sensibly apply to constitutional law.[10] This Article answers that question and thereby lights the way for broader and more effective use of Hohfeldian analysis.

Part II explains and further develops the theory and operation of Hohfeldian analysis, providing the foundation necessary to apply Hohfeldian analysis to constitutional law. Part III then demonstrates Hohfeldian analysis of constitutional law and tries to clarify the nature of constitutional rights.

1685 (1976)). However, Kennedy and Fisher never mention any scholarship applying Hohfeldian analysis to constitutional law. *See id.* at 52–54.

9. *See, e.g.*, Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 n.8 (2008) (citing Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 5) (applying Hohfeld's framework to the right to procreate); Samuel C. Rickless, *The Right to Privacy Unveiled*, 44 SAN DIEGO L. REV. 773, 775–79 (2007); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 914 (2008) (applying Hohfeld's framework to the First Amendment); Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 232 (2008) (applying Hohfeld's framework to legislation enacted pursuant to the Commerce Clause); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 256–57 (2008) (citing Hohfeld, *Fundamental Legal Conceptions*, *supra* note 5; Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 5) (stating that the U.S. government possesses Hohfeldian rights but not constitutional rights). Before these, very few articles applied Hohfeldian analysis to constitutional law. *See, e.g.*, Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1547–48 (1995) (applying Hohfeld's framework to the allocation and reservation of powers set forth in the Constitution); Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038, 1048–49 (1992) (considering the application of Hohfeld's framework to the First Amendment to derive the constitutional right of education); William T. Mayton, *"Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 373 (1994) (citing Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 5) (applying Hohfeld's framework to the constitutional right of free speech); Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 HOW. L.J. 913, 921–22 (1985) (citing Hohfeld, *Fundamental Legal Conceptions*, *supra* note 5) (applying Hohfeld's framework to the Ninth Amendment).

10. Only one other scholar has tried to answer this question. *See* H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 (1988) [hereinafter Morse, *Applying the Hohfeld System*]; H. Newcomb Morse, *The Hohfeldian Approach to Constitutional Cases*, 9 AKRON L. REV. 1 (1975); H. Newcomb Morse, *The Hohfeldian Place of Power in Constitutional Cases*, 7 CAP. U. L. REV. 397 (1978); H. Newcomb Morse, *The Hohfeldian Place of Right in Constitutional Cases*, 6 CAP. U. L. REV. 1 (1976). Professor Morse applied Hohfeldian analysis to constitutional law based on the Constitution's use of specific terms that were later used by Hohfeld. *See* Morse, *Applying the Hohfeld System*, *supra*, at 639–40 (showing "a nexus between Hohfeldian logic and constitutional construction" based on the Constitution's use of "Hohfeldian gravamen terms—rights, privileges, powers and immunities"). This Article provides a better approach, applying Hohfeldian analysis to constitutional law based on the conceptual structure underlying both.

II. HOHFELDIAN ANALYSIS

Wesley Newcomb Hohfeld was a professor at Stanford University and later Yale University who published only a few articles before his premature death in 1918.[11] His most famous article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, became a canonical landmark in American jurisprudence. For more than a decade after its publication, legal scholars vigorously debated the article's implications for jurisprudence and private law.[12] The resulting body of literature has been called the "Hohfeldian debate."[13] Since then, private law scholars have continued drawing on Hohfeldian analysis—for instance, with the familiar "bundle of rights" metaphor in property law.[14] Also, moral and legal philosophers have commonly invoked Hohfeld in discussing general theories of rights.[15] In short, Hohfeldian analysis "has become a staple of academic legal culture."[16]

The first two subparts below set forth basic Hohfeldian analysis. Part II.A explains how it operates, and Part II.B shows how it can clarify legal issues. The other two subparts further develop Hohfeldian analysis in two ways. Part II.C clarifies its conceptual structure, and Part II.D explains why it can describe constitutional law.

A. The Fundamental Concepts

Hohfeld observed that important legal terms, including *right* and *duty*, had no agreed meaning and thereby caused muddled analysis.[17] Professor Karl Llewellyn remarked that "[t]his invites confusion, it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable."[18] In particular, Hohfeld noted four different meanings of the term *right*.[19] To resolve such ambiguity, he identified eight

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11. *See* Kennedy, *supra* note 5, at 47.

12. *See* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 989 n.22 (citing sixty-six sources about "the legal rights debate" published after Hohfeld's article).

13. *Id.* at 989.

14. *See* Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 252–53 (2007).

15. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 199 (1980) (using Hohfeld's framework to discuss "human rights"); Matthew H. Kramer, *Introduction* to A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 1, 2 (1998) (noting that the authors of essays in the book use the framework developed by Hohfeld to discuss the nature of moral rights); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 39 (1990) (citing HOHFELD, *supra* note 5) (using Hohfeld's framework to discuss "the moral significance" of rights).

16. Kennedy & Michelman, *supra* note 8, at 751.

17. Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 239 (2002).

18. K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 84 (1960).

19. *See* HOHFELD, *supra* note 5, at 36–37, 71.

"fundamental" concepts that allow one to describe any legal position.[20] These concepts are duty, claim, liberty (or privilege), no-claim, power, liability, disability, and immunity.[21] Hohfeld explained how these concepts logically relate to one another through correlation and opposition.[22] These concepts and the analytical framework arising from them are best explained using hypothetical examples.

Suppose Abe and Ben make a contract with one another in which Abe promises to pay Ben ten dollars, and in exchange, Ben promises to mow Abe's lawn. Because the contract says that Ben must mow Abe's lawn, Ben has a *duty*. Abe, in turn, has a *claim* against Ben. Specifically, Abe has a claim that Ben mow his lawn. Abe's claim and Ben's duty *correlate*. This means that Abe's claim entails Ben's duty. The two concepts of claim and duty correlate because they describe two sides of one relationship, just as "parent" and "child" go together because they describe two sides of one relationship. This relationship may be expressed as "Ben shall mow the lawn for Abe."

Assuming that Ben never promised to water Abe's plants, Ben does not have a duty to water them. He thus has a *liberty* not to water Abe's plants.[23] Duty and liberty are *opposite* concepts in that one negates the other.[24] In other words, where someone lacks a duty to perform some action, that person has a liberty not to perform the action.[25] The relationship arising from Ben's liberty may be expressed as "Ben may decline to water the plants for Abe." In this situation, what concept describes Abe's legal position relative to Ben? Because Ben lacks a duty to water Abe's plants, Abe must lack a claim that Ben water his plants. Because no term existed to describe Abe's position, Hohfeld invented one that seemed to make sense.[26] This Article uses the term *no-claim*.[27] Thus, Ben's liberty not to water the plants correlates with Abe's no-claim that Ben water his plants.

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20. *Id.* at 36.

21. *Id.* at 36–38.

22. *Id.* at 36.

23. This Article uses the term *liberty* rather than *privilege*. For an analysis of these terms, see generally Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129, 1131–35 (1956) ("In the present discussion, the concept of absence of duty is being expressed by 'liberty' . . . instead of Hohfeld's 'privilege.'"). *See also* HOHFELD, *supra* note 5, at 42 ("A 'liberty' considered as a legal relation (or 'right' in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege . . . ."). While *liberty* and *privilege* "occupy the same structural position" in Hohfeld's theory, "[t]he usual distinction is that liberties are acts that are completely unregulated and privileges are exceptions to generally imposed duties." Singer, *supra* note 12, at 987 n.14.

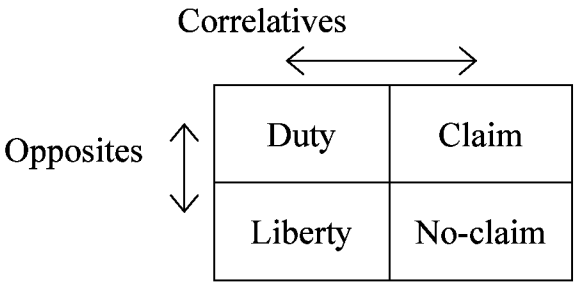
24. *See* HOHFELD, *supra* note 5, at 38.

25. *See id.* at 39.

26. *See id.* at 38–39 (adopting the term *no-right*).

27. Rather than using Hohfeld's terms *right* and *no-right*, this Article uses the terms *claim* and *no-claim*. Hohfeld himself observed that *right* carried a broader, popular connotation and a narrower, technical denotation. *Id.* at 36. Because the broader, popular usage seems to predominate today, this Article has abandoned the narrower, technical one to avoid confusion. Hohfeld foresaw this possibility and sanctioned the choice of *claim* to indicate the term *right* used narrowly. *Id.* at 38.

The discussion thus far has identified four concepts and illustrated how they interrelate by correlation and opposition. The following diagram shows these concepts' interrelation:



Hohfeld observed that people often confused the distinction between *claim* and *liberty*.[28] Indeed, Professor Joseph Singer said that clarifying this distinction was Hohfeld's "central goal."[29] In particular, Hohfeld was concerned with the tendency to believe that a person's liberty entails a claim that other people not interfere with the exercise of that liberty.[30] Professor Glanville Williams provided the following clarification:

> You and I are walking together when we see a gold watch lying in front of us. I have a liberty to run forward and pick it up. . . . But you may run faster than I and pick it up first; this will de facto be an interference with me in the exercise of my liberty, but will not be a tort or other legal wrong to me. My liberty is a bare liberty unsupported by a [claim] in this particular respect.[31]

As Williams's example implies, one may distinguish between *claim* and *liberty* by determining whether interfering with the concept's protection violates

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28. *Id.* at 39 (using the terms *right* and *privilege* instead of *claim* and *liberty*).

29. Singer, *supra* note 12, at 987.

30. HOHFELD, *supra* note 5, at 43 ("[A] privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against 'third parties' as regards certain kinds of interference. . . . The only correlative logically implied by the privileges or liberties in question are the 'no-rights' of 'third parties.' It would therefore be a *non sequitur* to conclude from the mere existence of such liberties that 'third parties' are under a *duty* not to interfere, etc.").

31. Williams, *supra* note 23, at 1143–44. This example calls to mind a classic case of property law, *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805). Post was hunting a fox using hounds and had almost caught it when Pierson arrived and interfered by catching and killing the fox before Post could. *Id.* at 175. The court found that Pierson's interference was permissible. *Id.* at 179. Post thus had a liberty to kill the fox but did not have a claim that Pierson not kill the fox before him. *See id.* If Post had such a claim, then Pierson would have violated the correlative duty.

a duty.[32] This approach works because claims always correlate with duties, but liberties never do.[33]

The four concepts discussed thus far share the characteristic of concerning only actual physical behavior or primary conduct.[34] They may thus be called *primary concepts*. These concepts describe situations where the law forbids, permits, or requires physical actions or inactions. The remaining four concepts do not share this characteristic and may be called *secondary concepts*. Unlike the first four, these concepts relate to whether by doing certain actions a person changes the law. To illustrate, whereas primary concepts describe whether a couple may stand before a priest and say "I do," secondary concepts describe whether by doing this the couple creates a legal marriage. Primary concepts describe whether a person may utter the words "I promise to mow your lawn," but secondary concepts describe whether by uttering those words the person creates a legal duty.

The four secondary concepts interrelate just like the primary ones.[35] Recall Abe and Ben's contract mentioned above. Before making the contract, Ben had a *power* to create his duty to mow Abe's lawn. He exercised this power by accepting Abe's offer to pay ten dollars in exchange for Ben's promise to mow the lawn. Because Ben's duty correlated with Abe's claim, Ben also had a power to create Abe's claim by accepting the offer. In turn, Abe was liable or subject to Ben changing Abe's legal position from no-claim to claim. Abe thus had a *liability* that correlated with Ben's power.

Suppose Ben wants to create for Abe a duty to steal a car, but the state in which Ben and Abe live does not allow such a contract. While Ben may want Abe to promise to steal a car in exchange for Ben's promise to mow Abe's lawn, Ben lacks the power to make this arrangement a legal contract. Ben thus has a *disability* to create the desired duty for Abe. Disability and power are opposite concepts—like liberty and duty.[36] Because Ben has a disability to create a duty for Abe to commit a crime, Abe cannot have a liability to Ben creating this duty for him. Abe thus has an *immunity* from Ben creating the duty. The following diagram illustrates how the secondary concepts interrelate:

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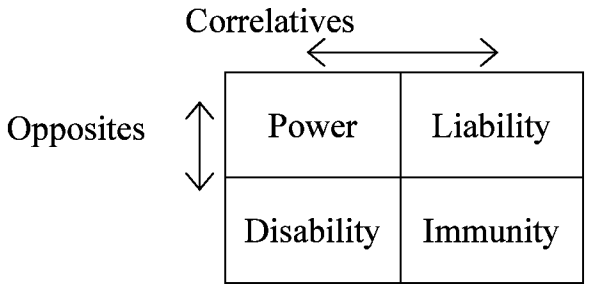
32. *See* Williams, *supra* note 23, at 1143–44.

33. *See* HOHFELD, *supra* note 5, at 36.

34. *Cf.* Teague v. Lane, 489 U.S. 288, 307 (1989) (holding that on habeas review "a new [constitutional] rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" (quoting Mackey v. United States, 401 U.S. 667, 692 (1971))).

35. HOHFELD, *supra* note 5, at 36.

36. *Id.*



These eight concepts are the heart of Hohfeldian analysis.[37] They allow one to describe any legal position that a person can occupy.[38] Hohfeld remarked, "If a homely metaphor be permitted, these eight conceptions . . . seem to be what may be called 'the lowest common denominators of the law.'"[39]

B. Application to Case Analysis

Using Hohfeld's framework, one can identify and define people's relative positions under the law and the legal issues involved in any dispute. In particular, Hohfeldian scholars have observed that a judge deciding a case must determine which Hohfeldian concept describes each litigant's relative position.[40] The following two sections illustrate this point using actual cases that are paradigmatic of private law.

1. O'Brien v. Cunard S.S. Co.[41]

Mary O'Brien was a passenger aboard a steamship from Queenstown to Boston.[42] As the ship neared Boston, a physician began vaccinating the passengers.[43] O'Brien never expressly requested a vaccination, but she stood in line with about 200 women awaiting vaccinations.[44] When her turn came, O'Brien presented her apparently unvaccinated arm to the physician, and he vaccinated her.[45] She later sued Cunard Steam-Ship Company in the Superior Court of Suffolk County, Massachusetts, alleging that Cunard's physician assaulted her by vaccinating her against her will.[46] After the Superior Court

37. *See id.*
38. *See* Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 229–30 (1921).
39. HOHFELD, *supra* note 5, at 63–64.
40. *See* Singer, *supra* note 12, at 992–93.
41. 28 N.E. 266 (Mass. 1891).
42. *Id.* at 266.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

found in Cunard's favor, O'Brien appealed to the Supreme Judicial Court of Massachusetts.[47]

O'Brien's allegation implies that Cunard's physician had a duty not to vaccinate her, she had a correlative claim against vaccination, and the physician violated his duty by giving her the vaccination. The court reasoned, however, that "[i]f the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been."[48] Accordingly, while Cunard's physician may have had the mentioned duty, O'Brien had a power to change that duty into a liberty by giving her consent.[49] The factual question for the court thus became whether she had exercised her power before the moment when Cunard's physician vaccinated her.[50]

Finding that O'Brien had consented, the court concluded that Cunard was not liable to pay damages.[51] Thus, the relevant legal relation involved a liberty and a no-claim. Cunard's physician had a liberty to vaccinate O'Brien, and O'Brien had a no-claim against vaccination.

2. Feinberg v. Pfeiffer Co.[52]

Anna Feinberg worked for the Pfeiffer Company for decades.[53] One day, Pfeiffer's board of directors "'[r]esolved . . . that she be afforded the privilege of retiring from active duty in the corporation at any time she may elect to see fit so to do upon retirement pay of $200.00 per month, for the remainder of her life.'"[54] When Feinberg retired, Pfeiffer began sending her monthly $200 checks, but after two changes in management, the company reduced these payments to $100.[55] Feinberg brought an action in the Circuit Court of St. Louis, Missouri, requesting an order for Pfeiffer to pay the amount owed.[56] After the circuit court found in Feinberg's favor, Pfeiffer appealed to the St. Louis Court of Appeals.[57]

Feinberg argued that, by passing the resolution, Pfeiffer's board had imposed a duty on Pfeiffer to pay her $200 monthly.[58] She would thus have a correlative claim to those payments. Pfeiffer responded that because the resolution did not satisfy the elements required to form a contract, Pfeiffer never had such a duty.[59] Instead, it said that Feinberg had merely been receiving $200

47. *Id.*
48. *Id.*
49. *See id.*
50. *See id.*
51. *See id.* at 266.
52. 322 S.W.2d 163 (St. Louis Ct. App. 1959).
53. *Id.* at 164.
54. *Id.* at 165.
55. *Id.*
56. *Id.* at 164.
57. *Id.*
58. *See id.* at 166–67.
59. *See id.* at 167.

gifts.[60] The court of appeals agreed with Pfeiffer on this question, reasoning that while Pfeiffer had a power to contract with Feinberg, the alleged duty to pay $200 monthly could not have resulted from the resolution because Feinberg never gave any consideration in exchange for the promise.[61] Thus, under these circumstances, the legal relation between Pfeiffer and Feinberg involved a liberty and a no-claim.

The court further observed, however, that Feinberg had relied to her detriment on Pfeiffer's promise by stopping work at an age when she could not easily find another job.[62] Under the doctrine of promissory estoppel, Feinberg's reliance effectively exercised a power to create the contract with Pfeiffer.[63] Viewing her behavior in this light, the court affirmed the lower court's order that Pfeiffer pay damages to Feinberg.[64] This order created a duty for Pfeiffer and a correlative claim for Feinberg.

C. The Underlying Structure

Part II.A and Part II.B above explain and demonstrate Hohfeld's original theory. Although widely accepted, his theory leaves certain questions unanswered. This did not prevent scholars from using Hohfeldian analysis to clarify private law, but the conceptual structure underlying Hohfeldian analysis must be clarified before the analytical framework may be extended to constitutional law. Accordingly, this subpart develops Hohfeld's original theory in three ways. Section 1 clarifies the structure of legal relations. Section 2 accounts for the principle of correlativity. Finally, section 3 explains two ways in which Hohfeldian concepts may be deduced from one another.

1. The Legal Relation

Claim and duty, like other pairs of correlative concepts, must go with one another because they describe two sides of one relationship.[65] Hohfeldian analysis calls this a *legal relation*.[66] For example, the legal relation between Abe and Ben may be expressed as "Ben shall mow the lawn for Abe." Although legal relations are central to his framework, Hohfeld never discussed their basic structure. The following observations clarify that structure.

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60. *Id.*
61. *Id.*
62. *Id.* at 168–69.
63. *See id.* at 168.
64. *Id.* at 168–69.
65. HOHFELD, *supra* note 5, at 38 (quoting Lake Shore & M.S. Ry. v. Kurtz, 37 N.E. 303, 304 (Ind. App. 1894)).
66. *Id.* at 36. This Article uses *legal relation* rather than *jural relation*. Hohfeld used both terms interchangeably. *Id.* at 36–38. *Legal relation* appears more commonly today. *See, e.g.*, 28 U.S.C. § 2201 (2006) ("In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party . . . .").

Professor John Finnis observed that every legal relation has three components.[67] It contains a description of conduct or behavior, which Finnis called an "act-description."[68] A legal relation also contains two positions, each of which may be described using a Hohfeldian concept. In the legal relation, "Ben shall mow the lawn for Abe," for example, Ben and Abe occupy the two positions and "mow the lawn" is the act-description. These positions may be described by the concepts of duty and claim.

Next, Professors Henry Hart and Albert Sacks distinguish between concepts describing the position of someone whom the law addresses directly and other concepts.[69] In the legal relation, "Ben shall mow the lawn for Abe," for example, the law addresses Ben directly by regulating his conduct. By contrast, the law addresses Abe only indirectly in that Abe benefits from the regulation. Duty, liberty, power, and disability all describe the position of someone whom the law addresses directly, whereas claim, no-claim, liability, and immunity all describe the position of someone whom the law addresses indirectly.[70]

These observations may be combined as follows. In any legal relation, the person whom the law addresses directly occupies one position and the person whom the law addresses only indirectly occupies the other position. This Article uses the term *active position* to describe the position occupied by someone whom the law addresses directly and the term *passive position* to describe the other position. These terms are apt because correlative Hohfeldian concepts are like the active and passive voices of a statement.[71] Professor Max Radin explained:

> A's [claim] and B's duty . . . are not separate, however closely connected, things at all. They are not even two aspects of the same thing. They are two absolutely equivalent statements of the same thing. B's duty does not follow from A's right, nor is it caused by it. B's duty is A's right. The two terms are as identical in what they seek to describe as the active and passive form of indicating an act; "A was murdered by B"; or "B murdered A." The fact that A and B are wholly distinct and separate persons must not be allowed to obscure the fact that a relation between them is one relation and no more.[72]

In summary, a legal relation's basic structure includes a description of conduct or behavior and two complimentary positions that may be described

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67. FINNIS, *supra* note 15, at 199.

68. *Id.* Another name for the act-description could be "the elements," as in "the elements that must be proved to establish liability."

69. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 128–29 (Foundation Press 1994) (1958).

70. *See id.*

71. Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1150 (1938).

72. *Id.*

using Hohfeldian concepts. These three components are the active position, act-description, and passive position.

2. *The Principle of Correlativity*

Part II.A above described how Hohfeldian concepts correlate, but a deeper question remains about the principle of correlativity. Where a person has a particular duty with a certain act-description, how does one determine who has a correlative claim? If Carl has a duty to pay Dana ten dollars, for example, who holds a correlative claim? The intuitive answer is Dana, but suppose that she never made a contract and instead her mother, Ella, promised to mow Carl's lawn in exchange for Carl's promise to give Dana ten dollars. Because of Dana's youth, moreover, only Ella can enforce the contract by suing Carl for nonperformance. The question thus becomes more difficult.

This question parallels a philosophical debate about rights that clarifies how Hohfeldian analysis operates.[73] The interest or benefit theory states that a person holds a right when and only when the right protects the person's interest or benefits the person.[74] By contrast, the will or choice theory states that a person holds a right when and only when the person can demand or waive its enforcement.[75] Although these theories address what *right* means philosophically and do not directly implicate this Article,[76] the benefit theory suggests an answer to the question of who holds a claim that correlates with a given duty. One should consider who benefits from the duty's performance to determine who holds a correlative claim.[77]

This observation is only a first step, however, because describing legal scenarios requires a more elaborate formula. For example, although giving Dana ten dollars may make her happy and thus please her sister, Fanny, one would not say that Fanny holds a claim. This outcome can be avoided by including only intended benefits. Ella elicited the promise from Carl for her own gratification and to benefit Dana, but neither Ella nor Carl considered the sister. Thus, only

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73. *See* Kramer, *supra* note 15, at 2–5 (presenting discussions on both sides of the debate); NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 154–66 (1982) (discussing competing theories of rights in the context of children's rights).

74. *See* Matthew H. Kramer, *Rights Without Trimmings*, *in* A DEBATE OVER RIGHTS, *supra* note 15, at 61–62.

75. *See id.* at 64–65 ("In effect, the advocates of the Will Theory contend that rights and claims are not equivalent. Unlike Hohfeld, they apply the label of 'rights' only to claims that are coupled with genuine powers of enforcement/waiver on the part of the claim-holders. . . . A champion of the Interest Theory . . ., by contrast, is happy to join Hohfeld in using 'claim' and 'right' interchangeably.").

76. *See id.* at 65 ("As far as Hohfeld's analytical scheme is concerned, . . . the difference between the Interest Theory and the Will Theory is simply a matter of labelling.").

77. *See* Layman E. Allen, *Some Examples of Using the Legal Relations Language in the Legal Domain: Applied Deontic Logic*, 73 NOTRE DAME L. REV. 535, 536–37 (1998) (using a benefit theory formula to describe correlativity between duties and claims).

Dana and Ella would hold claims. This approach seems most intuitive and provides an effective guide for legal analysis. Thus, the principle of correlativity may be explained using the following formula: A person has a claim correlative with a particular duty when and only when the duty was intended to benefit that person.

This formula accords with how the Supreme Court has treated the concept of right. The Court held that to enforce a federal statute under 42 U.S.C. § 1983,[78] "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[79] The Court then identified three factors to determine whether a particular statutory provision creates a right.[80] The first one states, "Congress must have intended that the provision in question benefit the plaintiff."[81]

3. *Deduction of Legal Concepts*

Hohfeldian analysis enhances legal reasoning by allowing one to deduce one legal concept from another. This can be done in two different ways, although Hohfeld only discussed one.[82] Both are important for applying Hohfeldian analysis to constitutional law. First, the mode of deduction that Hohfeld noted arises from the principle of correlativity just explored.[83] In short, whenever one knows the concept that describes one position in a legal relation and the relevant act-description, one can infer the concept that describes the other position in the legal relation.

Second, the other mode of deduction arises from the practical implication of certain concepts. Suppose Gus wants to contract with Hanna, but Hanna has a disability to make binding contracts because she is a minor. Given the principle just discussed, Hanna's disability correlates with an immunity for Gus. But Hanna's disability also causes Gus, practically speaking, not to have the opportunity to enter into a binding contract with Hanna. Given this implication, Hanna's disability causes Gus to have a disability to enter a binding contract with Hanna. One may thus deduce Gus's disability from Hanna's disability even though the two concepts describe positions in separate legal relations.

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78. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

79. Blessing v. Freestone, 520 U.S. 329, 340 (1997) (citing Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 106 (1989)).

80. *Id.* at 340–41 (citing Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 430–32 (1987)).

81. *Id.* at 340 (citing *Wright*, 479 U.S. at 430). Embracing the principle of correlativity, the third factor states, "[T]he statute must unambiguously impose a binding obligation on the States." *Id.* at 341.

82. *See* HOHFELD, *supra* note 5, at 38–42.

83. *See id.*

D. Extension to Constitutional Law

Although it became widespread in private law, scholars conspicuously avoided using Hohfeldian analysis to describe constitutional law.[84] One reason may have been an assumption that Hohfeldian analysis, focusing on bilateral relationships, cannot accommodate matters of public law involving more complex relationships—where branches of government create and enforce legal relations between private entities. Another reason may have been that scholars saw an incommensurable difference between contract or tort rights and constitutional rights designed to prevent government oppression. Whatever the reason, this subpart explains how in theory Hohfeldian analysis can indeed describe constitutional law. Section 1 shows the connection between Hohfeldian analysis and an accepted distinction among legal rules, and section 2 thereby extends Hohfeld's framework to constitutional law.

1. Primary and Secondary Rules

Professor H.L.A. Hart famously explained law's structure in *The Concept of Law*.[85] His argument begins with an objection to John Austin, who maintained that laws are commands backed by force.[86] Specifically, Austin believed that laws are general, enduring, and imperative statements made by a sovereign and backed by threats of coercive force.[87] "Stop at red lights" and "pay taxes" are classic examples. Hart discredited Austin's theory by pointing out the counterexample of contract law.[88] Suppose that state law requires all contracts to be signed by two witnesses, but Ike and Jen only have one witness sign their written agreement. Although they have clearly failed to comply with the law, Ike and Jen will not face any coercive force or punishment. Instead, they simply fail to make a contract. To explain this outcome, Hart pointed out that contract law differs in form from the traffic-law and tax-law examples that illustrate Austin's theory.[89] The legal rule "pay taxes" commands certain conduct and threatens punishment, whereas the legal rule "contracts must be signed by two witnesses" merely specifies the steps necessary to accomplish a certain legal result.

Every law takes either one form or the other. Hart called laws that take the first form "primary" rules.[90] Under primary rules, "human beings are required to do or abstain from certain actions, whether they wish to or not."[91] Examples

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84. *See supra* note 8.
85. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1997).
86. *Id.* at 18–20.
87. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 285 (Wilfred E. Rumble ed., Cambridge Univ. Press 1995) (1832).
88. HART, *supra* note 85, at 27–28.
89. *See id.*
90. *Id.* at 81.
91. *Id.*

include "stop at red lights," "pay taxes," and "an inviter shall exercise reasonable care toward an invitee," as well as the legal relations "Ike shall pay Jen" and "Jen shall keep off Ike's land." Hart called laws that take the second form "secondary" rules.[92] He explained that secondary rules "provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations."[93] Examples include rules specifying the steps necessary to marry, to make wills or contracts, to form partnerships or corporations, and to appoint agents.[94] Hart also indicated that rules specifying the steps necessary to make law are secondary.[95]

Hohfeld's eight concepts map neatly onto Hart's conceptual distinction between primary and secondary rules. Hart's distinction leads to four possible scenarios in law: (1) a primary rule mandates or forbids a physical act; (2) a primary rule permits a physical act; (3) a secondary rule enables a legal act; and (4) a secondary rule does not enable a legal act.[96] These scenarios correspond to the four pairs of correlative concepts identified by Hohfeld. The following diagram illustrates how:

Type of rule		*Type of relation*
Primary rule binds conduct	⟶	Duty / Claim
Primary rule does not bind conduct	⟶	Liberty / No-claim
Secondary rule enables conduct	⟶	Power / Liability
Secondary rule does not enable conduct	⟶	Disability / Immunity

92. *Id.*
93. *Id.*
94. *See id.* at 27–28.
95. *See id.* at 31–32 ("If a measure before a legislative body obtains the required majority of votes and is thus duly passed, the voters in favour of the measure have not 'obeyed' the law requiring a majority decision nor have those who voted against it either obeyed or disobeyed it: the same is of course true if the measure fails to obtain the required majority and so no law is passed.").
96. *Cf.* Corbin, *supra* note 38, at 228 (describing the four possible predictions about law delineated by Hohfeld's correlative pairs: that the government will or will not act against someone and that an individual will or will not influence the government into action).

Hart himself seemed to recognize this correspondence, stating that "[r]ules of the first type impose duties; rules of the second type confer powers, public or private."[97] Professor Lon Fuller explicitly recognized the connection: "The Hohfeldian analysis discerns four basic legal relations . . . . [T]he basic distinction on which the whole system is built is that between right–duty and power–liability; this distinction coincides exactly with that taken by Hart."[98]

2. The Structure of Constitutional Law

Given how Hohfeld's concepts map onto Hart's theory, the remainder of Hart's theory shows why Hohfeldian analysis can describe constitutional law. Hart maintained that our concept of law arises from a union of primary and secondary rules.[99] He explained why using a thought experiment in which one imagines a society with only primary rules.[100] Hart observed that people in this society would encounter three distinct problems.[101] They would have trouble (1) determining whether a particular rule had been recognized as binding, (2) amending their rules to address changed circumstances, and (3) resolving disputes about whether a person had violated a particular rule.[102] This society would also lack efficient mechanisms for determining what punishments to impose when a person violated a rule.[103]

Hart observed that the solution to each problem is to supplement the society's primary rules with secondary ones.[104] To resolve the first problem, the society would need a secondary rule to specify how to make a valid rule.[105] Hart called this the "rule of recognition."[106] Examples include "laws are what have been carved on the obelisk" and the Bicameralism and Presentment Clauses of the Constitution.[107] To resolve the second problem, the society would need secondary rules to specify how to amend existing rules.[108] Hart called these "rules of change."[109] Examples include "the king may amend any rule by public announcement" and the Amendment Clause.[110] To resolve the third problem, the

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97. HART, *supra* note 85, at 81.

98. LON L. FULLER, THE MORALITY OF LAW 134 n.50 (rev. ed. 1969).

99. HART, *supra* note 85, at 98.

100. *Id.* at 91–98. To make it more feasible, assume that these rules restricted "violence, theft, and deception," and assume that few rebelled against them. *Id.* at 91–92.

101. *Id.* at 92–94.

102. *Id.*

103. *Id.* at 93.

104. *Id.* at 94.

105. *Id.* at 94–95.

106. *Id.* at 94.

107. U.S. CONST. art. I, § 7, cls. 2–3 (specifying how to make laws); *see* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 625–26 (1987) (applying Hart's concept of the rule of recognition to the U.S. legal system).

108. HART, *supra* note 85, at 95.

109. *Id.*

110. U.S. CONST. art. V (specifying how to amend the Constitution).

society would need secondary rules to specify how to determine whether a person had broken the law and what punishment should be imposed.[111] Hart called these "rules of adjudication."[112] Examples include "the queen may determine whether a rule has been violated and what punishment shall apply" and Article III of the Constitution.[113]

Having shown how our concept of law requires the combination of primary and secondary rules, Hart concluded, "[I]t is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist."[114] Indeed, rules of recognition, change, and adjudication form the basic structure of constitutional law. Given how Hohfeld's concepts map onto Hart's theory, that constitutional law consists of primary and secondary rules entails that Hohfeldian analysis can describe constitutional law.

One caveat must be made before going forward. This section's argument does not require accepting Hart's positivist theory, which has been subject to criticism by scholars such as Professors Ronald Dworkin[115] and Fuller.[116] Specifically, while this section relies on Hart's uncontroversial distinction between primary and secondary rules, one need not accept his broader argument separating law and morality.[117] Indeed, the analytical framework offered here may coexist with the critiques of Hart's positivism by Dworkin[118] and Fuller.[119]

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111. HART, *supra* note 85, at 96–97.

112. *Id.* at 97.

113. U.S. CONST. art. III (creating the Supreme Court to adjudicate certain disputes and empowering Congress to create lower courts).

114. HART, *supra* note 85, at 98.

115. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 60 (1977). Dworkin maintains that "hard cases"—cases where settled law does not clearly dictate the proper outcome—reveal the error of positivism. *Id.* at 81. According to Hart's positivist theory, argues Dworkin, when a judge decides a hard case he creates—or "legislate[s]"—a new legal rule based on considerations of policy and then applies it to the case's facts. *Id.* By contrast, Dworkin maintains that a judge deciding a hard case discerns a litigant's rights outside of positive law and then applies them to the case's facts. *Id.* He concludes that by reaching beyond positive law, judges commonly and appropriately draw upon independently existing rights to decide hard cases. *See id.* This would undermine Hart's thesis that all laws are by nature positive and created according to the rule of recognition.

116. *See* FULLER, *supra* note 98, at 133–34. Fuller agrees with calling the rule of recognition a secondary rule, *see id.* at 137, but he disagrees with Hart's theory in that "Hart seems to read into this characterization the further notion that the rule cannot contain any express or tacit provision to the effect that the authority it confers can be withdrawn for abuses of it," *id.*

117. *See generally* HART, *supra* note 85, at 185 (arguing that there is no necessary connection between morality and the validity of a law).

118. This Article's conceptual theory of rights may in two senses coexist with Dworkin's critique of Hart's theory. For discussion of Dworkin's critique, see *supra* note 115. First, judges deciding hard cases based on Dworkin's proposed criteria (indeed, according to any criteria) declare legal relations in determining the cases' outcomes. Second, Dworkin maintains that such judges consider "principle" rather than policy to make their decisions. DWORKIN, *supra* note 115, at 83–84. He defines *principle* by saying that "[a]rguments of principle justify a political decision by showing that the decision respects or secures some individual or group right." *Id.* at 82. Dworkin's notion of

III. APPLICATION TO CONSTITUTIONAL LAW

Part II explained Hohfeld's framework and why it extends to constitutional law. In turn, this part actually demonstrates Hohfeldian analysis of constitutional law. Part III.A and Part III.B discuss the Constitution's text and four noteworthy decisions by the Supreme Court using Hohfeldian analysis. Part III.C then explores the nature of constitutional rights based on the foregoing discussion. Overall, this part demonstrates how Hohfeld's framework can improve constitutional analysis, especially as regards constitutional rights.

A. The Text

The Constitution vests sovereign power in three branches of government. The Preamble reveals the ultimate source of authority for this: "We the People of the United States, in Order to form a more perfect Union . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[120] Based on this authority, the Constitution vests "[a]ll legislative Powers herein granted" in Congress,[121] "[t]he executive Power . . . in a President,"[122] and "[t]he judicial Power . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[123] These vesting clauses are fundamental building blocks of our legal system because they articulate basic rules of recognition and adjudication. They also show how the Constitution consists mostly of secondary rules that create powers for particular branches of government.[124] These powers correlate with liabilities for "We the People . . . and our Posterity."[125] Furthermore, express exceptions to the vesting clauses and the Constitution's failure to enumerate certain powers create disabilities for the federal government that correlate with immunities for the people.[126]

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principle may be compared with what this Article has called a *rule* or otherwise may be dissected conceptually using the analytical framework developed here. Indeed, Dworkin implicitly recognized the correlation of concepts underlying principles while discussing a particular hard case: "If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him." *Id.* at 85.

119. *See* FULLER, *supra* note 98, at 134 ("Hart begins with a distinction between rules imposing duties and rules conferring legal powers. So far there can be no complaint. The distinction is a familiar one, especially in this country where it has served as the keystone of the Hohfeldian analysis.").

120. U.S. CONST. pmbl.

121. *Id.* art. I, § 1.

122. *Id.* art. II, § 1, cl. 1.

123. *Id.* art. III, § 1.

124. *See, e.g., id.* art. I, § 8 (describing specific powers of Congress).

125. *Id.* pmbl.

126. In this Article, "the people" refers to "We the People . . . and our Posterity." *Id.*

James Madison proposed to Congress on June 8, 1789, what ultimately became the Bill of Rights adopted in 1791.[127] In his speech to the House of Representatives, Madison explained that "the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode."[128] Accordingly, the Bill of Rights generally creates disabilities for the federal government that derogate from the initial vesting clauses and that correlate with immunities for the people.[129]

The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[130] This language regulates Congress relative to the people. Because the act-description beginning "shall make no law" describes secondary conduct, the First Amendment provides secondary rules that withdraw from Congress the authority to make certain laws. Thus, the First Amendment gives Congress disabilities that correlate with immunities for the people. Since those disabilities by practical implication prevent Congress from creating certain duties (e.g., most prohibitions on speech), people enjoy certain liberties (e.g., liberties to say most things). Although the First Amendment ostensibly applies only to Congress, the Supreme Court has applied it more broadly, including against the states.[131]

From 1865 to 1870, Congress proposed and the states ratified amendments to protect the newly freed slave population from oppression by the southern states. Congress's first step toward this objective was the Thirteenth Amendment. Section One reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[132] This language creates a primary rule that regulates every person relative to every other person. The Thirteenth Amendment thus gives every person both a duty not to enslave and a claim against enslavement. Section Two

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127. JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 168 (1998).

128. James Madison, Speech to the House of Representatives (June 8, 1789), *in* RAKOVE, *supra* note 127, at 176; *see also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986) ("The ratification debates and the preamble to the resolution proposing the Bill of Rights contain repeated references confirming Madison's explanation that the Bill of Rights was designed to protect against 'abuse of the powers of the General Government,' and in particular to limit the powers of Congress.").

129. For example, regarding the Sixth Amendment right to trial by jury, see *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004), explaining "[t]hat right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."

130. U.S. CONST. amend. I.

131. *See generally* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986) (contrasting the First Amendment's intended meaning with its application by courts and scholars to the Judicial and Executive Branches).

132. U.S. CONST. amend. XIII, § 1.

reads: "Congress shall have power to enforce this article by appropriate legislation."[133] This language gives Congress a power to pass laws enforcing Section One, which correlates with liabilities for those on whom Section One imposes duties or claims.

The Fourteenth Amendment has a similar structure. Section One provides rules that create legal relations between states and individuals, whereas Section Five gives Congress the power to enforce those rules. In Section One, the Equal Protection Clause reads: "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."[134] This language creates a primary rule giving each state a duty not to deny a person "the equal protection of the laws," which correlates with a claim for "any person within its jurisdiction."[135]

B. Case Law

Part III.A having outlined the Constitution's structure using Hohfeld's theory, this subpart applies Hohfeldian analysis to decisions by the Supreme Court interpreting the Constitution. Each section shows how Hohfeldian analysis clarifies the legal positions involved in a particular case and uses that discussion to clarify what *right* means. In particular, this subpart illustrates how Hohfeldian analysis can clarify the Commerce Clause, federalism, and the First and Fourteenth Amendments.

1. Perez v. United States[136]

Alcides Perez was a '"loan shark'" who loaned money to one Miranda, increased demands for repayment, and threatened severe violence for nonpayment.[137] The loans were for $1,000 and $2,000 with demanded repayments from $105 weekly to $1,000 weekly.[138] When Miranda could no longer make the loan payments, Perez threatened him, saying at one point that Miranda should steal to get enough money because "if he went to jail it would be better than going to a hospital with a broken back or legs."[139] Perez was prosecuted under a federal statute that prohibited "extortionate credit transactions," meaning credit transactions involving "the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to

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133. *Id.* § 2.

134. *Id.* amend. XIV, § 1.

135. *Id.* Notably, the Fourteenth and Fifteenth Amendments directed at the states consist mostly of primary rules imposing duties, whereas the Bill of Rights directed at the federal government consists mostly of secondary rules withdrawing powers. This might have interesting implications for the doctrine of incorporation, whereby Bill of Rights provisions were "incorporated" against the states via the Fourteenth Amendment's Due Process Clause.

136. 402 U.S. 146 (1971).

137. *Id.* at 147–48.

138. *Id.* at 148.

139. *Id.*

person, reputation, or property as a means of enforcing repayment."[140] The statute added that extortionate credit transactions often occur in interstate commerce and, at any rate, directly affect interstate commerce.[141] After the Second Circuit affirmed Perez's conviction, he appealed to the Supreme Court on the ground that the statute exceeded Congress's power under the Commerce Clause.[142]

The statute provided a primary rule that gave Perez a duty not to carry out extortionate credit transactions. Because the statute intended to protect potential victims, Miranda had a correlative claim. Because it also intended to protect against threats to interstate commerce, the people had a correlative claim as well. Only the federal government had a power to enforce the statute by prosecuting Perez for violating his duty. This prosecutorial authority included powers to initiate criminal proceedings and to cause Perez's liability to punishment by proving his guilt beyond a reasonable doubt.

Congress had presumed to have the power to pass this statute under the Commerce Clause,[143] which provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[144] This power correlates with liabilities for the people. Perez argued that the Commerce Clause did not authorize passing the statute[145] and thus Congress actually had a disability to pass the statute, correlative with immunities for Perez and the people. By practical implication, Congress's disability would imply the prosecutor's disability to initiate a criminal action and the lower court's disability to impose punishments for violating the statute.

The Supreme Court affirmed the Second Circuit's decision to affirm Perez's conviction for loan sharking.[146] Writing for the Court, Justice Douglas reasoned that the Commerce Clause granted Congress the power to regulate "the use of channels of interstate . . . commerce," to protect "the instrumentalities of interstate commerce," and to regulate "activities affecting [interstate] commerce."[147] He concluded that because Congress could have determined that loan-sharking affected interstate commerce, the Commerce Clause gave Congress the power to enact the statute under which Perez was convicted.[148]

This discussion shows how Hohfeldian analysis may be used to describe legal positions arising from the Constitution. In particular, Hohfeld's framework

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140. *Id.* at 147 n.1 (quoting Consumer Credit Protection Act, Pub. L. No. 90-321, § 201(a), 82 Stat. 146, 159 (1968) (codified at 18 U.S.C. § 891 (2006))).

141. *Id.*

142. *Id.* at 146–47.

143. *See* § 201(b), 82 Stat. at 159 ("[T]he Congress determines that the provisions . . . are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce . . . .").

144. U.S. CONST. art. I, § 8, cls. 1–3.

145. *See Perez*, 402 U.S. at 149.

146. *Id.* at 147.

147. *Id.* at 150.

148. *See id.* at 154–55.

clarifies how Congress's commerce power, the President's enforcement power, and the Court's judicial power create legal relations among Perez, Miranda, and the people. The discussion also shows a conceptual difference between individual and collective rights. Miranda's claim was an *individual* right because, for the act-description "shall not loan shark Miranda," only Miranda occupied the passive position.[149] By contrast, the people's claim was a *collective* one because "shall not loan shark" aimed to benefit the whole community collectively.[150]

2. U.S. Term Limits, Inc. v. Thornton[151]

Arkansas voters amended the Arkansas Constitution in 1992 by adopting the Term Limitation Amendment (TLA), which provided that an otherwise eligible candidate for Congress who had already served three terms in the House of Representatives or two terms in the Senate could not have his name on the general election ballot.[152] Arkansas voter and taxpayer Bobbie Hill brought an action for declaratory relief against several Arkansas public officers and Arkansas's Democratic and Republican parties.[153] The State of Arkansas and U.S. Term Limits, Inc., intervened as defendants.[154] Hill alleged that the TLA violated Article I of the U.S. Constitution,[155] which prescribes the eligibility requirements for congressmen.[156] The Circuit Court for Pulaski County, Arkansas, held that the TLA violated the Constitution.[157] The Arkansas Supreme Court affirmed, and the defendants appealed to the U.S. Supreme Court.[158]

Normally in electing a congressman, Arkansas citizens have a power to vote for any candidate who meets the Constitution's requirements and whose name appears on the general election ballot—called an "eligible candidate." They also have a liberty to choose which candidate to vote for. In turn, eligible candidates each have a liability to being elected that correlates with Arkansas citizens' power to vote. Specifically, a candidate assumes the various legal positions associated with his office (e.g., the power to make law) upon being elected and

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149. The terms *active position* and *passive position* are defined in Part II.C.1.

150. *Cf.* Heath v. Alabama, 474 U.S. 82, 88 (1985) (noting "the common-law conception of crime as an offense against the sovereignty of the government").

151. 514 U.S. 779 (1995).

152. *Id.* at 783–84.

153. *Id.* at 784–85.

154. *Id.* at 785.

155. *See id.*

156. *See* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

157. *U.S. Term Limits*, 514 U.S. at 785.

158. *Id.* at 785–86.

sworn. Prior to being elected, anyone who meets the Constitution's requirements can become an eligible candidate.

These legal positions changed when the TLA took effect. People who served in Congress too often now had a disability to become eligible candidates. By practical implication, Arkansas voters had a disability to vote for such candidates. Whereas before Arkansas citizens could vote for any candidate meeting the Constitution's requirements and whose name appeared on the general election ballot, now they had a disability to vote for anyone who could not satisfy the TLA. The question for the Court was thus whether Arkansas had the power to enact a secondary rule creating eligibility requirements for election to Congress beyond those already provided in the Constitution.[159]

The Court affirmed the Arkansas Supreme Court's decision striking down the TLA.[160] Writing for the Court, Justice Stevens determined that Arkansas lacked the power to create such requirements for congressional candidates because the Constitution's eligibility requirements displace any created by the states.[161] This rationale relies on the Supremacy Clause, which provides that the Constitution "shall be the supreme Law of the Land . . . any Thing in the Constitution . . . of any State to the Contrary notwithstanding."[162] Thus, the Supremacy Clause creates a disability for Arkansas to amend the Arkansas Constitution in any way preempted by the U.S. Constitution.

This discussion shows how Hohfeldian analysis can elucidate the legal relations implicated by federalism and voting. This Hohfeldian analysis also clarifies the term *right*. For example, Justice Kennedy wrote a concurring opinion that discusses whether Arkansas interfered with "the federal right to vote (and the derivative right to serve if elected by majority vote) in a congressional election."[163] This phrase "right to vote" can mean many things, including a claim that congressmen be chosen by election and a liberty to access the polls. However, the above Hohfeldian analysis shows that Justice Kennedy must have been referring to the power to vote and correlative liability to being elected.

3. Texas v. Johnson[164]

Outside the 1984 Republican National Convention in Dallas, Texas, protestors spray-painted walls, overturned plants, and removed an American flag from a building.[165] The flag was handed to Gregory Johnson, who "doused it with kerosene[] and set it on fire" while others "chanted: 'America, the red,

159. *See id.* at 787.
160. *Id.* at 783.
161. *Id.* at 806.
162. U.S. CONST. art. VI, cl. 2.
163. *U.S. Term Limits*, 514 U.S. at 844 (Kennedy, J., concurring).
164. 491 U.S. 397 (1989).
165. *Id.* at 399.

white, and blue, we spit on you.'"[166] After the demonstration, a "witness to the flag burning collected the flag's remains and buried them in his backyard."[167] Others "testified that they had been seriously offended by the flag burning."[168] Johnson was charged and convicted under Tex. Penal Code Ann § 42.09(a)(3), which provided: '"A person commits an offense if he intentionally or knowingly desecrates . . . a state or national flag.'"[169] The statute explained: '"For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.'"[170] The Texas Court of Criminal Appeals reversed Johnson's conviction, and Texas appealed to the U.S. Supreme Court.[171]

The Texas statute provided a primary rule prohibiting behavior described by the statute. This rule imposed on Johnson a duty not to desecrate the American flag and gave correlative claims to those likely to observe or discover such desecration. Under the First Amendment, which applied to Texas through the Fourteenth Amendment Due Process Clause, Texas had a disability not to make a law abridging Johnson's freedom of speech, which gave Johnson a correlative immunity. Invoking that immunity, Johnson argued that the Texas law violated his "right to differ" under the First Amendment.[172] The legal question before the Court was thus whether Johnson's behavior fell within the First Amendment's act-description and whether any government interest outweighed the constitutional mandate.[173]

The Court affirmed the Texas court's decision to reverse Johnson's conviction.[174] Texas had conceded that Johnson's conduct was "expressive," thus implicating the Free Speech Clause,[175] but maintained that suppression of this expressive conduct was justified.[176] Writing for the majority, Justice Brennan held that neither governmental interest declared by Texas justified the suppression.[177] He reasoned (1) that "preventing breaches of the peace"[178] did not justify the suppression because "[n]o reasonable onlooker would have regarded Johnson's [conduct] . . . as a direct personal insult or an invitation to exchange fisticuffs,"[179] and (2) that "preserving the flag as a symbol of

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 400 & n.1 (quoting TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1989)).
170. *Id.* (quoting § 42.09(b)).
171. *Id.* at 400–02.
172. Brief for Respondent at 10, Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155).
173. *Johnson*, 491 U.S. at 403–04.
174. *Id.* at 402.
175. *Id.* at 405 (citing Transcript of Oral Argument at 4, *Johnson*, 491 U.S. 397 (No. 88-155)).
176. *Id.* at 407.
177. *Id.* at 420.
178. *Id.* at 407.
179. *Id.* at 409.

nationhood and national unity"[180] did not justify the suppression because the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[181] Justice Brennan adopted the Texas Court of Criminal Appeals' explanation that '"the right to differ is the centerpiece of our First Amendment freedoms.'"[182]

Once again, this Hohfeldian analysis clarifies the term *right*. For example, media reports described *Johnson* as declaring a constitutional "right to burn the flag."[183] Here and in Justice Brennan's phrase "right to differ," the term *right* must indicate a liberty because the right-bearer occupies the active position. While Johnson did retain a liberty in some limited sense because Texas's disability to proscribe flag burning prevents him from having a certain duty, Hohfeldian analysis shows that the Court did not declare a liberty to burn the American flag. Indeed, the Court recognized this very fact: "We . . . emphasize that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson."[184]

Professor Matthew Adler has made a related observation: "Constitutional rights are rights against rules. A constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls."[185] Hohfeldian analysis shows why. With regard to *Johnson*, the notion that "constitutional rights are rights against rules" amounts to the observation that the First Amendment gave Johnson an immunity from Texas enacting certain laws rather than a liberty to burn an American flag.

4. Grutter v. Bollinger[186]

Barbara Grutter was a Caucasian resident of Michigan who applied for admission to the University of Michigan Law School.[187] She had an undergraduate grade point average (GPA) of 3.8 and a Law School Admission Test (LSAT) score of 161.[188] The law school's admissions policy instructed admissions officials to consider all available information about an applicant, including her GPA and LSAT score, the quality of her personal essay, the

180. *Id.* at 407.

181. *Id.* at 414.

182. *Id.* at 401 (quoting Johnson v. State, 755 S.W.2d 92, 97 (Tex. Crim. App. 1988)).

183. Linda Greenhouse, *Justices, 5-4, Back Protesters' Right to Burn the Flag*, N.Y. TIMES, June 22, 1989, at A1.

184. *Johnson*, 491 U.S. at 412 n.8.

185. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998) (emphasis omitted) (footnote omitted). Significantly, Adler defined "'predicate'" in this context to mean "the act-description contained in the rule's canonical formulation." *Id.* at 3 n.6.

186. 539 U.S. 306 (2003).

187. *Id.* at 316.

188. *Id.*

enthusiasm of her recommenders, and other criteria to determine her potential contributions to the law school.[189] Aiming to "achieve that diversity which has the potential to enrich everyone's education," the policy also instructed admissions officers to give "substantial weight" to whether an applicant would contribute to diversity.[190] According to the policy, the law school was especially committed to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans,"[191] and sought to enroll a "'critical mass' of [underrepresented] minority students . . . to ensur[e] their ability to make unique contributions to the character of the law school."[192] When the law school denied Grutter admission, she brought an action against it in the U.S. District Court, alleging that the admissions policy significantly disadvantaged nonminority applicants and violated the Equal Protection Clause.[193] The court granted her request for declaratory and other relief.[194] The Sixth Circuit sitting en banc reversed this judgment, and Grutter appealed to the Supreme Court.[195]

Based on the law school's admissions policy, Grutter had a power to make herself an eligible applicant for admission to the law school. Exercising this power involved attending college, taking the LSAT, mailing her application, and completing the other eligibility and application requirements.[196] Both she and the law school had liabilities correlative with that power. Being an eligible applicant gave Grutter a claim that the law school consider her for admission, with a correlative duty for the law school acting through its admissions officers. The law school also had a power to offer admission to any eligible applicant as well as a liberty to choose which eligible applicants would receive offers. Grutter accordingly had a correlative liability to become an admitted applicant as well as a correlative no-claim that the law school offer her admission. Finally, acting through its public university, Michigan had a duty not to deny Grutter equal protection of the laws, which correlated with a claim for Grutter. The question for the Court was whether the law school's admissions policy violated this claim.[197]

The Court affirmed the Sixth Circuit's decision.[198] Writing for the Court, Justice O'Connor held that the law school's admissions policy was constitutional under the Equal Protection Clause because its consideration of race was narrowly tailored to further the compelling government interest of "obtaining the

189. *Id.* at 315.
190. *Id.* at 315–16 (internal quotation marks omitted).
191. *Id.* at 316 (internal quotation marks omitted).
192. *Id.* (internal quotation marks omitted).
193. *Id.* at 316–17.
194. *Id.* at 321.
195. *Id.* at 321–22.
196. *See id.* at 315–16.
197. *See id.* at 322, 343.
198. *Id.* at 343–44.

educational benefits that flow from a diverse student body."[199] She determined that the use of race was narrowly tailored because the policy (1) called for an "individualized, holistic review" of every applicant that allowed each one to highlight his particular contributions to diversity; (2) did not unduly burden nonminority applicants; and (3) did not make race the defining feature of an application.[200]

Once again, this Hohfeldian analysis clarifies the term *right* and other constitutional issues. First, *Grutter* contains ambiguous language implying that the case involved balancing one right against another right, which can be confusing. Justice O'Connor mentioned the "right to select those students who will contribute the most to the 'robust exchange of ideas,'"[201] and Justice Kennedy's dissenting opinion mentioned the "right to classify on the basis of race."[202] Hohfeldian analysis clarifies this ambiguity by showing that Grutter asserted a claim (correlating with a duty for Michigan), whereas Michigan asserted a liberty (correlating with a no-claim for Grutter).

Second, Hohfeldian analysis shows an important difference between *Grutter* and *Gratz v. Bollinger*,[203] where the Court struck down the University of Michigan's undergraduate admissions policy.[204] This policy assigned points to eligible applicants based on certain criteria and offered admission to any eligible applicant who received at least 100 points.[205] Because the policy instructed admissions officers to award racial minority applicants an extra twenty points,[206] minority applicants had correlative claims that the officers award them those extra points while nonminority applicants had no-claims for this act-description. By contrast, the law school's admissions policy gave admissions officers duties to give "'substantial weight'" to every applicant's potential contribution to the law school's racial diversity,[207] which correlated with claims for all eligible applicants. Thus, under the undergraduate admissions policy, minority and nonminority applicants had opposite legal relations for the same act-description, whereas under the law school admissions policy they had identical ones, albeit with different amounts of benefit. This disparity may help explain why *Gratz* and *Grutter* reached different outcomes.

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199. *Id.* at 343.

200. *See id.* at 337–41.

201. *Id.* at 324 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)) (internal quotation marks omitted).

202. *Id.* at 395 (Kennedy, J., dissenting).

203. 539 U.S. 244 (2003).

204. *Id.* at 251.

205. *Id.* at 255.

206. *Id.*

207. *Grutter*, 539 U.S. at 316.

Finally, Justice Ginsburg wrote a concurring opinion in *Grutter* that mentions "'unequal or separate rights.'"[208] What Hohfeldian analysis shows about the difference between *Gratz* and *Grutter* clarifies this phrase. The *Gratz* admissions policy involved separate rights and the *Grutter* admissions policy involved unequal rights, given that in *Grutter* the "substantial weight" more likely benefits racial minorities. Stated formally, two people have *separate* rights when, for the same act-description and relative to the same person, they have opposite legal positions; whereas two people have *unequal* rights when, under the same circumstances, they have identical legal positions but receive different amounts of benefit from the legal relation.[209]

C. The Nature of Constitutional Rights

Part III.B demonstrated Hohfeldian anaylsis of various constitutional issues. The discussion also showed how the Supreme Court often uses the term *right* equivocally to mean different concepts. This not only confuses legal analysis but also obscures the nature of constitutional rights. As Hohfeld remarked, "[C]hameleon-hued words are a peril both to clear thought and to lucid expression."[210] Accordingly, this subpart tries to clarify what *right* means and thereby improve constitutional analysis. It identifies four narrow meanings and one broader meaning.

Previously, this Article showed how the Constitution creates legal relations between an individual and the government. *Constitutional right* can mean any legal position relative to the government arising from the Constitution that Hohfeldian analysis would call a claim, liberty, power, or immunity. These are the four narrow meanings. For example, *Johnson* announced a constitutional right by holding that the Free Speech Clause provides an immunity from the government enacting a flag burning law.[211]

People also use the term *constitutional right* more broadly to mean a collection of such legal positions. For example, the phrase "right to freedom of speech" describes the collection of positions created by the Free Speech Clause,

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208. *Id.* at 344 (Ginsburg, J., concurring) (quoting International Convention on the Elimination of All Forms of Racial Discrimination art. II, § 2, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195).

209. Two people could theoretically have separate rights but experience equal benefits. This would happen when, for comparable act-descriptions relative to the same person, two people receive equal amounts of benefit from their separate legal relations with the same person. Losing arguments in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *United States v. Virginia*, 518 U.S. 515 (1996), used this conceptual pattern. In *Brown v. Board of Education*, 347 U.S. at 488, the Board of Education of Topeka, Kansas, argued that it could have separate public schools for white and African-American children because the schools were of equal quality. In *United States v. Virginia*, 518 U.S. at 526, the Commonwealth of Virginia argued that it could restrict the Virginia Military Institute to males because the Virginia Women's Institute for Leadership, a parallel school for females, was of equal quality.

210. HOHFELD, *supra* note 5, at 35.

211. *See* Texas v. Johnson, 491 U.S. 397, 418–20 (1989).

and the phrase "right of privacy" encompasses many positions arising from different clauses and policies in the Constitution.[212] This broader conception of *constitutional right* may be compared to that of *property*. Courts describe the concept of ownership or property using the metaphor "bundle of rights," meaning a bundle of legal relations that concern how an owner relates to others with regard to the thing owned.[213] Likewise, *constitutional right* in the broader sense may also be called a *bundle of relations*, meaning a bundle of relations between an individual and the government that arise from a particular clause or value of the Constitution.

In sum, *constitutional right* means a claim, liberty, power, immunity, or bundle of relations arising from the Constitution. Seeing how this important term may indicate one of five different concepts and knowing how to distinguish them allow one to avoid confusion stemming from equivocations of the term *right*. Hohfeldian analysis thus provides an essential tool for improving legal reasoning about constitutional rights.

Moreover, appreciating the structure of constitutional rights helps penetrate legal reasoning couched in abstract language. An important application of Hohfeldian analysis has been to clarify moral and political choices that account for particular legal rules.[214] Hohfeld criticized "the conceptualist technique of claiming that specific rules were implicit in highly abstract concepts."[215] By showing how moral and political choices may underlie appeals to highly abstract concepts labeled *constitutional rights*, Hohfeldian analysis provides another tool for clarifying traditional reasoning about constitutional rights.

Finally, Hohfeldian analysis suggests that our popular understanding about rights needs a paradigm shift. Rights are not like objects that people can possess or carry with them. Nor are they metaphysical entities floating in space between individuals and the government. Instead, rights are positions within legal relations or bundles of such relations.[216] And these positions only have meaning

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212. *See* Griswold v. Connecticut, 381 U.S. 479, 482–85 (1965) (inferring the right of privacy from the "penumbras" of various constitutional clauses and decisions).

213. *See* United States v. Craft, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (noting "one of the most essential sticks in the bundle of rights that are commonly characterized as property—right to exclude others").

214. Singer, *supra* note 12, at 1056–59.

215. *Id.* at 1057. On this matter, Singer argues as follows:

> The *logic of rights* is a human invention whose purpose is to preserve us from the notion that we must make political and moral choices. To make conscious choices, it is necessary to realize that we are making a choice. To choose wisely, we must know who gains and who loses from the concrete legal rules and what values are thereby preserved or undermined.

Id. at 1059.

216. HART & SACKS, *supra* note 69, at 128 ("In thinking about legal 'duties,' 'liberties,' and 'powers,' and their respective incidents, including 'rights,' the beginning of wisdom is to understand clearly what they are. They are not metaphysical entities, or concepts existing in the

by reference to the broader relationship. They are like different vantage points upon a single relationship. Llewellyn explained: "A has a right that B shall do something . . . [b]ut the right has B on the other end. The right is indeed the duty, a duty seen other end to. The relation is identical; the only difference is in the point of observation."[217]

IV. CONCLUSION

Nine years after Hohfeld published his famous article setting forth Hohfeldian analysis, Professor Charles Clark explained why the theory had prospered: "Making the discriminations called for by this system means the difference between winning and losing cases, between decisions for the plaintiff and decisions for the defendant."[218] Professor Walter Wheeler Cook stated that "no more 'practical' legal work was ever done than which is found in the pages of Hohfeld's writings."[219] He called Hohfeldian analysis "a necessary aid both in discovering just what the problems are which confront courts and lawyers and in finding helpful analogies which might otherwise be hidden."[220] Hohfeld thus reached his goal of providing a practical benefit to law students and professionals.[221]

Despite this success, however, Hohfeldian analysis has yet to be widely adopted in constitutional law. This Article hopes to change that. By showing how in theory and practice Hohfeld's framework can elucidate constitutional issues, this Article invites broader and more effective Hohfeldian analysis of constitutional law. This Article also employs Hohfeldian analysis to clarify the nature of constitutional rights. They are not portable objects or floating metaphysical entities but rather positions within legal relations or bundles of such relations. This stems from something implicit in Hohfeldian analysis—that relationships are central to constitutional law's structure and meaning.

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order of nature, or anything else mysterious. They are simply characteristic *positions* which people have in authoritative directive arrangements.").

217. LLEWELLYN, *supra* note 18, at 85 (emphasis omitted).

218. Charles E. Clark, *Relations, Legal and Otherwise*, 5 ILL. L.Q. 26, 26 (1922). Clark states that Hohfeld's theory prospered because "the system has a direct relation to the problems before not merely the student, but the lawyer and the judge, and . . . its cultivation brings practical results." *Id.*

219. Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721, 738 (1919).

220. *Id.* at 722.

221. *See* HOHFELD, *supra* note 5, at 26–27.