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

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INTRODUCTION

“Liberty finds no refuge in a jurisprudence of doubt,”¹ the Supreme Court has said. For this reason, courts must clearly delineate the rights,

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liberties, and other constitutional protections that they recognize. Doing this requires clearly defining the word “right” and other concepts referring to constitutional protection. Despite this need for clarity, the Supreme Court has used the word “right” with many different meanings. For example, in “the woman’s exercise of the right to choose,” the word implies a freedom to do something; in “[t]he right not to be discriminated against based on one’s race,” the word implies that someone cannot do something; and in “[w]hen the right of privacy must reasonably yield to the right of search,” the word implies a broad category of constitutional interests. Using the word “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 in constitutional analysis and applies 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. By the twenty-first century, Hohfeldian analysis had become an uncontroversial and widely used theory in private-law scholarship. Legal scholars had always assumed, however, that constitutional law fell outside the scope of Hohfeldian analysis.

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6 For Hohfeld’s seminal article, see Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913). His article was reprinted in Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 35 (Walter Wheeler Cook ed., Yale U. Press 1919). This article cites to the book.
8 David Kennedy and William Fisher, III, review the secondary literature about Hohfeld’s theory in The Canon, supra note 7, at 52. Their account indicates that from the 1910s through the 1930s, scholars extensively applied Hohfeld’s theory to common law topics. See, e.g., Walter Wheeler Cook, Privileges of Labor Unions in the Struggle for Life, 27 Yale L. J. 779 (1918); Arthur L. Corbin, Offer, Acceptance, and Some of the Resulting Legal Relations, 26 Yale L. J. 169 (1917); Albert J. Harno, Tort-Relations, 30 Yale L.J. 145 (1920). Moreover, 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, e.g., Kennedy & Michelman, supra note 7. However, Kennedy and Fisher mention no scholarship applying Hohfeldian analysis to constitutional law. See also John Harrison, The Constitutional Origins and Implications of
Recently, that assumption may have begun to change. Scholars are now invoking Hohfeld with surprising frequency in discussing constitutional issues. 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. This article answers that question and thereby lights the way for broader and more effective use of Hohfeldian analysis.

Part I explains and further develops the theory and operation of Hohfeldian analysis, providing the foundation necessary to apply Hohfeldian analysis to constitutional law. Part II then demonstrates the application of Hohfeldian analysis to constitutional law and draws conclusions about the nature of constitutional rights.

I. HOHFELDIAN ANALYSIS

Wesley Newcomb Hohfeld was a professor at Stanford University and later Yale University who wrote only a few articles before his premature death in 1918. 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.\textsuperscript{11} The resulting body of literature has been called “the Hohfeldian debate.”\textsuperscript{12} Private-law scholars have continued drawing on Hohfeldian analysis—for instance, with the familiar “bundle of rights” metaphor in property law.\textsuperscript{13} Also, philosophers have commonly invoked Hohfeld in discussing general theories of rights.\textsuperscript{14} In short, Hohfeldian analysis “has become a staple of academic legal culture.”\textsuperscript{15}

The first two sections below set forth Hohfeld’s basic theory. Section A explains how Hohfeldian analysis operates, and Section B shows how it can clarify legal issues. The other two sections further develop Hohfeld’s theory in two ways. Section C clarifies the conceptual structure that underlies it, and section D explains how Hohfeldian analysis can describe constitutional law.

\textbf{A. The Fundamental Concepts}

Hohfeld observed that important legal terms, including “right” and “duty,” had no agreed meaning and thereby caused muddled analysis.\textsuperscript{16} 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.”\textsuperscript{17} In particular, Hohfeld recognized four different meanings of the word “right.”\textsuperscript{18} To resolve such ambiguity, he identified eight “fundamental” concepts that allow one to describe any legal position. These concepts are duty, claim, liberty, no-claim, power, liability, disability, and immunity.\textsuperscript{19} Hohfeld explained how

\begin{itemize}
  \item \textsuperscript{11} See Joseph William Singer, \textit{The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld}, 1982 Wis. L. Rev. 975, 989 n.22 (1982) (listing articles about Hohfeld’s work published during that decade).
  \item \textsuperscript{12} Id. at 989.
  \item \textsuperscript{14} See, e.g., \textit{Judith Jarvis Thomason, The Realm of Rights} 39-60 (Harv. U. Press 1990); \textit{John Finnis, Natural Law and Natural Rights} 199 (Oxford U. Press 1982); \textit{A Debate Over Rights: Philosophical Enquiries} (Matthew H. Kramer ed., 1998) [hereinafter Debate].
  \item Duncan Kennedy & Frank Michelman, \textit{Are Property and Contract Efficient?}, 8 Hofstra L. Rev. 711, 751 (1980).
  \item \textit{Karl N. Llewellyn, The Bramble Bush} 85 (1960).
  \item For various uses, see supra note 2.
  \item This article alters Hohfeld’s terminology somewhat to accord with modern usage. First, this article uses the term “liberty” rather than “privilege.” For an analysis of this word choice, see Glanville Williams, \textit{The Concept of Legal Liberty}, 56 Colum. L. Rev. 1129, 1131-35 (1956). \textit{See also Hohfeld, supra} note 6, at 42 (“A ‘liberty’ considered as a legal
these concepts logically related to one another through what he called “correlation” and “opposition.” These concepts and the analytical framework arising from them are best explained using hypothetical examples.

Suppose Abe and Ben made a contract with one another in which Abe promised to pay Ben ten dollars, and in exchange, Ben promised to mow Abe’s lawn. Since the contract says that Ben must perform the action of mowing 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 that Ben mow Abe’s lawn entails Ben’s duty to mow Abe’s lawn. The two concepts correlate because they describe two sides of one relationship, just as the words “parent” and “child” go together because they describe two sides of one relationship. This relationship may be expressed “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. Duty and liberty are “opposite” concepts in that one negates the other. In other words, where someone lacks a duty to perform some action, that person has a liberty not to perform that action. The relationship arising from Ben’s liberty may be expressed “Ben may decline to water the plants for Abe.” Here, what concept describes Abe’s legal position relative to Ben? Because Ben lacks a duty to water Abe’s plants, which would have correlated with a claim, Abe must lack a claim that Ben water his plants. Since no word existed to describe Abe’s position, Hohfeld invented one that seemed to make sense. This article uses the word “no-claim.” Thus,
Ben’s liberty not to water the plants correlates with Abe’s no-claim that Ben water his plants.

The discussion thus far has identified four concepts and illustrated how they interrelate by correlation and opposition. This diagram shows the first four concepts’ interrelation:

![Diagram showing the interrelation of duty, claim, liberty, and no-claim]

Hohfeld observed that people often confused the distinction between “claim” and “liberty.” Indeed, Professor Joseph Singer said that clarifying this distinction was Hohfeld’s central goal. In particular, Hohfeld was concerned with people’s tendency to believe that a person’s liberty entails a claim that other people not interfere with the exercise of that liberty.

To clarify, Professor Glanville Williams provided the following example:

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 right [claim] in this particular respect.

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22 See Singer, supra note 11, at 987.
23 See HOHFFELD, supra note 6, 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.").
24 Williams, supra note 19, at 1143-44. This example calls to mind a classic case of property law Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. 1805). Post was hunting a fox using hounds and had almost gotten it when Pierson arrived and interfered by catching and killing the fox before Post could. The court found that Pierson’s interference was permissible. Post thus had a liberty to kill the fox but did not have a claim that Pierson not kill the fox before him. If Post had had such a claim, then Pierson would have violated the correlative duty.
As Williams’s example implies, one may distinguish between “claim” and “liberty” by determining whether interfering with the concept’s protection violates a duty. This heuristic works because, while claims will always correlate with duties, liberties never will.

The four concepts discussed thus far share the characteristic of concerning only actual physical behavior, which may be called “primary conduct.”25 They describe situations where the law forbids, permits, or requires physical actions or inactions. The remaining four concepts do not share this characteristic. Instead, they relate to whether by doing certain actions a person changes the law. This may be called “secondary conduct.” To illustrate, whereas the first four concepts, or “primary concepts,” describe whether a couple may stand before a priest and say “I do,” the other four concepts, or “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 are power, liability, disability, and immunity. They interrelate just like the primary concepts. Recall Abe and Ben’s 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. Since 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. Thus, Abe had a “liability” that correlated with Ben’s power.

Suppose Ben wanted to create for Abe a duty to rob the downtown bank, but the State in which Ben and Abe live does not allow such a contract. While Ben may want Abe to promise to rob the downtown bank 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. Since 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. This diagram illustrates how the secondary concepts interrelate:

These eight concepts are the heart of Hohfeldian analysis. They allow one to describe any legal position that a person can occupy. 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.’”

B. Application to Case Analysis

Hohfeldian analysis allows one to identify and define people’s relative positions under the law and the legal issues involved in any dispute. This section illustrates how. In particular, Singer observed that a judge deciding a case must determine which Hohfeldian concept describes each litigant’s relative position. Subsections 1 and 2 illustrate how this occurs.


Mary O’Brien was a passenger aboard a steamship from Queenstown to Boston. As the ship neared Boston, a physician began vaccinating the passengers. O’Brien never expressly requested a vaccination, but she stood in line with about 200 women awaiting vaccinations. When her turn came, O’Brien presented her apparently unvaccinated arm to the physician, and he vaccinated her. 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. After the

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26 See Arthur Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (deriving Hohfeld’s eight concepts from a general definition of law).
27 See HOHFFELD, supra note 6, at 63.
28 Singer, supra note 11, at 992.
30 Id.
31 Id. at 274.
32 Id.
33 Id. at 272-73.
Superior Court found in Cunard’s favor, O’Brien appealed to the Supreme Judicial Court of Massachusetts. O’Brien’s allegation implies that at the moment when she was vaccinated Cunard’s physician had a duty not to vaccinate her, she had a correlative claim that he not vaccinate her, 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.” Thus, 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. The factual question for the court thus became whether she had exercised her power before the critical moment when Cunard’s physician vaccinated her.

Finding that O’Brien had consented, the court concluded that Cunard was not liable to an order to pay damages. Thus, the relevant legal relation involved a liberty and a no-claim. Cunard’s physician had a liberty to vaccinate O’Brien, and she had a no-claim that he not vaccinate her. O’Brien also had liberties to step away or withdraw her arm, but she did neither.

2. Feinberg v. Pfeiffer, Co.

Anna Feinberg worked for the Pfeiffer Company for decades. One day, Pfeiffer’s board of directors resolved “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.” Pfeiffer began sending Feinberg monthly $200 checks when she later retired, but after two changes in management, the company discontinued these payments. Feinberg brought an action in the Circuit Court of St. Louis, Missouri, requesting an order for Pfeiffer to pay the amount owed. After the Circuit Court found in Feinberg’s favor, Pfeiffer appealed to the St. Louis Court of Appeals.

Feinberg argued that, by passing the resolution, Pfeiffer’s board had imposed a duty on Pfeiffer to pay her $200 monthly. She would thus have a correlative claim to those payments. Pfeiffer responded that because the

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34 O’Brien, 154 Mass. at 272.
35 Id. at 273.
36 See id. at 275.
37 Feinberg v. Pfeiffer, Co., 322 S.W.2d 163, 164 (Mo. App. 1959).
38 Id. at 165.
39 Id.
40 Id. at 164.
41 Id. at 163-64.
42 See Feinberg, 322 S.W.2d at 166-67.
resolution did not satisfy the elements required to form a contract, Pfeiffer never had such a duty. Instead, it said that Feinberg had merely been receiving $200 gifts. 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. 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. Under the doctrine of promissory estoppel, Feinberg’s reliance effectively exercised a power to create the desired contract with Pfeiffer. Viewing her behavior in this light, the Court affirmed the lower court’s order that Pfeiffer pay damages to Feinberg. This order created a duty for Pfeiffer and a correlative claim for Feinberg.

C. The Underlying Structure

Sections A and B above explain and demonstrate Hohfeld’s original theory. Although widely accepted, this theory leaves certain questions unanswered. For example, how does one determine what claim correlates with a given duty? Such questions did not prevent scholars from using Hohfeldian analysis to clarify private law, but before one can apply it to constitutional law the conceptual structure underlying Hohfeldian analysis must be clarified. Accordingly, this section develops Hohfeld’s original theory in three ways: Subsection 1 clarifies the structure of legal relations, subsection 2 accounts for the principle of correlativity, and subsection 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. Hohfeldian analysis calls this a “legal relation.” For example, the legal relation between Abe and Ben may be expressed “Ben shall mow the lawn

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43 Id. at 167.
44 Id.
45 Id. at 168.
46 Id.
47 Feinberg, 322 S.W.2d at 169.
48 For discussion of this article’s word choice, see supra note 19.
for Abe.” Although legal relations are central to Hohfeldian analysis, Hohfeld never discussed their basic structure. The following observations clarify that structure.

Professor John Finnis observed that every legal relation has three components. Each contains two positions, which may be described with Hohfeldian concepts, and one description of conduct, which Finnis called an “act description.” 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. Here, the positions may be described by the concepts duty and claim.

Next, Professors Henry Hart and Albert Sacks distinguish concepts describing the position of someone whom the law addresses directly from other concepts. 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.

Bringing these observations together completes the picture. 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 word “active position” to describe the position occupied by someone whom the law addresses directly, and the word “passive position” to describe the other position. These words are apt because correlative Hohfeldian concepts are like the active and passive voices of a statement. To summarize, therefore, the conceptual structure

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49 Cf. HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 128 (Foundation Press 1994) (1958) (“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 order of nature, or anything else mysterious. They are simply characteristic positions which people have in authoritative directive arrangements.”).

50 FINNIS, supra note 14, at 200. Another name for the act description could be “the elements,” as in “the elements that must be proved to establish liability.”

51 HART & SACKS, supra note 49, at 129.

52 See Max Radin, A Restatement of Hohfeld, 51 HARV. L. REV. 1141 (1938) (“A’s demand-right [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
of a legal relation includes an active position, an act description, and a passive position.

2. The Principle of Correlativity

The discussion thus far has described how Hohfeldian concepts correlate, but a deeper question remains about the principle of correlativity. If one knows that someone 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. Now the question of who holds a claim that correlates with Carl’s duty is more difficult.

This question parallels a philosophical debate about rights that clarifies how Hohfeldian analysis operates. On one hand, the “interest theory” or “benefit theory” states that a person holds a right when and only when the right protects his interest or benefits him. On the other hand, the “will theory” or “choice theory” states that a person holds a right when and only when he can demand or waive its enforcement. Although this debate addresses what the word “right” means philosophically and does not directly implicate this article, the benefit theory suggests an answer to the question of who holds a claim that correlates with a given duty—that is, one should consider who benefits from the duty’s performance to determine who may hold a correlative claim.

The benefit theory gives only a first step, however, because describing legal scenarios requires a more elaborate formula. For example, although 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.”).

53 See DEBATE, supra note 14 (presenting articles on both sides of the debate); NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 154-66 (Clarendon Press 1982).

54 See DEBATE, supra note 14, 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.”).

55 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 labeling.”).

giving Dana ten dollars may make her happy and thus please her sister, one would not say that the sister 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 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: Someone has a claim correlative with a particular duty when and only when the duty was intended to benefit him.

This formula is consistent with how the Supreme Court has treated the concept of “right.” The Court has held that to enforce a federal statute under 42 U.S.C. § 1983, “a plaintiff must assert the violation of a federal right, not merely a violation of federal law.” The Court then identified three factors to determine whether a particular statutory provision creates a right:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

The first factor shows the Court applying a rule consistent with the above formula. In addition, the third factor reveals an implicit recognition of the correlativity of claims and duties.

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. Understanding both ways will be important for using Hohfeldian analysis to clarify constitutional law.

First, Hohfeld discussed what may be called “deduction by correlation.” This arises from the principle of correlativity just explored. In short, whenever one knows both the concept that describes a 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, another way to deduce legal concepts may be called “deduction by practical implication.” Suppose Gus wanted to contract with Hanna, but

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58 *Id.* at 340-41 (emphasis added).
Hanna had a disability to make binding contracts because she was 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.

D. Extension to Constitutional Law

Although it became widespread in private law, scholars conspicuously avoided using Hohfeldian analysis to describe constitutional law. One reason may have been an assumption that Hohfeldian analysis, focusing on bilateral relationships, cannot accommodate matters of public law involving more complex relationships—e.g., where branches of government create and enforce legal relations between private entities. Another reason may have been that scholars saw an incommensurable difference between rights under contract or tort law and constitutional rights designed to prevent government oppression. Whatever the reason was, this section explains how Hohfeldian analysis can in fact describe constitutional law. Professor H.L.A. Hart famously explained law’s structure in The Concept of Law. Subsection 1 below maps Hohfeld’s concepts onto Hart’s distinction among legal rules, and subsection 2 explains how Hart’s theory accounts for constitutional law.

1. Primary and Secondary Rules

Hart’s argument begins with an objection to John Austin, who maintained that laws were commands backed by force. Specifically, Austin believed that laws are general, enduring, imperative statements made by a sovereign and backed by threats of coercive force. “Stop at red lights” and “pay taxes” are classic examples. Hart discredited Austin’s theory by pointing out the counterexample of contract law. Suppose that state law requires that all contracts be signed by two witnesses, but Abe and Ben only have one witness sign their agreement. Although they have clearly broken the law, Abe and Ben 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 and tax law

59 See supra note 8.
61 See id. ch.II.
examples that exemplify Austin’s theory. 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.” Under these, “human beings are required to do or abstain from certain actions, whether they wish to or not.” Examples include “stop at red lights” and “pay taxes,” the rule “an inviter shall exercise reasonable care toward an invitee,” and the legal relations “Abe shall pay Ben” and “Ben shall keep off Abe’s land.” Hart called laws that take the second form “secondary rules.” He explained that these “provide that human beings may by doing or saying certain things introduce new rules … extinguish or modify old ones, or in various ways determine their incidence or control their operations.” Examples include rules specifying the steps necessary to marry, to make wills or contracts, to form partnerships or corporations, and to appoint agents. Hart also indicated that rules specifying the steps necessary to make law are secondary.

Hohfeld’s eight concepts map neatly onto Hart’s conceptual distinction between primary and secondary rules. Hart’s observation reveals four possible situations: Either (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, or (4) a secondary rule does not enable a legal act. These situations correspond to the four pairs of correlative concepts identified by Hohfeld. This diagram illustrates how:

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62 Id. at 81.
63 Id.
64 Id.
65 HART, supra note 60, at 81.
66 See id. at 31 (“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.”).
67 Cf. Corbin, supra note 26 (describing the four possible predictions about law delineated by Hohfeld’s correlative pairs, namely, 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.” 68 Professor Lon Fuller explicitly recognized the connection, stating: “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.” 69

2. The Structure of Constitutional Law

Given how Hohfeld’s concepts map onto Hart’s theory, the remainder of Hart’s account of law shows that Hohfeldian analysis can describe constitutional law. Hart maintained that our concept of law arises from a union of primary and secondary rules. 70 He explained why using a thought experiment. 71 Imagine a society with only primary rules. 72 Hart observed that people in this society would encounter three distinct problems. 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. This society would also lack efficient

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<th>Type of rule</th>
<th>Application to particular case</th>
<th>Type of legal relation</th>
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<tr>
<td>Primary rule binds conduct</td>
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<td>Duty / Claim</td>
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<td>Primary rule does not bind conduct</td>
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<td>Liberty / No-claim</td>
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<td>Secondary rule enables conduct</td>
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<td>Power / Liability</td>
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<td>Disability / Immunity</td>
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68 HART, supra note 60, at 81.
70 HART, supra note 60, at 98.
71 Id. at 91-98.
72 To make it more feasible, assume that these rules restricted violence, theft, and deception, and that few rebelled against them.
mechanisms for determining what punishments to impose when a person violated a rule.

Hart observed that the solution to each problem is to supplement the society’s primary rules with secondary ones. To resolve the first problem, the society would need a secondary rule to specify the steps necessary to make a valid rule. Hart called this the “rule of recognition.” Examples include “laws are what have been carved on the obelisk” and the Bicameralism and Presentment Clauses. To resolve the second problem, the society would need secondary rules to specify the steps necessary to amend existing rules. Hart called these “rules of change.” Examples include “the king may amend any rule by public announcement” and the Amendment Clause. To resolve the third problem, the society would need secondary rules to specify the steps necessary to determine whether a person had broken the law and what punishment should be imposed. Hart called these “rules of adjudication.” Examples include “the queen may determine whether a rule has been violated and what punishment shall apply” and Article III of our Constitution.

This combination of primary and secondary rules not only illuminates our concept of law but also reveals the basic structure of constitutional law. Hart concluded that “it 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.” Given how Hohfeld’s concepts map onto Hart’s theory, that primary and secondary rules underlie constitutional law 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 Professor Ronald Dworkin.

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73 Id. at 94.
75 Hart, supra note 60, at 95.
76 U.S. Const. art. V.
77 Hart, supra note 60, at 97.
78 See, e.g., U.S. Const. art. III, § 2.
79 Hart, supra note 60, at 98.
80 Dworkin maintains that “hard cases,” namely cases where settled law does not clearly dictate the proper outcome, reveal the error of positivism. According to Hart’s positivist theory, argues Dworkin, when a judge decides a hard case he creates (or “legislates”) a new legal rule based on considerations of policy and then applies it to the case’s facts. Ronald Dworkin, Taking Rights Seriously 81 (Harv. U. Press 1978). 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 thus reaching
and Fuller. Specifically, while this section relies on Hart’s sociology-based distinction between primary and secondary rules, one need not accept his broader argument separating law and morality. Indeed, the analytical framework offered here may coexist with the critiques of Hart’s positivism by Dworkin and Fuller.

II. APPLICATION TO CONSTITUTIONAL LAW

Part I explained Hohfeldian analysis and showed how it can describe constitutional law. Now this part actually applies Hohfeldian analysis to constitutional law. Sections A and B discuss the Constitution’s text and four noteworthy decisions by the U.S. Supreme Court using Hohfeldian analysis. Section C then explores the nature of constitutional rights based on the foregoing discussion. Overall, this part tries to show how Hohfeldian analysis 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

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81 Fuller, supra note 69. Fuller agrees with calling the rule of recognition a secondary rule but 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. at 137.
82 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 80. First, a judge deciding a hard case based on Dworkin’s proposed criteria (indeed, according to any criteria) declares a legal relation in determining the case’s outcome. Second, Dworkin maintains that such a judge considers principle rather than policy to make his decision. 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.” DWORKIN, supra note 80, at 82. Dworkin’s notion of “principle” may be compared with what this article has called a “rule” or at any rate 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.
83 See Fuller, supra note 69, 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.”).
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.”

Based on this authority, the Constitution vests “[a]ll legislative powers herein granted” in Congress, “[t]he executive Power ... in a President,” and “[t]he judicial Powers ... in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.” These vesting clauses provide fundamental building blocks for the Constitution’s structure 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. These powers correlate with liabilities for “We the People ... and our Posterity” (“U.S. people”). 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 U.S. people.

James Madison proposed to Congress on June 8, 1789, what ultimately became our Bill of Rights adopted in 1791. 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.” 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 U.S. people.

The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

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84 U.S. CONST. pmbl.
85 Id. art I, § 1.
86 Id. art II, § 1, cl. 1.
87 Id. art. III, § 1, cl. 1.
88 See supra § D.2 of part I.
89 See, e.g., id. art. I, § 8.
90 U.S. CONST. pmbl.
92 James Madison, Speech to the House of Representatives (June 8, 1789), in RAKOYE, supra note 91, at 170-82 [hereinafter Speech]. See also David 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.”).
93 For example, with regard to the Sixth Amendment’s right to trial by jury, see Blakely v. Washington, 542 U.S. 296, 305-06 (2004) (“That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.”).
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." This language regulates Congress relative to the U.S. people. Since the act description beginning “shall make no law” describes secondary conduct, the Amendment provides secondary rules that withdraw from Congress the authority to make certain laws. Thus, the First Amendment gives Congress certain disabilities, which correlate with immunities for the U.S. people. Since those disabilities by practical implication prevent Congress from creating certain duties, such as most prohibitions on speech, people enjoy certain liberties, such as liberties to say most things. Although the Amendment ostensibly applies only to Congress, the Supreme Court has applied it more broadly, including against the States.

From 1865 to 1870, Congress adopted 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.” This language creates a primary rule that regulates every person relative to every other person. The Amendment thus gives every person both a duty not to enslave and a claim against enslavement. Section Two reads: “Congress shall have the power to enforce this article by appropriate legislation.” This language gives Congress a power to pass laws enforcing Section One and gives correlative liabilities to 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: “nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” 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.”

94 U.S. CONST. amend I.
95 See Mark 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).
96 U.S. CONST. amend. XIII, § 1.
97 Id. amend. XIII, § 2.
98 Id. amend. XIV, § 1.
99 Id.
B. Case Law

Section A having outlined the Constitution’s structure, this section applies Hohfeldian analysis to decisions by the U.S. Supreme Court interpreting the Constitution. Each subsection shows how Hohfeldian analysis clarifies the legal positions involved in a particular case and uses that discussion to clarify what “right” means. Overall, this section illustrates how Hohfeldian analysis can clarify disputes about Congress’s enumerated powers, federalism, and the First and Fourteenth Amendments.

1. Perez v. U.S.

Alcides Perez was a “loan shark” who loaned money to one Miranda, increased demands for repayment, and threatened severe violence for nonpayment. 100 The loans were for $1,000, $2,000, and $1,000, with demanded repayments from $105 weekly to $500 weekly. 101 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.” 102 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 person, reputation, or property as a means of enforcing repayment.” 103 The statute added that extortionate credit transactions often occur in interstate commerce and, at any rate, directly affect interstate commerce. 104 After the U.S. Court of Appeals for the Second Circuit affirmed Perez’s conviction, he appealed to the U.S. Supreme Court on the ground that the statute exceeded Congress’s power under the Commerce Clause. 105

The statute provided a primary rule that gave Perez a duty not to carry out extortionate credit transactions. Since the statute intended to protect potential victims, Miranda had a correlative claim. Since the statute also intended to protect against threats to interstate commerce, the U.S. people had a correlative claim as well. Only the federal government, acting through an Assistant U.S. Attorney, had a power to enforce the statute by prosecuting Perez for violating his duty. This prosecutorial authority

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101 Id. at 148.
102 Id.
103 Id. at 147 n.1.
104 Id.
105 Perez, 402 U.S. at 146-47.
included powers to initiate criminal proceedings and to create Perez’s liability to punishment by proving his guilt beyond a reasonable doubt.

Additionally, Congress had presumed to have the power to create Perez’s duty under the Commerce Clause, which provides that “Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

This power correlates with liabilities for the U.S. people. Perez’s defense alleges that, since the Commerce Clause does not authorize passing this federal statute, Congress actually had a disability to pass the statute, correlative with immunities for Perez and other people in the U.S. By practical implication, Congress’s disability would imply the prosecutor’s disability to seek and the District 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. 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.

He concluded that, since 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.

This discussion illustrates how Hohfeldian analysis can describe legal positions arising from the Constitution. Specifically, Hohfeldian analysis showed how Congress’s commerce power, the President’s enforcement power, and the Court’s judicial power create legal relations among Lopez, Miranda, and the U.S. people. The discussion also shows a conceptual difference between “individual” and “collective” rights. Miranda’s claim was an individual one because, for the act description “shall not loan-shark Miranda,” only Miranda occupied the passive position. By contrast, the U.S. people’s claim was a collective one because “shall not loan-shark” aimed to benefit the whole community collectively.

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106 U.S. CONST. art. I, § 8, cl. 3.
107 Perez, 402 U.S. at 147.
108 Id. at 150.
109 Id. at 154.
110 The words “active position” and “passive position” are defined supra in § C.1. of part I.
2. U.S. Term Limits, Inc. v. Thornton

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.\(^{112}\) Arkansas voter and taxpayer Bobbie Hill brought an action for declaratory relief against several Arkansas public officers and Arkansas’ Democratic and Republican parties.\(^{113}\) The State of Arkansas and U.S. Term Limits, Inc., intervened as defendants.\(^{114}\) Hill alleged that the TLA violated Article I of the U.S. Constitution, which prescribes the eligibility requirements for Congressmen.\(^{115}\) The Circuit Court for Pulaski County, Arkansas, held that the TLA violated the federal Constitution, the Arkansas Supreme Court affirmed, and the defendants appealed to the U.S. Supreme Court.\(^{116}\)

Normally in electing a Congressman, Arkansas citizens have a power to vote for any candidate who meets the U.S. 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 sworn. Prior to being elected, anyone who meets the U.S. 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 U.S. 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


\(^{113}\) *Id.* at 784-85.

\(^{114}\) *Id.* at 785.

\(^{115}\) *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.”).

\(^{116}\) *U.S. Term Limits*, 514 U.S. at 785-86.
eligibility requirements for election to Congress beyond those already provided in the federal Constitution.

The Court affirmed the Arkansas Supreme Court’s decision striking down the TLA. Writing for the Court, Justice Stevens determined that Arkansas lacked the power to create such requirements for congressional candidates because the U.S. Constitution’s eligibility requirements displace any created by States. This rationale relies on the Supremacy Clause, which provides that the federal Constitution “shall be the supreme Law of the land … any Thing in the Constitution … of any State to the Contrary notwithstanding.” Thus, the Supremacy Clause creates a disability for Arkansas to amend the Arkansas Constitution in any way preempted by the U.S. Constitution.

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.” The phrase “right to vote” can mean many things, including a claim that Congressmen be chosen by election and a liberty to access the polls. The above Hohfeldian analysis shows that here Kennedy refers to the power to vote and correlative liability to being elected.

3. Texas v. Johnson

Outside the 1984 Republican National Convention in Dallas, TX, protestors spray-painted walls, overturned plants, and removed an American flag from a building. The flag was handed to Gregory Johnson, who doused it with kerosene and set it on fire while others chanted “America, the red, white, and blue, we spit on you.” After the demonstration, a witness to the flag-burning collected the flag’s remains and buried them in his backyard. Others testified that they had been seriously offended by the flag-burning. Johnson was charged and convicted under Tex. Penal Code § 42.09, which provided: “A person commits an offense if he intentionally or knowingly desecrates … a state or national flag.” The statute explained: “For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will

117 Id. at 783.
118 Id. at 806.
119 U.S. CONST. art. VI, cl. 2.
120 U.S. Term Limits, 514 U.S. at 844.
122 Id.
123 Id.
124 Id.
125 Id. at 400 n.1.
seriously offend one or more persons likely to observe or discover his action.” The Texas Court of Criminal Appeals reversed Johnson’s conviction, and Texas appealed to the U.S. Supreme Court.

The Texas statute provided a primary rule prohibiting certain behavior, namely, the behavior described by the crime’s elements. 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, applied to Texas through the Due Process Clause of the Fourteenth Amendment, 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. The legal question before the Court was thus whether Texas’s behavior fell within the First Amendment’s act description and whether any government interest outweighed the constitutional mandate.

The Court affirmed the Texas court’s decision to reverse Johnson’s conviction. Texas had conceded that Johnson’s conduct was “expressive,” thus implicating the Free Speech Clause, but maintained that this suppression of expressive conduct was justified. Writing for the majority, Justice Brennan held that neither governmental interest declared by Texas justified the suppression. He reasoned (1) that “preventing breaches of the peace” did not justify the suppression because no reasonable onlooker would have regarded Johnson’s conduct “as a direct personal insult or an invitation to exchange fisticuffs,” and (2) that “preserving the flag as a symbol of nationhood and national unity” 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.” Brennan explained that “the right to differ is the centerpiece of our First Amendment freedoms.”

Following this decision, media reports described Johnson as declaring a constitutional “right to burn the flag.” Here and in Brennan’s phrase

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126 Johnson, 491 U.S. at 400 n.1.
127 Id. at 400.
129 Johnson, 491 U.S. at 407.
130 Id. at 409.
131 Id. at 407.
132 Id. at 414.
133 Id. at 401.
“right to differ,” the word “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 constitutional 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.”

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.” Hohfeldian analysis shows why. Regarding 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 constitutional liberty to burn an American flag.

4. Grutter v. Bollinger

Barbara Grutter was a Caucasian resident of Michigan who applied for admission to the University of Michigan Law School (“Law School”). She had an undergraduate grade point average (“GPA”) of 3.8 and a Law School Admission Test (“LSAT”) score of 161. The Law School’s admission 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 enthusiasm of her recommenders, and other criteria to determine her potential contributions to the Law School. 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.

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

135 Johnson, 491 U.S. at 413 n.8.
138 Id.
139 Id. at 315.
140 Id. at 315-16.
discriminated against, like African-Americans, Hispanics and Native Americans,” and sought to enroll a “critical mass of [underrepresented] minority students” in order to “ensure their ability to make unique contributions to the character of the Law School.” When she was denied admission to the Law School, Grutter brought an action against the Law School in the U.S. District Court alleging that the admissions policy significantly disadvantaged non-minority applicants and violated the Equal Protection Clause. The court granted Grutter’s request for declaratory and other relief. The U.S. Court of Appeals for the Sixth Circuit sitting en banc reversed this judgment, and Grutter appealed to the U.S. Supreme Court.

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. 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. Thus, the question for the Court was whether the Law School’s admissions policy denied Grutter equal protection of the laws.

The Court affirmed the Sixth Circuit’s decision. 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 educational benefits that flow from a diverse student body.” 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

141 Id. at 316.
142 Grutter, 539 U.S. at 316.
143 Id. at 317.
144 Id. at 321-22.
145 Id. at 343.
diversity; (2) did not unduly burden non-minority applicants; and (3) did not make race the defining feature of an application.\textsuperscript{146}

Grutter contains ambiguous language implying that the case involved balancing one “right” against another “right,” which can be confusing. With regard to Michigan, O’Connor mentioned the “right to select those students who will contribute the most to the ‘robust exchange of ideas,’”\textsuperscript{147} and Justice Kennedy’s dissenting opinion mentioned the “right to classify on the basis of race.”\textsuperscript{148} 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).

Hohfeldian analysis also clarifies the difference between Grutter and Gratz v. Bollinger,\textsuperscript{149} where the Court struck down the University of Michigan’s undergraduate admissions policy. This policy assigned points to eligible applicants based on certain criteria and offered admission to any eligible applicant who received 100 points. Since the policy instructed admissions officers to award racial minority applicants an extra 20 points, minority applicants had correlative claims that the officers award them those extra points while non-minority 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, which correlated with claims for all eligible applicants. Thus, under the undergraduate admissions policy minority and non-minority applicants had different legal relations, 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 reach opposite results.

Justice Ginsburg wrote a concurring opinion in Grutter that mentions “unequal or separate rights.”\textsuperscript{150} What Hohfeldian analysis showed about the difference between Gratz and Grutter clarifies this phrase. The Gratz admissions policy involved “separate” rights and the Grutter admissions policy involved “unequal” ones, 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

\textsuperscript{146} Id. at 334.
\textsuperscript{147} Grutter, 539 U.S. at 324 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)).
\textsuperscript{148} Id. at 395 (Kennedy, J., dissenting).
\textsuperscript{149} 539 U.S. 244 (2003).
unequal rights when, under the same circumstances, they have identical legal positions but receive different amounts of benefit from the legal relation.\textsuperscript{151}

\section*{C. The Nature of Constitutional Rights}

The above discussions show how the Supreme Court invokes the phrase “constitutional right” equivocally to mean different concepts.\textsuperscript{152} Given their importance, the nature of constitutional rights must be understood clearly. Accordingly, this section tries to clarify what “constitutional right” means and thus to improve constitutional analysis.

The Constitution creates legal relations between an individual and the government. Generally, “constitutional rights” are those positions occupied by individuals relative to the government that Hohfeldian analysis calls claims, liberties, powers, or immunities. For example, \textit{Johnson} announced a constitutional right by holding that the Free Speech Clause provides an immunity from the government enacting a flag-burning law.\textsuperscript{153} People often use the phrase “constitutional right” more broadly, however, to mean a collection of such positions. For example, “right to freedom of speech” describes the collection of positions created by the Free Speech Clause, and “right of privacy” encompasses many positions arising from different clauses and policies in the Constitution.\textsuperscript{154}

The broader concept 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.\textsuperscript{155}

\textsuperscript{151} 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. Dissenting arguments in \textit{Brown v. Board of Education} and \textit{U.S. v. Virginia} used this conceptual pattern. In \textit{Brown v. Board of Education of Topeka}, 347 U.S. 483 (1954), 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 \textit{U.S. v. Virginia}, 518 U.S. 515 (1996), 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.

\textsuperscript{152} \textit{See supra} note 2.

\textsuperscript{153} \textit{Johnson}, 491 U.S. at 420.

\textsuperscript{154} \textit{See Griswold v. Connecticut}, 381 U.S. 479, 484-85 (1965) (inferring the right of privacy from the “penumbras” of various constitutional clauses and decisions).

Likewise, “constitutional right” in the broader sense may be called a “bundle of relations,” meaning a bundle of relations between an individual and the government that arise from the same constitutional clause or value.

By thus clarifying the nature of constitutional rights, Hohfeldian analysis allows for better legal reasoning about them. Recognizing that the word “constitutional right” may indicate one of five distinct concepts—i.e., claim, liberty, power, immunity, or bundle of relations—helps avoid confusion arising from equivocal use of the word. 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 the policy choices that account for particular legal rules. Hohfeld criticized “the conceptualist technique of claiming that specific rules were implicit in highly abstract concepts.” On this matter, Singer observed:

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.

Courts and litigants today likewise purport to infer specific rules from highly abstract concepts in constitutional analysis. By clarifying how policy and moral choices frequently underlie appeals to highly abstract concepts labeled “rights,” Hohfeldian analysis provides an important tool for clarifying traditional reasoning about constitutional rights.

CONCLUSION

This article shares Hohfeld’s aim to provide a practical benefit to law students and professionals. The analytical framework presented here

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156 Singer, supra note 11, at 1056-59.
157 Id. at 1057.
158 Id. at 1059.
159 See HOHFIELD, supra note 6, at 26. See also Charles Clark, Relations, Legal and Otherwise, 5 ILL. L. Q. 26, 26 (1922) (stating 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 that its cultivation brings practical results. 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.”); Walter Wheeler Cook, Hohfeld’s Contributions to the Science of Law, 28 YALE L.J. 721 (1919) (describing
provides this benefit by enabling clearer and more focused constitutional analysis. Professor Arthur Corbin remarked:

[In our search for justice we need desperately to be equipped with the keenest and the truest analytical weapons. Terminology and analysis are the tools that we must use in the process of applying the precedents and in stating rules and policies. They are vitally important tools. They clear the ground and lay bare the underlying legal and social problem to be solved! Without them, we may not see this underlying problem at all; and even if we see it, we may get lost in the inaccuracy and confusion of our own verbosity.]

This article provides such an analytical weapon by explaining and demonstrating the following insights. Hohfeldian analysis stems from a recognition that relationships are central to law’s structure. The relationships that comprise law each have an active position, an act description, and a passive position. Each position may be described with a Hohfeldian concept. Thus, knowing a particular concept’s significance normally requires identifying a broader relation’s nature and source.

Rights are not like objects that a person can possess or carry with him. They are either Hohfeldian concepts or bundles of such concepts, and each Hohfeldian concept describes an active or passive position within a legal relation. Critically, such positions only have meaning by reference to the broader relationship. They are like different vantage points upon a single relationship. The recognition that relationships are central to law’s structure not only clarifies constitutional analysis but also illuminates the nature of constitutional rights.

Hohfeld’s theory as a practical one that helps lawyers expose legal issues and discover analogies otherwise hidden by confusing language).

160 Corbin, supra note 26, at 238.
161 See Llewellyn, supra note 17, at 85 (1960) (“There is a person on each end, always. A has a right that B shall do something. I repeat, when should B fail to do it, A can get the court to make trouble for B. But the right has B on the other end. The right is indeed a duty, a duty seen other end to. The relation is identical; the only difference is in the point of observation.”).