What is a Contract?

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ABSTRACT: A contract is generally understood to be a legal duty that is deliberately created by the obligor and the obligee. But that description misses many legal relationships that are similarly created and are essential to private ordering. Hohfeld referred to these non-duty relations as privileges, powers, and immunities. When ruling on the legal effect of privately-created privileges, powers, and immunities, courts often mislabel them as “contracts” in order to apply borrowed contract doctrines, such as consideration. Courts fail, however, to rationalize the application of borrowed rules to such relationships.

This article proposes that all in personam rights, powers, privileges, and immunities be recognized as being contracts in the sense that they are legal relations that the parties deliberately create by exercising a power. Contracts for privileges, powers, and immunities merit the same judicial and theoretical attention that is given to contracts for rights. Existing contract rules and principles should be adapted to all of the modes of private ordering by agreement.

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Introduction. At common law, a contract is an in personam obligation created by the obligor and obligee. It can be formed in various ways, the most common of which is by the parties’ mutual assent to the exchange of the obligor’s promise for a consideration given by the obligee. These defining features have formally distinguished the law of contract from that of property and tort for hundreds of years of Anglo-American jurisprudence. In this Article, I argue that this ancient conception should be significantly enlarged. I propose that we understand contract to be the creation of any new consensual, in personam legal relationship. Thus understood, contract expands from a law of obligation to a more general capacity for private ordering.

Why tamper with such a settled jurisprudential concept? It was once thought that a rigorously “correct” analytical differentiation of legal concepts would assist in the solution to legal problems by clarifying the relationships among the elements of a legal system.¹ That hope has vanished, along with the conceptualism whose errors it aimed to expose. It turns out that definitions don’t solve real legal problems. Indeed, a concern for analytic clarity seems quaintly anachronistic in a world in which legal issues are resolved by pragmatic policy analysis rather than by deductive reasoning from conceptualist axioms.² But I hope to show that a shift in analytic perspective can serve practical as well as conceptualist ends.

Although the received definition of “contract” enjoys an apparent consensus, a broader conceptualization would offer several advantages. First, it would align the concept with actual judicial usage that frequently contradicts the accepted definition by affixing the “contract” label to relations that do not create obligations. Second, it would encourage these courts to recognize the actual legal effects of such binding legal

² It may be that we are, or should be, all pragmatists now, if only to avoid the ignominy of being legalists. See RICHARD A. POSNER, HOW JUDGES THINK 41-3; 230-32 (2009) (Advocating pragmatism as both a descriptive and normative philosophy of judging).
relationships without having to misconstrue them as creating rights and duties. Third, seeing such relationships as contracts encourages a functional analysis of their rules of formation and enforcement of the sort that has been applied to rights-creating contracts. Finally, the redefinition would give a name and address to a mass of legal relationships that currently inhabit a no-man’s land bounded by contract, tort, and property. Because they perform essential functions in the commercial world, recognition of these relations as contractual phenomena is the first step toward their theoretical explanation and justification.

Part I of this Article shows that the dominant definition of “contract” is too narrow even to encompass the fundamental legal relationships that are created when a rights contract is formed. Part II proposes that contract be reconceptualized to include the consensual creation of any in personam right, privilege, power, or immunity by the exercise of a power to do so. That power is typically exercised through one of four modes of formation: bargain with consideration; agreement without consideration; action and reliance; and unilateral declaration. Part III illustrates the ubiquity of contracts for privileges, powers, and immunities and the variety of judicial approaches to these agreements. Courts often lose their way when applying contract principles such as consideration to these relationships because they have failed to recognize how privileges, powers, and immunities differ from rights-contracts.

I. How to Describe a Contract.

Formal definitions of “contract” appear in the two most authoritative sources of American contract law, the Restatement (Second) of Contracts and the Uniform Commercial Code.

“A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”3

“Contract’” means the total legal obligation which results from the parties’ agreement. . . .”4

It is apparent that the Restatement definition refers to the operative event that creates a legal relation, the promise, while the U.C.C. definition refers to the legal

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3 RESTATEMENT (SECOND) OF CONTRACTS § 1. I acknowledge that the Restatement is “authoritative” only in a persuasive sense until its language is adopted by the courts.
4 UNIFORM COMMERCIAL CODE § 1-201 (11).
relation that is created by the operative event, the obligation.\(^5\) Each of the definitions refers to obligations that the other one misses. Restatement contracts include duties arising from non-agreement promises, such as those enforced under Section 90,\(^6\) while U.C.C. contracts include non-promissory duties, such as good faith, care, and reasonableness.\(^7\) More important than their differences, however, is that they agree in defining contract as a relationship created by two parties, under which at least one of whom owes a legally enforceable duty to the other.\(^8\) This centuries-old common law usage is also maintained in contemporary treatises.\(^9\)

A law student having been duly informed that a contract is a legally enforceable obligation might then be given a quiz in which she is asked which of the following agreements is a contract under that definition, assuming each agreement to have its intended effect:

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\(^5\) \textit{Restatement (Second) of Contracts} § 1, cmt. b. \textit{Arthur L. Corbin, Corbin on Contracts} (1952) ("Corbin on Contracts") § 3. ("Contract" is used variously to refer to the operative act, the legal relation created by the operative act, and the written memorandum of the operative act.) Hohfeld defined "operative facts" in Hohfeld, \textit{Fundamental Conceptions I}, supra note 1, 25 ("Operative, constitutive, causal, or 'dispositive' facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously.")

\(^6\) \textit{Restatement (Second) of Contracts} § 90. The promises enforceable under sections 82 to 94 are classified as contracts that do not require bargain or mutual assent. See \textit{Restatement (Second) of Contracts} 17(1).

\(^7\) \textit{Uniform Commercial Code} § 1-302. The Code also creates implied warranties that arise upon a sale in the absence of promise or agreement. \textit{Id. E.g.} § 2-314 (any sale of goods by a merchant who deals in goods of that kind creates an implied warranty of merchantability).

\(^8\) In very general terms, contract is distinguished from tort because tort law relations are created by law and not by the parties. (This distinction is questionable, however, as discussed below at page xxx.) Contract is distinguished from property because property relations are between the owner and everyone else in the world.

\(^9\) \textit{Corbin on Contracts}, \textit{supra} note 5, § 3 (the legal relations resulting from certain operative acts, always including the relation of right in one party and duty in the other.); \textit{E. Allan Farnsworth, Contracts} § 1.1 (3rd Ed. 1999) ("Farnsworth, Contracts") (Restatement definition); \textit{Joseph M. Perillo, Calamari and Perillo on Contracts} § 1.1 (6th ed. 2009) ("Every contract involves at least one promise that has legal consequences."); John Edward Murray Jr., \textit{Murray on Contracts} (4th Ed. 2001) (Restatement definition). \textit{Anson, Law of Contract} 1 (23d Ed. 1969) (Legally binding promise); \textit{Trietel, The Law of Contract} 1 (3d Ed. 1970) (Agreement giving rise to legally enforceable obligation); \textit{Chitty on Contracts} Para. 1.001 (29th Ed. 2004) (H.G. Beale, ed.) (Either an enforceable promise or an agreement giving rise to enforceable obligations).

Older treatises generally concur: 2 \textit{William Blackstone, Commentaries on the Laws of England} 442 (1765-69) ("an agreement, upon sufficient consideration, to do or not to do a particular thing."); \textit{Frederick Pollock, Pollock on Contracts} (11th Ed. 1942) 1,2, ("a promise or set of promises which the law will enforce"). Duty, or obligation, has also been said to be essential to civil law definitions of contract. Leo Duguit, \textit{Collective Acts as Distinguished from Contracts}, 27 Yale L.J. 753, 756-8, (1917) ("Duguit, \textit{Collective Acts.}").
1. A and B agree during contract negotiations that neither will be bound to any agreement between them except by a writing that is signed by both of them.

2. A agrees that A’s contract offer to B will be irrevocable for a fixed time.

3. A and B agree that all implied warranties in a sale of goods from A to B will be disclaimed.

4. A and B agree about when risk of loss will pass in their sales agreement.

5. A and B agree that all disputes relating to their contract will be resolved by mandatory arbitration and will be governed by the law of Idaho.

6. A agrees to waive part of B’s performance due under a contract.

7. A authorizes B to enter into a contract with C on A’s behalf.

8. A releases B from liability for a personal injury that B previously caused A.

9. A and B agree that A will waive A’s rights to property and maintenance if their pending marriage is ever dissolved.

10. A agrees that B may disclose and market A’s personal information obtained as a result of A’s use of B’s internet service.

Because none of these agreements creates a right/duty relationship, the correct student answer would be “None of the above.”

After the quiz has been graded, however, the student might well be moved to ask, “If these agreements are not contracts, then what are they? And why are you teaching me about them in Contracts class?” For they are taught about in Contracts classes. Contracts casebooks are full of decisions that deal with such agreements with no hint that they are not contracts. This Article proposes that such agreements be formally admitted to the fold and treated as contracts are treated.

Both the courts and the Restatement already use the term “contract” to refer to some legal relations, such as the agreements in the quiz, that do not consist of rights and duties. Some of these relations arise from terms in classic contracts, some arise as modifications to classic contracts, and some arise as free-standing relationships created apart from any other contract. Courts frequently treat these non-rights relations as if they

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10 Some of the agreements create “incidental” rights and duties that are not the chief object of the agreement. For example, the creation of an agency will create incidental duties of loyalty and good faith. But the central purpose and effect of the agency is the creation of the agent’s power and the principal’s liability.

11 My students seem to have a gift for putting me on the spot this way. The sure sign of it is when I stall by saying, “That’s a good question,”as I would here.
were rights-contracts in order to subject them to contract rules, such as those relating to formation formalities, consideration, and mutual assent. But sometimes the reasoning runs the other way: having defined a non-rights relation as a contract in order to apply one contract rule to it, courts then apply other contract rules to it “because it is a contract.”

12 Rarely, however, are the rules applicable to these relations subjected to an independent, functional analysis as is the case with rights-contracts.

Although contracts scholars have frequently suggested particular redefinitions of “contract” in order to gain insight into legal features of exchange relationships, the feature that has most beguiled them has been the creation of legal enforceability. Contract theory is concerned almost exclusively with the creation of duties, as it ponders why and how the law enforces certain promises and not others. Theories concerning the judicially recognized grounds for enforcement -- consideration, reliance, and restitution -- seek to rationalize the creation and enforcement of legal rights and duties only. No equivalent theories are thought to be necessary to rationalize creation of the other legal relationships -- privileges, powers, and immunities -- that accompany the formation of every contract.

Agreements that create non-rights legal relations have been “under-theorized,” largely because they have been invisible as a class. We have not subjected non-rights relations to the questions that we have posed for the creation of obligations. Questions, for example, such as the following: Should consideration be required to create any of the following legal relations: an option contract, a release of a tort claim, a release of an

12 See discussion infra at Part III c.
13 CORBIN ON CONTRACTS supra note 5 § 3 (1952) (The usage we make of the term “contract” should be such as “serves our necessity and convenience.”); Friedrich Kessler, Contracts of Adhesion – Some Thoughts About Freedom of Contract,” 43 COLUM. L. REV. 629, 633 (1943) (“[T]he use of the word “contract” does not commit us to an indiscriminate extension of the ordinary contract rules to all contracts.”); Arthur Alan Leff, Contract As Thing, 19 Am. L. Rev. 131, 132, 134  (1970) (Classification of transactions as “contracts” is done to promote intellectual and operational efficiency); Jay Feinman, The Last Promissory Estoppel Article, 61 Fordham L. Rev. 303 (1992) (Suggesting that contract analysis concern itself with relationship rather than with promise); Ian Ayers, Empire or Residue: Competing Visions of the Contractual Canon, 26 Fla. St. U. L. Rev. 897, 898 (1999) (Hereinafter “Ayers, Empire or Residue”) (disclaiming the possibility of an essentialist, all-purpose definition of contract and adopting a broad, “imperial” definition of contract in order to examine private agreement’s ability to change default rules of many kinds).
14 A focus on judgments as the essence of law can be seen in much of the early realist analysis, which defined law as a prediction of what courts would do. What they did was to decide claims based on rights. See, Oliver Wendell Holmes, Jr. The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897) (Law is prediction of judicial action).
executory right to contractual performance, a no-oral modification clause; a choice of law agreement; an arbitration clause? As to which of the foregoing legal relationships should a party have the power of assignment? What if any formalities should be required for the creation of any of the foregoing relationships? Only by subjecting such non-rights relations to the functional analysis that we have applied to contracts can such questions be given respectable answers.

My argument and proposed redefinition will be clearer after I clarify some descriptive terms. In order to answer the question “What is a contract?” it is useful to have a non-question-begging way to describe the transactions and relationships that qualify for the title. These descriptions should identify the salient features of the relationships that are relevant to the purposes of the classification. Because they precisely distinguish among the elemental legal relationships that make up a contract, I will use the descriptive terms systematized by Wesley Hohfeld.

A. Hohfeld's Fundamental Conceptions.

Early in the last century, Wesley Hohfeld published two articles that he hoped would reform judicial reasoning by clarifying what he called the “fundamental conceptions” of private law.15 His analysis of prior decisions in various common law doctrinal areas led him to believe that many courts had reached unsupportable results because they had confused the conception of a legal “right” with three related ideas: privilege, power, and immunity. To Hohfeld, each of these terms referred to a distinct legal relationship with its own unique effect. Hohfeld contended that these four elements, properly understood, were the primary, indeed the only, irreducible constituents of the private legal order, and he hoped to induce courts and lawyers to recognize and differentiate among them more precisely.

15 Hohfeld, Fundamental Conceptions I and Fundamental Conceptions II, supra note 1.
The fundamental unit of analysis in Hohfeld’s system is the legal relation.\(^{16}\) Each relation unites exactly two persons and stipulates the legal effect of an action that one of them might take. There are four such fundamental relations, two of which are simply the absences or negations of the other two.\(^{17}\) Each person’s role in each relationship has a separate name, so that there are four pairs of Hohfeldian roles: right/duty; no-right/privilege; power/liability; and disability/immunity. In each relationship, the two “halves” (the roles divided by the virgule) are merely two perspectives on the same legal fact, the two “ends” of a single relationship, neither of which can exist without the other.

1. Right/duty. A person who has a duty has a legally enforceable obligation to act or refrain from acting in a specific way. The person who may enforce the duty has the correlative right to the performance.\(^{18}\) This is the only kind of “right” properly so called in Hohfeldian description.\(^{19}\)

Examples of Hohfeldian right/duty relationships include the right of a property owner to exclude others from her property, the right of a person not to be negligently injured by another person, and the right of a contract party to receive the promised performance. The potential trespasser, the potential tortfeasor, and the contract promisor in these examples each has a duty to act or refrain from acting in the prescribed way.

\(^{16}\) Although Hohfeld’s analysis focused on the fundamental nature of legal relations, it was not a precursor to what has come to be referred to as a relational contract theory. The theory of relational contracts describes and explains the legal and non-legal relationships between parties who are engaged in a more or less continuous pattern of reciprocal exchange and interaction. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980). The literature on relational contract is vast. For a concise description on the differences between relational and neoclassical contract theory, see Jay Feinman, Relational Contract Theory in Context, 94 NW. U.L. REV. 737 (2000). Professor Elements of trust, expectation, reliance, and flexibility characterize relational contracts to a greater extent than they do discrete, or one-time exchanges. Insofar as they consist of bundles of the same kinds of legal relations between the parties, however, relational contracts do not differ from discrete contracts. To the Hohfeldian eye, both kinds of contract are composed of the same elemental particles: rights, privileges, powers, and immunities, albeit in different configurations. Hohfeldian analysis is not intended to describe the personal, economic and other factors that make relational contract theory interesting.

\(^{17}\) Hohfeld, Fundamental Conceptions I, supra note 1, 30, 32, 55. In his articles, Hohfeld displayed the eight fundamental legal conceptions in tabular form as four sets of pairs. Graphic juxtaposition illustrated their relations to each other as correlative or opposites. Because this Article does not concern the logical relationship among the fundamental relations, I will rely on a verbal description.

\(^{18}\) Hohfeld, Fundamental Conceptions I, supra note 1, 31-2.

\(^{19}\) Hohfeld, Fundamental Conceptions I, supra note 1, 30-31; Fundamental Conceptions II supra note 1 at 717. ("The synonym ‘claim.’ seems best.") Despite Hohfeld’s insistence, this relation is called a “claim-right” by some Hohfeldian analysts, E.g. J.E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. REV. 711, 712 (1996) (“Penner, The Bundle of Rights Picture”) and a “demand-right” by others. Radin, Restatement of Hohfeld, supra note 13 at 1149.
Breach of that duty will usually subject the breaching duty-holder to a claim for a legal remedy brought by the rights-holder for any harm caused by the breach.\textsuperscript{20}

2. No-right/privilege. This is the absence of a particular right/duty. A person who has no duty to act in a specific way has a privilege not to act; a person who has no duty to refrain from acting in a specific way has a privilege to act. In each case, the person to whom he owes no duty has a “no-right.”\textsuperscript{21} For example, non-owners of property have no-right to exclude others from its use; persons have no-right to be free from harm that other persons are privileged to cause; and promisees of unenforceable promises have no-right to receive a promised performance. The non-trespasser, the non-tortfeasor, and the promisor in these examples each has a privilege to act or refrain from acting in the designated way without incurring legal liability to the “no-right” holder.

3. Power/liability. A person who has the ability to create or extinguish a legal relationship by a voluntary act has a power.\textsuperscript{22} A person who will be a party to the legal relation thus created or extinguished is under a corresponding liability.\textsuperscript{23} For example, the owner of property has the power to transfer title to another person; a person has the power to consent to what would otherwise be a tortious act, extinguishing another person’s duty to refrain; an offeree has the power to create contract relations by accepting the offer. The property transferee, the potential tortfeasor, and the offeror in these

\textsuperscript{20} Upon breach of a legal duty, the right holder acquires a secondary capacity to obtain a remedy, the duty-holder acquiring the corresponding secondary duty and liability. Hohfeld, Fundamental Conceptions II, supra note 1, 760. Whether a claim for damages for breach of a duty is a right or a power is disputed, however. Compare Max Radin, A Restatement of Hohfeld, 51 Harv. L. Rev. 1141, 1151 (1938) (“Radin, Restatement of Hohfeld”) (Breach of a duty creates a new duty to pay damages) with Walter Wheeler Cook, The Powers of Courts of Equity, 15 Colum. L. Rev. 37, 45 (1915) (“The ‘right to damages’ on analysis, appears to consist of (1) a privilege, and (2) a power with the corresponding liability.” (Footnote omitted.)) and Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 80-81 (1998) (Remedies are powers, not duties; violation of a duty and creation of a remedial entitlement does not create a duty of recompense in the defendant).

\textsuperscript{21} Hohfeld, Fundamental Conceptions I, supra note 1, 32-33; 39 (The dominant technical meaning of “privilege is negation of legal duty). “No-right” is a neologism Hohfeld created because no existing legal term had that meaning. Id. 33. Because the “negative” relations exist in the absence of any creation of positive relations, it is obvious that the number of no-rights vastly exceeds the number of rights in the legal cosmos, as the number of immunities exceeds the number of powers.

\textsuperscript{22} Hohfeld, Fundamental Conceptions I, supra note 1, 44-5. Hohfeld defined a power as the ability to change a legal relation by a voluntary action. Id. As one author expressed it, “a power is a latent possibility that present legal relations might be changed.” David Gray Carlson, Voidable Preferences and Proceeds: A Reconceptualization, 71 Am. Bankr. L.J. 517, 538 (1997).

\textsuperscript{23} See RESTATEMENT OF THE LAW, PROPERTY § 3 and Special Note (1936) (Adopting Hohfeld’s definitions of power and liability). The exercise of a power may create a relationship to which the power-holder is a party or it may create a relationship between two other persons. In the latter case, the power holder has a power/liability relationship with each of the parties.
examples are each under a liability (or vulnerability) to become a party to the new legal relationship created by the exercise of the power.

4. Disability/Immunity. This is the absence of a particular power/liability.\textsuperscript{24} A person who lacks the power to create or extinguish a legal relation by a voluntary act has a disability. Each person who is or would be a party to that legal relation has a corresponding immunity. A property owner is immune from being divested of title by someone who misappropriates the property; those protected by the Bill of Rights are immune from laws that would abridge freedom of speech; and a contract offeror who has revoked the offer is immune from the offeree’s later attempted acceptance. The misappropriator, the legislature, and the offeree in these examples are disabled from creating the legal relationships in question.

Hohfeld’s system is so tightly constructed that the creation of any Hohfeldian relationship is \textit{ipso facto} the extinction of the opposite one relating to the same act and the same parties.\textsuperscript{25} The creation of a duty is the extinction of the corresponding privilege/no-right relationship; the extinction of a duty is the creation of the corresponding privilege/no-right relationship; the creation of a power is the extinction of the corresponding disability/immunity relationship; and the extinction of a power is the creation of the corresponding disability/immunity relationship. These correlations permit any power to be described as the power to create one of the four relationships and any relationship to be described by reference to the position of the party who has the pre-Hohfeldian “right”: right, privilege, power, or immunity.\textsuperscript{26} That usage will be followed in the Article.

Although every Hohfeldian relationship unites exactly two persons, the set of such relationships created by a legally operative event may be either \textit{in personam} or \textit{in rem}.\textsuperscript{27} In general, \textit{in personam} relations are created between two determinate persons

\textsuperscript{24} Hohfeld, \textit{Fundamental Conceptions I}, supra note 1, 55.

\textsuperscript{25} “The ‘extinguishment’ of a legal relation is necessarily the creation of a new one.” Arthur L. Corbin, \textit{Legal Analysis and Terminology}, 29 \textit{Yale L.J.} 163, 164 (1919) (\textit{Hereinafter}, “Corbin, \textit{Legal Analysis}.”).

\textsuperscript{26} Hohfeld’s list is somewhat confusing because it shifts perspectives. The four relations as seen from the same party’s point of view would be rights, no-rights, powers, and disabilities. The extinction of a right creates a privilege in the former duty-holder, not the former right-holder. Because Hohfeld wanted to focus on the four definitions of rights, his system shifted focus from right to privilege and from power to immunity.

\textsuperscript{27} Hohfeld, \textit{Fundamental Conceptions II}, supra note 1, 718. [“A paucital right, or claim, (right \textit{in personam}) is either a unique right residing in a person (or group of persons) and availing against a single
while *in rem* relations are created between a person and an indeterminate number of others.\(^{28}\) For example, *in personam* rights protected by contract law are effective only against the parties to the agreement while an owner’s *in rem* rights protected by property law are effective against everyone else in the world. *In rem* relations also include the right/duty relations created by law and enforced under the law of torts, such as rights to personal security.\(^{29}\) As Hohfeld noted, *in rem* relations are always constructive rather than consensual, arising independently “of even an approximate expression of intention on the part of those concerned.”\(^{30}\)

The four fundamental relations occur in combinations that arise simultaneously upon the creation of the more familiar complex legal relations, including property interests, express trusts, contracts, agencies, business organizations, and bailments. Thus, since Hohfeld’s time, it has become common to speak of property ownership as a complex of discrete legal relations, analogized to a bundle of sticks.\(^{31}\) At the moment that

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\(^{28}\) Hohfeld, *Fundamental Conceptions II*, supra note 1, 719, TAN 22; 723; 733. Hohfeld considered *in rem* rights to be intrinsically identical to *in personam* rights and denied that they attached only to persons through their relationship to particular things, instancing patentee’s rights and rights to personal security as *in rem* rights. *Id.* Hohfeld defined a “general relation” as one of a class of similar relations residing in people in general. Thus, any duty correlating with a multital right is a general duty. “The right of a person not to be struck by another is both multital and general.” *Id.*, 718, n. 30 (emphasis in original.)

\(^{29}\) Hohfeld, *Fundamental Conceptions II*, supra note 1, 733-4; 743-4.

\(^{30}\) Hohfeld, *Fundamental Conceptions II*, supra note 1, 720, n. 23. He went on to say: “This explains, no doubt, why most, if not all, of such duties are negative in character: it is just and politic to spread such merely negative duties broadcast; whereas precisely the opposite would be true in the case of most kinds of affirmative duties.” *Id.* (Emphasis in original.)

a person becomes the owner of Blackacre, a bundle representing ownership of Blackacre is created. This bundle contains *in rem* relations between the owner and every other person in the world. These include right/duty relations, barring everyone else from interfering with the owner’s exclusive possession of Blackacre; duty/right relations barring the owner from maintaining a nuisance on the property; no-right/privilege relations whereby the owner may freely use and occupy Blackacre without breaching any duty owed to any other person; power/liability relations whereby the owner may transfer ownership of Blackacre, extinguishing his *in rem* relations and creating similar ones in the transferee; liability/power relations whereby the owner may be divested of title by the actions of certain third parties; and immunity/disability relations whereby the owner’s bundle of relations may not be extinguished by anyone else’s action.

The owner’s bundle includes several types of all four of the interests that some courts formerly lumped together as “rights”: rights, privileges, powers, and immunities. Post-Hohfeld, one cannot fully describe the legal effect of property ownership without reference to all its component relationships. It is only a slight exaggeration to say that in the typical first year Property course, the student is introduced to the bundle concept and spends the rest of the course unpacking its various sticks.

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33 Hohfeld, *Fundamental Conceptions II*, supra note 1, 745-52.
35 Hohfeld, *Fundamental Conceptions II*, supra note 1, 756-7. The property may be lost through judicial process, for example, under a writ of execution.
36 Hohfeld, *Fundamental Conceptions I*, supra note 1, 55.
B. Contract as a Bundle of Rights, Powers, Privileges, and Immunities.

“Such terms of the law as “contract” . . . do not represent a single legal relation; they describe and represent complex and variable aggregates of legal relations.” 37

Long before the misleading simplicity of the Restatement and Uniform Commercial Code definitions, Corbin had adopted Hohfeld’s insight and terminology: the formation of a contract brings about not only duties and their correlative rights, but also powers and liabilities, privileges and no-rights, and disabilities and immunities. 38 Some of these, which I will term “coeval relations,” arise automatically at the moment a contract is formed, which is the moment that the duty is created. By definition, the formation of a contract creates in personam right/duty relations whereby the obligor acquires a duty to perform the promise and the obligee acquires a right to the obligor’s performance. 39 But formation also automatically creates all the coeval implied rights and duties that have been held to supplement the express terms of the contract agreement, such as the duty of good faith. In addition, formation creates coeval, in personam power/liability relations whereby the other relations may be extinguished, e.g., by assignment, modification, or waiver.

Finally, and perhaps most importantly, formation of a contract creates coeval in personam disability/immunity relations concerning either party’s ability to extinguish the other newly created relations. The legal relations created by the agreement are immune to unilateral extinction by either of the parties who created them. This is part of what is meant by saying that the contract is “binding” and is recognized as a central phenomenological characteristic of contract liability. 40

37 Corbin, Legal Analysis., supra note 20 at 165. The same is true of the relations that give rise to “tort duties,” which are always accompanied by either powers or disabilities, such as of waiver or disclaimer. Professor Penner has made a similar observation “Penner, The Bundle of Rights Picture,” supra note 24, 739-40.
38 Hohfeld, Fundamental Conceptions I and Fundamental Conceptions II, supra note 1.
39 Formation of a contract does not necessarily create any new privilege/no-right relation, which would result only from the extinction of a pre-existing duty. Particular contracts may do so, however. A contact between a patient and a surgeon, for example, may create a privilege in the surgeon to cut and sew the patient.
A Hohfeldian perspective also discloses that formation of a contract creates coeval *in rem* property relations between the contract rights-holders and the rest of the world. A rights-holder acquires *in rem* rights against the world precluding certain kinds of interference with her interest in receiving her counter-party’s performance. These rights are enforced under the tort theory of inducing breach of contract. Both contract parties acquire coeval *in rem* immunities that disable the rest of the world from enlarging or extinguishing their contractual relations with each other. In many cases, rights holders acquire a coeval *in rem* power of assignment, which is, as in the case of property ownership, the power to extinguish their own rights to the obligor’s performance and create similar ones in an indeterminate number of assignees. The age of derivatives has taught us to accept that the rights of the original obligees may be detached, chopped into bits, and bundled with other, similar bits to form financial products that can be traded in markets far removed from the world in which the contract was formed.

In addition to the coeval relations that arise with the formation of every contract, other relations of all four types arise as a result of the parties’ agreement to express terms. Some of these terms, such as express warranties and liquidated damages provisions, create additional contract duties. Most of them do not. The modern contract bristles with express and implied terms that create privileges, powers, and immunities rather than duties. Among these are terms that concern choice of law; choice of venue; remedy limitations; reliance waivers; assignability; interpretation; express conditions;

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42 RESTATEMENT (SECOND) OF CONTRACTS § 317. Hohfeld, *Fundamental Conceptions I*, supra note 1, 45. If the right is not assignable, the obligee has an *in rem* disability.

43 U.C.C. § 2-213. An express warranty creates an obligation to tender conforming goods. Id.

44 U.C.C. § 2-719; RESTATEMENT (SECOND) OF CONTRACTS § 356. A liquidated damages provision creates a conditional, secondary right/duty and power/liability relation that arises only upon breach of the contract. Some of these terms in the following list may create incidental or ancillary right/duty relations. Those relations are not, however, their primary intended effect.

45 E.g., U.C.C. §§ 2-718; 2-719.

46 See infra Anti-Contracts, Part III. Kabir Masson, *Note: Paradox of Presumption: Seller Warranty and Reliance Waivers in Commercial Contracts*, 109 COLUM. L. REV. 503 (2009). If given legal effect, a non-reliance agreement prevents a parties’ reliance on the other party’s words or conduct from creating a waiver
written and oral modification; integration; risk-of-loss; disclaimers of warranty; remedies limitations; and an entire range of options whereby contract parties may have the power to modify or terminate the contractual relationship, with or without consideration. Additional non-duty contractual relations arise either before the contract is formed, such as anti-contracts and non-reliance provisions, or after the contract is formed, such as waivers of express conditions, discharge provisions, releases, and agreements to rescind. None of these contract terms or agreements creates a right/duty relationship: each creates a privilege, power, or immunity.

Thus, as a purely descriptive matter, the classical definition of a contract is seriously incomplete in referring solely to rights and duties. As with acquisition of or estoppel or obligation. W.R. Grace & Co. v. Taco Tico Acquisition Corp., 454 S.E.2d 789 (1995); Sidney W. DeLong, Placid, Clear-Seeming Words: Some Realism About the New Formalism (With Particular Reference to Promissory Estoppel), 38 San Diego L. Rev. 13 (2001) (“Delong Placid Clear-Seeming Words”). Thus it creates an immunity. 48 RESTATEMENT (SECOND) OF CONTRACTS § 322; Uniform Commercial Code § 2-210. If effective an anti-assignment clause creates an immunity. 49 An interpretation stipulation is an agreement about how the written agreement is to be interpreted in any enforcement proceeding. On the power of the parties to specify a court’s interpretive strategy, see Robert E. Scott, The Case for Formalism in Relational Contract, 94 N.W.U.L. Rev. 487 (2000) (Courts should defer to parties’ stipulation of interpretive strategy). 50 Express conditions that consist of an act by one of the parties create a power in the person whose action constitutes the condition, Arthur L. Corbin, Conditions in the Law of Contract, 28 YALE L.J. 739, 742, (1918). What were formerly known as conditions subsequent are characterized as “events of discharge” in the Second Restatement. RESTATEMENT (SECOND) OF CONTRACTS § 230. 51 Part III C, infra. See RESTATEMENT (SECOND) OF CONTRACTS § 27 cmt. b Uniform Commercial Code § 2-209 (2). Such an agreement creates an immunity to the legal relations that would otherwise be created by an oral contract modification. 52 The integration of an oral agreement has the legal effect of discharging all inconsistent agreements concerning the same transaction and, if the integration is complete, all agreements within the scope of the transaction. Uniform Commercial Code § 2-202; RESTATEMENT (SECOND) OF CONTRACTS § 213. Thus, an integration can have the effect of creating any of the Hohfeldian relations. 53 Risk of loss agreements create a power to transfer risk because risk of loss agreements stipulate when and how risk of loss is to transfer from the seller to the buyer in a sales agreement. See Uniform Commercial Code §§ 2-319, 2-320, 2-321, 2-322. 54 See Uniform Commercial Code § 2-316. If a disclaimer of warranty extinguishes an existing duty of tendering conforming goods, then it creates a privilege. If it prevents one from arising in a later sale, it creates an immunity. 55 Uniform Commercial Code § 2-719. See RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt d. 56 See infra Part III for a definition and description of anti-contracts. 57 See infra Part III. 58 RESTATEMENT (SECOND) OF CONTRACTS §§ 224-230. 59 See infra Part I. 60 RESTATEMENT (SECOND) OF CONTRACTS § 284. 61 RESTATEMENT (SECOND) OF CONTRACTS § 283. 62 The Restatement recognizes that the creation of a right, privilege, power, or immunity, may itself be consideration for a promise as can the operative act necessary to effect the change. RESTATEMENT
property, formation of a contract creates a bundle of discrete legal relations that arise both as necessarily incident to the creation of any contractual duty and as contingent features of particular agreements.63 Unlike the property bundle, however, the contract bundle consists chiefly of in personam relations between the parties to the contract rather than in rem relations between one person and the rest of the world.

II. Reconceiving Contract as the Creation of In Personam Legal Relations.

A. A Proposed Redefinition.

Having shown that right-duty relationships are not sufficient to create a contract, I now move to the more controversial claim that they should not be necessary to one. It is understandable that the traditional conceptualization makes a right/duty relation the sine qua non of contract. Because legal relations are given reality by privately instituted litigation, private law could be defined as the set of conditions under which courts will and will not vindicate rights. As a result, the institutional requirements of judicial process have come to define legal substance,64 to the point at which the law of contract, tort, and property is in practice a law of claims and remedies based on rights and duties.

The other legal relations are not wholly invisible to the judicial dispute resolution process. However, a privilege, power, or immunity usually has legal reality only as it figures as a preliminary issue in judicial enforcement of rights claims. For example, a judicial finding of privilege might support a determination that a plaintiff has no enforceable right and might warrant judgment for the defendant. A finding that a party has a power may be integral to a finding that the power was exercised to form or extinguish a right-duty relation on which a legal claim has been brought. A finding of

63 The number of such relationships is infinite because they include all the immunities to which the contract relations enjoy. For a similar reason, the vast majority of the relationships are of no practical consequence.

64 The history of contract traces its development to the writs of debt, covenant, and trespass, from the latter of which arose general and special assumpsit. See generally A.W. B Simpson, THE HISTORY OF THE COMMON LAW OF CONTRACT (1975). Sir Henry Maine, Dissertations on Early Law and Custom (1883) 389: “[s]o great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.” (Quoted in Robert S. Summers and Robert A. Hillman, Contract and Related Obligation 1040 (5th Ed.2006).
immunity may underlie a finding that no right-duty relation has been created. In this way, a law of powers, privileges, and immunities necessarily evolved in the interstices of the law of rights. But no general conception of the creation of powers, privileges, or immunities as such was ever named or acknowledged as a legal category.

Private parties commonly create relation-bundles that center around each of the four fundamental Hohfeldian relations. Only the rights-centered bundles have been recognized as contracts. Bundles centering around privileges, powers, and immunities are given no such generic description, although courts have labeled some of them as contracts when it suited their purposes to do so. Legal thinkers can make use of a general term for all privately-created Hohfeldian relations. Because it is already defined as a mode of creating new relations, albeit of a more limited sort, contract is an appropriate general term for this purpose. Contract broadly defined can then be differentiated into four sub-categories: rights-contracts, privilege-contracts, power-contracts, and immunity-contracts.

I therefore offer the following definitions of “contractual relation” and “contract” as being appropriate to both to judicial practice and to theoretical inquiry:

A “contractual relation” is a binding, in personam right, privilege, power, or immunity formed by one or both of the parties to the relationship pursuant to a power. A “contract” is a group of contractual relations that are formed together.

The proposed definition wants some explaining. “Binding” means both that the relation is legally effective and that at least one of the parties is disabled from extinguishing the relationship by unilateral action. Thus, the definition does not include the creation of relations that either party may freely terminate, such contract offers.

The definition excludes the in rem interests that are created by property transfers because the theoretical underpinnings and background rules of in rem relations are significantly different from those relating to the creation of in personam relations. Limiting the definition of contract to in personam relations keeps the concept from swallowing all of private law and gives it more analytic utility.

The definition is limited to legal relations that are created through the exercise of a power, and not, for example, by breach of a duty or by operation of law. In order to

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65 See generally Part III below.
restrict the definition to such more-or-less deliberate alterations of legal relationships through the exercise of legal powers to do so, I would therefore exclude from the scope of the definition of contractual relation the following actions, even though they incidentally create in personam legal relations:

(1) The breach of a duty, such as a tort or breach of contract, or an action that gives rise to a claim for restitution.

(2) Actions and relations involved in the judicial enforcement of a remedial claim, such as filing a complaint or levying execution on a judgment.

(3) Actions that subject parties to a duty of care or skill that is created by law, such as driving on a highway or making a material representation of fact.

With one exception discussed below, contracts thus redefined would continue to include all of the contracts as currently defined by the Restatement, the U.C.C., and the treatise writers. Now, however, contractual relations would also include all the rights, privileges, powers, and immunities that are formed in the contract bundle. More importantly, contracts also include all such relations created outside the scope of a traditional, “rights-contract” in free-standing transactions.

The proposed redefinition limits contract to relations deliberately created through the exercise of a power to do so. That description applies fully to contacts created by mutual assent expressed in an offer and acceptance. But liability for promises made enforceable under the principle of promissory estoppel has been analyzed by some as tort liability, and thus not fit the proposed redefinition of contract.66 Under a tort perspective, the promisor has breached a general, pre-existing duty created not to both make and break a reliance-inducing promise. This general duty is analogous to the general duty, pre-existing duty not to make an intentional misrepresentation of material fact. The right/duty relationship enforced under Section 90 does not result from the exercise of a power by either the promisor or the promisee but arises by operation of law.67

67 The promisee of a potential Section 90 promise is not in the position of an offeree of a bargain promise. She cannot elect to make the promise enforceable by her act of reliance in the way that an offeree can make the offer enforceable by her act of acceptance. See DeLong, Catch-22, supra note xxx, 1001.
By contrast, a contracts perspective on promissory estoppel sees the promisor as exercising a power to assume a duty to perform her promise, conditional on the promisee’s reliance.\(^{68}\) Whether promissory estoppel creates a contract under the proposed definition therefore depends on whether the principle of promissory estoppel is seen as recognizing a duty or a power, a matter as to which there is no clear consensus.

Contract as redefined would also include a large category of regulated legal relationships that occupy a borderland between contract and tort. Parties have the power to create, by agreement, the relationships of principle/agent, settlor/trustee/beneficiary, seller/buyer,\(^{69}\) employer/employee, insuror/insured, bailor/bailee, director/officer/corporation, attorney/client, doctor/patient, and spouse/spouse. These relations all consist of bundles of rights, powers, privileges, and immunities that are largely fixed by background common law and statutory legal rules, some of which are immutable and some of which can be changed by the parties’ agreement. For pedagogical and other purposes, some of these relations have been set aside from contract law for special treatment.\(^{70}\)

Regulated relationships are contractual in the traditional sense in two ways: they are formed by the parties through the deliberate exercise of creative powers and their legal content (including duties) is, to some extent, provided or controlled by the parties’ express agreement. They are nevertheless also non-contractual in two senses: some of their terms are implied by law and some of those implied terms cannot be changed by the parties’ agreement. No clear dividing line separates such regulated relationships from “ordinary” contracts, however.\(^{71}\) Even contracts as classically defined are themselves non-contractual in the sense that they contain background or implied terms, provided by law in the absence of express agreement, some of which cannot be changed by the

\(^{68}\) See DeLong, *Catch-22, supra* note xxx, 950-58; 968-70; 992-994 (analyzing promise and consent theories of promissory estoppel.)

\(^{69}\) Article 2 of the Uniform Commercial Code establishes many background rules, some of which are immutable, that arise automatically upon entry into a contract for the sale of goods. Sales contracts thus create a form of regulated relationship comparable, for example, to professional relationships.

\(^{70}\) Examples include employment law, corporate law, attorney/client law, insurance law, and trust law. Nathan Isaacs, *Standardization of Contracts*, 27 Yale L.J. 34 (1917) (Bailment, lease, and other relations formerly understood as status have become contractualized); Grant Gilmore, *The Death of Contract* (1973).

\(^{71}\) As Jay Feinman expressed it, “A basic tenet of neoclassical law was that contract law was regulatory as well as facilitative.” Jay Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 Seattle U.L. Rev 1,26 (2004).
parties’ agreement.\textsuperscript{72} It is more accurate to say that ordinary contracts and regulated relationships exist along a continuum of legal relationships whereby parties can “opt in” to a relatively fixed set of legal relations whose content is at least in part determined by statute or common law and based on public policy.\textsuperscript{73} Because opting in is the exercise of a power to create the relationship, the proposed redefinition of contract would embrace all regulated relationships despite their immutable elements.

Because “contract” is not defined as any particular collection of contractual relations, the specification of the particular relations that will be deemed to arise upon any legally operative formation event is purely a matter of positive law. As has been observed, Hohfeldian description is non-normative,\textsuperscript{74} which is the reason that a redefinition of contract alone can have no substantive effect on the content of a contractual bundle of relationships. Thus, it is not proposed to plug the new definition into Section One of the Restatement of Contracts and leave the rest of the rules unchanged, to be applied automatically to contracts that create privileges, powers, and immunities. Each Restatement rule must be re-examined to determine its appropriateness to such non-rights agreements. That re-examination is, indeed, a chief point of the redefinition.

\textbf{B. Rationalizing the Rules of Non-Rights Contracts.}

One reason to define privileges, powers, and immunities as contracts is to foster a systematic, functional analysis of the legal rules that concern them, similar to the analysis that undergirds the rules of rights-contracts. The substance of contract law, as expressed for example in the Restatement, can be seen as a response to a set of societal and


\textsuperscript{73} In this way, they can be considered consensual. Randy E. Barnett, \textit{The Sound of Silence: Default Rules and Contractual Consent}, 78 Va. L. Rev. 821, 902-05 (1992) (Finding consent even to immutable contract rules when the cost of exit is sufficiently low).

\textsuperscript{74} Eric R. Claeys, \textit{Property 101: Is Property a Thing or a Bundle?}, 32 SEATTLE U. L. REV. 617, 622 (2009) (Reviewing \textsc{Thomas W. Merrill \& Henry E. Smith, Property: Principles and Policies (2007)} (“Because it is a specification language, the Hohfeld-Honoré vocabulary cannot do justificatory work.”)) Nevertheless, Claeys agrees with several thinkers that certain aspects of Hohfeldian description, including the \textit{ad hoc} nature of the particular relations to be found in any particular relational aggregate, lend themselves implicitly to normative claims that are hostile to natural law.
institutional needs. In a functional approach to contract law, the rules of contract law represent the lawgiver’s answers to a set of general policy questions:

What functions or purposes are served by giving legal effect to the contract in question? (E.g., autonomy, efficiency, fairness, reliance protection, prevention of unjust enrichment, institutional considerations);

What public interests may be disserved by giving legal effect to the contract in question? (Questions of public policy, illegality, mandatory or immutable rules);

In light of the functions of contract in question, what conditions or circumstances should be necessary to its creation and what existing or supervening conditions or circumstances should render it voidable? (Questions of fraud, duress, mistake, undue influence, unconscionability, capacity, mistake, frustration, impracticability, frustration, and conditions);

In light of the functions of legal formality, what should be the formal prerequisites for creation of the contract in question? (Questions concerning statutory formalities, consideration, statutes of frauds, parol evidence, objective standards of contract interpretation);

In light of the functions of the contract in question, what legal relations should be deemed to arise coeval with its formation? (Questions of the contents of the contract bundle, implied terms, remedies, and coeval in rem relations).

In light of the functions of contract, what judicial enforcement or recognition is appropriate to give legal effect to contract relationships? (Questions of remedies and their limitations).

Following the lead of Lon Fuller and others, contract theorists have subjected various contract doctrines for rights-contracts to functional analysis along the lines
suggested by these questions. Many of them have been answered, although many of them are still in dispute. Exactly the same questions should be asked about the formation of privileges, powers, and immunities. Reclassifying these relations as contracts suggests, without compelling, application of rules of rights contracts to the formation and enforcement of these other kinds of agreement. As will be seen in Part III, courts have long been engaged in the process of applying rights-contract rules to non-rights contracts, such as waivers, releases, and arbitration agreements, using the fiction that they are rights contracts.

Some traditional contracts concepts can have no application to the new contract relations. The concept of breach of contract, for example, applies only to rights-contracts because breach means the failure to perform a legal duty. Neither party can breach a privilege, power, or immunity because these relations are not legal duties. For the most part, privileges, powers, and immunities are “enforced” only insofar as they are recognized and given legal effect in judicial rulings on rights-based claims. If exercise of a power has created a duty that a defendant has breached, the power is given indirect effect when the court awards a remedy to the plaintiff. If an immunity has prevented the duty from being created, the immunity is given indirect effect when the court denies the

75 Fuller, Consideration and Form, supra note xxx. Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,” 100 COLUM. L. REV. 94 (2000) (Tracing the general technique of resolving legal issues by balancing of conflicting considerations to Fuller’s article).
76 McCutcheon v. United Homes Corp, 486 P.2d 443 (Wash. 1971) (Tenants’ waiver of landlord’s duty to maintain common areas held unenforceable on grounds of public policy.)
77 Noroski v. Fallet, 442 N.E.2d 1302 (Ohio 1982) (Release of personal injury claim avoided on grounds of mistake.)
78 Amendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) (arbitration agreement held unenforceable because it contained so many unconscionable provisions that it was not possible to make it enforceable by severing the offending provisions).
79 Fuller himself applied his functional approach to a non-rights contract when he noted that the formal prerequisites of releases were less rigorous than those required for the creation of rights because the circumstances of releasing a claim were more likely to have a cautionary effect on the speaker than the circumstances of making a promise. Fuller, Consideration and Form, supra note xxx 820-21.
80 John Harrison, The Constitutional Origins and Implications of Judicial Review, 84 VA. L. REV. 333, 340-41 (1998) (“[O]ne cannot really violate rules about power. One who fails to comply with such a rule, for example by failing to seal one’s contract for the sale of land, has not done anything bad and is not made any worse off as a result. Rather, the action that fails to satisfy the rule about power is simply a legal nullity.”) A creditor cannot breach a release, for example, although he will suffer dismissal if he seeks to enforce the released claim. A contract party cannot breach a no-oral modification clause, although her attempted modification may be without legal effect. A buyer cannot breach a warranty disclaimer, although his claim for breach may be dismissed. A promisee or representee cannot breach a non-reliance clause by relying, but her reliance-based claim will be dismissed.
plaintiff’s claim for breach of the duty. The legal efficacy of privileges, powers, and immunities is manifested only in the litigation of rights-based claims.\(^81\) Otherwise powers and immunities cannot engender a judicial case or controversy.

It might be argued against redefinition and in defense of the current definition of contract as rights only, that although privileges, powers, and immunities are part of all contracts, they are merely ancillary or adjectival, modifying the rights-creating terms and incapable of an independent existence or justification. On this view, their existence, significance, and legal efficacy would depend on the enforceability of the rights-creating part of the agreement.

As the discussion in Part III will show, many powers, privileges, and immunities are perfectly capable of standing alone, apart from any associated rights-creating agreement. Common examples discussed below include releases, dispute resolution agreements, and anti-contractual letters of intent. Moreover, privileges, powers, and immunities that arise coeval with a rights contract can have a separate existence and may, in some cases, outlive the extinction of the rights. Examples include dispute resolution agreements such as choice-of-law and arbitration clauses. Powers, privileges, and immunities are not merely derivative attributes of rights but are integral legal relationships.

*The Need for Theory.* Rationalizing the rules that govern the creation of privileges, powers, and immunities will make necessary the development of theories that justify judicial recognition or rejection of attempts to create these relations. Although this Article will not attempt to achieve this, the phenomenon of judicial borrowing of rights-contract rules and principles for application to non-rights contracts suggests that a similar borrowing might be justified at the theoretical level. Existing theories of contract law rationalize legal enforcement of contractual rights by reference to various institutional and moral values.\(^82\) Most of these theories apply with equal force and reason to legal recognition of contractual privileges, powers, and immunities.

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\(^{81}\) This is generally true, although they could in theory be evidenced by a declaratory judgment seeking only to confirm a privilege, power, or immunity.

\(^{82}\) Randy Barnett has made a comprehensive summary of existing theories in his Contracts casebook, *Randy Barnett, Contracts: Cases and Doctrine* 585-604 (4th Ed. 2008)
Efficiency theories\textsuperscript{83} of contract, for example, justify enforcement of contractual exchanges on grounds that voluntary exchange creates Pareto efficient reallocation of assets resulting in an increase in wealth or utility for both parties. The same argument justifies giving judicial recognition to any voluntary and informed choice made by both parties to alter their legal relationship. Mutual agreement justifies a presumption that the new legal relationship increases both parties’ utility because each of them prefers the new relationship to the old one.

Reliance theories of contract justify enforcement of promises that have induced the promisee to rely in order to protect and encourage such reliance.\textsuperscript{84} Such theories can give equal justification to enforcement of privileges, powers, and immunities on which parties have similarly acted in reliance.\textsuperscript{85}

The consent theory of contract\textsuperscript{86} justifies enforcement of contract promises in certain circumstances on grounds that the obligor has consented to be legally bound by voluntarily conveying a right of enforcement to the obligee. Such consent similarly justifies holding a party to its manifestation of agreement to create a privilege, power or immunity in another party.

The promise theory of contract\textsuperscript{87} holds that the law should enforce promises because the promisor has intentionally made use of a social convention whose function it is to give moral grounds to another to expect the promised performance. Parties who create privileges by waiver might equally be said to have used conventional forms to extinguish claims they might have had and should be held equally bound to the social meaning of their speech acts.

\textsuperscript{83} Robert Cooter & Melvin A. Eisenberg, \textit{Damages for Breach of Contract} 73 Calif. L. Rev. 1432, 1460 (1985) (Efficient contract maximizes value created by exchange.)
\textsuperscript{85} The Restatement of Contracts does give effect to non-rights contracts on the basis of one of the party’s reasonable reliance. E.g., § 87 (2) (Reliance on irrevocable offer); § 89c (Reliance on modification of executory contract).
\textsuperscript{86} Randy E. Barnett, \textit{A Consent Theory of Contract}, 86 Colum. L. Rev. 269 (1986)
This is not to say that existing theory is adequate to justify the rules relating to privileges, powers, and immunities tout court. But it is doubtful that radically new principles must be created to rationalize these forms of private ordering.

**C. Formation of Non-Rights Contracts.**

A power, privilege, or immunity may come into being as a term in a rights-contract, as a modification to a rights-contract, or as a free-standing relationship that does not involve the creation of a right. Under the Hohfeldian model, parties form non-rights contracts by exercising a power to do so. The way this power is exercised is determined by positive law in the rules of formation, which designate the preconditions and the legally operative acts that are necessary or sufficient to create the relationship.  

Contract law contains extensive formation principles and rules for forming rights-contracts. These include the objective theory of contract; the rules of offer and acceptance; and the doctrines of consideration and reliance.

As for non-rights-contracts, courts have recognized four modes of forming in personam privileges, powers, and immunities: bargain with consideration; non-bargain agreement; action and reliance; and unilateral declaration.

_Bargain with consideration._ The law concerning formation of rights-contracts developed the bargain principle: the idea that an obligee must compensate an obligor for incurring an obligation in the creation of a contract. The bargain principle underlies the consideration doctrine: a promise is enforceable if given in return for something that the promisor sought in return for the promise and that the promisee gave to induce the promise.

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88 Hohfeld defined a legally operative event as one that, in connection with other facts, caused a legal relation to arise. Hohfeld, _Fundamental Conceptions I_, supra note 1, 25. (“Operative, constitutive, causal, or 'dispositive' facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously. [footnote omitted].” Operative facts may be affirmative or negative (Id. 26).

89 Many analysts have characterized consideration as the price paid for a promise. Anthony J. Waters, _Book Review: Grant Gilmore, The Death of Contract_, 36 MD. L. REV. 270, 282 (1986) (Discussing English law);

90 _RESTATEMENT (SECOND) OF CONTRACTS_ § 71. “Bargain” is defined in § 3, _Id. FARNSWORTH, CONTRACTS_, supra note 9 § 2.2. The consideration doctrine has both a positive and negative effect: A promise is enforceable if given in return for consideration and it is unenforceable if not given in return for
Lon Fuller famously claimed that the consideration requirement has both a formal and substantive function.\(^9\) While this Article will not evaluate his defense of consideration as a prerequisite to rights-contract liability,\(^9\) Fuller’s analysis of the role of consideration in regulating the process of agreement is relevant to this discussion because courts have required consideration as a prerequisite to the formation of some powers, privileges, and immunities.

The formal function of consideration, identified by Fuller and largely accepted by modern theory is three-fold: evidentiary, cautionary, and channeling.\(^9\) Bargained-for exchange supplies evidence of an actual promise, alerts the promisor to the significance of the act, and provides parties a recognized route to legal efficacy. Fuller noted that the degree of formality required by law to validate a particular transaction depends on the degree to which these three functions would naturally be fulfilled in its absence.\(^9\)

Requiring consideration for the creation of privileges, powers, and immunities can in some cases serve the same formal functions. As will be seen, courts have often borrowed the consideration requirement for application to the formation of powers, privileges, and immunities that are perceived to impose a burden or disadvantage on one of the parties to the new relationship. An example is the treatment of the release of a claim at common law, discussed below. Consideration given in return for the release gives the court some evidence that the release actually took place and may caution the releasing party about the consequences of the release. Even though these relations do not burden one of the parties with a new legal obligation, courts refer to them as “contracts” and apply the consideration doctrine because they do have an unequal utility effect on the parties. Conversely, when formation of a privilege, immunity, or power does not involve any unequal burden to either party, courts generally do not refer to it as a contract and do

\(^{91}\) Lon L. Fuller, Consideration and Form, supra note 79.
\(^{92}\) The Restatement commentary seems to take issue with Fuller’s analysis. RESTATEMENT (SECOND) OF CONTRACTS § 72, cmt. c. “Consideration furnishes a substantive rather than a formal basis for the enforcement of a promise. . . [After citing Fuller’s functions of formality]. But formality is not essential to consideration; nor does formality supply consideration where the element of exchange is absent.”
\(^{93}\) Fuller, Consideration and Form, supra note 79, 800-804.
\(^{94}\) Id. 805 (“The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises – including in these “forces” the habits and conceptions of the transacting parties.” (emphasis in original.)
not require consideration as a prerequisite to its effectiveness. Thus, for example, an
agreement choosing the law of a particular jurisdiction does not require consideration
from either party for its legal efficacy. 95 Indeed, it is unclear in such a symmetrical
agreement who would owe the consideration to whom.

Non-bargain agreement. Courts recognize that some legal relations are created
solely by agreement or consent of the parties to the resulting relationship without the
need for bargained-for consideration. Giving legal effect to agreements to enter into a
binding legal relation is justified on the basis of considerations of autonomy and
efficiency. 96 A manifestation of agreement provides a reason for judicial recognition
because it is evidence of the utility to both of the parties of the legal effects that they
agree upon. Agreement permits the assumption of Pareto efficiency because it gives
evidence that each party prefers the new relationship to the old and believes that she will
be made better off by giving it effect. 97 Express agreement by the parties affected by a
new privilege, power, or immunity provides a prima facie reason for its legal
effectiveness just as voluntary exchange does for the traditionally defined contract.

Courts will usually give effect to a non-bargain agreement to create a privilege,
power, or immunity that does not appear to burden one of the parties. The compensatory
principle served by consideration – the notion that the party incurring the obligation must
be paid for his assumption of a duty – does not apply when neither party is incurring an
obligation or other form of burden by the new legal relationship.

Although agreement alone will generally not be sufficient if the new relation has
an unequal effect on the parties’ apparent interests, as in the case of releases or options, 98
the law sometimes recognizes formation of privileges, powers, or immunities by
agreement alone, without consideration or reliance, even if the change creates an apparent

95 See infra Part III A and C.
96 On the presumed economic efficiency of voluntary transactions, see RICHARD A. POSNER, ECONOMIC
ANALYSIS OF LAW 11-14 (3d Ed. 1986); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT,
7-8, 164-167 (1993) (quoting Milton Friedman: “The possibility of coordination through voluntary
cooperation rests on the elementary – yet frequently denied – proposition that both parties to an economic
transaction benefit from it, provided the transaction is bilaterally voluntary and informed.” MILTON
FRIEDMAN, CAPITALISM AND FREEDOM, 13 (1962)); Fuller, Consideration and Form, supra note 79 loc. ci.
97 More precisely, each believes that she will be made better off by the overall exchange, which includes
the agreement in question. The same reasoning underlies the economic concept of Pareto efficiency in
exchange relations, which presumes a gain in utility for both parties and underlies the theoretical
justification for enforcement of contracts generally.
98 See discussion below at Part III A and C.
burden. Thus, parties have the power to modify contracts under the Restatement by agreement without consideration where the modification is fair and reasonable in light of circumstances that were not foreseeable at the time the contract was formed.\(^\text{99}\) Parties have the power to modify contracts under Article 2 of the Uniform Commercial Code by agreement without consideration so long as the modification is in good faith.\(^\text{100}\) In such cases, voluntary agreement is sufficient to establish a presumption of utility.

Defining the creation of privileges, powers, and immunities as contracts suggests the application of established contract rules and principles that govern agreements, subject to such variation as a functional analysis might determine. Agreements creating privileges, powers, and immunities can be judged by the same objective theory of contract, rules of interpretation, and rules of construction that apply to rights-contracts. Such agreements can also fail in all the ways that invalidate agreements creating rights, such as fraud, duress, mistake, and unconscionability.\(^\text{101}\) These circumstances, of course, negate the assumption of mutual benefit.

*Action and reliance.* The current law of contract recognizes some right/duty relationships that are not unilaterally created yet do not require bargain or agreement. These relations typically arise upon some speech act or other communication by one party that is relied upon by the other party so that it becomes inequitable for the speaker to act inconsistently with the statement. For example, the Restatement formalized the theory that came to be known as promissory estoppel, under which a right-duty relation arises when a promisee foreseeably relies on a non-bargain promise.\(^\text{102}\) The Restatement also recognizes numerous non-promissory speech acts that create binding legal relations because of reliance by one of the parties.\(^\text{103}\)

\(^{99}\) Restatement (Second) of Contracts § 89 (1).

\(^{100}\) Uniform Commercial Code § 2-209 (1) and Official Comment 2.

\(^{101}\) See Restatement (Second) of Contracts Ch. 12, Topic 2, Introductory note. (“Although much of this terminology is peculiar to the field of discharge, the substantive rules are essentially the same as those generally applicable to the formation of contracts. Under the rules stated in §§ 279-81, which speak of a “contract,” all of the requirements for enforceability of promises are imported, so that a party may raise such defenses as mistake, misrepresentation, duress and lack of consideration or one of its substitutes.

\(^{102}\) Restatement (Second) of Contracts § 90. (The term “promissory estoppel” does not appear in the text of the Restatement.)

\(^{103}\) E.g. Restatement (Second) of Contracts § 45 (offer for unilateral contract becomes non-revocable because of offeree’s reliance). See generally Charles Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 Colum. L. Rev. 52 (1981)
Reliance may also make a statement purporting to create a privilege, power, or immunity legally effective and binding. For example, an obligee’s statement extinguishing an obligor’s duty may be unenforceable in the absence of consideration, but may become enforceable to prevent injustice if the obligor relies on that statement. In such a case, the obligor is not relying on performance of a promise but upon the assumed new legal relationship of being freed from the obligation. Under the common law, a contract offeror’s statement that purports to create an immunity with regard to the offeror’s power to revoke the offer would ordinarily not be binding in the absence of consideration, but it may become binding if necessary to prevent injustice if the offeree relies on the offer.

Unilateral declaration. Courts sometimes give effect to a party’s declaration that creates a legal relation to which the speaker is a party, even absent reliance by the other party. Common examples are waivers, renunciations, and exercises of powers by the giving of notice. A unilateral declaration may be a conventionalized mode of signifying the exercise of the power in question. In these cases, new legal relations can be created without the need for consideration, agreement, or reliance.

Unilateral declarations include non-verbal acts that comply with formal prerequisites to enforceability. For example, a gratuitous assignment of contract rights is irrevocable if it is in a writing signed by the assignor and delivered to the assignee. A merchant may, under Article 2 of the Uniform Commercial Code, unilaterally make an irrevocable offer in a signed writing. Under the same Article, a seller may make a unilateral disclaimer of implied warranties that will prevent formation of warranty

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104 See Farnsworth, Contracts, supra note 9, § 4.23 (Discharge of debt may become enforceable through debtor’s reliance.) Southern Furniture Mfg. v. Mobile, 161 So.2d 322 (Ala. 1963) (Release in absence of consideration may become enforceable through releasee’s reliance.); Fried v Fisher, 196 A. 39, 41-2 (Pa. 1938) (Reliance on lessor’s oral promise to release withdrawing partner from lease obligation estopped lessor from enforcement even absent consideration.)

105 Restatement (Second) of Contracts § 45 (reliance on offer of unilateral contract by beginning performance creates option.); § 87 (2) (Reliance on offer creates option even if not the commencement of performance.)

106 Restatement (Second) of Contracts § 332 (1).

107 Uniform Commercial Code § 2-205.
obligations in the sale. As will be seen below, other forms of unilateral disclaimer may operate as anti-contracts to prevent creation of legal duties during negotiations.

The presumption of Pareto improvement noted above does not hold for unilateral creation of legal relations. The non-acting party, having exercised no choice in the matter, may not be presumed to be made better off by the new relation. Whether analyzed under the justificatory theory of autonomy or utility, a unilateral change in legal relations does not enjoy a presumption of validity. For this reason, the privileges, powers, and immunities that can effectively be created by unilateral speech acts usually are understood to disadvantage only the speaker and to be the sort to which the other party would never object. As to the others, the efficacy of the declaration is a matter of policy.

Fictional constructions. As the discussion in Part III will show, despite the fact that agreements creating privileges, powers, and immunities do not create duties, they are often construed by courts as if they do. Privileges, powers, and immunities are not formed by promises. They do not represent commitments by one of the parties to act or refrain from acting in a particular way. Courts that have dealt with privileges, powers, and immunities, however, have tried to impute promissory content to the parties’ agreements, apparently in order to rationalize their enforcement as traditionally defined contracts. Thus, for example, a landlord’s release of a co-tenant from liability on a lease was construed as a promise to release the tenant rather than as the immediate creation of a privilege; a contract offeror who made the offer irrevocable was understood as having made a promise not to revoke the offer, rather than as creating an immunity to its revocation; and an agreement creating a power to extinguish a claim by tender of payment (an accord) was seen as a promise to discharge the claim upon such tender

108 UNIFORM COMMERCIAL CODE § 2-316.
109 See Infra, Part III c.
110 On the relation between welfare and utility theories that may underlie the consideration requirement, see TREBILCOCK, FREEDOM OF CONTRACT, supra note 95, 164-187. The author, following the lead of Milton Friedman and others, limits his analysis to exchange transactions, referred to as “economic” transactions. This analysis should apply with equal force to any voluntary, agreed-upon change in legal relations.
111 An exception to this generalization is the unilateral creation of immunities, such as warranty disclaimers and anti-contracts. These new relations favor the speaker by disabling her from binding herself to duties owed to the hearer. They do not deprive the hearer of any existing legal interest, however.
112 Fried v Fisher, 196 A. 39, 41-2 (Pa. 1938) (Reliance on lessor’s oral promise to release withdrawing partner from lease obligation estopped lessor from enforcement even absent consideration.).
113 See discussion infra, Part III C.
rather than as the creation of a power in the obligor to discharge the claim by tender of the agreed amount.\textsuperscript{114}

The judicial habit of construing privilege contracts and immunity contracts as rights contracts can lead to judicial contortions. In \textit{Abry Partners V.L.P. v. F&W Acquisition LL},\textsuperscript{115} an agreement entered into before a corporate acquisition contained a statement by the buyer that it was not relying on any financial information other than that set forth in the written agreement.\textsuperscript{116} When the buyer later brought an action based, in part, on misrepresentations outside the document, the court rejected the claim. In doing so it characterized the buyer’s statement both as a broken promise not to rely on such information\textsuperscript{117} and as a misleading representation of fact that the buyer had not actually relied on such information.\textsuperscript{118} The \textit{Abry} court labored under an apparent need to classify the buyer’s speech acts as promises or factual representations in order to fit them within the doctrinal matrices of rights-contract and tort law. The parties’ intended result would have been more directly achieved if the pertinent language had been read as a waiver. A waiver is not a factual representation that the representations were not made or that they

\begin{itemize}
\item \textsuperscript{114} See \textit{Restatement (Second) of Contracts} § 281 (3).
\item \textsuperscript{115} 891 A.2d 1032 (Del. Ch. 2006).
\item \textsuperscript{116} The language of the disclaimer was as follows: “Acquiror acknowledges and agrees that neither the Company nor the Selling Stockholder has made any representation or warranty, expressed or implied, as to the Company or any Company Subsidiary or as to the accuracy or completeness of any information regarding the Company or any Company Subsidiary furnished or made available to Acquiror and its representatives, except as expressly set forth in this Agreement . . . and neither the Company nor the Selling Stockholder shall have or be subject to any liability to Acquiror or any other Person resulting from the distribution to Acquiror, or Acquiror's use of or reliance on, any such information or any information, documents or material made available to Acquiror in any "data rooms," "virtual data rooms," management presentations or in any other form in connection with, or in connection with the transactions contemplated hereby.”
\item \textsuperscript{117} Id. 1055-8; The court repeatedly characterized the language of the disclaimer as a promise: “By its plain and unambiguous terms, the Stock Purchase Agreement stated the Buyer’s promise that it was not relying upon representations and warranties not contained within the Agreement’s four corners and that no such extra-contractual representations had been made.” Id. 1034; “By its plain terms, the Buyer promised that neither the Company nor the Seller had made any representation or warranty as to the accuracy of any information about the Company except as set forth in the Agreement itself. The Buyer further promised that neither the Seller nor the Company would have any liability to the Buyer or any other person for any extra-contractual information made available to the Buyer in connection with the contemplated sale of the Company.” Id. 1041; “[T]he Buyer promised that it was only relying on representations and warranties expressly set forth in the Agreement and expressly disclaimed reliance on any other extra-contractual information; . . .” Id. 1043.
\item \textsuperscript{118} “For the plaintiff in such a situation to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract. Put colloquially, this is necessarily a "Double Liar" scenario. To allow the buyer to prevail on its claim is to sanction its own fraudulent conduct”) Id. 1058. See also 1064, n. 85.
\end{itemize}
were not relied upon\textsuperscript{119}; nor does waiver amount to a promise not to rely on such information in the future.\textsuperscript{120} Instead, despite its literal language, the clause immediately creates a privilege and an immunity: the buyer extinguished any claim it might otherwise have based on its reliance on false information outside the document. Without creating any contract duty, the waiver effectively blocks any action based on the alleged misrepresentations of financial information by extinguishing the duty upon which it would be based.\textsuperscript{121}

Privileges, powers, and immunities have their intended effect without creating a duty to act or refrain from acting. Recognizing the contractual and binding nature of privileges, powers, and immunities would enable courts to construe them as they are, while subjecting them to the appropriate standards of formation and legal effectiveness.

**III. “Non-rights Contracts” in the Courts and the Restatement.**

The proposed redefinition of “contract” to include privileges, powers, and immunities as well as rights brings formal recognition to existing legal practice in the courts. The implicit definition of contract used by many courts transcends the official definitions of the Restatement, the U.C.C., and the treatises. A modern court is likely to classify as a contract any deliberate change in \textit{in personam} relations that is created by agreement and that has the effect of transferring wealth from one of the parties to the other or burdening one party more than the other. This practice is recognized in various ways in the Restatement of Contracts despite its inconsistency with the its initial definition.

The following non-comprehensive survey gives a sense of how contemporary courts and the Restatement handle consensual changes in legal relations that create privileges, powers, and immunities but not rights. From it, one may draw three conclusions: First, non-rights contracts are common as free-standing legal relations as

\textsuperscript{119} The same characterization of the waiver as a factual misrepresentation by the buyer was made in a case cited by \textit{Abry, Danann Realty Corp. v Harris}, 157 N.E.2d 597, 604 (1959) (Characterizing buyer in such a case as deliberately misrepresenting its intention to the seller).

\textsuperscript{120} The promissory interpretation of the agreement creates an odd sort of right in the other party (“But you promised you wouldn’t rely!”).

\textsuperscript{121} The court held that the waiver would not bar claims of actual fraud: that rule was immutable for public policy reasons. Id. 1064.
well as provisions of rights-contracts. Second, courts generally characterize (or
mischaracterize) these relations as rights-creating contracts when they seem to have
wealth effects on the parties in order to apply the doctrines of consideration or
promissory estoppel. When these relations do not have wealth effects, courts generally
require either an express bilateral agreement or else a clear declaration in order to form
the relation. In some cases, courts have construed the formative language as promissory
in order to make the doctrine fit. Finally, courts have generally failed to rationalize their
principles of formation, merely borrowing contract doctrines for use as needed.

A. Contracts that Create Privileges.

Parties have powers not only to create a right/duty relationship but also to
extinguish one. The extinction of a right extinguishes the corresponding duty and, in
doing so, creates a no-right/privilege relationship regarding the act that was the subject of
the duty. The former obligor may then fail to perform the act without incurring liability
for breach; the former obligee has no claim if the act is not performed. The obligation
that is extinguished in a privilege-creating-contract may have arisen from any source,
including contract, tort, or property law. It can be a primary obligation or a remedial
obligation, which arises upon breach of a primary obligation.

Consent to tortious acts. Parties can create privileges by extinguishing duties that
are created by law and are enforced in the law of torts. For example, a privilege is created
when a person consents to what would otherwise be an intentional tort, such as trespass
or battery or a negligent act. In Hohfeldian terms, an effective consent alters the legal
relations between the obligor and obligee by extinguishing the duty and creating a
privilege to act within the scope of the consent. Such legally effective consents are not
contracts as classically defined because they create no obligation. They would, however,
fit the proposed redefinition of contract because they deliberately create a binding
privilege by exercise of a power.

The power to extinguish legal duties is, however, limited. Obligees who would be
owed a duty of care under background negligence rules may effectively waive their rights
by agreement, extinguishing the obligor’s duty and creating a privilege in her to act in

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122 Restatement (Second) of the Law of Torts §§ 890-892D.
123 Consent forms containing no promises by either party are nevertheless sometimes referred to as
ways that would otherwise be prohibited. Obligors, by contrast, generally lack the unilateral power to extinguish their own duties. More importantly, courts may refuse to give legal effect to attempts to consent to tortious acts. In the language of the contemporary theories of private ordering, non-waivable rights arise from immutable rules. Whether and under what circumstances attempted waiver will be given legal effect is a matter of positive law, determined by public policy or by statute. Thus, courts have refused to give effect to contractual disclaimers that would relieve one of the parties in advance from liability for fraudulent misrepresentations. The Uniform Commercial Code expressly bars disclaimer of the implied contract duty of good faith.

What acts are necessary to the creation of such a privilege-contract? Historically, consent to a tort has not required consideration, even though the consenting obligee is burdened by the loss of the right that is extinguished. In some cases, consideration is given because the execution of the consent is required as a condition to some exchange involving a benefit that will be given to the person waiving, such as the receipt of medical treatment or the ability to participate in an athletic contest. In such transactions, an element of exchange can be found that satisfies the implicit demand for compensation underlying the consideration doctrine. Courts do require that the waiver or consent be voluntary and informed, as is required with other contractual agreements.

**Discharge of executory contract duties.** After a rights contract is formed, one or both of the parties may release the other from a future duty of performance. If legally effective, this act extinguishes the releasing party’s right and gives the other party a privilege not to perform as originally promised. For example, after a sales contract is formed, the buyer may request the seller to release her from her obligation because she no longer needs the goods. If the seller agrees, the buyer’s duty and the seller’s right are extinguished. In extinguishing a duty, the discharge of an executory contract duty is analogous to consent to a tort.

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124 Compare McCutcheon v United Homes Corp., 486 P.2d 1093 (Wash. 1971) (Tenants’ waiver of landlord’s duty of care regarding common areas violated public policy) with Garretson v United States, 456 F.2d 1017 (9th Cir. 1972) (Ski jumper’s waiver of ski area’s duty of care did not violate public policy).
126 U.C.C. § 1-302.
127 See Garretson v United States, supra note 106.
In some circumstances, the common law empowers a person to extinguish a right that she has by simply declaring that she no longer has the right in question. The classical definition of waiver is the intentional and voluntary relinquishment of a known right by language or conduct. Abandonment of the right simultaneously extinguishes the duty, so that the effect of waiver is to create a privilege in the former obligor not to act in the way specified. Effective waiver is the exercise of a power that is often coeval with the creation of the right. Waiver is thus not a contract as classically defined, but is a contract under the proposed redefinition.

The Restatement refers to the extinction of a right to contract performance as a “discharge.” A release is defined as “a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition.” A discharge is thus not a contract under the definitions of the Restatement or the Uniform Commercial Code because it extinguishes a duty rather than creating one. It is a contract under the proposed redefinition, however, because it creates a privilege through the exercise of a power to do so.

At common law the discharge of an executory contract duty required consideration. Some state statutes require consideration for a release. While the Restatement hedges and says that releases are “contractual in nature,” it nevertheless adopts the common law requirement of consideration. The Restatement commentary acknowledges the lack of a basis for applying the consideration doctrine to releases and other forms of discharge of duty, but offers no justification for retaining the requirement. Even though the drafters acknowledge that “the discharge is an

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128 BLACK'S LAW DICTIONARY 1580 (6th ed. 1990). The term “waiver” in contract law is often used to refer to the excuse of the non-occurrence of a condition by the promisor, rather than to a release of a rights claim. FARNSWORTH, CONTRACTS, supra note 9, 451-2.
130 RESTATEMENT (SECOND) OF CONTRACTS Chapter 12. See FARNSWORTH, CONTRACTS, supra note 9, §§ 4.24;
131 RESTATEMENT (SECOND) OF CONTRACTS § 284 (1). The commentary distinguishes a release from a promise to release, which of course can be a contract. Id. cmt. a
132 CORBIN ON CONTRACTS, supra note xxx § 67.9 (Release originally required either a seal or consideration or reliance); RESTATEMENT (SECOND) OF CONTRACTS § 284, cmt. 6. Fried v Fischer, 196 A. 39 (Pa. 1938).
133 CORBIN ON CONTRACTS, preceding note.
134 RESTATEMENT (SECOND) OF CONTRACTS Introductory Comment, Ch. 12, Topic 3.
135 RESTATEMENT (SECOND) OF CONTRACTS §§ 273, 284.
136 I will quote the apology in full.
immediate change in the legal relations between the obligor and the obligee and involves no promise by the obligee,” the discharge is not effective unless it is supported by consideration or some substitute for consideration.\footnote{137}

The consideration requirement for a release underlies the much-criticized rule announced in \textit{Foakes v Beer}\footnote{138} that an agreement to forgive part of a liquidated, immediately-due debt upon payment of the balance is unenforceable for lack of consideration.\footnote{139} The rule, concededly based on an early confusion between release and rights-contract, has survived solely by reason of inertia and nestles comfortably within the Restatement.\footnote{140}

The continuing viability of the consideration requirement for a common law release reflects a principle that when a consented-to change in legal relations appears to benefit one party and burden the other, the latter must be compensated by the former. The bargain requirement is a crude effort to assure that the burdened party assessed the compensation as the equivalent of the burden. While the burden in a rights-contract is the undertaking of an obligation, the burden in a release is the loss of a potentially valuable right to a performance or a payment. This compensation principle will be seen to trigger the consideration doctrine for other non-obligation agreements.

\begin{quote}
The Requirement of Consideration. An obligee’s assent to discharge a duty that he is owed may take the form of a promise to discharge that duty in the future or of a present discharge. A promise to discharge the duty must, like any other promise, be supported by consideration or one of its substitutes in order to be enforceable. The common law carried over this requirement to a present discharge, even though it involved no promise. Such a discharge was not effective unless supported by consideration or one of its substitutes. This requirement is stated in § 273. It applies to the traditional transactions dealt with in Topics 2 and 3, including discharge by substituted performance or contract, accord, agreement of rescission, release and contract not to sue. It also applies to transactions involving discharge that do not take one of these traditional forms.

The wisdom of applying to a present discharge the rules developed for the enforceability of promises has been questioned, however, particularly since the seal has been deprived of its effect in most states. Exceptions have developed judicially and these are supplemented by statute in some states \textit{Restatement (Second) of Contracts} Introductory Note, Ch. 12, Topic 1.

The Restatement also recognizes that an obligor may simply accept an offer of a substituted performance in satisfaction of a duty, with the legal effect that the duty is discharged. \textit{Restatement (Second) of Contracts} § 278
\end{quote}

\begin{flushright}
\footnote{137} \textit{Restatement (Second) of Contracts} § 278, cmt. c. (Noting that the rule is “much criticized.”) \\
\footnote{138} L.R. 9 App. 605 (HL 1884). \textit{Foakes} relied on \textit{Pinnel’s Case}, 5 Coke 117a; 77 Eng.Rep. 237 ( ). Many courts continue to follow the rule that one may not release a liquidated, undisputed claim upon the payment of a lesser sum on the ground that such a release is not given for consideration. \textit{Brown v. Kentucky Lottery Corp.}, 891 S.W.2d 90, 92 (Ky. Ct. App. 1995). \\
\footnote{139} \textit{Farnsworth, Contracts, supra} note 9, § 4.23. \\
\footnote{140} \textit{Restatement (Second) of Contracts} Ch. 12, Topic 1.
\end{flushright}
The Uniform Commercial Code dispenses with the fiction that a release is a rights-contract and thus permits parties to a sales contract to extinguish executory duties by an agreement of modification without consideration. The premise of the Code is that the parties’ mutual consent to the creation of a privilege is sufficient to warrant judicial recognition, either on autonomy or efficiency grounds. The ubiquitous and immutable requirement of good faith\(^{141}\) and the principle of unconscionability\(^{142}\) limit the degree to which breach of that faith might result in oppression. I believe that the Code’s enlightened approach to non-rights contracts would become more common if the proposed reconceptualization were generally adopted.

**Release of remedial claims.** After a tort or breach of contract, the rights holder usually acquires a remedial entitlement and the breaching party acquires a duty\(^{143}\) to compensate the rights holder for harm caused by the breach. The Restatement uses the term “discharge” to refer to the extinction of both rights to contract performance and rights to remedy for breach. The formal requirements for a release have changed from the common law, when an instrument under seal was required.\(^{144}\) Following abandonment of the seal, American common law courts have repeatedly characterized releases of remedial claims as “contracts,”\(^{145}\) and on this basis have imposed a requirement that they be supported by consideration in order to be enforceable.\(^{146}\)

Again, the Uniform Commercial Code has dispensed with the fiction that a release of a remedial claim is the creation of a rights-contract, and has jettisoned the consideration requirement as a result. In contrast to the common law, the Uniform

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\(^{141}\) U.C.C. § 1-302.

\(^{142}\) U.C.C. § 2-302.

\(^{143}\) Whether the non-breaching party acquires a duty or a power is disputed. See note 20 *supra*. If it is seen as a power, then a release of a remedial entitlement is the creation of an immunity contract, discussed below in Part III C.

\(^{144}\) CORMAN ON CONTRACTS *supra* note 5 § 67.9; RESTATEMENT (SECOND) OF CONTRACTS § 284, cmt. b.

\(^{145}\) *Lomas & Nettleton Co. v. Tiger Enters., Inc.*, 99 Idaho 539, 585 P.2d 949, 952 (Idaho 1978) (a release is a "type of contract" in which one party makes a complete abandonment of a cause of action); *Brown v. Kentucky Lottery Corp.*, 891 S.W.2d 90, 92 (Ky. Ct. App. 1995) ("it is well established that a release must be supported by valuable consideration.").

\(^{146}\) *Maynard v. Durham & S. R. Co.*, 365 U.S. 160 (1961) (Release of employee’s FELA claim for injury requires consideration); *Golf Shaft & Block Co. v. O’Keefe*, 139 S.W.2d 691, 693 (Ark. 1940) (Release requires consideration because it is a contract); *Indiana C.R. Co. v. Fairchild*, 91 N.E. 836 (Ind. App. 1911) (Employer who did not provide agreed-upon consideration for employee’s release could not plead the release in defense of claim); *Sloan v Burrows*, 258 N.E.2d 303 (Mass.1970) (Payment of undisputed amount was not consideration for release of unknown claims); *Chaput v. Unisys Corp.*, 964 F.2d 1299 (2d Cir. 1992) (N.Y. law).
Commercial Code does not require consideration for an effective release of either remedial rights and permits parties to extinguish remedial rights and duties without consideration. The age-old common law rule requiring consideration simply vanished when the policies relevant to releases were finally addressed.

**Contracts to Rescind.** Aside from claim settlements, the most common form of extinction of a right/duty relationship occurs when parties to a contract agree to rescind it, putting an end to any remaining executory duties. Courts have consistently referred to rescission as a contract even though no new duties are created. Mutual agreement is necessary to the effectiveness of a rescission, the older courts saying, “Just as it takes two parties to form a contract, it takes two to rescind one.” Realizing that classifying rescission as a contract triggers the consideration requirement, courts frequently say that each counter-party’s release is the consideration for the other’s. This requires that some part of the contract remain executory for each party, however. Courts have also applied the usual contract law of offer and acceptance to rescission agreements.

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147 **Waiver or Renunciation of Claim or Right After Breach.** A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record. Uniform Commercial Code § 1-306 (Rev. 2xxx) (Replacing former § 1-107). Under Article 3, a person entitled to enforce a negotiable instrument may extinguish her claim by an intentional, voluntary cancellation or renunciation manifested in various ways, apparently without consideration. UNIFORM COMMERCIAL CODE § 3-604.

148 **RESTATEMENT (SECOND) OF CONTRACTS** § 283 (“An agreement of rescission is an agreement under which each party agrees to discharge all of the other party’s remaining duties of performance under an existing contract. (2) An agreement of rescission discharges all remaining duties of performance of both parties. . . . Rescission is to be distinguished from avoidance under a power and from a party’s exercise of a power of termination or cancellation.”) cmt a. U.C.C. § 2-106. FARNSWORTH, CONTRACTS, supra note 9, § 4.24.

149 **Lemlich v. Board of Trustees,** 385 A.2d 1185 (1978) (Because rescission is a contract, it must be formed by offer and acceptance); **Payne v. Cumming,** 315 P.2d 818 (Colo. 1957) (Enforcing oral “contract of rescission”); **Atlas Refining Corp. v Vaughan,** 195 N.W. 123 (Neb. 1923); **Rawlings v. Fields,** 110 S.E. 499 (Ga. App. 1921) (Applying the parol evidence rule to a contract of rescission); **Lustgarden v. Jones,** 371 N.W.2d 668 (Neb. 1985) (Rescission requires manifestation of a meeting of the minds just as does contract formation). See also, JOHN EDWARD MURRAY, JR. MURRAY ON CONTRACTS § 143 D (“A contract of rescission is formed and performed simultaneously.”); RESTATEMENT (SECOND) OF CONTRACTS § 148, cmt. a.

150 **Akers v J.B. Sedberry, Inc.,** 286 S.W.2d 617, 621 (Tenn. App. 1955).

151 **Savage Arms Corp. v. United States,** 266 U.S. 217, 621 (1924). See RESTATEMENT (SECOND) OF CONTRACTS § 283, cmt. a (“Consideration is provided by each party’s discharge of the duties of the other.”)

152 **Akers v J.B. Sedberry, Inc.,** 286 S.W.2d 617 (Tenn. App. 1955) (Employees’ oral offer of rescission of employment contract expired when it was not accepted during the meeting at which it was made.)
B. Contracts that Create Powers.

A Hohfeldian power is the ability to create or extinguish a right, privilege, power, or immunity by a voluntary action. A person whose legal relationship is subject to a power is said to have a liability. Thus, for example, a contract offer creates in the offeree a power to accept, and thereby to create the contract bundle of relations. The offeror has the corresponding liability to become bound to the new legal relation upon the offeree’s acceptance. Meanwhile, however, the offeror retains the power to revoke the offer before it is accepted, a power to whose exercise the offeree is liable because revocation extinguishes the offeree’s power of acceptance. Conversely, if the offeree accepts before revocation, she incidentally extinguishes the offeror’s power of revocation.

All contracts under the proposed new definition are created through the exercise of powers to do so. These powers either exist by virtue of background rules or else have been created through the exercise of such background powers. Background legal rules give people the power to make a contract offer, for example. Parties can also create new powers, either alone or by agreement. Creation of binding new powers counts as the creation of a contractual relation under the proposed redefinitions. The new power alters the legal effect of some future act so that it will, in turn, create a new duty, privilege, power, or immunity. The parties to a rights-contract create some coeval new powers automatically when they form the contract. These include obvious powers, such as the power to assign benefits or waive conditions, as well as less obvious ones, such as the power to breach the contract. The parties may also try to create particular powers by express agreement.

153 See supra, Part I A.
154 Corbin, Offer and Acceptance, supra note xxx at 171, 181 (“An offer is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract.” Hohfeld, Fundamental Conception I, supra note 1, 49-51.
155 As a person whose legal relations will be affected by exercise of the power, the offeree herself is under a liability as well.
156 Id at 184.
157 At the risk of making this analysis even more hyper-technical, I should point out that the creation of a power always involves the exercise of a power to create the power. Happily, this has no bearing on the analysis.
158 Breach of contract creates a complex of new legal relations. The non-breaching party has various rights and powers as defined by the civil justice system and its remedial rules. Walter Wheeler Cook, Powers of Courts of Equity 15 Col. L. Rev. 37, 45 (1915).
That contracts may create express powers as well as rights is not controversial. Express terms in negotiated contracts often give one or both parties powers to change the contractual relationship in various ways. For example, one party may have the power to terminate the agreement, perhaps upon payment of a fee to the other party. A party may have the power to alter quantities or specifications, perhaps with a corresponding adjustment in the price.\(^{159}\) A party may have the power to alter the form of its ownership in an entity. Such express powers are often risk-shifting devices, created as options that parties may exercise in order to respond to changed circumstances. The creation of any such power creates a contractual relationship under the new definition even though the power does not amount to a right or duty of either party. Exercise of the power may create or extinguish a right, but the power holder has no more right than does a contract offeree.

As with other legal relations, the capacity to create new powers depends on whether the new power changes a default rule or an immutable rule. An example of an immutable power rule is the Article 2 statute of frauds, which requires certain contracts to be memorialized in a signed writing in order to be enforceable.\(^{160}\) Parties forming a sales contract cannot contract around the statute of frauds to create in themselves a power to form an oral sales contract because the statute of frauds is an immutable rule.\(^{161}\) By contrast, parties are given the express statutory power to create choices by which one of the parties may designate particulars of performance after the contract is formed.\(^{162}\) Those rules are to that extent, only default rules.

Agency. Perhaps the most well-recognized form of power creation occurs when a principal effectively designates an agent to act on her behalf. Depending on its terms, the agreement creates a power in the agent to create binding legal relations between the principal and third parties with whom the agent may deal when acting in the principal’s behalf.\(^{163}\) The agency agreement also makes possible the creation of powers in those third parties to enter into binding legal relations with the principal by dealing only with the

\(^{159}\) See, e.g., U.C.C. § 2-311 (A sales contract may leave particulars of performance to be specified by one of the parties or may give a buyer options about the goods to be shipped.)


\(^{161}\) See U.C.C. § 1-302, Official Comment 1.

\(^{162}\) U.C.C. § 2-311supra note 159..

\(^{163}\) Hohfeld, *Fundamental Conceptions I*, supra note 1, 45-6.
agent. The principal creates in herself the correlative liability to the legal relations the
agent may create. Although some duties, such as the duty of loyalty, are created by the
formation of an agency, the primary effect of agency is not to create a duty in the agent
through a bargained-for exchange. 164 Thus, an agency does not fit the current definition
of a contract as an obligation. It would, however, be a contract under the proposed
redefinition as an in personam power and liability relationship created through the
exercise of a power to do so.

An agency may be formed without bargained-for consideration. 165 Only a
manifestation of agreement is required, and the agreement can be inferred from the
parties’ conduct. 166 Presumably, the law does not view the creation of an agency as a
wealth transfer between the agent and principle and does not presume that either party
should compensate the other for its creation.

Severable Dispute Resolution Agreements. An entire body of powers is often
created by contracts that establish dispute resolution processes. Under these terms of the
agreement, parties who are dissatisfied with the performance of their counter-parties in a
rights-contract or a regulated relationship are given the power to take various steps to
obtain remedies, including termination of the contract. The law relating to dispute
resolution powers created at the time of the rights contract demonstrates that powers are
not merely attributes of rights-contracts.

1. Choice of Law. Under the choice of law rules of most American jurisdictions,
courts will give effect to agreements by which parties choose the law of a jurisdiction to
govern their relations. 167 A choice of law provision often, but not always, appears as part
of a contract between the parties making the choice. Sometimes the choice of law
agreement is entered in anticipation of a later contract or other economic relationship. 168

164 Hohfeld, Fundamental Conceptions II, supra note 1, at 727 (Agency need not involve contractual
rights.) The parties may by agreement extinguish any such incidental duties that the agent may incur.
165 Indeed, it is difficult to decide whether the principal or the agent would be expected to receive
consideration for the creation of an agency.
166
167 Second Restatement of Conflict of Laws § 187. U.C.C. § 1-105(1). Russell J. Weintraub,
168 A choice of law agreement may select the tort law that will apply to the parties’ relationship. See Kuehn
v. Children’s Hospital, Los Angeles, 119 F.3d 1296 (9th Cir. 1997) (dictum); Weintraub, Commentary,
supra note xxx, 445-447 (courts differ on whether to enforce choice of law agreements to cover torts
relating to the contract.)
Because neither party makes a promise or incurs an obligation, a choice of law agreement is not a traditionally defined contract. It is, however, a new, *in personam* legal relation created by the parties by means of the exercise of a power to do so, and so fits the proposed redefinition of contractual relation.\(^{169}\)

It might be argued that a choice of law agreement that is made in the course of forming a standard contract or that appears as a term in such a contract is, for that reason, merely an ancillary element of a rights-contract. However, as the following examples illustrate choice of law agreements are sometimes given legal effect as if they were separate, free-standing agreements whose validity does not derive from the associated rights-contract.

Parties typically include a choice of law provision within the text of a written contract, which I will refer to as the “container” contract. The legal enforceability of the container contract will depend in part on the jurisdiction that supplies its governing law. Courts have given effect to choice of law agreements that choose a law under which the container contract is enforceable even though it would have been unenforceable under the law of the state whose law would otherwise govern.\(^{170}\) Thus, by making an effective choice of law agreement, the parties created in themselves a power to form a rights-contract that they did not have in the default jurisdiction.\(^{171}\) Similarly, a choice of law agreement creates a new power when the law of the chosen state enforces an arbitration clause that would otherwise be unenforceable.\(^{172}\)

\(^{169}\) Choice of law agreements alter the parties’ *in personam* relations, but in ways that are not neatly described by any of the Hohfeldian concepts. An effective choice of law that alters the otherwise applicable law to that of another jurisdiction is simply a wholesale creation of all the rights, privileges, powers, and immunities that are part of the background rules of the chosen jurisdiction. Does a choice of law agreement create a Hohfeldian power? It does in the cited example, because it creates a power to form a contract without consideration. More generally, however, choice of law agreements are sui generis as contractual agreements in that they do not simply create any particular new legal relation, but effect a global shift in the governing, background rules of law that regulate the parties.

\(^{170}\) *See Prichard v. Norton*, 106 U.S. 124 (1882) (Agreement unenforceable in common law jurisdiction where it was made, New York, held enforceable under the laws of a civil law jurisdiction, Louisiana, because that was the law “with a view to which it was made.” *Id* at 136. On the power of parties to choose the law of a jurisdiction that would validate an otherwise unenforceable agreement, *see Weintraub, Commentary, supra note xxx* at 45x.

\(^{171}\) I realize that an effective choice of law may alter many other legal relations in one fell swoop, and so is not an exemplary power creating contract.

\(^{172}\) *Gay v. CreditInform*, 511 F.3d 369, 389-91 (3d Cir. 2007) (Arbitration clause class action bar was not unconscionable under Virginia law, the chosen state.) *See William J. Woodward, Jr., Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses, 40 Loy. L.A. L. Rev. 9, 64 (2006).*
So independent is the choice of law provision from the container contract that some decisions have given effect to a choice of law provision that selected a law under which the container contract was invalid. 173 These courts give effect to the parties’ choice of law and hold the container contract to be unenforceable even though it would otherwise have been enforceable under the law applied in the absence of a choice of law agreement. 174 The unenforceability of the container contract does not impair the effectiveness of the choice of law agreement.

Choice of law agreements are not classic contracts because they do not create new right/duty relationships. They are legally effective regardless of the enforceability of the container contracts in which they may appear. 175 While courts do not refer to choice of law agreements themselves as “contracts,” their approach is to give them legal effect based solely on the quality of the assent. 176

2. Forum Selection Clauses. By a forum selection agreement, the parties submit to the personal jurisdiction of the courts of the chosen jurisdiction and may agree that the chosen jurisdiction is the exclusive forum for any dispute relating to the container contract. 177 A forum selection clause thus creates no duties, but does create and extinguish powers that relate to legal claims. Courts rarely analyze the reasons for giving

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173 Moyer v. Citicorp Homeowners, Inc., 799 F.2d 1445 (11 th Cir. 1986) (contract invalid because of usury statute under chosen law); Foreman v. George Foreman Associates, Ltd., 517 F.2d 354 (9 th Cir. 1975) (Invalidating contract under chosen law). There are decisions that refuse to give effect to a choice of law that makes the container agreement invalid, however, as noted in the next footnote.

174 WEINTRAUB, COMMENTARY, supra note xxx, 449-455 (recommending a choice of the jurisdiction under which the container agreement would be valid, regardless of parties’ choice.) Some courts have applied the doctrine of mistake to refuse to give effect to choice of law agreements that choose a law under which the container agreement is invalid. WEINTRAUB, COMMENTARY, supra note xxx 451. Neither the Restatement of Choice of Law nor the U.C.C. mentions any requirement of consideration for a valid choice of law agreement. Courts have given effect to choice of law agreements if they become part of the parties’ agreement under the applicable law of offer and acceptance.


effect to a forum selection clause, but appear to require only that it be the product of assent.\textsuperscript{178}

So far as the prerequisites for creating a valid forum selection clause, consideration appears not to be required. This may be because of such a clause is typically included in a container agreement for which there is consideration. A forum selection clause will be operative even against a claimant who challenges the enforceability of the container contract, for which consideration will usually exist.\textsuperscript{179} Thus, like choice of law agreements, forum selection agreements can be valid contracts independent of the validity of their container contracts.

3. Arbitration Agreements. Parties to a contract may agree that all disputes arising from their contract are subject to mandatory arbitration. Arbitration agreements are enforceable under the Federal Arbitration Act\textsuperscript{180} and under state arbitration acts. Like choice of law agreements, mandatory arbitration agreements are usually to be found in container contracts.

Arbitration agreements are not contracts under the standard definition of contract. While an arbitration agreement may create some incidental duties, the primary effect is to extinguish powers to litigate claims in courts, while creating powers to litigate them before an arbitrator. Arbitration clauses are therefore akin to choice of law and choice of forum clauses in that they are not “contracts” in the standard sense of duty-creating agreements but instead create and extinguish powers relating to enforcement.

Under the United States Supreme Court’s decision in the \textit{Prima Paint}\textsuperscript{181} case, arbitration agreements are severable from the container contracts in which they appear and do not depend for their effectiveness on the enforceability of the container contract. Even if the container contract is voidable for fraud\textsuperscript{182} or illegality,\textsuperscript{183} the arbitration

\textsuperscript{178} \textit{Carnival Cruise Lines, Inc. v. Shute} (Consent found in retaining ticket after notice of forum selection clause). Many such cases deal primarily with the law of offer and acceptance, in finding that a forum selection clause becomes binding under the UCC’s “battle of the forms” provision, § 2-207.\textsuperscript{179} \textit{Kysar v. Lambert, supra} note 157.\textsuperscript{180} 9 U.S.C. § 1 et. seq (2009) (“FAA”). The act applies to contracts “in commerce.”\textsuperscript{181} \textit{Prima Paint Corp. v. Flood & Conklin Mfg. Co.}, 388 U.S. 395 (1967) (“[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate — the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”).\textsuperscript{182} \textit{Prima Paint Corp. v. Flood & Conklin Mfg. Co.}, \textit{supra} note 157.\textsuperscript{183} \textit{Buckeye Check Cashing, Inc. v Cardegna}, 546 U.S. 440 (2006).
agreement it contains is fully effective unless it was itself procured by fraud or is separately voidable for other reasons.

The Supreme Court’s ruling has left many puzzled about the nature of the assent that is necessary to form an effective arbitration agreement. The Court has affirmed that arbitration agreements are like any other contract term in that they are not enforceable without assent. Yet, the Prima Paint doctrine prevents judicial scrutiny of the only assent actually given to the arbitration clause if that was the assent given to the container contract as a whole. Every other promise and agreement appearing in the container contract may be voidable by the plaintiff on grounds of fraud or illegality, but the arbitration agreement, formed by the same acts of assent that failed to form a valid container contract, somehow escapes untouched.

The creation of remedial powers in dispute resolution clauses appears not to require consideration, but only an agreement. The reason appears to be that choice of law, forum selection, and arbitration agreements are not seen to impose a disproportionate burden on one of the parties or to create a shift in wealth between the parties to the relationship.

\[184\] Id. 


C. Contracts that Create Immunities.

If a power represents the ability to extinguish a legal relationship by a voluntary act, the extinction of a power makes the relationship immune from the act and preserves the status quo. Extinction of a power is thus equivalent to the creation of an immunity. Despite the arguments of some of Hohfeld’s critics that an immunity was not really a legal relation worth giving a name to, modern transaction lawyers commonly create immunities in the process of negotiating exchange transactions. Immunities can eliminate troublesome powers that might bring a contract into being prematurely as well as those that would threaten a contract, once created, with inadvertent modification or discharge. The proposed definition of contractual relation includes the deliberate creation of an immunity; the traditional definition of contract as an obligation does not. Deliberately created immunities represent some of the most theoretically interesting of the redefined contractual relations.

An attempt to create an immunity will fail if the targeted power/liability relationship is itself an “immutable” rule of law. For example, at common law, many courts refused to enforce a contract term in a written contract that provided that the parties could not modify the contract except in a signed writing (a “no-oral-modification clause”). Courts gave effect to later oral modifications in the face of such provisions on the ground that the subsequent oral agreement “waived” or mutually rescinded the no-oral-modification clause. In effect, the parties’ power to modify a contract by oral agreement was an immutable power that the parties were powerless to extinguish.

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185 Albert Kocourek, The Hohfeld System of Fundamental Legal Concepts, 15 Ill. L. Rev. 24, 34 (1920) (“Immunity’ if it means anything at all of importance, is immunity from something; but, in Professor Hohfeld’s System, an immunity is an immunity from nothing.” Id. Emphasis in original.) Albert Kocourek, Non-Legal-Content Relations, 4 Ill. L. Q. 233 (1922).

186 Murray On Contracts § 64 E 3. ([N]o oral modification (NO(M) clauses were not favored at common law because of the principle that parties to a contract should not be deterred from changing their minds.”) citing 6 Corbin On Contracts § 1295 at 206 and n. 32. Cardozo Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (1919) (“Those who make a contract may unmake it. The clause which forbids a change, may be changed like any other.”) Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir. 1986). See Restatement (Second) Of Contracts § 283, cmt. b (Parties do not have the power to extinguish their power to orally rescind a contract.) The argument seems circular, of course, because a no oral modification clause can have an effect only if the parties actually attempt an oral modification.

187 “The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof.” Wagner v. Graziano Construction Co., 136 A.2d 82, 83-84 (Pa. 1957).

188 See Restatement (Second) Of Contracts § 283, cmt. b (“Even a provision of the earlier contract to the effect that it can be rescinded only in writing does not impair the effectiveness of an oral agreement of
Whether it deserves this status has been doubted by modern courts.\textsuperscript{189} The Uniform Commercial Code gives effect to no-oral-modification clauses,\textsuperscript{190} but hedges by giving attempts at oral modification possible effect as a waiver.\textsuperscript{191} This reflects an uncertainty about the public policy of giving effect to attempts to extinguish rights and powers through private ordering.

The continuing difficulty that courts have in deciding how much effect to give to disclaimers, reservations of rights, and other contractual immunities rests, perhaps, on the problematic differences between Hohfeldian powers and rights. If oral modification of a written contract is seen only as the exercise of a power, then the extinction of that power by agreement of the parties to that contract would seem to be \textit{prima facie} valid. Later purported oral modifications would then have no legal effect as contract modifications. But the parties to a contract also owe each other immutable duties of good faith and truthfulness that correspond to inextinguishable rights. The right to good faith is unaffected by the no-oral-modification clause. A party who engages in a purported oral modification that has the effect of deceiving the other party has breached the duty of good faith. Under this analysis, a court’s treatment of the modification as a waiver is remedial, not the enforcement of a contractual modification as such.

Similarly, as noted above, courts have refused to permit parties to extinguish the duty of truthfulness by contractual disclaimers of liability for fraudulent misrepresentations.\textsuperscript{192} Parties may immunize themselves from negligent misrepresentations, but the anti-fraud rule is immutable.\textsuperscript{193}

\textit{Warranty Disclaimers.} A common form of immunization occurs at or before the creation of a sales contract when a seller immunizes itself from creating a warranty. A warranty is an assurance given by a seller that creates a duty to indemnify the buyer if the subject matter of the sale or the surrounding circumstances are not as they are warranted.

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\textsuperscript{189} \textit{Wisconsin Knife Works v. National Metal Crafters}, 781 F.2d 1280, 1285-6 (7th Cir. 1986).
\textsuperscript{190} \textsc{Uniform Commercial Code} § 2-209 (2).
\textsuperscript{191} \textsc{Uniform Commercial Code} § 2-209 (3) (4) (5);
\textsuperscript{192} \textit{Sabo v. Delman}, 143 N.E.2d 906 (N.Y. 1957).
\textsuperscript{193} \textit{But see Danann Realty Corp. v. Harris}, 157 N.E.2dd 597 (N.Y. 1959) (No claim for fraud where written disclaimer specifically disavowed alleged misrepresentation.)
\end{flushright}
to be. Warranties may arise by promise, description or representation of fact, or operation of law.\footnote{194 \textsc{Uniform Commercial Code} §§ 2-312 (implied warranty of title and against infringement); 2-313 (express warranty); 2-314 (implied warranty of merchantability); 2-315 (implied warranty of fitness for a particular purpose); \textsc{Id.} § 2-316 (disclaimer of warranty).}

An effective disclaimer of warranty in a contract of sale is not a promise and it does not create a duty. Instead, it has the legal effect of preventing the creation of this right/duty relation.\footnote{195 \textsc{Id.} § 2-316 (2) (requirements of specific language and conspicuousness).} It is not a contract in the traditional sense but would be under the proposed reconceptualization. The disclaimer, if it complies with statutory formalities, is given its expressed legal effect. Because the warranty disclaimer is agreed to before an exchange of property, it does not have the effect of shifting wealth from one party to the other. Thus, the legal efficacy of a warranty disclaimer does not depend on consideration but on declaration by the disclaiming party. In the case of disclaimers under Article 2, the declaration must meet formal requirements of language and conspicuousness.\footnote{196 Typical language appeared in the letter of intent at issue in \textit{W.R. Grace \\& Co. v. Taco Tico Acquisition Corp.}, 454 S.E.2d 789 (1995): “Notwithstanding . . . any . . . past, present, or future written or oral indications of assent or indications of results of negotiation or agreement to some or all matters then under negotiation, it is agreed that no party to the proposed transaction (and no person or entity related to any such party) will be under any legal obligation with respect to the proposed transaction or any similar transaction, and no offer, commitment, estoppel, undertaking or obligation of any nature whatsoever shall be implied in fact, law or equity, unless and until a formal agreement providing for the transaction containing in detailed legal form terms, conditions, representations and warranties (secured by an appropriate escrow) has been executed and delivered by all parties intended to be bound.” 454 S.E.2d at 424. The court held this language sufficient to prevent a later oral promise from creating liability under a theory of promissory estoppel.}

\textit{Anti-contracts}. I use the term “anti-contract” to refer to a legally effective declaration or agreement that prevents formation, modification, or extinction of a rights-contract in a particular way. Anti-contracts succeed by creating immunities, thereby extinguishing powers to form, modify, or extinguish a rights-contract. Anti-contracts are in common use during the negotiation phase of a transaction.\footnote{197 \textsc{DeLong, Placid Clear-Seeming Words, supra} note 47, 24-32; \textsc{See} \textsc{Restatement (Second) of Contracts} § 21 (manifestation of intention not to be bound may prevent contract formation.)} For example, one or both negotiators often stipulate that neither party will be legally bound until some future act takes place, such as execution of a mutually satisfactory written agreement or approval by a board of directors.\footnote{198 By reducing the risk of inadvertent or premature commitment,}
anti-contracts make the negotiation process less costly to the parties. For this reason, most courts will give effect to anti-contracts without referring to them as “contracts.”

Although an anti-contract is not a classic rights-contract, courts sometimes apply rights-contract doctrines to them. For example, in *Empro Manufacturing Co., Inc. v. Ball-Co Manufacturing, Inc.*, 199 during the negotiation of a contract for the sale of assets, the parties executed a letter of intent that set forth the basic terms on which the parties were in agreement, including the price. The letter also provided, however, that neither party would be bound until execution of a mutually satisfactory definitive agreement and approval by the buyer’s board of directors. 200 The seller later backed out before those conditions had been met, and the buyer sued for specific performance of the agreement. The court held that the express provisions of the letter of intent prevented it from creating a binding contract to perform the sale. It also held, however, that the letter operated to exclude consideration of contrary evidence by operation of the parol evidence rule. 201 Summary judgment for the defendant was affirmed.

The court gave the letter its preclusive effect as an integration although it was not itself an enforceable contract: the letter did not create any duties 202 but operated to prevent duties from arising other than in the way stipulated. By giving the letter the preclusive effect of a contract integration, the court apparently based its decision solely on the fact of agreement and on the general utility of such agreements in complex negotiations. 203 Its use of the parol evidence rule, established for classical rights-contracts, was a borrowing based on the policy behind the rule in reducing the risks of inadvertent contract formation. The ruling suggests that non-rights contracts can be integrated for the same reasons and with the same legal effect as rights contracts.

A related form of pre-formation anti-contract is the non-reliance agreement. 204 As a clause in a negotiation agreement or as a term in a contract after formation, a non-reliance agreement, if effective, provides that no liability of any kind will result from one

199 870 F.2d 423 (7th Cir. 1989).
200 870 F.2d 425-6.
201 870 F.2d 425.
202 Some courts have held that letters of intent create a duty of good faith in the negotiation, breach of which may entitle the counter-party to reliance damages.
203 870 F.2d 425-6.
party’s reliance on any oral promise made by the other party. Such reliance would otherwise have been effective to make the promise enforceable, thus creating a duty-contract. This power/liability relationship is extinguished by the agreement. Anti-reliance agreements, like no-oral-modification agreements, also suffer from the ambiguous relation between powers and rights. If the anti-reliance agreement is interpreted as an attempt to extinguish the speaker’s duty not to lie, it might be held to be an ineffective attempt to extinguish an immutable tort duty.\(^{205}\)

Anti-contracts, non-reliance agreements, and no-oral modification clauses do not create duties and do not cause wealth effects between the parties. For this reason, courts generally do not require that these agreements be supported by consideration in order to have legal effect, although an occasional court has suggested otherwise.\(^{206}\) Article 2 of the UCC requires a signed agreement in order to make an effective no-oral-modification clause.\(^{207}\) Often, however, not even an agreement is necessary to an effective non-reliance contract, the courts giving effect to unilateral declarations made by one of the parties in the course of the negotiation.\(^{208}\)

Option contracts.

Hamlet: Do you see yonder cloud that’s almost in shape of a camel?
Polonious: By th’ mass, and ‘tis like a camel, indeed.
Hamlet: Methinks it is like a weasel.
Polonious: It is backt like a weasel.
Hamlet: Or like a whale?
Polonious: Very like a whale.\(^{209}\)

Nowhere have courts and commentators struggled more with the traditional definition of “contract” than in their treatment of options. In its most basic form, an

\(^{205}\) E.g. Danann Realty Corp. v Harris, 157 N.E.2d 597 (N.Y. 1959) (Non-reliance clause upheld).

\(^{206}\) In Cloud Corp. v. Hasbro, Inc., 314 F.3d 289 (7th Cir. 2002). Judge Posner, discussing a no-oral-modification agreement in a sales agreement between two merchants wrote: “The October letter provided that purchase orders could not be modified without Hasbro’s written consent. Cloud signed the letter and so became bound by it, consideration being furnished by Hasbro’s continuing to do business with Cloud.” This suggests that he believes that consideration is necessary for the no oral modification agreement. But agreement alone would seem necessary to the efficacy of the no-oral-modification agreement.

\(^{207}\) UCC § 2-209 (2).

\(^{208}\) DeLong, Placid Clear-Seeming Words, supra note 47, 25.

\(^{209}\) William Shakespeare, HAMLET PRINCE OF DENMARK, Act III, Scene II, lines 393-402.
option is simply an irrevocable offer: a power (of acceptance) coupled with an immunity (the offeror is disabled from revoking). But courts and eminent contract authorities have persistently described an option as a Rorschach blot, appearing now in the shape of an irrevocable offer, now in the shape of contract not to revoke the offer, and now in the shape of a contract to perform subject to a condition precedent. The reason for this confusion appears to be an inability to adopt a more straightforward Hohfeldian description of the legal relations that are created by an option because they are not rights contracts.

The older view of option contracts was that they were offers coupled with contractual promises by the offeror not to revoke the offer. Langdell argued that a promise not to revoke an offer, if enforceable, gives the optionor a duty not to revoke the offer and gives the optionee a right that it not be revoked. As a rights-contract, the promise not to revoke was enforceable only if given in return for consideration. Regardless of whether the promise of irrevocability was enforceable, however, Langdell believed that the optionor retained the power to revoke even if its exercise would breach a duty. This he deduced from the necessity of a meeting of the minds as a formal requirement for contract formation. Breach by revoking the offer entitles the optionee to damages or other remedies, but would be legally effective as an exercise of the power of revocation, which, Langdell apparently believed, was inextinguishable.

Hohfeld rejected Langdell’s analysis of option as a contractual right/duty relationship. Under his analysis, an optionee has not a right but a power coupled with an immunity: a power of acceptance coupled with an immunity to revocation by the offeror. An attempted revocation by an optionor who has effectively terminated his power of

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210 CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS, § 178.
211 RESTATEMENT (SECOND) OF CONTRACTS § 87.
212 As a practical matter, the breach of the promise not to revoke would produce the same harm and warrant the same damages remedy as repudiating of the underlying agreement after formation.
213 Langdell’s position is often cited as the essence of legal conceptualism: “An offer is merely one of the elements of a contract; and it is indispensable to the making of a contract that the wills of the contracting parties do, in legal contemplation, concur at the moment of making it. An offer, therefore, which the party making it has no power to revoke, is a legal impossibility.” CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS, § 178 at 240 (2d ed. 1880). Wormser, The True Conception of Unilateral Contracts, 26 Yale Law J. 137.
revocation is not a wrong but a nullity. (In this instance, the immunity is more valuable than a right would be). The option offer remains legally open and a “post-revocation” acceptance by the optionee creates a contract. The attempted revocation, having no effects on the parties’ legal relations, does not give rise to a remedy any more than an attempted, unilateral oral modification of a contract does.

Hohfeld’s description was uncharacteristically incomplete, however, because an option is in fact a bundle of legal relations, many of which do not arise with a revocable contract offer. A revocable offer will terminate upon the death of either the offeror or the offeree. By contrast, an option does not terminate upon the death of either the optionor or the optionee, whose successors in interest assume the powers and liabilities of the original parties. A revocable offer is personal to the offeree and is not assignable, even if the offered contract would have been assignable. By contrast, an option contract is assignable by the optionee if the offered contract would have been assignable. Finally, an option contract creates a duty by the optionor not to convey the optioned property to a third-party before the expiration of the option period or to otherwise repudiate the offered contract. A revocable offer creates no such duty.

The modern view of options was developed by Corbin, whose position can be described as intermediate between that of Langdell and Hohfeld. Initially, he analyzed

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214 Hohfeld, *Fundamental Conceptions* I, supra note 1, at 51. (An enforceable option creates “in the optionee an irrevocable power to create, at any time within the period specified, a bilateral obligation as between himself and the giver of the option. Correlatively to that power, there would, of course, be a liability against the option-giver which he himself would have no power to extinguish.”) *Id.*

215 Whether an attempted revocation is also a breach of duty is another question. Walter Wheeler Cook, *Powers of Courts of Equity*, 15 COL. L. REV. 37, 41 (1915) (In the course of arguing that a party to a contract does not have a “right” to break it and pay damages, but a power, the author observes: “In the case of an offer coupled with a promise to keep the offer open for a certain time, if this promise is either under seal or given for a consideration, it seems to be the prevailing view that the offer is irrevocable. [citations omitted.] If this be true, the contract to keep the offer open can not be broken so as to destroy the offer. Quite possibly an action could be brought because of the ineffectual attempt to revoke, on the analogy of anticipatory breach.” n. 18.)

216 RESTATEMENT (SECOND) OF CONTRACTS § 48.

217 RESTATEMENT (SECOND) OF CONTRACTS § 37.

218 RESTATEMENT (SECOND) OF CONTRACTS § 52; 320, cmt. a. (“An offer can be accepted only by a person whom it invites to furnish the consideration, or by his agent. See §§ 29, 52. The power to accept can be exercised by a transferee only if the transferee is such a person.”)

219 RESTATEMENT (SECOND) OF CONTRACTS § 320, cmt a ([A]n option contract, limiting the power to revoke an offer, is treated as creating a right which is assignable like other contractual rights. See § 25”); John Edward Murray, Jr., *Murray on Contracts* (3d Ed. 1990) § 138 (6), 804.


221 *Dickenson v. Dodds*, 2 Ch. Div. 463 (1876).
options as being of two sorts: those in which the optionor had made a contract not to revoke his offer (as Langdell had taught) and those in which he had entered a binding unilateral contract, supported by consideration, in which his duty to perform was subject to an express condition that the optionee tender or promise to pay within the option period.222 Only the latter kind of option was to be assignable, inheritable, and specifically enforceable as a contract to sell. Later, Corbin appears to have endorsed the Hohfeldian analysis,223 but he never abandoned the conditional contract model of the transaction as seen from the optionor’s perspective.

The contract that Corbin envisioned was not the contract that Langdell had posited (a binding promise not to revoke) but was instead a contract to perform the exchange described in the offer itself, e.g., to sell property to the optionee. Because Corbin conceded that the optionor would not be required to perform if the option was not exercised, he described the optionor’s duty as a unilateral contract whose performance was subject to a condition precedent, i.e., the act of acceptance or exercise by the optionee.

Certainly such a conditional contract can be made. Seller and Buyer could bind themselves to a sale of Blackacre, subject to the condition precedent that Seller has no duty to perform unless Buyer tenders payment by a certain date. Failure of the Buyer to tender would discharge all remaining executory duties of both parties, with the Seller to retain any down payment. Such a contract could be made, but is that an accurate description of an option? Corbin wavered: he contended that this described the parties’ legal relationship in most options, but only from the point of view of the Seller/Optionor.224 He recognized the problem with viewing the optionor as bound to a

222 Arthur L. Corbin, Option Contracts 23 YALE L.J. 641 (1913) (This early treatment appeared in the same volume as Hohfeld’s first Fundamental Conceptions article and does not cite Hohfeld.
223 After becoming familiar with Hohfeld’s analysis, Corbin’s analysis of options became more abstract and functional: “[An option under seal or for consideration] might be (and often has been) regarded as creating a duty in A not to change his mind or not to notify B of such a change, but it should be far better regarded as creating a power in B to be exercised by acceptance and a disability in A to extinguish that power. Thus the purpose of a promise may be the creation of a disability instead of a duty.” Arthur L. Corbin, Conditions in the Law of Contract, 28 YALE L.J. 739, 745, n. 13 (1918) (citations omitted). Corbin, Offer and Acceptance, supra note xxx 185-189 (Rejecting Langdell’s view and arguing that whether an offeror retains the power to revoke is a matter of positive law to be determined by policy and convenience
224 CORBIN ON CONTRACTS, supra note 5 § 264.
contract subject to a condition subsequent is that it implies that the optionee is likewise not even conditionally bound, which it is emphatically not.

California courts have adopted Corbin’s view that options have a “dual nature” depending on the perspective the court chooses to take, that of the optionor or the optionee. Following Corbin, they elect to look at the option from the optionee’s perspective, i.e., as an offer, in order to apply the “effective-upon-posting” or mailbox rule to acceptances of the option offer. Corbin also reasoned that the mailbox rule did not apply because the option was a conditional contract rather than an offer. California courts also take the “irrevocable offer” viewpoint when deciding that an option is not a conditional sale of real property or an interest in land, which would trigger the statute of frauds. By contrast, they take the optionor’s perspective in determining that venue in a suit to enforce the option is the place where the option was made, not where it was exercised. They also take the optionor’s perspective (option as conditional contract) in finding that an option to sell the optionor’s services binds the optionor and constitutes a contract to perform or render services for purposes of employment law.

The Restatement also adopted Corbin’s hybrid approach to irrevocable offers, defining them as “option contracts”: “a promise which meets the requirements for the

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226 Palo Alto Town and Country Village, Inc. v. BBTC Company, 521 P.2d 1097 (Calif. 1974) (under a statute mandating the mailbox rule for acceptances of offers) By contrast, Corbin elected to view the option from the optionor’s perspective so that he could avoid application of the mailbox rule to options. Also rejecting Corbin’s view and applying the mailbox rule under a similar statute is Worms v Burgess, 620 P.2d 455 (OK. 1980).
227 Speaking of an offeree’s notice of acceptance of an option offer under the mailbox rule, Corbin wrote: “[T]he notice is in one aspect a notice of acceptance of an offer; but in another aspect it is a condition of the promisor’s already existing contractual duty. It is more likely to be regarded in this latter aspect by the parties themselves. 1A CORBIN ON CONTRACTS supra note 5 § 264. This view has been adopted by several courts. (“The contract has already been made, as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance.”) Seeburg v. El Royale Corp., 128 P.2d 362 (Cal. App. 1942) (Buyer made contract for purchase at time option was formed, so was not enjoined from its exercise by injunction entered subsequently against seller).
228 Hicks v. Christeson, 164 P. 395 (Cal. 1917). Accord Shaughnessy v. Eidsmo, 23 N.W.2d. 362, 363. Corbin took the view that if the option were a conditional contract, it did convey an interest in land, but not if it were merely an irrevocable offer. Corbin, Option Contracts, supra note 204 at 660. Whether an option to sell land is considered to be an interest in land from the perspective of the optionor or optionee may also be relevant to the laws of inheritance and bequest. Id. 661-2.
229 Dawson v Goff, 43 Cal. 2d 310, 316-18.
formation of a contract and limits the promisor’s power to revoke an offer.”\textsuperscript{231} As a “contract” as defined by the Restatement, the option contract would be an enforceable promise not to revoke an offer.\textsuperscript{232} But the promise not to revoke is “enforceable” only in that it “limits” the offeror’s “power” to revoke.\textsuperscript{233} Yet, despite this limitation, the Restatement later adopts Corbin’s dual view of the option as a conditional contract in the comment to § 37: “An option contract binds the offeror and gives rise to a duty of performance conditional on the offeree’s acceptance exercising the option.”\textsuperscript{234} If this is to be believed, then the offeror is after all bound to a “contract” in the traditional sense of a binding duty to perform the offered exchange.

This usage is misleading on two grounds. First, it seems to create a duty without a corresponding right. The option is a conditional contract only \textit{from the point of view} of the optionor; \textit{from the point of view} of the optionee, it is only an offer, \textit{i.e.} a power and not a right. In Hohfeldian terms, this binocular perspective is gobbledygook. No legal relation between two people can look one way from one of their perspectives and another way from the other perspective. If an option is a conditional contract from the optionor’s point of view, then it must also be one from the optionee’s. If it is only an irrevocable offer from the optionee’s point of view, then it is only an irrevocable offer from the optionor’s.

The Restatement position also would require applying the entire law of conditions to options, which is surely unintended. The Restatement takes the position that a “condition” arises only after a contract is formed,\textsuperscript{235} but is forced to make an exception for acceptances of offers that constitute option contracts.\textsuperscript{236} This is a clear

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\item \textsuperscript{231} \textsc{Restatement (Second) of Contracts} § 25. This usage is anomalous: a promise is a commitment to act or refrain from acting: a promise cannot limit a power as, e.g., a waiver can.
\item \textsuperscript{232} \textsc{Restatement (Second) of Contracts} § 1: A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”
\item \textsuperscript{233} \textsc{Restatement (Second) of Contracts} § 25, cmt d: “Effect of option contract. The principal legal consequence of an option contract is that stated in this Section: it limits the promisor’s power to revoke an offer. The termination of the offeree’s power of acceptance is subject to the requirements for discharge of a contractual duty. See § 37. A revocation by the offeror is not of itself effective, and the offer is properly referred to as an irrevocable offer.”
\item \textsuperscript{234} \textsc{Restatement (Second) of Contracts} § 37. The provision goes on to say “The rules governing discharge of contractual duties therefore apply.”
\item \textsuperscript{235} \textsc{Restatement (Second) of Contracts} § ; See \textsc{Farnsworth, Contracts}, supra note 9, § 8.2, 522-3; Arthur L. Corbin, \textit{Conditions in the Law of Contract}, 28 \textit{Yale L.J.} 739, 743 (1918);
\item \textsuperscript{236} \textsc{Restatement (Second) of Contracts} § 224, comment c. (applying the rule, in the illustration, to option contracts formed under § 45 by the reliance of an offeree of a unilateral contract.
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acknowledgment that the underlying contract has not yet been formed by mere issuance of the option. The essence of a contractual condition, as opposed to a prerequisite to the creation of a contract, is that the condition is waivable by the promisor.\textsuperscript{237} If the optionee’s act of acceptance is only a condition precedent to the optionor’s duty to perform, then the optionor, as the promisor whose promise is subject to the condition, may waive the non-occurrence of that condition and enforce the bilateral agreement. But it is clear that, if an optionee fails to exercise the option, the optionor may not “waive” the offeree’s non-acceptance and thereby create a bilateral contract.\textsuperscript{238} Nor may the court excuse the non-occurrence of the condition of acceptance as it might the non-occurrence of a non-material condition under the usual rules of equity.\textsuperscript{239}

If the acceptance is instead construed as a condition precedent to both parties’ duties to perform, then its non-occurrence would not be waivable by the optionor alone. However, where the condition precedent consists either partly or wholly of an action or forbearance by the promisor, the promisor usually has an implied duty to bring about the occurrence of the condition or not to prevent its occurrence.\textsuperscript{240} But no one argues that the optionee has any duty to accept, or bring about the occurrence of the condition precedent to its duty. This exposes the fiction of characterizing an irrevocable offer as a conditional contract.

It is therefore imprecise to say that an irrevocable offer is a traditional contract conditional on acceptance. An option does in fact create a rights-contract, but it is not a conditional one and does not depend on the optionee’s act of acceptance. From the time the option is formed, the optionor has a duty not to repudiate the contract or to convey optioned property to third parties prior to expiration of the option.\textsuperscript{241} But an optionor \textit{qua}
offeror is not yet under any sort of duty to convey, conditional or otherwise. Rather, as Hohfeld emphasized, an option creates a liability that is not subject to the optionor’s power of revocation.\textsuperscript{242}

A Hohfeldian view of option contracts would see them as bundles of \textit{ad hoc} legal relations, as it sees property ownership and rights-contracts. Under the proposed redefinition of contract, an option can be considered to be that precise bundle of legal relations that the courts find to be appropriate without having to ground their reasoning in a fictional or perspective-shifting analytic model. An option would be irrevocable by the optionor and any attempt at revocation would be a nullity. The optionor would have a duty not to repudiate or to convey. Rights of third-party purchasers would be determined as they are now. An option would then be assignable not because it was a contract from the perspective of the optionor but because an option is assignable on grounds of policy or common understanding. An option would be exercisable under the deposited acceptance rule not because it was an offer from the perspective of the optionee but because that rule is appropriate as a matter of policy. Hohfeldian analysis rejects the sort of conceptualism that makes legal fictions necessary, although it also disables courts from convenient conceptualist inferences.

\textbf{Conclusion}

In addition to their power to bind themselves to contracts traditionally defined as relationships of right and duty, people also have the power to bind themselves to other legal relations -- privileges, powers, and immunities -- both as incidental parts of the formation of rights contracts and as free-standing relations. It is both practically and theoretically useful to recognize this capacity as a dimension of the institution of contract. Judicial rules for formation of privileges, powers, and immunities have been borrowed from the rules of formation of rights-contracts. Courts will usually enforce agreements that create powers, privileges, and immunities as part of an exchange transaction if and to involves an implied negative covenant not to sell the property to a third party. Corbin, \textit{Option Contracts}, supra note xxx 659, n. 50.\textsuperscript{242} Hohfeld, \textit{Fundamental Legal Conceptions I, supra} note 1, at 51. Hohfeld made a similar criticism of the argument that the exercise of a public calling created a “duty” to serve anyone who is a member of the public. He argued that this error arose “from a failure to see that the innkeeper, the common carrier and others similarly “holding out” are under present \textit{liabilities} rather than present \textit{duties.”} (\textit{Emphasis in original.”}) Hohfeld, \textit{Fundamental Legal Conceptions I, supra} note 1, at 52.
the extent that the parties have successfully created a rights-contract. Particular terms of course remain subject to modification or invalidation on grounds of fairness or public policy.

Sometimes, however, non-rights contracts are not embedded in rights-contracts. They may arise as modifications to rights contracts or they may simply be free-standing agreements. Two principles seem to have guided courts who must decide whether to give legal effect to parties’ attempts to create powers, privileges, and immunities in such cases. If the creation of the new relation has a wealth transfer effect between the parties, the court will usually insist on consideration for the disadvantaged party. If the creation of the new relation will not have a wealth transfer effect, but instead treat the parties equally or symmetrically, the court will insist on a valid agreement or consent by both parties, but will not require consideration. In such cases, those factors which make an agreement or consent defective for contract formation (force, fraud, mistake, etc.) also make it defective in forming non-duty relationships.

What would be the use of reconceptualizing contract in the way suggested? At the end of Hohfeld’s first article, he speculated about the utility of adopting his analytic system. Noting the variety of different transactions that were, reduced to their elements, alike in creating powers and liabilities, he wrote:

By such a process it becomes possible not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various jural problems involved. . . . [I]t frequently becomes feasible, by virtue of such analysis, to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant. If this point be valid with respect to powers, it would seem to be equally so as regards all of the other basic conceptions of the law. In short, the deeper the analysis, the greater becomes one’s perception of fundamental unity and harmony in the law.

The potential virtue in conceptualizing privileges, powers, and immunities as rights-contracts has already been demonstrated in those judicial decisions that have misdescribed them as such. “Common principles of justice and policy” that relate to the

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243 He listed conditional sales of personality, escrow transactions, option agreements, agency relations, and powers of appointment. Hohfeld, *Fundamental Conceptions I*, supra note 1, 59.

244 Hohfeld, *Fundamental Conceptions I*, supra note 1, 59.
process of agreement in creating obligations have been applied to the formation of these other relations. Not only the consideration doctrine, but the entire body of rules and principles that have evolved to regulate the agreement process for obligation contracts has been deployed to regulate both the creation and the avoidance of releases, anti-contracts, options, and the like. Precedents otherwise “altogether irrelevant” stand ready for use as examples.

Conversely, however, consciously acknowledging that these agreements are not rights-contracts should make courts and parties think twice about whether any particular rule or principle is appropriate for a privilege, power, or immunity. When the rights-contract source of such doctrines is held in mind, for example, a thoughtless application of the consideration doctrine or the statute of frauds should be less likely.

The primary virtue of a generalized reconceptualization of contract law is that it may lead courts to see voluntarily created legal relations as they are. They need not imagine promises and duties where they do not exist. Without that mischaracterization, they must determine whether parties have the power to create new privileges, powers, and immunities and, if so, how that power must be exercised. They must ultimately determine the sticks in each bundle of each new type of contract on the basis of its role in a rational system of private ordering.