

REVISITING RIGHTS-TALK IN MAGNA CARTA: APPLYING HOHFELD TO THE PROBLEM

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INTRODUCTION: THE PROBLEM OF RIGHTS IN HISTORY AND IN MAGNA CARTA

Most would agree that the history of rights is in essence a history of the “relations between public power and individual freedoms.”¹ It is also a search for origins, usually according to the binary whether rights concepts have their origin in modernity,² or

¹ Martti Koskenniemi, *Foreword: History of Human Rights as Political Intervention in the Present*, in REVISITING THE ORIGINS OF HUMAN RIGHTS ix, xvii (Pamela Slotte & Miia Halme-Tuomisaari eds., 2015).

² See, e.g., LEO STRAUSS, NATURAL RIGHT AND HISTORY 180–81 (1953); NORBERTO BOBBIO, THOMAS HOBBS AND THE NATURAL LAW TRADITION 154 (Daniela Gobetti trans.)

whether they are a pre-modern phenomenon.³ For many years, this history accorded to a reasonably well-accepted “textbook narrative” that described a general development in rights consciousness from ancient times to modern, culminating in the United Nations Declaration of Human Rights in 1948.⁴ This textbook narrative was essentially a “Whig” account of the progression of humankind from ignorance to an enlightened understanding of rights.⁵ This long-accepted narrative was disrupted, however, by the revisionist thesis of Samuel Moyn in 2010.⁶ This, in turn, has led to a new “zeal” for the history of rights,⁷ or what I call a recent “historical turn” in the analysis of rights. As a result, the search for the origins of rights concepts has become as elusive as ever because “finding a language that would provide a uniformly—much less, globally—acceptable description remains impossible,”⁸ a problem that has long beset understandings of rights.⁹

Magna Carta represents a historical example that scholars have often identified as providing an early pre-modern source of rights discourse or rights talk.¹⁰ This has not always been done accurately or with appropriate scholarly rigor. Further, the scholarship on Magna Carta as an early source in the origin of rights language is contested,¹¹ since debate has traditionally turned on whether that document represents a principled defense of human liberty¹² or instead reflects a pragmatic statement of

(1993); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 86–106 (3d ed. 2013); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 70 (3d ed. 2007); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1–4, 220–38 (1962).

³ See generally Michel Villey, *La genèse du droit subjectif chez Guillaume d’Occam*, 9 *ARCHIVES DE PHILOSOPHIE DU DROIT* 97, 97–127 (1964); MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE. COURS D’HISTOIRE DE LA PHILOSOPHIE DU DROIT* (1968); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979) (chronicling the language and theories of natural rights); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW* 13–78 (1997) (detailing the origins of individual rights and natural rights language).

⁴ Miia Halme-Tuomisaari & Pamela Slotte, *Revisiting the Origins of Human Rights: Introduction*, in *REVISITING THE ORIGINS OF HUMAN RIGHTS* 1, 5–6 (Pamela Slotte & Miia Halme-Tuomisaari eds., 2015).

⁵ *Id.* at 6.

⁶ See generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

⁷ Halme-Tuomisaari & Slotte, *supra* note 4, at 1, 17; see also *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 4–7 (Darrin M. McMahon & Samuel Moyn eds., 2014).

⁸ Halme-Tuomisaari & Slotte, *supra* note 4, at 22.

⁹ See generally, e.g., REX MARTIN, *A SYSTEM OF RIGHTS* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); *THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984).

¹⁰ See Cary J. Nederman, *The Liberty of the Church and the Road to Runnymede: John of Salisbury and the Intellectual Foundations of the Magna Carta*, 43 *PS: POL. SCI. & POL.* 457, 457 (2010), whose formulation of the historiographical state of play I have adopted.

¹¹ See *id.*

¹² See RALPH V. TURNER, *MAGNA CARTA: THROUGH THE AGES* 145–82 (2003). See

baronial liberties.¹³ Scholarship on either side of the divide has encountered a similar problem to the history of the origin of rights more broadly, namely terminological and conceptual imprecision in the use of rights terms, particularly the conflation of the terms rights and liberties.

The most commonly accepted and authoritative account is Sir James Holt's *Magna Carta*, which was published posthumously in a third edition in 2015 with an additional introduction by renowned English legal historians George Garnett and John Hudson.¹⁴ Holt stressed the continuity between developments in English common law and the provisions in Magna Carta, observing:

Individual freedom can be justified by many methods. There is no logical reason for including Magna Carta among them. That something survives from 1215 is a reflexion of the continuous development of English law and administration. Magna Carta has been preserved not as a museum piece, but as a part of the common law of England, to be defended, maintained or repealed as the needs and function of the law required. That so much of what survives is now concerned with individual liberty is a reflexion of the quality of the original act of 1215. It was adaptable. This was its greatest and most important characteristic.¹⁵

Holt depicted this as a top-down grant of entitlements. The concept of liberties in that document, he stated, evoked understanding of the customary feudal idea that privileges were personal (varying according to class and individual), were conferred by a superior, and thus revocable by that superior.¹⁶ This, significantly, is at odds with notions of rights as inherent in the individual, as in the revolutionary models of constitutional rights such as in the United States.¹⁷ Accordingly, Holt's account has shifted the focus away from rights-talk in Magna Carta.

Despite a flurry of other works in 2015 to mark the 800th year anniversary of the first issue of Magna Carta, the focus of scholarship has moved away from rights. This activity has included academic monographs¹⁸ and special issues of journals.¹⁹

generally PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL* (2008).

¹³ J.A.P. JONES, *KING JOHN AND MAGNA CARTA* 109 (1971).

¹⁴ *See generally* J.C. HOLT, *MAGNA CARTA* (3d ed. 2015).

¹⁵ *Id.* at 34.

¹⁶ *See* RALPH V. TURNER, *KING JOHN: ENGLAND'S EVIL KING?* 187 (2d ed. 2009).

¹⁷ *See, e.g.*, Timothy Sandefur, *Lex Terrae, 800 Years On: The Magna Carta's Legacy Today*, 9 N.Y.U. J.L. & LIBERTY 759, 772 (2015).

¹⁸ *See generally, e.g.*, NICHOLAS VINCENT, *MAGNA CARTA: THE FOUNDATION OF FREEDOM 1215–2015* (2015); RANDY J. HOLLAND, *MAGNA CARTA: MUSE AND MENTOR* (2014); DANIEL B. MAGRAW ET AL., *MAGNA CARTA AND THE RULE OF LAW* (2014); *MAGNA CARTA, RELIGION AND THE RULE OF LAW* (Robin Griffith-Jones & Mark Hill QC eds., 2015).

¹⁹ *E.g.*, Symposium, *After Runnymede: Revising, Reissuing, and Reinterpreting Magna*

Yet the most authoritative accounts that have emerged (other than Holt's) are those of David Carpenter²⁰ and the online commentary still in progress by Henry Summerson of the Magna Carta Project team.²¹ The Magna Carta Project is aimed at replacing what is still the only clause-by-clause commentary on Magna Carta in print by William Sharp McKechnie.²² Legal historians and other scholars, following Holt's work, have veered away from systematic and normative accounts of "rights" in Magna Carta and towards more diverse, fragmented, and specialist studies. Recent work, for example, focuses instead on the rule of law,²³ the influences of Roman and canon law,²⁴ the law of nature,²⁵ religious freedom,²⁶ the reissues of Magna Carta,²⁷ and the significance of particular clauses in that document.²⁸

This Article attempts to resurrect rights-talk in Magna Carta and, in doing so, to revisit rights discourses in the histories of rights more generally. It does so by means of a rights discourse that is axiomatic and therefore arguably free from the contentious underpinnings that potentially beset many historical accounts of rights. This is the formalistic account of rights offered by influential legal theorist Wesley Hohfeld. Against charges that it is anachronistic to apply a modern formalist legal

Carta in the Middle Ages, 25 WM. & MARY BILL RTS. J. 403 (2016); Jiang Dong, *The Past, Present, and Future of Rule of Law*, 11 FRONTIERS L. CHINA 201 (2016).

²⁰ See generally DAVID CARPENTER, *MAGNA CARTA* (2015) [hereinafter CARPENTER, *MAGNA CARTA*].

²¹ *About the Magna Carta Project*, MAGNA CARTA PROJECT, <https://magnacartaresearch.org/about/aboutproject> [<https://perma.cc/F827-B8VU>] (last visited Oct. 2, 2023).

²² See *id.*; WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (2d ed. 1914). According to John Baker, the 1215 version of Magna Carta was a charter and its provisions are therefore correctly referred to as 'clauses,' whereas the 1225 reissue was a statute and so its contents should be called 'chapters.' John Baker, *Magna Carta*, in *GOLDEN BULLS AND CHARTAS: EUROPEAN MEDIEVAL DOCUMENTS OF LIBERTIES* 195, 200 n.7, 205 n.18 (Elemér Balogh ed., 2023).

²³ See, e.g., Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1 (2015); Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L.J. 621 (2016); R.H. Helmholz, *The Myth of Magna Carta Revisited*, 94 N.C. L. REV. 1475 (2016); R. George Wright, *The Magna Carta and the Contemporary Rule of Law Problem*, 54 U. LOUISVILLE L. REV. 243 (2016).

²⁴ See, e.g., Ken Pennington, *Reform in 1215: Magna Carta and the Fourth Lateran Council*, 32 BULL. MEDIEVAL CANON L. 97 (2015).

²⁵ See, e.g., R.H. Helmholz, *Magna Carta and the Law of Nature*, 62 LOY. L. REV. 869 (2016).

²⁶ See, e.g., A. Keith Thompson, *The Liberties of the Church and the City of London in Magna Carta*, 18 ECCLESIASTICAL L.J. 271 (2016); Steven K. Green, *The Mixed Legacy of Magna Carta for American Religious Freedom*, 32 J.L. & RELIGION 207 (2017).

²⁷ See, e.g., Allen Shoenberger, *William Marshal, Great Knight and Protector of Magna Carta: The Unknown Founder of the Rights of Englishmen and Americans!*, 50 J. MARSHALL L. REV. 1 (2016).

²⁸ E.g., Hector L. MacQueen, *Magna Carta, Scotland and Scots Law*, 134 L.Q. REV. 94 (2018).

theory such as Hohfeld's to pre-modern sources, it is contended that this same accusation could be levelled at any other attempt to trace a modern concept into pre-modern sources, as I demonstrate in this Article. This Article nevertheless will carefully attend to contextualising the sources and explaining the methodology. In applying Hohfeld's so-called "fundamental legal conceptions" to the provisions of Magna Carta, this Article is consistent with recent works by Thomas Duve advocating an approach to legal history that incorporates "praxis."²⁹

The usefulness of Hohfeld's approach to rights is demonstrated in this Article when compared with that of Brian Tierney's well-known work on lineages of natural rights as shifting from objective to subjective and as comprising permissive natural rights. In resurrecting rights talk in Magna Carta and by revisiting approaches to rights in it, this Article takes issue with certain aspects of Holt's dominant account although it does not seek to diminish the importance of his outstanding scholarship. In applying Hohfeld to Magna Carta in praxis, further, this Article also tackles an issue that divides scholars in their interpretations of Magna Carta and the history of rights more broadly (including Tierney and others), namely the binary that necessarily characterises modernity as associated with individual rights on the one hand and pre-modernity with communal rights on the other. This binary is one that also characterises the concept of constitutionalism,³⁰ a concept long associated with Magna Carta.

This Article tackles the problem with rights in history and in Magna Carta that has been outlined above. Part I outlines a proposed solution to this problem, namely the analysis of rights put forward by legal theorist Wesley Hohfeld, contrasting this to historian Brian Tierney's well-known studies on the lineages of rights analysing objective and subjective understandings of the term *ius* and a later iteration examining permissive natural rights. It also turns to the notion of praxis hinted at by Tierney but given greater emphasis in recent scholarship by Thomas Duve. Part II provides the background to the problem of rights in Magna Carta by outlining its provisions and then tracing scholarship on it: the traditional approaches before Holt, which found a place for discussions of rights; the monumental work of Holt, which shifted the focus away from rights; and the diversity in readings that followed Holt, further moving away from rights. Part III then turns to Hohfeld in praxis by applying his conceptions of legal entitlements to the provisions of Magna Carta. It also, by

²⁹ Thomas Duve, *Global Legal History—A Methodological Approach* (Max Planck Inst. for Eur. Legal Hist. Rsch. Paper Series No. 2016-04 (Apr.–May 2016)), <https://ssrn.com/abstract=2781104> [<https://perma.cc/F827-B8VU>].

³⁰ Compare the "continuity" thesis of JOHN NEVILLE FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414–1625*, at 27 (photo. reprt. 1978) (2d ed. 1916), with the contrasting "discontinuity" views of Cary J. Nederman, *Conciliarism and Constitutionalism: Jean Gerson and Medieval Political Thought*, 12 *HIST. EUR. IDEAS* 189, 189–91 (1990).

way of contrast and illustration of the usefulness of Hohfeld in this context, applies Tierney's rights analyses to those chapters. Part IV completes this revisiting of rights-talk in Magna Carta by comparing and contrasting the approaches of Holt, Tierney, and others with Hohfeld in their conception of the traditional binary that separates conceptions of rights as modern (individual) or pre-modern (communal). The Article concludes with some observations on how the term "rights" can still be meaningfully applied to historical examinations of Magna Carta and rights more generally albeit with some important qualifications.

I. REVISITING RIGHTS-TALK: HOHFELD'S APPROACH, COMPARISON WITH TIERNEY, AND PRAXIS

In order to understand their history, we must have a clearly understood concept of rights. What do we mean by "rights" then? To answer this question, this Article turns to Hohfeld's analysis of legal entitlements, then compares this axiomatic approach to Brian Tierney's search for subjective versus objective rights or permissive natural rights. It then turns to Tierney's and other scholars' attempts to apply these theoretical constructs to case studies, that is to apply them in praxis.

A. Hohfeld on Rights

Wesley Newcomb Hohfeld (1879–1918)³¹ was an American jurist known for his seminal contribution to understanding legal rights in a series of articles in the early 1900s and posthumously published as *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.³² The centenary of his death nearly coincided with the octocentenary of Magna Carta.³³ In his "fundamental legal conceptions," Hohfeld attempted to clarify the term "right" as it was understood in legal relations.³⁴ His work is particularly suited to the current academic and cultural environment in which there has been, in legal and historical scholarship, an "exponential increase

³¹ For biographies and personal details, see generally Comment, *Wesley Newcomb Hohfeld*, 28 YALE L.J. 166 (1918); Comment, *Wesley Newcomb Hohfeld—Teacher*, 28 YALE L.J. 795 (1918); Editorial Note, *Wesley Newcomb Hohfeld*, 7 CALIF. L. REV. 58 (1918).

³² In this Article, I cite the 1923 edition, WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1923) [hereinafter HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS*], because—unlike other editions—it contains not just the two main articles usually cited (*Fundamental Legal Conceptions I* and *II*) but also additional articles of his that are relevant and that were revised by Hohfeld himself. The three principal chapters referred to are: *Fundamental Legal Conceptions I*, *id.* at 23–65; *Fundamental Legal Conceptions II*, *id.* at 65–115; and *Nature of Stockholders' Liability for Corporation Debts*, *id.* at 194–229.

³³ See Kit Barker, *Private Law, Analytical Philosophy and the Modern Value of Wesley Newcomb Hohfeld: A Centennial Appraisal*, 38 OXFORD J. LEGAL STUD. 585, 585 (2018).

³⁴ See *id.* at 588–93 (detailing the "Hohfeldian" scheme of rights).

in rights discourse in recent years.”³⁵ Hohfeld’s work has been the subject of wide attention since its first publication in the second decade of the twentieth century, and the recent centenary of his death has witnessed “something of a renaissance” in interest in his approach.³⁶

Hohfeld set out a taxonomy of legal entitlements in which he formulated eight legal positions or terms, which corresponded to four pairs of jural correlatives and four pairs of jural opposites.³⁷ The first pair of jural correlatives Hohfeld describes is claim-rights and duties.³⁸ The second pair is privileges/liberties and no-rights.³⁹ Hohfeld’s views of the identification of rights and claim-rights, on the one hand, and his distinction between rights and liberties, on the other, have become axiomatic to most legal theorists. Yet such semantic concerns are absent from most accounts that trace pre-modern genealogies of natural rights or human rights, let alone scholarship on Magna Carta. Accordingly, it is apposite to apply his notion of claim-rights to the provisions of Magna Carta. Modern categories such as Hohfeld’s can help us understand what we are talking about, even if medieval people would not have classified things this way. In the words of a recent appraisal of Hohfeld, his usefulness is not in telling us “*what* to think about legal rights, but ‘*how*’ to think about them.”⁴⁰ Further, in an environment in which rights talk has become protean, Hohfeld provides a much-desired unanimity in approach to the task. Hohfeld’s aim was to clarify the use of the term rights and to provide a clear definitional framework for analysing rights.⁴¹ Indeed, Hohfeld’s system eschews any empirical or historical critique; rather it is a set of axioms or truisms that interrogate the form of human relationships and interactions as legal entitlements. Such a quest for semantic and conceptual clarity is necessary for scholarship that concerns itself with the question as to precisely when in Western European history “modern” notions of rights first developed. Scholars often used words imprecisely and so confuse their meanings across and beyond the Hohfeldian categories or have taken different features of rights as definitive of the modern concept.

Hohfeld employed four “fundamental” conceptions of legal rights: claim-rights, privileges (or liberties), powers, and immunities.⁴² These four concepts comprised four pairs of jural corollaries or correlatives and four pairs of jural opposites, as set out in the table below.⁴³

³⁵ *Id.* at 586.

³⁶ *Id.* at 586, 594, 604–12.

³⁷ *See id.* at 588–93.

³⁸ *Id.* at 589.

³⁹ *Id.* at 589–90.

⁴⁰ *Id.* at 586 (citing Pierre Schlag, *How to Do Things with Hohfeld*, 78 LAW & CONTEMP. PROBS. 185, 189 (2015)).

⁴¹ *See id.* at 588.

⁴² *Id.* at 589.

⁴³ *Id.*

	First-order relations		Second-order relations	
Fundamental Legal Conception	Claim-right	Privilege/Liberty	Power	Immunity
Jural correlative	Duty	No-right	Liability	Disability
Jural opposite	No-right	Duty	Disability	Liability

The most significant of these for our purposes is the concept of the so-called “claim-right.” For Hohfeld, being endowed with a claim-right consists of being legally protected against someone else’s interference (or someone else’s withholding of assistance or remuneration) in regard to a certain action or a certain state of affairs.⁴⁴ There were three critical features of a claim-right. First, the person who is required to abstain from interference or to render assistance or remuneration is under a *duty* to behave so.⁴⁵ Thus, where a claim-right existed there necessarily also existed a duty; the two were jural correlatives in the sense that a claim-right *entailed* a duty. Second, because such a claim-right has a correlative duty, such a claim-right is *enforceable*.⁴⁶ Third, each claim-right “is held by a specific person or group of persons against another specific person or group of persons,” rather than against the world or in things, i.e., rights *in rem*.⁴⁷ That is, the particular nature of the jural correlative claim-right-duty is relational: “Any right of *Y* against *Z* concerning \emptyset will mean that *Z* has to forbear from interfering with \emptyset or has to assist with \emptyset in some way.”⁴⁸

As Kramer observes, Hohfeld’s “Correlativity Axiom,” the postulation of the correlativity or mutual entailment between rights and duties, is a definitional stipulation insusceptible to being disproved.⁴⁹ So any legal entitlement that did not fit this axiom is not, properly speaking, a “right” at all. A right can only be truly so-called if it satisfies the postulates of Hohfeld’s claim-right, as a matter of axiomatic logic.

In contrast, or opposition, to a claim-right (and its correlative duty), is what Hohfeld called a “privilege” (also called a liberty).⁵⁰ A privilege or liberty specifies some behaviour in which the *liberty-holder* is free to engage (or free to avoid). For example, where “*Y* has a liberty against *Z* to do \emptyset . . . we know that, at least as far

⁴⁴ My reading of Hohfeld is based on Matthew H. Kramer, *Rights without Trimmings*, in A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 7, 8–9 (Matthew H. Kramer ed., 1998) and HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 32. As Morss observes, Kramer’s version of Hohfeld “remains true to Hohfeld while significantly developing the consequences of his approach.” JOHN R. MORSS, INTERNATIONAL LAW AS THE LAW OF COLLECTIVES: TOWARD A LAW OF PEOPLE 60 (2013).

⁴⁵ Kramer, *supra* note 44, at 9.

⁴⁶ *Id.*

⁴⁷ *Id.* at 9; *see also id.* at 9 n.2.

⁴⁸ *Id.* at 13.

⁴⁹ *Id.* at 24–36.

⁵⁰ *See id.* at 9–10.

as *Z* is concerned, *Y* is legally or morally free . . . to do \emptyset .⁵¹ The person against whom the privilege/liberty is held has a “no-right” concerning the activity or state of affairs to which the privilege/liberty pertains. Thus, privilege/liberty and no-right are jural correlatives. Importantly, in contrast to claim-rights, which must be specified by reference to the actions of the people who bear the correlative *duties* (rather than those who hold the *claim-rights*), privileges/liberties must be specified by reference to the actions of the people who hold the liberties. Furthermore, equally significant is the explicit absence of any entailment between claim-rights and privileges/liberties: “A right to do \emptyset —that is, a right to be free from interference with the doing of \emptyset , or a right to be assisted in the doing of \emptyset —will not entail a liberty to do \emptyset and is not entailed by such a liberty.”⁵²

Claim-rights and privileges/liberties are “first-order” or “primary” relations in the Hohfeldian taxonomy. These first-order relations apply to the entitlements themselves, while “second-order” relations apply to the ability or not to alter these first-order entitlements. Someone who holds a Hohfeldian “power” can expand or reduce or otherwise modify his or her own entitlements or the entitlements held by some other person, on the one hand, while someone who is thus exposed to the exercise of a power bears a “liability” on the other hand.⁵³ “[T]he entitlements of the liability-bearer are open to being amplified or diminished or shifted in certain ways.”⁵⁴ Therefore, power and liability are correlates. A Hohfeldian disability, on the other hand, is the absence of having a power, where a person has a disability to change these legal relations; hence, disability is the jural opposite to power. “Like the other Hohfeldian legal positions, powers and liabilities” are relational in the sense that they are always “held between particular persons in regard to specified actions or states of affairs.”⁵⁵

Also important are the jural opposites. In particular, a no-right is the absence of a claim-right; further, a duty to abstain or to do is the absence of a privilege/liberty to do or to abstain.⁵⁶ That is, the existence of a claim-right negates the existence of a privilege/liberty, and vice versa.⁵⁷

There is one further aspect of Hohfeld’s schema that requires consideration, namely his view on the relational nature of rights and his view on collectives. The two are related. Hohfeld’s system requires that claim-rights must be relational, that is to say there must exist “a *set of indefinitely numerous rights*, each of which is held against a particular person.”⁵⁸ The notion of the legal or juristic person, namely that

⁵¹ *Id.* at 14.

⁵² *Id.* at 14–15.

⁵³ *Id.* at 20.

⁵⁴ *Id.*

⁵⁵ *Id.* at 21.

⁵⁶ *Id.* Further, a liability is the absence of an immunity. *Id.*

⁵⁷ *See id.* at 14–15.

⁵⁸ *Id.* at 9 n.2; *see also* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 32, at 92, 94, 95 (emphasis added).

of a corporate entity, for Hohfeld was nothing more than the rights of the individuals or natural persons associated with that corporate entity.⁵⁹ Hohfeld was of the view that there was a distinction between the juridical notion of person (also known as a fictive notion of person, usually used for legal entities such as corporations) and natural persons, namely individuals. Hohfeld asserted that a corporation was “just an association of natural persons conducting business under legal forms, methods, and procedure that are *sui generis*. The only conduct of which the state can take notice by its laws *must* spring from natural persons—it cannot be derived from any abstraction called the ‘corporate entity.’”⁶⁰ This has implications for understanding rights in Magna Carta, as I explain below.

B. Comparing Tierney’s Lineages of Rights: From Subjective to Objective and Permissive Natural Rights

To date, applications of Hohfeld’s axiomatic understanding of claim-rights have mostly been confined to private law contexts, rather than public law discourse such as constitutional law.⁶¹ In contrast, another line of scholarship has focused more squarely on the political dimensions of rights, namely by identifying a “subjective” understanding of rights.⁶² Tierney explicitly locates a turning point from “objective” to “subjective” rights—that is an origin to individual or human rights language—in the twelfth and thirteenth centuries.⁶³ In contrast to Hohfeld’s theories on defining rights from a jurisprudential or theoretical perspective, Brian Tierney, taking a “history of ideas” approach,⁶⁴ attempted to find the particular turning point in history when humans began to articulate the notion of rights as something akin to our modern understanding of individual rights or human rights. The reason for turning to Tierney in this Article is to illustrate how other histories of rights narratives attempt to wrestle with the history or lineages of rights concepts.

⁵⁹ HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 32, at 198–99.

⁶⁰ *Id.* at 198.

⁶¹ *But see generally, e.g.*, Nicholas Bamforth, *Hohfeldian Rights and Public Law*, in RIGHTS, WRONGS AND RESPONSIBILITIES (Matthew H. Kramer ed., 2001); Laura K. Donohue, *Correlation and Constitutional Rights*, in WITHOUT TRIMMINGS: THE LEGAL, MORAL, AND POLITICAL PHILOSOPHY OF MATTHEW KRAMER (Mark McBride & Visa A.J. Kurki eds., 2020); Jerrold A. Long, *Waiting for Hohfeld: Property Rights, Property Privileges, and the Physical Consequences of Word Choice*, 48 GONZ. L. REV. 307 (2012).

⁶² *See* Jason Taliadoros, 34 BULL. MEDIEVAL CANON L. 259, 260–61 (2017) (reviewing BRIAN TIERNEY, LIBERTY AND LAW: THE IDEA OF PERMISSIVE NATURAL LAW, 1100–1800 (2014)) and the references therein.

⁶³ For an introduction to and an outline of Tierney’s work, see generally *id.*

⁶⁴ *See* Melvin Richter, *Begriffsgeschichte and the History of Ideas*, 48 J. HIST. IDEAS 247, 247 (1987) (explaining the origin and goals of conceptual history); *cf.* RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY 14 (Darrin M. McMahon & Samuel Moyn eds., 2014); Assaf Likhovski, *The Intellectual History of Law*, in THE OXFORD HANDBOOK OF LEGAL HISTORY 151 (Markus D. Dubber & Christopher Tomlins eds., 2018).

Tierney's starting point is that individual human rights can be traced in history through historical and linguistic analysis of the concepts of "subjective" or individual rights. He places particular emphasis on the notion of individuality. Seeking origins to rights language earlier than other scholars, and responding in particular to French jurist Michel Villey, Tierney suggests the existence of understandings of subjective notions of rights in the commentaries of later-twelfth-century canonists, and an associated permissive natural law.⁶⁵

In the twelfth century, Tierney argues, the phrase *ius naturale*, previously having the one meaning of "natural law" in the sense of "cosmic harmony or objective justice or natural moral law" (or objective right or law), now had the additional meaning of natural *right* in the sense of "a subjective natural right."⁶⁶ The latter did not derive from the former but both were "derived as correlative doctrines from the same underlying view of human personality."⁶⁷ He delineates this shift in language from objective to subjective as occurring in the works of canonists in the period from the second half of the twelfth century and thirteenth century onwards.⁶⁸

Of particular importance in Tierney's identification of this shift was the canonist Rufinus, who composed a commentary around 1160 on Gratian's *Decretum* and the term *ius naturale*.⁶⁹ Rufinus stated that *ius naturale* was, first, "a certain force instilled in every human creature by nature to do good and avoid the opposite."⁷⁰ In this subjective definition, *ius naturale* is a faculty or power or ability inherent in individuals.⁷¹ We can see here that added to the traditional, objective meaning of *ius* (this is right) is the additional, subjective meaning of *ius* (this is my right). The subjective meaning is obtained by the location of this *ius* in the individual, rather than external to her. Second, for Rufinus, natural *ius* also comprised commands, prohibitions, and demonstrations. The last of these described a sphere of personal liberty, a zone of autonomy, an area of licit choice, in which the right holder was free to act as he or she pleased.⁷² In this way of thinking, Tierney argues, it was understood that "natural law left to individuals a sphere of autonomy where the

⁶⁵ BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150–1625*, at 43–77 (1997).

⁶⁶ *Id.* at 46–47.

⁶⁷ *Id.* at 5; cf. Helmholz, *supra* note 25, at 870 (defining natural law as requiring "that all true law serve the cause of morality and the just purposes of human society" in his identification of six clauses that articulate it).

⁶⁸ TIERNEY, *supra* note 65, at 38–39.

⁶⁹ *Id.* at 62.

⁷⁰ *Id.* (citing RUFINUS, *DIE SUMMA DECRETORUM 6–7* (Heinrich Singer ed., 1902)).

⁷¹ *Id.* at 63.

⁷² RUFINUS, *DIE SUMMA DECRETORUM 6–7* (Heinrich Singer ed., 1902), *translated in* TIERNEY, *supra* note 65, at 62–63 ("Est itaque naturale ius vis quedam humane creature a nature insita ad faciendum bonum cavendumque contrarium. Consistit autem ius naturale in tribus, scil.: mandatis, prohibitionibus, demonstrationibus."); TIERNEY, *supra* note 65, at 63–66.

rights inherent in human nature could licitly be exercised.”⁷³ The views of canonists were hugely influential in the schools of the twelfth and thirteenth centuries and Richard Helmholz has suggested correlation, although not necessarily cause-and-effect, between their ideas and the provisions of Magna Carta.⁷⁴

C. *Rights in Praxis*

In this Article, I approach understandings of rights in pre-modern legal-historical contexts by suggesting a new theoretical understanding of that concept based on Hohfeldian concepts and then testing it by applying it to cases studies, in this case the provisions of Magna Carta. This is rights in praxis. Although scholarship on praxis has become influential only more recently,⁷⁵ Tierney also attempted it by applying his notions of the rights of the poor to the surplus goods of the rich in times of need. Tierney describes the development of this doctrine as beginning with the debate on private versus communal property in the canonists of the twelfth century and follows their maturation and refinement into the thirteenth century. In addition, as the editor to the modern edition of Hohfeld’s *Fundamental Legal Conceptions* remarked, “no one recognized more clearly than did Hohfeld that ‘theory’ which will not work in practice is not sound theory If a theory is ‘theoretically correct’ it will work; if it will not work, it is ‘theoretically incorrect.’”⁷⁶

Tierney began with the canonist Huguccio (writing between 1188 and 1190), who defined *ius naturale* as providing that “all things are common . . . that is . . . they are to be shared with the poor in time of need.”⁷⁷ “In this way of thinking,” Tierney notes, “[p]roperty could and should be private *and* common at the same time; private in the sense that ownership and administration belonged to individuals, common in the sense that worldly goods had to be shared with others in times of need.”⁷⁸ But Huguccio did not actually apply this doctrine to the natural rights of the poor to the superfluous property of the rich. A later canonist, Ricardus Anglicus, did, although to a limited extent only when he deduced: “Since by natural *ius* all

⁷³ TIERNEY, *supra* note 65, at 5. On criticism of Tierney’s thesis, see Ernest L. Fortin, *On the Presumed Medieval Origin of Individual Rights*, in 2 CLASSICAL CHRISTIANITY AND THE POLITICAL ORDER: REFLECTIONS ON THE THEOLOGICO-POLITICAL PROBLEM 243, 245–57 (J. Brian Benestad ed., 1996). See generally Jason Taliadoros, ‘Human Rights’ in the Twelfth Century: Tierney’s Thesis Reconsidered, in RULE MAKERS AND RULE BREAKERS: PROCEEDINGS OF A ST. MICHAEL’S COLLEGE SYMPOSIUM (1–2 OCTOBER 2004) 223 (Joseph Goering et al. eds., 2006); Taliadoros, *supra* note 62, at 259.

⁷⁴ See R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 306 (1999).

⁷⁵ See Duve, *supra* note 29, at 12.

⁷⁶ Walter Wheeler Cook, *Introduction: Hohfeld’s Contributions to the Science of Law*, in HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS*, *supra* note 32, at 21.

⁷⁷ TIERNEY, *supra* note 65, at 72.

⁷⁸ *Id.* at 72–73 (emphasis added).

things are common, that is to be shared in times of need, he [the pauper] is not properly said to steal.”⁷⁹

From this, other canonists took things further. Alanus Anglicus around 1200 stated that the poor man in such circumstances did not steal because what he took was really his own “‘by natural right’ or ‘by natural law’” (*iure naturale*).⁸⁰ The canonist who wrote the *Apparatus Militant siquidem patroni ad Compilatio I* in c.1207–1210 suggested that this person in need could “declare his right for himself” (*sibi ius dicere*), like a creditor against a debtor.⁸¹ Then Laurentius, in his *ad Compilatio I*, and Vincentius Hispanus’s *ad Compilatio I*, added that when a poor man took what he needed, it was “as if he used his own right and his own thing” (*accipiendo quasi iure suo et re sua utebatur*).⁸² This doctrine entered the mainstream of medieval jurisprudence when Hostiensis, in his 1271 *Lectura* on the *Decretals*, stated: “One who suffers the need of hunger seems to use his right [*uti iure suo*] rather than to plan a theft.”⁸³ Tierney notes that, up to this point, the poor person had a power to take superfluities from the wealthy, but queries whether this poor person also had a claim that would make him immune from prosecution for theft.⁸⁴ Tierney here made a veiled reference to claim-rights of the type identified earlier. Huguccio doubted whether the poor person could claim his right: “Many things are owed that cannot be sought by judicial procedure, such as dignities and dispensations and alms.”⁸⁵ The only option was to seek them by extrajudicial procedure, such as by means of evangelical denunciation.⁸⁶

Tierney attempted to apply these notions to a practical example, namely to the putative “rights” of an indigent poor person in need to have what she requires by way of food and water in order to survive, specifically from those who have a surplus of these necessities. Was it a part of *ius naturale* to provide for the poor? According to Tierney, the answer to this was yes: “The rich . . . had a natural duty to succor the poor,” but a poor person had no clear-cut “natural right that could be asserted against the rich.”⁸⁷

How does Tierney’s notion of subjective natural rights relate to Hohfeldian claim-rights? Tierney was aware of the Hohfeldian schema:

A great feudal lord could enjoy simultaneously all the rights
enumerated in Hohfeld’s modern classification—a claim to rents

⁷⁹ *Id.* at 73 (quoting Gloss *ad Comp. I* 5.26.25).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 73 n.101.

⁸⁴ *See id.* at 74.

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Id.* at 71.

and services, a power to do justice, an immunity from external jurisdiction, a liberty to, say, hunt in the neighboring forest. Cathedral canons asserted their rights against bishops. Bishops and barons defended their rights against kings.⁸⁸

Charles Reid, Jr. observed of Tierney's analysis that "a correlation between rights and duties had been worked out by the canonists in this basic area of law," i.e., poor law, and that Hohfeld's categories were "satisfied in this development."⁸⁹ Arguably, therefore, Tierney had successfully established the existence of a *claim* by the poor in times of need to the surplus goods of the rich and a correlative *duty* on the part of a rich person to provide it.

But Charles Reid, Jr.'s reading of Tierney's application of Hohfeld in praxis is doubtful. Two circumstances mitigate against the validity of Tierney's establishment of a Hohfeldian claim-right. First, Tierney's assertion of the existence of a claim-right held by the poor to the surplus of the rich in times of need cannot be accepted. As Charles Reid, Jr. himself notes, the remedy of evangelical denunciation, the means of enforcing the duty, "did not fare well among the decretalists" and, despite Bernard of Parma supporting it in principle, Pope Innocent IV and Hostiensis did not.⁹⁰ There is no evidence of evangelical denunciation being applied in practice in cases such as this. If viewed on a theoretical level, the absence of enforceability means that a claim-right cannot exist; this is axiomatic on the Hohfeld schema. Viewed on an historical—albeit empirical—analysis, the lack of an enforcement mechanism for the claim-right of the poor to the surplus of the rich means that we are loathe to give credence to the existence of that claim-right.

Tierney's later work retreats from the language of subjective rights to permissive natural rights. On the apparent right of the poor to sustenance as in existence by the mid-thirteenth century, Tierney's later *Liberty and Law*, characterises this as a privilege rather than a claim-right.⁹¹ In *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800*, Tierney elaborated on his earlier thesis on subjective natural rights but focused on the concept of "permissive natural law."⁹² Permissive natural law, according to his earlier thesis, referred to conduct that was permitted by natural law but that "could properly be prohibited by human law," or was a "'privilege' or 'liberty right,' a right that did not impose an obligation on others."⁹³ In *Liberty and Law*, Tierney considers the evidence for the existence of permissive

⁸⁸ *Id.* at 55.

⁸⁹ Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37, 66–67 (1991).

⁹⁰ *Id.* at 66.

⁹¹ BRIAN TIERNEY, *LIBERTY AND LAW: THE IDEA OF PERMISSIVE NATURAL LAW, 1100–1800*, at 33 (2014).

⁹² *Id.*

⁹³ *Id.*

natural law in “such words as *demonstratio*, *permissio*, *fas*, *libertas*, *perplexitas*, *tolerantia*, *licitum*—and the ideas that the canonists associated with these words.”⁹⁴ That is, these permissive natural rights fell within and were circumscribed by a broader concept of natural law. It appears that this is an attempt to equate permissive natural law with Hohfeldian privileges/liberties. Accepting that premise, the person against whom the privilege/liberty is held has a “no-right” concerning the activity or state of affairs to which the privilege/liberty pertains; this may more accurately describe the relevant entitlement of the poor person but it is quite distinct from a claim-right.

Accordingly, Tierney’s earlier work on the notion of subjective natural rights, as opposed to objective rights, subsisting in the term *ius*, delineated a force in the individual of power and potentiality. This notion, although understood by some as connoting a Hohfeldian claim-right, did not satisfy the requirements of being enforceable and so cannot be a claim-right. Tierney’s later notions of “permissive natural rights,” as discussed above, are quite distinct and most likely connoted Hohfeldian privileges/liberties. This is reinforced by Hohfeld’s axiom that the holder of a claim-right cannot at the same time hold a privilege/liberty.⁹⁵ Accordingly, Tierney’s earlier assertion that the rights of the poor to food is a claim-right cannot be valid on the basis of his later admission that this was a privilege/liberty. If we accept Tierney’s new position that this entitlement of the poor to sustenance is a Hohfeldian privilege/liberty, then that entitlement is not a “right” properly so-called. On this basis, neither understanding of rights in Tierney equates to a Hohfeldian claim-right.

II. BACKGROUND: MAGNA CARTA AND RIGHTS IN SCHOLARSHIP

A. Magna Carta 1215: Background and Context

Before re-examining notions of “rights” in Magna Carta through the multiple perspectives offered by Holt, Hohfeld, and Tierney, it is necessary to understand that document and its provisions in their immediate historical context before we impose on them admittedly anachronistic modern concepts of “rights.” Although, as I discuss below, Holt did discuss rights in Magna Carta, his account of that document has also formed the basis for scholarship on the Great Charter.

When Magna Carta was first published in 1215 it had little impact in real terms in its own day. Holt wryly observes that, on the face of it, it “was a failure.”⁹⁶ On 15 June 1215, King John authorized the sealing of Magna Carta, or the Great Charter,

⁹⁴ *Id.* at 22–23; see also *id.* at 23 (describing texts involving *demonstratio-permissio*); *id.* at 29 (describing *fas*); *id.* at 33 (describing *libertas*); *id.* at 37 (describing *perplexitas* and *tolerantia*); *id.* at 44 (describing *licitum*).

⁹⁵ Kramer, *supra* note 44, at 14–15.

⁹⁶ HOLT, *supra* note 14, at 33.

at a field in Runnymede, between Windsor and Staines.⁹⁷ Yet just over a month later King John asked the Pope to quash the Great Charter.⁹⁸ John's baronial opponents consequently abandoned the Charter and the King, and attempted to replace their monarch with Prince Louis, the eldest son of the King of France.⁹⁹ A papal bull arrived in England at the end of September 1215, by which Pope Innocent III purported to annul Magna Carta, on the grounds that John had been coerced into signing it.¹⁰⁰ Despite its short life, subsequent reissues ensured its ongoing survival.

On John's death in mid-October 1216, a new version of Magna Carta was issued by the infant King Henry III and his governors (the first reissue).¹⁰¹ They did so again in 1217 (the second reissue), consolidating the peace reached with the barons.¹⁰² Henry issued a final version of Magna Carta in 1225, in return for a grant of taxation (the third and final reissue).¹⁰³ It was this 1225 charter that became the definitive version of Magna Carta, and an official copy (an *inseximus* version) was made in 1297, which became the law of Parliament.¹⁰⁴

Magna Carta was neither a bill of rights nor a constitutional document as we would understand those concepts today. Rather, it was a charter containing sixty-three provisions that we call clauses, which dealt with a wide variety of matters.¹⁰⁵ The order of the clauses seems jumbled and we can understand them in an overall way if we regroup them as Charles Donahue, Jr. has done.¹⁰⁶ Four clauses deal with the church (clauses 1, 22, 42, 46), of which the most important is clause 1 on the freedom of the English Church.¹⁰⁷ Two deal with cities, citizens, burgesses, and boroughs (clauses 13, 41),¹⁰⁸ and another five deal with commercial matters (clauses 9, 10, 11, 33, and 35). Of these, the most important are the guarantees of the city of London (clause 13) and other towns, and the attempt to impose a uniform system of weights and measures (clause 35).¹⁰⁹ Nineteen of the provisions deal with feudal relationships between the king and his tenants-in-chief, of which eleven clauses deal

⁹⁷ *Id.* at 26–27.

⁹⁸ *Id.* at 121.

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 311.

¹⁰¹ *Cf. id.* at 314, 317.

¹⁰² *Id.* at 317.

¹⁰³ *Id.* at 327.

¹⁰⁴ The 1225 version was enacted as Magna Carta 1225, 9 Hen. III (1225), chapter 30 when it was “enrolled” by the Chancery, that is copied into the earliest of the Chancery’s Statute Rolls, as London, PRO C74/1. *Cf.* J.C. Holt, *The Ancient Constitution in Medieval England*, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 53–55 (Ellis Sandoz ed., 1993).

¹⁰⁵ *See generally* MAGNA CARTA (1215), in HOLT, *supra* note 14, at 378–98.

¹⁰⁶ *See* Charles Donahue, Jr., “*The Whole of the Constitutional History of England is a Commentary on this Charter*,” 94 N.C. L. REV. 1521, 1528–31 (2016).

¹⁰⁷ *Id.* at 1528.

¹⁰⁸ *Id.* at 1529.

¹⁰⁹ *Id.*

with relief, primer seisin, and the king's wardship of widows and infant heirs (clauses 2–8, 37, 43, 44, 53), and eight deal with levying feudal scutages, or payments in lieu of personal military service, and aids (clauses 12, 14, 15, 16, 26, 27, 29, 32).¹¹⁰ Twenty provisions deal with the administration of justice (clauses 17–21, 24, 34, 36, 38, 39, 40, 44, 45, 52, 54–59), including the famous so-called “due process” clause (clause 39).¹¹¹ Eleven of the provisions deal with miscellaneous administrative matters, such as: distraint for repair of bridges and dykes (clause 23), seizure of foodstuffs for the king (clause 28), seizure of animals for king's service (clause 30), seizure of wood for royal works (clause 31), forests (clause 48), hostages (clause 49), removal of named ministers and their relatives (clause 50), removal of foreign knights and soldiers (clause 51), and adjusting forest boundaries (53).¹¹² The beginning and final clauses (clauses 1, 60–63) deal with the administration of the charter.¹¹³

Some of these clauses evoke notions of what we might recognise as rights. This is so for those clauses from the original charter of 1215 that remain on the English statute books today: clause 1 (the English Church shall be free); clause 13 (the city of London and “all other cities, boroughs, towns and ports” to each have their “ancient liberties and free customs”); clause 39 (“No free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go against him, except by the lawful judgement of his peers or by the law of the land.”); and clause 40 (“To no one will we sell, to no one will we deny or delay right or justice.”).¹¹⁴ Several other provisions from the original issue of 1215 also invoke rights concepts, and survive in modified form in the statute books, namely the provisions dealing with the protection of personal property (clauses 28, 30 and 31) and real property (clauses 52, 53 and 59) and freedom from arbitrary exactions and taxation (clauses 12, 14, 20, 21, 48 and 55).¹¹⁵ I focus on these clauses in this Article, although I note that other clauses, such as clause 33, more obliquely reference notions of rights.¹¹⁶

¹¹⁰ *Id.* at 1530.

¹¹¹ *Id.* at 1531.

¹¹² *Id.*

¹¹³ I depart from Professor Donahue Jr.'s outline here in adding clause 1 to his clauses 60–63, for the reason that clause 1 was a “general enacting clause” as I explain below. *See id.*

¹¹⁴ Clause 1 of the 1215 issue survived as chapter 1 of the 1225 reissue; clause 13 as chapter 9 of the 1225 reissue; and clauses 39 and 40 as chapter 29 of the 1225 reissue. See the text of MAGNA CARTA (1225) chs. 1, 9, 29, in HOLT, *supra* note 14, at 420–28.

¹¹⁵ *See* Magna Carta (1215), in HOLT, *supra* note 14, at 384–87, 391–95.

¹¹⁶ Helmholz, *supra* note 25, at 880 n.37, notes that clause 33 (fish-weirs to be removed from Thames and Medway) has been cited in support of claims regarding navigable waters in contemporary American litigation, citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 262, 284 (1997) and *Arnold v. Mundy*, 6 N.J.L. 1, 3–92 (N.J. 1821). Nicholas Vincent also notes that this same clause 33 has been cited in Canada to assert traditional rights of common access to rivers and coastal waters, through the removal of fish weirs. VINCENT, *supra* note 18, at 152.

B. Scholarship Before Holt

How did scholars before Holt interpret the Great Charter, known as Magna Carta? In particular, what were their understandings of rights in that document? As Nicholas Vincent has usefully outlined, scholarly understandings of Magna Carta before the “Holt era” broadly understood that document in one or more of the following ways, namely: as representing a signal moment in the development of common law precedents (or as a pragmatic political document?), as part of natural law doctrine, or as a step in proto- or pre-modern constitutional advancement.¹¹⁷

The fourteenth century saw Parliament interpret Magna Carta, in particular clause 39, as representing long-standing common law case precedent that had built up over more than a century and represented fundamental legal principles.¹¹⁸ Between 1331 and 1368, in six acts during Edward III’s reign (the so-called “Six Statutes”), Parliament passed statutes that provided interpretations of the wording of clause 39 of the 1215 document that went far beyond any obvious or plain reading of the words of the original Charter.¹¹⁹ First, it interpreted the phrase “lawful judgment of peers” to mean trial by peers and therefore trial by jury, a process which existed only in embryo in 1215.¹²⁰ Second, the law of the land was defined in terms of yet another potent and durable phrase, due process of law, which meant procedure by original writ or by an indicting jury.¹²¹ Third, the words no free man were so layered that the “Charter’s formal terms became more socially inclusive”; for example, in the statutes of Edward III of 1331 and 1352 they became simply “no man”¹²² or, in the 1354 iteration which refers for the first time to “due process of law,” “no man of whatever estate or condition he may be.”¹²³ So, by the mid-fourteenth century, clause 39 and its equivalent in the 1225 reissue (chapter 29) represented the right of all men to a trial by jury in litigation initiated by writ, as opposed to the arbitrary decision-making of the ruler.

Seventeenth century interpretations of Magna Carta emphasized individual liberty in two contrasting ways: as grounded in precedent or as grounded in natural law. In terms of articulating such principles of liberty as founded on long-established

¹¹⁷ Nicholas Vincent, *Magna Carta and the English Historical Review: A Review Article*, 130 *ENG. HIST. REV.* 646, 646–68 (2015).

¹¹⁸ HOLT, *supra* note 14, at 39–40.

¹¹⁹ Charles Donahue, Jr., *Magna Carta in the Fourteenth Century: From Law to Symbol? Reflections on the “Six Statutes,”* 25 *WM. & MARY BILL RTS. J.* 591, 597 (2016); Anthony Musson, *The Legacy of Magna Carta: Law and Justice in the Fourteenth Century*, 25 *WM. & MARY BILL RTS. J.* 629, 629 (2016).

¹²⁰ Donahue, *supra* note 119, at 598.

¹²¹ *Id.* at 602.

¹²² HOLT, *supra* note 14, at 40.

¹²³ *Id.* at 40 nn.34–35 (citing 25 Edward III (1331), ch. 9, in 1 *STATUTES OF THE REALM* 267 (reprt. ed. 1963); 25 Edward III (1350), ch. 4, in 1 *STATUTES OF THE REALM* 321; 28 Edward III (1354), ch. 3, in 1 *STATUTES OF THE REALM* 345)).

precedent in the law, lawyers such as Sir Edward Coke (1552–1634) utilized in this way the provisions of Magna Carta in the Five Knights’ Case (1627), debates on the Petition of Right in 1628, and the Bill of Rights in 1689.¹²⁴ For Coke, Magna Carta was “for the most part declaratory of the principal grounds of the fundamental laws of England” that embodied fundamental, incontrovertible law that went back beyond the Charter to the days before the Norman Conquest.¹²⁵ These fundamental principles arose from precedents in the common law, since Coke “was seeking the continuous thread in English law. He was concerned with precedent, with principles and judicial decisions which in his view indissolubly linked his world with the past.”¹²⁶

J.G.A. Pocock has accused Coke of being a “predecessor and to a large extent the parent” of Whig interpretations of Magna Carta.¹²⁷ Holt argues that this is not an accurate account. Both Coke and Whig interpretations focused on notions of individual liberty, but the latter relied on natural law, which was completely “lethal” and antithetical to Coke, who relied instead on common law precedent.¹²⁸ Also in contrast to Coke were Locke in his *Second Treatise of Civil Government* (1689) and Hobbes in his *Leviathan* (1651), both of whom were also natural law proponents and, therefore, the “real enemies of legal precedent.”¹²⁹

The late eighteenth century American drafters of the bills of rights, such as the Virginia Declaration of Rights of 1776, employed the language of clauses 39 and 40 from the 1215 issue of Magna Carta, as well as Locke’s notions of individual rights. Whereas in England the two concepts were “inimical,” in America the two worked “hand in hand.”¹³⁰ Holt observed the distinctive understandings of Magna Carta in the American context as expressive of higher or natural law rights from those in English contexts promoting it as expressive of a long common law tradition of precedent.

From the late nineteenth century, interpretations of Magna Carta shifted from understandings based on precedent to those that observed a proto-constitutional trend.¹³¹ The first sign of this constitutional teleology was Bishop Stubbs’s *Constitutional History of England*, published in 1878, which described the Great Charter as the “first great public [law] act of the nation” following which “the whole of the constitutional history of England is little more than a commentary.”¹³² Included in

¹²⁴ Cf. *id.* at 34–37.

¹²⁵ HOLT, *supra* note 14, at 35.

¹²⁶ *Id.*

¹²⁷ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 46 (1987).

¹²⁸ HOLT, *supra* note 14, at 38. For a more recent argument on the correlation between Magna Carta and natural law, see also Helmholz, *supra* note 25, at 871, 879.

¹²⁹ HOLT, *supra* note 14, at 44.

¹³⁰ *Id.* at 45–46.

¹³¹ See Vincent, *supra* note 117, at 646.

¹³² *Id.* (citing 1 W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 532 (1874)).

this Stubbsian proto-constitutional legacy was McKechnie's famous line-by-line commentary of 1915 and Petit-Dutaillis's French translation of Stubbs between 1907 and 1913. This trend was followed by Frederick Maurice Powicke, after the First World War, who saw the Great Charter as more than a mere baronial settlement; it was more broadly based and for the benefit of all free men.¹³³ Powicke's book on Archbishop Stephen Langton, although a "brave new departure" in promoting the idea that Magna Carta was founded in political ideas (and not just self-interest), was still part of "English constitutional studies" and achieved by means familiar to Stubbs.¹³⁴ Some more recent work on the Charter has continued to emphasize its constitutional and public law character.¹³⁵

C. Sir James Holt

Sir James Holt's scholarship on Magna Carta and the barons began in the 1950s and culminated in the first edition of his magisterial monograph *Magna Carta* in 1965. This book made a decisive break with the proto-constitutional approach that Stubbs and others had followed. Holt's *Magna Carta* adopted a new method, namely using government and administrative records, especially the rolls, rather than legal documents such as charters that Stubbs saw as akin to "constitutions."¹³⁶ Holt also eschewed arguments that the origin of the Magna Carta lay in concepts of natural law and natural rights, as expounded by Hobbes and Locke in the seventeenth century.¹³⁷ Holt also rejected Coke's account of Magna Carta as revealing ancient fundamental rights that represented a continuation of the common law; Holt dismissed Coke's claims that Magna Carta was "for the most part declaratory of the principal grounds of the fundamental laws of England," namely that fundamental, incontrovertible law that went back beyond the Charter to the days before the Norman Conquest.¹³⁸

Holt also moved away from intellectual histories that saw Magna Carta as containing political ideas (such as through the agency of a non-secular, religious figure, Stephen Langton) and back to government administrative sources, the rolls, to examine the immediate political and social context that gave rise to the provisions. Holt argued that Magna Carta was a product of local English customs that arose from local social and political conditions, including individual and municipal charters that granted rights, ad hoc privileges from royal prerogative powers, royal writs, and

¹³³ *Id.* at 660.

¹³⁴ *Id.* at 661; see F.M. POWICKE, STEPHEN LANGTON 120–28 (1928).

¹³⁵ See, e.g., LAW, GOVERNANCE, AND JUSTICE: NEW VIEWS ON MEDIEVAL CONSTITUTIONALISM (Richard Kaeuper ed., 2013); RALPH V. TURNER, KING JOHN: ENGLAND'S EVIL KING? 145–82 (2d ed. 2009); PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 1–45 (2008); VINCENT, *supra* note 18, at 1–5.

¹³⁶ See Vincent, *supra* note 117, at 669.

¹³⁷ HOLT, *supra* note 14, at 38, 44–45.

¹³⁸ *Id.* at 35.

most importantly the “good old laws” of the Charter of Liberties of Henry I (1100).¹³⁹ Holt argued, in this way, that the clauses of this document reflected their immediate feudal social and political context, with the result that Magna Carta largely represented the self-interested aspirations of the barons. On the other hand, he also pointed to contemporaneous imperial and customary developments in Continental Europe that mirrored some of these changes.¹⁴⁰

D. Diversity in Approaches “After” Holt

Following the publication of Holt’s *Magna Carta*, the period from 1965 onwards has seen significant diversity in scholarly approaches to the Charter.¹⁴¹ Some have emphasized the legal culture behind Magna Carta (in the scholarship of figures such as Michael Clanchy,¹⁴² Paul Brand,¹⁴³ George Garnett,¹⁴⁴ Richard Helmholz¹⁴⁵); others have focused on the interplay between common law, Roman law, and canon law (Paul Hyams,¹⁴⁶ Anne Duggan,¹⁴⁷ James Brundage,¹⁴⁸ John Hudson,¹⁴⁹ Helmholz¹⁵⁰), in this way bringing in continental perspectives to challenge traditional English exceptionalism approaches; S.F.C. Milsom put forward a thesis of a disjunction between the king as manipulator of the law and justice as a universal concept diffused throughout society (oddly, matching Walter Ullmann’s now-discredited

¹³⁹ See *id.* at 49–68.

¹⁴⁰ *Id.* at 50–51.

¹⁴¹ For what follows, see Vincent, *supra* note 117, at 671–84.

¹⁴² See generally M.T. Clanchy, *Magna Carta, Clause Thirty-Four*, 79 ENG. HIST. REV. 542 (1964) (discussing the meaning of clause 34).

¹⁴³ See generally Paul A. Brand, *The Origins of the English Legal Profession*, 5 LAW & HIST. REV. 31 (1987) (discussing the rise of the legal profession).

¹⁴⁴ See generally GEORGE GARNETT, *CONQUERED ENGLAND: KINGSHIP, SUCCESSION AND TENURE, 1066–1166* (2007).

¹⁴⁵ See generally R.H. HELMHOLZ, *THE IUS COMMUNE IN ENGLAND: FOUR STUDIES* (2001) (discussing the role of Roman and canon law on the history of England and the development of Anglo-American law).

¹⁴⁶ See generally Paul Hyams, *The Common Law and the French Connection*, in *PROCEEDINGS OF THE BATTLE CONFERENCE ON ANGLO-NORMAN STUDIES IV* (R. Allen Brown ed., 1981); PAUL R. HYAMS, *RANCOR & RECONCILIATION IN MEDIEVAL ENGLAND* (2003) (examining various sources of law to explain the legal context of the time).

¹⁴⁷ See generally Anne J. Duggan, *Roman, Canon and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-Examined*, 83 HIST. RSCH. 379 (2010) (discussing the influence of Roman-canonical concepts on the common law).

¹⁴⁸ See generally James A. Brundage, *The Managerial Revolution in the English Church*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN* 83 (Janet S. Loengard ed., 2010) (explaining the role of Roman and canon law in England and their influence on the Magna Carta).

¹⁴⁹ See generally John Hudson, *Magna Carta, the ius commune, and English Common Law*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN* 99 (Janet S. Loengard ed., 2010) (arguing the *ius commune* had a narrow influence on the Magna Carta).

¹⁵⁰ See generally Helmholz, *supra* note 74 (arguing the *ius commune* influenced parts of the Magna Carta).

concepts of descending and ascending theories of law¹⁵¹); Peter Harvey investigated the economic causes leading to Magna Carta;¹⁵² others have challenged the previously homogenized concepts of baronage and knighthood in the context of Magna Carta (e.g., Peter Coss,¹⁵³ David Crouch,¹⁵⁴ and Paul Hyams¹⁵⁵); yet others have argued for a prominent role for Stephen Langton (e.g., David Carpenter,¹⁵⁶ Philippe Buc,¹⁵⁷ David D'Avray,¹⁵⁸ and John Baldwin¹⁵⁹); while Smith¹⁶⁰ and Carpenter's¹⁶¹ studies have involved the resifting of archival evidence.

¹⁵¹ See S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 68–71 (1976) on the role of clause 34 of the 1215 version of Magna Carta, dealing with the writ *praecipe*, and its centrality to Milsom's argument that the common law developed in the early decades of the thirteenth by means of seignorial responses to royal encroachment of the former's jurisdiction. See generally WALTER ULLMANN, *PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES* (1961) (explaining the ascending and descending themes of government).

¹⁵² See generally P.D.A. Harvey, *The English Inflation of 1180–1220*, 61 *PAST & PRESENT* 3 (1973) (evaluating the effect of the rapid rise in prices on society at the time); P.D.A. Harvey, *The Pipe Rolls and the Adoption of Demesne Farming in England*, 27 *ECON. HIST. REV.* 345 (1974).

¹⁵³ See generally P.R. Coss, *Sir Geoffrey de Langley and the Crisis of the Knightly Class in Thirteenth-Century England*, 68 *PAST & PRESENT* 3 (1975) (examining the impact of the knight class on land ownership through a case study of Sir Geoffrey de Lanley); PETER COSS, *THE ORIGINS OF THE ENGLISH GENTRY* (2003) (defining gentry and discussing knights' role in the changing political context); PETER COSS, *THE FOUNDATIONS OF GENTRY LIFE: THE MULTONS OF FRAMPTON AND THEIR WORLD, 1270–1370* (2010) (studying the social and sociocultural history of the gentry).

¹⁵⁴ See generally DAVID CROUCH, *THE BIRTH OF NOBILITY: CONSTRUCTING ARISTOCRACY IN ENGLAND AND FRANCE, 900–1300* (2005) (discussing the influence of English and French aristocracy); D. CROUCH, *THE ENGLISH ARISTOCRACY, 1070–1272: A SOCIAL TRANSFORMATION* (2011).

¹⁵⁵ See generally PAUL R. HYAMS, *KINGS, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES* (1980) (discussing the significance of the common law of villeinage).

¹⁵⁶ See generally David A. Carpenter, *Archbishop Langton and Magna Carta: His Contribution, His Doubts and His Hypocrisy*, 126 *ENG. HIST. REV.* 1041 (2011) [hereinafter Carpenter, *Archbishop Langton*] (arguing Archbishop Langton was central to the Magna Carta).

¹⁵⁷ See generally P. BUC, *L'AMBIGUÏTÉ DU LIVRE: PRINCE, POUVOIR, ET PEUPLE DANS LES COMMENTAIRES DE LA BIBLE AU MOYEN ÂGE* (1994).

¹⁵⁸ See generally David L. D'Avray, *Magna Carta: Its Background in Stephen Langton's Academic Biblical Exegesis and its Episcopal Reception*, 38 *STUDI MEDIEVALI*, 423 (1997).

¹⁵⁹ See generally John W. Baldwin, *Master Stephen Langton, Future Archbishop of Canterbury: The Paris Schools and Magna Carta*, 123 *ENG. HIST. REV.* 811 (2008); J.W. Baldwin, *Due Process in Magna Carta: Its Sources in English Law, Canon Law and Stephen Langton*, in *MAGNA CARTA, RELIGION AND THE RULE OF LAW*, *supra* note 18, at 31–52.

¹⁶⁰ See generally J. Beverley Smith, *The Treaty of Lambeth, 1217*, 94 *ENG. HIST. REV.* 562 (1979) (examining newly discovered text relating to the Magna Carta); J. Beverley Smith, *Magna Carta and the Charters of the Welsh Princes*, 99 *ENG. HIST. REV.* 344 (1984) (examining a recently unearthed account to corroborate events leading to the Magna Carta).

¹⁶¹ CARPENTER, *MAGNA CARTA*, *supra* note 20, at xi–xii.

These more modern accounts, however, have not engaged with the notions of rights and liberties in the same way that Holt did, namely by interrogating the objective-subjective distinction within *ius*, the semantic slippage between *ius* and *libertas*, and the notion of communal entitlements. Further, this diversity in scholarship on Magna Carta after 1965, and particularly after 2015, has meant that Holt's account of Magna Carta arguably represents the *status quo* "traditional" approach on rights, and so remains influential. The third edition of Holt's *Magna Carta* was published posthumously with commentary by John Hudson and George Garnett, and stands its ground against the proto-constitutional, natural law, and common law precedent approaches that preceded it.¹⁶² Published also in 2015 and following, and largely building on Holt's legacy, are the highly influential and expert commentaries by David Carpenter¹⁶³ and the Magna Carta online project team, represented by Henry Summerson.¹⁶⁴

III. RIGHTS IN PRAXIS: APPLYING THE HOHFELDIAN APPROACH TO MAGNA CARTA

In this section, I examine those clauses in Magna Carta identified earlier as possibly giving rise to entitlements or "rights." I begin by setting out what the clauses meant at the time of their drafting in the 1215 version, mostly relying on Holt's account but also incorporating other scholarship. Next, I analyse how these liberties, privileges, and concessions in Magna Carta—what we might be tempted to simply call "rights"—may be more clearly understood in the Hohfeldian schema.¹⁶⁵ I then compare this to how such provisions might be understood in Tierney's schema of rights language, specifically his earlier understanding of "subjective" rights and his later notion of "permissive natural rights." In following this approach, this section takes plural theoretical analyses and applies them to the provisions of the 1215 issue of Magna Carta as an illustration of praxis.

A. Free Ecclesiastical Elections

Clause 1 of Magna Carta is in two parts, which are quite distinct, and so will be dealt with separately here. The first part of clause 1 relates to the English Church, and reads as follows:

¹⁶² George Garnett & John Hudson, *Introduction*, in HOLT, *supra* note 14, at 17–18.

¹⁶³ See generally CARPENTER, *MAGNA CARTA*, *supra* note 20.

¹⁶⁴ See generally Henry Summerson, *Magna Carta: Text & Commentary*, MAGNA CARTA PROJECT, https://magnacartaresearch.org/read/magna_carta_1215 [https://perma.cc/QU6W-XA4Z].

¹⁶⁵ See Jason Taliadoros, *Consent, Power, and the Political Community: Communal versus Individual "Rights" in the Twelfth and Thirteenth Centuries*, in *RETHINKING MEDIEVAL AND RENAISSANCE POLITICAL THOUGHT: HISTORIOGRAPHICAL PROBLEMS, FRESH INTERPRETATIONS, NEW DEBATES* 231–34 (Chris Jones & Takashi Shogimen eds., 2023).

In the first place [*sc.* we, i.e., King John] have granted to God and by this our present charter have confirmed, for us and our heirs in perpetuity, that the English church is to be free, and shall have its rights undiminished and its liberties unimpaired: and we wish it thus observed, which is evident from the fact that of our own free will before the quarrel between us and our barons began, we granted and confirmed by our charter freedom of elections, which is thought to be of the greatest necessity and importance to the English church, and obtained confirmation of this from the lord pope Innocent III, which we shall observe and wish our heirs to observe in good faith in perpetuity.¹⁶⁶

This first part of clause 1 provides for the freedom of the English Church (*Anglicana ecclesia libera*); for the English Church's rights to be "undiminished" or "whole" (*iura integra*) and its liberties "unimpaired" or "unharmd" (*libertates illesas*); and for "freedom of elections" (*libertatem electionum*).¹⁶⁷ Clause 63 provides a "corroboration" of the freedom of the English Church,¹⁶⁸ stating in its opening line: "Wherefore we [*sc.* we, i.e., King John] wish and firmly command that the English Church shall be free"¹⁶⁹

What did these parts of clauses 1 and 63, providing for the "freedom" of the English Church, the protection of its rights and liberties, and freedom of elections, mean to a thirteenth century audience? If we can understand what entitlements arose from, or were intended to arise from, these provisions, we can then develop a clearer notion of whether these were truly "rights."

Some commentators have referred to these clauses as providing for a broad notion of "ecclesiastical freedom." According to Cary Nederman, this notion in the thirteenth century entailed "freedom from the control of secular rulers and their ministers to the Church as a whole, as well as to those people who staffed its offices and to its lands and other earthly possessions."¹⁷⁰ Nederman sees this notion of freedom as freedom from the control of secular rulers more broadly rather than merely in the case of ecclesiastical elections; for instance, he notes it meant that "churchmen could not be detained by temporal governors or tried and punished" in secular courts and that "church properties were exempt from many of the financial imposts that secular authorities could demand of the laity."¹⁷¹ This idea of the Church being free of secular interference was an ongoing social, cultural, and political trend from the Investiture Controversy of the eleventh and twelfth centuries; as Berman

¹⁶⁶ MAGNA CARTA (1215) cl. 1, in HOLT, *supra* note 14, at 379.

¹⁶⁷ CARPENTER, MAGNA CARTA, *supra* note 20, at 197, 351.

¹⁶⁸ HOLT, *supra* note 14, at 434.

¹⁶⁹ *Id.* at 397.

¹⁷⁰ Nederman, *supra* note 10, at 458.

¹⁷¹ *Id.*

has argued, *libertas ecclesiae* was the cardinal tenet of the movement of reform led by the papacy and embodied in the law of the church.¹⁷² Nederman has also argued that these provisions reflected “a form of freedom that already exist[ed] independently,” rather than a concession that the king might rightfully withhold or revoke.¹⁷³

But arguably the reference to the freedom of the English Church and the protection of its rights and liberties meant no more or less than freedom of *election*. The specific “freedom of election,” for McKechnie, meant that in “all cathedral and conventual churches and monasteries, the appointment of prelates [e.g., bishops and abbots] was to be free from royal intervention for the future, provided always that licence to fill the vacancy had first been asked of the King.”¹⁷⁴ This view is shared by other commentators, who emphasize the novelty of clause 1’s provision for free elections of bishops and abbots by chapters, thus distinguishing it from precedents that linked this freedom to episcopal and abbatial vacancies and to the plundering of church lands during such vacancies.¹⁷⁵ Clause 1 makes reference to John’s earlier charter of 21 November 1214, reissued on 15 January 1215 by its words “we granted and confirmed by our charter freedom of elections.”¹⁷⁶ John’s November 1214 charter is known as the “Unknown Charter,” which comprised a copy of the charter of liberties of Henry I of 1100 and certain concessions added by John, the compilation being of uncertain date but likely sometime between January and June 1215. Clause 1 of Henry’s I Charter of Liberties, contained in this “Unknown Charter,” referred to the king making the “holy church of God free” and not interfering with church property during any vacancy but without specific reference to free elections.¹⁷⁷ This charter of Henry I was followed by subsequent charters by Stephen and Henry II, agreeing to give greater freedom of elections and (in 1176) that the king would not keep seats vacant for longer than one year, but avoided sweeping promises of unlimited freedom.¹⁷⁸

The second circumstance that indicates chapter 1 was concerned principally with freedom of election rather than broader freedoms was the Church’s specific anxiety about royal overreach in such matters. As Helmholz has observed, the king’s role in choosing bishops had come to be supported by long tradition, much to the chagrin of the English Church.¹⁷⁹ A related grievance for the Church in England was the “great evil,” namely the way the king kept bishoprics and abbeys vacant so that he

¹⁷² See Harold J. Berman, *Law & Revolution*, 4 CHRISTIAN LEGAL SOC’Y Q. 12, 14 (1983).

¹⁷³ Nederman, *supra* note 10, at 458.

¹⁷⁴ MCKECHNIE, *supra* note 22, at 194.

¹⁷⁵ George Garnett & John Hudson, *Introduction*, in HOLT, *supra* note 14, at 17–18; Carpenter, *Archbishop Langton*, *supra* note 156, at 1052; cf. CARPENTER, *MAGNA CARTA*, *supra* note 20, at 197.

¹⁷⁶ MAGNA CARTA (1215) cl. 1, in HOLT, *supra* note 14, at 379.

¹⁷⁷ The text of the “Unknown Charter” appears in HOLT, *supra* note 14, at 349–55. Holt summarises its contents in *id.* at 211–12.

¹⁷⁸ MCKECHNIE, *supra* note 22, at 192.

¹⁷⁹ See Helmholz, *supra* note 74, at 314.

could take their revenues.¹⁸⁰ Accordingly, freedom of elections also meant that such elections would take place quickly, thus avoiding lengthy vacancies.¹⁸¹ Third, the reference to broad rights and liberties of the English Church in clause 1 is unspecific and therefore permitted other chapters of Magna Carta to deal with non-election ecclesiastical freedoms. For instance, clause 22 deals separately with the exemption of clerics from amercement of their ecclesiastical benefices, which has some connection with ecclesiastical freedom, but is quite specific in its scope and distinct from that concept.¹⁸²

How do these provisions on church freedoms in clauses 1 and 63 represent notions of “rights,” if at all, in the thirteenth century? On the basis of the above theoretical framework, this involves consideration of whether and how such provisions can be understood within (1) Hohfeld’s fundamental legal conceptions; and (2) the objective/subjective distinction drawn by Tierney.

1. Hohfeld

Does this freedom of election constitute one of Hohfeld’s fundamental legal conceptions? Arguably, it constitutes a Hohfeldian claim-right. For the English Church to have a claim-right to conduct its elections freely, it follows that the church and its members must be legally protected against others interfering with their entitlement to stand for, hold, and effect elections.¹⁸³ That is, King John or the Crown must, correlatively, have a *duty* to abstain from interfering with ecclesiastical elections. Clause 1 specifies that the “we” (the Crown) “observe” (*observo*) this freedom of elections, and the clause 63 corroboration “wish[es]” and “firmly commands” the “freedom” of the English Church and that the men of the realm “have and hold all the aforesaid liberties, rights and concessions,” which would include free elections.¹⁸⁴ The term “observe” hints at, but does not seem to go far enough or be explicit enough in its compulsory meaning, to connote a “duty.” The phrase “firmly commands” arguably goes sufficiently further to indicate a duty. More broadly, these chapters contain the operative provisions of the whole document, which is a charter, a form of contract, and so arguably bind the king in this way to such a duty.

If a Hohfeldian claim-right exists, it must be enforceable. So, the English Church must have been able to enforce this duty on the Crown to forbear from interfering

¹⁸⁰ CARPENTER, *MAGNA CARTA*, *supra* note 20, at 197.

¹⁸¹ MCKECHNIE, *supra* note 22, at 193 notes the limits to this freedom of election represented by the assize of darrein presentment, which preserved the right of patrons to appoint religious to parochial churches.

¹⁸² See *MAGNA CARTA* (1215) cl. 22, in HOLT, *supra* note 14, at 385.

¹⁸³ See Kramer, *supra* note 44, at 9.

¹⁸⁴ *MAGNA CARTA* (1215) cl. 63, in HOLT, *supra* note 14, at 397; see *supra* notes 156–58 and accompanying text (discussing clause 1 and clause 63 of the Magna Carta).

with its elections. Several possibilities exist for enforcing this claim-right. Clause 61 of Magna Carta, the so-called “security clause,”¹⁸⁵ provided a means of enforcing this provision (along with any other provision) if the king or his officers “offended ‘against anyone in any way, or transgress any of the articles of peace and security.’”¹⁸⁶ In addition, the medieval conventions of oath-giving provided another means of enforcement: clause 63 provides that King John has sworn an oath “that all these things aforesaid shall be observed in good faith and without evil intent.”¹⁸⁷ The solemnity of oath and the legal and political anathema of breaching it under accusation of perjury provided a further means of enforcement.¹⁸⁸

As observed previously, a Hohfeldian claim-right is relational in the sense that it must be held by a specific person against another person. Taking Hohfeld’s conception of claim-rights as necessarily individual and relational on a one-to-one basis between the claim-right holder and the duty-bearer, indicate that, while such entitlements reside in the fictive corporate persona of the Church, it is the human agency of its individual members that exercises that right. On this reasoning, the claim-right to free elections is arguably relational since each individual member of a cathedral church, or each member of an abbey, holds this right to vote free from the interference of the king.

Yet Kramer argues that Hohfeld’s Correlativity Axiom is capable of recognizing collectivities without violence to its internal logic. Kramer begins by criticizing Hohfeld’s failure to recognise collective entities; for Kramer, “numerous duties are uncorrelated with any rights” and so the Correlativity Axiom would prove false in situations involving, for example, public duties.¹⁸⁹ By way of illustration, following Hohfeld’s logic that claim-rights are relational and therefore only apply between one individual and another individual, the obligation to pay tax is owed (in a modern context) to the state rather than to any individual inspector or any member of the general public, and so is arguably not relational and so not a claim-right. If, on the other hand, Kramer posits, we were to infer that the Correlativity Axiom “encompasses collective legal positions—including collective rights,” then it is possible too that any public duty is owed by an individual to “a collectivity (the state, the nation, the community) which holds the correlative right.”¹⁹⁰ In this way, “each public duty correlates with a collective right only, whereas each private duty correlates with an

¹⁸⁵ George Garnett & John Hudson, *Introduction*, in HOLT, *supra* note 14, at 7. Compare the term “sanctions clause” used by Catharine MacMillan, *Introduction*, in CHALLENGES TO AUTHORITY AND THE RECOGNITION OF RIGHTS: FROM MAGNA CARTA TO MODERNITY 1 (Catharine MacMillan ed., 2018).

¹⁸⁶ George Garnett & John Hudson, *Introduction*, in HOLT, *supra* note 14, at 7.

¹⁸⁷ MAGNA CARTA (1215), in HOLT, *supra* note 14, at 397; *see also* HOLT, *supra* note 14, at 222–23.

¹⁸⁸ HOLT, *supra* note 14, at 222–24.

¹⁸⁹ Kramer, *supra* note 44, at 58.

¹⁹⁰ *Id.* at 59.

individual right.”¹⁹¹ Therefore, for Kramer, although Hohfeld’s position on collectivities as a legal fiction is flawed, his Correlativity Axiom is nevertheless capable of recognizing such collectivities by a small modification that does not interfere with its internal logic. Hohfeld did not envisage his semantic apparatus applying to communal rights, but Kramer argues it is nevertheless capable of such application.

The very language of clauses 1 and 63, by their reference to the *libertas* or “freedom” of elections, and of the English Church more broadly, imply their characterisation as Hohfeldian “privileges” or “liberties.” As noted above, for Hohfeld, a privilege or liberty is to be free from any duty to do an action or refrain from that action as against another specific person (or group of persons, if we accept Kramer’s modification) if that other person has a corresponding “no-right” concerning that action. On this reasoning, the English Church, or rather each canon or monk, would have a liberty to vote or be elected in elections, or not to do so, since there was no obligation to positively do so or to refrain from doing so at canon law.¹⁹² Further, continuing this line of reasoning, in respect of this potential liberty to vote or be elected, the king would arguably have a correlative “no-right,” in the sense that he would have no standing or ability to interfere with that voting or election process.

Yet, for Hohfeld, a claim-right does not entail a liberty/privilege.¹⁹³ Accordingly, this entitlement to ecclesiastical elections cannot be both a claim-right and a liberty. The potential for a liberty/privilege to exist is axiomatically impossible because, on Hohfeld’s reasoning, the king would not have a “no-right” (a correlative of a privilege) as against a cleric choosing to vote but instead a positive *duty* not to interfere with that entitlement to vote.¹⁹⁴ A “no-right” is the absence of a claim-right or duty to do something or to abstain from it.¹⁹⁵

Although not the principal focus of this Article, are other Hohfeldian categories implicated in chapter 1? For instance, do these provisions constitute a “power” under Hohfeld’s analysis? A power, we may recall, is a capacity to alter legal relations affecting others.¹⁹⁶ John Morss remarks that a power, part of Hohfeld’s so-called “second-order relations,” is in fact of great importance since it applies directly to people’s entitlements and only indirectly to their conduct.¹⁹⁷ A power “is the opposite [or the ‘contrary’] of legal disability, and the correlative of legal liability.”¹⁹⁸ Here there is arguably a grant of power by the Crown to the Church that is an amplification of the Church’s entitlement to elect its prelates.¹⁹⁹ The Church is the recipient

¹⁹¹ *Id.*

¹⁹² See Helmholtz, *supra* note 74, at 325–26.

¹⁹³ See Kramer, *supra* note 44, at 13–15.

¹⁹⁴ *Id.* at 18–19.

¹⁹⁵ *Id.* Further, a liability is the absence of an immunity.

¹⁹⁶ *Id.* at 20.

¹⁹⁷ MORSS, *supra* note 44, at 61.

¹⁹⁸ HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 32, at 50.

¹⁹⁹ See Kramer, *supra* note 44, at 20–21.

of this grant, and therefore it has a correlative “liability” in the sense of “suffering,” not necessarily in a negative way, but in the sense of being the “object of” the amplification of its rights. The relational aspect is satisfied as the power/liability dyad exists between the Church electors and the king. This analysis may be questionable, however, on the basis that this was in fact no grant of power by the Crown but simply the recognition or confirmation of an entitlement that the church already had. Arguably, the medieval church always had an entitlement to elect its own prelates at canon law and in customary law, but this was something that had in practice been encroached on over time.²⁰⁰

If not a “power,” can this entitlement to ecclesiastical elections be its opposite, a Hohfeldian “immunity”? An immunity exists in the absence of having a power, where a person has a disability to change legal relations in that they are not exposed to the exercise of a power by another.²⁰¹ Arguably, individual electors in the cathedral churches and abbeys can exercise their claim-right to elect and are not exposed or affected by any royal power that may impact it. Accordingly, in terms of second-order jural relations, the entitlement to ecclesiastical elections can be considered a Hohfeldian immunity from royal power. Such a finding is not inconsistent with that same entitlement also being a claim-right. First-order relations apply to the entitlements themselves, while “second-order” relations apply to the ability or not to alter these first-order entitlements.

Thus, the first part of clause 1 of Magna Carta, the English Church’s freedom of election, is arguably a Hohfeldian claim-right held by the English Church or its individual members as against the king. Further, it is also arguably a Hohfeldian immunity from the power of the king.

2. Tierney

Since we have made the finding above that the provision of free ecclesiastical elections is a Hohfeldian claim-right, is this also a subjective right according to Tierney? That is, is it a faculty or power or ability inherent in individuals (since we have concluded that its other meaning, of a sphere of personal liberty, a zone of autonomy, an area of licit choice, or permissive natural law, does not constitute a claim-right)?

The existence of a claim-right in freedom of elections amounts to the right of each monk or canon to vote for and elect their choice of canon or prebend, and for the Crown owing a duty not to interfere. The claim gives rise to a subjective right, as Tierney would understand it, since it is a power or faculty inherent in individual ecclesiastics to vote. Moreover, as discussed above, such a right is enforceable

²⁰⁰ SUSAN WOOD, *ENGLISH MONASTERIES AND THEIR PATRONS IN THE THIRTEENTH CENTURY* 2–3 (1955).

²⁰¹ Kramer, *supra* note 44, at 21.

against the duty-bearer, the king, by the committee of twenty-five and other established legal procedures.

The language of entitlement here, significantly, is not explicitly expressed as an *ius*, but rather as a *libertas* and other cognate terms. In accordance with Tierney's earlier position on subjective rights, linguistic terminology was crucial. A subjective right did not exist unless expressed as *ius*.²⁰² In respect of Tierney's later work, in which he was more accommodating linguistically, he specifically acknowledged the use of the term *libertas*. But this was to connote notions of "permissive" rights, which would not be Hohfeldian claim rights but more akin to Hohfeldian first-order privileges/liberties or second-order immunities.

B. General Grant of Entitlements

The second part of clause 1, following the confirmation of liberties to the English Church in its first part, has been labeled a "general enacting clause" by McKechnie.²⁰³ It reads as follows: "We have also granted to all the free men of our realm for ourselves and our heirs for ever, all the liberties (*libertates*) written below"²⁰⁴ This provision gives a general grant of entitlements but leaves the details to the remaining sixty-two chapters of the Magna Carta.²⁰⁵ Then the final clause, clause 63, corroborates the clause 1 general enacting clause, by confirming the grants of entitlement:

Wherefore we wish and firmly command that . . . the men in our realm are to have and hold all the aforesaid liberties (*libertates*), rights (*jura*) and concessions (*concessionones*) well and peacefully, freely and quietly (*libere et quiete*), fully and completely (*plene et integre*), for them (*sibi*) and their heirs of us and our heirs in all things and places for ever (*in perpetuum*), as is aforesaid.²⁰⁶

²⁰² TIERNEY, *supra* note 65, at 47 (quoting J.G.A. Pocock, *The Concept of Language and the métier d'historien: Some Considerations in Practice*, in *THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE* 19, 31 (A. Pagden ed., 1987)) (explaining that "the performance of speech acts not merely modifies language, but leads to the creation and diffusion of new languages" and that "any text may be an actor in an indefinite series of linguistic processes").

²⁰³ MCKECHNIE, *supra* note 22, at 195.

²⁰⁴ MAGNA CARTA (1215), in HOLT, *supra* note 14, at 379. Unless otherwise stated, all quotations from Magna Carta are to the first issue of Magna Carta in 1215 as edited and numbered in the Latin-English facing-page translation in HOLT, *supra* note 14, at 378–98. Compare this translation to that in CARPENTER, MAGNA CARTA, *supra* note 20, at 39, which is slightly more fluent and distinguishes the two parts of clause 1 into separate paragraphs.

²⁰⁵ MCKECHNIE, *supra* note 22, at 195.

²⁰⁶ MAGNA CARTA (1215), in HOLT, *supra* note 14, at 397. Similar confirmations of grants appear in clause 60, *id.* at 395 ("[A]ll these aforesaid customs and liberties which we have granted to be held in our realm"), and clause 61, *id.* ("[W]e have granted all the aforesaid

Pollock and Maitland described the document as “[i]n form a donation, a feudal grant of franchises and liberties freely made by the king, in reality a treaty extorted from him by the confederate estates of the realm.”²⁰⁷ Holt essentially agrees with this characterisation. The essence of the document was the terms of settlement between King John and his warring barons, as reflected in the references to “the quarrel between us and our barons” (clause 1)²⁰⁸ and “the better settling of the quarrel which has arisen between us and our barons” (clause 61),²⁰⁹ which were agreed between the parties in draft form on 19 June 1215 and put into effect not by any written instrument but by formal and verbal means, specifically by renewal of homage between the parties and by oaths to observe the peace treaty between them.²¹⁰ These draft terms of settlement were then put into charter form by the king’s Chancery clerks; its appearance like any other typical charter of the time resembled a legal instrument that recorded an act of concession or a grant—hence the words “[k]now that we [*sc.* we, i.e., King John] . . . granted to all free men of our realm . . . all the liberties written below” (preamble and clause 1).²¹¹ These were the “operative phrases typical of the English charter of this time.”²¹² As is usual in a medieval charter, the language was of liberties (*libertates*), rights (*iura*), or concessions (*concessionones*).²¹³ But as Holt observes, the form of the Charter was not dispositive but merely evidentiary; it was given effect legally and politically by the formal and public acts of homage and oath.²¹⁴ Yet, despite Magna Carta’s essence as a peace treaty, its formal language (apart from hints at “discord” in clauses 1, 61, and 62) betrays no sign that it was brought about by force or duress; to do so would invalidate it.²¹⁵ Rather, its language indicates a “freely given grant in perpetuity made ‘in reverence for God and for the salvation of our soul and those of all our ancestors and heirs, to the honour of God and the exaltation of Holy Church.’”²¹⁶

1. Hohfeld

The relevant parts of clauses 1 and 63 provide a general grant of rights and liberties but impose no duty on the king or anyone else to do or refrain from doing

things for God, for the reform of our realm and the better settling of the quarrel which has arisen between us and our barons, wishing these things to be enjoyed fully and undisturbed in perpetuity.”)

²⁰⁷ 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* 150 (1895).

²⁰⁸ *MAGNA CARTA* (1215), in HOLT, *supra* note 14, at 379.

²⁰⁹ *Id.* at 395.

²¹⁰ See HOLT, *supra* note 14, at 223–24; JOHN BAKER, *THE REINVENTION OF MAGNA CARTA 1216–1616*, at 5 (2017).

²¹¹ *MAGNA CARTA* (1215), in HOLT, *supra* note 14, at 379.

²¹² *Id.* at 225.

²¹³ Alan Harding, *Political Liberty in the Middle Ages*, 55 *SPECULUM* 423, 432 (1980).

²¹⁴ HOLT, *supra* note 14, at 224, 226.

²¹⁵ *Id.* at 228.

²¹⁶ *Id.* (quoting *MAGNA CARTA* (1215), in HOLT, *supra* note 14, at 379).

any particular act. As such, there is no conduct to enforce. Accordingly, there is no Hohfeldian claim-right. Rather, the clause 1 enacting clause and the clause 63 corroboration clause fit Hohfeld's depiction of a "power" in that they provide for the king's capacity to alter legal relations with his subjects by granting them miscellaneous entitlements broadly termed liberties, rights, and concession, and these subjects are under a corresponding "liability" to have their entitlements altered.

2. Tierney

Do the Hohfeldian powers in clauses 1 and 63 identified above indicate either subjective rights or permissive natural rights under Tierney's schema? The grant of "rights" (*iura*) in clause 63 does not appear in clause 1; accordingly, its use in clause 63 may well signify the kind of subjective rights that Tierney describes, particularly so since clauses 52 and 61 provide for that entitlement to be enforced. The use of the terms "liberties" and "concessions" in that same clauses 63, and "liberties" in clause 1, resemble the permissive natural rights that Tierney describes in his later works.

C. Legal Process

Clause 39, possibly the most famous provision in Magna Carta, states:

No free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined (*destruatur*), nor will we go or send against him (*nec super eum ibimus, nec super eum mitemus*), except by the lawful judgment of his peers (*per legale iudicium parium suorum*) or (*vel*) by the law of the land (*vel per legem terre*).²¹⁷

This is possibly the most discussed and debated provision in Magna Carta. It deals with the arbitrary treatment of individuals, particularly by the king. To "disseise" meant to dispose of someone's property; to "go or send against" someone meant taking arms against someone; while to "ruin" or "destroy" meant to threaten someone's life or property.²¹⁸

The use of the word *vel* between the phrases "by the judgment of his peers" (*per iudicium parium suorum*) and "by the law of the land" (*per legem terre*), rendered as "or" in the above translation, makes it unclear whether one or both are required. In Latin, *vel* can mean "or" or "and," depending on its context. That context turned on the meanings of the other phrases in clause 39. Holt adopts Powicke's reading

²¹⁷ MAGNA CARTA (1215), in HOLT, *supra* note 14, at 389. Clause 39 (joined together with clause 40) survived in the 1225 version as chapter 29. See MAGNA CARTA (1225), in HOLT, *supra* note 14, at 425.

²¹⁸ CARPENTER, MAGNA CARTA, *supra* note 20, at 28.

that “peers” meant social equals;²¹⁹ “free men” included barons as well as “all non-baronial tenants.”²²⁰ Thus, it meant, for example, that a baron be judged by his baronial peers. For Holt and Powicke, judgment “by peers” and “by the law of the land” were distinct, although potentially overlapping, alternatives. While a judgment of peers in the King’s Court was a normal method of procedure, it was not the only means for legal process; trial by combat was another option.²²¹ The *lex terrae* was intended to refer to the customs of England and the varieties of local customs, as well to actions and procedure generally, according to Powicke.²²² “The phrase ‘judgment of peers,’ on the other hand, had a more limited and precise meaning. It implied . . . [that] the judgment must be delivered on behalf of a company of men who were of the same race or nationality or status of the accused party.”²²³ Yet the prime focus of the chapter was arguably not the requirement for a judgment of peers in all cases. Rather, the chapter “was concerned primarily with . . . justice,” that “the practices of English law not be changed.”²²⁴ Clause 39, for Holt, consistent with these views of Powicke, articulated the fundamental principle that “judgement should precede execution.”²²⁵

Clause 40 states: “To no one will we [*sc.* we, i.e., the king] sell (*vendemus*), to no one will we deny or delay right or justice (*rectum aut iusticiam*).”²²⁶ Here, as Henry Summerson notes, the king speaks as himself, emphatically using the royal plural form (*vendemus*) to proclaim that he, and he alone, will not sell, deny or defer right or justice, that there will be no exceptions to this since the benefits of the clause will be refused to nobody (*nulli*).²²⁷ Despite the prohibition against “selling” (*vendemus*) right or justice, clause 40 did not provide that it should be for free; it remained the case that payments were made for writs, to expedite a matter, for the hearing of a matter in the Exchequer, and other matters. Rather, the prescription was against venality and abuse of the system, such as excessively high fines.²²⁸ It obliged

²¹⁹ MAGNA CARTA (1215), in HOLT, *supra* note 14, at 278 (citing F. M. Powicke, *Per Iudicium Parium Vel Per Legem Terrae*, in MAGNA CARTA COMMEMORATION ESSAYS 96, 103, 108 (Henry Elliot Malden ed., 1917)). The phrase judgment by peers also appears in clauses 52, 56, 57 (*sine legale iudicium parium suorum*), and 59 (*iudicium parium suorum in curia nostra*). *Id.* at 391–95.

²²⁰ *See id.* at 278; F. M. Powicke, *Per Iudicium Parium Vel Per Legem Terrae*, in MAGNA CARTA COMMEMORATION ESSAYS 103 (Henry Elliot Malden ed., 1917).

²²¹ Powicke, *supra* note 220, at 100.

²²² *Id.* at 101.

²²³ *Id.*

²²⁴ *Id.* at 120–21.

²²⁵ MAGNA CARTA (1215), in HOLT, *supra* note 14, at 278.

²²⁶ *Id.* at 389. Clause 36 of the 1215 issue survived in the 1225 version as chapter 26, and clauses 39 and 40 of the 1215 issue as chapter 29. *See* MAGNA CARTA (1225), in HOLT, *supra* note 14, at 425.

²²⁷ Summerson, *supra* note 164, at cl. 40.

²²⁸ MCKECHNIE, *supra* note 22, at 396 (citing THOMAS MADOX, HISTORY AND ANTIQUITIES OF THE EXCHEQUER OF THE KINGS OF ENGLAND I 455 (2d ed. 1769)).

the king to provide legal process at reasonable rates in his courts, and without delay.²²⁹ The two terms, right (*rectum*) and justice (*iusticiam*) appear to be deliberate choices: *iustitia* covered the formal, rule-bound, justice dispensed by the royal courts; and *rectum*, making its only appearance in Magna Carta at this point, referred to the less clearly defined “fairness or equity” that the king was recognised as being especially able to provide as an alternative to it.²³⁰ Clause 40 particularly applied to abuses in respect of royal writs in the king’s courts, which at the time were far more commonly used than procedures in other courts.²³¹ Further, it promised justice to everyone, not just freemen.

Other clauses of Magna Carta provide for justice and legal process too. Clause 36 also promises, similarly, to take no payment for writs of inquest concerning “life or limb,” and that it be granted “without charge and not refused.” Clause 45 reinforces these provisions by requiring that only those who know the law of the land and are willing to observe it can be justices, constables, sheriffs, and bailiffs.

1. Hohfeld

How do we apply Hohfeld’s axioms here? If clause 39 is to be regarded as recognising a Hohfeldian claim-right for every free man to non-interference with his personal integrity, his property rights, and his legal status, without legal process, King John must be under a *duty* towards such free men not to interfere with their person, property, or legal status unless by means of legal process. Further, that duty must be enforceable and relational. The Latin for the king to restrain from taking (*capiatur*), imprisoning (*imprisonetur*), disseising (*disseisiatur*), and so on, are in the subjunctive mood indicating compulsion and so would enliven the concept of his being duty-bound not to so act. Further, the entitlement of freemen against arbitrary royal arrest, dispossession, or outlawry has legal protection in that it was enforceable by means of clause 52 of Magna Carta that restored to anyone who had been “disseised or deprived by us, without lawful judgement of his peers, of lands, castles, liberties, or of his right” or, if any disagreement arose on this, by “the judgment of the twenty-five barons,”²³² or by means of clause 61, the “security” or sanctions clause, which provided for the election of the committee of twenty-five barons to enforce the king’s observance of Magna Carta, if necessary by distraining and distressing the king.²³³ In addition, as Holt powerfully argues, court procedure committed John to acts of “restoration” by executive mandates that were enforceable

²²⁹ Helmholz, *supra* note 74, at 340–41.

²³⁰ Summerson, *supra* note 164, at cl. 40 (citing D.M. STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER, 1066–1215, at 93 (1965)).

²³¹ *Id.*

²³² *See id.* at cl. 52.

²³³ *Id.* at cl. 61. Clause 55 similarly provides for unjust and unlawful fines and amercedments levied by the king to be remitted, failing which they would be “settled” by this committee of twenty-five barons.

in the courts, which drew on the language and procedure of the assize of *novel disseisin* or more general concepts of “right.”²³⁴ These were for the first time directed against the king himself. As Holt observes: “[O]ne of the great unnoticed victories of 1215 . . . [was the establishment and extension of] routine process governing seisin and right in cases involving tenants-in-chief.”²³⁵ Lastly, there is no issue with the individual relational concept required by Hohfeld since each freeman has this entitlement against the king himself.

Can clause 40 be similarly characterised as a claim-right? Arguably yes. The language of clause 40, like clause 39, is in the subjunctive and indicates a duty by the king not to sell, deny, or delay right or justice. Clause 40 is also enforceable in the same way as clause 39 by clauses 52 or 61. Further, like clause 39, it is relational as between each person and the king. Accordingly, clause 40 provides that every person has a claim-right to access legal procedure and the law without undue interference by way of fines and delays imposed by the king. Conversely, the king has a duty to abstain from interfering in the delivery of justice by imposing fines and delays by exercise of his arbitrary and prerogative will.

2. Tierney

Although Holt specifically avoids linking the entitlements in clause 39 to discourses related to Tierney’s subjective rights, he characterises them as part of a wider movement in Western Europe that was beginning to recognise civil and political rights. Holt characterises these provisions as part of the intellectual climate in Western Europe at the time limiting arbitrary rule. The distinction between “will and law,” Holt notes, had been recognised by Glanvill and FitzNeal before the drafters of 1215.²³⁶ The notion of “[r]esistance to the abuse of monarchical power” in certain provisions of Magna Carta, Holt adds, permeated society in Western Europe in the twelfth and thirteenth centuries.²³⁷ Thus, such provisions in Magna Carta were a statement about “the organization of a feudal state.”²³⁸ This “common experience” came from a variety of sources, customals and law-books, statutes, texts on the conflict between Church and State, assizes, and charters of liberties.²³⁹ For example, Holt notes, clause 39 found parallel in chapter 31.7 of the Laws of Henry I, and was first articulated in the edict of Emperor Conrad II of 1037.²⁴⁰ Holt concedes that this requirement for judicial procedure was based on the feudal assumption that a lord was bound to do justice to his men, a “common” principle open to interpretation.²⁴¹

²³⁴ HOLT, *supra* note 14, at 135.

²³⁵ *Id.* at 157.

²³⁶ *Id.* at 99–103.

²³⁷ *Id.* at 88.

²³⁸ *Id.*

²³⁹ *See id.*

²⁴⁰ *Id.* at 88–89.

²⁴¹ *Id.* at 89.

In other words, continued Holt, these liberties of the twelfth and thirteenth centuries were “cognate” in the sense that there “is no need to explain the many similarities between them as derivatives from some basic grant or legal code . . . [T]hey were part of the very atmosphere.”²⁴² In other words, clause 39 was a continuation of the common law.

Thus, Holt explicitly disavows any link with a broader lineage of rights such as Tierney’s concepts of subjective rights or permissive natural rights. Instead, Holt favors an explanation of incremental development from feudal and legal ideas. The lack of use of the term *ius* or *ius naturale* makes it difficult to link these to Tierney’s natural rights. But the substance, if not the language itself, of the provisions of clause 39, namely that judgment precede execution—or the corollary, that every freeman has a claim-right to protection against arrest or dispossession or outlawry by recourse to judgment—arguably assert a notion of subjective or permissive power within the individual consistent with Tierney’s understanding of those concepts. This is, however, to interpret them in a way that Tierney did not intend, given his insistence on identifying concepts in specific terms. Even if Tierney’s later ideas on permissive natural rights were considered, the positive nature of the entitlements here in clause 39 are quite different in their nature to permissions. Like clause 39, clause 40 fails to meet Tierney’s conception of a subjective right or a permissive right.

This analysis certainly points to weaknesses in Tierney’s schema. The substance of clauses 39 and 40 provide for access to legal process without undue delay and free of the costs of bribery. The terms “the law of the land” (*per legem terre*) in clause 39,²⁴³ and “right or justice” (*rectum aut iusticiam*) in clause 40,²⁴⁴ meaning, respectively, “the law” of England and an undefined sense of what is “right,”²⁴⁵ clearly connote objective understandings of law and rights according to Tierney. Further, they also provide any person with the power to seek legal redress, thus arguably representing a “subjective” right. But the language of these chapters excludes the term *ius* and so falls outside Tierney’s subjective rights; it also is different to the permissive rights that Tierney later described, as noted above.

D. Property Protection

Other provisions in Magna Carta evoking notions of rights are those protecting chattels (personal property) and land (real property). Several clauses prohibit royal officials—“our” (*noster*) bailiffs, sheriffs, constables—taking anyone’s corn or other chattels (*catalla*) (clause 28) without paying cash for them at once or delaying

²⁴² *Id.* at 92–93.

²⁴³ Summerson, *supra* note 164, at cl. 39.

²⁴⁴ *Id.* at cl. 40.

²⁴⁵ *Id.*

payment without the seller's agreement or take horses or carts (clause 30) or timber (clause 31) without the consent of the owner.²⁴⁶ These chapters addressed abuses arising from the royal right of purveyance, by which the king was entitled to appropriate, under fair conditions, the necessities for his household, namely the supply of the king's castles. The conditions for fair terms were vague, but the basic principle was compensation at the market rate.²⁴⁷ In the years around 1215, John held about seventy castles in England, so the sheer number created a potential source for corruption by royal officials, who might take goods when there was in fact no need for them, extract bribes for returning goods or leaving property unmolested, or delay payments of compensation or not pay them at all.²⁴⁸

Other clauses protected property from royal interference, specifically disseisin. John was an "inveterate disseisor of other men's lands," and in particular Robert FitzWalter, William and Geoffrey de Mandeville, Robert de Vere, and William of Huntingfield were among those the subject of recent disseisin and targeted for its reversal.²⁴⁹ Clause 52 in its first part restored to those dispossessed by the king "without lawful judgement of his peers" their interests in "lands, castles, liberties (*libertates*), or of his right (*vel iure suo*)."²⁵⁰ Summerson observes that it acted as a "sequel" to the earlier clause 39 by its focus on the oppressive action of disseisin.²⁵¹ This is evident from the fact that clause 52 contained similar opening words to clause 39;²⁵² clause 52 went further by explicitly demanding an immediate remedy.²⁵³ In a second part, clause 52 restored those things disseised or deprived previously "by King Henry our father or King Richard, our brother," King John's predecessors.²⁵⁴ Clause 53 likewise in its first part restored afforestations made and custodies acquired over land by Henry II and Richard I.²⁵⁵ The second part of Clause 53 also provided for the restoration of lands disseised by John through wardship and monastic patronage.²⁵⁶ Significantly, both clauses 52 and 53 were qualified by the so-called "crusader's privilege," a qualification that allowed King John to delay

²⁴⁶ Clauses 28, 30, and 31 survived as chapters 19 and 21 respectively of the 1225 version. MAGNA CARTA (1225), in HOLT, *supra* note 14, at 424.

²⁴⁷ See MCKECHNIE, *supra* note 22, at 330.

²⁴⁸ Summerson, *supra* note 164, at cl. 28.

²⁴⁹ See *id.* at cl. 52.

²⁵⁰ *Id.*

²⁵¹ See *id.*

²⁵² Compare *id.* at cl. 39 ("No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgement of his peers or by the law of the land"), with *id.* at cl. 52 ("If anyone has been disseised or dispossessed by us, without lawful judgment of his peers, of lands, castles, liberties or of his right, we will restore them to him immediately.").

²⁵³ *Id.* at cl. 52.

²⁵⁴ *Id.*

²⁵⁵ See *id.* at cl. 53.

²⁵⁶ See *id.*

restoring the disseised lands until he returned from Crusade.²⁵⁷ Clause 59 restored to Alexander, King of the Scots, “his sisters and hostages, and his liberties and right” (“*libertatibus suis, et iure suo*”) in the same manner that restoration was made to other barons.²⁵⁸ The unspecified “liberties and rights”²⁵⁹ here most likely cross-reference the “lands, castles, liberties or . . . right[s]” referred to in clause 52,²⁶⁰ since clauses 53 and 59 appear to be cognates of clause 52 by their reference to affording respite “in the same manner” as clause 52.

1. Hohfeld

Are these provisions protecting property claim-rights according to Hohfeld? As with the provisions on legal process discussed above, the language of clauses 28, 30, and 31 is in the subjunctive and indicates a mandatory duty by the king not to disseise or unlawfully take property. This duty is also enforceable by clauses 52 and 61, although qualified by the crusader’s privilege. Further, these clauses are relational in that the duty exists as between the king and each person not to disseise them of their property.

Clauses 52, 53, and 59 operate slightly differently. They provide for the restoration of property once it has been unlawfully disseised or taken, but the language in these provisions makes no explicit reference that the king refrain from doing so; therefore, there is arguably no duty. Any duty not to disseise, had it existed in clauses 52, 53, and 59, would have been enforceable in the qualified way anticipated by clauses 52 and 61. Further, any such duty would have hypothetically existed as between the king and each individual property right-holder, thereby potentially satisfying the relational aspect of Hohfeld’s categorization.

Accordingly, clauses 28, 30, and 31 give rise to Hohfeldian claim-rights but clauses 52, 53, and 59 do not. The latter would not constitute Hohfeldian privileges or liberties either since, although there is arguably no duty and no right, there is also absent a freedom from any duty as against another specific person since the king has no duty to do or refrain from any action; and there is also absent a corresponding “no-right” by the disseised or deprived person because this person has the ability to recover their disseised property from the king.

²⁵⁷ See Helmholtz, *supra* note 74, at 348–49.

²⁵⁸ Summerson, *supra* note 164, at cl. 59; see also *id.* at cl. 32 (providing for the return of land of convicted felons after “a year and a day”); *id.* at cl. 46 (providing for barons to retain their rights of patronage, specifically custody during monastic vacancies). This was a time when kings usually sought to extend their right to appoint to a vacant monastery beyond the usual circumstances of forfeiture, escheat, or wardship. *Id.* at cls. 56, 57 (providing for the restoration of Welsh lands and liberties “disseised or dispossessed” without “lawful judgment” of their “peers”).

²⁵⁹ *Id.* at cl. 59.

²⁶⁰ *Id.* at cl. 52.

Clauses 52, 53, and 59 can be seen to provide a remedy to those disseised of property—is this a Hohfeldian power? Arguably, it is. The king can change legal relations by restoring land to those disseised; further, those disseised are thus exposed to the exercise of this power and so bear a “liability.” In this way, clause 52 and its cognates provide a remedy that arguably constitutes a Hohfeldian power.

2. Tierney

Do the protections of private property in these chapters provide a practical example of Tierney’s subjective rights language? The language employed in clauses 28, 30, and 31 (*nullus . . . nisi*) is by way of prohibition rather than a positive expression of entitlement. It would be difficult to express them positively without recourse to anachronism, but these chapters would assert an entitlement akin to something like reasonable terms or reasonable compensation for the king’s use of that property. While enforceable by the remedies offered by clauses 52 and 61, there is no language of *ius* that expresses a positive right; nor is there any language connoting permissive rights as understood by Tierney.

Clauses 52, 53, and 59 provide possible avenues for Tierney’s language of rights because of their use of the term *ius* and cognate terms, such as *libertas* and *iustitia*. Clause 52 in its first part refers to any person disseised or deprived of “lands, castles, liberties or . . . his right[s]” (*libertatibus, vel iure suo*) being entitled to their restoration by the king.²⁶¹ The use of the term *ius* in clause 52 here resembles the simultaneous existence of an objective law or recognised normative concept in the English common law, i.e., an entitlement to seisin, and a subjective right that gives rise to a power or force in the individual to assert it. It is also enforceable by its own language that provides for immediate restoration of disseised things in the first part by the king (or by judgment of the twenty-five) and by the king in the second part following any crusader respite. The reference to *libertas* in clause 52, in distinction, evokes notions of Tierney’s “permissive natural rights,” which were distinct from subjective rights in their articulation of entitlements that existed in the absence of prohibitions or proscriptions.

The second part of clause 52 makes reference to the historical acts of disseisin or deprivation by John’s predecessors for which John will “do full justice” (*plenam iusticiam exhibebimus*) at once.²⁶² Clause 53 in its first part refers to “doing justice” and “full justice” for historical acts of disafforestation by his royal predecessors and for lands disseised by royal prerogatives of wardship and monastic patronage.²⁶³ The phrase “doing justice,” although capturing something of Tierney’s subjective notion of an individual power, does not employ the language of *ius*. Further, it does not capture the notion of permissive rights for the reasons outlined above.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at cl. 53.

E. Limits on Exactions

Clause 12 prohibited exactions of scutage or aid from being levied in the realm “except by the common counsel of our [realm]” (*per commune consilium regni nostri*).²⁶⁴ There were three exceptions to this prohibition on royal exactions to raise funds, namely for ransoming the king, for knighting the king’s eldest son, or for the first marriage of the king’s eldest daughter.²⁶⁵ Scutage was a money payment owed by a tenant-in-chief to the king for military service in place of sending his quota of knights.²⁶⁶ An aid was another feudal due owed to the lord (including the king) for knight service.²⁶⁷ In effect, they constituted the king’s means of taxation.²⁶⁸ To obtain the “common counsel of the kingdom,” clause 14 explains that it was necessary to summon archbishops, bishops, abbots, earls, and greater barons, as well as tenants-in-chief of the king to meet on a fixed date with forty days’ notice and proceed on the arranged day “according to the counsel of those present.”²⁶⁹ This requirement of consent to levy aids was a reassertion of existing law and so, not new; but its applicability to scutages was novel. The requirement of consent to scutage was a considerable innovation, since previously scutage was at the total discretion of the king.²⁷⁰ Accordingly, the essence of clause 12 (read together with clause 14) required that royal exactions of scutage and aids in the realm only occur if the king participated beforehand in a process of consultation (and implicitly consent).

Similar requirements for the need for consent before imposing royal exactions were evident in other clauses. Clauses 20 and 21 dealt with amercements, which were financial penalties imposed by the king for falling into the king’s mercy that arose when an individual was convicted before the king or his justices of some offense.²⁷¹ Often these sums were “ruinous” for those the king and his agents particularly wished to punish.²⁷² Clause 20 required free men not to be amerced “except by the oath of trustworthy men of the vicinity.”²⁷³ Clause 21 also dealt with amercements but was concerned only with earls and barons, providing that they “shall not be amerced except by their peers.”²⁷⁴ Both clauses 20 and 21 also required proportionality between the offense and the exaction.²⁷⁵

²⁶⁴ *Id.* at cl. 12.

²⁶⁵ *See id.*

²⁶⁶ *See id.*

²⁶⁷ *See id.*

²⁶⁸ *See id.*

²⁶⁹ *Id.* at cl. 14.

²⁷⁰ *Cf.* HOLT, *supra* note 14, at 254, 257.

²⁷¹ *See* Summerson, *supra* note 164, at cls. 20–21.

²⁷² *See id.* at cl. 20.

²⁷³ *Id.* at cl. 20.

²⁷⁴ *Id.* at cl. 21.

²⁷⁵ *Id.* at cls. 20–21.

In contrast to these provisions requiring consultation, clauses 48 and 55 required the removal of exactions altogether. Clause 48 required all “evil customs . . . [of] forests and warrens . . . sheriffs and their officers, rivers and their keepers . . .” to be investigated and then “completely abolished.”²⁷⁶ Clause 55 provided that “[a]ll fines which have been made with us unjustly and against the law of the land, and all amerancements made unjustly and against the law of the land, are to be completely remitted, or dealt with by judgement of the twenty-five barons”²⁷⁷

Accordingly, while clauses 12 and 14, 20, and 21 required consultation, which would then require consent, prior to the imposition of a range of royal exactions, clauses 48 and 55 provided for certain feudal exactions to be abolished altogether. Together they reflect one of the main motivations behind Magna Carta, namely the concern to limit and stop arbitrary and excessive exactions, characterised by Carpenter as the “money-getting operations of royal government.”²⁷⁸ Helmholz has suggested that they arguably mark the beginnings of a concept of no taxation without consent, a concept analogous to the *ius commune* legal maxim (what touches all must be approved by all) (*quod omnes tangit ab omnibus approbari debet*).²⁷⁹ In this sense, they represent proto-constitutional notions of rule conditional on consent or consultation or both.

1. Hohfeld

How do these clauses requiring consent to exaction fit into the Hohfeldian schema? Clauses 48 and 55 abolish certain feudal exactions altogether and so provide each inhabitant of the realm a freedom from the king’s or other tenant-in-chief’s claim-right to make these exactions; to this extent they connote Hohfeldian privileges/liberties.²⁸⁰ At the same time, in terms of second-order Hohfeldian relations, these chapters remove the “power” of exaction from the king and tenants-in-chief, that is they change legal relations such that these parties now have a “disability” to demand exactions. This disability correlates to an “immunity” from exaction. Therefore, clauses 48 and 55 represent both Hohfeldian privileges/liberties as well as immunities.

The other chapters do not abolish exactions nor provide exemptions from them; they merely provide an entitlement to prior consultation to scutage (clauses 12 and 14) and to amerancements (clauses 20 and 21). Prior consultation, even if it implies consent, is not the same as exemption. In Hohfeldian terms, each person would have

²⁷⁶ *Id.* at cl. 48.

²⁷⁷ *Id.* at cl. 55.

²⁷⁸ CARPENTER, MAGNA CARTA, *supra* note 20, at 26. For example, the judicial visitations of 1210 that King John arranged using his agents known as the ‘autumnal justices.’ See Summerson, *supra* note 164, at cl. 20.

²⁷⁹ *Cf.* Helmholz, *supra* note 74, at 322.

²⁸⁰ See HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 32, at 61.

claim-rights as against the king or tenant-in-chief for some process of consultation and consent, before the imposition of any exaction. This claim-right would exist if and only if the king had a duty to refrain from imposing an exaction on them unless he previously consulted with them, and that this duty was enforceable. The language of clause 12 is in the subjunctive mood and mandatory as it provides that “[n]o scutage or aid is to be imposed,” hence it gives rise to a duty; likewise with clauses 20 (“A free man is not to be amerced . . .”) and 21 (“Earls and barons are not to be amerced . . .”).²⁸¹ Clauses 52 and 61 provide for the enforcement of these duties. Clauses 12 and 14, 20, and 21, accordingly, provide claim-rights to a process of consultation in certain kinds of exaction by the king and tenants-in-chief.

2. Tierney

Do these provisions evoke subjective rights in Tierney’s *ius*-language, and the corollary of that, freedom from arbitrary taxation, exaction, or fines, which is distinct from Tierney’s notions of subjective rights or permissive natural rights? Clauses 48 and 55, as discussed above, connote Hohfeldian liberties/privileges. Accordingly, they are consistent with Tierney’s permissive natural rights. In respect of clauses 12 and 14, 20, and 21, the Hohfeldian analysis adopted above indicates that a person has a claim-right as against the king or tenant-in-chief for a process of consultation to occur in the event that the former wishes to impose an impost. This right to call for consultation is arguably a subjective *ius* since it provides for a power in the individual freeman or baron yet, as with many of the other chapters analysed, the presence of a power in an individual does not coincide with the presence of the term *ius* or its cognates. Accordingly, Tierney’s notion of a subjective sense of *ius* is not made out in these provisions of Magna Carta. Nor does Tierney’s permissive natural rights approach apply to clauses 12 and 14, 20, and 21, since they are arguably claim-rights.

F. Liberties for London, Other Towns, and Merchants

As observed above, Holt lauded as one of the “decisive achievements” of Magna Carta the “shift from individual to communal or corporate privilege,”²⁸² illustrated by clauses 13 and 41.

Clause 13 provides that “the city of London is to have all its ancient liberties and free customs, both on land and water” and that “we wish and grant that all other cities, boroughs, towns and ports are to have all their liberties and free customs.”²⁸³ These “liberties and free customs” are left unspecified in Magna Carta, but Summerson and Carpenter have noted that they comprised the privileges that the

²⁸¹ Summerson, *supra* note 164, at cls. 12, 20–21.

²⁸² HOLT, *supra* note 14, at 73.

²⁸³ Summerson, *supra* note 164, at cl. 13.

citizens of London and other places enjoyed prior to 1215 by dint of charters entered into with John and his predecessors that limited or removed the wide range of exactions, such as scutages, aids, and tallage, that applied to them. These included a feefarm granted by Henry I by charter but later withdrawn by Henry II; a 1204 commutation of service to Normandy called *pro fine passagii*; and a 1206 grant by the king to Londoners to appoint twenty-four well qualified men to reform the assessment, collection, and payment of tallages.²⁸⁴ These entitlements to Londoners and other towns also included allowing citizens to elect their own sheriffs, to form communes that were headed by an elected mayor, and to hold property by burgage tenure that allowed them to alienate it, and other associated freedoms.²⁸⁵

Whereas clause 13 was concerned internally with providing London and other English municipalities with privileges, Clause 41 was essentially outwardly focused on doing so with respect to interactions with foreigners. Clause 41 provided that: “All merchants are to be safe and secure in departing . . . and coming to England, and in . . . England, by both land and water, for buying and selling, without any evil exactions but only paying the ancient and rightful customs”²⁸⁶ The *maletotes*, or evil customs and exactions, referred to any unwarranted or innovative tax, which included a levy called *pro fine passagii* on French merchants coming into Normandy exacted by Richard I and “the tenth,” the first nationwide English customs levy also initiated during the reign of Richard I.²⁸⁷ The “ancient and rightful customs,” on the other hand, did not refer to complete freedom from import and export duties but previously well-established financial exactions including “lastage, an impost payable on exports[;] scavage, a levy on imports[;] and a duty on the import of wine, payable by the barrel, which was supplemented by the king’s right of ‘prise,’ a form of purveyance”²⁸⁸

1. Hohfeld

How do we characterise these provisions in clauses 13 and 41 according to Hohfeld? These clauses clearly denote the granting to London and to other towns’ freedom from exactions. In this way, clauses 13 and 41 are similar to clauses 48 and 55 discussed in the previous section and are, therefore, Hohfeldian privileges/liberties. In terms of the communal versus individual nature that Holt attributes to these liberties, such a characterisation can be accommodated to the relational requirements of Hohfeld by positing that they exist between the king and each inhabitant of London or other place.

²⁸⁴ See *id.* at cl. 13.

²⁸⁵ CARPENTER, *MAGNA CARTA*, *supra* note 20, at 118; Summerson, *supra* note 164, at cl. 13.

²⁸⁶ Summerson, *supra* note 164, at cl. 41.

²⁸⁷ See *id.*

²⁸⁸ *Id.*

Clause 13 is also a grant within a grant—that is, it is a grant of liberties within the overall grant of liberties in Magna Carta—namely of “ancient liberties and free customs,”²⁸⁹ and so it is relevant to Hohfeld’s second-order relations. It arguably resembles the general grant in clauses 1 and 63 discussed above, and thereby a Hohfeldian power: from the perspective of King John, it purports to change the king’s legal relations with Londoners and those in other municipalities; those inhabitants now have a “liability” to that power. But, on further analysis, from the perspective of these inhabitants of London and other places, theirs is not a “liability” in being free of import/export customs and the like but rather a freedom from the legal power or control of another regarding that legal requirement to pay customs and the like. It is a freedom from power rather than an affirmative control that is entailed here in clause 13. Likewise, clause 41 is clearly an entitlement to immunity from certain evil tolls. Accordingly, both clauses 13 and 41 comprise liberties/privileges as well as immunities in the Hohfeld scheme.

2. Tierney

On the basis of the foregoing analysis of clauses 13 and 41 as Hohfeldian privileges/liberties, they represent Tierney’s permissive natural rights. Tierney’s analysis even understood the term *libertas* as connoting such an entitlement.

This section has shown that clause 1, granting the English Church freedom to hold its own elections, is a claim-right; that is, it is a right properly so-called. Clauses 39 and 40 on legal process also represent Hohfeldian claim-rights. Those clauses in Magna Carta dealing with the protection of property (clauses 28, 30, and 31) also represent Hohfeldian claim-rights. Clause 12 (in combination with clause 14), requiring the king to consult before imposing scutages and aids, is a Hohfeldian claim-right, as are clauses 20 and 21 that require similar rights of consultation prior to the royal exaction of amercements. On the other hand, clauses 13 and 41 on municipal privileges, are Hohfeldian privileges/liberties, as are clauses 48 and 55 on limiting financial exactions. In terms of second-order relations, clauses 1 and 63 in relation to the freedom of the English Church are immunities while those same clauses arguably represent Hohfeldian powers in their general grant of entitlements. The remedy to protect property in clauses 52, 53, and 59 is a power (but not a claim-right), while further immunities exist in clauses 48 and 55 limiting exactions, as are clauses 13 and 41.

IV. THE PRE-MODERN/COMMUNAL VERSUS MODERN/INDIVIDUAL RIGHTS BINARY: APPLYING HOLT, HOHFELD, AND TIERNEY TO MAGNA CARTA

The preceding section of this Article has provided an analysis of whether the provisions of Magna Carta represent rights truly so-called when applied in praxis to

²⁸⁹ *Id.* at cl. 13.

the axiomatic account of Hohfeld and comparing it to the narrower reading of subjective rights provided by Holt and Tierney. This section digs deeper into how Holt deals with the language of rights in his analysis of Magna Carta. For the most part, as we have seen, Holt understands the entitlements in Magna Carta as liberties. The preceding Hohfeldian analysis in this Article indicates that these are more accurately speaking both liberties/privileges and claim-rights. Further, Holt characterises these as communal or communitarian in nature, rather than individual. This invites a comparison with Tierney's distinction between objective and subjective rights in the term *ius*. It also brings to the fore the binary between communal/pre-modern and individual/modern that engaged Tierney in his lineage of rights but also arose in Hohfeld's relational understanding of legal relations between individuals rather than corporate or collective entities. This section will analyse these issues.

A. Holt's Communal Understandings of Entitlements

To understand Holt's communal understanding of entitlements more clearly, several features of Holt's analysis of the provisions of Magna Carta are analysed here: first, his understanding of the objective-subjective distinction in the term *ius*; second, his consideration of the terms *ius* and *libertas*; and third, his explanation of these as communal rather than individual notions. In examining these aspects, it is noteworthy that Holt's account of rights went through two phases of thought: an earlier essay, "Rights and Liberties in Magna Carta," published in 1960 in a collection of contributions on representative and parliamentary constitutions,²⁹⁰ and the final edition of his *Magna Carta* monograph, *Magna Carta*, published in 2015 shortly after his death.²⁹¹ The former has received little scholarly attention, yet, as I argue below, it provides valuable context in order to understand Holt's nuanced treatment of rights issues in Magna Carta.²⁹²

1. Holt on *ius* as Subjective and Objective

Holt, in both his essay, "Rights and Liberties in Magna Carta," and his monograph, *Magna Carta*, observed that, from the twelfth century, the Latin term *ius* meant right or title as well as law.²⁹³ Both Holt's works provide examples of *ius* in one of its objective senses, as law, by reference to Glanvill's phrases *ius et consuetudo regni* and *iura regni*, and the Roman law of the *corpus iuris civilis*.²⁹⁴ Holt's *Magna*

²⁹⁰ See J.C. Holt, *Rights and Liberties in Magna Carta*, in ALBUM HELEN MAUD CAM.: STUDIES PRESENTED TO THE INTERNATIONAL COMMISSION FOR THE HISTORY OF REPRESENTATIVE AND PARLIAMENTARY INSTITUTIONS 57 (1960).

²⁹¹ See generally HOLT, *supra* note 14.

²⁹² See Taliadoros, *supra* note 165, at 228–31.

²⁹³ Holt, *supra* note 290, at 60; HOLT, *supra* note 14, at 120.

²⁹⁴ Holt, *supra* note 290, at 60; HOLT, *supra* note 14, at 120.

Carta also recognised *ius* in its other objective sense, as something that was objectively right or just, observing that both “just judgement and custom led in the end to right; indeed their major function was to establish right.”²⁹⁵

In respect of the subjective meaning of right, Holt in *Magna Carta* observes that “‘right’ had a simple traditional meaning; men sought land or castles ‘as their right’; rights of this kind were even tangible, and when used in this way the word was not particularly explosive.”²⁹⁶ In this sense it meant a title or, more broadly, an entitlement, for example men seeking land or castles as their right. In his earlier essay, he made no such explicit reference to subjective rights.²⁹⁷

Holt’s monograph focuses on the notion of *ius* as meaning “the restoration of right.”²⁹⁸ Holt describes an “atmosphere” in which “men began to demand the restoration of right, or assert their right to judgement, or demand the confirmation of good and ancient custom.”²⁹⁹ Thus, he adds, men “sought their rights in the king’s court” by the time of John’s reign as king.³⁰⁰ After *Magna Carta*, the “gates were unbarred,” states Holt, and King John committed to numerous acts of “restoration.”³⁰¹ Such acts of restoration included making the possessory writs—actions for the writ of right, disseisin, and *mort d’ancestor*—a regular feature of the courts and actionable against the king himself.³⁰² As Holt put it, the procedures “were not new They established and extended routine processes governing seisin and right in cases involving tenants-in-chief.”³⁰³

Accordingly, Holt demonstrates an understanding of the subjective-objective distinction in the term *ius* in both works. His book *Magna Carta* indicates an understanding of *ius* that arguably incorporated both objective and subjective understandings, in the notion of restoration of rights. But he fails there to develop this analysis further.

2. Holt on *ius* and *libertas*

How does Holt deal with *ius* in relation to the concept of *libertas* and its cognates? Holt’s 1960 essay observes that *Magna Carta* distinguished *ius* from *libertas*: “rights” was the “wider term” and could “be enjoyed by custom whereas liberties

²⁹⁵ HOLT, *supra* note 14, at 120; *cf.* Holt, *supra* note 290, at 59–60 (making no equivalent observation explicitly). *But cf.* Holt, *supra* note 290, at 63 (conflating *ius* and justice in a discussion of the *iurae coronae*).

²⁹⁶ HOLT, *supra* note 14, at 120.

²⁹⁷ *See* Holt, *supra* note 290, at 59–60.

²⁹⁸ HOLT, *supra* note 14, at 121.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 122.

³⁰¹ *Id.* at 156.

³⁰² *Id.*

³⁰³ *Id.* at 157.

[were] more usually privileges to which [one was] entitled by royal grant or prescription.”³⁰⁴ But he notes that “the terms were close enough to each other to be frequently associated,”³⁰⁵ for example, clause 63’s reference to “liberties, rights and concessions” that were set out in the preceding parts of the document, and clause 52’s reference to those disseised or deprived of their “lands, castles, liberties or rights.”³⁰⁶ Holt’s essay adds that these were not merely abstract entitlements, but ones that men could “petition for . . . , sue for . . . and be sued for.”³⁰⁷ That is, they were enforceable. Holt does not specifically analyse these in Hohfeldian terms but, as we can see from the analysis above, clause 52 provided a remedy but not a duty; it was not therefore a claim-right but a “power.” The clause 63 corroboration clause was also a power as it granted liberties, rights, and concessions, but similarly to clause 52 provided no duty and so was not enforceable.

In his monograph, Holt widens the distinction between *ius*, on the one hand, and *libertas* and privilege, on the other, seeing the latter as the primary achievement of 1215. Holt considered the following provisions in Magna Carta as providing such liberties: freedom of election in the English Church (clauses 1 and 63); town privileges (clause 13); concession from reliefs (clause 2); protection against arbitrary imprisonment and disseisin (clause 39); the provision that right and justice were not to be sold, denied, or delayed (clause 40); and the provision that only those who knew and were willing to observe the law of the land were to be employed in administering it (clause 45).³⁰⁸ To these, Holt adds the freedom to trade and access markets (clause 41); the freedom to access the Thames and other waterways by the destruction of fish weirs (clause 33);³⁰⁹ and “administrative liberties” (clause 45).³¹⁰ Holt argues that these provisions represented the “liberties of the realm,” and were based on good and lawful customs that had been ignored by King John.³¹¹ Accordingly, Holt’s account focuses on the achievement of Magna Carta as its provision of liberties—not rights—granted to different parts of English society. For him, it was the understanding of these privileges and liberties within the community of the realm that was “at once the underlying assumption, the essential achievement and the justification” of the events of 1215.³¹²

This Article has identified these same chapters as giving rise to entitlements but, following the Hohfeldian analysis carried out above, characterises them as of

³⁰⁴ Holt, *supra* note 290, at 59.

³⁰⁵ *Id.* (citing MAGNA CARTA (1215) cl. 52); MAGNA CARTA (1215) cl. 52, *in* HOLT, *supra* note 14, at 391.

³⁰⁶ MAGNA CARTA (1215) cl. 63, *in* HOLT, *supra* note 14, at 397.

³⁰⁷ Holt, *supra* note 290, at 59.

³⁰⁸ *E.g.*, HOLT, *supra* note 14, at 241.

³⁰⁹ *Id.* at 74, 241, 251.

³¹⁰ *Id.*; *see also id.* at 78–79, 81, 241, 252.

³¹¹ *Id.* at 333.

³¹² *Id.* at 87.

different kinds. In terms of first-order claim-rights, clauses 1 and 63 in respect of the English Church's freedom of election are claim-rights; similarly, clauses 39 and 40 on legal process are claim-rights; likewise, clause 28, 30, and 31 protecting property are claim-rights; and clauses 12 and 14, 20, and 21 are claim-rights also albeit in respect of the right to consultation on exactions. Other first-order jural relations are the privileges/liberties provided for in clauses 48 and 55 on limiting financial exactions and those in clauses 13 and 41 providing liberties for London, other towns, and merchants. In terms of second-order jural relations, clauses 1 and 63 in respect of the English Church's freedom of election are also immunities from the power of the king, as are the limits on exactions in clauses 48 and 55 and the liberties for London and elsewhere in clauses 13 and 41. In contrast, powers arguably exist in the general grant evident in the relevant parts of clauses 1 and 63 and in the property protection clauses 52, 53, and 59. This is a far more nuanced consideration of entitlements than the terms of liberty, privilege, and concession used by Holt; and, further, a consideration that provides greater meaning and clarity to the normative character of these clauses.

3. Holt on *ius* and *libertas* as Communal, Not Individual

Holt's book *Magna Carta* concludes that the notions of *ius* and *libertas* were to be understood as communal, not individual, entitlements. In doing so, he builds on the analysis provided in his 1960 essay.

Starting with his monograph *Magna Carta*, Holt argues that, as a consequence of *ius* being understood in both its objective and subjective senses, "rights and law came to be confused"—that is, the two merged together.³¹³ *Ius* in its subjective meaning of right or title, he adds,

came to be viewed as something more than simple individual title. It now became an impersonal right attached to an institution; it even developed into the rights enjoyed by the realm. In the latter case right and law were equated, for law was now viewed as something to which the community and each one of its members was by right entitled.³¹⁴

Holt cross-references his 1960 essay to fortify his analysis.³¹⁵

In that essay, Holt explains that this merging of "right and law" occurred by their embodiment in an office or institution rather than any individual: "The concept of the rights of the crown quickly passes into Glanville's concept of the laws of the

³¹³ *Id.* at 120.

³¹⁴ *Id.*

³¹⁵ *Id.* at 120 n.202.

kingdom. The *iurae Coronae* are not just rights, they are also responsibilities to which the King is bound not just by his own interest but by virtue of his office.”³¹⁶ Although the chancery clerks who drafted Magna Carta would not “stomach” equating “baronial liberties with the laws and liberties of the kingdom,” Holt continues, they were prepared to countenance the grant of liberties to “[w]ell established institutions,” such as the city of London (clause 13) and the English Church (clauses 1 and 63).³¹⁷ One significant exception to this, Holt notes, was the Magna Carta’s grant of liberties—not to the “kingdom,” an institution of sorts—but to “freemen of the kingdom” in clause 1 and elsewhere throughout the document, which individuals were “outside these corporate bodies [and so] . . . only permitted to enjoy their newly-won grant severally.”³¹⁸

Nevertheless, even such supposedly several grants to individuals were communal entitlements, as Holt’s 1960 essay goes on to observe: “[W]hatever Magna Carta says about itself, we are faced with rights which, if they are to mean anything, must be held not severally but in common, by a community, whether that community be hundred, shire or kingdom.”³¹⁹ Holt’s essay provides examples of several “concessions.”³²⁰ In respect of clause 40 (right and justice not be sold, denied, or delayed), he asks rhetorically, who is to hold this “concession,” if not a community? Or the concession in clause 45—only those that know the law of the land and are willing to observe it can be justices, constables, sheriffs, and bailiffs? Or that concession in clause 25 (that shires, hundreds, wapentakes, and tithings must be held at the ancient farms, i.e., that is at the old rates)? It is noticeable that Holt’s terminology has slipped from “rights” to “concessions.” It is apparent that by “concessions,” he means “liberties,” as he goes on to make clear.

Holt’s 1960 essay notes several contemporary documents that bear witness to the impression that these provisions of Magna Carta were “liberties,” and that these were communal. For instance, the Dunstable Annalist referred to Magna Carta as the *Chartae super libertatibus regni Anglia* (the “charter on liberties of the realm of England”), albeit it the very concept of community that the Magna Carta drafters had attempted to avoid.³²¹ In Magna Carta, Holt concludes, “we are dealing with the origins of the concept of the community of the realm.”³²² Too much is made of the Magna Carta’s grants to “freemen of the kingdom,” according to Holt.³²³

In the equivalent passage in his book *Magna Carta*, Holt observes that the “law was now viewed as something to which the community and each one of its members

³¹⁶ Holt, *supra* note 290, at 63.

³¹⁷ *Id.* at 64.

³¹⁸ *Id.*

³¹⁹ *Id.* at 65.

³²⁰ *See id.* at 64–65.

³²¹ *See id.* at 65.

³²² *Id.* at 66.

³²³ *Id.* at 66–67.

was by right entitled.”³²⁴ And, consistent with his earlier essay, Holt in *Magna Carta* observes that these entitlements resided in an office or institution rather than personally: for instance, the rights of the Crown existed by means of the doctrine of “inalienable sovereignty,” which “continued to subsist apart from the succession of particular kings.”³²⁵ Holt then reiterates his earlier assertions from the 1960 essay that Magna Carta’s grant of privileges and liberties was communal, rather than individual: “The shift from individual to communal or corporate privilege was indeed one of the decisive achievements of 1215.”³²⁶

In his book, Holt accounts for this by Magna Carta’s confirmation and extension of “municipal privileges,” such as those granted to London and “all other cities, borough, towns and ports” (clause 13);³²⁷ “borough privileges,” such as merchants’ freedom to trade (clause 41), removal of the obstructions of fish weirs (clause 33), and limitations on feudal rights of lordship (e.g., clauses 2–8, 37, 43, and 53 on relief, wardships and marriage);³²⁸ shires’ liberties in respect of disafforestation (clause 53) and control over the office of sheriff (clause 4, 24, 26, 30, 45, 48);³²⁹ and “administrative liberties,”³³⁰ including the alienation of royal control over local government at county and shrieval level, such as in clause 50 (dismissal of alien officers) and clause 45 (that officials know the law of the land, namely “administrators who would be locally congenial”).³³¹ “Communities of this kind,” Holt suggests, “were not created, but . . . reinforced by the purchase and possession of such liberties.”³³² And, although Holt’s earlier essay had suggested that custom provided the substrate for *ius* and privilege for *libertas*, his book is not so precise in its language, noting that “[c]ustom lay at the heart” of these liberties “whether expressed in charters or not.”³³³ Holt’s book emphasizes that it is the privileges and liberties just outlined that are “the essential achievement” of Magna Carta, whatever the language employed, based on a theory that “the community of the realm was capable of the corporate possession of liberties.”³³⁴ Holt confirms such notions in an appendix to his book.³³⁵

Accordingly, Holt’s depiction of the principal entitlements in Magna Carta as communal follows from a recognition of: (a) the objective-subjective distinction in the term *ius*; (b) the distinction between the terms *ius* and *libertas* (albeit not

³²⁴ HOLT, *supra* note 14, at 120.

³²⁵ *Id.*

³²⁶ *Id.* at 73.

³²⁷ *Id.* at 73 (citing MAGNA CARTA (1215)).

³²⁸ *E.g., id.* at 74 (citing MAGNA CARTA (1215) cls. 41, 33).

³²⁹ *Id.* at 76.

³³⁰ *Id.* at 78, 81.

³³¹ HOLT, *supra* note 14, at 78; MAGNA CARTA (1215), *in* HOLT, *supra* note 14, at 389–91.

³³² HOLT, *supra* note 14, at 84.

³³³ *Id.*

³³⁴ *Id.* at 87.

³³⁵ *Id.* at 434–35.

consistently or in a developed way); and (c) the communal nature of such entitlements, expressed in terms of *ius* but emphasized more so in the term *libertas* and its cognates. Significantly, this analysis is not based on any explicit use of Tierney's work nor on a systematic semantic interpretation of the term *ius*; rather Holt relied principally on *libertas* and its cognates as representing the new and significant entitlements under Magna Carta that were communal. How valid is the communitarian perspective, when seen alongside the findings of other scholars, as well as Tierney and Hohfeld?

B. Assessing Holt's Communal Understandings of Entitlements: Hohfeld and Others

How do we assess Holt's communal understanding of entitlements in Magna Carta? Other scholars, in particular, political theorists and historians, have largely endorsed Holt's version of the entitlements in Magna Carta as being communal. Tierney provides an ambiguous response, while the notion of collectivities is problematic for Hohfeld but arguably capable of accommodation within his schema.

1. Other Scholars

Alan Harding, in his study of the concept of political liberty in the Middle Ages, concludes that in England this political liberty was a "quality of lordship," in the sense that liberty, synonymous with privilege, attached to and was exercised in respect of a lord's land for centuries; only later did this liberty/privilege become right.³³⁶ Those liberties granted by charter, Harding adds, were privileges, "even when the recipients were communities; they were not the rights of individual citizens."³³⁷ Magna Carta was "the greatest charter of territorial immunity and communal privilege."³³⁸ Harding therefore concurs with Holt in characterising these liberties as communal.

These liberties and privileges were, however, precursors to modern concepts of individual political liberty. The territorial lord's "power of independent action within his liberty gave the idea of freedom political force."³³⁹ Harding provides examples of these proto-concepts of individual liberty, namely a merchant's burgage tenure, freedom of passage, freedom from impleading outside his borough, and protection from arbitrary imprisonment by officials.³⁴⁰ Individual political liberty in the modern sense arose later when boroughs were given the right of sending

³³⁶ Harding, *supra* note 213, at 441; *see also* ALAN HARDING, *MEDIEVAL LAW AND THE FOUNDATIONS OF THE STATE* 214–16 (2002).

³³⁷ Harding, *supra* note 213, at 434.

³³⁸ *Id.*

³³⁹ *Id.* at 441.

³⁴⁰ *See id.* at 441–42.

representatives to Parliament.³⁴¹ He adds that “the curbing of the territorial power of magnates by the monarchy in the thirteenth century in the name of the liberty of communities gave the concept of freedom emotional force, and created the politics of freedom.”³⁴²

Harding therefore agrees with Holt that these liberties or privileges in Magna Carta were communal. It may be argued that both Holt and Harding recognised them as precursors to individual political liberty and what others, including Tierney, have called individual subjective rights or permissive rights.

Cary Nederman also endorses Holt’s understanding of the provisions of Magna Carta as giving rise to communal entitlements, specifically in respect of clauses 1 and 63 regarding the freedom of the English Church. He does so, however, from a different perspective. Nederman posits that these provisions reflect “a form of freedom that already exist[ed] independently, rather than a concession that the king might rightfully withhold or revoke.”³⁴³ He argues that “ecclesiastical liberty forms the foundation of and prerequisite for temporal political harmony, so that a prince who denies the Church its proper freedom undermines his own capacity to govern.”³⁴⁴ Nederman then observes the communal nature of this independent ecclesiastical liberty as “one which licenses a more corporatist conception of political order than the practical, feudal interpretation permits.”³⁴⁵ It “by no means approaches the universalistic claim of human freedoms that more modern readers have sought to ascribe to it.”³⁴⁶ So, for Nederman, clauses 1 and 63 represent a pre-existing communal liberty that fell short of any modern concept of a human or individual right.

Political scientist and historian Antony Black’s essay on individual versus communal rights in the high Middle Ages, the period *c.* 1150 to *c.* 1450 in *The Cambridge History of Political Thought*, suggests that developments in thought around the time of 1215 may cast doubt on Holt’s account of communal entitlements.³⁴⁷ Black notes the sense of individualism that pervaded Western European consciousness from around 1100 onwards; at the same time there was the development of “consciously chosen community” by which individuals belonged to any number of compulsory and voluntary groups.³⁴⁸ Accordingly, Black observes that “the individual asserted his rights against outsiders by his very membership, which gave him his ‘liberty’ and defined his socio-economic position. In this context, therefore, it would

³⁴¹ See *id.* at 442.

³⁴² *Id.*

³⁴³ Nederman, *supra* note 10, at 458.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 459.

³⁴⁶ *Id.* at 461.

³⁴⁷ Antony Black, *The Individual and Society*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* C. 350–C. 1450, at 588, 588–606 (J.H. Burns ed., 1988). For what follows, see also Taliadoros, *supra* note 165, at 226–27.

³⁴⁸ Black, *supra* note 347, at 589.

make little sense to talk of the individual having claims *against* the community; the latter upheld *his* claims.”³⁴⁹ In other words, Black observes that the notions of individual and communal were diverse but not necessarily adverse concepts.

Black also notes that, while there was a rich supply of Latin nouns for conceptions of “society” generally in medieval society (e.g., *societas*, *communitas*, *corpus*, *universitas*, *multitudo*, *congregatio*, *collectio*, *coetus*, *collegium*), there was no word for “individual.”³⁵⁰ Despite this, Black notes the “right to one’s property,” i.e., clauses 28, 30, 31, 52, 53, and 59, “and to trial by peers,” clause 39, in the Magna Carta exemplified the “dignity, liberty and rights of the individual,” a development also taking place in canon and Roman law in respect of the notion of *ius*,³⁵¹ which we have seen in Tierney’s work on the canonists. Jurists such as Bassianus, from the twelfth century onwards, Black observes, distinguished between corporations and individuals as legally and conceptually distinct, the former having perpetual existence, the latter not.³⁵² Accordingly, Black’s arguments to this point are consistent with Tierney’s.

Black describes this trend of distinguishing individual and communal personality as continuing, but with a noticeable change in the mid-thirteenth century from the “essentially pragmatic discourses” of Bassianus and other early jurists to more “abstract” or fictive understandings by jurists such as Innocent IV (d. 1254).³⁵³ Innocent famously prohibited collective excommunication, explaining that corporations could not commit a wrong because they were “names of law and not of persons,” while a college “pretended to be one person” (*fingatur una persona*) for the purpose of making oaths, “and therefore act[ed] through a representative.”³⁵⁴ Black observes that Innocent’s teaching, based on “the Christian doctrine of personal responsibility,” dictated that personality could “only properly be predicated of rational individuals; a group is but ‘a representative person.’”³⁵⁵ But, by the fourteenth century, Black observes, Innocent IV’s view of corporations as fictions, combined with the development of philosophical nominalism by William of Ockham and others to produce “an academic consensus that *social entities have no reality apart from the individual human beings that compose them.*”³⁵⁶ We see here resonances of Hohfeld’s arguments that legal relations comprised individual relationships.

In sum, Black suggests that, despite ideas of the primacy of communal entitlement and enforcement in the twelfth century, there was, in the twelfth and by the thirteenth, also developments in law that recognised that (a) individual rights existed (as for example in Magna Carta) and (b) that communally held legal entitlements

³⁴⁹ *Id.* at 591.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 593.

³⁵² *Id.* at 598.

³⁵³ *Id.* at 599.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 601.

were mere fictions. The former view is consistent with Tierney's notion of individual subjective rights. The latter nominalist viewpoint is reminiscent of Hohfeld's views on corporations specifically and communal entities more broadly.

2. Tierney

An earlier account by Tierney of rights theories in the Middle Ages is consistent with Black. In this account, Tierney locates in the twelfth century a "combination of intense individualism and intense corporatism," which, although ostensibly "paradoxical," were not necessarily so since human beings "become fully persons in intimate social intercourse with one another, not in desert-island isolation."³⁵⁷ Tierney notes that medieval corporation law as developed by the canonists in the twelfth century was "intensely concerned with the rights of individuals within corporate communities," for example, a cathedral canon held some rights in common with other members, but also an individual right in his own prebend, which he could enforce at law if necessary.³⁵⁸ In respect of the "vast extension of civil liberties" that occurred in the twelfth century, for instance, through the grant of charters of rights to churches, boroughs, and cities, these "rights were of a kind that could actually be exercised only by individuals, e.g. the right of a merchant to come and go freely."³⁵⁹ Likewise, exemption from royal jurisdiction, such as a baron's right, was also recognizable as an individual right.³⁶⁰

These twelfth century developments continued into the thirteenth to produce a "broadening [of] civic liberties," Tierney observes, that were arguably applicable to Magna Carta.³⁶¹ Tierney takes issue with Holt's understanding of Magna Carta as a "vast communal privilege" since it would have been difficult to imagine how any thirteenth century mind could have made the "conceptual leap" to draw an analogy between the corporate identity of a city commune and the people of the realm of England.³⁶² Yet Tierney notes that the Prior of Dunstable at the time was the great canonist, Ricardus Anglicus, who may have been the one to make this conceptual leap, as illustrated in *Annals of Dunstable Priory* referring to Magna Carta as a charter "concerning the liberties of the realm."³⁶³ Ricardus had elsewhere analogised the corporate nature of a city to that of a realm, Tierney notes, when he wrote: "The corporate body of a city can confer jurisdiction . . . how much more the corporate body of a whole realm [confer it]."³⁶⁴

³⁵⁷ Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J.L. & RELIGION 163, 170 (1987).

³⁵⁸ *Id.* at 171.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 171–72.

³⁶¹ *Id.* at 172.

³⁶² *Id.* at 172–73.

³⁶³ *Id.* at 173; see Holt, *supra* note 290, at 65.

³⁶⁴ Tierney, *supra* note 357, at 173.

Tierney, therefore, endorses Holt's concepts of the entitlements in Magna Carta as inhering in corporate and institutional collectivities, and that such understandings aligned with legal, particularly canonistic, notions of corporate identity. But whereas Tierney insists that these entitlements were ultimately exercisable in the hands of the individual members of those collectivities, whether merchants, monks, or cathedral canons, Holt's argument is precisely the opposite—that these entitlements, to mean anything, must necessarily be communal.

3. Hohfeld

As we have seen in Hohfeld's schema, his understanding of legal relations was that they were relational between individuals. How, therefore, does the communal nature of entitlements uncovered by Holt and the other scholars just discussed accord with Hohfeld's conception of rights? In other words, can a communal concept of rights be accommodated within Hohfeld's schema? This requires consideration of two further issues. First, is Hohfeld's rejection of the possibility that rights could be held severally or individually supportable? Second, whether it is possible to accommodate communal entitlements in Hohfeld's schema without doing violence to its internal logic, as Kramer argues.

Kramer asserts that Hohfeld's refusal to recognise collective rights was untenable. Against Hohfeld's "nominalism,"³⁶⁵ Kramer asserts that:

Because a group is an overarching structure, it can never be *reduced* to the individual interactions that are its components— notwithstanding that it can be thoroughly *explicated* by reference to those components. Its interests do not amount to a sum or welter of individual interests, since its interests are those which characterize its members *qua* collectivity rather than those which characterize its members *qua* individuals.³⁶⁶

In this, Kramer asserts that Hohfeld conflates explicability with reducibility; although corporations can be so explained, this does not mean that they must be reduced to individual entitlements. The implication of Hohfeld's failure to recognise "the reality of collective entitlements," Kramer argues, is that numerous duties are uncorrelated with any rights (such as the right of a government to tax), and the finding that the Correlativity Axiom, which is true by definition, "falls far short of a universal reign."³⁶⁷

³⁶⁵ Kramer, *supra* note 44, at 51; *see id.* at 58–59.

³⁶⁶ *Id.* at 56 (emphasis added).

³⁶⁷ *Id.* at 58. By way of illustrating the falsity of the explicability/reducibility distinction, Kramer notes that, if someone were to declare a group large, this describes a characteristic of the group that *can* be fully explicated by reference to the individual members, but yet

Therefore, Kramer ostensibly rejects Hohfeld's extreme nominalism and recognises the reality of collective entitlements.³⁶⁸

Nevertheless, Hohfeld's jurisprudential framework is capable of conveying the nature of collective entitlements, Kramer observes: "When we impute to some group a right, for example, we thereby affirm that that group is entitled to non-interference or assistance or remuneration on the part of the person (individual or corporate) who bears the correlative duty."³⁶⁹ Further, Kramer noted that such a position by Hohfeld included rejection of the existence of rights "against the world," also known as rights *in rem*; despite this, Kramer concedes that Hohfeld's position nevertheless characterises such entitlements as having "continually shifting *applications*" rather than being "continually shifting entitlements."³⁷⁰

Accordingly, Hohfeld's axioms are capable of accommodating Holt's conception of communal rights in Magna Carta. Arguably, this is possible on a straightforward reading of Hohfeld, by recognizing rights as individually relational. But, arguably, the better approach, following Kramer and others, is a modification of the Hohfeldian approach to accommodate collectivities while, at the same time, preserving the axiomatic nature of his fundamental legal conceptions.

The preceding assessments indicate that Holt's characterisation of the entitlements in Magna Carta as communal withstand close scrutiny. It accurately depicts developments in law and society that had emerged in the twelfth century and continued into the thirteenth both in respect of the granting of freedoms from traditional feudal ties and relationships and in canonistic commentaries on corporations. But even Holt's account, and those of Black, Harding, and Tierney's earlier views, recognise the possibility of individual rights. It is these individual rights that Tierney's thesis of subjective understandings of *ius* tries to highlight, although they find no specific semantic correlation in the provisions of Magna Carta. The existence of Hohfeldian claim-rights in Magna Carta, which this Article reveals, arguably indicates that the semantic and linguistic exactitude demanded by Tierney's subjective rights thesis has fatal limitations in its application to this particular context.

CONCLUSION

Modern historians of Magna Carta have tended to downplay the notion of rights in that document. As this Article has revealed, Holt's reading of that document does not disregard rights altogether but indirectly does so by privileging notions of communal entitlement in the form of liberties, privileges, and concessions.

"[n]othing other than the members' numerousness accounts for the group's largeness. To seek to expound that largeness by reference to anything else would be asinine." *Id.* at 53–54.

³⁶⁸ *Id.* at 58.

³⁶⁹ *Id.* at 54.

³⁷⁰ Kramer, *supra* note 44, at 9–10 n.2 (emphasis added).

By a new reading of the provisions of Magna Carta, namely by using Hohfeld as a theoretical interpretative lens applied in praxis to the chapters of the Great Charter, this Article has highlighted that the story of rights remains a valid one. Such a method arguably assists in providing greater precision in the history of rights language when the current academic and legal environment is one of rights-proliferation. As we have seen, Hohfeldian claim-rights are arguably evident in Magna Carta in the “rights” to ecclesiastical elections in clauses 1 and 63; to legal process in clauses 39 and 40; to property protection in clauses 28, 30, and 31; and to consultation prior to financial exactions in clauses 12 and 14, 20, and 21. The jural opposite, liberties, exist in clauses 13 and 41 on municipal privileges and clauses 48 and 55 on limiting financial exactions. Accordingly, contrary to Holt’s account and that of many other scholars, the entitlements in Magna Carta comprise a number of “rights” strictly so-called—not just privileges or liberties. We can consider Magna Carta to be a “rights” document to this extent. Further, the Hohfeldian analysis in this Article indicates that some provisions constitute second-order jural relations: clauses 1 and 63 in relation to the freedom of the English Church, clauses 48 and 55 limiting financial exactions, and clauses 13 and 41 granting liberties to London, other localities, and merchants, are “immunities.” Hohfeldian “powers,” in contrast, are constituted by clauses 1 and 63 in their general grant of entitlements and in clauses 52, 53, and 59 in the remedy they provide to protect property.

This Article provides a corrective to the dominant strands of scholarship on Magna Carta, which fail to adequately deal with, and therefore differentiate, juridical understandings of rights as per Hohfeld from civil and political understandings of rights (i.e., human rights and “inalienable rights”). We can conclude that the first issue of Magna Carta in 1215 did in fact articulate some ideas that we moderns would identify and agree on as rights, as understood by Hohfeld’s claim-rights.

What findings can we draw from this new approach to reading the history of rights in Magna Carta? First, as noted above, this Article has shown the value and usefulness of deploying a rigorous approach such as Hohfeld’s, in order to determine with precision which provisions are truly “rights” and which are other kinds of entitlements, namely “liberties/privileges” or second-order “powers” or “immunities.” This entails a necessarily close reading of those chapters in their immediate historical, social, political, and legal context. This Article has demonstrated that Hohfeld’s axioms not only have a use in delineating normative concepts with precision, but fruitful application to historical contexts, such as Magna Carta, which have evaded clear understanding over time through manifold interpretations.

Second, this Article has shown that Hohfeld’s understanding of claim-rights as relational and individual, when applied in praxis to the chapters of Magna Carta, is limited. But, when read as relational and applicable to collectivities, and without altering their axiomatic nature, this Article has also shown the compatibility and usefulness of Hohfeldian claim-rights in identifying and elucidating claim-rights and other entitlements in Magna Carta. This contrasts with Tierney’s approach of

identifying subjective rights in pre-modern texts as a source of individualistic notions of rights. A document such as Magna Carta reveals the importance of the interrelatedness of individual and community as constitutive of legal entitlements.

Third, this Article has shown, through the application of theory in praxis, that approaches to identifying lineages of rights in precise language, such as Tierney's subjective rights, have limited usefulness in sources such as Magna Carta. The use of multiple terms for entitlements, such as *ius*, *libertas*, *concessio*, and others, in that document, however, does not preclude a Hohfeldian analysis. Although the nature of the two differ, in that Hohfeld's is a means of identifying rights more broadly, and Tierney's is directed towards political notions of rights, the Hohfeldian method is amenable to multiple semantic and linguistic terms while Tierney's is not. In historical contexts where the language used varies, either deliberately or not, a language-contingent approach such as Tierney's is limited in its usefulness. Accordingly, the use of Hohfeldian axioms in historical contexts has a usefulness that is yet to be fully tapped.

Fourth, as Barker has noted of Hohfeld, the jurist "has much to offer . . . and his framework is useful . . . in understanding the modern dynamics between private and public law."³⁷¹ Although once seen as confined to private law, this Article has demonstrated that, applied with sensitivity to historical context and modified accordingly, Hohfeld's axioms have the capability of being applied to public law contexts, such as constitutional and administrative law. This is consistent with modern American Realists who proclaim that "all law is public law," recognising the political realities in legal decision-making.³⁷² Realism recognises the impact of the real-world on judge-made law; similarly, such notions resonate with attempts to reconstruct the reality of history from scholarly theories, as this Article has attempted to do.

³⁷¹ Barker, *supra* note 33, at 586.

³⁷² See John C.P. Goldberg, *Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1641 (2012).