Escaping the Dilemma in Tuttle vs. Lakeland Community College

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The case study presents a dilemma that involves two clauses of the First Amendment to the United States Constitution. Here is the text of the Amendment:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

The two clauses implicated in the dilemma are the establishment clause and the free speech clause. The jurisprudential literature on each of these clauses is enormous and, of course, each is associated with a very large body of case law. For several reasons, some of which are mentioned in the case study, it is not possible to give the Tuttle case and the constitutional issues it raises anything approaching comprehensive treatment in these pages. However, the case study presents several prompts for discussion that may bear fruit in an ethics class.

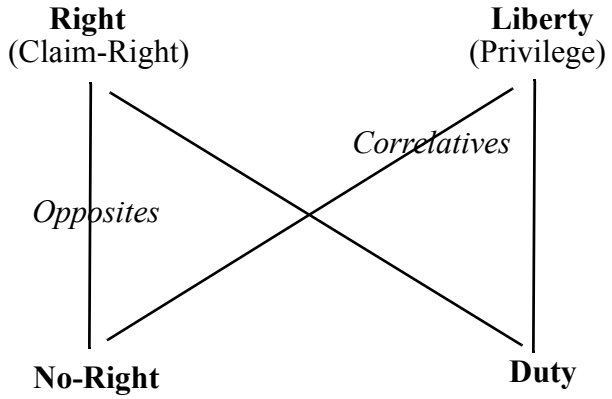
In what follows I respond briefly to some prompts related to the free speech clause. I draw on the work of Wesley Newcomb Hohfeld to suggest (a) that in presenting the dilemma the case study misrepresents the constitutional right of free speech and (b) that following Hohfeld the dilemma presented in the case is easily escaped. I also join issue with the claim that "in the interest of academic freedom" a state college "should occasionally allow courses to be taught from sectarian perspectives" and raise some doubts about the proposed resolution with which the case study ends.

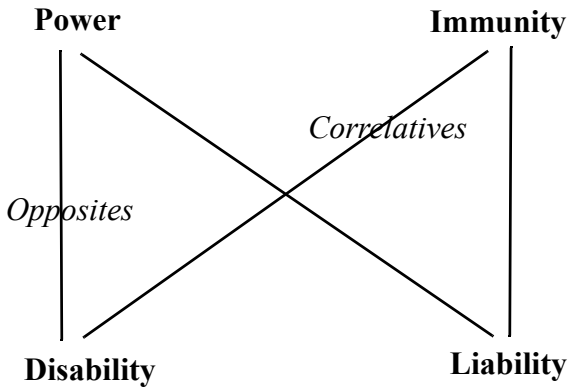
Rights talk can make one dizzy. There are several reasons for this: the term 'a right' has many possible referents (I will return to this); it

often seems that there are nearly 31 flavors of rights — positive, negative, moral, legal, human, natural, animal, minority, conventional, rights in *personam*, rights in *rem*; the vast literature on rights includes analyses of them as protected interests, protected choices, and as entitlements; moreover, some theorists take human will to be central to the analysis of rights, while others hold that a right holder's status as a beneficiary is the key.

One thing that all agree on is that rights are relational. But the relations we refer to when we assert our rights vary in important ways. As Wesley Newcomb Hohfeld pointed out in his *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919), what's on the other side of what I refer to as my right may be a legal duty or a legal disability of another, for example. This is a difference that makes a difference: the legal relations in these two cases are quite different. In the first case, asserting one's right calls attention to what must be done by another. In the second case, it directs attention to what another is unable to do because he/she lacks the requisite legal power. Much like the fathers of analytical jurisprudence, Jeremy Bentham and John Austin, Hohfeld believed that judges would find it easier to resolve practical problems in the law if they embraced his analysis of legal relations.

The legal relations Hohfeld analyzed involve two parties. They can be represented on two matrices that reveal correlations and relations of opposition (legal correlatives and legal opposites). These relations can be multiple. That is, one can have powers, claim rights, duties, liabilities, immunities and so on, sometimes in bundles.





Some examples may be helpful. I have a **claim *right*** in the face of Clemson University to be paid; the correlative of this right is the duty the university has to pay me. The university has a claim right against me to the work it is paying me to do; this right is **correlative** to my **duty** to do that work. These rights and duties are, as it were, two sides of a coin. They are the upshot — the product — of powers each of us has to change our legal relations by means of a contract. In this case, I have exercised this **power** and the state has exercised its power as well; we each have a correlative **liability** to a change in our legal relations as a result of this exercise of (legal) power by the other.

I am immune — have an **immunity** — to a change by the government in my legal relations respecting freedom of religion. The government (both state and federal) lacks the power to make it my duty to worship the Christian or any other god, i.e., the government has a **disability** in this connection. I am immune to a change in my legal relations respecting my son through action by you, but not the state of South Carolina. For the state can, under certain circumstances (e.g., my neglect or abuse of my son) take custody of him away from me. So here, the state has power vis-à-vis me respecting custody of my son (this correlates with a **liability)**. Happily, that *power* is limited in that certain conditions have to obtain for its exercise.

I have a ***liberty-right /privilege*** to play my guitar while sitting on the porch of my house; the correlative of this liberty is the **no-right** my neighbor has that I not play my guitar while I sit on the porch of my house. This no-right comes to this: I have no duty not to play my guitar (this duty would be the correlative of my neighbor's right that I not play

my guitar, if he had such a right). My neighbor has no valid claim against me that I not play my guitar. If I play my electric guitar through a Marshall amplifier at full volume late at night, we would have a different situation, as my neighbor presumably has a right to not be disturbed in this fashion, which in Hohfeldian terms is the correlative of my duty not to disturb him in this way.

How will this analytical framework help with the dilemma of the case study? Well, the first thing to notice is that our constitutional right of free speech is not a claim right; there is no duty on the other side of it. No one is obligated to listen to me as I express ideas and, more importantly for the present purpose, no one has to provide me with the wherewithal (say a venue) to express my ideas. Our right of free speech begins as an immunity, for it is the upshot of a constitutional denial of power ("Congress shall make no law…"). I have no legal duty not to speak. The reason for this is not far to seek: the government lacks the legal power to create such a duty. In the Hohfeldian scheme, then, one is at liberty; one has a liberty-right to speak.

The case study suggests that Tuttle's case involves a constitutional dilemma: The first horn of the dilemma is that allowing Tuttle to teach in the way that he does involves advancing religion in a state-supported classroom. But that, of course, violates the establishment clause. The second horn of the dilemma is that "denying him the opportunity to teach" in that way — where he "advance[s] his religious beliefs in the classroom" — violates "the free speech clause." Hohfeld's framework facilitates easy escape from this dilemma, for seen in the light it casts, the second horn is an illusion. Although the state no longer provides Tuttle with a teaching venue in which he can advance his religious beliefs, it does not thereby violate his constitutional right to free speech. It would if, contrary to fact, the state had a duty to provide such a venue that is correlative to Tuttle's right to free speech. However, Tuttle's constitutional rights to free speech (yours and mine too) are immunity and liberty rights and there is no duty on the other side of them.

The case study suggests that teaching and learning about religion and encouraging awareness of the wide variety of religious perspectives are good things. I certainly agree. I should say the same thing about political arrangements. Students should learn about democracy, communism, monarchism, and anarchism, for example. It does not follow, however, that they should be taught about monarchism or anarchism, from the perspective of a monarchist or anarchist. So too, it does not follow from the fact that students should know about Catholicism or Zorastrianism

that the course(s) they take should be taught from these sectarian perspectives. Advocacy is not an essential element of teaching about politics or religion. Thus, many colleges, including Lakeland Community College, offer courses in comparative religion. Doing this does not run afoul of the establishment clause. I do not see how this is true of the suggestion in the case study that a "state institution…should occasionally allow courses to be taught from sectarian perspectives, including those perspectives that oppose other sectarian perspectives." For as the case study makes plain, teaching in this way a teacher such as Dr. Tuttle is advancing religion and thus runs afoul of the establishment clause.

The case study ends with the suggestion that "the institution might have satisfactorily resolved the issue if they had allowed Tuttle to teach upper level courses in this style while demanding that he change his style in the introductory courses." It is not clear to me how this would be a satisfactory resolution of the matter as the establishment problem so clearly articulated in the case has not been mitigated, let alone obviated. Even if we put that general point aside, there is a problem specific to Lakeland that may make one uneasy about the proposed resolution. It is assumed that because students in upper level courses "will already have some training in the field" it will not be necessary for instructors to "maintain a neutral position on the issues so as not to unduly influence the development of students." Upper level philosophy courses at Lakeland are numbered 2XXX — they are at the sophomore level, and 50% of them have no prerequisite. Moreover, they are listed as general education courses in both the associate of arts and the associate of science degree programs (which are "normally pursued by students intending to transfer to a senior institution for the completion of a bachelor of arts or science degree."). Consequently, if the case study's points about general education and the need for a "level playing field" before neutrality can be abandoned are well taken — and I believe they are — the proposed resolution does not withstand scrutiny.

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