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## THE HOHFELDIAN APPROACH TO CONSTITUTIONAL CASES

H. NEWCOMB MORSE\*

**I**NFERRED, OR AT THE MOST rebuttably presumed, is a slight acquaintanceship on the part of the reader with the work on jural opposites and jural correlatives by Professor W. Newcomb Hohfeld.<sup>1</sup> The Founding Fathers, as though anticipating the coming of the Messianic logician, used all of the four Hohfeldian gravamen terms—rights, privileges, powers and immunities—in the Constitution of the United States,<sup>2</sup> and for this reason the author perceives a nexus between Hohfeldian logic and constitutional construction. The appropriate initial touchstone for contemporary use of this theory could appear to be the 1968 case of *Flast v. Cohen*,<sup>3</sup> considering Mr. Justice Harlan's allusions to Hohfeld in his dissenting opinion.<sup>4</sup>

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<sup>1</sup> Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter cited as Hohfeld]. The philosophical concept of jural opposites and correlatives which has gathered dust for approximately 50 years has recently enjoyed a rebirth, and still offers a viable method of constitutional analysis. A summary treatment of the Hohfeldian system would leave one with the four keystone concepts of rights, privileges, powers and immunities as well as an awareness of the critical legal interrelations between those four signal words. The classification developed by Hohfeld groups the four signal words as follows:

<i>Jural</i>	rights	privilege	power	immunity
<i>Opposites</i>	no rights	duty	disability	liability
<i>Jural</i>	right	privilege	power	immunity
<i>Correlatives</i>	duty	no right	liability	disability

The theory further asserts that an appropriate legal meaning cannot be ascertained without reference to its partner, either opposite or correlative and the relationships embodied therein.

<sup>2</sup> The word "right" appears in the Constitution in the first, second, fourth, sixth, seventh, twelfth, fourteenth, fifteenth, nineteenth, twentieth, and twenty-fourth amendments. The word in its plural form is contained in the ninth amendment.

The word "privilege" is found in Art. I, § 9, cl. 6. The word in its plural form is included in Art. IV, § 2, cl. 2 and in the fourteenth amendment. The word in its derivative form as "privileged" is incorporated in Art. I, § 6, cl. 4.

The word "power" appears in Art. I, § 2, cl. 5; Art. I, § 3, cl. 6; Art. I, § 8, cl. 1; Art. I, § 10, cl. 3; Art. II, § 1, cl. 1; Art. II, § 2, cl. 1; Art. II, § 2, cl. 2; Art. II, § 2, cl. 3; Art. III, § 1, cl. 1; Art. III, § 2, cl. 1; Art. III, § 3, cl. 2; Art. IV, § 3, cl. 2, and in the eleventh, thirteenth, fourteenth, fifteenth, sixteenth, eighteenth, nineteenth, twenty-third, and twenty-fourth amendments. The word in its plural form is contained in Art. I, § 1, cl. 1; Art. I, § 8, cl. 18; Art. II, § 1, cl. 6, and in the tenth and twenty-fifth amendments. The word in its derivative form as "empower" is found in the seventeenth amendment.

The word "immunity" is not included in the Constitution. However, the word in its plural form is incorporated in Art. IV, § 2, cl. 1 and in the fourteenth amendment.

<sup>3</sup> 392 U.S. 83 (1968).

<sup>4</sup> *Id.* at 119, 120, 121, 124, 125, 131, 132 (Harlan, J., dissenting).

In *Flast* a taxpayer *successfully* attacked a federal statute,<sup>5</sup> adopted by the Congress in pursuance of its power under article I, section 8, clause 1 of the Constitution to spend for the general welfare, on the ground that it breached, *inter alia*, the establishment clause of the first amendment.<sup>6</sup> Mr. Chief Justice Warren, as the author of the opinion of the Court, held that the establishment clause operates as a specific constitutional limitation upon the exercise by the Congress of the spending power conferred by article I, section 8, clause 1.<sup>7</sup> However, no Hohfeldian gravamen word is contained in the establishment clause to counter the term "power" found in article I, section 8, clause 1.

Forty-five years prior to *Flast*, in *Frothingham v. Mellon*,<sup>8</sup> with Mr. Justice Sutherland as the organ of the Court, a taxpayer *unsuccessfully* challenged a federal statute,<sup>9</sup> enacted by the Congress pursuant to its power under article I, section 8, clause 1 to spend for the general welfare, on the ground that it infringed the tenth amendment and the due process clause of the fifth amendment.<sup>10</sup> The fifth amendment includes no Hohfeldian gravamen word to check the term "power" contained in article I, section 8, clause 1. But the word "powers," found in the tenth amendment  *Cancels*, and not merely *counters*, the exercise of "power" under the general welfare clause, unless it relates *directly* to one or more instances of *specific* congressional authorization *enumerated* in article I, section 8. As the same Mr. Justice Sutherland admonished in *Carter v. Carter Coal Company*,<sup>11</sup> 13 years after *Frothingham*: "It [the Framers' Convention] made no grant of authority to Congress to legislate substantively for the general welfare . . . and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted."<sup>12</sup>

Thus, based upon Hohfeldian precision-thinking, a legally incorrect result ensued in both *Frothingham* and *Flast*. Mr. Justice Harlan's plaint, in his dissenting opinion in *Flast*, that he found no basis for distinction among the establishment clause, the tenth amendment, and the due process clause of the fifth amendment as specific limitations upon the Congress' spending power<sup>13</sup> would seem to dispel the inference of even a slight acquaintanceship on his part with the "Hohfeld system."

<sup>5</sup> Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241 *et seq.*, 821 *et seq.* (Supp. II, 1964).

<sup>6</sup> 392 U.S. at 85.

<sup>7</sup> *Id.* at 104.

<sup>8</sup> 262 U.S. at 447 (1923).

<sup>9</sup> Act of November 23, 1921, ch. 135, § 42 Stat. 224.

<sup>10</sup> 262 U.S. at 479.

<sup>11</sup> 298 U.S. 238 (1936).

<sup>12</sup> *Id.* at 292.

<sup>13</sup> 392 U.S. at 126.

*Bailey v. Drexel Furniture Company*,<sup>14</sup> decided the year before *Frothingham*, was concerned with whether the Child Labor Tax Law<sup>15</sup> constituted a valid exercise of the taxing power. An employer, who during the taxable year employed and permitted to work in its factory a boy under 14 years of age, was assessed an ostensible tax of 10% on its net profits for that year pursuant to the statute. The statute had been passed purportedly in pursuance of the taxing clause. The statute contained an inseparable admixture of taxing and regulatory schemes. It attempted to regulate "a detailed and specified course of conduct in business"<sup>16</sup> and accordingly fell within the police power, which is invested and lodged in the states.

Mr. Chief Justice Taft, in applying the dominant element or primary emphasis rule, determined that the taxing scheme was merely incidental to the regulatory scheme and consequently that the tenth amendment was a specific constitutional limitation upon this kind of perversion of the taxing power of article I, section 8, clause 1.<sup>17</sup> The Chief Justice stated:

Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.<sup>18</sup>

Thus, the Hohfeldian gravamen term "powers" in the tenth amendment constituted an effective check to the same word in its singular form in article I, section 8, clause 1.

*United States v. Butler*,<sup>19</sup> in 1936, involved the question of whether the Agricultural Adjustment Act<sup>20</sup> was bottomed constitutionally upon the spending power in article I, section 8, clause 1. The statute exacted an excise tax upon the agricultural processors' class for the benefit and use of the agricultural producers' group. The Court ruled that the taxing provisions were a mere incident to the regulation of agricultural production and, accordingly, that the tenth amendment was a specific constitutional limitation upon this

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<sup>14</sup> 259 U.S. 20 (1922).

<sup>15</sup> Act of February 24, 1919, ch. 18, § 40 Stat. 1057, 1138.

<sup>16</sup> 259 U.S. at 36.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 38.

<sup>19</sup> 297 U.S. 1 (1936).

<sup>20</sup> § 48 Stat. 31 (1933).

type of subversion of the spending power.<sup>21</sup> Mr. Justice Roberts, as the writer of the opinion of the Court, stated:

It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted.<sup>22</sup>

Then Justice Roberts invoked the ghost of Story, saying:

Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to provide for the common defence and general welfare, the government of the United States is in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." . . . If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1, section 8 of article I would become the instrument for total subversion of the governmental powers reserved to the individual states.<sup>23</sup>

Again, the Hohfeldian gravamen term "powers" in the tenth amendment was an effectual counter to the identical word in its singular form in article I, section 8, clause 1.

The crucible for the application of the Hohfeldian synthesis to constitutional interpretation is the 1873 decision in the *Slaughter-House Cases*.<sup>24</sup> As counsel for the independent butchers contesting the state-sanctioned monopoly of slaughter-houses, John Archibald Campbell<sup>25</sup> contended that the 1869 Louisiana statute conferring a 25-year monopoly upon the Crescent City Live-Stock Landing and Slaughter-House Company violated, *inter alia*, the privileges and immunities clause of the fourteenth amendment. His theory was that the state had denied to the independent butchers a privilege guaranteed to them as citizens of the United States under that clause. On the other hand, Matthew H. Carpenter, as counsel for the Crescent City Company, contended that this was a local matter only and affected the citizenship of the independent butchers only as citizens of the state by denying to them a privilege under the privileges and immunities clause of article IV, section 2, clause 1 and, further,

<sup>21</sup> 297 U.S. at 61, 68.

<sup>22</sup> *Id.* at 64.

<sup>23</sup> *Id.*

<sup>24</sup> 83 U.S. 36 (1873).

<sup>25</sup> See H. G. CONNOR, JOHN ARCHIBALD CAMPBELL, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 1853-1861 (1920).

that this was permissible for the reason that the statute constituted a legitimate exercise of the state's police power on the ground that the monopoly benefited the public at large in assuring more sanitary conditions in livestock slaughtering, processing, handling, and distribution as protection against the recurrence of a yellow fever epidemic.

The Hohfeldian gravamen term here is, of course, "privileges." According to Hohfeld, the closest approximation in meaning to "privileges" is "liberties" (or freedoms).<sup>26</sup> Privileges and liberties, because they represent different disciplines, law and political science, are no more absolutely equivalent than are insanity and psychosis, which also represent different disciplines, law and medicine. In both cases the legal word of art has a more constricted meaning.

Mr. Justice Miller considered the constitutional sections in chronological order. The "privileges and immunities clause" of article IV, section 2, clause 1, he held, referred to those generic and implied liberties which the citizens of a state possess and enjoy by virtue of the citizenry constituting the seat of sovereignty,<sup>27</sup> and of the protection accorded the people of a state by their state government in such possession and enjoyment due to the delegation of sovereignty by the populace of that state to their state government as agent. Every utilization of this delegated sovereignty by the state government constitutes an exercise of the police power. The police power is more than the most generic of powers; it is the pervasive power. While the police power is delegated by the citizens of a state, as the source of sovereignty, to their state government, it is, unlike sovereignty itself, divisible. If a part of sovereignty could be granted or surrendered instead of delegated or loaned it too would be divisible. Just as a crime can be defined by other than a traditional statement type of definition or by means of synonyms or antonyms (it can be defined in terms of its components: the mens rea and the actus reus), so too can sovereignty be defined otherwise; it can be defined in terms of its attributes.<sup>28</sup> Either a crime has been committed or it has not; so too either a political entity is a state, meaning that it possesses and enjoys sovereignty, or it is not. Sovereignty can no more be split than can mental state in the

<sup>26</sup> Hohfeld at 41. The word "liberty" appears in the Constitution in the preamble and in the fifth and fourteenth amendments. The word "freedom" is contained in the first amendment. The word in its derivative form as "free" is found in Art. I, § 2, cl. 13, and in the first and second amendments.

<sup>27</sup> In the words of John Stuart Mill in *ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1946), at 141: "[T]he sovereignty, or the supreme controlling power in the last resort, is vested in the entire aggregate of the community. . . ."

<sup>28</sup> According to John Fiske in *AMERICAN POLITICAL IDEAS VIEWED FROM THE STANDARD OF UNIVERSAL HISTORY* (1885) at 98: "The chief attributes of sovereignty with which the states have parted are the coining of money, the carrying of mails, the imposing of tariff dues, the granting of patents and copyrights, the declaration of war and the maintenance of a navy."

bifurcated criminal trial; sovereignty may be described, in the words employed by Mr. Justice Preston of the California Supreme Court in characterizing mental state in the context of the bifurcated criminal trial, as an "indivisible integer."<sup>29</sup> The police power is more than the chief attribute of sovereignty; it is the embodiment of all the attributes; "it is the matrix, the indispensable condition"<sup>30</sup> of the other attributes.

Article IV liberties, described by Mr. Justice Miller as "fundamental,"<sup>31</sup> as comprising "fundamental principles,"<sup>32</sup> and as "powers . . . of the most ordinary and fundamental character,"<sup>33</sup> are manifold. They are referred to by the Justice, quoting from Judge Washington's opinion in the 1823 case of *Corfield v. Coryell*,<sup>34</sup> under headings or, as he put it, "general heads"<sup>35</sup> as "protection by the government,"<sup>36</sup> with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject,<sup>37</sup> nevertheless, to such restraints as the government may prescribe for the general good of the whole."<sup>38</sup> Just how many liberties these headings encompass it is difficult, if not impossible, to say. It is akin to asking how many rebuttable presumptions there are. So long as the state government does not unreasonably transgress these liberties, it may, in decreasing sequence of extremity, prohibit, curtail, or regulate them. The word "regulate" as used here, having a different contextual meaning than what it has in the commerce clause, does not include "prohibit."<sup>39</sup> The state government also

<sup>29</sup> *People v. Troche*, 206 Cal. 35, 53, 273 P. 767, 774 (1928).

<sup>30</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J., concurring).

<sup>31</sup> 83 U.S. at 76.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 78.

<sup>34</sup> 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

<sup>35</sup> 83 U.S. at 76.

<sup>36</sup> *HOBBS, LEVIATHAN* at 144 (E. P. Dutton & Co., Inc. 1950). The source is the following passage by Thomas Hobbes:

The attaining to this Sovereigne Power, is by two wayes. One by Naturall force; as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse, or by Warre subdueth his enemies to his will, giving them their lives on that condition. The other, is when men agree amongst themselves to submit to some Man, or Assembly of men, voluntarily, on confidence to *be protected* by him against all others. This later, may be called a Politicall Common-wealth, or Common-wealth by Institution; and the former a Common-wealth by Acquisition. . . . A Common-wealth is said to be Instituted, when a multitude of men do Agree, and Covenant, every one, with every one, that to whatsoever Man, or Assembly of Men, shall be given by the major part, the Right to Present the Person of them all, (that is to say, to be their Representative;) every one, as well he that voted for it, as he that voted against it, shall Authorize all the Actions and Judgements of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst them selves, and *be protected* against other men (emphasis added).

<sup>37</sup> The *caveat* which follows constituted the inspirational source for WOODROW WILSON, *THE NEW FREEDOM* (Prentice-Hall 1961).

<sup>38</sup> 83 U.S. at 76.

<sup>39</sup> See *Wickard v. Filburn*, 317 U.S. 111 (1942); *Champion v. Ames* 188 U.S. 321 (1903).

may increase these liberties by repealing or amending prohibitions, curtailments, or regulations. There is, therefore, *traffic* flowing back and forth and to and fro in these liberties on a two-way street between the people of a state and their state government. Article IV thus involves the relationship, insofar as liberties are concerned, between the people of a state and their state government. And upon these reserved liberties the national government may not impinge. All that the mandate of article IV means, according to Mr. Justice Miller, is that state "A" may not prohibit, curtail, or regulate the fundamental liberties of citizens of state "B" residing in state "A" further than it does the basic liberties of its own citizens.<sup>40</sup>

The fourteenth amendment establishes another street, but this time a one-way thoroughfare, linking the people of the United States with the national government, as the delegated sub-agent of the peoples of the several states. The one-way *traffic* is in liberties flowing from the national government to the people of the United States which the national government may not prohibit, curtail, or regulate and with which the state governments may not interfere.

Campbell's contention in the Slaughter-House Cases, rejected in Mr. Justice Miller's opinion of the Court, was that the fourteenth amendment effected a "transfer"<sup>41</sup> of *traffic* in the fundamental liberties of the two-way street to the one-way thoroughfare and thus beyond the pale of a state's power to prohibit, curtail, or regulate. Additionally, the Justice laid down that the liberties flowing to the people of the United States from the national government were specific, limited, and expressly enumerated in the Constitution.<sup>42</sup> Campbell saw the same word ("privileges") used twice but with a single meaning and, according to him, the effect, *inter alia*, of the adoption of the fourteenth amendment was to shift the meaning from article IV to the fourteenth amendment—from the people of a state-state government relationship to a United States-national government relationship. Mr. Justice Miller, of course, saw the identical term used twice with two separate and distinct contextual meanings. Campbell's contention, in short, was to "transfer" to the word "privileges" in the fourteenth amendment the contextual meaning of the term "privileges" in article IV, leaving that definitional cupboard bare. In effect, Campbell was advocating fourteenth amendment "liberties" (Hohfeld's nearest equation to "privileges") as a constitutional limitation (by the national government) upon article IV "liberties" (against the state governments), one Hohfeldian closest equivalent to checkmate the same earlier but contextually different Hohfeldian closest equivalent.

"Right is an abstract term. It has no satisfactory definition or explanation

<sup>40</sup> 83 U.S. at 77.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 79.

except in connection with some concrete conception of the thing out of which it grows."<sup>43</sup> Due to recognition of the truism expressed in the foregoing statement, Hohfeld defined the word "right" in the only manner possible: in terms of the hypothetical and in relation to its opposite and to its correlative.

According to Hohfeld, the correlative of "right" is "duty."<sup>44</sup> But, Hohfeld was not the first to recognize *legally* "duty" as the correlative of "right." Judge Orlando J. Lotz of the Appellate Court of Indiana in 1894,<sup>45</sup> Justice H. H. Neill of the Court of Civil Appeals of Texas in 1903,<sup>46</sup> and Justice John C. Sherwin of the Supreme Court of Iowa in 1904,<sup>47</sup> all did so. However, Judge Lotz, Justice Neill and Justice Sherwin were merely intermediaries rather than progenitors, as they relied upon and cited as authority the renowned legal scholars Herbert Broom, Thomas McIntyre Cooley and Charles Fearn, respectively. Hohfeld paid his indebtedness to Judge Lotz and Justice Neill by citing their opinions<sup>48</sup> (but not to Justice Sherwin!).

Hohfeld's famous "land hypothetical" delineates the contrasting characteristics of right and duty: "[I]f X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place."<sup>49</sup> Now, initially, let us enlarge and extend X; let us transform his individual identity to collective status, so that *his private* right becomes *their public* right. Here, the words of Justice Thomas H. Owen of the Supreme Court of Oklahoma are appropriate:

By "publici juris," we understand, is meant "of public right." The word "public," in this sense, means "pertaining to the people, or affecting the community at large; that which concerns a multitude of people." . . . The word "right," as used here, is . . . "a well-founded claim;<sup>50</sup> an interest; concern; advantage; benefit." We understand "public interest" to mean . . . some interest by which their legal rights . . . are affected.<sup>51</sup>

The first alteration of the "land hypothetical"—that is, transforming X from individual identity to collective status—is akin to transforming X from

<sup>43</sup> Hampton v. North Carolina Pulp Company, 223 N.C. 535, 546, 27 S.E.2d 538, 545 (1943).

<sup>44</sup> Hohfeld at 30.

<sup>45</sup> Lake Shore & Michigan So. Ry. Co. v. Kurtz, 10 Ind. App. 60, 67, 37 N.E. 303, 304 (1894).

<sup>46</sup> Galveston, Harrisburg & San Antonio Ry. Co. v. Hennigan, 76 S.W. 452, 453 (Tex. App. 1903).

<sup>47</sup> McDonald v. Bayard Savings Bank, 123 Iowa 413, 416, 98 N.W. 1025, 1026 (1904), cited with approval in Coty v. Prestonettes, Inc., 285 F. 501, 514 (2d Cir. 1922). However, Coty did not cite Hohfeld!

<sup>48</sup> Hohfeld at 31, 32.

<sup>49</sup> *Id.* at 32.

<sup>50</sup> *Id.* According to Hohfeld, the word "claim" is the closest equivalent in legal meaning to the word "right."

<sup>51</sup> State v. Lyon, 63 Okl. 285, 286, 165 P. 419, 420 (1917).

*one* who is represented by the “Hohfeldian plaintiff” to *many* who are represented by the “non-Hohfeldian plaintiff” of Mr. Justice Harlan’s dissenting opinion in *Flast*.<sup>52</sup>

The second alteration is contextual, from land to some of the specified rights contained in the first eight amendments to the Constitution. Of the first eight amendments the word “right” is included in the first, second, fourth, sixth, and seventh amendments. There is one specified right delineated in the second, fourth and seventh each, two in the first and several in the sixth.

It necessitated five decisions by the Supreme Court (the work product of 17 justices over a period of 19 years) to incorporate selectively via the fourteenth amendment five of the several specified rights of the sixth amendment so as to be applicable against state impingement. This was accomplished by *Klopper v. North Carolina*<sup>53</sup> in 1967 in relation to a speedy trial, by *In re Oliver*<sup>54</sup> in 1948 in relation to a public trial, by *Pointer v. Texas*<sup>55</sup> in 1965 in relation to confrontation of opposing witnesses, by *Washington v. Texas*<sup>56</sup> in 1967 in relation to compulsory process for obtaining witnesses, and by *Gideon v. Wainwright*<sup>57</sup> in 1963 in relation to assistance of counsel.

All that was needed was one decision in which the Supreme Court utilized and applied Hohfeldian logic: the Court could have attained the same objectives. This is apparent when one considers that in the amended context of the “land hypothetical” Y becomes government, state as well as national, because the gravamen of both the original hypothetical and the revised version is the imposition of a duty conterminous with the protection of X’s right.

Applying Hohfeldian logic, the only right an individual has under the Constitution is that government—both governments, state as well as national—not impinge upon the specified rights (but only where the word “right” is actually used) contained in the first eight amendments. The individual does not, however, have the *right* to enjoy those rights; rather, he has the *privilege* of enjoying or not enjoying those rights. This is a basic distinction of the Hohfeldian system.

Another modus of explanation might clarify the point; that would be to accent the relational aspect: the right is between the parties—between the individual and government—pertaining to the subject matter (the specified rights of the first eight amendments where the word “right” is used), but the

<sup>52</sup> See note 4 *supra*.

<sup>53</sup> 386 U.S. 213 (1967).

<sup>54</sup> 333 U.S. 257 (1948).

<sup>55</sup> 380 U.S. 400 (1965).

<sup>56</sup> 388 U.S. 14 (1967).

<sup>57</sup> 372 U.S. 335 (1963).

privilege is between the individual and the subject matter (the same subject matter). The correlative of the individual's privilege is government's "no-right," that he not take advantage of the protection made available to him by the specified rights (where that particular word is used) delineated in the first eight amendments.

Next, let us analogize and analyze in respect to Hohfeld's famous "shrimp salad hypothetical."<sup>58</sup> Hohfeld wrote:

A, B, C and D, being the owners of the salad, might say to X: "Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you." In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated.

Let us first analogize in respect to the parties by transforming A, B, C and D collectively to the national government and X to the state government. Then, secondly, let us analogize in respect to the subject matter by transforming the shrimp salad to the commerce power. Now, by means of the analytical process, we encounter the doctrine of concurrent powers as enunciated by Mr. Justice Curtis in *Cooley v. Board of Wardens of the Port of Philadelphia*<sup>59</sup> in 1851: "[I]t is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States. . . ."<sup>60</sup>

Inasmuch as we have analogized in respect to the subject matter by transforming the shrimp salad to the commerce power, let us probe the Hohfeldian conception of the word "power." Therefore, let us avail ourselves of Hohfeld's famous "abandoned object hypothetical."<sup>61</sup> Hohfeld wrote:

X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object, *e.g.*, the power to acquire title to the latter by appropriating it.

The national government has the power to extinguish its own legal interest (rights, powers, immunities, etc.) in a particular aspect of the power to regulate commerce "among the several states" by practicing a policy of legislative continence in respect thereto, and by permanently continuing

<sup>58</sup> Hohfeld at 35.

<sup>59</sup> 53 U.S. (12 How.) 299 (1851).

<sup>60</sup> *Id.* at 319.

<sup>61</sup> Hohfeld at 45.

to pursue such a policy. In short, it has the power to obliterate a power through desuetude; and—simultaneously and correlatively—to create in the state governments the power to appropriate the abandoned power. Thus, the “shrimp salad hypothetical” is the doctrine of concurrent powers, illustrated by the commerce power, with the word “power” defined by the “abandoned object hypothetical.”

In conclusion, the Supreme Court could have, and still may, arrive at a decision point by applying the Hohfeldian interrelationship approach rather than the case-by-case, amendment-by-amendment analysis utilized in the past. It is recommended that future judicial decisions rely on a Hohfeldian analysis, and thus escape the short circuiting that has riddled constitutional development in the past; such a change would provide a vehicle for the logical and direct expansion and contraction of constitutional principles.