

Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence

Johan van der Walt*
University of Luxembourg

Introduction

Attempts to come to terms with the deep tensions and paradoxes that inform the state action and horizontal effect jurisprudence are largely absent in the vast literature available today on this crucial subject. Attempts to come to terms with the conceptual difficulties that attach to the state action doctrine in the United States remain stuck between acceptances and rejections of an idea that one can, following Frank Michelman, call the “simple Hohfeldian point.”¹ Michelman explains the simple Hohfeldian point in terms of the rather unproblematic recognition that the state is ultimately the author of all law, irrespective of whether this law comes in the form of legislation, common law or executive commands.² But this is Michelman’s short hand statement of the Hohfeldian point. The expanded or full version of the Hohfeldian point would be this: The state is ultimately the author of all law, irrespective of whether this law comes in the form of legislation, common law or executive commands or the absence of legislation, common law or executive commands. This expanded version of the Hohfeldian point will be explained in Section I of this chapter.

The vicissitudes of the state action doctrine in the United States are a function of judicial attitudes that either embrace or reject the Hohfeldian point. That this is so will be shown in Section II of this chapter with reference to both the shorthand and expanded version of the Hohfeldian point. Some American judicial decisions accept that state authorship of law also includes, alongside legislation, authorship of common law and authorship of judicial decisions. When they do, they implicitly also accept that state authorship of law includes the absence of legislation and common law (absence of judicial decisions does not constitute a plausible variation). Some judicial decisions, on the other hand, steadfastly deny that state authorship of law includes authorship of common law rules and judicial decisions. Those that do naturally also deny that authorship of law includes the absence of legislation and common law.

A dominant trend in the history of horizontal effect jurisprudence in a number of significant jurisdictions outside the United States can be read in terms of a consistent endeavour to prevent importation of those elements of the American state action doctrine that represent a judicial endorsement of the Hohfeldian point. That this is so will be shown with reference to the Canadian and South African jurisdictions in Section III of this chapter. Section IV will also highlight the irony evident in the South African resistance to the Hohfeldian

* Thanks to André van der Walt for reading and commenting on an earlier draft of this chapter. Shortcomings are of course strictly my own. The articulation of a number of the passages in this chapter rely on passages from my book *THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY* (2014).

¹ Frank I. Michelman, *W(H)ither the Constitution?*, 21 *CARDOZO L. REV.* 1063, 1076 (2000) [hereinafter Michelman, *W(H)ither the Constitution?*].

² Frank I. Michelman, *The Bill of Rights, The Common Law, and the Freedom-Friendly State*, 58 *U. MIAMI L. REV.* 401, 404 (2003) [hereinafter Michelman, *The Bill of Rights*].

point. In its fervour to keep the boundaries of South African horizontal effect Hohfeld-tight, the South African judiciary did not only rely on the quarantine to which the Hohfeldian point was subjected in Canada. The South African judiciary also called in the service of German *Drittwirkung* jurisprudence, and more specifically, the so-called indirect *Drittwirkung* approach articulated in the famous *Lüth*³ decision of the German Federal Constitutional Court in 1957. The irony of this reliance on *Lüth* consists in the fact that *Lüth* does not at all represent a rejection of the Hohfeldian point. It turns, in fact, on a clear endorsement of the Hohfeldian point and its choice in favour of the indirect approach to horizontal effect or *mittelbare Drittwirkung* does not militate one millimeter against its endorsement of the Hohfeldian point. The South African judiciary's reliance on *Lüth* pivots on a fundamental misreading of *Lüth*.

Section IV subsequently turns to the reasons that inform the judicial rejection of the Hohfeldian point. It explains the judicial rejection of the Hohfeldian point in terms of an abdication of sovereignty. One might respond that the rejection of the Hohfeldian point self-evidently amounts to an abdication of sovereignty. Why the need then to go into deeper analyses in this regard? The point of the deeper analyses of the relation between the rejection of the Hohfeldian point and abdications of sovereignty in state action or horizontal effect jurisprudence is to highlight the deep fault line that has been destabilizing this jurisprudence from its very beginnings. Should horizontal effect jurisprudence wish to rethink itself on firmer foundations, it would first need to come to terms with this fault line.

1. The Hohfeldian Point

The crux of the Hohfeldian point is this: Law does not only consist as a set of relations between rights and duties. Law includes the correlative relations between the binary opposites of rights and duties. The legal opposite of a right is the absence of a right or a *non-right*, as Hohfeld calls it. The opposite of a duty is the absence of a duty. Hohfeld calls the absence of a duty a *liberty*. When one is not under a duty to do or not to do something, one is at liberty to do or not to do that thing; one has the liberty to do or not do it. Liberties relate to non-rights in the same way that duties relate to rights. And Hohfeld's point is this: Law consists as much in relations between non-rights and duties as it consists in relations between rights and duties. In fact, the vast majority of legal relationships actually consist in relations between non-rights and liberties. Relations between rights and duties materialize relatively rarely in comparison to the vast spectrum of social relations, with regard to which there are no legal rules that assign rights or duties to the individuals involved.

So how do relations between non-rights and liberties attain legal significance? They do so when litigation ends with a judicial finding that the law provides no applicable remedy under the circumstances that overrides all applicable defences. In other words, non-rights and liberties materialize in a legally significant way when the claimant or plaintiff fails to make her case. When this happens, the court basically tells the claimant that she has no right

³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERFGE] 198 (Ger.) [hereinafter *Lüth*].

(she has a non-right) to ask the defendant to do or not to do something. The defendant has the liberty to do as he pleases as far as the complaint of the plaintiff is concerned. The important point to note, however, is that this relationship between a plaintiff that has no right and a defendant that has the liberty to act freely with regard to the complaint filed is a legal relationship. It is not qualitatively different from the relations that materialize when a court finds the plaintiff has a right and the defendant has a duty to act in compliance with the plaintiff's right. Law is still very much at issue in the relation between non-rights and liberties. Law is not absent from these relations. Law just appears in the particular but pervasive mode of its presence that is marked by the absence of positive rules that assign rights and duties.⁴

What is the point of discussing the Hohfeldian point yet again, one might well ask.⁵ Not only is it child's play to make the point, as Michelman writes,⁶ it also makes no real headway in any direction for there are evidently as many judges and lawyers that reject the Hohfeldian point as there are ones that endorse it. This much will become clear in the next section when we turn to state action case law in the United States and horizontal effect jurisprudence outside the United States in sections III and IV. In other words, the Hohfeldian point may well be a clever and intellectually delightful ruse that appeals to those who subscribe to an expansive understanding of constitutional law that would extend constitutional protection of the vulnerable as far as conceivably possible. The thinking of those who do this proceeds as follows: All law is in principle subject to constitutional scrutiny. If law is also present in relations between non-rights and liberties, it is present in the form of all conceivable social relationships, which means all social relationships are subject to constitutional scrutiny and protection. But again, what is the point of continuing to make the Hohfeldian point if it is clear by now that some lawyers and some judges simply meet it with flat rejection?

The point of making the Hohfeldian point again in this essay is to interpret the rejection of the Hohfeldian point as an abdication of sovereignty that frustrates—instead of advancing—the goal pursued by this deliberate abdication. This is the main point that this chapter makes in Section V below. Rejecting or endorsing the Hohfeldian point does not only concern a choice between two conceptual stances, neither of which can claim exclusive and conclusive validity, thus leaving the question regarding the reach of law and constitutional law undecided. Rather, it also concerns a deeper choice between two seemingly irreconcilable conceptions of statehood. The Hohfeldian point articulates a strong endorsement of the principle of state sovereignty. It takes to heart the principle that there is just one sovereign that authors the law. It takes to heart the idea that any political power that claims sovereignty can only be taken seriously if it can be seen to effectively pursue the expression of its political will in all walks of civil and social life. A sovereign does not leave matters to contingent or chance social developments. The sovereign responds to all such developments with decisions to make new law or decisions to refrain

⁴ Cf. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 28 (1913). See also Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, for his instructive discussion of Hohfeld's views.

⁵ Especially if one has done it so many times before. Cf. references, *infra* note 47.

⁶ Frank I. Michelman, *W(H)ither the Constitution?*, *supra* note 1, at 1076 (2000).

from making new law. Such is the nature of complete sovereignty. The idea is surely not new. The Romans already knew and accepted the maxim of *tacitus consensu populi*.⁷

Hohfeld did not apply his analysis expressly to the state action doctrine or horizontal effect jurisprudence, but many American scholars can be seen as taking a Hohfeldian approach to the state action problematic.⁸ Stephen Gardbaum's instructive contribution to the state action debate suggests the whole state action doctrine can be recast in terms of the principle that the Supremacy Clause of the United States Constitution binds all judicial action in the United States, irrespective of state laws that may be at variance with the Constitution.⁹ Gardbaum's is another typical Hohfeldian approach to the state action problem which takes all law—not only legislation but also common law and judicial interpretations of common law—as state action that is subject to the Constitution. Gardbaum does not address the point expressly, but one can assume that his line of thinking also subsumes absence of legislation and common law under the law that is bound by the United States Constitution. But these scholarly endorsements of the Hohfeldian point constitute but one camp in American jurisprudence. Another line of scholars and judges simply reject the point. They do not do so because they do not grasp its logical or conceptual force. They do so, we shall see in sections II and III, because they entertain a different conception of the state that resists the concept of full state sovereignty and the idea that the state is the author of all positive law *and* all absences of such positive law.

II. *Vicissitudes of the American State Action Doctrine*

The state action doctrine sprung its source in the following dictum of Justice Bradley in the Civil Rights Cases:

[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by the State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual . . . is simply a private wrong, or a crime of that individual. . . . [But an] individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot

⁷ Cf. HANS KELSEN, HAUPTPROBLEME DER STAATSRICHTSLEHRE 99–101 (1984) (Ger.).

⁸ Cf. JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY 171–72 n.10 (2014) [hereinafter VAN DER WALT, HORIZONTAL EFFECT REVOLUTION], for references to the many American scholars who take a Hohfeldian stance in their state action jurisprudence.

⁹ U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; cf. Stephen Gardbaum, *The Horizontal Effect of Constitutional Rights*, 102 MICH. L. REV. 387, 414–15 (2003).

destroy or injure the right; he will only hold himself amenable to satisfaction or punishment, and amenable therefore to the laws of the State where the wrong acts are committed. Hence, . . . where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights for which the States alone were or could be responsible was the great . . . wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that, in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.¹⁰

The key assertion of this dictum turns on the conceptual construction or definition of individual or private conduct as absolutely incapable of curtailing or violating a Fourteenth Amendment right.¹¹ A state can violate a constitutional right but private individual conduct cannot. The construction derives from a literal interpretation of words contained in the Fourteenth Amendment of the Constitution which stipulates that:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*¹²

At issue in this literal reading of the Fourteenth Amendment is not only the origin of the state action doctrine. Justice Bradley's literal reading of the Fourteenth Amendment also suggests that there are areas of law that do not constitute state action (state authorship), or it suggests that there are areas of social life with regard to which the state has hitherto not made any law. Either some law is not state action, or all law is state action but some individual conduct is completely untouched by law. Both of these interpretations of Justice Bradley's dictum came to mark a dominant line of thinking in American state action adjudication and jurisprudence. But this line of thinking also came to be challenged, if only intermittently, in later Supreme Court decisions. The first significant challenges came from two decisions in the 1940s: *Labor v. Swing* (*Swing*),¹³ decided in 1941, and *Shelley v. Kraemer* (*Shelley*),¹⁴ decided in 1948.

In *Swing* the Supreme Court decided that an Illinois common law rule prohibiting secondary picketing (the picketing of any third party not directly involved as an employer in a dispute between employers and employees) constituted an unconstitutional abridgment of the freedom of expression granted by the Fourteenth Amendment. The decision thus clearly accepted the principle that common law rules constitute state action for purposes of the Fourteenth Amendment.¹⁵ This acceptance that common law rules constitute state action

¹⁰ 109 U.S. 3, 17 (1883).

¹¹ U.S. CONST. amend. XIV.

¹² *Id.* § 1 (emphasis added).

¹³ 312 U.S. 321 (1941)

¹⁴ 334 U.S. 1 (1948).

¹⁵ *Swing*, 312 U.S. 321.

would later find more illustrious endorsement in *New York Times v. Sullivan* (*Sullivan*).¹⁶ Sullivan, a commissioner of the City of Montgomery, brought a civil law libel action against four Alabama clergymen and the New York Times Company for an advertisement run in the *New York Times* on 29 March 1960.¹⁷ The Circuit Court of the County of Montgomery awarded him damages to the amount of \$500,000 on the basis of the common law of Alabama.¹⁸ The Supreme Court of Alabama upheld the judgment on appeal, but the United States Supreme Court overturned it again and dismissed the claim for damages. Justice Brennan found the Alabama libel law on which the claim turned to fall foul of the First and Fourteenth Amendments.¹⁹ The respondent claimed that his action for damages concerned a civil or private matter on which the Federal Constitution has no bearing. Justice Brennan responded as follows:

We may dispose at the outset of [the first ground] asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. [T]he proposition relied on by the State Supreme Court that “The Fourteenth Amendment is directed against State action and not private action” . . . has no application to this case. Although this is a civil lawsuit between private

The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.

Id. at 325–26; Justice Frankfurter’s reference in this dictum to a “judicial organ of state” might point to the possibility that his decision is actually much closer to the one in *Shelley* 334 U.S. 1, *cf. infra* note 21. However, a reading of the whole case suggests that it was the existence of a common law rule and not just the judicial application of the rule that decided the matter for him.

¹⁶ 376 U.S. 254 (1963).

¹⁷ The advertisement in the *New York Times* on which the claim was based, did not mention Sullivan by name, but referred to “loads of police armed with shotguns and tear-gas” that ringed the Alabama State College Campus in order to suppress civil rights protests on the campus. The advertisement also stated, among more allegations, that “the Southern violators have answered Dr. [Martin Luther] King’s peaceful protests with intimidation and violence”, “have arrested him seven times for ‘speeding’, ‘loitering’ and similar ‘offenses’ [and have now] charged him with perjury”. Sullivan claimed that the article implicated the police, not only in the ringing of the campus where they were expressly mentioned, but also in all of the latter actions, and by thus implicating the police, also implicated him as commissioner of Montgomery.

¹⁸ In the trial court judgment, the judge instructed the jury that the statements in the advertisement were ‘libellous per se’ and ‘not privileged’. In terms of the common law of Alabama, he instructed further, injury is implied by the bare fact of the per se libellous publication. Malice, falsity and general damages are presumed and need not be alleged or proved, and punitive damages may be awarded by the jury if they found that the statements were indeed published maliciously and not just negligently or carelessly. The liability of the defendants therefore ultimately only turned on the questions whether the jury found the article to have been published by the defendants and whether the statements were made ‘of and concerning’ the plaintiff. The judge rejected the defendants’ contention that his rulings abridged the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments.

¹⁹ The decision turned on the finding that common law rules that imposed the burden to prove truth and absence of malice on the defendants in a libel claim cannot be reconciled with the robust freedom of expression granted by the First and Fourteenth Amendment when criticism of public officials and personalities is at stake. The constitutional standard, Justice Brennan decided, requires that the claimant carry the burden of proof of falsity and malice. *Cf. Sullivan* 376 U.S. at 297–98.

parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised.²⁰

Sullivan basically put state action “out of business”, claims Michelman. If the Constitution tolerates, neither executive state administration, nor state legislation, nor state common law that falls foul of its guarantees, there is simply no basis left on which a constitutionally-unsound contention can enter a court of law and exit that court triumphantly.

State action had in fact been “put out of business” twice before *Sullivan*. The first time in 1941 by Justice Frankfurter in *Swing*, as shown above, and the second time in 1948 in the even more dramatic judgment of Justice Vinson in *Shelley*.²¹ The disputes in *Shelley* turned on the question whether the court enforcement of two restrictive covenants entered into by private individuals constituted state action that was subject to review in terms of the Fourteenth Amendment of the United States Constitution. At issue were the appeals of two Negro families against the findings of the Supreme Courts of Missouri and Michigan that restrictive covenants between private individuals in the cities of St. Louis and Detroit that prevented Negroes from occupying properties subject to the covenants did not abridge rights protected by the Fourteenth Amendment.²² The respondents in both cases argued that there was no state action involved in the covenants and that the mere enforcement of the covenants by a court of law also does not constitute state action for purposes of the Fourteenth Amendment. The Federal Supreme Court dismissed this argument. Justice Vinson’s opinion for the Court put the matter in no uncertain terms:

²⁰ *Id.* at 265. See Michelman, *The Bill of Rights*, *supra* note 2, at 403 (for a similar quotation of this passage).

²¹ 334 U.S. 1 (1948).

²² The first case concerned the enforcement of a restrictive covenant between owners of property on a section of Labadie Avenue in the city of St. Louis that they will not allow their property to be occupied by people of the “Negro or Mongolian Race” for a period of 50 years. Pursuant to a contract of sale of one of the properties subject to the restrictive covenant, the Shelleys, a “Negro” couple, received the title or deed for the property purchased from the seller in August 1945. In October 1945, other owners of property subject to the covenant sought to obtain an order from the Circuit Court of St. Louis to prevent the Shelleys from occupying the purchased property. The Circuit Court refused to grant the order. The court found that the agreement had never become effective, given the failure of the participants in the covenant to obtain the signatures of all the property owners in the district as the covenant stipulated. The Supreme Court of Missouri overturned the Circuit Court’s decision by finding that the covenant had become effective. By the time it did so, however, the Shelleys had already moved into the house they purchased. They now petitioned the Federal Supreme Court to obtain an order that the restrictive covenant violated the Fourteenth Amendment. The second case concerned an essentially similar set of facts regarding property purchased in the city of Detroit. In this case, the Circuit Court of Wayne County granted an order that the purchasers, one Ferguson and his wife, must vacate the property within 90 days. They appealed to the Supreme Court of Michigan on the ground that they had been denied the rights protected by the Fourteenth Amendment. The Supreme Court dismissed the appeal on the finding that no Fourteenth Amendment rights had been affected by any of the afore-going events.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment.²³

Justice Vinson's opinion proceeded to trace the acceptance that adjudication constitutes state action through a long history of Supreme Court case law. The earliest cases to which the court was referring here included *Virginia v. Rives*²⁴ and *Ex Parte Virginia*²⁵, both of which were decided in 1880, as well as the *Civil Rights Cases* of 1883. With regard to the latter, Justice Vinson observed the following:

In the Civil Rights Cases this Court pointed out that the Amendment makes void "state action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed no less than eighteen times during the course of that opinion.²⁶

Justice Vinson could in fact also have gone back all the way to Chief Justice Marshall's emphatic statement that courts are also bound by written constitutions in *Marbury v. Madison*.²⁷ The consistent acceptance of the Hohfeldian point in the Supreme Court's jurisprudence appears incontestable. Yet, avers Michelman, "something persists in [American] jurisprudence that walks and talks like a state action doctrine with teeth."²⁸ Why is this so?

Justice Vinson was the first to back off from his own opinion in *Shelley*. Five years after his explosive judgment in *Shelley*, Justice Vinson would argue in *Barrows v. Jackson (Barrows)*²⁹ that the principle in *Shelley* only applies when the court's order will be the direct cause of the abridgement of an individual's constitutional rights by enforcing a racially discriminatory covenant against the member of the racial minority targeted by that covenant. It does not apply, he argued, when the court only stands to enforce the covenant between the parties to the covenant. An action for damages filed by one party to the covenant against another is therefore not covered by the rule in *Shelley*.

Chief Justice Vinson's opinion in *Barrows* did not convince the majority of the court and for this reason had no immediate effect. But the reasoning that he employed surely opened the door for or anticipated the majority decision in

²³ *Shelley*, 334 U.S. at 14. It is obvious that *Shelley* could have been decided on the same principle that common law rules constitute state action for purposes of the protection afforded by the Fourteenth Amendment. Henry Friendly suggests it was decided thus, but Frank Michelman contends more convincingly that it was not. Cf. Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1295 (1982), with Michelman, *The Bill of Rights*, *supra* note 2, at 406.

²⁴ 100 U.S. 313 (1880).

²⁵ 100 U.S. 339 (1880).

²⁶ Cf. *Shelley*, 334 U.S. at 14-15 (1948).

²⁷ 5 U.S. 137 (1803) ("confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that all courts, as well as other departments, are bound by that instrument."). *Id.* at 180 (emphasis Justice Marshall, C.J.).

²⁸ Michelman, *The Bill of Rights*, *supra* note 2, at 404.

²⁹ 346 U.S. 249 (1953).

*Black v. Cutter Laboratories (Cutter Laboratories)*³⁰ in which the Supreme Court enforced a collective bargaining agreement that held Communist Party membership as a just cause for dismissal. The majority held that the decision turned on nothing but the interpretation of a contract between private parties and thus rendered constitutional principles irrelevant.³¹ Chief-Justice Warren and Justices Douglas and Black tried in vain to uphold the rule in *Shelley*.³²

Justice Vinson's turn in *Barrows* and the turn of the Supreme Court in *Cutter Laboratories* could not have pivoted on a failure to grasp the Hohfeldian point. It turned on willful decisions to reject it and to ignore a long history of Supreme Court decisions in which it was incontestably accepted, a history that Justice Vinson himself traced in detail in *Shelley*. The Supreme Court's decision to ignore Hohfeld is articulated in the clearest of terms in Chief Justice Rehnquist's opinion in *Flagg Brothers, Inc. v. Brooks*.³³ As Michelman puts it, Justice Rehnquist simply "insisted . . . that American constitutional-legal doctrine must pretend not to notice it".³⁴ According to Chief Justice Rehnquist "[i]t would intolerably broaden . . . the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action'".³⁵

The most remarkable aspect of Chief Justice Rehnquist's articulation of the matter is the way it even excludes *statutory* private law from the scope of state action. This exclusion of statutory private law from state action either implies that a significant percentage of the sovereign's legislation is simply not subject to constitutional scrutiny, or it implies that a significant percentage of American legislation is not authored by the sovereign. It either implies a considerable suspension of basic principles of constitutionalism and the rule of law, or it implies a considerable denial of sovereignty.

What happens when one admits to vast enclaves of human co-existence within state boundaries that simply fall outside the reach of state sovereignty? One turns the state into an archipelago of sovereign islands within a vast wilderness of lawlessness. One draws the *Blood Meridian* just outside one's doorstep.³⁶ In fact, one fails to draw the *Blood Meridian*, for the wilderness ultimately does not respect doorsteps. To the contrary, one is likely to find its darkest caves inside doorsteps, as the case of *DeShaney v. Winnebago County Department of Social Services* makes abundantly clear (*DeShaney*).³⁷ *DeShaney* surely represents one of the American people's darkest disavowals of sovereignty. Officials of the Winnebago County Department Social Services Department knew what was going on in the house where the DeShaneys lived. They knew or should have known in view of the evidence available to them that Randy DeShaney was maiming his son Joshua DeShaney for life. They stood by and did nothing until it was too late. Instead of admitting to a failure of sovereignty, a failure of state sovereignty that dismally failed the Fourteenth

³⁰ 351 U.S. 292 (1956).

³¹ *Id.* at 299.

³² *Id.* at 300, 302.

³³ 436 U.S. 149 (1978).

³⁴ Michelman, *W(H)ither the Constitution?*, *supra* note 1, at 1076.

³⁵ *Flagg Brothers*, 436 U.S. at 160 n.10.

³⁶ CORMAC MCCARTHY, *THE BLOOD MERIDIAN* (1990).

³⁷ 489 U.S. 189 (1989).

Amendment of the Federal Constitution, the Supreme Court preferred to read the *DeShaney* case in terms of a disavowal of sovereignty. Joshua DeShaney would have been entitled to tort compensation from the state had the people of Wisconsin passed legislation that provided for tort action in response to the state's failure to act. But Wisconsin had not passed such legislation, averred Justice Rehnquist, and that is the end of the story.³⁸

Thus did Justice Rehnquist erase the *Blood Meridian*. Thus did he turn America into the American frontier. Thus did he ensure that America would be, at least as far as its legal consciousness is concerned,³⁹ no country for the old, the young, or for anyone.⁴⁰

III. Vicissitudes of Horizontal Effect in Canadian, South African and German Jurisprudence

The United States Supreme Court stabilized the borders of the American Republic with its decisions in *Swing*, *Shelley* and *Sullivan*. These decisions defined a territory in which American law and the American Constitution governed, at least in principle, in no uncertain terms. This, however, was not how the Supreme Court of Canada would see the matter when it laid down its horizontal-application jurisprudence in *RWDSU v. Dolphin Delivery Ltd (Dolphin Delivery)*,⁴¹ taking the exact opposite position to the one taken by Justice Frankfurter in *Swing*.⁴²

Dolphin Delivery also turned on the question whether an injunction against secondary picketing obtained under Canadian common law constituted an unconstitutional abridgment of the right to freedom of expression guaranteed

³⁸ *Id.*

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

Id. at 202–03.

³⁹ One need not mention its infamous laws on the possession of firearms.

⁴⁰ *Cf.* Cormac McCarthy, *No Country for Old Men* (2005). One can also say this is the country in which Senator Rance Stoddard gets shot instead of Liberty Valance. *Cf.* John Ford, *THE MAN WHO SHOT LIBERTY VALANCE* (Paramount Pictures 1962).

⁴¹ [1986] 2 S.C.R. 573 (Can.).

⁴² *Labor v. Swing*, 312 U.S. 321 (1941).

by section 2(b) of the Canadian Charter of Rights and Freedoms.⁴³ Section 1 of the Charter makes provision for reasonable limitations of the Charter rights. The respondent argued that the common law rule constituted such a reasonable limitation of the right to freedom of expression granted by section 2(b). The appellant argued that the limitation was not reasonable. The Supreme Court of Canada finally dismissed the injunction of secondary picketing granted by the trial court. The Court not only did so on the ground that the common law rule against secondary picketing constituted a reasonable limitation of the right to freedom of expression, but also on the ground that the Charter did not apply to common law disputes in which the state was not a party. It is the latter ground that is of concern in what follows.

Justice McIntyre delivered the judgment for the majority of the court. His finding that the Charter does not apply to common law disputes in which the state is not a party turned on a peculiar limitation of the reasoning in *Swing* and *Sullivan* and an implied but fervent rejection of the reasoning in *Shelley*. Justice McIntyre's judgment commenced with a firm recognition that section 52(1) of the Charter nullifies all law that is inconsistent with the provisions contained in the Charter.⁴⁴ This recognition is fully consistent with the recognition that the common law constitutes state action in *Swing* and *Sullivan*, but it did not last long. Justice McIntyre almost immediately proceeded to retreat from this broad acceptance that all common law is bound by the Constitution by asserting, in view of sections 32(a) and 32(b) of the *Charter*, that the Constitution only binds common law that applies to governmental action. This is how he put it:

In this way the *Charter* will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. . . . The element of governmental intervention necessary to make the *Charter* applicable in an otherwise private

⁴³ *Id.* The appellant, a workers union (Retail, Wholesale and Department Store Union) acted as bargaining agent for the locked out employees of Purolator, an Ontario based courier. The respondent made local deliveries for Purolator in its area, at first directly and later through Supercourier, a company connected to Purolator. Appellant had approached the British Columbia Labour Relations Board for a declaration that the Respondent and Supercourier were allies of Purolator. The declaration would have enabled the appellant to lawfully picket the respondent's business premises. The Board declined to hear the application for want of jurisdiction. The lawfulness of the picketing now had to be determined on the basis of the Canadian common law, given the silence of the Canada Labour Code, R.S.C. 1985, c. L-2 on the matter. Under the common law, the matter turned on the rule that secondary picketing (the picketing of any third party not directly involved as an employer in a dispute between employers and employees) was unlawful. The respondent had obtained an injunction *quia timet* on the basis of this rule and the appeal against the granting of the injunction now turned on the claim that the rule constituted an unconstitutional infringement of the right to freedom of expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

⁴⁴ *Dolphin Delivery*, [1986] 2 S.C.R., *supra* note 41.

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit.*"

Id. at para. 25 (emphasis added).

action is difficult to define. We have concluded that the *Charter* applies to the common law but not between private parties.⁴⁵

Cast in terms of *Swing* and *Sullivan*, Justice McIntyre's move essentially amounts to saying this: The fact that the common law constitutes state action is not enough for the Constitution to apply; *further* state action is required for the Constitution to apply. *Dolphin* can in other words be argued to have formulated a *double state action test* for constitutional application in Canada. Justice McIntyre found it necessary to make sure that *Shelley* did not find a way into Canada. He did not refer to *Shelley*, only to the "troublesome" view of Professor Hogg. Hogg wrote in the second edition of his *Constitutional Law of Canada*:

The fact that a court order is governmental action means that the Charter will apply to a purely private arrangement, such as a contract or proprietary interest, but only to the extent that the Charter will preclude judicial enforcement of any arrangement in derogation of a guaranteed right. In a sense, the common law authorizes any private action that is not prohibited by a positive rule of law. If the Charter applied to the common law in that attenuated sense, it would apply to all private activity. But it seems more reasonable to say that the common law offends the Charter only when it crystallizes into a rule that can be enforced by the courts. Then, if an enforcement order would infringe a Charter right, the Charter will apply to preclude the order, and, by necessary implication, to modify the common law rule.⁴⁶

⁴⁵ *Id.* at paras. 34-35.

⁴⁶ *Id.* para. 35, *quoting* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA VOL. II 678 (5th ed. 2007).

Again, Justice McIntyre found this view “troublesome.” As he put it:

I find the position thus adopted troublesome . . . [I]t should not be accepted as an approach to this problem . . . To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would . . . widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. [T]his approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the *Charter* applies.⁴⁷

As Hogg clearly notes in his response to the decision in *Dolphin Delivery*, Justice McIntyre was exorcising the specter of *Shelley* in this passage. Having invented this doubly fortified state action jurisprudence—*state action in the form of common law is really only state action when corroborated by further state action*, and *state action in the form of law is only state action when the further state action required to make it state action is not judicial action*—the decision in *Dolphin* that the Charter does not apply to the dispute in the case could not have come as a surprise. And thus the endless American frontier—the great Wild West—swept into the vast Canadian prairielands.

And then it crossed the Atlantic and swept south, far south. One would have thought that the freshly liberated *Republic* of South Africa, with its liberation movement government and a team of constitutional judges as faithful to the new democratic Constitution as one might wish for, would opt forcefully and unequivocally for a constitutional jurisprudence that would consolidate and strengthen the civil sovereignty for which so many had fought so hard and for which so many had come undone. The invocation of Eliot is deliberate here. One would have thought that no chances would be taken with the survival and return of the wastelands of the past. But this was not to be. In its landmark judgment on the horizontal effect of the constitutional rights contained in chapter 3 of the Constitution of South Africa of 1993, *Du Plessis v. De Klerk* (*Du Plessis*),⁴⁸ the South African Constitutional Court took the clearest stance imaginable in favor of *Dolphin Delivery* and against *Shelley* and, by obvious implication, also against *Swing* and *Sullivan*. And as if *Dolphin*’s doubly fortified state action jurisprudence was not sufficient for purposes of keeping *Shelley*, *Swing* and *Sullivan* out, the South African Constitutional Court would further invoke a serious misreading of the significantly sovereignty-friendly and *Shelley*-friendly jurisprudence that the Federal German Constitutional Court articulated in its now famous *Lüth* decision in 1958. But this was not all that was remarkable about the *Du Plessis* case. As if determined to pile irony upon irony, the judge who most vociferously announced the constitutional sovereignty of the fledgling republic, Justice Kriegler, was also the one who most vociferously disavowed this sovereignty.⁴⁹

⁴⁷ *Dolphin Delivery*, [1986] 2 S.C.R. 573, para. 36.

⁴⁸ 1996 (5) BCLR 658 (CC) (S. Afr.).

⁴⁹ See VAN DER WALT, HORIZONTAL EFFECT REVOLUTION, *supra* note 8, at (2014) 90–92, 117–19, 160, 311–12, for an extensive engagement with Justice Kriegler’s “dissenting” opinion in *Du Plessis*.

Space constraints preclude detailed engagement with the remarkable *Du Plessis* judgment and its most remarkable dissenting and concurrent opinions.⁵⁰ Suffice it to note the clear endorsement of the insistence in *Dolphin Delivery* that constitutional rights only apply to common law disputes when the state is directly involved in the dispute and not only as author of applicable common law rules.⁵¹ And suffice it to note its clear rejection of *Shelley*. That judges act on behalf of or *as* the state is a fact that none of the judges sitting in the *Du Plessis* case would deny in the abstract, but those who concurred in the majority opinion all endorsed the *Dolphin Delivery* rejection of *Shelley*: However obvious it may be that regular judicial action constitutes the third branch of sovereign government, it simply does not count as state action for purposes of activating constitutional scrutiny. To state the matter properly in terms of the key clause of the 1993 Constitution on which the decision was based, the judiciary was not included in Article 7(1) which defined the scope of state action to which the Constitution applies. Article 7(1), the majority opinion in *Du Plessis* asserted, was devised in this way exactly for purposes of negating the rule in *Shelley*.⁵²

Probably sensing and addressing the significant loss of sovereignty evident in this reading of Article 7(1), the South African Constitutional Assembly revised the application provisions in Article 7(1) of the Interim Constitution incisively when they drafted Article 8(1) of the 1996 Constitution. Article 8(1) now expressly listed the judiciary among the organs of state that are subject to constitutional scrutiny.⁵³ And the Constitutional Assembly went even further. Almost as if to make double sure that the forfeiture of sovereignty performed in *Du Plessis* would not happen again, it stipulated in Article 8(2) that the Constitution also binds private individuals when appropriate.⁵⁴ The Constitutional Court, however, persisted with the application jurisprudence developed in *Du Plessis* when it commenced to apply the 1996 Constitution. It did so by constructing an intricate semantic relation between sections 8(1), 8(2) and 8(3) to which we shall return below. Suffice it to say that it persisted with the abdication of sovereignty performed in *Du Plessis* until it finally, by implication, re-appropriated this forfeited sovereignty some years later with its decision in the case of *Carmichele v. Minister of Safety and Security and Another (Carmichele)*.⁵⁵

In the end, the majority judgment in *Du Plessis* opted for the so-called indirect horizontal effect or *mittelbare Drittwirkung* method developed in the *Lüth* judgment. The indirect method of constitutional application has become an

⁵⁰ I have discussed the *Du Plessis* case and South African horizontal effect jurisprudence in several other articles. See van der Walt, *Progressive Indirect Horizontal Effect of the Bill of Rights: Towards a Co-operative Relation Between Common-Law and Constitutional Jurisprudence*, 17 S. AFR. J. HUM. RTS. 341 (2001); van der Walt, *Horizontal Effect of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga*, 19 S. AFR. J. HUM. RTS. 517 (2003).

⁵¹ Cf. *Du Plessis*, 1996 (5) BCLR, *supra* note 48, at para. 49b.

⁵² S. AFR. CONST., 1996. Article 7(1) states: "This chapter [containing the Bill of Rights] shall bind all legislative and executive organs of state at all levels of government." *Id.*

⁵³ *Id.* art. 8(1), which reads: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

⁵⁴ *Id.* art. 8(2), which reads: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

⁵⁵ *Carmichele v. Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (S. Afr.).

essential ingredient of contemporary legal consciousness.⁵⁶ It turns on the principle that constitutional protections do not apply to private disputes directly. Litigants can accordingly not rely on constitutional rights for the resolution of private disputes; they must rely on private law remedies. Constitutional rights nevertheless remain relevant to private law litigation because the judicial application of private law must remain reconcilable with constitutional values and ideally promote these values. Thus do constitutional values *radiate* through the private law system, as the German Constitutional Court put the matter in *Lüth*.⁵⁷

The method applied as articulated in *Lüth* is problematic in many respects, as has been pointed out especially well in German scholarship over the years. Suffice it to state briefly only the most problematic aspect of the indirect method: It rarely remains a matter of pure method. It invariably addresses questions of constitutional substance (questions as to *whether* the Constitution applies or not) as mere questions of form (questions as to *how* the Constitution must be applied). The *Lüth* decision made it abundantly clear that the judiciary is one of the organs of state sovereignty. It is therefore as much conditioned (burdened would be too weak an expression) by the constitutional duty to protect the constitutional rights of citizens as the executive and legislative powers of the state are.⁵⁸ The *Lüth* judgment also corroborated its unambiguous avowal of state and judicial sovereignty—and its unflinchingly positive answer to the *whether* question—with a remarkable concluding passage that would become nothing less than a formulaic maxim that it would employ consistently in future adjudication. The conclusion in *Lüth* reads as follows:

The decision of the Regional Court failed to recognise the significance which the right to freedom of expression enjoys also in those cases where it comes into conflict with private interests. As such it fell short of constitutional criteria and must be deemed to have violated the fundamental right which the plaintiff enjoys in terms of article 5 I.⁵⁹

A clearer restatement of the rule in *Shelley* cannot be imagined: “The decision of the Regional Court . . . must be deemed to have violated the fundamental right [of] the plaintiff.” Again, the German Federal Constitutional Court went on to use this formula repeatedly in future decisions.⁶⁰ Considering its misgivings vis-à-vis *Shelley*, the South African Constitutional Court had good

⁵⁶ Compare, for example, the essays in *Human Rights in Private Law* (Daniel Friedman & Daphne Barak-Erez eds., 2001).

⁵⁷ *Lüth*, *supra* note 3, at 205–06.

⁵⁸ *Id.* at 206–07.

⁵⁹ *Id.* at 230:

Das Bundesverfassungsgericht ist auf Grund dieser Erwägungen zu der Überzeugung gelangt, daß das Landgericht bei seiner Beurteilung des Verhaltens des Beschwerdeführers die besondere Bedeutung verkannt hat, die dem Grundrecht auf freie Meinungsäußerung auch dort zukommt, wo es mit privaten Interessen anderer in Konflikt tritt. Das Urteil des Landgerichts beruht auf diesem Verfehlen grundrechtlicher Maßstäbe *und verletzt so das Grundrecht des Beschwerdeführers* aus Art 5 Abs 1 Satz 1 GG. (Emphasis added).

⁶⁰ See 24 BVerfG 278; 25 BVerfG 256; 30 BVerfG 173; 34 BVerfG 35 BVerfG 202; 42 BVerfG 142; 46 BVerfG 325; 54 BVerfG 129; 54 BVerfG 148; 60 BVerfG 234; 61 BVerfG 1; 62 BVerfG 230; 66 BVerfG 116; 73 BVerfG 261 (Ger.).

reason to be much more apprehensive of the jurisprudence laid down in *Lüth* than it was. But it was enamored with the indirect method in *Lüth* and proceeded to sever this method from the clear avowals of judicial state sovereignty and the clear endorsements of *Shelley* that are written all over *Lüth*. It basically ignored these avowals of sovereignty and endorsements of *Shelley* in *Lüth*. That is how it managed to turn the question of method into a question of sovereignty. No longer founded and anchored by the clear substantive avowal of sovereignty in *Lüth*, the indirect method itself commenced to stand in for the sovereignty question in *Du Plessis*. The indirect method became a device for determining the question *whether*—and not just *how*—the Constitution applied to a private dispute.

The debate between proponents of direct and indirect horizontal effect was fuelled from its very beginnings by the contentious way the indirect approach bypassed and absorbed the question of sovereignty. Or, to be more precise, it was fuelled by the perception that the indirect approach bypassed the question of sovereignty by absorbing it. Had the indirect approach from the beginning been an “innocent” matter of method; had it from the beginning recognized that the Constitution applies self-evidently to all possible instances of social conflict and discontent because the state self-evidently takes responsibility for all such conflict and discontent; and had it further only added to this that it is probably better first to cast discontent between private individuals in standard terms of private law before one starts scrutinizing the impact of the Constitution on that discontent, the debate between proponents of the direct and indirect approach to horizontal effect would have been much less charged and probably rather short-lived. But proponents of the direct approach sensed that the proponents of the indirect approach were up to something more. And they were right. It was clear from Günter Dürig’s first contributions to the debate that the whole brouhaha about method was informed by one thing and one thing only, namely, the endeavor to reserve an a priori sphere of private freedom that is untouched or “less touched” by the sovereignty of the Constitution.⁶¹ At issue in the indirect approach is a surreptitious resistance to sovereignty among some legal theorists and a surreptitious inclination among some judges to forfeit sovereignty.

Constitutional clauses undoubtedly do not affect private individuals and public officials in exactly the same way. This difference between the Constitution’s impact on private individuals and public officials is indeed one of the key questions that the *how* question, the question of method, should be addressing. But the *whether* question became a vehicle for evading the *how* question. Simplistic and surreptitious *whether* questions should not stand in for complex *how* questions. Surreptitious replacements of *how* questions with *whether* questions either amount to outright abdications of sovereignty or obfuscated avowals of sovereignty that fail to take sovereign responsibility as constitutional democratic sovereigns would: Openly, honestly and transparently. They amount to abdications of sovereignty when the surreptitious response is negative (i.e., the Constitution does not apply to the private sphere). They amount to obfuscations of sovereignty and failures to own up to sovereignty

⁶¹ Günter Dürig, *Grundrechte und Zivilrechtsprechung*, in VOM BONNER GRUNDGESETZ ZUR GESAMTDEUTSCHEN VERFASSUNG. FESTSCHRIFT ZUM 75. GEBURTSTAG VON HANS NAWIASKY 177–82 (Theodor Maunz ed., 1956) (Ger.).

when the surreptitious response is positive (i.e., the Constitution does apply to the private sphere, but only by influencing private law in some way or another). It is a good question which of these two responses one should dread most.

The replacement of *how* with *whether* questions and the obfuscation of sovereignty concomitant to it continued to dominate South African constitutional jurisprudence after *Du Plessis*, as the judgment in *Khumalo v. Holomisa* (*Khumalo*)⁶² makes abundantly clear. In the hope of moving the court to turn the defendant's burden of disproving negligence in defamation claims against the press (the current position in South Africa⁶³) into the claimant's burden of proving malicious intent (the position in *Sullivan*), the defendants requested the court to apply the constitutional protection of freedom of speech directly to the case as Article 8(2) requires and not in terms of the development of the common law that Article 8(3) requires. Dismissing this request, Justice O' Regan surreptitiously disavowed the direct application of the Constitution to the case that she herself had just affirmed in a previous paragraph of her judgment.⁶⁴ She effectively performed this disavowal by claiming that Article 8(3) would be rendered meaningless if Article 8(2) were taken to allow direct resort to constitutional rights in private law disputes.

Some might claim that there is nothing wrong with and nothing disavowing about this argument. However, the argument turns on a crucial misreading and it is this misreading that allows for the disavowal of horizontal effect and of sovereignty at issue here. Article 8(3) would indeed be rendered *pro non-scripto* if Article 8(2) suggested constitutional rights could be invoked directly in private litigation. But there is nothing in Article 8(2) that suggests this. It only stipulates that the rights in Chapter Two apply to private legal subjects and says nothing about how this application must be pleaded by litigants or articulated by courts. Article 8(3)—which can indeed be construed as dealing with (and *only* with) the question of how horizontal effect must be pleaded and articulated by litigants and courts—can therefore not affect the direct horizontal effect stipulated in Article 8(2). It only called for a *method*. It only called for the undeniable direct application called for under Article 8(2) to be processed *via* the regular discourse of private law.

This, however, is not quite how Justice O' Regan approached the matter. She proceeded as if the requirement to process the claim and defence through private law affected the substantive question regarding the constitutionally required burden of proof significantly. A clear avowal of the direct horizontal effect stipulated in Article 8(2) and a clear avowal of the unambiguous affirmation of constitutional sovereignty thus contained in 8(2) would have made it abundantly clear to the defendants that Article 8(2) affords them no advantage that Article 8(3) takes away from them. It would have made clear that Article 8(2) does not offer a stronger defence than Article 8(3) offers. But Justice O' Regan did not do this. She preferred to leave the spurious impression hanging that the method of application prescribed in Article 8(3) restricts the substance of application prescribed by Article 8(2); that is, that the development of the common law in accordance with Article 8(3) offers some shelter against the sovereign reach of the Constitution that Article 8(2) does not provide.

⁶² *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) (S. Afr.).

⁶³ *National Media v. Bogoshi* 1998 (4) SA 1196 (SCA) (S. Afr.).

⁶⁴ *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) at para. 30–32 (S. Afr.).

That this shelter does not exist was later conceded by the Constitutional Court's judgment in *Carmichele v. Minister of Safety and Security*. The concession came in the form of the recognition that Articles 8(3) and 39(2) require constitutional scrutiny of all private law causes of action. *Carmichele* is the South African equivalent of *Swing* and *Sullivan*. The decision in *Carmichele* effectively recognized that any private law cause of action that provided insufficient protection of constitutional rights undoubtedly falls foul of those rights. This means that it ultimately cannot make any difference whether one processes litigation in the language of private law or constitutional law.

The decision in *Carmichele* effectively confirms the substantive reality of direct horizontal effect. It effectively confirms the reality that an option to process litigation either in terms of Article 8(2) or 8(3), had it existed, could never have had any impact on the substantive outcome of the litigation, as the defendants claimed in *Khumalo*. By failing to tell them so clearly, Justice O'Regan avoided the express avowal of the sovereign reach of the South African Constitution embodied in Articles 8(1) and 8(2). This avowal of constitutional sovereignty can now be distilled from close readings of the *Carmichele* decision,⁶⁵ but the South African judiciary has still not developed clear jurisprudence on this point. This is remarkable when one considers the actuality that the question of horizontal effect has enjoyed for such a long time. The horizontal effect question enjoyed constant attention in South Africa ever since the enactment of the 1993 Constitution. Against this background, the *implied* affirmation of constitutional sovereignty in *Carmichele* is at best a surreptitious or obfuscated affirmation of sovereignty.

IV. Self-defeating Abdications of Sovereignty

In his dissent in *Du Plessis*, Justice Kriegler believed that he was proposing "direct horizontal effect" jurisprudence for South Africa that differed significantly from the "indirect horizontal effect" jurisprudence for which the majority opted.⁶⁶ This was not really the case, as I show elsewhere, but let us nevertheless look at one of the crucial statements with which he sought to justify his "direct horizontal" approach. This "direct horizontal approach", he argued, "is a far cry from the spectre of the state placing its hand on private relationships."⁶⁷ Justice Kriegler was evidently bothered by the implications of a strong avowal of sovereignty that are evident in endorsements of "direct horizontal effect." He was, as Matthias Kumm puts it, "afraid of the total constitution" and suspected that there might be something like a totalitarian state lurking in or behind it.

The perception that the strong avowal of sovereignty evident in the endorsement of direct horizontal effect is irreconcilable with concerns with liberty may well also be the source of the notorious conceptual difficulties

⁶⁵ Cf. VAN DER WALT, HORIZONTAL EFFECT REVOLUTION, *supra* note 8.

⁶⁶ *Du Plessis v. De Klerk* 1996 (5) BCLR 658 (CC) at 720 D-I (Kriegler, J., dissenting) (S. Afr.).

⁶⁷ *Id.* at 720 D-I. It should be noted again here that the majority judgment in *Du Plessis* did not literally present itself as a stance in favour of indirect horizontality, nor did Justice Kriegler present his position as a stance in favour of direct horizontality. Strictly speaking, the former simply rejected horizontal effect and the latter endorsed it. However, a close reading of both opinions shows that the majority had indirect horizontal effect in mind whereas Justice Kriegler had a kind of direct horizontality in mind—even though he too ended up proposing a kind of indirect horizontality in a rather self-contradictory way.

associated with the state action doctrine. This is indeed how Louis Seidman sees the matter in a most instructive 1993 article.⁶⁸ Seidman's basic question is whether Americans lawyers should not simply accept the Hohfeldian point to straighten out the conceptual problems that attach to the state action doctrine. As he puts it: "Why not simply concede that state action is always present in some form and move directly to an analysis of whether the state action is constitutionally permissible?"⁶⁹ And he responds as follows:

In light of the confusion produced by the state action inquiry, this approach is certainly attractive. Unfortunately, however, it only shifts the problem without really solving it, because something like the state action doctrine—together with all the uncertainty and incoherence that accompanies it—is built into how we think about constitutional rights.⁷⁰

And how is it that Americans think about constitutional rights, according to Seidman? They think of it, on the one hand, claims Seidman, in terms of legitimate sovereign pursuits of ideals of social justice—such as the New Deal revolution—to which we subscribe unwaveringly. But they also want "to embrace," on the other hand, "a concept of a private sphere because we know that it preserves a space for individual flourishing that the state may otherwise destroy."⁷¹ If Seidman is right, a commitment to constitutional rights is much like being lethally allergic to oxygen. Constitutional rights depend on strong sovereignty and are fatally threatened by strong sovereignty. This would surely explain the conundrum with which Justice Kriegler's dissent in *Du Plessis* leaves us. If state action and horizontal effect jurisprudence is going to make any headway out of this conundrum, it will have to come forth with an articulation of constitutional rights that does not fatally pitch constitutional sovereignty and constitutional freedoms against one another, but rather understands them as mutually sustaining one another—that is, as reinforcing one another. This is where horizontal effect and state action theory would need to pick up the debate if it is to make any significant progress.⁷²

⁶⁸ Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 397 (1993).

⁶⁹ *Id.* at 392. This is the question asked by all the authors cited, *supra* note 8.

⁷⁰ Seidman, *supra* note 68, at 392-93.

⁷¹ *Id.* at 401.

⁷² See further VAN DER WALT, HORIZONTAL EFFECT REVOLUTION, *supra* note 8 (where I believe I have taken some first steps in this regard).