AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 6: Civil War/Reconstruction – Federalism/The Status of Southern States During Reconstruction

**Texas v. White, 74 U.S. 700 (1869)**

The federal government in 1851, as part of a settlement over state boundaries, issued to Texas $5 million in government bonds. The bonds paid 5 percent interest and could be redeemed for their face value after December 31, 1864. In an effort to raise revenue during the Civil War, the Texas legislature in 1862 directed that all the remaining bonds be sold. George White in 1865 purchased $210,000 worth of bonds from the Confederate State of Texas. After the war, the provisional and Reconstruction governments of Texas renounced the bond sale as part of an illegal conspiracy to overthrow the federal government. In February 1867, Texas asked the U.S. Supreme Court for an injunction prohibiting the United States from redeeming or paying interest on the Texas indemnity bonds sold by the Texas legislature during the Civil War. Texas argued that, as secession was null and void, all acts performed by the Confederate state of Texas, including the bond sales, were also null and void.

*Texas v. White* presented several difficulties for the Supreme Court. The first was jurisdictional, whether the Reconstruction government in Texas was a “state” that could initiate a lawsuit directly in the Supreme Court. Simply deciding whether the Supreme Court could hear the case seemingly required the justices to rule on the legal status and constitutionality of the Reconstruction governments. With congressional Reconstruction already well under way and the impeachment of Andrew Johnson still a fresh memory, the Court was ill positioned to regard the legitimacy of the Reconstruction governments as an open question. Nevertheless, how to explain their status under the Constitution was hardly clear.

The merits of the case were no easier than the jurisdictional issue. *Texas v. White* raised the classic legal problem of regime change: What was the status of actions taken by the ancien regime after the revolution? What was the legal status of the secessionist governments during the Civil War? Were any actions valid? If the old government had disposed of public property, whether for good, bad, or corrupt reasons, did the new government have to respect those arrangements?

On the one hand, something was wrong with the idea that the U.S. government was obliged to pay those who had financed the Southern “rebellion.” On the other hand, there was long-term value in stabilizing property rights and not subjecting the legitimacy of a government to judicial scrutiny. If the bond sales of the “illegal” government were open to question, what about other routine acts of that government, such as granting marriage licenses or executing wills?

The Supreme Court in *Texas v. White* granted the injunction prohibiting the federal government from paying bondholders who purchased from Texas during the Civil War. Chief Justice Salmon Chase’s majority opinion declared that Texas was a state entitled to bring a lawsuit in federal courts and that all state legislative actions from 1861 to 1865 intended to facilitate secession and the war effort were void. All the justices were clear that in 1869 there was only one right answer to the question of the legitimacy of secession: The Union was “indissoluble” and “perpetual.” Chase wrote that the United States was an “indestructible Union, composed of indestructible States.” The court was otherwise divided 5–3, even on issues of style. Polk’s appointee Justice Robert Grier, writing in dissent, kept the old habits. He referred to the “United States” as a plural noun. Lincoln’s appointee, Chief Justice Salmon Chase, adopted the new style. His nation was no longer “these United States,” but “the United States.”

CHIEF JUSTICE CHASE delivered the opinion of the Court.

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. . . It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

. . .

In the Constitution the term state most frequently expresses the combined idea . . . of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

. . .

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to “be perpetual.” And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained “to form a more perfect Union.” It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. . . . [I]t may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. . . .

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. . . . If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

. . .

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. . . . All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

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In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

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Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. . . .

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The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. . . .

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. . . The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence.

. . .

The legislature of Texas, at the time of the [sale of the bonds], constituted one of the departments of a State government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And, yet, it is an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

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[The agency that sold the bonds to White] was organized not for the defence of the State against a foreign invasion or for its protection against domestic violence, within the meaning of these words as used in the National Constitution, but for the purpose, under the name of defence, of levying war against the United States. This purpose was undoubtedly unlawful, for the acts which it contemplated are, within the express definition of the Constitution, treasonable.

. . .

It follows that the title of the State was not divested by the act of the insurgent government in entering into this contract.

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On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

JUSTICE GRIER, dissenting.

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The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. . . .

. . .

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a “rebel State,” and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the “military authorities of the United States.”

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State’s being in the Union; Dakota is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

. . . I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court.

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. . . The contest now is between the State of Texas and her own citizens. She seeks to annul a contract with the respondents, based on the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion. . . . She now sets up the plea of insanity, and asks the court to treat all her acts made during the disease as void.

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. . . She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions, that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be “an organized political body,” exercising all the powers and functions of an independent sovereign State. . . .

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JUSTICE SWAYNE, with whom JUSTICE MILLER joins, dissenting.

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

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