VIRGINIA LAW REVIEW ONLINE

VOLUME 103 DECEMBER 2017 72–93

ESSAY

THE RULE OF RECOGNITION IN RECONSTRUCTION: A REVIEW OF *SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS*, BY CYNTHIA NICOLETTI

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INTRODUCTION

In this book,[1] Professor Cynthia Nicoletti demonstrates, through an examination of the historical record that leaves no stone unturned, that secession remained an open question after the Civil War. Victory in the Civil War had established *de facto* Union authority over the former Confederate states, and had made the illegality of secession a foregone conclusion, at least in the eyes of almost all observers today.[2] Perceptions differed at the time, however, over the legal implications of military victory, and many prominent politicians, lawyers, and judges could not figure out how to translate *de facto* Union authority into the *de jure* illegality of secession.[3] Legal theory at the time did not have the resources to absorb the implications of "trial by battle" as a necessary element of the rule of law.

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[1] Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis (2017).

[2] See id. at 3 & n.7.

[3] Id. at 84–120 (discussing the Civil War as a trial by battle).

Nicoletti recounts all this in a dramatic account of the treason prosecution of Confederate President Jefferson Davis that proceeds simultaneously at two extremes: practical tactics in litigation and high principles of constitutional law. Delay, deception, and encoded communications with his client formed the core of Charles O'Conor's strategy in defending Davis. Nicoletti brings O'Conor back to life as one of the leading lawyers of his generation, who nevertheless held irredeemably racist and secessionist views.

These views drew him to the defense of Davis, which he managed brilliantly, and, because of concerns about leaks to the prosecution, executed almost single-handedly.[4] Putting O'Conor's reactionary politics to one side, his success in preventing the trial and conviction of the last leading Confederate to be apprehended by Union forces deserves grudging admiration for his skills as an advocate.

O'Conor did not lack for worthy opponents in the Davis litigation. William Evarts and Richard Henry Dana, among other leading attorneys, handled the prosecution and the political negotiations that attended the prosecution, such as the crucial decision to try Davis before the federal court in Richmond instead of before a military commission.[5] Issues such as those led directly to a multitude of constitutional questions, from technical questions about the proper venue for Davis's trial to the fundamental question of the legality of secession.

Evarts and Dana were up to the task of addressing these momentous issues—Dana had argued *The Prize Cases*,[6] which also concerned the status of the Confederate states during the Civil War—but they were trapped by the prospect that a jury in Richmond would acquit Davis on the ground, avowed or not, that he did not commit treason because secession was legal. They feared a jury would find Davis could not have committed treason against the United States because he did not "owe allegiance" to the United States after his home state, Mississippi, seceded from the Union.

At the level of constitutional principle, Nicoletti engages with the dilemma the lawyers faced in attempting to reconcile the rule of law with the verdict of the Civil War. Modern lawyers and legal theorists

[4] Id. at 69.

[5] Id. at 39–49, 225–29.

[6] 67 U.S. 635, 650 (1862).

do not find this dilemma as intense as their predecessors in Reconstruction did. It might just be that the distance of time has foreshortened our view, collapsing the years of constitutional uncertainty between General Robert E. Lee's surrender at Appomattox Courthouse and the Supreme Court's pronouncement in *Texas v. White* that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[7] The resolution of the great question of secession through "trial by battle" seems to amount to simple, unproblematic realism today. Nicoletti dispels any such anachronistic attribution of views prevalent today to actors a century and a half ago—they were deeply troubled that the settlement of the question of secession by the outcome of the Civil War "destabilized the rule of law in the United States."[8]

Yet her book raises a nagging doubt. Maybe the lawyers and legal theorists then were wrong in insisting upon an irreconcilable conflict between the rule of law and trial by battle. They did not fully appreciate how the first is possible only because of the second: the rule of law presupposes a legal system embedded in and dependent upon social facts and political structure. In particular, the dominant modern form of legal positivism, derived from the work of Professor H.L.A. Hart, places a social "rule of recognition" at the foundation of any legal system and makes it the basis from which all other legal norms, including constitutional principles, are derived.[9] Although Hart's view has been revised by later positivists, two central tenets of his theory have remained intact: first, that law has its foundation in customary practice; and second, that customary practice consists (1) in prevailing acceptance of the rule of recognition by government officials and (2) in obedience to the resulting regime of legal rules by the population at large.[10] ''

Variations on modern positivism, including some made by Hart himself, differ over how much the rule of recognition incorporates morality, what the precise content of the rule of recognition is, and

[7] Texas v. White, 74 U.S. (7 Wall.) 700, 19 L.Ed. 227, 237 (1868).

[8] Nicoletti, supra note 1, at 120.

[9] H.L.A. Hart, The Concept of Law 100–10 (3d ed. 2012).

[10] Id. at 116–17.

how it identifies the other rules in a legal system.[11] Nevertheless, any of these variations has the same implications for the legal dilemma of secession after the Civil War: if the war changed the rule of recognition to take secession off the table, then constitutional doctrine had to change accordingly. The question is *how* changes in the rule of recognition altered constitutional law.

Some of the light cast by modern legal positivism on this issue might reflect harshly on the rule of recognition itself and, specifically, how well it identifies the other rules in a legal system.[12] Nevertheless, these problems pale in comparison to the problems with the reasoning in *Texas v. White*. The opinion, handed down by the Supreme Court in 1868, does not contain much in the way of reasoning to support its resounding pronouncement of "an indestructible Union, composed of indestructible States."[13] It relies on the Articles of Confederation to support the premise that the Union originally was declared to be "permanent"[14] and then was made "more perfect" by the Preamble to the Constitution.[15] The opinion simply ignores the fact that the Constitution took effect contrary to the terms of the Articles, which required unanimity among the states for any amendment,[16] because the Constitution required approval of only nine of the original thirteen states to supersede the Articles.[17] The Court's own reasoning calls attention to the fact that the Union in the Articles was not permanent at all, but expired with the ratification of the Constitution. This solecism might have been forgiven in a political speech, as it was when Lincoln made virtually the same argument in his First Inaugural

[11] See Matthew D. Adler & Kenneth Einar Himma, Introduction *to* The Rule of Recognition and the U.S. Constitution xiii, xviii–xxii (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

[12] *See* Scott J. Shapiro, What Is the Rule of Recognition (And Does It Exist)?, *in* The Rule of Recognition and the U.S. Constitution, supra note 11, at 235–68.

[13] *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 237.

[14] Articles of Confederation of 1781, art. XIII.

[15] U.S. Const. pmbl. The phrase "perpetual union" also appears in the title of the Articles of Confederation: "Articles of confederation and perpetual union between the states of . . . ." Articles of Confederation of 1781, pmbl.

[16] See Articles of Confederation of 1781, art. XIII.

[17] U.S. Const. art. VII.

Address.[18] But it deeply mars any judicial opinion attempting to restate the fundamental principles of constitutional law.

Dissatisfaction with this flawed reasoning has led many commentators, both then and now, to seek better reasoning.[19] This effort has not been successful. Appealing simply to the verdict of "trial by battle," without articulating its consequences for legal doctrine, begs the question: how can the fact of military victory change the principles upon which the rule of law relies?

Appealing only to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendment ignores the problematic process by which they were adopted. The Amendments were approved by sessions of Congress that did not seat legislators from the former Confederate states and that forced those states to ratify the amendments as a condition of regaining their seats. Apart from the obviously coercive nature of this process, it also denied the former Confederate states equal status as states in the Union.

On the dominant Republican view in Reconstruction, the former Confederate states had always remained in the Union and yet because of attempted secession could be denied equal participation in approving the new Amendments to the Constitution.[20] Although the process of proposing and ratifying those Amendments nominally conformed to Article V of the Constitution, it depended upon coercion exercised against the former Confederate states. An alternative view that conceives of the Confederate states as "conquered provinces," equivalent to the territory of conquered foreign nations, presupposes that those states were successful in leaving the Union. This view justifies Military Reconstruction but at the cost of abandoning the Union's opposition to secession

[18] See Abraham Lincoln, First Inaugural Address, *in* 4 The Collected Works of Abraham Lincoln 262, 264–65 (Roy P. Basler ed., 1953).

[19] See Nicoletti, supra note 1, at 3 & n.7; Mark R. Killenbeck, Political Facts, Legal Fictions, *in* Nullification and Secession in Modern Constitutional Thought 223, 223–24, 236–38 (Sanford Levinson ed., 2016); Sanford Levinson, The 21st Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate, or Serious Arguments to Be Wrestled With?, *in* Nullification and Secession in Modern Constitutional Thought 10, 38–39 (Sanford Levinson ed., 2016); see also Nicoletti, supra note 1, at 120.

[20] Bruce Ackerman, 2 We the People: Transformations 99–119 (1998).

throughout the Civil War.[21] Holding to the view that Confederate states committed "state suicide" leads to a similar contradiction with Republican principles—that those states and their votes had to be counted in the ratification of the Reconstruction amendments. Without being readmitted to the Union, how could states that discontinued their existence be counted in the ratification process?

Modern commentators have fared no better than their predecessors in the nineteenth century in trying to cut the Gordian knot of the status of the former Confederate states. Some revert simply to the acceptance of "trial by battle" as the agent of constitutional change.[22] But even accepting this premise, this explanation leaves out any account of precisely *how* military victory and political coercion led to constitutional change. What was the mechanism by which events outside the legal system could result in changes in legal doctrine within it? So, too, the attempt by Professor Bruce Ackerman to assimilate political and legal developments in Reconstruction to a process analogous to constitutional amendment leaves out how the particular decisive event he identifies—President Andrew Johnson's resounding loss in the congressional election of 1866—could be analogized to approval by two-thirds of each house in Congress and ratification by three-quarters of the states.[23] To be sure, the election of 1866 set the stage for ratification of the Fourteenth and Fifteenth Amendments, but the Thirteenth Amendment had been ratified before the election, and under similarly coercive terms. At the time, only a few of the Confederate states were represented in Congress and those who were not represented were forced to ratify the amendment as a condition of regaining their seats.[24]

Three features of that era demand explanation: first, why the illegality of state secession became a foregone conclusion without being articulated in a canonical source of law; second, why it took nearly four years for this conclusion to become accepted in formal

[21] See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 419–57 (2001).

[22] See supra note 19 and accompanying text.

[23] See Ackerman, supra note 20, at 209–10.

[24] Harrison, supra note 21, at 407–08.

law; and third, why the opinion that accomplished this acceptance, *Texas v. White*, did so in such poorly reasoned fashion.

The answers to these questions from a legal positivist perspective follow directly from the central role of the rule of recognition as a social practice. First, a social practice has an inchoate, uncertain character, far divorced from the artificial certainty of legal doctrine. Second, it takes some time to resolve uncertainty in the rule of recognition by changing legal doctrine. This requires a mixed process that gradually moves from a social practice distinct from law to rules accepted and articulated by the officials of a legal system, primarily judges, but other officials and citizens as well. And third, an opinion accepting changes in the rule of recognition succeeds only by success—by its acceptance going forward rather than its justification looking backward. Such a prospective take on *Texas v. White* does far more to explain its efficacy than a retrospective analysis of the unstable reasoning offered in the opinion itself. This essay proceeds in three parts corresponding to these three questions and the answers to them.

I. THE RULE OF RECOGNITION AS A SOCIAL PRACTICE

Ever since its publication over 50 years ago, *The Concept of Law* has dominated discussions in Anglo-American jurisprudence, as much in renewing the tradition of legal positivism as in generating disputes over it. That discussion has focused largely on the rule of recognition as the basis for a legal system in social fact rather than in freestanding natural law. For Hart, "the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."[25] The fact of the rule's existence breaks down into two components: first, that "the laws which are valid by the system's tests of validity are obeyed by the bulk of the population," and second, that there is "a unified or shared official acceptance of the rule of recognition."[26] Debate has swirled over each of these elements, and as noted earlier, also over

[25] Hart, supra note 9, at 110.

[26] Id. at 114–15.

whether the content of the rule of recognition does or must incorporate moral standards and values.[27]

The factual nature of the rule of recognition has largely escaped controversy, however. Even those who assign a large role to political morality in identifying the valid laws of a legal system maintain that the ultimate test for validity depends, at least in part, on the social fact of an existing practice.[28] Only strict natural law theorists and followers of Professor Hans Kelsen give no role at all to social practices at the foundation of a legal system. Kelsen, in particular, reduces the role of the rule of recognition to a mere presupposition, which need not be accepted by anyone; it need only serve as a hypothetical "basic norm" that would provide a test for validity for all the other norms in a legal system if it were accepted.[29]

Strict natural law theorists make law depend upon the requirements of morality, again, whether or not they are actually accepted in a society.[30] Virtually all other philosophers agree with Hart in assigning a factual dimension to the rule of recognition or its equivalent.[31] They make the other norms of a legal system dependent upon a matter of social fact, and as social fact changes, so do the legal norms that it recognizes as valid.

If the legal theorists are right in following Hart, then they have provided a ready explanation for a conundrum that has troubled constitutional theorists, especially in accounting for the questionable process that led to the ratification of the Reconstruction amendments. They can get around the problems posed by the process of ratification of the Reconstruction amendments, and the related difficulties with the opinion in *Texas v. White*, simply by categorizing the fundamental changes in the American constitutional structure wrought by the Civil War and Reconstruction as resolving a dispute over the rule of recognition—the social practices of American society—not changes in constitutional law alone.

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[27] Id. at xxxviii–xliv (introduction by Leslie Green).

[28] Ronald Dworkin, Law's Empire 62–65 (1986).

[29] Hart, supra note 9, at 292–93.

[30] Id. at 186–88.

[31] See supra notes 28–30 and accompanying text.

Before the war, secession could be supported by the compact theory of the Union, which gave the states the right to secede in the same way that an independent nation could withdraw from a treaty. The opposing nationalist theory derived the powers of the Union directly from the people, independent of the states and their continued allegiance. The Civil War resolved this dispute over state power under the rule of recognition, and constitutional law had to change accordingly.

Some might object that the Constitution is, by its own terms, the rule of recognition of the American legal system. It does declare itself in Article VI to be "the supreme Law of the Land,"[32] but that provision more plausibly makes the Constitution supreme over other conventional sources of law than transforms it into a rule of recognition. The latter alternative would beg the question where the authority for Article VI (and the rest of the Constitution) comes from. The widely accepted answer to that question rests the original Constitution on a delegation of power from the people acting through state conventions.[33] The Tenth Amendment accepts this point in reserving the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, . . . to the States respectively, or to the people."[34] This basic principle of American federalism requires that the Constitution cannot be the whole of the rule of recognition. But if it is only part, then it must be reconciled with the other elements of the rule of recognition, leading to the conclusion that some superior source of law reconciles all the constitutional and non-constitutional elements of the rule of recognition. The incompleteness of the Constitution takes on other forms as well, most obviously in leaving open fundamental questions of interpretation, like the legality of secession.

For these reasons (among others that could be multiplied), most constitutional theorists treat the fundamental law in a legal system as a political act, which cannot be judged by the ordinary standards of legal validity.[35] In this respect they agree with Hart in treating the

[32] U.S. Const. art. VI, cl. 2.

[33] Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 415–16 (2016).

[34] U.S. Const. amend. X.

[35] See supra note 33 and accompanying text.

existence of the rule of recognition as a social fact (albeit by another name). Nor do they disagree with Hart's analysis of this social fact as a combination of acceptance by public officials and compliance with the resulting regime by the people as a whole. Most theorists view constitutional law as embedded in and derived from social practice with superior authority over standard sources of legal doctrine.[36] Where they might balk is in resorting to the rule of recognition, or its equivalent, to decide hard questions of constitutional law. "Here," Hart maintains, "all that succeeds is success."[37] Appealing to the rule of recognition might offer an all-too-easy way around the text of the Constitution, established precedent, and other standard sources of law.

Such an evasion of orthodox legal reasoning appears all the more problematic because of the amorphous nature of the rule of recognition. Attempts to formulate the rule of recognition for the American legal system, even in schematic form, have foundered over the difficulty of capturing the dividing line between the powers reserved to the states and the people and those delegated to the federal government. The rule of recognition, as noted earlier, must provide for both.[38] The search, however, for the canonical form of the rule of recognition underestimates the degree to which it is generated by social practice. Just as isolated instances of customary law can be identified and debated in the absence of a comprehensive account of their source, the same could be true of the rule of recognition. In the case of secession, we could say that the rule of recognition left open the legality of secession in antebellum law and that it was altered *after* the Civil War to close off this question.

Some might still object that this claim cannot be fully understood or analyzed apart from a complete restatement of the rule of recognition. Yet desirable as a comprehensive account of the rule of recognition might be, it is not strictly necessary. The crucial features of the rule of recognition for one question might have little to do with its features bearing on another. Insofar as it legitimizes judicial

[36] See Frederick Schauer, The Force of Law 79–89 (2015) (also emphasizing the role of force in gaining acceptance of the rule of recognition).

[37] Hart, supra note 9, at 153.

[38] See Kent Greenawalt, The Rule of Recognition and the Constitution, *in* The Rule of Recognition and the U.S. Constitution, supra note 11, at 23–25.

review, for instance, the rule of recognition has little to say about how that power should be exercised to determine the legality of secession. In fact, the real problems arise from the translation of the rule, based on custom and practice, into the formalities of legal doctrine. This process, as we shall see in the next section, involves both the need for official acceptance of the rule and drawing out the implications of the rule for ordinary sources of law, such as the decision in *Texas v. White*.

II. RESOLVING DISPUTES OVER THE RULE OF RECOGNITION

Hart characterized the rule of recognition as one that imposed a duty on government officials to follow the lawmaking process and the sources of law that it identified.[39] Scholars have subsequently questioned whether duty alone can fill the gap between the rule of recognition and legal doctrine, arguing that legal power to change the law must also be conferred on government officials to give the legal system the flexibility it needs as a union of primary rules of conduct and secondary rules of change.[40] However this debate is resolved, it does point to the need to draw out the implications of the rule of recognition for conventional sources of law, if only to confirm that government officials actually accept the rule. If they did not, then the changed rule would not meet the first of the two conditions for its existence. Legal officials, and particularly judges, signal their acceptance of the rule through official statements of legal doctrine.

The process of clarifying the rule of recognition therefore becomes intertwined with changes in the law authorized by the rule. Whether this process proves to be successful is, so to speak, a mixed question of law and fact. Clarifying the rule of recognition without any consequences for ordinary sources of law would be entirely pointless. It would not support any new understanding of the rules of the legal system.

[39] Hart, supra note 9, at 100–02.

[40] Stephen Perry, Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law, *in* The Rule of Recognition and the U.S. Constitution, supra note 11, at 295–297. See generally id. at 295–326.

Even without *Texas v. White*, the illegality of secession plainly was presupposed by the provisions of the Fourteenth Amendment requiring congressional approval of any pardon to former government officials who "engaged in insurrection or rebellion" against the United States,[41] and invalidating "any debt or obligation incurred in aid of insurrection or rebellion against the United States."[42] Changes in the rule of recognition, or clarification of its terms, must become manifest in standard sources of law, even if judges and other public officials do not candidly articulate exactly how, or why, the rule has changed.

It follows that the standard sources do not provide a completely sound foundation for judicial decisions resolving disputes over the rule of recognition. If they did, the dispute would only be over a subordinate source of law derived from the rule of recognition. In Reconstruction, existing constitutional provisions and constitutional decisions did not even provide a completely sound foundation for the Reconstruction Amendments, as demonstrated by the irregularities in the process of adopting those Amendments.[43] Justification for a decision clarifying the rule of recognition, as Hart emphasized, must look forward to acceptance rather than backward towards preexisting sources of law.[44] If the prospective and retrospective views generally coincided, there would be no dispute over the rule to be resolved. Presenting a prospective resolution as the result of a retrospective justification, as judicial opinions commonly do, cannot be taken as confirmation that no change in the rule to clarify its terms occurred. On the contrary, the rhetoric of continuity with the past often has been employed to promote acceptance of changes going forward.[45]

The susceptibility of judges to this rhetorical strategy explains the notorious gaps in the reasoning in *Texas v. White*. Foremost among them is the glaring inconsistency between relying on the Articles of Confederation, which established a "perpetual union" and required a

[41] U.S. Const. amend. XIV, § 3.

[42] Id. § 4.

[43] See supra notes 19–23 and accompanying text.

[44] Hart, supra note 9, at 272.

[45] Id. at 273–75.

unanimous vote among the states for amendment,[46] and the Constitution, which declared a "more perfect Union,"[47] but required ratification by only nine states to go into effect (and similarly required ratification of subsequent amendments by only three quarters of the states).[48] Other defects can be added, such as the reliance on the Preamble to the Constitution for the phrase "more perfect Union" instead of some operative provision in the Constitution.[49] Many commentators have also criticized the opinion for distinguishing between the existence of a state and the existence of a government "competent to represent the State in its relations with the National Government."[50] This distinction raises the possibility that a state can continue to exist without an appropriate government, and indeed, this is how the Court characterized the status of Texas during the Civil War. In name, it remained a state in the Union, but without the rights and powers of the states not in rebellion. "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."[51] Yet if Texas could remain a state without a lawful government, presumably it could remain a state without any government at all—even if it descended into anarchy. This reasoning presses far beyond the usual understanding of a "state" as an organized government exercising sovereignty over identified territory and the population within it.[52] The Court just deletes the element of a government from the ordinary conception of a state.

These familiar objections to the reasoning in *Texas v. White* did nothing, however, to impair the authority of the opinion's pronouncement on the indestructibility of the states and the union. Nor should they have. We should not expect airtight arguments for changes in the law that jettison potentially valid legal arguments based on previously accepted legal authority. If the Civil War made

[46] Articles of Confederation of 1781, pmbl. & art. XIII.

[47] U.S. Const. pmbl.

[48] U.S. Const. art. V.

[49] See District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008).

[50] Texas v. White, 74 U.S. (7 Wall.) 700, 19 L.Ed. 227, 238 (1868).

[51] Id.

[52] See id. at 236. But see Restatement (Third) of the Foreign Relations Law of the United States § 201 (Am. Law Inst. 1987).

the illegality of secession a foregone conclusion, then it effectively erased the previous basis for secession in accepted legal sources. It swept those arguments off the table, so much so that the Court in *Texas v. White* asserted it need not address the legality of secession "at length."[53] Likewise, the defendants' argument turned "entirely upon the validity of the possession of the bonds" by the third-party purchaser.[54] The Court did not focus upon the question of secession, largely because it could not—because any significant dispute over the rule of recognition, by definition, opens up a gap with preexisting law and erodes the reliability of preexisting legal sources. Those sources that do not support the resolution of the dispute simply are ignored or misconstrued. The Court employed both strategies in *Texas v. White*.

The compact theory of the Constitution, in which the states entered into it as sovereigns with the right to withdraw, simply received no attention from the Court. Yet if the outcome of the Civil War swept such arguments off the table, it left on the table many of the components of the antebellum constitutional order, especially the continued sovereignty of the states. For reasons mentioned earlier, state sovereignty could not easily be reconciled with the exigencies of Reconstruction.

That became clear as the Supreme Court repeatedly refused to decide the merits of the legality of secession or the constitutionality of Reconstruction. Those cases, like the high-profile prosecution of Jefferson Davis, created the risk of detracting from rather than adding to acceptance of the consequences of Union victory. However those cases were decided, they would either give a victory to southern opponents of Reconstruction or diminish northern support by departing from the rule of law. Instead the Court settled for a series of opaque rulings whose meaning and significance are still debated today.[55] By contrast, *Texas v. White* sent a much clearer signal, even if it was based on much weaker legal reasoning.

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[53] *White,* 74 U.S. (7 Wall.) 700, 19 L.Ed. at 237.

[54] Id. at 229.

[55] See Ex Parte McCardle, 74 U.S. 506, 515 (1868) (no appellate jurisdiction); Ex Parte Yerger, 75 U.S. 85, 106 (1868) (only jurisdictional issue addressed); Georgia v. Stanton, 73 U.S. 50, 77 (1867) (no jurisdiction in equity over political question); Mississippi v. Johnson, 71 U.S. 475, 501 (1866) (no jurisdiction in equity to enjoin discretionary acts of the president).

III. CONSEQUENCES AS JUSTIFICATION

As Nicoletti documents in detail, critics of the opinion in *Texas v. White*, beginning with Justice Grier's dissent, attributed the defects in the opinion to the Court's failure to candidly acknowledge the verdict of trial by battle.[56] The opinion did not, on this view, make a virtue of necessity by admitting that it could not find the resources for its decision in existing legal doctrine, but instead showed its willingness to have its virtue all too easily compromised.

The Court papered over gaps in the law in a semblance of conventional legal reasoning. It did not admit that it was changing legal doctrine, apparently out of fear that candor would impede its success in accomplishing any change.[57] On this view, simply characterizing the Court's reasoning in modern positivist terms as resolving a dispute over the rule of recognition does little to dispel doubts about it.

A sustained analysis under the rule of recognition, however, leads to the opposite conclusion: that the rule of law, so far from being inconsistent with trial by battle, depended upon it as the foundation for a new constitutional settlement. On this interpretation, the opinion in *Texas v. White* implicitly acknowledged the changed social and political context of constitutional law after the Civil War and promoted acceptance of that change as a necessary element of altering the rule of recognition and drawing out its implications for legal doctrine.

The widely criticized[58] deficiencies in the opinion result from a retrospective look at its basis in conventional legal sources, when a correct appreciation of the decision requires a prospective examination of its consequences. Relying on the Articles of Confederation hardly supports interpretation of the Constitution, when it was the latter that unceremoniously displaced the former. An attempt to clarify the rule of recognition must be aimed at

[56] See supra note 3 and accompanying text; *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 241–42 (Grier, J., dissenting).

[57] See *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 237–38.

[58] See, e.g., Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992, 2040–43 (2003) ("However significant its contribution to sectional reconciliation, the fiction of *Texas v. White* posed a basic paradox for Reconstruction . . . .").

securing widespread official acceptance and popular obedience, which is what actually resulted from *Texas v. White*. The opinion was itself part of the process of changing the rule. Despite objections to its reasoning, it elicited no widespread reaction that prevented it from becoming the canonical statement of state and national sovereignty.[59]

The absence of objections partly resulted from the relative obscurity of the merits of the dispute, which concerned the rights of private individuals who had purchased United States bonds from Texas during the Civil War.[60] That issue would have been of interest to investors who held government bonds and who might have been seriously worried about their rights to bonds that they purchased on the open market. The holding on this issue put indirect purchasers of bonds in the position of those who had purchased their bonds directly from Texas, because the bonds had become due during the Civil War. These holders were plainly on notice that the bonds were sold to finance the secessionist government of Texas and that the sale could be invalidated for that reason.

During the War, according to the Court, the secessionist government lacked the authority to sell bonds in furtherance of the Confederate war effort.[61] But the Court reasoned that because the bonds were then mature, the indirect purchasers could not invoke the good faith purchaser rule that typically protected other holders of negotiable instruments; they could not insulate their indirect purchases from the invalidity of the initial direct purchase sale of the bonds from Texas.[62]

All this sounds—and is—highly convoluted and it bears only a distant relationship to the jurisdictional holding that Texas, through its reconstructed government, could invoke the original jurisdiction

[59] See New York v. United States, 505 U.S. 144, 162 (1992) ("In Chief Justice Chase's much–quoted words, '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.'" (quoting *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 237)).

[60] *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 227–28.

[61] Id. at 239–40.

[62] Id. at 239–41.

of the Supreme Court.[63] Strictly speaking, the jurisdictional holding did not require the Court to opine on the existence of "an indestructible Union, composed of indestructible States." The Court could simply have held that, regardless of the status of Texas during the Civil War, it had the status of a state by reason of its reconstructed government after the war. It was only then that Texas brought this case against the bondholders. That conclusion was entirely consistent with the holding on the merits that the secessionist government of Texas lacked authority to sell the bonds in furtherance of the Confederate war effort.

Curiously, however, the holding that relegated good faith purchasers to the status of direct purchasers was subject to "grave doubt" within six years and explicitly overruled ten years later.[64] Undermining the good-faith purchaser rule evidently caused greater concern than rejecting the arguments for secession in a poorly reasoned dictum. The survival of the dictum seems to have resulted from the obscurity of the merits. Participants in the market for United States bonds no doubt worried more about erosion of the good-faith purchaser rule than the illegality of secession.

The immediate implications of the case soon became divorced from the dictum on secession, which has since had a successful career as an established principle of constitutional law.[65] Doubts about the logic of the opinion, although voiced repeatedly over the years, never led to questions about the validity of the dictum, which soon acquired a life of its own.

The afterlife of *Texas v. White* conforms quite closely to Hart's account of how resolution of uncertainty in the rule of recognition

[63] Id. at 238–39.

[64] Vermilye & Co. v. Adams Express Co., 88 U.S. 138, 145 (1874) (expressing "grave doubt" about the holding relegating good faith purchasers to direct purchasers); Morgan v. United States, 113 U.S. 476, 495–96 (1885) (overruling *Texas v. White* on the good faith purchaser question except where the title is acquired with notice of the defect of title or under similar circumstances).

[65] See Poindexter v. Greenhow, 114 U.S. 270, 290–91 (1885); Daniels v. Tearney, 102 U.S. 415, 418 (1880); Keith v. Clark, 97 U.S. 454, 461–62 (1878). Recent decisions on federalism continue to rely upon *Texas v. White*. Shelby County v. Holder, 133 S. Ct. 2612, 2623 (2013) (equal sovereignty of states under the Constitution); Printz v. United States, 521 U.S. 898, 918–19 (1997) (states retained inviolable sovereignty under the Constitution); Kohlhaas v. State Office of Lieutenant Governor, 147 P.3d 714, 718–20 (Alaska 2006) (secession not proper subject for referendum).

takes hold and becomes integral to a legal system. It does not, however, indicate that the process is instantaneous or free from the contingencies characteristic of any significant change in the law.

Reducing uncertainty in the rule of recognition as a social practice by altering determinate legal rules requires more than logical deduction. The guiding force of the rule of recognition might become ever more attenuated as the needed changes reach ever further into the intricacies of the legal system. At such a distance, it might not guide judges to the dispositive sources in standard legal sources. The rule of recognition does not operate as simply or as directly as Hart's original account of the rule suggests.[66] Although emphasized by critics of Hart, the complexity of the rule of recognition does not detract from the central insight behind the rule: that it locates the ultimate authority of law in social and political facts. Those facts, although distinct from legal doctrine, nevertheless depend upon it because it constitutes the means for gaining official acceptance and popular obedience to changes in the rule of recognition, which are the conditions for its continued existence.

The interdependence of the rule of recognition and the legal rules derived from it enhances, rather than detracts from, the role of decisions based directly on the rule of recognition without the benefit of intermediate sources of ordinary law. Such decisions do not simply draw out the implications of a clarified rule of recognition; they also promote acceptance of the changes implicit in clarifying the rule.

This dual role does more than excuse the weak reasoning in *Texas v. White*. It also explains the overt political appeal in the opinion, most obviously in adopting the argument for perpetual union from Lincoln's First Inaugural Address.[67] That address constitutes the canonical statement of the mainstream Republican justification for fighting the Civil War. The opinion departs from the First Inaugural Address, as it had to do, in referring to state sovereignty only in the most abstract way. In a vain effort to avert the Civil War, Lincoln much more specifically conceded state sovereignty over slavery.[68]

[66] See Shapiro, supra note 12, at 245–50.

[67] See Lincoln, supra note 18, at 264–65.

[68] Id. at 265–66.

That concession disappeared as the Civil War turned into a war of emancipation in addition to one to preserve the Union. After the war, Chief Justice Chase could refer to state sovereignty only in an abstract and conclusory reference to "indestructible States."[69]

The balance struck in the opinion between "an indestructible Union" and "indestructible States" appears to modern eyes to be a nearly inscrutable reference to all the issues of federalism that have animated constitutional law and politics in this country. At the time, however, it solidified the status of the Reconstruction amendments, which presupposed that the former Confederate states continued to be states in the Union. Yet it did not cast doubt upon Military Reconstruction, so long as the federal occupation of the South did not purport to destroy the southern states.[70] The dictum allowed the Court to continue to equivocate and evade the constitutionality of Reconstruction, which was essential to exacting compliance in the South with the new regime established by the victory of the North. Mixed though the results of Reconstruction were,[71] it would not have achieved even limited success if it had been declared unconstitutional. The abstract compromise formulated in *Texas v. White* was an offer that neither side could wholly refuse.

Another feature of the opinion that turns vice into virtue is the seemingly illogical distinction between a state and its government. The Court ruled in favor of a partially reconstructed southern government, reasoning that its efforts to return to normal relations with the Union were enough to allow it invoke the Court's original jurisdiction.[72] Moreover, those same efforts distinguished it from the prior secessionist government, whose acts in selling the bonds were invalid because they were in aid of the Confederate war effort. Although the basis for the distinction in political and legal theory might be elusive, its impact in *Texas v. White* was tangible and immediate. It allowed the State to prevail on both the jurisdictional issue and on the merits,[73] and in the process defused any practical

[69] *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 237.

[70] Id. at 237–38.

[71] See generally Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 602–12 (1988) (discussing mixed results of reconstruction).

[72] *White*, 74 U.S. (7 Wall) 700, 19 L.Ed. at 239.

[73] Id. at 239, 241.

objection to the decision. By 1868, most of the former Confederate states were deemed entitled to representation in Congress although four, including Texas, were readmitted in 1870.[74]

In this respect, and in several others, the decision in *Texas v. White* bears an uncanny resemblance to *Marbury v. Madison*.[75] Just as President Jefferson could not object to the assertion of the power of judicial review in the earlier case, because his position had prevailed on the merits,[76] so too, the former Confederate states could not object to the result in the later case. Likewise, both decisions turned on the arcane issue of the original jurisdiction of the Supreme Court, most of whose power lies in its appellate jurisdiction.[77] And both decisions twisted the original jurisdiction around from a straightforward reading of the statute, in *Marbury v. Madison*, purporting to confer such jurisdiction, and of the Constitution, in *Texas v. White*, in conferring jurisdiction over claims by the states. A state, according to the decision, could take advantage of this jurisdiction sometimes and sometimes not—depending on the relations between its government and the Union—even though it always remained a state. The Court remained equivocal about the exact dimensions of the original jurisdiction.

The ad hoc reasoning in *Texas v. White* nevertheless formed the basis for a durable resolution of the tensions between state and national sovereignty after the Civil War.[78] No one, with the exception of bondholders who were denied the right to invoke the good-faith purchaser rule for negotiable instruments, had anything to complain about. And even those bondholders succeeded in having that part of the decision overruled within two decades.[79] An inconspicuous case on the sale of United States bonds might appear to be an unlikely vehicle for clarifying fundamental law, but only if judged solely by the standards of conventional legal reasoning based on existing sources of law. Judged by the prospective standards of

[74] Harrison, supra note 21, at 408 (noting that Virginia, Mississippi, and Georgia did not regain their seats in Congress until 1870).

[75] 5 U.S. (1 Cranch) 137 (1803).

[76] Id. at 162, 173.

[77] Id. at 173–76; *White*, 74 U.S. (7 Wall.) 700, 19 L.Ed. at 237, 241.

[78] See supra notes 58–63 and accompanying text.

[79] Morgan v. United States, 113 U.S. 476, 495–96 (1885).

fostering acceptance and obedience to the changed legal order, on the other hand, *Texas v. White* offered an auspicious occasion to make this change official.

CONCLUSION

Was the decision in *Texas v. White* deliberate, inevitable, or lucky? Giving Chief Justice Chase the benefit of the doubt, we might find the choice of this case to declare the indestructibility of the Union to be an act of inspired statesmanship. Or, given the widespread belief, then and now, that the illegality of secession was the verdict of the Civil War, we might find it inevitable that the Supreme Court would come to the same conclusion. Or we might say that the confluence of events and actions, both inside the law and outside it, made the outcome highly contingent. Perhaps Grier's dissent had been as likely to become the law as Chase's majority opinion.

Nicoletti does not make a choice among these alternatives, although the first accords with her general suspicion of Chase's motives,[80] especially in light of his ambition to become president.[81] Indeed, his near quotation of Lincoln's First Inaugural in *Texas v. White* might have betrayed an ambition to deliver his own inaugural address. The Court had, after all, heard a number of cases in which it could have ruled on the legality of secession. One of them, *Ex parte McCardle*,[82] was handed down the same day as *Texas v. White*, with another majority opinion written by Chase. The Court also delayed the decision in *Ex parte McCardle* and confined its holding to a narrow jurisdictional issue.[83] The Court employed the same tactic a year later in *Ex parte Yerger*,[84] in yet another opinion by Chase. Those delaying tactics cleared the way for deciding the legality of secession with a grand dictum in an otherwise inconspicuous case. In this context, ironically enough, Chase's opinion in *Texas v. White* becomes, as in *Marbury v. Madison*, an astute manipulation of

[80] Nicoletti, supra note 1, at 194–95.

[81] Michael Les Benedict, Salmon P. Chase and Constitutional Politics, 22 Law & Soc. Inquiry 459, 460, 478–79 (1997) (reviewing John Niven, Salmon P. Chase: A Biography (1995)).

[82] 74 U.S. 506, 506–09 (1868) (discussing application of writ of habeas corpus).

[83] See Ackerman, supra note 20, at 226–27.

[84] 75 U.S. 85, 104–06 (1868).

political cross-current, ostensibly to carry out the "duty of the judicial department to say what the law is."[85]

Of course, no matter how opportunistic we find Chase to be, circumstances had to favor his strategy, both in presenting him with the issue of the legality of secession and in generating a promising case in which to resolve it. If Union victory in the Civil War made the illegality of secession a fait accompli, then it was a legal principle simply waiting to be recognized in legal doctrine.

On the other hand, exactly how it would be recognized depended upon the vicissitudes of the shifting politics and judicial decisions in Reconstruction. Even Chase could not control the cases brought before the Supreme Court, which at the time lacked the discretion inherent in the writ of certiorari.[86] If we accept the need for the legal system to adjust to a change in the rule of recognition, as almost all legal theorists do in some form today, all the crucial features of that adjustment cannot be deduced as a matter of first principles. At times like Reconstruction, it is exactly those principles that remain open to reconsideration and revision.

Other times present other challenges and some might draw implications from *Texas v. White* for constitutional controversies in other eras. Few such cases, however, would present the stark contrast, asserted at the time, between "trial by battle" and "the rule of law." Appeal to the rule of recognition dissolves this contrast, or so I have argued. Whether it could facilitate reconciliation between social practices and legal doctrine in other circumstances remains an open question. Hart himself thought that judicial decisions resolving disputes over the rule of recognition were few and far between.[87] If they became common, the rule of recognition would tend to supplant standard sources of law in hard cases, diminishing its value as a foundation for law rather than the law itself. Invoking it in the extraordinary circumstances of *Texas v. White* poses few

[85] *Marbury*, 5 U.S. (1 Cranch) at 177.

[86] Felix Frankfurter & James M. Landis, The Supreme Court Under the Judiciary Act of 1925, 42 Harv. L. Rev. 1, 1–2 (1928) ("The remedy proposed by the Supreme Court and adopted by Congress was a transference of numerous classes of cases from obligatory review by appeal or writ of error to discretionary review by *certiorari*.").

[87] Hart, supra note 9, at 153–54.

such risks. Despite all the criticism that the opinion has received, it has not been attacked as an instance of judicial overreaching.[88]

Professor Nicoletti has done a great service in forcefully reminding us of the live controversy that the decision effectively put to rest. The illegality of secession today, at the distance of a century and a half, might appear to be a foregone conclusion, but this conclusion is more a matter of hindsight than insight into the actors at the time and their motives. An uneasy lesson of her book is that the familiar and seemingly realist assumption that law depends on politics has disturbing implications, not just for legal theory but for the law itself, whenever it is put to the test.

[88] New York v. United States, 505 U.S. 144, 162 (1992) (endorsing *Texas v. White* as one of several decisions which recognized the independent existence of both the states and the United States).