



Reconstructing *Klein*

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This Article interrogates the conventional understanding of United States v. Klein, a Reconstruction Era decision that concerned Congress’s effort to remove appellate jurisdiction from the Supreme Court in a lawsuit seeking compensation for property confiscated during the Civil War. Scholars often celebrate the decision for protecting judicial independence; so, too, they applaud the decision for shielding property rights against arbitrary legislative action and for preserving Executive clemency from legislative encroachment. Absent from all contemporary accounts of Klein is its racialized context: The decision allowed an unelected judiciary to disable Congress from blocking the President’s promiscuous use of the pardon power to obstruct the enforcement of policies aimed at racial equality, including land distribution to emancipated slaves—the proverbial “forty acres and a mule.” Klein, we show, was one of a number of Supreme Court decisions that helped to restore a white supremacist, aristocratic power base to the South. In particular, the decision is a coda to a tragic story in which property, central to the political reconstruction of the South on a multi-racial basis, was returned to former enslavers and those who did commerce with them.

This Article makes three contributions. First, it decenters the traditional narrative about Klein by focusing on the land-dreams of Black freedom seekers, rather than on the compensation claims of Confederate rebels and their allies, and on the Union’s broken commitments to Blacks about land acquisition and the promise of full citizenship. Second, it explores the erasure of racial politics from scholarly discussion of Klein, and the ways in which a purportedly neutral jurisdictional rule achieved extreme racialized effects. We argue that the Court’s assertion of interpretive supremacy was partner to partisan efforts to defeat Reconstruction and to maintain Black people in a subordinate class subject to legalized violence and economic exploitation. Finally, we bring the decision into dialogue with Reconstruction Era constitutional decisions, and examine how the Court’s reasoning in Klein, and its valorization of a “Lost Cause” ideology, set the foundation for a hollowed-out construction of the Fourteenth Amendment that equates Black citizenship with emancipation only, disregarding the material conditions that make freedom and equality possible.

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Introduction

United States v. Klein is well known as a case about constitutional limits on the otherwise plenary authority of Congress to regulate the jurisdiction of the Article III courts.¹ The facts of the case have been called “simple”—the story of “a family seeking reimbursement for approximately six hundred bales of cotton of which Union forces had taken possession during the Civil War.”² The “family,” like thousands of other cotton merchants whose commerce financially fueled the Confederacy,³ grounded their claim on having taken an oath of allegiance to the Union, anticipating that a Presidential pardon would wipe clean any taint of disloyalty.⁴ Congress, however, had other ideas; an 1863 statute barred compensation to anyone who had

¹ 89 U.S. 128 (1871).

² Amanda I. Tyler, *The Story of Klein: The Scope of Congress’s Authority to Shape the Jurisdiction of the Federal Courts*, in *FEDERAL COURTS STORIES* 88 (Vicki C. Jackson & Judith Resnik eds. 2010).

³ See Tyler, *supra* note 2, at 91.

⁴ *Kline v. United States*, 4 Ct. Cl. 559 (1868), *aff’d sub nom. United States v. Klein*, 80 U.S. 128, 20 L. Ed. 519 (1871).

given “any aid or comfort to the present rebellion.”⁵ And when the Supreme Court held, notwithstanding the 1863 statute, that “in the eye of the law the [pardoned] offender is as innocent as if he had never committed the offense”⁶—clearing the way for compensation—Congress held fast. It passed another statute, this time directing courts to treat a Presidential pardon as evidence of the claimant’s disloyalty to the Union, thus barring compensation.⁷ In *Klein*, the Supreme Court invalidated that statute as outside Congress’s authority to regulate the Article III appellate jurisdiction, and also interpreted Presidential clemency “in a generous spirit.”⁸ By the time he left the White House, Andrew Johnson had issued four amnesty proclamations, and as Charles Fairman reported in the *Oliver Wendell Holmes Devises*: “On Christmas Day, 1868, when impeachment lay behind and the end of his term was close at hand, Johnson threw open the gates and granted a full pardon for the offense of treason to all participants in the rebellion.”⁹ The Court’s decision in *Klein* bolstered the importance of those pardons, helping restore the antebellum aristocratic system in the states of the former Confederacy

Klein is a staple of many federal courts casebooks, offered as a virtually unique example (beyond habeas corpus) of limits on Congress’s power to regulate the Article III jurisdiction.¹⁰

⁵ Abandoned and Captured Property Act of 1863, 12 Statutes at Large 821 (1863)

⁶ *Ex parte Garland*, 4 Wall. 333, 380 (1867).

⁷ *United States v. Klein*, 80 U.S. 128, 129 (1871) (“The proviso in the appropriation act of July 12th, 1870 (16 Stat. at Large, 235), in substance ... is unconstitutional and void. Its substance being that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court; it invades the powers both of the judicial and of the executive departments of the government.”).

⁸ CHARLES FAIRMAN, *THE OLIVER WENDELL HOMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, VOL. VI, PART ONE, RECONSTRUCTION AND REUNION 1864–88 (1971), 874.

⁹ *Id.* at 788 (summarizing the four amnesty proclamations).

¹⁰ Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts--Opposition, Agreement, and Hierarchy*, 86 GEO. L. J. 2445, 2450 (1998) (“Indeed, *Ex parte McCordle*, [and] *United States v. Klein*...are often understood in the federal courts canon as involving a tension or pull between the substantive outcomes being reached by the courts and Congress's effort to use its control of jurisdiction to mitigate or change the effects of the courts' substantive leanings.”).

Scholars have celebrated *Klein* for providing the Court with a shield against an overreaching Congress;¹¹ some commentators applaud *Klein* for vindicating property rights and the rule of law;¹² the broad reading of the President’s pardon power, it is argued, was “justified by public welfare considerations” and the need for “a national reunification” in the wake of the Civil War.¹³ At the same time, commentators have called the Court’s reasoning “opaque,” even “impenetrable”; the decision is “puzzling”¹⁴ and it “continues to baffle.”¹⁵ For this reason, some scholars have questioned whether trying to understand the case is even worth the candle, suggesting that *Klein* be cast aside as “an antique, without useful application to contemporary circumstance.”¹⁶ As to the merits, some commentators have ascribed “little practical value” to the decision;¹⁷ to others, the Court’s focus on confiscation and clemency is said to “sound strange” to twentieth-century readers, “because, happily, the nation has had little occasion to remember.”¹⁸

This Article seeks to show the relevance of *Klein* to current times, but not in the ways that earlier scholarship has suggested. Many scholars today warn that the United States is at an important inflection point, with the mechanisms of democracy being used for anti-democratic

¹¹ See also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953). In its most extravagant form, *Klein* is said to support a principle that “Congress may not employ the courts in a way that forces them to become active participants in violating the Constitution.” Tyler, *supra* note 2, at 112.

¹² See generally Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133 (2017) (arguing that *Klein* protects individual interests against the government’s attempts to renege on its promises). See also Gordon G. Young, *Congressional Regulation of Federal Courts’ Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189 cf. 26 (collecting articles embracing *Klein*’s perceived limits). Young also observed that *Klein* had become “nearly all things to all men.” *Id.* at 1195.

¹³ Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 614 (1991).

¹⁴ Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998).

¹⁵ Tyler, *supra* note 2, at 87.

¹⁶ Sager, *supra* note 14, at 25.

¹⁷ WILLIAM COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS: A HISTORY* 27 (1978).

¹⁸ FAIRMAN, *supra* note 8, at 776.

purposes.¹⁹ Moreover, in what has been called a “racial reckoning,”²⁰ there has been increased attention to the ways that America’s history of chattel slavery and Jim Crow reverberate in contemporary institutions,²¹ with some making the case for reparations.²² Amid these national conversations about democracy and race, the Supreme Court is prominently charged with helping to facilitate anti-democratic backsliding,²³ together with racial subordination,²⁴ and prominent scholars are urging significant changes to the institution.²⁵ Against this background, we argue that what ought to sound “strange” is celebrating a decision that allowed an unelected judiciary to disable Congress from blocking the President’s promiscuous use of the pardon power to obstruct the enforcement of Reconstruction policies aimed at racial equality. Critical to those policies of racial equality was land distribution to emancipated slaves, which was to be

¹⁹ See, e.g., TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

²⁰ See, e.g., *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at *7 (E.D. Va. Feb. 23, 2021) (“the racial reckoning continues”); Isabelle R. Gunning, *Justice for All in Mediation: What the Pandemic, Racial Justice Movement, and the Recognition of Structural Racism Call Us to Do As Mediators*, 68 WASH. U. J.L. & POL’Y 35, 36 (2022) (observing that “a “racial reckoning” is “now being proclaimed in public discourse.”); Alexis Hoag, *The Color of Justice*, 120 MICH. L. REV. 977, 978 (2022) (referencing “the nation’s current engagement in a racial reckoning and the increased awareness of racism’s pervasive impact.”)

²¹ See, e.g., DOROTHY BROWN, *THE WHITENESS OF WEALTH* (2021); Darren Hutchinson, *With All the Majesty of the Law”: Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371 (2022). See also Jamillah Bowman Williams et. al., *#blacklivesmatter: From Protest to Policy*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 103, 143–44 (2021) (“For years, reparations have been proposed to address the lingering disadvantages and harms of chattel slavery and centuries of federally constructed and funded apartheid. . . . It was not until the protests of 2020 that the idea gained traction in mainstream politics.”)

²² WILLIAM A. DARITY, JR. & A. KIRSTIN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2020); Martha M. Ertman, *Reparations for Racial Wealth Disparities As Remedy for Social Contract Breach*, 85 LAW & CONTEMP. PROBS. 231 (2022); A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255 (2020); Roy L. Brooks, *Racial Reconciliation Through Black Reparations*, 63 HOWARD L.J. 349 (2020); Patricia M. Muhammad, *The U.S. Reparations Debate: Where do We Go from Here?*, 44 HARBINGER 43 (2020); Ta-Nehisi Coates, *The Case for Reparations* (THE ATLANTIC, June 2014).

²³ IAN MILLHISER, *THE AGENDA HOW A REPUBLICAN SUPREME COURT IS RESHAPING AMERICA* (2021); ADAM LAMPARELLO, CYNTHIA SWANN, *THE UNITED STATES SUPREME COURT’S ASSAULT ON THE CONSTITUTION, DEMOCRACY, AND THE RULE OF LAW By* (2016); JAMIN RASKIN *OVERRULING DEMOCRACY THE SUPREME COURT VERSUS THE AMERICAN PEOPLE* (2004).

²⁴ DEVON CARBADO, *UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT* (2022); Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833 (2022); Russell Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016).

²⁵ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

facilitated through the confiscation of Confederate property.²⁶ By the end of his presidency, Johnson had issued pardons to almost all those not covered by the general amnesty—“13,000 Confederates: nearly everyone except the warden of Andersonville prison and those who had conspired with John Wilkes Booth”²⁷—who thereby were not only restored to ownership of their former property (other than slaves), but also later permitted to resume political power in the South. Freed Blacks lamented the President’s broad policy of clemency and protested its subordinating effects:

“Four-fifths of our enemies are paroled or amnestied, and the other fifth are being pardoned,” declared one assembly of blacks in Virginia, charging Johnson with having “left us entirely at the mercy of these subjugated but unconverted rebels in everything save the privilege of bringing us, our wives and little ones, to the auction block.”²⁸

If the goal of Johnson’s use of the pardon power was to secure reconciliation and peace in the South, one might reasonably ask upon reading the freedmen’s pleas, peace for whom? It did not

²⁶ See *infra* Part I.A.

²⁷ See WALTER A. MCDUGALL, *THROES OF DEMOCRACY: THE AMERICAN CIVIL WAR ERA 1829–1877*, 510 (2008). John Minor Botts, a Unionist politician in Virginia who was imprisoned by the Confederacy for stating pro-Union views, criticized the role of money, lawyers, and “pardon brokers” in helping to secure pardons. See JOHN MINOR BOTTS, *THE GREAT REBELLION: ITS SECRET HISTORY, RISE, PROGRESS, AND DISASTROUS FAILURE. THE POLITICAL LIFE OF THE AUTHOR VINDICATED* 340 (1866) (stating that “through the use of money paid to pardon-brokers and feed attorneys, aided by the influence of subordinates in the employment of the administration, pardons were more readily procured for the most vindictive and obnoxious traitors, than for those who had sinned the least but had no money wherewith to purchase a release”). See also GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 29 (2006):

The drama of the pardon-seekers soon came to dominate Johnson’s time and attention. Walt Whitman, true to form, was at its center, for his office handled all applications for pardon. “There is a great stream of Southerners comes in here day after day, to get *pardoned*—All the rich, and all higher officers of the rebel army cannot do anything, cannot buy or sell, &c, until they have special pardons—(that is hitting them where they *live*) so they all send or come up here in squads, old A& young, men & women.”

²⁸ JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 318 (2018), citing *The Colored People of Virginia*, *THE ANTI-SLAVERY REPORTER*, Oct. 2, 1865, 250. See also Steven F. Miller, Susan E. O’Donovan, John C. Rodrigue & Leslie S. Rowland, *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners during Presidential Reconstruction, 1865–1867–Freedom: Political*, 70 *CHICAGO-KENT L. REV.* 1059 (1995) (collecting other statements by freed Black criticizing Presidential Reconstruction).

bring peace to freed Blacks in the American south. It brought violent terror, economic exploitation, and legal apartheid.²⁹

This Article argues that *Klein* was one of a number of post-Civil War decisions that helped restore a white racist hegemony in the South and impeded efforts of freed Blacks to obtain land needed for economic self-sufficiency and political equality.³⁰ In the transition from slavery to freedom, other goals like acquiring the vote were undoubtedly significant.³¹ But legal attention on the Fifteenth Amendment should not eclipse another important post-Civil War goal: ensuring the material conditions of freedom.³² As to that, formerly enslaved people recognized the unique value of land as protection against economic subjugation and sought ways to acquire it.³³

²⁹ See *infra* Part I A.

³⁰ Our use of the term hegemony should not be taken to ignore the dynamic nature of power relations or the possibility for alternative hegemony. To borrow from Raymond Williams, “hegemony is not singular; ... its own internal structures are highly complex, and have continually to be renewed, recreated and defended.” Raymond Williams, *Base and Superstructure in Marxist Cultural Theory*, 82 NEW LEFT REVIEW 1, 3 (Nov. 1, 1973)..

³¹ On the relation between suffrage, property, and freedom, see, e.g., HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901*, 41 (2001) (referring to “the mixed blessing of universal suffrage”); see also LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 531 (1979) (“Both suffrage and land came to be regarded, albeit with sharply contrasting emphases by different classes of the black population, as indispensable to freedom. ... While the demand for land raised the ugly specter of confiscation and the abrogation of the rights of property, the demand for the vote simply reaffirmed traditional American principles ...”); see also Francis B. Simkins, *New Viewpoints of Southern Reconstruction*, V J. SOUTHERN HIST. 49 (1939) in *RECONSTRUCTION IN THE SOUTH* 88 (Edwin C. Rozwenc ed. 1952) (“Land was the principal form of Southern wealth, the only effective weapon with which the ex-slaves could have battled for economic competence and social equality. ... Conservative constitutional theory opposed any such meaningful enfranchisement.”).

³² See, e.g., Horace Mann Bond, *Social and Economic Forces in Alabama Reconstruction*, in *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS* (Kenneth M. Stampp & Leon F. Litwack eds. 1969) (“And yet these masses—these ignorant and restless ex-slaves—knew exactly what they needed. Their slogan has been ridiculous for nearly seventy years, and probably will be so for eternity. What they asked of the government which had set them free was, indeed, a monstrosity. They asked for a subsistence farmstead—for forty acres and a mule.”).

³³ Georges Clemenceau, then a foreign affair correspondent, reported in September 1865:

The real misfortune of the negro race is in owning no land of its own. There cannot be real emancipation for men who do not possess at least a small portion of the soil. We have had an example in Russia. In spite of the war, and the confiscation bills, which remain dead letters, every inch of land in the Southern states belongs to the former rebels. The population of free negroes has become a nomad population, congregated in the towns and suffering wretchedly there, destined to be driven back eventually by poverty into the country, where they will be forced to submit to the harshest terms imposed by their former masters.

To say that their acquiring land was difficult is an understatement. Before the war, the Supreme Court had made clear that “the African race... had no rights which the white man was bound to respect.”³⁴ Enslaved Blacks received no cash wages for their work, had limited opportunities to secure capital, and neither the Emancipation Proclamation nor the Thirteenth Amendment required former owners to pay emancipated Blacks for prior service.³⁵ To the contrary, men, women, and children were dispatched, as Frederick Douglas said, “empty handed, without money, ... and without a foot of land to stand upon.”³⁶ Moreover, some states of the Confederacy, notwithstanding Emancipation, continued to bar Blacks from purchasing or owning land.³⁷

Yet even before the war ended, Black men and women attempted to acquire land, and the federal government encouraged them to think that through sweat equity—farming and tilling assigned allotments—they would have a chance to lease or purchase land confiscated by the

³⁴ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), superseded (1868).

³⁵ For a discussion of limited opportunities for slaves to obtain cash wages through practices such as self-hire, cultivation of gardens, and specialized skills, see LOREN SCHWENINGER, *BLACK PROPERTY OWNERS IN THE SOUTH 1790–1915* (1990).

³⁶ KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865–1877*, 123 (1966). See also W.E.B. Du Bois, *Black Reconstruction*, in STAMPP & LITWACK, *supra* note 32, at 432–433:

In the first place, it goes without saying that the emancipated slave was poor; he was desperately poor, and poor in a way that we do not easily grasp today. He was, and always had been, without money and, except for his work in the Union Army, had no way of getting hold of cash. He could ordinarily get no labor contract that involved regular or certain payments of cash. He was without clothes and without a home. He had no way to rent or build a home. Food had to be begged or stolen, unless in some way he could get hold of land or go to work; and hired labor would, if he did not exercise the greatest care and get honest advice, result in something was practically slavery.

³⁷ See EDWARD MAGDOL, *A RIGHT TO THE LAND: ESSAYS ON THE FREEDMEN’S COMMUNITY* 150 (1977):

[T]he struggle over the land in the summer and fall of 1865 was an agrarian class conflict. The planters resisting expropriation used the machinery of state. In the provisional state governments under President Johnson’s protective leniency, planters not only prohibited black landownership but enacted extreme measures of social control that virtually restored slavery. The black codes struck directly at freedmen striving to escape their subordination and to obtain their communities. It was class and race legislation. But planters escalated the struggle on the political plane by pressing President Johnson to curb the redistribution of lands to freedmen. Simultaneously, they demanded that the result of the war be set aside by their insistent demand for restoration of their lands. The President responded with alacrity

Union from Southern insurrectionists.³⁸ To be sure, the Union’s confiscation policy served many goals and these goals changed as the war continued. It cut off sources of financing for the Confederacy. It encouraged those residing and working in the Confederacy to defect to the Union. But it also provided resources to carry out a modest program of land distribution—what came to be known as “forty acres and a mule.”³⁹ And, in a society in which power derived from land, confiscation chipped away at the white aristocrat monopoly on power in the South.

While many factors contributed to the failure of confiscation and land distribution,⁴⁰ President Johnson’s obstinance, obstruction, and pardon policy were critical—and the pardon power was at the heart of the *Klein* case.⁴¹ By returning property to those who were pardoned, Johnson eliminated the Freedmen’s Bureau’s chief source of funding (having never appropriated funds for its operation), as well as the land needed to create a multi-racial power base in the

³⁸ WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT (1976).

³⁹ *Id.* at 285.

⁴⁰ See CLAUDE OUBRE, FORTY ACRES AND A MULE (1978) (providing an account of this failure). See also Robert Harrison, *New Representations of a ‘Misrepresented Bureau’: Reflections on Recent Scholarship on the Freedmen’s Bureau*, 8 AMERICAN NINETEENTH CENTURY HISTORY 205-29 (2007) (presenting a metastudy of scholarship documenting this and other failures of the Freedmen’s Bureau); STAMPP, *supra* note 36, at 129:

Why did confiscation—indeed, land reform of any kind—fail to pass Congress? In part it was due to the fact that many of the radicals did not understand the need to give Negro emancipation economic support. Most of them apparently believed that a series of constitutional amendments granting freedom, civil rights, and the ballot would be enough. They seemed to have little conception of what might be called the sociology of freedom, the ease with which mere laws can be flouted when they alone support an economically dependent class, especially a minority group against who is directed an intense racial prejudice.

⁴¹ This Essay does not explore or explain Johnson’s changing attitudes toward clemency and land distribution. See generally e.g., JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861–1898, 19 (2018 rep.: 1953) (“A combination of circumstances operated to turn Johnson to a course of leniency in dealing with the South.”); Eric L. McKittrick, *Andrew Johnson, Outsider* in RECONSTRUCTIONS: AN ANTHOLOGY OF REVISIONIST WRITINGS 56–57 (Kenneth M. Stamp & Leon F. Litwack eds. 1969) (stating that Johnson’s “softened attitude is attributed variously to the counsels of Secretary Seward, the intrigues of the Blairs, and the blandishments of southern Ladies seeking pardons for their husbands. . . . But in the long run Johnson made his own decisions, and the really critical aspect of his Reconstruction policy—the constitutional relations of the states to the Union—had probably hardened for him, and thus ceased to vest his mind, early in the war.”).

South.⁴² More generally, it restored power to a landed class determined to subordinate Black people and to disregard their constitutional freedom.⁴³

The Court decided *Klein* in 1872, the year that Congress officially abolished the Freedmen’s Bureau. Its decisions in the *Slaughter-House* and *Civil Rights Cases*⁴⁴—setting in place, as Charles L. Black, Jr., put it, “[s]eparate but equal’ and ‘no state action’—... fraternal twins [that] have been the Medusan caryatids upholding racial injustice”—were still to come.⁴⁵ This Article foregrounds the relationship between *Klein*, the failure of land distribution, and the restoration of a racist hegemonic order in the old Confederacy. It brings into sharp relief the striking contrast between the federal government’s treatment of Blacks’ economic interests during that period, and the interests of their enslavers. As Claude Oubre has written, “[t]he tragedy of Reconstruction is the failure of the black masses to acquire land, since without the economic security provided by land ownership the freedmen were soon deprived of the political

⁴² See GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN’S BUREAU 96 (1955) (“Johnson had ended almost every chance for a program of confiscation and redistribution,” and “had prevented what had promised—or threatened—to be the most revolutionary feature of Reconstruction”).

⁴³ DONALD G. NIEMAN, THE FREEDMEN’S BUREAU AND BLACK FREEDOM, vol. 2, vii (1994):

If slavery was dead ... the contours of what was to replace it were uncertain. ... [W]hite landowners and freedmen had fundamentally conflicting visions of the post-emancipation order. African American badly wanted freedom from white, control, which they equated with landownership, freedom of movement, control of their families, establishment of community institutions such as churches, schools, and mutual-aid societies, and access to justice. Southern whites, however, were intent on maintaining a cheap, tractable, immobile, dependent source of labor and, given the powerful racism that survived slavery, were convinced that blacks were incapable of living responsible in freedom.

See also W.E.B. Du Bois, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART OF WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, 601 (1935) (“This land hunger—this absolutely fundamental and essential thing to any real emancipation of the slaves—was continually pushed by all emancipated Negroes and their representatives in every southern state. It was met by ridicule, by anger, and by dishonest and insincere efforts to satisfy it apparently.”).

⁴⁴ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁴⁵ Charles L. Black, Jr., *Foreword: “State Action,” “Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 70 (1967). *See* David R. Upham, *Protecting the Privileges of Citizenship: Founding, Civil War, and Reconstruction*, in CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY 139 (Ronald J. Pestritto & Thomas G. West eds. 2005) (“As is well known, the *Slaughter-House* cases virtually nullified the Fourteenth Amendment’s privileges or immunities clause.”).

and civil rights which they had won.”⁴⁶ In that tragedy, the Court in *Klein* played a role that has been overlooked in the federal-courts literature, raising questions about the decision’s iconic status and the rule of law values that it is said to support. Far from glorifying *Klein* as a case about judicial independence, this Article instead suggests that the Court’s assertion of constitutional supremacy should be reconsidered as facilitating political efforts to defeat Reconstruction in ways that suppressed racial equality.

We proceed as follows:

Part I provides the context for *Klein*, expanding the narrative from the legal claims of the white cotton vendor who brought the lawsuit, to the property dreams of Black people newly emancipated from slavery; to Congressional and military efforts to support land distribution; and to the Court’s role in supporting Presidential policies that radically deferred Black people’s land dreams to this day. Discussions of *Klein* tend to focus on its interpretation of Article III and the pardon power; we bring into the analysis the dissenting opinions of Justices Miller and Bradley, who, while agreeing that the Court had jurisdiction and that the President’s pardon power was plenary, nevertheless found that as a legislative matter, no compensation was warranted because the claimant possessed no property interest as defined by Congress. The majority’s assertion of supremacy—for itself and for the President—thus came at the expense of Article I powers and with disregard of the government’s broken promises to freed Blacks.

Part II traces the erasure of racial politics from scholarly discussion of *Klein*. At the time of the decision, the public, as reflected in contemporary newspaper accounts, fully understood the import of the Court’s decision, and saw it not only as a case about land confiscation, but also about the restoration of the white power structure of the South. Deep into the twentieth century,

⁴⁶ OUBRE, *supra* note 40.

commentators applauded the failure of land distribution as having prevented, as Woodrow Wilson, then professor, said, the worst of the “dangerous racial consequences”⁴⁷ of post-Civil War policies. Over time, the decision’s racial implications disappeared from mainstream academic discussion;⁴⁸ Charles Fairman waved away the effect of the confiscation cases as “of transitory importance” and concluded that “[i]n this chapter of its annals the Court performed well.”⁴⁹ Cleansed of any racial stain, *Klein* transformed from an early decision about the government’s obligation to honor war claims,⁵⁰ to a case about limits on Congress’ power to regulate the appellate jurisdiction of the Supreme Court. By the 1950s, *Klein* had acquired its singular status as a victory for judicial independence and the inviolability of property rights; Legal Process scholars erected it as pillar in arguments about institutional settlement and race-neutral concepts of Article III jurisdiction.⁵¹ And it then acquired a scholarly significance quite detached from its original racial origins.

Part III considers the implications of *Klein* once it is brought into dialogue with scholarship about the Reconstruction Court’s perpetuation of legacies of slavery. *Klein* did not interpret the Reconstruction Amendments. But the Court’s technical issues of jurisdiction, evidence, and the pardon power should not obscure the decision’s importance to notions of Black citizenship. *Klein*, alone, was not responsible for the restoration of white Southern power and

⁴⁷ Quoted in Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2047 (2022).

⁴⁸ The leading exception of course was W.E.B. DuBois, *Reconstruction and its Benefits*, 15 THE AMERICAN HISTORICAL REVIEW 781 (1910). See also Martin Abbott, *Free Land, Free Labor, and the Freedmen’s Bureau* 30 AGRICULTURAL HISTORY 150-56 (1956).

⁴⁹ FAIRMAN, *supra* note 8, at 874.

⁵⁰ See William Lawrence, *The Laws of War. The Constitution and the War Power. The Liability of the Government to Pay War Claims*, 22 THE AMERICAN LAW REGISTER 265 (1874). The next reference in 1895, includes *Klein* in a list of decisions by the Supreme Court overturning legislation on grounds of unconstitutionality. See Hampton L. Carson, *Judicial Power and Unconstitutional Legislation*, 43 THE AMERICAN LAW REGISTER AND REVIEW 796 (1895).

⁵¹ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953).

the continuing injustice of racial inequality. But we urge that the decision’s canonical status today not be used to reinforce past practices of racial exclusion.⁵² Like those who have argued for including slavery in the constitutional law canon,⁵³ we argue that understanding *Klein*—already a part of the federal courts canon—requires a reckoning with post-Civil War efforts to suppress Black Emancipation. This Part closes by raising questions about how our reading of *Klein* might encourage a reorientation of Article III doctrine with respect to federalism, separation of powers, and judicial power.

I. *Klein* and the Court’s “Breach of Faith”

United States v. Klein was one of a number of cases in the post-Civil War period involving the Union’s confiscation of rebel property; the decision fortified the property rights of former Confederates while hindering freed Blacks from obtaining property.⁵⁴ Along the way, *Klein* bolstered the President’s pardon power and disabled Congress from enacting significant egalitarian legislation. The intertwined issues of confiscation and Black land ownership were central to debates at the time. Was the Confederacy to be restored to the Union, as President Johnson urged, “with all its manhood”?⁵⁵ Or was the Civil War “a revolutionary war of emancipation,”⁵⁶ seeking, as Thaddeus Stevens urged, to change “[t]he whole fabric of southern

⁵² Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071, 1085 (2021) (“As a democracy with an anti-democratic past, it is incumbent on us to explore ways not to reproduce past exclusion.”).

⁵³ See, e.g., Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHICAGO-KENT L. REV. 1087, 1111 (1993) (questioning the view that materials about slavery “however intellectually interesting, ... are simply ‘outdated’”); Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000) (arguing that the omission of slavery from the constitutional canon “leads to a skewed and incomplete understanding” of the American Constitution).

⁵⁴ For an overview, see Daniel W. Hamilton, *A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court*, 29 J. SUP. CT. HIST. 254, 265-80 (2004).

⁵⁵ PHILIP B. LYONS, STATESMAN AND RECONSTRUCTION: MODERATE VERSUS RADICAL REPUBLICANS ON RESTORING THE UNION AFTER THE CIVIL WAR 44 (2014).

⁵⁶ JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 296 (2018).

society”⁵⁷ Southern newspapers and Northern Democrats called confiscation and efforts to promote it “mean and malicious ... begotten by a mean and malicious set of men”⁵⁸ For them, the President’s offer of pardons was a welcome tonic.⁵⁹ African Americans newspapers like the *New Orleans Tribune* and the *South Carolina Leader* insisted that freed Blacks needed land as protection against exploitation.⁶⁰ As an article published in November 1864 observed: “[T]he negro enjoys no marks of liberty, except that he is not to be a chattel. He has no ballot; he cannot enter into contract; he cannot change his residence; he cannot go into court; government fixes his rate of wages.”⁶¹ There needs to be, the editor wrote, “a new class of landlords who shall be based on a new and truly republican system.”⁶²

This Part opens by discussing the centrality of land to emancipated slaves’ dreams of freedom. We sketch out the complex web of orders and statutes that authorized land distribution to freed Blacks, the dependence of these programs on the confiscation of insurrectionists’ property, and President Johnson’s use of the pardon policy to thwart land distribution. The history of this period is vast and we do not purport to be comprehensive. We instead are stylized in our approach, emphasizing themes through path marking incidents. With this history in the foreground, we then briefly recount the Court’s decision in *Klein*, raising questions about its

⁵⁷ THADDEUS STEVENS, SPEECH AT LANCASTER, SEPTEMBER 6, 1865, IN RECONSTRUCTION: VOICES FROM AMERICA’S FIRST GREAT STRUGGLE FOR RACIAL EQUALITY 92, 103–104 (2018).

⁵⁸ *More Loyal Trouble*, PUBLIC LEDGER (Memphis, Tennessee, Jan. 31, 1872, available at <https://www.newspapers.com/image/587388395>).

⁵⁹ See W.R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865–1867, 33 (1963) (recounting that the 1865 Proclamation of Amnesty, announced five weeks after Johnson assumed the Presidency, “came like a tonic to the demoralized South. The mass of people were unconditionally pardoned, and their leaders were led to expect a favourable consideration if they made personal application for presidential pardons”); *id.* at 34 (explaining that the pardon required taking “a simple oath to the United States, which was no more than a recognition of the situation following the Southern defeat”).

⁶⁰ Gilles Vandal, *Black Utopia in Early Reconstruction New Orleans: The People's Bakery as a Case-Study*, 38 THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION 437, 442 (1997) (“Furnishing freedmen with lands was the cornerstone of any real emancipation policy, the Tribune argued, since it was the only way black laborers could escape the domination of white planters.”).

⁶¹ *Id.* 442 (citing an editorial from November 3, 1864).

⁶² *Id.* (citing an editorial from November 29, 1864).

constitutional holdings in light of their racial implications and role in the defeat of Reconstruction.

A. Property, Black Freedom, and Broken Promises

Before, during, and after the Civil War, many Black people, through their actions and words, made clear their desire for freedom and their belief that land ownership was a core component of freedom.⁶³ That an enslaved person could dream of owning property was itself legally “transgressive”;⁶⁴ the Fugitive Slave Law made it a crime for a slave to run away and be a “freedom seeker.”⁶⁵ Early Black efforts to self-emancipate through land acquisition were thus all outside the boundaries of law—for example, the 1739 temporary settlement “attempted by a collectivity of South Carolina slaves from Stono,” and the more permanent community set up in the 1760s along the Savannah River.⁶⁶ During the Civil War, some Blacks took the initiative and seized abandoned plantations where they had been enslaved.⁶⁷ In addition, more than ten percent of the enslaved population, roughly about a half million people, escaped to Union-held places in the South like Fortress Monroe in Virginia, Port Royal in South Carolina, and, ultimately, any place where Union troops were stationed.⁶⁸

⁶³ MAGDOL, *supra* note 37 **Error! Bookmark not defined.**, at 6 (discussing Black people’s acts of “self-emancipation” and the centrality of property to their conception of freedom); Joel Williamson, *The Meaning of Freedom*, in STAMPP & LITWAK, *supra* note 32, at 219 (stating that “even in the early days of freedom, former slave with amazing unanimity revealed— ... by their ambition to acquire land—a determination to put an end to their slavery”).

⁶⁴ Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives From Slavery* 97 NOTRE DAME L. REV. __ (2022) (forthcoming), available at <https://ssrn.com/abstract=4129417> (using the term transgressive constitutionalism to describe acts by enslaved people that “asserted their claims to freedom and fundamental human rights”).

⁶⁵ See Chandra Manning, *Contraband Camps and the African American Refugee Experience During the Civil War*, in OXFORD RESEARCH ENCYCLOPEDIA DEC. 19, 2017, <https://doi.org/10.1093/acrefore/9780199329175.013.203> (using the term “freedom seeker” to describe an enslaved person who ran away).

⁶⁶ MAGDOL, *supra* note 37.

⁶⁷ *Id.*

⁶⁸ BENTLEY, *supra* note 42; PAUL SKEELS PEIRCE, *THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 3 (1904) (“The early date ... at which the question of dealing with fugitives and refugees

For the first two years of the war, the United States' official position was that even when physically within the sphere of Union protection, freedom seekers were not emancipated, but rather “contraband.”⁶⁹ Despite that label, boots on the ground took policy in directions—toward emancipation and land settlement—that President Lincoln did not yet favor. In 1861, General Butler at Fort Monroe unilaterally barred the return of runaway slaves to their masters, ordered rations be given to all, and authorized able-bodied Black people be put to work.⁷⁰ Placing runaway slaves in makeshift congregate facilities, “contraband camps” of Black workers emerged.⁷¹ Black labor provided resources and revenue for the war effort; the war effort's need for labor converged with Black people's aspirations for freedom and opportunities to acquire economic self-sufficiency.⁷² Against this background, Congress passed the First Confiscation Act in 1861, which provided that any property used in “aiding, abetting, or promoting” the insurrection was “declared to be lawful subject of prize and capture wherever found,” and made it “the duty of the President . . . to cause the same to be seized, confiscated, and condemned.”⁷³ Property included slaves; under this act, seizure of property was permanent. In the meantime, decisions affecting Black people and land continued to be made in the field. General Fremont

presented itself and the strong desire and necessity of conciliating the border states, prevented the war department from promptly formulating a general policy).

⁶⁹ Kate Masur, “*A Rare Phenomenon of Philological Vegetation*”: The Word “Contraband” and the Meanings of Emancipation in the United States 93 J. AMER. HIST. JOURNAL OF AMERICAN HIST. 1050 (2007).

⁷⁰ National Park Service, *Fort Monroe and the “Contrabands of War,”* <https://www.nps.gov/articles/fort-monroe-and-the-contrabands-of-war.htm>.

⁷¹ Manning, *supra* note 65. The contraband camps are said to have provided “antecedents” for later land reform programs. PEIRCE, *supra* note 68, at 1.

⁷² Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (“[T]his principle of ‘interest convergence’ provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.”); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988) (arguing that, consistent with Bell’s thesis, America’s foreign policy interests in the Cold War facilitated integration). For a critique of the theory, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 156 (2011) (“[T]he theory’s overly broad conceptualization of ‘black interests’ and ‘white interests’ obscures the intensely contested disputes regarding what those terms actually mean.”)

⁷³ 12 Statutes at Large 319.

famously acted on the basis of martial law and freed slaves in Missouri—which had not seceded—only to have the decision countermanded by President Lincoln.⁷⁴ In November 1861, General Sherman captured the Sea Islands and Port Royal, and the Union gained legal control and possession of all property including 8,000 enslaved persons.⁷⁵ Joel Williamson has written,

Hardly had the troops landed, in November, 1861, before liberal northerners arrived to begin a series of ambitious experiments in the reconstruction of southern society. One of these experiments included the redistribution of large landed estates to the Negroes. By the spring of 1865, this program was well underway, and after August any well-informed, intelligent observer in Southern Carolina would have concluded as did the Negroes, that some considerable degree of permanent land division was highly probable⁷⁶

Congress responded in 1862 with a Second Confiscation Act. The drafting of this statute was complex and reflected extensive debate and compromise; it declared that the “confiscated” slaves of Confederate officers and civilians “shall be forever free,” but the law could be enforced only in Union-occupied portions of the South.⁷⁷ The sale of other confiscated property that was seized required in rem proceedings.⁷⁸ Lincoln hesitated before signing the Act, concerned, in part, that forfeiture would run beyond the life of the owner.⁷⁹ In many ways, the Second Confiscation Act was more ambitious than the first because it authorized the confiscation of all property from those who aided the Confederacy. The property would help finance the war and, ultimately be “distributed to freemen and poor whites after the fighting ended.”⁸⁰ As historians

⁷⁴ Vernon L. Volpe, *The Fremonts and Emancipation in Missouri*, 56 *THE HISTORIAN* 339 (1994).

⁷⁵ Louis S. Gerteis, *Salmon P. Chase, Radicalism, and the Politics of Emancipation, 1861-1864*, 60 *THE JOURNAL OF AMERICAN HISTORY* 42, 59 (1973).

⁷⁶ Williamson, *supra* note 63, at 218–219.

⁷⁷ RODNEY P. CARLISLE, J. GEOFFREY GOLSON, *TURNING POINTS ACTUAL AND ALTERNATE HISTORIES A HOUSE DIVIDED DURING THE CIVIL WAR ERA* 78 (2007).

⁷⁸ 12 *STAT. AT LARGE* 319.

⁷⁹ JOHN SYRETT, *THE CIVIL WAR CONFISCATION ACTS: FAILING TO RECONSTRUCT THE SOUTH* 53 (2003).

⁸⁰ *ID.*

have observed, “[m]any Republicans in Congress, but not Lincoln, hoped the measure would also destroy the planter class and submit the South to a thorough Reconstruction.”⁸¹

That same year, Congress enacted the Militia Act, which authorized use of paid Black labor in the war effort, and for the first time, Black laborers had access to capital (although wages were not always paid, always paid on time, or always equal to wages paid to whites).⁸² Additionally, the Direct Tax Act of 1862⁸³ provided for the seizure of certain lands for overdue taxes in the states that seceded from the United States,⁸⁴ with federal tax commissioners administering the program.⁸⁵

Confiscating land provided the Union with sources of revenue as Black laborers tilled the land and brought in the cotton harvest. It also provided the Union with a mechanism for assembling property that could be sold, leased, or given to Black people. In Roanoke, Virginia, General Foster established a contraband camp that was described as a “a unique and successful system of colonization at home”: “Negroes were given absolute ownership of small lots and were allowed an unusual measure of self-government.”⁸⁶ Less successful was the initial situation at Port Royal, where confiscated land was put to sale but purchased almost exclusively by Northern financiers.⁸⁷ With the goal of reversing this development, in February 1863, Congress amended

⁸¹ ID.

⁸² See CHANDRA MANNING, *TROUBLED REFUGE: STRUGGLING FOR FREEDOM IN THE CIVIL WAR* 222–32 (2016) (discussing unequal pay rates for Black and white soldiers, and the eventual enactment in June 1864 of a federal statute “equalizing soldier pay”)

⁸³ Direct Tax Act (Insurrectionary Districts), June 7, 1862, ch. 98, 12 Stat. 422 The act was called at the time “An act for the collection of direct taxes in insurrectionary districts within the United States and for other purposes,”

⁸⁴ Charles F. Dunbar, *The Direct Tax of 1861*, 3 THE QUARTERLY JOURNAL OF ECONOMICS 436, 448–49, Jul., 1889. (describing the 1862 law).

⁸⁵ President of the United States of America, *Collection of Taxes in Insurrectionary Districts: A Proclamation*, THE NEW YORK TIMES, July 3, 1862

⁸⁶ PEIRCE, *supra* note 68, at 8.)

⁸⁷ Louis S. Gerteis, *Salmon P. Chase, Radicalism, and the Politics of Emancipation, 1861–1864*, 60 THE JOURNAL OF AMERICAN HISTORY 42, 59 (1973); see also James M. McPherson, *The Ballot and Land for the Freedmen, 1861–1865*, in STAMPP & LITWACK, *supra* note 32, at 146–147 (reporting that of 16,479 acres put to sale on the sea islands, freedmen who had pooled their savings purchased 2,000 acres, and Edward Philbrick as representative of a

the Direct Tax Act and authorized the commissioners to set aside some of the land for “charitable purposes” as a means of aiding former slaves.⁸⁸ Then in September 1863, the Lincoln administration provided for the sale of 16,000 twenty-acre lots in South Carolina at a rate of \$1.25 per acre to people of “the African race.”⁸⁹ General Saxton invited freedmen to identify and claim property they wished to purchase in advance of the sale.⁹⁰ Relying on these representations, freedmen paid for the first right-of-refusal with respect to specific plots.⁹¹ The carrying out of this policy created the very real prospect of a small class of former enslaved Black Americans who, years before the Civil War ended, would own decently sized plots of farmable land in South Carolina. Freedmen “joyfully staked out allotments,” tendered payments, and applied to the proper tax commissioners, but the commissioners—whether because of white supremacy, paternalism, or corruption—refused to accept their money and the land purchases came to naught.⁹²

group of Boston financiers, purchased 8,000 acres and then hired freedmen to farm the land and “cleared a huge profit”).

⁸⁸ *Id.*

⁸⁹ Abraham Lincoln, *Instructions to Tax Commissioners in South Carolina*, Sept. 16, 1863, in Roy Basler, *WORKS OF LINCOLN*, 6:453 (1953); see also Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 460 (2003) (describing Lincoln’s instructions.); Akiko Ochiai, *The Port Royal Experiment Revisited: Northern Visions of Reconstruction and the Land Question*, 74 THE NEW ENGLAND QUARTERLY 99, 100 (2001).

⁹⁰ Ochiai, *supra*, at 89; see also BENTLEY, *supra* note 42, at 90.

⁹¹ Gerteis, *supra* note 87, at 59.

⁹² At least one historian attributes this rejection, in part, to a paternalistic attitude of those who lobbied to commission against selling the land to freedmen. White Northern investors who wanted to purchase the land insisted that selling the land to freedmen would “confuse[]” emancipated Blacks, “encourage[] them to them to leave their accustomed chores, and created chaos at a time when the blacks needed order and paternal direction.” *Id.* Another historian has highlighted the tax commissioner’s commitment to “white superiority” as a reason for the rejection. Ochiai, *supra* note 89, at 112. See also PEIRCE, *supra* note 68, at 13:

Under General Saxton in South Carolina, more stringent rules concerning the issue of free rations were enforced and negroes were set to work for the government or for white employers and, in some cases were able to purchase small farms sold by the tax commissioners at merely nominal prices. They suffered, however, from non-payment of wages, contradictory orders of generals, ungenerous action of tax commissioners, and failures of northern adventurers. So trust in the government was shaken and the efficiency of the system impaired.

As the war continued, land policy continued to change; in 1863 Lincoln’s Secretary of War Stanton established The American Freedmen’s Inquiry Commission, to investigate ways to encourage Black people to join the war effort and to support the transition from slavery to freedom.⁹³ The commission conducted extensive interviews. Of Black refugees in South Carolina, the report stated: “The chief object of ambition among the refugees is to own property, especially to possess land, if it be only a few acres, in their own State. . . . They delight in the idea.”⁹⁴ The commission’s investigation also underscored the dangers of extensive racialized violence against Black people, and emphasized the need for federal protection.⁹⁵

The same year as the Commission’s Report, Congress passed the Captured and Abandoned Property Act.⁹⁶ Under that act, agents of the Treasury Department could obtain and seize any abandoned or captured property in insurrectionist States. Both the report and the Captured and Abandoned Property Act were an important part of the origins of the Bureau of Refugees, Freedman, and Abandoned Lands. Indeed, historians have called the Commission’s Report the “blueprint” for Reconstruction,⁹⁷ and its recommendations contributed to the establishment in March 1865 of the Freedman’s Bureau, enacted a month before Lincoln’s assassination. The Bureau’s mandate was clear: to distribute abandoned and confiscated lands to “every male citizen, whether refugee or freedman” for a three-year rental period, and then for

⁹³ PRELIMINARY REPORT TOUCHING THE CONDITION AND MANAGEMENT OF EMANCIPATED REFUGEES; MADE TO THE SECRETARY OF WAR, BY THE AMERICAN FREEDMEN’S INQUIRY COMMISSION, June 30, 1863, 14 (Publication Authorized by the Secretary of War (1863)).

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 35:

Every aggression, every act of injustice committed by a Northern man against unoffending fugitives from despotism, every insult offered by the base prejudice of our race to a colored man because of his African descent, is not only a breach of humanity, an offense against civilization, but is also an act which gives aid and comfort to the enemy.

⁹⁶ 12 Stat. 820.

⁹⁷ John G. Sproat, *Blueprint for Radical Reconstruction*, 23 J. SOUTHERN HIST. 25 (1957).

purchase from the United States with “such title as it could convey.”⁹⁸ Congress viewed the Freedmen’s Bureau as a temporary agency, to operate “during the present war of rebellion, and for one year thereafter,” and did not appropriate funds for any of its activities, which included education and social services in addition to land settlement.⁹⁹ Instead, Congress assumed that by leasing out confiscated lands, the Bureau could operate on a self-sustaining basis, using proceeds from the rentals to fund its own operations and supplies.¹⁰⁰

On a parallel track, federal officials continued to make promises to freedmen that they would be able to lease or purchase the federal lands on which they lived and worked. On January 12, 1865, twenty freedmen met with Secretary of War Stanton and Major General Sherman in Savannah, Georgia; the Rev. Garrison Frazier served as the freedmen’s spokesperson. When asked his views on the meaning of freedom, he answered in part:

Slavery is, receiving by irresistible power, the work of another man, and not by his consent. The freedom is, as I understand it, promised by the [Emancipation Proclamation], is taking us from under the yoke of bondage, and placing us where we could reap the fruit of our own labor, take care of ourselves and assist the Government in maintaining our freedom. The way we can best take care of ourselves is to have land, and turn it and till it by our own labor—that is, by the labor of the women and children and old men; and we can soon maintain ourselves and have something to spare... We want to be placed on land until we are able to buy it and make it our own.¹⁰¹

⁹⁸ Freedman and Refugees Act, ch. 90, 13 Stat. 507 (1865).

⁹⁹ Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 507 (1865) (“That there is hereby established in the War Department, to continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands....”); see Taja-Nia Y. Henderson, *Dignity Contradictions: Reconstruction As Restoration*, 92 CHI.-KENT L. REV. 1135, 1154 (2017) (“Congress clearly expected the Bureau’s to have a limited lifespan. In addition to its single year authorization, the legislation included no budget appropriation for the new agency.”).

¹⁰⁰ John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 96 (2006).

¹⁰¹ *Minutes of an Interview Between the Colored Ministers and Church Offices at Savannah with the Secretary of War and Major-Gen. Sherman*, Jan. 12, 1865, as reproduced in PAUL HARVEY, *THROUGH THE STORM, THROUGH THE NIGHT: A HISTORY OF AFRICAN AMERICAN CHRISTIANITY* (2011)

Shortly after the meeting, Sherman announced Special Field Order 15.¹⁰² That order sought to distribute land to freedmen along parts of the South Carolina, Georgia, and Florida coasts.¹⁰³ Saxton, now appointed inspector of plantations and settlements, was tasked with assigning each family possessory title in forty acres and furnishings. Major General Howard, as commissioner of the Freedmen’s Bureau, permitted Saxton to continue this program—and by June 1865 the enterprise had distributed more than 400,000 acres to 40,000 freedmen.¹⁰⁴ Both the Freedmen’s Bureau and the generals fully expected that Congress would formalize title.¹⁰⁵ One bureau official said at the time, “I trust the pledges will be upheld.... I am sure a permanent title will be given to the actual settlers on these lands.”¹⁰⁶ To that end, in July 1865, Saxton issued Circular No. 13 and instructed field officers that land distribution was now the official Union policy, and ordered assistant commissioners to set aside land coming into their control and to start dividing it into lots for sale.¹⁰⁷

Special Field Order No. 15 has been called “the single most revolutionary act in race relations in the Civil War.”¹⁰⁸ But the order quickly came onto a collision course with Johnson within weeks of his becoming President.¹⁰⁹ By May 1865 Johnson made clear that he wanted “to

¹⁰² LAURA JOSEPHINE WEBSTER, *THE OPERATION OF THE FREEDMEN'S BUREAU IN SOUTH CAROLINA* 1916.

¹⁰³ Lawanda Cox, *The Promise of Land for the Freedmen*, 45 *THE MISSISSIPPI VALLEY HISTORICAL REV.* 413, 429 (1958); PAUL A. CIMBALA, *UNDER THE GUARDIANSHIP OF THE NATION*, 2-5 (2003).

¹⁰⁴ BENTLEY, *supra* note 42, 82-83; *see also* CIMBALA, 166.

¹⁰⁵ STAMPP, *supra* note 36, at 125 (stating that lands in South Carolina and Georgia sea islands south of Charleston and abandoned rice lands “were to be divided into farms of not more than forty acres, and Negro families were to be given ‘possessory’ titles to them until Congress should decide upon their final disposition”); Sproat, *supra* note 97, at 29 (“Responsible directly to the War Department, Saxton was able to operate unencumbered by other officials in the vicinity. His creditable management of the colony helped solve some of the problems of refugee Negroes so effectively that the project became an important element in Radical propaganda and a model for subsequent efforts by the War Department.”).

¹⁰⁶ BENTLEY, *supra* note 42, at 98.

¹⁰⁷ Gregg Cantrell, *Racial Violence and Reconstruction Politics in Texas, 1867-1868*, 93 *THE SOUTHWESTERN HISTORICAL QUARTERLY* 333, 345 (1990).

¹⁰⁸ MICHAEL FELLMAN, *CITIZEN SHERMAN: A LIFE OF WILLIAM TECUMSEH SHERMAN* (1997).

¹⁰⁹ BENTLEY, *supra* note 42, at 87–88:

Finally in one area of the work it had been expected to do the Freedmen’s Bureau made almost no beginning at all in 1865. That was in the assigning of confiscated and abandoned land to refugees

have the seceded States return back to their former condition as quickly as possible,”¹¹⁰ and announced that he would offer pardons on a lenient basis. Increasingly, former owners, now armed with pardons, sued to reclaim their land—even land that freed men occupied and tilled. In a particular case, Johnson directed Howard to instruct bureau officials to relinquish possession of the property of a Confederate veteran in Tennessee, and he simultaneously ordered, “The same action will be had in all similar cases.”¹¹¹ Howard stalled, taking the position that the President’s pardon did not “extend to the surrender of abandoned or confiscated property, which by law has been set apart [for use] by the freedmen.”¹¹² He even issued another circular promoting land distribution for freedmen that Johnson forced him to withdraw.¹¹³ Saxton wrote to Howard: “Thousands of [freedmen] are already located on tracts of forty acres each. Their love of the soil and desire to own farms amounts to a passion—it appears to be the dearest hope of their lives.” In a second letter Saxton wrote: “the faith of the Government is solemnly pledged to these people who have been faithful to it and we have no right to dispossess them of their lands.” In his Autobiography, commenting on the President’s pardon policy, Howard later wrote: “all was done for the advantage of the Confederates and for the disadvantage and displacement of the freedmen.”¹¹⁴

The President insisted that the lands be immediately restored which meant forcing the freedmen off the land where they now lived and worked. As the *Detroit Free Press* reported on

and freemen. In that matter the Bureau was having real trouble—a difference of opinion, then a controversy, with the President of the United States. As he restored the abandoned lands to pardoned southerners, the Bureau lost its anticipated income, and as it tried to keep this source of revenue, it incurred the bitter opposition of the President.

¹¹⁰ Miller, *supra* note 28, at 1060.

¹¹¹ A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 (1897), 112 (compiled by JAMES DANIEL RICHARDSON).

¹¹² BENTLEY, *supra* note 42, at 93.

¹¹³ *Id.*

¹¹⁴ Oliver Otis Howard, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD, 237 (1908).

September 20, 1865, “President Johnson has, within a few days, used the pruning axe most unsparingly.”¹¹⁵ Moreover, he ordered Howard to go South Carolina to “effect an arrangement mutually satisfactory to freedmen and landowners.”¹¹⁶ “Landowner” in this instruction did not mean the Blacks who now held illusory title. The subtext was clear: compel the freedmen to work as field laborers under the white owners. Howard and a white planter set up a meeting with a group of freedmen to encourage them to enter into contracts with the Southern white claimants. Many historians have described this meeting, which took place in a crowded church in Edisto.¹¹⁷ The meeting began with a Black woman singing, “Nobody knows the trouble I feel—Nobody knows but Jesus.”¹¹⁸ The meeting attracted a great deal of attention in the Black press; *South Carolina Leader*, a Black newspaper in Charleston, later published an editorial: “There may be some technical imperfection in the confiscation act which we do not comprehend. But considered in the light of good old-fashioned honesty there is no more reason for taking away these lands from negroes than there would be in taking their personal freedom and reducing them again to slavery.”¹¹⁹

The freedmen initially refused to leave their land and later handed Howard a petition directed to the President:

Shall not we who Are freedman and have been always true to this Union have the same rights as are enjoyed by Others? Have we broken any Law of these United States? Have we [forfeited] our rights of property In Land?– If not then! are not our rights as A free people and good citizens of these United States To be considered before the rights of those who were Found in rebellion against this good and just [Government] are these rebellious Spirits to be reinstated in

¹¹⁵ *The Freedmen’s Bureau*, DETROIT FREE PRESS (Detroit, MI), Sept. 20, 1865, <https://www.newspapers.com/image/118140825>

¹¹⁶ BENTLEY, *supra* note 42, at 98.

¹¹⁷ See, e.g., ID. ; WILLIAM S. MCFEELY, YANKEE STEPFATHER: GENERAL O. O. HOWARD AND THE FREEDMEN 144 (1994); Edwin D. Hoffman, *From Slavery to Self-Reliance: The Record of Achievement of the Freedmen of the Sea Island Region* 41 THE JOURNAL OF NEGRO HISTORY 8 (1956).

¹¹⁸ BENTLEY, *supra* note 42, at 98.

¹¹⁹ *Id.*, citing *South Carolina Leader* October 23, 1865.

[their] *possessions* And we who have been abused and oppressed For many long years not to be allowed the [Privilege] of purchasing land But be subject To the will of these large Land owners? God [forbid], Land monopoly is injurious to the advancement of the course of freedom, and if government Does not make some provision by which we as Freedmen can obtain A Homestead, we have Not bettered our condition.¹²⁰

In the months after, freedmen attempted to defend the property on which they toiled, trying to drive off individuals by force who trespassed.¹²¹ On January 15, 1866, Johnson dismissed Saxton as assistant commissioner for the Freedmen’s Bureau;¹²² by then, the South Carolina Governor had complained that Saxton was dragging his heels in returning land to those Johnson had pardoned.¹²³ Later, the President dismissed Stanton as well.¹²⁴ And, as is known, that decision set in motion the impeachment and eventual acquittal of the President.

Through his pardon policy, Johnson succeeded in wresting land from freedmen and returning it to white rebel owners.¹²⁵ As to freed people who had trusted in the government’s representations, they were given the Hobson’s choice of contracting with their new white overseers or leaving to face volatile and hostile conditions. Even the original Sherman allotments were restored to their rebel owners. The *Chicago Tribune* explained in an article dated December 23, 1865:

Although Gen. Sherman’s order was made subject to the future orders of the Government, yet this clause of his order was universally regarded as analogous to

¹²⁰ Freedmen and Southern Society Project, Committee of Freedmen on Edisto Island, South Carolina, to the President, October 28, 1865, *available at* <http://www.freedmen.umd.edu/Edisto%20petitions.htm#:~:text=We%20the%20freedmen%20of%20this,be%20but%20A%20few%20acres>

¹²¹ BENTLEY, *supra* note 42, at 99.

¹²² OUBRE, *supra* note 40, at 59.

¹²³ *Id.*

¹²⁴ *See* DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 751–752* (2005) (“Johnson’s disregard for the Tenure of Office Act became one of the articles of impeachment lodged against him in 1868.”).

¹²⁵ As another example, see the discussion of Davis Bend, Mississippi, in STAMPP, *supra* note 36, at 125–126 (reporting that 1,800 freedmen organized to raise crops and “finished the year with a cash balance on hand of \$159,200, but Johnson pardoned the owners of the plantation and returned the land (the owners included Jefferson Davis and his brother); see also VERNON LANE WHARTON, *THE NEGRO IN MISSISSIPPI, 1865–1890*, 38–41 (1947) (“A wiser and more benevolent government might well have seen in Davis Bend the suggestion of a long-time program for making the Negro self-reliant, prosperous, and enterprising element of the population.”).

the clauses inserted in charters granted by Congress making them repealable at the will of the Government. He invited the freemen to make their “homes” on these lands, and by such language Gen. Sherman never meant that they were merely to come upon the lands, till and improve them, supposing them their own, while the war should last, and the moment it was over and the President assassinated, that then the former owners were to come back, take possession and ask the negroes to work for them! Yet such is the unjust course pursued by the President of the United States towards these freedmen; and in our judgment this this is the worst, in all the catalogue of wrongs toward the freedmen under the present “magnanimous” policy of conciliating the rebels.¹²⁶

In the teeth of these actions, some members of Congress remained committed to land distribution for emancipated Blacks. In June 1866, Congress enacted the Southern Homestead Act, which opened 46 million acres of public lands in Alabama, Mississippi, Louisiana, Arkansas, and Florida, to be divided into 80-acre lots, and to be acquired through sweat equity—five years of working the land. In the end, this program failed for Black people as well. Among other barriers, Black codes in Mississippi obstructed Black citizens from owning land,¹²⁷ Southern commissioners did not tell freedmen of their right to file land claims,¹²⁸ and many Black Americans had signed sharecropping leases that did not allow them to leave and toil this newly available land.¹²⁹

Rather than the fulfilment of promises of landownership opportunities, governmental decisions and policies instead resulted in the reconsolidation of the antebellum aristocrats’ wealth, reproducing a racial caste system that was fortified by law, economic conditions, and

¹²⁶ *Gen. Howard’s Report*, CHICAGO TRIBUNE (Dec. 23, 1865), <https://www.newspapers.com/image/466093984>.

¹²⁷ OUBRE, *supra* note 40, at 95.

¹²⁸ PEIRCE, *supra* note 68, at 69. See also OUBRE, *supra* note 40, at 95 (observing that freedmen were “deprived of information by officials in Mississippi”).

¹²⁹ OUBRE, *supra* note 40, at 118 (“Since many blacks were under contract to work until the end of the harvest, they would not be able to select their land until after the period for exclusive entry.”) Oubre also documents a devastating flood in Louisiana that contributed to “chaotic conditions” and “confusion.” *Id.* at 114. See also BENTLEY, *supra* note 42, at 146 (explaining that the defective quality of the lands, the lack of subsidies, and the absence of tools including livestock, made the program “a miserable failure”); see also *Id.* at 142 (“Commissioner Howard hoped that this law might enable him to make independent, land-owning farmers of many Negroes—and probably no work of the Freedmen’s Bureau would have been more beneficial to its charges.”).

mob violence. As historian Chandra Manning has written, because President Johnson “prioritized restoring states to the Union,” across the south, “land that freedpeople had gained during the war (and had made profitable with their uncompensated labor before the war) went back to the antebellum owners, narrowing former slaves’ options for building new lives. As the troops pulled out, violence against freedpeople returned throughout the former Confederacy.”¹³⁰ The majority of freed people thus found themselves “with little choice but to return to work (for wages or for shares of the crop) for the same people who had owned the bulk of the land and the wealth before the war.”¹³¹ Rev. Squire Dowd, a former slave in North Carolina, explained when interviewed during the Great Depression as part of a history project of the Work Projects Administration: “[O]ur masters had everything and we had nothing. The Freedmen's Bureau helped us some, but we finally had to go back to the plantation in order to live.”¹³²

B. Property, White Power, and Presidential Pardons

Klein concerned a merchant who had aided the Confederacy, but armed with a Presidential pardon, sought compensation for his confiscated cotton. Compensation claims were statutory in nature, and the statutes set out a formal process for recovering property or obtaining compensation. The 1862 Act used in rem procedures drawn from admiralty law; the 1863 Act (at issue in *Klein*) permitted the filing of suit in the Court of Claims. The statutes also authorized the President to grant amnesty. Indeed, the possibility of granting pardons was critical in convincing

¹³⁰ See Chandra Manning, *Contraband Camps and the African American Refugee Experience During the Civil War*, in OXFORD RESEARCH ENCYCLOPEDIA DEC. 19, 2017, <https://doi.org/10.1093/acrefore/9780199329175.013.203>. See also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR TWO* (2012); DONALD G. NIEMAN, *FROM SLAVERY TO SHARECROPPING WHITE LAND AND BLACK LABOR IN THE RURAL SOUTH, 1865-1900* (1994).

¹³¹ MANNING, *supra* note 130.

¹³² WORK PROJECTS ADMINISTRATION, *SLAVE NARRATIVES: INTERVIEWS WITH FORMER SLAVES, NORTH CAROLINA NARRATIVES, PART 1*, available at <https://www.loc.gov/resource/mesn.111/?st=list>.

Lincoln to sign the statutes; Lincoln recognized seizure as a valid military power but was concerned that the law could deprive the insurrectionists' heirs of property even after the rebel had died and after the insurrection had ended.¹³³ "The severest policy may not always be the best justice," Lincoln stated in his signing statement to the 1862 Act.¹³⁴ Later, in December 1863, Lincoln famously issued his Proclamation of Amnesty to those who pledged loyalty to the United States (except high-ranking Confederate officers), insisting his authority came from the Constitution, and not from Congress. During Lincoln's presidency, very few Confederates stepped forward to request a pardon.¹³⁵ After Lincoln's assassination, Johnson initially seemed to embrace Lincoln's measured approach to pardons, a policy that would have left the Freedmen's Bureau equipped to use abandoned and confiscated property for land distribution to freed men.

The President announced:

That all officers of the Treasury Department, all military officers, and all others in the service of the United States turn over to the authorized officers of said Bureau all abandoned lands and property contemplated in said act of Congress approved March 3, 1865, establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, that may now be under or within their control. They will also turn over to such officers all funds collected by tax or otherwise for the benefit of refugees or freedmen or accruing from abandoned lands or property set apart for their use, and will transfer to them all official records connected with the administration of affairs which pertain to said Bureau.¹³⁶

However, in an about-face, Johnson quickly reverted to an aggressive clemency policy that all agree "seemed to befriend the pardoned claimants to the land taken over by the

¹³³ SYRETT, *supra* note 79, at 54.

¹³⁴ *Id.*

¹³⁵ Abraham Lincoln, Proclamation 108—Amnesty and Reconstruction, UCSB: The American Presidency Project (Dec. 8, 1863), <https://www.presidency.ucsb.edu/documents/proclamation-108-amnesty-and-reconstruction>

¹³⁶ *Orders Respecting Freedmen*, June 2, 1865, as reproduced in EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION (1871).

Freedmen’s Bureau rather than the freedmen whom the Bureau endeavored to aid, thus favoring the whites rather than the blacks.”¹³⁷ In May 1865, President Johnson issued a general proclamation of amnesty to those who pledged to support and defend the constitution and laws of the United States.¹³⁸ Again, there were exceptions; among others the “aristocrats”—those who voluntarily participated in the rebellion with taxable property of more than \$20,000.¹³⁹ Also excepted were those who had accepted an oath from President Lincoln, but aided the rebellion thereafter.¹⁴⁰ Johnson’s proclamation left open the option of special pardons, and he announced that “such clemency will be liberally extended as may be consistent with the facts of the case and the peace and dignity of the United States.”¹⁴¹ Consistent with that announcement, Johnson indeed liberally granted special pardons. A November 1865 notice in the *Argus and Patriot*, a Vermont newspaper, reported: “President Johnson has restored 6000 acres of confiscated land in Arkansas to its lawful owner, the Confederate General Gideon J. Pillow. It makes the abolition land pirates howl.”¹⁴²

Johnson issued additional general amnesties in 1867 and 1868, each time with fewer exceptions.¹⁴³ Within nine months of his first proclamation, Johnson had issued 14,000 pardons—a rate of about 100 pardons per day,¹⁴⁴ and argued that land be returned with full title.

¹³⁷ DORRIS, *supra* note 41, at 227.

¹³⁸ *Proclamation Pardoning Persons who Participated in the Rebellion*, May 29, 1865, as reproduced by Miller Center, University of Virginia, at <https://millercenter.org/the-presidency/presidential-speeches/may-29-1865-proclamation-pardoning-persons-who-participated>.

¹³⁹ *Id.* See also DORRIS, *supra* note 41, at 221.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² ARGUS AND PATRIOT (Montpelier, Vermont, Nov. 2, 1865. <https://www.newspapers.com/images/355362915> (accessed June 23, 2022). See UT Arlington Library, A Continent Divided: Gideon Johnson Pillow, https://library.uta.edu/usmexicowar/item?bio_id=85&nation=U.S. (Pillow served as Brigadier General in the Confederate Army; in February 1862 he “abdicated his command at Fort Donelson on the Tennessee River ... leaving Brigadier General Buckner to surrender the fort to Ulysses Grant”).

¹⁴³ Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867); Proclamation No. 6, 15 Stat. 702 (July 4, 1868); Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

¹⁴⁴ RICHARD ZUCZEK, STATE OF REBELLION RECONSTRUCTION IN SOUTH CAROLINA (2021), 11. See, e.g., Daily Evening News (Fall, River, MA) (Mar. 4, 1869), <https://www.newspapers.com/image/589882363>

In all, Johnson's pardons and accompanying orders narrowed the land available for land reform and deprived the Bureau of funds needed to carry out educational and social services for freed people.¹⁴⁵ Congress later allowed the Freedmen's Bureau to close;¹⁴⁶ looking back in 1880 to the failure of land reform, Frederick Douglas wrote:

In the ... eager desire to have the Union restored, there was more care for the subline superstructure of the Republic than for the solid foundation upon which it would alone be upheld. ... The old master class was not deprived of the power of life and death, which was the soul of the relation of master and slave. They could not, of course, sell their former slaves, but they retained the power to starve them to death, and wherever this power is held there is the power of slavery.¹⁴⁷

C. *Klein* and the Failed Promise of Land Distribution

The Supreme Court in *Klein* showed itself to be an active partner in the clemency policy that proved so detrimental to freedmen. To be sure, *Klein* was not the first or only case in which the Court attached the broadest possible reading to the legal implications of a pardon. Indeed, from the outset, with Lincoln still President, the Court interpreted the pardon power capaciously—even more capaciously than Lincoln intended, prompting him to issue a supplementary amnesty proclamation with clear exclusions that he insisted be honored.¹⁴⁸ *Klein* is, however, a coda to a tragic story in which property central to the reconstruction of the South

WASHINGTON NEWS: A special to the Providence Journal, dated 3d, says President Johnson granted a large number of pardons this morning to rebels an thieves generally. His ante-rooms were crowded all day by the agents of criminals seeking pardons. A fresh batch is promised to-morrow morning. Washington is ... jammed with visitors

¹⁴⁵Professor Claude Oubre starkly laid out the degree to which the amount of land controlled by the bureau dropped precipitously during this era. In Louisiana, for example, the number fell from 78,200 acres in 1865 to 3,040 acres in September 1868. In Mississippi, the number fell from 43,500 acres in 1865 to none in September 1868. And overall, the number fell from 858,000 to 139,543 acres during that period. OUBRE, *supra* note 40, at 37.

¹⁴⁶ See STAMPP, *supra* note 36, at 126–131; ROGER LOWENSTEIN, WAYS AND MEANS: LINCOLN AND HIS CABINET AND THE FINANCING OF THE CIVIL WAR 325–26 (2022).

¹⁴⁷ Frederick Douglass, *Why Reconstruction Failed* [August 1, 1880], reprinted in 7 FOURTH INTERNATIONAL 277 (1946), <https://www.marxists.org/history/etol/newspape/fi/vol07/no09/freddoug.htm#:~:text=The%20Negro%20today%20would%20not,native%20soil%20in%20comparative%20independence.>

¹⁴⁸ See DORRIS, *supra* note 41.

on a multi-racial basis was returned to enslavers and those who did commerce with them.¹⁴⁹ Well before *Slaughter-House* or *Civil Rights Cases*, *Klein* accelerated inequality and helped fortify a caste system during a fragile period of radical racial possibility. Moreover, the Court craftily narrowed Congress’s power—not just with respect to the pardon power and Article III jurisdiction, but also with respect to property rights—while validating the Lost Cause ideology.

Klein was a case that involved abandoned property—in particular, cotton. Cotton merchants had access to capital, and they played an important role in serving as sureties to the bonds and loans that the Confederacy floated in order to raise funding for the war effort.¹⁵⁰ Victor F. Wilson, whose actions were at issue in *Klein*, was a wealthy merchant in Vicksburg, Mississippi. Wilson owned large amounts of cotton, which he stored in warehouses in Vicksburg. At the time that Wilson’s cotton was seized, at least some of it was in containers marked “C.S.A.” (Confederate States of America) which, according the Attorney General of the United States, showed that the cotton was intended to aid the insurrectionists.¹⁵¹ After the cotton was seized, Wilson took an oath of loyalty on February 15, 1864.¹⁵² At the end of the war, on March 7, 1866, the administrators of Wilson’s estate, John A. Klein and Wilson’s wife,¹⁵³ sought compensation for the seized cotton under the 1863 Act by filing suit in the Court of Claims.¹⁵⁴

¹⁴⁹ On military views of merchants who traded with the Confederacy see, e.g., ROGER LOWENSTEIN, *WAYS AND MEANS: LINCOLN AND HIS CABINET AND THE FINANCING OF THE CIVIL WAR* 136 (2022) (“Sherman viewed the merchants trading across the lines as a fifth column propping up the enemy” and he and Grant “were horrified that profiteers were putting their troops at greater risk”).

¹⁵⁰ Cf. Richard C. Todd, *C. G. Memminger and the Confederate Treasury Department*, 12 *THE GEORGIA REVIEW* 396 (1958).

¹⁵¹ *Kline v. United States*, 4 Ct. Cl. 559, 566 (1868), *aff’d sub nom. United States v. Klein*, 80 U.S. 128, 20 L. Ed. 519 (1871)

¹⁵² *Id.*

¹⁵³ Mrs. Wilson died during the pendency of the action. See Transcript of the Record, *United States v. Klein*, 69-365, Index (noting the “Death of Jane Wilson”).

¹⁵⁴ The 1863 Act set out clear procedures for filing compensation claims. Within two years of the end of the war, “any person claiming to have been the owner of any such abandoned or captured property may... refer his claim to the proceeds thereof in the Court of Claims.” To obtain relief, a claimant needed to demonstrate four things. First, the claimant needed to show that the property was not “used or intended to be used for carrying on war against the United States.” Second, the claimant needed to prove “to the satisfaction of said court of his ownership of said

Under the 1863 Act, the estate had the burden to show loyalty¹⁵⁵—namely, that Wilson had not given aid or comfort to the rebellion. To meet that burden, the estate put forward evidence that Wilson had helped some individuals elude or escape service into the Confederate army. The United States countered that the seized cotton had “actually [been] used in the waging and carrying on war against the United States,” and the 1863 Act expressly exempted from compensation property in the waging of war against the United States.¹⁵⁶ The Court of Claims ruled in favor of the Wilson estate. The court appeared to credit testimony that the bales of cotton were labeled “C.S.A.” not because Wilson intended to give the cotton to the Confederacy, but because this label helped Wilson “to procure transportation, and to protect [the cotton] in transit.”¹⁵⁷ Moreover, the Court of Claims found that Wilson “never gave any voluntary aid or comfort to the rebellion, or to the persons engaged therein, but did consistently adhere to the United States.”¹⁵⁸

After judgment, the government asked the Court of Claims to reconsider in light of facts stipulated to by the estate’s counsel: that in 1862 and 1863, Wilson “signed as surety two official bonds of military officers in the confederate army, one of a brigade quartermaster, and the other of an assistant commissary.”¹⁵⁹ The Court of Claims affirmed its prior judgment, following the Supreme Court’s prior decision in *United States v. Padelford*, which had considered and resolved

property.” Third, the claimant needed to show that he was entitled to the recovery. Fourth, the claimant needed to demonstrate that “he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.”

¹⁵⁵ See James G. Randall, *Captured and Abandoned Property During the Civil War*, 19 AMERICAN HIST. REV. 65, 73 (1913)(“The government was not to be loaded with the burden of proving loyalty.”).

¹⁵⁶ *Kline v. United States*, 4 Ct. Cl. 559, 564 (1868), *aff’d sub nom. United States v. Klein*, 80 U.S. 128, 20 L. Ed. 519 (1871).

¹⁵⁷ *Id.* at 566 (1868).

¹⁵⁸ *Id.* at 567.

¹⁵⁹ *Brief of the United States*, *United States v. Klein*, No. 156, Appeal from the Court of Claims, 1.

the question of whether a Presidential pardon purged a surety of prior disloyalty.¹⁶⁰ The case involved a Savannah merchant named Edward Padelford who had aided the insurrection, but, once pardoned, was held to be entitled to compensation for the seized goods. Notably, the Court agreed with the United States that Padelford had voluntarily aided the rebellion, having “executed as surety three official bonds, two of commissaries and one of a quartermaster in the military service of the so-called Confederate States, from motives of personal friendship to the principals.”¹⁶¹ Indeed, the Court emphasized that Padelford had alleged “[n]o compulsion On the contrary, these acts are found to have been voluntary. We cannot doubt that these facts did constitute aid and comfort to the rebellion within the meaning of the act.”¹⁶² Nevertheless, the Court affirmed the lower court’s judgment for Padelford on a different ground: receipt of a Presidential pardon. The Court reasoned that “after the pardon no offence connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proof which, under the act, entitled him to a decree for the proceeds of his property, the law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion.”¹⁶³

¹⁶⁰ United States v. Padelford, 76 U.S. 531, 539, 19 L. Ed. 788 (1869).

¹⁶¹ Edward Padelford was a leading shareholder in Marine Bank, located in Savannah Georgia. During the course of the war, Padelford aided the rebellion in three ways: (1) he purchased \$5,000 worth of bonds issued by the confederacy; (2) his bank (over his alleged objection) purchased \$100,000 in bonds; and (3) he voluntarily executed as surety the official bonds of close personal friends who were acting as quartermasters and assistant commissaries in the insurrectionist armed forces.¹⁶¹ Like Wilson, he owned large amounts of cotton, which he stored in warehouses in Savannah. Padelford sought amnesty on January 18, 1865, about a month after General Sherman captured Savannah, and the United States took physical possession of the cotton after he had sworn the oath. Padelford, like Wilson’s estate, sued after the war in the Court of Claims seeking payment for the cotton under the Captured and Abandoned Property Act. Citing Padelford’s personal actions, and those of his bank, the United States argued that Padelford was not entitled to these proceeds, because his actions constituted aid or comfort to the rebellion. The Court of Claims sided with Padelford in this dispute, concluding that he had not *voluntarily* aided the rebellion. See Robert B. Murray, *The Padelford Claim*, 51 THE GEORGIA HISTORICAL QUARTERLY, 324, 330 (1967).

¹⁶² United States v. Padelford, 76 U.S. 531, 539 (1869).

¹⁶³ In the Court’s view, this reading best comported with Congressional intent; in passing the Captured and Abandoned Property Act, Congress expressly accounted for presidential amnesty. (“A different construction would . . . defeat the manifest intent of the proclamation and of the act of Congress which authorized it.”) That Congress required individuals to take loyalty oaths within sixty days of a presidential proclamation—and Padelford had taken his in January 1865, a year after Lincoln’s Amnesty Proclamation—was of no moment. The Court also ignored that by statute, dated June 25, 1868, Congress had prescribed the evidentiary procedures for a party

Padelford was a closely watched decision, largely because the legal implications of a pardon affected not only claims to monetary compensation or the recovery of property, but also—with the adoption of the Fourteenth Amendment—the potential disqualification of rebels from holding office in the post-Civil War South. Newspaper articles from the period stressed just this point. The *Daily Arkansas Gazette*, for example, reported:

Such is the effect of a pardon granted by the president with the authority of congress that an action of congress requiring express proof that no aid or comfort was rendered the rebellion is satisfied by the pardon. The principle of this ruling not only affects very considerable private interests, but its political consequences are important. The Garland decision was pronounced by Judge Field and sustained by a bare majority of the court. It is now treated as the settled law, and cited in a unanimous decision of the bench to affect the present case.¹⁶⁴

Deeply concerned by the Court’s decision, Senator Charles D. Drake of Ohio introduced an amendment to an appropriations bill to prevent those who aided the rebellion from filing successful claims for property seized during the war effort.¹⁶⁵ He told his colleagues on the Senate floor:

I hold in my hand a copy of a decision given by the Supreme Court the United States in a case that went up on appeal from the Court of Claims, in which the Supreme Court did entirely set aside those provisions of law which have been read to the Senate, and did give a judgment against the United States in favor of a man who was identified with and gave aid and comfort to the rebellion, a judgment under which something like \$120,000 have been paid out of the Treasury since. They found that he had given voluntary aid to the rebellion.¹⁶⁶

seeking compensation: “that whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty or such person to the United States, during such rebellion, shall be required to prove affirmatively that such person did, during said rebellion, constantly adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion.” Brief, 2.

¹⁶⁴ See, e.g., *Daily Arkansas Gazette* (Little Rock, Ark.) (May 11, 1870),

<https://www.newspapers.com/image/131018666>. In *Ex parte Garland*, 4 Wall.333 (1867), the Court invalidated the Congressional test oath for lawyers seeking to practice in federal court. Fairman, citing contemporary newspaper accounts, reported that Garland “made former rebels and Democrats ‘ecstatic’ and destroyed what returning confidence Unionists felt in the Court.” FAIRMAN, *supra* note 8, at 245.

¹⁶⁵ 41st Cong. 2d Session, *The Congressional Globe*, May 25, 1870, 3810.

¹⁶⁶ *Id.*

Drake emphasized that the Court had granted Padelford’s claim only because “he went forward and took an oath of allegiance to the Government of the United States, and thereby made himself the beneficiary of an amnesty offered by the President.” He expressed concern that the ruling would “deplete[]” the Treasury, and “propose[d] to put it out of the power of any court whatever to give any such effect to an amnesty or a pardon.”¹⁶⁷

Despite objections, Drake’s amendment passed with only minor changes, providing that “no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant [to] support any claim against the United States,” nor could any pardon be used as “proof to sustain” a claim on an appeal.¹⁶⁸ Upon “proof of [a] pardon and acceptance,” the Court of Claims had a duty to “dismiss the suit of such claimant.”¹⁶⁹ Moreover, whenever an appeal from the Court of Claims to the Supreme Court was based on a presidential pardon, the amendment mandated that the Supreme Court “shall, on appeal, have no further jurisdiction of the cause, and should dismiss the same for want of jurisdiction.”¹⁷⁰

Having lost in the Court of Claims in the *Klein* case, the United States appealed to the Supreme Court and pressed three arguments. First, the Attorney General argued that the case should be dismissed for want of jurisdiction under the 1870 proviso put forward by Senator Drake¹⁷¹ Second, the government argued, again under the 1870 proviso, that the Presidential pardon was itself insufficient to show loyalty to the Union: “[T]he enactment of the July 12, 1870, requires... evidence that he was *in fact*, and *not by imputation of innocence*, at all times

¹⁶⁷ *Id.*

¹⁶⁸ 16 Stat. at Large 235.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Brief of the United States*, United States v. Klein, No. 156, Appeal from the Court of Claims, 3.

borne true allegiance to the Government of the United States.”¹⁷² Third, the United States proffered opposing counsel’s stipulation: that Wilson’s “signing the bonds . . . of officers in the rebel army” was not involuntary; the fact that the Confederate army controlled Vicksburg at the time of the bonds’ execution did not render Wilson’s actions involuntary; and Wilson was not loyal.¹⁷³

The Supreme Court sided with Wilson’s estate on essentially every contestable legal issue. On jurisdiction, the Court rejected the argument that the Drake Amendment divested it of jurisdiction. The Court conceded that Congress has broad authority to regulate the Supreme Court’s appellate jurisdiction.¹⁷⁴ But the 1870 proviso, they held, fell outside that general rule. The Court reasoned that “the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.”¹⁷⁵

As to the effect of a pardon on a the right of a disloyal person to receive compensation, the Court relied upon *Padelford* and held that it “had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty.” The Court added: “It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.”¹⁷⁶

¹⁷² *Id.* at 4.

¹⁷³ *Id.* at 4.

¹⁷⁴ *United States v. Klein*, 80 U.S. 128, 145 (1871) (“Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make ‘such exceptions from the appellate jurisdiction’ as should seem to it expedient.”)

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 145–46.

And on the merits, the Court again echoed its reasoning from *Padelford*: By “seeking to avail himself of the offered pardon,” Wilson “promise[d] that he would thenceforth support the Constitution of the United States and the union of the States thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.”¹⁷⁷ In the Court’s view, “[p]ardon and restoration of political rights’ were ‘in return’ for the oath and its fulfilment. To refuse it would be a breach of faith not less ‘cruel and astounding’ than to abandon the freed people whom the Executive had promised to maintain in their freedom.”¹⁷⁸

Two Justices, Miller and Bradley, dissented. They agreed with the majority that the Drake Amendment was unconstitutional “so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President.”¹⁷⁹ But answering that question, the dissent argued, did not resolve whether disloyal persons were entitled to compensation under the 1863 Act. For a pardon to restore property, the claimant needed to have an interest in property for which he could claim compensation. In *Padelford*, Justice Miller emphasized, the claimant had such an interest because before “*before the capture his status as a loyal citizen had been restored.*”¹⁸⁰ In *Klein*, by contrast, the estate lacked any interest for “the property had already been seized and sold, and the proceeds paid into the treasury”; “the pardon does not and cannot restore that which has thus completely passed away.” This approach, the dissent insisted, was faithful to Congress’s intent: only those loyal to the rebellion would be eligible to recover for their seized property. Thus, notwithstanding the Court’s jurisdiction which the 1870 proviso did not oust; and notwithstanding the breadth of the President’s pardon power

¹⁷⁷ *Id.* at 140.

¹⁷⁸ *Id.* at 142.

¹⁷⁹ *Id.* at 148 (Miller, J., dissenting)

¹⁸⁰ *Id.* at 150 (emphasis in original).

as interpreted in *Padelford*, which the 1870 proviso could not narrow, Wilson’s estate in *Klein* deserved to lose the on merits. Contrary to the majority’s view, Wilson, having “given aid and comfort to the rebellion,” lacked “any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act.”¹⁸¹

In many ways the dissent’s reasoning may not sound familiar: it depended on the nineteenth-century distinction between perfect and imperfect titles that property scholars have only recently begun to excavate.¹⁸² As to why the 1863 Act statute intended no compensation “to the disloyal,” the dissent emphasized Congress’s omission from the Act of some “some judicial provision . . . by which the title of the government could at some time be made perfect, or that if the owner established.”¹⁸³ No provision was made, and none was necessary, the dissent explained, because the disloyal owner retained no “right or interest whatever” when the property was seized before being granted a pardon.¹⁸⁴ The dissent’s import was clear: disloyal claimants, even if pardoned by the President, had no property for which they could claim compensation if the pardon was received after the seizure.¹⁸⁵ Certainly newspapers at the time understood the significance of the dissenting Justices’ position. The *Detroit Free Press*, for example, reported the Court’s decision and explained that according to the dissent, “there was no interest in the

¹⁸¹ *United States v. Klein*, 80 U.S. 128, 148149 (1871)

¹⁸² See Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277 (2022). Nevertheless, the structure of the dissent’s reasoning certainly is familiar: it tracks modern Due Process analysis in the sense that Due Process protection attaches and provides protection only to an existing property or liberty interest; it does not create a property or liberty interest. See Erwin Chemerinsky, *Procedural Due Process Claims*, 16 Touro L. REV. 871 (2000) (explaining that for Due Process to attach, there must be a deprivation of a liberty or property interest).

¹⁸³ *United States v. Klein*, 80 U.S. 128, 149. (Miller, J., dissenting),

¹⁸⁴ *Id.*

¹⁸⁵ Cf. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) (“When you got nothing, you got nothing to lose.” Bob Dylan, *Like A Rolling Stone*, on *Highway 61 Revisited* (Columbia Records 1965).”)

former owner of the property, under the Captured and Abandoned Property Act, when the property had been sold and the proceeds paid into the treasury under it.”¹⁸⁶ Thus, even under the dissenting decision, confiscated lands allotted to the freedmen could not have been successfully retained unless there already had been a prior sale and payment of proceeds to the treasury. Nevertheless, the dissenting decision suggests that the majority’s invalidation of the Drake Amendment implicated more than even the scope of the President’s pardon power and the authority of Congress to regulate the appellate jurisdiction of the Article III courts. Significantly, the majority’s robust assertion of judicial supremacy also implicated Congress’s Article I powers to define property, an issue that increasingly would come into contention in the post-Reconstruction period and leading up to the *Lochner* Era.¹⁸⁷

James Garfield Randall, whose history of Civil War confiscation dominated professional views until Eric Foner and other revisionist historians brought it into question,¹⁸⁸ approvingly acknowledged that *Klein* gave “the most liberal view” to the legal effects of a pardon by holding that even under the 1863 Act, Congress intended “to restore property not only to loyal owners, but to those who had been hostile and might later become loyal.”¹⁸⁹ But Randall expressed regret that *Klein* held limited utility for former Confederates because under the 1863 act’s two-year statute of limitations, many claims were now time-barred (as to those, he urged claimants to

¹⁸⁶ *The Supreme Court*, DETROIT FREE PRESS (Detroit, MI), Jan. 30, 1872., available at <https://www.newspapers.com/image/118150814>.

¹⁸⁷ See generally HOWARD GILLMAN, THE CONSTITUTION BESIEGED THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

¹⁸⁸ Daniel W. Hamilton, *A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court*, 29 J. SUP. CT. HIST. 254, 256 (2004) (observing that the failure of confiscation, leading to the failure of land reform in the South, has been treated by historians “either as a judicious response to Radical Republican vengeance or as a tragic missed opportunity of Reconstruction.”).

¹⁸⁹ JAMES GARFIELD RANDALL, THE CONFISCATION OF PROPERTY DURING THE CIVIL WAR, 51 (1913).

petition Congress for private bills).¹⁹⁰ Certainly, the Court decided *Klein* knowing that compensation claims would soon be extinguished.¹⁹¹ But that does not mean *Klein* lacked utility for former Confederates. With the Fourteenth Amendment now in place, insurrectionists were barred from holding local office, Congress had not yet granted amnesty, and the Attorney General had begun to bring prosecutions to enforce the ban. The contemporary press saw *Klein* as a signal that the Court would be willing to treat a Presidential pardon as lifting political disabilities thus giving former rebels an important weapon against Reconstruction and a pathway back to power. Indeed, the popular press treated *Klein* as a victory precisely because it would ensure restoration of political power to the white aristocracy. As a Nashville newspaper press emphasized in March 1872, *Klein*

[f]oreshadow[s] very clearly we think the fate of the indictments pending against citizens of the Southern States for holding office in violation of the fourteenth amendment to the Constitution of the United States. The President's pardon can be plead effectually in bar of these indictments. . . . That principle will certainly apply to all parties who obtained the benefits of President Johnson's proclamation of amnesty and pardon, issued July 4, 1868. The fourteenth amendment was not proclaimed ratified 'as part of the Constitution' until the 20th of July, 1868, and therefore it did not take legal effect until sixteenth days after the issuance of the President's proclamation. Thus, in the interim, under and by virtue of the Constitution *as it then was*—that being then the supreme law of the land—all persons who either “directly or indirectly participated in the insurrection or rebellion,” except such as might be under indictment for felony or treason in a court of competent jurisdiction, were pardoned “unconditionally and without reservation.”¹⁹²

¹⁹⁰ See James Garfield Randall, *Captured and Abandoned Property During the Civil War*, 19 THE AMERICAN HISTORICAL REV. 65, 75 (stating that because of a two-year statute of limitations within which to asset claims for compensation, most compensation claims were time barred by the time the Court decided *Klein*).

¹⁹¹ See Robert B. Murray, *The End of the Rebellion*, 44 N.C. HIST. REV. 321 (1967). The case of *United States v. Anderson*, 9 Wall. 56 (1869), fixed the end-date of the Civil War for purposes of the statute of limitations under the 1863 Act, which, as interpreted in *Anderson*, barred claims for those who were not originally loyal, notwithstanding *Klein*.

¹⁹² *Effect of Pardon by the President*, NASHVILLE UNION AND AMERICAN (Nashville, TN), March 3, 1872, <https://www.newspapers.com/image/50647961>. *Universal Amnesty*, THE WEEKLY SENTINEL (Raleigh, NC), March 19, 1872, <https://newspapers.com/image/67749472> (“The long-delayed and much-talked-of amnesty has come at last, through a decision of the Supreme Court of the United States.”).

Indeed, not only did *Klein* facilitate the return of the white power structure to the former states of the Confederacy; it also provided the ideological justification for the continued subordination of Black people. Although *Klein* did not interpret the Reconstruction amendments, it relied upon a definition of constitutional equality that treated Black freedom as the absence of legal enslavement. The decision itself refers to freed people only once, and indirectly, in the majority's statement that a denial of compensation to the rebel ally "would be a breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom."¹⁹³ The phrase "cruel and astounding" of course is from Lincoln's December 1863 Message to Congress, as he reflected back on the Emancipation Proclamation issued in January of that year.¹⁹⁴ It is impossible to say how Lincoln's approach to Reconstruction might have evolved.¹⁹⁵ But by 1872 when the Court decided *Klein*, the role that violence and economic domination would play in the lives of emancipated Blacks was evident: the Ku Klux Klan had already begun its campaign of terror;¹⁹⁶ the Memphis riot had run for three weeks killing more than forty freedmen;¹⁹⁷ and "Black Codes" ruthlessly restricted Black land ownership, mobility, and labor options.¹⁹⁸ Nowhere in *Klein* did the Court acknowledge the role

¹⁹³ *United States v. Klein*, 80 U.S. 128, 142, 20 L. Ed. 519 (1871).

¹⁹⁴ WILLIAM LEE MILLER, *PRESIDENT LINCOLN THE DUTY OF A STATESMAN* 393 (2009).

¹⁹⁵ *See, e.g.*, JONATHAN LURIE, *THE CHASE COURT: JUSTICES, RULINGS, AND LEGACY* 11 (2004) (stating that Northern sentiment toward the South and emancipated slaves was "ambivalent and uncertain," marked by conflicting sentiments of "revenge, restoration, reconciliation, racism, and restitution," and "we can never know how Lincoln would have handled this very difficult challenge"); LAWANDA COX & JOHN H. COX, *POLITICS, PRINCIPLE, AND PREJUDICE 1865–1866*, 42 (1976) ("Had Lincoln lived through his second term of office, the Radicals might never have faced the danger of political ostracism.").

¹⁹⁶ STAMPP, *supra* note 36, at 199 ("Organized terrorism was popularly associated with the Ku Klux Klan, formed in Tennessee in 1866, but the Klan was only one of many such organizations, which included the Knights of the White Camelia, the White Brotherhood, the Pale Faces, and the '76 Association."); WALTER A. MCDUGALL, *THROES OF DEMOCRACY: THE AMERICAN CIVIL WAR ERA 1829–1877* 503 (2008) ("The Ku Klux Klan, founded by Nathan Bedford Forrest in 1866, spread from Tennessee across the Deep South.").

¹⁹⁷ Stephen V. Ash, *A MASSACRE IN MEMPHIS: THE RACE RIOT THAT SHOOK THE NATION ONE YEAR AFTER THE CIVIL WAR* 193 (reporting Black death toll) (2013).

¹⁹⁸ *SEE* LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 367 (1979) (stating that under the Black Codes, "[a]lthough the ex-slave ceased to be the property of a master, he could not aspire to become his own master. No law stated the proposition quite that bluntly but the provisions breathed that spirit in ways that could hardly be misunderstood"); BROCK, *supra* note 59, at 37 ("If the codes did not re-enact slavery they might

of confiscation in efforts by Congress and the Freedmen’s Bureau to establish a landed class of free Blacks, or to suggest that equality meant more than release from slavery.

Even before the Court’s more infamous decisions about Reconstruction, we see in *Klein* the emergence of a highly constrained conceptual frame about racial equality—the principle that freedom for the Black person is constituted by Emancipation, in the sense of not being legally enslaved, but little else. No recognition is given to the material conditions of freedom and to the role of property in protecting equality and dignity. No mention is given to efforts seeking to establish Black citizenship on a landed basis that depended on what the historian Chandra Manning called “the wartime bargain of an exchange of labor and loyalty.”¹⁹⁹ Indeed, the Court used respect for a formal principle of non-enslavement as requiring respect for the property rights of former enslavers and their enablers. Although the Court left this unsaid, the suggestion is that not to have respected these property rights would have been “mean and malicious”—the main theme of the Lost Cause ideology that later was popularized in well-known movies like *Gone with the Wind* and *Birth of a Nation*, which dominated American politics until the 1960s, and, as evidenced by Confederate monuments, has never been uprooted from political life.²⁰⁰

well make the condition of the negro worse in some respects than it had been under slavery, for the machinery of the State was now brought in to enforce obligations which had hitherto been the responsibility of the mater.”); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, in *BLACK SOUTHERNERS AND THE LAW 1865–1900*, 35 (Donald G. Nieman ed. 1994) (discussing impact of Black Codes on Black labor well into the twentieth century). Critics of Johnson’s restoration plan emphasized his actions “as working to place the governments of the Southern states in the hands of those already re-enacting Black codes.” COX & *supra* note 135, at 151. For a collection of testimony from Congressional hearings investigating the Memphis riots, see HANS L. TREFOUSSE, ED., *BACKGROUND FOR RADICAL RECONSTRUCTION: TESTIMONY TAKEN FROM THE HEARINGS OF THE JOINT COMMITTEE ON RECONSTRUCTION, THE SELECT COMMITTEE ON THE MEMPHIS RIOTS AND MASSACRES, AND THE SELECT COMMITTEE ON THE NEW ORLEANS RIOTS—1866 AND 1867* (1970).

¹⁹⁹ MANNING, *supra* note 82, at 283.

²⁰⁰ See STAMPP, *supra* note 36, at vii (stating that “[a] half century ago, most historians were extremely critical of the reconstruction measures that congressional Republicans forced upon the defeated South. They used terms such as ‘military despotism,’ federal tyranny,’ ‘negro rule,’ and ‘africanization’ to describe what white Southerners were forced to endure.”); J.G. RANDALL & DAVID HERBERT DONALD, *THE CIVIL WAR AND RECONSTRUCTION* (2d ed. rev.1969) (reporting the dominant view that Reconstruction, was “an era in which illiterate Negroes, self-seeking Northern immigrants, called carpetbaggers, and a few vicious native whites, known as scalawags, ruled over and against the will of the large but disenfranchised white majority” in the South); *see also* HAROLD M. HYMAN, *INTRODUCTION*, in *THE RADICAL REPUBLICANS AND RECONSTRUCTION 1861–1870*, xvii (1967) (providing an

II. *Klein* and the Federal Courts Canon

Scholarly work about *Klein* certainly references the decision’s Civil War roots and the statutory run-up to the dispute.²⁰¹ Some commentators have referred to the claimants, accurately or not, as “unreconstructed southerners.”²⁰² But even the most radical accounts of *Klein* have relied upon a history that is radically incomplete: *Klein* entered the federal courts canon largely cleansed of any stain of slavery, without acknowledgment of private racialized violence, and without questioning whether racial partisanship motivated the Court’s arguments favoring judicial independence and Executive clemency. As with the Reconstruction Court’s later decisions involving the Fourteenth and Fifteenth Amendments, the Court in *Klein* rendered a version of the Civil War and its aftermath that “drained institutional memory of several aspects of slavery and Reconstruction politics,” giving support to the view that abolition consisted of “formal equality only.”²⁰³ Scholarship about *Klein* as it relates to Article III jurisdiction likewise

overview of Reconstruction historiography and stating that “in the war of words ... ‘by some quixotic reversal the Lost Cause is no longer lost’”), citing New York Times Book Review, Aug. 5, 1962, at 1 (asking, “Who Won the Civil War, Anyway,” and “that for far too long a time, the South had swept the field “in writing Reconstruction history “as though Appomattox had never been”). Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 BUFF. L. REV. 1393, 1401–02 (2020) (citing a 2019 Southern Poverty Law Center report finding 1,747 Confederate place names and symbols” including over 700 monuments and that while some were recently removed, “hundreds of Confederate monuments remain across the South.”)

²⁰¹ See, e.g., Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 59 (2010) (setting out a “Brief History” that recounts the statutory lead-up and “inter-branch pathologies accompanying” the “Civil War and its aftermath”).

²⁰² Gene R. Nichol, Jr., Book Review, *Giving Substance Its Due*, 93 YALE L.J. 171, 183 n.82 (1983).

²⁰³ PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 13 (1999); see also *id.* at 92 (“In the Court’s Reconstruction era decisions, black experiences of subordination by white popular majorities, with the exception of legislation similar to the Black Codes, was put outside the boundaries of legal relevance.”). Fairman closed his account of the Court’s treatment of compensation claims with the statement that *Klein* could be taken “as text for a complacent observation that as the war receded its penalties were being remitted, thanks to Executive clemency and a benign Court.” Fairman went on, however, to say that from a different perspective, *Klein* was not the end, but rather the start of a series of decisions in which “the Court would be making some constructions of the law that were anything but benignant toward those for whose protection they had been adopted.” FAIRMAN, *supra* note 8, at 846 (referring to the 1866 Civil Rights Act and the Court’s invalidation of its jurisdictional provision in *Blyew v. United States*, 89 U.S. (13 Wall.) 581 (1972)).

has consistently deflected or disregarded the decision’s racial implications and the relevance of the decision to conceptions of Black citizenship.²⁰⁴ Our goal in this Part is to trace the making of a legal classic that has been detached and purged of its racialized origin. In the scope of this Article, we do not claim to be complete in our canvassing of the literature, but our synthesis of is sufficient to show the narrative arc.

A. Formalism and Silence

In its first half century,²⁰⁵ *Klein* drew only occasional mention by legal commentators. These fifty years coincided with the near dominance of Reconstruction narratives written from the Confederate perspective—a history intent on casting the white rebels as constitutional martyrs who later found themselves further oppressed by the “cruel purpose of Yankee civil rights legislation.”²⁰⁶ In keeping with the period’s legal formalism,²⁰⁷ academic treatment of the decision lacked all historical context; no mention was made of the Civil War or to the policy of confiscation and pardon. An 1899 article in the *Harvard Law Review* on the constitutional power

²⁰⁴ The sole exception appears to be an article addressing *Klein* as authority for allowing the pardon power to reach immigration matters. Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 253 (2010). Cf. Norman W. Spaulding, *Constitution As Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing that the Rehnquist Court’s federalist revival depended in part on “chillingly amnesic” antebellum principles).

²⁰⁵ For this Part, we conducted searches through Westlaw and JSTOR for “United States v. Klein,” but we do not claim to be complete.

²⁰⁶ EDWARD C. ROZWENC, ED., RECONSTRUCTION IN THE SOUTH v (1952) (citing the poet Sidney Lanier who published a collection of poems in 1874 on this theme). The North had won the Civil War, but the victors did not write its history. Indeed, the phrase “history is written by the victors” apparently entered American discourse in 1891, when “Missouri Sen. George Graham Vest, a former congressman for the Confederacy who was still at that late date an advocate for the rights of states to secede, used the phrase in a speech, reprinted by the Kansas City Gazette and other papers on the next day, Aug. 21, 1891. ‘In all revolutions the vanquished are the ones who are guilty of treason, even by the historians’” Vest said, ‘for history is written by the victors and framed according to the prejudices and bias existing on their side.’” Matthew Phelan, *The History of “History Is Written by the Victors,”* SLATE (Nov. 26, 2019), <https://slate.com/culture/2019/11/history-is-written-by-the-victors-quote-origin.html> (accessed May 5, 2022).

²⁰⁷ See generally Morton J. Horwitz, *The Rise of Legal Formalism*, 19 THE AMERICAN JOURNAL OF LEGAL HISTORY 251 (1975)

of state courts to regulate admission to the state bar discussed whether *Klein* could be enlisted as support for legislative power “to make evidence [that] logically tends to prove a certain proposition, conclusive on the court,” positing that *Klein* “itself by no means called for such strong doctrine.”²⁰⁸

As is known, during this period the Court began to flex its institutional muscle by invalidating statutes; a major theme in the legal literature was concern about this trend. James Bradley Thayer published his highly influential “The Origin and Scope of the American Doctrine of Constitutional Law” in 1893,²⁰⁹ setting the high bar of clear mistake and irrationality for judicial intervention in legislative affairs.²¹⁰ With this background, a 1907 article in the *Columbia Law Review*, titled “The Function of the Judiciary,” provided a review of cases current through 1888 in which the Supreme Court had declared federal statutes unconstitutional.²¹¹ *Klein* received a general mention, included in a list of eight cases in which “the objection to the action of Congress in whole or in part was that action had amounted to an interference with or an assumption of judicial power and accordingly was contrary to the principle of the separation of powers.”²¹² Urging that judicial review of federal legislation be exercised only in the most extraordinary circumstances,²¹³ the author took an ahistoric approach to each of the listed cases,

²⁰⁸ Lee Blewett, *The Constitutional Power of the Courts over Admission to the Bar*, 13 HARV. L. REV. 233, 253 (1899).

²⁰⁹ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

²¹⁰ Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1419 (2019) (“Professor Thayer’s position is enormously influential, and it was accepted as scripture by Justices Oliver Wendell Holmes, Felix Frankfurter, William H. Rehnquist, and Byron White.”).

²¹¹ Percy Bordwell, *The Function of the Judiciary I.*, 7 COLUM. L. REV. 337, 337 (1907).

²¹² *Id.* at 337.

²¹³ *Id.* at 337.

even as it emphasized the general importance of history to questions of separation of powers and the constitutional role of the Supreme Court.²¹⁴

In the next decade, legal analysis of *Klein* begins to refine the decision’s significance by treating it as a formal marker of institutional boundaries. A 1913 article on the remedy of impeachment included *Klein* in a footnote along with *Martin v. Hunter’s Lessee*,²¹⁵ for the proposition that only tribunals established under Article III “were intended to perform the judicial function.”²¹⁶ That same decade, the American Law Reports in 1919 included *Klein* in its collection of cases for the “well settled” “general rule” that “the legislature is without power to invade the province of the judiciary by setting aside, modifying, or impairing a final judgment rendered by a court of competent jurisdiction,” as well support for the validity of federal measures to public utilities.²¹⁷

B. Accommodation within Boundaries

By 1924, Felix Frankfurter and James Landis had begun to reconceptualize a formal approach to separation of powers, arguing that the “accommodations among the three branches of the government are not automatic,” but rather “undefined, and in the very nature of things could not have been defined, by the Constitution.”²¹⁸ They acknowledged, however, a few

²¹⁴ *Id.* at 343.

As long as the government could do only a minimum of harm many were indifferent as to whether it could do much that was good. To-day the feeling is quite different. Increased governmental activity is desired on all hands and though we not have the concentration which is considered so essential in Europe, we must at least have co-operation. Grants to the legislature must not be too narrowly construed. Only in the clearest possible case should acts of the legislature be declared unconstitutional, otherwise we will have what Napoleon had, a three-chambered legislature important for good or ill alike.

²¹⁵ *Martin v. Hunter’s Lessee*, 1 Wheat. (U. S.) 304 (1816).

²¹⁶ Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684, 694 n.14 (1913).

²¹⁷ M.B., *Power of legislature to set aside or impair judgment*, 3 A.L.R. 450 (originally published in 1919); W.M.C., *Federal control of public utilities*, 4 A.L.R. 1680 (originally published 1919).

²¹⁸ Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempt in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1020 (1924).

limitations on Congress’s power, especially as it related to the Court—and *Klein* provided support for the limitation they defined as preserving the court’s power of independent judgment:

Independence of judgment must be left to the court in cases where it may decide. Of course, it is the province of Congress to prescribe rules of substantive law as well as of practice, even to govern a specific litigation. But it may not coerce the judgment of courts by the imposition of an arbitrary rule. Obedience to such an attempt would undermine public confidence in the independence of the judiciary; judicial self-respect forbids obedience; “due process” precludes it.²¹⁹

Throughout the decade, commentators invoked *Klein*, but less as a general principle of congressional restriction, than a specific limit on national institutional power. President Wilson’s failing to sign nine bills and two joint resolutions while the Sixth-sixth Congress was still in session generated questions about the power of the President to sign bills after Congress had adjourned, a question that turned attention to the enactment of the 1863 Confiscation Act and to *Klein*.²²⁰ Relatedly, the end of World War I raised a host of legal questions that implicated various aspects of the *Klein* decision. A 1921 article in the *Columbia Law Review* entitled “The Obligation of the United States to Return Enemy Alien Property” relied upon *Klein* as precedent for the “now established” principle that “courts will protect the rights of an enemy alien.”²²¹ A note published in the *Harvard Law Review* in 1922 entitled “Jurisdiction to Confiscate Debts,”

²¹⁹ *Id.*

²²⁰ Lindsay Rogers, *The Power of the President to Sign Bills after Congress has Adjourned*, 30 YALE L.J. 1 (1920). Lincoln signed the 1863 Confiscation Act on March 12, 1863, eight days after Congress adjourned. On June 11, 1864 the Committee on the Judiciary of the House of Representatives “reported its unanimous opinion that the act was not in force.” *Id.* at 8.

In spite of the action of the House Judiciary Committee, Congress took no steps to reenact the measure; rather did it consider the law as in force, and in the only judicial decision on the subject, the court upheld the validity of a law signed during a congressional recess very largely on the ground that the constitutionality of the measure signed by President Lincoln after an adjournment had never been questioned.

Id. at 9. The author cites to *Klein* for Justice Miller’s raising no objection to the 1863 Act, but emphasizing that the decision did not raise the question of whether a post-adjournment signature was valid. *Id.* at 11 n.29.

²²¹ Julius Henry Cohen, *The Obligation of the United States to Return Enemy Alien Property*, 21 COLUM. L. REV. 666, 669 (1921).

referenced *Klein* for the view that “civilized nations, as a matter of international law, have generally abandoned the right to confiscate debts due to private enemy individuals,” but without discussion of the decision or its Civil War context.²²² And the large number of commercial claims against the United States for war goods focused attention on the jurisdiction of the Court of Claims,²²³ an inquiry that carried into the 1930s as commentators continued to grapple with the constitutional status of that court and whether its decisions were subject to revision either by Congress or the Executive or to appellate review by the Supreme Court.²²⁴ Some of the analyses were prepared as part of a seminar offered at the Harvard Law School by then Professor-Felix Frankfurter.²²⁵ A 1933 note in the *Harvard Law Review* cited to *Klein* for the view that decisions of the Court of Claims are protected “from congressional interference” for they are “absolutely conclusive of the rights of the parties,”²²⁶ but the author quickly acknowledged that precedent existed only to insulate decisions of the Court of Claims from executive revision.²²⁷ An article that same year in the *Yale Law Journal* focused, in part, on whether Congress could refuse to appropriate funds to execute a decision it disfavored.²²⁸ Observing that Congress “has several times indicated that it considers the final settlement of claims against the United States within its own discretion,” the author contrasted *Klein*’s resistance to that principle with the Court’s decision a generation later when it “refused to interfere when similar action was taken as to

²²² Note, *Jurisdiction to Confiscate Debts*, 35 HARV. L. REV. 960, 960 n.3 (1922).

²²³ See Judson A. Crane, *Jurisdiction of the United States Court of Claims*, 34 HARV. L. REV. 161, 167 n.37 (1920) (citing *Klein* as support for the proposition that “the Court of Claims is an authentic, genuine court”).

²²⁴ A 1925 note in the *Harvard Law Review* cited to *Klein* when recounting the history of the Court of Claims. Note *The Jurisdiction of the United States Court of Claims over Claims Founded Upon Implied Contracts*, 38 HARV. L. REV. 1104, 1104 n.1 (“At first the court was authorized only to hear claims an[d] prepare bills for Congress.”).

²²⁵ See, e.g., Wilbur Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 905 n.45 (1930) (referencing *Klein* with a cf. signal for treating the Court of Claims as a constitutional court).

²²⁶ *Id.* at 684 n.48, citing *United States v. Klein*, 13 Wall. 128, 144 (U.S. 1871).

²²⁷ *Id.* at 684 n.49, citing *United States v. O’Grady*, 22 Wall. 641 (U.S. 1875). *O’Grady* was a “cotton case”; after judgment the Treasury Department sought to tax the cotton, and the Court held the executive without authority to interfere with the judgment.

²²⁸ Comment, *The Distinction between Legislative and Constitutional Courts*, 43 YALE L.J. 316 (1933).

certain claims and judgments against the District of Columbia” (while acknowledging that “other provisions would be made for these claimants”).²²⁹

The New Deal brought new attention to *Klein*. Those opposed to President Franklin Delano Roosevelt’s economic program enlisted the decision for the principle it is now best known: as a limitation on the power of Congress “to limit or interfere with the jurisdiction of the federal courts.”²³⁰ In 1937 the *University of Pennsylvania Law Review* published an article questioning the validity of Congress’s power to regulate the Court’s appellate jurisdiction or to remove jurisdiction over constitutional cases. By this point the Court had invalidated major planks in President Roosevelt’s program, and challenges to the Social Security Act, minimum wage laws, and the National Labor Relations Act were pending on the docket.²³¹ Quoting the President’s statement that “The Congress has the right and can find the means to protect its own prerogatives,” the author pointed to *Klein* as a shield against all possible jurisdiction-stripping proposals.²³² That same year the *Michigan Law Review* published a descriptive account of proposals, both state and federal, to withdraw jurisdiction over categories of cases and discrete issues, stating clearly an intention “not [to] take sides in the controversy” over pending proposals or the President’s position.²³³ Discussing *Klein*, the authors treated the challenged statute as both an evidentiary rule purporting to treat a Presidential pardon as “conclusive aid to

²²⁹ *Id.* at 320, citing *In re Hall*, 167 U.S. 38 (1897).

²³⁰ Thomas Raeburn White, *Disturbing the Balance*, 85 U. PA. L. REV. 678, 678 & 882–883 nn.20–21 (1937) (relying on *Klein*, without discussion of the decision’s post-Civil War setting, to conclude that withdrawal of the Court’s appellate jurisdiction “in all cases in which it found unconstitutional a law involved in the case . . . would be a method of beating the devil around the bush, which quite certainly could not succeed”).

²³¹ For a succinct overview of these developments, see LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 210–15 (1988).

²³² White, *supra* note 230, at 678.

²³³ Katherine B. Fite & Louis Baruch Rubinstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 262, 262 (1937).

the Rebellion” and a lop-sided jurisdictional withdrawal in cases involving “a person who claimed [compensation] under a pardon obtained under the Amnesty Proclamation.”²³⁴

During the 1940s, the *Harvard Law Review* published comments about Recent Cases, and three of them cited to *Klein*, again for the separation-of-powers principle for which it had now come to stand. The first, published in 1944, involved a special act directing the Court of Claims to render judgment on a contract for a claimant previously denied recovery; all that remained was the computation of damages. The commentator cited to *Klein* for the principle that “[w]hen the Court of Claims was considered a constitutional court, Congress could not prescribe its decisions.”²³⁵ The second, published that same year,²³⁶ discussed the famous *Yakus* decision,²³⁷ and the Court’s holding that Congress could withdraw jurisdiction in the district court to review a regulation, not invalid on its face, in a criminal prosecution. The author emphasized that “under wartime conditions, the Act would seem to have made adequate provision for due process,” and included what was becoming an obligatory citation to *Klein* for the statement, “Congress cannot, under the guise of withholding jurisdiction, prescribe what is in effect a rule for decision.”²³⁸ And a 1946 comment considered whether Congress constitutionally could bar disbursement of funds to pay for the salary of named officials who came under investigation for subversive activities because of statements made by the Chair of the House Committee on Un-American Activities. Upon suit, the Court of Claims issued judgment ordering salary, without regard to the

²³⁴ *Id.*, at 769. As to the impact of *Klein* on New Deal jurisdiction provisions, the authors stated: “That decision seems to be a pretty clear indication of the attitude that the Supreme Court would now take towards any attempt to regulate the method of exercising its power in a case over which it has jurisdiction.” *Id.*, at 770.

²³⁵ Recent Case, *Constitutional Law—Separation of Powers—Congress Cannot Dictate a Decision of the Court of Claims*, 57 HARV. L. REV. 732 (1944) (discussing *Pope v. United States*, 53 F. Supp. 570 (Ct. Cl. 1944), cert. granted, 12 U.S. L. Week 3342 (April 3, 1944)).

²³⁶ Recent Case, *Constitutional Law—Judicial Powers—Congress Can Withhold Jurisdiction from District Courts to Consider Defense of Invalidity of Administrative Regulations*, 57 HARV. L. REV. 728, 729 (1944), discussing *Yakus v. United States*, 64 Sup. Ct. 660 (March 27, 1944).

²³⁷ *Yakus v. U.S.*, 321 U.S. 414 (1944).

²³⁸ Recent Case, *supra* note 236, at 730.

statutory bar. In the author’s view, the court, by failing “to consider the practical effect” of the no-disbursement bar, had violated the *Klein* principle, for “[e]fforts by Congress to infringe upon the other branches of the government are unconstitutional as a violation of the doctrine of separation of powers.”²³⁹ None of these discussions of *Klein* historicized the decision, acknowledged its Reconstruction context, or gave any attention to the role of the Court or the President’s pardon power in restoring a racialized political hierarchy to the Southern states.

C. Legal Settlement and Neutral Principles

Klein’s current canonical status likely became secure with the 1953 publication of the First Edition of Hart and Wechsler’s *The Federal Courts and the Federal System*, which remains the leading casebook in the field.²⁴⁰ The formal principle of “[s]eparate but equal” remained the law of the land,²⁴¹ but the United States was beginning to be shaken out of its racial slumber. About a decade earlier, Gunnar Myrdal had published his 1944 study *An American Dilemma: The Negro Problem and Modern Democracy*,²⁴² and the Court in *Shelley v. Kraemer*²⁴³ had held that although private agreements to bar Black people from residential housing were legal, state courts could not legally enforce them under the Fourteenth Amendment. To be sure, the Court

²³⁹ Recent Case, *Constitutional Law—Legislative Powers—Constitutionality of Statute Denying Salary Disbursement to Named Officials Held Immaterial Since Obligation Reducible to Judgment in the Court of Claims Continued*, 59 HARV. L. REV. 615, 616 (1946).

²⁴⁰ HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953). *Klein* did not appear in the 1937 casebook prepared by Felix Frankfurter and Harry Shulman. See FELIX FRANKFURTER & HARRY SHULMAN, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (1937 rev. ed.). See James E. Pfander, *Fifty Years (More or Less) of “Federal Courts”: An Anniversary Review*, 77 NOTRE DAME L. REV. 1083, 1089 (2002) (raising questions whether Hart carried forward the Frankfurter tradition of federal courts teaching or whether they were “founders of a new school of thought”).

²⁴¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁴² GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944); see Charles E. Wyzanski, *Book Review*, 58 Harv. L. Rev. 285, 285–86 (1944) (stating that “the chief merit of the book is that it recognizes that the race problem cannot be studied in isolation. The problem runs through all our society — its politics, its law, its economy, its personal relations. The Negro’s position is the reflection of the white man’s position and of the white man’s civilization.”).

²⁴³ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

had not yet decided *Brown v. Board of Education*;²⁴⁴ Rosa Parks had not yet refused to give up her seat in the front of the bus.²⁴⁵ Congress still comfortably used its taxing and spending power to support racial segregation in housing and urban infrastructure,²⁴⁶ but the President pressed for desegregation of the military, federal contracting, and federal employment.²⁴⁷ Within this constitutional culture, “Hart & Wechsler” gave *Klein* pride of place by featuring it in the framing chapter on the federal judicial function (in the section on parties and finality), but equated it with a principle narrower than the one for which it is now known: “[t]he validity of Congressional action questioning judgments of the Court of Claims against the United States,” with the authors generalizing the challenged statute as “an attempt to prescribe a rule of decision retroactively, and hence invalid as an invasion of the judicial function.”²⁴⁸ The discussion of the pardon power, which appears in later editions, made no appearance in the First Edition, although a descriptive note summarized the statutory conflict at the heart of *Klein*. But neither the First nor later editions expanded upon the historical context of *Klein* or raised questions about the decision’s racial implications—that by blocking Congress’s power over Article III jurisdiction, the Court ceded to the President authority, through the pardon power, to undo legislation aimed at securing the material foundation for Black citizenship and political equality. Within the Legal Process frame that informed “Hart & Wechsler,” jurisdictional rules are normatively attractive because they are neutral; a sound constitutional order depends on according respect to the

²⁴⁴ See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 958–59 (1994) (stating “it may be puzzling that the forces loosed by the Warren Court in general, and *Brown v. Board of Education*, in particular, did not render the book an immediate anachronism”).

²⁴⁵ *Parks v. City of Montgomery*, 38 Ala. App. 681 (1957).

²⁴⁶ See Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65 (2022).

²⁴⁷ See generally DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* (2007); David J. Garrow, *Black Civil Rights During the Eisenhower Years*, 3 CONST. COMMENT. 361 (1986).

²⁴⁸ HART & WECHSLER, *supra* note 240, at 114.

distinct institutional capacities of the different branches of government and of the national government and that of the states.²⁴⁹ If the pardon power was given to the President in plenary form, then it was incumbent upon Congress to respect that power; it followed that Congress could not use Article III to work-around that principle and assert dominance over the President or the Court.

III. *Klein*, Article III, and the Uses of History

So far, we have attempted to reconstruct *Klein* in light of the racial politics surrounding President Johnson’s use of his pardon power to restore property confiscated from those who worked and lived in the Confederacy. We acknowledge that we have omitted or merely gestured at many important issues, including Lincoln’s evolving views on race relations, the Reconstruction Acts of 1867 that overturned Johnson’s plan of restoration, Northern financial interests, changes to the size of the Supreme Court, factional and inter-class disputes within the South, the role of violence in suppressing the Black vote, and partisan disputes between Democrats and Republicans. These issues are important, but we emphasize that we are not arguing a counter-factual: that a different result in *Klein* would have significantly affected land distribution in the South, or that regulating the President’s clemency policy would alone have been sufficient to establish a multi-racial political power base in the post-Civil War South.²⁵⁰

²⁴⁹ See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 958–959 (1994)

²⁵⁰ President Johnson’s obstruction of Congressional Reconstruction was not limited to his use of the pardons. See, e.g., Robert J. Pushaw, Jr., *Ulysses S. Grant and the Lost Opportunity for Racial Justice*, 33 CONST. COMMENT. 331, 336 (2018):

Johnson repeatedly vetoed Reconstruction bills designed to nullify Southern states’ oppressive Black Codes and their encouragement of race-based violence and, after Congress overrode him, refused to properly execute those laws Johnson also assailed—and delayed adoption of—Congress’s proposed Fourteenth Amendment, which prohibited States from (1) abridging the “privileges or immunities” (i.e. basic civil right) of all ‘citizens.’ Including former slaves; (2) depriving any “person” of “life, liberty, or property without due process of law”; or (3) denying “any person ... the equal protection of the laws”).

Our focus, instead, is internal to Article III: how the decision has affected jurisdictional doctrine by erasing from discussion the vestiges of slavery.

In *Klein*, the Court began a process of constructing an official version of the Civil War that insidiously took the perspective of the defeated South. The so-called Lost Cause ideology for decades dominated public opinion in the United States about the causes and results of the Civil War.²⁵¹ Lost Cause ideology characterized the era of the Reconstruction Amendments as “the ultimate shame of the American people—as one historian phrased it, ‘the nadir of national disgrace.’”²⁵² Rather than focusing on the broken promises to freed Blacks, the emphasis instead was on the putative mistreatment of the defeated South, a view retold in conventional history books with titles such as “‘The Tragic Era,’ ‘The Dreadful Decade,’ ‘The Age of Hate,’ and ‘The Blackout of Honest Government,’”²⁵³ and symbolized by the erection of statutes celebrating Confederate leaders that until recently claimed public space throughout the South.²⁵⁴ In this retelling, equality for the former slave consisted in emancipation only, and as to that, as the Court stated in *Slaughter-House*, “slavery as a legalized social relation, perished.”²⁵⁵ No further intervention was needed to secure and protect for Black people meaningful citizenship and protection from legalized and extra-legal violence and exploitation.

²⁵¹ See James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 446 (2014):

Until the 1960s, the judicial view of Reconstruction mirrored that of the Dunning School, since discredited among historians as a “‘white supremacist narrative ... masquerading as proper history.’” Claude Bowers, E. Merton Coulter, and other Dunning School historians attributed the tragedy of Reconstruction to black suffrage, not white terrorism.

²⁵² STAMPP, *supra* note 36, at 4.

²⁵³ *Id.*

²⁵⁴ See Ben Paviour, *Charlottesville Removes Robert E. Lee Statue That Sparked a Deadly Rally*, NPR (July 10, 2021), <https://www.npr.org/2021/07/10/1014926659/charlottesville-removes-robert-e-lee-statue-that-sparked-a-deadly-rally>

²⁵⁵ *Slaughter-House Cases*, 83 U.S. 36, 68 (1872),

The Lost Cause ideology, like *Klein* itself, gave no weight to the vestiges of slavery, which have worked to subordinate Black Americans well beyond the date of Emancipation.²⁵⁶ Indeed, at the time of *Klein*, “emancipation” was itself a word of double-edged meaning: The Ku Klux Klan’s Prescript of 1868 demanded, by violence if necessary, the “emancipation of the white men of the South, and the restitution of the Southern People to all their rights, alike proprietary, civil, and political.”²⁵⁷ Thus, far from seeing *Klein* being an “antique, without useful application to contemporary circumstance,”²⁵⁸ in our view the decision set the stage for a “pact of forgetting”²⁵⁹ that to this day deforms the Court’s Article III analysis in terms of both separation of powers and federalism. Constitutional scholars have long acknowledged the role of the Supreme Court in hollowing out the Reconstruction Amendments shortly after their enactment.²⁶⁰ But jurisdictional cases largely do not figure into this analysis. Likewise, federal courts scholarship has given short shrift to the role of racial politics in the development of

²⁵⁶ See also Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. 195, 203 (2021) ([P]owerful actors in previous generations intentionally disrupted America’s collective memory about this nation’s mass human rights abuses. Monuments honoring colonizers and Confederates outnumber memorials to the colonized, the captured, and the controlled by orders of magnitude. Past subordination shapes our present memory.”)

²⁵⁷ *Ku Klux Klan, Prescript of the Order*, reprinted in 5 AM. HIST. MAG. 3, (1990), discussed in Jared A. Goldstein, *The Klan’s Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 299 (2018); see also *id.* at 316–21 (discussing “the birth of the Klan legend” of “heroic white Southerners who banded together to protect American civilization against Radical Republican oppression, government corruption, and rule by buffoonish freedmen. The Constitution features prominently in the legend: the Klan saved it.”).

²⁵⁸ Sager, *supra* note 14, at 25.

²⁵⁹ See Omar G. Encarnación, *Forgetting in Order to Move On*, THE N.Y. TIMES (Jan. 22, 2014), available at <https://www.nytimes.com/roomfordebate/2014/01/06/turning-away-from-painful-chapters/forgetting-in-order-to-move-on>

After the demise in 1975 of the Francisco Franco dictatorship, the nation’s leading political parties negotiated the so-called Pact of Forgetting, an informal agreement that made any treatment of the most difficult episodes of Spanish history, such as the horrific violence of the Civil War, unnecessary and unwelcomed. Far from seeking “justice,” “truth” or “reconciliation,” the nation chose to forget and move on, even passing a comprehensive amnesty law making it all but impossible to prosecute the human rights abuses of the old regime.

²⁶⁰ See generally PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999) (discussing the Court’s construction of an anti-egalitarian narrative about Reconstruction and the Fourteenth Amendments, focusing on *Slaughter-House* and the *Civil Rights Cases*, that later “provided ‘objective’ ammunition for critics of Warren Court expansions of rights in the 1960s”).

jurisdictional doctrine. It is not that the field is indifferent to history;²⁶¹ in particular, scholarship on some discrete issues (the Eleventh Amendment, for example, or abstention) has been candid in assessing the racial fault line that threads through the Court’s notion of jurisdictional immunity.²⁶²

Indeed, although federal courts doctrine is said to track two contradictory and inconsistent models—the Nationalist and the Federalist—race figures, if at all, only *sub silentio* in both of these “ideal” types. It is significant that *Klein* became a jurisdictional icon during a period in which the Dunning School of Reconstruction continued to hold sway and even dominate intellectual elite circles; revisionist writers, such as W.E.B. DuBois, and historians who wrote in the post-World War II period, had not yet surfaced the legacies of slavery that the accepted histories erased;²⁶³ if anything, Charles Fairman’s magisterial writings about the Court and the Fourteenth Amendment gave the Lost Cause approach a critical and nuanced update.²⁶⁴

²⁶¹ See, e.g., Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1739 (2015) (“One of the most pervasive and important debates in federal courts jurisprudence is over the role that history should play in interpreting Article III of the United States Constitution.”).

²⁶² Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. (2002–2003); Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

²⁶³ See STAMPP, *supra* note 36, at 3–23 (discussing the “tragic legend of Reconstruction”); see also *id.* at vii (observing that “the leaders of the resistance to ‘mid-twentieth century] civil right legislation and racial integration have evoked the hobgoblins of reconstruction to advance their cause”). The Dunning school refers to the historical writings of William Dunning of Columbia University and the graduate students he trained. see also Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 690 n.41 (referring to “the Columbia University historian who was the eponymous founder of a school of early-twentieth-century Reconstruction historiography now recognized primarily for its racist underpinnings); see also *id.* at 804 (“The Dunningites tended to be rather warmly disposed toward the klans, portraying them as a quasi-legal, stabilizing force necessitated by extraordinary circumstances. . . . Dunning . . . argued that the klans were the ‘inevitable’ outgrowth of Southerners’ ‘subjection to the freedmen and northerners.’”), citing WILLIAM DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877*, 121 (1907)). Revisionist accounts, including those by W.E.B. DuBois published in the 1930, did not affect the dominant view of Reconstruction. See BRANDWEIN, *supra* note 203, at 115 (stating “DuBois’s account of Reconstruction was published in 1935, but it received no institutional endorsement or alter “the white-dominated education culture: in which “Fairman was trained”).

²⁶⁴ See BRANDWEIN, *supra* note 203, at 106 (ascribing to Fairman “a version of Civil War history taken from the Dunning School, written during the first two decades of the twentieth century”). In 1959, Justice Frankfurter cited to Fairman in stating that the historical materials “demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the First eight amendments making them applicable as explicit restrictions upon the States”). *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959). Alexander Bickel, a key expositor of Article III jurisdiction and a

To be sure, some contemporary federal-courts scholars have urged that the field move beyond the seemingly neutral jurisdictional values of “uniformity” and “friction,” arguing that the Court’s jurisdictional decisions are not neutral but rather reflect “naked politics” and the ideological preferences of the Justices.²⁶⁵ In the scope of this Article, we can only nod at this issue which, given the current Court, seems of great urgency.²⁶⁶ For now, our goal is more modest: to draw out the implications of *Klein* for current doctrine and for future scholarship.

A. *Klein* and Separation of Powers

Consider separation of powers. Recall that in *Klein*, the Court flexed its institutional muscle by placing limits on Congress’s power to regulate the Article III appellate jurisdiction. From this perspective, the case is considered a victory for separation of powers in the sense of protecting the Court from an overreaching and avaricious Congress. But separation of powers involves three branches, and *Klein* entailed the Court’s renunciation of power to review the President’s grant of pardons. By protecting Executive exclusivity, the Court threw its weight in favor of Johnson’s approach to restoration of the ancien regime in the South²⁶⁷—and, at the time, was perceived by the public as an important ally to the President in blocking Congressional reconstruction of the South on a multi-racial political foundation.²⁶⁸ The Court in *Klein* gave no

judicial clerk to Justice Frankfurter, likewise relied upon Fairman’s view of the Fourteenth Amendment in his discussion of school segregation. See BRANDWEIN, *supra* note 203, at 133–34 (discussing Bickel’s intellectual debt to Fairman).

²⁶⁵ Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Argument*, 47 EMORY L.J. 89 (1998).

²⁶⁶ See, e.g., Ian Millhiser, *The case against the Supreme Court of the United States*, Vox (June 25, 2022) (“The Court was the midwife of Jim Crow, the right hand of union busters, the dead hand of the Confederacy, and now one of the chief architects of America’s democratic decline.”), <https://www.vox.com/2022/6/25/23181976/case-against-the-supreme-court-of-the-united-states>

²⁶⁷ See Saikrishna Bangalore Prakash, *Zivotofsky and the Separation of Powers*, 2015 SUP. CT. REV. 1, 2 (2015) (referring to *Klein* “as a case in which the Court sided with the presidency over Congress”).

²⁶⁸ The American Anti Slavery Society, at its thirty-fourth anniversary reception held in May 1867, called upon the nation to provide for “the further security and present safety of the colored people,” and urged Congress “to impeach and remove the traitor of the White House at once.” And further:

attention to the goals of confiscation as they related to broader Reconstruction policy of protecting freed Blacks from exploitation and violence. Instead, the Court retained a singular focus on the property rights of the merchant who demanded confiscation—rights that the dissenting justices put into question. But the pardon power was important not only to restore land, but also to restore the vote to former rebels; the acts of 1867, as then-Professor Woodrow Wilson put it, had caused “the disenfranchisement, for several weary years, of the better whites, and the consequent giving over of the southern governments into the hands of the negroes.”²⁶⁹

In retrospect it may seem foreordained that a Presidential pardon would allow the return of confiscated property to their Confederate owners.²⁷⁰ But it is not clear that the scope of the pardon power was fixed prior to the Civil War (nor was it certain that confiscation worked an impermissible bill of attainder). At the time of the founding, the power was interpreted as essentially identical to that of the British Crown.²⁷¹ By then, the English Bill of Rights had abrogated the monarch's more general power to suspend or dispense with Parliamentary statutes, and its remaining pardon power was regarded as narrower, and limited to a specific, narrower criminal-law-specific authority.²⁷² It was not until the Civil War period, in *Ex parte Garland*,

urge on all friends of freedom to keep vigilant and ceaseless watch on the Supreme Court, and the present efforts of rebels to make use of it, in order to block the wheels of Government; that a large measure of confiscation and the division of confiscated land among negroes is one act of justice to them and the former rebel owners of land, and will be security to his other rights and to the nation itself.

New York, REPUBLICAN BANNER (Nashville, TN), May 8, 1867, <https://www.newspapers.com/image/604909405>

²⁶⁹ Woodrow Wilson, *The Reconstruction of the Southern States*, 87 ATLANTIC MONTHLY, 2–11 (Jan. 1901), in Edwin C. Rozwenc, ed., RECONSTRUCTION IN THE SOUTH 5 (1952).

²⁷⁰ Charles Fairman in his Oliver Wendell Holmes Devise questioned the majority's reasoning in *Klein*:

The notion that the Government bargained for the citizen's return to his allegiance as the contractual equivalent of the restoration of his property was not flawless. And Chase's further assertion, that a refusal thus to restore would have been as “cruel and astounding” as a failure to maintain the freedom of the Emancipation Proclamation, was not carefully measured. The more Chase wanted a result, the less rigorous was this thinking

FAIRMAN, *supra* note 8, at 845.

²⁷¹ See, e.g., *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

²⁷² Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 59 (1963).

that the Court attached a broad reading to the President’s pardon power and its legal consequences:

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.²⁷³

Ex parte Garland did recognize some limit on the legal consequences of a presidential pardon: “it does not restore offices forfeited, or property or interests, vested in others in consequence of the conviction and judgment.”²⁷⁴ But in later decisions, “the Court backed away from the broad proposition that a pardon erases both the consequences of a conviction and the underlying guilty conduct.”²⁷⁵ And in the 1915 decision in *Burdick v. United States*, , the Court stated that a pardon “carries an imputation of guilt; acceptance of a confession of it.”

Recent scholarship has drawn a connection between the Lost Cause ideology of the post-Civil War period and the emergence of a separation of powers doctrine that entailed both judicial supremacy and a unitary Executive.²⁷⁶ For that position, scholars have focused primary attention on *Myers v. United States*, which is said to mark the first time that Congress sought “to structure the Executive branch.”²⁷⁷ Although we agree that the Court’s reconfiguring of separation of

²⁷³ *Ex parte Garland*, 71 U.S. 333, 380–381 (1866).

²⁷⁴ *Id.* at 381.

²⁷⁵ Michael A. Fischer, Cong. Rsch. Serv., R46179, *Presidential Pardons: Overview and Selected Legal Issues 12* (2020). Most notably, in *Carlesi v. New York*, the Court determined that a pardoned offense could still be considered “as a circumstance of aggravation” under a state habitual-offender law), citing *Carlesi v. New York*, 233 U.S. 51, 59 (1914).

²⁷⁶ See Bowie & a Renan, *supra* note 47, at 2023; Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power And Congress Should Claw it Back* THE ATLANTIC, June 8, 2022, (tracing the idea of judicial supremacy to the end of Reconstruction and called it “an institutional arrangement brought to cultural ascendancy by white people who wanted to undo Reconstruction and the rise of organized labor that had followed”), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/>.

²⁷⁷ *Myers v. United States*, 272 U.S. 52 (1925); see Bowie & Renan, *supra* note 47, at 2028.

powers reflected “a particular revanchist ideology,” we see the trend beginning earlier, with *Klein*—an important first move in the Court’s turn away from the Republican promise of Reconstruction and its insulating the President’s pardon power under the cloak of reviewability.

B. *Klein* and Federalism

Next, consider federalism. Recall that in *Klein* the Court stated that to reject the merchant’s claim for compensation would be a “breach of faith not less ‘cruel and astounding’ than to abandon the freed people whom the Executive had promised to maintain in their freedom.”²⁷⁸ By ratifying the President’s pardons, the Court was restoring the South to its rightful leaders, and the states could resume their traditional sovereign role with the federal courts assuming only a limited role in their superintendence. Richard H. Fallon, Jr. has called this understanding of national-state relations the “Federalist model,” and said it is “the model most often dominant in Supreme Court opinions,” with “its roots in a theory of the understandings that surrounded the framing and ratification of the original Constitution in 1787 and 1788.”²⁷⁹ Uncharitably, one might call this model the slogan of the Democratic Party in 1864: “The Union as it Was, and the Constitution as it is”²⁸⁰—unamended and unchanged by the Thirteenth, Fourteenth, and Fifteenth Amendments. At the time of *Klein*, even as the newly forged Justice Department attempted to prosecute the Klan for violent attacks on Blacks and their allies, Southern Democrats, as Robert J. Kaczorowski has written, “viewed Klansmen as defenders of Southern nationalism and excoriated federal officials for martyring them in them In their opinion, peace would be restored only when the federal authorities restored law

²⁷⁸ *United States v. Klein*, 80 U.S. 128, 142, 20 L. Ed. 519 (1871).

²⁷⁹ Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1143 (1988)

²⁸⁰ “*The Union as it Was, and the Constitution as it is.*” N.Y. TIMES (Oct. 18, 1864), at 4; see also LA WANDA COX & JOHN H. COX, *POLITICS, PRINCIPLE, AND PREJUDICE 1865–1866*, 1 (1976) (stating that the Democratic Party “had fought the recent presidential election with the slogan ‘The Constitution as it is [i.e., with slavery] and the Union as it was.’”).

enforcement to the people of the South.”²⁸¹ And further: “The racism, economic self-interest, partisanship, and liberal ideology that characterized the political order of the 1870s promoted a callous disregard among Northern Republicans toward Southern violent oppression of black Americans. The Supreme Court reflected this political order in emasculating the Reconstruction civil rights program in the 1870s.”²⁸²

Klein provided important justification for returning to the Founding-era allocation of power between the states and the national government—an allocation, that in the post-Civil War period, consigned Blacks to the legalized oppression of Southern courts and Southern laws. The jurisdictional cases that have built on the fiction of state judicial fairness in the Reconstruction period are the staple of the Federal Court’s course and continue to block efforts to secure racial justice in the United States.²⁸³ From this perspective, *Klein* set the stage for the Court’s formal institutional approach to federalism,²⁸⁴ purporting to respect the exclusive sovereignties of the states and the national government, valorized as principled and restrained, although recognized in fact to produce predictable effects that are partisan, racialized, and substantive²⁸⁵—“perpetual losers,” in Robert Cover’s often-quoted phrase.²⁸⁶ But surely (or, “for at least some purposes,” to borrow from Richard Fallon), reconstructing *Klein* compels asking whether the doctrine of judicial federalism ought to support democratic values and “rely openly on such

²⁸¹ ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876* (2004).

²⁸² *Id.*

²⁸³ Fred O. Smith, Jr. *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2017).

²⁸⁴ Evan H. Caminker, “*Appropriate Means-Ends Constraints on Section 5 Powers*,” 53 STAN. L. REV. 1127 (2001) (stating that “‘jurisdictional values’ concern the allocation of law-making authority between the federal and state governments, and protect the proper sphere of exclusive regulatory jurisdiction”).

²⁸⁵ For a description and critique of this trend, see, e.g., Michael Wells, *Who’s Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 177 (1987) (explaining that the “neglect of substantive aims produces a distorted picture of what the Supreme Court and Congress do in Federal Courts cases, and why they do it. In addition, shunting aside substantive themes hampers any examination of the normative question of whether and how much substance ought to count for in Federal Courts law.”).

²⁸⁶ Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982).

considerations as ... functional desirability,²⁸⁷ of which racial equity would be an important factor.

C. *Klein* and the Federal Courts Canon

Jurisdiction is a critical political resource that allocates opportunity and access.²⁸⁸ How jurisdictional policy is framed, and its relation to federalism, separation of powers, and judicial independence, is a significant factor in facilitating participation and influence, fostering trust and accountability, and protecting rights and liberties.²⁸⁹ In our view, the legal community's collective amnesia about the racialized background of *Klein* is an unhappy feature of some federal courts scholarship, with consequences that spill over from the ivory tower to the public square, the courthouse, and the political branches. In particular, the elimination of racial equity from jurisdictional policy has served to illegitimate judicial activity seeking to secure rights of social citizenship—emancipatory rights that found themselves nearly extinguished at the end of Reconstruction. It is long time, we suggest, for the field to construct a “Reconstruction canon” for federal courts scholarship that brings jurisdictional doctrine into dialogue with the Fourteenth Amendment and concepts of Black citizenship. Decisions such as *Tarble's Case*,²⁹⁰ *Murdock*,²⁹¹ and *Klein*²⁹² share not only temporal proximity, but also thematic approaches: in particular, an

²⁸⁷ Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1048 (2010).

²⁸⁸ See Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline* (Unpublished manuscript on file with the author) (July 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4167200

²⁸⁹ See Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing, Injury*, 70 BUFF. L. REV. 523 (2022).

²⁹⁰ *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871) (holding that a state judge lacks jurisdiction to issue a writ of habeas corpus on behalf of a federal detainee).

²⁹¹ *Murdock v. Memphis*, 87 U.S. 590 (1874) (holding that the Supreme Court lacked jurisdiction under the First Judiciary Act of 1867 to review state law questions).

²⁹² *United States v. Klein*, 80 U.S. 128 (1871).

emphasis on sovereign exclusivity as between the federal government and the states, and a clear barrier between a perceived private sphere from the public. By studying these cases together, one can better assess the ways in which the lost potential of Reconstruction continues to shape current law. As with so many issues of race in the United States, “The past is never dead. It’s not even past.”²⁹³

Conclusion

A frequently mooted question in federal courts scholarship concerns the role of history in the Court’s Article III jurisprudence. History can affect how the Court reaches a decision in the light of past practice; it also can affect the weight the Court chooses to ascribe to a decision. To borrow from Henry P. Monaghan in his reconsideration of Henry Hart’s *The Dialogue*, “there is the troublesome question of how much weight should be given to the various opinions written during the turbulence of the Civil War era.”²⁹⁴ And there is the equally troublesome question, urgently presented by the current Court, of how much jurisdictional weight to accord to historical periods characterized by their notorious subordination of Blacks, Native Americans, and women. By reconstructing *Klein*, we have raised questions whether the Court’s unquestioned support for the President’s power to extend amnesty helped to legitimate the “Lost Cause” ideology of the post-Civil War period and the racial and economic subordination it served to entrench. The question may defy answer, but failing to ask it risks using federal courts doctrine in ways that “normalize the present,” leaving unacknowledged the subtle ways in which jurisdictional

²⁹³ WILLIAM FAULKNER, *ABSOLOM, ABSOLOM* 261 (1936)

²⁹⁴ Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 18–19 (2019). See also Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012) (urging more attention to the ante-bellum Court and its activist approach to the invalidation of legislation).

doctrine through its purported neutrality supports and continues the legacy of racial and class stratification.²⁹⁵ In particular, we have suggested that *Klein* be considered in the racial context of Reconstruction, and that jurisdictional values be interrogated to surface their anti-egalitarian and racial aspects.²⁹⁶ If we have raised more questions than we have answered, we hope that we have at least opened the field to further conversation.

²⁹⁵ ROBERT W. GORDON, TAMING THE PAST; ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 7 (2017).

²⁹⁶ Cf. BRANDWEIN, *supra* note 203, at 94 (“Questions of race were implicitly brought into Court opinions [in the period post 1873] and not explicitly stated. . . . The fact that its presence was only implicit . . . meant that the Warren Court majority in the 1960s could not simply reject it by observing that racial ideologies had changed. Future Supreme Court justices would first have to establish its presence in order to expunge it.”).