ARTICLE

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 abandoned property confiscated by the United States 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 policies aimed at racial equality. These policies included 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 in 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 multiracial basis, was returned to former enslavers and those who did commerce with them.*

This Article makes three contributions. First, it augments the traditional narrative about Klein *by highlighting the land dreams of Black freedom seekers and*

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the Union's broken commitments to Blacks about land acquisition and the promise of full citizenship, rather than exclusively focusing on the compensation claims of Confederate rebels and their allies. 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 that worked to maintain Black people in a subordinate class subject to legalized violence and economic exploitation. In particular, we bring the decision into dialogue with Reconstruction Era constitutional decisions, and examine how the Court's reasoning and its implicit 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, without regard to the material conditions that make freedom and equality possible. Finally, we raise questions whether acknowledging* Klein*'s racialized context might motivate reassessing as well as reorienting the notion of jurisdictional neutrality and jurisdictional doctrines involving federalism, separation of powers, and federal judicial power.*

INTRODUCTION

United States v. Klein[1] 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.[2] The facts of the case have been called "simple"—the story of "a family

1 80 U.S. (13 Wall.) 128 (1872).

2 *See generally id.*

seeking reimbursement for approximately six hundred bales of cotton of which the United States had taken possession during the Civil War."[3] The "family," like thousands of other cotton merchants whose commerce financially fueled the Confederacy,[4] grounded its claim on having taken an oath of allegiance to the Union after seizure of the property, in the hope that a presidential pardon would later wipe clean any taint of disloyalty.[5] Congress, however, had other ideas; the 1863 Captured and Abandoned Property Act[6] barred compensation to anyone who had given "any aid or comfort to the present rebellion."[7] Nevertheless, the Supreme Court cleared the way for compensation by holding, first, in *Ex parte Garland*,[8] that a presidential pardon rendered "the offender . . . in the eye of the law as innocent as if he had never committed the offense,"[9] and then, in *United States v. Padelford*,[10] awarding compensation to a pardoned offender who had served as a surety on Confederate bonds. Congress held fast. It passed another statute, this time directing courts to treat a presidential pardon as evidence of the claimant's disloyalty.[11] In *Klein*, the Supreme Court invalidated that statute as outside Congress's authority to regulate the Article III appellate jurisdiction, interpreting presidential clemency in what Professor Charles Fairman called "a generous spirit."[12] President Andrew Johnson was likewise generous in his use of the pardon power,

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[3] 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).

[4] *Id.* at 91.

[5] Kline v. United States, 4 Ct. Cl. 559, 564 (1868), *aff'd sub nom.*, *Klein*, 80 U.S. (13 Wall.) 128.

[6] Ch. 12, 12 Stat. 820.

[7] Captured and Abandoned Property Act § 3, 12 Stat. at 820.

[8] 71 U.S. (4 Wall.) 333 (1867).

[9] *Id.* at 380.

[10] 76 U.S. (9 Wall.) 531, 539 (1869).

[11] *Klein*, 80 U.S. (13 Wall.) at 129:

> 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.

See generally Act of July 12, 1870, ch. 251, 16 Stat. 230.

[12] 6 CHARLES FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, PART ONE, RECONSTRUCTION AND REUNION 1864–88, at 874 (1971).

issuing over the course of his administration four amnesty proclamations. Indeed, as Fairman reported: "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."[13] The Court's decision in *Klein* bolstered the importance of those pardons, which went far in restoring the antebellum, racialized 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.[14] Scholars have celebrated *Klein* for providing the Court with a shield against an overreaching Congress,[15] and applauded *Klein* for vindicating property rights and the rule of law.[16] 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.[17] At the same time, commentators have called the Court's reasoning

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[13] *Id.* at 788 (summarizing the four amnesty proclamations).

[14] 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 McCardle*, [and] [*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."); Helen Hershkoff, *Waivers of Immunity and Congress's Power to Regulate Federal Jurisdiction—Federal-Tort Filing Periods as a Testing Case*, 39 SETON HALL LEGIS. J. 243, 247–48 (2015) (stating that "since *Klein*, the Court has held in *Boumediene v. Bush* that Congress's withdrawal of jurisdiction over *habeas corpus* relief must comport with the Constitution's Suspension Clause" (first citing Boumediene v. Bush, 553 U.S. 723 (2008), and then citing U.S. CONST. art. I, § 9, cl. 2 (Suspension Clause))).

[15] *See* 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 3, at 112.

[16] *See* Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2190–94 (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, 1194 n.26 (collecting articles embracing *Klein*'s perceived limits on legislative power). Professor Gordon Young also observed that *Klein* had become "nearly all things to all men." *Id.* at 1195.

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

"opaque," even "impenetrable";[18] the decision is "puzzling,"[19] and it "continues to baffle."[20] For this reason, some scholars have questioned whether trying to understand the case is even worth the candle, asking whether *Klein* would best be cast aside as "an antique, without useful application to contemporary circumstance."[21] As to the merits, some commentators have ascribed "little practical value" to the decision;[22] 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."[23]

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 antidemocratic purposes.[24] Moreover, in what has been called a "racial reckoning,"[25] there has been increased attention to the ways that the United States' history of chattel slavery and Jim Crow reverberate in contemporary

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[18] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 34 (2002).

[19] Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998).

[20] Tyler, *supra* note 3, at 87.

[21] Sager, *supra* note 19, at 2531–32.

[22] WILSON COWEN, PHILIP NICHOLS, JR. & MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS: A HISTORY PART II, at 27 (1978).

[23] FAIRMAN, *supra* note 12, at 776.

[24] *See, e.g.*, TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 91, 126–27 (2018); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021).

[25] *See, e.g.*, *Dyer v. Smith*, 2021 WL 694811, at *7 n.9 (E.D. Va. Feb. 23, 2021), *rev'd and remanded*, 56 F.4th 271 (4th Cir. 2022) ("[T]he 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, 53 (2022) (discussing the "racial reckoning" which clarifies that "our very laws have been defined only with the voices, views, and circumstances of a small and privileged few out of the white American populace"); 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").

doctrines[26] and institutions,[27] with some making the case for reparations.[28] Amid these national conversations about democracy and race, commentators have prominently charged the Supreme Court with facilitating antidemocratic backsliding[29] and racial subordination.[30] Indeed, scholars are urging significant changes to the institution itself,[31] offering reforms of a type that *Klein* has been understood to disallow.[32]

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[26] *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1071–91 (2022); Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1286 (2022); Darren Hutchinson, *With All the Majesty of the Law: Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 378–79 (2022); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674, 718–31 (2022); *see also* David Alan Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering* Queen v. Hepburn, 2022 SUP. CT. REV. 413, 432–43 (2023).

[27] *See, e.g.*, DOROTHY BROWN, THE WHITENESS OF WEALTH 21 (2021).

[28] *See, e.g.*, WILLIAM A. DARITY, JR. & A. KIRSTIN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 256–70 (2020); KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION 16 (2019); Martha M. Ertman, *Reparations for Racial Wealth Disparities as Remedy for Social Contract Breach*, 85 LAW & CONTEMP. PROBS. 231, 241 (2022); A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1269–71 (2020); Roy L. Brooks, *Racial Reconciliation Through Black Reparations*, 63 HOWARD L.J. 349, 360 (2020); Patricia M. Muhammad, *The U.S. Reparations Debate: Where Do We Go from Here?*, 44 HARBINGER 43, 44 (2020); Ta-Nehisi Coates, *The Case for Reparations,* ATLANTIC (June 2014), https://perma.cc/5L3X-ZE46; *see also* Jamillah Bowman Williams, Naomi Mezey & Lisa Singh, *#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.").

[29] *See generally* 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 57–112 (2016); JAMIN RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VERSUS THE AMERICAN PEOPLE 2–6 (2003); 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*, 70 BUFF. L. REV. 523, 584–85 (2022); Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1 (2023).

[30] DEVON CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 193 (2022); Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 850–53 (2022); Russell Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 183 n.218 (2016).

[31] *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1720–21 (2021); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1843 (2020); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

[32] Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power and Congress Should Claw It Back*, ATLANTIC (June 8, 2022), https://perma.cc/YF2K-4PNG [hereinafter Bowie & Renan, *This Much Power*]; Doerfler &

At the same time, national court systems outside of the United States find their independence under siege by political and even authoritarian pressure.[33] Against this background, we argue that a more nuanced but critical lens is warranted before lionizing *Klein*—a decision in which the Court, allied with the executive, defeated congressional policies aimed at securing racial equality and protecting Black people's liberty.

Distributing land to emancipated slaves was critical to Congress's egalitarian ambitions, and the policy's success depended on the confiscation of Confederate property.[34] But the promise of land distribution came into collision with President Johnson's promiscuous use of the pardon power. By the end of his presidency, President Johnson issued pardons to almost all those not covered by the general amnesty—as historian Walter McDougall archly put it, those pardoned comprised "13,000 Confederates: nearly everyone except the warden of Andersonville prison and those who had conspired with John Wilkes Booth."[35] The effect of those pardons was bolstered by the

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Moyn, *supra* note 31, at 1720–21; Sprigman, *supra* note 31, at 1780–81 (contending that Article III "give[s] to Congress a means to limit the scope of judicial review—to take back from the federal courts, in specific cases, the power to say what the law is"). *Cf.* Barry Friedman, *What It Takes to Curb the Court*, 2023 WIS. L. REV. 513 (2023) (outlining conditions in which court reform has historically been feasible, and explaining why those conditions are not yet present, current reform proposals notwithstanding).

[33] *See, e.g.,* Philippe Dam, *Poland's Compromised Court Threatens Rule of Law in Europe*, HUM. RTS. WATCH (Oct. 13, 2021), https://perma.cc/Y34R-79J9; Dan Ephron, *"An Unprecedented Constitutional Crisis": What Netanyahu's Assault on the Supreme Court Means for Israel*, FOREIGN POL'Y (Feb. 14, 2023), https://perma.cc/82LC-DEL4.

[34] *See infra* Part I.A.

[35] *See* WALTER A. MCDOUGALL, THROES OF DEMOCRACY: THE AMERICAN CIVIL WAR ERA 1829–1877, at 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 . . . money paid to pardon-brokers and [ ] 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) (emphasis in original):

> 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 com[ing] in here day after day, to get *pardoned*—All the rich, and all high officers of the rebel army cannot do anything, cannot buy or sell, &c., until they have special

Court's "generous" interpretation of presidential clemency; those pardoned not only were restored to ownership of their former property (other than slaves), but also later permitted to resume political power in the South and the nation.[36] The subordinating racial effects of the pardon policy brought anguished, albeit futile, protest from freed Blacks:

> "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."[37]

If the goal of President Johnson's pardons was to secure reconciliation and peace in the South, one might reasonably ask upon reading the freedmen's pleas,[38] peace for whom? The pardons did not bring peace to freed Blacks in the American South. They brought violent terror, economic exploitation, and legal apartheid.[39]

This Article argues for reassessing *Klein*'s canonical status in light of its racialized context. Judicial independence is of course critical to a constitutional democracy. But so are values of democratic inclusion and racial equality. We think it important to acknowledge that *Klein* was one of a number of post–Civil War decisions that helped restore a white, racist hegemony in the South—in particular, the Court's interpretation of executive clemency impeded congressional Reconstruction and blocked freed Blacks from obtaining property needed for economic self-

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> pardons—(that is hitting them where they *live*) so they all send or come up here in squads, old & young, men & women."

[36] MCDOUGALL, *supra* note 35, at 510–11.

[37] JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 318 (2018) (citing *The Colored People of Virginia*, 13 ANTI-SLAVERY REP. 250, 250–51 (1865)); *see also* Steven F. Miller, Susan E. O'Donovan, John C. Rodrique & Leslie S. Rowland, *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners During Presidential Reconstruction, 1865–1867–Freedom: Political*, 70 CHI-KENT L. REV. 1059, 1064–77 (1995) (collecting other statements by freed Blacks criticizing President Johnson's approach to Reconstruction).

[38] We use the term "freedmen" but recognize the important and distinct contributions of freedwomen during this period. *See generally, e.g.*, MARY FARMER-KAISER, FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION (2010).

[39] *See infra* Part I.A.

sufficiency and political equality.[40] In the transition from slavery to freedom, other goals—significantly, acquiring the vote—were important.[41] But the focus on the Fifteenth Amendment should not eclipse another important post–Civil War goal: ensuring the material conditions of freedom.[42] As to that, formerly enslaved people recognized the unique value of land as protection against economic subjugation and sought ways to acquire it.[43]

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[40] 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 author Raymond Williams, "hegemony is not singular; . . . its own internal structures are highly complex, and have continually [been] renewed, recreated and defended." Raymond Williams, *Base and Superstructure in Marxist Cultural Theory,* 82 NEW LEFT REV. 1, 8 (1973). Moreover, while this Article focuses on the restoration of white supremacist hegemony in the South, others have made the compelling case that this was a tragic period of broader fortification of white, patriarchal hegemony well beyond the South. *See generally* FRANKE, *supra* note 28. As we observe in Part I, Northern speculators played a substantial role in undermining land distribution to freedmen and refugees along the South Carolina and Georgia coasts. This Article primarily focuses on Southerners, however, because they were the primary beneficiaries of the aggressive use of the pardon power, and the muscular effect the Supreme Court gave those pardons.

[41] On the relation between suffrage, property, and freedom, see, for example, HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 41 (2001) (referring to "the mixed blessing of universal suffrage"), and 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*, 5 J. S. 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.").

[42] *See* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1363 (2016) (urging attention to the Second Freedmen's Bureau Bill and its focus on "aiding transitions to freedom and citizenship, as well as preventing regressions into states of dependence"); *see also* Horace Mann Bond, *Social and Economic Forces in Alabama Reconstruction*, *in* RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS 373 (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.

[43] Georges Clemenceau, then a foreign affairs 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

To say that their acquiring land was difficult is an understatement.[44] Before the war, the Supreme Court had made clear that "the African race . . . had no rights which the white man was bound to respect."[45] Enslaved Blacks generally 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.[46] Instead, men, women, and children were dispatched, as abolitionist Frederick Douglass said, "empty handed, without money, . . . and without a foot of land to stand upon."[47] Moreover, some states of the Confederacy,

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> 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.

GEORGES CLEMENCEAU, AMERICAN RECONSTRUCTION 1865–1870, at 40 (1969).

44 *See, e.g.*, DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 79 (2003) (stating that "the fact that slaves could not own property was the low-slung roof on the dungeon of their oppression, one whose other pillars were beatings, killings, and the threat of the slave trader").

45 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406–07 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that a Black person could not be a citizen and therefore could not invoke the federal court's diversity jurisdiction); *see* STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 15 (2003) ("As chattel property and legal dependents, they were subject to the sovereign authority of their masters and thereby lacked, at least theoretically, the very essence of political beings: the ability to express and act according to their individual and collective wills.").

46 For a discussion of the limited opportunities of enslaved people 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, at 30–36 (1990). *See also* PENNINGROTH, *supra* note 44, at 45–69 (discussing "slaves' independent economic activity" before the Civil War); Loren Schweninger, *Black-Owned Businesses in the South, 1790–1880*, 63 BUS. HIST. REV. 22, 25 (1989) (recognizing that it is "incongruous to discuss slaves engaging in business activities"); HAHN, *supra* note 45, at 24 (discussing the emergence of "paid labor" and its organization around kin-based households, and used in some places to require slaves to be "responsible for feeding themselves"); PENNINGROTH, *supra* note 44, at 54 (reporting that some states criminalized the hiring out of slaves and that in those states where the practice was allowed or tolerated, "self-hiring was always a harsh exchange for slaves").

47 KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 1865–1877, at 123 (1966); *see also* W.E.B. Du Bois, *Black Reconstruction*, *in* STAMPP & LITWACK, *supra* note 42, at 432–33:

> 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

notwithstanding emancipation, continued to bar Blacks from purchasing or owning land.[48]

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 that the United States confiscated from Southern insurrectionists.[49] To be sure, the United States' 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.[50] 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."[51] And, in a society in which power derived from land, confiscation chipped away at the white monopoly on power in the South.

> 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 that was practically slavery.

48 *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 results of the war be set aside by their insistent demand for restoration of their lands. The President responded with alacrity during the second half of 1865 and until his impeachment.

See DANIEL B. THORP, FACING FREEDOM: AN AFRICAN AMERICAN COMMUNITY IN VIRGINIA FROM RECONSTRUCTION TO JIM CROW 85 (2017) ("Immediately after emancipation it was impossible for freedmen in Montgomery County to acquire land.").

49 *See, e.g.*, WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT 297–319 (1976).

50 *See* ROGER LOWENSTEIN, WAYS AND MEANS: LINCOLN AND HIS CABINET AND THE FINANCING OF THE CIVIL WAR 131 (2022) (explaining that the aim of the second Confiscation Act "was to take the economic war to the plantation, by authorizing, on military grounds, the seizure of property (including slaves) of Rebel officials").

51 *See id.* at 285.

While many factors contributed to the failure of land distribution,[52] President Johnson's obstinance, obstruction, and pardon policy were critical—and the pardon power was at the heart of the *Klein* case.[53] Presidential clemency not only enabled the return of confiscated property to those who had given aid and comfort to the Confederacy, but also eliminated the Freedmen's Bureau's chief source of revenue (Congress never having appropriated funds for its operation), as well as the land needed to create a multiracial power base in the South.[54] More generally, it restored power to a landed class determined to subordinate Black people and to disregard their constitutional freedom.[55]

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[52] *See* CLAUDE OUBRE, FORTY ACRES AND A MULE 197 (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*, *in* 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 47, 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 whom is directed an intense racial prejudice.

[53] This Article does not explore or explain President 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, at 314 (2018 reprt. ed. 1953) ("A combination of circumstances operated to turn Johnson to a course of leniency in dealing with the South."); Eric L. McKitrick, *Andrew Johnson, Outsider*, *in* STAMPP & LITWACK, *supra* note 42, at 56–57. Historian Eric McKitrick stated that President 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 vex his mind, early in the war.

[54] *See* GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 96 (1955) (noting President 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").

[55] DONALD G. NIEMAN, 2 THE FREEDMEN'S BUREAU AND BLACK FREEDOM, at 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 Americans 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

Klein was not the first or only case in which the Court attached a broad reading to the legal implications of a pardon.[56] Indeed, from the outset, when Abraham Lincoln was in the White House, the Court interpreted the pardon power capaciously—even more capaciously than President Lincoln intended, prompting him to issue a supplementary amnesty proclamation with clear exclusions that he insisted be honored.[57] *Klein* is, however, a coda to a tragic story in which property central to the Reconstruction of the South on a multiracial basis was returned to former enslavers and those who did commerce with them.[58] Well before the *Slaughter-House Cases*[59] or the *Civil Rights Cases*,[60] *Klein* accelerated inequality and helped fortify a caste system during a fragile period of radical racial possibility. Moreover, by pressing the false equivalence of freedom to the formerly enslaved and financial compensation to their former enslavers, the Court set the stage for the Lost Cause ideology[61] that came to dominate elite and popular circles[62]—a view that tarred the era of the

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> 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 responsibly 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, at 526 (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.").

56 *See generally* Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867) (overturning a congressional law that disbarred Confederates in federal court and that required a loyalty oath for them to return).

57 *See* DORRIS, *supra* note 53, at 56–57.

58 On military views of merchants who traded with the Confederacy, see, for example, LOWENSTEIN, *supra* note 50, at 136 (noting that "Sherman viewed the merchants trading across the lines as a fifth column propping up the enemy," and that he and Grant "were horrified that profiteers were putting their troops at greater risk").

59 83 U.S. 36 (1872).

60 109 U.S. 3 (1883).

61 During the decades after the Civil War, ex-Confederates "nurtured a public memory of the Confederacy that placed their wartime sacrifice and shattering defeat in the best possible light." Gary W. Gallagher, *Introduction* to THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 1, 1 (Gary W. Gallagher & Alan T. Nolan eds., 2000). This interpretation of the Civil War cast those who took up arms against the United States as heroes; contended that the United States' wartime efforts were excessive; minimized the brutality of the institution of slavery; and vilified Reconstruction efforts. For an early example of the "Lost Cause" interpretation of the Civil War and Reconstruction, see EDWARD ALFRED POLLARD, THE LOST CAUSE REGAINED 14 (1868).

62 *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, 445 (2014) ("Until the 1960s, the judicial view of Reconstruction mirrored that

Reconstruction Amendments as "the ultimate shame of the American people" and "the nadir of national disgrace,"[63] reflected in books with such titles as "'The Tragic Era,' 'The Dreadful Decade,' 'The Age of Hate,' and 'The Blackout of Honest Government,'"[64] and celebrated in public spaces throughout the South with the erection of statutes idolizing Confederate leaders.[65] In this retelling, equality for the former slave consisted in emancipation only—and no further political interventions were required to protect Black people from private violence, economic exploitation, and political subordination.

Part I opens with *Klein* itself, briefly describing the litigation, exploring what was at stake for the claimant, and examining the Court's grounds for invalidating legislation aimed at preventing those who had given aid and comfort to the Confederacy from reacquiring abandoned property that the United States confiscated during the Civil War. Academic discussions of *Klein*—and certainly all casebook treatments—tend to focus on the Court's interpretation of Article III and the pardon power. Descriptively, this Part expands the discussion in two directions. First, we examine the overlooked dissenting opinions of Justices Samuel Miller and Joseph Bradley which, although 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.[66] Second, we shift the narrative focus from the legal claims of the white cotton vendor's estate that brought the lawsuit, to the property dreams of Black people newly emancipated from slavery—and the land promises made to them by Congress and the military. Contemporary newspaper accounts show that the public fully understood the racial import of *Klein* in facilitating restoration of a white power structure to the South.

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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." (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 1594 (1988))).

63 STAMPP, *supra* note 47, at 4.

64 *Id*.

65 *See* Ben Paviour, *Charlottesville Removes Robert E. Lee Statue That Sparked a Deadly Rally*, NPR (July 10, 2021), https://perma.cc/T8N5-UM9L.

66 *Klein*, 80 U.S. (13 Wall.) at 149 (Miller, J., dissenting).

Part II turns from the Court to the legal academy. Very quickly, racial politics were erased from academic discussions of *Klein*, and the decision's racialized context disappeared from legal analysis.[67] 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."[68] Indeed, deep into the twentieth century, under the thrall of the Lost Cause ideology, commentators applauded the failure of land distribution to freed Blacks as having prevented, as then-Professor Woodrow Wilson said, the worst of the "dangerous racial consequences"[69] of Reconstruction policies. Cleansed of any racial stain, *Klein* transformed from an early decision about the government's obligation to honor war claims, to a case about limits on Congress's power to regulate the appellate jurisdiction of the Supreme Court.[70] By the 1950s, *Klein* acquired its singular status as a victory for judicial independence and the inviolability of property rights; Legal Process scholars erected the case as a pillar in arguments about institutional settlement and race-neutral concepts of Article III jurisdiction.[71] And *Klein* then acquired a scholarly significance quite detached from its original racial origins.[72]

Part III then considers *Klein*'s pride of place in the federal courts canon. The Court decided *Klein* in 1872, the year that Congress officially abolished the Freedmen's Bureau.[73] Still to come were its decisions in the *Slaughter-House Cases* and the *Civil Rights Cases*—which set in place, as Professor Charles Black, Jr. put it, "'[s]eparate but equal' and 'no state action'—these fraternal twins [that] have been the Medusan caryatids upholding racial injustice."[74] *Klein* did not interpret the

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67 The leading exception of course was W.E.B. DuBois, *Reconstruction and Its Benefits*, 15 AM. HIST. REV. 781 (1910); *see also* Martin Abbott, *Free Land, Free Labor, and the Freedmen's Bureau*, 30 AGRIC. HIST. 150–56 (1956).

68 FAIRMAN, *supra* note 12, at 873–74.

69 Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2047 (2022) [hereinafter Bowie & Renan, *Counterrevolution*].

70 *See infra* Part II.

71 *See id.*

72 *See id.*

73 BENTLEY, *supra* note 54, at 212.

74 Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 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, 153 (Ronald J. Pestritto & Thomas G. West eds., 2005) ("As is well known,

Reconstruction Amendments, but we urge that the Court's treatment of abstruse issues of jurisdiction, evidence, and the pardon power be brought into dialogue with scholarship about the Reconstruction Court and its role in perpetuating the legacies of slavery.[75] At the least, *Klein*'s racialized context raises questions about the Court's invocation of judicial independence in resisting congressional Reconstruction while bolstering presidential policies that deferred Black people's land dreams even to this day. Like those who have argued for including slavery and legacies of racism in the constitutional law canon,[76] the property law canon,[77] the contract law canon,[78] the employment law canon,[79] the criminal law canon,[80] the civil procedure canon,[81] and the evidence law canon,[82] 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. In particular, taking account of *Klein*'s racialized context—and its nascent Lost Cause ideology that came to inform constitutional concepts of Black citizenship—raises questions about the role of racial subordination in the construction of doctrines of federalism,

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the *Slaughter-House* cases virtually nullified the Fourteenth Amendment's privileges *or* immunities clause." (emphasis in original)).

75 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.").

76 *See, e.g.*, Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-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, 262–72 (2000) (arguing that the omission of slavery from the constitutional canon "leads to a skewed and incomplete understanding" of the U.S. Constitution). A new generation now argues for acknowledging the white supremacist basis of the Constitution and many of the Court's decisions, but also seeing in the Constitution the "tools of abolition democracy." *See* Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 165 (2022); *see also* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 3, 3–30 (Angela J. Davis ed., 2017).

77 Park, *supra* note 26, at 1067–69.

78 *See* Penningroth, *supra* note 26, at 1290–96.

79 *See generally, e.g.*, James Gray Pope*, Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474 (2010); Lea VanderVelde, *The Anti-Republican Origins of the At-Will Doctrine*, 60 AM. J. LEGAL HIST. 397 (2020).

80 *See generally* Brandon Hasbrouck, *Movement Constitutionalism*, 75 OKLA. L. REV. 89 (2022).

81 *See generally* Victor D. Quintanilla, *Race and Civil Procedure*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado et al. eds., 2022). *See also* Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey*, 54 J. LEGAL EDUC. 242, 246, 252 (2004).

82 *See generally* Sklansky, *supra* note 26.

separation of powers, and property rights. At a time when commentators have raised concerns that institutions of democracy are being used to achieve antidemocratic ends, *Klein* offers a warning of how "neutral" rules of jurisdiction and institutional structure can be used to dismantle substantive rights in partisan and racialized ways. *Klein*, alone, was not responsible for the restoration of white Southern power and the continuing injustice of racial inequality. But we urge that the decision's canonical status not be used to reinforce past practices of racial exclusion.

I. *KLEIN* IN THE SUPREME COURT

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.[83] This Part first discusses the litigation that led to *Klein*, Congress's contemporaneous legislative efforts, and the Supreme Court's resultant opinion. On its face, *Klein* is a case about an overreaching Congress seeking to usurp private property, encroach upon executive prerogative, and invade judicial independence. The case has acquired canonical status in the federal courts literature, celebrated for its protection of separation of powers as a guardian of liberty and rights. That canonical status, however, ignores the decision's racialized context: freedmen's dreams of becoming freemen through land acquisition and economic opportunity; the Reconstruction Congress's egalitarian ambitions for land distribution in the postwar South; and the president's pardon policy, bolstered by the Supreme Court and aimed at destroying both those dreams and those ambitions. This Part foregrounds the relationship between *Klein* and the restoration of a racist hegemonic order in the old Confederacy, bringing into sharp relief the contrast between the federal government's treatment of Blacks' economic interests during Reconstruction and those of their former enslavers.

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[83] 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).

A. Rebel Compensation and the Court's "Breach of Faith"

Klein was a case that involved abandoned property—in particular, cotton.[84] 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.[85] Victor Wilson, whose actions were at issue in *Klein*, was a wealthy merchant in Vicksburg, Mississippi.[86] Wilson owned large amounts of cotton, which he stored in warehouses in Vicksburg.[87] At the time that Wilson's cotton was abandoned, at least some of it was in containers marked "C.S.A." (Confederate States of America).[88] The United States seized the cotton under an 1863 statute that authorized the confiscation of abandoned property, and which established a process allowing an owner who had remained loyal to the Union to claim compensation.[89] After his cotton was seized, Wilson swore an oath of loyalty to the Union.[90] At the end of the war, on December 26, 1865, the administrators of Wilson's estate, John Klein and Wilson's wife,[91] sued the United States in the Court of Claims under the 1863 Act seeking compensation for the seized cotton.[92]

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84 *Klein*, 80 U.S. (13 Wall.) at 132.

85 *Cf.* Richard C. Todd, *C. G. Memminger and the Confederate Treasury Department,* 12 GA. REV. 396 (1958).

86 *Kline*, 4 Ct. Cl. at 566.

87 *Id.*

88 *Id.*

89 *See* Abandoned and Captured Property Act, 12 Stat. 820.

90 *Klein*, 80 U.S. (13 Wall.) at 131 (stating Wilson took the oath on February 15, 1864).

91 Mrs. Wilson died during the pendency of the action. *See* Transcript of the Record, Index, United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (No. 156) (noting the "Death of Jane Wilson").

92 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 . . . prefer his claim to the proceeds thereof in the [Court of Claims]." Abandoned and Captured Property Act § 3, 12 Stat. at 820. 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." *Klein*, 80 U.S. (13 Wall.) at 137. Second, the claimant needed to prove "to the satisfaction of said court of his ownership of said property." *Id.* at 131. Third, the claimant needed to show that he was entitled to the recovery. *Id.* at 139. 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.

Id. at 131.

Under the 1863 Act, the estate had the burden to show the original owner's loyalty[93]—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.[94] The United States countered that the seized cotton had been stored in containers marked C.S.A. not for convenience, but rather had "actually [been] used in the waging and carrying on war against the United States"—significant because the 1863 Act barred compensation to owners whose property had been used to aid the insurrectionists.[95] The Court of Claims nevertheless ruled in favor of the Wilson estate.[96] 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."[97] 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."[98]

After judgment, the government asked the Court of Claims for reconsideration in light of counsel's stipulated facts that in both 1862 and 1863 Wilson had "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."[99] The Court of Claims affirmed its prior judgment, following the Supreme Court's earlier decision in *United States v. Padelford*,[100] which had considered and resolved the question of whether a presidential pardon purged a surety of prior disloyalty.[101] That case involved a Savannah merchant named Edward Padelford who had aided the insurrection, but, once pardoned, was held to be entitled to compensation for his seized goods.[102] Notably, the

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

94 *Kline*, 4 Ct. Cl. at 562.

95 *Id.* at 564.

96 *Id.* at 568.

97 *Id.* at 566.

98 *Id.* at 567.

99 Brief for the Appellants at 1, United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (No. 156).

100 76 U.S. (9 Wall.) 531 (1870).

101 *Id.* at 539.

102 *Id.* at 543.

Court agreed with the United States that Padelford had voluntarily aided the rebellion; in particular, Padelford had "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."[103] 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."[104] Nevertheless, the Court affirmed the lower court's judgment for Padelford on a different ground: receipt of a presidential pardon.[105] 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.[106]

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[103] *Id.* at 539. 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. 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 generally* Robert B. Murray, *The Padelford Claim*, 51 GA. HIST. Q. 324 (1967).

[104] *Padelford*, 76 U.S. at 539.

[105] *Id.* at 542–43.

[106] *Id.* at 543. 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. *Id.* ("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 President Lincoln's Amnesty Proclamation, *id.* at 534.—was of no moment. The Court also ignored that by statute, dated June 25, 1868, Congress had prescribed the evidentiary procedures for a party seeking compensation:

> [W]henever 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,

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, "The principle of this ruling not only affects very considerable private interests, but its political consequences are important."[107] The paper observed that *Ex parte Garland*, an earlier decision that disabled Congress from placing conditions on the Confederates' pardons, had been "sustained by a bare majority of the court."[108] But *Padelford*, the author emphasized, was "now treated as the settled law."[109]

Alarmed by the impact of *Padelford* on rebel compensation claims, Senator Charles Drake of Missouri took preemptive action.[110] Specifically, Drake introduced an amendment to an appropriations bill aimed at defeating compensation claims from those who had aided the rebellion and later received a presidential pardon.[111] He told his colleagues on the Senate floor:

> I hold in my hand a copy of a decision given by the Supreme Court of the United States in a case that went up on appeal

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> 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.

Act of June 25, 1868, ch. 71, § 3, 15 Stat. 75; *see also* Argument for the Respondent at 2, *Klein*, 80 U.S. (13 Wall.) 128 (No. 156).

107 *United States Supreme Court.*, DAILY ARK. GAZETTE, May 1, 1870, at 3.

108 *Id.*

109 *Id.* The paper pointed to the 5–4 opinion in *Ex parte Garland* in which the Court invalidated the congressional test oath for lawyers seeking to practice in federal court. *Ex parte Garland*, 71 U.S. (4 Wall.) at 381. Fairman, citing contemporary newspaper accounts, reported that *Ex parte Garland* "made former rebels and Democrats 'ecstatic' and destroyed what returning confidence Unionists felt in the Court." FAIRMAN, *supra* note 12, at 245.

110 Before joining the Senate, Drake had served as a member of the Missouri State Constitutional Convention, which often is referred to as the "Drake Constitution" (and which opponents called the "Draconian Constitution"), and formally recognized emancipation. It also included the so-called "Ironclad Oath," requiring voters and office holders to show they had not supported the rebellion and to swear they would uphold the state and federal Constitutions. *See* Speech of Charles D. Drake, The Missouri State Convention, and Its Ordinance of Emancipation.(July 9, 1863). On Drake's role throughout the Reconstruction Congress, see generally David P. Currie, *The Reconstruction Congress,* 75 U. CHI. L. REV. 383 (2008).

111 CONG. GLOBE, 41st Cong., 2d Sess. 3810 (1870) (statement of Sen. Charles Drake) (available at https://perma.cc/28PX-XYT9).

> 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.[112]

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."[113]

The Drake Amendment elicited some objections, but passed with only minor changes. It provided 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.[114] Upon "proof of [a] pardon and acceptance," the Court of Claims had a duty to "dismiss the suit of such claimant."[115] 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 shall dismiss the same for want of jurisdiction."[116]

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 Drake.[117] 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

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112 *Id.*

113 *Id.*

114 Act of July 12, 1870, 16 Stat. 230, 235.

115 Act of July 12, 1870, 16 Stat. at 235.

116 Act of July 12, 1870, 16 Stat. at 235.

117 Brief for the Appellants at 3, *Klein*, 80 U.S. (13 Wall.) 125 (No. 156).

in fact, and *not by imputation of innocence*, at all times borne true allegiance to the Government of the United States."[118] 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.[119]

The Supreme Court sided with Wilson's estate on essentially every contestable legal issue.[120] On jurisdiction, the Court rejected the argument that the Drake Amendment divested it of jurisdiction.[121] The Court conceded that Congress has broad authority to regulate the Supreme Court's appellate jurisdiction.[122] But the 1870 proviso, the Court 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."[123]

As to whether a pardon entitled a disloyal person to receive compensation for seized property, the Court relied on *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."[124] 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."[125]

And on the merits, the Court again echoed its reasoning from *Padelford*. By "seeking to avail himself of the offered pardon," Wilson

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[118] *Id.* at 4 (emphasis in original).

[119] *Id.* at 2–4.

[120] *See Klein*, 80 U.S. (13 Wall.) at 141–48.

[121] *Id.* at 145–48.

[122] *Id.* at 145:

> 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.

[123] *Id.*

[124] *Id.*

[125] *Klein*, 80 U.S. at 146.

> 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.[126]

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."[127]

Commentary about *Klein* typically begins and ends with the majority opinion. But Justices Miller and Bradley dissented, raising important and overlooked issues. The dissenting Justices agreed with the majority that the Drake Amendment was unconstitutional to the extent it purported to force the judiciary to give specific effect to the pardon power.[128] But answering that question, the dissent argued, did not resolve whether disloyal persons were entitled to compensation under the 1863 Act.[129] A pardon could be the basis for restoring property only if the complainant had a compensable interest in property to restore. As to that issue, the timing of the government's seizure and sale relative to the owner's oath of loyalty was critical. In *Padelford*, Justice Miller emphasized, the claimant had a compensable interest because "*before the capture* his *status* as a loyal citizen had been restored."[130] 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."[131] This approach, the dissent insisted, was faithful to Congress's intent: those who took an oath of loyalty to the Union before the seizure and sale of their property had legitimate claims for compensation. Those who took an oath of loyalty after the seizure and sale of their property did not.[132] Thus, agreeing that the 1870 proviso could not constitutionally eliminate the Court's

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126 *Id.* at 140.
127 *Id.* at 142.
128 *Id.* at 148 (Miller, J., dissenting).
129 *Id.*
130 *Klein*, 80 U.S. at 150 (emphasis in original).
131 *Id.*
132 *Id.* at 149 (discussing congressional intent).

jurisdiction or narrow the president's pardon power, the dissent argued that Wilson's estate deserved to lose on the merits: Wilson, having "given aid and comfort to the rebellion," swore loyalty to the Union only after his abandoned cotton had been seized and sold, and so 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."[133]

In some ways the dissent's reasoning may not sound familiar: it depended in part on the since-forgotten nineteenth-century distinction between perfect and imperfect titles that property scholars have recently begun to excavate.[134] As to whether the 1863 Act intended no compensation "to the disloyal," the dissent emphasized Congress's omission from the Act of "some judicial proceeding" "by which the title of the government could at some time be made perfect, or that of the owner established"[135] No provision was made, and none was necessary, the dissent explained, because the right of the United States to the "abandoned" property was fully vested and perfect upon seizure and sale.[136] The disloyal owner retained no "right or interest whatever" after property was seized.[137] The dissent's import was clear: disloyal claimants, even if pardoned by the president, had no property for which they could claim compensation if they took the oath of loyalty after seizure and sale of their property. A pardon could not restore property no longer owned.[138] This distinction was not lost on the public. The *Detroit Free Press*, for example, in reporting the Court's decision, underscored the dissent's view that "there was no interest in the former owner of the property, under the Captured and Abandoned Property Act,

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[133] *Id.* at 149–50.

[134] *See* Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 309–29 (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 typically 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, 871 (2000) (explaining that for due process to attach, there must be a deprivation of a liberty or property interest). Likewise, a pardon could restore but not create a property interest.

[135] *Klein*, 80 U.S. (13 Wall.) at 149 (Miller, J., dissenting).

[136] *Id.* at 148–49.

[137] *Id.* at 149.

[138] *Cf.* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) ("When you [ain't] got nothing, you got nothing to lose." (quoting Bob Dylan, Like A Rolling Stone, *on* Highway 61 Revisited (Columbia Records 1965))).

when the property had been sold and the proceeds paid into the treasury under it."[139]

Ignoring the dissent makes it seem that *Klein* concerned only the intersection of Congress's power to regulate Article III jurisdiction and the pardon power, and that once the jurisdictional question was decided in the estate's favor, the estate was entitled to win on the merits. In particular, it creates the misimpression that a rebel armed with a pardon had a right in all situations to win—and that any denial of compensation was illegal and what the majority dubbed a "breach of faith."[140] To the contrary, the dissenting opinion brings into view the separate but important question of how property is defined and the scope of Congress's Article I power to define property.[141] A pardon could provide legal innocence but not revive a claim to ownership when the rebel retained no legitimate "right or interest whatever" in the property.[142] At the same time, the dissenters agreed with the majority that Congress could not interfere with the president's pardon power or, at the least, not involve the Article III courts in such an effort by eliminating jurisdiction.[143] The fact that the dissenters apparently were sympathetic with Congress's confiscation policy, but not its jurisdictional policy, might suggest that a nonracialized principle of judicial independence was playing some autonomous role in their argument.[144]

B. Emancipation, Black Freedom, and Presidential Pardons

The Court in *Klein* focused on the compensation claim of the rebel merchant; it referred to emancipated Black people only once, and indirectly, in the majority's statement that a denial of compensation to pardoned rebels "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

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139 *Proceedings of the United States Supreme Court.,* DETROIT FREE PRESS, Jan. 30, 1872, at 4 (available at https://www.newspapers.com/image/118150814).

140 *Klein*, 80 U.S. (13 Wall.) at 142.

141 Further, the dissent's emphasis on congressional power to define property previews an issue that increasingly would come into contention in the post–Reconstruction period and leading up to the *Lochner* era. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

142 *Klein*, 80 U.S. (13 Wall.) at 149 (Miller, J., dissenting).

143 *Id.* at 148.

144 We thank Professor Daniel Hulselbosch for this insight.

freedom."[145] The phrase "cruel and astounding" of course is from President Lincoln's December 1863 Message to Congress, as he reflected back on the Emancipation Proclamation issued in January of that year.[146] It is impossible to say how President Lincoln's approach to Reconstruction might have evolved.[147] 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;[148] the Memphis riot had run for three weeks killing more than forty freedmen;[149] and "Black Codes" ruthlessly restricted Black land ownership, mobility, and labor options.[150] Yet the Court's rhetorical move in *Klein* placed pardoned

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[145] *Klein*, 80 U.S. (13 Wall.) at 142.

[146] WILLIAM LEE MILLER, PRESIDENT LINCOLN: THE DUTY OF A STATESMAN 393 (2009).

[147] *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 that "we can never know how Lincoln would have handled this very difficult challenge"); LAWANDA COX & JOHN H. COX, POLITICS, PRINCIPLE, AND PREJUDICE 1865–1866: DILEMMA OF RECONSTRUCTION AMERICA 42 (1976) ("Had Lincoln lived through his second term of office, the Radicals might never have faced the danger of political ostracism.").

[148] STAMPP, *supra* note 47, 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."); MCDOUGALL, *supra* note 35, at 503 ("The Ku Klux Klan, founded by Nathan Bedford Forrest in 1866, spread from Tennessee across the Deep South.").

[149] STEPHEN V. ASH, A MASSACRE IN MEMPHIS: THE RACE RIOT THAT SHOOK THE NATION ONE YEAR AFTER THE CIVIL WAR 193 (2013) (reporting the Black death toll).

[150] *See* LITWACK, *supra* note 41, at 367 (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," and further noting that "[n]o law stated the proposition quite that bluntly but the provisions breathed that spirit in ways that could hardly be misunderstood"); W.R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865–1867, at 37 (1963) ("If the codes did not re-enact slavery they might 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 master."); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, *in* BLACK SOUTHERNERS AND THE LAW 1865–1900, at 35 (Donald G. Nieman ed., 1994) (discussing the impact of Black Codes on Black labor well into the twentieth century). Critics of President 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 & COX, *supra* note 147, at 151. For a collection of testimony from congressional hearings investigating the Memphis riots, see generally 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 (Hans L. Trefousse ed., 1970).

offenders—merchant allies of enslavers who swore no loyalty to the Union until it became expedient to claim compensation—on a par with emancipated slaves, many of whom had aided the war effort and been guaranteed land in return. Indeed, at the time of *Klein*, "emancipation" had already become 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."[151]

This Section decenters the Court's narrative in *Klein*, expanding the lens to include the land dreams of Black people before and after emancipation. During the Civil War, the federal government encouraged these land dreams, which later were thwarted by executive clemency and the Court's "generous" interpretation of the pardon power. 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, bringing into focus the decision's relationship to emancipated slaves' desire for economic security. In particular, 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 congressional ambitions and freedmen's land dreams.

1. Black land dreams and rebel confiscation.

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.[152] That an enslaved person could dream of

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[151] Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L. L. REV. 285, 299 (2018) (quoting *Ku Klux Klan, Prescript of the Order*, *reprinted in* 5 AM. HIST. MAG. 3, (1990)); *see also id.* at 317–20 (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" where "[t]he Constitution features prominently in the legend: the Klan saved it").

[152] MAGDOL, *supra* note 48, at 6, 39–40 (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 42, at 219 (stating that "even in the early days of freedom, former slaves with amazing unanimity revealed— . . . by their ambition to acquire land—a determination to put an end to their slavery"); *see also* Mark Schultz, *African American Landowners, in* 24 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: Race 15–16 (Thomas C. Holt et al. eds., 2013) (stating that "from

owning property was itself legally "transgressive";[153] the Fugitive Slave Law[154] made it a crime for a slave to run away and be a "freedom seeker."[155] Early Black efforts to self-emancipate through land acquisition thus generally were outside the boundaries of law—consider the temporary settlements set up in 1739 following the "Stono Rebellion" when slaves in South Carolina attempted to escape to Spanish Florida,[156] and the more permanent community established in the 1760s along the Savannah River.[157] During the Civil War, some Blacks took the initiative and seized abandoned plantations where they had been enslaved.[158] In addition, more than 10% of the enslaved population, roughly 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.[159]

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

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emancipation until the Great Migration, landownership was the goal most black families sought in order to fashion for themselves a meaningful freedom").

153 Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives from Slavery*, 97 NOTRE DAME L. REV. 1375, 1380 (2022) (using the term "transgressive constitutionalism" to describe acts by enslaved people that "asserted their claims to freedom and fundamental human rights").

154 Ch. 60, 9 Stat. 462 (1850).

155 *See generally* Chandra Manning, *Contraband Camps and the African American Refugee Experience During the Civil War*, OXFORD RSCH. ENCYCLOPEDIA AM. HIST. 1, 21 (2017), https://doi.org/10.1093/acrefore/9780199329175.013.203 (2017) [hereinafter Manning, *Contraband Camps*] (using the term "freedom seeker" to describe an enslaved person who ran away).

156 William M. Wiecek, *The Origins of the Law of Slavery in British North America, Part I*, 17 CARDOZO L. REV. 1711, 1788 (1996) ("[F]rightened by the Stono Rebellion, the South Carolina Assembly [ ] provided that even where all the slave defendants had been acquitted or pardoned by the court one was to be executed anyway for the *in terrorem* effect." (citing PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 34 (1976))).

157 MAGDOL, *supra* note 48, at 104–05.

158 *Id.*

159 PAUL D. ESCOTT, "WHAT SHALL WE DO WITH THE NEGRO?": LINCOLN, WHITE RACISM, AND CIVIL WAR AMERICA 67 (2009); BENTLEY, *supra* note 54, at 1–14 (noting that there were approximately four million enslaved people in the United States at the time of the Civil War, and describing how many fled to Union camps); *see also* 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 presented itself and the strong desire and necessity of conciliating the border states, prevented the war department from promptly formulating a general policy.").

rather "contraband."[160] Despite that label, boots on the ground unofficially moved policy toward emancipation and land settlement—which President Lincoln arguably did not yet favor.[161] In 1861, General Benjamin 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.[162] As a result of placing runaway slaves in makeshift congregate facilities, "contraband camps" of Black workers emerged.[163] 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.[164]

Against this background, Congress passed the First Confiscation Act[165] 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."[166] 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 John Frémont famously acted on the basis of martial law and freed slaves in

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160 *See, e.g.*, Kate Masur, *"A Rare Phenomenon of Philological Vegetation": The Word "Contraband" and the Meanings of Emancipation in the United States*, 93 J. AM. HIST. 1050, 1050–52 (2007).

161 We recognize that this history is controverted. *See, e.g.*, James Oakes, *Was Emancipation Constitutional?*, N.Y. REV. OF BOOKS 52 (May 12, 2022) (stressing that by 1861 President Lincoln's administration had begun to instruct Union generals that slaves who came into Union-controlled territory were emancipated, and that "[a]though tens of thousands were thereby liberated in the first eighteen months of the war, some Union soldiers violated the policy and returned escaping slaves").

162 *Fort Monroe and the "Contrabands of War"*, NAT'L PARK SERV. (Aug. 15, 2017), https://perma.cc/JQ2C-WDC9.

163 *See generally* Manning, *supra* note 155. The contraband camps are said to have provided "antecedents" for later land reform programs. PEIRCE, *supra* note 159, at 1.

164 *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 113–20 (1988) (arguing that, consistent with critical race scholar Derrick 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, 164–65 (2011) ("[I]nterest-convergence theory's usage of the terms 'black interests' and 'white interests' ignores the deep intraracial disagreements regarding what constitutes progress and, more broadly, offers an excessively narrow understanding of the term 'interest.'").

165 Ch. 60, 12 Stat. 319 (1861).

166 First Confiscation Act § 1, 12 Stat. at 319.

Missouri—which had not seceded—only to have the decision countermanded by President Lincoln.[167] In November 1861, General William Tecumseh Sherman captured the Sea Islands and Port Royal, and the Union gained legal control and possession of all property including eight thousand enslaved persons.[168]

Congress responded in 1862 with a Second Confiscation Act.[169] 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.[170] The sale of other confiscated property that was seized required in rem proceedings.[171] President Lincoln is reported to have hesitated before signing the Act, concerned, in part, that forfeiture would run beyond the life of the owner.[172] In many ways, the Second Confiscation Act was more ambitious than the First Confiscation Act because it authorized the confiscation of all property from those who aided the Confederacy. The property would help finance the war and, at war's end, be distributed to freedmen and poor whites.[173] Some historians have ascribed broader ambitions to this policy: "Many Republicans in Congress, but not Lincoln, hoped the measure would also destroy the planter class and submit the South to a thorough Reconstruction."[174] That same year, Congress enacted the Militia Act,[175] which authorized payment of wages to Black people who worked in the Union's war effort, thus giving Black laborers access to capital (although wages were not always paid, always paid on time, or always equal to wages paid to whites).[176]

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167 Vernon L. Volpe, *The Fremonts and Emancipation in Missouri*, 56 THE HISTORIAN 339, 340 (1994).

168 Louis S. Gerteis, *Salmon P. Chase, Radicalism, and the Politics of Emancipation, 1861–1864*, 60 J. AM. HIST. 42, 59 (1973); ZACH SELL, TROUBLE OF THE WORLD: SLAVERY AND EMPIRE IN THE AGE OF CAPITAL 197 (2020).

169 Ch. 195, 12 Stat. 589 (1862).

170 Second Confiscation Act § 9, 12 Stat. at 591; RODNEY P. CARLISLE & J. GEOFFREY GOLSON, TURNING POINTS—ACTUAL AND ALTERNATE HISTORIES: A HOUSE DIVIDED DURING THE CIVIL WAR ERA 78 (2007).

171 Second Confiscation Act § 7, 12 Stat. at 591.

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

173 *Id.* at xi.

174 *Id.*

175 Ch. 201, 12 Stat. 597 (1862).

176 *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").

Additionally, the Direct Tax Act of 1862[177] provided for the seizure of certain lands for overdue taxes in the states that had seceded from the United States,[178] with federal tax commissioners administering the program.[179]

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 John Foster established a contraband camp that was described as "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."[180] Less successful was the initial situation at Port Royal, where confiscated land was put to sale but purchased almost exclusively by Northern financiers.[181] With the goal of reversing this development, in February 1863, Congress amended 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.[182] Then, in September 1863, the Lincoln administration provided for the sale of sixteen thousand twenty-acre lots in South Carolina at a rate of $1.25 per acre to people of "the African race."[183] General Rufus Saxton invited freedmen to identify and claim property they wished to purchase in advance

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177 Ch. 98, 12 Stat. 422. At the time, the Direct Tax Act was called: "An act for the collection of direct taxes in insurrectionary districts within the United States and for other purposes."

178 Charles F. Dunbar, *The Direct Tax of 1861*, 3 Q.J. ECON. 436, 448–49 (1889) (describing the 1862 law).

179 *See* President of the United States of America, *Collection of Taxes in Insurrectionary Districts: A Proclamation*, N.Y. TIMES (July 3, 1862), https://perma.cc/68GW-U895.

180 PEIRCE, *supra* note 159, at 8.

181 Gerteis, *supra* note 168, at 59–60; *see also* James M. McPherson, *The Ballot and Land for the Freedmen, 1861–1865*, *in* STAMPP & LITWACK, *supra* note 42, at 146–47 (reporting that of 16,479 acres put to sale on the sea islands, freedmen who had pooled their savings purchased two thousand acres, and Edward Philbrick, as representative of a group of Boston financiers, purchased eight thousand acres and then hired freedmen to farm the land and "cleared a huge profit").

182 Gerteis, *supra* note 168, at 59.

183 Abraham Lincoln, *Instructions to Tax Commissioners in South Carolina*, Sept. 16, 1863, *in* 6 ROY BASLER, WORKS OF LINCOLN 453, 457 (1953); *see also* Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 460–61 (2003) (describing President Lincoln's instructions); Akiko Ochiai, *The Port Royal Experiment Revisited: Northern Visions of Reconstruction and the Land Question*, 74 NEW ENGLAND Q. 99, 100 (2001).

of the sale.[184] Relying on these representations, freedmen paid for the first right-of-refusal with respect to specific plots.[185] 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.

As the war continued, land policy continued to change; in 1863, Lincoln's Secretary of War Edwin 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.[186] 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."[187] The Commission's investigation also underscored the dangers of extensive racialized violence against Black people and emphasized the need for federal protection.[188]

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[184] Ochiai, *supra* note 183, at 101; *see also* BENTLEY, *supra* note 54, at 90.

[185] Gerteis, *supra* note 168, at 59 (recounting that freedmen 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); LAURA JOSEPHINE WEBSTER, THE OPERATION OF THE FREEDMEN'S BUREAU IN SOUTH CAROLINA 79 (1916) (recounting that freedmen "joyfully staked out allotments"). Historian Louis Gerteis pointed to the paternalistic self-interest of those who lobbied the 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 leave their accustomed chores, and create[ ] chaos at a time when the blacks needed order and paternal direction." Gerteis, *supra* note 168, at 59. Another historian emphasized the tax commissioner's commitment to "white superiority" as a reason for rejecting the freedmen's tender. Ochiai, *supra* note 183, at 112; *see also* PEIRCE, *supra* note 159, 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.

[186] *See* AM. FREEDMEN'S INQUIRY COMM'N, PRELIMINARY REPORT TOUCHING THE CONDITION AND MANAGEMENT OF EMANCIPATED REFUGEES; MADE TO THE SECRETARY OF WAR 14 (1863).

[187] *Id.*

[188] *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

The same year as the Commission's Report, Congress passed the Captured and Abandoned Property Act.[189] Under that Act, agents of the Treasury Department could obtain and seize all abandoned or captured property in insurrectionist States. Both the report and the Captured and Abandoned Property Act were important parts of the origins of the Bureau of Refugees, Freedmen, and Abandoned Lands (known as the Freedmen's Bureau). Indeed, historians have called the Commission's Report the "blueprint" for Reconstruction,[190] and its recommendations contributed to the establishment of the Freedmen's Bureau in March 1865, a month before President 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 purchase from the United States with "such title thereto as the United States can convey."[191] 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.[192] Rather, 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.[193]

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 now Major General Sherman in Savannah, Georgia; the Reverend

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> 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.

189 12 Stat. 820.

190 John G. Sproat, *Blueprint for Radical Reconstruction*, 23 J. S. HIST. 25, 43 (1957).

191 Freedmen's Bureau Act, ch. 90, § 4, 13 Stat. 507, 508 (1865).

192 Freedmen's Bureau Act § 1, 13 Stat. at 507 ("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, 1144 n.54 (2017) ("Congress clearly expected the Bureau[ ] to have a limited lifespan. In addition to its single year authorization, the legislation included no budget appropriation for the new agency.").

193 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).

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.[194]

Shortly after the meeting, Sherman announced Special Field Order 15.[195] That order sought to distribute land to freedmen along parts of the South Carolina, Georgia, and Florida coasts.[196] Saxton, now appointed inspector of plantations and settlements, was tasked with assigning each family possessory title to forty acres and furnishings. Major General Oliver Howard, as commissioner of the Freedmen's Bureau, permitted Saxton to continue this program—and by June 1865 the enterprise had distributed more than four hundred thousand acres to forty thousand freedmen.[197] Both the Freedmen's Bureau and the generals fully expected that Congress would formalize title.[198] One bureau official said at the time, "I trust the pledges will be

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[194] *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, *reprinted in* PAUL HARVEY, THROUGH THE STORM, THROUGH THE NIGHT: A HISTORY OF AFRICAN AMERICAN CHRISTIANITY 162 (2011) (emphasis in original).

[195] WEBSTER, *supra* note 185, at 82.

[196] LaWanda Cox, *The Promise of Land for the Freedmen,* 45 MISS. VALLEY HIST. REV. 413, 429 (1958); *see also* PAUL A. CIMBALA, UNDER THE GUARDIANSHIP OF THE NATION 2–5 (2003).

[197] BENTLEY, *supra* note 54, at 98; *see also* CIMBALA, *supra* note 196, at 166–67.

[198] STAMPP, *supra* note 47, at 125 (stating that lands in South Carolina, 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 190, 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.

upheld . . . . I am sure a permanent title will be given to the actual settlers on these islands."[199] To that end, in July 1865, Howard 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.[200]

2. Land distribution and presidential pardons.

Special Field Order No. 15 has been called "the single most revolutionary act in race relations in the Civil War."[201] As Professor Joel Williamson has written, by the fall of 1865, given the considerable effort invested in land redistribution between 1861 and 1865, "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 probable."[202] However, within weeks of Johnson becoming president, Sherman's order, and land distribution generally, came into collision with executive clemency.[203] President Johnson at first seemed to embrace President 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 freedmen. President Johnson initially 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."[204]

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[199] BENTLEY, *supra* note 54, at 98.

[200] Gregg Cantrell, *Racial Violence and Reconstruction Politics in Texas, 1867–1868*, 93 SW. HIST. Q. 333, 345 (1990).

[201] MICHAEL FELLMAN, CITIZEN SHERMAN: A LIFE OF WILLIAM TECUMSEH SHERMAN 165 (1997).

[202] Williamson, *supra* note 152, at 219.

[203] BENTLEY, *supra* note 54, 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 and freedmen. 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.

[204] *Orders Respecting Freedmen*, June 2, 1865, *reprinted in* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 12 (D.C., Philp & Solomons 1871).

Nevertheless, President Johnson quickly did an about-face, taking an aggressive approach to pardons which, as Professor Jonathan Dorris later wrote, "seemed to befriend the pardoned claimants to the land taken over by the Freedmen's Bureau rather than the freedmen whom the Bureau endeavored to aid, thus favoring the whites rather than the blacks."[205] By May 1865, President Johnson made clear that he wanted "to have the seceded States return back to their former condition as quickly as possible,"[206] and announced that he would offer pardons on a lenient basis. Former owners, now armed with pardons, increasingly sued to reclaim their land—even land that freedmen occupied and tilled. That month, President Johnson issued a general proclamation of amnesty to those who pledged to support and defend the Constitution and laws of the United States.[207] Again, there were exceptions, including, among others, the "aristocrats"—those who voluntarily participated in the rebellion with taxable property of more than $20,000.[208] Also excepted were those who had accepted a pardon from President Lincoln, but aided the rebellion thereafter.[209] President 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."[210] Consistent with that announcement, President Johnson did indeed liberally grant special pardons. As an example, 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."[211]

In a particular case, President Johnson directed Howard to instruct bureau officials to relinquish possession of the property

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205 DORRIS, *supra* note 53, at 227.

206 Miller et al., *supra* note 37, at 1060 (citing Interview of Andrew Johnson with John A. Logan (May 31, 1865), *in* 8 The Papers of Andrew Johnson 153, 153 (Paul H. Bergeron ed., 1989)).

207 Proclamation No. 134 (May 29, 1865), 13 Stat. 758 (1865).

208 Proclamation No 134, 13 Stat. at 759; *see also* DORRIS, *supra* note 53, at 221.

209 Proclamation No 134, 13 Stat. at 759.

210 Proclamation No 134, 13 Stat. at 759.

211 ARGUS & PATRIOT, Nov. 2, 1865, at 2; *see* UT Arlington Libr., *A Continent Divided: Gideon Johnson Pillow*, CTR. FOR GREATER SW. STUD., https://perma.cc/MLK5-RRVQ (noting that Pillow served as Brigadier General in the Confederate Army and that, 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").

of a Confederate veteran in Tennessee, and he simultaneously ordered, "The same action will be had in all similar cases."[212] 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 refugees and freedmen."[213] He even issued another circular promoting land distribution for freedmen that President Johnson forced him to withdraw.[214] 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."[215] 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."[216] In his autobiography, Howard later wrote, commenting on the president's pardon policy: "all [was] done for the advantage of the Confederates and for the disadvantage and displacement of the freedmen."[217]

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 September 20, 1865, "President Johnson has, within a few days, used the pruning axe most unsparingly."[218] Moreover, he ordered Howard to go to South Carolina and "effect an arrangement mutually satisfactory to freedmen and landowners."[219] "Landowner" in this instruction did not mean Black farmers 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.

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[212] 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, PART 1: MESSAGES, PROCLAMATIONS, EXECUTIVE ORDERS, ETC., OMITTED FROM VOLUMES I TO IX, at 112 (James D. Richardson ed., 1899).

[213] BENTLEY, *supra* note 54, at 93.

[214] *Id.*

[215] Roy Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 657 (2013).

[216] Letter from Brevet Major Gen. Rufus Saxton to Major Gen. Oliver Otis Howard (Sept. 5, 1865) (available at https://perma.cc/TH3G-8A8L).

[217] 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD 237 (1908).

[218] *The Freedmen's Bureau,* DETROIT FREE PRESS, Sept. 20, 1865 (available at https://www.newspapers.com/image/118140825).

[219] BENTLEY, *supra* note 54, at 98.

Many historians have described this meeting, which took place in a crowded church in Edisto,[220] and began with a Black woman singing, "Nobody knows the trouble I feel—Nobody knows but Jesus."[221] The Black press gave it extensive attention; *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.[222]

In the months after, freedmen attempted to defend the property on which they toiled, trying to drive off by force individuals who trespassed.[223] On January 15, 1866, President Johnson dismissed Saxton as assistant commissioner for the Freedmen's Bureau;[224] by then, the South Carolina Governor had complained that Saxton was dragging his heels in returning land to those President Johnson had pardoned.[225] Later, the president

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[220] *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 J. NEGRO HIST. 8, 23 (1956).

[221] BENTLEY, *supra* note 54, at 98.

[222] *Id.* (quoting *Gen. Howard in Zion's Church*, S.C. LEADER, Oct. 28, 1865). 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 [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.

Letter from Freedmen and Southern Society Project, Committee of Freedmen on Edisto Island, South Carolina, to President Andrew Johnson (Oct. 28, 1865) (emphasis in original) (available at https://perma.cc/KSC4-P6BK).

[223] BENTLEY, *supra* note 54, at 99.

[224] OUBRE, *supra* note 52, at 59.

[225] *Id.*

dismissed Stanton as well.[226] And, as is known, that decision set in motion the impeachment but eventual acquittal of the president. Within nine months of his first proclamation, President Johnson had issued fourteen thousand pardons—at some points about one hundred pardons per day,[227] and he argued that land be returned with full title.[228]

Through his pardon policy, President Johnson succeeded in wresting land from freedmen and returning it to white rebel owners.[229] As to freedmen 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 that freedmen had "till[ed]" and "improve[d]" lands "supposing them their own."[230] It was not the intended policy "that then the former owners were to come back, take possession and ask the negroes to work for them!"[231] In their judgment, this "unjust course pursued by the President of the United States towards these freedmen . . . is the worst, in all the catalogue of wrongs toward

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[226] *See* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 751–52 (2005) ("Johnson's disregard for the Tenure of Office Act became one of the articles of impeachment lodged against him in 1868.").

[227] RICHARD ZUCZEK, STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA 11 (2021); *see, e.g.*, DAILY EVENING NEWS (Fall River, MA), Mar. 4, 1869, at 2 (available at https://perma.cc/NJE2-9TVN):

> A special to the Providence *Journal*, dated 3d, says President Johnson granted a large number of pardons this morning to rebels and 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.

[228] President Johnson issued additional general amnesties in 1867 and 1868, each time with fewer exceptions. *See* Proclamation No. 167 (Sept. 7, 1867), 15 Stat. 699 (1867); Proclamation No. 170 (July 4, 1868), 15 Stat. 702 (1868); Proclamation No. 179 (Dec. 25, 1868), 15 Stat. 711 (1868).

[229] As another example, see the discussion of Davis Bend, Mississippi, in STAMPP, *supra* note 47, at 125–26 (reporting that one thousand eight hundred freedmen organized to raise crops and "finished the year with a cash balance on hand of $159,200," but President Johnson pardoned the owners of the plantation and returned the land (the owners included former Confederate leader Jefferson Davis and his brother)). *See also* VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI, 1865–1890, at 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 a self-reliant, prosperous, and enterprising element of the population.").

[230] *Gen. Howard's Report*, CHI. TRIB., Dec. 23, 1865 (available at https://perma.cc/J2ZG-XPEQ).

[231] *Id.*

the freedmen under the present 'magnanimous' policy of concillating [sic] the rebels."[232]

In spite of these actions, some members of Congress remained committed to land distribution for emancipated Blacks. In June 1866, Congress enacted the Southern Homestead Act,[233] which opened forty-six million acres of public lands in Alabama, Mississippi, Louisiana, Arkansas, and Florida, to be divided into eighty-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,[234] Southern commissioners did not tell freedmen of their right to file land claims,[235] and many freedmen already had signed sharecropping leases that did not allow them to leave and toil this newly available land.[236]

3. Executive clemency and Southern restoration.

Presidential clemency touched on the intertwined issues of confiscation and Black land ownership that were central to debates at the time and led to litigation of the sort *Klein* illustrates. Was the Confederacy to be restored to the Union, as President Johnson urged, "with all its manhood"?[237] Or was the Civil War "a revolutionary war of emancipation,"[238] seeking, as Representative Thaddeus Stevens urged, to change "[t]he whole fabric of southern society"?[239] Southern newspapers and Northern

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[232] *Id.*

[233] Ch. 127, 14 Stat. 66 (1866).

[234] OUBRE, *supra* note 52, at 95.

[235] PEIRCE, *supra* note 159, at 69; *see also* OUBRE, *supra* note 52, at 95 (observing that freedmen were "deprived of information by officials in Mississippi").

[236] OUBRE, *supra* note 52, 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."). Historian Claude Oubre also documented a devastating flood in Louisiana that contributed to "chaotic conditions" and "confusion." *Id.* at 114; *see also* BENTLEY, *supra* note 54, 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 144 ("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.").

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

[238] LEPORE, *supra* note 37, at 296.

[239] Thaddeus Stevens, Speech at Lancaster (Sept. 6, 1865) *reprinted in* RECONSTRUCTION: VOICES FROM AMERICA'S FIRST GREAT STRUGGLE FOR RACIAL EQUALITY 92, 104 (Brooks D. Simpson ed., 2018).

Democrats called confiscation and efforts to promote it "mean and malicious . . . begotten by a mean and malicieus [sic] set of men."[240] For them, the president's offer of pardons was a welcome "tonic."[241] Countering that view, African-American newspapers like the *New Orleans Tribune* and the *South Carolina Leader* saw the danger of restoring land to the former enslavers, and insisted that freed Blacks needed land as protection against exploitation.[242] 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."[243] There needs to be, the editor wrote, "a new class of landlords who shall be based on a new and truly republican system."[244]

Rather than fulfill promises of landownership opportunities, the president's clemency policy contributed to the reconsolidation of the antebellum aristocrats' wealth, reproducing a racial caste system that was fortified by law, economic conditions, and mob violence. Of course, many factors were at work. But 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."[245] The

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[240] *More Loyal Trouble*, PUB. LEDGER (Memphis, TN), Jan. 31, 1872, at 2 (available at https://perma.cc/2D6P-LRD3).

[241] *See* BROCK, *supra* note 150, at 33 (recounting that the 1865 Proclamation of Amnesty, announced five weeks after President Johnson assumed the presidency, "came like a tonic to the demoralized South" and that "[t]he 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").

[242] Gilles Vandal, *Black Utopia in Early Reconstruction New Orleans: The People's Bakery as a Case-Study*, 38 J. LA. HIST. ASS'N 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.").

[243] *Id.* 442 n.17 (citing a *New Orleans Tribune* editorial from November 3, 1864).

[244] *Id.* at 422 (citing a *New Orleans Tribune* editorial from November 29, 1864).

[245] *See* Manning, *Contraband Camps*, *supra* note 155, at 21; *see also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR TWO 41–42 (2012); DONALD G. NIEMAN, FROM

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."[246] Reverend Squire Dowd, who had been enslaved in North Carolina, explained when interviewed during the Great Depression as part of a history project by 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."[247] In all, President 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.[248] Congress later allowed the Freedmen's Bureau to close.[249] Looking back in 1880 to the failure of land reform, Frederick Douglass 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.[250]

C. Judicial Independence and Black Dreams Deferred

President Johnson's policy of clemency helped restore the antebellum power base in the South—and depended in significant part on the Court's "generous" interpretation of the scope and content of a presidential pardon. Historian James Garfield

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SLAVERY TO SHARECROPPING: WHITE LAND AND BLACK LABOR IN THE RURAL SOUTH, 1865–1900 (1994).

246 Manning, *Contraband Camps*, *supra* note 155, at 21.

247 11 FED. WRITERS' PROJECT, WORK PROJECTS ADMIN., SLAVE NARRATIVES: INTERVIEWS WITH FORMER SLAVES, NORTH CAROLINA NARRATIVES, PART 1 (1941) (available at https://perma.cc/2AWS-9RE8).

248 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 52, at 37.

249 *See* STAMPP, *supra* note 47, at 126–31; LOWENSTEIN, *supra* note 58, at 325–27.

250 Frederick Douglass, *Why Reconstruction Failed* (Aug. 1, 1880), *reprinted in* 7 FOURTH INTERNATIONAL 277 (1946).

Randall, whose history of the Civil War—together with works by other adherents of the "Dunning School"[251]—dominated public understandings of Reconstruction, acknowledged with approval that *Klein* gave "the most liberal view" to the legal effects of a pardon in its 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."[252] Randall expressed regret, however, that *Klein* held only limited utility for former Confederates; under the 1863 Act's two-year statute of limitations, many claims had since become time-barred (and, as to those, he urged claimants to petition Congress for private bills).[253] Randall's views went unchallenged until W.E.B. Du Bois and other historians began to raise questions.[254]

We likely can assume that the Court decided *Klein* knowing that compensation claims would soon be extinguished.[255] 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

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[251] The Dunning school refers to the historical writings of Willian Dunning of Columbia University and the graduate students he trained. *See* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South,* 100 MICH. L. REV. 675, 690 n.41 (2002) (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 804–05 ("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 WILLIAN DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877, at 121 (1907))).

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

[253] *See* James Garfield Randall, *Captured and Abandoned Property During the Civil War*, 19 AM. HIST. REV. 65, 75–76 (1913) (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*).

[254] *See* Allen C. Guelzo, *Reconstruction as a Pure Bourgeois Revolution*, 39 J. ABRAHAM LINCOLN ASS'N 50, 52 (2018):

> Criticism of the Dunning school—and with it, the dominance of Southern voices in the interpretation of Reconstruction—offered its first major challenge in the 1930s, beginning with the attacks launched at the Dunningites by William Edward Burghardt Du Bois in *Black Reconstruction* (1935) and James S. Allen (the nom de plume of Sol Auerbach) in *Reconstruction: The Battle for Democracy* (1937).

[255] *See* Robert B. Murray, *The End of the Rebellion*, 44 N.C. HIST. REV. 321, 340 n.69 (1967). The case of *United States v. Anderson*, 76 U.S. (9 Wall.) 56 (1869), fixed the end-date of the Civil War for purposes of the statute of limitations under the 1863 Act.

prosecutions to enforce the ban.[256] 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 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 sixteen 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."[257]

Klein not only facilitated the return of the white power structure to the former states of the Confederacy, but it also legitimated the restoration that followed, providing a legal rationale for the Lost Cause ideology that cast former enslavers, and not the enslaved, as the victims of the War. That ideology

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[256] The General Amnesty Act of 1872, ch. 193, 17 Stat. 142, removed Section 3's disqualification subject to a few exceptions, *see* Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 178 (2021), and in 1897 Congress enacted universal amnesty, *see id.* (first citing General Amnesty Act of 1872, 17 Stat. 142, and then citing Act of June 6, 1898, ch. 389, 30 Stat. 432).

[257] *Effect of Pardon by the President*, NASHVILLE UNION & AM., Mar. 3, 1872 (emphasis in original) (available at https://perma.cc/J48H-8GVA); *Universal Amnesty*, WKY. SENTINEL (Raleigh, NC), Mar. 19, 1872 (available at https://perma.cc/D83Q-VVTU) ("The long-delayed and much-talked-of amnesty has come at last, through a decision of the Supreme Court of the United States.").

justified the subordination of Black people in ways that have had lasting influence.

Klein did not interpret the Reconstruction Amendments. Nevertheless, it played a so-far unacknowledged role in helping construct a notion of constitutional equality that treated Black freedom as only the absence of legal enslavement, ignoring the material conditions—land and economic opportunity—that are essential to any meaningful exercise of citizenship. As Professor 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 and civil rights which they had won."[258] In that tragedy, the Court in *Klein* played a role by enabling the white landed class to resume power, to reacquire property, and to deploy new forms of racial oppression. *Klein* is lionized in the federal courts canon for protecting rule of law values and property rights, but its iconic status can be defended only by ignoring the decision's racialized context and subordinating effects.

II. *KLEIN* IN THE LEGAL ACADEMY

In this Part, we turn from the Court to the legal academy, and 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 it is sufficient to show the narrative arc. 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 de jure emancipation, in the sense of not being legally enslaved, but little else. *Klein* gave no recognition to the material conditions of freedom or to the role of property in protecting equality and dignity. It made no mention of 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."[259] To the contrary, as the previous Part showed, *Klein* equated a formal requirement of nonenslavement—the release of Black people from legal bondage—with providing compensation to their former enslavers and their enablers.

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[258] OUBRE, *supra* note 52, at 197.

[259] MANNING, *Contraband Camps*, *supra* note 155, at 283.

Klein became a jurisdictional icon during a period in which the "Dunning School" of Reconstruction history dominated elite, intellectual circles and influenced even those historians who were not members of this school; the revisionist views of W.E.B. DuBois, and those of historians who wrote in the post–World War II period, had not yet toppled the primacy of accounts that ignored or distorted the legacies of slavery.[260] By these lights, withholding compensation from pardoned claimants would have been "mean and malicious"—the main theme of the Lost Cause ideology popularized in movies like *Gone with the Wind* and *Birth of a Nation* and celebrated by the erection of Confederate monuments in public spaces.[261]

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[260] As an example, consider the work of historian Charles Fairman as discussed in PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 115 (1999*)* (stating "DuBois's account of Reconstruction was published in 1935, but it received no institutional endorsement" and did not alter "the white-dominated education culture in which [Charles Fairman] was trained"). *See also id.* 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"). 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, *supra* note 12, at 846. 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." *Id.* (referring to the 1866 Civil Rights Act and the Court's invalidation of its jurisdictional provision in *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872)). Fairman's views influenced the Court's interpretation of the Fourteenth Amendment. In 1959, Justice Felix Frankfurter cited 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). Professor Alexander Bickel, a key expositor of Article III jurisdiction and a judicial clerk to Justice Frankfurter, likewise relied upon Fairman's view of the Fourteenth Amendment in his discussion of school segregation. *See* BRANDWEIN, *supra*, at 133–34 (discussing Bickel's intellectual debt to Fairman).

[261] *See* STAMPP, *supra* note 47, at vii ("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 622 (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, at xvii (Harold M. Hyman ed., 1967) (providing an overview of Reconstruction historiography); *id.* ("[Biographer Fawn Brodie] charged that for far too long a time, the South has swept the field. . . . as though Appomattox had never been. . . . [I]n the war of

Scholarly work about *Klein* certainly references the decision's Civil War roots and the statutory run-up to the dispute.[262] Some commentators have described the claimants, accurately or not, as "unreconstructed southerners."[263] But even the most radical accounts of *Klein* have accepted the Court's historical account of the confiscation acts at face value, allowing *Klein* to enter the federal courts canon largely cleansed of its racialized context. 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, as the historian Pamela Brandwein has written, "drained institutional memory of several aspects of slavery and Reconstruction politics," giving support to the view that abolition consisted of "formal equality only."[264] Scholarship about *Klein* as it relates to Article III jurisdiction likewise has consistently deflected or disregarded the decision's racial implications and the relevance of the decision to conceptions of Black citizenship.[265]

A. Formalism and Silence

In its first half century,[266] *Klein* drew only occasional mention by legal commentators. These fifty years coincided with the near

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words . . . 'by some quixotic reversal the Lost Cause is no longer lost.'" (quoting Fawn M. Brodie, *Who Won the Civil War, Anyway?*, N.Y. TIMES, Aug. 5, 1962, at 1 (book review))); 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 seven hundred monuments, and that while some were recently removed, "hundreds of Confederate monuments remain across the South").

[262] *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").

[263] Gene R. Nichol, Jr., *Giving Substance Its Due*, 93 YALE L.J. 171, 183 n.82 (1983) (book review).

[264] BRANDWEIN, *supra* note 260, at 13; *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.").

[265] 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. C.R. & C.L. 253 (2010); *cf.* Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 2015 COLUM. L. REV. 1992, 2036 (2003) (arguing that the Rehnquist Court's federalist revival depended in part on "chillingly amnesic" antebellum principles).

[266] For this Part, we conducted searches through Westlaw and JSTOR for "United States v. Klein," but we do not claim to be complete.

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."[267] In keeping with the period's legal formalism,[268] 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 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."[269]

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. General James Bradley Thayer published his highly influential *The Origin and Scope of the American Doctrine of Constitutional Law* in 1893,[270] setting the high bar of clear mistake and irrationality for judicial intervention in legislative affairs.[271] With this background, a 1907 article by Professor Percy Bordwell in the *Columbia Law Review*,

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[267] Edward C. Rozwenc, *Introduction* to RECONSTRUCTION IN THE SOUTH, at v (Edward C. Rozwenc ed., 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. Ironically, 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://perma.cc/W48S-QS4M.

[268] *See generally* Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

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

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

[271] Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1420 (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.").

titled "The Function of the Judiciary," provided a review of cases current through 1888 in which the Supreme Court had declared federal statutes unconstitutional.[272] *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."[273] The article's cursory treatment of *Klein*, devoid of historical context, contrasts with its detailed focus on *Juilliard v. Greenman*,[274] and the author's argument that, because the Supreme Court lacks "general powers over the action of the executive and the legislature," "[g]rants to the legislature must not be too narrowly construed."[275]

In the next decade, legal analysis of *Klein* began 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*,[276] for the proposition that only tribunals established under Article III "were intended to perform the judicial function."[277] 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,"[278] as well as support for the validity of federal measures to regulate public utilities.[279]

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[272] Percy Bordwell, *The Function of the Judiciary*, 7 COLUM. L. REV. 337, 337–38 (1907).

[273] *Id.* at 337.

[274] 127 U.S. 540 (1888).

[275] Bordwell, *supra* note 272, at 341–43; *see also 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 may 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.

[276] 14 U.S. (1 Wheat.) 304 (1816).

[277] Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684, 693 (1913).

[278] M.B., Annotation, *Power of Legislature to Set Aside or Impair Judgment,* 3 A.L.R. 450 (1919).

[279] W.M.C., *Federal Control of Public Utilities*, 4 A.L.R. 1680 (1919).

B. Accommodation Within Boundaries

By 1924, then-Professor Felix Frankfurter and his student 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."[280] Nevertheless, they acknowledged a few limitations on Congress's power, especially as it related to the judiciary—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.[281]

Throughout the decade, commentators invoked *Klein*, but not yet for the principle for which it came to stand. President Wilson's failing to sign nine bills and two joint resolutions while the Sixty-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*.[282] Relatedly, the end of World War I

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[280] 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, 1016 (1924).

[281] *Id.* at 1020–21.

[282] *See generally* Lindsay Rogers, *The Power of the President to Sign Bills After Congress Has Adjourned*, 30 YALE L.J. 1 (1920). President Lincoln signed the 1863 Confiscation Act on March 12, 1863, eight days after Congress had 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.

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."[283] A note published in the *Harvard Law Review* in 1922 entitled *Jurisdiction to Confiscate Debts* was to similar effect.[284] And the large number of commercial claims against the United States for war goods focused attention on the jurisdiction of the Court of Claims,[285] 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.[286] Some of the analyses were prepared as part of a seminar offered at the Harvard Law School by Professor Frankfurter.[287] A 1933 note in the *Harvard Law Review* cited *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.'"[288] An article that same year in the *Yale Law Journal* focused, in part, on whether Congress could refuse to appropriate funds to execute a

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Id. at 9. The author cited *Klein* for the statement that Justice Miller raised no objection to the 1863 Act, but acknowledged that the decision did not raise the question of whether a postadjournment signature was valid. *Id.* at 11 n.29.

283 Julius Henry Cohen, *The Obligation of the United States to Return Enemy Alien Property*, 21 COLUM. L. REV. 666, 670 (1921).

284 Note, *Jurisdiction to Confiscate Debts*, 35 HARV. L. REV. 960, 960 n.3 (1922). The note 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. *Id.* at 961.

285 *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").

286 A 1925 note in the *Harvard Law Review* cited *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 and prepare bills for Congress.").

287 *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).

288 *The Court of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677, 683 n.48 (1933) (citing *Klein*, 80 U.S. (13 Wall.) at 144). The author quickly acknowledged, however, that precedent existed only to insulate decisions of the Court of Claims from executive revision. *Id.* at 683–84. *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874), 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. *Id.* at 684 n.49 (citing *O'Grady*, 89 U.S. (22 Wall.) 641).

decision it disfavored.[289] 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 "refus[ing] to interfere when similar action was taken as to certain claims and judgments against the District of Columbia" (while acknowledging that "other provisions would be made for these claimants").[290] The trend line throughout was clear: academic discussion of *Klein* took no account of the decision's racialized context or its subordinating effects on Black freedom.

The advent of the New Deal continued this trend and indeed increased consideration of *Klein*, but without any attention to its partisan and racialized effects. Those opposed to President Franklin D. Roosevelt's economic program enlisted the decision for the principle for which it is now best known: as a curb on Congress "to limit or interfere with the jurisdiction and power of the federal courts."[291] 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,[292] minimum wage laws, and the National Labor Relations Act[293] were pending on the docket.[294] Quoting the president's statement that "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.[295] 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

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[289] Comment, *The Distinction Between Legislative and Constitutional Courts*, 43 YALE L.J. 316, 319–20 (1933).

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

[291] Thomas Raeburn White, *Disturbing the Balance*, 85 U. PA. L. REV. 678, 678 (1937); *id.* at 682 (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").

[292] Pub. L. No. 74-271, 49 Stat. 620 (1935).

[293] Pub. L. No. 74-198, 49 Stat. 449 (1935).

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

[295] White, *supra* note 291, at 678.

the controversy" over pending proposals or the president's position.[296] Discussing *Klein*, the authors assessed the challenged statute as both an evidentiary rule purporting to treat a presidential pardon as "conclusive evidence of aid to the Rebellion" and a lopsided jurisdictional withdrawal in cases involving "a person who claimed [compensation] under a pardon obtained under the Amnesty Proclamation."[297]

During the 1940s, the *Harvard Law Review* published comments about "Recent Cases," and three of them cited *Klein*, again for the separation of powers principle for which it had now come to stand, and again unmoored from its racial origins. 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 *Klein* for the principle that "[w]hen the Court of Claims was considered a constitutional court, Congress could not prescribe its decisions."[298] The second, published that same year,[299] discussed the famous decision in *Yakus v. United States*,[300] 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."[301] 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

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296 Katherine B. Fite & Louis Baruch Rubinstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 762, 762 (1937).

297 *Id.* at 769. As to the impact of *Klein* on discussions of jurisdiction-stripping, 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.

298 Recent Case, 57 HARV. L. REV. 732, 732 (1944) (discussing *Pope v. United States*, 53 F. Supp. 570 (Ct. Cl.), *cert. granted*, 321 U.S. 761 (1944)).

299 Recent Case, 57 HARV. L. REV. 728, 729 (1944) (discussing *Yakus v. United States*, 321 U.S. 414 (1944)).

300 321 U.S. 414 (1944).

301 Recent Case, *supra* note 299, at 729–30.

to the statutory bar.[302] 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 Professors Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System* ("*Hart and Wechsler*"), which remains the leading casebook in the field.[303] The formal principle of "[s]eparate but equal" remained the law of the land,[304] but the United States was beginning to be shaken out of its racial slumber. In 1944, economist Gunnar Myrdal had published his study *An American Dilemma: The Negro Problem and Modern Democracy*,[305] and four years later the Court in *Shelley v. Kraemer*[306] 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. The president pressed for desegregation of the military, federal contracting, and federal employment.[307] But *Brown v. Board of Education*[308]—which was winding its way

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[302] Recent Case, 59 HARV. L. REV. 615, 616 (1946). 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 violations of the doctrine of separation of powers." *Id.*

[303] HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). *Klein* did not appear in the 1937 casebook prepared by Professors Felix Frankfurter and Harry Shulman. *See* FELIX FRANKFURTER & HARRY SHULMAN, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (rev. ed. 1937); 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 and Wechsler carried forward the Frankfurter tradition of federal courts teaching or whether they were "founders of a new school of thought").

[304] Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

[305] 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) (book review) ("[T]he . . . book . . . 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.").

[306] 334 U.S. 1 (1948).

[307] *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).

[308] Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955).

through the lower courts—had not yet been decided by the Supreme Court.[309] The Montgomery Bus Boycotts were still to come.[310] And Congress continued to use its taxing and spending power to support racial segregation in housing and urban infrastructure.[311]

Within this constitutional culture, the first edition of *Hart and Wechsler* featured *Klein* in the opening chapter on the federal judicial function (in the section on parties and finality). The decision stood for a principle somewhat narrower than the one for which it is now known: "The validity of Congressional action questioning judgments of the Court of Claims against the United States";[312] the authors generalized that the challenged statute was "an attempt to prescribe a rule of decision retroactively, and hence invalid as an invasion of the judicial function."[313] The first edition did not discuss the pardon power, which appears in later editions, other than in a descriptive note summarizing 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, through the pardon power, apparently unfettered authority to undo legislation aimed at securing the material foundation for Black citizenship and political equality.

It is familiar fare that the Legal Process norms associated with the *Hart and Wechsler* paradigm emphasize the attractiveness of neutral and uniform jurisdictional rules built on the distinct institutional capacities of the different branches of government and of the national government and the states.[314] Within this frame, the Constitution's assignment of the pardon power to the president in plenary and exclusive form makes it incumbent upon Congress to respect that power; it follows that Congress cannot use its power to regulate the Article III appellate jurisdiction as a way to work around executive authority even when the

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309 *See* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 958–59 (1994) (stating that "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").

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

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

312 HART & WECHSLER, *supra* note 303, at 113.

313 *Id.* at 114.

314 *See* Fallon, *supra* note 309, at 957–59.

president seeks to undermine majoritarian commitments. By framing the problem in these terms, *Klein* could be rationalized as having given respect to jurisdictional neutrality and a sound principle of separation of powers. But it was a framing that tended to accept the democratic bona fides of the governing institutional structure, without accounting for the ways in which the political community, by law and by practice, excluded "freed" Blacks from participation. And although the famous *United States v. Carolene Products Co.*[315] footnote four formulation urged closer judicial scrutiny of legislation infected by process defects,[316] the theory was less frequently invoked when executive action came into play.[317] Separation of powers, aimed at dispersing power and enabling liberty, thus could be celebrated even as it consolidated power in a reconstructed white aristocracy that excluded Black citizens and hollowed out Black liberty.

III. *KLEIN* IN THE FEDERAL COURTS CANON

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 emphasize that we are not arguing a counterfactual: 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 multiracial political power base in the post-Civil War South.[318] Our focus is internal to Article III and forward

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[315] 304 U.S. 144 (1938).

[316] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

[317] *See generally* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020) (discussing judicial and legislative oversight of the executive); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) (discussing judicial deference and executive practice). *See also* Malick W. Gharchem & Daniel Gordon, *From Emergency Law to Legal Process: Herbert Wechsler and the Second World War*, 40 SUFFOLK U. L. REV. 333, 362 (2007) ("There is, however, little in the principle of 'separation of functions' that would encourage a less deferential approach on the part of the government lawyer to constitutionally questionable executive policies.").

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

looking: how the decision, by erasing the vestiges of slavery, has affected federal jurisdictional doctrine, with its emphasis on neutrality, and how the Court's approach to federalism and separation of powers might be reoriented in future.

Far from seeing *Klein* as an "antique, without useful application to contemporary circumstance,"[319] in our view the decision set the stage for a "pact of forgetting"[320] that erased the racialized impact of the Court's announced jurisdictional rules.[321] Even more, *Klein* offered the rhetorical trope that informed later decisions serving to narrow the Reconstruction Amendments[322]—that emancipation consisted of the legal release from slavery, without regard to the vestiges of slavery or the material conditions of freedom.[323] It is not that the field is indifferent to

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> 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."

As to whether fulfilling the promise of "forty acres and a mule" would have significantly affected the political and economic position of Black citizens in the United States, see Eleanor Marie Lawrence Brown, *The Blacks Who "Got Their Forty Acres": A Theory of Black West Indian Migrant Asset Acquisition*, 89 N.Y.U. L. REV. 27 (2014). *See generally* Keeva Terry, *Black Assets Matter*, 57 TULSA L. REV. 97 (2021); Eleanor Brown & June Carbone, *Race, Property, and Citizenship*, 116 NW. U. L. REV. ONLINE 120 (2021).

319 Sager, *supra* note 19, at 2531–32.

320 *See* Omar G. Encarnación, *Forgetting in Order to Move On*, N.Y. TIMES (Jan. 22, 2014), 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 [in Spain], 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.

321 *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.").

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

323 *See generally* BRANDWEIN, *supra* note 260 (discussing the Court's construction of an antiegalitarian narrative about Reconstruction and the Fourteenth Amendment,

history or to concerns about liberty and freedom.[324] Certainly 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 sovereign immunity and jurisdictional neutrality.[325] But, at most, race has figured only *sub silentio* in the Nationalist and Federalist models of scholarship that are said to dominate the federal courts field.[326] In this Part, we seek to draw out the implications of *Klein* for current doctrine and for future scholarship, recognizing that in this brief space we can only nod at possibilities for reorientation.

A. *Klein* and Separation of Powers

Consider separation of powers. Recall that in *Klein*, the Court is said to have asserted its independence from the political branches 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 over the pardon power, the Court by effect threw its weight in favor of President Johnson's approach to restoration of the ancient regime in the South[327]—fueling the public's view that the Court was the president's ally in blocking congressional Reconstruction of the South on a multiracial political

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focusing on the *Slaughter-House Cases* and the *Civil Rights Cases*, that later "provided 'objective' ammunition for critics of Warren Court expansions of rights in the 1960s"). *See also* Ian Millhiser, *The Case Against the Supreme Court of the United States*, VOX (June 25, 2022), https://perma.cc/WZT9-RCLD ("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.").

[324] *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.").

[325] 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. 1927, 1981–2028, (2003).

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

[327] *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").

foundation.[328] The Court in *Klein* gave no attention to the goals of confiscation as they related to the 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 compensation—property rights that the dissenting Justices put into question. Likewise, the Court sidestepped the political importance of the pardon power, which not only restored property, but also restored the vote to former rebels—helping to reinforce the view, as then-Professor Woodrow Wilson would put it, that congressional Reconstruction 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."[329]

In retrospect it may seem constitutionally foreordained that a presidential pardon would allow the return of confiscated property to their Confederate owners. But the Court's reasoning in *Klein* was not without its problems.[330] Questions could be raised about the scope of the pardon power prior to the Civil War (and whether confiscation worked an impermissible bill of attainder).[331] At the time of the founding, the power was

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[328] 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." *New York.*, REPUBLICAN BANNER (Nashville, TN), May 8, 1867, at 1 (available at https://www.newspapers.com/image/604909405). The Society further urged

> 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.

Id.

[329] Woodrow Wilson, *The Reconstruction of the Southern States*, *in* RECONSTRUCTION IN THE SOUTH 1, 5 (Edwin C. Rozwenc ed., 1952).

[330] 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 his thinking.

FAIRMAN, *supra* note 12, at 845.

[331] *Cf.* BERNARDETTE MEYLER, THEATERS OF PARDONING 249 (2019) ("Delineating the precise limits of the concepts of pardoning and amnesty itself requires a decision and may occasion conflict among the branches, as it did when Congress sparred with Presidents

interpreted as similar to that of the British Crown.[332] 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 criminal-law-specific authority.[333] It was not until the Civil War period, in *Ex parte Garland*, that the Court attached a broad reading to the president's pardon power and to 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 offence. 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.[334]

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."[335] Later, the Court is said to have "backed away from the broad proposition that a pardon erases both the consequences of a conviction and the underlying guilty conduct."[336] Indeed, in the 1915 decision *Burdick v. United States*,[337] the Court stated that a pardon "carries an imputation of guilt and acceptance of a confession of it."[338] Our reading of *Klein* thus raises questions about the scope of the pardon power itself. The Constitution nowhere defines that power, which is at best of

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Lincoln and Johnson about their authority to grant amnesty to members of the former Confederacy after . . . the Civil War.").

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

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

[334] *Ex parte Garland*, 71 U.S. (4 Wall.) at 380–81.

[335] *Id.* at 381.

[336] 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))).

[337] 236 U.S. 79 (1915).

[338] *Id.* at 94.

ambiguous content, left open-ended and indeterminate. At the least, acknowledging *Klein*'s Reconstruction context urges caution when assessing the president's use of the power in ways that carry partisan or racialized effects.[339]

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.[340] For that position, scholars have focused primary attention on *Myers v. United States*,[341] which is said to mark the first time that Congress sought "to structure the Executive branch."[342] Although we agree that the Court's reconfiguring of separation of powers reflected "a particular revanchist ideology,"[343] we see the trend beginning earlier, and, indeed, with *Klein*—an important first move in the Court's turn away from the Republican promise of Reconstruction and its insulating the President Johnson's pardon power under the cloak of nonreviewability.

Our proposed reassessment of *Klein* also implicates interpretive methodology and how the Court approaches questions of separation of powers. Professors Samuel Issacharoff and Trevor Morrison have urged a critical stance toward the use of textualism and argued instead for an approach that takes account of "institutional settlement—a constitution by convention."[344] Acknowledging *Klein*'s racialized context raises questions about the weight the Court should accord to conventions that depend on practices that perhaps by design but certainly by effect exclude Black economic and political interests.

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[339] *See* P.E. Digeser, *Justice, Forgiveness, Mercy, and Forgetting: The Complex Meaning of Executive Pardoning,* 31 CAP. U. L. REV. 161, 177 (2003) ("The Constitution does not establish the precise meaning of the executive's power to pardon.").

[340] *See* Bowie & Renan, *Counterrevolution*, *supra* note 69, at 2023; Bowie & Renan, *This Much Power*, *supra* note 32 (tracing the idea of judicial supremacy to the end of Reconstruction, and calling 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").

[341] 272 U.S. 52 (1925).

[342] *See* Bowie & Renan, *Counterrevolution*, *supra* note 69, at 2028.

[343] *Id.* at 2083.

[344] Issacharoff & Morrison, *supra* note 317, at 1916; *id.* at 1917 (recognizing that "practice-based institutional settlements are pervasive in the law," but emphasizing that "[n]ot every practical resolution of how to get things done carries legal or other normative weight").

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."[345] By ratifying the president's pardons, the Court enabled the South to resume its traditional sovereign role with the federal courts assuming only a limited role of superintendence. Professor Richard 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."[346] 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"[347]—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 Ku Klux Klan for violent attacks on Blacks and their allies, Southern Democrats, as Professor Robert Kaczorowski has written, "viewed Klansmen as defenders of Southern nationalism and excoriated federal officials for martyring them . . . . In their opinion, peace would be restored only when the federal authorities restored law enforcement to the people of the South."[348] And further: "The racism, economic self-interest, partisanship, and liberal ideology that characterized the political order of the 1870s promoted a callous disregard . . . toward Southern violent oppression of black Americans. The Supreme Court reflected this political order in

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345 *Klein*, 80 U.S. (13 Wall.) at 142.

346 Fallon, *supra* note 326, at 1143.

347 *"The Union as It Was, and the Constitution as It Is."*, N.Y. TIMES (Oct. 18, 1864), https://www.nytimes.com/1864/10/18/archives/the-union-as-it-was-and-the-constitution-as-it-is.html; *see also* COX & COX, *supra* note 147, at 1 (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'"); Peggy Cooper Davis, Anderson Francois & Colin Starger, *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 302 (2017) ("The Confederate narrative is a story in which the states' reunion after the Civil War was a modest reform by which state-sanctioned slavery was ended, but states' rights were virtually unaffected.").

348 ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 78 (2004).

emasculating the Reconstruction civil rights program in the 1870s."[349]

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 a staple of the Federal Courts course and continue to block efforts to secure racial justice in the United States.[350] From this perspective, *Klein* set the stage for the Court's formal institutional approach to federalism,[351] 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 substantive[352]—"perpetual losers," in Professor Robert Cover's often-quoted phrase.[353] Our reading of *Klein* raises questions about whether the doctrines of federalism can be separated from substantive commitments: as Professor Richard Fallon, Jr. has put it, whether "for at least some purposes," the Court ought to "rely openly on such considerations as . . . functional desirability."[354] In such a move, surely concerns of racial equity deserve weight in the balance.

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[349] *Id.* at 188.

[350] Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2322–37 (2017).

[351] Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1186 (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").

[352] For a description and critique of this trend, see, for example, Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 177 (1987) (emphasis in original):

> [N]eglect 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.

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

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

C. *Klein* and the Federal Courts Canon

Jurisdiction is a critical political resource that allocates opportunity and access.[355] 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.[356] 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 delegitimate 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*,[357] *Murdock v. City of Memphis*,[358] and *Klein*[359] share not only temporal proximity, but also thematic approaches: in particular, an 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."[360]

One hundred and fifty years after its decision, *Klein*'s role could be described as both canonical and uncertain. On the one hand, the case has pride of place in leading Federal Courts textbooks, treatises, and the constitutional law texts that give substantial treatment to federal jurisdiction. Moreover, when important disputes about judicial independence have reached the Supreme Court in recent years, debates about the reach of *Klein*

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355 *See* Hershkoff & Norris, *supra* note 29.

356 *See* Hershkoff & Loffredo, *supra* note 29, at 538–51.

357 80 U.S. (13 Wall.) 397, 411–12 (1872) (holding that a state judge lacks jurisdiction to issue a writ of habeas corpus on behalf of a federal detainee).

358 87 U.S. (20 Wall.) 590 (1874) (holding that the Supreme Court lacked jurisdiction under the Judiciary Act of 1867 to review state law questions).

359 *Klein*, 80 U.S. (13 Wall.) 128.

360 WILLIAM FAULKNER, REQUIEM FOR A NUN 85 (1919).

continue to feature prominently in the briefing, oral argument, and opinions. On the other hand, as Professor Howard Wasserman observed, "*Klein* is canonical as much for its purported indeterminacy as for its principles of separation of powers."[361]

Wasserman's observation is likely only more accurate today than when he offered it roughly a decade ago. When the Supreme Court has recently wrestled with the scope of *Klein*, the Court has distinguished the case more often than it has relied upon it. This is exemplified by *Bank Markazi v. Peterson*,[362] in which families of Americans killed in terrorist attacks sued the Republic of Iran. Their attempt to collect on the resultant judgment was aided by a congressional statute that extinguished Iran's sovereign immunity defense. Citing these families' case by docket number, the Iran Threat Reduction and Syria Human Rights Act of 2012[363] made specific Iranian assets available for post-judgment execution. The Supreme Court held that the law did not violate the separation of powers principles articulated in *Klein*. Observing that "*Klein* has been called 'a deeply puzzling decision,'"[364] the Court found that *Klein* should not apply when Congress "direct[s] courts to apply newly enacted, outcome-altering legislation in pending civil cases."[365] The Court further explained that "the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe."[366] But this reading of *Klein* is incomplete because it ignores the dissenting Justices' important distinction: the president could not use the pardon power to restore property in which the claimant no longer had a legitimate right or interest.

More recently, in *Patchak v. Zinke*,[367] a majority of the Court upheld a statute that divested federal courts of jurisdiction over any claims arising from a specific parcel of land in which ongoing litigation against the federal government was pending. A plurality of the Court again distinguished *Klein*. In an opinion by

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361 Wasserman, *supra* note 262, at 53.

362 578 U.S. 212 (2016).

363 Pub. L. No. 112-158, 126 Stat. 1214.

364 Bank Markazi v. Peterson, 578 U.S. 212, 226 (2016) (quoting Meltzer, *supra* note 72, at 2538).

365 *Id.* at 229 (citing Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438–39 (1992)).

366 *Id.* at 228.

367 138 S. Ct. 897 (2018).

Justice Clarence Thomas, the plurality reasoned that under "*Klein* itself . . . statutes that do 'nothing more' than strip jurisdiction over 'a particular class of cases' are constitutional."[368] Justice Stephen Breyer similarly concluded in a separate concurrence: "This case is consequently unlike *United States v. Klein*, where this Court held unconstitutional a congressional effort to use its jurisdictional authority to reach a result (involving the pardon power) that it could not constitutionally reach directly."[369] That reading, we suggest, again is incomplete—even if Congress lacked power to alter the meaning of a presidential pardon, it does not follow that the executive had authority to alter accepted notions of property or for the Court to enlarge the pardon power at the expense of Congress and the government's property entitlements.[370]

Scholarship has analyzed whether the opinions in *Patchak* and *Bank Markazi* are sufficiently faithful to *Klein* and "the core of judicial independence" the case purportedly protects.[371] We encourage readers to focus on two other features of the Court's recent applications of *Klein*. First, *Klein* is treated as having established an aspirational lodestar for judicial independence. Second, these rivaling sets of opinions omit the case's racialized context. The latter feature presents a sound reason to interrogate the former. When contemporary opinions tell the story of a "Radical Congress" arrogating authority that belonged to other branches, without referencing the story of the racial caste system Congress was attempting to break, we run the risk of unwittingly furthering the Lost Cause narrative. If *Klein* is "deeply puzzling," we may have been missing a part of the puzzle.

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368 *Zinke*, 138 S. Ct. at 909.

369 *Id.* at 911 (Breyer, J., concurring) (citations omitted).

370 Indeed, the most significant recent reliance on *Klein* has come in dissents. In *Bank of Markazi* and *Patchak*, dissenting opinions authored by Chief Justice Roberts reasoned that the statutes at issue ran afoul of the *Klein* principle. He described that principle as a rule against Congress's arrogation of "the judicial power to itself" and against Congress's ability to "decide[ ] a particular case." *Patchak*, 138 S. Ct. at 915 (Roberts, C.J., dissenting). He cited *Klein* as the bedrock of this principle, observing that the Court "first enforced that rule . . . when the Radical Republican Congress passed a law targeting suits by pardoned Confederates." *Id.* He noted that this case supplied what has become a "basic concept of the separation of powers." *Id.* at 916. But the dissent's view of *Klein* likewise assumes that the merits decision followed automatically from the jurisdictional decision.

371 Evan C. Zoldan, *The Vanishing Core of Judicial Independence*, 21 NEV. L.J. 531, 582 (2021).

D. *Klein* and Collective Memory

Contextualizing *Klein* also has implications for the nation's collective legal memory. Scholars have invoked the concepts of "constitutional memory,"[372] "collective constitutional memory,"[373] and "collective legal memory"[374] to describe shared American historical narratives that legal actors invoke. These narratives are often deployed as a means of either strengthening or interrogating the legitimacy of legal claims and legal institutions.[375] Memory, Professor Reva Siegel has observed, is different than history.[376] As she has written, "[s]ystematic divergence between constitutional memory and constitutional history can legitimate authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance."[377] Understanding the racial subordination at play in canonical cases like *Klein* can help narrow the troubling gap between memory and history, rendering voices of resistance legible in America's legal consciousness.[378]

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372 *See, e.g.*, Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1348 (1990); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash,* 64 UCLA L. REV. 1728, 1764 (2017).

373 Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 194 (2006).

374 Kara W. Swanson, *Race and Selective Legal Memory: Reflections on Invention of a Slave*, 120 COLUM. L. REV. 1077, 1081 (2020).

375 Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 21–22 (2022); Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 268 (2019) ("Constitutional judges around the world have bolstered their decisions by frequent appeal to constitutional memory.")

376 Siegel, *supra* note 375, at 24.

377 *Id.* For example, "[t]hough women contested their lack of political authority in the constitutional order over two centuries, there is no trace of their arguments in constitutional law." *Id.*

378 Courts and legal academics both play an important role in the production of collective legal memory. Judicial opinions invoke triumphant memories of democracy or, in the case of *Klein*, judicial independence and private rights. Judicial opinions also invoke the nation's sins as memorials and warnings of the poisons future generations are to avoid. *See* Collings, *supra* note 375, at 268. When judicial opinions become deeply associated with this poisonous status, this increases the likelihood they will become anticanonical. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 475 (2011); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998). Moreover, outside of judicial opinions, pedagogical tools such as casebooks play an important role in the production of memory as well. As Professor K-Sue Park recently observed, a casebook "serve[s] as an engine of knowledge production," as "elite legal scholars have used the casebook to identify a field's most important frameworks, its representative doctrines and illustrative cases, and the background needed to understand its development." Park, *supra* note 26, at 1071–72.

In the wake of America's national reckoning on race, a burgeoning and formidable body of scholarship has emerged studying how invocations of collective legal memory have often erased or omitted critical histories of subordination, conquest, and enslavement.[379] In the way of erasure, there are instances in which a case's racial context was once apparent.[380] Over time, as norms changed, legal actors opted to erase these stories rather than reckon with them.[381] As for omissions, there are other stories that seem to have never made their way into our collective legal consciousness at all; these stories have always been covert or peripheral. It has never been central to the teaching of the hearsay rule, for example, that one of the earliest and most important American cases in the development of that rule involved an enslaved woman who wanted to rely on out-of-court statements to demonstrate that her enslavement was unlawful.[382] When teaching the *Slaughter-House Cases*, students have not learned that while the cases were being decided, a book of firsthand narratives of chattel slavery was sent to the Court by an African-American who had been involved in the abolition struggle; that book likely influenced some of the Court's language.[383] And until recent work by historians Brittany Farr and Dylan Penningroth, little was known of the role that Black Americans played in the construction of contract law, as sharecroppers brought suit against those who held them in near-enslavement in the century after the Civil War.[384] Black Americans were actors with agency and will, who pressed their

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[379] We say "legal memory" here, rather than "constitutional memory" given that this growing body of scholarship has not exclusively emerged in the field of public law. It has also included fields such as property, contracts, and evidence. *See generally, e.g.*, Park, *supra* note 26; Penningroth, *supra* note 26; Farr, *supra* note 26; Sklansky, *supra* note 26. For earlier examples, see generally Spaulding, *supra* note 265; PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997).

[380] Park, *supra* note 26, at 1080 ("Early property-law casebooks, which appeared during the Jim Crow Era, included cases about slavery ubiquitously and without reflection, critique, or acknowledgment that property in people was, by that time, illegal and obsolete."). In an exhaustive analysis of property law textbooks dating back to the nineteenth century, Park has documented this pattern in the contexts of enslavement and Jim Crow apartheid. *Id.* at 1080–91.

[381] *Id.*

[382] *See generally* Sklansky, *supra* note 26 (discussing the omission of *Queen v. Hepburn,* 11 U.S. (7 Cranch) 290 (1813), a case involving an enslaved person seeking freedom, from casebooks despite its importance to hearsay doctrine and its role in entrenching slavery).

[383] Maeve Glass, *Killing Precedent: The* Slaughter-House *Constitution*, 121 COLUM. L. REV. 1135, 1145, 1169–75 (2023).

[384] Farr, *supra* note 26, at 700–18. *See generally* Penningroth, *supra* note 26.

claims through what Penningroth calls "doctrinal passing."[385] "Similar to the way some 'colored' people were allowed to 'pass' as white, 'colored' cases were 'passed' silently into the heart of contract law and naturalized as white when legal professionals elided the fact that [ ] litigant[s] w[ere] Black, and when they turned slavery into an abstraction, detached from race."[386]

Klein is a story of both erasure and omission. Its subordinating effects were once treated as commonplace or excusable before vanishing from the general understanding of the case's importance.[387] And yet, freedmen's dreams of and pleas for land ownership opportunities, and the tragic ends those dreams generally met, have never been central to the telling of *Klein*.[388]

There is democratic, informational, and ethical value in blending these neglected histories of subordination, conquest, and resistance into our collective legal memory.[389] On the democracy front, the narratives and "paradigms"[390] that emanate from corridors of power help forge a polity's identity.[391] Excluding the will and resistance of subordinated peoples from our narratives therefore serves to reproduce their past exclusion in the democratic order.[392] Surrounding and infusing *Klein* are stories

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385 Penningroth, *supra* note 26, at 1206.

386 *Id.*

387 *See generally infra* Part II.

388 *Id.*

389 Smith, *The Other Ordinary Persons*, *supra* note 75, at 1075 ("[I]mportant informational, ethical, and democratic benefits accrue when American legal doctrine includes the voices and perspectives of marginalized and subjugated members of the American community."). The use of the adjective "neglected" here is borrowed from Professor Peggy Cooper Davis, *see* DAVIS, *supra* note 379.

390 Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1792–93 (2019).

391 For an excellent discussion of this phenomenon in the context of originalism, see generally Reva Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023); Cristina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018); James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 679 (2016); James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 J. CONST. L. 267, 287 (2021).

392 *See* Siegel, *supra* note 375, at 21–22:

> The Constitution's interpreters are continuously producing constitutional memory as they make claims on the past to guide decisions about the future—as they tell stories about the nation's past experience to clarify the meaning of the nation's commitments, to guide practical reason, and to help express the nation's identity and values. Constitutional memory plays a special role in organizing a polity and in authorizing its law. Judicial decisions are products of constitutional memory, and, at the same time, they are one of the many social

of Black resistance, dreams, and pressing claims of citizenship in the sites that were open to them. When legal academics tell their stories, we are honoring their citizenship, ensuring their rightful place in our democratic order.

As for informational value, learning about a case's role in subordination provides, at a minimum, a sound reason to interrogate the case more closely.[393] To be sure, the fact that a legal opinion facilitated subordination does not mean that all of its legal reasoning should be abandoned. However, a case's relationship to subordination does provide a reason to test the resultant legal rules against contemporary egalitarian norms. It also provides a reason to reassess whether to continue treating a canonical case or well-accepted doctrine as a normative lodestar or irreducible baseline. Rather than ask whether a legal rule is sufficiently faithful to *Klein*, we might ask whether apparently "neutral" jurisdictional rules are sufficiently faithful to constitutional norms like equality and democracy. For all of their formalist scaffolding, jurisdictional rules are products of the balancing of competing constitutional norms and principles. Understanding *Klein*'s context can spur us to exercise more caution in future balancing, lest courts and commentators omit values of equality and freedom from the scale.

In the way of ethics, expanding the range of voices and perspectives in America's collective legal memory is a way of being less complicit in past harms. Much of life and law is about leaving a legacy through creations, democratic participation, bequeaths, or reputation-building. Many, including the freedmen, have historically been denied this right, through legal erasure and intentional campaigns like the Lost Cause ideology. By propagating past erasure and the messages of these campaigns, legal scholars become complicit in denying subordinated persons' equal right to leave a legacy. By contrast, in countering this

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institutions that produce constitutional memory. A nation forges its future through these claims on its past.

Cf. Primus, *supra* note 373, at 194 (2006) ("To the extent that our concerns and values differ from those of the victors in earlier constitutional struggles, limiting the collective constitutional memory to accounts of what was decided by those who prevailed might impede rather than foster a sense of continuity with the constitutional past.").

393 Sklansky, *supra* note 26, at 444 ("A rule that served bad purposes, even a rule that was intended, in whole or in part, to serve bad purposes, may today do more good than harm. But tainted history does provide reason to treat an inherited rule with at least a little more skepticism.").

erasure, today's legal actors provide remedies, albeit modest, for those past wrongs.

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 Professor Henry 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."[394] 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 questions may defy answer, but failing to ask them risks using federal courts doctrine in ways that "normalize the present," leaving unacknowledged the subtle ways in which jurisdictional doctrine through its purported neutrality supports and continues the legacy of racial, class, and gender stratification.[395] In particular, we have suggested that *Klein* be considered in the racialized context of Reconstruction, and that jurisdictional values be interrogated to surface their anti-egalitarian and racial aspects.[396] If we have raised more questions than we have answered, we hope that we have at least opened the field to further conversation.

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[394] 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, 587 (2012) (urging more attention to the antebellum Court and its activist approach to the invalidation of legislation).

[395] ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 7 (2017).

[396] *Cf.* BRANDWEIN, *supra* note 260, 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.