A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court

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During the Civil War, both the Union Congress and the Confederate Congress put in place sweeping confiscation programs designed to seize the private property of enemy citizens on a massive scale. Meeting in special session in August 1861, the U.S. Congress passed the First Confiscation Act, authorizing the federal government to seize the property of those participating directly in the rebellion. The Confederate Congress retaliated on August 30, 1861, passing the Sequestration Act. This law authorized the Confederate government to forever seize the real and personal property of "alien enemies," a term that included every U.S. citizen and all those living in the Confederacy who remained loyal to the Union.

Ten months later, in July 1862, the U.S. Congress passed the much broader Second Confiscation Act. This expansive law permitted the Union government to seize all the real and personal property of anyone taking up arms against the government, anyone aiding the rebellion directly, or anyone offering aid or comfort to the rebellion. This effectively meant the U.S. could legally seize all the property of all those who recognized and supported the legitimacy of the Confederacy.

The Civil War represented the second great American experiment with broad legislative confiscation during wartime, after the American Revolution. The Civil War is justly described as America's second revolution. Yet the nineteenth-century experience with confiscation reveals the extent to which, when it came to the relationship of property and the state, the country had changed from the first revolution to the second. The outcomes of these two wartime experiments with confiscation were nearly opposite. Revolutionary confiscation was marked by the quick, decisive, vigorous pursuit of disloyal property. A great deal of Loyalist property was seized forever, without compensation or recourse to the courts.

Eighty years later, confiscation met quite a different fate. During the Civil War, the
Revolutionary conception of sovereignty found its fullest expression only in the losing section. The Confederacy quickly put in place an effective confiscation program, designed to seize U.S. property, that was every bit as zealous as any pursued during the Revolution. Yet in the wake of Confederate defeat, this broad assertion of legislative power was quickly reversed. After the war, the Confederate confiscation program was completely dismantled. Soon after victory, the Union nullified almost all the public laws of the Confederacy, including sequestration. From the point of view of American law after the Civil War, it was quite literally as if the Confederate Sequestration Act had never existed. The seizure of millions of dollars of U.S. property by the Confederacy was meaningless and had never, in the eyes of the law, taken place.

If Confederate sequestration was marked by vigor, Union confiscation was marked by an agonized, intractable, ideological impasse. Union confiscation defied legislative consensus and mostly failed in practice as a result. The language of the Acts contained confusing, even contradictory instructions, which made their enforcement immensely difficult, if not virtually impossible. Relatively little property was actually confiscated, and the Second Confiscation Act was more or less ignored by Lincoln and the executive branch during the war before languishing in the federal courts for decades afterwards.

Once confiscation ceased to be politically viable, it did not simply vanish. Instead, it remained a fixture in American property law for fifty years. Even as the executive branch ceased to confiscate property, the federal courts were beginning to consider the vital legal and constitutional issues raised by confiscation. These questions included many that the Supreme Court had not faced in seventy-five years, or had never faced. Was permanent, uncompensated property confiscation for disloyalty a legitimate power of Congress? Did a presidential pardon mandate the return of already-confiscated property? Who had title to confiscated land, and how should it be treated in the marketplace? What was the legal and constitutional status of the Confederate Sequestration Act and property seized under the Act? The Supreme Court had never been asked these fundamental legal questions. Its answers to them had profound implications both for property law and for conceptions of property that fought for dominance after the Civil War.

The longevity of confiscation prompts reconsideration of the law's ultimate significance and takes the focus off President Andrew Johnson as the near-exclusive dismantler of the legislation. Attention to the treatment of confiscation in the federal courts, particularly the Supreme Court, after the Civil War reveals a much longer, richer lifespan for confiscation than historians have generally recognized. Confiscation lived on as an important issue for decades after the war and was not entirely put to rest until the twentieth century. This essay traces the Supreme Court's interpretation of confiscation and its implications for property law and constitutional law in the immediate wake of the Civil War and for several decades afterwards.

In case after case in the decades after the war, the Supreme Court used legal questions arising out of the confiscation acts to limit the power of the federal government over property and to argue for the sanctity of individual property rights. The Court was divided at points, but proponents of a broad confiscatory power were normally in the minority. Confiscation faded as a possibility after the war not solely due to the intransigence of the chief executive, but also because the Supreme Court—in particular Justice Stephen Field—chipped away at the power of the state to confiscate property on a broad scale. Confiscation cases served the Supreme Court as vehicles for the elaboration of a property ideology steeped in the natural rights of individuals protected at the expense of sovereign power. Field was
able, for the most part, to use major confiscation cases as opportunities to press for a liberal understanding of property rights and their place in the Constitution.

The power to confiscate property entered the nineteenth century as a controversial practice of legislatures as a punishment for disloyalty. It left the nineteenth century as a relic, enforceable only by courts. Confiscation at century’s end seemed almost quaint, a remnant of Revolutionary republican fervor nearly out of place at mid-century and badly anachronistic in the midst of an industrial revolution. Yet confiscation was notcharming to its radical proponents seeking to refashion the South, or to President Lincoln fearing the same, or to congressional conservatives fearing a legalized land grab as a consequence of the Civil War. The Supreme Court was able to accomplish what no other institutional actor could on confiscation. It stripped confiscation, through a thousand cuts, of both its menace and its appeal.

The Supreme Court underwent a dramatic change in leadership after Chief Justice Roger Taney died on October 12, 1864. Taney, who had served for twenty-eight years, was by that time so despised by Republicans for his opinion in *Dred Scott v. Sandford* that Congress refused to place a bust of him in the Court’s chambers in the Capitol. Radical Republican Salmon P. Chase, Lincoln’s Secretary of the Treasury, replaced Taney on December 15. In 1863 Congress had created a tenth judicial circuit and increased the number of Justices to ten. It then reduced the number of Justices to six in 1866 before returning it to nine in 1869. Chase was one of five Lincoln appointees to the high Court; the others included Noah Swayne, Samuel Miller, David Davis, and—most importantly—Stephen Field. President Grant made a remarkable eight appointments to the Supreme Court. Only four ultimately served, of whom the most important were William Strong, Joseph P. Bradley, and Morrison Waite, who replaced Chase as Chief Justice after only eight years in 1874.  

**The Longevity of Confiscation: Beyond Tragedy and Vengeance**

Generally, leading studies of confiscation have followed it only to the end of its enforcement, ignoring its significant afterlife in the Supreme Court. The demise of confiscation has been treated either as a judicious response to Radical Republican vengeance or as a tragic missed opportunity of Reconstruction. James G. Randall led the first school. Eric Foner and Michael Les Benedict currently dominate the second.

In his classic textbook on the Civil War, Randall called the Second Confiscation Act “one of the most drastic laws ever enacted by the American Congress.” In Congress, he posited, moderates argued in vain in the face of Radical determination to punish the South. To Randall, only Lincoln restrained Congress from the unconstitutional pursuit of broad confiscation, by threatening to veto the legislation and then forcing upon Congress an explanatory joint resolution providing that property could be seized only for the lifetime of an offender convicted under the Confiscation Act. For Randall, Lincoln effectively stopped the legislature in its “attempt to appropriate the private property of unoffending citizens,” and the wartime experience with confiscation “was such as to condemn the policy of promoting war by harsh punitive measures for the coercion of individuals.”

For Foner and Benedict, confiscation was the best hope for providing land to millions of freed slaves. Foner writes that Radicals in Congress advocated “an act of federal intervention comparable in scope only to emancipation itself—the confiscation of planter lands and their division among the freedmen.” For Benedict, “the concept of confiscation had been fundamentally altered” with the passage of the Freedman’s Bureau Act in early 1865. The law provided that Southern lands
This vitriolic indictment of the Confederacy shows cotton, tobacco, and sugar plants and the slaves the planter class relied on to grow these crops. Congress intended the Confiscation Acts to redistribute planters’ lands. In the end, however, only a miniscule amount of land ended up in the possession of freed blacks.

abandoned by their owners and property subject to confiscation be set aside for the use of emancipated slaves. Within a few years of the close of the war, both argue, the possibility of any widespread distribution of land was squelched. Mainstream Republicans resisted the efforts of House Radicals George Julian and Thaddeus Stevens, as well as freedmen themselves, and “in the end the amount of land that came into the possession of blacks proved to be miniscule.”

Foner and Benedict make a much more compelling historical case than does Randall. Confiscation was not some kind of Radical plot foiled by manifest constitutional law. Yet it is undoubtedly true, as Foner and Benedict argue, that confiscation policy after the war was a squandered opportunity to provide freed people with some measure of economic opportunity. However, confiscation was not purely a sad denouement to the Civil War; neither school pays sufficient attention to confiscation’s enduring importance for the articulation of liberal property ideology after the war.

Property Seizure during the Civil War

Alternative Regimes
During the Civil War, there were three legislative (as opposed to military) property regimes in place. The First Confiscation Act of 1861 authorized the permanent seizure of property used in support of the rebellion. The Second Confiscation Act of 1862 authorized the seizure of any property belonging to anyone taking part in the rebellion or lending it aid and comfort. Finally, the Abandoned and
Captured Property Act of 1863 authorized the army to take what amounted, in many cases, to temporary possession of any property it came across.\textsuperscript{16}

It is important to distinguish confiscated property from abandoned property. Abandoned property was land or personal property that had been deserted by its owners and then seized by the army.\textsuperscript{17} The U.S. Treasury appointed special agents to receive and collect such property under the Abandoned Property Act. This act did not repeal or replace either of the Confiscation Acts, but operated alongside them. The crucial difference between abandoned and confiscated property was that the former was seized without title passing to the government. Instead, the owner of abandoned property had two years after its seizure to appear before the Court of Claims and prove ownership and loyalty.\textsuperscript{18}

While it might well make no difference to a Confederate cotton planter which regime his property was seized under, it provided for crucial distinctions in the courts. The Abandoned
Property Act did not upset title to property: it amounted to an enforced loan in the case of Unionists, and to the traditional exercise of an army’s seizure of enemy property under the laws of war in the case of rebel property. Confiscated land was not physically seized by an army, but legally taken by Congress and by judges operating far from the battlefield. Such property belonged, at least for the lifetime of its owner and maybe longer, to the government. Presidential pardons also applied quite differently to those whose land had been confiscated and to those whose land had been seized. To be sure, confiscation cases and abandoned property cases were at points heard together, and each type of case at points drew rulings that affected the other. Yet it is still necessary to keep the two conceptually separate for the most part.¹⁹

Lincoln, Johnson, and Wartime Confiscation

The Confiscation Acts were difficult to enforce from the start. For purposes of confiscation, rebel property fell into two categories. Rebel property located in either the North or South and used directly in support of the rebellion was subject to seizure under the First Confiscation Act, which was applied almost exclusively to property inside the Confederacy (since little property in the North was used to directly support the rebellion). Rebel property located in either the North or South and belonging to anyone offering aid or comfort to the rebellion was subject to seizure under the Second Confiscation Act, which was initially applied only to rebel property located in the Union (since the confiscation of any property behind enemy lines necessarily awaited the reopening of the U.S. courts there). As described above, the Second Confiscation Act provided little by way of instructions on its enforcement. It simply asserted, “It shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects.”²⁰ Confiscation was initiated—though exactly how was not specified—by a U.S. Attorney in a judicial district “within which the property may be found.”²¹ Until the end of the Civil War, the vast bulk of Confederate property liable to confiscation remained in the South and under Confederate control. Only when the Union had dominion over a given district and a U.S. district court reopened could confiscation take place.

On the confiscation issue, Lincoln fit comfortably within the group of conservative Republicans led by Edgar Cowan and Jacob Collamer: he was openly dubious about the new legislation. Lincoln planned to veto the Second Confiscation Act; it was saved only by the inclusion of a last-minute congressional Joint Resolution that significantly weakened the bill. While the President did sign the bill, he nevertheless sent to Congress the veto message he had drafted but not used, in a move that signaled his doubts about the legislation. In the veto message, Lincoln questioned both the act’s constitutionality and its political utility. The President, Foner writes, “had no enthusiasm for large-scale confiscation that, he feared, would undermine efforts to win the support of loyal planters and other Southern whites, and the act remained largely unenforced.”²² During the war, Lincoln followed the letter of the law—in November 1862, he ordered Attorney General Edward Bates to issue instructions to federal district attorneys to enforce the Act—but he did not do much beyond this.²³ Bates, who was given authority to implement confiscation, was himself a conservative Missouri Republican and a strict defender of individual property. He did little to enforce the acts or even give advice to U.S. Attorneys seeking guidance.²⁴

The Lincoln administration’s lackluster enforcement of confiscation drew considerable criticism from Congress and from the Northern public. Perhaps most famously, on August 19, Horace Greeley, editor of the New York Tribune, published an open letter to the President, “The Prayer of Twenty Millions.”
Jacob Collamer and Edgar Cowan (left to right), both conservative Republican Senators, opposed the confiscation acts, which were to be enforced by the U.S. Attorney within the jurisdiction of the rebel property in question.

The Tribune was the most widely read Republican newspaper in the country and was sure to grab Lincoln's attention. Greeley seized upon the sections of the law freeing slaves that came within Union lines and demanded that the President enforce them: "We think you are strangely and disastrously remiss in the discharge of your official and imperative duty with regard to the emancipating provisions of the new Confiscation Act." He urged

President Lincoln (left) was not enthusiastic about the Confiscation Acts and did not do much to enforce them beyond ordering Attorney General Edward Bates (right) to instruct federal district attorneys to carry out the law.
that Lincoln, “as the first servant of the Republic, charged especially and pre-eminently with this duty, . . . execute the laws.”

Lincoln received pressure not just from the press, but also from his own Cabinet. In his 1863 Report to Congress, Secretary of the Treasury Chase urged Lincoln to move quickly against property located in the North and owned by those aiding the rebellion. “Property of great value in loyal states is held by proprietors who are actually or virtually engaged in that guilty attempt to break up the Union,” he wrote. Such property “should be subjected by sure and speedy processes to confiscation.”

This is not to suggest that Lincoln blocked any and all property confiscation. After the passage of the First Confiscation Act in August 1861, U.S. Attorneys were given wide discretion to instigate proceedings and began to seize Confederate property located in the North. In the Southern District of New York, which includes New York City, the district courts ordered eighteen separate confiscations of property under the Second Confiscation Acts. In Cleveland, the U.S. marshal seized $300 in gold coins in the possession of R. M. N. Taylor, the proprietor of the Angier Hotel, which had been hidden with Taylor by a Confederate sympathizer arrested while fleeing south. In Washington, D.C., the house of William B. Cross, a major in the Confederate army, was confiscated in 1863 by U.S. Attorney Edward Carrington. Nearby, in Allegheny County, Maryland, money was seized belonging to another Confederate officer, Joseph Anderson. George Coffey, the U.S. Attorney for the Eastern District of Pennsylvania, wrote Lincoln to inform him that under the First Confiscation Act, “the marshal by my direction has seized all copies of the New York Daily News found in this city.” Coffey asserted the paper was “property used for insurrectionary purposes” and asked Lincoln, “Am I right?”

Military commanders in the field carried out some property confiscation, erroneously claiming broad authority under the First and Second Confiscation Acts. In violation of the legislation’s requirement that property confiscated under the law take place in civilian courts, the army took matters into their own hands at some points. Relatively early in the war, Northern armies occupied parts of the Confederacy, including Tennessee, southern Louisiana, and eastern Virginia, as well as portions of the South Carolina and Georgia coasts. General Benjamin Butler in Louisiana carried out the most aggressive confiscation of any military commander. After conquering New Orleans in April 1862 Butler used the Confiscation Acts to seize and sell estates and personal property, before Lincoln replaced him with General Nathaniel Banks. General George McClellan tried to keep a tight reign on behavior, declaring that private property be protected and that seized property be paid for, but military confiscation continued throughout the war.

For proponents of confiscation, the prospects for enforcement were made considerably worse when Andrew Johnson became President in April 1865. As part of the Johnson administration’s drive to placate white Southerners and restore the Union, it began to radically restrict the enforcement of the Confiscation Acts. In the summer and fall of 1865, Johnson began to issue special pardons that restored the property rights of rebels, with dramatic—though not yet certain—consequences for the legal status of confiscated and abandoned land. Johnson’s Attorney General James Speed took a narrow view of confiscation: by the end of 1865, he was telling federal district attorneys to enforce confiscation only against those considered still rebellious. Ultimately, Speed declared that peacetime confiscation was illegal, and by June of 1866 he had ordered a halt to any more seizures. The President ordered that land seized by the federal government under the Confiscation Acts—land to which the United States had title—should be returned to its owners, unless it had already been sold to a third party. By then, Benedict argues, Johnson had “effectually nullified both the confiscation and the Freedmen’s Bureau laws.”
All told, total proceeds from confiscation by 1867 amounted to roughly $300,000.39 Civil War confiscation in the field was over in political terms before it began: it lasted for little more than five years, from 1861 to roughly 1866. Yet in that period, legal and constitutional questions were raised that remained in the courts—most notably the Supreme Court—for decades afterwards.40

Confiscation’s Hidden Legacy: The Right to Property and the Supreme Court

Coming from the California Supreme Court, Justice Stephen J. Field took his seat as the tenth Justice in December 1863, and stayed on the Court until December 1897. An ardent Democrat with a strictly religious upbringing in New England, Field moved to Washington flush with legal and commercial success on the California frontier, seeped in dogmatic beliefs in moral absolutes and ideals of the free individual.41 On the Supreme Court, Field soon “came to believe in a rather extreme version of an inalienable right of property” protected by the Constitution.42 These views were exemplified in his famous dissents in the Slaughterhouse Cases43 in 1873 and in Munn v. Illinois in 1877, arguing against the power of state legislatures to regulate commerce.44 In his thirty-four years on the bench, Field

Until Lincoln replaced him, Union General Benjamin Butler in Louisiana carried out the most aggressive program of confiscation of any military commander, using the Confiscation Acts to seize and sell estates and personal property. This 1861 sheet-music cover shows slaves trying to run from the ruthless Butler, who declared such fugitives contraband of war.
rights of property, a Supreme Court majority exercised supervision most famously over state laws, but also—as their treatment of confiscation makes clear—over federal legislation as well.

There has been extensive debate on whether Field and other proponents of an expanded constitutional right to property were shielding commerce from legislative control or utilizing a Jacksonian ideology hostile to corporate interests. At times, this debate has broken down into binary categorical disputes in which Progressive historians, having branded Field and the Court as pawns of big business, are then rescued by more recent historians—most notably Charles McCurdy and Benedict—who argue that Field and his cohort’s constitutional interpretation was driven by a Jacksonian free-labor ideology opposed to corporate privilege and corruption.49 As James Kloppenberg has warned us, in the liberalism-republicanism debate, binaries are historically dangerous. We can concede that Field and others had alternative commitments and different ideational tools at hand. If we move past the opposition of greed and ideology, we find, generally, that protecting commercial growth and protecting individual rights both produced a common outcome: namely, shielding property from legislative control. Morton Horwitz has persuasively argued that “[t]raditional conservative fears that the state might be used to protect debtors or to take property in order to equalize wealth were thus matched by neo-Jacksonian anxieties that the state would be taken over by corporate interests.” Instead of acting in opposition, these “twin fears” of the exercise of power by the state “combined to produce laissez-faire ideology.”50

Within the parameters of laissez-faire, liberal constitutionalism, Field held a special disdain for confiscation, which came to be an epithet in his jurisprudence, synonymous with the illegitimate regulation of property by the state.51 It is important to remember that even as he and the rest of the Court struggled to determine when regulation—especially rate

“profundely influenced the character of American law” and in particular exerted “extraordinary influence” on “American constitutional development.”45

Field’s steps toward locating substantive rights protecting property in the Constitution was part of a larger postwar trend reflected in the 1868 publication of Judge Thomas M. Cooley’s hugely influential Constitutional Limitations, a book that was “unabashedly designed to facilitate constitutional challenge to the legislature’s will” and aimed to “stake out the domain beyond which legislation could not go, no matter how alluring the public benefits.”46 After the Civil War, as James Ely has noted, “prevailing constitutional thought stressed property rights and limitations on legitimate government authority.” Gradually, the Supreme Court “embraced laissez-faire constitutionalism,”47 which, for its proponents, was “more than a preferred policy” but “a matter of natural law and natural rights.”48 Armed with this belief in the market and the
regulation—became "confiscatory" and so unconstitutional, they were at the same time ruling on actual confiscation cases—e.g., considering the power of the legislature to seize property outright.

In the 1870s and 1880s, even as the war receded into memory, confiscation remained a near constant in the Court, and Field was increasingly able to use confiscation cases to advance liberal property jurisprudence and liberal constitutionalism. For advocates of liberal property ideology, these cases were opportunities to recast what constituted legitimate property law under the Constitution. Legislative confiscation had emerged from the Union Congress in 1862 bloodied but still alive. After the war, however, Field and other Justices weakened and undermined the legislative power to confiscate property more effectively than Democrats in the 37th Congress could have hoped. The Confiscation Acts themselves were upheld as constitutional, even as their radical elements were gutted from within, leaving only an empty shell. Under the Court’s direction, confiscation was upheld on extremely narrow grounds with almost no precedential value. At the same time, confiscation beyond the lifetime of the offender was made explicitly unconstitutional, a broad presidential pardon power restoring all rights in land was recognized, and those whose property had been confiscated were given the right to alienate ultimate title to their property by sale or by will.

There were some instances when confiscations were upheld, but only in cases where the commitment to protecting the natural rights of property clashed with an explicit utilitarian concern for the function of the marketplace. This conflict arose primarily in cases in which the Court considered claims turning on property that had already been confiscated, sold by
the government, and then re-sold as alienable life estates in land. Once the offender whose property had been seized in the first place died, their heirs demanded the return of the property. In these cases, Field often deferred to settled property arrangements and upheld confiscations when invalidating them would upset the apple cart, or when intervention by the government reversing confiscation would disrupt private arrangements arrived at in the marketplace.

Field was generally “strongly results-oriented”: in cases where ideological commitments would lead to the “wrong” decision, these commitments gave way to a utilitarian drive to arrive at the right result. Here again, he was in line with broader postwar historical trends. Horwitz has noted that “as the law became increasingly implicated in the process of promoting economic growth,” judges turned more frequently to the “overly instrumental use of private law to advance utilitarian objectives.” Confiscation is an instance of the overt use of public law to advance the same objectives.

**Hollow Victory: Confiscation Upheld**

During the Civil War, one state court invalidated the Second Confiscation Act. In the summer of 1863, in *Norris v. Doniphan*, the Kentucky Court of Appeals held that the Second Confiscation Act was unconstitutional and therefore void. Coming from a bitterly divided state with a large population subject to property confiscation by the federal government, *Norris* was a full-throated denunciation of the Second Confiscation Act. The case was initially brought in Mason County Court and turned on a $5,000 debt owed by Norris to Rebecca Doniphan. Norris did not deny owing the money, but asserted as a defense that Doniphan was a professed secessionist who had moved to Arkansas at the outbreak of war and regularly had given aid and comfort to the rebellion. Doniphan’s property was therefore covered by the Second Confiscation Act, which provided that any offender was barred from bringing suit “for the possession and use” of his or her property. From this rather thin opening—would the court enforce the debt?—the court seized the opportunity to rule on the law as a whole.

The court’s opinion reads like a speech made by a conservative Democrat in the Senate in opposition to confiscation. Southerners retained their rights as citizens, and confiscation was a straightforward violation of the Fifth Amendment’s guarantees of due process and uncompensated takings. Making reference to the Magna Carta, the writings of Lord Coke, and Story’s *Commentaries*, the opinion rails against the usurpation of private property by the federal government. Confiscation had not been recognized by the law of nations since the eighteenth century, and since then “nearly a century’s advance of commerce, civilization and Christianity” had rendered “the barbarous rules of the past intolerable.” In sum, the Second Confiscation Act was “in derogation of the personal rights and rights of property.” It could not constitutionally be upheld and was “null.”

*Norris* remained the only judicial decision on the constitutionality of confiscation for more than seven years. Even though the question had not yet been litigated, Chief Justice Chase, in his capacity as a circuit court judge, made clear his position that most lawyers and judges believed the Second Confiscation Act was constitutional. However, as more and more confiscation cases were docketed at the Supreme Court in the late 1860s, it was only a matter of time until the Court considered the question. As Fairman noted, “Inevitably an assault would be made: the legislation did not seem impregnable, and there were many interested in attacking it.”

Such a case, *Miller v. U.S.*, reached the Supreme Court from the Circuit Court of the Eastern District of Michigan. Samuel Miller, a citizen of Virginia, owned shares in two Michigan railroads. These shares were seized in April 1864 and later sold at auction. After the war, Miller challenged the sale under the Fifth
Amendment. The case was argued before the Supreme Court on February 1 and 2, 1870.50 In an opinion by Justice William Strong, the Court sustained the constitutionality of the Act on April 3, 1870 by a 6–3 vote, with Justices Field, Clifford, and Davis dissenting.

Miller is routinely cited as sustaining the constitutionality of confiscation, but this description, while technically correct, can be misleading. The majority ruling in Miller was narrow—so narrow that virtually none of the competing conceptions of property advanced in Congress and by the President were even so much as raised. Confiscation as a congressional power was not upheld by the majority so much as subsumed within existing rights recognized by the laws of war. The principled property debates that had dominated consideration of confiscation were nowhere in evidence in Miller. Instead, the Court treated intensely controversial legislation as settled law, stripping away any larger implications for ideas of property.

Justice Strong was normally an ally of Field and an opponent of radical confiscation.61 However, Strong was also a former Democratic congressman and a recent convert to the Republican party, appointed to the Court by President Grant in 1870. His opinion accomplished the objective of sustaining Republican legislation while maintaining the majority’s commitment to liberal conceptions of property. Already marginalized by the Dred Scott decision and the impotent objections made by Chief Justice Taney to Lincoln’s actions during the war, the Court had found a way to sustain a popular law while giving no ground to radicals, such as Representative Stevens, who asserted the broad powers of Congress to seize and allocate land. Confiscation for the majority was not a congressional power at constitutional law, but a belligerent power at international law.

Justice Strong went to great lengths to uphold confiscation while minimizing its consequences for American property ideology or property law. The main constitutional question for Strong was whether the Confiscation
Acts were criminal statutes or emergency war measures. If the former, he conceded that full constitutional protections, most notably trial by jury, were due before any property could be confiscated. If the latter, then confiscation was in line with existing Supreme Court doctrine on the powers conferred on the federal government during war. For Strong, it was settled that the war power included “the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor.” Confiscation was justified “not because of crime” but because property belonging to a belligerent enemy was “not affected by the restrictions imposed by the fifth and sixth amendments” and was instead “liable to confiscation under the rules of war.”62

Strong clung tightly to the Supreme Court’s by-then famous “dual sovereignty” theory, promulgated in the Prize Cases,63 which allowed Congress and the President to treat rebels as both enemy belligerents and American citizens. It was a recognized fact that war existed between the Union and the Confederacy. Once war existed, Strong declared, “The United States were invested with belligerent rights in addition to the sovereign powers previously held.” Congress had “full power to provide for the seizure and condemnation of any property” of use to belligerent enemies. The fact that it was a civil war did not mean that the government was “shorn of any of those rights that belong to belligerency.”64 Thus, Congress could confiscate enemy property, even as the President could blockade enemy ports. Both fell within the powers of belligerents during war.

Field’s Dissent
The dissent by Justice Field was an explicit condemnation of confiscation legislation as a violation of international law and an unconstitutional deprivation of individual property without trial. Field, as a matter of international law, disagreed with Strong that there was a recognized right to confiscate all enemy property, arguing that “there is a limit to the subjects of capture and confiscation which government may organize.”65

Domestically, the Confiscation Acts were simply a species of criminal law, and were manifestly unconstitutional. Field echoed the claim made by conservatives in the congressional debates that, away from the battlefield, only judges could seize property as punishment for crimes of disloyalty. Property not taken to directly support the military was illegitimately taken unless taken pursuant to a trial. The in rem property seizures provided for in the Act did away with constitutional protections altogether and worked “a complete revolution in our criminal jurisprudence” that meant that individual trials for criminal offenders might be disregarded and “proceedings for such punishment be taken against [their] property alone.”66

The radical proponents of confiscation would not disagree with Field’s analysis of confiscation proceedings, but would disagree vehemently that these proceedings were unconstitutional. For them, it was an entirely constitutional premise that Congress could constitutionally set the criteria for determining the guilt of a disloyal offender and order the seizure of property based on that determination. Field’s dissent assumed what the congressional opponents of confiscation had argued: that confiscation was not a legitimate legislative function. This was an institutional argument with ideological implications, and it represented a view that was more liberal, more individual, and more protective of property. Congressional confiscation harkened back to a time when republican theory made the disposition of property the shared province of both the legislature and the courts. Field’s arguments in Miller show the growing dominance after the Civil War of the argument that only judges could legitimately order the uncompensated seizure of individual property. For Field, property ownership was by its nature individual, and property could only be seized with all the protections offered an individual at trial. Anything else was congressional usurpation of the judiciary’s exclusive power to seize
property for crimes. Though relatively new, the assertion of judicial exclusivity was boldly presented by Field as customary and even natural.

Field and the Sharp Edge of Admiralty Law

Even as confiscation was upheld on narrow grounds, Field wrote the majority opinion in a number of subsequent cases that held particular confiscations to be illegal. His technique for undermining confiscation was an exaggerated adherence to doctrinal technicalities, particularly those arising out of admiralty law. Field was not generally a high legal formalist; instead, he often arrived at results with little textual grounding. Yet in cases where a confiscation could be struck down on technical grounds, Field was brutally exacting. While Field had lost in *Miller*, he thereafter applied rigid, even aggressive, doctrinal inflexibility, making the Confiscation Acts almost impossible to enforce.

Both the First and Second Confiscation Acts provided that proceedings for confiscation should conform as much as possible to proceedings in admiralty law or revenue collection. This was a somewhat confusing instruction, in that admiralty jurisdiction did not normally extend to seizures on land, or revenue collection to enemy confiscation. Both were settled, highly specialized areas of law, each with arcane peculiarities and idiosyncratic requirements. Chief Justice Chase acknowledged this ill fit between admiralty, revenue, and confiscation in an early case arising out of the First Confiscation Act, *Union Insurance Company v. U.S.* Chase did not labor to align confiscation with admiralty, but held that “when we look beyond the mere words to the obvious intent” of Congress, admiralty could be seen as a template for confiscation and not a controlling body of law.

Field rejected any notion of a “template” and turned to formalism in an attempt to undo property confiscation. In *Tyler v. Defrees*, a case announced soon after *Miller*, Field wrote a blistering dissent asserting that confiscation must precisely resemble seizures in revenue cases. In revenue cases, property was seized by an executive officer who brought it into court, where it was effectively seized again by a judicial officer and so brought under the court’s control. In confiscation cases, judicial officers—normally the marshals—seized the property in the first place, and no “second seizure” was observed. Field claimed that the slight departure from revenue proceedings in this case made the confiscation invalid.

Writing for the majority, Justice Samuel Miller accused Field of attempting to accomplish what he had been unable to achieve in *Miller*. If Field’s constricted interpretation was adhered to, then “the confiscation acts would be nugatory from the difficulty of putting them judicially in force, though their constitutionality be conceded.” The analogy to admiralty and revenue law called for “reasonable and sound rules,” not “a system of procedure so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute.” For his part, Field essentially admitted that his resort to formalism was another method of undermining the law. Responding to Miller’s charge of raising an “unsubstantial objection,” Field railed, “I answer that no objection is narrow or unsubstantial which goes to the jurisdiction of the court to forfeit the property upon ex parte proceedings, without a hearing.”

In subsequent decisions, the Court was split, as Field was occasionally able to convince the Court to adopt his formalist objections to confiscation. In *Winchester v. U.S.*, the executor of the will of John C. Jenkins sought to recover the proceeds of the sale of 168 bales of cotton from Jenkins’ Mississippi plantation that had been confiscated and later sold. Field held for the Court that the confiscation was invalid on the grounds that the executive branch had never formally seized the property, and “the executive seizure is the foundation of all subsequent proceedings under the Confiscation Act.” Field was not always able
John Slidell and his wife (pictured) were prominent Confederates who owned substantial property in New Orleans. Their confiscation case drew nationwide attention when it came before the Supreme Court, and the public pressured the Justices to uphold the seizure of their lavish property. In his 1873 opinion for the Court, Justice Strong saved the confiscation of the Slidells' property.

to carry the majority, but his resort to high formalism did slow—and, in some instances, prevent—the confiscation of property.\textsuperscript{72}

The Question of Permanent Confiscation

The next great question for confiscation was whether property could be confiscated forever or only for the lifetime of the offender. This had been the crucial issue that had drawn the threat of Lincoln's veto. It was, in fact, the threshold question that determined whether confiscation could ultimately be considered legitimate or successful at all. The Constitution explicitly prohibits bills of attainder, or the conviction of those named guilty of treason in legislation, and corruption of blood, or a prohibition on heirs inheriting property as part of the punishment for treason. If these constitutional provisions were interpreted to mean that confiscation of property by the federal government could only be temporary, then confiscation was doomed to failure.
Temporary confiscation meant the government’s taking title to a life estate in confiscated property and would give the government control over the property only so long as its former owner remained alive. After death, it would revert to the former owner’s heirs. In material terms, a life estate meant lasting confusion and a deep reduction in the value of virtually all confiscated property. A former rebel might die tomorrow or in fifty years or more. When the government sold confiscated land at auction, it could sell only a life estate, not a fee simple title. Heirs to confiscated property, awaiting the death of the offender, could in the meantime sue to prevent the waste of the property. The record-keeping required over the course of decades to keep track of who retained what interest in the land would be extremely onerous. In short, as a practical matter, temporary confiscation would almost guarantee a failure to raise much money or to result in anything other than litigious chaos.

As a conceptual matter, the question of temporary or permanent confiscation meant the difference between a property-seizure regime based on republican ideology and one based more closely on the idea of individual property rights as sacrosanct. Revolutionary confiscation was permanent, and not just because there was not yet a Fifth Amendment. It was permanent because one’s ownership of property was explicitly based on continuing loyalty to the political community, a theme that was reiterated over and over again in the confiscation statutes passed by colonial legislatures. The inclusion of a Just Compensation Clause in the Constitution, as well as the attainder and corruption-of-blood provisions, represented a significant shift toward a more liberal, individual conception. Yet the question remained of whether violent disloyalty to the nation—treason on a massive scale—could allow for the legitimate, permanent seizure of enemy property, even if it was domestic.

Lincoln had hoped to squelch any controversy over this question by forcing the inclusion of an “explanatory resolution” providing that property could be seized only for the lifetime of the offender. In a key radical victory, confiscation had been seemingly permanent in the bill initially passed by both houses of Congress. Lincoln’s Resolution soon completely upset the delicate legislative maneuvering that had led to the bold assertion of the power of Congress to permanently seize property without compensation. For Lincoln, this was an illegitimate encroachment on the rights of property.

Importantly, the Joint Resolution did not settle the issue as Lincoln had hoped, and permanent property confiscation remained a live controversy. In both Congress and the courts, powerful voices continued to assert that the Constitution did not prohibit permanent confiscation. In a ringing endorsement of the radical position, Judge John C. Underwood, in Alexandria’s restored U.S. District Court for Eastern Virginia, delivered an opinion entirely at odds with Lincoln’s position. Underwood,
who had been a small-town lawyer in private practice in upstate New York, and then secretary of the Emigrant Aid and Homestead Society, had received a recess appointment by Lincoln in March 1863.\footnote{74} In the case of \textit{U.S. v. Right Title and Interest of Hugh Latham}, he read the constitutional provisions on bills of attainder and corruption of blood “except during the life” of the offender as prohibiting the sometime practice of the British Parliament of seizing the land and personal property of those considered traitors after their deaths. The explanatory resolution simply brought the Second Confiscation Act within this requirement. To read the resolution as limiting confiscation to life estates would be an absurdity, because it would mean that an explanatory provision had been passed that effectively destroyed the original bill itself. “It cannot be supposed,” he declared, “that Congress intended to repeal its own act by the resolution, or so to emasculate it as to make it worse than a nullity.”\footnote{75}

To emasculate the Act was precisely Lincoln’s intention. The “explanatory” Joint Resolution did not explain anything. Rather it forced into the bill, on the last day of the legislative session and under threat of a veto, the President’s understanding of the Constitution. Thus, Underwood was presented with a bill that provided for property confiscation and an accompanying resolution that made property confiscation unworkable. If, Underwood claimed, the law was read to require that “only a life estate is to be confiscated,” then the underlying purposes of the bill were undermined—and the reading would “defeat the leading objects” of the legislation itself. Such a reading would “promote jealousy and hatred between the holders of life estates and reversionary interests,” and would in any event raise little money because “if only a life interest is to be acquired, no purchaser could afford to take on so uncertain a tenure.”\footnote{76} Underwood ordered that all confiscated property sold in his district be sold in perpetuity and offered the federal judiciary a radical interpretation of the Second Confiscation Act.

At the same time, Congress was divided over precisely the same issue. In the first session of the 38th Congress, Lyman Trumbull and Charles Sumner in the Senate and George Julian in the House pressed for the repeal of Lincoln’s Joint Resolution. Both houses of Congress ultimately repealed the resolution in 1864. Early in the session, the House passed a resolution that essentially adopted Underwood’s reading of the Constitution. The resolution provided that the last clause of Lincoln’s Resolution be replaced with the instruction that no confiscation would take place that was “contrary to the Constitution of the United States.” This removed the language permitting only the confiscation of a life estate and was an implicit restatement of Underwood’s argument that more was permitted by the Constitution. The resolution passed 83–76.

On February 17, 1864, during consideration of the bill establishing the Freedmen’s Bureau, Trumbull submitted a resolution providing that the operative clause of the Second Confiscation Act’s Joint Resolution be “hereby repealed.” The amendment was tabled along with the rest of the bill and did not surface again until June 28. On that day, the amendment passed 23–15 with support from radical Republicans and opposition from Democrats and conservative Republicans such as Jacob Collamer and Edgar Cowan. Two days later, on June 30, the whole of the Freedmen’s Bureau bill was referred to a House committee, where consideration of the bill was postponed until December 20. This had the effect of delaying joint consideration of the measures repealing Lincoln’s resolution, and a common bill was never passed.

The Supreme Court soon slammed the door on these broad interpretations of the power of Congress to permanently confiscate property in the 1870 case of \textit{Bigelow v. Forest}.\footnote{77} In this case, a tract of land in eastern Virginia belonging to French Forrest, an officer in the Confederate Navy, had been seized by a U.S. Attorney in September 1863 and ordered confiscated under the Second
Confiscation Act by the U.S. District Court for the Eastern District of Virginia on November 9. The land was sold in July 1864 to the highest bidder, one Buntley, who then sold the deed to Bigelow. Forrest died without a will on November 24, 1866. His son Douglas, asserting that the confiscation was good only for the life of the offender (his father), brought an action of ejectment against Bigelow, and the case worked its way to the Supreme Court.

As of 1869, Underwood’s opinion in the Latham case was still the most prominent ruling on this issue by a federal court. In Bigelow, however, Justice William Strong utterly rejected Underwood’s interpretation. Strong’s language was a model of conservative
Republican thinking on confiscation and went to great lengths to squash the radical interpretation of Lincoln's explanatory resolution. The resolution was not, Strong contended, simply a cautious reiteration that all constitutional limitations must be observed. Instead, it was an explicit limitation that did not explain the bill so much as amend it. For Strong, "the act and the resolution are to be construed together," and taken together, they could "admit of no doubt" that the U.S. could seize property only for the "life of the person for whose act it had been seized." The U.S. could not, of course, sell any more than it possessed. Whether he understood it at the time or not, Bigelow had been sold a life interest in the confiscated estate of French Forrest—an interest that expired along with Forrest on November 24, 1866. Strong also made clear his view that Lincoln's Resolution had saved the Second Confiscation Act from unconstitutionality. The resolution ensured that "the punishment inflicted" upon a property owner subject to the Act was "not to descend to his children." Thus "his heritable blood is not corrupted." 78

Bigelow represented a signal triumph for liberal property ideology and liberal constitutionalism. Efforts in Congress to repeal the explanatory Resolution now faced a hostile Supreme Court ready to overturn such a move. The legal interpretation allowing for permanent confiscation had been demolished by the nation's highest court. As a practical matter, all the U.S. could sell was a terribly uncertain life estate that might well last for only a short time—as Bigelow learned. In addition, all those who had purchased confiscated property were now put in the position of keeping tabs on a former rebel—in all likelihood a stranger—or waiting for the day his or her heirs came to take back the property. Underwood had argued that, as a matter of policy, Congress could not have intended to pass an explanatory resolution that confined the courts and the executive to seizing and selling life estates. Such a reading, he feared, would "open the door to absurdis and calamities." 79 In practice, his fears had come to pass.

Apart from its significance for the reading of the Civil War confiscation acts, Bigelow had wider significance for the future of congressional confiscation. During the American Revolution, disloyal property had been permanently seized, as part of a republican vision of the overriding importance of allegiance to the polity. This vision had not altogether died by the 1860s, and it had been maintained by radicals like Charles Sumner in Congress during the confiscation debates. Bigelow represented a direct repudiation of this view. Before Bigelow, Lincoln's resolution had been an argument; afterwards, it was constitutional law. After Bigelow, permanent, uncompensated property confiscation for disloyalty was practically impossible and conceptually illegitimate. However, despite the certainty of Strong's language, the issue was still, as a historical matter, unsettled; indeed,
it was controversial during Strong's own time. In reading his opinion, it is striking to remember that Bigelow settled the question not by maintaining an established tradition, but by rejecting a much older tradition of legislative confiscation.

**Presidential Pardons and Instrumental Confiscation**

The Constitution grants the President the power "to grant reprieves and pardons for offences against the United States." The power of the sovereign to offer "grace" to offenders within the Anglo-American legal system was ancient, or, as Chief Justice Marshall declared, "had been exercised from time immemorial."\(^{80}\) Presidents Lincoln and Johnson—both of whom considered the Civil War one to preserve the Union, not to remake the South—found in the executive's broad prerogative to pardon a powerful policy tool. Lincoln issued his first general pardon on December 8, 1863. In it, he offered the vast bulk of those taking part in the rebellion the chance to sign a loyalty oath. Once taken, they were granted a "full pardon" with, among other things, the "restoration of rights of property, except as to slaves, and in property cases where rights of third parties have intervened."\(^{81}\) This proclamation thus gave the vast bulk of rebels an opportunity to escape property confiscation, while at the same time preventing the return of property that had already been confiscated. In 1864, Lincoln issued a second proclamation reiterating his offer of pardons for those who had "sufficiently returned to their obedience to the Constitution."\(^{82}\)

On taking office, President Johnson quickly issued pardon proclamations that reflected his professed hatred for the South's slave-owning planter class. On May 29,
1865, in two separate proclamations, he issued a broad amnesty that included the reestablishment of all property rights excluding slaves. Johnson, however, excepted fourteen separate classes from the proclamation, including those who owned in excess of $20,000 of taxable property; they were forced to apply for individual pardons. A dedicated opponent of black suffrage, Johnson took steps to align himself with the white yeoman class in the South, and also to liberally grant individual pardons to rich Southerners, eventually totaling over 7,000 individual pardons. As 1865 progressed, Johnson “further encouraged white Southerners to look upon the President as their ally and protector.”\(^{83}\) In August, he ordered the return of abandoned and confiscated property to those who had been pardoned. Even more expansive general pardons followed, culminating on Christmas 1868, when a lame-duck Johnson proclaimed an unconditional general amnesty for those who had taken part in the rebellion.

Johnson’s Christmas amnesty proclaimed the “restoration of all rights, privileges and immunities under the Constitution” and had potentially broad implications for confiscation.\(^{84}\) Without question, it ended any new prosecutions. All Southerners supporting the rebellion were given a full unconditional pardon and were free from any future prosecution as rebels. In its breadth, the Christmas pardon also threatened to undo any past confiscation. In past decisions, the Supreme Court had held that a presidential pardon barred the U.S. from afterwards seeking to confiscate the offender’s property.\(^{85}\) Left undecided was the effect of a pardon on past confiscations.\(^{86}\) This question came before Field who, a decade earlier, had written the Court’s leading pardon case.\(^{87}\)

In the October 1877 term, the Court heard the case of *Knote v. U.S.*\(^{88}\) Knote was a Virginia resident whose personal property was confiscated and sold for $11,000, with the proceeds deposited into the U.S. Treasury. Johnson’s amnesty proclamation applied “to all and to every person who directly or indirectly participated in the late insurrection” and unconditionally bestowed “a full pardon.”\(^{89}\) Citing the pardon, Knote sued for the reversal of the confiscation against him and reimbursement for assets seized and sold. The stakes were considerable: given the breadth of the Christmas pardon’s language, a holding that the pardon had undone confiscation for Knote could undo confiscation for all former rebels. In ruling on the retroactivity of pardons, Field had a chance to undo confiscation altogether. Yet he did not.

In *Knote*, Field upheld past confiscations when reversing them on a massive scale would have hurt the settled expectations of the market and of “innocent” third parties. In general, Field reversed confiscations when there was not more than one subsequent buyer of confiscated property—e.g., in cases where the government seized property and sold it at auction, depositing the proceeds in the Treasury. In these cases, it was relatively easy for Field, the protector of property, to order the return of land, or proceeds from the sale of land, to its original owner when the current possessor of the property was a shrewd speculator who had bought at a discount land auctioned by the U.S. government.

Field denied Knote’s claim, however, and the opinion reveals his instrumentalism in high relief. In pardon cases, Field’s belief in the liberal rights of individual property clashed with a liberal devotion to the unfettered alienation of property. In many instances, confiscated property had re-entered the marketplace, and had been bought and sold in good faith. To undo one was a way to restore property that had been taken unconstitutionally by the government. To undo them all—this was to bring uncertainty to the market and disappoint the reasonable expectations of those seeking to buy and sell property already sold by the government pursuant to a confiscation.

A pardon, Field asserted, “does not make amends for the past.” Once an offense was “established by judicial proceedings,” then any penalty was “presumed to have been rightfully done and justly suffered.” Turning to
confiscation, Field held that a pardon did not “affect any rights which have vested in others directly by the ... judgment of the offence, or which have been acquired by others whilst that judgment was in force.” After property had been confiscated, seized, and sold, “the rights of the parties have become vested, and are as complete as if they were acquired in any other legal way.”

Once the proceeds of a sale had been deposited in the Treasury, not only the subsequent purchaser but also the U.S. government was safe. If “the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be withdrawn by an appropriation.” In cases where confiscated property had not been sold but was in the control of the federal government, however, “property will be restored or its proceeds delivered to the original owner, upon his full pardon.”

Field’s declarations about the Court’s inability to order the U.S. government to pay back confiscated proceeds are quite inconsistent with his other confiscation decisions, and they throw his instrumental jurisprudence on confiscation into high relief. He dissented in Miller and Tyler on the grounds that confiscations were upheld and money not restored. In Winchester; one year after Knote, he reversed a confiscation of cotton and held that “the claimant must have judgment for the amount” claimed. This was a routine remedy in confiscation cases reversed by the Court, particularly those concerning personal property such as cotton that had been sold on the open market. Similarly, Field nowhere else expressed such strong adherence to the notion that once real property had been sold pursuant to confiscation it had, by right, “vested” in other parties. Indeed, in other cases Field urged that title to property be stripped from owners who bought it pursuant to a defective confiscation. Confiscated property had “vested” in everyone who bought it. Implicit in Field’s sudden concern for the protection of property “vested” and “complete” by sale was a larger concern for keeping the government from reversing settled private property transactions.

Instrumental Confiscation at the Turn of the Century

Field’s implicit balancing in Knote became the norm in the Supreme Court’s treatment of confiscation. Nowhere was this more apparent than in the Court’s treatment of the heirs to confiscated land, which ultimately included the Court’s greatest switch—or complete reversal—on any important confiscation issue. The Bigelow decision provided that the government could not constitutionally confiscate property permanently: It could only confiscate property for the lifetime of the offender. In this ruling, the Court had inadvertently lit the fuse on thousands of legal time bombs, set to explode some decades after the Civil War when those whose property had been confiscated started to die off and their heirs came to collect their property. Questions remained over exactly what happened to the land after the offender died. After Bigelow, it was still unclear who held the fee in confiscated property.

There were three possibilities. First, that the U.S. confiscated the whole fee from the rebel, and held it in trust for the heirs, to descend to the heirs upon the rebel’s death. Second, that the U.S. confiscated only a life estate from the rebel, with the remainder vesting, at the moment of confiscation, in the rebel’s heirs. Third, that the U.S. confiscated only a life estate from the rebel, leaving the reversion fee in the rebel. If this was the case, then the rebel could, while still alive, sell the future interest in the property, or title to the land after his or her death. This was an intricate future-interests problem, with important legal and policy consequences. What did the rebel continue to own, if anything? If either the U.S. or the heirs held the ultimate fee in confiscated property, then the rebel owned nothing and could sell nothing. If the rebel owned the future interest then sales of that future interest were valid.
There was little question that rebels were, in practice, routinely selling their reversionary interests in confiscated property up to the decision in *Wallach v. Van Riswick* in 1875.\(^{94}\) This was not surprising, given the sweeping language of Johnson’s general amnesty and the ambiguous language of *Bigelow*. Were all these sales invalid? As a matter of policy, should former rebels retain such broad power over property confiscated from them for disloyalty? *After Bigelow*, with its adamant insistence that confiscation was for the lifetime of the offender alone, it was only a matter of time until heirs of offenders showed up claiming title to the property, forcing the Court to settle these thorny issues.

In *Wallach*, the Court came down firmly on the side of the heirs, holding that a rebel owned no part of property that had been confiscated. In this case, the children and heirs of Charles L. Wallach, an officer in the Confederate army, claimed title to their father’s confiscated land upon his death in 1872 (Wallach’s Washington, D.C. estate had been seized and sold in 1863). Six years before, in 1866, Wallach sold the remaining interest in the land to Van Riswick. The heirs claimed that this sale to Van Riswick was meaningless, and that upon confiscation Wallach owned no remaining interest in the land. The heirs demanded “a decree for delivery of possession” of the land.

Writing for the majority, Justice Strong issued the decree and blasted former rebels who sought to sell future interests in confiscated land. The Court had been wrong to say, as it had in *Bigelow*, that the government had sold under the confiscation acts only “a life estate carved out of a fee.” This language, Strong wrote, “was, perhaps, incautiously used.” He explained: “We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated.” The confiscation of Wallach’s property “left in him no estate or interest of any description.” To give offenders remainder interests in confiscated land “would defeat the avowed purpose of the Confiscation Act.” The whole justification of Lincoln’s explanatory resolution prohibiting confiscation beyond the life of the offender was to prevent against “corruption of blood,” or the unjust, unconstitutional punishment of future generations. “No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers.” To hold otherwise “would give preference to the guilty over the innocent.”\(^{95}\)

Fifteen years later, the Court reversed itself entirely. In 1890, Justice Bradley held in *Illinois Central Railroad v. Bosworth*\(^ {96}\) that the title to confiscated property remained in the rebel. The Court reasoned that this was a necessary inference of property law. The heirs to confiscated property could inherit the property from the offender only if the offender still retained the ultimate title to the property. “Otherwise,” Bradley asked, “how could his heirs take it from him by inheritance?” The Court therefore concluded that the U.S. seized only a life estate from the rebel and that ultimately “the fee remains in him but without the power of alienating it during his life.” The rebel’s fee was “a mere dead estate” in “a condition of suspended animation” and would transmit to his heirs by descent.\(^ {97}\)

Having declared the rebel’s fee in a state of suspended animation, the Court next revived it. Johnson’s sweeping Christmas amnesty of 1868, Bradley argued, restored to offenders their future interests in confiscated property. In *Knute*, Justice Field’s great confiscation pardon case, the Court protected the purchasers of confiscated property, ruling that the pardon did not restore ownership to property already sold. This case did not prohibit the restoration by pardon of future interests in that property, however. Here the Court ruled that the Christmas amnesty had taken the fee out of suspended animation and restored the rebel’s power to alienate future interests. The pardon did not undo the seizure and sale of life estates in confiscated property. It did, however, restore all interests in property that had not vested in
another—"namely, the naked residuary ownership of the property." 98

Two years later, in U. S. v. Dunnington,99 the Court again protected the alienation of rebel property against the claims of the rebels’ heirs. In 1863, the Washington, D.C. property of a rebel, Charles Dunnington, was seized and sold to one A. R. Shepard. Dunnington never sold his reversionary interest, and he died without a will in 1887. Dunnington’s land was adjacent to the U.S. Capitol. Before he died, and without the notice of him or his heirs, Congress condemned the confiscated property to make it part of the Capitol grounds in 1872, paying Shepard market value for it. The heirs never knew about the condemnation proceedings and, upon their father’s death, they asserted that they were entitled to the property or, at the least, new condemnation proceedings. They argued that intervening in the earlier condemnation case was legally impossible, even if they had known about it. They claimed that they had no recognizable interest in the property until the rebel died and it passed to them by descent. In any event, the U.S. could not condemn any more than the purchaser of confiscated property owned, or anything more than a life estate. From a legal standpoint, the heirs were almost certainly correct. Yet the Court rejected their position outright in openly instrumental language. “Such a construction,” Justice Brown wrote, “would be intolerable.” “The march of public improvement,” he asserted, “cannot thus be stayed by uncertainties, complications, or disputes regarding the title to property sought to be condemned.”100

The historical relevance of Wallach on the one hand and Bosworth and Dunnington on the other lies less in the reversal of precedent than in recognizing the social, economic, and ideological pressures operating on the Court in the decades between the decisions. In Wallach, the heirs sought and received title to one Washington, D.C. estate. This was relatively easy to accomplish and unsettled a relatively small set of expectations. In Bosworth, on the other hand, the heirs sought one-sixth of a tract of Louisiana land that had belonged to their father and that, over the years and several sales, had been conveyed to the Illinois Central Railroad. For the Supreme Court to upset what was treated as settled title twenty-five years after the Civil War was too damaging to expectations, inserting uncertainty into land deals that the market considered certain. Bosworth and Dunnington had the effect of ratifying the status quo. To the extent that former rebels had sold the future interest in confiscated property, these sales were validated. To the extent that former rebels had not sold their reversionary interests, they were now free to do so.

Decades removed from the battlefield, the impulse to punish rebels so manifest in Wallach gave way to the preservation of rebel property sales in Bosworth. As the century came to a close, the Court retreated in its confiscation opinions from its earlier stance of punishing rebels and preserving the property rights of individual heirs to one favoring a laissez-faire economic policy that favored the alienability of property, even by rebels. Justice Field, still on the bench, had long favored such a position; now, in these last confiscation cases, so did his colleagues.

**Confiscation and Conquest**

In 1877, the Court issued an important opinion by Justice Field in the case of Williams v. Bruffy,101 the only major confiscation ruling considering the legitimacy not of Union confiscation but of Confederate sequestration. This was a case with broad implications, not just for property, but also for the determination of the legitimacy of Confederate law. Given its idiosyncrasy, Williams benefits from being considered last. In this case, unlike any other, the Court put aside for the most part the ideological balancing of commitments and instead speculated openly on the contingent relationship of property and sovereignty.

In Williams, Pennsylvania creditors sued the estate of George Bruffy of Rockingham
County, in the Shenandoah Valley, for the collection of unpaid debts after the Civil War. Lawyers for the estate claimed that the Sequestration Act had required them to pay the debt to the Confederate government, that they paid off the debt—with interest—to a Confederate district court in January 1862, and that by the terms of the law they were discharged of further responsibility for payment of the debt.

Up to this point, the Supreme Court had recognized the legal validity of commercial transactions inside the Confederacy. Four years earlier, in *Day v. M'cou*, Justice Strong had held that confiscation did not destroy pre-existing mortgages on confiscated property. In the same term as *Williams*, Field wrote *Conrad v. Waples* and its companion case *Burbank v. Conrad*, in which he considered the validity of conveyances in Louisiana by a father to his sons of land and money before the Second Confiscation Act took effect. In confiscation proceedings against the father, Field held that the U.S. could confiscate and sell only property the father owned as of the passage of the Act, explicitly recognizing the validity of transfers before the Act and preventing the confiscation of property conveyed by the father to his sons before July 17, 1862. The plaintiffs claimed that the U.S. was not bound to protect transactions made by rebels inside enemy country, but they were rebuffed by the Court on the grounds that “the character of the parties as rebels did not deprive them of the right to contract with and to sell to each other.” In the Confederacy, the Court held, “all the ordinary business between people of the same community in buying, selling, and exchanging property, movable and immovable could be lawfully carried on.”

If “ordinary” legal transactions were valid inside the Confederacy, then were Confederate legislation or parts thereof also valid? Here Field drew a dramatic line. Federal legislation inside the Confederacy was null and void: There was “no validity in any legislation of the Confederate States which this court can recognize.” Legally speaking, there was no Confederate States of America, and “whatever *de facto* character may be ascribed to Confederate government consists solely in the fact that it maintained a contest with the United States for nearly four years.” Yet “when its military forces were overthrown, it utterly perished and with it all its enactments.” The debt paid by Bruffy was legally meaningless, and his estate was ordered to pay the debt again. The holding had immediate, harsh consequences for defeated Southerners who had obeyed the Sequestration Act: every debt sequestered and paid to the Confederate government remained due to Northern creditors.

The Court’s reasoning was striking, amounting to a nineteenth-century version of the ancient power of conquest. Field unabashedly said that the main reason for the invalidity of Confederate legislation was that they had lost. While he could not deny there was a power called the Confederacy, its legal enactments would only gain legitimacy with military victory. Victory, not natural law or inalienable rights, was, he claimed, the ultimate arbiter of the legitimacy of secession or revolution. In the case of revolution, legislative acts were valid only when the opposition “has expelled the regularly constituted authorities from the seats of power” and “established its own functionaries in their places, so as to represent in fact the sovereignty of the nation.” Thus “the government of England under the Commonwealth” was “established upon the execution of the king and the overthrow of the loyalists.”

In the case of secession, or when “a portion of the inhabitants of a country have separated themselves from the parent state” the validity of the *de facto* government’s acts “depends entirely upon its ultimate success.” If, Field claimed, “it fails to establish itself permanently, all acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.” This was the case in the American Revolution, when the colonists “made good their declaration.
"General Haupt" was the name given to this locomotive—after the first chief of the Union’s military railway service—when it was confiscated from the Confederates.

of independence.” Had they failed to defeat King George, “no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.”

Normally the great explicator of inalienable rights maintained in the Due Process Clause, Field here seems to have bestowed legal legitimacy from the barrel of a gun. A sovereign is sovereign, he suggested, primarily because it can control what constitutes protected property inside a given community. Put another way, without the physical ability to define and set property relations, there is no sovereignty. The Union had no more intrinsically legitimate claim, whether under Locke’s natural law or Lincoln’s democratic theory, to exercise sovereignty over Southern property than the South did to exercise sovereignty over itself. Instead, when the war was over, the Union controlled the land and therefore controlled the types of property claims it would protect and the types it would not. Williams’ claim to Bruffy’s debt was legitimate for no other reason than that the sovereign could force Bruffy to pay. In this case, which turned on fundamental questions of state formation, even someone as ideologically committed as Justice Field argued that law and rights were not wholly natural but, like history, were written—or, more importantly, legitimated—by the winners.

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ENDNOTES

1"An Act to Confiscate Property used for Insurrectionary Purposes," 12 Statutes at Large 319 (1861) (hereinafter the "First Confiscation Act").

2"An Act for the Sequestration of the Estates, Property and Effects of alien Enemies and for the indemnity of citizens of the Confederate States and Persons aiding the same in the existing war with the United States" (hereinafter the "Sequestration Act"), in Acts and Resolutions of the Third Session of the Provisional Congress of the Confederate States (Richmond: Enquirer Book and Job Press, 1861), 57-67.

3"An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes," 12 Statutes at Large 589 (1862) (hereinafter the "Second Confiscation Act").

4Confiscation was in use at other points during the antebellum period, most notably in the seizure of Native American land. William Fisher estimates that of the two billion acres of land acquired from Native American tribes, "approximately one sixth was confiscated unilaterally by a federal statute or Executive Order without compensation." William W. Fisher III, "Property and Power in American History," in Ron Harris et al. (eds.), The History of Law in a Multicultural Society (Burlington, Vermont: Ashgate, 1992), 393-405, 395.


7Dred Scott v. Sanford, 60 U.S. 393 (1857). This anecdote is found in Kermit Hall (ed.), The Supreme Court of the United States (New York: Oxford University Press, 1992), 154.

8Currie, The Constitution in the Supreme Court, 356.

912 Statutes at Large 627 (1862).


13Foner, Reconstruction, 121.

1412 Statutes at Large 319 (1861).

1512 Statutes at Large 589 (1862).

1612 Statutes at Large 821 (1863).

17The most prominent historical account of the Abandoned Property Act remains James G. Randall, "Captured and Abandoned Property During the Civil War," American Historical Review 19 (1913), 65-79.


In 1871, Congress further modified this regime and created the Southern Claims Commission, under the auspices of the Treasury Department, to hear claims for compensation from Unionist Southerners who asserted that they had maintained their loyalty throughout the Civil War. Some 106 commissioners were sent to the South to hear thousands of claims. For a classic study of the Commission, see Frank W. Klingberg, The Southern Claims Commission (Berkeley: University of California Press, 1955). For an excellent recent study on the claims made by freed slaves, see Dylan Penningroth, "Slavery, Freedom, and Social Claims to Property Among African Americans in Liberty County, Georgia, 1850-1880," The Journal of American History (1997), 405-37.

19This is something Randall did not do. His dissertation tends to lump together all seized property when they were, conceptually and in practice, distinct regimes. See James Randall, The Confiscation of Property During the Civil War (Indianapolis, Indiana, 1913).

20Section 5, Second Confiscation Act.

21Preamble, Second Confiscation Act.

22Foner, Reconstruction, 51. Foner later asserts even more starkly that "the Lincoln Administration had left the 1862 Confiscation Act virtually unenforced." Ibid., 158.

23Bates, "General Instructions to District Attorneys and Marshals relative to proceedings under the acts of Congress for Confiscation" (Washington, D.C.), January 8, 1863.

24Marvin R. Cain, Lincoln's Attorney General Edward Bates of Missouri, (Columbia: University of Missouri

For the text of Greeley's letter and commentary on it, see William Ginnapp (ed.) The Civil War and Reconstruction: A Documentary Collection (New York: W. W. Norton, 2001), 125.


Shapiro, Confiscation of Confederate Property in the North, 44.


Military commanders had already been authorized by Lincoln to seize enemy property considered necessary for military purposes. The military had also been authorized to assist U.S. Attorneys in carrying out confiscation. No law on the books had given military commanders a general power of confiscation, though this is how the Acts were read by generals in the field at some points. The best treatment of the Union military's treatment of civilians is Mark Grimsley, The Hard Hand of War: Union Military Policy Toward Southern Civilians (Cambridge, UK: Cambridge University Press, 1995).

David Donald, et al., The Civil War and Reconstruction (New York: W. W. Norton, 2001), 450.

Grimsley, Hard Hand of War, 74–75.

Benedict, Compromise of Principle, 159. On May 29, 1865, Johnson issued an amnesty proclamation that provided for the restoration of all property rights—except for those in slaves—for participants in the rebellion who took an oath pledging support for the Union and for emancipation. Wealthy participants were exempted and were required to apply to the President for individual pardons.

Benedict, Compromise of Principle, 249–50.

Randall, Constitutional Problems Under Lincoln, 291. Randall relied on district court records, and he changed his estimates over the course of his career. He put the figure somewhat lower—at $129,680—in his earlier work, The Confiscation of Property During the Civil War (Indianapolis, 1913). Foner and Randall both date the decline of the active pursuit of new property confiscation to roughly 1867. In that year, Foner argues, Republican setbacks in elections "marked the end of any hope that Northern Republicans would embrace a program of land distribution." Foner, Reconstruction, 316.

See Charles Fairman, Reconstruction and Reunion, 1864–1888 (New York: Macmillan, 1971), 776. Fairman's book, part of the Oliver Wendell Holmes Devise series on the history of the Supreme Court, is a remarkable accomplishment. It is exhaustive and encyclopedic. However, Fairman's account is doctrinally oriented, and does not consider confiscation in the context of property ideology.


83 U.S. 36 (1873).

494 U.S. 113 (1877).

Robert G. McCloskey, American Conservatism in the Age of Enterprise, 87, 125.


Paul Keng, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age (Lawrence: University of Kansas Press, 1997), 5.

Charles McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of

51 See Kens, Justice Stephen Field, 256–65.


54 1 Ky. 385 (1863).

55 Ibid., 29.

56 Ibid., 32.


58 Fairman, Reconstruction and Reunion, 800.

59 78 U.S. 268 (1870). Two other cases on the docket in that same Term could have served as test cases for constitutionality. In Garnett v. U.S., 78 U.S. 256 (1870), two lots belonging to A. Y. P. Garnett in Washington, D.C., were ordered seized in July 1863 by the District Court for the District of Columbia. Garnett appealed to the Supreme Court of the District of Columbia which, the Supreme Court made clear, exercised appellate jurisdiction over the District Court. Nevertheless, the D.C. Supreme Court dismissed the appeal on the grounds that it could not hear writs of error from the District Court. Justice Swayne explained that “in coming to this conclusion the learned court fell into error,” and he remanded the case. Garnett, 258.

In the other case, McVeigh v. U.S., 11 Wall 259 (1870), McVeigh’s Alexandria home and its contents had been confiscated by a Virginia district court during the war. McVeigh, living in Confederate Richmond, appeared in court through his lawyer and sought to answer the charge that his property was liable to confiscation. The judge refused to admit the answer on the grounds that McVeigh was a rebel and an alien enemy with no standing to appear. Justice Swayne took the lower-court judge to task, stating that this ruling was “contrary to the first principles of the social compact and of the administration of Justice,” and sent the case back with instructions to admit McVeigh’s answer. McVeigh, 266. With these cases remanded on jurisdictional and procedural grounds, Miller became the test case.

60 For a detailed discussion of the treatment of Miller in the lower courts, see Fairman, Reconstruction and Reunion, 800–806.

61 Strong often joined with Field in cases turning on commerce power, most notably joining him in dissent in Munn v. Illinois, 94 U.S. 113 (1876). Strong also wrote the opinion in Bigelow v. Forrest, 9 Wall 339 (1870) (see below), holding that confiscation was not constitutional except for the lifetime of the offender. See Michael B. Doughan, “William Strong,” in Hall, Oxford Companion to the Supreme Court, 846.

62 78 U.S. at 306.

63 67 U.S. 635 (1863).

64 Ibid., 307.

65 Ibid.

66 Ibid., 323.

67 Before 1966, admiralty cases were heard on a separate side of federal district courts “where a special terminology and procedure were used.” See Grant Gilmore and Charles L. Black, The Law of Admiralty (New York: Foundation Press, 1975), 34–35. Admiralty jurisdiction attracted Congress because admiralty routinely used in rem prosecutions against property.

68 73 U.S. 759 (1867).

69 78 U.S. 331 (1870). Harry Tyler was a Confederate colonel whose Washington, D.C. house was confiscated and sold during the war.

70 Ibid., 344–45; 352.

71 79 U.S. 372 (1878).

72 See In re Confiscation Cases, 87 U.S. 92 (1873). In this case, Justice Strong saved the confiscation of John Slidell’s New Orleans property, even though the proceedings had been marked by “formal defects.” Slidell was a prominent Confederate diplomat and was quite wealthy, making for a high-profile case and increased public pressure to uphold the seizure of Slidell’s property. Field and Clifford dissented.

73 12 Statutes at Large 627 (1862).


76 Ibid.

77 Wall 339 (1870).
Wall at 352. The issue of the duration of the confiscation
case was one of the only times the Court drew a sharp
distinction between the interpretation of the First and Sec-
(1873), Chief Justice Waite made the argument that be-
because the First Confiscation Act authorized the seizure of
property actually employed in the rebellion, it was anal-
ogous to the seizure of property under the international
laws of war. "In war," he wrote, "the capture of prop-
erty in the hands of the enemy, used or intended to be
used for hostile purposes, is allowed by all civilized na-
tions." Absolute title to this hostile property passed to
the government immediately, in the case of movable prop-
erty, and, unless otherwise provided by treaty, when the
war was ended in the case of immovable property. *Ibid.*, 298–300. Very little property was confiscated under the
First Confiscation Act, and this ruling did not have any
effect on the vast bulk of confiscated property touched by
Bigelow.


Lincoln, "Proclamation of Amnesty and Reconstruc-
tion," December 8, 1863, in Don E. Fehrenbacher (ed.),
*Abraham Lincoln, Speeches and Writings* (New York:
Library of America, 1989), 555–58. Lincoln exempted
from his proclamation all civil and diplomatic Confederate
officers, as well as Confederate judges and high-ranking
officers in the Confederate military and those who mis-
treated prisoners of war.

Lincoln's Proclamation was also an initial step in set-
ing Reconstruction policy. He provided that in any reb-
elling state, once the number of white male voters taking
the oath equaled ten percent of the number of votes cast
in that state in the 1860 presidential election, these voters
could reorganize a state government that would be recog-
nized by the federal government. In opposition, Congress
passed the Wade-Davis Bill on July 2, 1864. This bill
had sweeping emancipation provisions and required fifty
percent of white male voters to take a loyalty oath be-
fore a new state government could be organized. Lincoln
pocket-vetoed the bill. For a full discussion of presidential
Reconstruction policies, see Foner, *Reconstruction*, 176–
226; Donald, et al., *The Civil War and Reconstruction*,
508–23.

Lincoln, "Proclamation Concerning Reconstruction,"
July 8, 1864, in Fehrenbacher, *Speeches and Writings*,
605–6.


15 *Statutes at Large* 711, December 25, 1868.

16 *Armstrong's Foundry*, 56 Wall 766 (1867). This case
arose under the First Confiscation Act. Attorney General
Henry Stanberry argued that the *in rem* proceedings were
against the property itself and that a pardon for John
Armstrong wiping away his guilt had no bearing on the
government's attempt to confiscate a New Orleans foundry
used in support of the Confederacy. Chief Justice Chase
argued that since the Act required the owner's consent to
the use of his property in aid of the rebellion as a condi-
tion of confiscation, forfeiture was a penalty against the
offender, not his property alone. Hence, a pardon absoled
the offender of his guilt and barred confiscation.

In *Mrs. Alexander's Cotton*, 69 U.S. 404 (1864), the
Louisiana owner of 72 bales of seized cotton sued the U.S.
for the proceeds. Roughly three weeks after the seizure,
Mrs. Alexander took Lincoln's December 8, 1863 loyalty
oath and, claimed, among other things, that the pardon re-
stored her property to her. Chase rejected her claim, not
reaching the question of whether pardons were retrospec-
tive, on the grounds that a condition of the pardon was
continued loyalty to the Union, and that by remaining in
enemy territory Mrs. Alexander herself remained an en-
emy. "Whatever might have been the effect of the amnesty,
her deed removed to a loyal state after taking the oath, it
can have none on her relation as an enemy voluntarily re-
sumed by continued residence and interest." *Mrs. Alexan-
der's Cotton*, 69 U.S. at 421.

Field was the author of the leading pardon case of the
was a congressional attempt to block former Confederates
from appearing as lawyers in federal courts. Before being
admitted to practice, all lawyers were required to take an
oath swearing that they had never supported the rebellion.
It was, of course, impossible for former Confederates to take
this oath, and so they were effectively barred from prac-
tice. Garland sued on the grounds that he had received a
full presidential pardon that entitled him to practice in the
federal courts. Field, writing for a divided court, took a
sweeping view of pardons and rebuked congressional at-
ttempts to delimit them. He held that "a pardon reaches both
the punishment prescribed for the offence and the guilt of
the offender; and when the pardon is full it releases the
punishment and blots out the existence of the guilt." A
pardon makes the offender "a new man, and gives him a
new credit and capacity." *Ex parte Garland*, 71 U.S. at
380.

985 U.S. 149 (1877).

99 Ibid.

10 Ibid., 154–55.

10 Ibid.

99 U.S. at 377.

9 See *Conrad v. Waples*, 96 U.S. 279 (1877), in which
Field, reversing a lower court, returned title to New Orleans
real property to two sons whose father had conveyed the
property before the Confiscation Act took effect.

100 U.S. 202 (1875)

100 Ibid., 210–15.

1013 U.S. 92 (1890).

101 Ibid., 103.

8 Ibid., 99–105. See also *Jenkins v. Collard*, 145 U.S. 546,
holding that the Christmas amnesty removed any disability...
preventing the offender from exercising control over the future interest of confiscated property.

99146 U.S. 338 (1892).

100146 U.S. at 349.

101196 U.S. 176 (1877). Interestingly, one of the cases making up the Legal Tender Cases, 79 U.S. 457 (1870) (considering the constitutionality of "greenbacks," or non-redeemable federal paper money), arose out of the sequestration of a flock of sheep in Texas owned by a Mrs. Lee of Pennsylvania. The sheep were sold at auction to one Knox, who paid in Confederate money. After the war, Lee sued Knox and won, at which point Knox was ordered to pay her several thousand dollars in greenbacks. Because of the demise of the Confederacy, Knox bought the same sheep twice—once under invalidated Confederate law and one under triumphant U.S. law.

10218 Wall 156 (1874). In Day, the court recognized the validity a mortgage held against the confiscated Louisiana estate of Judah Benjamin, holding that the purchaser of the confiscated land inherited the mortgage.

10396 U.S. 279 (1877).

10496 U.S. 291 (1877).

105Conrad v. Waples, 96 U.S. at 286.


107Ibid., 185.

108Ibid., 185–86.