The Better Class of People:

Judge Jacob Trieber

and a New Perspective on Judicial Abandonment

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In United States v. Morris *(1903), Judge Jacob Trieber of the United States District Court for the Eastern District of Arkansas found that the Thirteenth Amendment justified federal prosecution of private individuals who violated the Civil Rights Act of 1866's recognition of the right to make or enforce contracts through the Enforcement Act of 1870—a finding overturned by the Supreme Court in* Hodges v. United States *(1906). I argue that Trieber's use of the Thirteenth Amendment reflected an understanding of federalism that has profound implications for the way that legal historians should read the* judicial abandonment narrative*, which can only be fully captured by drawing upon Southern Progressivism. Understanding the* Hodges *story through these mutually constitutive lens necessarily reframes the abandonment narrative, taking into account how contemporaries on the ground actually understood "abandonment." Thus, I argue for a shifting of the narrative's discourse away from a fixation on its timeline and instead toward the motivations of Southern Progressive judges such as Jacob Trieber who believed in* some *federal enforcement—thereby putting into question whether this era should be labeled as an "abandonment" story at all.*

I. The (Incomplete) Judicial Abandonment Narrative

In *United States v. Morris*,[1] Judge Trieber of the Eastern District of Arkansas overruled a demurrer to the indictment of three individuals who had conspired to drive black sawmill workers off the land and out of work. He released what in 1903 seemed to lawyers, judges, and newspapers alike to be a groundbreaking legal conclusion: that the Thirteenth Amendment's reference to "slavery" included the right to be free, that freedom included the right to make and enforce one's contract, and that the federal government could be tasked with enforcing rights otherwise believed to be in the power of the states. In technical terms, the Thirteenth Amendment provided the justification for Sections 5508 and 5510[2] of the Enforcement Act of 1870, which criminalized private (non-state) individuals' conspiracies to violate this and other rights protected by the Civil Rights Act of 1866 ("CRA"), including the right to make or enforce contracts.

The Supreme Court granted the defendants' writ of error on the jurisdictional question of whether the Thirteenth Amendment made the right to contract one guaranteed by the Constitution or laws of the United States and therefore enforceable by federal officials under the

[1] *U.S. v. Morris*, 125 F. 322, 322 (E.D. Ark. 1903).
[2] Rev. Stat. § 5508, 5510 (1873).

Enforcement Act.[3] In the consolidated case of *Hodges v. United States*,[4] by a 7-2 vote, the justices answered in the negative. They rejected the notion that the Thirteenth Amendment or the CRA had effected a fundamental change in the role of the postbellum federal government. They declared the relevant provisions of the Civil Rights Act of 1866 and their reauthorizations through the Enforcement Act of 1870 unconstitutional as applied to these prosecutions. Immediately thereafter, the charges were dropped and the defendants were released.

Legal historians engaging turn-of-the-century *judicial abandonment* consider *Hodges* to be one of the final steps in the march toward "definitive" abandonment of protecting African Americans' rights enshrined in the background principles of the Reconstruction Amendments. Historians of the judicial abandonment narrative concern themselves overwhelmingly with its timeline ("periodization") and, more specifically, where—if at all—to locate the Supreme Court's "break" from its hitherto tacit support for protecting freedmen through federal enforcement of Reconstruction legislation. The narrative is bifurcated into the traditional perspective and the revisionist perspective.

Historians accepting a traditional reading of the judicial abandonment narrative conventionally peg the Court's opinion in *Plessy v. Ferguson*[5] in 1896 as the concluding moment in judicial abandonment. Some historians pin abandonment even earlier, at the end of formal Reconstruction in 1877,[6] and focus instead on the importance of the *Slaughter-House Cases* as

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[3] Pamela S. Karlan, "Contracting the Thirteenth Amendment: *Hodges v. United States,*" 85 B.U. L. REV. 783, 790–91 (2005).
[4] 203 U.S. 1 (1906); Trieber wrote the same opinion for two separate whitecapping trials. *See* Karlan, "Contracting the Thirteenth Amendment," at 786.
[5] 163 U.S. 537 (1896).
[6] *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 179–80 (1986); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER THE LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875 488 (1982); ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION 217 (1985); Michael J. Klarman,

the starting point.[7] By drawing on assumptions that white American conservatives had grown tired of the "race issue," these historians cross-reference bigger-picture external influences unto the Court, such as the Panic of 1873, Compromise of 1876, the Spanish-American War, or the rise of the Ku Klux Klan. They argue that a "break" occurred in the timeline, whereby the Supreme Court abruptly betrayed the background principles of Reconstruction by issuing opinions that limited the scope and meaning of the Reconstruction Amendments.[8] *Plessy* endorsed state-imposed racial segregation and, thus, wholesale federal retreat from these principles.

Revisionist historians, however, cast doubt on the importance of *Plessy*'s role in this periodization. While traditional historians believe that abandonment changed greatly from 1866 to 1896, the revisionists argue that this change was not so drastic. They focus on jurisprudential understandings of federalism,[9] conceptions of individual rights,[10] and the state action doctrine to advocate for a "continuity" interpretation of abandonment.[11] Pamela Brandwein deserves credit

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"The Plessy Era," 1998 S. CT. REV. 303, 303–414 (1998); PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 130–49 (1963); C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 245 (1951).

[7] See *Slaughter-House Cases*, 83 U.S. 36 (1873) (narrowing the list of rights inherent to citizenship under the Constitution and not state governments to those enumerated by the Civil Rights Act of 1866). For a detailed examination of the external forces affecting Justice Miller's majority opinion in the *Slaughter-House Cases*, *see* MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 189–210 (2003).

[8] *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987) (arguing that the Court faced external pressures such as the Compromise of 1876 in "breaking" with previous Eleventh Amendment jurisprudence by making state sovereign immunity more robust).

[9] Hyman & Wiecek, *Equal Justice Under Law* at 501; *See* MARY FRANCES BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 128 n.88 (1971).

[10] *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 530–31 (2002); LOREN MILLER, THE PETITIONERS 158 (1966).

[11] *See, e.g.*, Pamela Brandwein, "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law and Society Review* 41: 343–86 (2007).

for staking out a prominent place in this narrative through her work, *Rethinking the Judicial Settlement of Reconstruction* (2011), which chronicles the shift that took place from Waite Court jurisprudence of 1875-1888 to that of the Fuller Court from 1888-1910 by recasting the moments where judicial abandonment reached its apex. In this reading, *Plessy* reflects a transitional, but not conclusive (and certainly not concluding) role in abandonment periodization. A "continuity" story deconstructs the notion that there was a definitive endpoint of judicial abandonment; Brandwein opens up new avenues of examining the Court's ongoing role in shaping the law of civil rights during the Fuller Court era.[12]

She and other revisionists emphasize the importance of the "conferred" versus "secured" rights distinction.[13] States by default had jurisdiction over "secured" rights—rights that pre-dated the Constitution (e.g. common law-recognized rights and "natural rights")—and Congress could only enforce to protect those rights indirectly: when the state "fails to comply with the duty" to enforce such rights ("state neglect"[14]).[15] On the other hand, Congress could directly regulate

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[12] Some scholars in recent years have aptly elevated *Hodges v. United States* as an important moment in this timeline. *See generally* David E. Bernstein, "Thoughts on *Hodges v. United States*," 85 B.U. L. Rev. 811 (2005); Karlan, "Contracting the Thirteenth Amendment;" *see also* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 79–83, 91–92, 105 (2004).

[13] *See, e.g.*, Michael Collins, "Justice Bradley's Civil Rights Odyssey Revisited," 70 TUL. L. REV. 1979, 1991 (1995–1996). Michael Collins disputes the Compromise of 1876 as a "break" in Justice Bradley's views by highlighting that Bradley required, throughout his jurisprudence, some greater nexus between the wrongful private conduct and the basic rights of equal citizenship associated with the abolition of slavery (i.e. something above and beyond racial animus itself). For Collins, this reduces the need to turn to external political forces to explain how abandonment took place. *Id.* at 1981–82.

[14] Pamela Brandwein focuses on the "state neglect" nuance of the secured/conferred rights distinction. That is, if states neglected to provide their citizens remedies for violations of certain rights, the federal government could intervene. Brandwein assesses centrist Republicans' support for the theory of state neglect in tandem with their derision of public accommodation rights in order to argue that political and historical contingency ran well past *Plessy* and pushed "definitive" abandonment into the twentieth century. Brandwein, *Rethinking*, at 12–14. *See also*

rights that were "created or conferred" by the Constitution itself (e.g. the rights correctly attributed to the Thirteenth Amendment, passed as Section Two legislation). The *doctrinal* result was the understanding that most civil rights were to be enforced by state courts, whether those civil rights were rooted in common law, natural law, the CRA, or possible "fundamental rights;" only "corrective" federal court remedial action was allowed to protect civil rights.[16] The *historiographical* result is a shift in the periodization of definitive judicial abandonment, using the distinction to paint a more connected arc from 1866 to 1896 and beyond. For revisionists, the distinction is crucial to the continuity narrative because it recognizes a common denominator beneath juridical interpretations of state and federal power in the nineteenth and early-twentieth centuries—from the *Slaughter-House Cases* and before to *Hodges* and beyond.

Thus, both narratives focus on periodization—a top-down structural methodology. But what do we make of these two timelines? Does the periodization of this break matter? Why, one may ask, does the judicial abandonment narrative largely ignore what motivated turn-of-the-century federal judges' conception of governmental structure?

WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 196 (1988).

[15] Brandwein, *Rethinking*, at 12–14. As Southern legislatures and local Southern law enforcement agencies refused to enforce the law against race-based violence perpetrated by the Ku Klux Klan, the legal concept of state neglect arose from the idea that state governments were either unable or in refusal to restore order and the rule of law, constituting "state action" for purposes of the Fourteenth Amendment. LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872 37–39 (1996). Williams thoroughly details the inability of law enforcement and local legislatures to adequately deal with the widespread violence throughout South Carolina, resulting in magistrate judges refusing to even hear cases regarding violence against blacks.

[16] G. Edward White discusses the distinction with respect to "conferred/created" civil rights associated with one's "national citizenship" that could be directly federally. White argues that the Court's approach to civil rights cases "treated the federal government both as an overseer of state governments" with respect to this distinction, thus suggesting a needed modification of the conventional view of the Court as "abandoning the egalitarian promise of Reconstruction." G. EDWARD WHITE, LAW IN AMERICAN HISTORY FROM RECONSTRUCTION THROUGH THE 1920S, vol. II 31–32 (2016).

This paper seeks to answer those questions by arguing that the judicial abandonment narrative fails to consider the social and intellectual histories that are constitutive with judicial abandonment. Abandonment historians concern themselves with the granular niceties of doctrine through Supreme Court cases and a Northern, national discourse, premised on the notion that the people with power in the South have already abandoned African Americans. This paper explicates parallel social narratives—this paper will focus on Southern Progressivism[17]—to shed light on the abandonment story beyond the doctrine alone. Engaging Southern Progressivism literature on what animated members of the turn-of-the-century Southern social, political, and legal elite informs what judicial abandonment actually looked like on the ground in 1903, and, in turn, renders the abandonment periodization question less important than *why* abandonment happened and *what* abandonment looked like.

Trieber's worldview—his commitment to the "New South Creed," the effort by Southern Progressives to dismantle the South's legacy of backwardness and violence and instead promote the region as one of opportunity, success, and justice[18] —resulted in a particular manifestation of jurisprudence that complicates the conventional abandonment narrative. Trieber believed in a well-functioning federal system, whereby courts should defer to Southern states' power over the federal government to facilitate the legal relationship between its citizens and protect those citizens' rights. As members of the Southern business class and social elite, Southern Progressive judges had particular investments in the move toward modernizing the South. While Trieber may

[17] While my paper focuses specifically on the New South Creed's practical effects on Trieber's jurisprudence—and, consequently, its importance to the judicial abandonment narrative—I will frequently refer to Southern Progressivism in order to make the point that the judicial abandonment narrative would benefit from other narratives. Indeed, though the New South Creed is less of a narrative and more of a manifestation of Southern Progressivism, the former also had adherents outside of the Southern Progressive clique. *See* PAUL M. GASTON, THE NEW SOUTH CREED: A STUDY IN SOUTHERN MYTHMAKING 225, 245 (1970).

[18] *Id.* at 219.

not believe that his judgeship had a dual role that imported an "Arkansas-first" philosophy, the overwhelming deference that Trieber gave to Arkansans' collective voice to forge their own destiny resulted in a jurisprudence that favored state sovereignty. In this paper, I refer to this jurisprudence as "local paternalism."[19]

But equally as important to Trieber were the narrow and limited circumstances in which federal power *was needed* to vindicate the rights of Southerners when the *failure* to of states to do so meant stalling the South's march toward modernization. Trieber's *Morris* opinion demonstrates his belief that whitecapping was one such circumstance: whether because of the intransigence and racism of Arkansan Democrats or the crucial and "fundamental" nature of one's right not to be lynched, Trieber saw the federal government's power to protect Americans as appropriate when state governments could not or would not do it themselves. Despite an Arkansas-first philosophy, Trieber did not see a tension between local paternalism and

[19] Importantly, I choose the word "paternalism" *not* to connect Trieber's jurisprudential philosophy to the Paternalist strain of Southern Progressivism. Indeed, as discussed throughout this paper, Trieber's jurisprudence did not prioritize upholding legislation that would put blacks in the protective care of Southern white elites as "Paternalist" literature conveys. For how "Paternalism" fits into the Southern Progressive movement—a topic this essay does *not* concern itself with—*see* Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921," 5 LAW & HIST. REV. 249 (1987); GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914 200–02, 210 (1971). *Rather*, I use the term in a more general sense to convey simply Judge Trieber's concern for the best interest of Arkansan society as a whole. In this way, Trieber's "local" concern is a belief that, as a federal judge, he could put the interests of Arkansans above the priorities of national legislators by contributing to the Progressive impulse that used legal and social iterations of racial harmony to effect change in race relations. *See* JOHN SAMUEL EZELL, THE SOUTH SINCE 1865 400–05 (1963). A general tension for the white planter class existed for how best to maintain social order while simultaneously protecting the interest of white crop tenants; historian Jeannie Whayne points to Judge Trieber when discussing the oft-competing interests between the "ignorant and vicious" whitecappers motivated by economic desperation and those of the Southern Progressive elite who bemoaned the *failure* of a *general* planter-class paternalism to protect blacks' interests. JEANNIE M. WHAYNE, A NEW PLANTATION SOUTH: LAND, LABOR, AND FEDERAL FAVOR IN TWENTIETH-CENTURY ARKANSAS 64–71 (1996).

reasonable federal enforcement: the *local* should not always stay local, and the federal system born out of Reconstruction accommodated for this approach. This paper explicates Trieber's worldview, how it affected his jurisprudence, and what that result says about judicial abandonment.

Historians must reexamine judicial abandonment history and indeed the framing of the narrative as a story of "abandonment."[20] Indeed, Trieber's interpretation of the federal powers under the Thirteenth Amendment's Section Two may have been the most expansive ever, and historians have noted the importance of Trieber's connection to the moderate wing of the Republican Party and impulse toward Progressive advocacy for Southern modernization.[21] Without attention to the social and intellectual forces influencing Trieber's jurisprudence, one may assume that Trieber's commitment to improve the lives of African Americans was a mere cog in the complex machinery of his federal docket and duty to enforce individual rights. This paper instead shifts the focus away from Supreme Court doctrine and toward the external forces constitutive of that doctrine, away from removed national institutions and toward the Southern judges themselves, wrestling with and balancing these issues as both jurists and Southern social elites. Doing so provides a missing texture to the narrative that ultimately problematizes its framing and leads one to question whether judicial abandonment is really an "abandonment" story at all.

In Part II, I introduce *United States v. Morris* and the important doctrinal forces at issue in the case. In Part III, I will explicate local paternalism from Trieber's statements, speeches,

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[20] Judge Trieber is in fact a vastly understudied character in American legal history. For more on Jacob Trieber the man, *see* Gerald W. Heaney, "Jacob Trieber: Lawyer, Politician, Judge," 8 U.A.L.R. L. J. 421 (1985–1986).

[21] *See* Tsesis, *The Thirteenth Amendment*, at 79–80; *see also* Whayne, *A New Plantation South*, at 53.

writings, and records outside the courtroom to assess his commitment to the New South Creed and how that commitment manifested inside Trieber's courtroom and published opinions. In Part IV, I conclude by arguing that historians *should* synthesize the abandonment and Southern Progressivism narratives in order to have a more complete understanding of turn-of-the-century abandonment. Abandonment historians obsessed with periodization lose sight of how social and intellectual trends actually affected key players at the local level.

It is significant that Progressives in the Southern judiciary committed to an expansion of civil rights for blacks were nevertheless deterred from abandoning their commitment to federalism. This paper offers a new take on the framing of the judicial abandonment narrative by drawing upon local paternalism generally, and the *Morris* case specifically, to demonstrate the need for texture in the abandonment story, helpfully qualifying the conventional assumption that conservative Democrats and formalist judges left blacks to their own devices. Rather, there was a committed group of Southern Progressive judges who believed ardently in paternalism to modernize the South, preserve state sovereignty, and fulfill their obligation to protect African Americans after the Civil War. This take on judicial abandonment is a more human story, one that rescues Trieber from being a caricature of abandonment history. Whatever could be said of Trieber's efforts to interpret the Constitution, abandonment was not it.

II. *U.S. v. Morris* and *Hodges v. U.S.*

Part II introduces Trieber's *United States v. Morris* opinion. In doing so, I set up the doctrinal context for the historical moment in which local paternalism manifested in a particularly impactful way. As the subsequent parts of the paper will demonstrate, Trieber and

other judges of the Southern elite struggled over two competing concerns. On the one hand, they strove to actualize the New South Creed and usher in newfound entrepreneurship for Southern society by protecting the rule of law and promoting the potential of its citizens; on the other hand, they believed in a strict dividing line between state sovereignty and the limited powers of the federal government. While this essay focuses on the social and intellectual forces surrounding that struggle, a brief introduction of the doctrine will provide the context for how the external forces of Southern Progressivism influenced Trieber's jurisprudence.

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On October 6, 1903, twenty-seven Arkansans appeared in front of the federal grand jury of the United States District Court for the Eastern District of Arkansas in order to determine whether they could be indicted for "whitecapping." The proceedings involved two sets of indictments: twelve had allegedly intimidated a group of sharecroppers by posting notices on the homes of African Americans demanding that they leave Cross County, Arkansas; the other fifteen were accused of appearing armed at a sawmill in the ridge community of White Hall in Poinsett County with demands that the sawmill's ownership replace its African American employees with whites.[22] The United States Attorney, William G. Whipple, charged the latter set of defendants with acting "with the purpose of compelling [the black workers] by violence and threats and otherwise to remove from said place of business, to stop said work and to cease the enjoyment" of the right and privilege of contracting for their labor.[23] Judge Trieber read the charges to the federal grand jury; all twenty-seven men were indicted. On the very next day, Judge Trieber overruled the defendants' demurrer to the indictment (on the grounds that the CRA

[22] *Morris*, 125 F. at 322.
[23] Transcript of Record at 4, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term) [hereinafter *Hodges* Record].

could not justify the prosecutions for their conduct), publishing his opinion under the case name of *United States v. Morris, et al.* Trieber concluded that Congress, through the Thirteenth Amendment of the Constitution, had the power to protect the right to make or enforce contracts because "the denial of such privileges is an element of servitude within the meaning of that amendment,"[24] and the Enforcement Act of 1870 could thus be used to prosecute the defendants for their unconstitutional conduct.[25]

Despite Trieber's expansive reading of the CRA, the Enforcement Act rested on a theory of federal power that had come under increasing judicial attack at every level of the state and federal judiciary.[26] Indeed, Trieber's finding that the Thirteenth Amendment was required to uphold the constitutionality of the Act of 1866 was doctrinally incomplete. The Act of 1866 had in fact been *re*authorized as *Fourteenth* Amendment legislation as well.[27] Still, it was not obvious to anybody, including Whipple, that the victims' "right to make or enforce contracts"

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[24] *Morris*, 125 F. at 330.

[25] The Enforcement Act of 1870, when originally enacted, put to rest doubts that the Civil Rights Act of 1866 was a shift in the scope of Congress' power over state governments and provided the substance to the Thirteenth Amendment. It was introduced as legislation under Section Five of the Fourteenth Amendment (adopted in 1868) and Section Two of the Fifteenth Amendment (adopted in 1870, just weeks before debate over the Enforcement Act took full force). Section Six of the Act of 1866 (as well as Sections Four and Five) applied to private persons who acted to deprive an individual of their civil rights. Through Section Eighteen of the Enforcement Act of 1870, the Civil Rights Act of 1866 was reenacted under the Fourteenth and Fifteenth Amendments.

[26] *See* Owen M. Fiss, "Troubled Beginnings of the Modern State, 1888–1910," *History of the Supreme Court of the United States* (ed. Stanley N. Katz), vol. VIII (1993), 155–84.

[27] Indeed, the Grant administration began extensive federal involvement in whitecapping *precisely because* states were unable—or unwilling—to enforce the rule of law. In a May 4, 1871 proclamation, President Ulysses S. Grant stated, "The failure of local communities to furnish such means for the attainment of results so earnestly desired imposes upon the National Government the duty of putting forth all its energies for the protection of its citizens, of every race and color and for the restoration of peace and order throughout the entire country." *Chicago Tribune*, May 5, 1871, 1.

was violated in the requisite manner to trigger Thirteenth Amendment protection.[28] While Trieber held that U.S. Attorney Whipple drew the indictment *properly* in *Morris* because the charges connected the allegations of the defendants' interference with the workers' ability to "make or enforce contracts" to the Civil Rights Act of 1866's protections against racial discrimination, Trieber assessed state action with a narrower lens than this history might suggest: a state's failure to enforce its own police powers did not constitute state action opening the door to federal enforcement and thus precluded the Fourteenth Amendment being the locus for federal enforcement.[29] Thus, *only* the Thirteenth Amendment could support the CRA.[30]

Trieber found that the federal government had the authority to intervene in the lives of individuals when racial discrimination resulted in the deprivation of an individual's right to contract, but pinned the locus for that power on the Thirteenth Amendment alone. In order to justify the constitutionality of the Act of 1866 to protect this right,[31] Trieber cited Justice

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[28] *See* Demurrer to Indictment, *Hodges* Record at 5–6 (arguing that sections 1978 and 5508 "are not constitutionally within the jurisdiction of the courts of the United States, and . . . are judicially cognizable by State tribunals only and legislative action thereon is among the rights reserved by the several States and inhibited to Congress by the Constitution").

[29] *Morris*, 125 F. at 328. Whipple grounded his prosecutions in the text of two pieces of Reconstruction legislation. The first was Section One of the Civil Rights Act of 1866, which stipulated, *inter alia*, that "all persons born in the United States . . . shall have the same right to make and enforce contracts." The second came from Section Six the Enforcement Act of 1870, which made it illegal for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment" of his or her rights as a citizen or to deprive a citizen of those rights "by reason of his color or race."

[30] *Id*. at 322–23. This is evident from his quoting of Bradley's *Cruikshank* opinion in *Morris*: "All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the state courts, *unless, indeed, the state should deny to the class of persons referred to the equal protection of the laws.*" Thus, to "constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude."

[31] Trieber quickly dispensed with the defendants' argument that Section 5508 from the Enforcement Act of 1870—the other statute at issue in the case—was unconstitutional by

Bradley's decision in the *Civil Rights Cases* to conclude that "Congress is, therefore, authorized by the provisions of the thirteenth amendment to legislate against acts of individuals, as well as of the states, in all matters necessary for the protection of the rights granted by that amendment."[32] While Trieber took great pains to find that the *Hodges* defendants relegated the victims to the "badges and incidents of slavery,"[33] his concern was less about the nature of the right and more with the locus of power for enforcing that right. This paper demonstrates that Trieber's jurisprudential method for determining where that locus of power was available correlated with a vision that otherwise deferred to state power but allowed for federal enforcement when it would benefit the citizens he sought to protect.

Three years after *Morris*, the Supreme Court overruled Trieber's expansive definition of slavery in *Hodges v. United States*. The case before the Supreme Court focused on whether the Thirteenth Amendment made the right to contract one that the federal government could enforce through the Enforcement Act of 1870. Rueben Hodges and his co-appellants argued that the

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pointing to the Supreme Court's decision in *Ex parte Yarbrough* upholding the provision. 110 U.S. 651 (1884).

[32] *Morris*, 125 F. at 323 (quoting *Civil Rights Cases*, 109 U.S. 3, 23 (1883) ("Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.")).

[33] Trieber liberally quoted Justice Field's dissent in *Slaughter-House Cases*: The abolition of slavery and involuntary servitude was intended to make every one born in this country a free man, and as such to give him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. . . . A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a free man. *Morris*, 125 F. at 331 (quoting *Slaughter-House Cases*, 83 U.S. at 90 (Field, J., dissenting)). As the right to contract was of the "fundamental or natural rights, recognized among all free people," it was states' obligation to protect the rights of every one of its citizens; and, as African Americans had been granted citizenship by the Fourteenth Amendment, the Thirteenth Amendment justified the Reconstruction legislation allowing the federal government to step in when a state failed to do so.

Constitution simply recognized the right to contract and did not in fact protect it, thus leaving such protection to the state of Arkansas.[34] Their argument also rested on the fact that Judge Trieber's definition of slavery was untenable and that the "badges and incidents of slavery" could not include mere discrimination.[35] The government's argument, made by Attorney General William Moody, pointed to the language of the CRA as proof that it did.[36] Moody contended that Congress enacted Section Two of the Thirteenth Amendment for the purpose of protecting any individual deprived of their fundamental rights by states, like the right of contract, on the basis of their race.[37] Moody stressed the "practical freedom" embodied by the Thirteenth Amendment: the consequences of denying federal enforcement would result in blacks living on the "outskirts of civilization, [] becom[ing] more dangerous than the wild beasts, because he has a higher intelligence than the most intelligent beast."[38]

Justice David Josiah Brewer, writing for the majority, disagreed: the CRA was not "appropriate legislation" under Section Two of the Thirteenth Amendment.[39] While Congress could pass legislation to end slavery as proscribed by the Amendment, the majority disagreed that the right to contract was a right that fell under one's right to be free. Brewer also rejected Trieber's expansive definition of slavery: "[Emancipation] is the denunciation of a condition, and not a declaration in favor of a particular people. . . . [N]o mere personal assault or trespass or

[34] *See* Abstract, Argument, and Brief for Plaintiffs in Error, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term), 6–8.
[35] *Id.*
[36] *See* Brief for the United States, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term), 5.
[37] *Id.* at 11–13.
[38] *See* Oral Argument of the Attorney-General for the United States, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term), 40.
[39] *Id.* at 10.

appropriation operates to reduce the individual to a condition of slavery."[40] Brewer focused on the choice of citizenship to reject Trieber's paternalistic sentiment:

> At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have . . . established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. . . . Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the Nation . . . but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.[41]

Brewer and the majority thus held that, as applied, the Civil Rights Act of 1866 and its reenactment by the Enforcement Act of 1870 were unconstitutional, as there was no source of authority for them in the Constitution for the conduct of the *Hodges* defendants. Only days later, Whipple dropped the charges on Hodges and the other two defendants, as well as all other criminal defendants whose convictions hung in the balance of the *Hodges* outcome.

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Trieber's finding in the *Morris* opinion—that only the Thirteenth Amendment could provide Congress the power to enforce the Act of 1866—proved, ultimately, to be determinative for the *Hodges* majority. The *Morris* decision demonstrates the consequences of Trieber's conception of federalism at the turn of the century.[42] *Morris* elevates the importance of the CRA in the judicial abandonment narrative. I argue in Part III that Trieber's worldview affected his

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[40] *Hodges*, 203 U.S. at 16–18.
[41] *Id.* at 19–20.
[42] *See* William Forbath, Hendrik Hartog & Martha Minow, "Introduction: Legal Histories from Below," 1985 *Wis. L. Rev.* 759, 759–66 (1985). Indeed, the immediate on-the-ground results of the *Hodges* decision coalesced into a disastrous situation for blacks in Arkansas and the "Old Southwest" (Arkansas, Texas, and Missouri), which experienced some of the worst of the violence during the crest of white violence unto blacks in the 1880s and 1890s. Approximately ninety percent of this violence occurred in the South as a whole. *See* Berry, *Black Resistance, White Law*, at 124.

jurisprudence and ultimately led him to view the locus of federal power narrowly. Doing so adds the missing texture from the narrative that otherwise remains too internalist and incomplete in describing what judicial abandonment looked like to those on the ground. I turn now to what *Trieber* believed he was doing—protecting, rather than abandoning, the citizens of Arkansas.

III. Southern Progressivism in Jacob Trieber's Courtroom

I argue in the following part of this paper that Trieber's worldview affected his jurisprudence significantly, in turn shaping a moment in judicial abandonment history that looked quite different from the conventional "abandonment" narrative. While the bulk of Part III explicates the contours of which circumstances did (e.g. rule-of-law concerns) and did not (e.g. business concerns) justify federal protection of individual rights, I will first contextualize Trieber's "Arkansas-first" philosophy inside the courtroom by discussing the New South Creed, the ideological vision that animated Trieber's Progressive philosophy for Arkansas.

A. The New South Creed

Southern Progressives, such as Tennessee Congressman James Phelan, understood the Creed to be the "manifestation in all walks of life and in all undertakings of the progressive spirit," the embodiment of the social and industrial changes that would usher in a "spirit of enterprise."[43] They looked to the North's economic values as a model for modernity and

[43] JAMES PHELAN, THE NEW SOUTH. THE DEMOCRATIC POSITION ON THE TARIFF: SPEECH DELIVERED AT COVINGTON, TENN. 1–6 (1886).

prosperity, pointing to innovations in industry and agricultural diversification as reasons for its relative economic power. Trieber, Phelan, and other Progressives connected the economic objectives of a future, modern Southern economy to the maintenance of racial harmony.

Historians engaging the Southern Progressivism narrative have attempted to couch some of the values associated with these goals into a sub-narrative, referring to a movement called the "New South" or the "New South Creed," the belief that the postbellum South could achieve modernity and prosperity by following the Northern model of economic and agricultural diversification and industrialization. Doing so, and defining what the Creed was, has proved to be easier said than done.[44] Paul Gaston characterizes the New South Creed as a myth created by postbellum Southerners that fused a "collection of romantic pictures of the Old South . . . dominated by a beneficent plantation tradition, sustained by a unique code of honor, and peopled by happy, amusing slaves" with a "homegrown plan of reconstruction."[45] Edward Ayers defines the goals of the Creed's adherents as Southern industrialization, and with this emphasis, the interests of the South's businessmen, industrialists, and commercial agriculturalists shaped what the modern South should look like.[46] George Fredrickson, by contrast, focuses on a modern South that achieved social harmony between the races, the classes, and former Unionists, through paternalism and in coordination with the business sector.[47] And C. Vann Woodward emphasizes the political implications of a New South, in which "mainstream" Southerners opposed the tactics of Northern carpetbaggers and Populist agrarians that seemed unSouthern and thus less

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[44] *See* Gaston, *New South Creed*, at 8–12.
[45] *Id.* at 6, 219.
[46] EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 413-26 (1992). This discussion also includes a helpful discussion on the confluence of economic interests of the New South Creed with the social fabric at-large, considering spheres such as education, labor, class, and race. *See also id.* at 19–25.
[47] GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 285, 297–99, 301–12, 325 (1971).

attractive than the South-first political framework supported by the Redeemers.[48] Henry W. Grady, a contemporary Creed adherent, perhaps stated best the underlying belief of the Creed's proponents: that it was "impossible for the people of the south, either now or hereafter, to get along without the negro," or else, Southern progress would be broken by "mere prejudice."[49]

Trieber and a notable cast of Progressives in the Southern federal judiciary understood that moderate white Southerners must police their own racial problems.[50] They interpreted the Reconstruction Amendments as having required state governments to reform from within. And using their power from the bench, members of the Southern Progressive judiciary sought to protect blacks and expedite the modernization of the South. In doing so, these advocates took a long-term view of race-relations in the South and believed that the framers of the Reconstruction Amendments sought such a solution to the Southern race problem that embraced white paternalism over newly freed blacks.

Supporters of the Creed used the law to reinforce the benefits of societal order and peace in advancing the interests of all Americans, white and black. They believed strongly that African Americans should be treated fairly and for the benefit of society as a whole. They accepted the results of the Civil War, and though loyal Southerners, they believed that slavery had inhibited Southern development. To continue in the slavery mindset was to drag the South down. Jacob Trieber espoused the New South Creed in his correspondences, articles, and speeches, in addition

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[48] C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913 371–72 (1951).
[49] Henry Woodfin Grady, *Atlanta Constitution*, speech, May 18, 1883; *see* HENRY WOODFIN GRADY, THE NEW SOUTH AND OTHER ADDRESSES, ed. Edna Henry Lee Turpin (1969).
[50] For detailed commentary on the judges, legal advocates, and socialites promoting the New South Creed's manifestation through state governments' official organs, see BRENT AUCOIN, A RIFT IN THE CLOUDS: RACE AND THE SOUTHERN FEDERAL JUDICIARY, 1900-1910 14 (2007); TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890 190–91 (1999); CHARLES W. WYNES, ED., FORGOTTEN VOICES: DISSENTING SOUTHERNERS IN AN AGE OF CONFORMITY 5 (1967).

to his findings in his courtroom that attempted to keep Arkansas state sovereignty strong and Arkansas state court jurisdiction robust—all in pursuit of a localized paternalism that would modernize the South.[51]

In the remainder of Part III, I will discuss various spheres of society in which the law with regards to federal power took different shapes. Explicating Trieber's understanding of federalism in the context of his commitment to the Creed sheds light on the most important factors contributing to his jurisprudence. Trieber's understanding of the Thirteenth Amendment played a crucial role in the development of American constitutional law and the American judiciary's abandonment of its commitment to protect African Americans' civil rights after the Civil War—even while Trieber did everything he could to prevent such abandonment.

B. Rule of Law

In 1890, the popular Reverend Henry M. Field toured the South and spoke to "southern moderates" who supported paternalism. In contrast to the paternalism of old, Field argued that a "revived paternalism" would succeed in "bringing the old masters and their former slaves into a mutual understanding and good feeling that will be for the prosperity and happiness of both."[52]

Trieber's commitment to the rule of law in Arkansas constitutes one such motivation. As a devotee to the Republican Party, he believed that progress—which, for him, necessitated Republican leadership—would come about as Arkansans lived in an increasingly safer and justice-based society, a view shared by Progressive Republicans of the day. In his capacity as judge, Trieber believed that the Thirteenth and Fourteenth Amendments were powerful tools

[51] Aucoin, *A Rift in the Clouds*, at 84–90.
[52] HENRY M. FIELD, BRIGHT SKIES AND DARK SHADOWS 109–11 (2009).

now in the national government's arsenal to use when necessary. As a Republican businessman and member of the social elite, this meant citizens receiving protection from law enforcement that was ready and willing to assist them in times of mob violence and lynchings and thus the ability to benefit from a modernized economy.

No one reflected this rule-of-law philosophy better than Southern Progressive Judge (and ex-Democratic Governor of Alabama) Thomas Goode Jones, U.S. District Judge for the Northern and Middle Districts of Alabama. Jones and Trieber became close confidants throughout their tenure on their respective federal benches, freely exchanging letters to each other on the nature of their own legal opinions. Even in the 1890s as Governor, Jones expressed his paternalistic views that matched those of Trieber's: "The Negro race is under us . . . He is in our power. We are his custodians . . . we should extend to him, as far as possible, all the civil rights that will fit him to be a decent and self-respecting, law-abiding, and intelligent citizen. . . . If we do not lift them up, they will drag us down."[53]

Jones sought advice from other adherents to the New South Creed on whether Judge Trieber's *Morris* opinion could be used to prosecute similar cases in Alabama as well. One of the few who answered his call was U.S. Attorney Thomas Roulhac for the Northern District of Alabama. Roulhac wrote to Jones and noted that, despite the *Morris* opinion approaching "distasteful[ness] as it may be to us of states' rights antecedents and instruction," there was "no other conclusion [regarding the extent of the statutes] from the consideration of Judge Trieber's opinion and the authorities cited therein, in *United States v. Morris*" that Trieber's construction

[53] Fredrickson, *The Black Image*, at 49.

of the Act of 1866 was correct. Roulhac continued by saying that, to him, it was a "very forceful and logical opinion," and could be sustained in other federal courts as well.[54]

But as a Southern Progressive steeped in New South Creed-thinking, Trieber's jurisprudence walked a fine tightrope in order to reach the point at which federal power could usurp traditional state power. The following sub-sections discuss various examples of Judge Trieber squaring federalism issues with practical concerns for how to instill legal and social stability into the state he wanted to modernize and move into the New South. Unlike when issues concerning the business sector of Arkansas came into Trieber's courtroom, concerns for the rule of law in Arkansas and the South more broadly compelled Trieber to find that the Constitution justified federal jurisdiction and the enforcement of federal law in the South.

1. Civil Order

Trieber understood the realm of racism and white supremacy he operated within. Whitecapping, known also as "night riding" and "bald knobbing" (most common in Cross and Poinsett counties, as well as in other communities in Arkansas, Mississippi, Tennessee, and Missouri), was the widespread violent practice most prolific in the 1880s and 1890s that saw white farmers (often of cotton) committing acts of violence and vandalism against black tenant farmers and more occasionally squatters. Explicit racism and dedications to the Old South kept race relations at an ever-boiling temper point in the modern Deep South and beyond, often approaching social chaos.[55] In Arkansas's industrial towns and agricultural rural lands, poor whitecappers sought to drive black farmers away from their lands to keep the labor pool white

[54] Thomas Roulhac to Judge Jones, Oct. 5, 1904, Jones Papers, ADAH, box 3, file 29.
[55] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2d ed.) 81 (1955) (analyzing the "economic, political and social frustrations" that led to a "permission[]-to-hate" black sharecroppers).

and increase their value in their cotton crops.[56] Whites and blacks alike sought to work on new plantations established in the 1880s, and whites felt threatened by the massive number of blacks attempting to enter the work force.[57]

Although the Arkansas General Assembly passed Act 12 to outlaw whitecapping in 1909, the practice continued for decades.[58] Only as a result of President Franklin Roosevelt's New Deal program and the impact of World War II's mechanization in the tenant-farming sector that reduced the need for human labor did the practice of whitecapping cease entirely.[59] Indeed, Act 12 was used on numerous occasions to suppress striking workers. By 1916, Judge William Driver reported to the *Osceola Times* that "[i]f anyone ever loses his life while engaged in night riding, the man who kills him in defense of his home shall never go to jail."[60] Cross County and other areas of the cotton regions of eastern Arkansas experienced whitecapping on a normal

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[56] Ezell, *The South Since* 1865, at 123–24 (discussing the importance of cotton with respect to racial tensions and providing helpful statistics and analysis on how the planter class systematized wage slavery); Whayne, *A New Plantation South*, at 47–48, 53 ("That some planted paled at Trieber's open invitation to federal government to meddle in the South's labor and racial relationships is not to be doubted. That others found it acceptable is indicative of the lengths to which the social chaos prevalent in the Arkansas delta had driven them.")

[57] *See* Berry, *Black Resistance, White Law*, at 128 – 29 (discussing the various acts of whitecapping before and during 1906, the year of the *Hodges* decision).

[58] Whayne, *A New Plantation South*, at 52. On the Catcher Race Riot of 1923, see Wanda M. Gray, "Catcher Race Riot of 1923," THE ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE, *available at* http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=5885 (last accessed Apr. 8, 2015).

[59] For more sources on whitecapping in Arkansas and beyond, see Jeanie Horn, "Night Riders," THE ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE, *available at* http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=3008 (last accessed Apr. 8, 2015); MARY HARTMAN & ELMO INGENTHRON, BALD KNOBBERS, VIGILANTES ON THE OZARKS FRONTIER (1996); Guy Lancaster, "Nightriding and Racial Cleansing in the Arkansas River Valley." *Arkansas Historical Quarterly* 72: 242–64 (Autumn 2013).

[60] *Osceola Times*, Apr. 28, 1916.

basis. White farmers became enraged as former black sharecroppers saved enough money to purchase or lease lands, which they could farm as independent planters.[61]

Relatedly, peonage abounded the Arkansan countryside by 1905. In Phillips County, where Jacob Trieber lived, at least 75% of blacks were virtual slaves on the cotton farming areas of the east-Arkansas delta. White planters would advance cottonseed and cotton-farming supplies at inflated prices to black sharecroppers, who were then forced to sell their advances at below-market prices due to market forces manipulating by the planters. This would put the sharecropper in debt to the planters, and because most of the sharecroppers "voluntarily" signed contracts with the planters mandating their physical stay on the farms until they paid back their advances, the result was de facto slavery.[62]

The Peonage Cases demonstrate Trieber's strongest condemnation of his state's citizens' reticence to honor the spirit of the Thirteenth Amendment and establish rule of law in the cotton regions of Arkansas. White planters had prevented, in more than one instance, blacks from trucking their cotton to Helena or Memphis where they might obtain a fair price.[63] As a businessman and banker of Helena, Trieber's business associates often had their hands in the cotton sector. Trieber believed that a strong Arkansas business sector meant a strong Arkansan footprint in the Southern cotton industry and, accordingly, higher prices and fair competition between employers and employees alike.

The Peonage Cases marked the first effort in the history of Arkansas to use the Thirteenth Amendment to curtail peonage as a slavery-like condition.[64] Judge Trieber's

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[61] Heaney, "Jacob Trieber," at 451.
[62] *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).
[63] Heaney, "Jacob Trieber" at 452.
[64] *The Peonage Cases*, 136 F. at 707 (E.D. Ark 1905).

instructions to the grand jury reflect that Trieber would have a tough time getting the jury to secure indictments and convictions against the defendants for the simple reason that most Arkansans perceived peonage to be lawful due to its prevalence in society. "It is wholly immaterial," Trieber stressed of peonage contracts, "whether the contract whereby the laborer is to work out an indebtness due from him to the employer [was entered] into voluntarily or not. The laws of the United States declare all such contracts null and void, and they cannot be enforced." Accordingly, "any person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of, any person to a condition of peonage, is, and I stated before, guilty of an offense against the laws of the United States, and subject to indictment by a grand jury of the district in which the acts are committed."[65]

But Trieber's charge also included dicta of sorts that suggest his reassurance that this was not a case in which federal enforcement overstepped Arkansas' rights. Indeed, Trieber noted that Arkansan state law was "based upon the same principle" as the controlling federal law in this case, as state law prohibited parties from exacting usurious interest in the formation of a contract, and so to permit federal jurisdiction in this criminal case did not overstep state law.[66]

After concluding the instructional portion of is charge, Trieber added what amounted to postscript by discussing the necessity to enforce federal law in cases as important as those of civil rights and basic human dignity. Trieber referred to the Peonage Abolition Act of 1867 as one of the most "salutary in existence."[67] Nevertheless, Trieber commanded that it mattered not "what you or my individual views as to the wisdom of the enactment of this law" because the enforcement of legislation passed in order to honor the spirit of the Thirteenth Amendment and

[65] *Id.* at 708–09.
[66] *Id.* at 709.
[67] *Id.*

"protect the poor laborer against the exactions of the wealthy employer, compelling him to agree to work in many instances for a mere pittance for a loan made to relieve his most necessary wants."[68] The importance of protecting the right against slavery or involuntary servitude as conveyed by the Thirteenth Amendment meant that the federal government must insure that individuals and Arkansas generally would be free from peonage and could then progress into a more modernized and competitive economy. Just as Trieber would argue for an expansive application of federal enforcement against slavery in *Morris*, Trieber supported the prosecutions of those in the business of making peonage contracts.[69]

Cases concerning violence, terrorism, and flagrant abuses of human dignity reflect the outer bounds of what Judge Trieber believed the Thirteenth Amendments protected against from everything subject only to state enforcement and state jurisdiction. *The Peonage Cases* and other prosecutions against whitecapping provide context for Trieber's belief that protecting citizens from basic facets of safety and community stability was both good for Arkansas and consistent with state action jurisprudence. Trieber believed that certain categories of rights (such as that against slavery-like conditions, difficulties in actualizing one's right to contract, and the like) justified federal enforcement and legal jurisdiction, and rule-of-law concerns would influence his opinion in *Morris* just as it did in these efforts within his courtroom.

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[68] *Id.*

[69] *The Peonage Cases* ultimately saw the defendants plead guilty and one defendant discharge for wont of evidence. Despite this victory, Trieber's concern over the widespread belief in the lawfulness of peonage reigned true. Such was the case in courts throughout the South. One Judge, William B. Sheppard of the United States District Court for the Northern District of Florida, stated to the courtroom that he believed the defendants who had been indicted for peonage were guilty despite the jury's verdict to the contrary. *See* PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 19–20 (1972). Even when guilty verdicts were obtained, many of the verdicts were reversed. *See, e.g.*, *Clyatt v. U.S.*, 197 U.S. 207 (1905) (reversing on the suspect procedural ground that although the defendant had enslaved the black individual, he had not "returned" him to peonage as alleged in the indictment because the black individual had not previously been in peonage).

It is worth noting that Trieber's views on this matter were in the minority with regards to what kinds of rights the federal government could enforce to protect. Popular national law journals at the time emphasized that the Fourteenth Amendment was "universally conceded to be restraints on state action and are not intended to furnish redress for the invasion of individual rights."[70] Thus, where two or more persons conspired to deprive a "colored person equal protection of the laws," common understanding dictated that such individuals would be punishable by state law and not by acts of Congress.[71] Many authors of law journal articles spoke about "civil" rights in terms of ordinary substantive rights and took for granted that the right to make or enforce contracts was not the type of "liberty" that justified federal intervention on the basis of the Reconstruction Amendments.[72] That Trieber believed otherwise highlights the expansiveness of the *Morris* decision against many conventional federalism understandings of the day.

2. Voting Protections for Republican-Leaning Voters

Arkansans' right to vote displayed another area in which Trieber believed that rule-of-law concerns justified federal jurisdiction and thus federal enforcement. The more access blacks had to the voting booth, the more likely that the dying Republican party of Arkansas could be revived. With this in mind, voting protections represented an area in which the state was failing, and for Trieber, using the Constitution to remedy this failure not only comported with his

[70] Comment, 16 YALE L.J. 192, 201 (Issue 3, 1906–1907).
[71] D.H. Pingrey, "Legal View of Racial Discrimination," 39 AM. L. REG. 69, 79 (Jan.–Dec. 1891).
[72] *See, e.g.*, Charles E. Shattuck, "True Meaning of the Term Liberty in Those Clauses in the Federal and State Constitutions Which Protect Life Liberty and Property," 4 HARV. L. REV. 365, 391–92 (1890–1891).

understanding of an area that Congress could act on, but also would progress Southern modernization by removing a rule-of-law concern otherwise restricting such progress.

Unquestionably, Trieber did not share the same views as some of his fellow Republican conservatives on the role of judges or even society writ large with respect to African Americans. From an early age, Trieber's political ambitions in the legal arena were never divorced from his devotion to the Republican Party,[73] and by 1896, Trieber had embraced fully the reconciliationist position of his fellow Republicans. Trieber's party had begun formally retreating from supporting federal protection of African Americans after Senator Henry Cabot Lodge's "Force Bill" failed to pass in 1890.[74] In order to stymie the influence of the Populists and their potential to challenge McKinley's election in 1896, McKinley's coalesced around the motif of anti-silver, portraying Bryan's support of it as endorsing class warfare, pitting blacks and the lower class against industrial businessmen and middle class Americans.[75] Of the Republican Party Platform endorsed by Trieber at the Republican National Convention in St. Louis, the *New York Times*

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[73] After Trieber had been chosen by Arkansas Republican Party boss General Powell Clayton to hold a seat as a delegate to the 1880 Republican National Convention (making him, at twenty-seven, the youngest delegate at the convention), Trieber quickly identified himself with the "Old Guard" of the Republican Party, pro-Union and moderate in his political temperament. This would be reinforced by his unsuccessful 1892 Congressional run: though losing to Democratic candidate P.D. McCulloch, Trieber ran an election that typified the type of reconciliation that President Grant and the future President McKinley would embody.

[74] STANLEY P. HIRSHSON, FAREWELL TO THE BLOODY SHIRT: NORTHERN REPUBLICANS & THE SOUTHERN NEGRO, 1877-93 234–35 (1962). The bill, which would have expanded voting protection for African Americans, failed as a result of inter- and intra-party politics and defection of the business class, which did not support federal intervention into issues of labor. The McKinley administration furthered the Republican retreat from raising the race question.

[75] Republican Senator William Chandler, writing in the *North American Review*, argued that the Democrats "undertook to organize the solid South with a few states of the West, to menace the prosperity of the North and East, by as wicked a movement as that after which is was [sic] deliberately patterned, the Southern rebellion of 1861." Senator William E. Chandler, "Issues and Prospects of the Campaign," *North American Review* 163:2 (Aug. 1896). For more on the Election of 1896 and its political campaigns, see HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 296–301 (2008).

wrote approvingly of McKinley's "sagacity . . . in deprecating sectional division and appealing to a common patriotism to protect the nation's honor."[76]

Trieber fully supported the need for the law to be enforced so as to prevent the type of violence and lawlessness rampant in Arkansas. While Trieber believed that the South could reform itself on most issues and especially those relating to Arkansas' economy and business interests (discussed below), Trieber understood that certain Southern social problems—namely, whitecapping—touched and concerned basic tenets of the rights guaranteed by the Reconstruction Amendments and accordingly justified the enforcement of federal law within the South. Trieber viewed whitecapping as a threat to Southern order—and with it, a threat to Republican politics and the business communities alike. Trieber saw black subjugation as a cause for wholesale Republican losses across the state, as blacks were intimidated to stay at home and not vote.[77] If laws protecting blacks' right to make and enforce contracts could be applied and enforced equally, the vision of the New South could be fulfilled and help the Republican Party; likewise, Trieber's party-line support of tax incentives for railroad and manufacturing corporations hinged on the ability for businesses to operate in Arkansas without fear that violence and lawlessness would destabilize their financial decisions.[78] If racists were to reform their attitudes about blacks for the good of the South, the Southern business community could effectively engage the labor force and promulgate greater economic opportunity for African

[76] *New York Times*, Oct. 24, 1896.
[77] Trieber noted to Henry King, the editor of the *St. Louis Globe-Democrat*, that "if a fair election could be had throughout the State, we have no doubt but [t]hat Col. H. L. Remmel [the Republican candidate for governor in 1900] could carry the State by about 15,000 majority, but we have no right to expect that, as our election laws make it impossible to have a fair election." Jacob Trieber to Henry King, Aug. 8, 1900, Letters of Jacob Trieber, 1898–1903, Letterpress book, § 1, shelf 2, book no. 41, Arkansas History Commission, Little Rock, AR.
[78] Heaney, "Jacob Trieber," at 463–64.

Americans. In other words, while federal law should not interfere with the Arkansan business sector, federal law *should* be used to protect it.

As a political moderate, Trieber's unbridled support for the Republican Party's focus on reconciliation as an election theme and policy principle was consonant with the view that the North should *not* play a paternalistic role with respect to the South.[79] But, for Trieber, this did not mean that federal law and Congress had no role to play. Rather, Trieber believed that the result of the Civil War necessarily meant that the federal government could and should protect the basic tenets of (African-American) citizenship as understood by its framers at the time. This included the right to vote. Trieber wrote of the Arkansas Republicans' difficulty in gaining support in the state: "I honestly believe, [Democrats' sole platform of 'D— the Nigger'] is the most popular platform for a Democrat, and carries more of them into office, than any other, [the political issue of] silver not excepted."[80] That the Republican Party had much to gain from the black vote was no coincidence in this calculus, but so too did rule-of-law concerns factor into Trieber's view that federal law should protect the vote for Republican candidates.

3. Functioning Courts

Providing all Arkansans access to the voter booth represented an important pillar of Judge Trieber's commitment to the rule of law. Another pillar was their access to Arkansas' courts, state and federal. Trieber believed that a balanced and well-functioning court system was

[79] Writing to President Roosevelt about racial tension in the South, Trieber noted, "[C]ommon justice on the one hand, and a little patience on the other, will solve the [race] problem, not immediately, but in the course of time." Jacob Trieber to Theodore Roosevelt, Feb. 27. 1905, Theodore Roosevelt Papers, Library of Congress, microfilm, series 1, reel 53.
[80] Jacob Trieber to Major Charles Gordon Newman, Nov. 21, 1898, Letters of Jacob Trieber, 1898–1903, Letterpress book, § 1, shelf 2, book no. 41, Arkansas History Commission, Little Rock, AR.

crucial to the rule of law. That is, the Creed could only be realized in Arkansas if its courts—state *and* federal—worked efficiently to preserve peace for those that sought its protection.

Writing in the *Arkansas State Bar Proceedings of 1908-1910*, Trieber discussed the legal preeminence of federal law over state law in applications such as bankruptcy or admiralty, but differentiates this from when it *should* be used. Quoting Justice Harlan, if the Union is to be "preserved and handed down intact to posterity, National power and State power must go hand in hand in harmony with the Constitution."[81] With this principle of harmony between national and state powers, Trieber exemplifies the importance of federal courts exercising careful discretion when dealing with state affairs with respect to habeas corpus. Trieber cited *Ex parte Royall*[82] for the proposition that, though federal courts have jurisdiction under the acts of Congress to grant the writ of habeas corpus for the purpose of releasing a person in custody in violation of the Constitution or laws of the United States, it is a matter of discretion whether, "under the peculiar circumstances of each case," the federal court *should* in fact exercise that discretion.[83] Trieber

[81] Jacob Trieber, "Relationship Between State and National Courts," 42 AM. L. REV. 321, 360 (May-Jun., 1908).
[82] 117 U.S. 241 (1886).
[83] Trieber, "Relationship," at 347. Trieber quoted the Court stating in its holding that they could not "suppose that Congress intended to compel [state] Courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State Courts, exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States." After noting that courts have discretion as to the time and mode in which it will choose to prosecute an alleged offender, the Court states that "discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between Courts *equally bound to guard and protect rights secured by the Constitution*." *See id.* at 348.

noted in the article various cases that demonstrate the practice of comity as the rule ever since and should stay that way in order to preserve the needed harmony between the states.[84]

Aside from habeas, Trieber stressed the deference that courts should give to states when concerning state-internal issues. For example, with respect to admiralty law, Trieber noted "the [Supreme] Court, while insisting upon the exclusive jurisdiction of the Admiralty Courts, recognized the right of the States to enlarge its powers by State legislation." That is, with respect to navigable waters within state boundaries (like rivers, including those of Arkansas), only state statutes which attempted to confer upon states a remedy for marine torts and marine contracts by proceedings strictly *in rem* conflicted with the Act of Congress of 1845 (which concerned federal jurisdiction over certain admiralty claims as conferred by the relevant Act of 1789). Accordingly, state statutes could be passed conferring admiralty jurisdiction to state courts for a wide range of cases, and only the cases traditionally seen as strictly federal were covered by the Act.[85]

Trieber was particularly cautious when it came to decisions by national courts that affected Arkansans' money. Recognizing that state insolvency statutes or state recognition of common law precepts meant insolvency proceedings often began in state courts, Trieber noted that state courts often have jurisdiction over these proceedings *until* a bankruptcy court initiates its own action, in which cases the state statutes or common law are suspended. When conflict

[84] Trieber discusses the 1871 Supreme Court case *Tarble's Case*, in which it was held that a state court or state judge could not issue a writ of habeas corpus for the discharge of a person held under the authority or by an official of the federal government. Nevertheless, Trieber points out Chief Justice Samuel P. Chase's dissent. Chase believed that state courts had the right to inquire into the legality of the imprisonment of one held by the federal government sanctioned by a "national" court. "To deny the right of State courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by *habeas corpus* against arbitrary imprisonment in a large class of cases; and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution." *Tarble's Case*, 80 U.S. 397, 412–13 (1871) (Chase, J., dissenting).

[85] Trieber, "Relationship," at 327–28.

arose between the two—that is, whether a bankruptcy court would wait for the final results of state court litigation to settle or instead assert jurisdiction over the assets in question before that litigation concluded—Trieber believed adamantly in the idea of comity between the two courts. While he recognized the inarguable supremacy of national courts with respect to bankruptcy law this did not always mean they should assert their power. Trieber stressed the:

> duty of both the State and Federal Courts to exercise the greatest caution to avoid this necessity where it is possible. . . . [I]f each Court was attempting to enforce its own order as to the possession of the property, it would lead to a resort to physical force on the part of the executive officers of the respective Courts.[86]

When national courts fail to show comity toward state courts, negative consequences could ensue—even if the letter of the law was followed properly. Before he concluded the article, Trieber cites *Woodruff v. Trapnall*,[87] in which the state of Arkansas was required to accept the bills of the failed State Bank of Arkansas for tax and debt payments due to the state pursuant to the bank's original charter. The result was the near collapse of Arkansas' financial sector, and as a consequence, Arkansan politicians made this case and the bank's charter a political wedge issue.[88] Similarly, the Supreme Court of Arkansas upheld a federal court's writ of mandamus in *Vance v. Little Rock*[89] that required an individual to pay a tax to the city. In

[86] *Id.* at 345–46; *see Ex parte Siebold*, 100 U.S. 371 (1879). Trieber also cites *Defiance Water Co. v. Defiance*, 191 U.S. 184, in which the company attempted to enjoin the city from denying a contract. The Supreme Court in fact denied jurisdiction to the federal court in its review: "The proposition is wholly untenable that, before the State Court in which the case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the Courts of the United States can be called on to interpose on the ground that the State Courts *might* so decide as to render their final action unconstitutional. Moreover, the State Courts are perfectly competent to decide Federal questions arising before them and it is their duty to do so." Trieber, "Relationship," at 354-55 (emphasis added).
[87] 10 How. 190 (1850).
[88] Trieber, "Relationship," at 355.
[89] 30 Ark. 435 (1875).

doing so, however, the court expressed serious doubts as to the correctness of the judgment. Trieber points to language in the case—"This may seem unjust, but we cannot help it."[90]

Where this intersected with his views on the relationship between federal and national courts, Trieber undoubtedly believed in the legal supremacy of federal law and federal jurisdiction where appropriate. But just because such jurisdiction *could* be invoked did not always mean that it *should*. Instances in which this jurisdiction should *not* be invoked arose when national courts and Congress commandeered issues Trieber felt were best left to states. Trieber underscored this point by contrasting the Tenth Amendment with Article 3 of the Constitution:

> [T]he manifest purpose of the tenth amendment is to put beyond dispute the proposition that all powers not granted are reserved in the people. . . . On the other hand, in Art. 3 which treats of the judicial department, we find that . . . [i]t is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed.[91]

Thus, only in the strictest of circumstances should the federal *government* use federal law to encroach on state sovereignty. In *Morris*, for example, Trieber crafted a revolutionary argument based on the Thirteenth Amendment because he believed that an expansive definition of "slavery" justified federal reach into *individual's* lives. Trieber did *not*, however, believe that he could subvert the state action principle as defined in the *Civil Rights Cases* because it would reach too far into *states*' rights.

In order for states courts to preserve the rule of law and help usher in the benefits of the New South Creed, Trieber argued passionately for judicial reform to realize a better functioning court system. As far as how such reform would come about, Trieber supported the efforts of Southern states to reform their *own* courts. In order to best help Arkansan citizens, however, this

[90] Trieber, "Relationship," at 356.
[91] *Id.* at 356–57; *see Kansas v. Colorado*, 206 U.S. 46 (1907).

meant better functioning federal courts as well—and for Trieber, better functioning meant more limits on their exercise of discretion. While the CRA was not the type of legislation Trieber believed outside of federal courts' purview, many more nuts-and-bolts judicial-economy issues guided his belief that, generally, activist federal courts harmed state court and state law interests.

In the *Arkansas State Bar Proceedings of 1912*, Trieber wrote an article entitled "The New Judicial Code" that would become an influential and oft-cited piece in progressive Arkansas judicial circles. Trieber wrote the piece in the context of progressives' criticisms of the multiplicity of courts, calling for a more precise and systematic approach to administration in order to make the federal courts better functioning.[92] Accordingly, Congress created a commission to revise the jurisdiction of federal courts. In 1910, Congress adopted the commission's findings in what would be penned as the Judicial Code, and after amendments to it in 1911, the bill went into effect on January 1, 1912.[93] The Code's primary purpose was to abolish the circuit courts and circuit riding, allow circuit judges to focus exclusively on their appellate work, and make district courts more specialized as the only trial courts in the federal system. To paraphrase Jacob Trieber, the best outcome of the Code was its standardization of jurisdiction related to federal law, consolidating the scope of federal jurisdiction. This would mean that lawyers and judges were "relieved from spending hours and sometimes days hunting through the biennial Acts of Congress, the Statutes at Large, to ascertain definitely what the statute on any particular question is."[94] Trieber praised the early-nineteenth century Chief Justice Oliver Ellsworth's foundational work on the Judiciary Act of 1789, from which "there was no model from which to copy, as no other government had ever had a judiciary system made for two

[92] JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 189–90 (2012).
[93] *Id.* at 190–91.
[94] Jacob Trieber, "The New Judicial Code," *Arkansas State Bar Proceedings* 110 (1912).

sovereignties to be enforced side by side."[95] And yet, Trieber praised the new Code precisely in order to better honor Ellsworth's aim—to safeguard both the rights of states and those of the federal government in order to reduce and prevent conflict between the two.[96]

Trieber read into the Code more than mere efficiency. While the primary effect of the Code saw a more simple, logical, and functional federal judicial institution, in numerous places, Trieber comments on the Code's trusting of state courts to handle state judiciary matters so as to shore up the jurisdiction—and with it, docket loads—of the federal court system. For example, he highlighted the changes made in the Code to the amount-in-controversy, where the limits of the value were increased by the new Code as well as the related legislative acts before it, from five hundred dollars to two thousand to three thousand. In addition, Trieber detailed the Code's effect on the practice of removal of cases from state to federal courts, the result of which made removal more difficult for defendants. In the old regime, the record of the complaint in state court did not need to be filed in the federal court until the first day of the next term after the removal, and no requirement existed for defendants to file written notice of and bond for the removal petition to the plaintiff. The new Code required such written notice, and once removed, required that the record be filed in the federal court within thirty days from the filing, regardless of the judicial term. Trieber interpreted the effect of this change was to give plaintiffs more of an opportunity to challenge removal petitions.[97]

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[95] *Id.* at 104.

[96] Republicans and Democrats alike supported the measure, and the final bill in 1911 saw little opposition in either house of Congress. And yet, for all the praise the politicians and Trieber alike gave to the Code's honoring of Ellsworth's principle, the Code served as the third and final phase of the elimination of the circuit courts, almost one-third of the American judiciary—a facet of the American legal institution Ellsworth found crucial. Indeed, speaking about the Code in 1911, retired Supreme Court Justice Henry B. Brown described the Judiciary Act of 1789 as "slightly mutilated and much changed in phraseology." Crowe, *Building the Judiciary*, at 193.

[97] Trieber, "The New Judicial Code," at 106–07.

Trieber's record of supporting the efficiency of courts was not limited to his endorsement of *federal* court reform. Years prior to 1911, despite his desire for a lessened docket in his own courtroom, Trieber wrote to the Bar Association of Arkansas of the need for further funding of Arkansas state courts. For example, in 1906, Trieber spoke to the state bar association in his capacity as its President and chastised the state bar for its failure to respond to the state governor's veto of a bill that would have provided a stenographic clerk to each justice of the state supreme court. "It is hardly necessary," he began, "to say anything to lawyers engaged in active practice of the necessity of such a measure, and in view of the fact that our Supreme Court is still over a year behind in its work, in spite of the large number of opinions delivered weekly, this Association can not be too emphatic in its recommendation for the passage of such an Act by the next General Assembly."[98]

To Trieber, the new Code would bring about further prosperity to both the people of Arkansas and the lawyers they retained. The Code represented the culmination of efforts by Congress and state-backed lobbyists since 1887 to contract the jurisdiction of the federal courts rather than enlarging it. Accordingly, Trieber's jurisprudence reflected this culmination by giving Arkansan courts and Arkansan law deference with respect to claims litigated by Arkansan lawyers. Trieber held the lawyers of his state to high ethical and legal standards. Writing to the state bar association in 1906, Trieber noted that Arkansas' ethics statutes for lawyers were "so defective that it is almost impossible to prosecute proceedings for disbarment successfully." He supported reforming the law to "authorize any attorney, or any committee appointed by any bar

[98] *Bar Association of Arkansas, 1906* (statements by Trieber, Jacob, President), 35. Years earlier, Trieber spoke to the bar association about increasing the pay of judges in the supreme and circuit courts of Arkansas, which he referred to as the "most important reform in judicial administration" in order to incentivize judges in the state to honor the responsibility of their position and be commended properly for doing so. *See Bar Association of Arkansas, 1903-1905* (statements by Trieber, Jacob), 26.

association, either the State or local association, to institute such proceedings, and thus prevent unworthy persons from continuing the practice of the profession."[99]

Trieber was also concerned with the pre-Code regime's effect on Arkansas litigation and the confusion that could result from greater deference to federal civil and criminal procedure. Trieber again spoke as President to the bar association in 1913, this time on the matter of what course of action to take with respect to a proposed simplified system of pleading and procedure for all federal courts (a precursor to the Federal Rules of Civil Procedure). While Trieber expressed his personal support for the practice of state and federal courts to be "nearly the same as is possible," he recommended *against* the proposal that the Supreme Court of the United States make uniform rules for all federal courts within every state because it would cause "more confusion and annoyance to attorneys than at present," given that "many of the lawyers of [Arkansas] only occasionally appear in the National courts . . . even the slightest differences now prevailing have a tendency to confuse them."[100] Given that Arkansas had heretofore refused to adopt any federal rules of procedure for its state courts, and "knowing the conservatism of the Bar of this State," Trieber concluded that it would be more advisable to adopt the state procedural practices as a whole for the federal courts of Arkansas.[101] Trieber's aim to increase lawyer ethics and prevent lawyer confusion in court procedure was laudable. But Trieber also meant to keep the courts moving by preventing unnecessary filings, fraudulent actions, and unknowledgeable attorneys that clogged up the federal docket.

In one of his last published articles, Trieber bemoaned the inefficiencies of the federal court system and its consequential effects. Speaking to the *Arkansas Democrat*, Trieber outlined

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[99] *Bar Association of Arkansas, 1906* (statements by Trieber, Jacob, President), 35.
[100] Report of Special Committee, *Bar Association of Arkansas, 1913* (statements by Trieber, Jacob, President), 14.
[101] *Id.* at 15.

his ideas for improvement after his twenty-five years on the bench.[102] Amongst his thoughts not published in the article, Trieber mused to the editor personally on "the dignity of the federal district courts has been to a great extent destroyed by the requirement that all criminal cases, no matter how trivial, can only be tried in those courts, and to a jury." Trieber noted the "motley crowds seen" in federal courts, speaking of both the defendants and witnesses, but also lawyers "never seen in federal court."[103] This led to myriad inefficiencies and wasted time on explaining or correcting procedure in the courtroom.

* * *

Rule-of-law concerns demonstrate an important part of Trieber's jurisprudential understanding of federalism and the Constitution. Issues such as societal safety, voting protections, and insuring that the court system remained functioning all could progress Arkansas into the twentieth century. Providing Arkansans with a legal framework that utilized federal officials and courts only when necessary assured societal order remained an important part of Trieber's work in and outside the courtroom. These concerns were paramount in both Trieber's use of the Thirteenth Amendment in *Morris* and the eyes of the Progressive Southern judiciary that believed in local paternalism as a tool to actualize the New South Creed.

C. The Business Class of Arkansas

A second major area reflecting Trieber's worldview was his role in and membership of Arkansas' elite business class. Trieber frequently understood cases regarding federal or national regulation of Arkansan businesses as overstepping by federal power into state sovereignty. As

[102] *See Arkansas Democrat*, September 27, 1925, *available at* The Arkansas Historical Commission, "Trieber Collection."
[103] Jacob Trieber, *Letter to the Editor*, 12 A.B.A. J. 424 (1926).

demonstrated below, this philosophy manifested in local paternalism in Trieber's courtroom, the jurisprudential effect of Trieber's commitment to the Creed. The first part of this section will discuss Trieber's membership in the Arkansas business elite and how his social role shaped how he believed the law and private sector should interact as a means of making the New South Creed an attainable goal. Then, I will discuss a range of cases that demonstrate Trieber's commitment to federalism through local paternalism.

1. Trieber, the XV Club, and the Arkansas Business Elite

By 1911, Judge Trieber had been accepted into the prominent XV Club of Little Rock, a social club of the Arkansas elite made up of prominent men of both political parties and of various religious denominations. According to the Club's first meeting minutes, the meetings are meant to be "cultured but not too cultured, literary but not too literary, political but not too political, scientific but not too scientific, funny but not too funny, serious but not too serious."[104] Since the Club's existence, each meeting has consisted of a dinner hosted by one of the members followed by a single-topic discussion of an important social issue of the day, given by one presenter. The Club comprises exactly fifteen members at any given time; each member is assigned a number—I through XV—and only relinquishes the number upon unexplained absence, move from Pulaski County, or death; and each member is required to maintain the history of the members holding their respective number.[105]

While the purpose of the XV Club at its inception may have been to foster philosophical discourse and encourage long lasting friendship, the Club's membership comprised and still

[104] Steven Teske, "Helena-West Helena (Phillips County)," THE ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE, *available at* http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=950# (last accessed Apr. 3, 2016).
[105] *Id*.

comprises today of the economic elite of Arkansas, and as such, its membership reflected the premium the Club would place on business interests as a substantive characteristic of the organization. The XV Club's constitution bars no one on the basis of race, gender, or age. And yet, the Club continues to this day to retain white men of the business class—118 of its members, to be exact.[106] Accordingly, the Club has always spent lavishly on their meetings. After the third meeting's dinner that preceded an evening of cigars, McKee noted the excesses spent on alcohol, despite the organization's pro-temperance approach. "Possibly the only way to remedy this matter," he wrote, "will be to restrict the dispenser."[107]

The XV Club commenced at a time of economic expansion in Eastern Arkansas. At an XV Club's 100th anniversary meeting on January 7, 2004, Charles Witsell Jr.—No. IX of that year—spoke about the "context of a prosperous and rapidly growing community" in which the Club was founded.[108] Witsell's detailed minute meetings from the Club's second meeting on January 18, 1904 set the topic of conversation as the Panama Canal, suggesting that, from the start, the Club's philosophical interests would be tied to politics and economics.

Indeed, the Panama Canal had particular interest to Southern businessmen who sought cheaper and quicker ways to export timber, textiles, and—most importantly—cotton.[109] The Canal featured prominently in the Club's first meetings because of their concern for cotton and its sales benefitting Arkansas. No. III, Carl Voss, argued that the Canal would be a bonanza for

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[106] *Id.* Members included doctors, politicians, ministers, attorneys, bankers, business owners, and educators.
[107] THE XV CLUB: FIRST HUNDRED YEARS, 1904-2004 3 (2005).
[108] Scott A. Johnson, "A century of XV," *Arkansas Democrat-Gazette*, Jan. 18, 2004.
[109] *XV Club*, at 2–3. After the Civil War, the dearth in capital to invest in cotton land and pay for workers meant that high post-war prices and redistribution of land left a gap in economic leadership that only the white elites could fill, given the toxic race relations in agrarian Arkansas and the complex system of labor resulting from the eradication of the entrenched antebellum labor system. *See* Ezell, *The South Since 1865*, at 7, 115–17, 124–26.

the South because the state could export its cotton westward and indeed around the world. The members applauded Voss for his stance—popular amongst the business elite of the time—that cotton manufacturing would create a boon for Arkansas just as it had done in England, Germany, and France, as well as of Colombia's opposition to the canal, that "if Columbia [sic] had ever had any right in the premises, she had forfeited them long ago by misrule and nonrule."[110] In the Club's March 4, 1904 meeting, No. I Colonel Harmon L. Remmel spoke optimistically of Arkansas' economic future with respect to cotton, in which Arkansas would "manufacture all the cotton she raised, the canal would be built, and the people of the South would be the richest people of the richest section of the richest country of the globe."[111] The Club's 1904 Secretary, Charles McKee (No. II), detailed the importance of the issue to its members, writing about his thoughts in the third-person: "[I]n his mind's eye, as in a vision, the Secretary could see a thousand flotilla of merchantmen and squadron after squadron of the navies of all nations crowding the ports of the South, and trooping through the watery pass to sail majestically into the placid Pacific, to the marts and ports of the Orient."[112]

By 1911, the Club's business-minded foundation had welcomed Trieber into the fold of economic interests that converged with political discussions agreed upon by the Club. Indeed, while Trieber himself did not have cotton interests, nor did he come from one of these economic sectors himself, Trieber had much to gain from the Arkansas plantation industry doing well. Though by 1911 he had already served as U.S. District Attorney and federal judge for fourteen years, Trieber had retained his business interests in Helena that he had garnered as the county treasurer two decades prior. Trieber had also served as the president of the First National Bank of

[110] *Id.*
[111] *Id.* at 4.
[112] *Id.* at 1–2.

Helena in 1893, and Trieber's own economic interests were intertwined with the middle-class and elite, planting sector that would overtake the cotton economy by 1920. Indeed, it was during his time *as* judge that Jacob Trieber established ties with prominent planters, businessmen, and manufacturers; it was these connections that likely secured his invitation to the XV Club.[113]

Some historians such as Jeannie Whayne describe Trieber's interests as evidence of "mixed motives" possibly influencing the *Morris* decision with respect to his concern for justice for black victims of nightriding, given planters' utmost concern for an adequate supply of labor.[114] Such analysis of Trieber's concern for black justice, though, ignores the early importance that the XV Club placed on improving the economic lives of all Arkansan citizens. From 1880 to 1904, the population of Little Rock tripled from 13,000 to 40,000, and Pulaski Heights had installed high-technology trolleys to transport citizens to the western part of the state and beyond.[115] The XV Club's members supported private investment in transportation, and many of its members over the years indeed benefited from it. The Club's April 1, 1904 meeting, for example, focused on improving education. No. VII Jasper Keith Smith recommended providing free transportation to students attending rural primary schools.[116] Other ideas were floated to improve education for Arkansan students, including meritorious endowments to keep good teachers employed for want of adequate pay.[117] Such a feeling in Arkansas was a reflection of the XV Club's emphasis on local businesses and local economy able to solve the problems of blacks. The New South Creed influenced Progressive Republicans of the South who believed that economic prosperity and opportunity in the South could benefit blacks. Trieber wanted

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[113] *See* Whayne, *A New Plantation South*, at 53.
[114] *Id.* at 53–54.
[115] Scott A. Johnson, "A century of XV," *Arkansas Democrat-Gazette*, Jan. 18, 2004.
[116] *XV Club: First Hundred Years*, at 5.
[117] *Id.*

Arkansas to be a place where the American dream was possible for blacks. Even if motivated by financial gain, the plight of Arkansas' poor did not escape the meeting minutes of the XV Club.

To the extent that Jacob Trieber's fiscal conservatism affected his views on public expenditures in Arkansas, Trieber was concerned that the state legislature would waste money on unnecessary and vague programs. The state bar association's annual proceedings in 1917 reflect Trieber's support for a policy that the state of Maryland had adopted, to require the governor, treasurer, and state auditor to prepare a budget and submit copies of its estimates at least thirty days before the General Assembly of Arkansas would meet to discuss a budget. "At present," the notes mention, "Arkansas is practically without a budget system . . . rarely employed and inadequate. . . . [Judge Trieber] suggested this as one of the most desirable reforms that could be enacted."[118] The policy also meant that the General Assembly could only decrease the estimates of the budget, not increase them.[119] Judge Trieber viewed skeptically federal jurisdiction and the enforcement of federal law that encumbered Arkansan business, and instead advocated for the private sector to fill the gaps and benefit society more efficiently and more profitably.

2. Arkansas' Business and "National Law"

Trieber's commitment to the New South Creed necessarily entailed advocating for the interest of Arkansan business. Indeed, Trieber's chief biographer, Gerald Heaney, described Trieber as an "unabashed supporter of economic development in Arkansas" who thought that "Arkansas should encourage railroads and manufacturers to come to the state through tax breaks and promises of profitability."[120] Through the Courts, Trieber demonstrated that he wanted to

[118] Minutes, *State Bar Association* 73 (1917).
[119] *Id*.
[120] Heaney, "Jacob Trieber," at 463–64.

limit the application of federal law in Arkansas only to situations that warranted it. Trieber had myriad opportunities to test the staying power of local paternalism within the courts, and when in the service of Arkansan businesses and issues not in the civil rights cannon, Judge Trieber sided with state sovereignty over federal enforcement.

The hunting of migratory birds was but one area that Judge Trieber found federal enforcement to upset state sovereignty. The Department of Agriculture had the power to set aside certain seasons for closure of migratory game and bird hunting. When Harvey Shauver was indicted for violating this rule, his lawyer filed a demurrer of the indictment on the grounds that the Appropriations Act of 1913 giving the Department this power was an unconstitutional usurpation of Arkansan hunters' rights.[121] Trieber swiftly sustained the demurrer. Reading Trieber's words speaks strongly to a presumption against the national government's act: "Unless, therefore, there is some provision in the national Constitution granting to Congress either expressly or by necessary implication the power to legislate on this subject, the act cannot be sustained." This was because it was "well settled that as to all internal affairs the states retained their police power, which they, as sovereign nations, possessed prior to the adoption of the national Constitution, and no such powers were granted to the nation."[122]

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[121] The Act read, in pertinent part:

> The Department of Agriculture is hereby authorized and directed to adopt suitable regulations . . . by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons.

U.S. v. Shauver, 214 F. 154, 155 (E.D. Ark. 1914).

[122] *Id.* at 156. Trieber does away quickly with the government's alternative argument in the case, that there are "implied attributes of sovereignty in which the national government has concurrent jurisdiction with the states," an analogue to the Dormant Commerce Clause. Trieber rejected this

The main question came down to whether or not migratory birds were considered the property of the United States—justifying the Appropriations Act—or of the states where the animals are found. While Trieber provides a laundry list of cases holding, essentially, that "the wild game within a state, at common law, belongs to the sovereign, and in this country to the people in their collective capacity, and the state, therefore, has a right to say that it shall not become the subject of commerce."[123] Most importantly, Trieber made a point of discussing his lack of discretion to determine whether it is good or even sensible policy to afford the national government the power to regulate migratory birds. It may be," Trieber wrote, "that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the *people* who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary."[124] For Trieber, the Constitution was clear about the narrow bounds of Congress' enumerated powers.

Trieber stayed consistent on the issue when presented with a different case on migratory birds that focused on a treaty negotiated between the United Kingdom and United States for the protection of these birds. Trieber rejected a demurrer to the Migratory Bird Act of 1918 pursuant to this treaty because Article 6, Clause 2 of the Constitution expressly gave Congress the ability to enact laws "under the authority of the United States" treaties made by the Executive Branch and Legislative Branch together, and exclusive of the individual states. On the matter of the merits of the treaty in question, Trieber noted that courts should presume the constitutionality of treaties when they encroach, to a certain extent, on certain state rights. This was okay because a

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by citing to Justice Brewer's opinion in *Kansas v. Colorado*, 206 U.S. at 89 that stressed the importance of the Tenth Amendment in securing states' rights.

[123] *See* FREDERICK NEWTON JUDSON, THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION § 11 (1912). For example, Trieber analogizes migratory birds in the air to fish in the tides—the latter having been conclusively determined to be in the realm of the states.

[124] *Shauver*, 214 F. at 160.

treaty can "only be made by the President and the concurrence of two-thirds of the Senators, all elected by the people, and their servants."[125] Such a finding comported with Trieber's understanding of the state action doctrine: enforcement undertaken by the Executive Branch and pursuant to an express clause of the Constitution in no way violated the same kind of state action requirement imposed by the Fourteenth Amendment with respect to Congressional action.

Trieber applied moderation and consistency in other areas as well. In *United States v. United Shoes Machinery Co.*,[126] Judge Trieber upheld a piece of anti-trust legislation, the Clayton Act, which prohibited an exception to the Sherman Anti-trust Act ("tying arrangements") that the Supreme Court had previously found constitutional, but not without limiting the scope of the power the Act gave to Congress. Under the commerce clause, Judge Trieber found that the spirit of the clause is meant to reach to regulation of a "corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels, instead of selling them, why is it not as much engaged in commerce as if it sold them outright[.]"[127] However, when the merits of the case were argued four years later, Trieber refused to apply the Act to leases and contracts entered into before the enactment of the provision. Despite the finding by four other courts that the Act should be given retroactive application, Trieber worried that importing meaning into a statute giving Congress a power it did not expressly give itself would set a bad precedent for federalism, particularly in the realm of commerce. Accordingly, Trieber not only compared the Clayton

[125] *United States v. Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).
[126] 234 F. 127 (E.D. Mo. 1916). Interestingly, Chief Justice White asked Trieber to take this case over from a previous judge in the Eastern District of Missouri.
[127] *Id.* at 143–44. Indeed, Trieber saw where the winds of change were blowing with respect to an expansion of commerce clause power afforded to Congress by the courts: "[A]s new methods of transacting business are devised, if they are found to be in effect methods of carrying on commerce in any business . . . and it is sent or transported from one state to another, it is interstate commerce." *Id.* at 145.

Act's language to language of other acts with much more express language, but also discussed various amendments proposed and struck from the Clayton Act that would have given it retroactive application in finding that Congress did not mean to give the Act retroactive power.[128]

In the area of moonshining, Judge Trieber had one of the most prolific dockets in the South. Because the Eastern District of Arkansas contained the region's most prolific "moonshining district," Trieber's docket as federal judge was rife with cases regarding the illicit distilling of alcohol.[129] In combination with his impatience for these cases that he saw as overly time-consuming,[130] Trieber held strong beliefs in favor of these defendants. Lower-income Arkansans in the northeastern part of the state—both white and black—had opposed the national and local progressive impulses of prohibition for quite some time. In the town of Marked Tree in Poinsett County, for example, the elite sought to implement prohibition in order to maintain a segregated labor force and attract white small-business owners. Blacks and whites alike opposed closing down saloons. They rightly viewed the temperance movement as a means of attracting outside business at the expense of low-income millworkers and planters, but with the pretext of checking what Progressives described as an "unruly millworking population."[131]

The *Helena World* went out of its way to highlight the U.S. Attorney's compassion for the moonshiners: "Our Jake must be as persuasive with the mountain-dew folks as he was wont

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[128] *United States v. United Shoe Machinery Co.*, 264 F. 138, 173–74 (E.D. Mo. 1920).
[129] Heaney, "Jacob Trieber," at 430. For more on the prohibition movement's complicated interaction with Progressives and Southern business leaders, see Woodward, *Origins of the New South*, at 389–92.
[130] In supporting criminal sentencing reform for reasons largely related to judicial economy, Trieber wrote to the ABA in his later years bemoaning the "requirement that all criminal cases, no matter how trivial, can only be tried in [federal district courts] . . . Lawyers, whose practice was heretofore confined to police and magistrates' courts, who were never seen in a federal court, now crowd them . . ." Jacob Trieber, *Letter to the Editor*, 12 A.B.A. J. 424 (1926).
[131] Whayne, *A New Plantation South*, at 21–22.

to be with all manner of people before he went away from us. This district has never had a more efficient, industrious and painstaking official."[132] Trieber's compassion came from both a sincere belief in the "honesty" of the persons living in his jurisdiction but also from these persons' dissatisfaction with (and ignorance of) new federal liquor regulation—a dissatisfaction he felt in dealing with these cases.[133] "The moonshiners," Trieber wrote, "as a rule are good citizens in every way except that they will break the law in making whiskey. In this *they do not believe that they are committing any wrong* and they are otherwise honest."[134]

Trieber's sentiments on judicial economy were clearly affected by a sense that there were unfair disconnects between the purposes of these federal liquor laws and the offenders of the laws. Trieber frequently referred to the federal liquor laws as "of a petty nature, who, if charged with violations of petty offenses of the laws of the state would only be tried in inferior [or state] courts." In one particular judicial proceeding, Trieber chose not to scold the defendant from Saline County charged with illegally manufacturing whiskey, but rather the attorney representing the defendant, because the latter had represented the same and other defendants in similar cases. Reprimanding the attorney for his defendants' ignorance of these laws, Trieber (perhaps sarcastically) recommended that the county's churches send missionaries to Saline County, analogizing the "foreign[ness]" of the national laws to those in "Africa and other foreign

[132] *Helena World*, Mar. 23, 1898, *available at* The Arkansas Historical Commission, "Trieber Collection."
[133] In one telling letter to his wife, Trieber chronicled the ubiquity of his docket with respect to moonshining cases, where, "[i]n court everything moves smoothly, and the lawyers don't waste time any more than I do" in tackling these cases. Undated letter from Trieber to Ida Trieber, *available at* The Arkansas Historical Commission, "Trieber Collection."
[134] Heaney, "Jacob Trieber," at 430 (emphasis added).

countries."[135] Trieber felt that the inability of state courts to have the capacity or willingness to deal with these cases did not justify clogging the federal courts.

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Trieber held a presumption against allowing federal courts to apply federal law to areas such as migratory birds, anti-trust law, and moonshining that he felt were inherently the stuff of state plenary powers. This is in marked contrast to areas such as civil order, voting, and judicial economy, which he felt were rule-of-law issues that were inherent to the rights embodied by the postbellum Constitution and were, practically speaking, better suited to be remedied by Congress. The following section offers a summary of how Trieber's worldview reflected an ardent commitment to protecting Arkansans and ensuring an orderly society.

D. The "Conservative Philosophy"

As C. Vann Woodward notes in *The Strange Career of Jim Crow*, one of the philosophies of race relations put forth for the South as early as the 1880s, was the "conservative philosophy," which promoted the rule of law in the wake of the Civil War and secession's disastrous ruin upon the nation.[136] Influenced by the emphasis on rule of law after the chaos of the Civil War, Southern Centrist Republicans and former Whigs wanted blacks to maintain the rights that had been afforded to them during Reconstruction, and not lose them in the pursuit of further freedom to what they viewed would be an inevitable backlash. In a society governed by the stable rule of

[135] *Arkansas Democrat*, Oct. 1926, *available at* The Arkansas Historical Commission, "Trieber Collection."
[136] Woodward, *The Strange Career of Jim Crow*, at 44–45. Woodward notes that this philosophy was not called as such, but is rather an academic term for the umbrella of "fragmentary formulations" and "policies pursued" by Southern conservative paternalists. *Id.* at 47, 49.

law, each class of society should acknowledge its responsibilities and obligations and pursue its rights from its respective rank in a stable social hierarchy.[137]

Although Jacob Trieber supported protection for African Americans, he believed that the best means of doing so—that is, the best for Arkansas—would be by Arkansans themselves. Only by Arkansan elites supporting "fairness" for African Americans could Arkansas experience newfound economic and social progress. Conversely, federal protection of African Americans and enforcement of civil rights would *only* be justified in narrow circumstances: "[I]nstead of attempting to overcome [prejudice] by force or abuse," Trieber noted, "it is the better part of wisdom to act along conservative lines." To supporters of the New South Creed, "conservative" meant opposition to wholesale federal action to solve the miseries of African Americans.[138] Adherents to the New South Creed understood the tenuous nature in rallying fellow Southerners to the cause of uplifting the region from economic stagnation. But for Trieber, the fine tightrope was a sturdy one: limited federal power worked when states failed to maintain societal order through basic rule-of-law principles.

For Southern Progressives, determining when the enforcement of a given federal law comported with their understanding of federalism depended heavily on the latter's effect on spheres like Southern business that, left untouched, could propel the South into modernity and prosperity. The topics discussed in Part III together reflect a distinct framework for how to assess the motivating principle of this determination: federal law that touched and concerned private Southern individuals and businesses should be viewed skeptically by federal courts and enforced by federal officials only when the state failed to preserve and boost those otherwise private interests.

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[137] *Id.* at 48.
[138] Fredrickson, *The Black Image*, at 212.

I redirect back to Trieber's reading of the charges to the federal grand jury in *Morris* so as to note the importance of lawful order to Trieber and the need for it to modernize Arkansas. Trieber ended his charge by calling on the jurors of Poinsett County to honor their "duty" and consider the facts of the case without racial prejudice. "Nothing tends more to bring the courts into disrepute and lead to mob rule than a failure of the courts and juries to enforce the laws of the country."[139] As a river town in the Old Southwest, lawlessness abounded in Helena, a thriving hot spot for thieves, gamblers, and other outlaws. As a result, by the mid-1850s, Helena began to adopt anti-gambling societies and began initiatives to establish private schools, churches, temperance societies, newspapers, and forums for public lectures. By Trieber's arrival in Helena, the town's reforms and investment in timber infrastructure had resulted in a near quadrupling of its population.[140] And yet, at the time, articles in the *Arkansas Gazette* and the *Helena World*, Trieber's hometown newspaper, discussed at length the heinous nature of mob rule and violence resulting in the deaths of innocent African Americans.[141]

Accordingly, in describing his judicial philosophy on federal law to the *Arkansas Democrat* in the twilight of his career, Trieber emphasized that the role of the federal courts must be to protect "the rights of the people, for the protection of the lives, property and those rights, either guaranteed by the constitution and the laws of the nation and the state, [or] are inherent in every free man under a democratic republican government such as ours."[142] Even before the Supreme Court overruled his *Morris* opinion, Trieber remained confident that Southerners could

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[139] *Arkansas Gazette*, Oct. 7, 1903, 1, *available at* The Arkansas Historical Commission, "Trieber Collection."
[140] Teske, "Helena-West Helena (Phillips County)."
[141] See*, e.g.*, *Arkansas Gazette*, Oct. 21, 1892; *Helena World*, Feb. 23, 1898; *Arkansas Gazette*, Oct. 7, 1903, *all available at* The Arkansas Historical Commission, "Trieber Collection."
[142] *Arkansas Democrat*, Sep. 20, 1925, *available at* The Arkansas Historical Commission, "Trieber Collection."

come to agree with his convictions for equal application of the law and the federal courts' role in protecting the equal protection of all citizens' rights under the U.S. Constitution. Writing of the "rabble" in Arkansas, Trieber noted encouragingly to Judge Thomas Goode Jones:

> I sincerely believe that this race question could be solved to the lasting benefit of our country and in conformity with the spirit of this civilized age, provided those well meaning Northerners could be induced to keep quiet and trust the good people of the South with the solution of this problem. When I tried whitecapping cases here the jury which convicted the parties was composed exclusively of natives of the South; yet there was no trouble to secure a righteous verdict. This shows that the rabid expressions found in many of our leading newspapers, and so freely indulged in by petty politicians, do not express the sentiment of the better class of people.[143]

The better class of people. Trieber sincerely believed that the people of Arkansas could fulfill their destiny toward a modern South, free from the uncivilized rabble holding it back. The rabble was bad for business, bad for politics, and bad for judicial economy. The South was decades behind the North in economic and social output, and only Southern politicking and a cohesive national political strategy through the Democratic Party held up the status quo of the foundational tenets of its racist social fabric.[144]

The conservative philosophy, for Trieber, meant a well-constructed Union of individual states that should be helped, not hampered, by the federal government. The New South Creed's premium on the South reforming *itself* is an important factor when considering how Judge Trieber's understanding of the state action doctrine informed his rule-of-law commitments and support for racial harmony in coming to the *Morris* reasoning. Ultimately, Trieber's Arkansas-first worldview affected his jurisprudence by limiting the appropriateness of federal enforcement of traditional state powers to circumstances that required it for the maintenance of Arkansas'

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[143] Judge Jacob Trieber to Judge Thomas Goode Jones, Oct. 14, 1904, Jones Papers, ADAH, box 3, file 29.
[144] Gaston, *New South Creed*, at 221–23.

progression into the twentieth century. In Part IV, I argue that the judicial abandonment story means something more significant than what the doctrine on its own suggests: when asking *what* people on the ground thought, did, and *why* they thought and did what they did, one must modify their conceptions of whether this is truly an "abandonment" story.

IV. Judicial "Abandonment?"

Hodges effectively gutted the Civil Rights Act of 1866, declaring its expansive possibilities null-and-void under *both* the Thirteenth Amendment (a substantive determination) and the Fourteenth Amendment (a jurisdictional determination). The legislation's downfall and its implications for judicial abandonment propel *Hodges* to the forefront of cases progressing and completing judicial abandonment. No longer could the shrinking constituency of advocates for equal rights for African Americans find viable legislative authority to bring their claims.

That a Progressive of the Southern judiciary committed to expanded protection for African Americans could play a key role in judicial abandonment makes *Hodges* all the more undervalued in the judicial abandonment historiography to date because of what it says about what actors like Trieber thought they were doing—and to Trieber, "abandonment" was not it. Despite the protection Trieber sincerely believed was necessarily for blacks in Arkansas, the *Hodges* moment locked-in judicial abandonment as a federal policy. Thus far, scholars writing about judicial abandonment have yet to assess the doctrinal shifts associated with the period in light of Southern Progressivism, and particularly not in light of the New South Creed.

The judicial abandonment narrative is more complete when synthesized with the Southern Progressivism narrative. I remain agnostic to the temporal debate between traditional

and revisionist judicial abandonment authors (though, in arguing for greater consideration of *Hodges* in the narrative, I find credence in the revisionist notion that *Plessy v. Ferguson* represents much more of a starting point than it does a finish line for "definitive" judicial abandonment). More importantly, using the Southern Progressivism narrative provides texture to the judicial abandonment narrative. This approach helps to incorporate a study of countervailing social forces and not focus solely on the broader political impacts within the judiciary. Local paternalism reflects one such social force, a synthesis of concerns for modernization and those of state sovereignty. It was a political form of legal federalism. It was not tied only to the state but also to a specific region of the country. And there is no doubt that the framers of the Reconstruction Amendments had the South in mind when writing their texts; Southern Progressives inherited the problem that Reconstruction sought to fix. But in attempting to fix it themselves, their adoration for a New South ultimately inhibited the South's ability to make real progress toward the future. That there *were* Southern Progressive judges seeking to actualize the New South Creed by requiring states to protect, at least, a baseline of rights necessary for Southern modernization compels a modification to the abandonment narrative.

Providing texture to the narrative, perhaps most importantly, calls into question the framing of the entire narrative and whether it is accurate to call this era "abandonment" at all. To be sure, the American judiciary and American white society writ-large abandoned blacks. The Supreme Court in *Hodges* relegated the Civil Rights Amendment of 1866 to the annals of legal history and removed one of the strongest "tools" that could have employed to enforce the promise of the Thirteenth Amendment and usher in a new South. When assessing *Hodges* in light of both the judicial abandonment narrative and the Southern Progressive narrative, the Civil Rights Act of 1866 embodies the "last great hope" that could have prevented definitive judicial

abandonment through its strengthened enforcement power by means of the Act of 1870. Combining these narratives provides a much more human story than what the judicial abandonment narrative speaks to now.

But Jacob Trieber never believed that he was abandoning them. Trieber believed strongly in voting protections for African Americans, advocated for more efficient courts for the betterment of society's poor, and strove to maintain societal harmony and fairness in Arkansas. Doing so would raise the stature of the Southern judiciary that many throughout the rest of the Union saw as backwards and Democrat. Trieber did not conceive of his judicial philosophy as judicial abandonment at all, but rather, as upholding his responsibility to secure rule of law and progress Arkansas into modernity. But Trieber calibrated his philosophy in the state arena, and not just through state courts, but also through state politics and state society. That Trieber recognized such a strong distinction between the limited circumstances in which federal rights could be enforced by the federal government against the default of state enforcement does not mean that he supported judicial abandonment. To Trieber, it was not a binary of full federal enforcement or no federal enforcement at all, but rather, an effort to reconcile the doctrinal and normative grey area of states' failures to honor the spirit of Reconstruction. The historiographical effect of efforts by individuals like Trieber necessitates a modification of the abandonment narrative framing.

The judicial abandonment narrative *needs* synthesis with the Southern Progressivism narrative (and perhaps other social histories). In doing so, judicial abandonment can be assessed in light of how abandonment was felt on the ground and in the courtrooms of the South and gives us reason to elevate moments like *Hodges* in the history of early Progressive America. This synthesis also puts the Thirteenth Amendment much more in the driver's seat of this narrative

than the Fourteenth Amendment. The discursive tenets of judicial abandonment consider overwhelmingly internalist texts from the federal level (and indeed largely from the perspective of the Supreme Court justices only) and ignore the efforts of those who believed they were doing anything but abandoning blacks. Jacob Trieber's attempts to expand federal enforcement necessarily relied on an expansive understanding of the Thirteenth Amendment. Using a textured judicial abandonment narrative complicates why and how Trieber relied on the Thirteenth Amendment—given his understanding of the state action requirement—and highlights the contingency along the path toward definitive judicial abandonment.

Trieber believed strongly that federal enforcement worked concomitantly with robust state sovereignty, and while the Supreme Court disagreed with Trieber's support of federal power in *Morris*, it and Trieber both sought to find where the locus of power was located to prosecute conduct like that of Reuben Hodges. In 1968, the Supreme Court overruled *Hodges* by vindicating Trieber's *Morris* opinion, though with a different analytical lens.[145] Justice Stewart recognized that the CRA was designed to prohibit all racial discrimination with respect to the rights enumerated within the statute, private or otherwise.[146] But Stewart's opinion recognized a vision of individual rights that Trieber would not have recognized. Trieber did not see a tension between federal enforcement of whitecapping and state power because he is not interested in rights for individuals themselves. Trieber did not believe he was abandoning blacks by denying a "Fourteenth Amendment opening" for the CRA. Trieber accepted the doctrinal avenues open between the Thirteenth and Fourteenth Amendments, but, as this essay seeks to demonstrate, recognizing the forces that led Trieber to accept these openings and choose the "Thirteenth

[145] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Stewart explicitly recognized the merits of Judge Trieber's *Morris* opinion. *Id.* at 441, n.78.
[146] Berry, *Black Resistance, White Law*, at 128.

Amendment opening" provides insight into *how* those on the ground wrestled with where the locus of power for federal enforcement may be.

Nevertheless, *Hodges* illustrates a sincerely disappointing story. To the extent that Southern backwardness on social harmony and civil rights was a Southern problem, New South Creed advocates such as Jacob Trieber felt obliged to fix the region from within. Jacob Trieber's commitment to the New South Creed and the judicial philosophy he embraced from the bench stands as an example of the texture currently missing from the simple account of the Supreme Court commanding a retreat from paternalism. By weaving in a story of individuals' motivations and influences in order to explain why and how they came to believe what they did, Jacob Trieber becomes a sympathetic figure: the most perfect out-of-town judge, seeking to honor the spirit of Reconstruction, and doing so in a way he thought was right. That he failed to protect the citizens of the state that adopted him as a young Jewish immigrant from whitecapping perpetrated by the upper class white community that he himself was a part of must have disappointed Trieber greatly.[147]

[147] When President McKinley appointed Jacob Trieber to the federal bench in 1900, Trieber became the first Jew to ever sit on the federal bench in any position.