A Better Class of People

Judge Jacob Trieber and Judicial Abandonment
in Eastern Arkansas

INTRODUCTION

This paper focuses on the opinion of Judge Jacob Trieber in a 1903 case arising out of the United States District Court for the Eastern District of Arkansas, *United States v. Morris*. In doing so, I argue that Trieber’s opinion reflected an understanding of the state action doctrine rooted in a particular vision of the proper balance between federal and state governments. I explain this understanding as a result of a concept I refer to as “local paternalism,” a conception of the New South Creed that emphasized state-centric change toward southern modernization. Trieber found that, under the Thirteenth Amendment, the Civil Rights Act of 1866 could be used to prosecute private individuals for certain acts of racial discrimination under federal law (a conclusion overturned by the Supreme Court in *Hodges v. United States*). I ask why Judge Trieber felt compelled to justify his finding under Section Two of the Thirteenth Amendment rather than Section Five of the Fourteenth Amendment. The stakes of this tension and the consequences of Trieber’s *Morris* opinion have been under-appreciated in the narrative of judicial abandonment of African Americans in the late-nineteenth century and early-twentieth century. Though *Morris* stood as the “last hope” for slowing rapid judicial abandonment, local paternalism reflects a particularly strong feature of “state action” as understood by the judiciary at the turn of the century. This paper is still in progress, so I look forward to robust conversation and feedback on it and in the course of our conference. Thank you very much.
PART I

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. The charges against them, in short, related to the defendants’ alleged organized violence—known as “whitcapping”—to enforce white supremacy in the late-nineteenth and early twentieth-century United States. 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. The United States Attorney, William G. Whipple, charged the latter set of defendants “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.

Judge Jacob Trieber of Helena, Arkansas presided over the case. The charges were read to the federal grand jury on October 6. All twenty-seven men were indicted. On the very next day, Judge Trieber overruled the defendants’ demurrer to indictment, 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, has the power to protect the right to make and

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1 United States v. Morris, 125 F. 322, 322 (E.D. Ark. 1903).
2 Judge Trieber filed the same opinion for both Morris and Maples. As such, Trieber’s Maples opinion went unpublished. See Transcript of Record at 4, Hodges v. United States, 203 U.S. 1 (1906) (No. 14 of Oct. 1905 term) [hereinafter Hodges Record].
3 Hodges Record at 4.
enforce contracts because “the denial of such privileges is an element of servitude within the meaning of that amendment.”

Three years later, the Supreme Court would overrule this conclusion in *Hodges v. United States.* Justice David Josiah Brewer, writing for the Court, declared that the relevant provisions of the Civil Rights Act of 1866 and its reauthorization through the Enforcement Act of 1870 were unconstitutional usurpations of states’ right to adjudicate these kinds of claims. Brewer proclaimed that Congress “gave [African Americans] 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.” Thus, the right to make and enforce contracts was not a “badge or incident” of slavery, as “no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery.” For the *Hodges* majority, the Act of 1866 was not “appropriate legislation” under Section Two of the Thirteenth Amendment.

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Historians have portrayed Judge Trieber as the “most perfect out-of-town judge who ever presided in the big town.” Trieber found that the defendants in *Morris* violated the victims’ “fundamental rights, inherent in every free citizen” that the Thirteenth Amendment and Declaration of Independence secured. The legal historians who have written about Trieber

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4 *Morris*, 125 F. at 330.  
5 203 U.S. 1 (1906).  
6 *Id.* at 10.  
understand his interpretation of the federal powers under the Thirteenth Amendment as expansive, perhaps the most expansive ever.\(^8\)

Such analysis, however, has thus far failed to give proper consideration to a subtle yet crucial legal underpinning of the *Morris* decision. Trieber noted that the indictment was properly drawn because it connected the allegation of the defendants’ interference with the workers’ ability to make and enforce contracts—or, in simpler terms, their ability to be employed and work—to the Civil Rights Act of 1866’s protections against racial discrimination.\(^9\) Trieber wrote the opinion having found that the Thirteenth Amendment was the only means by which this protection could be afforded:

If the power to enact the legislation involved in this proceeding exists at all, it must have been granted by some provision of the last three amendments to the Constitution—the thirteenth, fourteenth, or fifteenth. As the acts contemplated by this statute are those of individuals, as well as of officers in the enforcement of the statutes of a state or in the discharge of official functions, neither the fourteenth nor fifteenth amendment can be relied upon as an authority for it, for it is now well settled that these two amendments have reference solely to the actions of the state, and not to any action of private individuals.\(^10\)

Trieber’s goal in issuing the *Morris* opinion was not confined solely to guaranteeing equal rights for African Americans. As a member of the southern progressive judiciary, Trieber was part of an ideological movement called the “New South Creed.” Prominent adherents to the movement, such as Tennessee Congressman James Phelan, understood it to be the “manifestation in all walks of life and in all undertakings of the progressive spirit,” the embodiment of the social

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\(^9\) *Morris*, 125 F. at 328.

\(^10\) *Id.* at 322–23.
and industrial changes that would usher in a “spirit of enterprise.” Triber and other New South advocates primarily looked to the North’s economic values as a model for modernity and prosperity, pointing to innovations in industry and agricultural diversification as reasons for its relative economic power. For Triber and other adherents, the economic goals of the New South Creed could only be made possible by supporting—and enforcing—racial harmony. Influential proponent of the New South Henry W. Grady had ingrained in the movement the notion that it was “impossible for the people of the south, either now or hereafter, to get along without the negro,” or else, Southern progression would be broken by “mere prejudice.”

By using the law as an iterative tool, supporters of the Creed could convince Arkansans and other Southerners to internalize the benefits of societal order and peace in advancing the interests of all Americans, white and black. Thus, the movement emphasized the role of the judiciary, which was to progress the law by simply enforcing it, and in doing so, preserving social harmony.

In this paper, I argue that Triber’s commitment to the New South Creed manifested in a distinctly local character that came to influence his conception of the state action doctrine with respect to the *Morris* opinion. Using a concept I call “local paternalism,” I will examine the influence that it had on Triber’s worldview and, by extension, his views on deciding the *Morris* case. I employ the word “paternalism” primarily because of its common usage in relevant literature on judicial abandonment, but refer to it only to describe a set of beliefs that argued

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12 *Atlanta Constitution*, May 18, 1883.
that protection of whites was necessary in order to effect real steps toward southern modernization.¹⁴

As a constitutively conservative man, 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.¹⁵ In Arkansas’s industrial towns and agricultural rural lands, whitecappers sought to drive black farmers away from their lands to keep the labor pool white and increase their value in their crops. 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. Although the Arkansas General Assembly passed Act 12 to outlaw whitecapping in 1909, the practice continued for another fourteen years.¹⁶ 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

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of whitecapping cease entirely.\textsuperscript{17} Indeed, Act 12 was used on numerous occasions to suppress striking workers. By 1916, Judge William Driver reported to the\textit{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.”\textsuperscript{18} Seeing the situation as retarding southern efforts to modernize, Trieber embraced a robust vision of white paternalism as the means for achieving the New South Creed. The white population’s protection of African Americans was necessary in order to effect real change for the South.

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 necessary and justified in narrow circumstances: “[I]nstead of attempting to overcome [prejudice] by force or abuse, it is the better part of wisdom to act along conservative lines.” To supporters of the New South Creed, “conservative” meant opposition to wholesale government action to solve the miseries of African Americans.\textsuperscript{19} As a laissez-faire notion, adherents to the New South Creed understood the tenuous nature in rallying fellow Southerners to the cause of uplifting the region from economic stagnation was to appeal to their own pre-existing white supremacist attitudes. In 1890, the popular Reverend Henry M.

\textsuperscript{17} For more sources on whitecapping in Arkansas and beyond, see Jeanie Horn, “Night Riders,” \textsc{The Encyclopedia of Arkansas History & Culture, available at}\textsc{http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=3008} (last accessed Apr. 8, 2015); Mary Hartman & Elmo Ingenthron, \textit{Bald Knobbers, Vigilantes on the Ozarks Frontier} (Gretna, LA: Pelican Publishing Co., 1996); Guy Lancaster, “Nightriding and Racial Cleansing in the Arkansas River Valley.” \textit{Arkansas Historical Quarterly} 72 (Autumn 2013): 242–64.
\textsuperscript{18} \textit{Osceola Times}, Apr. 28, 1916.
\textsuperscript{19} Fredrickson, \textit{The Black Image} at 212.
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.”

I begin in Part II by summarizing the legal and normative underpinnings of the Act of 1866. In doing so, I provide the legal backdrop to Trieber’s understanding of the state action doctrine. In Part III, I turn to the “worldview” constituting Jacob Trieber’s understanding of the state action doctrine. It is in this part that I provide detail on local paternalism and its relation to the New South Creed that Trieber used to interpret the law. Trieber’s worldview had profound consequences on both his Morris opinion as well as a reflection of judicial abandonment more generally. One of the most powerful of these consequences was the change in the conception of the state action doctrine. After having established a context by which one can assess Trieber’s

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constituted understanding as a district court judge in 1906 Arkansas, in Part IV I turn to the reasoning behind the *Morris* decision itself. This section of my paper will explicate the *Morris* opinion by drawing out how Trieber’s views on how the state action doctrine influenced—and comes into tension with—his legal reasoning. I will also evaluate Brent Aucoin’s argument that Trieber was a paternalist\(^2\)\(^2\) and clarify the significance of Trieber’s distinctly Southern focus that ultimately brought about the downfall of the Civil Rights Act of 1866. Whether Trieber’s finding in *Morris* was dicta or not, this subtle feature of the opinion is telling with respect the timing and impact of judicial abandonment.

In Part V, I aim to raise *Hodges* to a higher pedestal in post-Reconstruction legal history by illustrating its consequences for the Act of 1866 and, more importantly, how a “southern Progressive” such as Trieber could understand the state action doctrine to prevent real protection for African Americans. In gutting the foundational legislative building block of Reconstruction, the Supreme Court accelerated the judicial abandonment of blacks that *Plessy*’s Jim Crow regime began; by 1906, the Court had clearly absolved itself of the responsibility for protecting blacks from extra-legal violence and discrimination. By focusing on ways in which Trieber’s *Morris* opinion reflected a commitment to local paternalism, the importance of the Act of 1866 and its downfall in *Hodges* makes the case an important event in the narrative of judicial abandonment.

**PART II**

\(^{1865–1898}\) (Baton Rouge: Louisiana State University Press, 2005); and that of Judaism with respect to Trieber, see Soifer, *Law and the Company We Keep* at 175–78, 183.  
The Thirteenth Amendment lacked a state action requirement, and accordingly, Trieber sought to employ it as expansively as possible in order to fulfill his goal of protecting African Americans. However, the Civil Rights Act of 1866 was reauthorized under the Enforcement Act of 1870, the latter passing as Fourteenth (and Fifteenth) Amendment legislation. The “state action” limitation on federal enforcement of its law did not come into form until Judge Joseph Bradley’s circuit court opinion for United States v. Cruikshank in 1874. As late as the Civil Rights Cases in 1883, the state action doctrine was not understood in ways that would preclude the Act of 1866 from drawing its power from the Fourteenth Amendment.

While this issue may seem to be a narrow technicality in the broader scope of the Hodges case, I use Part II to provide background and articulate the doctrinal backdrop of the state action requirement behind both the Hodges case and the judicial abandonment narrative more broadly. I will provide a brief explanation of the doctrinal forces at work from the passage of the Act of 1866 to the Civil Rights Cases of 1883. This section provides an outline of the “what” of the state action doctrine’s change over time; Part III will explain “how” and “why” that change came to be.

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The Civil Rights Act of 1866 was the first attempt to give substance to Section Two of the Thirteenth Amendment. Its proponents understood the bill to be the legislative assurance of the death-knell of slavery and its “badges and incidents.” After passage of the Thirteenth Amendment, Congress was already contemplating the legislative product that would embody the

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23 25 F. Cas. 707 (C.C.D. La. 1874).
24 109 U.S. 3 (1883).
amendment’s conception of freedom. The most robust debate on the Act of 1866 centered on what rights would fall under the Act’s enforcement power, not where the source of authority was for the legislation to expand the scope of federal power to enforce civil rights. That debate over the Act’s enforcement power was straightforward lends credibility to the notion that what the Act’s framers understood by “appropriate legislation” under Section Two of the Thirteenth varied according to how appropriate the “ends” of the legislation were to Congress’s power, not its “means.” Any reference to structural limitations of the federal government’s actions—that is, anything looking like a state action requirement—would not arise until as early as 1874.

When debates on the Act of 1866 began on the House floor, Iowa Republican Representative James F. Wilson made clear his impetus for the word choice in drafting the Act’s enforcement power. After McCulloch v. Maryland, the Necessary and Proper Clause gave Congress the ability to realize the “legitimate end” of Reconstruction by “all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.” Wilson’s notion of the scope of the federal government’s enforcement power was broad, and such a notion gave sufficient means to Congress to effect the legitimate end. Similarly, Senator Jacob Howard of Michigan argued that it was “easy to

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25 In doctrinal terms, the Act of 1866 attempted to answer the question of what the relationship was between the Thirteenth Amendment and the privileges and immunities of citizenship recognized in Article IV.
26 Defining what exactly “civil rights” meant to the framers of the Act of 1866 is a conversation beyond the scope of this paper. The civil rights relevant to this story and identified by Trieber are those enumerated in Section One of the Act of 1866, “to make and enforce contracts.” For a helpful explication of this concept, see George Rutherglen, Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866 (New York: Oxford University Press, 2013), 40–57.
27 See Act of 1866, § 2.
28 Act of 1866, § 2.
29 17 U.S. 316, 421 (1819).
foresee” that states would attempt to circumvent whatever rights were incident to Section One of the Thirteenth Amendment. Accordingly, federal enforcement must be strong to prevent them from “resort[ing] to every means in [the states’] power” to “restrain[] and circumscrib[e] the rights and privileges which are plainly given by it to the emancipated negro.”

The ultimate passage of the Act and its subsequent overriding of President Johnson’s veto actualized Radical and Centrist Republicans’ vision of a definitive shift in the scope of federal power.

Centrist Republicans supported their endorsement of the Act’s enforcement power by relying on investigations by General (and later Republican Senator) Carl Schurz that documented the “violation and oppression” that still existed after the passage of the Thirteenth Amendment.

The former states of the Confederacy had adopted and successfully implemented the Black Codes to preserve the vestiges of slavery that were not understood to be prohibited by the Thirteenth Amendment. Accordingly, the Act’s enforcement provisions borrowed language from the Fugitive Slave Act of 1850 in order to preempt local resistance to the legislation’s enforcement. State officials and state courts were required to actively enforce the rights enumerated in Section One, authorizing federal marshals and the President to call upon the armed forces of the United States to enforce federal law when local proceedings did not adequately do so. These provisions further authorized federal prosecutions, punished resistance

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33 For how the Black Codes’ text influenced debates surrounding the passage of the Civil Rights Act of 1866, see Theodore Brantner Wilson, The Back Codes in the South (Tuscaloosa: University of Alabama Press, 1965), 61–80.
34 Act of 1866, §§ 3–10.
to federal enforcement, and provided the Supreme Court appellate jurisdiction over cases arising under the Act.\textsuperscript{35}

Subsequently, the Enforcement Act of 1870 confirmed any doubts that the Civil Rights Act of 1866 was a shift in the power that the federal government could now constitutionally assert over state governments. The Enforcement Act of 1870 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). Defenders of the Act of 1870, justifying its coverage to “two or more persons,” did not take the “under color of” clause to exclude private individuals from criminal liability (due to the fact that an individual could still act with authority of state law or state custom) nor to cover private individuals purely on their own and without any reference to the relevance of state law or state custom.\textsuperscript{36} 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. The legislative record reveals only one instance in which any legislator criticized the Act of 1866 for being too broad because it covered private discrimination. Regarding the Fifteenth Amendment, Senator Casserly remarked that, if the Amendment were to extend to private action and not merely state action, it could “only operate upon such persons as are officially related to the United States or to the States, and who, under color of some statute or ordinance” undertaken to infringe an individual’s civil rights.\textsuperscript{37} This “under color of” language comes from the Act of 1866’s limitation of criminal

\textsuperscript{35} *Id.*


prohibition to any person who acts “under color of any law, statute, ordinance, regulation or custom,” language that the Enforcement Act of 1870 itself repeated.\textsuperscript{38}

While the Fourteenth Amendment did indeed open up a wide range of criticism that ultimately invited judicial discretion in the form of the state action doctrine,\textsuperscript{39} the debates surrounding the Fourteenth Amendment contain little attention to the issue of state action.\textsuperscript{40} Indeed, the vague nature of the Amendment’s language indicates that its supporters likely saw the Fourteenth Amendment as accomplishing more to enshrine the principles behind the Act of 1866 than to add substance to its enumerated rights.\textsuperscript{41} Unlike Senator Casserly’s objection to the scope of the Fifteenth Amendment, the record is absent of objections made to the Act of 1870 on Fourteenth Amendment grounds. The terms of the Amendment were understood to insulate the Act of 1866 from judicial review. By 1870, opponents of the federal government’s expanded power quibbled over which rights this power addressed, not when the federal government could act. That Congress and federal officials could override state jurisdiction when the latter proved unable to enforce federal law was assumed.

The state action doctrine would not appear in any cognizable form until Justice Bradley would address the subject in the following decade. Ultimately, the framers of the Act of 1866 and those debating the Act of 1870 understood the Act of 1866 to be immunized from attacks because of its perceived limitations on its coverage, based on the “under color of” clause; had

\textsuperscript{38} Act of 1870, §§ 4–6.
\textsuperscript{39} See, e.g., \textit{Slaughter-House Cases}, 83 U.S. 36 (1872).
\textsuperscript{40} Indeed, literature on the true meaning of the Fourteenth Amendment’s vague and ambiguous language, particularly that of Section 1, has emphasized the futility in attempting to decipher a coherent answer to the state action issue. See Herman Belz, \textit{A New Birth of Freedom: The Republican Party and Freedmen’s Rights, 1861 to 1866} (Westport, CT: Greenwood Publishing Company, 1976), 171–72 (noting that only passing mentions of the state action issue were made and did not constitute a substantial portion of the Fourteenth Amendment debates).
they understood it differently, the Enforcement Act’s debates likely would have seen the Civil Rights Act of 1866 cited for support or criticism of federal power over a potential state-only realm.

Thus, through Section Eighteen of the Enforcement Act of 1870, the Civil Rights Act of 1866 was reenacted under the Fourteenth and Fifteenth Amendments.\textsuperscript{42} In essence, the absence of debate over the appropriate sphere for federal activity lends credence to the view that the Act’s framers did not understand “state action” to be a requirement for federal enforcement—nor did they conceive of “state action” as posing any fundamental limitation on Congress’ ability to legislate under the Fourteenth Amendment, like Judge Trieber would find in \textit{Morris} forty years later.

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Pamela Brandwein has helpfully coined the aforementioned understanding of the Act of 1866’s enforcement power as one originating in the theory of “state neglect,” adopted by Centrist Republicans and maintained throughout the period of judicial abandonment.\textsuperscript{43} As Southern legislatures and local Southern law enforcement agencies refused to enforce the law against race-based violence perpetrated by the Ku Klux Klan,\textsuperscript{44} 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—or, as Republicans saw it, failure to enforce laws passed to put the provisions of the Thirteenth Amendment into practice. By 1900, the Southern practice of using extra-legal means

\footnotesize\textsuperscript{43} \textit{Id.} at 12–14.
\footnotesize\textsuperscript{44} See Hyman & Wieck, \textit{Equal Justice Under the Law} at 416–25.
to subvert law enforcement as well as the wills of Republican judges had become commonplace.\textsuperscript{45}

This prompted the Grant administration to begin extensive federal involvement in dealing with states’ inability—or unwillingness—to enforce the rule of law.\textsuperscript{46} In 1871, the Grant administration pressed Congress to investigate the failure of southern governments and courts to adequately control the lawlessness spreading over the South. Known as the “KKK Report,” Congress published a thirteen-volume excoriation of the southern criminal justice system.\textsuperscript{47} The course of these investigations informed Republicans (and some Congressional Democrats) in the debates over the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871. The group of framers of the Fourteenth Amendment was largely the same group that debated these acts. This included Representative and future-President James A. Garfield, who pressed state neglect as the primary motivation for these laws because of the “systematic maladministration of [the laws of the United States], or a neglect or refusal to enforce their provisions.” Referring to the violence perpetuated by the Ku Klux Klan, he argued that a “portion of the people are denied equal protection under [these laws]. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and

\textsuperscript{45} Lou Falkner Williams, \textit{The Great South Carolina Ku Klux Klan Trials, 1871–1872} (Athens, GA: University of Georgia Press, 1996), 37–39. 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.

\textsuperscript{46} 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.” \textit{Chicago Tribune}, May 5, 1871, 1.

\textsuperscript{47} Williams, \textit{Ku Klux Klan Trials} at 29.
provide for doing justice to those persons who are thus denied equal protection.” In addition to the many other Republicans supporting state neglect at the time, the political scientist John Mabry Matthews noted in 1909 that Republicans identified the denial of rights as a “failure to make arrests, to put on trial, to convict or punish offenders.

Accordingly, only a year after the Enforcement Act of 1870 was passed, Congress passed the Ku Klux Klan Act with authority unequivocally rooted in the Fourteenth Amendment. The language within its seven sections readily speaks of state neglect. Likewise, its opponents denied the reality of the Klan’s violence and using such denial to delegitimize this shift in the power of states to enforce the law to that of Congress. Republicans were committed to the state neglect doctrine as a political matter, viewing Democrats as the party that had destroyed the country in bringing war through secession. As such, the driving force that would keep the South at bay was enforcement of Reconstruction legislation, and federal intervention in light of state nonenforcement would assure that practices embodies by state movements such as the Black Codes could not inhibit the laws passed by Congress.

It was not long until the judiciary also began recognizing the possibility that nonenforcement of the law could trigger Section 2 of the Act of 1866 (its enforcement section). The first, and perhaps most influential, moment of this recognition came from Justice Bradley’s

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48 Brandwein, *Rethinking* at 40–41.
49 *Id.*
50 Act of Apr. 20, 1871.
51 See, *e.g.*, 42nd Cong., 1st sess., App. 72, 117 (remarks of Rep. Blair).
52 Brandwein also chronicles the “Fifteenth Amendment Exemption,” featured prominently in her book. Its connection and importance to the state neglect theory cannot be understated. Though I devote my attention in this project toward the Civil Rights Act of 1866 and its relevance to the state action doctrine, the Fifteenth Amendment Exemption would compliment to this paper, given the Fifteenth Amendment’s invocation by the legislations’ framers as well as Trieber’s own views on a related issue. See Gerald W. Heaney, “Jacob Trieber: Lawyer, Politician, Judge,” 8 U.A.L.R. L. J. 421, 451–52 (1985–86).
circuit court opinion in the 1874 United States v. Cruikshank case in the circuit court. If ever there was a moment to encapsulate the need for federal enforcement of rights, it was the Colfax Riot. After the ambiguous results of the 1872 Gubernatorial Election in Louisiana, a white militia attacked a group of African American Republicans who had gathered at the Grant Parish courthouse in Colfax to protect it from being occupied by Democrats. Estimates of those killed range from sixty to three hundred.53

Indictments against certain members of the local militia were brought under the Enforcement Act of 1870. Bradley began his analysis by explaining that individual rights arose from two different sources, the federal government and the state, and thus the ability for any Reconstruction amendment to justify federal enforcement of civil rights depended on the right itself. Bradley emphasized that the rights enforceable by the federal government were limited to instances of a state’s failure to protect natural rights:

The [states’] duty and power of enforcement [of natural rights] take their inception from the moment that the state fails to comply with the duty enjoined, or violates the prohibition imposed. . . . [W]ith regard to mere constitutional prohibitions of state interference with established or acknowledged [federal] privileges and immunities, the appropriate legislation to enforce such prohibitions is that which may be necessary or proper for furnishing suitable redress when such prohibitions are disregarded or violated.54

Bradley made clear, however, that “enforcement of the guaranty [of natural rights] does not require or authorize congress to perform the duty which the guaranty itself supposes it to be the duty of the state to perform.” Thus, “[w]here no violation is attempted, the interference of

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53 The brevity of my attention to the horrors of this violence is matched—and indeed, overcome—only by the Supreme Court in its Cruikshank opinion. For a detailed account of the massacre and the Court’s disregard of the case’s facts, see Charles Lane, The Day Freedom Died (New York: Holt Paperbacks, 2008).
54 Id. at 710–711
congress would be officious, unnecessary, and inappropriate.”\textsuperscript{55} This was the first true emergence of any legally cognizable prohibition of the federal government’s ability to enforce its laws—that is, the state action doctrine. Bradley’s \textit{Cruikshank} circuit court opinion represents the conception of the state action requirement as a doctrine rooted in concerns over nonenforcement, the same concerns animating the framers of the Act of 1866.

Bradley would expand on this dichotomy in his 1883 \textit{Civil Rights Cases} opinion. While the case dealt with the Civil Rights Act of 1875, its discussion of the Act of 1866 is enlightening with regards to state neglect. This is highlighted by his discussion of the “under color of” language discussed above. Bradley noted that this language stood for the proposition that individual race-based wrongs against civil rights are under the color of law or custom if the laws protecting civil rights are not enforced.\textsuperscript{56} The federal government could only enforce civil rights upon the incidence of state “excuse and perpetration,” or carelessness to address the race-based wrongs committed against an individual.\textsuperscript{57} If states “by some shield” refused to protect a civil right that “rest[ed] upon” their authority to protect, it rose to the level of “color of law…or custom.”\textsuperscript{58} Thus, “[t]he wrongful act of an individual, unsupported by [State authority], is simply a private wrong . . . unless protected in these wrongful acts by some shield of State law or State authority.”\textsuperscript{59} Accordingly, Bradley found that the Fourteenth Amendment did in fact authorize the federal government to enforce race-based infringements of an individual’s civil rights when the state or state officials failed to do so themselves.

\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 16–17.
\textsuperscript{57} \textit{Id.} at 18.
\textsuperscript{58} \textit{Id.} at 16.
\textsuperscript{59} \textit{Id.}
Bradley’s opinions stood for the proposition that state neglect justifies federal enforcement, an infringement of an individual’s federal rights, allowing for an individual to remove a case to federal court even if state officials are not directly implicated. Put another way, Bradley endorsed a definition of “state action”—for purposes of the Enforcement Act of 1870—as one that included a state’s refusal or inability to protect its citizens. As previously mentioned, the framers of the Act of 1866 simply assumed federal power to enforce federal law when states could not do it themselves. This history is important for overcoming the conventional doctrinal wisdom that Bradley’s Civil Rights Cases opinion constituted a stringent state action requirement. Rather, his opinions were rooted in the animating purposes behind the Act.

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Such was the state of the state action doctrine by 1883. For purposes of the judicial abandonment narrative, the interesting question arises: how did the state action doctrine develop into this stringent boundary for federal enforcement? Thus we come to Trieber’s Morris opinion. For the story of judicial abandonment, on first glance, it is surprising that Jacob Trieber understood state action to preclude enforcement absent direct, “formal” state action considering his liberal quoting of Bradley’s Cruikshank opinion:

As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that Congress had the power, under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race. Conceding this to be true (which I think it is), Congress then had the right to go further, and to enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon them. Without having this power, Congress could not enforce the amendment. It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the thirteenth amendment and the laws thus passed in pursuance thereof. But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone.
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. . . . 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. Otherwise it is a case
exclusively within the jurisdiction of the state and its courts.\textsuperscript{60}

While it is impossible to know for certain what doctrinal options were in the head of Judge
Trieber, it is unlikely he was unaware of state neglect as an interpretation of what he had come to
understand of the state action doctrine. Even without state neglect, the Act of 1866 had in fact
been reauthorized as Fourteenth Amendment legislation. Trieber’s finding that the Thirteenth
Amendment was required to uphold the constitutionality of the Act of 1866 was—if not in a
doctrinal sense—at least in a historical sense incorrect.

This is less interesting—and, indeed, less difficult—than answering why Jacob Trieber
understood the state of state action doctrine to preclude the Act of 1866’s constitutionality under
the Fourteenth Amendment. Though Trieber’s \textit{Morris} opinion reflects a principled commitment
to conveying federal protection to African Americans, I argue in Part III that local paternalism
explains how Judge Trieber understood the role of the federal government in protecting African
Americans. Trieber’s conclusion that the Act of 1866 could find authority only in the Thirteenth
Amendment ultimately reflects a particular understanding of state action doctrine that was
neither inevitable nor necessary. I aim to characterize local paternalism as a strong influence not
just on Jacob Trieber but as a reflection of the powerful role that the state action doctrine played
in the judicial abandonment narrative.

\textbf{\textsc{Part III}}

\textsuperscript{60} \textit{Morris}, 125 F. at 328 (quoting \textit{Cruikshank}, 25 F. Cas. at 711–12) (emphasis added).
On October 6, 1903, Judge Jacob Trieber read the charges to the federal grand jury. In boldly claiming that the “right to own, hold, dispose, lease and rent property” is a “natural right,”61 Trieber told the jury that one ceases to be free and is thus a slave if he or she is deprived of these rights. These instructions lacked the formality characterizing many at the time. Indeed, Trieber used language from the Declaration of Independence and the Bill of Rights to justify his expansive definition of slavery and the freedom that “every citizen is entitled to enjoy” that such a status denied.62 With the passage of the Act of 1866, moreover, the jury had the “duty under the law” to convict the defendants if the motivation for their actions was one of racial animus. And Trieber felt little need to downplay his feelings in front of the jury on what the correct outcome of the case should be: “But so far as this court is concerned, the cause of these lawless acts must have been the fact that the parties against whom they were directed were colored persons or Negroes.”63

Trieber’s communication of the charges to the jury in Morris reflected his commitment to the New South Creed. But, if Morris can be understood for a proposition consonant with this commitment—that preventing African Americans from making and enforcing contracts not only violated the spirit of the Thirteenth Amendment but also rested on retrograde racism holding Arkansas back from advancing into the twentieth century—what should we make of Judge Trieber’s finding that the Thirteenth Amendment was the sole source of power for the Act of 1866? More specifically, why did Judge Trieber—who, as I will demonstrate, stood as an

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61 While Lochner v. New York, 198 U.S. 45 (1905) would not be decided for another two years, substantive due process under the liberty of contract principle had been gaining momentum and support in the American judiciary. The Thirteenth Amendment contains no due process clause, however, and so for Trieber to describe the Thirteenth Amendment right to contract as a natural or fundamental right against the state and federal governments was novel.


63 Id.
emphatic Republican supporter of the New South Creed—endorse an interpretation of the state action doctrine that prevented federal enforcement of its laws unless in the most extreme of circumstances?

The definitive answer to “why” a historical figure made a decision they made, without concrete historical evidence, is often the product of speculation.\(^{64}\) However, by constructing the worldview constituting Trieber’s understanding of the relationship between the federal and state government, one can understand the circumstances precipitating Judge Trieber’s interpretation of the doctrine and history of the state action requirement. In this part of my paper, I aim to contextualize Jacob Trieber’s conviction in the New South Creed by answering how his understanding of the New South Creed affected his opinion in Morris. I argue that these tenets coalesced into the concept of local paternalism, which empowered states to foster the New South Creed rather than develop a robust relationship of rights-enforcement sharing between states and the federal government.\(^{65}\) In turn, local paternalism’s effect on Trieber’s Morris opinion brings to light the role that it played on his and others’ jurisprudential understanding of the state action doctrine. I will assess how local paternalism constituted Trieber’s understanding of the federal government with respect to Arkansas by noting its manifestation in Trieber’s identity as a (1) Republican, (2) judge, (3) businessman, and (4) conservative.

\(^{64}\) For a helpful, and perhaps foundational, method for doing so, see Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 3–7.

\(^{65}\) See generally Hendrik Hartog, “The Constitution of Aspiration and ‘The Rights that Belong to Us All,’” *Journal of American History* (1987). While I do not explicitly discuss Hartog’s theory of constitutiveness, Hartog’s piece informs this paper greatly with respect to “rights consciousness” and the methodological importance of focusing on external forces and their effect on the way individuals—from Rueben Hodges to David Brewer and indeed Jacob Trieber—understand the law.
Local paternalism played a strong role in shaping Trieber’s political views as a Republican. Specifically, “reconciliation” proved to be a predominant political trope for Republicans throughout the late-nineteenth century. Beginning as early as 1880 with former President Grant’s support, the Republican reconciliation policy appealed to Southern calls for moderation. Republicans began to support internal improvements, federal patronage, and Southern integration into the national manufacturing and railroad economy as a means to appeal to Southern moderates.66 Over the course of the late-nineteenth century, Republicans increasingly embraced this policy; more and more Americans from both halves of the country had grown weary of sectionalism’s divisiveness.

From an early age, Trieber’s political ambitions in the legal arena were never divorced from his devotion to the Republican Party, and by 1896, Trieber had fully embraced the reconciliationist position of his fellow Republicans. 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.67 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.68

67 This was reflective of the “conservative philosophy” of Southern Republicans. While I discuss the role of conservative Republicans in their shift against blacks in the following pages, I discuss the conservative philosophy, and its rule-of-law commitments, in more detail below.
68 On November 6, 1892, the Democratic newspaper, *Forrest City Times*, reported that Trieber “made a very excellent speech the striking feature of which was that he admitted that he was not
Tribe played a dominant role in campaigning for McKinley at the 1896 Arkansas State Republican Convention in Little Rock. The *Helena World* reported of Tribe’s activities that there was “[n]o mention of ballot-box stuffing, free bills or bloody shirts.”\(^6^9\) The tone of the Old Guard was one of reconciliation, and the Party’s focus was on portraying McKinley as the arbiter of further sectional healing. As a result of Tribe’s widespread appeal at the state convention, he was easily selected as a delegate to the national convention in St. Louis. Tribe had more than just ideology to fuel his support for reconciliation, however. It was widely believed that the Party would nominate Tribe as the Republican candidate for Arkansas’s First District. In order to broaden his appeal as a formidable candidate, Tribe played up his popularity amongst Democratic voters back home. The *Helena World* praised this effort in supporting his candidacy, noting this popularity as the reason why he was the “only Republican in the district who could make the slightest showing against the candidate of the Democratic party.”\(^7^0\) Ultimately, however, Tribe was not selected for the nomination, with the Party instead choosing Mr. T.O. Tucker of Clover Bend, Lawrence County.\(^7^1\)

Republicans began formally retreating from supporting federal protection of African Americans after Senator Henry Cabot Lodge’s “Force Bill” failed to pass in 1890. 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

\(^7^0\) *Helena World*, Jun. 12, 1895, *available at* The Arkansas Historical Commission, “Tribe Collection.”
\(^7^1\) Heaney, “Jacob Tribe” at 429.
The McKinley administration furthered the Republican retreat from raising the race question. William McKinley’s nomination for the Republican ticket in 1896 and subsequent election employed national reconciliation and unity as a foil to the Populist appeal of Democratic challenger William Jennings Bryan. In order to stymie the influence of the Populists and their potential to challenge McKinley’s election, McKinley’s supporters invoked Civil War memory in order to promote unity and cast Bryan as divisive and classist. The Republican National Convention solidly 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. Of the Republican Party Platform endorsed by Trieber at the Republican National Convention in St. Louis, the New York Times wrote approvingly of McKinley’s “sagacity . . . in deprecating sectional division and appealing to a common patriotism to protect the nation’s honor.”

Reconciliation policy had practical implications. Between 1877 and 1900, for example, Democratic and Republican politicians alike pressed to keep U.S. army officers and troops out of the South, reminiscing to the divisive Radical Republican policy of militant Reconstruction that had formally dissipated by 1870. Despite lawless violence and widespread refusal to enforce the law throughout the South, there were never more than 29,000 troops enrolled in the U.S. army during this period, an uptick of 5,000 men from 1877, and virtually all of them were stationed

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72 Hirshson, *Farewell to the Bloody Shirt* at 234–35.
73 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* (New Haven: Yale University Press), 296-301.
74 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): 182.
either on the Atlantic seaboard or on the frontier for Indian control. Instead, the responsibility of
restoring order to the South was left in the hands of local militias of men who carried with them
all the prejudices contributing to the very lawlessness they were assigned to quell. The state of
affairs seemed to confirm Frederick Douglass’ concern in 1875: “If war among the whites
brought peace and liberty to blacks, what will peace among the whites bring?”

Unquestionably, Trieber—as an ardent paternalist—did not share the same views as some
of his fellow Republican conservatives on the role of judges or even society writ large. But
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. On Memorial Day, 1898, Trieber was asked to deliver
an oration on the significance of the Civil War. Trieber expressed his view that the primary
consequence of the Civil War was its confirmation of the Union’s perpetuity. “Disunion,” he
said, “is a thing of the past.” By 1900, the Grand Army of the Republic appointed committees
of three members in states North and South to examine every history book for “historical
inaccuracies,” defined by the organization of Civil War veterans as those putting too positive a

76 Russell F. Wiegley, History of the United States Army (New York: Macmillan Publishing
77 David W. Blight, Race and Reunion: The Civil War in American Memory (Cambridge, MA:
78 However, as Woodward notes, leaders of Southern progressivism like Trieber were often
simultaneously extolling the virtues of racial prejudice. Trieber was not among them, but
conservatives throughout the era shared the same veins of white superiority that justified his
paternalistic goals. Woodward attributes President Woodrow Wilson’s 1912 Presidential victory
in large part to these progressives, and those supporting Wilsonian progressivism enshrined this
79 Speech Given at Memorial Day Exercises at National Cemetery, Little Rock, in Heaney,
“Jacob Trieber” at 433.
portrayal of the Civil War and its results, such as emancipation.\textsuperscript{80} Southern branches of the GAR were receptive to the idea that teaching the “right” history would perpetuate loyalty to the American nation. Notably, the Commander of the Arkansas GAR branch reflected the southern demand for “loyal history” in stating that veterans were to “leaven this great ponderous lump of disloyalty that exists here.” Indeed, Southern GAR branches encouraged the installation of the American flag over Southern schoolhouses and patriotic exercises on Columbus Day.\textsuperscript{81}

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Trieber’s political views as a Republican were consistent with the New South Creed. Trieber supported reconciliation for its emphasis on steering the South away from, as he put it, the “curse of the [D]emocratic legislation [that has been] responsible for keeping Arkansas back.”\textsuperscript{82} Since the 1880s, Republicans had succeeded in the eastern parts of Arkansas and other mountainous areas of the region by appealing to strong Unionist sentiments through patronage positions and pensions.\textsuperscript{83} As Republicans embraced reconciliation as a solution to sectionalism and “state prejudice,” Southern voters responded best to arguments that nationalism would lead the South to prominence through Northern aid and participation but Southern ingenuity and self-determinism.\textsuperscript{84} Instead of relying on Northern preemption of Arkansan citizens’ own powers, Arkansan Republicans could reform the state internally, and one place where Trieber’s support

\textsuperscript{81} Mary R. Dearing, \textit{Veterans in Politics: The Story of the G.A.R.} (Baton Rouge: Louisiana State Press, 1952), 421. Dearing spends some time discussing the sectional interests of both sides in this fight, but mitigates this conflict by pointing out that, by 1899, the patriotic Southern branches of the GAR were more indicative of patriotism than their “obdurate neighbors.”
\textsuperscript{82} \textit{Arkansas Gazette}, Aug. 29, 1898, \textit{available at} The Arkansas Historical Commission, “Trieber Collection.”
\textsuperscript{84} Gaston, \textit{New South Creed} at 99, 166–67.
for a local answer to the retrograde status of Arkansas appeared prominently was in his criminal docket as U.S. Attorney.

Because the District Court for 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.\(^8^5\) In combination with his impatience for these cases that he saw as overly time-consuming,\(^8^6\) 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 progressivist 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.”\(^8^7\)

The *Helena World* went out of their 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 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.”\(^8^8\) Trieber’s compassion came from both a sincere

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\(^8^5\) Heaney, “Jacob Trieber,” at 430.
\(^8^6\) 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).
\(^8^7\) Whayne, *A New Plantation South* at 21–22.
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.89 “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.”90

Trieber’s sentiments on judicial economy were clearly affected by a sense that there were
unfair disconnections 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.”91 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
countries.”92 Trieber felt that the inability of state courts to have the capacity or willingness to
deal with these cases would not justify the pressure it would put on federal courts to adjudicate
such cases.

89 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.”
90 Heaney, “Jacob Trieber,” at 430 (emphasis added).
91 See Trieber supra note 86.
Collection.”
In addition, the Arkansan business class pushed for largely laissez faire agendas in keeping corporations profitable in their southern operations. Trieber’s membership in the XV Club is telling here.\textsuperscript{93} The XV Club was an elite social club established in Arkansas in 1904 for the purpose of “social intercourse and the discussion of literary, scientific, historical, political, and all current topics.” Trieber joined the XV Club in 1911. The club’s membership primarily consisted of upper-middle class businessman with ties to and support of the Republican business class. Trieber had also served as the president of the First National Bank of Helena in 1893, and Trieber’s own economic interests were intertwined with the middle-class and elite planting sector that would overtake the timber economy by 1920.

The XV Club was known to represent a united front in pushing their economic agenda. Indeed, many of its members had ties to the railroad and timber economies, two of eastern Arkansas primary lucrative sectors. The 1880s saw an explosion of timber industry in eastern Arkansas, and railroad companies profited along with timber companies in the manufacture and transportation of wood. Though many Southern economic sectors sought Northern investment, the railroad industry’s boom in Arkansas allowed timber manufactures to be less dependent on the North for its transportation to other areas in the South. By 1910 the South accounted for forty percent of the nation’s timber production.\textsuperscript{94}

The business elite believed that the federal government should not be in the business of propping up diminishing economic sectors at the expense of prospering ones. They did support a robust program of private philanthropy for the poor—a conservative position in that it worked to mitigate the realities of poverty but opposed government relief and assured that the business

\textsuperscript{93} See Whayne, \textit{A New Plantation South}, 53–54; Marilyn Jackson Parins, ed., \textit{The XV Club First Hundred Years, 1904–2004} (Little Rock: XV Club, 2005).

\textsuperscript{94} Ayers, \textit{The Promise of the New South} at 4, 124–25.
class would be in control of the nation’s wealth and votes. This manifested in their rallies against national prohibition regulation as well. Local municipalities in the region were rife with distilleries and saloons owned by small businessmen. Because entire communities were divided on the issue of prohibition, businesses supported letting these localities vote for themselves whether their towns would be dry or wet, rather than let far-away zealots ignorant of Southern local economies and cultures determine for them. As men of the local business class, the members of the XV Club felt strongly about local businesses having local autonomy from encroaching federal regulation.

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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 rule of law in the wake of the Civil War and secession’s disastrous ruin upon the nation. 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. The conservatives believed that in a society governed by the stable rule of law, each class of society should acknowledge its responsibilities and obligations and pursue its rights from its respective rank in a stable social hierarchy.

No one reflected this rule-of-law philosophy better than Judge (and ex-Democratic Governor of Alabama) Thomas Goode Jones, U.S. District Judge for the Northern and Middle

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95 Frederickson, *The Black Image* at 212.
96 Ayers, *The Promise of the New South* at 174–75.
97 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.
98 *Id.* at 48.
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.”99 Though a conservative, supporters of paternalism like Jones were almost alone among southern whites in expressing concern for the freedmen by the turn of the century. When they did, they expressed their concern in local terms. 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. For example, U.S. Attorney Thomas Roulhac for the Northern District of Alabama 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 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.100

Identifying with the Republican Old Guard as an ardent supporter of Harrison, McKinley, and Roosevelt, Trieber fully supported the need for the law to be enforced so as to prevent the type of violence and lawlessness rampant in Arkansas. As a result of conservative Republican policies favoring railroads, corporations, and business interests that were highly unpopular in the

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99 *Id.* at 49.
100 Thomas Roulhac to Judge Jones, Oct. 5, 1904, Jones Papers, ADAH, box 3, file 29.
South, a number of Democrats that called themselves “Readjusters” (a rebut to the Whiggish policy of the “Redeemers”) were able to amass large gains in taking over state legislatures throughout the 1880s and 1890s.\footnote{Woodward, The Strange Career of Jim Crow at 57.} Democrats buttressed these substantive points by appealing to their constituents’ racism by casting itself as the only party that could protect the advancement of the white interest over that of blacks.\footnote{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.” 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.} In addition, despite its overt racist agenda, the Democratic Party’s overtures to blacks made Republicans worry that Republican support could further shrink in the “Solid South,” and the dominant conservative forces in the Republican Party found a locally-based paternalism to be a way of assuaging African Americans to stick with the Republican Party.\footnote{Indeed, President Cleveland appointed several Negroes to office in the South at the advice of many Southern Democrats. See Woodward, The Strange Career of Jim Crow at 59.}

This brings one back to Trieber’s reading of the charges to the federal grand jury in *Morris*. 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.”\footnote{Arkansas Gazette, Oct. 7, 1903, 1, available at The Arkansas Historical Commission, “Trieber Collection.”} Trieber also understood the real benefits of lawful order. 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.\footnote{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#.}

Trieber viewed whitecapping as a threat to societal 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 note vote.\footnote{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.} 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.\footnote{Heaney, “Jacob Trieber” at 463–64.} If Southern racists were to reform their attitudes about blacks for the good of the South, the southern business community could effectively engage the southern labor force and promulgate greater economic opportunity for African Americans. Thus, Trieber recognized racial tension and the violent treatment of blacks as a local problem and a Republican problem. Rather than rely on Northern carpetbaggers and radical-Republican policies, Trieber supported local solutions to the “labor question.” Trieber understood that this change would necessarily be effected conservatively, gradually, and over the span of a long time. Writing to President Roosevelt about racial tension in the South,
Trieber noted that “common 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.”

If rule of law was important to subscribers to the New South Creed, it is clear that the paternalistic notions generally advocated by its adherents starkly contrasted with the egalitarian sentiments of radical Republicans. That is, Trieber’s support for paternalism did not translate into a wholesale rejection of how the Republican Party understood the federalist balance by 1900. Consistent with the Party’s reconciliationist impulse, Trieber’s dedication to the New South Creed did not emphasize the federal government as the source for this protection. Trieber believed that the emancipation of slaves and its consequences on the Southern social order were irreversible. If the blacks were not propped-up by the dominant race, they would drag the South down and prevent it from joining the North in twentieth century economic and political modernity.

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 decision. While the enforcers of this harmony could come from the federal government when circumstances required it, for Trieber, his devotion to the Republican party’s platform on federalism and respect for sectional reconciliation led him to define this set of circumstances narrowly. Considering Trieber’s devotion to helping African Americans for the benefit of the South, his understanding of paternalism as manifesting as local in nature acted as a guiding principle for him as a supporter of the New South Creed. In Part IV, I will discuss local

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108 Writing to President Roosevelt about racial tension in the South, Trieber noted that “common 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.
paternalism with respect to the *Morris* decision specifically, while in Part V I will discuss its significance to the judicial abandonment narrative as a whole.

**PART IV**

The two sets of indictments procured by U.S. Attorney Whipple in *Hodges v. United States* and *United States v. Morris* were not guaranteed to result in convictions. The *Helena World* (Trieber’s hometown newspaper) described six years prior the difficulty of securing “proof against [the whitecappers]. When a gang of hoodlums circle around the back end of large plantations at the hour of midnight and fire into negro cabins and then disappear, it is difficult to swear who did the nefarious work.” The *Arkansas Gazette* added that the victims were too “afraid of the consequences that may be visited on them after they have returned to their homes.”

Whipple had asked the U.S. Department of Justice for funds to hire a special prosecutor. Whipple clearly saw these indictments as important in the fight against whitecapping. Given the gravity of the crimes, Whipple may have believed he would have an

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109 When presented to Judge Trieber, the case was titled *United States v. Maples*. The trial transcript reflects that the issues in the *Maples* prosecutions were “the same” as those of the *Morris* decision and for reasons unstated, the latter was chosen to be published. See *Hodges Record* at 6–7.


113 *Id.* Of the twenty-seven defendants, Whipple told Knox that they, as “white men feeling themselves unable to compete with colored tenants,” conspired to “drive [the African American workers] out of the count[ies]. The movement is denounced by all the respectable white element irrespective of party.”
easy time obtaining the indictments from the federal grand jury. One of the defendants on the sawmill case, James A. Davis, had even gone as far as to ask the justice of the peace, John Harrison, for help in quashing the mob. When asked, Harrison “not only refused to help keep the peace, but joined the mob, which told the negroes they must leave. Acting on Davis’s advice, the negroes obeyed.”

However, Whipple also knew that Davis, the other defendants—including a man named Reuben Hodges—and their attorney, L.C. Going, would certainly file a demurrer to the indictments should the federal grand jury grant them. 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:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . . shall have the same right, in every state or territory of the United States to make and enforce contracts . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens and shall be subject to like punishments, pains and penalties.

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.”

Whipple must have known that the demurrer might deal a major blow to his case. Written over forty years prior, both provisions rested on a theory of federal power that had come under

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114 *Arkansas Gazette*, Mar. 17, 1904, 1.
increasing judicial attack at every level of the state and federal judiciary.\(^{117}\) Put another way, Whipple’s assumption that these statutes could authorize the federal government to prosecute individuals for private acts of racial discrimination seems, at cursory glance, to be an aggressive reading of the legislation.\(^{118}\)

Triber’s charge to the jury was read, and ultimately, the jury indicted all twenty-seven of the defendants. After the defendant’s attorney, L.C. Going, submitted an immediate demurrer of the indictment, claiming the Act of 1866 to be unconstitutional. Judge Triber issued his \textit{Morris} opinion the very next day, overruling the demurrer.

Triber found in \textit{Morris} 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. In order to justify the constitutionality of the Act of 1866,\(^{119}\) Triber began by citing Justice Bradley’s decision in the \textit{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.”\(^{120}\) With this power, Triber recognized that Congress’s answer to what legislation was necessary was the Civil Rights Act of 1866. Triber justified this specific choice by referring


\(^{118}\) See Demurrer to Indictment, \textit{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”).

\(^{119}\) Triber 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 pointing to the Supreme Court’s decision in \textit{Ex parte Yarbrough} upholding the provision. 110 U.S. 651 (1884).

\(^{120}\) \textit{Morris}, 125 F. at 323 (quoting \textit{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.”)).
to the Court’s decision in \textit{Prigg v. Pennsylvania}, in which Justice Story rejected a strict interpretation of the Constitution in upholding—ironically—the Fugitive Slave Law, on the basis of the Necessary and Proper Clause.\footnote{121} Finding the means-ends connection satisfied by the Act of 1866, Judge Trieber seemed to mock the demurrer when asking, “Shall the courts be less liberal in construing constitutional provisions in favor of freedom than those in favor of slavery?”\footnote{122}

While the \textit{Morris} opinion found that the Thirteenth Amendment could be used to prosecute individuals for acts of racial discrimination that prevented an individual from realizing their right to contract, this finding rested on Trieber’s assumption that “[i]f the power to enact the legislation involved in this proceeding exists at all, it must have been granted by some provision of the last three amendments to the Constitution—the thirteenth, fourteenth, or fifteenth”—the power, that is, vested in the federal government by Section One of the Civil Rights Act of 1866.\footnote{123} This was obvious to Trieber because—despite the Act’s reauthorization by the Enforcement Act of 1870—the Fourteenth and Fifteenth Amendments had not yet been submitted to the states for ratification when the Civil Rights Act of 1866 was passed. Using the state action requirement as a dividing line, Trieber noted the presence of it in the latter two amendments but not the Thirteenth as evidence that Congress meant for the Fourteenth and Fifteenth Amendments to be inapplicable \textit{per se} when enforcement is against actions committed by non-state agents.

\footnote{121} 41 U.S. 539, 567 (1842).
\footnote{122} Morris, 125 F. at 330.
\footnote{123} Morris, 125 F. at 323 (E.D. Ark. 1903). Also at issue in \textit{Morris} was Section Six of the Enforcement Act of 1870. Rev. Stat. §§ 5508, 5510 (1901). Unlike the focus on Section 1978, Trieber quickly dispensed with the argument that Section 5508 was unconstitutional.
This, however, fails to prove that the Thirteenth Amendment was the sole source of authority for the legislation. As detailed in Part II, the Enforcement Act of 1870 reauthorized the Act of 1866. In doing so, Congress reenacted it as legislation in light of the *Fourteenth* Amendment, not the Thirteenth. When the Act of 1866 was in Congress, Republican Representative John A. Bingham portentously expressed doubts that the legislation would be upheld under Thirteenth Amendment legislation, given the potentially narrow interpretation of the rights thought of in Section One. As a key Congressional leader in passing the Fourteenth Amendment through the House of Representatives, when it time came for passing the Enforcement Act of 1870, Bingham made sure to erase any doubts of the Act of 1866’s constitutionality and passed the 1870 legislation under Section Five of the Fourteenth Amendment.\(^{124}\)

That Justice Bradley found as much in the *Civil Rights Cases* bears a brief repeating, because it shows that as late as 1883 the state action doctrine was not yet recognized as the kind of strict limitation on federal enforcement of its laws that would have precluded upholding the Act of 1866 under Section Five of the Fourteenth Amendment. In a discussion within the opinion about the constitutionality of the Act of 1866, Bradley interpreted the “color of law . . . or custom” language in Section Two of the Act of 1866 to support federal reach of remedies to address private acts of racial discrimination.\(^{125}\) In doing so, Bradley admitted to not coming down on whether the Thirteenth Amendment would have granted the law its power, but rendered the question moot given that it was constitutional under the Fourteenth Amendment.\(^{126}\) That is, Bradley treated the Act of 1866 and Enforcement Act of 1870 as valid Section Five legislation.

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\(^{124}\) Brandwein, *Rethinking* at 164.  
\(^{125}\) *Id.*  
\(^{126}\) 109 U.S. at 22.
under the Fourteenth Amendment.127 To any extent that this question was discussed subsequent to the Civil Rights Cases, there is no indication that this basic fact of legislative history was questioned.

Trieber did indeed err in his assumption that the Thirteenth Amendment was the sole source of power, should it exist, for the Act of 1866 to be upheld. But describing his finding as a doctrinal error does little justice to the profound implications of local paternalism on the state of the state action doctrine by 1903. Trieber had come to understand the state action doctrine as a complete bar on the federal government’s power to intervene in state affairs. While Trieber was aware of the transformative power of the Civil Rights Act of 1866, his devotion to local paternalism informed his understanding of the soundest and most constitutional means by which to honor the “background principles” inherent to the Reconstruction legislation at issue in Morris. Accordingly, only the finding that the Hodges defendants relegated the victims to an equivalent state of slavery—a “badge and incident of slavery,” as phrased by Bradley in the Civil Rights Cases—would justify federal intervention like that vested by the Act of 1866.

* * *

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 Constitution simply recognized the right to contract and did not in fact protect it, thus leaving such protection to the state of Arkansas.128 Their argument also rested on the fact that Judge Trieber’s definition of slavery was untenable, that the “badges and incidents of slavery” could include the actions committed by

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Hodges and his cohorts. The government’s argument, made by Attorney General William Moody, did not contemplate whether the right to contract could be protected by the federal government, pointing to the language of the Act of 1866 as proof that it did. While not referring to state neglect specifically, Moody contended that Section Two of the Thirteenth Amendment was written for the purpose of protecting any individual denied their fundamental rights like the right of contract on the basis of their race. Moody stressed the “practical freedom” that the Thirteenth Amendment sought to enforce, and the consequences of denying the federal government this power 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.”

Ultimately, Justice Brewer and the majority disagreed. Brewer rejected the notion that the Thirteenth Amendment or the Act of 1866 had effected any fundamental change in the role of the federal government. 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 appropriation operates to reduce the individual to a condition of slavery.” Most importantly, Brewer focused on the choice of citizenship to reject Trieber’s paternalistic sentiment:

129 Id.
131 Id. at 11–13.
133 Hodges, 203 U.S. at 16–18.
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.134

Brewer and the majority thus held that 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.

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Brent Aucoin notes that Trieber was an ardent paternalist and a believer in the responsibility of the federal government to take affirmative steps to lift African Americans up from bondage.135 Though believed in the duty and power of the federal government to protect African Americans, his efforts to do so in Morris were curtailed by the state action doctrine. This is a relatively conventional conclusion, consistent with the historiographical narrative that judicial abandonment occurred because of the judiciary’s formal dedication to the state action requirement; the only thing that separates Trieber, Judge Jones, and Judge Emory Speer from the rest of the Southern judiciary, then, was their lack of overt racism, and belief that only paternalism could fulfill the promise of the Thirteenth Amendment.

In that sense, the Act of 1866’s role in judicial abandonment seems to lose its importance, given that it had into the background like the constitutional “background principles” it was passed to enforce. In other words, under this view, Hodges is but another step in the line of cases that led from Plessy. Given the circumstances affecting and precipitating Trieber’s Morris

134 Id. at 19–20.
135 Aucoin, A Rift in the Clouds at 88–89.
opinion, however, I posit that the role played by local paternalism in affecting the *Morris* decision is underscored when considering that Trieber comes off as more egalitarian in his social beliefs than Aucoin may credit him for.

Though wedded to the idea that southern whites had a strong role to play in protecting the rights of African Americans, his willingness to recognize the inherent rights shared by whites and blacks alike is consonant with his original understanding of Section Two of the Act of 1866 to “enforce this article by appropriate legislation.” Trieber quoted Justice Swayne in noting how and why the Thirteenth Amendment expanded the powers of the federal government after the Civil War:

> No spirit of vengeance animated those who insisted upon the adoption of this amendment. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people.\(^\text{136}\)

In addition, 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.\(^\text{137}\)

Even if Trieber believed in the superiority of the white race, his paternalism seems born out of a desire for African Americans to receive the same rights owed to them under the Constitution as whites. These rights did not simply end after the bondage of slavery was broken, but continued

\(^{136}\) *Morris*, 125 F. at 325 (quoting U.S. v. Rhodes, 1 Abb. U.S. 28, 27 F. Cas. 785, 788 (C.C.D. Ken. 1866)).

\(^{137}\) *Id.* at 331 (quoting *Slaughter-House Cases*, 83 U.S. at 90 (Field, J., dissenting)).
as badges and incidents of slavery. 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.\textsuperscript{138}

Still, despite its opposite holding, the \textit{Morris} decision’s finding that only the Thirteenth Amendment could provide Congress the power to enforce federal law proved, ultimately, to be determinative.\textsuperscript{139} As I will make clear in Part V, the \textit{Morris} decision is demonstrative as a methodological example of the value in taking a close look at the various forces at play in any given case that we think of as a “Supreme Court case.”\textsuperscript{140} That is, Trieber’s \textit{Morris} opinion contextualizes the significance of local paternalism at work and, in turn, sheds a new light on the historiographical significance of the \textit{Hodges} holding.\textsuperscript{141}

\begin{thebibliography}{9}
\bibitem{138} \textit{Morris}, 125 F. at 325. Indeed, Pamela Karlan argues persuasively that the \textit{Hodges} holding is inconsistent with the \textit{Lochner} decision that found right to contract a fundamental liberty. See Pamela S. Karlan, Symposium on “Contracting the Thirteenth Amendment: Hodges v. United States,” 85 B.U. L. REV. 783 (Jun. 2005). For more on Jacob Trieber’s understandings of blacks and the change in their relationship to the United States after the Civil War, see Jacob Trieber, “The Legal Status of the Negro in Arkansas Before the Civil War,” 3 BULL. ARK. HIST. SOC’Y (1911).
\bibitem{139} Indeed, the immediate results of the \textit{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 Mary Frances Berry, \textit{Black Resistance, White Law: A History of Constitutional Racism in America} (New York: Penguin Books, 1971), 124. These results included the dismissal of a series of charges in connection with whitecappings, the repeal of state laws protecting blacks, and an exacerbated lack of enforcement of any remaining laws by law enforcement officials. For more on the immediate effects of the \textit{Hodges} decision, see Aucoin, \textit{A Rift in the Clouds} at 32–35; Berry, \textit{Black Resistance, White Law} at 128.
\bibitem{141} Though beyond the scope of this paper, the parallel story of indentured servitude known as peonage plays an informative role in the judicial abandonment narrative. White planters would
\end{thebibliography}
PART V

convey cottonseed to black sharecroppers at inflated prices, causing the latter to become indigent. Because it was law (by contract) that these sharecroppers could not leave the farm until his debts were paid off, he would be held in economic bondage. See Pete Daniel, *The Shadow of Slavery: Peonage in the South* (Champagne-Urbana: University of Illinois Press, 1990), 19–20. In 1905, Justice Brewer held in *Clyatt v. United States* that a set of Arkansas state laws prohibiting the practice of peonage was constitutional. 197 U.S. 207 (1905). Trieber had been the judge of record for the case at the district court level. See *Peonage Cases*, 136 F. 707 (E.D. Ark. 1905). While not essentially differing in their findings of the laws’ constitutionality, Trieber’s instructions to the jury differed markedly from the essence of Brewer’s opinion in the former’s enunciation of the unlawfulness of peonage:

“[I]n the case of peonage, [this law has been enacted] to 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 . . . If the evidence which is laid before you satisfies you that . . . [the poor laborer] has left, and was arrested either on some trumped-up criminal charge or without any warrant of law . . . then it is your duty as grand jurors to find an indictment against such persons.”

See id. Indeed, Trieber knew this system well, having lived at one point in Phillips County where peonage was widely practiced. While the Court overturned the defendant’s conviction for enslaving an African American against the meaning of the statute on a technical reading of the statute’s text, the Court would reject the constitutionality of peonage under Thirteenth Amendment reasoning in subsequent cases such as *Bailey v. Alabama* and *United States v. Reynolds*. Why the Court should set itself in firm opposition to peonage but not to other “badges and incidents of slavery,” however, remains a mystery. It is clear that the Court’s firmness was in part because “the principles of the Peonage Cases [such as Bailey and Reynolds] were thought to be needed to protect whites as well as blacks, and were not conceived as commitments to racial justice.” See Benno C. Schmidt, Jr., “Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases,” 82 Colum. L. Rev. 646 (May 1982) (discussing the Russell Reports that found the bad abuses of peonage and their effect on blacks but also white immigrants). This would stand as a reaffirmation of the Act of 1866’s fate as an unused source of protection for African Americans and the inability for the Thirteenth Amendment to effect real protection for African Americans against the violent practice of whitecapping. Indeed, to the extent that *Clyatt* could have stood for the proposition that the Thirteenth Amendment could be used to protect African Americans from slavery-like conditions such as the victims in *Hodges*, Justice John Harlan’s dissent in *Hodges* scolded Justice Brewer for not remembering his own *Clyatt* opinion. “One who us shut up by superior or overpowering force . . . from earning his living in a lawful way of his own choosing is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage.” *Hodges*, 203 U.S. at 34 (Harlan, J., dissenting). Thus, it appears that, at the least, a lack of concern for the African American race played a more than abstract role in the story of judicial abandonment.
JACOB Trieber sat on the bench during a time in Arkansas in which whitecapping ran rampant, relegating African Americans to a state of constant fear without an effective sovereign to protect them. “Race wars” were becoming commonplace throughout Arkansas in the 1880s and 1890s. 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.142 For Trieber, this lawlessness did not only hold Arkansas back from achieving greater prosperity for the postbellum generation, but in addition, it ran contrary to his impulse for applying the law equally to all citizens. In describing his judicial philosophy to the *Arkansas Democrat* in the twilight of his career, Trieber emphasized that the role of courts is 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.”143

Even before the Supreme Court overruled his *Morris* opinion, Trieber remained confident that Southerners could come to agree with his convictions for equal application of the law and equal protection of all citizens’ rights. Writing to Thomas Goode Jones, Trieber wrote encouragingly:

I do not know the conditions existing in your state, but in our state the rabble seems to have obtained absolute control of the politics of the state . . . 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

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indulged in by petty politicians, do not express the sentiment of the better class of people. To awaken their conscience and supply them with the moral courage necessary to give expression of their views on the subject is all that, in my opinion, is necessary to influence a patriotic adjustment of the negro question.\textsuperscript{144}

It is in this moment of judicial abandonment, \textit{Hodges v. United States}, that the Supreme Court relegated the Civil Rights Amendment of 1866 to the annals of legal history and removed one of the strongest “tools” that egalitarians and paternalists alike could have employed to enforce the promise of the Thirteenth Amendment. The evolution in understanding of the state action doctrine from 1866 to 1900 led to the evisceration of the “last great hope” that could have prevented definitive judicial abandonment—the Act of 1866.

Legal and constitutional historians have recognized the significance of the \textit{Hodges} decision.\textsuperscript{145} Their analysis frames the case in the context of the Supreme Court’s “judicial abandonment” historiography. Though the Court began curbing Reconstruction legislation and the power of the federal government to protect African Americans soon after the conclusion of the Civil War,\textsuperscript{146} historians have conventionally pegged the Court’s opinion in \textit{Plessy v. Ferguson}\textsuperscript{147} in 1896 as the concluding moment in judicial abandonment by permitting legal segregation. Scholars point to the Court’s acceptance of the “civil/social” distinction of rights—embedded in the opinion’s language—as strong gestures signaling judicial abandonment of

\begin{footnotes}
\item[144] Judge Jacob Trieber to Judge Thomas Goode Jones, Oct. 14, 1904, Jones Papers, ADAH, box 3, file 29.
\item[145] See Aucoin, \textit{A Rift in the Clouds} at 33–35; Whayne, \textit{A New Plantation South} at 52–53; Hyman & Wiecek, \textit{Equal Justice Under Law} at 501; Berry, \textit{Black Resistance, White Law} at 128 n.88.
\item[146] See \textit{Slaughter-House Cases}, 83 U.S. at 36 (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 \textit{Slaughter-House Cases}, see Michael A. Ross, \textit{Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era} (Baton Rouge: Louisiana State University Press, 2003), 189–210.
\item[147] 163 U.S. 537 (1896).
\end{footnotes}
African Americans and the rejection of a protective or paternalistic role for the federal government over internal matters within the states.

Revisionist historians, however, have begun to cast doubt on the importance of *Plessy*’s role in this narrative. Pamela Brandwein in *Rethinking the Judicial Settlement of Reconstruction* effectively chronicles the shift that took place from Waite Court jurisprudence to that of the Fuller Court in recasting the moments where judicial abandonment reached its apex. By this reading, *Plessy* reflects a transitional, but not conclusive, role in the judicial abandonment narrative. Brandwein deconstructs the notion that there was a definitive endpoint of judicial abandonment, and in doing so, opens up new avenues of examining the Court’s ongoing role in shaping the law of civil rights during the Fuller Era of the Court.148

If *Plessy v. Ferguson* marks the commencement to the Supreme Court’s wholesale rejection of paternalism, *Hodges v. United States* deserves more attention than it has received in the judicial abandonment narrative. An important consequence of *Hodges*’ effect on judicial abandonment was its role in removing the foundational piece of Reconstruction legislation from the essence of “appropriate legislation” under Section Five of the Fourteenth Amendment. The Civil Rights Act of 1866 contained the promise of freedom envisioned by its framers in the immediate years after the Civil War. As an immediate response to the Black Codes, its framers’ efforts to use the Act for robust protection of African Americans is evident in its reauthorization under the broader Enforcement Act of 1870.

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148 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); see also Tsesis, *The Thirteenth Amendment* at 79–83, 91–92, 105.
The *Morris* opinion effectively gutted the Civil Rights Act of 1866, declaring its expansive possibilities null-and-void under both the Thirteenth and Fourteenth Amendments. 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 by which to bring their claims. That a progressive of the Southern judiciary could play a key role in this undertaking—and, that Trieber went to great lengths in the *Morris* opinion to uphold the Act of 1866 makes its downfall seem arguably accidental—makes *Hodges* all the more undervalued in the judicial abandonment historiography to date. Despite the protection Trieber sincerely believed was necessarily for blacks in Arkansas, the *Hodges* moment assured that judicial abandonment would be formal federal policy.

Equally as important in *Morris* are the nuances at play concerning state action. Centrist Republicans throughout the 1870s, and justices such as Joseph Bradley, had understood “state action” to be a malleable, ad hoc concept dependent on how state authorities responded to the enforcement (or lack of enforcement) of federal laws. Reconstructing the worldview of Judge Trieber provides a microcosm into how the state action doctrine evolved over the course of the late-nineteenth century. As “waving the bloody shirt” became politically unpopular, sectional reconciliation combined with stringent application of legal formalism and conservative rule-of-law commitments to constitute a normative binary: federal law was undeniably sovereign and thus permissible, a product of the perpetual Union, but only when applied in the narrowest of circumstances.

Judge Trieber attempted to squeeze the right to make and enforce contracts into one of those narrow circumstances—a badge or incident of slavery under Section One of the Thirteenth
Amendment—but chose not to protect that right when it would result in what he perceived to be the federal government encroaching when they ought not to. Even still, Trieber wanted nothing more than to establish societal harmony, a sure boon to the Republican Party and business class alike. But Trieber’s Arkansas was one riled in racism. Trieber knew that legal and societal forces of the early Jim Crow South constrained his power on the bench to effect real change for African Americans. *Morris* thus symbolizes the confluence of various political, social, normative, and geographic factors resulting in a concept of local paternalism that affected Trieber’s understanding of the proper balance between federal and state government. The *Hodges* outcome then highlights not only the importance of the Act of 1866 (and its demise) in the judicial abandonment narrative, but also demonstrates significant change seen by the state action doctrine from 1874 to 1906 by way of local paternalism. Trieber believed in civil rights for all, but not before his commitment to the state that adopted him as a young Jewish immigrant.¹⁴⁹

¹⁴⁹ When President McKinley appointed Jacob Trieber to the federal bench in 1900, Trieber became the first Jew to ever hold such a position. Judah P. Benjamin had turned down President Millard Fillmore’s offer in 1853 of a Supreme Court appointment.