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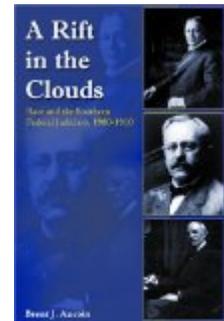


Brent J. Aucoin. *A Rift in the Clouds: Race and the Southern Federal Judiciary, 1900-1910.* Fayetteville: University of Arkansas Press, 2007. Illustrations. xii + 163 pp. \$34.95 (cloth), ISBN 978-1-55728-849-3.

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Reconstruction's Children

Reconstruction ushered in a tremendous social, political, and constitutional revolution that profoundly reshaped American society and culture. Nevertheless, within a generation the American people proved unwilling to sustain a commitment to racial equality. Through the tactics of violence, force, and fraud, Southern Democrats returned to power, and it appeared that Reconstruction's gains were illusory at best. While throughout the 1880s Republicans attempted to stem the racist tide, in the end, their efforts failed. By 1900, southern states were completing the racial and class-based disfranchisement of both African Americans and poor whites.

That was bad enough, but American society in the early 1900s was also deeply committed to the guiding principles of white supremacy. This was in no stretch of the imagination limited to the South. Americans as a society firmly approved of disfranchisement as well as lynching and the segregated racial order. Not only was the Reconstruction effort to craft constitutional racial equality considered a critical error, but in many ways efforts at emancipation itself were deemed erroneous too. The justification of white supremacy was propounded for an enthusiastic audience in a vast array of social scientific literature, law review articles, magazines, and newspapers.

In such an environment, those who dissented from the dominant racial milieu were marginal figures. Yet

the fact is that an alternative critique of race relations not only survived those years but also created new legal and social institutions to combat racism. It was this very era that saw the creation of such groups as the Constitution League, the National Association for the Advancement of Colored People (NAACP), the National Urban League, and later the Association of Southern Women for the Prevention of Lynching. The triumph of the civil rights movement was far into the future, but in many ways the seedtime of the freedom struggle was not the 1930s but the racist climate of the Progressive Era. In many ways, historians have failed to see the continuities of action by civil rights activists that saw a century of struggle.

Brent J. Aucoin's brief book thus tells an important, and one could even argue a central, event in the history of the civil rights movement. His focus is on three southern judges who served on the federal district bench: Jacob Treiber, Emory Speer, and Thomas Jones. As a group, they offer an interesting insight into the world of nineteenth-century southern white dissent.

Jones's background would make him an unlikely supporter of civil rights jurisprudence. The product of the planter elite he matriculated at the Virginia Military Institute where he was a student of Thomas "Stonewall" Jackson. During the war, Jones served as an aide to Confederate General John B. Gordon, who led the Georgia Ku Klux Klan, and later became an important statewide leader. Jones's postwar career followed a similar path.

Part of the state elite who helped overthrow Reconstruction, he advanced rapidly through the state party until winning the Democratic nomination for governor in 1890 and 1892. Both within the state and the Democratic Party, Jones was tied to the party's conservative wing that fought the agrarians and Populists who sought economic reform. Jones's election as governor was only possible due to massive vote fraud in which the Democratic elite counted out the opposition. While as governor Jones supported some modest reforms of the convict lease system, he was perhaps best known for taking a hard line against the United Mine Workers (UMW) during the 1894 strike. Jones's active intervention of sending troops in to break up the strike had a deadly effect. His efforts led to the breaking of the strike but also helped to maintain Democratic control of the state. Similarly, Jones supported the Sayre Election Law, which imposed tougher registration requirements that systematically removed large numbers of whites and African Americans from the voting rolls. It was hardly a surprise then that at the 1901 Alabama Constitutional Convention, Jones warmly supported disfranchisement as part of an effort for both racial and class control of the electorate.

Jones's approach to these issues revealed little more than your typical southern reactionary trying to use law as a way to preserve the status quo. Yet, in the pre-judicial period of his career, Jones also seems to have been a sincere racial paternalist who was prepared to defend the safety of African Americans. As governor Jones denounced lynching repeatedly as a matter of law and order. It was this record that led African American educator and political leader, Booker T. Washington, to urge President Theodore Roosevelt to nominate Jones to the federal bench.

As a judge, on civil rights questions Jones had a mixed record. On voting rights issues Jones changed little in his approach, and he ruled against African Americans in the infamous case of *Giles v. Harris* (1903). Aucoin does not address Jones's approach in *Giles*, which is a little striking, especially as the case reveals Jones as a defender of the disfranchisement racial order. It appears Jones was willing to rule in African Americans' favor only when they had become politically marginalized and no longer were a threat to the planter dominated Democratic Party.

However, in cases involving economic questions and attacks on African American personal safety, Jones took a different approach. As Aucoin makes clear, Jones's interest in lynching was several decades old before he became a federal judge. One can understand Jones's con-

cern about lynching as an issue of both law and order and an undermining of societal cohesion. In fact, that was the usual rationale given by antilynching opponents in the South. The so-called southern moderates also blamed lynching as a problem of lower-class whites, of democracy run amok. This was an argument that was deeply disingenuous, as lynching was frequently an orchestrated event by those who held political power. But to admit this was to also recognize that lynching was but a natural manifestation of the central ideas of white supremacy.

The interesting thing about Jones was that he dispensed with the usual platitudes about race. Jones's famous charge to the Grand Jury in *Ex Parte Riggins* (1907) revealed a belief that lynching was a practice that the federal government should abolish. Jones's argument was multifaceted on several levels. While he relied on the due process and equal protection clauses of the Fourteenth Amendment, he also declared lynching as one of the badges of servitude abolished by the Thirteenth Amendment. The similarity with Albion Tourgee's famous brief in *Plessy v. Ferguson* (1896) is also clearly apparent. In this and other cases, Jones presented an expansive view of the Reconstruction amendments and also reinforced the responsibility of Congress to pass legislation that would enforce these amendments. Lynching was not simply the private acts of individuals but instead a subversion of the very principle of equality before the law. Little in Jones's jurisprudence in cases involving lynching demonstrates any concern about preserving a state-centered conception of federalism. Aucoin does not address the degree to which Jones's constitutional creativity deviated from the approach followed by the Fuller Court.

Equally interesting was Jones's interest in what has commonly been referred to as the peonage cases. Beginning in the early 1900s, the Justice Department began a wide-ranging investigation of the ways African Americans and other racial minorities were kept in a state of legal bondage. Southern U.S. attorneys were in fact quite aggressive in bringing suit before federal courts and they won a series of victories. That someone like Jones, with his close ties to the planter elite, would become such an advocate in attacking a system of economic exploitation is curious to say the least. Aucoin does not explain why Jones felt so deeply about these questions, but his conscience was evidently deeply moved. Indeed, in making these efforts to stamp out peonage, Jones was more a crusader than a detached jurist.

However, there were also limitations to how far Jones was prepared to go. It is true that Jones aggressively pushed the prosecution of those who kept African Americans in a form of debt bondage. Yet, once convictions were obtained, Jones was prepared to be remarkably mild in the punishment stage, giving short jail sentences and relatively modest fines. The euphoria with which the national press greeted these convictions was out of proportion to what had really been achieved. As Pete Daniel in the *Shadow of Slavery: Peonage in the South, 1901-1969* (1972) and Benno C. Schmitt Jr. in *The Judiciary and Responsible Government, 1910-21* (pt. 2, 1984) have shown, simply attacking the practice was seen in some ways as an effective solution.

Jones was not without triumphs in this regard. He struck down the Alabama labor law that abetted peonage as unconstitutional, and he actively helped shepherd the case of *Bailey v. Alabama* (1911) before the Supreme Court. From the beginning, Jones took an interest in the case of an African American held in debt bondage and pushed the Roosevelt administration to bring suit. As Aucoin points out, Jones even went so far as to draft an eighteen-page memorandum that was designed as helpful advice for U.S. attorneys in bringing suit. The Court's ruling in *Bailey* must have been a remarkable vindication. Yet such prosecutions frequently did little to address the systemic causes of African American economic exploitation in the Deep South. Change would have required a far more aggressive effort, one that had a national political context, not simply a few isolated legal cases. However, Jones's accomplishments in this era were nothing short of remarkable.

By the time that Judge Speer heard his own peonage cases, he had already been serving on the bench for many years. While Speer and Jones both served in the Confederate army during the war, their political temperaments were markedly different. Speer broke with the Democratic Party in the late 1870s, and was an active member of the independent parties that proliferated in the South in opposition to the Democratic Party. While initially little more than a Democratic dissent over taxes, political reform, and opposition to economic policies that seemed at variance with the concerns of the yeomanry, over time the movement broadened. Speer was an important part of the independent movement in Georgia and in the process developed close relationships with the local African American community. Elected to two terms in Congress, Speer was defeated for reelection only after Democrats used violence, electoral intimidation, and blatant fraud to defeat him at the polls. Indeed, Speer's experience with

white terrorist groups, such as the Pop and Go Club, fueled his desire to secure the voting rights of Georgians. The result of Speer's efforts was the prosecution of the famous case of *Ex Parte Yarbrough* (1884) in which the Supreme Court affirmed the ability of federal attorneys to bring suit against violations of the right to vote. Nevertheless, the independent movements of the late 1870s and early 1880s collapsed by this point, and Speer became a Republican. In the waning days of the Arthur administration, Speer was appointed to the federal bench where he would be a deeply principled advocate of racial equality for the next thirty-three years.

Aucoin deals relatively briefly with Speer's tenure on the bench. Nevertheless, there can be little doubt that Speer was one of the most despised federal judges in the South, although in his case, the odium of the Democratic Party does not seem to have disturbed him greatly. Democrats in Georgia kept up a frequent running battle with Speer, even attempting to have him impeached in the Wilson administration. Speer seems to have run his court with an iron hand and Aucoin notes that he refused to allow attorneys to use racial slurs in court.

While in many ways Jones was the first southern judge to focus on the problem of peonage, it was a subject that clearly animated Speer as well. In the case of *United States v. Thomas McClellan and Thomas Crawley* (1904), Speer aggressively asserted that the federal government had full powers to prosecute peonage. Speer also had an expansive view of the Thirteenth Amendment, believing that the heart of the amendment was a desire to strike down economic coercion.

It was this economic critique that was an important component of Speer's interpretation of the problem of peonage. A system based on economic exploitation had the effect of preventing a fully functioning free economy. Those who exploited workers by keeping them in permanent debt interfered with the ability of workers to compete over wages and placed an unfair burden on those employers who followed the rules. However, similar to Jones, once conviction had been reached in the case of *McClellan and Crawley*, the punishment was relatively mild.

If Speer and Jones had active political careers that made them state celebrities and national figures, the same cannot be said about Treiber. While Speer became a Republican out of a process of genuine conversion and conviction, Treiber rose in the party's ranks for years before President William McKinley appointed him to the bench. Despite the fact that the Arkansas Democrats returned

to power in 1874, the state's Republican Party remained highly competitive. However, Democratic control of the ballot box usually ensured the party's defeat when official results were released. It is therefore not that surprising that Treiber's frequent efforts to achieve political office were stymied by vote fraud. Aucoin does not examine this question in greater depth, but Treiber studied law with a prominent Reconstruction-era Arkansas Republican leader, and his home county was Phillips County. This was the very county that later became infamous during the Elaine Riots in which African Americans were brutally murdered in the aftermath of World War I. How a white Jewish Republican had his worldview shaped as a member of a party which was overwhelmingly African American in a black belt county bears closer examination.

Aucoin's principal focus is on Treiber's rulings that dealt with the problem of peonage. Treiber too held to an expansive interpretation of the Thirteenth Amendment. Aucoin's interpretation of Treiber's understanding of this amendment is one of the more intriguing discussions in the entire text, for Treiber saw it as more than simply an act declaring slavery illegal. He also believed freedom was a social value. The Thirteenth Amendment did more than say one was no longer a slave; it vested one with citizenship. If not, the amendment failed to achieve the true intent of the Reconstruction-era founders. Additionally, Treiber viewed the 1866 Civil Rights Act as reinforcing a belief in freedom; clearly part of its purpose was to prevent such things as peonage from taking place. Unfortunately, the Supreme Court had a narrower reading of the Thirteenth Amendment and in the case of *Hodges v. United States* (1906) they also declared the 1866 Civil Rights Act unconstitutional.

It should be said that despite its brevity the story that

Aucoin seeks to tell is an important one. While the attitude of the Supreme Court was frequently disappointing, an important point can be made by studying these southern judges closely. The larger question becomes how should law be properly interpreted? These judges had a view of law that was more than simply words in a statute book, the power of precedent, and the language of constitutional amendments; they also seemed to have the ability to discern the larger purpose of the laws. Their empathy with African Americans does not reveal a blinding to the true meaning of law but instead shows that they had come to understand the substance of Reconstruction-era law. Indeed, in many ways, it was the Waite and Fuller Court that circumscribed the law as part of a political effort to impose a racial and ideological interpretation of law. The way legal historians have frequently seen the era of the late nineteenth-century law has been from the vantage point of those who believed in a state-centered conception of federalism and limited governmental power.

Yet these judges reveal to us that there was another way to think about race, law, and the meaning of the Reconstruction era. For in their view, Reconstruction was not simply a political experiment gone awry but was instead a permanent restructuring of the very nature of the Constitution. While their approach to civil rights law was exceptional in their era, it would also be remarkably prescient. It would be left to later generations to dust off the constitutional amendments and the forgotten Reconstruction-era law. In the process, whether jurists or civil rights activists realized it, they were engaging in an act of historical and legal reclamation. Much like Treiber, Jones, and Speer, they returned to the principles of the Reconstruction era seeking to create a legal order that was truly just.

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