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Abandoned Blacks?

Reconstruction – America's second revolution[1] – was dead by 1877, and the fatal blow was inflicted by the Supreme Court. This has been the common wisdom since the dawn of the civil rights era, when a story about the Court's dismantling of Reconstruction spread across law, history, and political science.[2] In this story, the Court stands accused of crippling the national government and forsaking the former slaves. The end of Reconstruction meant "the abandonment of the freed slaves to the prejudices of their former owners,"[3] and the vehicle for abandonment was a legal rule known as "state

[1] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (1988). Reconstruction has also been called "America's Second Founding." See Barry Friedman, "Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)," 11 *Journal of Constitutional Law* 1201, 1205, 1207.

[2] See, e.g., C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951), 245; Robert J. Cottrol, "Civil Rights Cases," in Kermit Hall, ed., *The Oxford Companion to the Supreme Court* (1992), 149; Harold M. Hyman and William Wiecek, *Equal Justice Under Law* (1982), 488; Eugene Gressman, "The Unhappy History of Civil Rights Legislation," 50 *Michigan Law Review* 1323, 1336–7 (1952); Robert J. Harris, *The Quest for Equality* (1960), 82–91; Peter Magrath, *Morrison R. Waite: The Triumph of Character* (1963), 130–49; William Gillette, *Retreat from Reconstruction, 1869–79* (1979), 295, 310, 346; Robert Kaczorowski, *The Politics of Judicial Interpretation* (1985), 217; Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986), 179–80; Foner, *Reconstruction*, 587; J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (1999), 49–50; Rogers M. Smith, *Civic Ideals* (1997); Rayford Logan, *The Negro in American Life and Thought, The Nadir, 1877–1901* (1954); Loren Miller, *The Petitioners* (1966), 158; Walter Murphy, James Fleming, and William Harris, *American Constitutional Interpretation* (1986), 744; Laurence H. Tribe, *American Constitutional Law* (2000), 922; David O'Brien, *Storm Center* (2000), 1290; Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (2008); Lou Faulkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871–1872* (1996), 142; Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96 (2002): 516.

[3] See Melvin I. Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States*, vol. 1 (2002), 480.

action" doctrine. Elaborated by the Court in a series of decisions from 1876 to 1883,[4] this rule is said to have put Klan violence and intimidation beyond the reach of the Fourteenth and Fifteenth Amendments, rendering those amendments largely useless in the federal effort to protect the physical safety and voting rights of blacks.

In this book, I elaborate an alternative account of the judicial settlement of Reconstruction. State action doctrine, I argue, was not a definitive abandonment. Indeed, an entire jurisprudence of rights and rights enforcement has been lost to twentieth-century observers. This jurisprudence included a Fourteenth Amendment concept of "state neglect" and a voting rights theory built from the Fifteenth Amendment and Article 1, Section 4.[5] Constructed from legal categories that have long since disappeared, this jurisprudence contained broad possibilities as well as constraints and ambiguities, and modern observers have perceived its contours in only partial and inchoate ways. I recover this jurisprudence and attend to the consequences of its recovery. One consequence is a shift in the periodization of definitive judicial abandonment: it begins with *Plessy v. Ferguson* (1896),[6] the infamous decision that put the Court's imprimatur on legal segregation, and culminates ten years later with *Hodges v. United States* (1906),[7] an under-studied decision that gutted the Civil Rights Act of 1866.

A second consequence of recovering this lost jurisprudence is its highlighting of the limitations of realist-inspired approaches to Court decision making in political science. My account shows that these dominant approaches' focus on outcomes leads to a misunderstanding of the state action cases. The misunderstanding is compounded by an inability to explain subsequent, rights-friendly decisions handed down by the same Court, decisions whose theory of rights traces back to the state action cases. Only by investigating the jurisprudential context – the discursive and institutional world in which concepts were shaped, debated, and deployed – can we understand the Court's role in the transition from Reconstruction to Jim Crow. Otherwise put, my study reveals that in order to properly understand judicial outcomes, we must invest in the historical study of ideas and political regimes.

My new account dispenses with the cinematic terms that characterize the accepted narrative of judicial abandonment. In that narrative, the forces of good (Republicans) are vanquished by the forces of evil (Democrats) and Court justices (with the exception of Justice John Marshall Harlan) are aligned with the latter. On my reading, the protagonists – the Republican actors who built and circulated an eclipsed jurisprudence of rights and rights

[4] *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883).

[5] U.S. Constitution, Article 1, Section 4: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

[6] 163 U.S. 537 (1896).

[7] 203 U.S. 1 (1906).

enforcement – are neither heroes in the mold of Fredrick Douglass nor villains like the Democrats. These Republicans believed in white superiority and rejected what was termed the "social equality" of blacks, often scorning the public accommodation provisions of the Civil Rights Act of 1875. But they also supplied broad possibilities for the federal protection of black physical safety and voting rights. Indeed, in the 1880s the federal government succeeded in several important cases that relied on a Court-supplied theory of voting rights. If these doctrines creatively devised by the Waite Court had been consistently exploited by the executive and subsequently institutionalized, the legal edifice that undergirded Jim Crow would not have existed. Certainly a two-tiered system of citizenship rooted in white supremacy could and no doubt would have emerged. But it would have required the explicit overturning of Waite Court precedent. Or it would have required extra-legal sources of authority and thus enforcement. Whether or not such a counterfactual system of political and economic racism would have led to the same degree of black subjugation, the path to such a system – and so opportunities for resisting it – would have looked profoundly different.

Twentieth-century interpretations of the *Civil Rights Cases* and precursor decisions have been guided by assumptions about what follows from or is necessarily produced by racism. Justice Bradley and his brethren cannot be absolved of racism, and they are not pardoned here. What follows from their racism is the crucial question. Assumptions about such entailments carry a risk: misapprehension of the state action cases and the political and legal opportunities and resources that flow from them. As I show here, the rejection of black property, contract, safety, and voting rights does not follow inevitably from derision for black claims to public accommodation rights, though the assumption has been otherwise. In the wake of the Civil War, after the republic had nearly been destroyed, a resurgent commitment to rule of law, which now encompassed blacks, combined in mainstream Republicans with a belief in white superiority. In recovering the legal concepts and rights theories that were generated in the 1870s by mainstream Republican jurists – which could support the federal protection of blacks' physical safety and voting rights but not public accommodation rights – my goal is not to rescue Bradley. Rather, it is to elaborate the stakes that attach to the use of faulty assumptions about what follows from racism in the Reconstruction and post-Reconstruction eras.

Let me now turn to a more detailed introduction of state action doctrine. This doctrine holds that the Fourteenth and Fifteenth Amendments[8] protect

[8] U.S. Constitution, Fourteenth Amendment, Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constit. Amend. XV, Section 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

individuals against the government; the "merely private" wrongs of individuals are beyond the reach of the amendments. "The provisions of the Fourteenth Amendment have reference to State action exclusively,"[9] the Court explained. "The first section of the Fourteenth Amendment . . . is prohibitory in its character and prohibitory upon the States. . . . That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[10] "Individual invasion of individual rights," the Court summed up, "is not the subject-matter of the Amendment."[11] While all of the Court's explications of state action doctrine cited the Fourteenth Amendment, jurists and scholars have assumed that the Court applied the doctrine to the Fifteenth Amendment as well, since prohibitory language is a feature of both amendments.

As scholars understand it, state action doctrine decisively closed the door on Reconstruction because it answered a critical question about the power of Congress to protect black rights. Did Congress have the power to punish private individuals, such as Klansmen, whom states failed to punish? The answer has been a firm and decisive *no*: the failure or refusal of state officials to punish Klansmen did not count as state action, and so there was no federal remedy for their rampant and brutal violence.

This answer was, of course, devastating. As Eric Foner explains in his standard history of Reconstruction, state action doctrine gave "a green light to acts of terror where local officials either could not or would not enforce the law."[12] Legal historians agree: a state's failure to protect its citizens "could not be construed as a reason for the federal government to intervene."[13] This view appears in the *Oxford Companion to the Supreme Court*, where Robert Cottrol explains that the *Civil Rights Cases* – the canonical expression of state action doctrine – "largely mandated the withdrawal of the federal government from civil rights enforcement."[14] In Derrick Bell's words, the promised protections for blacks were rendered "meaningless in virtually all situations."[15] Leonard Levy sums it up perhaps most bluntly. State action doctrine, he declares, "shaped the Constitution to the advantage of the Ku Klux Klan."[16]

[9] *Virginia v. Rives*, 100 U.S. 313, 318 (1880).
[10] 109 U.S. at 11.
[11] 109 U.S. at 11. The Court had earlier stated that the Fourteenth Amendment "adds nothing to the rights of one citizen as against another." (*United States v. Cruikshank*, 92 U.S. 542, 544).
[12] Foner, *Reconstruction*, 531.
[13] Williams, *The Great Klan Trials*, 141. See also Kaczorowski, *The Politics of Judicial Interpretation*, xiii (the decision "relegated Southern blacks . . . to the protection of local law and law enforcement agencies"); Michael Kent Curtis, *No State Shall Abridge* (1986), 179 ("Republican judges were abandoning a commitment to enforcement of . . . the rights of blacks"); Loren Miller, *The Petitioners* (1966), 158.
[14] Robert Cottrol, "Civil Rights Cases," in Kermit Hall, ed., *The Oxford Companion to the Supreme Court* (2005), 174.
[15] Derrick Bell, *Race, Racism, and American Law* (1992), 58.
[16] Leonard W. Levy, *United States v. Cruikshank*, in Leonard W. Levy and Kenneth L. Karst, eds., *Encyclopedia of the American Constitution* (2000), 733.

And as scholars have emphasized, the Court did not have to exclude state failure to punish Klan violence from its concept of *state action*. The text of the Fourteenth Amendment does not demand this exclusion. The language of the equal protection clause can be read to include the unequal enforcement of the law, where violence against whites is punished but violence against blacks is not. Moreover, there is substantial evidence that Congress understood the equal protection clause in precisely this way.[17] In addition, then, to imposing a reading that is not demanded by the text, the Court appeared to be betraying the original understanding.

In need of a historical and political explanation for state action doctrine, scholars have seized upon long-standing wisdom about the Compromise of 1877. The Compromise is central to historical accounts of the disputed 1876 election and its aftermath. The conventional account tells of the removal from the South of the last Union troops, which had remained in South Carolina and Louisiana. Republican President Rutherford B. Hayes removed these troops in the wake of the 1876 election, and the troop withdrawal is part of the reason that scholars take 1877 to mark the end of Reconstruction.

But more broadly, the Compromise is seen as "a pivotal moment in national policy."[18] As told in the classic work of C. Vann Woodward,[19] a political deal was struck between Republicans and Democrats in which the nation's economic and rights enforcement policies hung in the balance. Republicans got control of the White House and the national economic program. In return, "the Democrats got a free hand to implement of policy of reaction in the South.... [W]ith scarcely a shrug, Republicans abandoned the freedpeople of the South to their fate, freeing themselves to pursue a policy of economic development unencumbered by moral baggage."[20] The Compromise is thus taken to mark the definitive abandonment of blacks by the Republican Party.[21]

[17] See, e.g., studies of the passage of the Ku Klux Klan Act of 1871 by Michael Zuckert (1986) and Frank Scaturro (2000).

[18] William M. Wiecek, *The Lost World of Classical Legal Thought* (1998), 77, citing C. Vann Woodward, *Origins of the New South, 1877–1913* (1951).

[19] C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951).

[20] Wiecek, *The Lost World of Classical Legal Thought*, 77. See also Howard Gillman, *Constitution Beseiged* (1993), 84 (the Compromise gave the Republicans "the presidency and southern support for their policy of rapid industrialization in exchange for southern internal improvements and an end to the federal commitment to the protection of black civil rights in the South"). Gillman cites C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951), and Eric Foner, *Politics and Ideology in the Age of the Civil War* (1980), 126.

[21] This view of the Republican Party also appears in the American political development literature. See, e.g., Richard Bensel, *Sectionalism and American Political Development, 1880–1980* (1984); Richard Bensel, *The Political Economy of American Industrialization, 1877–1900* (2000).

The standard view is that the Court followed and cemented the policy shift of the Republicans.[22] By remitting blacks to "home rule," state action doctrine was an instrument to consolidate the party's definitive political abandonment of blacks.

A portrait of President Grant's judicial appointees, dominant since the Progressive era, buttresses this explanation of state action doctrine. These biographical sketches present Grant's appointees as railroad attorneys who cared only for the interests of large corporations and were happy to facilitate the party's turn to big business.[23] One of Grant's appointees, Justice Joseph P. Bradley, is a key figure in the abandonment narrative. Material interest and political regime neatly converge in the portrait of Bradley: in addition to having a reputation as a railroad lawyer, Bradley served on the Electoral Commission that gave the disputed 1876 election to Hayes.

But it is Bradley's authorship of the *Civil Rights Cases*, a prominent post-war decision, that secures his role as a central player in that narrative. Making the link between the Compromise and the *Civil Rights Cases*, Woodward called the decision the Court's own "bit of reconciliation" between North and South, "which sacrificed blacks in order to cement reunion."[24]

The *Civil Rights Cases* invalidated the public accommodation provisions of the Civil Rights Act of 1875, which guaranteed to individuals "full and equal" enjoyment of inns, public conveyances, and places of public amusement, regardless of race.[25] Black plaintiffs, excluded from theaters and a ladies' railway car, argued that these exclusions were "badges of slavery" and a denial of the equal protection of the law. Justice Bradley rejected these arguments. "It would be running the slavery argument into the ground," he declared, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre."[26] Such access was among "the social rights of men and races in the community"[27] and not among the essential rights of freedom. Bradley also cautioned against treating blacks as the "special favorite of the laws."[28] This comment, in conjunction with the

[22] See, e.g., Magrath, *Morrison R. Waite*, 132–4; Ruth Ann Whiteside, *Justice Joseph P. Bradley and the Reconstruction Amendments* (1981), 223, 284; Walter Murphy, James Fleming, and William Harris, *American Constitutional Interpretation* (1986), 744; John A. Scott, "Justice Bradley's Evolving Concept of the Fourteenth Amendment," 25 *Rutgers Law Review* 565–9 (1971).

[23] See Gustavus Myers (1912) and, more recently, James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2009).

[24] Woodward, *The Strange Career of Jim Crow* (1950), 71.

[25] 18 Stat. 336 (1875).

[26] 109 U.S. at 24–5.

[27] 109 U.S. at 22.

[28] "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or as a man, are to be protected in the ordinary modes by which other men's rights are protected" (109 U.S. at 25).

case outcome, its elaboration of state action doctrine, and Bradley's professional history, make the decision look like an archetypical example of judicial retrenchment.

The story of abandonment winds down by sliding quickly from the *Civil Rights Cases* to *Plessy v. Ferguson*, where the story ends.[29] The 1896 *Plessy* decision, of course, stands symbolically for America's embrace of racial apartheid. The *Civil Rights Cases* dealt with black exclusion from public accommodations, not with legal segregation, but the abandonment narrative presents the Jim Crow regime as a short step from the Court's invalidation of the public accommodation provisions. The narrative links the decisions, moreover, through the lone dissenting opinions of Justice Harlan. Justice Harlan wrote sharp dissents in both cases, arguing that exclusion and legal segregation were indeed badges of slavery and a deprivation of equal treatment. His arguments rang true to the twentieth-century civil rights generation, who cast him as the egalitarian-minded racial hero opposite the racist–railroad lawyer Justice Bradley.

So goes the conventional wisdom, accepted across multiple academic disciplines. For legal historians and law professors, the abandonment narrative is standard constitutional history. Conducting a rearguard action against Reconstruction, the Court ushered in the long nightmare of Jim Crow. For political scientists, the constitutional history provides a stock example of the "political" as opposed to "legal" nature of Court decision making. State action doctrine was an instrument for enacting the policy shift of the ruling regime.

Unraveling the threads of this tightly interwoven account entails attention to a multitude of interpretive errors. My own point of entry takes its bearings from a series of recent historical studies that look anew at political events between 1877 and the early 1890s. Read together, these works provide a new political history that challenges standard wisdom about the *political* (party) abandonment of blacks. On this reading, it was the failure of the Lodge Elections bill in 1890–91 that marked definitive political abandonment.

THE NEW POLITICAL HISTORY

In the past dozen years, an emerging literature has shown that the Republican Party maintained a genuine and principled effort to protect black voting rights between 1877 and the early 1890s, though this effort matched neither the vigor nor the effectiveness of the early 1870s.[30] Revealing conventional

[29] 163 U.S. 537 (1896). See, Friedman, "Reconstructing Reconstruction," 1232.

[30] Charles W. Calhoun, *Conceiving a New Republic: The Republican Party and the Southern Question, 1869–1900* (2006); Charles W. Calhoun, *Benjamin Harrison* (2005); Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (2004); Richard M. Valelly, "Partisan Entrepreneurship and Policy Windows: George Frisbie Hoar and the 1890 Federal Elections Bill," in S. Skowronek and M. Glassman, eds., *Formative Acts: American Politics in the Making* (2007); Richard M. Valelly, "The Reed Rules and Republican Party Building: A New Look," *Studies in American Political Development* 23

wisdom about the Compromise of 1877 to be myth, this work identifies the disputed election of 1876 and its immediate aftermath as more complex and ambiguous than Woodward imagined.[31] These studies replace the standard image of 1877 (as a falling curtain) with a new story about political transition and uncertainty. Beginning with the economic Panic of 1873 and ending with the failure of the Lodge Elections bill in 1890–91, scholars trace a period of transition separating the height of Reconstruction from the establishment of Jim Crow.

This revisionist work has never been directly challenged, but neither has it been grappled with nor integrated into accounts of post–Civil War constitutional development. And notably, it aligns with older work that has been anomalous in past generations. These older political studies, for example, concern the southern disfranchisement movement,[32] the Republican Party's southern policy after 1877,[33] and national election patterns.[34] Studies of other social developments also emphasize a period of transition. Trends in black migration north and west[35] and trends in northern acceptance of Southern "Lost Cause" versions of Civil War history[36] indicate that the mid-1870s through the late 1880s were years of decline and increasing violence, but the nadir of postwar black subjugation was not reached until the early decades of the twentieth century.

These older works and revisionist studies of Republican Party development together comprise a critical mass of scholarship that forces a rethinking of the conventional wisdom. I bring these diverse studies together for the first time under the label the *new political history*, emphasizing its uncontested but nonintegrated reception in constitutional history.

The economic Panic of 1873, as we will see, triggered a steep and long-running economic depression, and it altered the politics of rights enforcement in ways that have been unattended by legal scholars. Complicating assessments of the Republican commitment to rights enforcement, the Panic and depression hurt white labor, made Republicans vulnerable at the polls, and made rights enforcement both expensive and politically risky. Bearing out the political axiom that voters turn their wrath on the party in power after an

(October 2009): 115–142; Xi Wang, *The Trial of Democracy: Black Suffrage and Northern Republicans, 1860–1910* (1997); Robert M. Goldman, *A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877–1893* (2001). See also Michael F. Holt, *By One Vote: The Disputed Presidential Election of 1876* (2008).

[31] Historians have raised questions about Woodward's thesis. See, e.g., Allan Peskin, "Was There a Compromise?" *Journal of American History* 50 (1973): 63–75; Keith Ian Polakoff, *The Politics of Inertia*: *The Election of 1876 and the End of Reconstruction* (1973). These critiques have not been transported into the legal literature on Reconstruction.

[32] J. Morgan Kousser, *The Shaping of Southern Politics* (1974).

[33] Stanley P. Hirshson, *Farewell to the Bloody Shirt* (1962).

[34] Joel H. Silbey, *The American Political Nation, 1838–1893* (1991).

[35] James R. Grossman, *Land of Hope: Chicago, Black Southerners, and the Great Migration* (1989). See also Klarman, "The Plessy Era," 309–312, 374.

[36] David Blight, *Race and Reunion: The Civil War in American Memory* (2001).

economic shock, Democrats gained control of the House in the 1874 election. Now in charge of appropriation bills, Democrats could set low appropriations for rights enforcement, jamming government machinery, as inadequate as it already was.[37] Following the panic, too, was a burgeoning of new organizations such as the White Leagues, which were more threatening and menacing than predecessor Klans.[38]

It is not a coincidence, I suggest, that the year 1873 marked the high point in the number of federal voting rights prosecutions brought in the South under the Enforcement Acts of 1870 and 1871.[39] But after reaching a low in 1878, voting rights enforcement resurged with the 1880 election of Republican President James A. Garfield,[40] an election marked by the sectional antagonism between North and South of a decade earlier. This resurgence, which was sustained throughout the Garfield and Arthur administrations (1880–85), carries enormous significance for our understanding of the state action decisions and the role of the Court in politics. Though enforcement rates never approached that of the early 1870s, this resurgence provides the context not only for the *Civil Rights Cases*, but also for the little-studied voting rights decisions, *Ex parte Siebold* (1880) and *Ex parte Yarbrough* (1884). The strongly worded decisions sent election officials and Klansmen to jail and endorsed a broad theory of voting rights, the contours of which have been missed in the legal literature. These tools lay unused by the next administration, but that is unsurprising as a Democrat, Grover Cleveland, won the 1884 election.

The larger point is that the Panic of 1873 and election of 1874 marked the beginning of a transitional period during which national politics was uncertain, unstable, and fluctuating. Neither of the major political parties and no faction in the Republican Party had full control at the national level and national elections were decided by razor-thin margins. The Republican Party was no longer what it had been, but it was not yet what it would become. Still committed to building a southern wing for both pragmatic and principled reasons – but facing profound constraints – the party strategically experimented with a variety of means, including conciliation, internal improvements (regional infrastructure), and alliances with Independents. These strategies held out the possibility of circumventing the difficulties that plagued rights enforcement: massive resistance, inadequate administrative machinery, lack of funds, jury nullification, and fear of voters' reprisals. As even proponents of the abandonment thesis acknowledge, "federal election enforcement had never worked well."[41] But after each of these alternative

[37] Gillette, *Retreat from Reconstruction*, 293, 357.
[38] Gillette, *Retreat from Reconstruction*, 229.
[39] Wang, *Trial of Democracy*, 300–1 (Appendix 7).
[40] Leading scholars have stated that enforcement ended in 1873 if not 1876. Among legal historians, see Kaczorowski (1987), 67. Among political scientists, see Gillman (2002), 516. According to Gillette, Republicans had largely given up on the southern question by 1875; see Gillette, *Retreat from Reconstruction*, 317, 333, 371, 374.
[41] Gillette, *Retreat from Reconstruction*, 292.

strategies failed – Democrats responded with violence and fraud to each of them, making gains in national elections that pushed Republican power to the precipice – Republicans returned to rights enforcement. As the elections of 1880 (and 1888, which returned Republicans to power) show, northern distrust of Democratic political strength remained, and northern ire could still be sparked. Each of the party's renewals of rights enforcement brought some success, but the returns were diminishing.

Scholars are fond of quoting *The Nation*, which sounded the death knell for Reconstruction in 1877. "The Negro will disappear from the field of national politics," the newspaper declared. "Henceforth the nation, as a nation, will have nothing more to do with him."[42] But *The Nation* was wrong. Blacks did not completely disappear from the field of national politics in 1877, and the Republican Party did not change so thoroughly between the early 1870s and 1876.

And while black electoral inclusion of course suffered as violence and fraud increased, its collapse, as Richard Valelly notes, "was far from becoming a complete certainty."[43] J. Morgan Kousser observed years ago that "[t]he notion that disfranchisement was simultaneous with the textbook end of Reconstruction in 1877[44] and that the South became 'solid' immediately after that date are myths."[45] Indeed, the first wave of the disfranchisement movement, which turned the Deep South solidly Democratic and inaugurated the reign of lynch law, was launched in the wake of the Lodge bill defeat in 1890–91. It was only after this defeat that the political coalition that gave us Reconstruction was finally destroyed.

The new political history matters – quite a lot – when it comes to understanding state action doctrine and the judicial settlement of Reconstruction. For if the Republican Party did not definitively abandon blacks until the early 1890s, then state action doctrine *cannot be explained as a judicial consolidation of the party's definitive policy shift*. The relationship between case law and political context suddenly looks unclear. So how can state action doctrine be explained?

One tempting answer is that the judicial and political branches were working at cross-purposes: the Court tried to dismantle Reconstruction, while the Republican Party held to the project of building southern Republicanism.[46]

[42] *The Nation* 24 (April 5, 1877): 202. This line is often quoted in the Reconstruction literature as evidence that federal civil rights enforcement was over. Most recently, see Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (2008), 249.

[43] Valelly, *The Two Reconstructions*, 121.

[44] This claim was advanced by Charles Warren, *The Supreme Court in US History* (1922), 604.

[45] Kousser, *Shaping of Southern Politics*, 11; Kousser, *Colorblind Injustice*, 20. See also Valelly, *The Two Reconstructions*, 121–48.

[46] The Republican Party was split into factions during this transitional time, but none of them sought to abandon the project of building southern Republicanism. The struggle was over the best strategy to achieve this end; support for rights enforcement, when the party