

Facing the Ghost of *Cruikshank* in Constitutional Law

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Teaching constitutional law to make Black Lives Matter requires confronting the race-based violence institutionalized in American law. In Ferguson and beyond, news reports of suspicious deaths of unarmed African-Americans at the hands of race-conscious state authority persist as a predictable reality smoothly coinciding with a constitutional jurisprudence that claims to embrace principles of negative liberty and colorblind formal equality. The federal Justice Department has taken action to correct constitutional violations in Ferguson and in other municipal police departments in recent decades.¹ Yet despite some successful city reforms, the pattern of violations continues, with federal enforcement often hampered by resistance and by inadequate resources.²

The standard story of constitutional law encourages acquiescence in the continuing routine official racial violence by keeping it out of view as a fixed and murky background fact. The Constitution's failure to enforce racial justice seems to be a problem of inherent limits that need not disturb general faith in the Constitution as a beacon of democracy and liberty. As Robert Gordon noted in an essay on the value of critical legal studies, legal education tends to perpetuate injustice by teaching that law cannot change anything important and substantive in society, except perhaps at the margins.³ To instead challenge the long history of law's complicity in devaluing black lives, we should focus attention on how the Court has powerfully reshaped the Constitution to make protection of black lives appear beyond the reasonable reach of law.

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1. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); *see also* Nathalie Baptiste, *Urban Policing Without Brutality*, AM. PROSPECT, Summer 2015, at 62-69 (reporting on successful reforms in Cincinnati following a Department of Justice agreement addressing a 2001 police killing).
2. Simone Weichselbaum, *Policing the Police*, MARSHALL PROJECT (May 26, 2015), <https://www.themarshallproject.org/2015/04/23/policing-the-police>.
3. Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641, 643, 647-48 (David Kairys ed., 3d. ed. 1998).

Disregarding Black Lives in the Constitutional Canon

The initial constitutional law course is not easily structured to give a clear picture of how constitutional law turns American law enforcement into a source of fear rather than protection in many communities of color.⁴ A constellation of dubious constitutional doctrines works together to produce and reinforce this result, yet students are likely to study each of these as separate, relatively technical and formal rules without the time, details, and context needed to grasp the cumulative impact.⁵ The problem of racialized police violence does not neatly appear in the case lineup of the standard introductory constitutional law course. Indirectly if not directly, the basic course is likely to reinforce the troubling lesson that this violence does not threaten the legitimacy of the American legal order.⁶

Taking my syllabus as a typical example, students encounter police brutality as the occasion for the Court to limit standing to challenge city police policy in *City of Los Angeles v. Lyons*⁷ (without judicial discussion of racial disparities). Then later in the semester they study *McCleskey v. Kemp*,⁸ in which the Court ruled that the disparate racial results of Georgia's death penalty do not count as evidence of race discrimination triggering heightened scrutiny. In *Lyons*, the Court ruled that the risk of harm from policies supporting future unconstitutional police violence is too speculative and abstract to be legally justiciable, even in a case brought by an individual nearly killed by this violence. In *Kemp*, the Court refused to recognize racial intent in Georgia's policy of wide discretion in death sentencing, despite stark statistical evidence that this discretion is used so that black lives do not matter equally in a state that historically designed the death penalty to promote white supremacy.

These rulings fall into place in students' course outlines as settled doctrine, even if taught as unsettling. In the standard syllabus, current constitutional agonizing about racial injustice tends to focus on the possible harms to white students from educational affirmative action programs—harms that the Court takes as sufficiently palpable and substantial to merit heightened judicial

4. See, e.g., Emmarie Huetteman, *Lynch Says Death in Police Custody Highlights Fears of Blacks*, N.Y. TIMES, July 26, 2015, at A12 (quoting Attorney General Loretta Lynch, "I think that we have a situation where many minority communities for so long have felt that law enforcement was coming in to essentially enforce laws against them, not to protect them.").

5. For an insightful analysis of the doctrines, see Shakeer Rahman & Sam Barrdec, Editorial, *Eric Garner and the Legal Rules that Enable Police Violence*, N.Y. TIMES, Dec. 5, 2014, at A23.

6. See Bruce Hay, *The Silence of the Lawyers*, COMMON DREAMS (Dec. 7, 2014), <http://www.commondreams.org/views/2014/12/07/silence-lawyers> (criticizing the mainstream professional silence about America's unequal criminal justice system).

7. 461 U.S. 95 (1983).

8. 481 U.S. 279 (1987).

attention and constitutional protection.⁹ I have stopped including affirmative action cases in my course, in part to avoid this warped vision.¹⁰

In addition, I have been experimenting with incorporating *United States v. Cruikshank*¹¹ into my basic constitutional law course using teaching materials James Gray Pope has developed and generously shared with me.¹² This essay's exploratory thoughts grow out of the challenges of including *Cruikshank* in an introductory first-year course, along with my overwhelming sense of the glaring and deepening deceptions of the contemporary constitutional law framework.

Putting *Cruikshank* in its Canonical Place

United States v. Cruikshank “belongs at the center of our constitutional narrative,” as James Gray Pope argues in his important article on the case.¹³ This 1876 Supreme Court decision barred the Justice Department from using the federal Enforcement Act of 1870¹⁴ to prosecute a prominent instance of white supremacist terrorism against African-American political participation after the Civil War. *Cruikshank*'s ghastly disregard for democracy and racial justice deserves a place alongside the ghost of *Lochner*. By keeping *Cruikshank* “safely off stage,” in Pope's words, the current canon can tell a “happy story” of racial progress from *Plessy* to *Brown* led by judges pushing constitutional boundaries.¹⁵ In that story, currently persisting injustices appear to have exhausted constitutional law's power for heroic change.

Cruikshank arose from a massacre of black Republicans in the courthouse of Colfax, Louisiana, by white Democrats disputing the results of the 1872 election in Grand Parish, a majority black district.¹⁶ Affirming the Circuit Court decision by Justice Bradley, and largely adopting his reasoning, the Supreme Court ruled that because these murders violated no federal constitutional rights, the federal government lacked legal authority to prosecute the crimes under the Enforcement Act of 1870, enacted to quell violence by the Ku Klux

9. See *Gratz v. Bollinger*, 539 U.S. 244, 284-85 (2003) (Stevens, J., dissenting) (arguing that *Lyons* should preclude standing for prospective relief for a claim of discrimination by a white student challenging the University of Michigan's affirmative action policy).
10. A better approach would be to cast affirmative action in light of a revised constitutional narrative showing the Court's role in limiting democratic political coalitions for racial justice, see discussion of *Carolene Products*, *infra* note 71 and accompanying text.
11. 92 U.S. 542 (1876).
12. James Gray Pope, *The Reconstruction Amendments* (2015) (unpublished manuscript) (on file with author).
13. James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the Constitutional Canon*, 49 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 385, 446 (2014) [hereinafter *Snubbed Landmark*].
14. Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870).
15. Pope, *Snubbed Landmark*, *supra* note 13, at 391.
16. *Id.* at 387.

Klan and other white supremacist paramilitary groups. The Act made it a crime for any person to join in a conspiracy to deprive any citizen of “a right or privilege granted or secured to him by the Constitution or laws of the United States.”¹⁷

By impeding federal prosecutions, the *Cruikshank* decisions cleared the way for violent restoration of a white supremacist legal order that replaced Reconstruction with the Jim Crow system of segregation, inequality, and racial violence that reigned largely unchecked by the Court for nearly a century.¹⁸ In 1875, after Bradley’s initial Circuit Court ruling in *Cruikshank* had “decisively disrupted federal enforcement efforts” to a surge of white terrorism,¹⁹ Louisiana’s governor reported to Congress that Cruikshank “establish[ed] the principle that hereafter no white man could be punished for killing a Negro.”²⁰

Cruikshank’s enormous historical and doctrinal impact continues to structure American law and politics in many ways, as Pope explains, even though the case itself has largely receded from mainstream view.²¹ *Cruikshank* can help shed light on the wrongs of Ferguson by showing how racial inequality and oppression have been powerfully enforced through judicial support for systemic racial violence,²² not just by formal government classification by race. In addition, reinstating *Cruikshank* in the constitutional narrative may sharpen understanding of the high substantive stakes of the Court’s current array of seemingly technical limiting doctrines. In doing so, *Cruikshank* can help push back against the current canonical tendency to subdue the Constitution’s substantive aspirations through the ghost of *Lochner*.

Challenging *Lochner*’s Updated Anti-Legal Fundamentalism

*United States v. Lochner*²³ commands a central place in the current canon as a widely repudiated decision reminding us that judges, like other authorities, wield their power under sway of particular prejudices and politics. More important, it is used to teach the overarching lesson that judicial protection of substantive constitutional rights should be tightly constrained to ensure judges properly stay within their legitimate role of interpreting and applying the law

17. 16 Stat. at 140-41; see Pope, *Snubbed Landmark*, *supra* note 13, at 401-02.

18. See Pope, *Snubbed Landmark*, *supra* note 13, at 392 (noting that the Jim Crow laws of *Plessy* and *Brown* might not have existed if *Cruikshank* had upheld the convictions); *id.* at 445-47 (discussing the monumental historical impact of the case).

19. *Id.* at 414.

20. *Id.* at 415 (quoting Louisiana Gov. William Pitt Kellogg’s 1875 testimony to Congress, as cited in LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 147* (2008)).

21. *Id.* at 389 (summarizing four current doctrines developed from *Cruikshank*).

22. See *id.* at 391-92 (discussing how the case reveals the Court’s major role was not enforcing civil rights but rather stripping legislative and executive protection of law and order against white terrorism).

23. 198 U.S. 45 (1905).

rather than making it. Ideally, *Cruikshank* should help teach a comparably far-reaching lesson about the Court and the Constitution, taking students beyond superficially dismissing the case as the inevitable product of the times or individual judges' biases, to learn instead that unequal judicial denial of substantive constitutional rights in the guise of constitutional modesty has been a major, and ongoing, threat to constitutional legitimacy.

The prevailing story of *Lochner's* repudiation lowers constitutional expectations by establishing an overarching tragic trade-off: Judicial intervention to correct problematic government power requires the exceptionally problematic government power of unelected and elitist federal judges. According to the narrative, *Lochner*-era federal courts infused the due process clauses of the Fourteenth and Fifth Amendments with their own anti-labor politics, concocting and selectively applying a fundamental substantive right to contractual freedom that overrode legislation protecting workers, consumers, and health and safety. As the canonical example of that trend, the 1905 *Lochner* decision invalidated a state law setting a sixty-hour maximum work week for bakery employees, ruling that this labor regulation violated a fundamental freedom-of-contract right implicit in the Fourteenth Amendment due process clause.²⁴

In *Lochner's* shadow, the Civil War Amendments' cure for America's fundamental flaw of slavery appears to have prescribed dangerous medicine. If judges protect promised constitutional rights to liberty and equality, they threaten democracy and the rule of law. Showing *Lochner's* continuing power to cast doubt on constitutional transformation, Chief Justice Roberts relied on a lengthy invocation of *Lochner* to justify his dissent from the Court's protection of a constitutional right to same-sex marriage in *Obergefell v. Hodges*.²⁵ Justice Roberts reinscribes and amplifies the message that the Court should disregard concerns about substantive political fairness and fundamental human rights, leaving judgments about values and policy to the political branches, especially when "dramatic social change" may be at stake.²⁶ To avoid the wrongs of *Lochner*, the Court properly limits constitutional doctrine to focus primarily on neutral process, normally leaving substantive decisions about justice to other authorities.

But as faith in the political process has faded, the lesson of *Lochner* has tended to drift backward. In my experience, students readily focus on the illegitimacy of the political process, viewing legislators and administrators as beholden to vast inequalities of power, irrationality, and destructive partisanship. Because the federal government represents big political power, students tend to accept the idea that it is presumptively more illegitimate than state or

24. *Id.*

25. 135 S. Ct. 2584, 2611-26 (2015) (Roberts, J., dissenting). See also Ian Millhiser, *Chief Justice Roberts' Marriage Equality Dissent Has a Hidden Message for Conservatives*, THINKPROGRESS (June 29, 2015, 8:00 AM), <http://thinkprogress.org/justice/2015/06/29/3674897/roberts-obergefell-dissent-conservatives/> (counting sixteen references to *Lochner* in this dissenting opinion).

26. See 135 S. Ct. at 2612.

local power, as well as private power. That contemporary popular distrust of political governance has combined with post-*Lochner* distrust of constitutional substantive rights to spawn an updated anti-legal fundamentalism as *Lochner*'s legacy.

A widespread sense of government's diminished legitimacy sets the stage for a revival of faith in judicial protection of a naturalized realm imagined to transcend law's imperfections. In contrast to constitutional substance and democratic process, this fundamentalism imagines that abstract markets, local communities, individual market choices, or traditions are governed by superior forces relatively unsullied by judicial whim, systemic prejudice, or subjective politics. In this theory, the distortions of government can be further diluted and disciplined through judicial support for the power of states, communities, and businesses to resist substantive federal legal protection to better reflect decentralized discretion as the most legitimate source of public values and policies. Perversely, then, the ghost of *Lochner* has breathed life and authority into new incarnations of the dishonored *Lochner*-era doctrine, justifying a new revival of judicially created limits on both substantive democratic authority and substantive human rights.

Many of the conservative Justices' recently created or enhanced substantive constitutional limits on government protections have little or no grounding in constitutional history or text, but nonetheless have been embraced free of their fear of *Lochner*'s ghost.²⁷ For example, the Court's Eleventh Amendment doctrine barring private rights of action for damages against states to enforce federal rights explicitly departs from text to rely on pre-constitutional naturalized law.²⁸ And in an example relevant to the issues of unequal law enforcement in *Ferguson*, the Court has recently gone beyond specific text and history to develop a fundamental due process right to constitutional protection against bias in state law enforcement.²⁹ However, the Court narrowly targeted this new protection to limit state tort damages against corporate defendants.³⁰ This inconsistent obedience to *Lochner*'s lessons is partly explained by an implicit logic that these new fundamental limits represent judicial deference to power outside the law.

27. My analysis here counters the liberal hope that Justice Roberts's dissent reflects a new conservative respect for democratic legislation that might spread to (for instance) voting rights. See Millhiser, *supra* note 25 (arguing that Justice Roberts' dissent may counter recent scholarly and judicial efforts to rehabilitate *Lochner*).

28. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (expanding constitutional limits on remedies for violation of workers' federal rights with a doctrine of state sovereign immunity that "neither derives from, nor is limited by, the terms of the Eleventh Amendment").

29. Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in State Farm*, 56 BUFF. L. REV. 1035 (2008) (discussing the recent constitutional doctrine limiting punitive damage awards in the case *State Farm v. Campbell*, 538 U.S. 408 (2003)).

30. *Id.* at 1043 (contrasting this due process protection for corporate tort defendants to the lack of constitutional protection for criminal defendants).

Robin West insightfully captures this emerging conservative vision as a new paradigm of substantive rights to opt out of public benefits and responsibilities, in contrast to the civil rights paradigm expanding access to governmental protection.³¹ The Court's newly reconstructed Second Amendment right to bear arms exemplifies this right to exit the social compact, subsuming the rule of law to an ideal of natural competition.³² West also analyzes as examples the new judicial and popular interest in protecting new fundamental rights to opt out of public education, anti-discrimination laws, federal health care programs, and collective bargaining costs.³³ This "exit rights" paradigm helps undercut constitutional support for democratic civil rights and protections, lending credibility (for example) to the Court's rulings limiting Congress's power to protect against gender-motivated private violence or gun violence in schools.³⁴

Given popular skepticism about the democratic legitimacy of contemporary government, along with a constitutional story that emphasizes minimizing substantive constitutional mandates, many students tend to accept the argument that the general ideals of freedom and fairness will be advanced by new judicial barriers to federal protective legislation. Despite continuing strong popular support for the idea of constitutional protection of individual liberty, consistent with West's theory, many now are likely to see that protection as achievable mainly through a right to escape from legal power to a realm of apparent self-reliance. From that narrowed perspective, problematic police practices like those in Ferguson represent the inevitable corruption of government power from cultural prejudice or economic pressure—perhaps tragic, but largely beyond the scope of reasonable constitutional power and protection.

Cruikshank pushes back against this resignation by exposing the Court's constitutional responsibility for actively shaping a legitimate and trustworthy government. As William Forbath explains, *Cruikshank* stands for a tradition of constitutional bad faith after the Civil War, in which the Court professed constitutional passivity while constructing a new, enduring national order institutionalizing white resistance to the Reconstruction Constitution's promise of racial justice.³⁵ *Cruikshank* should remind us, as Pope further argues, of the Court's active role in forming and empowering the societal and political

31. See Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 894-95 (2014) (contrasting this new paradigm of "exit" rights with civil "rights to enter" government protection).

32. *Id.* at 898-900.

33. *Id.* at 901-02.

34. See *id.* at 896-97.

35. William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1, 6, 51 (1999) (discussing how the Court's illegitimate denial of constitutional Reconstruction led to a 20th-century federal politics and administrative state dominated by Southern states).

forces that then make meaningful constitutional correction of inequalities appear intrusive and improbable.³⁶

Cruikshank's ghost also points toward an alternative understanding of *Lochner's* lesson. In the New Deal transformation of constitutional doctrine, the Court rejected *Lochner* not only by deferring to the political process, but also by establishing the constitutional legitimacy of a particular transformative politics.³⁷ Overturning *Lochner* meant that the Court lifted barriers that had prevented workers and other ordinary citizens from (partly) participating in governing conditions affecting the value of their lives at work and beyond. In rejecting *Lochner*, the Court questioned the idea that contractual bargaining power constitutes individual freedom distinct from public force. In *West Coast Hotel v. Parrish*, for example, the Court explained that employers' failure to require a minimum living wage was not a natural exercise of freedom but rather a contestable policy decision forcing communities to subsidize the private gains from underpaid labor.³⁸ From this contextualized perspective, *Lochner* was wrong not simply because of judicial interference with policy and politics, but because its interference gave constitutional protection for politics and policies bent toward protecting unequal private force, including direct violence suppressing labor organizing.

Confronting *Cruikshank's* Enduring Constitutional Denials

Cruikshank's similar history-changing protection of unequal politics backed by unequal private violence came not from judicial creation of fundamental rights as in *Lochner*, but from judicial creation of formal constitutional *limits* on fundamental rights. Pope's article identifies *Cruikshank's* four enduring doctrinal principles: It gutted the Fourteenth Amendment privileges and immunities clause; it established a narrow state action limit on due process and equal protection; it imposed a strict racial intent requirement; and it narrowed Congress's power granted by the Reconstruction Amendments.³⁹ These limits operate to obscure and deny the Constitution's potential for transformative racial justice.

a) *Privileges and Immunities*

Cruikshank's first ground for invalidating the federal prosecution was that the Fourteenth Amendment's grant of privileges and immunities of national citizenship does not include the enumerated protections of the Bill of Rights,

36. Pope, *Snubbed Landmarks*, *supra* note 13, at 435-38 (explaining how *Cruikshank's* ruling helped create the state structure and popular racial politics that then helped the Court appear powerless to enforce voting rights).

37. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) (arguing that *Lochner* was wrong not because of judicial "activism," but because the Court wrongly and covertly constitutionalized common law doctrines promoting economic inequality).

38. 300 U.S. 379, 399-400 (1937).

39. See Pope, *Snubbed Landmarks*, *supra* note 13 at 388-89 (listing these doctrinal limits to show how the case is "perhaps the single most important civil rights ruling" by the Court).

so these cannot count as federal rights triggering protection of the Enforcement Act.⁴⁰ Relying on an abstract discussion of federalism and the pre-Civil War precedent of *Barron v. Baltimore*,⁴¹ the Court posited an exclusive sphere of state sovereignty limiting the Bill of Rights to action directly involving the federal government.⁴² The Court concluded that the massacre of a political gathering at the Colfax courthouse did not implicate the First Amendment right to free assembly nor the Second Amendment right to bear arms because the direct purpose of the black Republicans' political assembly was not access to the *federal* government, nor was the federal government the direct source of interference with their right to bear arms.⁴³

Though this analysis takes a tone of dispassionate obedience to technical detail and settled precedent, the ruling was a momentous departure from prominent contemporary judicial opinion as well as an audacious (though unacknowledged) judicial denial of the text, context, and purpose of the Fourteenth Amendment. Pope's teaching materials contrast *Cruikshank* with the 1871 Circuit Court decision in *United States v. Hall*,⁴⁴ which upheld another federal prosecution of white Democratic murders of black Republicans who were gathered for a campaign rally. Pope's note on the case explains that judicial rulings like *Hall* provided authority for numerous successful prosecutions of paramilitary attacks on black political participation in the early 1870s.⁴⁵ Until *Cruikshank* terminated this authority, the prosecutions helped achieve substantial progress toward the goal of establishing Reconstruction law and democratic order in Southern states.⁴⁶

Contrary to *Cruikshank*, *Hall* reasoned that the Fourteenth Amendment has "a vital bearing" on the question of whether its grant of new federal privileges and immunities protects the Bill of Rights against the states, recognizing the authority of the new constitutional text to override the pre-Civil War precedent in *Barron*.⁴⁷ *Hall* reasoned that the Fourteenth Amendment's privileges and immunities clause gives substantive content to the immediately preceding clause guaranteeing national citizenship to all persons born in the United States. Explaining that these clauses reverse the pre-Civil War order of citizenship, so that state discretion over fundamental rights is replaced with

40. *Cruikshank*, 92 U.S. at 551-53.

41. 32 U.S. (7 Pet.) 243 (1833).

42. *Cruikshank*, 92 U.S. at 549-50.

43. *Id.* at 553.

44. 26 F. Cas. 79 (C.C.S.D. Ala. 1871). For Pope's note on its privileges and immunities ruling, see *The Reconstruction Amendments*, *supra* note 12, at 7 n.3.

45. See Pope, *The Reconstruction Amendments*, *supra* note 12, at 11 (reporting historical evidence that prosecutors obtained "numerous successful convictions, including 49 in North Carolina, 154 in South Carolina, and 597 in northern Mississippi, the main centers of Klan activity in 1868-1871").

46. *Id.* at 11.

47. 26 F. Cas. at 81.

uniform and supreme federal government protection, *Hall* concluded that “we are safe in concluding” that the federal protections “expressly secured” in the Bill of Rights, including the right of peaceful assembly, are among the privileges and immunities of citizens of the United States.⁴⁸

Cruikshank’s decision to instead deny incorporation of the Bill of Rights in the privileges and immunities clause remains current constitutional law, even though widely agreed to be without constitutional basis other than its status as long-standing precedent.⁴⁹ The typical constitutional law casebook uses the *Slaughterhouse Cases* to present this doctrine in whitewashed innocuous form. In that decision, rejecting white butchers’ claim of a fundamental right to do business free from local health regulation, the privileges and immunities rule emerges drained of substance and disconnected from any of the enumerated Bill of Rights as well as from the core racial justice concerns of the Reconstruction Amendments.⁵⁰

Restoring *Cruikshank* as the basis for this doctrinal wrong turn matters. Removed from context, its rule gutting federal privileges and immunities tends to stand as a trivial technical glitch, because the 20th-century Supreme Court gradually applied most of the Bill of Rights to the states through incorporation in the Fourteenth Amendment’s due process clause.⁵¹ But by deferring federal protection of basic First Amendment freedoms for many decades after the Civil War, *Cruikshank* undermined not only the public power of African-American political participation but also the private power to organize independent civic, religious, and economic activities—including multiracial coalitions of workers—that are arguably as vital to meaningful political power as the right to vote.⁵² Indeed, the historical suppression of labor organizing as part of violent enforcement of racialized low-wage labor was intertwined with the development of American policing, as Ahmed White analyzes.⁵³ Further, in contrast to the privileges and immunities clause, which protects *citizens*, the due

48. *Id.*

49. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010) (acknowledging serious doubts among scholars about the plausibility of the rule, and identifying its origins in *Cruikshank* as well as the *Slaughterhouse Cases*, but nonetheless declining to disturb the precedent).

50. Pope, *Snubbed Landmark*, *supra* note 13 at 389 (explaining the *Slaughterhouse Cases* as “an odd choice to serve as a leading teaching vehicle on the issue”).

51. *McDonald*, 561 U.S. at 758 (rationalizing leaving *Cruikshank*’s rule undisturbed by instead using the due process clause to incorporate the Second Amendment as a Fourteenth Amendment right limiting the states).

52. See Pope, *Snubbed Landmark*, *supra* note 13, at 421, 440 (discussing *Cruikshank*’s impact narrowing the focus of federal enforcement to limited protection of voting rights distinct from broader civil rights). See also Kenneth M. Casebeer, “Public Since Time Immemorial . . .” *The Labor History of Hague v. CIO*, 66 RUTGERS L. REV. 147, 176 (2013) (discussing the importance of free assembly rights denied in *Cruikshank* to the structure of legal, political and economic institutions developed in response to the Great Depression).

53. See Ahmed White, *A Different Kind of Labor Law, Vagrancy Law and the American Regulation of Harvest Labor 1913-1924*, 75 U. COLO. L. REV. 667, 669-70 (2004) (describing this integration of criminal law and labor control as a major impetus in the development of policing).

process clause shifted the substantive protections of the Bill of Rights from a focus on human individuals to corporate property and profit.⁵⁴

Beyond the legal and historical effects of deferring and redirecting Bill of Rights protections, *Cruikshank's* egregious reasoning on the privileges and immunities clause launches a broader theory of constitutional powerlessness and submission to external authority that continues to undermine constitutional protection of African-American lives. *Cruikshank's* rationale for excising the Bill of Rights from the privileges and immunities clause focuses superficially on federalism principles. But the opinion's formalistic analysis slips away from its tainted and fraught privileging of state sovereignty. It conspicuously avoids the specific questions of state power raised by the facts of this case involving prosecution of a paramilitary attack on Reconstruction state government in the aftermath of the Civil War's Confederate defeat.

Instead, the Court's opinion justifies its denial of fundamental federal rights by vaguely suggesting the Constitution's subordination to natural law. The Court presents the right of free assembly as a universal, ahistorical attribute of citizenship and civilization⁵⁵ that therefore does not depend on the particular human law created by the Constitution. Coyly detached from judgment about the specific substantive law and facts at issue, the Court then asserts that the lesser authority of the federal Constitution lacks general power to protect fundamental freedoms. Pope connects the opinion's murky assertion of state primacy over fundamental rights to a theory promoted by some leaders at the time that state sovereignty signified not the authority of specific official government entities but rather a general natural entitlement by Southern white people to veto government protection of African-Americans.⁵⁶

This narrowing of constitutional protection to accommodate purportedly superior and natural rights not surprisingly served to reinforce practical human power to undermine Reconstruction. Exploring the reasoning underlying Justice Bradley's Circuit Court opinion, substantially followed in the Supreme Court's *Cruikshank* decision, Pope notes that Justice Bradley had written extensively in support of maintaining what he believed was a natural economic hierarchy dependent on legally enforced race and class subordination.⁵⁷

In one sense, *Cruikshank's* use of natural law to gut the privileges and immunities clause and Bill of Rights reinforces the conventional lesson of *Lochner*: that judicial power is least legitimate when it strays beyond clear constitutional text and historical intent to embrace nebulous abstract ideals. Yet *Cruikshank's* problematic ruling also complicates that conventional lesson by showing the

54. James Gray Pope, *The Supreme Court, the Subjugation of Black Workers, and the Creation of the "White Working Class,"* 94 TEX. L. REV. (forthcoming 2016) [hereinafter Pope, *The Supreme Court and the "White Working Class"*].

55. *Cruikshank*, 92 U.S. at 551.

56. See Pope, *Snubbed Landmark*, *supra* note 13, at 425 (discussing a theory promoted by President Andrew Johnson and by scholarly commentators approving the Supreme Court's decision).

57. See *id.* at 418-21 (discussing Bradley's extensive writings on labor and slavery).

Court mobilizes shady ideals not only to inflate its constitutional role but also to duck it, using those ideals to theorize a constitutional powerlessness that overrides specific constitutional text and history. This broader problematic principle of constitutional deference to pre-existing hierarchical order helps sustain the other current doctrinal limits developed from *Cruikshank*.

b) State Action

Cruikshank ruled that the Fourteenth Amendment equal protection and due process clauses also did not support the prosecution of the Colfax murders as violations of federal rights under the Enforcement Act.⁵⁸ The Court's reasoning emphasized the fundamental importance of equal government protection of life and liberty, but again grounded this duty not in the specific Fourteenth Amendment constitutional rights but in superior natural law linked to state authority.⁵⁹ From that position of constitutional modesty, *Cruikshank* then narrowly read the Fourteenth Amendment's text to prohibit *states* from depriving life, liberty, or equal protection, concluding that this prohibition did not include constitutional protection against harm from private action.⁶⁰ Accordingly, the Court concluded that the unofficial actions of murder in Colfax did not count as violations of due process or equal protection rights that could be prosecuted under the Enforcement Act.

Pope's teaching materials contrast *Cruikshank*'s state action holding to the reasoning in *Hall*,⁶¹ in which the Circuit Court explained that "[d]enying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws."⁶² *Hall* supported its interpretation with the Fourteenth Amendment text and federalism principles, explaining that the Enforcement Act was an exercise of Congress' enumerated power to enforce the Fourteenth Amendment with appropriate legislation. *Hall* reasoned that direct federal enforcement appropriately respects states' constitutional role by correcting failures in state protection without interfering with state authority.⁶³

Cruikshank instead ignored both the Amendment's enumerated grant of enforcement power and the actual facts of public and private power in the case, using selective strict adherence to constitutional text to mask judicial evisceration of Reconstruction. *Cruikshank* characterized the case as a problem

58. See *Cruikshank*, 92 U.S. at 553-54 (discussing due process); *id.* at 554-55 (discussing equal protection).

59. See *id.* at 553-54 (describing the government responsibility for protecting all citizens' lives as an inalienable right endowed by "the Creator").

60. *Id.* at 555.

61. Pope, *The Reconstruction Amendments*, *supra* note 12, at 17 n.2.

62. *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

63. *Id.*

involving “the rights of one citizen as against the other,” as if the political massacre were a routine legal conflict on a level playing field rather than a paramilitary attack aimed at denying citizenship and overturning government in the wake of the Civil War.⁶⁴ The Court’s superficial federalist deference, as Pope’s notes on the case explain, ignored that the federal prosecution was responding to well-known breakdown of state authority in the face of rampant terrorism. For example, the state of Louisiana had sought the federal intervention in this case after an attempted state criminal prosecution of the murders was thwarted by an attacking mob threatening to kill the state prosecutor.⁶⁵ Despite the Court’s allusion to competing private “rights,” it was the judgment of the federal Justices, not state law, that infused the violence with both practical and legal power. As Pope argues, the Court deferred to unlawful private terrorism aimed at seizing state power, not to more legitimate state authority, thereby enabling this private force to secure seemingly legitimate political power in both state and federal government.⁶⁶ *Cruikshank*’s narrow state action limit on equal protection contributed to institutionalized unequal protection for many generations after the Fourteenth Amendment.

In the prevailing narrative, bold judicial leadership in *Brown v. Board of Education*⁶⁷ redeemed the Constitution’s failed Reconstruction promise of equal protection.⁶⁸ But without directly challenging the distorted equal protection vision of *Cruikshank*, the narrative gives an incomplete and uneasy view of *Brown*’s judicial initiative. *Brown*’s reasoning does not identify the fundamental illegitimacy of the political processes that produced school segregation, nor does it mention the web of official and unofficial racial violence that supported those processes and the resulting policies of segregation. The equal protection doctrine that emerged from *Brown* established heightened judicial scrutiny for race discrimination as an exception to the general 20th-century principle of judicial deference to political process established in the shadow of *Lochner*.

Framed by *Lochner*, with *Cruikshank*’s legacy out of view, *Brown*’s exceptional judicial power stands in the canon as constitutionally threatening, even if morally noble. To provide principled ground for *Brown*’s focus on substantive racial harms not detailed in text or history, the constitutional canon (though not *Brown* itself) relies on *Carolene Products*,⁶⁹ a case involving a now-obscure substantive dispute (regulation of “filled milk”) irrelevant to racial injustice. The famous Footnote 4 of that case explained that the Court’s rejection of

64. 92 U.S. at 554-55.

65. Pope, *The Reconstruction Amendments*, *supra* note 12, at 19-20 n.7; Pope, *Snubbed Landmark*, *supra* note 13, at 410.

66. Pope, *Snubbed Landmark*, *supra* note 13, at 434-40 (analyzing historical evidence showing the impact of *Cruikshank* on ending Reconstruction).

67. 347 U.S. 483 (1954).

68. See Pope, *Snubbed Landmark*, *supra* note 13, at 391 (arguing that *Cruikshank* challenges this narrative of redemption).

69. 309 U.S. 144 (1938).

Lochner still permits judicial intervention in substantive policy to address exclusion or bias in the political process, especially prejudice against “discrete and insular minorities.”⁷⁰

Carolene Products inscribes heightened constitutional protection of racial equality as countermajoritarian, positioning African-Americans as victims dependent on anti-democratic authority.⁷¹ The ghost of *Cruikshank* instead reveals a more complete picture of judicial *minimization* of constitutional racial protection as a similarly dangerous countermajoritarian force. In the case itself, *Cruikshank*’s narrowing of equal protection through the state action doctrine meant the federal government did not prosecute the violent overthrow of black majority power in a local Louisiana election. The case cleared the way for white minority rule in the several former Confederate states with black majorities. As Pope argues, attention to *Cruikshank* expands the historical narrative by showing that African-Americans have been quite capable of mobilizing democratic power beyond their “discrete and insular” numbers, altering existing patterns of prejudice and power by building local electoral coalitions with white workers, for example,⁷² and also through Reconstruction coalitions at the federal level that produced the Enforcement Act. This developing majoritarian power withered not from lack of special judicial protection, but rather from *Cruikshank*’s extraordinary judicial refusal to uphold democratic law against extralegal terrorism.

By presenting *Brown* in the shadow of *Lochner* but not *Cruikshank*, the constitutional canon helps redeem the continuing use of the narrow state action doctrine in the decades after *Brown* to limit the remedial scope of the civil rights initiatives of what has been called the second Reconstruction. Majoritarian race-conscious lawmaking appears to be the main culprit in the history of constitutional racial inequality, so that judicial intervention tailored narrowly to direct government race-based action appears to correct the problem while also promoting the virtues of judicial restraint counseled by *Lochner*’s ghost. The state action doctrine has helped scale down *Brown*’s promise of racial integration to a formal ban on government racial classification, treating pervasive continuing racial segregation as a normal and constitutionally legitimate feature of American schools, communities, economic opportunity, and electoral districts.

Echoing *Cruikshank*, the state action doctrine today neutralizes the power that fuels this racial inequality in and out of government by treating it as the naturalized result of free individual preferences mediated by benign forces of

70. *Id.* at 152 n.4.

71. Pope, *Snubbed Landmark*, *supra* note 13, at 392 (arguing *Cruikshank*’s importance in challenging that portrayal of African-Americans in constitutional law).

72. For an analysis of the potential for multiracial coalitions impeded by the Court, see Martha Mahoney, *What’s Left of Solidarity? Reflections on Law, Race and Labor History*, 57 *BUFF. L. REV.* 1515 (2009); Pope, *The Supreme Court and the “White Working Class”*, *supra* note 54.

market and culture.⁷³ The doctrine institutionalizes constitutional disregard for government's failure to enforce antidiscrimination laws that would have shaped different markets and cultures. And it legitimates the government policies that institutionalized disregard and ill regard for African-American lives by subsidizing and enforcing divided and unequal private housing, social services, infrastructure, electoral districts, and economic development. The resulting pervasive local racial segregation creates the conditions central to producing and perpetuating the racially disparate police practices found in Ferguson.⁷⁴

c) Racial Intent

Of course, the Black Lives Matter movement focuses directly on the persistent problem of official government unequal protection, not private action. A third lasting doctrine established by *Cruikshank* combines with the state action requirement to further impede constitutional protection against government disregard for black lives. In *Cruikshank*, the Court rejected the indictment's charge of violation of Fifteenth Amendment rights because the defendants acted with intent "to hinder and prevent the citizens named, being of African descent, and colored" from freely exercising their right to vote.⁷⁵ Again deflating the substantive power of the Reconstruction Amendments, the Court explained that the right to vote is not fundamental to national citizenship, and that Fifteenth Amendment protection is limited to protecting the right to vote against discrimination on account of race, leaving the general right to vote in the hands of the states.⁷⁶

The opinion did not go further to discuss the general purpose and legislative history of the amendment and the Enforcement Act to shed light on what should count as discrimination on account of race. Nor did it consider the text of the Amendment's grant of congressional enforcement power as authorizing Congress to regulate a broader swath of actions (like mass murder of African-American voters) that Congress, in its experience, deemed necessary and appropriate to enforcing this constitutional protection against race discrimination in voting. Contrary to the Circuit Court opinions in other cases

73. For an extensive and brilliant critique of the state action doctrine, see Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 *MIAMI L. REV.* 247 (2000).

74. For a detailed discussion of the government racial inequality and uncorrected constitutional violations underlying recent police violence, see RICHARD ROTHSTEIN, *ECON. POL'Y INST.*, *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <http://s3.epi.org/files/2014/making-of-ferguson-final.pdf>; Richard Rothstein, *From Ferguson to Baltimore, The Fruits of Government-Sponsored Racial Segregation*, *ECON. POL'Y INST.: WORKING ECON. BLOG*, (Apr. 29, 2015, 2:46 PM), <http://www.epi.org/blog/from-ferguson-to-baltimore-the-fruits-of-government-sponsored-segregation/> (applying this analysis to the context of Baltimore's police violence and the police custody death of Freddie Gray).

75. *Cruikshank*, 92 U.S. at 555.

76. *Id.* at 555-56.

of the recent period (not mentioned in *Cruikshank*),⁷⁷ the Court concluded that the indictment failed because it did not explicitly allege that the defendants' violence directed against African-Americans' political activity was specifically *on account of their* race. According to the opinion, "We may suspect that race was the cause of the hostility; but it is not so averred."⁷⁸

In denying constitutional protection against race discrimination in this case, the Court claimed to subsume its own substantive judgment to formal technicality. Yet the Court directed its legal power and technical efforts to rationalizing its refusal to see the openly flaunted and widely sensationalized racial meaning of the violence at stake in the case. That refusal likely helped amplify and institutionalize that racial meaning, reflected in a 1921 Colfax cemetery monument to the massacre, still standing uncorrected in the 21st century, honoring the white "heroes" who died "fighting for white supremacy."⁷⁹ In its doctrine of racial intent, *Cruikshank* used the cover of judicial restraint from substantive judgment to constitutionalize deliberate blindness to racial injustice.

In addition to the specific historic impact of this narrow intent doctrine, analyzed in Pope's article,⁸⁰ the canon's ongoing failure to confront the doctrine's origin in *Cruikshank* signals a norm of low expectations for constitutional transformation of racial wrongs. From *Cruikshank* through the present, the narrow intent doctrine incorporates a steep presumption in favor of treating official harm to black lives as the natural or necessary result of generally beneficial policy. In the standard narrative, the original Constitution's failure to renounce slavery was a tragic tradeoff sacrificing African-American lives and citizenship as the price of building a legal order otherwise advancing the ideals of liberty and democracy.⁸¹ *Cruikshank's* disregard is more insidious because it sacrificed African-American lives in order to disrupt rather than to advance a more democratic legal order. By perpetuating *Cruikshank's* narrow recognition of race discrimination, current doctrine continues to invest in a legal order designed to discount harm to black lives.

77. See Pope, *Snubbed Landmark*, *supra* note 13, at 424-25 (contrasting *Cruikshank's* reasoning on congressional enforcement power and racial intent to other judicial rulings of the time).

78. *Cruikshank*, 92 U.S. at 556.

79. See, e.g., Matt LaRoche, *Tributes to Terror: The Misonumentation of the Colfax Massacre*, GETTYSBURG COMPILER (Mar. 27, 2015), <http://wp.me/p3dApw-xk>.

80. See Pope, *Snubbed Landmark*, *supra* note 13, at 428-30 (arguing that even though *Cruikshank's* technical requirement for showing racial intent left open theoretical possibilities for federal prosecution, in practice and combined with its other rulings the rule allowed narrow judicial interpretations to preclude successful enforcement).

81. See Derrick Bell, *The Real Status of Blacks Today: The Chronicle of the Constitutional Contradiction*, in *AND WE ARE NOT SAVED* 26-38, 41-42 (1987) (using a parable of the founding to criticize this presumed tradeoff).

The typical constitutional law course teaches the intent doctrine through the 1976 ruling in *Washington v. Davis*,⁸² which rejected an equal protection challenge to a qualifying test for District of Columbia municipal police officers that disproportionately excluded African-American police applicants. *Davis* ruled that, standing alone, evidence of discriminatory racial impact does not count as purposeful race discrimination triggering constitutional heightened scrutiny. This doctrine allowed the Court to accept the dubious rationality of the qualifying test, leaving its specious technical questions out of sight, to instead legitimate the resulting inequality as judicial deference to a reasonable policy preference.

This narrow standard has contributed to the difficulties of challenging the current legal landscape where racially unrepresentative police departments and racially disparate police practices are pervasive. Presenting the doctrine through *Davis*, separate from *Cruikshank*, the rule appears to represent principled restraint from judicial interference with substantive policy, credibly obeying *Lochner*'s lesson of deference to democratic political and executive processes. *Davis* supports its narrow intent doctrine with precedent, removed from details of the constitutional history and purpose.⁸³ *Cruikshank* instead grounds that precedent in a historically important judicial rejection of text, history, purpose, and precedent. Casting a different shadow on the rule, *Cruikshank* reveals its superficial judicial restraint as a powerful tool for usurping constitutional responsibility for the legitimacy of those processes.

d) Congress' Reconstruction Amendment powers

A final doctrinal move in *Cruikshank* has assumed new power in recent Supreme Court jurisprudence. As Pope's article and teaching materials highlight, *Cruikshank* ignored other courts' reasoning that Congress's Reconstruction Amendment enforcement power conferred authority to decide the appropriate policy means to enforce the new constitutional rights.⁸⁴ Like *Cruikshank*, the current doctrine arguably departs from established principles of *McCulloch v. Maryland*, along with Reconstruction Amendment text and history, to erect steeper standards for what Congress can count as inequality or state action deserving federal correction in exercising its Reconstruction powers.⁸⁵

The Court's doctrine effectively imposing heightened judicial scrutiny on congressional Reconstruction enforcement powers can be viewed as a *Lochner*-like judicial usurpation of democratic substantive judgment. But the Court

82. 426 U.S. 229 (1976). See Pope, *Snubbed Landmark*, *supra* note 13, at 390 (criticizing the constitutional canon's reliance on this case to present the intent doctrine).

83. See *Washington*, 426 U.S. at 239-41.

84. See Pope, *The Reconstruction Amendments*, *supra* note 12, at 7, 18 (discussing the reasoning in *Hall* as well as in *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866)); Pope, *Snubbed Landmark*, *supra* note 13, at 402 (discussing the congressional and judicial arguments supporting Congress' power).

85. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2636-37 (2013) (Ginsburg, J., dissenting) (criticizing the majority's failure to defer to congressional judgment).

rationalizes its skepticism of Congress' Reconstruction Act judgment as deference to what it presents as the more democratic and natural authority of decentralized states. By linking this doctrine to the ghost of *Cruikshank* as well as to the ghost of *Lochner*, we can go further to challenge the current Court's selective revival of countermajoritarian principle. *Cruikshank* reveals that the narrowing of congressional enforcement power is less about deference to the states than to a judicial vision of naturalized order beyond constitutional power to transform.

For example, in *Shelby County v. Holder*, the Court's emphasis on state sovereignty discounts the unanimous state political endorsement of the Voting Rights Act reauthorization in the Senate, bypassing this constitutional process for protecting state interests. Instead focusing on the abstract indignity to states of the Act's targeted federal oversight, the Court assumes this oversight is naturally and necessarily stigmatizing and degrading rather than a means to state leadership and excellence.⁸⁶

Rationalizing its scrutiny of congressional judgment, the *Shelby County* majority emphasizes that the Voting Rights Act is "extraordinary" in its intrusion into states' traditional control of voting.⁸⁷ The Court acknowledged this tradition included enactment of the Fifteenth Amendment followed by "a century of failure of Congressional enforcement"⁸⁸ so that race discrimination was entrenched by "unremitting and ingenious constitutional defiance."⁸⁹ But the Court failed to acknowledge that its own evisceration of Congress's Reconstruction Amendment enforcement power was a key factor in establishing this tradition of constitutional defiance. Nor does *Shelby County* acknowledge that the resulting "ordinary" state electoral practices were pervasively shaped by extralegal violence rather than legitimate state authority. As Pope's article notes, the current canon obscures these problems by grounding the doctrine of Reconstruction Amendment limits not in *Cruikshank* but instead in the case of *City of Boerne v. Flores*,⁹⁰ removed from the context of racial justice.⁹¹

86. See *id.* at 2616 (describing preclearance as a degrading act forcing states to "beseech" the federal government for permission to exercise their entitled powers); Martha T. McCluskey, *Toward a Fundamental Right to Evade Law? The Rule of Power in Shelby County and State Farm*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 216, 225 (2015) (criticizing the Court's construction of harm to state dignity from law enforcement and comparing it to similar reasoning about harm from deterring illegal activity by corporate defendants).

87. See 133 S. Ct. at 2618, 2624, 2625, 2626, 2628, 2630 (using the term "extraordinary" to describe the Voting Rights Act).

88. *Id.* at 2619.

89. *Id.* at 2618.

90. 521 U.S. 507 (1997).

91. See Pope, *Snubbed Landmark*, *supra* note 13, at 390 (discussing the importance of *Cruikshank's* absence from the constitutional canon).

Cruikshank's Lesson

Standing alongside *Lochner*, *Cruikshank's* ghost should teach that judicial evasion of substantive judgment in the guise of judicial restraint is a technique of illegitimate power as destructive as judicial commandeering of substantive law. The standard narrative begins with *Marbury v. Madison's*⁹² tension between judicial power and majoritarian law. But with *Cruikshank* at the center, that case could also set the stage for a constitutional drama about judicial responsibility for creating a more principled and lawful democratic order. In that founding case, Justice Marshall's ambitious reasoning and result embraces the Constitution's transformative potential. His seemingly technical analysis of the case's minor and major issues repeatedly insists on subjecting practical power to law and on making legal principle powerful. For example, in the opinion's analysis of preliminary issues, before discussing the power of judicial review, Marshall declares, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."⁹³

Lochner's ghost remains an important warning about the ongoing dangers of judicial power, but its lesson should not become an excuse for judicial complicity in constructing law's powerlessness. *Cruikshank* should warn us that the legacy of failure of government protection for African-Americans is neither the product of inherent trade-offs of noble principles of liberty and security nor the result of inevitable weakness and corruption of human power. Instead, it is built on constitutional rules that continue to excuse judicial construction of many inequalities and injustices as natural hierarchical power beyond the law, even while erecting new judicial barriers to political and legal efforts to transform these problems. In a brilliant and extensive analysis of the limiting doctrines of state action and racial intent, Kenneth Casebeer summarizes contemporary constitutional law as "systematically undemocratic in content . . . a danger for all the people even as the Court cynically celebrates majoritarian form in the denial of constitutional and civil rights for minorities."⁹⁴

Directly repudiating *Cruikshank* as well as *Lochner* would open the canon to more nuanced and promising constitutional principles for constraining both judicial and political failures. Casebeer revises *Lochner's* lesson by offering principles for guiding judicial review toward accountability for judicial substantive judgments.⁹⁵ Rather than relying on formal principles of restraint, Casebeer's guidelines respond to the countermajoritarian difficulty by pushing Courts to investigate and explain the implications and impact of technical rulings on democratic values in light of actual societal conditions.

92. 1 Cranch 137 (1803).

93. *Id.* at 163.

94. Casebeer, *supra* note 73, at 249.

95. *Id.* at 311-13.

Constitutional rules inevitably shape whose lives matter. Constitutional legitimacy—both in the Court and in the political branches—necessarily requires judges to exercise independent substantive judgment and leadership as much as judicial deference and self-discipline. The wrongs of Ferguson persist not despite constitutional law but because of insufficient professional, scholarly, and popular outrage and resistance directed at challenging particular constitutional doctrines of deceptive minimalism. By orienting constitutional law to *Cruikshank's* ghost, we can better disturb the constitutional complacency that has helped erode the Constitution's promise of racial justice.