DEMOCRACY AND THE OTHER: THE INVERSE RELATIONSHIP BETWEEN MAJORITY RULE AND A HETEROGENEOUS CITIZENRY

*Franciska A. Coleman**

* Assistant Professor, Yonsei Law School, Seoul, South Korea. Research for this Article was partially funded by a grant from Hanyang University.

I. INTRODUCTION

According to the U.S. Census projections, the bell is tolling for the White, non-Hispanic American majority. After 240 years of being either the entire polity or the majority in the polity, White, non-Hispanic Americans are expected to become a minority in 2043.[1] While this change has far-reaching implications for racial profiling, voting regulations, and education, perhaps the most significant implication lies in the effect the demise of the majority will have on doctrines of judicial review that presuppose majoritarian tyranny.

Current approaches to judicial review justify expansive judicial powers as necessary to protect vulnerable minorities from an overweening majority. However, the growing heterogeneity of the nation is increasingly transforming rights conflicts from battles to protect minorities into battles between minorities seeking to reverse or cabin political losses.[2] The majority tyranny paradigm has survived despite these changes, for there are still racial and ethnic minorities that make the current aggregation of judicial power at least marginally defensible, despite the byproduct of minority-minority reallocations of power. The emergence of a minority majority, however, will transform all groups into racial and ethnic minorities. In that context, minority-minority reallocations of power would not be a byproduct of judicial review but its core function. The absence of a coherent numerical majority as a driver of majoritarian politics would make all exercises of judicial review reallocations of power among competing minorities. In such a context, the balance of power would inevitably shift from various coalitions of "We the People" to the fixed power of "We the Court." Though such a polity could remain democratic in theory, it would function as a judicial oligarchy in practice.

As a result, this Article argues that the transition of the United States from a democracy with a numerical White majority to a democracy with a minority majority requires a corresponding change in the goal of judicial review—from the protection of minority rights to the empowerment of an educated citizenry—if it is to remain democratic in fact as well as in name. This Article draws upon Paulo Freire's theory of empowerment, identifying Freire's principles of critical consciousness and dialogic praxis as key to the transformation of the judicial review paradigm.

This Article is divided into four Parts. Part I discusses judicial review under a coherent, White male majority in the founding era, when shared cultural assumptions limited the scope of judicial review primarily to economic issues. Part II discusses the emergence of racial, ethnic, and religious minorities

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[1] *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, U.S. CENSUS BUREAU (Dec. 12, 2012), https://www.census.gov/newsroom/releases/archives/population/cb12-243.html.

[2] *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY, EXPANDED EDITION 1080–81 (Kindle ed., 2006).

in the century between the Civil War and the Civil Rights Movement, using *Plessy v. Ferguson*, the *Insular Cases*, and parental liberty cases as examples of the ways heterogeneity enlarged the scope of judicial review and discretion. Part III discusses the emergence of majority minorities during the civil rights era, and the transformation of judicial protection into judicial insurance through the proliferation of conflicts over implied rights rooted in identity claims. Part IV discusses the ways in which Freirean ideals of critical consciousness and praxis can be adapted to the legal context in order to transform the current jurisprudence of insurance into a jurisprudence of empowerment.

II. JUDICIAL REVIEW IN A HOMOGENOUS AMERICA

American judicial review originated in a highly homogenous society which limited the rights and benefits of citizenship to White males.[3] As a result, judicial review in the founding era focused on protecting propertied minorities and relied heavily on textual and historical approaches to constitutional interpretation—resulting in high levels of political autonomy and "popular constitutionalism."[4] This Section discusses judicial review during this period, beginning with an overview of the construction of cultural homogeneity in the early decades of the nation and then exploring the ways in which this construction helped to limit judicial review to the rights of economic minorities.

A. Construction of WASP (White Anglo-Saxon Protestant) Hegemony

The Preamble to the U.S. Constitution was a radical innovation, claiming as it did a power of governance for "the people" at a time in history when monarchs, emperors, czars, and sultans governed the majority of the world.[5] However, though "people" is read broadly and inclusively today, the original preamble was a statement of White cultural hegemony, invoking the self-governance rights of only a small subset of the individuals then living on the North American continent: White males of property.[6] The American commitment to democracy and popular sovereignty was instantiated through new forms of exclusion based on nationality and ethnicity,[7] which presupposed

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3 *See infra* note 6.

4 *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 24–29 (discussing the prevalence and practice of popular constitutionalism in the founding era).

5 AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 8 (2005).

6 *See id.* at 18–21 (noting that the new world ideals of opportunity and mobility were limited to White males).

7 ANDREAS WIMMER, NATIONALIST EXCLUSION AND ETHNIC CONFLICT: SHADOWS OF MODERNITY 1 (2002).

the exclusion of African-Americans, Native Americans, and Asian-Americans—basically all non-Whites—from the scope of "We the People."[8] In order to unite the thirteen colonies and secure the land needed for expansion, American citizenship was ordered along the lines of a shared racial and ethnic White identity, which legitimized the oft-times violent exclusion of peoples of color by constructing them as "non-people" and even non-human.[9]

In several of the original colonies, free blacks were able to vote if they met the property qualifications,[10] while the Thanksgiving tradition speaks of the mutual respect and empathy between the original English immigrants and the Native Americans. With the emergence of American nationalism and the new White American identity, however, many states disenfranchised their free blacks, and wars of conquest were increasingly launched against the Native Americans, often despite the existence of peace treaties.[11] In addition, between 1790 and 1820, non-British immigration was greatly restricted, and the natural-born population of the United States almost tripled, facilitating the construction of a national identity apart from the Old World cultural and religious influences that new immigrants often brought with them.[12] These political and geographic exclusions and aggressions facilitated the emergence of the White Anglo-Saxon Protestant identity as the quintessential "American" identity.[13]

As a result of this new national identity, non-White persons were legally precluded from becoming citizens of the United States throughout the founding era,[14] while non-Anglo-Saxon, non-Protestant Whites were excluded from the full benefits of community membership in various ways.[15] More

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8 *See supra* note 6.

9 Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 114 (Jean Allain ed., 2012) (noting that early American laws "effectively reduced slaves to the legal status of wild beasts, to be 'destroy[ed]' by public authorities without any trial or hearing. Slaves were property, except when they might 'lie hid and lurk' and then they were reduced to the legal status of wild creatures"), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5386&context=faculty_scholarship.

10 AMAR, *supra* note 5, at 392–93.

11 Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1030–31, 1074 (2014).

12 VINCENT N. PARILLO, DIVERSITY IN AMERICA 71 (2d ed. 2005).

13 JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 9 (1955) ("The concept that the United States belongs in some special sense to the Anglo-Saxon 'race' . . . [was] crystallized in the early nineteenth century as a way of defining American nationality . . . .").

14 Naturalization Act of 1790, ch. 3, 1 Stat. 103 (establishing a uniform rule of naturalization).

15 *See, e.g.*, Otto J. Hetzel, *Remediation Techniques for Racial Housing Discrimination—An Introduction to the Symposium*, 51 WAYNE L. REV. 1461, 1466 (2005) (noting that the British press often presented the Irish and Anglo-Saxons as different races while New Englanders often posted signs declaring, "No dogs or Irish allowed"); Patricia M. Wald, *Looking Forward to the*

significantly, implicit in the construction of the racially, ethnically, or religiously different as existing apart from the people, was the construction of "the people" as lacking racial, ethnic, and religious difference. This constructed homogeneity contributed to the dearth of minority Bill of Rights cases in the early decades of the union, for the basic principles of identity and membership precluded the recognition of visible minorities as "American."[16] The minority-majority rights conflicts that have enlarged the scope of judicial review in the modern era did not present constitutional questions in the early decades of American history, for Fourteenth Amendment minorities were constructed as non-American,[17] and thus possessed no rights under the original Constitution.

B. Minority Status As a Function of Property Not Identity

The absence of identity based minorities during the founding era did not translate into an absence of minorities. The original Constitution was designed to secure the rights of property owners against socialist encroachments by state legislatures[18]—in other words, to protect a property owning minority from the redistributive tyrannies of a property-less majority. As a result, most majority-minority conflicts resolved by the early Supreme Court centered upon rights in property rather than social rights. For example, of the seven exercises of judicial review by circuit courts pre-*Marbury*, six of them invalidated state statutes that impaired property rights.[19] After *Marbury* and before the Civil War, the Supreme Court itself invalidated 31 state statutes, all of which raised an issue of economic rights and almost two-thirds of which were invalidated under the Contracts Clause.[20]

Next Millennium: Social Previews to Legal Change, 70 TEMP. L. REV. 1085, 1109 (1997) (suggesting that discrimination against Italians was similar to the discrimination against the Irish); Melissa Hogan, Note, *The Shadow Spreads: Impact of S.B. 1070 and Trends in Modern Immigration Law*, 14 RUTGERS J.L. & RELIGION 551, 568 (2013) (noting the widespread use of NINA (No Irish Need Apply) signs in the late 1800s rooted in stereotypes of the Irish as "lazy," "pugnacious," and "alcoholics").

16 *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("[African-Americans were] not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.").

17 *See supra* notes 14–15.

18 *See* CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION 84–85 (2006).

19 William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 518–33 (2005) (summarizing the seven cases in which circuit courts invalidated state legislation before the *Marbury* decision).

20 *See generally* U.S. GOV'T PUBL'G OFFICE, STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW (2014), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014-12.pdf.

Given the importance of protection of private property to the drafters of the Constitution, protections of propertied minorities were inscribed in specific provisions throughout the constitutional text,[21] susceptible only to a narrowly defined subset of interpretations.[22] For example, the prohibition of laws "impairing the obligations of contract" was directed at specific practices of colonial legislatures that harmed the interests of powerful creditors[23] and was limited by contract law principles that had been defined across centuries of English common law-making. The specificity of the constitutional language and the availability of a large body of precedent served as a natural limit on the boundaries of judicial review in the area of economic rights. At the same time, cultural homogeneity and its concomitant creation of shared backgrounds and authorities served to insulate most non-economic "issues and assumptions from challenge"[24] and thus from the scope of judicial review. Thus, the exclusion of Fourteenth Amendment minorities from the polity facilitated the development of White cultural hegemony and helped to keep the focus of early judicial review on textually delimited economic rights rather than more general social rights. This was a major factor in narrowing the scope of judicial review. As discussed in the next Section, however, the increased visibility and political power of minorities in the decades following the Civil War produced fundamental changes in the scope and purpose of judicial review by challenging the inequalities inherent in White cultural hegemony and making racial and ethnic equality issues of law rather than of social practice.

III. JUDICIAL REVIEW IN A NEWLY HETEROGENEOUS AMERICA

The emancipation of African-Americans in the 1860s; the acquisition of Hawaii, Puerto Rico, and the Philippines in the 1890s; and the increased immigration of Southern and Eastern Europeans between 1880 and 1920, introduced new, non-economic levels of heterogeneity into American society. As these new citizens challenged longstanding practices of White supremacy, judicial review also changed, beginning to articulate novel racial equality norms and to drift away from strict textual interpretation of the Constitution to new equality doctrines rooted in prudential concerns for social stability.[25] This Section seeks to chart this progression in judicial review, beginning with the constitutionalization of White privilege in *Plessy v. Ferguson*, continuing to the

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21 *See, e.g.*, U.S. CONST. art. I, § 10.

22 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997) (noting that words have a limited range of meaning, which limits the range of acceptable interpretations).

23 AMAR, *supra* note 5, at 127.

24 JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY xvii (William Rehg trans., 1998).

25 *See infra* Part III.A–C.

constitutionalization of social Darwinism in the *Insular Cases*, and concluding with the constitutionalization of judicially derived social and cultural norms in parental liberty cases.

A. The Emergence of Racial Minorities and the Power To Constitutionalize Racial Norms

> As soon as an educated middle class emerges among these [excluded] groups, sufficiently established to resist pressures for assimilation, they break the silence of subordination and begin to challenge the national bases of the state. Being excluded from the privileged seats in the theatre of society by virtue of their ethnic background, their discourse of injustice develops along national or ethnic lines as well. They thus draw on the ideal of ethnic representativity, of equality before the law, and of the state's responsiveness towards "the people," in order to demand a "just" representation in government, a recognition of their cultural heritage as part of the nation's treasures, a treatment as equally valuable and dignified parts of "the people."[26]

To a large extent, legally cognizable racial minorities were a product of the Civil War and the Fourteenth Amendment. The Civil War sought to end the treatment of African-Americans as property, and the Fourteenth Amendment sought to secure their treatment as citizens. The recognition of racial equality between Whites and people of color, however, was virgin constitutional territory, written at a time when doctrines of Western superiority were used to justify the widespread colonization and oppression of people of color and to mask the incompatibility of Western imperialism and Enlightenment doctrines.[27] The English common law and rights tradition, which had informed the interpretation of the original provisions of the Bill of Rights, limited itself to protecting the liberties of White men and offered no guidance as to how the equality rhetoric of the Enlightenment, embedded in the Fourteenth Amendment, applied to people of color.[28] Moreover, the Fourteenth Amendment's mandate of equality between "superior" and "inferior" races was both literally unprecedented and seemingly counterfactual; for, in the worldview of the times, persons of color—particularly African-Americans—

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[26] WIMMER, *supra* note 7, at 4.

[27] *Accord* CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 1–14 (2005).

[28] *See* Colm O'Cinneide, *Equality: A Constitutional Principle?*, U.K. CONST. L. ASS'N (Sept. 14, 2011), http://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/ (noting that the first arguable common law recognition of equality occurred in *Kruse v. Johnson*—30 years after the passage of the Fourteenth Amendment and two years after *Plessy*).

were cursed by God to be the slaves of White people.[29] How, then, could they be "equal"?

As a result, the Amendment's authors, while agreeing on the need for racial equality, were divided as to what the Fourteenth Amendment's guarantee of equality meant in practice. Was it the substantive equality enshrined in the Declaration of Independence, which purported to recognize the equal dignity and freedoms of all human beings, and thus was incompatible with segregation?[30] Or was it a more procedural equality compatible with segregation—one that would not dismantle White privilege, but only ensure that it was maintained through "due process" rather than violence or coercion?[31] In the Civil Rights Act of 1875, the former view at first prevailed, but it was the latter view that became law.[32]

This political fluctuation between procedural and substantive equality was characteristic of the early racial politics of the day, as African-Americans held the balance of numerical power in the South, but White Southern Democrats held the social and economic power. The history of railroad segregation in the years leading up to *Plessy v. Ferguson* is a case in point.

In 1869, the Republican Louisiana State Legislature passed a law prohibiting railroad segregation within the state.[33] By 1890, the Democratic Party had regained control of the Louisiana legislature and passed a new railroad law mandating racial segregation.[34] After Louisiana's African-American citizens and legislators failed to prevent the passage of the segregation law through ordinary politics, they resorted to the courts,[35] giving rise to the infamous case of *Plessy v. Ferguson*. This resort to the courts as a second forum in which to fight political battles was not new, for property owners had had frequent recourse to the courts seeking invalidation of laws

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29 *See, e.g.*, Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1322–23 (2000) (noting the widespread belief that African-Americans are descendants of Canaan, who was cursed to be the "lowest of slaves" to his brothers).

30 *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 166–67 (1995) (describing the anti-segregation efforts of Sen. Sumner).

31 This is the view of Justice Harlan in his *Plessy v. Ferguson* dissent. In the same breath in which he argues for a color-blind Constitution, he affirms his belief in White privilege, suggesting that it is something that can be maintained without invidious racial discrimination. 163 U.S. 537, 559 (1896) (emphasis added), *overruled by* Brown v. Bd. Of Educ., 347 U.S. 483, 494 (1954).

32 SCHWARTZ, *supra* note 30, at 167–68.

33 Hall v. DeCuir, 95 U.S. 485, 487 (1877).

34 *Plessy*, 163 U.S. at 540.

35 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 30 (2004).

affecting property rights.[36] What was new, however, was the nature of the property at issue: namely, White privilege.[37] Congress and the political parties were divided over the status of customary White privilege in the aftermath of the Civil War,[38] and thus the question was deferred to the Supreme Court. Unlike the Court's power to define traditional property rights, which was limited by text and common law precedent, the Court's power to define the scope of White privilege was limited instead by the Court's subjective view of "national customs and values" and the requirements of social stability.[39] Thus, *Plessy v. Ferguson*, spawned by the rising political power and identity consciousness of African-Americans, was one of the earliest cases to give the Court the power to decide questions of culture as well as of law. It defined American culture, and thus American law, as presupposing White privilege. In subsequent cases, it would transform White superiority over African-Americans into a general White superiority over all peoples of color, rooted in the constitutionalization of "social Darwinism."[40]

B. Emergence of Ethnic Minorities and the Power To Define "Fundamental" Rights

Around the same time that Southerners were dealing with the political ramifications of Black citizenship, Northerners were debating the parameters of the citizenship of the non-White inhabitants of non-contiguous U.S. territories, who began to lay claim to constitutional rights by virtue of their acquisition by the United States at the end of the Spanish-American War.[41] The political sphere was divided between those who believed the Constitution followed the flag and those who believed the culture of the inhabitants of the newly acquired territories made them unsuited for the full panoply of constitutional rights.[42]

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36 *See supra* Part II.B.

37 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).

38 *See, e.g.*, SCHWARTZ, *supra* note 30, at 167–68 (discussing the original Senate version of the 1875 Civil Rights Act, which outlawed segregation in "common schools" as well as public accommodations, over strong opposition). A year later, the "common school" prohibition was removed by the House and not reinserted by the Senate. The shifting fate of the school segregation clause suggests some political uncertainty over the status of "social" as opposed to "economic" White privilege. *Id.*

39 *Plessy*, 163 U.S. at 550 (noting that the Fourteenth Amendment issue raised in *Plessy* was a question of reasonableness, which the Court was at liberty to evaluate "with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order").

40 *See infra* Part III.B.

41 *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922) (in which a Puerto Rican unsuccessfully sought to claim the Sixth Amendment right to a jury trial).

42 2 EDGAR J. MCMANUS & TARA HELFMAN, LIBERTY AND UNION: A CONSTITUTIONAL HISTORY 313–14 (2013).

Here, too, the Constitution's assumption of homogeneity and the lack of precedent recognizing the self-governing capacities of non-Whites produced a broad judicial discretion to translate unsettled aspects of American social and political culture into fundamental law.

As it had in the racial context, the Court largely deferred to racists and nativist sentiments cloaked in concerns for stability. It differentiated between White territorial populations (designating them "incorporated" territories entitled to the full panoply of constitutional protections) and non-White territorial populations (designating them "unincorporated" territories entitled only to "fundamental" constitutional protections).[43] Thus, Alaska, a sparsely populated land easily accessible to White American settlers was incorporated, but Puerto Rico was not.[44] The Court found that the inhabitants of Puerto Rico were unprepared for the responsibilities that attended the Constitution's entitlements.[45] In so doing, the Supreme Court delegated to itself the power to decide which constitutional rights were truly "fundamental" enough to be extended even to "semi-civilized" peoples.[46]

In defining the "fundamental" rights of the culturally diverse, as in defining the equality rights of the racially diverse, the Court's discretion was informed by its reading of extra-constitutional cultural norms rather than by the constitutional text.[47] These norms, rooted in ideologies of social Darwinism and American exceptionalism,[48] constructed the non-White peoples of the tropics as inferior cultures incapable of self-governance and in need of U.S. colonization and control.[49] Such control was justified as tutelage of inferior races and cultures by a superior race and culture for the ultimate good of the subject nations.[50] Though the Constitution's textual guarantees of equality were certainly compatible with full constitutional protections of acquired territories, the vagueness of the text and continued novelty of heterogeneity created interpretive gaps that allowed the Court to constitutionalize a dominant social

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[43] *See* Dorr v. United States, 195 U.S. 138, 143–44 (1904).

[44] *Compare* Rassmussen v. United States, 197 U.S. 516, 525 (1905) (holding that Alaska was an incorporated territory), *with Balzac*, 258 U.S. at 313 (holding that Puerto Rico was not an incorporated territory).

[45] MCMANUS & HELFMAN, *supra* note 42, at 314.

[46] Downes v. Bidwell, 182 U.S. 244, 290–91 (1901) (White, J., concurring) (finding that "even in cases where there is no direct command of the Constitution which applies there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution").

[47] *See* MCMANUS & HELFMAN, *supra* note 42, at 314 (noting that the doctrine of incorporation was purely a judicial creation with "overtones of national and cultural superiority").

[48] *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The* Insular Cases *(1901-1922)*, 65 REV. JUR. U.P.R. 224, 285–89 (1996).

[49] *See id.*

[50] *Id.* at 286.

ideology—social Darwinism—in the same way it later constitutionalized the laissez-faire economic ideology.[51] Thus, when the inhabitants of these territories began to assert their claims to the full range of constitutional rights and liberties, the Court used its discretion to create a binary classification for territories that tracked the "civilized vs. savage" binaries of the dominant social ideologies,[52] and constitutionalized the view construction of America as "the fittest" culture and thus entitled to rule and expand. This power to "constitutionalize" favored ideologies and philosophies was a byproduct of the nation's growing heterogeneity. It planted the seeds for a fundamental transformation in the nature of judicial review.

C. Emergence of White Ethnic and Religious Minorities and the Power To Conduct Reasonableness Review of All State Legislation

The growing power of the judiciary to constitutionalize its choice of cultural and social norms into the law reached its first heyday during the latter years of the *Lochner* era. As Germans and Irish Catholics became visible sources of ethnic and religious diversity, while also claiming increased shares of political power, the assimilationist model that had protected the White, Anglo-Saxon Protestant view of American identity began to break down, and the Court found itself at the center of cultural battles over the changing content of national identity.[53] The Court adjudicated these new variations of White cultural property by expanding its interpretation of liberty under the Fourteenth Amendment:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[54]

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[51] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[52] *See* Ramos, *supra* note 48, at 285–86.

[53] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (upholding a challenge to mandatory schooling in a Protestant-oriented public school); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down legislation designed to ensure "that the English language should be and become the mother tongue of all children reared in [the] state").

[54] *Meyer*, 262 U.S. at 399.

This definition of liberty read general social norms into fundamental law in a way not unlike the way in which the Court had read the racial norms of White privilege and social Darwinism into the law in *Plessy* and the *Insular Cases*, respectively. Thus, in *Meyers v. Nebraska*, the Court found that due process liberty barred state restrictions on the rights of parents to control the linguistic resources of their children,[55] and in *Pierce v. Society of Sisters*, it extended this analysis—now known as substantive due process—to the rights of parents to control the education of their children.[56] However, unlike White privilege, which was a norm implicit in the constitutional text prior to the passage of the Fourteenth Amendment (after which it became contested), and liberty of contract, which could be read as implicit in the various contracts clauses of the Constitution, the Court's social due process liberty had no textual anchor. It was a judicial extrapolation from the textual guarantees of liberty and due process, based on judicially derived norms and independent of the legislative deliberations of the citizenry.[57] Thus, under the pressures and opportunities created by increased heterogeneity, the Court began to define minority rights as a function of judicially selected principles and ideologies, rather than judicial interpretations of the constitutional text.[58]

D. Establishment of a Paradigm of Minority Rights Jurisprudence

The expansion of judicial review under the Fourteenth Amendment's minorities jurisprudence survived the demise of the natural rights paradigm due, in large part, to the valorization of its decision in *Brown v. Board of Education*, widely considered to be the Court's most important contribution to minority rights. In *Brown*, the Court departed dramatically from traditional sources of constitutional interpretation—text, history, and precedent—in order to redress what is universally considered to have been an egregious denial of fundamental liberty and equality.[59] The Court's heroic attempt to "speak truth to power," by daring to name segregation the fundamental violation of equal protection that it was, placed a halo around the doctrine of judicial supremacy that emerged lockstep with increased national heterogeneity, and has spawned a

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55 *Id.* at 403.

56 *Pierce*, 268 U.S. at 534.

57 *See Meyer*, 262 U.S. at 403; *see also Pierce*, 268 U.S. at 536 (finding that the mandate to attend public school violated due process because it was an "arbitrary, unreasonable, and unlawful interference with [the school's] patrons and [destroyed] their business and property").

58 *See infra* Part V.

59 *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 3, Dec. 21, 1965, 660 U.N.T.S. 195, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.").

veritable cottage industry of scholarly justifications for "We the Court" as the ultimate definer and protector of fundamental liberties. *Brown v. Board of Education* made the concepts of judicial supremacy and minority rights protection so seemingly inseverable that the protection of minority rights in the absence of judicial review is widely perceived as impossible.[60] In the traditional view, *Brown* demonstrated the need for a strong judiciary willing to go beyond the text of the Constitution, the will of the majority, and even its own precedents, in order to protect evolving higher order principles of fundamental equality, while the backlash against *Brown* helped create a legal culture that is committed to judicial supremacy.

What the traditional tale of *Brown v. Board of Education* misses, however, in its valorization of strong judicial review and judicial supremacy, is that the wrong redressed in *Brown* was one the Court played a central role in creating.[61] The Civil War Amendments originally allocated the power to protect minority rights to Congress,[62] which sought to fulfill its mandate through the various Civil Rights and Enforcement Acts.[63] The Court's early evisceration of the Civil War Amendments[64] and its invalidation of the original Civil Rights Acts[65] ensured the disenfranchisement of African-Americans in the South and made it impossible for them to oppose their marginalization through ordinary political processes—leaving them no recourse aside from the mercy of the Court. This situation is reminiscent of the story of a young boy who gained a

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[60] *See* Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 683 ("The famous *Carolene Products* footnote got it exactly right: when it comes to politically powerless minorities, or ensuring the workings of the political process, or safeguarding fundamental rights, the political process—and popular constitutionalism—cannot be trusted. If there is no judicial review, or no judicial supremacy, then the checks on persecution of minorities are dramatically reduced, if not eliminated. Minorities should not need to depend on the majority for their protection.").

[61] The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting) (arguing that the Court's decision reduced the Civil War Amendments to "'splendid baubles,' thrown out to delude those who deserved fair and generous treatment at the hands of the nation").

[62] U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

[63] *See, e.g.*, Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (prohibited racial discrimination in public accommodation and jury selection); Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (prohibited racial discrimination in voter registration and provided for enforcement of the act by federal courts and marshals); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (right of all races to make contracts and purchase property); *see also Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/ (last visited Apr. 2, 2015).

[64] *See generally* The Slaughter-House Cases, 83 U.S. 36, 78 (1872) (holding that Congress does not have the power to protect the general civil rights of individuals).

[65] *See generally* The Civil Rights Cases, 109 U.S. at 25 (invalidating the Civil Rights Acts on the ground that they exceeded Congress's power).

permanent reputation for kindness and generosity in his local community by saving a group of baby squirrels.[66] "Remember the squirrels? . . . First I knocked them out of their nest with a rock. . . . Then I saved them."[67]

The Civil War Amendments and Civil Rights Acts were the beginnings of a political equality "nest" within which African-Americans might have grown to (or continued to) exercise genuine political power. The Supreme Court knocked them out of that nest with a rock;[68] then, almost a hundred years later, it saved them.

This is not to deny the immense value of the Court's brave renunciation of the separate but equal paradigm, but merely to observe that it was the Court's own rulings that made such a brave renunciation necessary. The Court's refusal to protect African-American civil rights when the constitutional text, history, and a Congressional majority supported it produced a situation in which those rights could only be vindicated by bare-knuckled assertions of judicial supremacy. As a result, the implication of *Brown*'s assertion of such supremacy is not only that the Court is the champion of minority rights, but, more soberly, that the Court, and the Court alone, decides when minority rights should be vindicated and protected and who qualifies as a protectable minority. This, too, is the legacy of *Brown*'s reification of minority rights jurisprudence.

IV. JUDICIAL REVIEW IN A POLARIZED SOCIETY

In the decades following the *Brown* decision, rising identity consciousness produced unprecedented levels of cultural heterogeneity. As a result, issues of individual liberties increasingly displaced issues of racial equality, and constitutional interpretation rooted in social ideologies gave way to textual interpretations rooted in ethical approaches to the protection of "implied rights." These two trends led to even greater reductions in political autonomy and increased focus on "insurance-oriented" judicial review, in which individuals sought protection from each other rather than from the government. This Section seeks to chart the rise of the paradigm of judicial review as insurance, beginning with the emergence of "subjugation-neutral" protection of minorities, continuing to polarizing identity conflicts, and concluding with the constitutionalization of social fragmentation—the foundation of judicial review as insurance.

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66 *See* WHILE YOU WERE SLEEPING (Hollywood Pictures 1995).

67 *Id.*

68 *See supra* note 65 and accompanying text.

A. Emergence of Majority Minorities

After *Brown*, the minority rights paradigm exploded, as not only minorities but also distinct segments of the "majority," began to contest their marginalization in various spheres of American life. The Civil Rights Movement and the Vietnam War led to a "conscientization" on the part of other racial and ethnic minorities, feminists, communists, minority protestant sects, young Americans, and older Americans—all of whom began to challenge their political losses in the courts.[69]

Unlike in the earlier cases, such as *Plessy v. Ferguson*, in which the lines between the majority (Whites) and the minority (Blacks) were clearly, if arbitrarily, defined, the lines between the majority and these later minorities were shifting, blurred, and contingent on perspective. For example, with the emergence of the Women's Rights Movement, White women remained members of the White racial majority, but sought judicial protection as members of a gender minority. Black men remained members of the Black racial minority, but were now constructed as members of the dominant patriarchic majority. Prior to the emergence of the double dichotomy between White women and Black men, the "majority" was constructed as "White males," and members of the majority could not simultaneously be members of the minority in any coherent way. The new dichotomy completely destabilized the category of majority and made dual minority-majority identities, not merely possible, but an increasing norm.

Thus, by the end of the 1970's, the concept of "discrete and insular minorities"[70]—minorities who lacked concurrent membership in a powerful majority group—was dead; "minority" was an individual characteristic, rather than a function of the political powerlessness and institutionalized oppression of a marginalized group.[71] Though *Brown* had reasoned that segregation sent a message to African-Americans as a group that they were inferior,[72] later cases focused on individuals, independent of their group membership and whether or not that group had a history of being marginalized or subjugated.[73] This meant that though Whites as a group occupied 90 out of 100 available positions, an

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[69] *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (challenging successfully the denial of English language instruction to Chinese students in public schools); Roe v. Wade, 410 U.S. 113 (1973) (challenging successfully restrictions on the "right to choose"); United States v. Seeger, 380 U.S. 163 (1965) (successfully challenging doctrinal restrictions on conscientious objector exemptions).

[70] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[71] *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (holding that affirmative action policies designed to remedy past racial discrimination are unconstitutional, but that affirmative action policies designed to increase diversity in general are acceptable).

[72] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[73] *See e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

individual White person could still claim racial discrimination if they were denied the opportunity to fill the 91st seat in favor of a non-White person.[74] In the early 1980's, this allowed members of the traditional majority—White males—to resist affirmative action and other government policies designed to benefit poor minorities at the expense of White male privilege.[75] The Court's individual, "subjugation-neutral" minority jurisprudence allowed it to continue to protect the social and economic benefits of White privilege as forms of property that, like other property, could not be redistributed through minority preference programs in the name of equality.[76] Moreover, if the quintessential hegemonic majority, White males, were entitled to protection under the new individualized minority rights jurisprudence, minority rights jurisprudence was effectively unlimited. The Court had the discretion to protect anyone as a function of any characteristic.

B. The Rise of Polarizing Identity Conflicts

As the definition of minority was extended beyond those individuals denied civil and political rights, minority rights litigation also moved beyond demands for civil and political rights and began to center on increasingly polarized conflicts over identity marginalization. The rights litigation of these new minorities, seeking to secure implied fundamental liberties, differed from traditional civil and political rights litigation in two respects: purpose and impact.

1. Differences of Purpose

With few exceptions, civil and political rights (hereinafter "civil rights") had their roots in the common law and in historical practices of self-governance and citizenship.[77] As a result, they were almost universally conceded to be rights. The purpose of constitutional litigation of civil rights was generally to update the ways in which those rights were distributed in modern society, i.e., extending them to women and people of color. The implied rights paradigm was different. By and large, the implied rights asserted by the new minorities had no roots in the common law or in the historical practices of free peoples, for they were the product of destabilized consensus

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74 *Cf. id.*

75 *See* Harris, *supra* note 37, at 1768 (describing the Court's affirmative action decisions in the 1980's as turning not on the "scope of the injury to the subjugated, but [on] the extent of the infringement on settled expectations of whites").

76 *See id.*

77 The Slaughter-House Cases, 83 U.S. 36, 76 (1872) (defining "privileges and immunities" as the fundamental rights of citizens of free governments).

and the rejection of traditional sources of authority.[78] Thus, the purpose of constitutional litigation in the implied rights contexts was not to update the ways in which existing rights were distributed, but to update the very definition of fundamental rights to include the autonomy needs of formerly inchoate groups.

For example, in civil rights litigation there existed, on the one hand, a core of common law civil rights stretching back almost to the English Magna Carta and, by and large, incorporated into the text of the Constitution.[79] On the other, there existed a core of foundational civil and political documents that asserted the fundamental equality of citizens.[80] The Court's task in civil rights litigation was merely to combine the two—to use equality to extend the scope of pre-existing textual constitutional rights. In the human rights context, however, the Court had to use assertions of fundamental equality to create completely new rights for new identity groups.

When preexisting textual rights are being extended, judicial discretion is constrained by the textual exposition of the rights.[81] When new rights are being created, there are no clear limits on judicial discretion.[82] A constitutional court is free to make rights to abortion[83] and divorce[84] fundamental, and the right to practice religion trivial.[85] It can mandate marriage equality[86] while constitutionalizing educational inequality.[87] It can overturn state laws to secure rights of self-protection to gun owners,[88] while prohibiting congressional efforts to reduce violence against women.[89] The difference in purpose means that under the implied rights regime, the Supreme Court can elevate any interest to the status of right and demote any right to the level of an interest—greatly expanding the number of rights and thus the number of rights

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78 *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (finding that the Defense of Marriage Act's purpose of "promot[ing] an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'" was illegitimate).

79 *Compare* U.S. CONST. amend. I–X, *with* English Bill of Rights, 1689, 1 W. & M. 2, c. 2 (Eng.), *and* MAGNA CARTA (1215).

80 *See e.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

81 *See* SCALIA, *supra* note 22, at 44–46 (discussing the ways in which the text provides a standard that limits judicial discretion and contrasting that with open-ended "living constitutionalism," which is often the foundation of implied rights jurisprudence).

82 *Id.*

83 *See generally* Roe v. Wade, 410 U.S. 113 (1973).

84 *See generally* Boddie v. Connecticut, 401 U.S. 371 (1971).

85 *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990).

86 *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).

87 *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

88 *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

89 *See generally* United States v. Morrison, 529 U.S. 598 (2000).

conflicts—while simultaneously diminishing the scope of self-governance and reducing opportunities for citizen deliberation.

2. Impact

Civil rights and implied rights also differ in terms of the impact these conflicts have on social cohesion and fragmentation. Civil rights are primarily rights to participate in civil society on equal terms through voting and commerce.[90] Implied rights are increasingly rooted in the larger struggle of individuals with comprehensive identities "to be acknowledged publicly as what they already really are,"[91] and to obtain respect *as* a particular identity, rather than *in spite of* a specific identity.[92]

As a result, assertions of implied rights tend to be qualitatively different from assertions of civil rights. For example, when the Court refuses to uphold African-American voting rights in the face of poll taxes, it is placing severe limitations on the ability of African-Americans to influence law and politics. When it refuses to uphold gay rights or religious rights, however, it is not only limiting the freedom to marry or to freely exercise religion, it is also threatening the legitimacy and continued existence of the underlying gay and religious identities by suggesting that key elements of those identities are socially and legally illegitimate. As a result, implied rights cases are a unique form of high stakes litigation. The threat is not only the permanent infringement of a right one considers fundamental, but also the loss of the ability to define the terms of one's identity and existence. While all rights litigation is controversial, this unique personal dimension makes the opposing side in many implied rights cases not merely wrong or unjust, but an existential threat.

C. From Protection from the Government to Protection from the "Other"

One byproduct of the proliferation of identity conflicts is the increased villainization of opposing views,[93] and thus increased social fragmentation.

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90 *See e.g.*, Civil Rights Act, 42 U.S.C. § 1981 (2013).

91 KWAME A. APPIAH, THE ETHICS OF IDENTITY 105 (2005).

92 *Id.* at 109.

93 *Compare* Monique Ruffin, *Occupy Christian Oppression*, HUFFPOST BLOG (Mar. 6, 2012, 5:12 AM), http://www.huffingtonpost.com/monique-ruffin/christianity-homophobia_b_1181924.html (stating "[t]oday in many churches all across this nation, we continue to indoctrinate innocent children in the practice of homophobia"), *with* Erick Erickson, *Barack Obama is Not a Christian in Any Meaningful Way*, REDST. (Feb. 6, 2015, 4:30 AM), http://www.redstate.com/2015/02/06/barack-obama-is-not-a-christian-in-any-meaningful-way/ ("Barack Obama is not, in any meaningful way, a Christian and I am not sure he needs to continue the charade. With no more elections for him, he might as well come out as the atheist/agnostic that he is. He took his

According to Peter McLaren, "*[f]ragmentation* occurs when relations of domination are sustained by the production of meanings in a way which fragments groups and places them in opposition with one another . . . ."[94] The Court's fundamental rights jurisprudence is a method of fragmentation. While the rights in the original Bill of Rights were the product of legislative deliberation and drafting, modern implied rights are the product of adversarial litigation rather than collaboration. The goal of consensus on rights has been displaced by a bare goal of winning judicial recognition of one's preferred right. This recognition is contingent on the right's status as "fundamental"—a status that is often inseparable from the harms flowing from infringement of the right. As a result, successful assertion of an implied right generally requires the creation of a sexist, racist, something-ist "Other," from whom one needs judicial protection. Within such a paradigm, there is no room for reasoned disagreement and compromise; one is either the person being protected or the enemy Other from whom the person is being protected, with the judiciary assigning these labels at its sole discretion. In this context, each recognition of an implied right produces an additional level of social fragmentation.

A process McLaren describes as "reification" compounds this fragmentation. Reification occurs "when transitory historical states of affairs are presented as permanent, natural, commonsensical."[95] For example, the barbaric cruelties of the Southern Whites after the Civil War and the horrors perpetuated by the Nazis during the Holocaust were both products of majoritarian democracy. Reification is the process by which these past historical instances of tyranny come to be treated as the permanent and inevitable byproduct of majoritarian democracy. In other words, it is the

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first step in doing so yesterday in a speech reeking with contempt for faith in general and Christianity in particular."). *See also* United States v. Windsor, 133 S. Ct. 2675, 2708–09 (2013) (Scalia, J., dissenting) ("[T]he majority says that the supporters of this Act acted with *malice*—with the '*purpose*' 'to disparage and to injure' same-sex couples. It says that the motivation for DOMA was to 'demean,' to 'impose inequality,' to 'impose . . . a stigma,' to deny people 'equal dignity,' to brand gay people as 'unworthy,' and to '*humiliat[e]*' their children. I am sure these accusations are quite untrue. . . . [T]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements . . . . It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race."); John Hawkins, *The Left's War on Christianity*, TOWNHALL.COM (Mar. 9, 2012), http://townhall.com/columnists/johnhawkins/2012/03/09/the_lefts_war_on_christianity/page/full ("Liberals believe Christians should be mocked, impugned, and driven from the public square at every opportunity, except when there's an election coming up. . . . This should shock no one who has seen the Left enthusiastically support government sponsored anti-Christian art, sue Christians who want to mention Christ in schools or courthouses, and even just fight to remove the World Trade Center Cross from the National September 11th Memorial and Museum.").

[94] Peter McLaren, *On Ideology and Education: Critical Pedagogy and the Cultural Politics of Resistance*, *in* CRITICAL PEDAGOGY, THE STATE, AND CULTURAL STRUGGLE 188 (Henry A. Giroux & Peter McLaren eds., State University of New York Press 1989).

[95] *Id.*

process by which people come to believe that the majority which tyrannized African-American and Jewish minorities will always be prone to tyranny and oppression, but the justices who made the abolition of slavery unconstitutional,[96] raised segregation to the level of a binding constitutional principle,[97] and gave their blessing to the involuntary sterilization of millions,[98] have moved beyond their own tyrannical past to a more enlightened future.

Fragmentation and reification work together within the paradigm of implied rights to build trust in the judiciary at the expense of trust in one's fellow citizens. For example, social fragmentation means that no winning coalition can be certain that it will maintain its majority in subsequent elections, but must face the ever-present possibility that future elections will shift power to another coalition. Reification of the historical failures of majoritarian politics makes the possibility of such a shift alarming in homogenous societies,[99] and a generator of something akin to political hysteria in societies marked by high degrees of heterogeneity. This causes a breakdown in the communicative political processes essential to the operation of democracy, and diverts power from the many to the few, due to the halo of stability and security rights jurisprudence casts over the judiciary. The result is the construction of judicial review as insurance.[100]

One need not look far for examples of the distrust and communicative breakdowns indicative of the shift to judicial review as insurance. Over the past six years of President Obama's tenure, the strength of the opposition to majority rule by the Other has been dramatically displayed, with government shut downs,[101] filibusters of routine appointments,[102] and increased resort to divisive rhetoric and fear-mongering as sources of political mobilization.[103] In

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[96] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 414 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[97] *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[98] Buck v. Bell, 274 U.S. 200, 207 (1927).

[99] *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25 (2003).

[100] *See id.*

[101] Sam Levine, *Republicans Hint at Another Government Shutdown over Obamacare. Seriously.*, HUFFINGTON POST (Oct. 9 2014, 11:59 AM), http://www.huffingtonpost.com/2014/10/08/obamacare-government-shutdown-2014_n_5956270.html.

[102] Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

[103] John Wihbey, *Negative Political Ads, the 2012 Campaign and Voter Effects: Research Roundup*, JOURNALIST RESOURCE (May 6, 2013), http://journalistsresource.org/studies/politics/

such an atmosphere, judicial review has been pursued for the limitations it places on majority rule by victorious coalitions of minorities, which limit the maximum amount of harm the Other can do in the season "the People" are out of power. It also functions as a forum of "second chances" through which "the People" can continue to oppose and stymie the policies of an enemy Other, who commands a temporary majority. It is, in effect, an insurance policy for minimizing losses and obtaining second chances.

The emergence of a minority majority in 2043—which effectively is not a new majority at all, but rather the end of racial and ethnic majorities—will raise the visibility of the Other to an unprecedented level and shift an even larger share of political power to peoples of color. As peoples of color have never been completely assimilated into the polity, due to the continuing embeddedness of White privilege in our Constitution and institutions[104] and the enduring legacy of school and residential segregation,[105] this new visibility is highly likely to produce an even more strident political hysteria than President Obama's election. In evaluating this observation, it is helpful to remember that the American republic and its Constitution were originally conceived and instantiated as a government by consent only for the propertied White elite,[106] and that the Supreme Court itself was created to safeguard the property interests and privileges of those elites.[107]

Moreover, the strict dichotomy in America between a White "us" and a non-White "them" has persisted throughout our 200 year history, with the most expansive forms of self-governance marking periods of social, political, and legal dominance by a White majority, and the most limited forms of self-governance emerging alongside the rise in the social and political visibility of minorities.[108] For example, as discussed in Section II, the increased social, political, and legal power of people of color has grown in lockstep with the increased social, political, and legal power of a judiciary dominated by a White majority and most responsive to the interests of White elites.[109] In addition, the text and principles upon which the Court relies in its constitutional interpretation continue to presuppose the aim of securing the interests and privileges of a White elite, despite the rights revolution brought about by the tardy enforcement of the Fourteenth Amendment. This cautions against a rising

ads-public-opinion/negative-political-ads-effects-voters-research-roundup#sthash.k2GNPzHi.dpuf.

104 *See generally* Harris, *supra* note 37, at 1716–20.

105 *See generally* PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISES OF THE BROWN DECISION (2002) (discussing the widespread persistence of de facto school segregation post-*Brown*).

106 *See* AKHIL, *supra* note 6, at 18–21.

107 BEARD, *supra* note 18, at 84–85.

108 *See supra* Part II.

109 ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 334–37 (2014).

majority of color continuing to valorize judicial protection of "minority" rights in the face of increased resort to judicial review as insurance against their participation in democratic governance.

For, as Audre Lorde has noted, one cannot "us[e] the master's tools to tear down the master's house."[110] Traditional approaches to the Constitution, which reject poverty as a suspect class, elevate racially distributed liberties over remedies for inequality, and foreclose recognition of socio-economic rights that would decrease the economic disparities between racial and ethnic groups, are neither democracy enforcing nor minority empowering. They were designed to protect a plutocracy, and they import the appendages of that purpose into every new context in which they are applied. As a result, over time, the Fourteenth Amendment has been suborned into the service of preserving an enduring White plutocracy in an increasingly brown America.

One lasting effect of this is a paradigm of judicial review with the potential to operate in exactly the same way as Black Codes and Jim Crow laws in the South, preserving the dominance of a White minority in the face of the threat of a new and politically active majority of color. Though methods of fragmentation have replaced methods of coercion, insurance-oriented judicial review rests on a similar elevation of fear of the Other above fidelity to promises of democratic autonomy. It cannot be trusted to resolve the fundamental challenges of a new pluralistic America neutrally. Instead, in order to ensure that a new "We the People"—composed primarily of individuals excluded from the scope of the original social contract—have powers of self-governance comparable to that originally secured by the Constitution, a new approach to constitutional interpretation is needed. The outdated focus on protecting a subjectively defined minority from the majority needs to be replaced with an empowerment approach to jurisprudence, that has as its goal self-governance by an educated citizenry rather than the disempowerment or control of an increasingly brown majority.

V. JUDICIAL REVIEW IN A MAJORITY-MINORITY SOCIETY

As noted above, judicial review for empowerment is an essential next step for a maturing democracy under conditions of plurality. Citizen empowerment, rather than implied rights, must become the focus of judicial review and judicial doctrines must be reframed to allow room for citizen deliberation and autonomy. This Section seeks to provide the broad outlines of judicial review for empowerment, identifying two general prerequisites that must be satisfied if judicial review is to help create the conditions under which a pluralistic polity can engage in a more enlightened form of self-governance: conscientization and praxis. It begins with a discussion of conscientization: the

[110] AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (1984).

need for the polity to become critically aware of the growing judicial restrictions on self-governance and political autonomy. Next, it discusses praxis—dialogue coupled with transformative action—as possible only within a paradigm of shared constitutionalism, which the Author titles "judicial review for empowerment."

A. Conscientization

> *I know no safe depositary of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.*[111]

Jurisprudence for empowerment, like education for empowerment, must begin with the development of a critical consciousness. "We the People" must first become critically conscious of their position as the object, rather than the subject, of governance before they can hope to challenge a system of jurisprudence that has become increasingly oligarchic as the nation has become more heterogeneous. The paradigm of judicial insurance creates the false illusion of "We the Court"—the Court as an ally of minority interests broadly defined, rather than as an independent power that constructs itself as superior and external to the people. The rights doctrines that inform insurance-oriented judicial review cloaks judicial dominance in the language of equality and protection of the vulnerable.[112] This is a species of "false generosity" that

> constrains the fearful and subdued, the rejects of life, to extend their trembling hands. True generosity lies in striving so that these hands—whether of individuals or entire people's—need be extended less and less in supplication, so that more and more they become human hands which work and, working, transform the world.[113]

As democracies mature and political rights become more widespread, judicial review as protection becomes an impediment to, rather than an essential element of, the realization of democratic aims, for its existence presupposes that minorities can never be fairly accommodated within a democratic system. Such an orientation risks legitimizing paradigms that construct political

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[111] Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 12 THE WORKS OF THOMAS JEFFERSON 161, 163 (Paul Leicester Ford ed., 1905).

[112] *See e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[113] PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 45 (Bloomsbury 2000).

inequality in order to maintain the need for judicial intervention in the name of the same.[114]

The rejection of judicial protection in favor of self-empowerment can be facilitated by others, but must originate with the people themselves.[115] For the ordinary masses of the people to initiate such change, they must first become critically conscious of their subordination and of their power to change their reality.[116] They must first become conscious of the Supreme Court as a distinct institution that is neither their ally nor the divine embodiment of the Constitution made flesh. They must come to see it instead as it is: a government institution staffed by individuals who are equally human and thus, equally prone to both greatness and error. *More importantly, they must see it as an institution that they have the power to change*. The key to critical consciousness is the same across all contexts: information.

Currently, the only way ordinary citizens can obtain specific information about the way in which the Court operates is to travel to Washington, D.C., in hopes of snaring one of the 250 seats available[117] to members of the public attending an oral argument. The American population is over 320 million,[118] but only 250 people are permitted access to the oral arguments by which the Court will decide, for all 320 million who can and cannot get married in the nation,[119] whether the nation can provide universal healthcare,[120] and even the decorations communities across the nation can display during the holiday season.[121] In a time when almost all information is communicated visually, the Supreme Court communicates solely through post hoc audiotapes and dense, written opinions. This ensures that, aside from the legal aristocracy, the wider citizenry's knowledge of the Court is limited to sporadic headlines about its most controversial cases. As a result, few people know who the Supreme Court justices are, with barely a quarter of Americans able to identify John Roberts as the Chief Justice.[122]

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[114] *See id.* at 44 (In order to have an opportunity to express "false generosity . . . oppressors must perpetuate injustice.").

[115] *Id.* at 66 ("[W]hile no one liberates himself by his own efforts alone, neither is he liberated by others.").

[116] *Id.* at 47.

[117] Kenneth W. Starr, *Open Up High Court to Cameras*, N.Y. TIMES, Oct. 2, 2011, http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras.html?_r=0 (noting that there are only 250 public seats available at Supreme Court Oral Arguments).

[118] *U.S. Population and World Clock*, U.S. CENSUS BUREAU (Apr. 3, 2015), http://www.census.gov/popclock.

[119] *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).

[120] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[121] *See generally* Lynch v. Donnelly, 465 U.S. 668 (1984).

[122] *The Invisible Court*, PEW RES. CENTER (Aug. 3, 2010), http://www.pewresearch.org/2010/08/03/the-invisible-court/.

The incremental construction of a judicial oligarchy has benefitted greatly from the truth of the old adage, "[O]ut of sight out of mind."[123] If it is to be dismantled, the Supreme Court must be brought into sight and into mind. Scholars have already urged the Court to allow broadcasts of its proceedings,[124] and this Article endorses that approach. Broadcasting Supreme Court proceedings, however, is not the only, or most immediate, way of making the Court visible. This Article urges that calls for the broadcasting of Supreme Court proceedings be supplemented by education. It urges teachers in public high schools and undergraduate colleges to make the invisibility of the Supreme Court visible to the rising majority passing through their hands by encouraging students to question the purposes of this invisibility and the ends that it serves.

Numerous plans have been conceived by scholars to stall or reverse progress towards a judicial oligarchy, from terms limits for justices[125] to the abolition of judicial review altogether.[126] Before any of these plans can be meaningfully implemented, however, the non-legal public must become critically conscious of the processes by which judicial supremacy has been entrenched in American democracy and of their own power to effect change.[127] This must begin by demystifying the Supreme Court and constructing judicial review as something that occurs within, rather than beyond, society. In essence, conscientization is the "Protestant reformation" of judicial review by which ordinary individuals cease to unquestioningly accept authoritative pronouncements about the meaning and purpose of constitutional principles, instead, become conscious of their own interpretative resources and authority as the heirs in authorship of the original "We the People," whose values and principles the constitutional text is designed to embody. Such conscientization is especially crucial for the nation's racial and ethnic minorities; for, as long as these minorities view the Supreme Court as their savior rather than recognizing its role in facilitating their oppression, they will be unable, as the new majority, to engage in the political activism and reform that is so essential to restoring the democratic foundations of American government. This rising majority is still in the nation's classrooms; thus, education that promotes conscientization is key to their empowerment. It is only when "the People" become critically conscious of the doctrine of judicial supremacy, and of their own historical claim to a more populist supremacy, that they can engage in transformative praxis.

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123 *Id.*

124 CHEMERINSKY, *supra* note 109, at 325.

125 *Id.* at 310–12.

126 *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (2000).

127 FREIRE, *supra* note 113, at 64 ("As long as the oppressed remain unaware of the causes of their condition, they fatalistically 'accept' their exploitation. Further, they are apt to react in a passive and alienated manner when confronted with the necessity to struggle for their freedom and self-affirmation.").

B. Dialogic Praxis

The dialogue and transformative action at the heart of praxis requires a shared constitutionalism that is only possible within a paradigm of empowerment jurisprudence. Only an empowerment paradigm can accommodate minorities as collaborating subjects, reflecting and acting upon the world to transform it instead of being the objects of another's transformative efforts. This is not a call to eliminate judicial review, but a call to restructure the process of judicial review so that the citizenry is included in the elucidation of enduring constitutional values—a jurisprudence "with," rather than "for," the people.

Judicial review in pluralistic societies cannot be limited to the creation of minority-majority rights dichotomies, but must also promote "collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens."[128] Once a meaningful level of fundamental rights has been secured, the preconditions of "government by discussion" must also be secured, so that those given a "voice" under the Court's rights jurisprudence have not merely an opportunity to speak, but also a meaningful opportunity to be heard. For the ideal of a democratic society requires more than freestanding individuals formally constructed as equal; it requires collaboration as equals in the maintenance of the social order. It falls to higher law to institutionalize this collaboration in terms that are communicative rather than merely strategic. Democratic decision-making is impossible without consensus. As identity politics and rights conflicts increasingly dismantle the shared understandings and authorities that generated consensus on fundamental premises in the past,[129] a new countervailing source of consensus is needed. Using process-based jurisprudence to institutionalize dialogue and deliberation taps into the latent unifying potential of law to secure democracy in the face of social difference and fragmentation.[130]

The premise of jurisprudence for empowerment is constitutionalism shared between the judiciary and a diverse people. It differs from existing rights jurisprudence in two ways. First, it divides the world of judicial review into two distinct spheres: constitutional questions and socio-political questions (akin to the now defunct[131] distinction between constitutional questions and political questions). Socio-political questions are questions that require the

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[128] HABERMAS, *supra* note 24, at 88.

[129] *Id.* at xvii ("Pluralization and disenchantment undermine the ways in which communities can stabilize themselves against shared background and authorities that removed certain issues and assumptions from challenge.").

[130] *Id.* at 318.

[131] *See* Bush v. Gore, 531 U.S. 98, 113, 138–39 (2000).

elucidation of the rights "implicit in the concept of ordered liberty"[132] and "so rooted in the traditions and conscience of [the American] people as to be ranked as fundamental."[133] These questions will normally entail either (1) a conflict between two minorities asserting competing express or implied rights, or (2) a conflict over restrictions on actions central to the enactment of fundamental personal identities—i.e., enactments of a religious identity that conflict with enactments of a gay identity.

These questions are separated out from traditional judicial review because they create rights controversies that cannot be resolved through adversarial litigation without mandating nationwide denigration or marginalization of the fundamental interests of a subgroup of the citizenry—a common result under insurance-oriented review.[134] Instead, empowerment jurisprudence makes judicial resolution of socio-political questions contingently politically binding on nonparties, rather than permanently constitutionally binding. This means that laws invalidated on socio-political grounds would be deemed invalid for a maximum of two years, after which, they could be reenacted by the legislature, subject only to a process-based judicial review centered upon "political participation, dialogue and public interaction."[135] This would not affect finality for the parties to the original case, but would temper the wider anti-democratic effects on nonparties by leaving the political process open to dissent.

In the first instance, this approach would reduce polarization and fragmentation by lowering the stakes of constitutional litigation and reducing incentives to resort to judicial review as "insurance" against political losses. Any judicial victories over the Other would be limited to one election cycle, making it impossible to rely on judicial review as a second "bet the house" strategy that incentivizes the avoidance of engagement, dialogue, or compromise. Instead, all competing coalitions would be redirected to the political process, where subsequent victories on both sides—maintaining the law against a second attack or successfully challenging the law a second time—would first require evidence of genuine dialogue and efforts at compromise. As Cass Sunstein noted,

> Widespread error and social fragmentation are likely to result when like-minded people, insulated from others, move in extreme directions . . . because of limited argument pools and parochial influences. In terms of designing institutions, and even [interpreting] constitutions, the best response is to ensure

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132 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

133 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

134 *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1992) (attributing such marginalization to the polarization of the abortion debate).

135 AMARTYA SEN, THE IDEA OF JUSTICE 326 (2009).

> that members of deliberating groups, whether small or large, will not isolate themselves from competing views . . . .[136]

Empowerment jurisprudence seeks to incorporate this insight into the core function of judicial review. It calls for courts to go beyond protection of minorities to facilitation of their empowerment by constitutionalizing the conditions necessary for them to engage in democratic deliberation with others on terms of equal regard. For free citizens must make their own laws;[137] they cannot simply be protected from the bad laws others make.

Though calling for judges to promote collaboration and dialogue on terms of equal regard is a species of process based judicial review, empowerment jurisprudence attempts to avoid the substance-process dichotomy by adopting elements of both and using the strengths of the latter to compensate for the weakness of the former. In this way, empowerment jurisprudence still allows the judiciary to take the lead in recognizing the fundamental rights of unpopular or vulnerable minorities, but subjects such recognition to popular ratification in a way that does not become unworkable under conditions of pluralism. For example, Article V was written for a homogenous society with widely shared background assumptions that tempered disagreements and made supermajority consensus across states possible. The diversity of the civil rights generation and its nationalist orientation required the evolution of a new way of amending the Constitution, focused on politics and separation of powers at the national level.[138] The demise of the majority and emergence of a minority majority may make it impossible for coalitions to reach the completely theorized agreements[139] necessary to gain control of all three branches of government. Thus, empowerment jurisprudence seeks to offer yet a third way of expressing the will of the people on issues of fundamental values: judicial facilitation of collaboration and dialogue between competing coalitions.

Allowing Congress and state legislatures to overturn Supreme Court rulings on socio-political questions means that some rights that the Court recognizes as fundamental will not be permanently validated as fundamental in the political arena. However, the two-year period of invalidation and the provision for process-based judicial review of subsequent enactments allows the Court to continue to serve its core function of tempering majority passions in times of crisis by delaying implementation of the law and ensuring that

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136 CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 40 (2001).

137 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS xxviii (Mary Gregor & Jens Timmerman trans., Cambridge Univ. Press 2d ed. 2012) (noting that "it is the mark of free citizens to make their own laws . . .").

138 *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 4–5 (2014).

139 SUNSTEIN, *supra* note 136, at 40.

attempts at re-passage are the product of intercoalition dialogue rather than political hysteria.

At the state level, a potential drawback of the limited two-year invalidation and the option of subsequent re-passage is that different communities may develop different answers to the same socio-political questions, leading to differences between the states in their recognition of "fundamentals." However, questions that seek to define the rights "implicit in the concept of ordered liberty" [140] are not esoteric legal questions susceptible to a single universal right answer. They are human questions about the paths to freedom, equality, human dignity, and community to which "We the People," no less than "We the Court," can articulate a "right" answer rooted in the nation's fundamental principles.[141] The fact that these answers may differ from one state to another does not imply that one of them is wrong,[142] but merely that different but equally fundamental American principles were given different levels of priority in different states—an approach fully consonant with original constitutional understandings. The strength of nationalism lies in shared fundamental principles—incompletely theorized agreements—rather than in their specific instantiation in any particular context. If, however, nationalization of a specific instantiation of a fundamental principle is perceived as needed *by the people*, the proper locus of such harmonization is the People or its Congress, with the Court limited to ensuring the preconditions for a collaborative dialogue among equals.

VI. CONCLUSION

In new democracies, where power is concentrated in a few hands and large portions of the citizenry are effectively disenfranchised, judicial review as protection of minority rights is essential for the survival of democracy and is needed to fulfill a "schoolmaster" function for young governments. As governments mature and power distributions equalize through mass enfranchisement, however, judicial review as protection becomes problematic, because no matter how widespread civil and political rights become, its existence continues to presuppose that minorities cannot be integrated into the democratic system, but must always be separately defined and protected. This presupposition is particularly problematic in societies like America, where increased diversity will soon make everyone a minority and effectively redefine the protective function of judicial review from protecting people from their government to protecting them from each other.

In order for the democratic promise of self-governance to be realized in such a pluralistic society, conscientization and praxis are essential first steps.

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140 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

141 *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard Univ. Press 1978).

142 *Id.*

The veil of secrecy, behind which the Court decides which minorities to protect and when, must be lifted, and the gaps, inconsistencies, and bare judicial extrapolations that underlie its determination of implied rights must be made visible and accessible. Self-governance requires transparency, and minorities cannot "choose" minority protection over political autonomy, much less seek to rebalance the two, if they are denied access to information about the process of judicial review and about the Court that determines the nature of such review. Moreover, hidden exercises of power are the hallmark of oppression rather than freedom; a "free" people cannot long remain in that state if they take no notice or have no knowledge of the ways in which power is allocated and used within their polity. Thus, if America is to remain a democracy in the coming decades, the conscientization of the people—particularly the rising minority majority—is crucial.

However, self-governance, like liberation, cannot be bestowed as a gift.[143] Thus, after conscientization, minorities themselves must actively seek to change the doctrines and practices that limit them to being the objects of another's protection and restrict their ability to become the subjects of their own empowerment. For the best the Court can do under protection-oriented judicial review is make the rights of minorities subject to the whims of the court, rather than to the whims of the majority—a substitution that is not guaranteed to be an improvement,[144] and in diverse democracies with a minority majority, is particularly likely to be a handicap. Accordingly, when democracies have matured to the point of meaningful universal enfranchisement, judicial review must also mature—shifting its focus from protection to empowerment—or the democratic enterprise itself will regress.

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143 FREIRE, *supra* note 113, at 66.

144 CHEMERINSKY, *supra* note 109, at 10.