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JUDICIAL REVIEW AND DIVERSITY*

DESERIEE A. KENNEDY**

W.E.B. DuBois is quoted as saying, “The history of the world is the history, not of individuals, but of groups, not of nations, but of races, and he who ignores or seeks to override the race idea in human history ignores and overrides the central thought of all history.”¹ With his words in mind, I would like to examine *Marbury v. Madison*² and the concept of judicial review primarily from the perspective of African-Americans, essentially asking what would the concept of a strong judiciary, and even further, judicial independence, have meant to African-Americans in early America and now.³ If we begin our analysis from this vantage point, we are left with a wider perspective of the potential impact and meaning of judicial review. While John Marshall’s opinion in *Marbury* is touted as a watershed moment in crafting American democracy by strengthening the judiciary through the creation of judicial review, it is possible to conceive of *Marbury* and the creation of judicial review as not only “not new”⁴ but, at its inception, as, *inter*

* Address at the *Marbury v. Madison: 200 Years of Judicial Review in America* Symposium at the University of Tennessee College of Law (Feb. 21, 2003) (revised Apr. 2003) (transcript on file with the Tennessee Law Review).

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1. *The Conservation of Races* Speech by W.E.B. Du Bois to the American Negro Academy (1897), quoted in *THE FUTURE OF THE RACE* 123 (Henry Louis Gates, Jr. & Cornel West eds., 1996).

2. 5 U.S. (1 Cranch) 137 (1803).

3. Professor Akhil Reed Amar has noted the importance of placing a constitutional analysis in historical context. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). Professor Amar has written:

Epic events gave birth to the Constitution’s words—The American Revolution, the Civil War, the Woman Suffrage Movement, the 1960s Voting Rights and Youth Movements. The document’s words lose some of their meaning—some of their wisdom, some of their richness, some of their nuance, some of their rigor—if read wholly apart from these epic events.

Id. at 29.

4. Professor Scott Gerber has identified numerous state court opinions that recognized judicial review before *Marbury* was decided. Scott Douglas Gerber, *The Myth of Marbury v. Madison and the Origins of Judicial Review*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 1, 4 (Mark A. Graber & Michael Perhac eds., 2002); see also ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 48-50 (1989); Amar, *supra* note 3, at 32 (“Although Marshall could have invoked various judicial decisions in support of his analysis of judicial review—prior state court invocations of state constitutions against state legislatures,

alia, an effort to protect the legal rights of a narrow class of property holding white men rather than as a means of ensuring the rights of the politically underrepresented.⁵

Marbury's roots and the movement from legislative supremacy to strong judicial review are commonly said to be grounded in the conception of a new nation with a constitution designed to secure individual rights.⁶ In protesting British rule and in crafting their own government, American revolutionaries drafting the Constitution adopted "John Locke's application of [Isaac] Newton's ideas to politics . . . [asserting] that human society—like the physical universe—ran according to natural laws."⁷ Thus, strong judicial review eventually was seen as an effective means of checking governmental power and an essential component of protecting the interests of the people. However, the reality is that the drafters of the Constitution were primarily property holders who, while spouting democratic ideals, were keenly interested in maintaining their own interests.⁸ They viewed the masses with

a famous circuit court ruling striking down a federal statute, an earlier Supreme Court case invalidating a state statute on Supremacy Clause grounds—he does not.”). Although judicial review may not have been novel at the time *Marbury* was decided, it was still a somewhat controversial idea. WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 67 (2000). Some scholars suggest, however, the revolutionary and egalitarian nature of the Constitution's provisions by juxtaposing its “democratic pretensions” against the “Old World dominated by unelected monarchs and inequalitarian customs.” Even this assertion has met considerable opposition as women, blacks, Native Americans, and the few white men who did not have property were not permitted to participate in the drafting of the Constitution. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT*, at 90 (1995). It can be argued, however, that native groups in pre-Columbia America, Africa, Australia, and New Zealand already relied on democratic forms of consensus government at the time the Constitution was penned. See generally WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* (1998); ASMAROM LEGESSE, *OROMO DEMOCRACY: AN INDIGENOUS AFRICAN POLITICAL SYSTEM* (2000); THEDA PERDUE, *SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY* (1979).

5. NELSON, *supra* note 4, at 70, 93. Further, Professor Nelson asserts that Marshall would have viewed the *Marbury* decision as reflecting a consensus view of property rights; the concept of using judicial review “as a protection for minorities against majorities” did not occur until the latter part of the nineteenth century. *Id.* at 70, 91.

6. Gerber, *supra* note 4, at 1, 4. Although the Founders of the American Republic were influenced by John Locke and the concepts of natural or inalienable rights, they only applied these concepts to white men. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 374 (1978). This is ironic given the tendencies of colonists to refer to their condition and their relationship with the British as one of slavery. See *id.* at 374-75. John Adams stated “that we are ‘the most abject sort of slaves, to the worst sort of masters!’” *Id.* at 375.

7. DARLENE CLARK HINE ET AL., *AFRICAN AMERICANS: A CONCISE HISTORY* 49 (2004).

8. Protecting property rights was regarded, at the time, as a means of ensuring independence and personal authority. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 178-79* (1992). Not owning property was equated with dependence and a lack of

suspicion and continually expressed doubts about the ability of the majority to govern themselves and the new nation.⁹ This view is supported by historian Charles Beard, who found that “most of the makers of the Constitution had some direct economic interest in establishing a strong federal government Four groups . . . were not represented in the Constitutional Convention: slaves, indentured servants, women, men without property. And so, the Constitution did not reflect the interests of those groups.”¹⁰ Far from advancing the interests of the masses, the Founders instead sought “to benefit the groups the Founders represented, the ‘economic interests they understood and felt in concrete, definite form through their own personal experience.’”¹¹ Their revolutionary ideas and motivations were in part spurred by efforts by the British Crown to affect Americans’ property interests without their political participation. In fact, it is axiomatic that the most widely recognized spark for the American revolution was “taxation without representation.”¹² Along with this interest in protecting their economic interests from a distant government, the conveners sought to protect themselves, their status, and their property from more local threats, such as an increasing number of uprisings by poor farmers.¹³ Some view the struggle for independence and the

power. *Id.* at 179.

9. Howard Zinn has noted:

The colonies, it seems, were societies of contending classes—a fact obscured by the emphasis, in traditional histories, on the external struggle against England, the unity of colonists in the Revolution. The country therefore was not “born free” but born slave and free, servant and master, tenant and landlord, poor and rich.

ZINN, *supra* note 4, at 50, 59; see also *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* (Bernard Grofman & Donald Wittman eds., 1989).

10. ZINN, *supra* note 4, at 90. Beard found that of the fifty-five men who drafted the Constitution “a majority of them were lawyers by profession, that most of them were men of wealth, in land, slaves, manufacturing, or shipping, that half of them had money loaned out at interest, and that forty of the fifty-five held government bonds, according to the records of the Treasury Department.” *Id.* at 89-90. During the Revolutionary period about “one-third of the population . . . were small farmers, while only 3 percent of the population had truly large holdings and could be considered wealthy.” *Id.* at 98. Zinn has further asserted that even the Bill of Rights favors the interests of the wealthy. *Id.* at 99; NELSON, *supra* note 4, at 103 (“The Founding Fathers did not draft the text of the Constitution with a purpose of securing minority rights as their main goal . . .”).

11. ZINN, *supra* note 4, at 90.

12. “Taxation without representation became the central issue, the focal symbol which expressed the entire American feeling of discontent.” GREAT ISSUES IN AMERICAN HISTORY: FROM SETTLEMENT TO REVOLUTION, 1584-1776, at 400 (Clarence L. Ver Steeg & Richard Hofstadter eds., 1969).

13. In the late 1700s, uprisings took place in several communities in western Massachusetts and Rhode Island. See ZINN, *supra* note 4, at 90-94. Shay’s Rebellion in western Massachusetts in 1786 was one of the largest rebellions by small farmers. *Id.* at 90; THE RADICAL READER: A DOCUMENTARY HISTORY OF THE AMERICAN RADICAL TRADITION 51 (Timothy Patrick McCarthy & John McMillian eds., 2003) [hereinafter RADICAL READER].

subsequent creation of the democratic republic as part of a larger class struggle in early American society.¹⁴

This class struggle represented itself in the belief shared by many of the elites that the average colonists needed strong leadership and were incapable of governing themselves. Howard Zinn has noted:

Alexander Hamilton . . . one of the most forceful and astute leaders of the new aristocracy . . . voiced his political philosophy: "All communities divide themselves into the few and the many. The first are the rich and well-born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right."¹⁵

Distrust of the masses is reiterated in a number of the *Federalist Papers*.¹⁶ For example, "In *Federalist Paper # 10*, James Madison argued that representative government was needed to . . . control the factional struggles that came from inequalities in wealth. Minority factions could be controlled, he said, by the principle that decisions would be by vote of the majority."¹⁷ Thus, early democratic pronouncements were "not simply the work of wise men trying to establish a decent and orderly society, but the work of certain groups trying to maintain their privileges, while giving just enough rights and liberties to enough of the people to ensure popular support."¹⁸

At the time of drafting, it is certain that the "people" and the rights and liberties accorded to them under the Constitution were quite narrowly defined and, without exception, excluded women, blacks, and Indians.¹⁹ In other

14. One historian has summarized the failed promise of the Revolution to African-Americans and lower class whites as follows:

Middle- and working-class whites exhibited dissatisfaction with elite domination of the new nation's economy and polity. In their view, the Revolution enriched large landowners and merchants at the expense of the small yeoman farmers. . . . The new federal constitution that [the commercial elites] adopted not only represented the triumph of a class-biased republic but also strengthened the institution of slavery as a race-based system of labor exploitation and social relations.

JOE WILLIAM TROTTER, JR., *THE AFRICAN AMERICAN EXPERIENCE* 124 (2001).

15. ZINN, *supra* note 4, at 95. In fact, some Founders so distrusted the colonists' ability to select their own government that "[a]t the Constitutional Convention, Hamilton suggested a President and Senate chosen for life." *Id.*

16. The *Federalist Papers* were a series of anonymous newspaper articles appearing in New York newspapers; the articles favored the adoption of the Constitution and were written by James Madison, Alexander Hamilton, and John Jay. *Id.* at 96.

17. *Id.*

18. *Id.* at 97.

19. *Id.* at 95, 124-25. "As many as half the people were not even considered by the Founding Fathers They were not mentioned in the Declaration of Independence, they were absent in the Constitution, they were invisible in the new political democracy. They were the

words, the concept of natural, inalienable rights that were to be protected from an overreaching government did not include nonwhites or women.²⁰ The conceptual and practical exclusion of Africans from these revolutionary ideas and efforts to protect property interests has a certain degree of irony given that African slaves were a significant part of the assets which the drafters sought to maintain and protect.²¹ Many members of the nation's property holding elite counted African men, women, and children among their assets.²² The

women of early America." *Id.* at 101; see SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD," *WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE* 48-51 (2001).

In keeping with the terms of the revolutionary settlement, written constitutions and law codes drew women under the political umbrella, not as full-fledged members of the constituent power, but essentially as wards of men. Nor did revolution alter women's economic condition. The proportion of wealth owned by American women remained more or less the same—from 1 percent to 11 percent of the total, depending on the location—throughout the era . . . the revolutionary experience had virtually no effect on the property or contractual rights formally conceded to belong to women.

VANBURKLEO, *supra*, at 51. Nor did the Revolution improve the status of blacks. Professor Higginbotham has addressed the equality produced by the Revolution and noted:

Abraham Lincoln . . . [recognized that] the success of the first Revolution in no way altered the degraded status of most black Americans. Nor did it free the more than one-half million slaves in the colonies. . . . Frederick Douglass spoke . . . to the same point when he noted: "This Fourth [of] July is yours, not mine . . . the sunlight that brought light and healing to you, has brought stripes and death to me." From the perspective of the black masses, the Revolution merely assured the plantation owners of their right to continue the legal tyranny of slavery.

HIGGINBOTHAM, *supra* note 6, at 371 (footnote omitted). Higginbotham has conceded, however, that the concepts of equality and natural rights laid the groundwork for the eventual abolition of slavery. *See id.* at 384.

20. *See* HINE ET AL., *supra* note 7, at 48 ("When Thomas Jefferson wrote 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness,' he was not supporting black claims for freedom."); VANBURKLEO, *supra* note 19, at 48 ("Political philosophers have come to see that the 'he' and 'him' of framing documents spoke literally to men, not to a generic humankind."); *see also* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth Century Race Law*, 88 CAL. L. REV. 1923, 1928 (2000) ("Although the Drafters of the Declaration of Independence held as a self-evident truth that 'all men are created equal,' preserving or creating equality was not of prime importance to them; nor was equality a core principle for the Framers of the Constitution.").

21. *See* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 196-201 (1975). As property, a slave could not be party to a suit, could not serve as a witness in court, could not form contracts, had no right to marry, had no civil or political rights, and no freedom of movement. *Id.* at 197-98. The irony of the conflicts presented by the Constitutional Convention is the basis for DERRICK BELL, *The Chronicle of the Constitutional Contradiction*, in *AND WE ARE NOT SAVED* 26 (1987).

22. Kenneth Stampp has argued that slaves were important as property not only because slavery was profitable but also because they provided a source of status to their owners. *See* STAMPP, *supra* note 21, at 385-86. He writes:

bondage and forced labor of African men, women, and children were commonly and casually accepted.²³ Moreover, the ownership of Africans became a linchpin in the negotiations for union of the colonies and a constitution.

Some academics and historians have argued that the right of Africans to be free was sacrificed for economic and political expediency during the constitutional conventions. Contradictions between a democratic ideal and reality were made explicit by the newly drafted Constitution, which, in a number of clauses, directly and indirectly favored the continuation of slavery as an American institution.²⁴ One historian has argued:

The Constitution gave Congress the power to put down "insurrections" and "domestic violence." It also provided that persons "held to service or labour in one State, escaping into another . . . shall be delivered up on claim of the party to whom such service or labour may be due." This clause was the basis for the Fugitive Slave Act of 1793, which allowed masters or their agents to pursue slaves across state lines and regain legal custody of them.

[T]he Constitution strengthened the political power of slaveholders through the Three-Fifths Clause, which provided that slaves be counted as three-fifths of a free person in determining a state's representation in the House of Representatives and in the electoral college.²⁵

The ownership of slaves . . . had become "a fashionable taste, a social passion"; it had become a symbol of success like "the possession of a horse among the Arabs: it brings the owner into connexion [sic] with the privileged class; it forms the presumption that he has attained a certain social position." Slaves, therefore, were "coveted with an eagerness far beyond what the intrinsic utility of their services would explain." . . . [I]t would be futile to propose compensated emancipation, for this would be asking slaveholders to renounce their power and prestige "for a sum of money which, if well invested, might perhaps enable them and their descendants to vegetate in peaceful obscurity!"

Id. at 385-86 (quoting JOHN ELLIOT CAIRNES, *THE SLAVE POWER: ITS CHARACTER, CAREER, AND PROBABLE DESIGNS* 137-46 (1862)).

23. Although slavery was commonly accepted, the institution had been condemned by many since its inception. According to Higginbotham, "Long before July 4, 1776, many forceful arguments had been asserted as to the immorality of slavery, had our forefathers sought precedent for a commitment to universal freedom." HIGGINBOTHAM, *supra* note 6, at 377. In fact, numerous slave holders, including Patrick Henry and Thomas Jefferson, questioned the morality of slavery. *Id.* at 378-80; ZINN, *supra* note 4, at 88.

24. HINE ET AL., *supra* note 7, at 68; Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 262 (2000) ("Slavery was a central issue at the Constitutional Convention. Many clauses in the Constitution were fully or partially included in the document to accommodate or protect slavery."); see BELL, *supra* note 21, at 34. Bell references the work of William Wiecek who lists "direct and indirect accommodations to slavery contained in the Constitution." *Id.* at 34 n.*.

25. HINE ET AL., *supra* note 7, at 68; see also TROTTER, *supra* note 14, at 137; Finkelman *supra* note 24, at 262.

Thus, the preservation of slavery represented the protection of property interests and reflected commonly held views about the inferiority of Africans, enslaved and free.²⁶

It was at the same time that this new nation was forming and democratic ideals were under discussion that blacks, aware of the revolutionary rhetoric of the period, were increasingly making demands for greater equity and freedom.²⁷ Using the Declaration of Independence as a foundation, blacks “petitioned Congress and the state legislatures to abolish slavery, to give [them] equal rights.”²⁸ Key political players at the time were also aware that the island now known as Haiti was undergoing a revolution which would oust its colonial rulers.²⁹ This uprising and rumors of similar uprisings by slaves in the Caribbean and the Deep South created a sense of fear and uneasiness between slave holders and American property holders.³⁰ While blacks in most Northern states won emancipation from slavery shortly after the Revolutionary War, control of black slaves in the South instead grew tighter.³¹ Moreover, the decades following the Revolutionary War witnessed “intensifying racism” and reliance on “scientific racism” to support and justify

26. See TROTTER, *supra* note 14, at 137.

27. Their expectations have been well summarized as follows:

Black people were in attendance when Patriot speakers made unqualified claims for human equality and natural rights; they read accounts of such speeches and heard white people discuss them. In response, African Americans began to assert that such principles logically applied as much to them as to the white population.

....

The greatest source of optimism for African Americans was the expectation that white patriot leaders would realize that their revolutionary principles were incompatible with slavery.

....

... African Americans in Massachusetts, New Hampshire, and Connecticut petitioned their colonial or state legislatures for gradual emancipation. These petitions indicated that the black men who signed them were familiar with revolutionary rhetoric. . . . In 1773 black petitioners from Boston told a delegate to the colonial assembly, “We expect great things from men who have made such a noble stand against the designs of their *fellow-men* to enslave them. . . . The divine spirit of *freedom* seems to fire every human breast.”

HINE ET AL., *supra* note 7, at 48, 50.

28. ZINN, *supra* note 4, at 87; see also HINE ET AL., *supra* note 7, at 48-50; TROTTER, *supra* note 14, at 104. For copies of such slave petitions, see RADICAL READER, *supra* note 13, at 25, 57.

29. See HINE ET AL., *supra* note 7, at 74-75.

30. *Id.* at 75. See generally RAYFORD W. LOGAN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH HAITI, 1776-1891* (1941); BRENDA GAYLE PLUMMER, *HAITI AND THE UNITED STATES: THE PSYCHOLOGICAL MOMENT* (1992).

31. HINE ET AL., *supra* note 7, at 63-64, 67. Although emancipated, free blacks in the north still faced considerable de facto and de jure restrictions on their political and civil rights. TROTTER, *supra* note 14, at 214-15, 218-21.

the continuation of slavery.³² According to Professor Darlene Clark Hine, "Thomas Jefferson reflected this view when he argued that 'scientific observation' supported the conclusion that black people were inherently 'inferior to whites in the endowments of both body and mind.'"³³

Predictably, African-Americans in their quests for freedom from slavery, for stopping the spread of scientific racism, and for gaining greater equality added to fears of the "turbulent" masses. These concerns may have spurred efforts to further centralize and institutionalize controls over legislatures which might become subject to the demands of the people. Evidence of ethnocentrism and efforts to concentrate power among white male property holders during this time abounds.³⁴ "A 1790 law limited the granting of naturalized citizenship to 'any alien, being a white person.' Two years later, Congress limited enrollment in state militias to 'each and every free, able-bodied white male citizen.'"³⁵ The late eighteenth to early nineteenth centuries saw the disenfranchisement of black men. While some northern states did not initially prevent black males from voting because of their race,³⁶ egalitarian efforts to make male suffrage universal and prohibit property requirements for voting resulted in race-based suffrage provisions across the Northeast.³⁷

It was within this historical context and shortly after this time of conflicting ideals and turmoil that John Marshall penned the opinion in

32. HINE ET AL., *supra* note 7, at 69; *see also* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981).

33. HINE ET AL., *supra* note 7, at 69.

34. The Constitution empowered Congress to use state militias to suppress slave uprisings in Article I, Section 8, and "the federal government was obliged to protect the states against . . . slave insurrections." BELL, *supra* note 21, at 34 n.* (citing WILLIAM WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848, at 62-63 (1977)).

35. HINE ET AL., *supra* note 7, at 69.

36. Although many of the voting restrictions of the time were not race-based, property requirements resulted in most black males as well as poor white males being unable to vote. *Id.* at 103.

37. Professor Hine has summarized some of the more significant events as follows:

New Jersey stopped allowing black men to vote in 1807 and in 1844 adopted a white only suffrage provision in its state constitution. In 1818 Connecticut determined that, although black men who had voted before that date could continue to vote, no new black voters would be allowed. At the other extreme, Maine, New Hampshire, Vermont and Massachusetts—none of which had a significant African-American minority—made no effort to deprive black men of the vote. . . .

In 1822 Rhode Island denied that black men were eligible to vote in its elections, but in 1842 a popular uprising against the state's conservative government extended the franchise to all men, black as well as white. In New York an 1821 state constitutional convention raised the property qualifications for black voters while eliminating it for white voters. This denied the right to vote to nearly all of the ten thousand black men who had previously voted in the state.

Id. at 103-04.

Marbury and solidified the concept of judicial review. The increasing recognition of judicial review, which rests supreme power to declare the constitutionality of legislation with the judiciary, represented an increasing distrust of legislators and their ability or willingness to protect individual rights, including private property rights.³⁸ Marshall, and other leaders of his time, “viewed ‘the people’ as a politically homogenous and cohesive body possessing common political goals and aspirations”³⁹ and saw the protection of private property rights as uncontroversial and not political.⁴⁰ Under this interpretation, a stronger judiciary as evidenced in Marshall’s articulation of judicial review may be seen as an effort to centralize power by establishing judicial oversight over potentially democratic and “overly-representative” legislatures.⁴¹ By controlling the Constitution’s meaning, an elite judiciary could work to protect private property and maintain control over an unrestrained spread of liberties to the poor, Africans, women, and Native Americans. By contrast, blacks and poor whites at the time would have been and, in fact, were more successful in gaining rights and freedom from some legislatures than they were in swaying judges.⁴² Strong judicial review, then, might have moved power further away from enslaved and free Africans.

It seems relevant in this context to recognize that John Marshall, like many of the principals in the newly formed government, was a slaveholder. In fact, Judge Bruce Wright has noted, “Children are taught in school that John Marshall was the greatest chief justice the land has ever had, but not that

38. Gerber, *supra* note 4, at 4, 7. Gerber in discussing the origins of *Marbury* references a letter to the editor written by James Iredell, counsel in a seminal pre-*Marbury* state case. According to Gerber, “Iredell insisted that judicial review was necessary because without it individual rights like the right to property would not be adequately protected.” *Id.* at 11.

39. NELSON, *supra* note 4, at 83.

40. *Id.* at 82. Ensuring a strong central government was consistent with Marshall’s Federalist ideals. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 72 (1974).

41. Professor Nelson has noted,

This conventional wisdom . . . contends that John Marshall, in deciding *Marbury*, consciously furthered the political goals of the Federalist Party, to which he belonged—first, by stretching the Constitution’s meaning to increase national power at the expense of state power, and second by designing constitutional doctrines, such as judicial review, that protected the upper classes’ privileges against the growing democratic onslaught

NELSON, *supra* note 4, at 2. But note that Nelson further stated that “the conventional wisdom has begun to erode.” *Id.* at 3. Nelson asserts that Marshall would have viewed the protection of property rights as an unquestionable legal right and not as a matter of policy. *Id.* at 8-9.

42. See *supra* note 27-28 and accompanying text; Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2000-08 (1990). In fact, Professor Nelson has stated that “John Marshall . . . did not see judicial review as a mechanism for protecting minority rights against majoritarian infringement.” NELSON, *supra* note 4, at 83.

on his tenth birthday he received a black slave as a gift and that upon his marriage he received another."⁴³

Marshall's own opinions provide some evidence that he shared a feeling of ambivalence toward Africans, their status as slaves, the right of whites to hold property, and democratic ideals. In one Marshall opinion involving ownership of the *Antelope*, a slave ship, and its cargo, he ignored the possibility of emancipating the enslaved Africans, choosing instead to elevate the right of whites to own property over the individual African's right to freedom. Marshall wrote:

In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed; this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.⁴⁴

It is clear, rightly or wrongly, that Justice John Marshall did not understand the condition of Africans of his time, nor would he have even purported to represent their interests either as judge or slave owner.

Thus, Marshall's interpretation of an American prohibition of the slave trade and its application in this case was necessarily limited by his myopic perspective on rights that at a minimum excepted African-Americans as deserving beneficiaries of democratic rights. As a "product of his time" it is unlikely that Marshall's analysis of judicial power and the interrelationship among the three branches of government in any way incorporated the condition of the African. In fact, his understanding of liberty, justice, and democratic ideals would necessarily have been limited by his inability to understand and empathize with the Africans in early American society. Thus, Marshall probably failed to contemplate the possible negative effects a stronger judiciary might have had on the rights of Africans—slave and free.

The question remains, what does this brief historical treatment add to our understanding of judicial review today? One view is that an independent judiciary, and the current, expanded view of judicial review, can play important roles in protecting the rights of the underrepresented.⁴⁵ In fact, Professor William Nelson has asserted that Justices should protect the interests of "minorities" when it is fair and just to do so.⁴⁶ But he has acknowledged that fairness and justice are determined largely by "intuitions about sound social policy."⁴⁷ Yet the ability to create progressive change may be limited by the fact that intuition is developed by an understanding of law,

43. BRUCE WRIGHT, *BLACK ROBES, WHITE JUSTICE* 63 (1987).

44. *The Antelope*, 23 U.S. (10 Wheat.) 66, 114 (1825).

45. NELSON, *supra* note 4, at 101.

46. *Id.* at 103.

47. *Id.*

institutions, policies, and interests that is largely developed through life experiences.

Thus, the continuation of a judiciary that Professor Sherrilyn Ifill has called “a powerful tenured institution that is overwhelmingly white, male, and upper-middle class” may mean that the strength and scope of judicial review and judicial independence continue to move the possibility of a representative democracy further away from people of color.⁴⁸ The question remains whether judges, in exercising oversight over legislation, can fairly review cases involving issues of relevance to people of color (and women) with little diversity of identity or experience on the bench.⁴⁹

In large part, the answer to that question lies in whether race matters. Quite simply, the reality in American society is that race continues to matter. Social science data supports the view that similar differences of perspective and understanding that can only be attributed to race continue to exist today. For example, a 1993 National Science Foundation survey of over 2200 American adults found that:

51 percent of the white conservatives but also 45 percent of the white liberals agreed with the statement that “blacks are aggressive or violent.” Thirty-four percent of the conservatives and 19 percent of the liberals “agreed that blacks

48. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 (2000) [hereinafter Ifill, *Diversity on the Bench*] (quoting Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J. WOMEN & L. 1, 3-4 (1997)); see also Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) [hereinafter Ifill, *Judging the Judges*] (asserting the lack of diversity on state benches violates the Fourteenth Amendment’s judicial impartiality mandate). According to Judge Edward Chen,

National statistics reveal the lack of judges of color within the federal judiciary: Of the nearly 1,600 active federal judges (including Article III judges, part- and full-time magistrate judges, bankruptcy judges, and court of claims judges) as of September 30, 2001, 7.2% were African American, 4.0% were Latina/o, 0.8% were Asian American, and 0.1% were Native American. None were Pacific Islanders. Among minority judges, women of color were substantially underrepresented. In contrast, according to the 2000 census, African Americans were 12.3% of the U.S. population, Latinas/os were 12.5%, Asian Pacific Americans were 3.7%, and Native Americans were 0.9%.

Of the 579 active district court judges nationwide, there are only five Asian Pacific Americans, including only one outside of California and Hawaii (Judge Denny Chin of the Southern District of New York). There are no Native American district court judges in the United States. There are a total of nineteen active judges of color at the appellate level, including one Asian Pacific American. Only 22.6% of active judges are women. Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CAL. L. REV. 1109, 1111-12 (2003) (footnotes omitted).

49. “Race matters whether we like it or not.” Chen, *supra* note 48, at 1120.

are lazy.” Twenty-one percent of the conservatives and 17 percent of the liberals concurred that African-Americans are “irresponsible.”⁵⁰

Social science and other literature suggest that stereotyping based on race is pervasive, complex, and subtle.⁵¹ Although it is unwise to extrapolate from this data that Supreme Court Justices or other judges share these views, it is difficult to divorce them completely from a society in which racist assumptions about behavior and motivations are still common.⁵² And, as Professor Ifill has stated, “Judges . . . carry the same ‘cultural baggage’ as other members of society.”⁵³ The question remains whether judges who “continue to live and work in a racially segregated world . . . [are] deeply entrenched in their racialized perspectives” in ways that impact their legal analysis.⁵⁴ Although judicial review has been characterized as a means of promoting equality and preventing injustice and discrimination,⁵⁵ the willingness of the court to further such ends has included severe limitations that have compromised the interests of racial and ethnic minorities. Thus,

50. MANNING MARABLE, *Crossing Boundaries, Making Connections: The Politics of Race and Class in Urban America*, in SPEAKING TRUTH TO POWER: ESSAYS ON RACE, RESISTANCE, AND RADICALISM 117 (1996); see also David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946-57 (1996) (summarizing survey evidence and laboratory experiments concerning similar discriminatory attitudes). As I have noted in a previous article,

A national survey completed in 1990 [by the University of Chicago's National Opinion Research Center] revealed that sixty-two percent of non-black respondents thought that blacks were lazier than other groups, fifty-three percent saw blacks as less intelligent, and seventy-eight percent felt that blacks were less self-supporting. More than one in four whites believe in neighborhood segregation and forty-one percent felt as though it is acceptable for white property owners to discriminate against blacks seeking to purchase a home or rent an apartment. Almost one of every four whites believes in laws prohibiting mixed marriage. Nearly half of all whites say they would not send their children to any school where more than half the students were black. Six of ten whites strongly or mildly agree with the statement, “Blacks shouldn't push themselves where they aren't wanted.”

One in five whites say they wouldn't vote for a black candidate for President, even if the candidate was a member of their own party and espoused views with which they agreed. Deseriee Kennedy, *Radicalism, Racism and Affirmative Action: In Defense of a Historical Approach*, 27 CAP. U. L. REV. 61, 76 (1998) (footnotes omitted).

51. John M. Conley et al., *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1191-95. “Generally, stereotyping is the attribution of particular characteristics to an individual because of that individual's membership in some category or group.” *Id.* at 1191.

52. See Chen, *supra* note 48, at 1119-22.

53. Ifill, *Diversity on the Bench*, *supra* note 48, at 434; see Chen, *supra* note 48, at 1120-22.

54. Ifill, *Diversity on the Bench*, *supra* note 48, at 436; see Chen, *supra* note 48, at 1117-18.

55. NELSON, *supra* note 4, at 119-20.

while scholars point to *Brown v. Board of Education*⁵⁶ as a paradigmatic example of the use of judicial review to advance racial equality,⁵⁷ the opinion has been criticized for its willingness to compromise the interests of blacks by requiring the integration of public schools “with all deliberate speed.”⁵⁸

Scholars also note that the decisions which require proof of intent in constitutionally-based discrimination claims and which apply the same standard of review in cases of benign and invidious discrimination are products of a nuanced perspective—affected in large part by the decision-maker’s subject positioning—and are not just the products of a neutral analysis of constitutional doctrine.⁵⁹ It should be of great concern that issues central to democracy—such as whether a cross-burning statute violates the First Amendment,⁶⁰ whether hate speech is deserving of First Amendment protection,⁶¹ how to maintain diversity in education,⁶² and the future of affirmative action⁶³—are regularly placed in the hands of a judiciary that may find it difficult if not impossible to fully imagine the condition of the individuals whose lives are impacted most directly by their decisions.

In short, the scope and extent of judicial review may continue to work as a means of concentrating power. Lani Guinier has noted that “[i]n a heterogeneous society [such as ours] deeply cleaved by issues of gender and race, centralized authority, by contrast, may reflect a deeply felt need to preserve the control of those in power while ostensibly protecting democratic values.”⁶⁴ The relationship between judicial review and the power to guard

56. 347 U.S. 483 (1954).

57. NELSON, *supra* note 4, at 120-23.

58. DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 381 (2d ed. 1980); BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION 108 (1997) (further criticizing the opinion for failing “to explain to white Americans that white supremacy was unconstitutional”); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS OF THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* 125 (2004).

59. See, e.g., FAIR, *supra* note 58, at 109-13; Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989); Spann, *supra* note 42.

60. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003).

61. See Chen, *supra* note 48, at 1116. See generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989) (examining First Amendment response to hate speech in light of its effects on its victims).

62. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 538 U.S. 306 (2003).

63. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); see Chen, *supra* note 48, at 1116.

64. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 175 (1994). “That federal courts have signed on more habitually to the Reagan-Fried agenda seems directly related to Reagan’s success in changing the membership of the judiciary. Ronald Reagan and George Bush appointed over half the federal judiciary, many of whose members are former Reagan Administration standard-bearers.” *Id.* at 182; see also Carl Tobias, *Judicial Selection at the Clinton Administration’s End*, 19 LAW

justice—racial, gender, economic—is affected not only by the scope of that review and the extent to which the judiciary is empowered to declare legislation unconstitutional but also by the ability of the decision-makers to first recognize and then act upon the constitutionality of particular enactments.

It may be equally if not more important to focus on the identity of the members of the bench⁶⁵ and to insist on a diverse bench and, before that, diverse law schools.⁶⁶ Judge Chen has advocated a more diverse bench, observing that diversity

encourag[es] richer debate and more thoughtful reflection and discussions . . . [and] facilitates the expansion of an organization's agenda and broadens its perspective. . . .

. . . .
Diversity can establish the credibility of an institution, build bridges to other communities, and increase sensitivity to and awareness of diverse clientele and constituents. . . .

. . . .
. . . The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?⁶⁷

Diversity is critical “for improving the legitimacy and quality of judging” because “the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making.”⁶⁸ Further, diversity “encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.”⁶⁹ Also, the data

& INEQ. 159, 188 (2001) (suggesting that politics plays a role in the small number of women and minority judges). Judge Chen posits that the appointment and selection process may contribute to the lack of judicial diversity. Chen, *supra* note 48, at 1114-15.

65. See Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329-30 (2002) (suggesting that a diverse bench improves the process).

66. The call for a more diverse bench has been made repeatedly by many. See e.g., Chen, *supra* note 48, at 1113 (noting “historical patterns of discrimination in the educational system” as one of the explanations for the lack of diversity within the judiciary); Ifill, *Judging the Judges*, *supra* note 48, at 98-99; Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 1-2 (2002).

67. Chen, *supra* note 48, at 1115-17 (footnote omitted).

68. Ifill, *Diversity on the Bench*, *supra* note 48, at 409-10; Tobias, *supra* note 64, at 183-86.

69. Ifill, *Diversity on the Bench*, *supra* note 48, at 411.

suggests support for the conclusion that diversity may affect not only outcomes but the process as well.

The potentially transformative power of judicial independence is necessarily limited by the homogeneity of the individuals sitting on the bench.⁷⁰ Although an individual judge's race cannot and should not determine the outcome of individual cases, having a range of ideas, values, and experiences represented on the bench can be relevant to judicial deliberations and, ultimately, to decision-making.⁷¹ As long as the bench lacks serious diversity, the ability of the judiciary to declare legislative acts unconstitutional is limited; moreover, it will continue to concentrate power and reserve the right of the few to interpret the Constitution and legislate for the many.

70. Lani Guinier has alluded to a similar point in discussing Charles Fried's reign as Solicitor General for former President Ronald Reagan, when she has noted, "His Administration won its revolution by changing the membership, not simply the orientation, of the Court." GUINIER, *supra* note 64, at 159. Professor Ifill has written extensively on racial diversity on the bench and has noted:

[T]he most important benefit of judicial diversity is its potential to improve judicial decision-making. First, the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. . . .

Second, racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making. Ifill, *Diversity on the Bench*, *supra* note 48, at 409-11.

71. Edwards, *supra* note 65, at 327.

