POST-COLONIAL CONSTITUTIONALISM

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This Article is drawn from remarks delivered by Professor Peggy Cooper Davis at the inaugural Elie Hirschfeld Symposium on Racial Justice in the Child Welfare System, held on January 23, 2019. For a full transcript of Professor Cooper Davis' remarks, see Appendix at the end of this issue.

I.
INTRODUCTION

In 1980, shortly after I was sworn in as a judge of the Family Court of the State of New York, a more senior judge of that court looked me in the eye and said, "We do things to these families that we would never do with our own." She was a white judge speaking to a new Black colleague, and so I understood the kinship suggested by her use of the inclusive pronoun to reference our class positions. The "we" was we of the middle and upper classes, and "our own" were people who did not live in poverty and almost never appeared as respondents in the neglect, abuse, domestic violence, support, and delinquency cases we handled each day. She was also socially conscious, and I knew without her having to say it, that in the larger scheme of things she saw that the "we" who did things to others that we would not do to "our own" was predominantly white, and the families to whom we did things were almost exclusively Black and Latinx. I am looking for principles that will help us to bridge the gap between how we see "our own" and how we see "Others."

[∞] Peggy Cooper Davis, Professor of Law, N.Y.U School of Law. I salute the launch of this symposium and salute Martin Guggenheim and Chris Gottlieb of the Family Defense Clinic for its organization. I am grateful to the staff of *N.Y.U. Review of Law & Social Change* for its highly professional editorial assistance and to the D'Agostino-Greenberg Faculty Research Fund for its financial support.

The subject of this symposium is Black families and child protection systems. The subject of this talk is post-colonial constitutionalism. I hope to provide in the next few pages satisfactory proof that the two subjects are importantly related. Those familiar with child welfare systems might agree immediately that colonization is an apt, albeit harsh, metaphor for child welfare systems in many cities, towns, or rural areas in the United States: An entity assuming governmental authority supervises and alters the terms of life in a community—and in families—that had thought of themselves as autonomous. And it does so with a presumption of cultural or informational, if not biological, supremacy. It professes to act in the name of the long-term interests of communities and families as it undertakes a kind of cultural or educational conversion. Kidnapping of Native children to boarding schools for socialization comes to mind,[1] as do the orphan trains of immigrant children being shipped to more "American" homes farther west.[2]

I want to emphasize that the colonial metaphor is harsh, for child welfare agencies earnestly and honorably aim to protect children against the vices, failures, or incapacities of their parents. We cannot fault them for expressing a communitarian sense of responsibility for children with whom they have no kinship or friendship ties and often no affinity ties. That sense of human responsibility is appropriate and commendable. *But I will suggest that good governments—like good parents—must appreciate and respect the tensions between liberty and loving care. And I will suggest that governments that are self-consciously post-colonial have things to teach us about managing those tensions.*

When I speak of post-colonial constitutionalism, I refer to constitutional principles adopted in reaction to supremacist arrogance and atrocity. The South African post-apartheid constitution is the most prominent example, but it is joined by the post-World War II constitutions of many other nations following independence from imperial powers. Sociologist Julian Go has reported that in the second half of the twentieth century, ninety-one nations rose to independent statehood after colonial rule.[3] As of 1970, two thirds of the world's constitutions were post-colonial, and by the 1990s four fifths of the world's constitutions were either post-colonial or secessionist.[4] Understanding post-colonialism more broadly as apply-

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[1] This history is well documented in congressional hearings leading to the passage of the Indian Child Welfare Act. *See, e.g.*, *Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. (1974).

[2] For an overview of the orphan trains and the attitudes that gave rise to them, see STEPHEN O'CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED 84–85 (2004). *See also* Anita Ortiz Maddali, *The Immigrant 'Other': Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 Ind. L. Rev. 643, 667 (2014) (describing the practice of sending children of poor Irish, Polish and Italian immigrants "to be rais[ed] . . . above the class from which they [came]").

[3] Julian Go, *A Globalizing Constitutionalism? Views from the Post-Colony, 1945-2000, in* CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION 89, 101 (Saïd Amir Arjomand ed., 2007).

[4] *Id.* at 89.

ing to "all cultures (and cultural expressions) affected by political oppressive systems,"[5] we can see that the German post-Holocaust constitution, while not post-colonial in the sense that it followed independence from imperial power, is analogous in that it is reactive to supremacist extermination policies.[6] To the extent that post-colonial constitutions have common features, post-colonial constitutionalism is plausibly thought of as a "globalizing" force that reflects a number of potentially harmonizing tendencies, the most encouraging of which are human rights ideology and democratization.[7]

Analysts more knowledgeable than I have pointed out that post-colonial constitutional policies and practices vary widely in their embrace of human rights principles.[8] Some have emphasized the extent to which post-colonial constitutions track those of former colonizers,[9] and others have emphasized the vulnerability of post-colonial nations to authoritarian control.[10] Nonetheless, one can identify a significant set of jurisprudential and political stances that are democratic and self-consciously reactive to supremacist and imperial assumptions.[11] In the oft-quoted words of South Africa's former chief judge, Ismail Mahomed, a constitutional system like that of South Africa

> retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[12]

There are reasons to think that this stance has received inadequate attention in the Global North.[13] I want to respond by arguing that we in the United States

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[5] Erika Lemmer & Michele Olivier, *The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom*, 33 DE JURE 138, 140 (2000).

[6] *See* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527 (2016).

[7] Go, *supra* note 3, at 102–03.

[8] *See* Upendra Baxi, *Postcolonial Legality: A Postscript from India*, 45 L. & POL. AFR. ASIA & LATIN AM. 178 (2012).

[9] *See* Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014) (reporting results indicating that "the decision of countries to adopt a right is correlated with past adoption by their former colonizer, countries with the same legal origin, the same religion, the same former colonizer, and the same aid donor").

[10] *See* Baxi, *supra* note 8, at 184–85.

[11] *See* Lemmer & Olivier, *supra* note 5, at 141 (defining post-colonial strategies as those that empower that which has been "marginalised by various forms of political oppression").

[12] *State v. Makwanyane* 1995 (3) SA 1 (CC) at para. 262 (S. Afr.).

[13] *See* Daniel Bonilla Maldonado, *Toward a Constitutionalism of the Global South*, *in* CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1, 20 (Daniel Bonilla Maldonado ed., 2013) ("[T]he conversation about modern law, and particularly about modern constitutionalism, is too centered in the Global North.").

would be a better people—and would have, among other things, a much better child welfare system—were we to adopt a similarly reactive stance.

The United States *is* post-colonial, of course; post-colonial in the sense that our country was formed in rebellion against British imperial rule. We seem, however, to be in denial about our post-colonial status, and the United States is not usually classified by others as a post-colonial nation. This has to do, I suppose, with the fact that the United States' revolutionary war was more a rebellion of colonizers than one of indigenous people; more like a Boer War than like an indigenous or enslaved people's liberation struggle. I suppose it also has to do with the fact that many in the United States have thought of themselves as members of a white country—alas, many still do—and colonization is typically thought of in terms of a white/Other binary.

I want to try to answer three questions:

- How is it that we are, after all, in a post-colonial posture?
- Why is our post-colonial posture an especially important thing to be aware of today?
- And what has all this to do with Black families in child welfare systems?

II.
IN WHAT SENSE ARE WE A POST-COLONIAL NATION?

We are post-colonial in an unusual way. The Revolution of 1775 was both a war against distant, monarchical rule and a war against governance without representation. But British rule over the thirteen colonies was not as overtly supremacist as was European rule over lands that were populated more heavily by indigenous people and other people of color. Disregard of native sovereignty and compromise with the institution of slavery factored heavily in the United States revolutionary calculus. The declaration that all are created equal and endowed with inalienable rights[14] was not explicitly given the force of law, and the constitution that followed did not disavow, but only papered over, the new nation's developing caste structure. The Constitution contained no Equal Protection Clause. The Bill of Rights was an afterthought that protected only against abuse from the national government. It contained no explicit right to vote, to be educated, or to any measure of equality or social justice. States remained free to enslave or to disenfranchise. Citizenship was undefined, and the Supreme Court was able to announce in *Dred Scott* that African Americans could not qualify.[15]

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[14] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these Truths to be self-evident, 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.").

[15] Dred Scott v. Sanford, 60 U.S. 393 (1857) (holding, inter alia, that an African American could not be a citizen of the United States). For a fuller account of the enduring influences of this

I invite you to think of the United States Civil War as a war of liberation from colonial-style oppression and to think of the post-Civil War Reconstruction as the formation of a new nation that would stand—half-heartedly at least—against supremacist oppression. I invite you to adopt the perspectives made visible by the great sociologist and historian, W.E.B. Du Bois,[16] and the preeminent contemporary historian of Reconstruction in the United States, Eric Foner[17]:

- To think of enslaved people deserting plantations and joining Union armies.
- To think of abolitionists also joining those Union armies.
- To think of the people of the United States as a post-colonial people engaged since the beginning of the Civil War in a struggle against supremacy and hierarchy.[18]

III.
WHAT ARE THE 21ST CENTURY IMPLICATIONS OF BEING POST-COLONIAL?

The idea of a post-colonial constitutionalism is perhaps most easily described by reference to the Constitution of South Africa and South Africa's Constitutional Court, the highest court of South Africa. Lourens Ackerman, who once sat as a Justice of that Court, has explained that respect for human dignity informs and enriches the proper interpretation of South Africa's Constitution, and he made clear that dignity is intrinsic and inalienable to every human being.[19] Remembering and responding to the indignities that apartheid imposed on South African people of color, South Africa's Constitution explicitly established—and its Constitutional Court consciously attempts to enforce—principles of equality and human entitlement to concern and respect.[20] The Constitution's Preamble acknowledges, and declares the Constitution responsive to, injustices of the past.[21] Its Bill

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history on Reconstruction-era constitutional jurisprudence and the Confederate narrative that influences jurisprudence to this day, see Peggy Cooper Davis, Aderson Francois & Colin Starger, *The Persistence of the Confederate Narrative* 84 U. TENN. L. REV 301 (2017).

[16] *See, e.g.*, W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 (Routledge 2013) (1935).

[17] *See, e.g.*, Eric Foner, RECONSTRUCTION UPDATED EDITION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (2014).

[18] DU BOIS, *supra* note 16, at 76–113 (detailing the decisive role played by Black soldiers who left plantations to fight for the Union and the promise of the Union's victory in heralding a new vision of democracy for the people of the United States).

[19] Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1374 (2009).

[20] *See, e.g.*, Nat'l Coalition for Gay & Lesbian Equality v. Minister of Just. 1999 (1) SA 6 (CC) (S. Afr.) (drawing upon principles of equality and human dignity to invalidate an apartheid-era law criminalizing same-sex lovemaking).

[21] S. AFR. CONST., 1996. The language of the preamble is as follows:

> We, the people of South Africa,
>
> Recognise the injustices of our past;

of Rights "affirms the democratic values of human dignity, equality and freedom"[22] and guarantees equal protection of the law and protection against group-based public or private discrimination.[23] In addition, it guarantees life,[24] freedom, personal security, and bodily and psychological integrity;[25] privacy;[26] freedom of religious belief and opinion;[27] freedom of expression limited only to exclude war propaganda; incitement to imminent violence or advocacy of group-based hatred that incites harm;[28] freedom of assembly, demonstration, picket, and petition;[29] freedom of association,[30] political participation, and voice;[31] occupational choice;[32] fair labor practices;[33] environmental protection;[34] protection against arbitrary deprivations of property;[35] access to housing;[36] access to health care, food,

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> Honour those who suffered for justice and freedom in our land;
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> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
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> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> May God protect our people.
>
> Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
>
> God seën Suid-Afrika. God bless South Africa.
>
> Mudzimu fhatutshedza Afurika. Hosi katakisa Afrika.

[22] *Id*. § 7(1).
[23] *Id*. § 9.
[24] *Id*. § 11.
[25] *Id*. § 12.
[26] *Id*. § 14.
[27] *Id*. § 15.
[28] *Id*. § 16.
[29] *Id*. § 17.
[30] *Id*. § 18.
[31] *Id*. § 19.
[32] *Id*. § 22.
[33] *Id*. § 23.
[34] *Id*. § 24.
[35] *Id*. § 25.
[36] *Id*. § 26.

water, and social security;[37] care and protection during childhood;[38] education;[39] cultural integrity;[40] access to information held by the state or otherwise required for the protection of rights;[41] access to courts;[42] and access to fair administrative or criminal procedures.[43]

South Africa's Constitutional Court has carefully considered the implications the country's history and founding principles hold for understanding the reach and limits of individual freedom. In that context, the Court has come to a profound insight about the importance of perspective-taking. When certifying a decision that found an apartheid-era statute criminalizing same-sex lovemaking to be unconstitutional, for example, the Constitutional Court approvingly quoted the notion that, "[t]he experience of subordination – of personal subordination, above all – lies behind the vision of equality."[44] Required by precedent to consider "the impact of the discrimination on . . . members of the affected group,"[45] the Court went on to examine in detail the indignities imposed upon sexual minorities as a result of the challenged laws, and then to interpret the South African Constitution's guarantees of equality, respect, and non-discrimination to require the invalidation of those laws.

I have written in the past about the difference between the South African Court's treatment of these issues and the treatment they received at the hands of U.S. Supreme Court justices in *Bowers v. Hardwick*,[46] and even in *Lawrence v. Texas*.[47] I argued then that the U.S. Supreme Court would do well to overcome its denial of our history of slavery, war, and Reconstruction and understand our reconstructed Constitution, with

- its guarantee of human freedom;
- its new guarantee of citizenship;
- its assurance that citizenship carries privileges and immunities;
- its newly encompassing protections of life and liberty; and
- its much belated guarantee of equal protection of the laws.

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[37] *Id*. § 27.
[38] *Id*. § 28.
[39] *Id*. § 29.
[40] *Id*. §§ 30–31.
[41] *Id*. § 32.
[42] *Id*. § 34.
[43] *Id*. §§ 33, 35.
[44] *Nat'l Coalition for Gay & Lesbian Equality v. Minister of Just.* 1999 (1) SA 6 (CC) at para. 22 (S. Afr.) (quoting MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xiii (1983)).
[45] *Id*. at para. 19.
[46] Bowers v. Hardwick, 478 U.S. 186 (1986).
[47] Lawrence v. Texas, 539 U.S. 588 (2003).

That is, the Court would do well to understand it upholds a constitution that mandates resistance to supremacist ways.[48] Should it do so, I argued, it would see that, like the Constitutional Court of South Africa, the U.S. Supreme Court interprets a constitution that is reactive to a history of subordination, and, like the Constitutional Court of South Africa, it is obliged to interpret that constitution from a position of empathy with the experience of subordination.

I speak of reactive, or responsive, or post-colonial constitutionalism with new inspiration. The new inspiration is the unanimous decision of the highest court of India, in *Johar v. Union of India*, to invalidate what the Honorable Justice Dr. D.Y. Chandrachud described as a "colonial" law that "made it criminal, even for consenting adults of the same gender, to find fulfillment in love."[49] The Indian Court's opinion in the case reaffirms the post-colonial wisdom that proper analysis of restraints on human liberty requires weighing their justifications from a position of empathy with those whose liberty is restrained, as much as it requires respect for the legitimate goals and powers of the restraining state. Justice Chandrachud said,

> [T]his case involves much more than merely decriminalising[50] certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship. Above all, our decision will speak to the transformative power of the Constitution. For it is in the transformation of society that the Constitution seeks to assure the values of a just, humane and compassionate existence to all her citizens.[51]

A reactive or post-colonial constitutionalism is, in the opinions of a growing number of national courts, a *transformative* constitutionalism—one that seeks, to quote Justice Chandrachud again, to "socializ[e] people away from supremacist thought and towards an egalitarian existence."[52]

IV.
WHAT HAS THIS GOT TO DO WITH RACIAL JUSTICE IN CHILD WELFARE SYSTEMS?

The autonomy and integrity of minority families in U.S. child welfare systems depend upon deeply contested principles that are explicitly tied to liberty and are

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[48] Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. OF CONST. L. 1373 (2009); Peggy Cooper Davis, *Toward a Relational Constitutionalism*, *in* FREEDOM AND THE POST-APARTHEID LEGAL ORDER: THE CRITICAL JURISPRUDENCE OF LAURIE ACKERMANN (André J. Barnard-Naudé, Drucilla Cornell & François Du Bois eds., 2009).

[49] Johar v. Union of India, (2018) 1 SCC 791 (India).

[50] Local spellings of English words are maintained throughout.

[51] *Johar*, (2018) 1 SCC 791.

[52] *Id.*

grounded in conceptions of human dignity and human rights. Unlike the constitutions of South Africa, India, and many other nations that see themselves as post-colonial—indeed, unlike the overwhelming majority of nation-states on this planet—we have no constitutional statement of fundamental human rights. Our Bill of Rights is a statement of protections against the federal government only; how and whether it protects against state power or citizen suppression is highly contested.

What we have are the Bill of Rights combined with the doctrine of incorporation—the doctrine that some, or perhaps all, of the rights conferred in the Bill of Rights were (or should be) incorporated into the Fourteenth Amendment so as to be binding on both state and national governments. We also have the original constitution's requirement, in Article IV, that "[t]he United States shall guarantee to every state. . . a Republican Form of Government,"[53] and the language of the Reconstruction Amendments—the Thirteenth forbidding slavery or involuntary servitude and its badges or incidents;[54] the Fourteenth conferring birthright citizenship and defining the attributes of citizenship;[55] and the Fifteenth forbidding denial of the franchise on grounds of race.[56]

Reliance on a partially incorporated Bill of Rights has limitations because the language of the Bill of Rights fails to capture many rights that seem fundamental—to most of us and to most of the world. There is no explicit right to political representation, education, public accommodation, or personal or family integrity and autonomy. There is no explicit right to equal protection in the Bill of Rights.

The guarantee of a republican form of government can be understood to require a degree of family sovereignty as a means of assuring the people's sovereignty, for government by the people implies that socialization will be decentralized rather than authoritarian.[57] However, the U.S. Supreme Court has been markedly, although perhaps mistakenly, reluctant to face the implications for states' rights of federal enforcement with respect to the forms of state government. It has therefore relied on the so-called political question doctrine as justification for declining to address even denials of the right to vote under the terms of the republican guarantee.[58] This makes reliance on Article IV a long shot.

That leaves us with the language of the Reconstruction Amendments, and that language can seem promising: The Thirteenth Amendment assures individual

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[53] U.S. CONST. art. IV, § 4.

[54] U.S. CONST. amend. XIII, § 1.

[55] U.S. CONST. amend. XIV, § 1.

[56] U.S. CONST. amend. XV, § 1.

[57] *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES, 234–36 (1997).

[58] *See generally* JARED P. COLE, CONG. RESEARCH SERV., R43834, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS (2014). *See also* Derek Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1072–73 (2019) (assessing the prospects of Supreme Court enforcement of the Guarantee Clause); JACK M. BALKIN, LIVING ORIGINALISM 241–42 (2011) (offering a more optimistic assessment of such prospects).

freedom as it forbids subordination of human will. The Fourteenth confers citizenship with all its privileges and immunities; guarantees to all the equal protection of the law; and protects against denials of life, liberty, or property without "due process of law." The Fifteenth suggests a right to representation, albeit only for some.

In part because of the U.S. Supreme Court's early and outrageously narrow interpretation of the "privileges and immunities of citizenship" conferred by the Fourteenth Amendment, the so-called Due Process Clause—which prohibits deprivations of life, liberty, or property without due process of law—has been commandeered as the vessel for fundamental human rights. It is a poor vessel, but it has been made to serve. We call the vessel substantive due process, and it was built for the most part in the area of family and child welfare law. It carries the right to marriage or family recognition, the right to procreate or choose not to procreate, and the right to keep and socialize one's children.

We are in the midst of a constitutional crisis over this notion of substantive due process, for the judiciary is being flooded with judges who take a dim or narrow view of it. The contest is not binary—there are many possible ways of addressing concerns about the concept. But it is roughly fair to say that there are two camps:

- those who would interpret the law *according to principles of respect for human dignity and in light of histories that should never be repeated*,[59] *as well as in light of histories and traditions that should be continued*; and
- those who would interpret the law in terms of the status quo.

Those who champion interpretation in terms of the status quo cling to the principle announced in the 1997 *Glucksberg* case[60] that fundamental rights are only those rights, narrowly defined, that have been recognized as part of the United States' history and tradition.[61]

The history and tradition camp is gaining ground.[62] Looking only at the top of the federal judiciary, we see that Chief Justice Roberts holds up *Dred Scott v.*

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[59] *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[60] Washington v. Glucksberg*,* 521 U.S. 702 (1997) (testing the right to die with dignity and with some measure of control over one's final days).

[61] *Id.* at 719–21.

[62] Drawing from contemporary statistics from the United States Courts website, a Wikipedia series on Donald Trump reports that

> [a]s of August 14, 2019, the United States Senate has confirmed 146 Article III judges nominated by President Trump, including 2 Associate Justices of the Supreme Court of the United States, 43 judges for the United States Courts of Appeals, 99 judges for the United States District Courts, and 2 judges for the United States Court of International Trade. There are currently 35 nominations to Article III courts awaiting Senate action, including 1 for the Courts of Appeals and 34 for the District Courts. There are currently 4 vacancies on the U.S. Courts of Appeals, 97 vacancies on the U.S. District Courts, 2 vacancies on the U.S. Court

Sanford as the origin of substantive due process, associating substantive due process with the *Lochner* era, invalidation of the Missouri Compromise, and protection of the right to claim fellow human beings as property. Against this discrediting backdrop, he insists that adherence to—rather than lessons from—history and tradition should be the lodestar for recognition of fundamental rights.[63] Justice Thomas argues that "constitutional liberty is nothing more than freedom from physical restraint,"[64] and he has been a defender of *Glucksberg*'s history and tradition test.[65] Justice Alito emphasizes the importance of reliance on history and tradition and bemoans the fact that *Obergefell* may have overruled the *Glucksberg* test.[66] Justice Gorsuch's views are less clear. Off the bench, he has expressed support for incorporating respect for human dignity into understandings of human rights, and he has, to be fair, questioned excessive reliance on history and tradition. However, he was quick to pen an alarmingly stingy interpretation of *Obergefell* in one of his first opinions on the Supreme Court,[67] and comments about substantive due process in his opinions at the Circuit level were notably guarded.[68] Justice Kavanaugh said in his confirmation hearings that "all roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test" for determining the scope of individual liberty,[69] having previously claimed in a 2017

> of International Trade, and 10 announced federal judicial vacancies that will occur before the end of Trump's first term (1 for the Courts of Appeals and 9 for District Courts).

List of Federal Judges Appointed by Donald Trump, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump [https://perma.cc/TT6E-ZCYL]. For an argument that excessive presidential control of judicial appointments should be avoided by reform of the U.S. judicial appointments process, see Mega Gupta, *Can the Indian judicial system of appointment serve as a model for the U.S. Judiciary?*, FOREIGN POLICY NEWS (Oct. 8, 2018) *available at* https://foreignpolicynews.org/2018/10/08/can-the-indian-judicial-system-of-appointment-serve-as-a-role-model-for-the-u-s-judiciary/ [https://perma.cc/7NP7-R4QU].

[63] Obergefell v. Hodges, 135 Sup. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting).

[64] *Id*. at 2632 (Thomas, J., dissenting).

[65] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 102 (1999).

[66] Bill Kristol, *Samuel Alito Transcript,* CONVERSATIONS WITH BILL KRISTOL (July 10, 2015), https://conversationswithbillkristol.org/transcript/samuel-alito-transcript/ [https://perma.cc/CS2J-JEZ4], *quoted in* Ed Whelan, *Justice Alito's Conversation with Bill Kristol: Substantive Due Process,* NAT'L REV. (July 20, 2015, 2:27 PM), https://www.nationalreview.com/bench-memos/justice-alitos-conversation-bill-kristol-substantive-due-process-ed-whelan/ [https://perma.cc/M6WE-7394].

[67] Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (arguing that Arkansas' requirement that a mother's male spouse or male sperm donor—but not the mother's female spouse—be included on the child's birth certificate did not conflict with *Obergefell*'s requirement that states recognize same-sex marriages as they would opposite-sex marriages).

[68] Browder v. City of Albuquerque, 787 F.3d 1076, 1078 (10th Cir. 2015).

[69] *CNN Newsroom: Kavanaugh Supreme Court Hearing* (CNN television broadcast Sept. 5, 2018) (transcript *available at* http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html [https://perma. cc/4R6B-MBEU]).

speech that "even a first-year law student" could see that *Glucksberg* is inconsistent with *Roe v. Wade* and *Casey v. Planned Parenthood*.[70] These men stand as a majority that could easily limit constitutional liberty to the kinds of liberty that can be protected by allegiance to history and tradition narrowly defined. This limitation would protect sexist, heteronormative, and white supremacist practices against constitutional attack. It would make it harder for the family defense bar to bring to light the perspectives of parents who are judged harshly merely because they look different or think, sound, and behave differently. It would make it harder for the family defense bar to sustain itself. More broadly, it would normalize—in law but also in policy and practice—the paternalism (dare I say the patriarchy) that leads well-meaning advocates for children to distrust and disrupt, rather than support, viable families.

[70] Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, REMARKS AT THE AMERICAN ENTERPRISE INSTITUTE (Sept. 18, 2017) http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf [https://perma.cc/56GM-C6VF].