LESSONS FOR THE UNITED STATES FROM POST-COLONIAL CONSTITUTIONALISM

-Peggy Cooper Davis*

I. INTRODUCTION

Ten years ago, I wrote admiringly of how the South African Constitutional Court interpreted South Africa’s post-apartheid constitution as a command to remember and apply the lessons of past atrocities when determining the range of freedom owed to South Africa’s people. The Constitutional Court’s approach was explicitly post-colonial in that it adhered to constitutional principles that were adopted in reaction to supremacist arrogance and atrocity.

Laurens Ackerman, who once sat as a Justice of South Africa’s Constitutional Court, explained that respect for human dignity informs and enriches the proper interpretation of South Africa’s post-colonial Constitution, and he made clear that dignity is intrinsic and inalienable to every human being. Remembering and responding to the indignities that apartheid imposed on black and brown South Africans, South Africa’s Constitution explicitly establishes, and its Constitutional Court consciously attempts to enforce, principles of equality and human entitlement to concern and respect. These principles require that restraints and deprivations be reasonably justified in terms of the common good, and they require special sensitivity to the position of the other. Governments that are self-consciously post-colonial in this way have much to teach the rest of the world.

When I speak of post-colonial constitutionalism, I refer to a range of constitutional principles adopted since World War II that reflect a growing international consensus for commitment to human rights and command

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2 Responsive Constitutionalism at ibid.
respect for human dignity. 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. As of 1970 two thirds of the world’s constitutions were post-colonial, and by the 1990’s four fifths of the world’s constitutions were either post-colonial or secessionist. Understanding post-colonialism more broadly, as “all...cultural expressions affected by political oppressive systems,” 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. 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.

Analysts more knowledgeable than I have noted the fragility of post-colonial democracies, and pointed out that post-colonial constitutional policies and practices vary widely in their embrace of human rights principles. Some have emphasized the extent to which post-colonial constitutions track those of former colonizers, and others have emphasized the vulnerability of post-colonial nations to authoritarian control. Nonetheless, one can identify a significant set of jurisprudential and political stances that are democratic and self-consciously reactive to supremacist and imperial assumptions.

5 Id.
7 See, Michaela Hailbronner Transformative constitutionalism: Not only in the Global South,” 65 AM. J. COMP. L. 527(2016).
8 Go, supra at 99-103 (2007).
10 See, Upendra Baxi, Post-Colonial Legality: A Postscript from India, 45 LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 148 (2012).
11 See, Benedikt Goderis and Mila Versteeg, Transnational Constitutions, 39 INT’L REV. OF L. AND ECON. 1 (reporting results indicating that “when adopting rights, countries follow the constitutional choices of their former colonizer, as well as foreign countries with the same legal origin, the same dominant religion, the same former colonizer, and the same dominant foreign aid donor) (2014).
12 See, Upendra Baxi, Postcolonial Legality: A Postscript from India, 45 LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA, 178, 184-85 (2012).
13 See, Lemmer & Olivier, supra, at 141 (defining post-colonial strategies as those that empower that which has been “marginalized by various forms of political oppression”).

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South Africa, India and Germany are examples. In the oft-quoted words of South Africa’s former chief judge, Ismail Mahomed, a constitutional system that is reactive in this way is one that 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.¹⁴

Justice Chaudrachud described the anti-supremacist and anti-imperial character of India’s post-colonial constitution when he said:

_The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution._¹⁵

Similarly, the post World War II German constitution is said to prioritize human dignity in response to Nazi atrocity. Its first two articles unequivocally and unalterably provide as follows:

1. Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.¹⁶

There are reasons to think that post-colonial and reactive constitutionalism has received inadequate attention in the Global North.¹⁷ This essay responds by arguing that we in the United States would be a better people

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¹⁵ *Johar* at Paragraph 5.
¹⁶ Arts. 1 & 2 GG (Germany).
¹⁷ See, Daniel Bonilla Maldonado, *Toward a Constitutionalism of the Global South*, in Maldonado, ed., *CONSTITUTIONALISM OF THE*
– and would have a much more humane constitutional system -- were we to own our post-colonial and reactive constitutional tradition.

The United States is, of course, post-colonial. It is 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 revolution 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 will try in this brief essay to answer three questions:

- How is it that the United States is post-colonial?
- What are the emerging lessons of post-colonial constitutionalism?
- What would be gained were the United States to embrace and learn from its post-colonial status?

II. IN WHAT SENSE IS THE UNITED STATES A POST-COLONIAL NATION?

The United States is post-colonial in an unusual way. The Revolution of 1775 was 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 or lastingly 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 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 have any measure of equality or social justice. States remained free to enslave or to...

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GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLUMBIA 1, 20(2013)(concluding that “the conversation about . . . modern constitutionalism is too centered in the Global North”).

18 U.S. DECLARATION OF INDEPENDENCE Preamble (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.”)
disenfranchise. Citizenship was undefined, and the Supreme Court was able to announce in *Dred Scott*\(^{19}\) that African Americans could not qualify.\(^{20}\)

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 -- halfheartedly at least -- against supremacist oppression. I invite you to adopt the perspectives made visible by the great sociologist and historian, W.E.B. DuBois, \(^{21}\) and the preeminent contemporary historian of Reconstruction in the United States, Eric Foner\(^{22}\):

- 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.

### III. What are the Emerging Lessons of Post-Colonial Constitutionalism?

The idea of a post-colonial constitutionalism is perhaps most often described by reference to the Constitution of South Africa. The Constitution’s Preamble acknowledges, and declares the Constitution responsive to, injustices of the past.\(^{23}\) Its Bill of Rights “affirms the democratic values of human dignity, equality and

\(^{19}\) *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).

\(^{20}\) For a fuller account of this history, see, Davis, Francois & Starger, *The Persistence of the Confederate Narrative* 84 U. TENN. L. REV 301 (2017).


\(^{22}\) See, especially, Eric Foner, Reconstruction Updated Edition: America’s Unfinished Revolution, 1863-1877 (2014)

\(^{23}\) The language of the preamble is as follows:

*We, the people of South Africa,*

*Recognise the injustices of our past;*

*Honour those who suffered for justice and freedom in our land;*

*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.*

*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*
and guarantees equal protection of the law and protection against group-based public or private discrimination. In addition, it guarantees life, freedom, personal security and bodily and psychological integrity, privacy, freedom of religion, belief and opinion, freedom of expression limited only to exclude war propaganda, incitement to imminent violence or advocacy of group-based hatred that incites harm, freedom of assembly, demonstration, picket and petition, freedom of association, political participation and voice, occupational choice, fair labor practices, environmental protection, protection against arbitrary deprivations of property, access to housing, access to health care, food, water and social security, care and protection during childhood, education, cultural integrity, information held by the state or otherwise required for the protection of rights, access to courts, and the benefit of fair administrative or criminal procedures.

South Africa’s Constitutional Court has carefully considered the implications the country’s history and founding principles hold for understanding the range and limits of individual freedom. In that context, the Court has come to a profound insight about the importance of perspective taking. In response to a challenge of laws criminalizing same-sex lovemaking, for example, the Constitutional Court noted that "[t]he experience of subordination - of personal subordination, above all - lies behind the vision of equality. Required by

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24 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 as amended, Chapter 2, para. 7(1).
25 Id. at Chapter 3, para. 1.
26 Id. at para. 11.
27 Id. at para. 12.
28 Id. at para. 14.
29 Id. at para. 15.
30 Id. at para. 16.
31 Id. at para. 17.
32 Id. at para 18.
33 Id. at para19.
34 Id. at para. 22.
35 Id. at para. 23.
36 Id. at para. 24.
37 Id. at para. 25.
38 Id. at para. 26.
39 Id. at para. 27.
40 Id. at para. 28.
41 Id. at para. 29.
42 Id. at paras. 30-31.
43 Id. at para. 32.
44 Id. at para. 34.
45 Id. at paras. 33, 35.
precedent to consider "the impact of the discrimination on . . . members of the affected group," 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 invalidation of those laws.

I have written about the difference between the South African Court’s treatment of these issues and the treatment they received at the hands of United States Supreme Court justices in Bowers v. Hardwick, and even in Lawrence v. Texas. I argued then that the Supreme Court of the United States 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

as a constitution that mandates resistance to supremacist ways. Should it do so, I argued, it would see that, like the Constitutional Court of South Africa, the United States 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.

The wisdom of a post-colonial constitutionalism continues to deepen and spread. This is evidenced in the recent, unanimous decision of the highest court of India, in Johar v. Union of India, to invalidate what the Honorable Dr. Justice D.Y. Chandrachud described as a “colonial” law “[making] it criminal, even for consenting adults of the same gender, to find fulfillment in love.” The Indian Court’s opinions in the case

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47 Id. At para. 19.
48 478 U.S. 186 (1986)
reaffirm 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 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."

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.”

IV. WHAT ARE THE LESSONS FOR THE UNITED STATES?

Unlike the constitutions of South Africa, India, and many other nations that see themselves as post-colonial – indeed, unlike the constitutions of an overwhelming majority of nation states on this planet – the United States constitution has no categorical statement of fundamental human rights. Its 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; the original constitution’s requirement, in Article IV, that “[t]he United States. . .guarantee to every state. . .a republican form of government;” and the language of the Reconstruction Amendments -- the 13th forbidding slavery or involuntary servitude and its badges or incidents, the 14th conferring birthright citizenship and defining the attributes of citizenship, and the 15th forbidding denial of the franchise on grounds of race.

52 Local spellings of English words are maintained throughout.
53 Johar, supra at para. 139.
54 CONST., Art. IV, Sec. 4.
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 of political representation, or education, or public accommodation, or personal or family integrity and autonomy. There is no explicit right of equal protection.

The guarantee of a republican form of government can be understood to protect human rights in that a republican government is a government of free people rather than government by people under authoritarian or majority control. A republican government therefore requires a degree of individual sovereignty as a means of assuring the people’s collective sovereignty. However, the Supreme Court has been markedly, although perhaps mistakenly, reluctant to face the implications for states’ rights of federal enforcement a guarantee with respect to the form and functioning of state governments. It has therefore relied on the so-called political question doctrine as justification for declining to enforce the republican guarantee. This complicates reliance on Article IV as a guarantor of human rights.

That leaves us with the language of the Reconstruction Amendments, and that language is promising. Moreover, it is in the spirit of post-colonial redemption. The 13th Amendment prohibition of slavery can be understood as a prohibition of the subordination of human will and the denial of civic existence that are its defining features. The 14th Amendment defines citizenship and confers attendant (but unspecified) privileges and immunities. Moreover, the 14th Amendment guarantees to all the equal protection of the law, and its protection against denials of life, liberty or property without “due process of law” is understood not only to assure procedural fairness, but also to guard against arbitrary or unreasonable deprivations of life, liberty or property. The 15th Amendment confers a right of representation, albeit only for some, but when read together with the 13th and 14th Amendments it adds weight to the claim that the post-Civil War amendments comprised an articulation of free personhood and autonomous citizenship.

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In part because of the Supreme Court’s early and outrageously narrow interpretation of the “privileges and immunities of citizenship” conferred by the 14th 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 carrying 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, among other rights, the right of marriage or family recognition, the right to procreate or choose not to procreate, and the right to keep and socialize one’s children.

The United States is 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.57 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,58 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 case59 that fundamental rights are only those rights, narrowly defined, that have been recognized as part of the Nation’s history and tradition.60

57 “President Donald Trump’s remarkable record of appointing conservative judges is leading to a dramatic shift in the make-up of several federal appeals courts. The Second, Third, Fourth, and Eleventh Circuits, whose territory ranges from Vermont to Florida, could all soon have a majority of Republican appointees. Even the Ninth Circuit, which has stymied Trump’s orders on immigration and environmental policies, is within striking distance of flipping its seats to a majority of Republican appointees.” https://news.bloomberglaw.com/us-law-week/2019-outlook-trump-judge-picks-could-flip-circuits-2

58 As of February 6, 2019, the United States Senate has confirmed 85 Article III judges nominated by President Trump, including 2 Associate Justices of the Supreme Court of the United States, 30 judges for the United States Courts of Appeals, [and] 53 judges for the United States District Courts. There are currently 61 nominations to Article III courts awaiting Senate action, including 12 for the Courts of Appeals, 47 for the District Courts, and 2 for the Court of International Trade. There are currently 12 vacancies on the U.S. Courts of Appeals, 125 vacancies on the U.S. District Courts, 2 vacancies on the U.S. Court of International Trade, and 20 announced federal judicial vacancies that will occur before the end of Trump’s first term (4 for the Courts of Appeals and 16 for District Courts).” https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Donald_Trump.

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 some measure of control).

60 Id. at 719-21.
The history and tradition camp is gaining ground. Looking only at the top of the federal judiciary, we see that Chief Justice Roberts misleadingly holds up the infamous case of *Dred Scott v. Sanford* as the origin of substantive due process, associating the concept with invalidation of the Louisiana Purchase (which arguably led to Civil War) and protection of the right to claim fellow human beings as property. Against this discrediting backdrop, the Chief Justice insists that adherence to – rather than lessons from – history and tradition should be the lodestar for recognition of fundamental rights. Justice Thomas argues that “constitutional liberty is nothing more than freedom from physical restraint,” and he has been a firm defender of *Glucksberg*’s history and tradition test. Justice Alito emphasizes the importance of reliance on history and tradition and bemoans the fact that in its recognition that history and tradition should not limit understandings of human rights, *Obergefell* may have “overruled” the *Glucksberg* test. 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. But he was quick to pen a seemingly stingy interpretation of *Obergefell* in one of his first opinions on the Supreme Court, and comments about substantive due process in his opinions at the Circuit level have been notably guarded. 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, and he claimed that “even a first year law student” could see that *Glucksberg* is inconsistent with *Roe v. Wade* (recognizing a right of abortion choice) and *Planned Parenthood v. Casey* (which declined to overrule *Roe v. Wade*) – cases that arguably rest on the same constitutional footing as *Obergefell*. 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.

Strict limitation to the understandings of history and the wisdom of tradition would protect many elitist,
sexist, hetero-normative and white supremacist practices against constitutional attack, for the United States has not so distant histories and traditions of discrimination or oppression on grounds of class, on grounds of sex, on grounds of sexual identity or preference, and on grounds or race, color or creed. Post-colonial constitutionalism can show us the way to learn and grow from those histories rather than repeat them. Hopefully, comparative constitutional analyses will enlighten United States scholars and jurists and guide the Supreme Court of the United States to an interpretive stance that draws explicit lessons from histories of atrocity and oppression as well as from the more noble aspects of our nation’s past.