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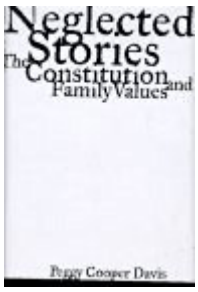
Peggy Cooper Davis. *Neglected Stories: The Constitution and Family Values.* New York: Hill & Wang, 1997. xi + 292 pp. $25.00 (cloth), ISBN 978-0-8090-7241-5.



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Critics of the U. S. Supreme Court's decisions affording strong judicial protection to rights of personal autonomy, privacy, reproduction, and family life usually assail the doctrines of "substantive due process" in which the Court has grounded those rights as without basis in either the text or the original meaning of the Fourteenth Amendment. In her book, *Neglected Stories: The Constitution and Family Values*, New York University law professor Peggy Cooper Davis undertakes the construction of an originalist case for those decisions and against other, mostly more recent decisions trimming or refusing to extend them. It is the most ambitious such attempt yet, and it succeeds in amassing an impressive amount of historical evidence concerning the centrality of arguments about rights of personal autonomy, privacy, and family life to the struggle against slavery, and for Reconstruction, which gave rise to the Fourteenth Amendment.

Neglected Stories is also one of the most enjoyably readable books in print about constitutional law. This is partly because of Davis' admirably clear, direct, and unpretentious style of writing, and partly because of the way in which she organizes her material by alternating analyses of decisional law, which she calls "doctrinal stories," with historical accounts, which she calls "motivating stories." The motivating stories serve to support her doctrinal arguments, but in many instances are quite compelling and even moving in their own right. Although the book should be of great interest to lawyers and law professors with expertise in constitutional and family law, it should also be quite accessible to scholars in other fields who lack legal training.[1]

After introducing both her subject and her method of organization, Davis devotes a chapter each to "stories" about work (this is, by far, the shortest chapter), marriage, parenting, and procreation, followed by a concluding chapter in which she suggests some implications of her project for morality-based justifications for both laws restricting individual autonomy (e.g., prohibitions on homosexual conduct or polygamous marriage) and governmental interference with parental authority. The grist for the doctrinal stories is mostly Supreme Court opinions. The motivating stories are drawn from secondary and some primary historical sources, the latter mainly consisting of the *Congressional Globe* during the Reconstruction Congresses. Indeed, one feature that differentiates this book from most other scholarship about original intent is the extent of its reliance on events and discourse extrinsic to the Article V amendment process. This approach opens up new possibilities for an enriched understanding of the process of constitutional change and of the meaning of the 14th Amendment. It also raises difficult questions about the perceptions and, ultimately, the intentions of the framers and ratifiers of the Fourteenth Amendment.

Fundamentally, Davis argues that (1) rights of personal autonomy, privacy, family life, and reproductive freedom played an important role in the arguments against slavery, and for Reconstruction, that took place in society at large during the period that led up to the crafting and adoption of the Fourteenth Amendment; and (2), accordingly, the Fourteenth Amendment should be interpreted by the courts today to afford strong protection to such rights. Her case for her first proposition is voluminous and quite persuasive. Davis recounts instance after instance in which antislavery activists, including slaves themselves, argued against the institution of slavery on the grounds that it violated basic human rights to work, marry, procreate (voluntarily), rear children, and enjoy the blessings of family life. These arguments, and the sto-

ries of heart-breaking cruelty, as well as, on the part of the slaves, enormous strength, courage, and heroism, are so powerful that one can scarcely doubt they lent great force to the antislavery movement and played an important role in its ultimate success.

More easily disputed is Davis' second proposition that the Fourteenth Amendment should be understood by the courts to afford strong protection to the rights on which antislavery advocates relied to make their case against slavery. In the abstract, one might suppose that this proposition would appeal to judges and constitutional scholars of an originalist bent. More concretely, however, it must be observed that most such judges and scholars invoke original meaning as a justification for reducing, not augmenting, the courts' role in protecting those rights.[2] Such resistance to substantive due process rights, at least at a theoretical level, is rooted in a commitment to a limited judicial role in constitutional enforcement, which in turn is rooted in a commitment to popular rule through the political process. According to this view, judges have no business thwarting the will of the majority as expressed through the political process unless the constitutional warrant to do so is clear and relatively specific. Davis' historical evidence almost certainly (and perhaps inevitably) falls short of providing the clear, specific guidance on which originalist judges and scholars generally insist.

In this respect, a parallel can be drawn with the rejection of textual arguments based on the Ninth Amendment's guarantee of unenumerated constitutional rights.[3] The Supreme Court has been unwilling to interpret the Ninth Amendment to afford any judicially enforceable limitation on legislative or executive power, probably because the Ninth Amendment provides no guidance whatsoever about what those limitations should be. Davis' historical evidence derived from the antislavery origins of the Fourteenth Amendment, unlike the text of the Ninth Amendment, does offer judges some guidance about the nature and scope of the rights in question, but probably not enough to satisfy those who are committed to a relatively limited judicial role in constitutional enforcement.

Until Davis' work, original intent had not figured prominently in the arguments supporting substantive due process doctrine. Supporters of privacy rights have tended to argue for a "living" Constitution, the meaning of which can change by judicial interpretation and reinterpretation in light of changing societal circumstances and needs. Davis demonstrates, and thereby reminds us, that the history of the antislavery movement is a rich source of material to support broader interpretations of the 14th Amendment –that the past is better viewed as fertile ground than as a dead hand.

From another perspective, one might wonder whether efforts such as Davis' to focus Fourteenth Amendment jurisprudence on particular, substantive liberties might subtly and inadvertently detract from the Fourteenth Amendment's role in guaranteeing against (at least governmentally imposed) subordination.[4] The people kidnapped from Africa and sold into slavery in the United States, and those born into slavery here, were subordinated to their masters in particular and to whites in general. Their subordination was extreme and comprehensive. It was manifested in innumerable ways, including restrictions on their freedom to work, to marry, to procreate (voluntarily), to rear children, and to enjoy family life. The Fourteenth Amendment may be understood as an attempt to provide substantive protection to the particular liberties that slavery and, later, the black codes denied, or it may be understood as an attempt to prohibit (at least governmentally imposed and relatively extreme) subordination, of whatever form it might take.[5]

Slavery and its successor regimes – the black codes and segregation – entailed the denial of certain liberties. Other forms of subordination, affecting other groups at other historical junctures, might entail the denial of other sets of liberties. If the Fourteenth Amendment is understood to guarantee the particular liberties that slavery and its successor regimes denied, it may offer little help to those who suffer other forms of subordination. Each new form of subordination, once overcome, would require the constitutionalization of a new set of liberties. The Fourteenth Amendment might have greater value to the oppressed if understood directly in terms of a prohibition on subordination rather than as a guaranty of certain liberties. On the other hand, it might be argued that slavery and its successor regimes entailed the denial of such a broad range of liberties that any other form of subordination would have to rely on denials of at least some of the same rights, so that interpreting the Fourteenth Amendment to guarantee the substantive liberties denied by slavery, the black codes, and Jim Crow should rule out other forms of subordination. Either way, the application of the Fourteenth Amendment to forms of oppression different from those that prompted its adoption requires a controvertible (and certain-to-be-controverted) appeal to a relatively abstract conception of its framers' intent.[6]

Anyone interested in either the substantive due process rights of privacy, personal autonomy, reproduction, and family life, or in the origins of the 14th Amendment, should find this book well worth reading.

Notes

[1]. There is one small but not completely insignificant error on a doctrinal point that will probably go unnoticed by those readers who are untrained in law, and perhaps by many who are. On page 209 and again on pages 246-47, the author states that the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), characterizes the state's interest in protecting unborn life as compelling from the moment of conception. In fact, the joint opinion characterizes the interest as legitimate, not compelling, from the moment of conception. Were it otherwise, the opinion would be incoherent because (as Davis notes) it reaffirms the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), which is that abortions cannot be prohibited before fetal viability, when the state's interest in protecting fetal life becomes compelling. If the state's interest were compelling from the moment of conception, the state could justify prohibiting pre- as well as post-viability abortions (except those necessary to save the life or protect the health of the woman). Less significantly, on page 210 the author refers mistakenly to Justice Stevens' opinion in *Roe v. Wade*, apparently meaning Justice Stewart's opinion. Justice Stevens was not a member of the Supreme Court in 1973 when *Roe v. Wade* was decided.

[2]. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989) (plurality opinion of J. Scalia).

[3]. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 518-20 (opinion of J. Black, dissenting), 529-30 (opinion of J. Stewart, dissenting).

[4]. Cf. Maltz, *The Concept of Equal Protection of the Laws – An Historical Inquiry*, 22 San Diego L. Rev. 499 (1985).

[5]. See Fiss, *Groups and the Equal Protection Clause*, Phil. & Pub. Aff. 107 (1976).

[6]. That the author's approach does so is exemplified by her discussion in Chapter Five of the implications of the antislavery origins of the Fourteenth Amendment for the validity of laws restricting homosexual relationships (pages 226-41), where she frames the issue in terms of the Fourteenth Amendment's protection of individual autonomy.

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