The South African Constitutional Court has issued internationally prominent decisions abolishing the death penalty, enforcing socioeconomic rights, allowing gay marriage, and promoting equality. These decisions are striking given the country’s apartheid past and the absence of a grand human rights tradition. By contrast, the U.S. Supreme Court has generally ruled more conservatively on similar questions. This book examines the Constitutional Court in detail to determine how it has functioned during South Africa’s transition and compares its rulings to those of the U.S. Supreme Court on similar rights issues. The book also analyzes the scholarly debate about the Constitutional Court taking place in South Africa. It furthermore addresses the arguments of those international scholars who have suggested that constitutional courts do not generally bring about social change. In the end, the book highlights a transformative pragmatic method of constitutional interpretation – a method the U.S. Supreme Court could employ.

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Kende previously taught at Notre Dame Law School, the University of Montana School of Law, the Thomas M. Cooley Law School, and the University of Tennessee Law School. He was Teacher of the Year at Montana in 2002–2003. He has served as a Senior Fulbright Scholar and Visiting Professor of Law at the University of Stellenbosch in South Africa, as a Fulbright Senior Specialist in the former Soviet Republic of Moldova, and as a Visiting Professor at the University of Nantes, France. He has lectured or published scholarship in Canada, China, the Democratic Republic of the Congo (as a rule of law consultant), France (at the University of Paris I – Sorbonne), Germany, Spain, South Africa, the United Kingdom (at Oxford University), and throughout the United States. In 2003, he served as chair of the Association of American Law Schools Section on Africa. In 2008, he served as chair of its Section on Constitutional Law. He also co-directs a Law & Society Research Network on Africa.

Kende’s writings have appeared in publications such as Constitutional Commentary, the South African Law Journal, the Hastings Law Journal, and the Notre Dame Law Journal. He is also the co-author of a casebook, Theater Law, and was one of the authors of Courting the Yankees: Legal Essays on the Bronx Bombers.
Constitutional Rights in Two Worlds

SOUTH AFRICA AND THE UNITED STATES

Mark S. Kende
Drake University
This book is dedicated to my father and mother, Andrew and Frances Kende, as well as to the memory of Allard Lowenstein.
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Preface and Acknowledgments

On the vast continent of Africa, South Africa’s post-Apartheid Constitutional Court, known for its innovative jurisprudence in the area of rights has emerged as the undisputed favorite of comparative constitutional scholars and social scientists as well as a lodestar for jurists across the globe.¹

In February 2006, U.S. Supreme Court Justice Ruth Bader Ginsburg told an audience at the South African Constitutional Court in Pretoria that she and Justice Sandra Day O’Connor had received Internet death threats.² An Internet posting said they “will not live another week” because they relied on foreign law in their decisions. The American press missed the story initially.³ Justice Ginsburg used her speech to explain why the U.S. Supreme Court should reference foreign materials. Her speech’s title came from the Declaration of Independence: “A Decent Respect to the Opinions of [H]umankind.” She had a sympathetic audience.

The South African Constitution requires the Constitutional Court to follow binding international law and specifies that the Court may examine relevant foreign law.³ The Constitutional Court therefore frequently cites U.S. Supreme Court cases, though usually in disagreement. The U.S.

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³ S. Afr. Const. ch. 2, Sec. 39(1).
Supreme Court also has ties with its South African counterparts. Justice O’Connor authored the foreword to an autobiography by former Constitutional Court Justice Richard Goldstone, *For Humanity, Reflections of a War Crimes Investigator*. Furthermore, Justice Goldstone is friendly with U.S. Supreme Court Justice Anthony Kennedy.4 Several South African Justices have taken sabbaticals at American law schools and have interacted with American Justices at international judicial conferences. Justice Ginsburg also has been one of America’s leading legal advocates for women’s rights, so she would have appreciated the South African judiciary’s post-apartheid mandate to promote societal transformation.

In 2006, the Constitutional Court invited Justice Ginsburg to speak at its new building, located on the spot of a former prison. This was the only prison in the world to hold both Mahatma Ghandi and Nelson Mandela.5 The Court’s location symbolizes South Africa’s new multiracial democracy. Indeed, the acclaimed Constitutional Court architects sought transparency and accessibility, distinguishing it from the impressive U.S. Supreme Court’s marble palace to the law. Instead, glass and light predominate; marble and wood were not allowed.

While in South Africa, Justice Ginsburg gave two other speeches. One was titled “*Brown v. Board of Education* in International Context.” The other was “Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle.” This was a more personal account of her efforts to implement gender equality.

The United States, however, is not so open to foreign law discussions, as the Internet threats show. Moreover, American congressional representatives introduced legislation advocating the impeachment of federal judges who employ foreign law.6 In addition, Justices Stephen Breyer and Antonin Scalia engaged in an extraordinary debate at American University over reliance on foreign law in constitutional cases.7 Since leaving the

Supreme Court, Justice O’Connor has continued to support such reliance, as well as to lobby for the independence of the judiciary. One reason the foreign law issue was less controversial in South Africa is that the nation had little other human rights tradition on which to rely.

The goal of this book is to follow in Justice Ginsburg’s internationalist footsteps by discussing the first fifteen years of the South African Constitutional Court’s rights jurisprudence. The book compares these cases with U.S. Supreme Court decisions on the same issues. This comparison is overdue as the Supreme Court has not yet cited to a Constitutional Court opinion, despite the South African Court’s international acclaim and the commonality of rights issues.

My personal interest in this topic has three sources. First, as a former civil rights attorney, I have been involved with and have focused on issues of racial discrimination and equality. Thus, I have long followed South Africa with its tragic history of apartheid. Second, I did a Fulbright Fellowship in South Africa during the year 2000 – four years into its “final” Constitution’s dispensation. I learned about a nation undergoing dramatic legal and political change and discussed these changes with people who drafted the new Constitution, as well as with ordinary South Africans.

Third, after arriving in Cape Town for my fellowship, a driver took me from the airport to the University of Stellenbosch, one of the lovelier and more privileged parts of the country – at least for whites. This is South Africa’s wine country – a bit like the Sonoma Valley in California. During the highway drive, however, we passed miles of shanty towns consisting of little more than tin shacks. Stellenbosch itself is surrounded by a poor township. This book therefore describes South Africa’s efforts to create a judicial body to help transform the society so that such wide divisions eventually do not exist. I hope this book can do justice to the complexity and inspiration of this relatively new democracy.

I owe thanks to countless people for various forms of assistance regarding this project. The group includes fellow academic travelers, such as Penelope Andrews, Anel Boshoff, David Chambers, Juana Coetzee, Ruth Cowan, David Cruz, Pierre de Vos, Johan de Waal, Lourens du Plessis, John Eastman, Stephen Ellman, Paul Farlam, Melissa Harrison, Lisa Hilbink, Tom Huff, Robert Hunter, Saras Jagwanth, Jonathan Klaaren, Karl Klaere, Heinz Klug, Frank Michelman, Keith Miller, Bronwen Morgan, Christina Murray, Andreas O’Shea, Phillip Prygoski, Brian Ray, Kim Lane Scheppele, Danielle Shelton, Geoffrey Stone, Cass Sunstein, André van der Walt, Karin van Marle, and Melissa Weresh – as well as the
anonymous peer reviewers for Cambridge University Press, my former assistant, Amy Russell, and my current assistant, Lauren Bartusek. I owe a debt of gratitude to the deans who supported my work financially and otherwise, namely Edwin Eck, James Fourie, Patricia O’Hara, Ben Ullem, and David Walker, as well as numerous library staff, including Amanda Barratt, Phil Cousineau, John Edwards, Brian Fodrey, Stacey Gordon, Susan Lerdal, Shawn Madsen, Fritz Snyder, and Karen Wallace. I conducted research in the libraries at the University of Cape Town, Columbia Law School, Drake Law School, Harvard Law School, the University of Montana Law School, the University of Notre Dame Law School, the University of Stellenbosch, and the Thomas M. Cooley Law School. Commentators from the South Africa Reading Group as well as from the Research Unit for Legal and Constitutional Interpretation also helped shape my thoughts.

In addition, I must thank the busy Constitutional Court Justices – Laurie Ackermann, Edwin Cameron, Richard Goldstone, Kate O’Regan, and Albie Sachs – who responded to my questions. Then there are the law students who provided invaluable research assistance, such as MacKenzie Breitenstein, Karen Carr, David Dance, Deena Flemming, Mary Lindgren, Jennifer McCarville, Kendra Mills, Chase Rosario Naber, Benjamin Patterson, Todd Smith, Molly Spellman, Michelle Warnock, and Andrew Wilcox. I apologize in advance for leaving anyone out. I also could not have embarked on or completed this project without the support of the U.S. Fulbright Program, and the Council for the International Exchange of Scholars. Any mistakes or flaws in the book are mine alone.8

Lastly, several law journals have been kind enough to allow me to reprint parts of my earlier writings in original or revised forms. These journals, and their articles, are acknowledged below:


8 The Internet URL citations included herein are updated, but are obviously subject to change or removal by the Web site publishers themselves.
Preface and Acknowledgments

