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Mark S. Kende. *Constitutional Rights in Two Worlds: South Africa and the United States.* New York: Cambridge University Press, 2010. 336 pp. $29.99 (paper), ISBN 978-0-521-17176-2.

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A Comparative Study of the U.S. Court and the South African Court

Mark Kende's book is very timely because it comes at a period when the scholarship on the relationships between South Africa and the United States has taken new and very promising directions and engages the key issues of human rights and justice in the post-apartheid area. Kende's book participates in an established scholarship that compares South Africa's modern history with that of the United States. A few major examples in this scholarship are George M. Fredrickson's *Black Liberation: A Comparative History of Black Ideologies in the United States and South Africa* (1996), Mary L. Dudziak's *Exporting American Dreams: Thurgood Marshall's African Journey* (2008), and the numerous articles that *Safundi: The Journal of South African and American Studies* has published on the connections between South Africa and the United States. A few of these essays include Christopher Saunders's "Cape Town and New Orleans: Some Comparisons" (July 2000), Michael F. Welsh and Jacque Jacobs's "Kids Killing Kids in School: Comparing Cases in the United States and South Africa" (July 2001), Grant Saff's "The Language of Residential Exclusion: Comparisons between Cape Town and Farmingville, New York" (July 2005), and Andrew Offenburger's "Applied Comparisons: The South African War through the Prism of American History" (July 2007). These works have helped to give greater visibility to South Africa's complex legal history by examining them within the frameworks of race, democracy, equality, and justice, which are topics that used to be quite particular to American historical scholarship.

Kende's book joins the pioneer legal scholarship since it provides us with an original comparative study of the death penalty, gender equality, affirmative action, freedom of expression and religion, and socioeconomic rights in the constitutional courts of South Africa and the United States. By exploring these issues in great detail, Kende shows how the Constitutional Court has functioned during South Africa's transition from an apartheid regime to a multiracial democracy (p. i). Kende brings to this book a long and rich experience as a professor of constitutional law and the director of the Drake Constitutional Law Center who has also served as a senior Fulbright scholar and visiting professor of law at the University of Stellenbosch in South Africa. These rich experiences allowed Kende to develop important personal and relationships between many Justices of the U.S. and South African supreme courts and draw major differences between the two institutions.

Kende begins his book with startling observations on the ways in which the U.S. and South African courts have disproportionately learned from each other. Kende argues that while South Africa's Constitutional Court often cites examples from the U.S. Court, "though usually in disagreement," the American system rarely "reference[s] foreign materials" (p. ix). This discrepancy is not surprising since, as Kende remarks, the United States "is not 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" (p. x). Opposing this restrictive political culture, U.S. Supreme Court Justice Ruth Bader Ginsburg gave a speech in South Africa on the topic "Brown v. Board of Education in International Context" though she and Justice Sandra Day O'Connor had received "Internet death threats" for developing such "internationalist" outlooks on U.S. constitu-

tional law (pp. ix-x). Kende's book intends "to follow Justice Ginsburg's bold and internationalist footsteps by discussing the first fifteen years of the South African Constitutional Court's rights jurisprudence" (p. xi). Stressing the major objective of his book, Kende writes: "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 a Constitutional Court opinion, despite the South African Court's international acclaim and the commonality of rights issues" (p. xi).

Kende's book is complex because it attempts to reveal positive qualities that the South African Constitutional Court has in spite of the pervasive socioeconomic inequalities and other contradictions that characterize the post-apartheid era. Although he does not dwell on the issue, Kende acknowledges the inequities of apartheid when he refers to Marxist scholars who view it as "part of capitalist domination" and as a "means to maintain capitalist colonial oppression" (p. 17). Kende also recognizes the injustices of the post-apartheid period when he writes: "Despite the country's AIDS pandemic, the massive gap between rich and poor that has produce terrible crime, and political domination by one party, South Africa now has a vibrant economy, a relatively strong infrastructure, and a critical press which enhance the prospects for social stability" (pp. 1-2). Without neglecting South Africa's tragic history, Kende however focuses on what he calls "the undisputed 'facts' " (p. 17) of South Africa's constitutions, which, when compared with those of the U.S. Constitution, suggest the following truth: "The South African Bill of Rights applies to state and private actors, unlike the American Bill of Rights, which has a state action requirement" (p. 48). Moreover, as Kende argues, the South African Constitution gives the government "state of emergencies powers" and guarantees "non-derogable rights" that can never be restricted, such as rights to life, dignity, and freedom from discrimination based on race, color, ethnic or social origin, sex, religion, and language (p. 49). Unlike the South African Constitution, the U.S. Constitution does not grant government "state of emergencies powers" and does not protect the languages and rights of "cultural and other communities," such as immigrants and women, from discrimination (p. 49).

Another discrepancy between the U.S. Constitution and South Africa's Constitution is that the former allows death penalty while the latter precludes it. According to Kende, "despite evidence that many South Africans favored the death penalty, the new South African Constitutional Court in 1995 ruled the death penalty unconstitutional" (p. 53). Through this example, Kende suggests that the South African Court, which South African Justice Arthur Chaskalson cited as an example which should be rejected "in light of the death penalty's disparate impact along racial and poverty lines" (p. 63), can serves as a model for the world's other constitutions, including that of the U.S. In this vein, Kende argues that the South African Court moves in the right direction that legendary Justice Thurgood Marshall intended the U.S. Court to follow when he declared, in *Furman v. Georgia* (1972), that "Punishment for the sake of retribution [is] not permissible under the Eighth Amendment" (p. 89).

In a similar vein, Kende examines the treatment of gender by the South African Constitutional Court, especially in June 1994, when, following his inauguration as president of South Africa, Nelson Mandela "released 'all mothers in prison on 10 May 1994, with minor children under the age of twelve' who had not committed violent offenses" (p. 92). As Kende points out, it is not clear whether such a kind of pardon is possible in the United States where "the pardoning power is an enumerated power of the Constitution" and not necessarily of the president himself (p. 95). Kende explains: "Put another way, even if the American president had unreviewable pardon power, a decision by Congress or a state legislature to remit sentences of certain mothers in prison would still be reviewable by the U.S. Supreme Court under equal protection principles" (p. 95).

Another strong contribution of Kende's book is its study of the rights that the South African Constitutional Court gives to gays, as opposed to the limited ones the U.S. Court provides. As Kende suggests, South Africa's Court is very progressive since it "went somewhere the U.S. Supreme Court is not likely to go any time soon: legalizing gay marriage" (p. 161). Given that Kende's book was published in 2009, about a year and a half before the repeal of the "Don't Ask, Don't Tell" policy and the possible future enactment of similar American legislation for the repeal of DOMA (Defense of Marriage Act), one may say that the United States Court may soon catch up with its South African counterpart on equal protection for sexual minorities.

Kende's book is groundbreaking since it reveals major differences between the South African Constitutional Court and the U. S. Supreme Court in areas such as criminal justice, gender equality, and gay rights, even if both systems have much to learn from each other. Though it has a more progressive approach to law and equality, the South African model owes much of its forward-thinking and transformative aspects to the American counterpart that influenced its basic premises and structure.

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