The South African Constitution as a Role Model for the United States

*Adrien Katherine Wing**

We are on the verge of achieving a new administration in Washington, perhaps a historic one led by a black man, Senator Barack Obama, or a white woman, Senator Hillary Clinton. If the Democratic Party comes back into power, a number of law students, faculty, and alumni may soon be in positions in the executive, legislative, and judicial branches, and able to consider fundamental change in how we conceptualize equality. This brief essay emphasizes the opportunity we have for considering whether the United States can push for constitutional amendments or statutory reform based upon lessons learned from South Africa.

I have spent over thirty years specializing in African studies, especially South Africa.[1] I was an advisor for several years to the African Na-

* Bessie Dutton Murray Distinguished Professor of Law & Associate Dean for Faculty Development, University of Iowa College of Law. J.D., Stanford, 1982; M.A., UCLA, 1979; A.B., Princeton, 1978. Thanks to research assistants Saba Baig, Kevin Dawson, Meredith Friedman, Elizabeth He, Cynthia Lockett, and Andrea Suzuki.

1. My publications on South Africa include Adrien K. Wing, *Southern Africa: Prospects for Peace?*, 83 Am. Soc'y Int'l L. Proc. 350 (1989); Adrien K. Wing, *Effects & Effectiveness of Economic Sanctions: South Africa*, 84 Am. Soc'y Int'l L. Proc. 209 (1990); Adrien Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia & South Africa*, 11 Wisc. Int'l L.J. 295 (1993); Adrien Katherine Wing, *The New South African Constitution: An Example for Palestinian Consideration*, 7 Palestine Y.B. Int'l L. 105 (1992-94); Adrien Katherine Wing and Eunice P. De Carvalho, *Black South African Women: Towards Equal Right*s, 8 Harv. Hum. Rts. J. 57 (1995); Adrien Katherine Wing, *Towards Democracy in a New South Africa*, 16 Mich. J. Int'l L. 689 (1995) (reviewing Ziyad Motala, Constitutional Options for a Democratic South Africa: A Comparative Perspective (1994)); Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 Alb. L. Rev. 943 (1997); Adrien Katherine Wing, *Critical Race Feminism and The International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for Lat-Crit Theory*, 28 U. Miami Inter-Am. L. Rev. 337 (1997); Adrien Katherine Wing, *From Liberation to State Building in South Africa: Some Constitutional Considerations for Palestine, in* Liberation, Democratization, and Transitions to Statehood in the Third World 91 (May Jayyusi ed., 1998); Adrien Katherine Wing, *Violence and State Accountability: Critical Race Feminism*, 1 Geo. J. Gender & L. 95 (1999); Adrien Katherine Wing, *The South African Transition to Democratic Rule: Lessons for International and Comparative Law*, 94 Am. Soc'y Int'l L. Proc. 254 (2000); Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. Contemp. Legal Issues 811 (2001); Adrien Katherine Wing, *From Liberation to State Building in South Africa: Some Constitutional Considerations for Palestine, in* Palestine and International Law: Essays on

tional Congress Constitutional Committee during the time period leading up to the adoption of the first democratic South African constitution. I will discuss how the 1996 permanent South African Constitution has provided equality on a much more sophisticated basis than the U.S. Constitution, overcoming a legacy of very recent de jure discrimination similar to, but also different from, the discrimination prevalent in the U.S. context.[2] The system of apartheid

> systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white,' which constituted nearly 90% of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.[3]

As a modern document designed for the 21st century, the purpose of the South African Constitution was the "creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination."[4] Inaugurating a society beyond what the U.S. founding fathers could have imagined, the South African Constitution "embodies social rights, affirmative state duties, horizontality, participatory governance, multiculturalism, and historical self consciousness."[5] The notion of positive state duties implies that the government must do more to remedy injustice than wait until a plaintiff sues upon facing discrimination. The state must be proactive instead of reactive, realizing that inequality is structural as well as individual in nature.[6]

A special Constitutional Court was created to enforce the South African Constitution, rather than leave that task up to the existing judiciary, which was steeped in apartheid-era jurisprudence and outlook. The members of the new court are "men and women who would not hold their

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POLITICS AND ECONOMICS 199 (Sanford R. Silverburg ed., 2002); Adrien Katherine Wing, *The Fifth Anniversary of the South African Constitution: A Role Model on Sexual Orientation*, 26 VT. L. REV. 821 (2002) [hereinafter *Sexual Orientation*]; Adrien Katherine Wing, *Equality: Facially Neutral Rules that Disparately Impact Protected Classes, in* COMPARATIVE CONSTITUTIONAL LAW (Mark Tushnet & Vikram Amar eds., forthcoming 2008).

2. For a report on how South Africa is succeeding in overcoming its legacy of racism, see U. N. Comm. on the Elimination of Racial Discrimination, 69th Sess., Consideration of Reports Submitted by States Parties under Article 9 of the Convention: South Africa, CERD/C/ZAF/CO/3 (Oct. 19, 2006), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.ZAF.CO.3.En?Opendocument [hereinafter CERD].
3. *Brink v. Kitshoff NO* 1996 (6) BCLR 752 (CC) at para. 40 (O'Regan, J.) (S. Afr.).
4. Penelope E. Andrews, *Perspectives on Brown: The South African Experience*, 49 N.Y.L. SCH. L. REV. 1155, 1163 (2004-05) (citing *Minister of Finance & Another v. Van Heerden* 2004 (11) BCLR 1125 (CC) at para. 26 (S. Afr.)).
5. Saras Jagwanth, *Affirmative Action in a Transformative Context: The South African Experience*, 36 CONN. L. REV. 725, 725 (2004).
6. SANDRA FREDMAN, DISCRIMINATION LAW 176 (2002).

judicial posts . . . but for their demonstrated commitments to the political values animating their country's post-apartheid constitution."[7] The South African Human Rights Commission (SAHRC) was also created to monitor and investigate human rights violations of the Constitution.[8]

The equality clause of the South African Constitution is very detailed in comparison to the U.S. Fourteenth Amendment, encompassing equal protection, antidiscrimination, affirmative action, and private action notions. Section 9 of the South African Constitution states:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[9]

The notion of substantial equality embodied by this section means that "a rigid, formal approach must be rejected in favor of a substantive, contextual and asymmetrical analysis."[10]

In addition to its generally comprehensive equality clause, the South African Constitution is the first one to include sexual orientation in its protections.[11] Several South African cases have also protected gay and lesbian rights. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,[12] the South African Constitutional Court decriminalized same-sex relations between adults. *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* invalidated an immigration law that discrimi-

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7. Frank I. Michelman, *Reasonable Umbrage: Race and Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1396 (2004). For more about the people appointed to the bench, see Penelope E. Andrews, *The South African Judicial Appointments Process*, 44 OSGOODE HALL L.J. 565 (2006).
8. *See* South African Human Rights Commission, http://www.sahrc.org.za (last visited Mar. 14, 2008).
9. S. AFR. CONST. § 9 1996.
10. *See* Jagwanth, *supra* note 5, at 727.
11. *See Sexual Orientation*, *supra* note 1, at 821.
12. *National Coalition for Gay and Lesbian Equality & Others v. Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) (S. Afr.).

nated against same-sex couples.[13] "South Africa, like most countries, gave the spouse of a citizen preference in immigrating, but did not extend that preference to homosexual partners."[14] In response, the court innovatively interpreted the language in the statute to include same sex partners.[15] A later case ruled that gay and lesbian couples have the same right to adopt children as married heterosexual couples.[16] A 2005 decision stated that the legislature had one year to legalize gay marriage,[17] and the law came into effect in November 2006, making South Africa only the fifth country in the world to legalize gay unions.[18]

Section 9(2) is the subsection permitting affirmative action.[19] The South African founding fathers and mothers were familiar with the American debate on the subject and wanted to avoid a rash of reverse discrimination cases[20] by making it clear that affirmative action is part of the notion of equality, rather than an exception to it.[21] Moreover, the South Africans go beyond the individualistic approach of U.S. jurisprudence and are more prepared to embrace group-based remedies, even though they may disadvantage individuals from a privileged group.[22]

The South African Constitution makes clear that discriminatory or disparate impact as well as intent is actionable under the Constitution.[23] It prohibits unfair direct or indirect discrimination.[24] The South Africans wanted to avoid the American interpretation of the Fourteenth Amendment only to forbid intentional discrimination.[25] The relation between di-

13. *National Coalition for Gay and Lesbian Equality & Others v. Minister of Home Affairs & Others* 1999 (3) BCLR 280 (C) (S. Afr.).
14. *Sexual Orientation*, *supra* note 1, at 826.
15. *National Coalition for Gay and Lesbian Equality & Others v. Minister of Home Affairs & Others* 1999 (3) BCLR 280 (C) (S. Afr.).
16. *Du Toit & Another v. Minister of Welfare and Population Development & Others* 2002 (10) BCLR 1006 (CC) (S. Afr.).
17. *Minister of Home Affairs & Another v. Fourie & Others; Lesbian and Gay Equality Project & Others v. Minister of Home Affairs & Others* 2006 (3) BCLR 355 (CC) (S. Afr.).
18. *See* Claire Nullis, *Same-Sex Marriage Law Takes Effect in South Africa*, WASH. POST, Dec. 1, 2006, at A20.
19. S. AFR. CONST. § 9(2) 1996.
20. I was involved in these discussions during my time as an advisor to the African National Congress. I co-organized a conference on Constitution Making in South Africa, held at the University of Western Cape in March 1991. This conference brought nearly 30 Americans together to present papers on various aspects of the United States and comparative constitutionalism. The conference was co-sponsored by the National Conference of Black Lawyers and National Lawyers Guild (USA) and the National Association of Democratic Lawyers of South Africa.
21. *See* IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 264 (5th ed. 2005).
22. *See* Jagwanth, *supra* note 5, at 734-35.
23. *See* S. AFR. CONST. §§ 9(2)-9(4) 1996.
24. *Id*. §§ 9(3)-9(4).
25. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially discriminatory effect."). The disparate impact doctrine *is* used in cases concerning Title VI and Title VII of the Civil Rights Act. Courts have seemed to reject the disparate impact doctrine in Title VI cases and accept it more often in Title VII cases. *See* Dan McCaughey, Note, *The Death of Disparate Impact Under Title VI:* Alexander v. Sandoval *and Its Effects on Private Challenges to High-Stakes Testing Programs,* 84 B.U.

rect and indirect discrimination was discussed in *City Council of Pretoria v. Walker* under § 8 of the interim Constitution, the predecessor of § 9.[26] In that case, the Constitutional Court held that the City indirectly discriminated on the basis of race when it charged an individual metered rate for utilities in the suburbs as opposed to charging a lower flat rate in urban townships of Pretoria.[27] The geographic realities were such that the townships were black and the suburbs were white.[28]

The *Walker* Court also held, however, that the discrimination was not unfair.[29] *Harksen v. Lane* set out the appropriate test to determine when discrimination would be unfair.[30] "Various factors must be considered," including "the position of the complainants in society and whether they have suffered" from past patterns of discrimination; "the nature of the provision or power and the purpose sought to be achieved by it"; as well as "any other relevant factors."[31] Such additional factors include "the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity."[32]

The *Walker* Court used an asymmetrical approach to note that "Courts should however always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other."[33] In other words, "reverse discrimination" against the privileged whites of the suburbs was not going to be considered "unfair," and thus grounds for them to recover.

Section 9(4) states that individuals, as well as the state, may not discriminate unfairly.[34] The national legislation that has been passed pursuant to § 9(4) includes "the Film and Publication Act of 1996, the South African Schools Act of 1996, the Culture Promotion Amendment Act of 1998, the National Empowerment Fund Act of 1998, the Refugees Act of 1998, the Employment Equity Act of 1999, and the Promotion of Equality

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L. REV. 247 (2004); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three,* 117 HARV. L. REV. 493 (2003) (considering whether impact tests are unconstitutional); Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis,* 28 BERKELEY J. EMP. & LAB. L. 217 (2007) (reviewing the success rates of disparate impact claims).

26. *City Council of Pretoria v. Walker* 1998 (3) BCLR 257 (CC) (S. Afr.). For a discussion of the case, see Michelman, *supra* note 7, at 1406-19. For more discussion of *Walker* and other cases as well as South Africa's view on equality, see, e.g., CURRIE, *supra* note 21, at 260-64; Janet Kentridge, *Equality*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA (M. Chaskalson et al. eds., 1999) at 14-55 to 14-66; SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS (Cheadle et al. eds., 2002); ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW 252-302 (2002). For access to all South African Constitutional Court cases, see Constitutional Court of South Africa, http://www.constitutionalcourt.org.za/site/home.htm (last visited Mar. 15, 2008).
27. *City Council of Pretoria v. Walker* 1998 (3) BCLR 257 (CC) (S. Afr.).
28. *Id*. at para. 4.
29. *Id*. at para. 64.
30. *Harksen v. Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para. 51 (S. Afr.).
31. *Id*.
32. *Id*.
33. *City Council of Pretoria v. Walker* 1998 (3) BCLR 257 (CC) at para. 48 (S. Afr.).
34. S. AFR. CONST. § 9(4) 1996.

and the Prevention of Unfair Discrimination Act of 2000."[35] The last Act is to "prevent and prohibit unfair discrimination . . . and to promote equality."[36] Special "Equality Courts" were established to enforce it.

Rather than leave the development of the appropriate multi-pronged test to the judiciary, as in the U.S., the South African Constitution specifically includes the test for evaluation of restriction of rights. Section 36, entitled *Limitation of Rights*, states:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose.[37]

Additionally, in the U.S. Supreme Court, there has been a vigorous debate about the appropriate sources of law for the judiciary to use in interpreting the Constitution. Originalist jurists like Justice Antonin Scalia do not believe that international or foreign law should be influential, whereas Justices Anthony Kennedy and Ruth Bader Ginsburg do, as shown by Justice Kennedy's opinion, which was joined by Justice Ginsburg, and Justice Scalia's dissent, in *Roper v. Simmons*.[38] South Africa wanted to be clear that it embraces multiple sources, including those outside its own legal system. Section 39, on *Interpretation of Bill of Rights*, states "[w]hen interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."[39] The Constitutional Court has many opinions that are full of citations to international and foreign law sources. Its first case, *State v. Makwanyane*, which abolished the death penalty, was typical in that regard, including references to U.S. law.[40]

I also write from the perspective of Global Critical Race Feminism, which emphasizes women of color around the world. This includes minority group women within the United States and Europe, as well as women in the developing world. I am the editor of *Global Critical Race*

35. CERD, *supra* note 2, at 2.
36. Jagwanth, *supra* note 5, at 730.
37. S. AFR. CONST. § 36 1996.
38. 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."); *id.* at 624 (Scalia, J., dissenting) ("the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand").
39. S. AFR. CONST. § 39 1996.
40. *State v. Makwanyane & Another* 1995 (6) BCLR 665 (CC) (S. Afr.).

Feminism[41] and *Critical Race Feminism* (CRF),[42] two readers from NYU Press. CRF emphasizes intersectionality or multidimensionality,[43] i.e., the possibility of considering race and gender simultaneously.

The South African Constitution permits this more complex approach,[44] which is very difficult within the U.S. constitutional and Title VII context. In South Africa, the justices are particularly attuned to the plight of people who have faced multiple forms of discrimination, such as black women. Justice O'Regan noted that they face "particularly acute" disadvantage.[45] Justice Goldstone warned of the complex relationship between identities and urged "neatly self-contained categories should be resisted."[46] In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, Justice Sachs noted that grounds may intersect, and thus discriminatory impact could not be evaluated on one ground only.[47] For example, African widows have suffered as "blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers."[48]

I call for the U.S. to consider passing an amendment reinventing our equality clause along the lines of the South African equality clause. On a smaller scale, reestablishing a national dialogue on the defeated Equal Rights Amendment[49] could successfully add gender into the U.S. Constitution. Additionally or in lieu of this approach, if the political process rejects it, I call for an intersectional approach to race and other identities in our statutory law along the lines of South Africa.[50]

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41. GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000).
42. CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003).
43. Kimberle Crenshaw has popularized the term "intersectionality." *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991). Peter Kwan has used the term "cosynthesis." *See* Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997). Another term used is "wholism." *See* e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998). "Inter-connectivity" is also mentioned. *See* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995). Finally, "multidimensionality" has been mentioned as well. *See* Berta Esperanza Hernandez Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).
44. *See* CURRIE, *supra* note 21, at 249.
45. *See Brink v. Kitshoff NO* 1996 (6) BCLR 752 (CC) at para. 44 (S. Afr.).
46. *See Harksen v. Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para. 49 (S. Afr.).
47. *National Coalition for Gay and Lesbian Equality & Others v. Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) at para. 113 (S. Afr.).
48. *Id.*
49. For a discussion of the failed Equal Rights Amendment, see the National Organization of Women, Constitutional Equality Amendment, http://www.now.org/issues/economic/cea/ (last visited Mar. 16, 2008).
50. Kimberle Crenshaw is best known for discussing the intersectional approach and the Title VII cases arising there under in her seminal article *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

Even if these changes are politically impossible in the next administration, perhaps they will become practical during the careers of the current law students. After all, many of them will live to see the day around 2050 when people of color become the majority of the United States.[51] Such revolutionary legal and political changes certainly seemed fantastical within the South African context until they actually occurred. As renowned civil rights attorney Oliver Hill wrote, I hope to create "in the twenty-first century a renaissance in human relationships."[52]

51. *See* Robert Pear, *U.S. Minorities are Becoming the Majority*, INT'L HERALD TRIB., Aug. 13, 2005, at 2.
52. OLIVER W. HILL SR., THE BIG BANG: *BROWN V. BOARD OF EDUCATION*, AND BEYOND 341 (Jonathan K. Stubbs ed., 2000).