

The role of social and economic rights in supporting
opposition and accountability in post-apartheid South Africa

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In 1995, Ian Shapiro and I published an article about South Africa's democratic transition. In it we argued that South Africa's negotiated settlement had yielded a constitution that was more focused on guaranteeing representation for minority whites than it was on entrenching opposition. The interim constitution included power sharing clauses that reserved seats in the executive for all of the major parties, and had very weak mechanisms for ensuring a strong institutionalized opposition, either from minority parties or from dissenting back-benchers within the major parties. We argued that a strong institutionalized opposition was the key to a healthy democracy, and we were not alone in warning that the gravest danger to South African democracy would be the lack of opposition to the ANC.

Although the final constitution did not include many of the articles we had been most critical of, most importantly dropping the guarantee of power-sharing, it retained all of the constitutional provisions that strengthened the ruling party and weakened the opposition. The National Party dropped out of the executive in 1996 to take up the role of opposition, but in the 1999 election the ANC won an even larger majority of the vote. The NP subsequently disintegrated, and the Democratic Party has since taken up the mantle of official opposition, positioning itself as a watchdog party. Although the DP is vociferous, its small size has nevertheless ensured that its role would be more that of a chihuahua than a rottweiler. The ANC still faces very little opposition within parliament. It won a solid majority in 2004, and is not likely to face a serious challenge to its hegemony in 2009.

This does not mean however, that the ANC actually faces no opposition. In

1995, Shapiro and I speculated that opposition to the ANC might come from within the party itself, and that the party might split among its competing constituencies. The ANC, we noted, was a broad church. The party's liberation struggle heritage carried sufficient moral weight that it could encompass social groups with opposing interests, but we anticipated that disaffection with the ruling party could soon break into open opposition from civil society groups affiliated to the ANC.

In fact, opposition has been most consistently voiced by community groups and non-governmental organizations whose members come from the ANC or from breakaway factions of the ANC. South African civil society has been vocal in its opposition to many government policies, taking the ANC to task for failing to provide adequate housing, for abrogating its commitment to healthcare, for failing to provide sufficient jobs, to guarantee a living wage, and to deliver the social and welfare services it has promised. Although this is not the kind of institutionalized opposition that Shapiro and I had in mind in 1995, it is certainly opposition, and it is playing an important role in maintaining democratic participation and deliberation. Despite ANC hegemony in parliament, civil society has sometimes succeeded in holding the ANC accountable.

One reason that popular participation has been effective in playing this role is that, while the final constitution dropped the guarantee of power sharing, it added a commitment to a raft of justiciable social and economic rights. Section 24 of the Constitution guarantees everyone's right to a safe and healthy environment and requires the state to protect the environment. Section 25(5) requires the state to enable citizens to gain equitable access to land. Section 26 provides a right to access to adequate housing

and prohibits arbitrary evictions. Section 27 guarantees access to healthcare services, sufficient food and water, and social security, and prohibits the refusal of emergency medical treatment. Section 28(1)(c) entrenches children's rights to shelter and basic nutrition, social services and healthcare services. Section 29 provides a right to education, and Section 35(2)(e) guarantees the right of detained persons to be provided with adequate nutrition, accommodation, medical care, and reading material.

For the most part, the ANC government has failed to fulfill the social and economic rights that are promised by the Constitution. In fact, the Constitutional Court has ruled that such rights are only guaranteed to the extent the government can afford them, and has been careful to insist that it cannot interfere in government policy regarding budgetary allocations. This severely limits the government's legal obligation to provide the level and type of socio-economic benefits and services the constitution appears to envisage.

As a result, there are reasons to be skeptical of the wisdom and value of enshrining socio-economic rights in a constitution. If nations lack the capacity to guarantee the rights they promise, are these in fact "rights?" If the constitution guarantees rights that the government does not uphold, does it undercut the idea of rights altogether? Should rights therefore be limited to the type of civil and political rights—the so-called negative rights--that most governments are in some position to protect? If governments are under limited obligation to ensure compliance with socio-economic rights, and lack the capacity to do so in a way that is justiciable, such rights may be meaningless or, even worse, potentially pernicious to the extent they undermine the legitimacy of rights more

generally (Sunstein, 1993).

Whereas the transformative potential of socio-economic rights may be limited from a legal standpoint, we argue that such rights have played an important role in opening up the political space of oppositional politics in South Africa. The existence of constitutionally enshrined socio-economic rights legitimates demands for government-provided welfare and services even as the government's neo-liberal policy direction attempts to evade such responsibility. The language of rights has additionally shaped the form of opposition in South Africa by framing the political demands of activists. Rights-language structures oppositional politics in a particular way. Finally, the existence of a particular menu of rights plays a role in determining which issues and political identities develop political traction.

The constitution, and the rights it enshrines, therefore plays an important role in motivating and sustaining political participation and opposition in South Africa. This is counter-intuitive because constitutionalism is generally understood as a framework for establishing the boundaries of political participation by setting limits on politics. Rights in particular are often said to stifle politics by removing issues from the realm of political action and mobilization to the courts. The South African case may offer an example of how constitutions, and the rights they enshrine, can instead generate politics, in particular as neo-liberal economic policies threaten increasingly to remand issues of welfare and redistribution to the private sector.

The Promise and Limits of Rights

As a weapon against the indiscriminate use of power, rights have had their ups and downs in recent years. Starting in the 1970s, scholars associated with the field of Critical Legal Studies issued an important critique against the transformative potential of legal rights. CLS took the position that engaging in rights discourse was fundamentally incompatible with a broader strategy of social change. Although the extension of rights may energize struggle, and produce apparent victories in the short run, ultimately it legitimates the dominant structure of class, race, and gender inequality. Rights, they argued, reinforce existing social arrangements. Because they are indeterminate, they are subject to interpretation and contextual grounding which most often protects the status quo. According to Mark Tushnet, people lose sight of their real objectives when they abstract concrete experiences of discrimination and injustice into legal rights discourse (Tushnet, 1984). Peter Gabel argued that rights are an illusion that bind people to an imaginary political community of citizens and legitimate state power by appearing to offer grounds for redress (Gabel and Kennedy, 1984).

Embedded as they are in the evolution of liberal theory, rights also play an important role in framing the public sphere as a space of interaction among free and equal individuals. Patrick Macklem has noted that human rights law privileges individual civil and political rights over collective social and cultural rights. As he notes, “(r)ights bearers overwhelmingly are individuals, and their entitlements protects a zone of individual liberty from the exercise of public power.” (Macklem, 2006:2) Ross Poole argues that rights isolate claims from public debate (Poole, 1999:126). Wendy Brown has shown that rights have acted historically “as a mode of securing and naturalizing dominant social

powers—class, gender, and so forth.” (Brown, 1995:99)

Critical Race Theorists, on the other hand, have been more sympathetic to the political use of rights, and issued a critique against CLS in defense of the strategic use of rights discourse and strategies in the Civil Rights Movement. Kimberlé Crenshaw argued that CLS scholars had disregarded the transformative significance of rights in “mobilizing black Americans and in generating new demands” and ignored “the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify,” she went on “it remains receptive to some aspirations that are central to black demands.” (Crenshaw, in Crenshaw et al., 1995:110) The existence of rights, she argued, forced a crisis in hegemonic legitimacy when “powerless people force open and politicize a contradiction between the dominant ideology and their reality.” (p.111) “Rather than using the contradiction to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real and demanded to exercise the “rights” that citizenship entailed.” (p. 111)

Crenshaw insisted in particular that it was the very fact that rights are enshrined in the prevailing ideology that made them useful as an oppositional tool. “Merely critiquing the ideology from without or making demands in language outside the rights discourse” she argues, “would have accomplished little.” (117) Her critique seems especially poignant in the context of neo-liberal political agendas that threaten to erase the role of government altogether, undermining the sovereign power--and obligation--of states to carry out reform or development. As she argues, “Some critics of legal reform movements seem to overlook the fact that state power has made a significant difference—

sometimes between life and death—in the efforts of black people to transform their world. Attempts to harness the power of the state through the appropriate rhetorical and legal incantations should be appreciated as intensely powerful and calculated political acts.” (117)

Crenshaw and others simultaneously recognized however, that the same rights that were used to push reform in the civil rights era were pushing back against the advances of the civil rights movement in the 1980s. “Yet today” she says, “the same legal reforms play a role in providing an ideological framework that makes present conditions facing underclass blacks appear fair and reasonable.” (117) The ostensible race neutrality of the legal system creates the illusion that racial disparities are the result of individual and group merit (117). Despite its emancipatory potential, the use of rights may ultimately limit oppositional politics, offering a degree of formal equality that masks underlying, and persistent, structural injustice. There are dangers, she warns, “both in engaging the dominant discourse and in failing to do so. What subordinated people need is an analysis that can inform them about how the risks can be minimized and how the rocks and the very hard places can be negotiated.” (112)

Between them, critical legal scholars and critical race theorists map the possibilities and pitfalls of using rights as a strategy of social transformation. Even as rights have played an important role in protecting vulnerable individuals and minority groups from the indiscriminate use of majority power, so have they entrenched the status quo by substituting formal for real equality. Crenshaw’s diagnosis, that we need to find ways of harnessing the emancipatory potential of rights without falling prey to their

limiting logic, precisely renders the challenge facing political activists in the present age.

There are two ways in which the South African case may help us to think creatively about the strategic potential of rights. First, this literature contemplates the use of civil and political rights as a strategy for achieving inclusion. Crenshaw goes so far as to say that “the struggle of blacks, like that of all subordinated groups, is a struggle for inclusion...” (119) In South Africa however, formal political inclusion and universal citizenship were substantially achieved in the democratic transition. Like Americans in the post-civil rights era, South Africans enjoy formal equality under the law and equal rights to political voice and participation. Black South Africans are in power in South Africa. What they do not enjoy, and what is at stake, is substantive social and economic equality. The rights that are still contested—in the sense that they offer a promise that has yet to be fulfilled—are social and economic rights. The South African case provides grounds for considering whether social and economic rights are susceptible to the same self-limiting logic that restricts the promise of civil and political rights, or whether they have greater potential to subvert the status quo.

The second difference that South Africa presents, and that was not contemplated by critical race or critical legal scholars, is the use of rights as a political, and not only a legal, strategy. For these theorists, the discourse of rights is synonymous with a legal reform strategy. When they write about the possibilities of rights, they are in fact contemplating the reach of legal reform, whether law can be transformed from within, and whether the courts are an appropriate or useful venue for social change. While South African political activists are certainly using legal reform to press their claims for social

and economic rights, they are also using such rights to frame political debate, to mobilize oppositional consciousness, and to retrieve the notion of government accountability.

This paper contemplates the use of social and economic rights as a political strategy in two senses. First, it examines the extent to which courts are not only a legal space, but also a political space. Second, it focuses attention on rights activism outside the courtroom, far from the offices of lawyers and legal scholars. The South African prism allows us to consider the relative merits of using rights as a strategy of political framing and mobilization.

At best, the same commitment to rights that is employed to protect private property and preserve the status quo may also operate as a condition of collective action in liberal democracy. Constitutions that supplement the negative rights associated with protecting individual freedom with the positive rights associated with social welfare, may spark public debate and contestation. Rights can be deployed to stretch the boundaries of political engagement to produce new political actors. As new actors enter politics, they transform the terms of debate and the conditions of political action. They open our eyes to injustices we did not recognize before as injustices, exposing naturalized, and therefore invisible, hierarchies, and contesting the limits of inclusion and exclusion. They introduce new strategies and alliances to the politics of opposition, and they alter established conceptions of what can be contested when, where, and how. Through the provision of rights, liberalism sets, and has the capacity to extend, the terms of democratic contestation. If pushed, this critical leverage exposes the emancipatory potential of constitutionalism, and highlights the crucial role of opposition in democratic transformation.

Extending the transformative project

Karl Klare makes an argument for transformative constitutionalism in South Africa. He defines transformative constitutionalism as “a long term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.” (Klare, 150) He argues that the South African Constitution was intended by its framers as a document that would lead to the transformation of society. The constitution marked a break with apartheid that would lay the groundwork for democratic justice. Constitutional Court justices are therefore obligated, he says, to take an activist stance in interpreting the Constitution in ways that will issue in social, economic, and political transformation. In South Africa, adjudication should have an explicitly transformative agenda.

In the field of law, his argument breaks from commonly held conceptions of constitutions as documents that are fundamentally conservative pre-commitment strategies, designed to offer protections against the potential excesses of democratic governance. Constitutionalism is understood as a limit on democratic politics. In the United States, judges who interpret the constitution with regard to the intent of the framers are considered deeply conservative. Judge Bork is the best known of these, and his Reagan-era Supreme Court nomination was rejected on the basis of his “originalist” approach to constitutional interpretation.

As Justice Kriegler has written about South Africa however, “(w)e do not operate

under a Constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our constitution aims at establishing freedom and equality in a grossly disparate society.” Klare and others are, correspondingly, trying to plumb the socially transformative potential of constitutions that support the rule of law in nascent democracies. Rather than acting as a curb on democracy, these constitutions may be used to deepen and extend a commitment to a society based on democratic values, social justice, and fundamental human rights. He is trying to develop what he calls a “revised, perhaps somewhat more politicized, understanding of the rule of law and adjudication that can consist with and support transformative hopes” while still maintaining interpretive fidelity (151). In South Africa, it is possible to be both “originalist” and “activist” at the same time—two positions that stand at opposite ends of the spectrum in the United States.

As Klare and others have pointed out however, the Constitutional Court has actually been surprisingly conservative in its interpretation of social and economic rights. Justices have not, for the most part, delivered decisions, or engaged in reasoning, that would force the government to commit funding or make policy changes that support a transformative interpretation of social and economic rights. For example, as Theunis Roux has pointed out, the Constitutional Court has consistently declined to endorse the view that socio-economic rights mandate judges to second-guess the budgetary allocations to the areas of social provision protected by particular rights (Roux, 2003, p.10, quoted in S. Wilson p.438). The Court has refused to interpret the existence of social and economic rights as imposing a minimum core obligation on the state, even though the concept of a

minimum core is central to international law on social and economic rights. Cass Sunstein has described the Court's decisions as "restrained," "respectful," and even "deferential" to the state (p.22 Brand), and Danie Brand argues that the courts have been acutely aware of the constraints under which they operate.

Brand and others (eg. Michelman, 2003) put this down to what is called a 'separation of powers' constraint. Courts are reluctant to enforce positive rights, it is argued, for three reasons that have to do with maintaining the independence of the judiciary and the separation of powers. The Court justifies its conservatism with reference to its lack of technical capacity (to decide issues of funding allocation), its lack of democratic accountability, and a concern over maintaining the institutional integrity of the court (Brand, 22-23). These arguments, which are marshaled against including positive rights in constitutions more generally, have also been used to critique the South African Constitution in particular.

Michelman focuses attention on the second of these constraints, calling it the democratic objection. It seems there are a number of objections to constitutionalizing social and economic rights that might fall under the rubric of "democratic" objections. First, the courts are not democratically elected, and therefore allowing the courts to make decisions that are otherwise made by elected legislators is anti-democratic. Second, if the judiciary issues positive enforcement orders, it does so against the prevailing political will (Michelman, 16) by compelling the democratically elected government to enact policy against its will. By naming social citizenship a constitutional right, he says, we impose "a far-flung constraint on policy choice by majority rule." (Michelman, 29) Third, coming at

it from another direction Dennis Davis has argued that justiciable socio-economic rights might “erode the possibility for meaningful political participation in the shaping of the societal good.” (Davis, 1992 in p.21 Brand)

The Court faces at least one other challenge in its effort to decide social and economic rights cases, and that is that it is operating virtually without precedent. Section 39(1) of the Constitution obligates courts to have regard to international law in their interpretation of the Bill of Rights, and allows courts to have regard to foreign law. Although socio-economic rights are protected as justiciable rights in many constitutions, they have seldom formed the basis of constitutional litigation. As Brand argues, where case law exists, such as in India and Germany, it has largely been developed “in jurisdictions where socio-economic rights are indirectly recognised through extended interpretation of other rights or application of broader constitutional norms.” (Brand, 6)

As he goes on, “absent foreign jurisprudence on socio-economic rights, the focus in South Africa has been on international human rights law.” (Brand, 7) The primary UN instrument in this respect is the International Covenant on Economic, Social and Cultural Rights (CESCR), which provides guidelines for domestic law, and the Committee on ESCR issues General Comments that are very influential in the interpretation of socio-economic rights (Brand,7). Nevertheless, the CESCR does not have an individual complaints mechanism through which a case might be laid against a state for violation of its provisions, which means that international law also fails to provide the authority that precedent offers to judges in deciding other cases.

The fact that the South African constitution includes justiciable social and

economic rights is the main element of Klare's argument that the constitution itself is "postliberal" and, therefore, potentially transformative (Klare, 153-54). Yet the constitutionalization of justiciable positive rights poses two sets of challenges that have limited the Court's willingness to fulfill the Constitution's transformative potential: a perceived need to defer to the democratically elected legislature and executive in matters of social policy, and the absence of a robust body of case law that could be used to support interventionist rulings.

One way of trying to manage, or resolve, this fundamental tension is to attempt to fill the vacuum created by the absence of precedent with an alternative source of authority that comes from democracy itself. Klare argues that transformative constitutionalism is aimed at "transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." (Klare, 150) He fails to specify however, where judges should take their cues from or what, other than presumably their own consciences, should guide their reasoning. His vagueness here is striking. "In the background," he says, "is an idea of a highly egalitarian, caring, multicultural community, governed through participatory democratic processes in both the polity and large portions of what we now call the 'private sphere.'" (Klare, 150) This may be what is in the background of Klare's interpretation of the meaning of socio-economic rights, but it is not obvious that such rights automatically imply this, or any other, proposed meaning. Such rights still need to be given content, and courts need some authority, in so doing, that can counter the anti-democratic charge that is laid against them. If courts are going to make the kinds of interventionist, transformative judgments

that they did in *Treatment Action Campaign* and *Grootboom*, which find against the democratically elected government and prescribe a particular policy outcome, they are going to need an external source of authority.

Michelman argues that the majoritarian objection against constitutionalizing socio-economic rights holds only if we employ a narrow definition of democracy which is not the only, or best, one available to us (p.13). “The point of naming social citizenship a constitutional right is to give a certain inflection to political public reason”, he says (34). “‘Democracy’ then would name the practice by which citizens communicatively form, test, exchange, revise, and pool their constitutional-interpretive judgments...” (34). By moving the location of democracy from the legislature to civil society, Michelman proposes that democracy—that is, deliberation in the public sphere-- will in fact be strengthened through the constitutionalization of socio-economic rights.

Michelman does not specify however what is to be the relationship between the debate that takes place in civil society around the issue of rights, and what happens in the courts. Sandra Liebenberg argues however that the capacity of social rights to open up political space (and presumably discussion) ultimately rests with the courts. As she says, “(t)he inclusion of socio-economic rights as justiciable rights indicates that the constitution envisages an important role for the judiciary in their enforcement. The jurisprudence will define the nature of the state’s obligations in relation to socio-economic rights, the conditions under which these rights can be claimed, and the nature of the relief that those who turn to the courts can expect.” If the courts interpret socio-economic rights as imposing weak obligations on government, the strategic political value of

mobilizing around rights discourse will diminish. Court decisions, in other words, importantly shape the capacity of civil society to use rights to make demands on the state.

To what extent is the opposite also true? Are the decisions of the courts influenced by social activism and mobilization, and do justices take cues from the deliberation that takes place in the public sphere around particular issues? Was the evolution from *Soobramoney*--a decision in which the Court basically upheld the government's prerogative to make its own decisions about the allocation of healthcare--to *TAC*—an interventionist ruling that required the government to change its policy on providing nevirapine to pregnant mothers--influenced by popular mobilization around the issue of mother-to-child transmission of HIV/AIDS? Can public deliberation serve the Court as a source of democratic legitimacy and independence? Does civil society importantly shape the capacity of the Court to deliver decisions that hold the government to account?

Court decisions and political mobilization

More broadly, is there a way in which an independent judiciary can respond to, and energize, civil society organizations to use social and economic rights to help to generate popular participation and accountability even when the party system and electoral outcomes have failed to entrench a strong institutionalized opposition?

One way of thinking through these questions is to compare two recent court

cases--*Grootboom*¹ and *TAC*²-- and two South African non-governmental organizations—the Landless Peoples Movement and the Treatment Action Campaign. The Constitutional Court found against the South African government in both cases, issuing landmark decisions that forced the ANC government to reverse policy decisions and commit resources to particular categories of people. But the decisions were reached in different ways, and vary widely in scope. *Grootboom* is narrower than *TAC*, turning in part on the negative right prohibiting arbitrary evictions (Article 26). The *Grootboom* decision also found that the government program was not constitutionally reasonable “if the measures, though statistically successful, fail to respond to the needs of those most desperate” or to situations of crisis. Despite the fact that the Court showed its willingness to find against the government in this case, the decision also rejected the concept of a minimum core obligation, affirming the government’s prerogative, and superior capacity, to develop housing policy given the need to rationally allocate scarce resources. Despite its important legal ramifications, the decision has not significantly motivated political activism around housing, nor has it been used by political activists to critique housing policy in general.

In *TAC*, the Court again rejected the concept of a minimum core, but it also explicitly asserted its own power to review health policy against the government’s argument that the separation of powers limited the Court from reviewing policy and for

¹ Government of the Republic of South Africa and Others v. Grootboom and Others CCT11/00, 2001(1) SA 46.

² Minister of Health and Others v. Treatment Action Campaign and Others (No.2) CCT 9/02 (18 April 2002)

making anything other than declaratory orders. The Court rejected the government's argument regarding constrained resources in toto, and dismissed all government arguments regarding safety and efficacy. The Court declined to exercise supervisory jurisdiction in *TAC*, but it ordered the government to devise and implement a comprehensive mother-to-child-transmission (MTCT) program and mandated government to immediately remove restrictions on the drug and make it available in the public sector, to provide training for counselors, and to take reasonable measures to extend testing and counseling facilities throughout the public health sector. The decision identified the Court's obligation "to guarantee that the democratic processes are protected so as to ensure accountability, responsiveness, and openness, as the Constitution requires," by ensuring that the state act reasonably to provide access to socioeconomic rights on a progressive basis.³

The *TAC* court case was preceded and accompanied by significant popular mobilization and organization by the Treatment Action Campaign (TAC), and by a lengthy domestic and international political campaign for drugs preventing mother-to-child transmission of HIV/AIDS. Treatment Action Campaign uses litigation as an explicit component of its political activism, and has also been involved as a friend of the court (*amicus curiae*), providing evidence and support in a number of cases that it has not brought directly. Because it works through the courts and has tried to engage cooperatively with the Ministry of Health and other government ministries and bureaucracies, TAC has been accused of being too reformist, and of being insufficiently critical of the ANC (PS Jones, 2005).

³ TAC decision at para 35 and para 36, in Forman, 288

The *Grootboom* case was precipitated by a land takeover in which 300 people living in appalling conditions moved onto previously earmarked land. Their settlement was then bulldozed by the provincial government, leaving them with no alternative housing. Other than the land takeover by the plaintiffs themselves, *Grootboom* was not accompanied by significant mobilization or political activism, nor was the case embedded in a larger campaign for housing more generally. Among the groups that might have become involved in the case, it is notable that the Landless Peoples Movement was absent, failing to take action either to try to influence the Court's decision or to use the decision to push its own agenda. The *Grootboom* decision was embedded in, and generated, a significantly distinct political environment from that which motivated the *TAC* case. Unlike *TAC*, the LPM explicitly eschews working through the courts or with the government, taking a much more radical approach to political action.

This paper will elaborate on this comparison to draw out the implications of a link between court decision and political activism.

Notes:

The transformative potential of constitutions may not be limited to the law, however. Constitutions may also be politically transformative to the extent that they offer grounds for an immanent critique of democratic governance. By enshrining rights, constitutions offer a standard by which societies can measure their progress toward goals they themselves have set. Constitutional rights also offer grounds upon which

oppositions can constitute themselves, and by which they can offer a critique of government policy with internal legitimacy. By providing the soil for domestic oppositions to take root, constitutionalism may open up, rather than close down, the space of politics.

The possibility that constitutionalism may issue in an immanent critique of government policies has the potential to extend democracy by being immanent as well as critical. Newly democratic countries are often eager to establish their sovereignty no less than their democratic credentials. Oppositions are bolstered to the extent they can draw on the nation's constitution as a source of moral legitimacy. Although oppositions also draw on international human rights to establish the standing of their claims and demands, such strategies may backfire to the extent they can be labeled as "Western" or non-local. Ruling elites may try to de-legitimize opposition groups by calling their patriotism into question. Constitutions offer grounds for political oppositions that are unmistakably internal.

Mark Tushnet, "An Essay on Rights," Texas Law Review 1363-64 (1984)

Peter Gabel and Duncan Kennedy, "Roll Over Beethoven" 36 Stan. L Rev., 1, 29 (1984)

Kimberlé Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" in Crenshaw et al. Critical Race Theory: The Key Writings that Formed the Movement (New York: The New Press, 1995)

Cass Sunstein, "Against Positive Rights" East European Constitutional Review, Winter 1993 (35-38)

Ross Poole, Nation and Identity, London: Routledge, 1999.