

Human Capabilities & Human Authorities

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WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH
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WHAT DOES IT MEAN to be truly human? And, relatedly, what does it mean to be *treated* as truly human, and with dignity, by the state, or community, of which one is a part? To be fully human, Martha Nussbaum has argued for the better part of two decades, and now argues in greater detail in *Women and Human Development*, is not only to be rational, and not only to be happy, but also to be *capable* – capable, for example, of loving others, of thinking rationally about one’s own life, of engaging in dignified labor, of interacting with the natural and political environment, of participating in a society’s cultural life.¹ A truly human life is defined by, or perhaps constituted by, these capabilities; to lack any one of them is in some way to lack a fundamental pillar of

one’s humanity.² Therefore, she continues, a citizen in a constitutional government is treated as fully human by the state to which she owes allegiance when that person’s fundamental capabilities – the capabilities which define her humanity – are, at least minimally, protected, promoted or nurtured by the state’s governing authorities. Constitutional governments, then, whatever else they do, must protect, promote, or create whatever conditions are necessary for citizens to possess these fundamental capabilities.³

Sometimes, this obligation to promote or protect capabilities will impose constraints on what states might otherwise be permitted to do in order to promote other ends: general welfare cannot be promoted through state action if as a consequence the funda-

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1 See, in addition to the book under review, e.g., Martha Nussbaum, *Sex and Social Justice* (1999). For a full listing of Nussbaum’s work on Capabilities, see footnote 2, page 34-35, in Martha C. Nussbaum, *Women and Human Development* (“WHD”).

2 WHD at 5.

3 WHD at 4-11.

mental capabilities of citizens are adversely impacted. In this way, the state's obligation to protect human capabilities limits the state's reach, in much the same way as does the state's obligation to protect rights.⁴ But at other times the duty to protect the citizens' capabilities will impose affirmative obligations on states. A state, for example, is obligated to ensure that every citizen has access to minimal food, shelter and health care, to protect the threshold capability of health. To take another example, it is obligated to ensure that children receive an adequate education, so that they will mature into adults capable of practical reason, and it is similarly required to ensure that children receive an adequately nurturant upbringing, to protect their present and future capacity for forming moral and emotive connections with others.⁵ Further, states must ensure, through their laws, that adults have access to non-discriminatory and non-humiliating work, that all are protected through laws against sexual and physical assault, that all have the capability of owning property and entering contracts, and so on. These obligations, clearly positive, are as fundamental, on a capabilities approach to constitutional duties, as the more broadly or conventionally accepted obligation of the state to protect individuals' negative rights of speech, thought, religious affiliation, and belief. Thus, unlike conventionally liberal "rights-based" approaches to states' powers and obligations, Nussbaum's "capabilities approach" envisions fundamental, non-negotiable, inalienable obligations of states that are positive as well as negative in character.

In *Women and Human Development*, Nussbaum develops this basic argument for the

"capabilities approach" in two directions. First, she develops – somewhat – the argument for the constitutional obligatoriness of the state's duty to protect fundamental capabilities. States everywhere, but liberal and constitutional states in particular, should protect and promote these capabilities as a basic requirement of political justice. This argument, which runs throughout the book,⁶ is best read and best criticized as a contribution to liberal political theory.

The book is also a major contribution to feminist political theory: a "capabilities approach" to constitutionalism, Nussbaum argues, puts the problem and injustice of women's inequality in dramatic, sharp relief. If we assume, for a moment, that to be fully human is to possess the basic capabilities she identifies, and if we assume that a state treats its citizens justly and with dignity when the state protects those capabilities, then it is vividly clear that states everywhere are unjust toward women, and that women are not treated with dignity by the states of which they are citizens, *anywhere*. As Nussbaum states in her opening paragraph:

Women in much of the world lack support for fundamental functions of a human life. They are less well nourished than men, less healthy, more vulnerable to physical violence and sexual abuse ... less likely than men to be literate ... still less likely to have preprofessional or technical education ... are not full equals under the law ... do not have the same property rights as men, the same rights to make a contract, the same rights of association, mobility, and religious liberty ... [are more] [b]urdened ... with the "double day" of taxing employment and full responsibility for housework and child care ... lack opportunities for play and for the cultivation of their imaginative and cognitive faculties ... have fewer opportunities than

4 WHD at 96.

5 WHD at 78-86.

6 WHD at 4-11, 101-106.

men to live free from fear and to enjoy rewarding types of love. ... In all these ways, unequal social and political circumstances give women unequal human capabilities."⁷

Consequently, Nussbaum concludes, if we wish to assess the progress of various states toward the goal of treating their female citizens and their male citizens in a roughly equal way, we should use the fundamental capabilities as a sort of benchmark. A state that protects the fundamental capabilities of men and women equally and above a minimal threshold is treating its citizens justly, at least as regards gender inequalities.

HUMAN CAPABILITIES & CONSTITUTIONAL AUTHORITIES

Generally, this is a powerful book: lucid, learned and heartfelt. There is, however, in my view, one sizeable and unfortunate gap in the argument, which goes not to the feminist thesis, but to the more basic political claim that the state's obligation to protect citizens' capabilities ought to be regarded as constitutional. As every reader will immediately see, the book is frankly utopian. There is not a lot of attention paid to *how* developing governments are to go about protecting basic human capabilities when they don't have the resources to do so, and even less devoted to how or whether recalcitrant governments might be persuaded or forced to protect their citizens' capabilities when they don't wish to. Even more striking, however, than the inattentiveness to politics, is the inattentiveness (or, more accurately, the only spotty attentiveness) to *law*. Although there is plenty of legal discussion, there is vir-

tually no sustained legal *argument*, constitutional or international, to the effect that all governments, or all constitutional states, or India or the United States (the two countries on which Nussbaum concentrates), as a matter of either domestic or international constitutional law, *must* – legally must – somehow go about doing this, beyond fairly general assertions that some constitutions already mandate some protection of these fundamental capabilities.⁸ Nor is there any argument that well-off countries *must* – legally must, and not just morally must – assist, through wealth transfers, those countries who presently lack the capacity to promote or protect their citizens' capabilities. There is, in other words, no argument for the capabilities approach, *from authority*.

This is not a casual omission: partly to ward off charges of imperialism, but partly to make clear the limitations of her own case, Nussbaum explicitly denies that she is invoking *any* sort of legal authority, constitutional or international, for her position. Rather, she says, the capabilities approach is simply a "good idea" that the government of the United States or India ought to employ, and implement through constitutional mechanisms.⁹ Nussbaum goes out of her way to make clear that she does not intend her capabilities prescription as a guideline for an international or transnational meta-constitutional system: the idea put forward in this book is emphatically *not* that an international board or international court should police nation-states for compliance with an international mandate that states must promote their citizens' capabilities.¹⁰ Nowhere does she make the sort of Dworkinian claim that even the United States

⁷ WHD at 1.

⁸ She does suggest that current human rights law in some ways is supportive of a capabilities approach, but the basis of the support, or the implications of it, are not spelt out. WHD at 104-05.

⁹ WHD at 103.

¹⁰ WHD at 103-04. At most, she urges nations that have already adopted a capabilities approach, and that have the power to do so, to impose economic sanctions against states that egregiously fail to meet the minimum threshold requirements. Unfortunately, she does not take up the oftentimes-

Constitution, best read in accordance with some specified set of moral and political principles, impliedly embraces a capabilities approach. Instead, if the governing authorities in constitutional governments can be persuaded to do so, they ought to reconstitute themselves, in effect, and commit their constitutions and states to promoting and protecting human capabilities. The book is an argument for why this would be, all things considered, a good thing to do.

This disavowal of, and then inattention to, international, constitutional, and legal authority is unfortunate, for four reasons, which I discuss below.

CAPABILITIES ☉ LEGAL RHETORIC

The first reason is rhetorical. The implicit rejection of even the relevance of actual constitutional law to her overall argument is going to leave readers who are also lawyers disoriented. Lawyers are accustomed to seeing arguments about what a constitution means or should mean in the context of disputes with implications for real cases, and anchored in some sort of reading of some part of a constitutional text. The “constitution” invoked here, by contrast, is ahistorical and non-contextual: it’s a constitutional idea lacking terms, phrases, or articles, not a constitutional fact. In the real world, legal argument, and particularly legal argument about what constitutions require, is (perhaps notoriously) a distinctive blend of ideal and fact, of norm and history. Nussbaum’s fundamental capabilities approach is ultimately a

constitutional argument with a constitutional conclusion, but grounded in no actual constitution.

Of course, Nussbaum is not the only theorist to take up the question of the requirements of justice, and then to eschew discussion of law. Rawls’s *A Theory of Justice*¹¹ – much discussed by Nussbaum, in this work and elsewhere – is at least as equally inattentive to problems of authority. But there are two major differences between Rawls’s and Nussbaum’s approach, that bear on this question. First, Rawls, unlike Nussbaum, puts no faith in constitutions as the vehicle for bringing recalcitrant states in line, and therefore Rawls’s thesis doesn’t itself raise expectations that an actual constitution might actually impose such requirements. Second, and perhaps more tellingly, in some of the liberal societies touched by Rawls’s ideas, authoritative pronouncements by courts and commentators regarding the requirements of constitutionalism were in fact *not* so far removed from the ideal he sketched out. Thus, it might be said that not only settled moral intuitions, but even some settled legal and constitutional practices, lent support (albeit indirect) to Rawls’s thesis. It was not at all difficult, in other words, particularly around the time Rawls’s work was published, to imagine the United States Constitution being read by a liberal court to bridge the ideal-to-real gap between Rawlsian theory and constitutional reality. Shortly following its publication, in fact, a cottage industry of lawyers began to do precisely that.¹²

Nussbaum, by contrast, has different

disastrous humanitarian effects of sanctions, as we have witnessed them in the last twenty years. Sanctions almost by definition inflict damage on the very human capabilities of citizens the denial of which motivated their imposition, rather than direct political or military costs on the state’s leaders. The capabilities approach would seem to suggest an argument against, not for, economic sanctions.

11 John Rawls, *A Theory of Justice* (1971).

12 Perhaps the best attempt to translate Rawlsian justice into constitutional law was Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973).

ambitions and faces different challenges. Nussbaum, unlike Rawls, thinks justice, as defined in part by the capabilities approach, should constrain governments everywhere, not just in liberal societies, and in even clearer contrast to Rawls, she explicitly envisions it happening through the authority of their own domestic constitutions. This alone raises an unmet expectation that constitutional authority will be invoked as an argument for the capabilities approach. But perhaps more important, and again in contrast to Rawls, the sheer magnitude of the gap between the conditions of the women's lives (and most men's as well) and the apparent disregard of states toward those women's capabilities, on the one hand, and the minimal obligations she thinks all constitutional governments have toward their citizens, is enough to give the reader vertigo; it is simply much larger than the gap between justice, as understood by various liberal constitutional authorities (including some Supreme Court Justices) in the mid-1970s, and as understood by John Rawls. So the challenge is different as well: "implementation" of Rawls's requirements of justice could occur (or could have occurred; the moment has likely passed) through normal processes of constitutional interpretive evolution, at least in some democracies, whereas "implementation" of Nussbaum's requirements of justice will minimally require both substantial redistribution of wealth between nations and revolutionary overhaul of governing domestic structures in, possibly, all states, as well as a re-thinking of governing constitutional principles. None of that seems imminent.

For Nussbaum, more than for Rawls, the unanswered question of political authority – how any of this could ever happen, in a world dominated by ethnic nationalism and economic globalism – simply dwarfs the question of justification she does take up – why this should happen – and is indeed, in complex ways, a part of it.

CAPABILITIES @ CONSTITUTIONAL THEORY

Second, the lack of attention in *Women and Human Development* to constitutionalism, constitutional doctrine, and even constitutional theory, is unfortunate for a formal, or logical reason: Nussbaum's argument, to be complete, needs *at least* a theory of constitutionalism, if not a full fledged constitutional argument. If the fundamental capabilities are to undergird principles that are in turn to be *constitutional*, as Nussbaum advocates, then we need an argument about what constitutions are, can be, have been, and should be in the future. Nussbaum seems to envision constitutionalism in what I would regard as a typically liberal-legal way, although nowhere does she spell this out: a constitution, liberally understood, should embody moral principles of governance, that are in turn drawn from some conception of our universally shared human nature. The constitution then constrains and directs states accordingly. The principles Nussbaum derives, and the conception of human nature she spells out, are quite different from those of other major liberal theorists. Nevertheless, in its reliance on moral principles, universalist in scope, and drawn from an understanding of human nature, the overall orientation is markedly liberal.

This is, most assuredly, one way to think about constitutions and it is a powerful one. The problem is that there are other, perhaps equally powerful ways to think about constitutions. It may be, for example, that a nation's constitution should embody moral principles drawn not from some universalist perspective, but rather from the nation's particular and particularizing *history*: this understanding, or something like it, surely underlies originalist or intentionalist understandings of constitutional law in our own country. Or, perhaps, the moral principles of governance embodied in a nation's constitution should be drawn instead from the

nation's self-regarding stories, whether fictional or factual, *about* its history that have, over time, constituted the "people's" moral self-identity. The U.S. constitutional law of race relations, for example, on this "mythic" understanding of constitutionalism, might sensibly be "read" as including not only the text of the reconstruction amendments, *Brown v. Board of Education*, and *City of Richmond v. Croson*, but also the slave rebellion at Harper's Ferry, the underground railroad, *Uncle Tom's Cabin*, *Huckleberry Finn*, *Native Son*, and so on. On either the historical or mythic understanding of constitutionalism, and what it means for a nation to have one, the moral guidance provided by a Constitution defines and delineates "the People," by *marking off* the country's history, and hence its moral commitments, from other world inhabitants. There may be some other source of law, and hence legal authority, that imposes obligations on nation states derived from universal truths of our nature, but constitutional law can't be it, if constitutional law, and constitutionalism generally, and by definition, is about a country's *distinctive*, rather than its universal, moral commitments.

We might, in fact, think of various theories of constitutionalism along a continuum, defined by this "particularist-to-universalist" axis. At one end are views of the constitution as delineating a national identity, by highlighting and sharpening distinctive features of the nation's shared history. At the other end are views of constitutionalism that see the role of the constitution as imposing constraints, in the name of universalist conceptions of humanity, on just that sort of national distinctiveness. Liberal theories of constitutionalism tend toward the universal pole, while communitarian and conservative theories tend toward the particular. In the United States, disputes over

constitutional doctrine are, among much else, in part over just this universalist vs. particularist sort of split: if the constitution is about what makes us distinctive, then the intentions of the framers, our country's various "constitutional moments," and (arguably) *Uncle Tom's Cabin*, (or some subset of those historically specific events) must be consulted as "authoritative" sources of constitutional law – they are part of our constitutional story. If, however, the Constitution is fundamentally about not what makes us truly *American*, but what makes us truly *human*, then the requirements imposed upon states to treat human beings with dignity, and not our distinctive history, are authoritative. If so, then a consensus of the sort Nussbaum hopes to build, across nations, cultures, and peoples, rather than historical-national events of character building, is indeed the evidence we need to interpret or create a morally just constitution.¹³ Again, either pole of this axis, as well as any number of mid-way points along it, are plausible enough accounts of the way constitutionalism has been bandied about in theory and used in practice, at least in the United States. And precisely because of that apparent plausibility, some sort of argument, or at least some sort of account, is needed, in support of a universalist, rather than particularist, approach to constitutionalism. Nussbaum's "capabilities" approach to constitutional governance, because it explicitly aims to marry liberal political theory with the promise of constitutionalism, clearly requires such an argument.

CAPABILITIES & CONSTITUTIONAL OBSTACLES

Third, Nussbaum's relative inattention to actual constitutional law (and to constitu-

13 Nussbaum suggests that she is in the middle of a "consensus-building" project for the capabilities approach, consulting with women, activists, and state officials from a number of countries on the capabilities list. WHD at 102.

tional theory) means that she has failed to attend to those moments in our own, domestic, U.S. constitutional history, including arguably the “moment” we’re currently in, during which both our particular constitution and the idea of constitutionalism more broadly have been authoritatively construed as *hostile* to anything even approaching a capabilities approach to moral governance. Obviously, such moments might be perversions of true constitutionalism, but on the other hand they might be paradigm-creating moments, depending on one’s point of view. Either way an argument is required, and here at least, none is provided.

To revert to a sixties slogan, Nussbaum optimistically assumes that constitutions will in some fashion be “a part of the solution” rather than a “part of the problem”: that constitutions can be drafted, and if already drafted can be read, as imposing obligations on states to protect human capabilities. But this optimism ignores sizeable chunks of actual constitutional history. If, for example, we read the old turn-of-the-century notion of the state’s “police powers” over matters pertaining to the citizens’ health, morals and safety, as roughly analogous to Nussbaum’s conception of the state’s “police power” to protect citizens’ capabilities, then it’s clear enough that at least during the *Lochner* era, the Court read the Constitution as *limiting* the state’s power to do precisely what Nussbaum argues the state should be constitutionally *obligated* to do. At the time, the Court reasoned that such expansive police powers posed too great a threat to individual economic liberty, particularly the economic liberty of employers and property owners to put their capital to whatever end they saw fit. The current Court is reading the Constitution as limiting the federal government’s power to protect women and children’s safety, and hence their capability to live a full and healthy life free of fear and abuse, rather than obligating it to do so. It is

doing so, these days, not so much out of libertarian worries regarding the freedom of capitalists, but rather, from federalist concerns regarding the power of states vis-à-vis nations in a federalist system. But now, as then, the Constitution is being authoritatively read as limiting the government’s power to protect human capabilities, rather than obligating it to do so.

Obviously, these moments – the *Lochner* era and the current *Brzonkala* era – might be anomalies. In fact, the United States Constitution itself, along with its manifest hostility toward the redistribution required to meet the minimal requirements of a “capabilities approach,” might be an anomaly – a product of a particular historical moment, dominated by fears of redistribution and an excessive commitment to private power. It might be that, overall, the idea of constitutionalism and the world’s various constitutions *will* prove to be a powerful force not only for liberalism, but also for a capabilities-based liberalism. But it’s not at all clear that the current *zeitgeist* is pushing us toward such a happy evolution. In fact, it seems more likely, right now, that *Lochner* and *Brzonkala* are paradigmatic moments rather than anomalies: the impulse toward minimal state authority for even human well-being, much less for the equal human capabilities of all citizens, that they articulate, might be emerging as *the* constitutional impulse. If that is in fact occurring, then it is also likely that the combined globalization of markets and the internationalization of the idea of law will push not only particular constitutions but even the idea of constitutionalism toward a decidedly minimal conception of state authority – and therefore push states toward a minimal, rather than capacious, responsibility for human capabilities. Finally, should that come to pass, advocates of a capabilities approach will have to urge such an approach as a constraint on constitutionalism, rather than a force in tandem with constitutionalism, and

will have to find authority for it elsewhere than in nations' domestic constitutional law.

None of this is writ in stone, and all of it could have been and might in the future be otherwise; there's nothing about the abstract idea of a constitution that necessarily implies minimal state authority for either capabilities or rights. Right now, however, at least domestically, the U.S. Constitution is more of a problem for a capabilities-based approach to just governance than a vehicle for it. As the U.S. Constitution becomes a model for developing nations internationally, there is reason to worry that its regressivism on capabilities will be one of our more shameful exports.

CAPABILITIES ☺ CONSTITUTIONAL POSSIBILITIES

Finally, the lack of attention paid to constitutionalism in this text carries a sort of opportunity cost: all of the above notwithstanding, there may well be a solid, credible, even compelling argument that the U.S. Constitution requires states to attend to the capabilities of its citizens, and there may also be good arguments that the idea of constitutionalism should tend states toward a capabilities approach. I think there are such arguments, all compatible with Nussbaum's overall approach. I'll spell them out, briefly.

First (and in addition to the fundamental rights authority under the due process clause, which she does cite as providing possible tangential authority for a capabilities approach¹⁴), the Fourteenth Amendment includes a requirement that states provide "equal protection of the law." Courts and commentators have parsed the term "equal" endlessly, but relatively little attention has been paid to the clause's actual requirement, which is that states must provide *protection*: "equal" is the modifier; to provide protection is what states

must do. If we pay attention to the plain language of the text, it should be clear that the Constitution requires states (and Congress, if states fail to act) to protect their citizens, and to protect them through law, and to provide the protection equally. The phrase, that is, by its language, clearly imposes positive obligations on states – the positive obligation to protect, and to do so equally.

What the phrase does not do is specify *what* the citizen must be protected, through law, *against*. Given our own history – and particularly the history of unchecked white-on-black violence against African Americans, first during slavery, and then after it – it seems sensible enough to read the phrase as requiring the states to provide all citizens with protection against private violence, and to provide that protection equally. The state *must* provide that protection, and citizens do indeed have a right to it – declarations of the current Court to the contrary notwithstanding. There does seem to be explicit constitutional authority, in other words, for the Nussbaumian claim that the state has a constitutional obligation to protect citizens' capability to live a life of ordinary duration, free of abuse and private violence, and free of the fear and degradation of health that accompanies such violence. There also seems to be explicit constitutional authority for the related claim that a state must provide this protection to male and female citizens, as well as white and non-white citizens, equally.

The harder question in United States constitutional law is whether the state's Fourteenth Amendment-based duty to protect its citizens extends beyond the duty to provide protection against violence. Is there a constitutional obligation to provide protection against other possible violations of our fundamental capabilities? The question is obviously wide open, but a few possible arguments – arguments from authority, so to speak – are worth

¹⁴ WHD at 202.

noting. First, as Nussbaum argues, there is indeed good reason – Nussbaum has articulated what that reason would be – to read the phrase broadly. To be truly human is to be capable, and to be treated with dignity is to be treated in such a way that one’s capabilities are nurtured and then protected. If that’s right, then justice *requires* states to protect the citizens’ fundamental capabilities, and the Constitution quite generally *requires* states to behave justly toward citizens. The conclusion, then, should be clear enough; the Constitution generally and the Fourteenth Amendment in particular, require the states to protect what needs to be protected in order to fulfill its mandate of justice.

Second, it might also be argued that constitutional authority emanates not only from explicit textual provisions of the constitutional text, but also from what Bruce Ackerman provocatively calls a culture’s “constitutional moments”: moments in which constitutional understandings are fundamentally altered, whether or not through the formal amendment process. We might be in such a moment, and it might be a “moment” that is tending toward recognition of a “capabilities” approach to just governance. There are signs of an emerging “capabilities moment” scattered about the current legal and political landscape. First of all, much of the 1960s to 1990s constitutional doctrine surrounding sex equality can easily – perhaps most easily – be read as underscoring the obligation of states to protect women’s equal capabilities (rather than equal rights): capabilities for dignified work, reproductive health, access to property and contract, and non-humiliating and non-discriminatory treatment in the private sector. Outside the courts, however, we also see movement – albeit fitful, often frustrated, and certainly incomplete – toward a re-constituting of our understanding of federal and state responsibility for

citizens’ capabilities. The flawed and inadequate Family and Medical Leave Act, for example, and even the conservative “welfare reform movement,” although cruelly punitive and heavy-handed, if read in a “best lights” spirit, tend toward a capabilities approach: the goal of both the FMLA and the PRAFA, according to at least some of their proponents, was to promote and nurture women’s capabilities – the capability to work, to achieve independence, and to affiliate with and care for their dependents. The now-stalled movement toward legal recognition of gay and lesbian intimate partnerships, and ultimately perhaps same-sex marriage, likewise, clearly conduces toward legal protection of a fundamental capability of intimate affiliation. The new found interest across the political spectrum, but importantly including the republican party, in defining a robust federal role in the education of children, in maintaining and strengthening head start programs, in expanding and even guaranteeing some measure of health care, in providing some sort of gun control legislation and expanded remedies for victims of domestic violence, and very generally for recovering the “lost opportunities of those left behind,” to quote the new President, all are suggestive of a “re-constituting” of our sense of national self identity, and in a way that protects fundamental capabilities.

Third, some authority for the capabilities approach might be found in the Hobbesian contractual metaphor that in some rough way underlies the phrase “We the People,” with which the U.S. Constitution opens. Nussbaum alludes at various points in her text to the potential consensual underpinnings of the capabilities approach.¹⁵ It is because some consensus over these capabilities is at least imaginable, and to some degree already evidenced, across cultures and generations, that one can say that protection of citizens’ capabilities

¹⁵ WHD at 14, 76.

ought to be a constitutive function of government. Although she doesn't make the argument, it seems to me fair to say that the same potential consensus suggests constitutional authority for that function as well. The idea of constitutionalism alone surely does not mandate any particular democratic form of government, but it does suggest a deliberative moment in which the state commits itself to the furtherance of the well-being of citizens. It also, arguably, suggests a quasi-contractual, neo-Hobbesian, hypothetical moment in which citizens renounce tools of anarchic self-help in order to re-constitute their political lives in some collective fashion, and re-constitute them so as to recognize the need and utility of collectivity. If Nussbaum is correct to argue that *all* of the "fundamental capabilities," and not just the quasi-Hobbesian capability of living a life of normal duration, are what make us "truly human," then constitutional bargains might be understood, minimally, as a conveyance from "the people" to the state of some responsibility for ensuring the minimal conditions for their flourishing. Then it might be fair to conclude that the existence of a constitution itself, particularly given an allusion at the outset in our own constitution, to "We the People," evidences a sort of contractual authority for the capabilities approach. If so, then while all states ought to protect the fundamental capabilities of citizens, constitutional states *must* do so, and they must do so because we the people have authoritatively proclaimed as much. That authorization, in effect, is at the heart of the constitutional pact.

And finally, the Constitution might "authorize" the capabilities approach in a rather different way: it may be that what distinguishes constitutional states from non-constitutional states, is that in a constitutional state, distinctively, citizens have *rights*

to make demands upon their governments, the core entitlement of which is to be treated with dignity and as fully human, by their state. Constitutionalism, distinctively, confers rights on citizens, and confers a specific type of right: the right to be treated with dignity, and as fully human, by the state. Constitutional rights, so understood, are not "natural rights," which Nussbaum correctly distinguishes from legal rights: natural rights are simply a listing of what ought to be; of what states ought to do.¹⁶ Nor, though, are constitutional rights just a variant of "legal rights" per se: legal rights are simply whatever states do in fact provide. Constitutional rights, or what Dworkin sometimes (confusingly) calls "institutional rights," by contrast to both, are what citizens are entitled to demand of, specifically, constitutional governments: the "point," or "purpose," of constitutionalism is precisely to create a state that recognizes the existence of such rights. Furthermore, and as Dworkin and others have argued, the *content* of those rights must derive from some morally best political theory of our human nature – of what it means to be truly human, of what it means to be treated with dignity. If Nussbaum is correct that to be fully human is to be fully capable, and to be treated with dignity by the state is to be treated in such a way that those capabilities are allowed to flourish, and Dworkin correct that citizens in constitutional governments have a constitutional right to a state that treats them with dignity, then citizens in constitutional states have a right to a state that will protect, nurture and develop these basic human capabilities.

At various points in her book, Nussbaum discusses human rights, and the human rights movement, largely to criticize its vagueness, and elsewhere she discusses legal rights, but only to distinguish them from natural

¹⁶ WHD at 100.

rights.¹⁷ Nowhere does she give the distinctive idea of a “constitutional right,” and the support and structure it might lend her overall thesis, its due. But the explicit reliance on constitutionalism as the vehicle for realizing the capabilities approach suggests that the inattentiveness to the existence, and import of constitutional rights, is mistaken. The connection between the capabilities approach, as what a state must do to treat its citizens with dignity, and the idea of a constitutional right – a citizen’s entitlement to be treated with dignity by the state – is a powerful one, and further provides an authoritative link, otherwise missing, between the “good idea” of capabilities, and the imperative of constitutionalism. The capabilities approach, rightly understood, is not an “alternative” to a rights approach, rather, the “capabilities approach” provides the *content* to a constitutional approach to government. Rights are not superfluous or unnecessary to such an approach. Rather, they render the capabilities approach (as any other approach) mor-

ally, and legally – because constitutionally – imperative.

We might summarize this completed Nussbaumian argument, then, in this way: In a constitutional government, we have rights, the content of which is a function of the conditions under which humans are treated with dignity. Humans are treated with dignity when their basic capabilities, without which they are not in some respect leading “fully human lives,” are nurtured and then allowed to flourish. It is not, Nussbaum’s modest claims to the contrary notwithstanding, simply a “good idea” that states should protect citizens’ capabilities. Rather, constitutional states must do so, because their citizens have a *right* to such treatment. Although Nussbaum does not herself draw this constitutional conclusion, nevertheless, that is the basic message of this book, and in my view it is a powerful one. One can only hope that this very good idea regarding what good constitutions require of good societies, can somehow be made authoritative. *GB*

¹⁷ WHD at 100.