Reply to Diane Wood, Constitutions and Capabilities: A (Necessarily) Pragmatic Approach

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What are people actually able to do and to be? And are they really able to do or be these things, or are there impediments, evident or hidden, to their real and substantial freedom, in some areas that are agreed to be of central importance to a rich human life, a life worthy of human dignity? More specifically, how have the basic constitutional principles of a nation, together with their interpretation, promoted or impeded people’s abilities to function in some central areas of human life?

The idea that all citizens in a nation are equally entitled to a set of basic opportunities, a set of substantial preconditions for a flourishing human life that includes opportunities to unfold themselves, to develop a set of basic human abilities to choose and act, has had a lasting appeal over the centuries in the Western tradition of political and legal thought. A familiar understanding of the purpose of government is that it should, at a minimum, secure those central entitlements.1 If it does not, it will not have a claim to be even minimally just.

The Capabilities Approach (CA), as I have developed it over the years, is a normative approach to basic social justice.2 It identifies a list of ten Central Human Capabilities, or substantial freedoms, and it then says that securing those capabilities up to a threshold level is a minimum necessary condition of social

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1 For a full discussion with references, see, Martha C. Nussbaum, Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism, 121 Harv L Rev 4, 11–12 (2007).

2 The three books in which I have developed the approach are: Women and Human Development: The Capabilities Approach (Cambridge 2000); Frontiers of Justice: Disability, Nationality, Species Membership (Harvard 2006); and Creating Capabilities: The Human Development Approach (Harvard 2010) (forthcoming book). The last contains a comprehensive bibliography of books and articles by me and others relevant to the approach.
justice. It does not, then, purport to describe any particular nation. It does however, have a close resemblance to the aims of quite a few modern nations, as embodied in their constitutional guarantees and their attempts to fulfill them.

The task of relating the CA to constitutional law is one that has keenly interested me. In my Supreme Court Foreword concerning the 2006 Term, I set out to explore the complicated relationship between the CA and the US tradition of thinking about constitutional entitlements.\(^3\) I conclude that some aspects of the CA are well embedded in our constitutional tradition, particularly in its tradition of interpreting the Bill of Rights, and in the interpretation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; others (those concerned with what are usually called social and economic rights) are not recognized as topics for constitutional law, although a beginning of such recognition appeared in the 1970s. Focusing on the 2006 Term, I conclude that, even to the extent to which the CA has been recognized in constitutional interpretation, the 2006 Term represented a backing away from it, toward a different sort of jurisprudence.

One difficulty in making any such argument is that of political structure. The CA says what should be delivered to people, not through what set of institutions. The whole topic of political structure has been insufficiently attended to by all the proponents of the approach. One certainly could not conclude from the fact that courts are not involved in the securing of a particular entitlement that this entitlement has not been recognized as important, and secured through legislation, or the actions of administrative agencies. Still, the fact that a given set of entitlements has been left to the legislature to secure means, at least, that these entitlements are not protected for all beyond the reach of majority whim. To that extent, then, looking at what a nation has decided to protect through its system of constitutional law and judicial interpretation offers us useful information about what it thinks most central, and most worthy of protection.

I am very grateful to Judge Diane Wood for her serious interest in this normative philosophical project and for her very thoughtful and shrewd comments. Since her paper is a commentary on my Supreme Court Foreword, I must begin this response with a brief summary of what I argue there. I then reply to her commentary.

I begin the Foreword by spelling out the core philosophical claims of the CA, contrasting it with two alternative normative approaches that have some influence in the legal fold, Utilitarianism and Libertarianism. I then turn to the history of political thought in the Western tradition, showing that the CA has a

\(^3\) Nussbaum, 121 Harv L Rev at 7–8 (cited in note 1).
long history. Its central elements can be traced to Aristotle and the Greek Stoics; it was then developed much further by modern thinkers trained in the classics, including Roger Williams in Rhode Island (thinking about religious liberty), Adam Smith in Britain (thinking about education), and, in the nineteenth century, British liberal T.H. Green, who used a very similar approach to support compulsory public education, maximum hours laws, and other governmental interventions supportive (he argued) of meaningful human freedom. Green is particularly useful because he contrasts the CA explicitly with Utilitarianism and Libertarianism.

I then turn to the history of US constitutional law, tracing the uneven history of the CA there. I first examine two areas in which its influence appears to have been consistent: religion-clause jurisprudence, and the interpretation of the Equal Protection Clause (in cases involving race, gender, and disability). In the area of social welfare (in part by appeal to the Due Process Clause and in part through an extension of the analysis of the Equal Protection Clause), its influence on the Court reached its apogee in the 1970s. I focus here on cases concerning educational entitlements, particularly Plyler v Doe and San Antonio School District v Rodriguez, although I also investigate Goldberg v Kelly, a resonant procedural welfare rights case. Other aspects of the CA, meanwhile, were enacted through legislation, during the New Deal and, later, in the programs of the Great Society. In the aftermath of the Reagan Revolution, however, legislative support for key aspects of the approach has proven fragile. Judicial support, in areas once agreed to be the legitimate domain of legal action, would appear to be on the wane. I conclude by examining some controversial cases of the 2006 Term, showing how the contest between two approaches to the case often turns out to be a contest between an approach in the spirit of the CA, and one that reads all entitlements much more narrowly.

Now to Wood’s reply. First, she is quite right to draw attention to the importance of looking at state constitutions and the tradition of their interpretation. In further work on the legal side of the CA, I shall follow this lead. As to the international conventions she discusses, this is very important, since the CA began as an international approach in the spirit of the Universal Declaration of Human Rights. It has been developed by a multinational group, and it draws inspiration from the constitutional traditions of some other nations.

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5 Consider Universal Declaration of Human Rights, General Assembly Res No 217 A (III), UN Doc A/810 at 71 (1948).
in particular India and South Africa, that implement it more consistently than does the US tradition.

However, I do have a worry about the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: they separate entitlements in a way that I myself would not wish to do. In discussing the relationship of the CA to various human rights approaches,\(^6\) I have pointed out that a key aim of the CA is to deny that there is any clear distinction between the group of rights usually called “first-generation rights,” the political and civil rights, and the group that are usually called “second-generation rights,” the social and economic rights, or, as in the Convention here, social and cultural rights. The separation misleads us by suggesting that the political and civil rights can be implemented and secured without state expenditure. Sometimes this point is put by calling them negative rights, and Wood appears to endorse this way of thinking, using the term and then saying that “they describe areas into which government may not intrude, or actions that government may not take.” But maintaining a system of free speech, freedom of the press, and political entitlements requires the state to take action and to spend money: at the very least, to set up mechanisms for political participation, to stop people from interfering with others who are trying to exercise their rights, and to maintain a judicial system to listen to complaints about failures to deliver these rights. Some have thought that the freedom of speech also requires the protection of education, and I sympathize with this point of view.\(^7\) A mistake often made by libertarians (although not the most thoughtful ones) is to suggest that some rights implement themselves; all governments need to do is to keep their hands off. This is just mistaken, both conceptually and historically. I believe that the two Conventions perpetuate this error, and that Wood’s discussion at times falls into it.

Later Judge Wood discusses an opinion by her colleague Richard Posner, which calls the Constitution a “charter of negative liberties,” and she appears to treat his historical claims as reliable. My Foreword, however, argues that a libertarian interpretation of the Constitution is both conceptually flawed and historically ill-grounded: seventeenth and eighteenth century thought prominently recognized that an active role for government is essential to securing essential freedoms. I shall not replicate that discussion here; I simply point out that one should not allude to Posner as though his extremely


\(^7\) See *San Antonio Independent School District*, 411 US at 112–13 (Marshall dissenting) (noting that “[e]ducation directly affects the ability of a child to exercise his First Amendment rights”); Nussbaum, 121 Harv L. Rev at 7 (cited in note 1).
contentious and controversial statements about both law and history were the final word on the matter.

Judge Wood’s appeal to the two Conventions raises a further issue that I shall need to address in future work: to what extent are international norms binding on nations that have not ratified the relevant documents? In responding to the objection that my normative approach is dictatorial, imposing a single standard on democratic societies of many different types, I have repeatedly\(^8\) drawn attention to the fact that the CA is a set of norms offered for persuasive purposes only. If it is going to be implemented, it will have to be implemented by the democratic choices of each nation. What role does this leave for international conventions and for customary international law? Of course, conventions may be ratified by nations; in that case, they are clearly binding. But the US ratifies very few international conventions. Should we still think of the norms embodied in the conventions as relevant to the US judiciary?\(^9\)

This is a huge question, requiring discussion of customary international law, and of the role of foreign sources of law in US judicial thought; on both matters a debate rages. At this point, my tentative view is that the role of international norms ought to be as a source of persuasive arguments and moral pressure, so that isolated nations may eventually feel that they have failed to understand something, if they think through the reasons that have led so many other nations to think differently. In some instances where a constitutional concept is vague, they may be sources of moral illumination that judges might use to argue for a particular interpretation. But I am skeptical about pushing the authority of customary international law very far, and I think it is very important that the autonomy of nations not become compromised by international pressures.

Judge Wood suggests that, although the US Constitution offers only a few toeholds for the CA, judges might use it as a tiebreaker in difficult cases. I find this proposal exciting; it goes further than anything I recommend. I believe, however, that the Constitution actually contains more toeholds than Judge Wood here acknowledges, from the Preamble onward. I find particularly resonant the tradition of argument against allegedly “separate but equal” facilities in education, where courts have held that equal protection needs to be analyzed in terms of equal capability or opportunity, not mere formal symmetry. As I argue in the Foreword, a whole series of cases, from *Brown* to *Loving* to *US v Virginia*, show the Court rejecting mere formal symmetry in favor of a searching analysis that inquires what people under the allegedly equal arrangements are

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8 See Nussbaum, 9 Feminist Econ at 44 (cited in note 6); Nussbaum, Frontiers of Justice at 255–62 (cited in note 2).
9 I am grateful to Daniel Abebe for pressing me on this question.
actually able to do and be. In my analysis of the 2006 Term, I found similar ideas at work—albeit in dissents—in Ledbetter and Parents Involved. The tradition of religion-clause interpretation is another area in which liberty is understood in terms of what people are actually able to do. So I think that there is a lot already there, and that some recent developments show a turning away from a partial commitment to the CA that was quite well entrenched.

Now to Justices Scalia and Breyer. Judge Wood is quite right that Breyer’s idea of active liberty offers a lot of what I have in mind, and that Scalia’s formalism, as a method of interpretation, is quite opposed to the spirit of the CA. Indeed, one of the main purposes of my Foreword was to develop the idea that the CA, as a normative approach, requires a particular method of interpretation, one that asks searchingly about the real opportunities and freedoms of people; and I contrasted this approach with abstract formalism. Justice Breyer’s searching historical analysis in his dissent in Parents Involved offered one of my key examples of an interpretive method in the spirit of the CA (as did some of Justice Ginsburg’s opinions). I think, however, that the contrast ought to be qualified, with reference to my analysis of eighteenth century history. Insofar as Justice Scalia is a formalist, his approach is not in the spirit of the CA. Insofar as he is an originalist, however, he is obliged to be interested in the sources at the time of the constitutional framing that shaped the public meaning of key elements of the text. By showing the extent to which thinkers highly influential at that time, Smith and Paine in particular, understood the idea of human entitlements in the spirit of the CA, I have given Justice Scalia reason to take it seriously. Perhaps, if he does so, he will discover a tension between his formalism and his originalism. Certainly, it would be wrong for originalists to neglect the powerful role of the CA in forming key eighteenth century ideas of the citizen, of the purposes of government, and of human abilities.

Once again, I am extremely grateful to Judge Wood for these searching (and practical) reflections, and I look forward to continuing our conversation.

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12 Parents Involved, 551 US 701, 803 (Breyer dissenting) (criticizing the majority opinion for its rigid and overly formal approach).