

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

2010

### Constitutions and Capabilities: A (Necessarily) Pragmatic Approach

Diane P. Wood

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Diane P. Wood, "Constitutions and Capabilities: A (Necessarily) Pragmatic Approach," 10 Chicago Journal of International Law 415 (2010).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# Constitutions and Capabilities: A (Necessarily) Pragmatic Approach

Diane P. Wood\*

## I. INTRODUCTION

Professor Nussbaum has thrown down the gauntlet in her Foreword:<sup>1</sup> do countries have a moral obligation to develop and abide by constitutional principles that will lead to the full development of all human beings? Or is it either necessary or appropriate to take a more laissez-faire approach to the nurturing of human potential, perhaps because of the risk that governments might be too intrusive, or because of a concern about diverting enough resources from private control to governmental control to get the job done?

There is a great deal to admire in Professor Nussbaum's Capabilities Approach (CA). Human beings are fundamentally social creatures. Before it is anything else, human history is the tale of groups of people and how they have chosen to live together and to interact with other groups. As the Foreword notes, the Founders of the United States drew on a rich intellectual history when they wrote the federal Constitution.<sup>2</sup> Someone reading the Constitution for the first time, however, is not likely to think immediately of the CA. That suggests two questions: First, is Professor Nussbaum right when she argues that a society's constitution *ought* to include provisions designed to develop human capabilities? And second, even if this is a worthy goal, is there anything useful that judges can or should do to further that goal?

---

\* Circuit Judge, US Court of Appeals for the Seventh Circuit, and Senior Lecturer in Law, The University of Chicago.

<sup>1</sup> Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 Harv L Rev 4, 56–59 (Nov 2007).

<sup>2</sup> *Id.* at 40–41.

## II. CAPABILITIES AND THEIR PLACE IN LAW

### A. Generally

It is helpful to begin with a quick review of the CA. In footnote 15 of the Foreword, Professor Nussbaum sets out the specific capabilities that she has identified (in the Foreword as well as in other work) as “necessary conditions of a life worthy of human dignity.”<sup>3</sup> Here is the list:

1. Life
2. Bodily Health
3. Bodily Integrity
4. Senses, Imagination, and Thought
5. Emotions
6. Practical Reason
7. Affiliation (both with respect to associations with others and with respect to one’s personal dignity with worth equal to that of others)
8. Respect for Other Species
9. Play
10. Control over One’s Environment<sup>4</sup>

Law intersects with these capabilities in numerous ways—even more ways than Professor Nussbaum identifies in the Foreword. At a very practical level, law authorizes the employment of police, who must assure public safety and security and restrain those who do not respect the rights and autonomy of others. It protects freedoms to speak, to associate, and to choose and follow a religion. It forces those who might pollute the environment to internalize the costs they are imposing on all around them. It provides for mechanisms through which things like health care and education are delivered.

But law is capable of doing more than this. One can see a glimpse of that potential in the two great international covenants on human rights: the International Covenant on Civil and Political Rights (ICCPR), to which the United States is one of 165 states parties,<sup>5</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which the United States is

---

<sup>3</sup> Id at 15 n 15; see also Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 76–78 (Harvard 2006); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 78–80 (Cambridge 2000).

<sup>4</sup> Nussbaum, 121 Harv L Rev at 15 n 15 (cited in note 1).

<sup>5</sup> International Covenant on Civil and Political Rights (“ICCPR”), 999 UN Treaty Ser 171 (Dec 16, 1966, entered into force Mar 23, 1976); UN, *Status of Multilateral Treaties Deposited With The Secretary General: International Covenant on Civil and Political Rights*, online at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (visited Nov 21, 2009).

not among the 160 states parties.<sup>6</sup> The two covenants entered into force in 1976.<sup>7</sup> They are expressly designed to operate together (in spite of the fact that nations may subscribe to one but not the other, as the United States has). Thus, the third paragraph of the ICCPR recognizes “that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”<sup>8</sup> The ICESCR says exactly the same thing, just reversing the final two phrases.<sup>9</sup>

The ICCPR calls on states parties to refrain from discriminating on a variety of grounds, including “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”<sup>10</sup> It specifically requires states to ensure equality between men and women;<sup>11</sup> it guarantees a right to life;<sup>12</sup> it prohibits slavery of all kinds;<sup>13</sup> it assures the right to “liberty and security of person” and a variety of criminal procedure rights;<sup>14</sup> it assures liberty of movement;<sup>15</sup> it forbids arbitrary or unlawful interference with “privacy, family, or correspondence” and “unlawful attacks on . . . honor and reputation”;<sup>16</sup> and it provides for “freedom of thought, conscience and religion,” and the right to marry and found a family.<sup>17</sup> In short, the ICCPR spells out in even more detail than the Bill of Rights in the US Constitution a comprehensive set of civil rights. Most, if not all, of the rights recognized in the ICCPR are negative in character, which is to say that they describe areas into which government may not intrude, or actions that government may not take.

---

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights (“ICESCR”), 993 UN Treaty Ser 3 (Dec 16, 1966, entered into force Jan 3, 1976); UN, *Status of Multilateral Treaties Deposited With The Secretary General: International Covenant on Economic, Social and Cultural Rights*, online at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (visited Nov 21, 2009).

<sup>7</sup> ICCPR, 999 UN Treaty Ser 171 (cited in note 5), ICESCR, 993 UN Treaty Ser 3 (cited in note 6).

<sup>8</sup> ICCPR, Preamble, ¶ 3 (cited in note 5).

<sup>9</sup> ICESCR, Preamble, ¶ 3 (cited in note 6).

<sup>10</sup> ICCPR, Art 2.1 (cited in note 5).

<sup>11</sup> *Id.* at Art 3.

<sup>12</sup> *Id.* at Art 6.

<sup>13</sup> *Id.* at Art 8.

<sup>14</sup> ICCPR, Arts 9, 10, 14, 15 (cited in note 5).

<sup>15</sup> *Id.* at Art 12.

<sup>16</sup> *Id.* at Art 17.

<sup>17</sup> *Id.* at Arts 18, 23.

The ICESCR, in contrast, picks up the theme of affirmative rights—areas in which governments must act. Many of its provisions look as if they came straight out of Professor Nussbaum’s CA. The ICESCR recognizes that states (particularly developing countries) may not have the resources to achieve full compliance with its terms immediately, but it requires each state “to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in” the Covenant.<sup>18</sup> Thus, the ICESCR recognizes not only the right to work, but also the right to “technical and vocational guidance and training programmes, policies and techniques.”<sup>19</sup> Not only that, but it requires states to ensure fair wages, equal pay for equal work, the ability to earn “[a] decent living for [workers] and their families,” safe and healthy working conditions, equal chances for promotion, and adequate rest and limitation of working hours.<sup>20</sup> The ICESCR also recognizes “the right of everyone to social security, including social insurance.”<sup>21</sup> Articles 11, 12, 13, and 14 are especially notable in their congruence with the CA.<sup>22</sup> Article 11 acknowledges “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing.”<sup>23</sup> Article 12 recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>24</sup> Articles 13 and 14 address the right to education.<sup>25</sup> Article 13.1 flatly says, “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”<sup>26</sup> The ICESCR calls for free and compulsory primary education and the progressive introduction of free secondary education “in its different forms, including technical and vocational” education.<sup>27</sup> Finally, it recognizes the right of all persons to participate in cultural life.<sup>28</sup>

---

<sup>18</sup> ICESCR, Art 2.1 (cited in note 6).

<sup>19</sup> *Id.* at Art 6.

<sup>20</sup> *Id.* at Art 7.

<sup>21</sup> *Id.* at Art 9.

<sup>22</sup> ICESCR, Arts 11–14 (cited in note 6).

<sup>23</sup> *Id.* at Art 11.

<sup>24</sup> *Id.* at Art 12.

<sup>25</sup> *Id.* at Arts 13–14.

<sup>26</sup> ICESCR, Art 13.1 (cited in note 6).

<sup>27</sup> *Id.* at Art 13.2(a)–(b).

<sup>28</sup> *Id.* at Art 15.1(a).

The US Constitution recognizes treaties, along with the Constitution and the laws of the United States, as part of the “supreme Law of the Land.”<sup>29</sup> Before turning directly to the Constitution, it is therefore fair to ask what impact the ICCPR has on US law, given the fact that the United States is a party to that Covenant. The answer is more complex than one might imagine. As Professor Louis Henkin has pointed out, the United States has regularly attached to its ratifications of the major human rights treaties “a ‘package’ of reservations, understandings and declarations (RUDs),”<sup>30</sup> designed to ensure that the treaty in question will not be understood as creating individually enforceable rights and to underscore the Senate’s understanding that the treaty does not require any changes to existing US law.

A set of RUDs to this effect was appended to the Senate’s consent to ratification of the ICCPR.<sup>31</sup> It is noteworthy that Section II, Paragraph 5 of the RUDs explicitly states that the power to implement the ICCPR lies primarily in the hands of the federal government; that is to say, the Covenant is not self-executing and does not create any new domestic rights of its own force.<sup>32</sup> By so providing, the Senate ensured that no possible argument could be made under *Missouri v Holland*,<sup>33</sup> to the effect that the treaty conferred rights that went beyond those that Congress could have embodied in legislation, and it also gave notice that the United States did not regard its adherence to the Covenant as requiring any changes in existing US law or practice.

The ICCPR remains important for US law insofar as one is talking about congressional action and executive branch policy. But, as a result of the RUDs, it cannot be invoked directly in court as a source of rights. *A fortiori*, the ICESCR does not have the force of law in the United States, because the United States is not a party to that Covenant. The net result is that neither treaty provides a solid basis for someone seeking to find legal support for the CA in US law. For that, it is necessary to turn directly to domestic law and to see whether, or to what extent, there is a basis from which one could develop a more self-conscious CA.

---

<sup>29</sup> US Const, Art VI, ¶ 2.

<sup>30</sup> Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am J Intl L 341, 341 (1995).

<sup>31</sup> US Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, Ex Cal 17, 102d Cong 2d Sess in 138 Cong Rec S 4781 (Apr 2, 1992) (Listing the reservations, declarations, and understanding to accompany US ratification of the ICCPR).

<sup>32</sup> *Id*; see also *Buell v Mitchell*, 274 F3d 337, 372 (6th Cir 2001) (recognizing that the ICCPR is not self-executing and citing other cases to the same effect).

<sup>33</sup> 252 US 416, 432–33 (1920) (holding the constitutional limitations on the legislative power of the federal government do not apply when the national government ratifies a self-executing treaty).

## B. Constitutional Recognition

As Professor Nussbaum notes, many countries with more recently written constitutions, including places like India and South Africa, have included in their constitutions provisions that explicitly adopt or reflect the CA.<sup>34</sup> (Many of these countries wrote their constitutions well after the entry into force of the ICCPR and the ICESCR; it is thus not surprising to see the principles of the covenants reflected in them.)<sup>35</sup> These constitutions guarantee such benefits as access to health care, adequate housing, and a basic education to all persons in the country.<sup>36</sup>

Provisions addressing these topics are not unknown in the United States, but they do not appear at the federal constitutional level. State constitutions, to a degree, are a different matter. Because, under the original constitutional design, the states retained sovereignty over everything that was not delegated to the federal government, the states were (and in some ways still are) the governing entities of last resort in the United States. States remain responsible for some of the most fundamental government tasks, such as the creation of relationships between people (marriage, adoption, inheritance), education, the definition and enforcement of property rights, and the law of contract. While federal criminal law exists and is growing, the states remain the primary actors in the criminal arena.

It is beyond the scope of this Article to provide details about all of those fields, but since education figures so centrally in the CA, a look at the education provisions in several state constitutions helps to illustrate the potential importance of the states for someone committed to the CA. Some state constitutions firmly establish a right to an education. Thus, the constitution of Arizona states, “The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system.”<sup>37</sup> The constitution of Massachusetts goes on at rather flowery length about the importance of education:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages

---

<sup>34</sup> Nussbaum, 121 *Harv L Rev* at 67 (cited in note 1).

<sup>35</sup> See, for example, India Const, Art 38 (enacted in 1978 and providing for the promotion of “the welfare of the people by securing and protecting . . . a social order in which justice, social, economic and political, shall inform all the institutions of the national life”); South Africa Const, Arts 26–27, 29 (enacted in 1996 and providing a right to basic education, adequate housing, and access to health care services).

<sup>36</sup> India Const, Arts 21A, 38; South Africa Const, Arts 26–27, 29.

<sup>37</sup> Ariz Const, Art XI, § 1.

of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.<sup>38</sup>

Kentucky takes a more terse approach; its constitution says only, “The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”<sup>39</sup> And the constitution of Alabama, while acknowledging the policy of the state “to foster and promote the education of its citizens in a manner and extent consistent with its available resources,” cautions that nothing in the constitution should be understood as creating any right to an education or training at public expense.<sup>40</sup> Illinois’s constitution proclaims that “[a] fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities,” and it requires the state to provide for “an efficient system of high quality public educational institutions and services,” that is free through the secondary level.<sup>41</sup> It appears, therefore, that many if not most of the states are already convinced of the central importance of education to a fully functioning community.

Matters are different at the federal level, although part of the reason for this has to do with the kind of federal structure the Framers of the Constitution chose to adopt. As is well known, the 1787 text of the Constitution was devoted almost entirely to the machinery of government. James Madison and Alexander Hamilton, in the essays that were later published as *The Federalist Papers*, argued that a properly organized government will deliver justice to all, will contain within itself all that is necessary to defeat factionalism, and basic rights will be protected by legislatures.<sup>42</sup> The people of the several states, however, were unwilling to place all their trust in this indirect protection of basic rights, and so they insisted that a Bill of Rights be added to the Constitution—as it was, in

---

<sup>38</sup> Mass Const, Pt 2, Ch V, § 2.

<sup>39</sup> Ky Const, § 183.

<sup>40</sup> Ala Const, Amend 111, § 256.

<sup>41</sup> Ill Const, Art X, § 1.

<sup>42</sup> The Honorable Diane P. Wood, *Madison Lecture: Our 18th Century Constitution in the 21st Century World*, 80 NYU L Rev 1079, 1087–1088 (2005) (arguing, among other things, that the Framers did not intend for the Constitution to contain a complete list of protected individual rights).

1791. The Bill of Rights addresses a few of the prerequisites to a CA, but, as Professor Nussbaum's Foreword demonstrates, far from all.<sup>43</sup> To the extent that the US Constitution has made room for a CA at the constitutional level, it has been through devices such as incorporation of many parts of the Bill of Rights through Section 1 of the Fourteenth Amendment (thus ensuring, for example, that the states, to the same degree as the federal government, are forbidden from establishing a religion, or from imposing prior restraints on speech, or from conducting unreasonable searches and seizures), or the doctrine of "substantive due process," through which the law protects certain aspects of the dignity and inviolability of the individual.<sup>44</sup>

Nevertheless, some clauses in the federal Constitution—though not as many as Professor Nussbaum might prefer—might be seen as guides to the two democratically elected branches of government, Congress and the President, telling them what kind of legislation ought to be passed, and in what spirit that legislation ought to be enforced. The Preamble to the Constitution can be read as just that kind of instruction. Its familiar language announces that the Constitution is being created in order (among other things) to "promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity."<sup>45</sup> These purposes presumably inform the understanding of all that follows. Article I, Section 8, Clause 18, known as the Necessary and Proper Clause, gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States."<sup>46</sup> Article I, Section 9, Clause 8, the Titles of Nobility Clause, forbids all such distinctions among people.<sup>47</sup> It can fairly be seen as an early expression of the equality principle. Finally, Article VI, Paragraph 3, anticipates the Religion Clauses of the First Amendment in its command that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."<sup>48</sup> Clauses like these, including the Republican Form of Government clause of Article IV, Section 4, have not typically been recognized as giving rise to individual rights enforceable in courts.<sup>49</sup> But it would be a great fallacy to think that a part of the Constitution that is addressed to the Legislative or Executive Branch is somehow unimportant. The contrary is true. Indeed, for

---

<sup>43</sup> See Nussbaum, 121 Harv L Rev at 56–59 (cited in note 1).

<sup>44</sup> US Const, Amend XIV, § 1.

<sup>45</sup> Id at Preamble.

<sup>46</sup> Id at Art I, § 8, Clause 18.

<sup>47</sup> Id at Art I, § 9, Clause 8.

<sup>48</sup> US Const, Art VI, ¶ 3.

<sup>49</sup> Id at Art IV, § 4.

someone committed to the CA, these clauses may be just as important (if not more so) than the more conventional judicially enforceable constitutional rules.

### III. THE CA AS AN INTERPRETATIVE GUIDE

As one comes closer to a strong version of the CA that could actually be enforced in domestic courts by individual litigants (as is the case in some other countries around the world), it becomes more difficult to imagine how one might implement Professor Nussbaum's ideas. Before turning to domestic applications, it is worth noting that the position of international courts like the International Court of Justice (ICJ) is different. The ICJ hears only cases between states, and Article 38 of the court's Statute explicitly recognizes international conventions as a source of law.<sup>50</sup> But a decision of the ICJ interpreting either the ICCPR or the ICESCR would be binding on a particular country only if it had consented to the court's jurisdiction, and the United States has not done so for disputes relating to the ICCPR. In parts of her Foreword, however, Professor Nussbaum points the way to an intriguing possibility: that is, using the CA as a canon of constitutional and statutory interpretation.<sup>51</sup>

#### A. The Charming Betsy

Returning to the topic of domestic US law, there are some useful analogies to be drawn between the CA and other areas the courts have encountered. In many ways, the CA calls to mind a very old Supreme Court decision known as *Murray v Schooner Charming Betsy*,<sup>52</sup> where the Court addressed the similarly knotty question of how customary international law is to be treated in US courts. Its conclusion in *Charming Betsy* is now practically Holy Writ among international lawyers: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>53</sup> Substitute "the capabilities approach" for "the law of nations," and one would have something close to what Professor Nussbaum's Foreword advocates.

In some ways, the CA is quite similar to customary international law. The American Law Institute's Restatement (Third) of the Law of Foreign Relations, in discussing the sources of international law, begins with the statement that "[a] rule of international law is one that has been accepted as such by the

---

<sup>50</sup> See Statute of the International Court of Justice, Art 38(1)(a), 59 Stat 1055, Treaty Serial No 993 (1945).

<sup>51</sup> See Nussbaum, 121 Harv L Rev at 56–60 (cited in note 1).

<sup>52</sup> 6 US (2 Cranch) 64 (1804) (stating that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

<sup>53</sup> Id at 118.

international community of states (a) in the form of customary law.”<sup>54</sup> It then describes “customary international law” as law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>55</sup> This is plainly a far cry from a statute that one can find in black and white in a book, or a provision of a written constitution, although it has some kinship with the common law. Because it is more difficult to ascertain the precise content of customary international law, and there are times when it seems to be honored in the breach, some people are not sure if it ought to be called “law” at all. Others, including the authors of the Restatement (Third), take the position that there is indeed a difference between the rules of customary international law and day-to-day government policy.<sup>56</sup>

It is well beyond the scope of this Article to take and defend a position on this longstanding debate. Rather, it is enough to point out that the CA’s position in the legal order is similarly difficult to pinpoint: is there really a legally enforceable right to an education? Do people really have a right to state-supported development of their capabilities? What happens if the state falls down on the job? A presumption like that of the *Charming Betsy* works only if it is fair to assume that this is the tiebreaker that Congress (or any other legislature) wants—that is, to comply with customary international law, or to advance the CA. Although it is difficult to point to concrete evidence showing that Congress is committed to a CA approach, it may be even more difficult to support the position that Congress is hostile to it. If, therefore, in case of doubt a court is compelled to make one or the other assumption (that is, should the law be read in a way consistent with the CA, or inconsistent with it) sources from the Preamble to the Constitution to the statements of purpose in statutes might, in many contexts, support a default assumption that reflects the CA.

## B. Context Versus Plain Meaning

Another way of looking at the CA is as a method of interpretation, rather than some kind of canon. This is particularly useful if the case at hand requires careful attention to the details of a person’s condition, rather than the “lofty formalism” that Professor Nussbaum condemns. None of the methods of interpretation that are currently the subject of debate among the Justices on the Supreme Court is a perfect fit for the CA, but some may be more compatible with it than others. One school of thought is “originalism,” which Justice Scalia has advocated strongly; in his view, this is the only legitimate approach to

---

<sup>54</sup> Restatement (Third) of the Foreign Relations Law of the United States § 102(1)(a) (1987).

<sup>55</sup> Id at § 102(2).

<sup>56</sup> Id at §§ 101–103.

constitutional interpretation. While there are now several strands of originalism, Justice Scalia's version favors strict adherence to the plain meaning of the words in the Constitution, as they would have been understood at the time the relevant section was written.<sup>57</sup> Thus, in *District of Columbia v Heller*,<sup>58</sup> Justice Scalia's opinion turns to eighteenth century dictionaries and to phrases elsewhere in the Constitution in order to interpret the Second Amendment.<sup>59</sup> He also consults other written documents of the founding period to see how the phrase "keep arms" was used by the authors of the Amendment.<sup>60</sup> What he did *not* find relevant was the context of the right to bear arms in the modern world, or the reasons why the people of the District of Columbia might have been concerned about gun violence, or even Mr. Heller's need for a gun.

Justice Breyer, in a number of debates with Justice Scalia, has urged a different kind of contextual approach—one in which courts defer to the judgments of the democratically elected branches of government unless there is reason to fear the kind of tyranny of the majority that Madison decried.<sup>61</sup> Although there is no guarantee that this "active liberty" approach, as Justice Breyer calls it, will coincide perfectly with the CA, in practice there appears to be significant overlap. By focusing on factors like congressional intent, the purpose of a law, the problem that the law was designed to address, and the question whether the law as applied in the particular case will further or frustrate those purposes, someone following Justice Breyer's approach will acquire a rich understanding of the human dimensions of the case before the court. The law itself does not change, of course, but the factual matrix to which the law is applied is likely to be more complex. Professor Nussbaum predicts that greater nuance will be fostered by a deeper understanding of the facts, and that this in turn is likely to produce decisions that are relatively more consistent with the CA than decisions that restrict the range of relevant information to the "plain meaning" or "original intent" of the law.<sup>62</sup>

---

<sup>57</sup> Consider Justice Antonin Scalia, *Foreword*, 31 Harv J L & Pub Pol 871 (2008) (summarizing Justice Scalia's view of originalism); see also Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 Harv J L & Pub Pol 875, 883 (2008) (providing an introduction to the debate over originalism and some of the varying strands).

<sup>58</sup> 128 S Ct 2783 (2008) (holding that the Second Amendment protects an individual right to bear arms for self-defense).

<sup>59</sup> *Id* at 2791–94.

<sup>60</sup> *Id* at 2791–92.

<sup>61</sup> *A Conversation on the Constitution: Perspectives from Active Liberty and A Matter of Interpretation*, American Constitution Society debate between Justice Scalia and Justice Breyer (Dec 5 2006), online at <http://www.acslaw.org/node/3909> (visited Nov 21, 2009).

<sup>62</sup> Nussbaum, 121 Harv L Rev at 78–79 (cited in note 1).

The Court is split, as Professor Nussbaum's Foreword shows, between Justices who think it important first to look at the entire background and purpose of a statute or constitutional provision and then to ask how it ought to apply to the particular person before it, on the one hand, and those who favor a more formalistic approach, on the other.<sup>63</sup> Those who are attracted to the image of Lady Justice with the blindfold on her eyes will tend to favor the Scalia approach—individual differences do not and cannot matter, else overall justice will not be done. Those who prefer Portia as their model and want their justice tempered with mercy and tailored to the particulars of a case are likely to try harder to understand the purpose of the law and how it will affect those to whom it applies. To the extent that the law is flexible enough to permit this inquiry, the outcomes are more likely to be consistent with the CA.

#### IV. THE CA AS A SOURCE OF INDIVIDUALLY ENFORCEABLE RIGHTS

The most difficult application of the CA for courts in the United States—or, more starkly put, the least likely application—is as a source of individual rights that can be directly enforced in a court.<sup>64</sup> Here it is important to recall the various elements of the CA that Professor Nussbaum has described. A recent example from the Seventh Circuit shows how difficult it would be to introduce CA-based rights directly into American jurisprudence. The case was called *Sandage v Board of Commissioners of Vanderburgh County*.<sup>65</sup> The plaintiffs were relatives of three people who had been murdered by a man named Moore while Moore was on work-release from a four-year prison sentence he was serving for robbery.<sup>66</sup> One of the victims, Sheena Sandage-Shofner, had contacted the

---

<sup>63</sup> Id at 82.

<sup>64</sup> It is worth noting that courts in countries whose constitutions reflect the principles of both the ICCPR and the ICESCR, and which are parties to both Covenants, may be less constrained in this respect. Article 2 of the new Optional Protocol to the ICESCR, adopted in late 2008, offers individuals within the jurisdiction of a State party a new avenue to seek enforcement of the rights enshrined in the ICESCR. See *Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, Resolution A/RES/63/117*, UN General Assembly, 63d Sess (Dec 10, 2008), UN Doc A/RES/63/117. Consider Michael J. Dennis and David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?*, 98 Am J Intl L 462 (2004). As Dennis and Stewart point out, it is very difficult to draft provisions that at the same time confer individually enforceable rights and yet take a realistic approach to the ability of any given State to find the resources to comply with those rights.

<sup>65</sup> 548 F3d 595 (7th Cir 2008) (noting that as “the Constitution is a charter of negative liberties,” there is no federal constitutional right to be protected against private violence that the government is not complicit in).

<sup>66</sup> Id at 596.

sheriff's department twice to complain that Moore was harassing her, but the authorities failed to respond until it was too late.<sup>67</sup> The plaintiffs' effort to hold the sheriff responsible did not succeed.<sup>68</sup> Some of the language in Judge Richard Posner's opinion for the court throws light on the difficulties that one would encounter in trying to implement the CA in this most immediate way:

We assume, given the procedural posture, that the defendants were reckless in failing to act on the complaint of harassment . . . . There is no federal constitutional right to be protected by the government against private violence in which the government is not complicit. So the Supreme Court held in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 [1989] . . . . In *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) . . . we had said that while "there is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law, . . . there is no constitutional right to be protected by the state against being murdered by criminals or madmen . . . . The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." . . . There is a moral right to such services—protection against violence is the single most important function of government—and a government that fails in this duty invites well-deserved political retribution. But there is no enforceable federal constitutional right.

Such a right would be impractical. The federal courts would have to decide how much money each state and every local community would be required to allocate to protection of life, limb, and property. They would have to decide how much money must be appropriated for police and prosecutors and prisons, how police resources should be deployed across neighborhoods, the minimum length of state prison sentences, when if ever probation or parole should be substituted for imprisonment or a prison sentence suspended, and which state prisoners should be allowed to serve part or all of their sentences in halfway houses, at home, or on work release. The federal courts would fix the speed limits on state highways, prescribe the lighting on state streets, regulate fire departments, public hospitals, and paramedic services.<sup>69</sup>

The *DeShaney* case to which Judge Posner alluded had equally horrifying facts. There, child welfare workers repeatedly visited the home of little Joshua

---

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 600.

<sup>69</sup> *Sandage*, 548 F3d at 596.

DeShaney, observed that he was being abused by his father, and did nothing.<sup>70</sup> The father eventually beat Joshua so severely that he suffered permanent brain damage and was rendered profoundly retarded.<sup>71</sup> When the family sued, however, the Supreme Court of the United States held that the family failed to state a legal claim against the county department of social services. Once again, indifference—even reckless indifference—on the part of the county was not something that the law reached.<sup>72</sup>

These two cases may well have come out the other way, if the CA were a judicially enforceable part of US law. But the concerns that Judge Posner raised are not fanciful. Judges are ill-equipped to decide whether a sheriff's department should immediately dispatch a deputy after a call, or if a wait-and-see approach is acceptable; or to decide on funding levels for social service departments; or to decide whether a 25-to-1 student-to-teacher ratio is low enough to permit effective learning.

Before the CA could be adopted in this final robust form, it would be necessary to find principled ways in which to draw these kinds of lines. Ideally, those lines would be drawn by the legislature, in implementing legislation. Without such an anchor, judges would be hard-pressed to explain the sources of law on which they were relying. Although it may be tempting to draw the line between public liability and non-liability based on the severity of the harm to which the inaction led (death in *Sandage*, profound mental retardation in *DeShaney*), there is a troublesome *ex post* quality to such a rule. Another possibility might be to draw sharp lines between individual liability and government liability, but it is worth noting that both *DeShaney* and *Sandage* were primarily against institutions rather than individual officers. One might look at the right that the state is failing to deliver—health care is a good example for the millions of uninsured people in the United States—and ask what kind of remedy a judge could give that might change things for them.

I confess that I find it difficult to imagine how a federal court could implement the most ambitious parts of the CA, other than by the more modest interpretative conventions noted earlier. Judges in countries with specially designated constitutional courts have also had more freedom to act, since the

---

<sup>70</sup> *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 191–93 (1989) (holding that “nothing in the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors”).

<sup>71</sup> *Id.* at 193.

<sup>72</sup> *Id.* at 195–203.

citizens of those countries have openly opted for this degree of judicial review.<sup>73</sup> One technique that has worked elsewhere has been to understand CA-based constitutional provisions as setting goals that must be realized progressively by legislatures. This, after all, is the approach to which much of the international community is committed, through its adherence to the ICESCR.

One can only hope that Professor Nussbaum will tackle this final problem in her future scholarly work. There is much to admire in her explication of the CA and how it relates to constitutions, not least the fact that she has made it impossible to pretend that formal equality of position will automatically lead to equality of outcomes, or to forget that (to borrow a phrase from a former governor of Texas, Ann Richards) some people are born on third base and think that they hit a triple. Our society can and should do better. The first step is to identify what a full human existence requires, and then it is possible to begin anew to work on ways to achieve it, through all of the institutions and legal mechanisms available.

---

<sup>73</sup> See, for example, South Africa Const, Ch 8, Art 167, ¶ 5 (stating that “[t]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional”).

