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BOOK REVIEW

GIVING WAY: MARTHA NUSBAUM AND THE MORALITY OF PRIVATION

JOHN LEWIS†


I. PRACTICAL RELEVANCE

Martha C. Nussbaum has for decades studied and taught philosophy with a view to its practical relevance. Ancient philosophers were concerned most of all with care for the soul and for beneficial effects upon human life, and we can learn from them in addressing deep problems faced by people today.1 In her present work, Women and Human Development: The Capabilities Approach, Nussbaum adds to her earlier attempts to formulate practical feminist political principles by focusing on the needs of women in developing countries, especially India. Her approach to the problems she details is moral, political and constitutional: “The

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aim of the project as a whole is to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by governments of all nations, as a bare minimum of what respect for human dignity requires. Ultimately her proposals are intended to serve as a moral core for a set of "constitutional guarantees" acceptable to nations with disparate customs and laws.

Nussbaum's use of ancient philosophy to develop her modern program leaves room for many levels of critique, but this review will focus on one aspect of her project. Given that she defines her proposals in political terms and states that governments under various systems of law should be concerned with the implementation of these proposals, we must ask: what are the general political and constitutional implications of her proposals? In particular, what are the implications for people whom Nussbaum does not talk about, who do not have a voice in her consensus or her narrative? These people are a substantial portion of the human race.

Nussbaum's focus is on women who are poor, oppressed by religious and cultural customs, or at the mercy of domineering husbands. She is explicit that her proposals will require massive redistribution of wealth as well as fundamental changes to cultural conditions, although the nature and amount of that redistribution are left unspecified, and she concludes that redistribution alone cannot do the job. But Nussbaum omits entirely the interests of the very people who have achieved human flourishing and who are to produce and provide the resources necessary to her plan. These omissions are not only a case of an author setting necessary limits to the scope of a book, but are significant in evaluating her entire approach. Justice demands that the interests of those people be considered when evaluating Nussbaum's plan.

To consider these implications, this review will examine several aspects of her program, including the normative standards she uses, her methods of deriving her proposals, the unstated single conception of the good that underlies her plan, and the implications that her proposals hold for people in developed na-
tions. Several basic conclusions, including subjectivity on descriptive and normative levels, deontology, enforced economic redistribution, and emotional idealism, are ultimately unavoidable with respect to her project. These conclusions should give pause to theorists and practitioners charged with implementing her proposals.

Before describing and evaluating her approach, a preliminary point is necessary. What does Nussbaum mean by “constitutional”? The question is important because ancient political thinkers did not have the same view of constitutions as we do and attempts to apply ancient principles to modern nations must acknowledge these differences. Ancient political systems were generally designed for small, independent communities; both Plato and Aristotle set explicit limits to the proper size of a polis. Early political philosophers intertwined moral and political issues; the prime determinant of the constitution of an ancient city was the moral health of its citizens.

But this is not what we mean by a constitution today. Unlike ancient constitutions such as Aristotle’s *Athenian Constitution*, the United States Constitution is a prescriptive document. It is the written law of the land and the government enforces it. A constitutional change is not primarily a change in the moral standards of the community but a law that sets the basic parameters for political and legal functions. Nussbaum can be quite unclear about whether she is dealing with a constitution *qua* moral system or a constitution *qua* legal standard. She seems to assume that every moral good should become a constitutional guarantee. This review, however, will accept Nussbaum’s stated intention that her proposals become constitutional guarantees by governments, and consider her proposals as constitutional in the modern sense. Nussbaum supports this interpretation with multiple comparisons of the American and Indian constitutions, and references to legal cases in India. Ultimately, she intends her proposals to be implemented politically, which is “to a large extent the job of citizens in each nation.”

II. UNDERSTANDING THE “CAPABILITIES APPROACH”: “THRESHOLD” AND “EQUALITY” STANDARDS

We begin with a basic presentation of the capabilities approach, which Nussbaum condenses in her introduction and expands in her narrative. She

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8. For direct comparisons between the American and Indian constitutions, see, for example, *WHD* at 39, 55. For mention of India’s “promising constitutional tradition,” see *WHD* at 9. For accounts of three legal cases, see *WHD* at 169-74.

9. *WHD* at 105.

10. *WHD* at 4-11. For the essentials of the approach, see *WHD* at 70-96.
adopts the ancient ideal of flourishing as an aspiration proper to human life. To flourish requires that a person choose to actualize certain functions: a person may read, do a job, experience sexual satisfaction, or live healthily to a normal life span. To develop these functions requires that a person have the capability of doing so; Nussbaum elevates these capabilities to the central focus of her approach.

The capabilities are dependent upon certain physical, emotional and cultural requirements, without which Nussbaum claims there is no actual ability to function: without adequate shelter one will be unable to flourish; without schools one will not learn to read; if one suffers genital mutilation then sexual satisfaction is impossible; without health care one will not live to a normal life span; if one is beaten then one’s emotions will not develop normally. Her approach recognizes that certain material resources are necessary to a person’s ability to achieve the functions proper to a flourishing human being. Nussbaum holds that one of the central purposes of politics is to provide these resources where they are needed.

Nussbaum has gathered the “Central Human Functional Capabilities” into a list that is expressly open-ended and incomplete; in various works she has amended the list and has left it open to change. The mutability of the list is essential to her method, given her claim that the basic derivation of these items is from a consensus. Her “capabilities” extend from basic needs of life (health, nourishment, shelter) to the length of life (to live a “normal” life span), bodily integrity (“being able to be secure against assault”), the senses, imagination and thought (“being able to use the senses, to imagine, think and reason”), emotions (“being able to have attachments to things and people outside ourselves,” “to grieve, to experience longing”), practical reason (“being able to form a conception of the good”), play (“being able to laugh”) and the capability to participate politically. A recent addition is environmental concerns (“being able to live with concern for . . . animals, plants and the world of nature”).

Nussbaum’s distinction between the capability to do these things and the actualized function is vital because she claims to support human freedom by

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11. For “Two Women Trying to Flourish,” see WHD at 15-24. WHD at 31: “Certain basic aspirations to human flourishing are recognizable across differences of class and context.”
12. To exercise one’s rights “requires material and institutional resources.” WHD at 54.
13. She also attributes this position to Aristotle in Nature, Function and Capability (cited in note 1).
14. For the “current version of the list,” see WHD at 78-81. For earlier versions, see Martha C. Nussbaum, Sex and Social Justice 41-42 (Oxford 1999); Martha C. Nussbaum, Human Capabilities, Female Human Beings, in Martha C. Nussbaum and Jonathan Glover, eds, Women, Culture, and Development: A Study of Human Capabilities 61, 83-85 (Clarendon 1995). A difference between Nussbaum and Sen is his unwillingness to list the capabilities.
15. WHD at 78-80.
16. Nussbaum distinguishes “the capability or opportunity to be healthy and actual healthy functioning.” WHD at 14.
limiting her proposals to providing the capability. It is politically and morally mandatory, she claims, that each person have the resources necessary to achieve these functions, but the choice to achieve a given function is up to the individual. However, although she acknowledges the necessity of the massive redistribution of wealth, she does not discuss the mechanism and implications of redistribution. To provide the necessary resources will require active redistribution of the products of people who function successfully. This is true even though Nussbaum steadfastly omits any discussion of the facts that producing these goods is an aspect of the flourishing of others, and that her approach makes those with fewer resources dependent on that flourishing.

The capabilities are discussed according to two basic levels. The first level is a “threshold level of each capability,” which is the basic level required for any person anywhere. This first level represents the biological needs of the human organism: “the body that labors is in a sense the same body all over the world, and its needs for food and nutrition and health care are the same.” But the “threshold” also establishes the level “beneath which it is held that truly human functioning is not available.” This is described as “the level at which a person’s capability becomes what Marx called ‘truly human,’ that is, worthy of a human being.” She intends to go beyond the “merely comparative use of the capability space” and to use “the idea of a threshold level of capabilities,” presumably by recognizing the needs of human beings apart from equality with others.

The second level of capability is based on equality: “comparisons of life quality” between people and between nations. She claims that the threshold level is more important than equality; getting people above the threshold level should be the social goal, and equality is the “weaker use” of the capabilities approach. Despite this distinction, she tends to evaluate matters by using equality as a standard. She does this in the first two sentences of her introduction: “Women in much of the world lack support for fundamental functions of a human life [threshold level]. They are less well nourished than men, less healthy, more vulnerable to physical violence and sexual abuse [equality level].” Given that both the content of the capabilities list and the standard for judging what belongs on the list are open-ended, she shifts between the “threshold” and the “equality” standards, especially when calling for economic redistribution: “And making

17. See section 6.  
18. WID at 87-88.  
19. WID at 6.  
20. WID at 22.  
21. WID at 6.  
22. WID at 73 (emphasis in original).  
23. WID at 12.  
24. WID at 6. “The notion of a threshold is more important in my account than the notion of full capability equality.” WID at 12.  
25. WID at 1. I am calling equality a “standard” because she uses it to determine the level of capability present.
capabilities the goal entails promoting for all citizens a greater measure of material equality than exists in most societies, since we are unlikely to get all citizens above a minimum threshold of capability for truly human functioning without some redistributive policies.”

To evaluate her proposals we must ask whether Nussbaum is basing her formulation on the threshold or the equality standard at any particular point. She is often not clear on this. The importance of this issue is due to the use of equality to define the normative terms of her capabilities, often used to justify greater redistribution. Despite her claims that threshold takes precedence over equality, she sets the tone for the reader's emotional engagement by beginning her book with four pages describing inequalities between men and women. The reader may be right to conclude that the passionate desire for equality is driving Nussbaum's own narrative, a point that is not lost if the purpose of these opening pages is to motivate the reader in the same way. If this is true, then the desire for redistribution may be more central to her approach than she admits, a point further supported by her elevation of matters of poverty over matters of sex when it supports her argument.

III. THE LIST: SUBJECTIVITY IN DESCRIPTION AND IN NORM

The importance of Nussbaum's list is not only in its specific content but in her methods of deriving that list. She stresses this point to defend her development of an actual list: “Like any universal approach, [the capabilities approach] is only valuable if developed in a relevant way: so we need to worry not just about the structure of the approach, but also about how to flesh out its content.” The method she presents has implications for how the proposals would be implemented constitutionally. Nussbaum begins her discussion with what she calls an intuition and a judgment. “The basic intuition from which the capability approach begins, in the political arena, is that certain human abilities exert a moral claim that they should be developed.” Her defense of philosophy as a means of examining a resulting belief is stated here and elsewhere. But

26. WHD at 86. “But the provision of a threshold level of capability, exigent though that goal is, may not suffice for justice, as I shall elaborate further later, discussing the relationship between the social minimum and our interest in equality.” WHD at 75.

27. A few pages later, Nussbaum observes that her narrative method has an “implicit emphasis on the political importance of the imagination and the emotions.” WHD at 15. By implication, the examples of poor women are intended to strike the reader emotionally.

28. Considering feminist philosophy, Nussbaum holds that “problems peculiar to middle-class women should give way to [problems of poor women].” WHD at 7.

29. WHD at 71.

30. Nussbaum equates her own “judgments” with “intuitions.” She claims that her own approach does not “appear to me to have an unacceptable amount of reliance on intuition—or, as I prefer to say, judgment.” WHD at 212.

31. WHD at 83. Nussbaum pointedly never asks if every moral “intuition” supported by a consensus should be enacted by government force. It is difficult to see how such an assumption could fail to transfer moral claims to “the usual contest of power.” WHD at 300.
means of examining a resulting belief is stated here and elsewhere. But what are the descriptive and normative aspects of the list and the process by which it is derived?

Nussbaum does not discuss exactly how the list should be developed and implemented in various national systems. Her own "moral core" is supposed to cut across such peculiarities. Nussbaum remains unclear as to how hundreds of millions of people should mold the list in consensus meetings and national legislatures according to their own intuitions, and what the implications would be for political constitutions. This question is exacerbated by the fact that she speaks of her project in two ways: as her own philosophical work to develop the approach and as a project in which other people are building a consensus. This is related to the two ways in which she speaks of values, as either formulated through philosophy or as the product of consensus; we will return to this issue below. But she provides an example of how her own list was derived by revealing how a particular capability was added to the list. In essence, the list of capabilities is derived by consensus and the list changes as the consensus changes. This subordinates the content of the list to the values of the consensus.

Nussbaum exposes the derivation of Central Human Functional Capability number eight, "Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature." This capability, she observes, was not on her initial list:

"[It] was added at the insistence of Scandinavian participants in the project, who said that this was something without which, for them, no life could be truly human. As we reflected, it became clear that many of us also held such a view, thought we hadn't theorized it as elaborately as had our Scandinavian participants. There were participants from South Asia who never thought this very important, who actively disliked animals, and who thought it a kind of romantic Green Party flourish to put this on the list when people were suffering. On the other side, as time went on, there were people who questioned the anthropocentricity of the entire list, judging that we had no reason to give the human capabilities priority over other capabilities, and objecting to the idea that other species would be brought in only on account of their relationship to the human. It seems to me that whole question is quite unresolved at this point, and we have not yet achieved a political

32. We need philosophy "to help us think through our own intuitive ideas, to criticize them, and to figure out which ones we are willing to hold on to." *WHD* at 299. See also Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard 1997), especially Chapter One, "Socratic Self-Examination." The life of questioning "is not just somewhat useful; it is an indispensable part of a worthwhile life." Id at 21.

33. Nussbaum claims that an "international feminism that is going to have any bite" needs "descriptive and normative concepts adequate to that task" of crossing "boundaries of culture, nation, religion, race, and class." *WHD* at 34.

34. On the nature of her project, compare "my proposal is intended to be compatible with several different accounts," *WHD* at 12, with the "project" discussed in the block quote below.
Given Nussbaum's desire that her list be viewed as a "proposal put forth in a Socratic fashion," the reader may wonder how this compares to Socrates's own means of examination. In short, it is difficult to see Socrates relying on a consensus to determine the "moral core" of anything. Nussbaum's list is rather derived by a process of intersubjectivity, in the sense that the persons who are present pay attention to each other's emotional expressions while relying on certain shared premises and ignoring others.

To determine the exact nature of the intersubjective process in Nussbaum's project would require more information and is beyond the scope of this review. The important point is that the values on the list are based upon the values of the participants in the consensus, and those values are communitarian. The adherents place a strong emphasis on cooperation and agreement, and exhibit a willingness to change their views to achieve a consensus. Those who do not agree with these premises would not be present, would not admit that these matters are properly the concern of the community, would not admit that they "also held such a view," would not think they or others should be required to pay for these proposals, and would have no part in the consensus. Although Nussbaum might claim to step beyond these normative considerations by formulating the capabilities in terms of a threshold based on facts, by molding the threshold to a consensus she supports the communitarian ideal. Those who oppose this ideal will be unheard.

This "consensus" method is not limited to mere political posturing; it is in-

35. WHD at 157. This item appears in Nussbaum, Human Capabilities, Female Human Beings at 84 (cited in note 14). It is not in Sex and Social Justice.
36. WHD at 77.
37. "Tell me then, whether I am right in saying that some opinions, and the opinions of some men only, are to be valued, and that other opinions, and the opinions of other men, are not to be valued." Plato, Crat 47a, in Louise Ropes Loomis, ed, Plato 69 (Walter J. Black 1942) (B. Jowett, trans).
38. Nussbaum uses this approach to understand Greek ethics through tragedy, "in a theatre in which each spectator looks across the staged action to the faces of his or her fellow citizens, as the assembled group, imagining, thinking, and feeling together." Martha C. Nussbaum, Aristotle on Human Nature and the Foundations of Ethics, in J.E.J. Altham and Ross Harrison, eds, World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams 86, 98 (Cambridge 1995). This becomes a guide to understanding ourselves today: "In the process of thinking thoughts like this [like Sophocles in Athens], we are brought close to one another." Martha Nussbaum, Hope, Fear and Suspense: A Chance to Focus on What Democracy Means, NY Newsday Sunday B4 (Nov 12, 2000).
39. Nussbaum makes this point in technical terms with respect to Plato's dialogue Philebus: "An elenctic argument on that issue [sociability] would not be self-validating in the way the communal argument is, since the mere fact of participating in personal self-examination would not by itself imply acceptance of the fundamental importance of ties to others." Nussbaum, Aristotle on Human Nature at 101 (cited in note 38).
40. In research for this review, and in past discussions, I have been told by women that they have "no time" for such projects, since they are busy earning a living, and they don't think it is right that money be taken and distributed in this way. These women will not attend the consensus meetings.
41. For Nussbaum's approval of Harsanyi's "moral community," see section 6 and note 81 below.
integral to Nussbaum's own thoughts. For example, in comparing demographics in India to other parts of the world, her primary concern is that "it might be thought inappropriate to compare developed to developing countries," not whether she thinks it is actually appropriate to do so or not.\textsuperscript{42} It is important for a reformer in India not to announce that religion will be respected only so far as it "lives up to a comprehensive liberal view of life" since this alienates people who might become "allies."\textsuperscript{43} Such an approach subordinates her proposals to the prevailing cultural trends accepted by the consensus.

However, Nussbaum also claims that there are "universal values" existing for all people at all times apart from such trends. Chapter One of \textit{Women and Human Development} is titled "In Defense of Universal Values," but her discussion focuses on comparing her approach with that of other theorists rather than resolving the clash between the "consensus" and "universal values" within her own program.\textsuperscript{44} For example, Nussbaum takes a "universal" position by claiming, "Pluralism and respect for difference are themselves universal values that are not everywhere observed; they require a normative articulation and defense, and that is one of the things I hope to provide in this project."\textsuperscript{45} Despite any denials, presumably "pluralism" is a universal value; if so, how does it differ from cultural diversity, and why is it not on the list of capabilities?

Nussbaum also limits the application of her list. Given its proposals for literacy and education, "the list is intended for the modern world, rather than as timeless."\textsuperscript{46} The reader may wonder: If the capabilities proposed here are not intended to last beyond the present moment, what is universal about them? Or are the real universal values rather something over and above the list, and is the list somehow circling those values without actually making them explicit? Is there a hierarchical relationship between the universal values and those that are not timeless? The possibility arises that "following the consensus" may be the deepest value being exhorted here.

Nussbaum's position leads to a series of problems. On the one hand, she denies that any single conception of the good is needed to accept her plan. On the other hand, she claims that she has a "determinate normative conception."\textsuperscript{47} On the one hand, she recognizes no hierarchy between items: "My view holds that all the capabilities are equally fundamental, and does not announce a lexical ordering among them."\textsuperscript{48} On the other hand, her list of capabilities implies a moral hierarchy: "practical reason" and "affiliation" are of "special importance"

\textsuperscript{42} \textit{WHD} at 3 n 5.
\textsuperscript{43} \textit{WHD} at 179.
\textsuperscript{44} For example, she discusses arguments from culture, diversity and paternalism. \textit{WHD} at 41-59.
\textsuperscript{45} \textit{WHD} at 32.
\textsuperscript{46} \textit{WHD} at 77.
\textsuperscript{47} \textit{WHD} at 6. Nussbaum claims a "philosophical project, whose aim is to develop a type of normative philosophical theory." \textit{WHD} at 10.
\textsuperscript{48} \textit{WHD} at 12.
since they "organize and suffuse all the others." On the one hand, all the capabilities are equal and cannot be traded off: "We cannot satisfy the need for one of them by giving a larger amount of another one. All are of central importance and all are distinct in quality." On the other hand, they can conflict, which leads to the need to "balance" them "above the threshold," which can only occur "at a later stage of political choice, after basic constitutional values are fixed."

The question remains: Are there universal values in Nussbaum's world that can be discerned apart from a consensus, or are values dependent upon an agreement about them? In constitutional terms, the question becomes: Can anything be proposed as the moral core of a political constitution, or does philosophy have guidance to offer as to which things are proper and which are not? Notwithstanding her claims, there is in practice clearly no limit to what could be proposed and added to the list. There is not even a recognition that the list, as a moral core of a political conception, is a statement of human values since other animals form no constitutions. The basic purpose of a written political constitution, to define and limit the powers of government, is missing. The constitution becomes a tool for the consensus to grasp whatever end those participating in the consensus desire. The idea that the purpose of a constitution may be to put the basic terms of government action beyond the reach of present-day opinion polls is not discussed.

But there is another level to the problem. Beyond the matter of consensus versus universal values, the very meaning of what is discussed is undefined. A person could not determine objectively what living "in relation to" the world of nature and with "concern" for animals even mean. Suppose a woman decided to express her concern for wild animals by killing those that threaten her children and her farm, since living "in relation" to nature means protecting herself from those animals. This would directly impede the "capabilities" of other women who wished to express their concern by protecting those animals globally. The entire project would break down into competing claims, and there would be no means of resolution. Who can say what one person's "concern" should consist of? Nussbaum resolves the issue not by offering philosophical guidance as to the proper scope of constitutional deliberations, but rather by adding items to the list on some provisional basis, pending resolution of an undefined future consensus. But again, if the particular laws about such a "concern" are local matters, what is universal about the concern and what is the point of guaranteeing it constitutionally?

In fact, a "capability" is a potentiality. Nussbaum holds that "the central ques-

49. *WHID* at 79, 82.
50. *WHID* at 81. This is repeated from Nussbaum, *Human Capabilities, Female Human Beings* at 85-86 (cited in note 14).
51. *WHID* at 211-12.
tion of the capabilities approach is . . . "What is Vasanti [an Indian woman] actually able to do and to be?"
Absent evidence (or witnesses) of physical abuse, it is simply impossible to tell whether a "capability" to develop a "function" is present or not. Any claim apart from evidence that the capability has been impaired is arbitrary and ultimately unverifiable. The same subjectivity, and similar moral and legal problems, permeate items such as: "not dying prematurely, or before one’s life is so reduced as to be not worth living"; "being able to use the senses, to imagine, think and reason"; "being able to search for the ultimate meaning of life in one’s own way"; "not having one’s emotional development blighted by overwhelming fear and anxiety"; "being able to form a conception of the good"; "to have the capability for both justice and friendship." In each case there would be no way to determine the existence of such states apart from the fact of physical assaults or restraints—and if those physical factors are present, there is no reason for such clauses. Moreover, Nussbaum does not explain why the countries that best exhibit the conditions necessary for such flourishing do not include such items in their constitutions. She simply assumes that those constitutions are imperfect.

The subjectivity of the list is further revealed in the use of normative terms. What is a "normal" length of life? "Adequate" shelter? "Truly human" imagining? The "ultimate" meaning of life? "Overwhelming" fear? "Good" health? Nussbaum calls upon normative standards continually without specifying how they should be understood, or what concept of the good gives rise to them. As the moral core of constitutional guarantees based on an open-ended consensus, some means are required to show how these terms are to be defined.

For example, capability number one, "being able to live to the end of a human life of normal length," does not define "normal." We must assume that such terms are to be understood first against a "threshold" standard, presumably on the most basic biological level as well as against the requirements for a flourishing life. But what is a "normal threshold" for the length of life? Is it what is normal to an Indian in a province that has rejected western science, or to a resident of New York City? Ultimately "normal" must mean normal as made possible by the advances of western science, and any advance in that science raises the standard of what is normal. In other words, the norms are defined by those who create the advancements.

An example is needed here. If a drug company develops a cure for a dangerous disease, the standard for what is normal rises to match the new ability to

52. *WHD* at 71.
54. See, for example, *WHD* at 39.
55. *WHD* at 78–79.
56. *WHD* at 132 discusses normative terms in a criticism of Brandt but offers no solution that overcomes Nussbaum’s own desire to admit differing conceptions of the good, respect the practices of various religions, and yet restrain coercive practices.
fight the disease. This is human progress. But every such advance then activates the equality standard, since those who have the medicine are now unequal to those that do not. This would lead to an immediate claim on those who have produced that advance. The drug company will be bound to provide the new drug to all of those who need it, and if they do not, they are depriving those who suffer from the disease of their constitutional guarantee to live life to a “normal” length. Not until everyone in the world is equal in their capability to live to a “normal” length of life will those who are able to live longer satisfy their obligations to the poor. But again, how is this “normality” to be determined for billions of people? And what, if any, protections are to be available for those who actually produce such advances? Why should they produce anything if they are to become the targets of lawsuits based on the constitutional guarantees embodied in the capabilities list?

Despite the presence of many items that are necessary to human life and that rational individuals should want to attain, as a basis for legally enforced political rights, Nussbaum’s list of “functional capabilities” is deeply subjective, emotionally conditioned, and arbitrarily derived. It should be a matter of pause to political and legal scientists that such a list, and its method of derivation, might become constitutional standards affecting billions of people. Those who reject the political enactment of such a moral platform will be justified in rejecting her plan, even if they value the specifics of the platform as personal and moral aspirations.

IV. MORAAL DEONTOLOGY AS THE COMMON CONCEPTION OF THE GOOD

According to Nussbaum, the “principle of each person’s capability” is a re-interpretation of the “principle of each person as an end.”57 Within the narrow limits of her focus on those in need, Nussbaum is adamant that no person or group can properly use any individual as a means to an end:

And I shall argue that the capabilities in question should be pursued for each and every person, treating each as an end and none as a mere tool of the ends of others: thus I adopt a principle of each person’s capability, based on a principle of each person as end.58

Nussbaum supports her political views with this claim to a moral focus on the individual; capabilities are of “individual people, not, in the first instance, of groups,” and even families are granted no “moral standing” apart from individu-

57. WHD at 188. See also WHD at 2, 5-6, 55-56, 73, 243, 247. Nussbaum does not mention Kant in regard to this position, although a debt to the Foundations of the Metaphysics of Morals is clear.
58. WHD at 5.
However, once we broaden the discussion to include those people who are to provide the resources for her plan, her idea of "each person as end" becomes distinctly ambiguous, with two incompatible meanings that must be distinguished.

Individuals have often been used as the means to the ends of others. This is undeniably an issue of justice and may require the forcible intervention of government authority to correct the injustice. When a child is sold into slavery or given away in marriage to consummate an economic or family goal, Nussbaum correctly identifies the child's position as a means to the ends of others and properly denounces any such idea or practice. To subordinate the ends of some individuals to those of others "is at the core of what exploitation is, to treat a person as a mere object for the use of others." This is how Nussbaum intends the idea to be understood.

But there is another meaning of "end." When we factor into Nussbaum's account those persons who must produce the material resources by which each person is to be provided with the capability for shelter, food, and even play, the ambiguity becomes glaring. Nussbaum sets this up in theoretical and practical terms. In terms of an international feminist philosophy, "it seems right that problems of poor working women in both developing and developed nations should increasingly hold the center of the scene, and that problems peculiar to middle-class women should give way to these." More concretely, in terms of international economics, her plan will require a massive redistribution of wealth from those that have it to those who do not. Those to whom the resources are given are to have the choice to reject them; to force them to attain proper functioning would fail to recognize their liberty, but no such choice is open to those who are to provide the resources.

But what of the middle-class American woman's conception of the good and her ability to realize her own flourishing state? What of her desire to send her daughter to a private college and her willingness to work to save the necessary money? To opt out of providing the material values necessary for others is not a choice open to her; her ideal must give way to Nussbaum's, if the consensus so agrees. As Nussbaum's universal values are ultimately subordinated to the consensus so a woman of moderate means must subordinate her values to the consensus. She has no moral right to send her daughter to college as long as a girl in India has no high school, or at least until she helps pay for that high school. The conclusion here is unavoidable: the American woman is in fact to be treated as a means to the ends of those in need.

To consider "each woman as an end" comes to denote her position not as

59. WHD at 188, 251.
60. WHD at 73.
61. WHD at 7. See also note 28 above.
62. WHD at 87-88.
an end of *her own* actions, but as an end of the actions of *any another person* who has the needed resources. In this way a poor woman becomes the end of any woman who actually flourishes. This will be manifested in increasing taxes and aid programs that are self-justified within the moral terms of the consensus. In these terms it becomes clear that women most of all should question Nussbaum's approach. Should any woman attain the state of flourishing, she will face a chorus of demands that she sacrifice her own flourishing to those who have not attained such a state. She must be willing to work to support the gargantuan bureaucracy that Nussbaum's schemes will require. A shifting set of demands according to a shifting consensus will determine the amount of her sacrifice. Enforcement will be by shifting legal interpretations and authorities. She must accept all this without harboring antisocial feelings. This is the core of the capabilities approach as it relates to those who work to produce the necessary resources.

Nussbaum's plan is deontological for several reasons. Her ultimate ends are derived from intuition and intersubjective consensus, and can never be solidified objectively. Her demand for the means to provide those ends, however, makes the duty to provide them categorical. The universal values at work reduce to a "conception of the good" that is definite, immutable, must be accepted by all, and may be imposed by force upon those who disagree. There is an unshirkable responsibility to provide to others whatever resources are required by the list, independent of its content. The subjective content of the capabilities, the normative terms by which they are formulated, and the means by which they are derived leave only the central core moral ideal of *duty to others* as a standard for human action. This sets the requirement that those who have the resources provide them and those who do not have them receive them. This is a duty, even though Nussbaum does not state the word explicitly. No flourishing woman will be able to choose otherwise.\(^{63}\)

Nussbaum can fall back on the government as the entity responsible for providing whatever material values the consensus demands. But the government can only get such resources through the enforced taxation of the wealth of its citizens, and practical implementation of Nussbaum's plan will require a massive increase in institutionalized expropriation in order to transfer the money on a global basis. As part of the conceptual narrowing of her discussion, she frames the discourse not in terms of *whether* such redistribution is to occur, but rather by *how much* and *what type*. A microcosm of this narrowing of the terms of the debate is seen in her consensus discussions, which argue not about whether such proposals should be principles of constitutional law, but rather about what de-

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63. "The very concept of duty is already the concept of a necessitation (constraint) of free choice through the law." Immanuel Kant, *The Metaphysics of Morals* 145 (Cambridge 1996) (Mary Gregor, trans). To constrain one's free choice to act exclusively *within* her conceptual and moral limits is precisely Nussbaum's plan.
tails should be written into them.

The problems in Nussbaum's approach—such as whether the "universal values" exist independently of a consensus or only once recognized in a consensus, or whether the items on the list are equally important or hierarchically related—result in a continual shift in the terms by which these values are recognized. Within the capabilities framework these questions may be ultimately unanswerable. Answering them may not even be necessary, given one's willingness to subordinate one's own judgments to a consensus. Once people accept the core moral idea that they have a duty to provide material resources to others as the consensus decrees, and they carve this into law, the enforcement power of the government will be unleashed against those who possess such resources. The rest is a matter of time and degree.

V. DEMOCRACY, CONSENSUS AND COERCION, AND LIBERTY

Nussbaum claims to be in "complete agreement" with Amartya Sen that "economic needs should not be met by denying liberty." She identifies liberty with democracy, stressing the need for consensus within democratic governmental structures. "It would be inconsistent if a defender of the capabilities approach, with its strong role for democratic politics and political liberty, were to seek an implementation strategy that bypassed the deliberations of a democratically elected parliament." On a national level, it is consistent for nations that have developed such an approach to use "economic and other strategies to ensure compliance," but ultimately constitutional change in India will require that the people of India choose to change. "Capabilities theory would be a prescription for tyranny if it bypassed the nation."

Nussbaum imagines that once the process of building a consensus is completed, "it can become the basis for international treaties and other documents that may be adopted by nations and incorporated in that way into national, as well as international, law. . . . We would be helped by the fact that we would have the actual agreement of all citizens," and that the governments are "elected" and "accountable to the people." She claims that this would help her plan pragmatically: it would be legitimated by the consensus. According to this view, consensus in a democracy is sufficient for legitimacy and eliminates the possibility of tyranny.

Nussbaum's democratic position is deeply problematic, both in theory and in practice. Practically, an individual can be tyrannized by the majority as well as by a minority; the majority that imposes its collective decision on an individual is a group subordinating an individual. Like any group, there must be limits set to

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64. WHD at 12.
65. WHD at 104.
66. WHD at 103-04.
its power. Aristotelian theory and the practices of classical Athens can illustrate the implications of these points.67

Aristotle observed that democracies existed on a continuum, from the “extreme” democracy of unlimited citizen rule to citizen polities limited by fundamental laws. The former, “pure” democracy, is a deviation from an ideal because the assembly acts for its own interests and not for the long-range good of the polis. If the democratic assembly places its decrees over the written laws, the result is a “composite monarchy” that acts despotically.68 The need to restrain the whims of the demos, to prevent it from acting without limits, was as important as the need to restrain a single tyrant or an oligarchy since they all lead to the same deviant rule if not limited. To Aristotle, just because the people agree to something does not make it legal, and it certainly does not make it good. For example, redistribution of the property of the rich by the poor is wrong; it destroys the polis because it destroys justice, despite any contrary resolution by the majority. Consequently, rule by the consensus of the assembly must be limited.69

In practice, the fifth-century Athenian demos ostracized a series of political enemies, ordered the city of Mytilene destroyed and then repented, destroyed the cities of Melos and Scione, killed six of her own victorious generals and then turned on the prosecutors, and sentenced Socrates to death. The writer Xenophon presented eloquently the political issue central to the trial of the generals. He recounts that Socrates himself, and others, had challenged the legality of the trial, showing that it violated fundamental laws, and refused to countenance it. Those dissenters were threatened with death along with the generals; this effectively eliminated any limits to the power of the assembly. Xenophon tells us that the greater number of people cried out from the back of the assembly that it was monstrous that the people not be able to get what they wanted. The result was the death of the generals and the loss of the war within two years.70 The people, however, had a consensus, and they got what they wanted.

The Athenians soon learned that the power of the people had to be defined and limited. In the last decade of the fifth century, the Athenians appointed citizens to re-inscribe the ancient laws of Athens. They developed the conceptual differentiation between a decree of the assembly (psephisma) and law (nomos). A decree was passed by the consensus of the assembly, to which any citizen could make any proposal, but this consensus was subordinated to the written

67. The major discussion is at Politics 4.4 (cited in note 7). The pitfalls involved in citing Aristotle in support of any modern political position are legion. Most of all, he was writing in a polis context, describing phenomena in a small community.
68. Aristotle, Politics 4.4 1292a11-25.
69. Aristotle, Politics 3.6 1281a14-1281b5. “Communitarian” interpretations that violate the non-redistribution factor are suspect. For the question of Aristotle’s views of redistribution and property, see Fred D. Miller, Jr., Nature, Justice, and Rights in Aristotle’s Politics 309-31 (Chrendon 1995).
70. For an account of the trial, see Xenophon, Hellenica 1.7 (Harvard 1947) (Carleton L. Brownson, trans).
law. A decree had to be consistent with the law, and if they disagreed, the law took precedence. In practice, the Athenians put in place procedures for changing the law that were distinct from the procedures for passing a decree. Any proposed decree, for example, could be opposed by any citizen. Such a challenge would turn the proposal over to legal review, a procedure conducted before jurors sworn to uphold the law. This was a prerequisite to any debates about passing the decree. To change a law, however, required a review before a jury in the first instance.71

The whole point of constitutional principles is to define the powers of the government and to constrain its institutions from reaching beyond those powers. Failing to uphold these limits results in the destruction of individuals by a tyranny of the majority.72 By attempting to interject open-endedness and consensus into constitutional principles, Nussbaum undercuts the very basis of constitutional government, which is designed to limit such actions. Consequently, constitutional change is procedurally very different from changes in the laws. As Aristotle says, in a sense, where the laws do not rule there is no constitution, since there is no defined order apart from popular whims.73 Democracy becomes a license for the dominant group to redistribute the lives of its individual citizens rather than a limitation upon the powers of the majority over individuals.

A further point: even in a democracy a particular law does not have “the actual agreement of all the citizens.” The proponents of law did not agree to the killing of the generals in Athens, and those who voted to acquit Socrates did not agree to the hemlock. A focus group should not be confused with the population of a nation. The former are present because they accept Nussbaum’s basic approach and the propriety of passing such proposals upon themselves and others. They can walk out if they do not like what is happening. The individuals in a nation may not accept such proposals, and they cannot leave if the vote goes against them. They are coerced into acting according to the decision. This is true even for a single individual who does not agree that her money should be taxed and redistributed. An injustice against an individual is an injustice.

Under a constitutional government the alternatives before the people are legitimated by their coherence with the government powers as defined by the constitution. Ultimately if each person is to be something other than a means to the ends of every other person, the people must agree that the powers of gov-


72. For the assembly unlimited by laws as a “composite tyrant,” see Aristotle, *Politics* 4.4 1292a11-12.

73. Aristotle, *Politics* 4.4 1292a32.
ernment are not open to ever-widening increase. Constitutionalism cannot be advanced by repudiating the idea of constitutionalism through an open-ended consensus to increase government powers.

Nussbaum does not elaborate a theory of constitutional principles that will help those who need protections against physical coercion the most. By elevating the consensus over philosophically validated constitutional principles, including an understanding of the purpose of a constitution, she leaves the ultimate content of the constitution open to majority vote. This ignores the fact that an injustice is directed at an individual and that an individual needs protection against all groups, especially the majority. The generals in Athens were individuals oppressed by the majority group and used as a means to the ends of those leading the majority. Nussbaum’s use of the consensus goes against her claim to be concerned with individuals. By directing her capabilities solely at those in need and failing to protect those who actually flourish, she sets up anyone who actually flourishes as an object of expropriation. This may not be her intention, but this is what her approach to the constitution means. The result would be the destruction of flourishing wherever it became real.

VI. NUSSBAUM’S “MISSING PERSONS”

*Women and Human Development* positions its discussions of property, choice, preference and flourishing almost exclusively in relation to poor people. Nussbaum claims to base her approach on the individual, explicitly rejecting any claim by any group to dominate individuals. She rejects, for instance, Becker’s view of the family as an “organic unit held together by altruism.” However, given that Nussbaum has omitted from her discussions those who must provide the material resources necessary for her proposals, her claim to individualism can be evaluated only after those persons are introduced into the practical implementation of the plan. She narrows the debate to matters such as need, preference and capability without asking whether it is appropriate for governments to enforce these claims. Again, because she does not distinguish the terms of political enforcement from moral persuasion, she is unclear as to which of her proposals are to be enforced and which are not.

Nussbaum affirms her commitment to her version of liberty by an extensive examination of various preference theories and a critique of “welfarism” as an alternative to the capabilities approach. She uses her distinction between capabilities and functions to claim that she supports personal liberties and rights, and to show that her plan is not “paternalistic”:

74. “Missing persons” is a term that Nussbaum attributes to Sen, that there are many “missing women” in the world based on political and social conditions. See *WHD* at 3-4. The “missing persons” that I wish to consider, however, are those omitted from Nussbaum’s discussions.

75. *WHD* at 2, 6, 247.

76. *WHD* at 248.
For if we were to take functioning itself as the goal of public policy, pushing citizens into functioning in a single determinate manner, the liberal pluralist would rightly judge that we were precluding many choices that citizens may make in accordance with their own conceptions of the good, and perhaps violating their rights. A deeply religious person may prefer not to be well nourished, but to engage in strenuous fasting. Whether for religious or for other reasons, a person may prefer a celibate life to one containing sexual expression. A person may prefer to work with an intense dedication that precludes recreation and play. Am I declaring, by my very use of the list, that such lives are not worthy of the dignity of the human being? And am I instructing government to nudge or push people into functioning of the requisite sort, no matter what they prefer?77

Nussbaum goes on to say that the answers to the posed questions must be no, given that practical reason, which is a central capability, must be allowed to function. For political purposes, “it is appropriate that we shoot for capabilities” only.78 “A person who has opportunities for play can always choose a workaholic life . . . once the stage is fully set, the choice is up to them.”79 To force people to function is to deny their liberty.

Yet observe who is missing in this account. Those who are to provide whatever that open-ended list demands are to be constrained in any necessary way, such as through high taxation and expropriation. Once a woman in America has worked from January through April to pay her obligations to strangers in another country, those strangers are free to reject what she has provided for them. Her ability to use practical reason is not a concern. Only the rights of those who are provided with the fruits of her labors are to be respected. It would be “paternalistic” to demand that they use what she provides, but not so to demand that she provide it.80 Nussbaum’s identification of each person as an end, as defined by the shifting standards of “threshold” and “equality,” without considering who is to provide the capabilities, reduces those who actually flourish to the status of means to those ends.

Practical reason here seems to mean rational thought as defined by Nussbaum’s conceptual and moral limits. A woman has the moral right to free choice, as long as the limits to that choice are held to be within Nussbaum’s definition of need as the standard of value. To refuse to follow one’s duty to the consensus would be a breach of moral norms and deserving of sanction. Nussbaum approvingly cites John Harsanyi for his move away from “welfarism.” Harsanyi states that “we must exclude [from the social-utility function] all clearly antisocial preferences, such as sadism, envy, resentment, and malice.” Nussbaum

77. WHD at 87.
78. WHD at 87.
79. WHD at 87-88.
80. See Nussbaum, Sex and Social Justice at 218 (cited in note 14). Nussbaum speaks of “objectification,” meaning “treating as a thing, something that is really not a thing.” She lists seven ways to treat a person as a thing: instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity. Several of them can apply to any woman who does not agree to Nussbaum’s plan.
cites as "fascinating" his justification for this, which is based on the idea of a
"moral community" based on "a general goodwill and human sympathy." Har-
sanyi continues, "A person displaying ill will toward others does remain a mem-
ber of this community, but not with his whole personality. That part of his per-
sonality that harbours these hostile antisocial feelings must be excluded from
membership, and has no claim for a hearing when it comes to defining our con-
cept of social utility." This may or may not be a fair reading of Harsanyi, but it
is difficult to see how Nussbaum's use of "resentment" here should not be ex-
tended to include any resentment against the demands of the consensus. In
other words, a woman who resented being taxed to pay for the needs of stran-
gers is to have her desires consciously excluded. Nussbaum's version of the
"moral community" will in practice belong only to those who accept the moral
commandments of the consensus.

Again, Nussbaum's desire to erase the desires of women in the developed
nations from the discussion is more than an author's thematic limit upon her
work. It is central to her methodology and has important consequences for how
she approaches her project. For example, that the government cannot both re-
strain a religious custom of female subordination (e.g., child marriage) and pro-
tect the religious freedom of those who wish to practice such customs leads
Nussbaum to "balance" various capabilities. She admits that this contrasts with
her claim that the capabilities cannot be balanced, but she justifies it by balanc-
ing "above the threshold level." In a significant omission, however, Nussbaum
sees no problem in the proposition that the government can both protect the
freedom to own property and redistribute that property to strangers, since she
does not discuss the effect on those who own the property.

This approach actually slants Nussbaum away from solutions to the prob-
lems she sees and bolsters certain predetermined conclusions irrespective of
those solutions. A particular use of statistics in the opening pages of her account
is telling. Nussbaum supports her conclusion that women are treated unequally
in the world by combining a biological conclusion with a statistic. She accepts,
as an undocumented biological fact, that women should live slightly longer than
men if given equal nutrition and health care. This means that sex ratios in na-
tions should favor women slightly; we should expect approximately 102.2
women per 100 men, and this ratio appears in sub-Saharan Africa. The ratio in
India is actually 92.7 to 100, a pattern that obtains in much of the undeveloped
world, which means that millions of women are missing in the world today.

Nussbaum selects sub-Saharan Africa as the "baseline of comparison with

81. WHD at 127-28, citing John C. Harsanyi, Morality and the Theory of Rational Behaviour, in Amartya
82. WHD at 211.
83. WHD at 3-4, citing Jean Drèze and Amartya Sen, Hunger and Public Action (Clarendon 1989);
cites Sen's figure of 100 million missing women in the world today.
India since it might be thought inappropriate to compare developed to developing countries. Again, her focus is not on whether such a comparison is, in fact, warranted, but rather what is thought about this comparison. To make the comparison would, presumably, upset the allies she needs to have her plan accepted. She then notes that the ratio of women to men in Europe and North America is actually 105 to 100. These facts are placed in a footnote. But applying this statistic to America using Nussbaum’s own method, women in America are actually better off than men and there are millions of missing men in America. Nussbaum neither considers this nor examines her own method and premises behind it.

The comparison with sub-Saharan Africa is also telling. She claims that this area matches the biological formula for the length of life given equal access to resources; it is what “we would expect.” However, what are the other statistics for that area? At the beginning of *Women, Culture and Development*, Nussbaum places a seventeen-page chart of demographic statistics, broken down by country and derived from 1993 U.N. Development Reports. In the summary row, the statistics for sub-Saharan Africa include an average life expectancy of 53.6 years, versus 77.9 in industrialized countries, and a maternal mortality rate of 690 per 100,000 live births, versus 26 for industrial countries. Corresponding literacy rates are 37 percent versus 99 percent. The obvious question is: what is the validity of the biological statistic cited, given that the countries with it have this level of mortality?

A comparison with developed countries is entirely appropriate, for this is where flourishing has been attained. If someone wants to know how women actually flourish she should examine places where this has actually happened. Such an examination would have to ask why the United States is so qualitatively different from India. In constitutional terms, this means asking why women have exceeded the expected biological ratio in the United States even though, according to Nussbaum, the United States Constitution does not include clauses such as affirmative action. In contrast, why is India still at such an undeveloped level even though affirmative action and redistribution are written into the Indian constitution and considered to be compatible with liberty?

Such an examination would acknowledge the fact that the creation of wealth on a scale that makes conditions in North America virtually incommensurable with India today did not begin with the importation of material values from other countries, or from a wealthy native elite, since there was no such wealth anywhere in the world. The relative differences in wealth existing in the eight-

84. *IPHD* at 3 n 5.
85. *IPHD* at 3 n 5.
86. *IPHD* at 5.
87. Nussbaum, *Women, Culture, and Development* Table 1 (cited in note 14).
88. *IPHD* at 39, 55 (on the Indian and American constitutions). *IPHD* at 39 (noting particularly that the Indian constitution was adopted “by overwhelming consensus”).
teenth century were, in modern terms, all below the absolute threshold demanded today. Health care is an obvious example; no one had antibiotic drugs. This, however, did not stop people from working to develop economic resources, and did not stop millions of immigrants from risking their lives to get to America in order to flourish. Such a perspective is a serious challenge to the redistributive model of development that Nussbaum uses.

When she does compare India to the United States, Nussbaum shifts between standards of evaluation. On the one hand, she considers the lack of “sex equality” in India to exist because the women suffer real hardships, despite an “equal rights amendment” to the constitution. On the other hand, “sex equality” cannot be credited to America because the United States Constitution has no such amendment, despite the fact that the women are so well off that comparison with India is inappropriate. A reader may question whether such an amendment is necessarily good for women and why Nussbaum still advocates such an amendment, given that women in developed countries without such an amendment have risen so much higher than those in developing countries with one.

A fuller comparison of India with America may reveal that the establishment, in legally enforceable writing, of political freedom in the form of negative rights (to act without fear of physical force and not the promise of redistribution based on need) was the primary factor that enabled the great wealth creation of nineteenth-century America and the rapid distribution of that wealth. Such freedom also allowed original flaws in the Constitution, such as slavery and the denial of the vote for women, to be corrected. This challenges Nussbaum’s subordination of individual rights to capabilities and her redefinition of rights into claims to economic resources. The simple fact is that Nussbaum cannot consistently support both property rights and legalized global redistribution of property, because a person cannot both maintain his property by right and have it taken. Nor can a person strive to attain the highest flourishing possible in the face of unchosen limits imposed upon the striving itself. Had Nussbaum’s plan been accepted in the early 1800s, efforts at industrialization would have been expropriated in favor of equality in non-mechanized farm life.

VII. CONCLUSION

Most people would agree that shelter, thinking, contemplating the good, fulfilling work, sexual satisfaction and recreation are good for individuals and that a flourishing person should pursue them. But these become bromides when combined with trivialities and stated as central moral values. We should not enshrine them as law and elevate them over rights casually. We need to know why they are important, what facts give rise to them, and in what terms an individual can realize them. As constitutional proposals we need to understand whether the government should attempt to guarantee them and if so why, and what the im-
lications are for everyone, including the people who produce the resources that make them possible. Flourishing is an achievable ideal but, contrary to Nussbaum, history indicates that the political requirements are first and foremost liberty, freedom from the initiation of force, and the protection of property rights.\textsuperscript{89} The capabilities are otherwise private matters.

This review has not addressed many aspects of Professor Nussbaum’s work. It has not engaged with nuances of difference between her views and those of other theorists. It has not compared her theoretical understanding of specific concepts, such as rights, with others. Nor has it dealt with many of the applications addressed by her, particularly religion, the emotions, and the family. It would be very fruitful to consider the implications of these applications for the persons that the capabilities approach does not discuss. It would also be interesting to examine the success stories she presents, such as the Self-Employed Women’s Association (SEWA) in India, and to ask if they depend on constitutional change or enforced redistribution at all.\textsuperscript{90}

The problems that Nussbaum engages are centuries old and continental in scope. Her case studies show people coping with situations that are often all but hopeless. The importance of the issues underlying these problems makes it all the more necessary to ask why American women have risen so far so fast. In answering this question it is vital not to attack the very foundations that made that advancement possible. Rather than assuming that redistribution is the ideal, we should consider the importance of property rights for Indian women. This will require a clear philosophical statement of each person’s inalienable right to strive for flourishing rather than a specious guarantee of their capability to do so.

\textsuperscript{89} Peruvian economist Hernando de Soto sees property rights as vital to understanding the difference between developed and undeveloped countries. He calculates that “the total value of real estate held but not legally owned by the poor of the Third World and former communist nations is at least $9.3 trillion.” He concludes that establishing firm rights to property is an essential step to using this wealth as capital for development. Hernando de Soto, \textit{The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else} 35 (Basic 2000). Nussbaum notes that 94 percent of women who work in India are “self-employed” in “cottage industries, agricultural labor” and other work. \textsuperscript{90} IPHD 15-17.

\textsuperscript{90} IPHD at 15-17. See generally Kalima Rose, \textit{Where Women are Leaders: The SEWA Movement in India} (Zed 1992).