

Law and Political Entitlements: A Capabilities Approach¹
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What are people actually able to do and to be? In developing my version of the capabilities approach as a partial account of basic social justice, I have emphasized repeatedly its links with constitutional law -- saying that my account of the ten central capabilities provides a source for basic political principles that can be given more concrete form in a nation's constitution. My own work on the approach has been illuminated by comparative study of constitutional traditions: those of India, South Africa, and the U. S. in particular. In today's lecture, I want to show how just one constitutional tradition -- that of the U. S. -- embraced, at one time, significant elements of the CA, and, more recently, has retreated from it. This case is illuminating, because it will show us how easy it is for once-admirable commitments to be interpreted, later on and in a different political climate, in such a way that they deliver merely nominal entitlements, not true human capabilities.

The capabilities approach needs judges who reason in a certain way, with a certain quality of mind: Aristotle, describing the virtues of such a judge called it "perception," contrasting it with a mere deference to rules. He emphasized that judges must confront the complexities of the reality before them, using a flexible measure that is able to fit the sometimes awkward shape of reality. In cases involving central constitutional entitlements, the judge must ask what people are really able to do and to be. Such judges confront human situations realistically, with an eye to the historical obstacles that stand in the way of full access to functioning for some groups. Legal reasoning can be realistic and historically informed in this way. It may also, however, be formalistic and obtuse, retreating from reality behind the shield of technical legal concepts. I'll first trace a few of the strands of the CA in the U. S. constitutional tradition. I shall then turn to the 2006 Term, where we see some alarming failures of capability-perception, and a retreat to a formalism that gives citizens opportunities that are more verbal than real.

¹ For a longer version of my argument please see *Harvard Law Review*, Fall 2007

I. THE CA IN AMERICAN CONSTITUTIONAL LAW

On the whole, the U. S. constitutional tradition has done well protecting some capabilities, those enumerated in the Bill of Rights – although even here, interpretation has fluctuated between an analysis that focuses on capabilities or substantial freedoms and a more minimalist analysis. The tradition of heightened scrutiny under the Equal Protection Clause and the recognition of fundamental rights under the Due Process Clause have also led to a focus on substantive opportunities, what people are actually able to do and to be, in areas affected by traditional discrimination. Our tradition, however, has been far more reluctant than many to offer constitutional protection, through judicial interpretation, to human capabilities in the areas covered by "economic and social rights," although a beginning was made in the 1970's. On the whole this job has been left to legislative action, as in the New Deal, and the whole matter is currently in disarray, given the erosion of New Deal commitments during and after the "Reagan Revolution." Our country simply does not protect basic material entitlements, in areas such as health, housing, and basic welfare support, as effectively as many of the European nations and many developing nations, India and S. Africa prominently included.

We could illustrate the positive side from many parts of our constitutional tradition; in my 2006 Presidential Address I considered the part concerning freedom of religion and religious establishment. However, for the purposes of this lecture I shall turn to the Equal Protection Clause of the Fourteenth Amendment and the question of separate but (allegedly) equal arrangements.

A. Separate But Equal. Minorities often face obstacles on the way to fully equal capability to choose and act; though equal on paper, they are not equal in material reality. Judicial interpretation under the Equal Protection clause has addressed this asymmetry: formally neutral arrangements have been found unconstitutional in a range of cases, because they do not promote substantively equal freedoms. Both our civil rights tradition and our tradition of pursuing sex equality pose, centrally, the question, "What are these people actually able to do and to be?" It is through that searching question that the formal symmetry of "separate but equal" arrangements has been unmasked as a device for the perpetuation of hierarchy.

In Brown v. Board of Education (1954) the existence of separate arrangements that looked equal on paper was not the end of the matter. Instead, the Court asked about the human capabilities of students: how were they enabled to learn and to function? The answer was that there was a great inequality here: the stigma of segregation was itself a burden that put unequal obstacles in the way of minority students.

Similarly, in Loving v. Virginia (1967), the case that invalidated laws against miscegenation, the laws of Virginia offered a simulacrum of equality in the form of formal symmetry. Blacks couldn't marry whites, whites couldn't marry blacks. The Court looked beneath the formal symmetry, however, asking about the meaning of the prohibition on miscegenation for what people were really able to do and be. The prohibition, they concluded, was not truly symmetrical, since it was part of the enforcement of "White Supremacy": it carried a stigma that made the civil rights of blacks systematically unequal. Not being able to marry a white person meant being unequal in general, whereas (for a white), not being able to marry a black person, while at times inconvenient, did not systematically affect the entirety of one's social standing.

But perhaps the most resonant equal-protection case, where the CA is concerned, is U. S. v. Virginia, the case that opened the doors of the Virginia Military Academy to women. Sex-based classifications, Justice Ginsberg's majority opinion observes, summarizing a group of precedents, may be used to compensate women for economic disabilities they have suffered, to promote equal employment opportunity, and "to advance full development of the talent and capacities of our Nation's people" (2276). The idea of developing the capacities of citizens is of course the idea at the very heart of the CA; equally significant is the observation that some affirmative measures may be justified in the name of truly equal opportunity, a corollary of the CA to which its proponents have frequently drawn attention: the traditionally disadvantaged may need more state support if they are to end at a position of similar capability. "[S]tate actors controlling gates to opportunity," however, "may not exclude qualified individuals based on fixed notions concerning roles and abilities of males and females" (2266). (Striking examples of the ways in which gender-based stereotypes have been used in our judicial history to limit the strivings of women are enumerated throughout the opinion.) Such pre-fixing and thus limiting of

human development is what proponents of the CA, from Aristotle to Smith to Mill and Green, have struggled against.

Equally striking is the majority's analysis of the purportedly "separate but equal" remedial alternative, the program at Mary Baldwin College called VWIL. A remedy, the majority writes, "must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination]'." Here we have a clear statement of our notion of "combined capability": the people must be in the same total position, where opportunity is concerned. The Mary Baldwin program, by contrast, is "different in kind from VMI and unequal in tangible and intangible facilities". This contention is supported by an analysis that asks what hypothetical graduates from that program would actually be able to do and to be (thus arriving at an account of capabilities through experienced practical imagination). The VWIL student, it is argued, lacks many opportunities characteristic of the VMI graduate. She is taught by an inferior faculty, with fewer Ph.D.'s. Her curriculum is a "pale shadow" of VMI, and her institution has grossly unequal finances. On graduation, she does not join the supportive alumni network of VMI, so important for future hiring. So, she simply lacks many opportunities that the average VMI graduate has. The remedy, however attractive it may appear at first glance, does not pass the test of promoting truly equal capabilities.

This case is of direct significance for the recent Term, and I shall return to it; let me now, however, turn to cases involving social and economic rights.

B. The General Principle: Goldberg v. Kelly

Unlike many nations, the U. S. has never embraced the idea of constitutionally guaranteed welfare rights. During the New Deal, Roosevelt pursued his ambitious social program through the legislature, only to face the hostility of the courts. During the late sixties and early seventies, however, existing constitutional materials were mined for an approach to welfare very much in the spirit of the CA.

A case that neatly captures the era's approach to welfare is Goldberg v. Kelly, 1970. This was a procedural due process case, involving the termination of welfare benefits without an evidentiary hearing. It did not, then, raise the question whether welfare was itself constitutionally

required. Justice Brennan's famous opinion, however, did focus on the unequal burden faced by extremely poor people in the situation under review: they have a right to be heard "at meaningful time and in meaningful manner," but they are made to wait until after benefits are terminated before the hearing, during which time they may have nothing at all to live on. The extremely poor person's situation thus "becomes immediately desperate", and the ensuing focus on daily subsistence is likely to undermine his ability to claim welfare benefits. The fact that welfare is not itself constitutionally required, said the Court, does not remove the constitutional obligation to administer it, once it is legislatively enacted, in an even-handed way, so as to provide substantively equal opportunities to all.

This is as far as Justice Brennan can go, so far as constitutional interpretation is concerned, given the materials at his disposal. Arguing that fair procedures serve important government interests, however, he adds a famous set of T. H. Green-like (or Thomas Paine-like) reflections on the purpose of government:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty...Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community...Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." (1019)

The nation's founding idea, as set forth in the Preamble to the Constitution, is interpreted (correctly, I believe), as that of securing a set of basic opportunities for meaningful activity: that is what is meant, says Brennan, by "promote the general Welfare" and "secure the blessings of Liberty." With that general insight, let us now turn to education.

C. Education and Equality

Education has always been central to proponents of the CA. One cannot have "combined capabilities" without first having "internal capabilities," those developed capacities of mind and body that prepare a young citizen to pursue personal achievement and to play a meaningful role in the life of the community. As we've seen, it was in this area that the CA rose to prominence in the 18th and 19th centuries. Nor is it surprising that education has been the focus of some of the most contested Fourteenth Amendment cases, such as Brown and U. S. v. Virginia. No proponent of the CA holds that everyone must have the same education. But if education is to

have the role of enabling young people to develop their human potential, then the minimum must be ample enough, and delivered in a way that respects the equal entitlement of all citizens.

Plyler v. Doe is a landmark case in this regard. Addressing a challenge to a Texas statute that excluded the children of illegal immigrants from the public schools, the Court held that the Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and that the children of illegal immigrants are plainly included within the meaning of this clause, just as they are also subject to the restrictions of the criminal law. Although precedent made it clear that education, unlike the voting right, does not have the status of a "fundamental right" for Fourteenth Amendment purposes, the majority opinion (authored, again, by Justice Brennan) emphasized that it does have a special status in American life. The analysis used ideas of capability and opportunity.

The discussion of education begins with a fundamental assertion of the equality of persons: "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." Public education, the majority now writes, has a "pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage. Deprivation of education "takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement." Later these points are elaborated. Education is "necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." It is also crucial to individual opportunity and self-development. "Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." Again, the denial of education denies "them the ability to live within the structure of our civic institutions, and foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."

The question what equal entitlement really means has been a difficult one, particularly in the light of the Court's refusal to deem education a fundamental right. In San Antonio School District v. Rodriguez, nine years before Plyler v. Doe, the majority, while acknowledging the special status of education as a necessary condition of the meaningful exercise of other constitutional rights, denied that wealth was a suspect classification and upheld a system under which extremely unequal amounts of funding were given to schools in different districts of the state of Texas. The provision of a "basic minimal set of skills" is the most that might even arguably enjoy constitutional protection, and Texas appears to provide this.

In his famous dissent, Justice Marshall argues that Texas's arrangement "deprives children in their earliest years of the chance to reach their full potential as citizens." While precise numerical equality in the distribution of benefits is not constitutionally required, gross discrimination in distribution is not constitutionally excusable under the Equal Protection Clause. Citing other instances (the right to vote, the right to travel) in which the Court has recognized a fundamental right under the Equal Protection Clause despite the absence of explicit wording to that effect, he urges that education, because of its immense importance for citizenship, deserves that status. Education "directly affects the ability of a child to exercise his First Amendment rights" of free speech and association. It provides the tools necessary for "political discourse and debate." It thus involves a governmental interest of the highest order.

Such ideas of equal entitlement and of the fundamental importance of education did not prevail; and yet they were not utterly infertile. The core ideas were used to extend free suitable public education to children with mental and physical disabilities. In 1972, in Mills v. Board of Education, the U. S. District Court for the District of Columbia ruled in favor of a group of children with mental disabilities who challenged their exclusions from the District of Columbia public schools. In an analysis that self-consciously set out to apply Brown v. Board of Education, the court held that the denial of free suitable public education to the mentally disabled is an equal protection violation.² (Notice that the opinion understands Brown to be about the difference between exclusion and inclusion, not about a ban on special affirmative remedies: indeed, it

understands the Brown framework to suggest, very strongly, the need for such affirmative remedies: children with disabilities will need to be given special support in order to be fully integrated into the public schools.) Moreover, they held that this equal protection violation could not be reasoned away by saying that the system had insufficient funds and these children were unusually expensive to include. "The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child," the opinion argues. Significantly, at this point the opinion cites Goldberg v. Kelly to make the point that the state's interest in the welfare of its citizens "clearly outweighs" its competing concern "to prevent any increase in its fiscal and administrative burdens."³ Similarly, reasons the Court, the District's interest in the education of these children "clearly must outweigh its interest in preserving its financial resources." Like Goldberg, the opinion emphasizes that the inclusion is not a matter of charity, but one of basic justice.

To sum up: The United States is far from having the sort of constitution that the CA would favor. It lags behind some other nations in recognizing the importance of guaranteeing some key social and economic entitlements to all. Nonetheless, we can discern many signs of the CA in our history, as at least one prominent strand in our thinking about what it means to protect a fundamental entitlement for all.

II. THE CA IN THE PRESENT TERM: FAILURES OF "PERCEPTION"

Now to decline and fall. When cases involving central human entitlements come before the Supreme Court, many factors are rightly involved: a Court cannot and should not apply an abstract normative philosophical program. Due respect must be shown to text, precedent, and other legal constraints. Nonetheless, the fact that a case is before the Court frequently means that it is a hard case, where these factors do not determine a clear solution. The 2006 Term contained a number of legally difficult and disputed cases. In such cases, judges need to call on

² Technically, because of the legally anomalous situation of the District, they held that it was a due process violation under the Fifth Amendment and that the equal protection clause in its application to education is "a component of due process binding on the District."

³ 397 U. S. 254 (1969).

their sense of history and context, and their understanding of the human meaning of the concepts involved in the statute and/or constitutional text. As I've argued above, that kind of experienced imagination of particulars, which Aristotle calls "perception," proves especially crucial in cases dealing with the equal rights of groups subject to historical discrimination. A good judge must have a keen sense of what stands between members of such groups and the opportunity to function as fully equal citizens. The 2006 term, despite one striking forward stride, shows a marked turning away from that realistic sort of imagining, in which a judge grapples seriously with all the facts in their historical, material, and social context, toward an obtuse though competent legal formalism and sometimes even toward ideological fantasy. Meanwhile, some eloquent dissents give us examples of CA-style reasoning as striking as any since Justice Brennan's opinions in a previous era.

A. Good news on education: disability and entitlement

This Term includes an education case that strikingly supports human capabilities. In Winkelman v. Parma, the Court held, by a 7-2 vote, that the IDEA (Individuals with Disabilities Education Act) gives rights to parents, as well as children, in respect of their children's education, thus permitting parents of children with disabilities to represent themselves in court when challenging a child's IEP (Individualized Education Program). The case represents important progress in protecting the educational capabilities of children with disabilities on a basis of real equality.

In a sense, this victory for the CA is indicative of its current weakness: for it is only in a statutory case, in which the statute in question is clearly written, allowing little scope for alternative readings, that the CA achieved a victory on behalf of a vulnerable minority. Other groups, as we shall see, were less fortunate.

B. Women's Employment: paternalism and obtuseness

The CA has always focused on the equality of women. Women are both a key topic for modern theorists of this approach and a test for its adequacy, showing its superiority to Utilitarian and minimalist approaches. sWomen's issues show us, as well, the danger in relying on any abstract and formal approach to decision-making: we need to take stock of what actually impedes

women's full social and political equality, and this requires detailed understanding of workplace and family situations.

What is always important in considering women's equality (argues the proponent of the CA), is to ask what they are actually able to do and to be, and to look closely at subtle or hidden impediments to those abilities. One cannot assume that a situation that appears fair on the surface is fair in fact, since many of the obstacles to women's equality lie concealed beneath an attractive veneer of symmetry or alleged fairness. A good judge in such cases must be able to imagine the obstacles women face. This sort of imagining informed U. S. v. Virginia, as also landmark decisions on sexual harassment.

Ledbetter v. Goodyear Tire and Rubber Company is a case in which "perception," the informed and realistic understanding of a complex situation in all its historical particularity, makes all the difference, and "perception" is in short supply in the majority's competent and closely reasoned opinion. Legally, the case boils down to an exercise in analogical reasoning. We have the case to be decided, Lily Ledbetter's claim of sex discrimination in pay. The question before the Court is whether she may sue, given that the pay decisions that took place within the statutory 180-day filing period were not in and of themselves (i.e. in isolation from their history) discriminatory decisions. On one side, we have a group of precedents in which the Court finds that the plaintiff may not sue for events that took place outside the 180-day period. On the other side, we have cases that seem to suggest that in cases of incremental or cumulative discrimination, each new act that forms part of a discriminatory historical pattern is itself a new offense, and thus occasion to bring suit: the history infects the current acts. Justice Alito attempts to show that Ledbetter's case is more like the first group, and to distinguish Bazemore, the leading case in the second group; in dissent, Justice Ginsberg attempts to distinguish the cases of the first group and to show that Ledbetter's case is rightly seen as linked to Bazemore and in light of the contrast announced in Morgan.

Because the entire case turns, and rightly turns, on these contrasting exercises in analogical reasoning, there is no substitute for coming up with a nuanced human understanding of the case. No mechanical formula will tell us from on high which features are the most salient in making comparisons. Perceptions of what factors are salient and what are not require

experienced judgment based on history, context, and a general familiarity with the conditions of human life. In this case, what is required is a sympathetic and realistic understanding of the reality of women's all-too-common experiences in the workplace. In the light of that understanding, certain features of earlier decisions will naturally assume salience and others will not.

Lily Ledbetter was a supervisor at Goodyear from 1979 until her retirement in 1998. For most of that time, she worked as an area manager; most other area managers were men. At first, Ledbetter's salary was in line with that of men performing similar work. Over time, however, her pay declined by comparison to the males in the same job. By 1997, even though by then Ledbetter had considerable seniority, her pay was \$3727 per month; males in the same position made between \$4286 and \$5236 per month. Ledbetter was able to prove at trial (a) that a pattern of discrimination at her plant, not bad performance on her part, accounted for the pay differential, and (b) that during the 180 day filing period her pay was substantially less than that of a man doing the same work. What makes her case a complicated one is that much of the evidence of discriminatory intent comes from a period outside the 180 day period. The majority argues that she would have had to file charges year by year, each time Goodyear failed to give her salary increases similar to those received by men; as it is, she can bring suit only for pay decisions made within the 180 day period, during which time there is slight evidence of discriminatory intent.

This approach, insisting that a wronged employee immediately contest her pay discrimination, "overlooks common characteristics of pay discrimination," as the dissent correctly argues. Pay discrimination is often incremental, and it can take a while to see that discrimination is at work: only the pattern over time shows this clearly. "Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves." Moreover, comparative pay information is often hidden, and it was hidden in this case, since Goodyear kept salaries confidential. It is only when the discrepancy becomes "apparent and sizable" that we could expect the employee to understand the nature of her situation. The Court's decision thus makes it impossible for many victims of discriminatory pay policies to avail themselves of Title VII.

That is the reality. What of the law? The majority points to a group of cases in which the Court held that a suit must be filed within the 180-day period. The opinion treats these cases as analogous to *Ledbetter's*. The dissent argues, however, that they have a feature that renders them importantly distinct: they all involve a "one-time discrete act," and it is also an "immediately identifiable" act. In *Evans* and *Ricks*, the act was a termination of employment; in *Lorance* it was the introduction (public and announced) of a new, discriminatory seniority system. Unlike *Ledbetter*, then, the plaintiffs in these three cases were well aware of the act that was at issue in their cases, and the act was a single thing, rather than an incremental pattern unfolding over time. That is what pay discrimination is like, and it is thus importantly unlike discriminatory firing. The dissent's foregrounding of this difference is underwritten by common sense and imaginative "perception" of the situation of a female employee in *Ledbetter's* situation. The majority's failure to consider it salient appears to result from a rather obtuse formalism, or perhaps from a consciousness that is focused solely on the consequences of the case for employers, rather than for the victims of discrimination.

On the other side, the dissent argues that *Bazemore*, a race discrimination case, gives sufficient analytical material to support the conclusion that in such incremental pay-differential cases, when once the pay scale has been "infected by gender-based (or race-based) discrimination," each new paycheck constitutes a new act of discrimination, "whenever a paycheck delivers less to a woman than to a similarly situated man." Thus the actions that occurred outside the 180 day period are not themselves actionable, but they are relevant to determining whether a system is "infected" by discrimination, and thus to assessing the lawfulness of conduct within the period. (The dissent also makes use of *Morgan's* characterization of the incremental nature of hostile-environment discrimination.) The relevance of *Bazemore* is evident in the light of the experienced "perception" of the nature of incremental pay discrimination. In other words, if you look at *Ledbetter's* case in the light of context and experience, it looks relevantly like *Bazemore*, whereas, if you neglect the real obstacles that stand between women and a vindication of their rights, you can make a formal move that distinguishes it.

What the majority is really saying is that women will often be unable to sue for pay discrimination, and that this is not a problem for the Court to resolve. They have non-discrimination rights on paper, but in reality, they are virtually unable (in this very common type of case) to exercise their rights. If the statute and the precedents were susceptible of only a single reading, then one might conclude that the Court had done its job well, but that a statutory remedy was urgently required. Since it is clear, however, that competent legal analysis can go in either direction, and that there is a large and salient (salient in the context of real life) distinction between the cases on which the majority relies and Ledbetter's case, one must conclude, more critically, that the majority has used analogical reasoning obtusely, in a way that neglects the actual capabilities of women in Ledbetter's position, showing concern only for employers.

The difference between the majority and the dissenters is nicely captured in a difference of intellectual styles. The majority opinion is utterly impersonal, crisp, focused on formal analysis. No attempt is made to come to grips with the difficulty of the problem; Lily Ledbetter and her story fade utterly into the background. In the dissent, by contrast, Ledbetter's story is presented at length, and the common nature of the problem it raises (incremental pay discrepancies) is analyzed as a problem that very often affects women in the workplace. The majority does not even mention the salient fact that Goodyear kept employees' pay secret; in the dissent we learn this fact, a key feature of the case.

Let us now return to the topic of education, and to a case in which the progressive sensibility of Winkelman v. Parma is utterly absent: Parents Involved v. Seattle School District, which drastically curtailed the ability of states and municipalities to use race-based classifications in seeking to end historical discrimination.

C. Bad news on education: curtailing race-based remedies

From its inception, the CA has been linked to a limited and principled defense of affirmative action. Amartya Sen's first article proposing the contemporary version of the approach, "Equality of What?" in 1980, used the example of aid to people with disabilities to show that the simple formula of formally similar treatment was inadequate: if we give the same amount of resources to a "normally" mobile person and a person who uses a wheelchair, the latter will probably not attain

the same level of actual ability to move around in society. To produce equal capabilities, we will need to spend more on the latter than on the former. Although Sen does not emphasize the remedial character of this extra expenditure, one should do so: for the reason that a person in a wheelchair has such difficulty getting around in "normal" settings is that they were long since designed without taking his or her situation into account. If we were operating de novo, we probably would not have to spend more to make all facilities fully available to people in wheelchairs. The proponent of the CA, then, sees a focus on equal capability as a way of choosing policies that remedy past injustice and that do so in a principled and limited way, with a specific goal always in view – people should be truly equal with respect to their basic entitlements. In this way, the CA has advocated spending more on the education of girls in societies in which girls face unequal obstacles to becoming fully equal participants in society: not for reasons of naked favoritism, but because additional spending is required to meet the objective of equal empowerment and capability.

Special affirmative attempts have several elements; these are clearly set forth in Justice Breyer's dissent in Parents Involved. First, there is a "historical and remedial element": special attention is given to minority status in order to redress an unjust situation. Second, they contain an "educational element": that is, they focus on what children are actually able to learn in the integrated setting. Finally, they contain a "democratic element," an interest in "producing an educational environment that reflects the 'pluralistic society' in which our children will live." Whether the remedies concern disability, race, gender, they typically have all three of these.

The CA's approach to affirmative action makes it abundantly clear that there is a salient asymmetry between measures that aim to include a previously excluded or disadvantaged group and measures that aim to exclude or stigmatize: for the goal is fully equal capability, and measures of the first kind may promote it, while measures of the second kind never do. We have seen how an analysis of this sort was at work in a whole range of Fourteenth Amendment cases, prominently including Brown, Loving, and U. S. v. Virginia, defeating the contention that formally symmetrical remedies are all that the equal protection of the laws requires. In all these cases, what had to be done was to take cognizance of the actual abilities of the minorities affected by the arrangements in question: what were they actually able to do and to be? And the answer, in

each case, came back: despite the formal symmetry of the arrangements, people are grossly unequal in what they can do and be. In each case, the Court adopted the CA's account of what equal protection means: not just "fine words on paper" (as Justice Breyer writes of Brown in this year's Seattle case), but equality "as a matter of everyday life in the Nation's cities and schools," equality "in terms of how we actually live."

These cases concerned legal permissibility: they held that states were not permitted to maintain the separate-but-(putatively) equal arrangements in question. Subsequently, where education and race are concerned, the Court has allowed states to work hard to come up with workable measures of a variety of types that are aimed at ending the baneful legacy of segregation. As a result of Parents Involved, most of these race-conscious remedies have been declared violations of the Equal Protection Clause.

The result in the case can be simply described: For the Chief Justice Roberts, writing for the Court, and for Justice Thomas, concurring, special attempts to aid minorities, looking at race as one salient factor, are no longer permitted. Three characteristics of the Roberts opinion are striking in the light of our legal history: the astonishing use of Brown in defense of an analysis that is utterly unlike Brown in spirit and result; the utter failure to confront with perception the history and current reality of racial segregation in the United States; and the obtuse formalism, as an array of technical distinctions are mobilized to avoid confronting historical reality.

Both the Chief Justice and Justice Thomas invoke Brown, as if Brown stood for the proposition that race must never be taken into account in education, no matter whether the reason for so doing is to include or exclude. Of course Brown stood for no such thing: indeed, the very measures that were struck down in Brown and in Loving were race-neutral measures – at least on their face – and they were struck down because they failed to consider how the reality of race inflects the entire experience of participants in the allegedly symmetrical institutions in question. Brown stood for the idea that one should not rest content with obtuse formalism: one must ask what children are actually able to do and to be. Justice Stevens rightly speaks of a "cruel irony" in the Chief Justice's invocation of Brown, saying that it reminds him of Anatole France's observation, "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." Justice Breyer, similarly, showing

in detail how the school measures in question are attempts to "bring about the kind of racially integrated education that Brown...long ago promised," denounces the majority's neglect of the distinction between "exclusionary and inclusive use of race-conscious criteria." It is, he concludes, "a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day."

The second marked characteristic of the Chief Justice's opinion is an indifference to history. In order to assess the Equal Protection issue, we need to know what children have actually been able to do and be in schools with different plans, and in order to know this we need to confront the history of the school districts' attempts to achieve integration in all their detail. What we see when we do this is that both Seattle and Louisville had histories in which segregation was a legal or governmentally fostered reality, and both have grappled in good faith, over time, with a variety of remedies for that history. The present use of race-based criteria is the result of the failure of plans that relied to a greater extent on such criteria, particularly plans involving busing. The attempt has been to give more, rather than less, room for children to be educated in the school closest to their home. Nor do the historical facts suggest that any less race-conscious solution could solve the problem of ongoing segregation. Looking at the history, we must see these efforts as decent if far from perfect continuations of the legacy and promise of Brown, not as similar to race-based measures that stigmatize and exclude. The plurality's rosy picture of an available "color-blind" way of educating children is simply unrealistic in the light of history and current reality.

The conclusion of Chief Justice Roberts's opinion, which removes from local school boards an area of discretion they had long enjoyed, is shocking in the light of the history of Equal Protection jurisprudence. Its shocking character is made clear in Justice Stevens's dissent, which ends with the claim that no member of the Court he joined in 1975 would have supported the result in the present case. It is defended not only by adherence to a specious symmetry but also by attachment to certain formal distinctions, in particular the distinction between de jure and de facto segregation and the distinction between dictum and holding. Justice Breyer shows convincingly that these formal distinctions do not have the significance the Chief Justice attributes to them.

I have suggested that several of the 2006 Term's major cases are characterized by an obtuse formalism: they stand so far back from the history and experience of the parties that crucial facts cannot be seen. The plurality opinion in Parents Involved is, of all this Term's opinions, the most clearly formalistic. (Indeed, Justice Breyer sardonically calls it an "exercise in mathematical logic.") The plurality purport to be balanced and fair-minded: that is what their allusion to the legacy of Brown clearly expresses. Nonetheless, they neglect the asymmetry between exclusion and inclusion that is among the most striking features of the history of race relations in the United States. Neglecting this, they cannot be either accurate or fully fair. Only from a lofty distance could the conclusion be reached that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," a statement whose verbal and intellectual fluency markedly contrasts with its failure to attend to the human salience of the distinction between exclusion and inclusion that its balanced use of words conceals. Contrast Justice Breyer's insistence that "[t]he historical and factual context in which these cases arise is critical, and his detailed analysis of those facts. Contrast, as well, his determination to look for an equality that is not merely a matter of "fine words on paper," but, instead, a matter of "how we actually live."

The legacy of the civil rights movement consists, above all, in a certain quality of imagination, in which the experience of exclusion is understood, in which the measure of its pain and indignity is taken, and in which it is strongly distinguished from governmental approaches that seek to include and remedy. The Chief Justice's opinion reads like a mockery of that legacy.

Conclusion: Capabilities and the Term

From its inception, our nation made a commitment to the protection of human capabilities, on a basis of equality for all. Some of these capabilities receive explicit protection in the constitutional text; others have been recognized as "fundamental rights" through the jurisprudence of the Fourteenth Amendment. Still others have never been securely recognized as constitutional rights, and they have been pursued primarily through legislative action. Nonetheless, such capabilities still raise constitutional issues in some contexts: education has been seen to raise issues of equality, welfare rights have been seen to raise procedural due

process issues. The Court, then, has a significant role to play in protecting human capabilities even where the constitutional text is silent. Much hangs, then, on its orientation to that task. Do the Court's majority and plurality opinions attempt to understand the particular struggles of historically disadvantaged groups with detail and realism, or do they stand so far above history that these struggles can't be seen? Do they ask about the obstacles real peoples, or do they ignore such realities in favor of a lofty formalism?

In the 2006 Term, we witnessed a striking and radical change of course, a shift away from the CA, in majority and plurality opinions at any rate, toward a different type of jurisprudence altogether. It is hard to characterize this new type. The opinions studied here contain elements of utilitarianism and elements, too, of libertarian minimalism. Above all, however, what is particularly striking about these opinions is, as I've said, their lofty formalism, the sense conveyed that history and people do not matter, and that cases can somehow be conveniently resolved technically, without detailed attention to their plights.

The cases I have discussed, however, are difficult cases, cases to which there is no obvious technical solution. In none of them does formalism actually lead to a decisive result, and the appearance of clarity is frequently purchased through an absence of history. In some cases, moreover, the very concepts involved – the concept of equal protection most conspicuously – actively invite the judge to ask questions about what people are actually able to do and to be. The formalist approach, in such a case, is not just incomplete, it is an evasion of the meaning of the constitutional text.

Where does this lofty formalism come from, and what does it mean? In the history of "separate but equal" facilities, from Brown to Loving to U. S. v. Virginia, opinions that focused on formal symmetry were clearly a mask for something worse: a determination to defend entrenched power against the demands of the powerless. Who could possibly say that miscegenation imposes equal disabilities on both black and white? Only someone who stands so far away from real life that the suffering of exclusion cannot be seen. And why might someone stand so far away from real life? Perhaps because of inexperience (although there would usually be some further reason why an educated adult would remain so inexperienced). Perhaps because of a fear of upsetting the social applecart: if one really looks at the excluded, they make demands,

and these demands are often very upsetting. Perhaps out of an asymmetrical cultivation of sympathy: the powerful are more familiar, more like one's friends, and the powerless just don't look as big or as significant. The CA says: don't be like that. Get some experience. Learn about the world. Use your imagination. Ask questions about what people are actually able to do and be, and, when you ask these questions, focus particularly on the special impediments faced by women and minorities.

One hesitates to compare the work of the current Court to such obviously flawed judgments. And yet one can at least observe that the refusal of realistic imagination involved in so many of these disturbing cases -- and, with it, the concealing and comforting embrace of an obtuse formalism -- have the result of entrenching power and privilege, and of marginalizing the weak. If they don't have that purpose, at least they have that effect.

Such an approach is dangerous for our nation, so lofty in its purposes, so deficient, often, in delivering real opportunity to real people.