

---

---

THE SUPREME COURT  
2006 TERM

FOREWORD:  
CONSTITUTIONS AND CAPABILITIES:  
“PERCEPTION” AGAINST LOFTY FORMALISM

*Martha C. Nussbaum*

TABLE OF CONTENTS

I. PHILOSOPHICAL ELEMENTS.....	10
II. THREE CONTRASTS.....	16
A. <i>Utilitarian Welfarism</i> .....	17
B. <i>Libertarian Minimalism</i> .....	21
C. <i>Lofty Formalism (Versus “Perception”)</i> .....	24
III. HISTORICAL SOURCES.....	33
A. <i>Aristotle and the Stoics</i> .....	33
B. <i>Early American Thought: Liberty of Conscience</i> .....	41
C. <i>The Eighteenth Century: Smith on Education, Paine on Social Security</i> .....	46
D. <i>Nineteenth and Twentieth Centuries:         The Capabilities Approach Opposes Utilitarianism and Libertarianism</i> .....	53
IV. THE CAPABILITIES APPROACH IN AMERICAN CONSTITUTIONAL LAW.....	56
A. <i>The Religion Clauses</i> .....	60
B. <i>Separate but Equal</i> .....	64
C. <i>Poverty and Due Process</i> .....	67
D. <i>Education</i> .....	69
V. THE CAPABILITIES APPROACH IN THE 2006 TERM: FAILURES OF “PERCEPTION”.....	73
A. <i>Good News on Environment and Education</i> .....	74
B. <i>Women’s Health and Employment: Paternalism and Obtuseness</i> .....	77
C. <i>Bad News on Education: Curtailing Race-Based Remedies</i> .....	87
D. <i>Religion and Standing: Mere Words on Paper?</i> .....	94
VI. CONCLUSION: CAPABILITIES AND THE 2006 TERM.....	95

---

---

THE SUPREME COURT  
2006 TERM

FOREWORD:  
CONSTITUTIONS AND CAPABILITIES:  
“PERCEPTION” AGAINST LOFTY FORMALISM

*Martha C. Nussbaum\**

A man, without the proper use of the intellectual faculties of a man, . . . seems to be mutilated and deformed in a[n] . . . essential part of the character of human nature. Though the state was to derive no advantage from the instruction of the inferior ranks of people, it would still deserve its attention that they should not be altogether uninstructed.

— Adam Smith<sup>1</sup>

Excellence grows like a young vine tree  
Fed by the green dew,  
Raised up among wise and just people  
To the liquid sky.

— Pindar<sup>2</sup>

It is evident that the best political order is that arrangement in accordance with which anyone whatsoever might do very well and live a flourishing life.

— Aristotle<sup>3</sup>

**W**hat are people able to do and to be? And are they *really* able to do or be these things, or are there impediments, evident or hidden, to their real and substantial freedom? Are they able to unfold themselves or are their lives, in significant respects, pinched and starved?

---

\* Ernst Freund Distinguished Service Professor of Law and Ethics, The University of Chicago (Law, Philosophy, and Divinity). I am grateful to Ryan Long and Nick Nassim for research assistance, and to Scott Anderson, Douglas Baird, John Deigh, Chad Flanders, Andrew Koppelman, Charles Larmore, Gabriel Richardson Lear, Jonathan Lear, Brian Leiter, Eric Posner, Richard Posner, Adam Samaha, Geoffrey Stone, David Strauss, and Cass Sunstein for valuable comments on earlier drafts.

<sup>1</sup> 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 788 (R.H. Campbell et al. eds., Liberty Classics 1981) (1776) [hereinafter SMITH, THE WEALTH OF NATIONS].

<sup>2</sup> PINDAR, *Nemea VIII*, ll. 39–42, in *CARMINA* (C.M. Bowra ed., 2d ed. 1947) (author’s translation).

<sup>3</sup> ARISTOTLE, *POLITICA* 1324a23–25 (W.D. Ross ed., 1957) (author’s translation).

---

---

What about their environment — material, social, and political? Has it helped them to develop their capacities to be active in important areas of life? If people are like Pindar's vine tree, is their environment more like a rich soil tended by wise and just gardeners, or more like an arid soil tended by indifferent gardeners, or gardeners with a restricted conception of their task?

More specifically, to focus on just one part of our larger question that touches on constitutional law: How have the basic constitutional principles of a nation, and their interpretation, promoted or impeded people's abilities to function in some central areas of human life? Does the interpretation of constitutional entitlements yield real abilities to choose and act, or are the constitution's promises more like hollow verbal gestures?

The idea that all citizens in a nation are equally entitled to a set of substantial preconditions for a dignified human life has had a lasting appeal over the centuries in Western political and legal thought — less because intellectuals have favored it than because it has great resonance in the lives of real people.

Appealing though the idea is, however, many things can go wrong when a nation sets up and interprets political principles that define citizens' basic entitlements.

Often, in one way or another, citizens are less like substantially free people, who can choose to act in the ways most pertinent to human dignity, than like prisoners, unable to select modes of activity that are central to a life worthy of human dignity. This happens most obviously when a regime represses choice across the board, curtailing many of the entitlements that are traditionally thought central to such a life.

Sometimes, however, imprisonment is only partial. It does not extend across the entire range of central entitlements, and yet citizens are like prisoners in at least some areas of life — as, for example, when a regime that supports some central opportunities curtails the freedom of religion or the freedom of speech.

Sometimes, imprisonment is partial in a different way: only certain groups are affected. Some (privileged) people are free to select the core set of valuable functions, while other people are not — as, for example, when a hierarchical constitution accords basic entitlements to men and not to women, to whites and not to blacks, to the rich and not to the poor.

Sometimes, these two types of partial imprisonment intersect, as when a regime treats blacks and whites, women and men, equally with respect to voting rights, but denies them equal educational or employment opportunities.

Sometimes, imprisonment is subtle, almost hidden: the words in a nation's constitution may be promising, extending basic entitlements to all citizens on a basis of equality, but the interpretation of these entitlements is so narrow that groups of citizens are not *really able* to se-

---

---

lect some crucial activities. In name, they are equally free, but not in actuality.

For example, a group of citizens might have rights to free speech and political participation, but be deprived of educational opportunities that are necessary to exercise those rights on a basis of equality with others. Or they might have the freedom of religion in name, but be unprotected against some common assaults against their equal dignity as citizens with diverse religious (and non-religious) views of the good life. Or they might be guaranteed protection against discrimination on the basis of sex, but discover that their legal entitlements have been interpreted in such a way as to render the meaningful exercise of that right extremely difficult.

For several centuries, an approach to the foundation of basic political principles that draws its key insights from Aristotle and the ancient Greek and Roman Stoics has played a role in shaping European and American conceptions of the proper role of government, the purpose of constitution-making, and the nature of basic constitutional entitlements.<sup>4</sup> This normative approach, the “Capabilities Approach” (CA), holds that a key task of a nation’s constitution, and the legal tradition that interprets it, is to secure for all citizens the prerequisites of a life worthy of human dignity — a core group of “capabilities” — in areas of central importance to human life.

The purpose of this Foreword is to study the CA as a framework for understanding the foundations of political entitlements and constitutional law, to sketch its history, and to measure against this norm some salient aspects of our tradition of constitutional interpretation, both formerly and in the 2006 Term. My contention is that the United States has had an inconstant relation to the CA, protecting some entitlements very effectively, but shying away from the protection of entitlements in the area of what are usually called social and economic rights — that is, welfare rights. This reluctance (which distinguishes the United States from most of the nations of Europe and the developing world<sup>5</sup>) is made more complicated by disputes over institutional competence and the proper scope of judicial action. Sometimes, when courts refuse to protect a given entitlement (refusing, for example, to give education the status of a fundamental right), the reason may be that judges do not believe that the existing constitution is plausibly interpreted to protect a certain entitlement. At other times, judges may simply oppose the recognition of such a right.

---

<sup>4</sup> The approach has been creatively extended in recent years by developing nations such as India and South Africa.

<sup>5</sup> See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 127–38 (2004).

---

---

At present, some aspects of the CA are deeply entrenched in our legal traditions and well protected by the courts; in such cases, the CA can provide a useful template against which to assess our achievements. In other areas, the CA provides a norm against which to assess what we have neglected and failed to protect.

The 2006 Term provides examples of different kinds: examples that illustrate our success in protecting central human capabilities and other examples (perhaps more striking because of the shift in thinking that they would appear to embody) that show an ominous failure to protect the capabilities of citizens. These latter cases also show a failure to use the sort of reasoning recommended by the CA — a realistic, historically and imaginatively informed type of practical reasoning that focuses on the actual abilities of people to choose and act in their concrete social settings. Although it is too soon to judge the achievements of the Roberts Court in any overall way, the 2006 Term, in its most divisive and controversial cases, seems to show a marked turn away from the CA's understanding of constitutional principles toward a much weaker understanding of the protections such principles offer. In some cases, this turn spells a reversion to selective imprisonment.

This is a new Court, and many people are thinking about its nature and identity. At such a time it would be easy to be drawn to specifics and to the study of emerging judicial styles, particularly of the Court's new members. But it is precisely at such a time that we do best to turn, instead, to first principles, pausing to ask about the deeper goals and ideals embodied (and sometimes not embodied) in our constitutional tradition. This approach gives us a deeper understanding of judicial styles and their relation to larger goals; it also gives us a benchmark for assessing how our legal and constitutional system performs when held up against persuasive norms of justice.

Although this Foreword outlines a theoretical normative approach to the law, it is important to notice from the start that this theoretical approach has deep ties to the common law tradition of legal reasoning.

The CA was an important element in the work of numerous thinkers of the seventeenth and eighteenth centuries, who articulated a mixed Aristotelian and Stoic idea of "natural law" that they derived from their classical education. It was highly influential in the American founding, expressing the ideas of several leading American intellectuals, particularly Thomas Paine and James Madison. It played an active role in our constitutional tradition from the beginning.

In nineteenth-century Britain, the CA was developed by politically influential philosophers John Stuart Mill and T.H. Green, who were both strongly influenced by Aristotelian ideas, in connection with controversies over the provision of public education, sex equality, and the protection of liberty. Meanwhile, in the United States, it began to figure in judicial interpretation. Its influence in this area reached its apogee in the mid- to late twentieth century, when some key constitu-

---

---

tional and statutory provisions were explicitly interpreted along lines suggested by the CA, rather than by its most influential rivals. Other aspects of the approach were enacted through legislation, during the New Deal and, later, during the Great Society. In the aftermath of the Reagan Revolution, legislative support for key aspects of the approach has proven fragile; judicial support in areas once agreed to be the legitimate domain of judicial action appears to be on the wane.

Currently, in the world of international development policy, the CA is becoming increasingly influential as an alternative to utilitarian approaches.<sup>6</sup> In short, the world is embracing the CA in preference to its major alternatives, while our own nation — to judge, at least, from the 2006 Term — is becoming increasingly indifferent to it.

This Foreword describes the CA, shows what makes it attractive as a normative approach to constitutional law, and describes the type of judicial reasoning that it invites. I argue that it is deeply embedded in many aspects of our history and our constitutional tradition — but also consistently opposed by what I shall call “lofty formalism,” an approach to judicial reasoning that is strikingly present in a group of cases from the 2006 Term.

In Part I, I examine the CA as a normative account of political principles. In Part II, I clarify the approach by contrasting it with two rival normative approaches, utilitarian welfarism and libertarian minimalism. I then turn to a procedural contrast and argue that the approach is committed to a definite mode of reasoning about complicated practical situations, and that it is opposed to lofty formalism. In Part III, I examine some of the historical antecedents of the CA, particularly those that influenced our own tradition: the ideas of Aristotle and the Stoics, early American reflections about liberty of conscience, the eighteenth-century ideas of Adam Smith and Thomas Paine, and nineteenth- and twentieth-century neo-Aristotelian liberalism. In Part IV, I identify the CA as one prominent (though never unopposed) strand in U.S. traditions of constitutional reasoning, focusing on the freedom of religion, equal protection arguments against “separate but equal” facilities, procedural protections for welfare opportunities, and access to education. In Part V, turning to the present, I argue that, from the normative vantage point of the CA and its associated model of good reasoning, the 2006 Term contains some markedly positive developments in the areas of environmental protection and disability education, but also a manifest trend in the direction of lofty formalism

---

<sup>6</sup> Through the influential *Human Development Reports* of the United Nations Development Programme and their domestic analogues in many nations the CA now has a widespread influence on the ways in which nations around the world measure their own success and think of their political goals. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1990, available at <http://hdr.undp.org/reports/global/1990/en>.

in the areas of women's rights (employment discrimination and abortion), affirmative action, and, finally, religious equality.

### I. PHILOSOPHICAL ELEMENTS

At the heart of the CA<sup>7</sup> is an idea that it borrows from and shares with most of the world's great religious traditions: the idea that all human beings are precious, deserving of respect and support, and that the worth of all human beings is equal. What respect centrally involves, the CA holds, is supporting human beings in the development and exercise of some central human abilities, especially prominent among which is the faculty of selection and choice.

One might agree with all of this and yet believe that law and government have only a restricted function in human life — *if* one also believed that human beings have all they need in order to live lives worthy of their dignity, or could easily get what they need by personal effort alone, without law and political organization. One might, for example, believe that the world is benign and usually gives everyone what they need, and that other people are benign, supplying to the needy whatever the world of nature does not. But who could believe this, in a world marred by violence, hunger, persecution, and humiliation? The tradition from which the U.S. Constitution emerged placed large constraints on government, to be sure, but the tradition was hardly willing to deny a substantial role for government, or even to minimize its presence.

One might believe, instead, that people usually have what they need, not because the world is benign, but because a life worthy of human dignity does not need anything from the material and social world. The Greek and Roman Stoics, for example, thought that people only needed their inner resources to live complete lives. Malnutrition, rape, humiliation, lack of education, slavery: none of these makes life worse, they thought; none is an insult to human dignity. A slave who is humiliated, beaten, and used as a sexual tool every day has a life fully worthy of human dignity, so long as he or she has the power of moral choice within.<sup>8</sup>

---

<sup>7</sup> For discussions of my version of the CA, see MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000) [hereinafter NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT]; and MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006) [hereinafter NUSSBAUM, FRONTIERS OF JUSTICE]. For Amartya Sen's approach, and the differences between that and my approach, see AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); and Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECONOMICS 33 (2003) [hereinafter Nussbaum, *Capabilities as Fundamental Entitlements*].

<sup>8</sup> See Martha C. Nussbaum, *The Worth of Human Dignity: Two Tensions in Stoic Cosmopolitanism* [hereinafter Nussbaum, *The Worth of Human Dignity*], in PHILOSOPHY AND POWER IN THE GRAECO-ROMAN WORLD 31 (Gillian Clark & Tessa Rajak eds., 2002).

---

---

The Stoic view is not obviously false, the way the “benign world” view is, because it is a normative and not a descriptive view. It asks us, in effect, not to value the body’s satisfactions, the character of social interactions, or, in short, any of the “gifts of fortune” as elements in a life worthy of human dignity. Many people have found the Stoic view attractive as a source of steadiness in an uncertain world. Yet, on the whole, it is difficult to accept it for two reasons. First, the human powers that the Stoics valued are more dependent on the world than the Stoics maintained. The capacities of thought, ethical selection, and will are undermined by malnutrition, humiliation, and lack of education. Second, things outside a person’s rational and ethical faculties also matter: health, bodily integrity, the chance to have relationships with friends, family, and children, the conditions of political action, the freedom to worship in one’s own way, and the ability to live on terms of respect and equality with others. The Stoic view has both an idealized view of the things it values and an excessively narrow view of what has value.

The CA rejects this Stoic doctrine, combining the idea of equal dignity with the idea of human vulnerability. It holds that the most important human powers, including the power of choice itself, are vulnerable and not rock-hard. It also holds that elements outside the control of a person’s rational will have worth and rightly play a part in our assessment of whether that person has access to a life in accordance with human dignity. For these reasons, the CA ascribes an important role to government in human life: government is charged with securing for citizens a comprehensive set of necessary conditions for a life worthy of human dignity.

People come into the world with rudimentary abilities to lead a dignified life. These abilities, however, need support from the world, especially the political world, if they are to develop and become effective. First, they need internal cultivation, usually supplied above all by a nation’s system of education — together with whatever support people receive from their families and other voluntary institutions. I call the developed form of innate abilities “internal capabilities.”<sup>9</sup>

People may be well educated, well fed, and healthy, however, and yet lack meaningful opportunities to use their powers in action. Many people who are capable of speaking freely, in the sense that they have been educated and cultivated, lack the meaningful opportunity to speak freely in public, because their nation has not protected their freedom of speech, or has not protected it equally for all. For women in many parts of the world, it has been a common experience to find oneself full of internal capabilities that one never gets a chance to use,

---

<sup>9</sup> See NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 7, at 84–86.



---

---

because many nations have not given women political rights, property rights, rights over their own bodies, and so forth, or have not given these rights to women and men on a basis of equality. So the job of government, as the CA sees it, is not just to produce internal capabilities, but, instead, to produce what I call “combined capabilities”: internal capabilities combined with suitable external circumstances to select the function in question.

Notice that the political goal is capability, not actual functioning. Government ought to give people a full and meaningful choice; at that point, the decision whether to take up a given opportunity must be their own. Respect for a person requires not dragooning that person into a particular mode of activity, however desirable it might seem.<sup>10</sup> Thus, having meaningful political rights (and *really* having them, not just as words on paper) does not require one to participate in politics. Members of the Old Order Amish have the right to vote, and they choose not to use it. That is just fine. To compel them to vote would be insufficiently respectful of their freedom. Similarly, people who have adequate nutrition available may always choose to fast — for example, for religious reasons. There is, however, a large difference between fasting and starving, and it is that difference that the CA wishes to capture.

There is also a large difference between *really being* in a position to acquire adequate nourishment (but choosing to fast) and being a jobless person in a nation without basic welfare support. This difference, too, the CA wishes to capture. Such a person *might* get adequate nutrition, but only by good luck, or by some humiliating performance (begging, sex work), and not because the government of her nation has, like Pindar’s just gardener, taken cognizance of her situation and accorded her the combined capability to be adequately nourished. A woman who is beaten by her husband in a nation that looks the other way when domestic violence is afoot *might* protect her bodily integrity, but, again, only by some kind of rare luck, or by killing the perpetrator, or by eluding him and taking to the streets.<sup>11</sup> In this case, again, we would not say that the nation in question has protected the woman’s capability to protect her bodily integrity. It is not enough for the law not to block her; it must actively support her.

On the whole, the CA holds that the question we need to ask is what is *adequate* — what basic minimum justice requires. Thus, it employs the notion of a threshold, and does not comment on what justice requires us to do about inequalities over the threshold. It is in

---

<sup>10</sup> Compulsory education of children is an exception to this rule, because children are not yet fully capable of meaningful choice.

<sup>11</sup> Many sex workers in developing countries are escapees from abusive marriages who lack employable skills and the education necessary to acquire them.

that sense a partial account of justice. But there is also a fundamental role for equality in the theory. Because the CA holds that people are fundamentally equal in dignity, it will sometimes require that entitlements be secured to people on a basis of full equality, reasoning that only this equality is compatible with their equal dignity as citizens. Thus, the right to vote, the freedom of religion, the freedom of speech, and quite a few other entitlements, have not been *adequately* distributed unless they have been *equally* distributed. Any other mode of distribution would set up ranks and orders of citizens, failing to treat citizens with equal respect. It is important to notice that the CA is not just about welfare rights: it is centrally concerned with the distribution of entitlements that are almost universally recognized in modern societies.

The CA, however, does not apply this constraint mechanically across the board. In many cases, citizens may have *adequate* capabilities without having fully *equal* capabilities. This will often be the case in areas dealing with property and material welfare. In a nation that recognizes a right to adequate housing, it would seem that such a right could be secured without making certain that everyone has a house of equal value; to attach too much emphasis to the precise cost of every house would be unrealistic; it would probably also show an excessive focus on material goods. To decide whether a given entitlement, such as a right to education or a right to health care, falls in one group or the other will require wise practical reasoning. The question that must be pressed is whether inequality in that area affects the equal dignity of citizens in the public realm.<sup>12</sup> Inequalities that track traditional sources of discrimination, such as race and sex, will be impermissible for that reason. Thus equality in the sense of nondiscrimination and nonhierarchy is always central to the CA. Even if the *content* of an entitlement is that all should have a threshold level of a given good thing, it will not be permissible to implement that entitlement in a way that subordinates one group of citizens.

Several key features of the CA help us distinguish it from rival approaches to constitutional law:

(1) *Entitlement, not Charity*. Support for the specified list of opportunities is not just a kind of handout, or *de haut en bas* charity. It is the right of each and every citizen, and all citizens have equal rights in the specified areas.

(2) *Combined Capability, not Notional Freedom*. The political goal is understood in a rather exigent way: the person has to be *really able* to select the activity in question. All capabilities, then, may require state action for their support; benign neglect is not enough.

---

<sup>12</sup> See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 7, at 291–95.

(3) *Capability, not Satisfaction of Desire.* The CA focuses on what people are actually able to do and be, not on whether their desires are satisfied. Desire is a malleable and inconstant element of people's lives. Desires are often artifacts of what people expect for themselves. Women who are told for centuries that a good woman does not get very much schooling may not demand more education, but that is hardly the end of the question of justice. In general, the absence of rebellion against a deprivation does not justify ignoring it. People may also become accustomed to having more than others, and they may protest if those unequal privileges are curtailed; but their great dissatisfaction does not dispose of the question of equal justice.

(4) *Each Person an End.* Government should not promote the overall good in a way that violates the entitlement of each citizen to a decent life. The idea of "general welfare" must be understood to mean the welfare of *all* individual citizens, not the welfare of some fused organic entity in which distinctions among persons have vanished.

(5) *Plural and Noncommensurable Opportunities.* The opportunities protected by the CA are not simply quantities of some single homogeneous value: they are distinct, plural, and different in quality. Because they are distinct, one cannot satisfy one entitlement by giving people a very large amount of another. For example, one cannot atone for an absence of religious liberty by giving people a very comprehensive health care scheme. The plurality and distinctness of the ends does not mean, however, that they do not often support one another. For example, education supports political activity, the freedom of speech, *and* the ability to protect one's bodily integrity from abuse (because education gives employment options and thus exit options from an abusive marriage).

(6) *Centrality of Choice.* The goal of the CA is capability, because respect for people's power of choice is at the center of the entire approach.<sup>13</sup>

(7) *Special Role of Education.* Because the approach aims at making people *really able* to choose in certain areas of importance, the

---

<sup>13</sup> There is a subtle difference between Aristotle's reasons for making choice central and the reasons I endorse. For Aristotle, choice is central because no action can count as virtuous unless it is chosen, and the best life is a life in accordance with virtue. See ARISTOTLE, *ETHICA NICOMACHEA* 1106a3-4, 1098a16-17 (Ingram Bywater ed., 1890). For me, choice is central because respect for human dignity is central, and respect requires us to give people room to live lives that are not merely dictated by someone else. This difference is closely connected to the difference about pluralism that I discuss *infra* in section II.A. In my view, the group of central capabilities should be understood as specifically political goals, and not as embodying a comprehensive view of the good life; that more comprehensive view will be supplied in different ways by citizens' religious and secular views of life's meaning. People who differ about ultimate meaning, however, can agree (or so I argue) on a group of capabilities as worthy of being promoted for all citizens in a pluralistic society.

formation of powers of perception, thought, and choice plays a special role. If we were aiming to produce pliant tools of an ideology, we might not care very much what education people had, so long as they were docile. The CA, by contrast, aims at a nation of free choosers, and so it matters greatly that they have had the opportunity to learn and develop in ways that open a meaningful world of choice to them. Choice is seen as crucial for citizenship and for options in life generally.<sup>14</sup> Nor is the CA interested in a narrow form of education that produces skilled robots: critical thinking and imagining are central to its aims.

(8) *Need for Imagination.* What the wise decisionmaker must see is how people are really placed, what obstacles stand between them and the substantive, not merely nominal, exercise of their powers. Seeing this requires keen scrutiny of a wide range of social positions. This scrutiny, in turn, requires experience, the study of history, and imagination. Imagination is necessary because no decisionmaker has first-hand experience of the lives of all the different groups in society (women, racial minorities, immigrants) who may need to be considered.<sup>15</sup>

<sup>14</sup> Note, however, that the CA does not insist that the only worthwhile lives are those that actually use the power of choice. In this sense the CA diverges from John Stuart Mill's comprehensive doctrine of autonomy. See JOHN STUART MILL, *ON LIBERTY* 56–74 (Stefan Collini ed., Cambridge Univ. Press 1995) (1859). Lives lived in a rule-bound traditional society, or in an authoritarian profession such as the military, are fully respected by the approach, *so long as* people have enough education first to opt for such lives in a meaningful way.

<sup>15</sup> I have also defended a more specific list of capabilities as necessary conditions of a life worthy of human dignity. This list, which is closely linked to the Universal Declaration of Human Rights, is a template for persuasion in the international community, not a recommendation for any single nation's constitution:

Central Human Functional Capabilities

- (1) *Life.* Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
- (2) *Bodily Health.* Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
- (3) *Bodily Integrity.* Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
- (4) *Senses, Imagination, and Thought.* Being able to use the senses, to imagine, think, and reason — and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.
- (5) *Emotions.* Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional

That is the approach in an abstract outline. Each nation, of course, makes its own list of core entitlements and sets a threshold to establish an adequate level of support. Nations make different decisions about which capabilities will get constitutional protection and which will be left to the majoritarian democratic process. What judges must interpret is the list validated by their own nation, together with the tradition of precedent that interprets it.

## II. THREE CONTRASTS

We can understand the CA more precisely by contrast, holding it up against two rival normative views of the function of government and one rival conception of how one should reason about basic entitlements.

The first normative rival view, which I shall call “utilitarian welfarism,” originated in the classical utilitarianism of Jeremy Bentham. Bentham’s primary interest was in providing the philosophical basis for law,<sup>16</sup> and the ideas he developed eventually had great influence in legal scholarship, particularly through the law and economics move-

---

development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

(6) *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)

(7) *Affiliation*.

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

(8) *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

(9) *Play*. Being able to laugh, to play, to enjoy recreational activities.

(10) *Control over One’s Environment*.

A. *Political*. Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.

B. *Material*. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 7, at 76–78; *see also* NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 7, at 78–80.

<sup>16</sup> *See* Alan Ryan, *Introduction* to UTILITARIANISM AND OTHER ESSAYS 7, 31 (Alan Ryan ed., 1987); *see also* John Stuart Mill, *Bentham*, in UTILITARIANISM AND OTHER ESSAYS, *supra*, at 132, 136–37 (assessing Bentham’s contribution to law).

ment.<sup>17</sup> The other, which I shall call “libertarian minimalism,” has had a steady influence for several centuries and is currently championed by numerous American thinkers. As we shall see, a form of libertarianism seems to be gaining influence within the current Supreme Court. The third rival conception, lofty formalism, is an approach to judgment that has often been found in constitutional interpretation. Although it can be combined with a variety of normative approaches, it is distinctly hostile to the CA.

#### A. Utilitarian Welfarism

Utilitarianism began as a radically democratic view, expressing the basic idea that social decisionmaking should pay attention to everyone and should count the satisfactions of each person the same (rather than weighting them by class and education).<sup>18</sup> Thus, although I argue that utilitarianism actually fails to give the right sort of respectful attention to each person, it is important to bear in mind its underlying commitment to equality. (In that sense, many of my criticisms are internal

---

<sup>17</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003) (setting forth the basic theory of utilitarianism as applied to law); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (discussing the theory’s applicability to constitutional law); see also GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976) (applying utilitarian economic analysis to nonmarket behavior). For the most part, law and economics is a positive, predictive discipline: it assumes that people are rational maximizers of satisfactions, see POSNER, *THE ECONOMICS OF JUSTICE*, *supra*, at 1–2, and advances the hypothesis “that the common law is best explained as if the judges were trying to maximize economic welfare,” *id.* at 4. Generally, the view does not say that the maximization of satisfactions ought to be a social goal. However, Richard Posner does often venture into normative territory: he announces that “efficiency as I define the term is an adequate concept of justice,” *id.* at 6, and remains critical of the privacy jurisprudence of the Supreme Court because it “has no systematic relationship to the economics of the problem,” *id.* at 8. Here, Posner moves very close to the normative theorizing of the classical utilitarians.

<sup>18</sup> The slogan, “each to count for one, and none for more than one,” nicely expresses this underlying commitment to equality. This famous and oft-cited quote is attributed to Bentham by Mill, who quotes it in the form, “everybody to count for one, nobody for more than one.” John Stuart Mill, *Utilitarianism*, in *UTILITARIANISM AND OTHER ESSAYS*, *supra* note 16, at 272, 336 (internal quotation marks omitted); see also DON A. HABIBI, *JOHN STUART MILL AND THE ETHIC OF HUMAN GROWTH* 84 (2001) (suggesting that Mill simply paraphrases Bentham’s “egalitarian statements on hedonism”); cf. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 31 (Hafner Publ’ns Co. 1948) (1789) [hereinafter BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*]. Bentham *does* write: “[E]very individual in the country tells for one; no individual for more than one.” JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 7 *THE WORKS OF JEREMY BENTHAM* 1, 334 (John Bowring ed., 1962). He also writes:

The happiness of the most helpless pauper constitutes as large a portion of the universal happiness, as does that of the most powerful, the most opulent member of the community. Therefore the happiness of the most helpless and indigent has as much title to regard at the hands of the legislator, as that of the most powerful and opulent.

JEREMY BENTHAM, *Constitutional Code*, in 9 *THE WORKS OF JEREMY BENTHAM*, *supra*, at 1, 107.

criticisms, arguing that the view does not fully realize its admirable goal.) Another similarity between the CA and utilitarianism should also be mentioned: like utilitarianism, the CA is an *outcome-oriented* view of justice, rather than a strictly *procedural* view. Under the CA, whether or not a society is just is to be decided by looking at the result of its decisions, namely, what people are really able to do and be, rather than simply looking at whether procedural rules have been correctly applied.<sup>19</sup> In that sense, the CA shares the worldliness and the commitment to an illusion-free confrontation with reality that are among the best features of utilitarianism.<sup>20</sup>

According to utilitarianism, the proper function of government (and of correct choice more generally) is to maximize society's total (or, in some versions, average) utility.<sup>21</sup> As Amartya Sen and Bernard Williams helpfully analyze it, utilitarianism has three parts<sup>22</sup>:

(1) *Consequentialism*. The right choice is the one that produces the best overall consequences (rather than, for example, the one that secures a core group of basic entitlements or rights).

(2) *Sum-Ranking*. The utilities of all people are combined by simply adding them together (rather than, for example, by focusing on the provision of a minimum threshold of utility for all, or on raising the utility level of the least well-off).

(3) *A Definite View of Utility*. Bentham and Henry Sidgwick preferred pleasure; more recent utilitarians prefer satisfaction of desires or preferences.<sup>23</sup> Whatever their specific content, however, all these views see utility as a single homogeneous entity, varying only in quantity.<sup>24</sup> Thus utilitarian welfarism contains a deep commitment to the

---

<sup>19</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 7, at 82–85 (using the example of a criminal trial, where the proceduralist will assess the result by asking whether fair procedures are followed, whereas the outcome-oriented theorist will assess the procedure by asking whether it results, by and large, in convicting the guilty and exonerating the innocent).

<sup>20</sup> Mill, indeed, liked to say that Aristotle was a utilitarian (and Jesus too!). See Ryan, *supra* note 16, at 20. For the truth in this claim, see Martha C. Nussbaum, *Mill Between Aristotle and Bentham*, *DAEDALUS*, Spring 2004, at 60.

<sup>21</sup> See BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 18; HENRY SIDGWICK, *THE METHODS OF ETHICS* 411 (7th ed. 1907).

<sup>22</sup> See Amartya Sen & Bernard Williams, *Introduction to UTILITARIANISM AND BEYOND* 1, 4–5 (Amartya Sen & Bernard Williams eds., 1982). Sen and Williams are both critics of utilitarianism, but this analysis of its elements is accurate, and is independent of the critical points they raise.

<sup>23</sup> See BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 18, at 11 (arguing that pleasure and pain are the standards of right and wrong); see also SIDGWICK, *supra* note 21, at 413 (making clear that he is using the word “happiness” to mean “pleasure”). For an example of the modern preference-satisfaction view, see generally PETER SINGER, *PRACTICAL ETHICS* (2d ed. 1993).

<sup>24</sup> Bentham mentions four dimensions of quantitative variation: intensity, duration, certainty, and propinquity. See BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 18, at 38.

commensurability of all the salient goods in a human life: all are seen as sources of this one homogeneous thing.<sup>25</sup>

The CA takes issue with utilitarianism in several ways.<sup>26</sup> Most centrally, it takes issue with the idea of commensurability: the important goods that it is the business of government to protect or secure are plural and distinct. One cannot promote one good, the CA holds, by giving people a very large amount of another.<sup>27</sup>

At this point, utilitarians will surely say that the satisfaction of desire is a good proxy for all these diverse goods. Moreover, they will claim that desire-satisfaction is a way of thinking about the good that is democratic and respectful of persons: it lets them decide what is worth pursuing. In response, the defender of the CA will say that desire is an unreliable proxy for the good. Desires can be created and extinguished by social manipulation.<sup>28</sup> As for the utilitarians' claim about respecting people, the CA accomplishes that in a more satisfactory way: both by focusing on creating conditions in which genuine choice is possible and by giving people a rich set of opportunities and then letting them choose whether and how to use them.

The CA also takes issue with sum-ranking: individual citizens' lives are not merely inputs into a glorious social total or average. It matters how *each* is placed. Notoriously, utilitarian views approve results that augment the social total or average, even when they give some people extremely miserable lives.<sup>29</sup> (Even slavery, in utilitarianism, is ruled out, to the extent that it is, only by fragile empirical claims to the effect that it does not in fact augment the total or average welfare.) The CA,

---

<sup>25</sup> Sidgwick admits that to some extent utilitarianism departs from common sense, but he argues that this departure is necessary for scientific precision. See SIDGWICK, *supra* note 21, at 424–25; see also MILL, *Utilitarianism*, *supra* note 18, at 278–79 (famously rejecting the thesis of commensurability in favor of the idea that pleasures differ in quality as well as quantity).

<sup>26</sup> See NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 7, at 111–66.

<sup>27</sup> See MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 290–317 (rev. ed. 2001); see also MARTHA C. NUSSBAUM, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality* [hereinafter NUSSBAUM, *The Discernment of Perception*], in LOVE'S KNOWLEDGE 54 (1990).

<sup>28</sup> Many utilitarians reject a simple view of desire-satisfaction, preferring the idea of “informed desire.” Such corrections, however, are insufficient: informational corrections do not weed out “adaptive preferences,” preferences shaped by background social conditions that govern people's likely expectations, nor do they weed out preferences of a malicious sort. One may introduce separate corrections for these problems, but at this point the view ceases to be utilitarian in any genuine sense, since it will be informed by a complex account of noncommensurable goods. See NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 7, at 122–42 (discussing the literature on adaptive preferences and corrections proposed by John Harsanyi and Richard Brandt).

<sup>29</sup> See JOHN RAWLS, A THEORY OF JUSTICE 75–83 (1971) (arguing that we should prefer principles of justice that devote special attention to the situation of the least well-off, and refuse to accept inequalities that do not improve that person's overall situation); see also *id.* at 150–61 (discussing classical utilitarianism).



---

---

by contrast, focuses on the provision to *each* of a basic minimum set of opportunities and freedoms — it sees people’s lives as *separate and distinct*. The opportunities and possibilities of one person’s life are not made richer by giving opportunities to someone else, or even to quite a few other people.

Finally, the CA takes issue with consequentialism. Good consequences can be produced by strategies that subordinate people, give them very miserable lives, or violate their basic rights. Insisting, again, on the separateness and worth of each citizen’s life, the CA refuses to go after good consequences in this way.

A more subtle point about consequentialism concerns its sweeping invasiveness. A government truly dedicated to pursuing the best overall consequences must have some overall view of what is good, and it must impose this view on everyone in order to maximize this good, despite the fact that in every society citizens differ about the good life.<sup>30</sup>

The CA, by contrast, is quite abstemious: it identifies a very short list of core entitlements that should be secured to all citizens as the basic entitlements of a just society. Beyond that short list, the CA does not make sweeping claims about the overall good. It allows people to make their own choices based on their different views of the good life. Moreover, since the core entitlements are understood as *capabilities*, rather than as actual functions or actions, giving one of them to a person does not require him or her to use it.<sup>31</sup>

---

<sup>30</sup> People have different religions and secular views of the meaning and purpose of life. A thoroughgoing consequentialist has to opt for one of these views, and the view usually chosen is one that equates the good with pleasure or the satisfaction of desire. Needless to say, this is not an overall view of the good that all citizens in a religiously and ethically diverse society can share. There consequently seems to be something dictatorial and disrespectful about imposing it on everyone, by suggesting that all major decisions should be made in accordance with the utilitarian principle.

Sen has proposed a version of consequentialism in which rights-violations count as bad elements of the consequence, and thus count against a course that involves them. See Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3 (1982). This form of consequentialism is so non-standard as to be more or less *sui generis*, however. Furthermore, it does not contain any special protection for rights when other consequences (wealth, desire-satisfaction) tell against protecting them.

We can imagine that, on due reflection, a utilitarian might come to accept the idea that respect for one’s fellow citizens requires not making the principle of utility an overall doctrine of good choice. Such a utilitarian could then become a “political liberal,” endorsing a utilitarian set of political principles as the basis for common life and not as a comprehensive doctrine. However, this distinction between the political and the comprehensive is not made by either classical or modern utilitarian philosophers. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (expanded ed. 2005).

<sup>31</sup> See NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 7, at 105 (stating that capabilities should function as a goal and that one should “leave to citizens the choice whether to pursue the relevant function or not to pursue it”); see also NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 7, at 297–98.

### B. *Libertarian Minimalism*

Libertarian minimalism<sup>32</sup> is another normative view that has had considerable influence in law; in constitutional law it has been more influential than utilitarianism.<sup>33</sup> Like utilitarianism, libertarianism begins from some attractive ideas: that people ought to have large areas of free choice around them, rather than being programmed by an intrusive government; that once people have state protection of a very basic type, they can be trusted to set goals for themselves and find the means to those goals. As in the case of utilitarianism, then, the CA applauds some of the deeper ideas behind libertarianism, particularly its defense of the freedom of choice, while parting company with its more detailed understanding of what that freedom is and how it is best promoted.

Libertarians hold that the proper role of government is simply to protect citizens from violation of some very basic rights — above all rights of personal security and property. Beyond this, government governs best when it governs least. Defenders of libertarianism may say that they favor “negative rights,” or “negative liberty,” that is, liberty from state interference, and oppose “positive liberty,” that is, liberty produced by affirmative state action.<sup>34</sup>

The idea of negative rights, however, is confused and confusing. All rights and liberties are liberties *to* do something (they are positive), and they all require something negative as well, namely, the prevention

---

<sup>32</sup> Libertarianism is not the only view that could be described as a form of minimalism; the view I am criticizing here is distinct from a minimalism pertaining to the judicial role (the view that judges should not make ambitious decisions, or should decide incrementally). For a presentation of the latter view, see generally CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

<sup>33</sup> See generally CRAIG DUNCAN & TIBOR R. MACHAN, *LIBERTARIANISM* (2005); RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* (1960); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Since libertarianism was, in effect, the creed of the Reagan administration, its influence on the political process, in rolling back the programs of the Great Society, has been vast. Such views are aggressively put forward by the Cato Institute today. The legal developments that I address in Part IV, such as denial that education has the status of a fundamental right and the narrow interpretation of welfare rights, are at least plausible examples of the influence of this pervasive American way of thinking. See SUNSTEIN, *THE SECOND BILL OF RIGHTS*, *supra* note 5, at 149–71 (analyzing the political developments behind the Supreme Court’s failure to recognize social and economic rights as inherent in the Constitution).

<sup>34</sup> These terms are often traced to Isaiah Berlin, but I am not contending that this loose talk of “negative” and “positive” represents a correct interpretation of Berlin’s distinction. For Berlin, “negative liberty” is the liberty of noninterference, while “positive liberty” is the liberty of self-command — the ability to take charge of one’s life and realize one’s projects. See ISAAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 191, 203–06 (1997). The libertarians I am talking about do not focus on the latter ability.

---

---

of interference by others.<sup>35</sup> I am not free to use my property unless you are prevented, by the state, from stealing or destroying it. Moreover, as proponents of libertarianism themselves soon concede, all valuable liberties require affirmative state action, not just a retreat on the part of the state. There is no system of property rights without laws regulating ownership or without enforceable laws against theft and fraud. There is no bodily security unless people are restrained by law (and effective law enforcement) from crimes against the person — as women suffering from domestic battery have long realized. So libertarians cannot really be saying that the state should keep its hands off of citizens' lives; they see clearly (or they should) that there could be no liberty without state action — and, indeed, without state expenditure. What they are really saying is that these protections and expenditures should focus on a small and specific range of rights — property, contract, bodily security — and that other things should be left to the market and to the personal choices of citizens.<sup>36</sup>

Libertarians therefore need to offer an argument about why some things and not others should be the focus of state action and expenditure; they also need to show that the items on their favored list do not require other items not on their list for their full attainment. Often, the language of negative rights papers over the failure to offer such arguments.

Libertarianism, then, is not a view diametrically opposed to the CA. Unlike utilitarianism, it does not insist on the commensurability of all the valuable things in citizens' lives, nor does it adopt a view of aggregation that allows some people's lives to be used as means to enhance the happiness of other people's lives. In keeping with the individualism of its proponents, it insists firmly that each and every citizen has certain rights, and it is happy enough to assert, at least, that those rights are equal. So, libertarianism looks like not an opponent of the CA but a sliver of it.

What, then, is the difference between the two approaches? Is it only that the CA has a somewhat longer list of the functions that are the proper role of government? That is surely one part of the difference: the CA sees an important role for the state in ensuring citizens adequate education, health care, nondiscrimination, equal employment

---

<sup>35</sup> Even liberties whose most prominent aspect is negative, for example, the freedom from arbitrary imprisonment, cannot be fully analyzed without speaking of their positive element, the freedoms of movement and speech that are curtailed by imprisonment. We do not begin to have a concept of imprisonment, or of what might be problematic about it, unless we think, at the same time, of the entitlements that citizens have in areas such as movement and choice.

<sup>36</sup> See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* (1999).

opportunities, and a threshold level of basic welfare, while libertarians deny that the state properly has a role in these areas.<sup>37</sup>

We can, however, find a deeper difference, by focusing on the idea of capability. The CA asks what position people are *really* in, what people are actually able to do and to be; it does not assume that if there is no obvious state interference with liberty, then all is well. The capabilities valued by the CA typically require both internal preparation and preparation of the external environment, both *internal* and *combined* capability. Libertarian minimalists are typically not very much concerned with internal capability: they do not see education, for example, as integral to the rights of free speech and political participation. They are also not very exigent in looking into the material and institutional circumstances that affect whether a combined capability is present. If there is a system of contract in place, they do not ask whether people are equally able to use that system. If there is a system of criminal law in place, they do not ask whether women face unequal obstacles to their bodily integrity through the reluctance of law enforcement to intervene in domestic violence. So they will often conclude that a liberty has been protected in a situation where an advocate of the CA would conclude that people were not really free to choose or to act in the relevant ways.

In general, libertarians are unwilling to acknowledge the fact that most, if not all, of the liberties they cherish have social and economic necessary conditions. It is very difficult to participate in political life on a basis of equality with others, or to enjoy the freedom of speech, if one has not had access to basic health care, or the opportunity for a decent education. The libertarian operates not only with a shorter list of basic entitlements but also with a thinner account of all of them, ignoring material and institutional conditions that turn mere words on paper into a working reality.

The CA, however, does not grant that two citizens have fully equal liberty if one of them is unable to take advantage of his or her entitlements because of poverty or other social obstacles; understanding liberty as capability, it denies that a liberty is equally present if the “worth of liberty” is dramatically different.<sup>38</sup>

---

<sup>37</sup> Though most libertarians by now concede the value of state provision of education, at one time they did not do so, and they do so somewhat uneasily today. See the discussion of T.H. Green *infra* Part III.D; Green’s political opponents in the education debate were the nineteenth-century equivalents of modern libertarians.

<sup>38</sup> The distinction between a merely nominal liberty and a full-fledged capability lies close to a distinction proposed by John Rawls between “liberty” and the “worth of liberty.” RAWLS, A THEORY OF JUSTICE, *supra* note 29, at 179. Rawls holds that two people may have equal liberties and yet be very unequal in their ability to take advantage of these liberties and opportunities, “as a result of poverty and ignorance, and a lack of means generally.” *Id.*

Libertarians may, and often do, favor ample support for the capabilities of poorer citizens, in the sense that they think poor people should get support from some generous source.<sup>39</sup> So, they believe that poor people ought to have a wide range of central capabilities — it is just that they think this should be a matter of private charity, not a matter of public entitlement. Libertarians frequently also make the shaky<sup>40</sup> empirical claim that leaving things to the market and to private actors will actually work out better than trusting government action, and they often thus feel confident that their minimalism does not leave real people in the lurch. Meanwhile, to make things even more complicated, a supporter of the CA may use the private sector to secure citizens' entitlements, if that seems the best way to do things in a difficult situation.

The difference between libertarianism and the CA, however, is not merely a matter of differing about means to agreed-upon ends. Unlike libertarianism, the CA holds that the purpose of government is to promote a set of core necessary conditions for reasonably flourishing lives, lives worthy of human dignity. If that purpose has not been fulfilled, government is ultimately to blame, and minimal justice has not been achieved. The buck stops there. If government tries a voucher program, or sells a public highway to a private developer, or privatizes the control of a prison system, it is ultimately government that is responsible for the result, and the issue is one of basic justice. Support for citizens' capabilities is not mere charity, it is their right — what they are entitled to expect from the nation in which they live, as a matter of basic justice, and out of respect for their equal worth.

### C. *Lofty Formalism (Versus "Perception")*

Our first two contrasts delineate the CA against rival normative views.<sup>41</sup> But the CA does not simply lay out a normative blueprint for

---

<sup>39</sup> Barry Goldwater always emphasized that his own personal choices were decent ones: for example, while opposing antidiscrimination laws for race (he voted against the Civil Rights Act of 1964 and often criticized the Supreme Court's decision in *Brown v. Board of Education*, 347 U. S. 483 (1954)), he strongly supported integration in his personal choices and was even a member of the NAACP. See Louis Menand, *He Knew He Was Right: The Tragedy of Barry Goldwater*, NEW YORKER, Mar. 26, 2001, at 92 (book review).

<sup>40</sup> See, e.g., INDIAN DEVELOPMENT (Jean Drèze & Amartya Sen eds., 1997). The Indian states provide a handy laboratory for testing the empirical claim, since some have pursued economic growth without direct state action to support the entitlements of citizens, whereas others have pursued direct state action. The field studies conclude that in the areas of health and education, direct state action is essential; on the other hand, too much state control over the economy has had effects on economic growth.

<sup>41</sup> I have omitted Kantian views, which are both important in themselves and important in law. See, e.g., RAWLS, POLITICAL LIBERALISM, *supra* note 30, at 99–106; RAWLS, A THEORY OF JUSTICE, *supra* note 29, at 221–27. My omission does not indicate a lack of respect for such views: entirely the contrary. Indeed, I have drawn on Kant in developing my own version of the

basic justice; it also recommends a distinctive way of reasoning about entitlements: here, too, it has an influential rival.

The CA asks us to figure out what human beings are actually able to do and to be, in the totality of their circumstances: material, political, and social. It therefore cannot be implemented without the ability to understand the manifold ways in which context bears on individual striving. Libertarian minimalists ask only whether some very basic freedoms are legally protected. The CA goes deeper, asking searching questions about whether, and to what extent, people are really in a position to avail themselves of these freedoms; and it directs attention to other areas of choice and opportunity as well, such as education and health. Nations sometimes have attractive political conceptions on paper, without delivering opportunities to their people in the sense of capability, so the partisan of the CA needs to be able to imagine in detail how circumstances of many different sorts bear on the abilities of human beings of various sorts to choose and to act.

Aristotle spoke of an ability that he called “perception,” which he made central to the account of the good political actor and the good judge.<sup>42</sup> Perception is experienced contextual understanding. Aristotle emphasizes that it cannot be delivered by abstract rules: only long experience will yield it. That is why, in his view, a young person cannot be a “person of practical wisdom.”<sup>43</sup> But mere age is not enough either: the person must really be able to see into the details of a case, with what Aristotle calls a “sympathetic understanding” of human matters.<sup>44</sup> Advanced, in part, as an account of what the reasoning of a competent judge is like, Aristotle’s view has great resonance with ideals of judging inherent in the common law tradition.<sup>45</sup>

At this point, the CA encounters another very formidable opponent, lofty formalism. This opponent is not, like the other two, a rival normative view. It is an approach to judgment that has frequently appeared, in both ethics and law, in connection with normative views of

---

CA. See, e.g., NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 7, at 73. See generally NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 7 (arguing that Rawls’s particular Kantian theory does not give adequate guidance on several specific issues, but making those critical points in the spirit of fine-tuning, not rejection).

<sup>42</sup> See, e.g., ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1126b4–5 (“The discrimination is in the particulars and in perception.” (author’s translation)). In the secondary literature, particularly important studies of “perception” in Aristotle are JOHN MCDOWELL, *Virtue and Reason*, in *MIND, VALUE, AND REALITY* 50 (1998); and David Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE’S ETHICS* 221 (Amélie Oksenberg Rorty ed., 1980).

<sup>43</sup> See ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1142a11–30 (contrasting practical wisdom with mathematics, in which a young person can excel).

<sup>44</sup> See *id.* at 1137b17–33.

<sup>45</sup> On the judge, see *id.*, further discussed in NUSSBAUM, *The Discernment of Perception*, *supra* note 27, at 69–70.

different types. Lofty formalism has often been found, and even defended, in constitutional interpretation.

Lofty formalism is the view that good judgment requires standing at a considerable distance from the facts of the case and the history of struggle that they frequently reveal. There are several different reasons why one might consider this distanced judging a good thing. One might believe that a more contextual or situational judgment is bound to be ad hoc or biased, influenced by one's own political sympathies. Or one might think that consistency over time is best served by a distanced procedure, rather than by immersed contextual judgment. Or, more narrowly, one might simply believe that courts are good at judging in this distanced formal way, and not so good at reasoning contextually and historically. In general, lofty formalism is seen by its proponents as ensuring neutrality or absence of bias.<sup>46</sup>

In ethics, formalism often takes the shape of claiming that good ethical judgment applies principles that have been defended in a general way and that have their place in a hierarchy of rules.<sup>47</sup> Often the appeal to rules is defended by arguing that human beings have a strong tendency to make personally biased judgments, and, once again, this contention is plausible in some cases, where no device exists to eliminate bias.<sup>48</sup> Similarly, judicial formalism sometimes takes the form of an appeal to rules: consider, for example, Benjamin Cardozo's description of his longing, early in his judicial career, for "the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience."<sup>49</sup> Christopher Columbus Langdell, similarly, thought of the job of a true lawyer or judge as that of applying fixed principles "with constant facility and certainty to the ever-tangled skein of human af-

---

<sup>46</sup> Thus formalism might be connected with utilitarianism, or with minimalism, or with yet other views, such as an excessively rule-oriented type of Kantianism. I do not contrast the CA with Kant's own views, since I believe that those are not excessively rule-oriented, and in most instances close to the analyses suggested by the CA. For the role of "perception" in Kant, see BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 79–83 (1993).

<sup>47</sup> See generally NUSSBAUM, *The Discernment of Perception*, *supra* note 27.

<sup>48</sup> Such a device might involve cutting the person off from information that would make a biased judgment possible, as in the practice of blind review in academic journals. Rawls's famous veil of ignorance is a similar device: parties choosing political principles behind this "veil" will be unable to favor their own social class, race, or gender. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 29, at 118–23. In a related way, Adam Smith urges the ethical chooser to think from the viewpoint of a "judicious spectator" who is concerned with the case, attentive to all of its features, but personally uninvolved. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 1–43 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759). Smith's ideal is closely related to norms of the good judge in the common law tradition. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 72–77 (1995) [hereinafter NUSSBAUM, *POETIC JUSTICE*].

<sup>49</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

fairs.”<sup>50</sup> Often, however, the judicial search for fixity takes a different form: sometimes fixity is sought in textualism, sometimes in a simple refusal to consider certain aspects of the cases (historical, contextual, or experiential).

There is nothing wrong with using rules and principles when they are good ones, embodying all the pertinent features of a complex situation; such principles are likely to be themselves very complex and close to the ground, since the world is complex and many historical features need to be taken into account in a good principle.<sup>51</sup> Kant seems right that a good decision should be *universalizable*, in the sense that, if all the relevant features were to reappear, the same decision would, once again, be correct.<sup>52</sup> The CA, however, insists that many historical features (for example, the history of discrimination suffered by a group) are highly relevant to judgment; one will, in consequence, rarely find principles that are highly *abstract* and *general*, covering a large number of cases without distinction.<sup>53</sup> Aristotle compares people who rely on such principles to builders who would try to measure a complex curved structure using a straight-edge; he points out that real builders use, instead, a flexible strip of metal that “bends to the shape of the stone, and is not fixed.”<sup>54</sup> The CA does not repudiate universalizability, or the judicious use of rules; it does insist on the relevance of context and history, and thus makes the prediction that useful principles will usually not be highly general or abstract.<sup>55</sup> One reason for study-

<sup>50</sup> C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii (2d ed. 1879).

<sup>51</sup> See R.M. HARE, MORAL THINKING (1981) (defending a type of universal principle that is highly concrete).

<sup>52</sup> See IMMANUEL KANT, *Grounding for the Metaphysics of Morals*, in ETHICAL PHILOSOPHY 1, 30–34 (James W. Ellington trans., Hackett Publ’g Co. 1983) (1785).

<sup>53</sup> On the distinction between the universal and the general, see MARTHA C. NUSSBAUM, *Introduction* to LOVE’S KNOWLEDGE, *supra* note 27, at 3, 38–39; NUSSBAUM, *The Discernment of Perception*, *supra* note 27, at 67–68; and MARTHA C. NUSSBAUM, “*Finely Aware and Richly Responsible*”: *Literature and the Moral Imagination* [hereinafter NUSSBAUM, *Finely Aware and Richly Responsible*], in LOVE’S KNOWLEDGE, *supra* note 27, at 148, 165–66. I make an exception to universalizability for the case of personal love: we should not grant that a clone of the person one loves, even one that is formally indistinguishable from the actual person and that has all the “same” memories, is an adequate substitute for the real person. NUSSBAUM, *Introduction*, *supra*, at 39.

<sup>54</sup> ARISTOTLE, ETHICA NICOMACHEA, *supra* note 13, at 1137b29–33 (author’s translation); see also NUSSBAUM, *The Discernment of Perception*, *supra* note 27, at 69–70.

<sup>55</sup> Thus, my own version of the CA is very friendly to many of Kant’s ethical insights, and I have distanced myself from the more anti-principle versions of Neo-Aristotelian ethics. See Martha C. Nussbaum, *Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior*, in THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 50 (Steven J. Burton ed., 2000).



ing history is that, suitably sifted, it can reveal certain types of principles, those of a type congenial to Aristotle.<sup>56</sup>

What I am calling lofty formalism is, then, not the bare determination to seek rules and principles, which, with suitable qualification, the proponent of the CA applauds; it is the determination to seek principles at a high level of abstraction and distance from history, whether or not that level is the one that best captures the complexity of the case at hand. Throughout the history of human life, people of intelligence and good will have sought such lofty abstractions, perhaps preferring, as Cardozo insightfully sees, a clear, schematic ideal to the sometimes messy and complicated realities of life.<sup>57</sup>

A classic example of the kind of lofty formalism that I reject here is given by Herbert Wechsler in his famous article, *Toward Neutral Principles of Constitutional Law*.<sup>58</sup> Wechsler begins his argument with an unexceptionable contention: courts should not function as a “naked power organ.”<sup>59</sup> Instead, he argues, they should seek criteria that can be publicly articulated, that “transcend any immediate result that is involved.”<sup>60</sup> As his argument continues, however, he makes it clear that he believes that this search for articulable reasons demands that one stand so far away from present circumstances and their history that one will ignore many specific social and historical facts. He insists at one point that his conception of principle does not entail disregarding history.<sup>61</sup> In his reading of the school desegregation cases, he nonetheless makes it clear that good judgment precludes close historical and social understanding: the relevant criteria must be sought at a level of abstraction far above the concrete situation.<sup>62</sup> Above all, judges deciding cases relating to “separate but equal” facilities should refuse themselves concrete empathetic understanding of the special disadvantages faced by minorities, and the asymmetrical meaning of segregation for blacks and whites, in order to ensure that their principles are applied without political bias.<sup>63</sup> The reasoning in *Brown v.*

---

<sup>56</sup> Hare pointed out that novels have similar properties. He suggested that they are “universal prescriptions” of the sort he favored: fine-grained, historically sensitive, detailed, and therefore neither abstract nor highly general. See NUSSBAUM, *Finely Aware and Richly Responsible*, *supra* note 53, at 166.

<sup>57</sup> See CARDOZO, *supra* note 49, at 166.

<sup>58</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>59</sup> *Id.* at 19.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* at 17.

<sup>62</sup> See *id.* at 33–34.

<sup>63</sup> See *id.* at 31–33 (arguing that the reference to the asymmetrical experience of minority children is a defect in the reasoning of the case). Notice that the concrete understanding of this asymmetrical meaning could itself generate an articulable principle, of a more historically situated and more pertinent sort.

*Board of Education*<sup>64</sup> was defective to the extent that it involved considering the experience of minority children in their separate schools. From the correct vantage point, he argues, the central legal issue raised by segregation is not one of discrimination at all: it is the denial of freedom of association, “a denial that impinges in the same way on any groups or races that may be involved.”<sup>65</sup> To say otherwise is mere (illicit) politics.<sup>66</sup>

Wechsler now offers a revealing aside: “In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court . . . he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.”<sup>67</sup> Wechsler suggests, then, that the fact that a white man and a black man cannot eat together in a white restaurant involves a symmetrical burden for both, a simple denial of associational freedom.<sup>68</sup> Besides his strange omission of the fact that whites were always perfectly free to visit black restaurants (a fact that the history of jazz clubs in Harlem would have made famous), his account of the example is oddly obtuse, given his passionate opposition to segregation. Had Wechsler asked with imagination what people are able to do and to be, he would quickly have seen that the meaning of that denial is very different for Houston and for himself: for Wechsler, an inconvenience and, possibly, a source of guilt;<sup>69</sup> for Houston, a public brand of inferiority.

Wechsler claims to state not only the constitutional but also the human meaning of the laws in question. He is wrong on both counts. There is such a lofty distance from the human experience of segregation that the facts, and, hence, the principles, are distorted. The meaning of the denial of associational freedom is not symmetrical. Wechsler’s claim that the issue of segregation is not one of discrimination at all has a bizarre Martian quality, as if he were standing so far above the world that the most salient facts cannot be seen. From this vantage point, furthermore, he fails to notice or to articulate perfectly rational and generalizable constitutional principles that would include the asymmetrical meaning of segregation and its history. Nonsubordination is one such principle.

---

<sup>64</sup> 347 U.S. 483 (1954).

<sup>65</sup> Wechsler, *supra* note 58, at 34.

<sup>66</sup> See NUSSBAUM, POETIC JUSTICE, *supra* note 48, at 87–89 (giving a similar account of Wechsler); see also MARTHA C. NUSSBAUM, *Equity and Mercy*, in SEX AND SOCIAL JUSTICE 154 (1999) (making related observations about narrative and judgment).

<sup>67</sup> Wechsler, *supra* note 58, at 34.

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

<sup>69</sup> Before the Houston anecdote, Wechsler says that segregation is a source of guilt for the Southern white. *Id.* He was not of Southern origin himself, but when the incident took place both he and Houston were working in the South, so it is not clear whether he intends to apply this reference to himself.

Wechsler's obtuseness extends, however, beyond *Brown*. His paragraph on the case ends with two rhetorical questions: "Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male? Is a prohibition of miscegenation a discrimination against the colored member of the couple who would like to marry?"<sup>70</sup> These questions are supposed to receive a quick answer in the negative, and thus to serve as a *reductio ad absurdum* of the mode of reasoning in *Brown*. Therefore, he implies, if following that mode of reasoning (thinking of separation as discriminatory), one is led to treat gender separation and laws against miscegenation as discriminatory (and we all can see how absurd that would be). Once again, his refusal of perception dooms his argument: there are perfectly good reasons for considering enforced separation of the sexes to be, in some cases, discriminatory, and the Court would soon find anti-miscegenation laws to be so.<sup>71</sup>

As I argue in Part V, the lofty formalism exhibited in Wechsler's analysis is prominent in the opinions of the 2006 Term. One aspect of Wechsler's argument, however, proves absent: the sense of inner struggle and "deepest conflict"<sup>72</sup> with which Wechsler, vigorously opposed to segregation, comes to the conclusion that *Brown* is defective.

The case of Wechsler shows how lofty formalism can prove an ally of libertarian minimalism: a simple guarantee of freedom of association is said to be all that the law may require, and this guarantee must suffice to resolve the problem presented by the case. Both lofty formalism and libertarian minimalism, in turn, favor existing power interests: the close scrutiny of history and context is more important for the powerless, who face unequal obstacles to opportunity. Wechsler is basically asking us to look at everyone as if they were placed as are the powerful. That perspective naturally discourages the thought that equal protection requires special ameliorative efforts.<sup>73</sup>

---

<sup>70</sup> *Id.* at 33–34.

<sup>71</sup> See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

<sup>72</sup> Wechsler, *supra* note 58, at 31 (comparing himself to Hamlet!).

<sup>73</sup> Is there a connection between lofty formalism and utilitarianism? In a sense there should not be: utilitarianism focuses intently on suffering, and so it ought to adopt a mode of reasoning that is able to imagine and assess the sufferings of people in many different situations. In practice, however, utilitarianism's commitment to quantitative commensuration of all the pleasures and pains in a given choice situation makes it adopt a mode of reasoning that, like lofty formalism, lies rather far from the experiences of real people. Real people typically do not see their difficulties as quantities of some single homogeneous feeling: they make distinctions between (for example) the pain of a toothache and the pain caused by segregation. Nor do real people typically view their own lives as simply one input into an overall calculus of total utility. They generally consider lives one by one, and they tend not to feel that the pleasure of a dominant group atones for the pain of a minority. According to the utilitarian calculus, it is difficult to find fault with segregation, since it caused pleasure to a larger number of people than it pained. The utilitarian

The proponent of the CA does not deny that a type of formalism is sometimes useful — for example, when one does not have time to consider all the facts of the case fully, when one has little experience of history or life, or when one feels that one's own judgment is especially likely to be biased.<sup>74</sup> The good judge, however, will rarely if ever be in such a position, since judges (as the proponent of the CA sees it) should be selected in part for their wide experience of life and knowledge of history. Good judicial structures will both allow plenty of time to consider the case and mandate recusal in cases of personal bias.

In general, proponents of the CA have seen as a key advantage of the approach its ability to offer a pertinent, context-sensitive account of the disadvantages faced by women, racial and ethnic minorities, and people with disabilities.

The sort of understanding the CA requires is like the understanding a reader derives from reading a social novel (with, of course, attention to historical truth).<sup>75</sup> Aristotle's vocabulary on this point suggests a link to his understanding of the social role of tragedies, which inspire compassion by their depiction of human predicaments.<sup>76</sup> For the Greeks, such literary works were seen as essential formations of citizenship and public debate.<sup>77</sup> Similarly, in the modern era, the reader of Charles Dickens or George Eliot sees how human striving is consis-

---

calculator, then, is required by the theory to adopt a mode of valuation that is lofty, in the sense of being very far from the perceptions of people in their daily lives. Sidgwick acknowledges this gap frankly, saying that this discrepancy between the ordinary person's view and the expert's view is a ubiquitous characteristic of science. See SIDGWICK, *supra* note 21, at 425. Mill, indeed, criticizes Bentham for his lack of sympathetic imagination, calling his view "the empiricism of one who has had little experience." Mill, *Bentham*, *supra* note 16, at 149; see also *id.* at 148 ("[T]he faculty by which one mind understands a mind different from itself, and throws itself into the feelings of that other mind, was denied him by his deficiency of Imagination.").

<sup>74</sup> See NUSSBAUM, THE FRAGILITY OF GOODNESS, *supra* note 27, at 304.

<sup>75</sup> See generally NUSSBAUM, POETIC JUSTICE, *supra* note 48, at 79–121 (discussing the interaction of literature, poetry, and judging).

<sup>76</sup> See, e.g., ARISTOTLE, ARS RHETORICA 1374b2–10 (W.D. Ross ed., 1959) (author's translation) (using *suggnômê*, "sympathetic understanding"); see also ARISTOTLE, ETHICA NICOMACHEA, *supra* note 13, at 1143a19–20 (connecting *suggnômê* with equity, and both with perception of the particular); *id.* at 1110a24–25, 1111a1–2 (discussing *suggnômê* in tragic situations). These passages do not establish clearly that Aristotle is interested in cultivating the imagination; he relies primarily upon experience to produce understanding. However, he argues elsewhere that tragedy is "philosophical" because it brings its spectator into contact with events "such as might happen" in a human life. ARISTOTLE, POETICS 1451a36–b11 (D.W. Lucas ed., 1968). For two accounts of Aristotle's views about the role of the imaginative experience of tragedy in ethical learning, see STEPHEN HALLIWELL, THE AESTHETICS OF MIMESIS 177–206 (2002); and Martha C. Nussbaum, *Tragedy and Self-Sufficiency: Plato and Aristotle on Fear and Pity*, in ESSAYS ON ARISTOTLE'S POETICS 261 (Amélie Oksenberg Rorty ed., 1992).

<sup>77</sup> There is a huge historical literature on this point (which, in a sense, is obvious, given that tragedies were staged at major civic festivals attended by all citizens, and often addressed issues central to the politics of the day). For recent discussions, see generally J. PETER EUBEN, CORRUPTING YOUTH: POLITICAL EDUCATION, DEMOCRATIC CULTURE, AND POLITICAL THEORY (1997); and GREEK TRAGEDY AND POLITICAL THEORY (J. Peter Euben ed., 1986).

tently hedged in by a variety of social obstacles deriving from class, gender, and social norms, and how unequal access to law is often the result of unequal social placement. When we see, for example, how difficult it is for David Copperfield to get even a minimal education, when we see how Stephen Blackpool's access to divorce and to employment rights is blocked by poverty, when we see how Dorothea is unable to use all her talents because of expectations connected to her gender, we have begun to see how societies form the capabilities of their members, often in unfair ways.

The good judge, as the CA imagines that role, will read a case the way an attentive reader reads such a novel, asking what the people are actually able to do and to be, what the history of their efforts is, and whether the freedoms and rights at issue are real for them, or distant and unavailable abstractions.<sup>78</sup> Because, as Aristotle emphasizes, such understanding is not conveyed by rules of the highly general and abstract type, the jurisprudence of the CA may sometimes look piecemeal, rather than elegant.<sup>79</sup> Nothing less, however, is required if the judgment is to present an accurate picture of people's substantive freedoms.

---

<sup>78</sup> During his Supreme Court confirmation hearings before the Senate Judiciary Committee, Justice Breyer alluded to the understanding a judge might derive from reading novels (his example was Charlotte Brontë's *Jane Eyre*). See NUSSBAUM, POETIC JUSTICE, *supra* note 48, at 79. When you see a city, he said, you might think that all the people are the same, but a novel shows you that they are not:

Each one of those persons in each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, family, work, lives — and you get that sense out of the book. And so sometimes I've found literature very helpful as a way out of the tower.

*Id.* More than two centuries earlier, Adam Smith — whose economic views are discussed in section III.C, *infra* pp. 46–53 — published one of the great works on this topic in the Western philosophical tradition. See SMITH, THE THEORY OF MORAL SENTIMENTS, *supra* note 48. Throughout his work, Smith emphasizes the idea that the good judge, in ethical matters, ought to be a “judicious spectator” of the predicaments of which he writes: not unfairly partisan, but close enough to the parties and their sufferings to see what their problems are and what they are able to do. Frequently he compares the stance of the judicious spectator to that of someone who reads a narrative or watches a play: a person who follows with keen interest the plights of the characters, who feels a wide range of emotions about their fate, but who does not permit himself to judge their plight with personal spite or favor. See MARTHA C. NUSSBAUM, *Steerforth's Arm: Love and the Moral Point of View*, in LOVE'S KNOWLEDGE, *supra* note 27, at 335, 338–46 (analyzing the pertinent passages from Smith's *Theory of Moral Sentiments*). The contrast between lofty formalism and the CA might be summarized as a contrast between the view of life from “the tower” and the experienced perception characteristic of the experienced (literary) reader.

<sup>79</sup> Thus, some of the best writers on Aristotle speak of his view as insisting that ethics is not “codifiable,” in contrast with views that hold that ethical rules and principles can be fixed in advance of the particular case. See, e.g., MCDOWELL, *supra* note 42, at 72–73. McDowell is difficult to interpret, but I believe that he does not reject Kantian universalizability here, but insists that highly general and abstract rules given before the fact are rarely adequate guides to choice.

---

---

Good judgment, so described, has deep links with practices of analogical reasoning embedded in the common law tradition. Good analogical reasoning requires perceiving what features of a case are salient, and this ability, in turn, requires an ability to grapple with the manifold features of a concrete case in all their historical and contextual complexity. The Aristotelian mode of reasoning requires experienced judgment, and is utterly opposed to a formalistic imposition of some abstract algorithm on the material of life. Therefore, the Aristotelian judge would be likely to take the part of the experienced common law judge, rather than the more mechanical decision procedures characteristic of libertarian minimalism, utilitarianism, and formalisms of yet other types.

### III. HISTORICAL SOURCES

The CA is a modern view, but it has a long history. This history, fascinating in itself, is also pertinent to the CA's role in constitutional law, since it shows that the CA had a distinct presence on the American scene from an early date — never uncontested, but a force to reckon with. The following highly selective sketch singles out themes that turn out to be prominent in the cases of the 2006 Term.

#### A. Aristotle and the Stoics

To talk about Greek and Roman thought in the context of modern American law might seem oddly remote, and yet the historical sources of the modern ideas I discuss continue to be highly salient. Until very recently, around the mid-twentieth century, more or less all future judges and politicians had a lengthy classical education. This Foreword, then, studies the early conversation partners of a host of later thinkers — prominently including the Framers of our Constitution.

The political and ethical thought of Aristotle is the primary source for the CA. Aristotle believes that political planners need to understand what human beings require for a flourishing life,<sup>80</sup> and sees his writings as guides for politicians.<sup>81</sup>

Because choice is all-important for Aristotle — no action is counted as virtuous in any way, unless it is mediated by a person's own thought and selection<sup>82</sup> — he does not instruct politicians to make everyone perform desirable activities. Instead, they are to aim at producing capabilities or opportunities.<sup>83</sup> Aristotle is no liberal, but he does

---

<sup>80</sup> ARISTOTLE, *POLITICA*, *supra* note 3, at 1323a15–22, 1325a7–15.

<sup>81</sup> See ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1179a33–b2.

<sup>82</sup> See *id.* at 1106a3–4, 1098a16–17.

<sup>83</sup> For a discussion of the evidence bearing on this contention (including arguments about the correct textual readings and translations of disputed passages), see Martha Nussbaum, *Nature*,

think that satisfaction achieved without choice is unworthy of the humanity of human beings.<sup>84</sup> And he understands that, even where no prohibitions exist, impediments to meaningful choice might be supplied by lack of education, or conditions of labor that make it impossible to inform oneself or to reflect.<sup>85</sup> Aristotle claims that political planning should focus “above all” on the education of the young, since the neglect of education does great harm to political life.<sup>86</sup> Repeatedly in his writings he identifies different levels of human capability (or *dunamis*), roughly corresponding to the distinctions I have introduced (innate capabilities, developed internal capabilities, and, finally, combined capabilities).<sup>87</sup>

Aristotle is particularly adamant that the pursuit of wealth is not an appropriate overall goal for a decent society.<sup>88</sup> Wealth is but a means to an end, and the human values that should guide political planning would be utterly debased and deformed were wealth to be understood as an end in itself.<sup>89</sup> Nor does he favor any account of the overall end of political planning that posits some single homogeneous goal varying only in quantity.<sup>90</sup> Although utilitarianism as such is un-

---

*Function, and Capability: Aristotle on Political Distribution, in* OXFORD STUDIES IN ANCIENT PHILOSOPHY 145 (Julia Annas & Robert H. Grimm eds., supp. vol. 1988).

<sup>84</sup> ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1145b8–20.

<sup>85</sup> Thus, Aristotle excludes manual laborers from citizenship on the grounds that the conditions of their labor preclude education. ARISTOTLE, *POLITICA*, *supra* note 3, at 1328a23–35, 1328b38–1329a2, 1278a15–38.

<sup>86</sup> *Id.* at 1337a10–11 (author’s translation). Aristotle’s conception of education’s contribution is shaped by his univocal conception of the constituents of the best human life, and is thus subtly different from the one that I would favor.

<sup>87</sup> Aristotle’s use of the vocabulary of *dunamis* is unusually complex and requires clarification. A typical example of the first meaning (“innate”) is found at ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1105b20–28, which contrasts *dunamis* with a developed capacity. But in other passages, *dunamis* is clearly used in the sense of a developed capacity. *Id.* at 1094b2, 1101b13, 1143a28. Finally, the term is sometimes used when the capacity is already active, and thus the conditions for its activation must be present. See ARISTOTLE, *DE ANIMA* 412a1–413a10 (W.D. Ross ed., 1956) (defining *psuchê* as the active organization of a body that has life, potentially, or *dunamei*). Of course, as Aristotle immediately points out, one is alive only when the body is *actually* alive, thus meeting all the “external” conditions for the presence of *psuchê*. See *id.*; see also Martha C. Nussbaum, *Commentary on ARISTOTLE, DE MOTU ANIMALIUM* 271, 363–64 (Martha Craven Nussbaum trans., 1978) (discussing ARISTOTLE, *DE MOTU ANIMALIUM* 702a30–31, 703b29–32).

<sup>88</sup> See ARISTOTLE, *POLITICA*, *supra* note 3, 1256a1–1258b8.

<sup>89</sup> See *id.*

<sup>90</sup> See generally NUSSBAUM, *THE FRAGILITY OF GOODNESS*, *supra* note 27 (describing Aristotle’s approach of favoring practical perception over scientific reasoning as an aid to complex public and personal decisionmaking); NUSSBAUM, *The Discernment of Perception*, *supra* note 27; HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1994) (providing a fine account of the nonutilitarian aspects of Aristotle’s conception, which contrasts Aristotle’s view explicitly with that of the British utilitarians). Key passages are found in ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1096b23–5 (insisting on the nonhomogeneity of our

known to him, he is aware of hedonist views that identify the good with the greatest net balance of pleasure over pain, and he makes a range of arguments against hedonism that remain valid today against Benthamite forms of utilitarianism.<sup>91</sup> With Mill, Aristotle holds that pleasures differ in quality as well as quantity;<sup>92</sup> he also argues that some pleasures are bad and should not count at all in favor of a project; that some choiceworthy human activities, such as risking one's life for one's country, are not pleasant;<sup>93</sup> that there are other activities, such as seeing, remembering, and knowing, that we would choose even if they brought no pleasure.<sup>94</sup> In general, he argues that pleasure and the satisfaction of desire are utterly unreliable as guides to what is to be promoted in society, since people learn to derive pleasure from all sorts of things, good and bad, depending on the type of education they have had.<sup>95</sup>

Any decent political plan, then, would seek to promote a range of diverse and incommensurable goods, involving the unfolding and development of distinct human abilities. Moreover, such a plan must seek to promote these goods not just for some overall aggregate group, but for each and every citizen. Aware of Plato's corporate state, where the overall good of society was allegedly promoted in ways that permanently subordinated one class of citizens, Aristotle rejects the idea of corporate flourishing as mistaken: "A city is by nature a plurality. . . . The good of each is what preserves each."<sup>96</sup> Elsewhere he observes that there are some concepts that can apply to a whole without applying to its parts: "even number" is such a concept. Human flourishing or *eudaimonia*, however, he argues, is not like "even number": it applies to a whole (like a city-state) only if it applies to "all or most" of its members individually.<sup>97</sup>

Many political thinkers in the much later liberal tradition have had similar insights. Aristotle's contributions are of continuing importance in political thought because he couples an understanding of choice and its importance with an understanding of human vulnerability. A great biologist, and the son of a doctor, Aristotle is never tempted to view

---

ends). See also *id.* at 1095b16–17 (condemning as crude or base the idea that pleasure is the end of life); *id.* at 1174a1–4 (arguing that we would not choose the life of contented children).

<sup>91</sup> See NUSSBAUM, *The Discernment of Perception*, *supra* note 27 (discussing the contemporary relevance of Aristotle's arguments).

<sup>92</sup> See ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1173b28–31, 1175a23–1176a3 (arguing that each pleasure is bound up with the activity that it completes).

<sup>93</sup> *Id.* at 1117b10–16.

<sup>94</sup> *Id.* at 1174a4–8; *cf. id.* at 1097b1–4 (arguing that we choose virtue, reason, and some other valuable things for their intrinsic value, as well as for the sake of happiness).

<sup>95</sup> *Id.* at 1173b28–30, 1175b24–29, 1176a21–29.

<sup>96</sup> ARISTOTLE, *POLITICA*, *supra* note 3, at 1261a17–b10 (author's translation).

<sup>97</sup> *Id.* at 1264b15–22.



the human being as a disembodied creature. He advises his students not to view with disgust the animal body and the unattractive parts from which it is made.<sup>98</sup> He understands, and he tells his students, that a human being is a kind of animal.<sup>99</sup> Human beings, like all animals, move from birth through infancy, childhood, maturity, and, if they live long enough, old age, with all its infirmities.<sup>100</sup> Thus the human life cycle brings with it periods of heightened vulnerability. Discussing occasions for compassion, Aristotle offers a remarkable list of such vulnerabilities: deaths, bodily violations, bodily infirmities, old age, illnesses, lack of food, friendlessness, having few friends, being separated from one's friends and relations, ugliness, weakness, deformity, getting something bad from a source from which you were expecting something good, having something good happen only after the worst has happened, having no good fortune at all, or, finally, not being able to enjoy good fortune when it does come.<sup>101</sup> So Aristotle clearly knew human life and its vulnerabilities.

Aristotle's understanding of human vulnerability led him to believe that government needs to address it by thinking about things like the purity of a water supply and the quality of air, as well as education.<sup>102</sup> Vulnerability cannot be removed altogether, of course, but Aristotle does lay emphasis on the way in which some cities support human weakness better than others. A scheme he particularly likes is the provision of nutrition by government, in the form of communal meals that promote fellowship and friendship as well as health. Richer people would pay for the costs of their own meals, but the participation of poor people would be supported by the city.<sup>103</sup> Therefore, fully half of the city's land should be publicly owned in order to subsidize both public meals and civic festivals.<sup>104</sup> These are some of the consequences Aristotle derives from his idea that the job of government is to

<sup>98</sup> ARISTOTLE, PARTS OF ANIMALS 644b21–645b1 (A.L. Peck trans., 1961).

<sup>99</sup> *Id.* at 639a25.

<sup>100</sup> Aristotle devoted an entire treatise to the topic of old age, another to the topic of sleep, another to memory and failures of memory. These treatises are typically gathered under *Parva Naturalia*, a title added long after the pieces were originally published. See, e.g., ARISTOTLE, PARVA NATURALIA (W.D. Ross ed., 1955) (includes Greek text and commentary in English).

<sup>101</sup> See ARISTOTLE, ARS RHETORICA, *supra* note 76, at 1385b11–1386b7.

<sup>102</sup> See ARISTOTLE, POLITICA, *supra* note 3, at 1330b11–17 (“The things that we use most of and most frequently where our bodies are concerned, these have the biggest impact on health . . . . Water and air are things of that sort. So good political planning should make some decisions about these things.” (author’s translation)); see also Martha Nussbaum, *Aristotelian Social Democracy*, in LIBERALISM AND THE GOOD 203 (R. Bruce Douglass, Gerald M. Mara & Henry S. Richardson eds., 1990) (discussing this and related passages).

<sup>103</sup> ARISTOTLE, POLITICA, *supra* note 3, at 1330a3–9.

<sup>104</sup> Even land that is privately owned is to be available for use by people in need. Elsewhere he mentions using produce one needs from farms that are privately owned in one’s area. *Id.* at 1263a30–38; see also *id.* at 1330a1–2.

make all citizens capable of leading a flourishing life in accordance with their choice.

I have mentioned citizens. One of the great defects of Aristotle's thought lies here. Aristotle is happy with a system like that of the Athens of his day, in which only free adult nonimmigrant males were citizens and in which slavery was practiced. Indeed, he criticizes Athens for being too inclusive, since it admitted to full citizenship people who perform manual labor and who therefore, he thinks, cannot get an education.<sup>105</sup> What Aristotle seems to lack is the basic idea of human equality, of a worth all humans share across differences of gender, class, and ethnicity.

Stoicism remedied this deficiency. The most influential school of ethical and political thought in Greco-Roman antiquity, and perhaps the most influential philosophical school at any time in the Western tradition, Stoicism exercised such a widespread sway, particularly in Rome, that every educated person, and many who were not educated, were at some level guided by it.<sup>106</sup> Roman Stoic authors such as Cicero, Seneca, Epictetus, and Marcus Aurelius were more influential in the seventeenth and eighteenth centuries than Plato or even Aristotle.<sup>107</sup>

<sup>105</sup> Aristotle's lack of concern with questions of inclusion and exclusion is all the odder in that he was himself a nonresident alien in Athens, lacking civil rights, even the right to own property. (A student of his had to handle the financial arrangements for his school.) See David Whitehead, *Aristotle the Metic*, 21 PROC. CAMBRIDGE PHILOLOGICAL ASS'N 94 (1975) (arguing that Aristotle did not have special privileges of ownership distinguishing him from ordinary metics).

<sup>106</sup> For a study of the philosophical learning of average Romans, arguing that even quite nonintellectual people are expected to be able to understand jokes and references based on philosophical allusions, see Miriam T. Griffin, *Philosophical Badinage in Cicero's Letters to his Friends*, in CICERO THE PHILOSOPHER 325, 327–30 (J.G.F. Powell ed., 1995). Cf. Miriam Griffin, *Philosophy, Cato, and Roman Suicide* (pts. 1 & 2), 33 GREECE & ROME 64, 191 (1986) (discussing the profound influence of Stoicism in shaping Roman attitudes toward death and suicide). Even when Christianity replaced Stoicism as the daily creed of the Roman Empire, it was a Christianity profoundly influenced by Stoicism, and the whole history of subsequent Western thought in the European Christian tradition bears the impress of Stoic philosophical ideas. See generally 1 & 2 MARCIA L. COLISH, *THE STOIC TRADITION FROM ANTIQUITY TO THE EARLY MIDDLE AGES* (1985). Both major Greek Christian authors such as Clement of Alexandria and Latin authors such as Augustine are steeped in Stoicism. For a discussion of Clement's familiarity with Stoicism, see Mark Julian Edwards, *Clement of Alexandria*, in THE OXFORD CLASSICAL DICTIONARY 344, 344 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996). Augustine quarrels with the Stoics, showing a detailed knowledge of their doctrines, in many places, not least in Book XIV of *The City of God*. See 4 SAINT AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* 258–407 (Philip Levine trans., 1966). For discussion of early Christian writers, see 1 COLISH, *supra*, at 7–224. Augustine is reviewed in *id.* at 142–238; his use of the Stoic doctrine of natural law is covered in *id.* at 159–165.

<sup>107</sup> See Martha C. Nussbaum, *Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy*, 8 J. POL. PHIL. 176, 179 (2000) [hereinafter Nussbaum, *Duties of Justice*] (discussing Cicero's influence on Grotius, Pufendorf, and Adam Smith); see also *infra* section III.C, pp. 46–53 (discussing the influence of the Stoics on the American Founders). On Kant's debt to the Roman Stoics, see Martha Nussbaum, *Kant and Stoic Cosmopolitanism*, in PERPETUAL PEACE: ESSAYS

The Stoics taught that every human being, just by virtue of being human, has dignity and is worthy of reverence.<sup>108</sup> The human ability to perceive ethical distinctions and to make ethical judgments is held to be the “god within” and is worthy of boundless reverence.<sup>109</sup> Ethical capacity is found in all human beings, male and female, slave and free, high-born and low-born, rich and poor. Wherever this basic human capacity is found, then, it must be respected, and that respect should be equal, treating the artificial distinctions created by society as trivial and insignificant.<sup>110</sup> This idea of equal respect for humanity lies at the heart of what the Stoics called “natural law,” the moral law that should provide guidance even when people are outside the realm of positive law.<sup>111</sup>

Because their thinking was not bounded by the walls of the city-state, the Stoics developed elaborate doctrines of duties to humanity, including proper conduct during wartime.<sup>112</sup> These ideas had a forma-

---

ON KANT'S COSMOPOLITAN IDEAL 25, 36–47 (James Bohmann & Matthias Lutz-Bachmann eds., 1997). On Kant's reading (which includes a single dialogue of Plato's that has been translated into German and partially rewritten as an original work by Moses Mendelssohn, but, otherwise, focused on Roman works), see Klaus Reich, *Kant and Greek Ethics* (pts. 1 & 2), 48 MIND 338, 446, at 338–39, 345–46, 447–60 (W.H. Walsh trans., 1939). As Ernst Cassirer puts it, “[Kant] seems to have been affected hardly at all by the spirit of Greek, which was taught exclusively by use of the New Testament.” ERNST CASSIRER, *KANT'S LIFE AND THOUGHT* 15 (James Haden trans., 1981). Needless to say, these are but a few examples of my point.

<sup>108</sup> The texts of the ancient Greek Stoics survive only in fragments, unlike the later Roman texts. For discussion of the major texts on these ideas, see Nussbaum, *Kant and Stoic Cosmopolitanism*, *supra* note 107. Particularly central is Seneca's *Moral Epistle 41*. See SENECA, AD LUCILIUM EPISTULAE MORALES 108–10 (L.D. Reynolds ed., 1965). Two typical works arguing for the equal entitlement of a previously excluded group are Musonius Rufus, *Should Daughters Get the Same Education as Sons?*, reprinted in THE SLEEP OF REASON 314 (Martha C. Nussbaum & Juha Sihvola eds., Martha C. Nussbaum trans., 2002); and Musonius Rufus, *That Women Too Should Do Philosophy*, reprinted in THE SLEEP OF REASON, *supra*, at 316.

<sup>109</sup> SENECA, *supra* note 108, at 108–10. Christian authors influenced by Stoicism often call this power “conscience.” See discussion of Roger Williams, *infra* section III.B, pp. 41–45.

<sup>110</sup> For one eloquent and typical expression of this idea, see MARCUS AURELIUS, MEDITATIONS 10 (C.R. Haines trans., 1916). Marcus, a Roman emperor who was also a Stoic philosopher, says that even the distinction between oneself and one's enemies ought to be overcome by the thought that we all possess a similar “morsel of the divine.” *Id.* at 27. On the artificiality of distinctions of rank, see, for a typical utterance, SENECA, *supra* note 108, at 114–15 (urging Lucilius not to define himself in terms of social class, “[w]e should look not at where people come from, but at where they are going” (author's translation)). See also *id.* at 93–96 (noting the importance of not deferring to intellectual authority: each person should strive for truth within him or herself).

<sup>111</sup> For one typical use of the phrase natural law, see CICERO, ON DUTIES 109–10 (M.T. Griffin & E.M. Atkins eds. & trans., 1991); *cf. id.* at 21–22 (arguing that the law of nature gives all human beings moral duties to all other human beings).

<sup>112</sup> See *id.* at 14–18. More than most, the Stoics meant what they said: they campaigned for the equal education of women, see Rufus, *Should Daughters Get the Same Education as Sons?*, *supra* note 108, and their ranks included a former slave (Epictetus), a foreigner from the far reaches of the Empire (Seneca, born in Spain), and various women, not to mention Cicero himself, whose non-aristocratic origins are a constant theme in his writings. Rufus's ideas appear to be based on

tive influence on modern founders of international law such as Grotius, Pufendorf, and Kant.<sup>113</sup>

The idea of human dignity, and of its boundless and equal worth, is the primary contribution of Stoicism to the CA. What political principles and actions does this idea suggest? Cicero and the Stoics hold that human dignity should never be abused by making it subject to the arbitrary will of another. Because human beings have dignity, one must not treat them like objects, pushing them around without their consent.<sup>114</sup> And because human dignity is equal, it is abhorrent to set up ranks and orders of human beings, allowing some to dominate others.<sup>115</sup>

The Romans themselves derived a range of different political lessons from these ideas. Cicero, a passionate defender of the Roman Republic in its waning days, believed that human dignity required republican institutions through which people could govern themselves without arbitrary tyranny. He defended the assassination of Julius Caesar in those terms, and he risked (and ultimately lost) his life in defense of the Republic. Many of Cicero's friends fully agreed with him about the Republic, whether they were Stoics or not,<sup>116</sup> and two anti-imperial movements during the early years of the Empire had Stoic roots.<sup>117</sup>

---

lost works by earlier Greek Stoics. See Martha C. Nussbaum, *The Incomplete Feminism of Musonius Rufus, Platonist, Stoic, and Roman*, in *THE SLEEP OF REASON*, *supra* note 108, at 283.

<sup>113</sup> This influence is traced in Nussbaum, *Duties of Justice*, *supra* note 107; and Nussbaum, *Kant and Stoic Cosmopolitanism*, *supra* note 107. See also MARTHA C. NUSSBAUM, *THE COSMOPOLITAN TRADITION* (forthcoming) (on file with the Harvard Law School Library).

<sup>114</sup> See CICERO, *supra* note 111, at 108.

<sup>115</sup> See Nussbaum, *Duties of Justice*, *supra* note 107, at 184–85 (summarizing Cicero's theory of duties of justice); Nussbaum, *The Worth of Human Dignity*, *supra* note 8, at 36–40 (referring to relevant passages in CICERO, *supra* note 111, and other Stoic authors). For a very good account of the role of Stoicism in the formation of the Republicanism of the Founders, see PHILIP PETTIT, *REPUBLICANISM* (1997). Cicero, it should be said, is not a thoroughgoing Stoic. He rejects their positions on metaphysics and epistemology; in ethics he defends a distinct, albeit very similar, view. In political thought, however, the differences between Cicero and the Stoics become insignificant.

<sup>116</sup> Brutus himself was a Platonist, and Cassius was an Epicurean. See David Sedley, *The Ethics of Brutus and Cassius*, 87 *J. ROMAN STUD.* 41, 41–42 (1997).

<sup>117</sup> Seneca and the poet Lucan lost their lives in the conspiracy of Piso during Nero's reign. See TACITUS, *THE ANNALS OF TACITUS 400–01* (Henry Furneaux ed., 1907) (discussing Seneca's death). A later alleged conspiracy led to the death of the Stoic philosopher Thræsea Paetus. See *id.* at 453–72. Some later Stoics thought, or at least said — since freedom of speech was compromised under the Empire — that a decently accountable monarchy might be acceptable. Some wrote praises of “good” emperors, such as Trajan. *E.g.*, PLINY, *Panegyricus*, in 2 *LETTERS AND PANEGYRICUS* 317 (Betty Radice trans., 1969). One Stoic, Marcus Aurelius, was himself the emperor. The experience of empire showed, however, that Cicero was correct: once a monarchy is in place, nothing prevents it from turning in an arbitrary and oppressive direction. So, as time went on, it came to seem more and more reasonable for Stoic thought to ally itself firmly to the idea of accountable republican institutions: only within these can human beings live lives worthy of human dignity.

Stoicism also contained, however, the seeds of a more quietistic response, suggested by their anti-Aristotelian ideas about human invulnerability. Because the Stoics taught that dignity was all-important and material conditions utterly unimportant, it was possible to maintain that the soul was always free within, whether or not institutions enslaved it on the outside.<sup>118</sup> In one striking example of this general point, Seneca's famous letter on slavery asks masters to show respect to their slaves, and to treat them like full-fledged and equal human beings, but it does not attack the institution of slavery, which Seneca holds to be compatible with a dignified free life within.<sup>119</sup> These disturbing conclusions were reached not by compromising the Stoic commitment to equal worth, but, instead, by denying the Aristotelian thought of human vulnerability: external conditions are not really important to a person's attempt to live well, so it is not very important for law and government to supply those conditions.<sup>120</sup>

The early modern thinkers who shaped the American founding were, thus, heirs to a complex tradition. Typically, thought about "natural law" in the seventeenth and eighteenth centuries — and, thus, the core of the classical education given to people bound for politics and government — melded Aristotelian with Stoic elements.<sup>121</sup> Al-

---

<sup>118</sup> See MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE* 359–401 (1994) (discussing the texts on the Stoic doctrine of the worthlessness of "external goods," and their related view of detachment).

<sup>119</sup> See SENECA, *supra* note 108, at 119–24. For analysis of this epistle, see Nussbaum, *Duties of Justice*, *supra* note 107, at 189–91.

<sup>120</sup> Even internal consistency suffered: it was difficult, or impossible, to square the denial of vulnerability with the Stoic commitment to non-domination and republicanism. Not that Stoics admitted this: but at this point their writings betray strain. See NUSSBAUM, *THE THERAPY OF DESIRE*, *supra* note 118, at 429–38 (analyzing the tensions in Seneca's *On Anger*, book III, chapters 14–15). For the relevant Latin text of *On Anger*, see SENECA, *DIALOGORUM LIBRI DUODECIM* 105–07 (L.D. Reynolds ed., 1977). See also Miriam Griffin, *Philosophy for Statesmen: Cicero and Seneca*, in *ANTIKES DENKEN — MODERNE SCHULE* 133, 140–47 (H.W. Schmidt & P. Wülfing eds., 1988); Martha C. Nussbaum, *Philosophical Norms and Political Attachments: Cicero and Seneca* (forthcoming) (on file with the Harvard Law School Library).

<sup>121</sup> A typical but unusually clear example (since he cites his sources far more than do most philosophers of the time) is Grotius, the Dutch philosopher whose 1625 work *On the Law of War and Peace* had enormous influence on all subsequent thought about international law. HUGO GROTIUS, *DE JURE BELLI AC PACIS* (Francis W. Kelsey trans., Oxford Univ. Press 1927) (1625). The section in which he defines and proves the existence of natural law, *id.* at 38–43, contains citations to Aristotle, Cicero, Seneca, Plutarch's *Life of Cato the Elder* (the Stoic hero), and Epicurus, as well as numerous Biblical texts and Christian authors. Cicero, as usual, plays a particularly prominent role. For general studies establishing that Aristotle played a role in the early modern development of natural law, alongside the more obvious Stoic sources, see Kelly Lynn Grotke, *Natural Law and Eighteenth-Century Prussia* (Jan. 2006) (unpublished Ph.D. dissertation, Cornell University) (on file with the Harvard Law School Library); and MANFRED RIEDEL, *METAPHYSIK UND METAPOLITIK* 237–53 (1975). For Lord Coke's use of Aristotelian/Stoic natural law ideas, see 7 EDWARD COKE, *REPORTS* (1608), *reprinted in* 1 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 161, 195–96 (Steve Sheppard ed., 2003).

though different combinations of ideas could be made, one attractive and enduring marriage, compatible with Christian beliefs, was a combination of the Stoic idea of the equal worth of all human beings with the Aristotelian idea of human vulnerability. Despite the enduring attraction of Stoic ideas of invulnerability, Aristotle's view was strongly commended by common sense and by most people's experience of loss, age, the damages of war, and so forth. Hugo Grotius, Adam Smith, Kant, and the American founders all accepted the Stoic idea of equal dignity, while turning to Aristotle to understand the many ways in which human beings need help from the world in order to live well.<sup>122</sup>

### B. *Early American Thought: Liberty of Conscience*

In England, in the wake of the civil wars, ideas of internal religious toleration were beginning to be defended as the best way to achieve a lasting peace. We associate the move toward toleration with John Locke's famous work, *A Letter Concerning Toleration*, published in 1689.<sup>123</sup> More than forty years earlier, however, Roger Williams, a classical and religious dissident who had by then taken refuge in the New World, published two works that, together, comprised a defense of religious liberty much more comprehensive and radical than Locke's, and of equal philosophical distinction.<sup>124</sup> Because Williams

<sup>122</sup> See GROTIUS, *supra* note 121, at 179–80 (discussing property); *id.* at 430–37 (discussing damages); *id.* at 203–05 (discussing acts that human life requires). He states: “Human life exists under such conditions that complete security is never guaranteed to us” — and he goes on to assert that only God can protect us from fear, a most un-Stoic sentiment. *Id.* at 184. Smith explicitly repudiates Stoic detachment in favor of a view similar to Aristotle's in the area of damages to one's family, country, and friends. See SMITH, THE THEORY OF MORAL SENTIMENTS, *supra* note 48, at 292–93 (arguing that the extreme degree of detachment prescribed by the Stoics leaves an insufficient basis to motivate virtuous conduct on behalf of family and country). He calls Aristotle “a philosopher who certainly knew the world.” *Id.* at 258. Grotius does not explicitly quarrel with the Stoics, but simply assumes that the damages of war are real and significant. Kant modifies the doctrines of Stoicism by insisting that we have a duty to promote the happiness of others and that we are permitted to pursue our own happiness in ways that do not interfere with the happiness of others. See KANT, *supra* note 52, at 37–38. For the views of Madison and Paine, see *infra* section III.C.

<sup>123</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., Hackett Publ'g Co. 1983) (1689).

<sup>124</sup> ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION (1644) [hereinafter WILLIAMS, BLOODY TENENT], *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS (Russell & Russell, Inc. 1963); ROGER WILLIAMS, THE BLOODY TENENT YET MORE BLOODY (1652) [hereinafter WILLIAMS, YET MORE BLOODY], *reprinted in* 4 THE COMPLETE WRITINGS OF ROGER WILLIAMS, *supra*. Both these works were published in England to considerable controversy, and because Williams's first job after his university education was as chaplain at the same noble house, Otes in Essex, where Locke later wrote his *Letter*, it seems likely that Locke knew Williams's work and used it as a source. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (forthcoming 2008) (manuscript at ch. 2, on file with the Harvard Law School Library) [hereinafter NUSSBAUM, LIBERTY].

was setting up the colony of Rhode Island at the same time that he was writing his two massive works on religious liberty, his ideas achieved lasting fame and influence.<sup>125</sup>

Williams's ideas were shaped by classical sources. His excellence as a young classical scholar led to his becoming the protégé of Sir Edward Coke, whose own work uses natural law ideas that both were ubiquitous during this period and found their origins in the works of Aristotle and the Stoics.<sup>126</sup> Williams's central concept is "conscience," and he defines it in almost exactly the way the Stoics defined the power of moral choice. Although, given his topic, he focuses on its religious employment, he also makes it clear that conscience is a general faculty of searching and choosing that directs the whole conduct of life.<sup>127</sup> For Williams, as for the Stoics, this faculty is in all human beings and is infinitely precious and worthy of respect.<sup>128</sup> Although some people use it well and others use it badly, we are all equal in possessing the faculty, and on this account deserve *equal respect* and impartial treatment from one another.<sup>129</sup>

As we saw, the Stoics held that equal respect requires little from the world of laws and institutions, since the power of choice is invulnerable. Williams, with the more Aristotelian side of the natural law tradition, denies this. A highly rhetorical writer, he obsessively repeats two images to illustrate the ways in which all existing governments

---

<sup>125</sup> See NUSSBAUM, LIBERTY, *supra* note 124 (manuscript at ch. 2). People in the colonies who did not know his writings knew the bold political experiment in which his ideas were embodied (and the extensive correspondence with political leaders in New England in which versions of the ideas are contained). For Williams's letters, see the two volumes of THE CORRESPONDENCE OF ROGER WILLIAMS (Glenn La Fantasia ed., 1988) [hereinafter WILLIAMS CORRESPONDENCE]. Among good biographical studies of Williams, see EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA (1991); W. CLARK GILPIN, THE MILLENARIAN PIETY OF ROGER WILLIAMS (1979); TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 17-39 (1998); PERRY MILLER, ROGER WILLIAMS (1953).

<sup>126</sup> See R.H. Helmholz, Bonham's Case, Judicial Review and the Law of Nature (July 2006) (unpublished manuscript, on file with the Harvard Law School Library) (discussing Coke's use of natural law argumentation in this famous case). One striking example of Coke's use of natural law argumentation is in Calvin's Case (1608), where he cites both Aristotle and Cicero (whom he calls by his middle name Tully) as sources for his natural law doctrine. COKE, *supra* note 121, at 195-96.

<sup>127</sup> See, e.g., WILLIAMS, YET MORE BLOODY, *supra* note 124, at 440; Letter from Roger Williams to Governor John Endicott (1651), in 1 WILLIAMS CORRESPONDENCE, *supra* note 125, at 337, 339-40; Letter from Roger Williams to John Whipple, Jr. (July 8, 1669), in 2 WILLIAMS CORRESPONDENCE, *supra* note 125, at 586, 586.

<sup>128</sup> See Letter from Roger Williams to Governor John Endicott, *supra* note 127, at 339 (it is "holy *Light*"); *id.* at 340 (it is "in all mankinde," including "*Jewes, Turkes, Papists, Protestants, Pagans, etc.*").

<sup>129</sup> The theme of impartiality is a huge one in Williams's writings. See, e.g., WILLIAMS, BLOODY TENENT, *supra* note 124, at 401-02; WILLIAMS, YET MORE BLOODY, *supra* note 124, at 33, 113, 290.

have abused the human conscience: imprisonment and “soul rape.”<sup>130</sup> Consciences are imprisoned when they are prevented from worshiping in their own ways; they are more profoundly damaged, or violated, when governments attempt to force people to worship or utter statements of belief against their consciences. Most often, governments favor the religion of the dominant group; they grant ample liberty to this group and they pretend to be in favor of liberty in general, but they do not acknowledge that in this way they are treating human beings with gross partiality. As Williams wrote in a 1670 letter to the governors of Massachusetts and Connecticut, both of which had coercive Puritan orthodoxies, “Your Selvs praetend Libertie of Conscience, but alas, it is but selfe (the great God Selfe) only to Your Selves.”<sup>131</sup> Liberty of conscience, for Williams, is grounded in our possession of basic human dignity, and is an entitlement for those in religious error as much as for those who have (what the ruling group takes to be) the correct religion.

Williams understood that governments were necessary for the protection of liberty of conscience. His own experience setting up a colony showed him that constant watchfulness and good laws were required lest people interfere with the worship and beliefs of others. It is not enough that government itself does not interfere: people must really be free to worship in their own way, and this takes an aggressive public policy of toleration and laws that promote it. In a move that shocked the English, Williams insisted that the protection of liberty of conscience be written into the colony’s charter (as well as a related protection for the freedom of action of the Indians and a defense of their property rights).<sup>132</sup> Protecting consciences from both rape and imprisonment meant not only the zealous protection of all groups from interference by others (Rhode Island welcomed Jews, Baptists, Quakers, Catholics, and all sorts of unaffiliated “seekers,” and Williams’s writings defend liberty for Muslims and atheists as well), it also meant making sure that the state itself was religiously neutral. Williams is more radical than Locke and is a precursor of Madison, in that he sees

---

<sup>130</sup> See e.g., Letter from Roger Williams to Governor John Endicott, *supra* note 127, at 338 (invoking imprisonment); WILLIAMS, BLOODY TENENT, *supra* note 124, at 182, 219 (invoking soul rape); WILLIAMS, YET MORE BLOODY, *supra* note 124, at 495 (same).

<sup>131</sup> Letter from Roger Williams to Major John Mason and Governor Thomas Prencce (June 22, 1670), in 2 WILLIAMS CORRESPONDENCE, *supra* note 125, at 609, 616.

<sup>132</sup> See THE CHARTER (1663), reprinted in 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 3 (John Russell Bartlett ed., 1857); Letter from Roger Williams to the Town of Providence (1654), in 2 WILLIAMS CORRESPONDENCE, *supra* note 125, at 423.



---

---

all religious establishments as threats to both the liberty and equality of citizens.<sup>133</sup>

For Williams, the capability of conscience requires protection of the widest possible space that is compatible with the safety and survival of the state. In his writings he insists that only the strongest possible government interest, namely an interest in safety and survival, could possibly justify any diminution of the space within which conscience exercises itself.<sup>134</sup> He strongly suggests that the space that ought to be protected includes a freedom to disobey at least some laws of general applicability if they burden one's conscience: thus he seems to have forged the concept of free exercise accommodation, an idea that soon became widespread in the colonies.<sup>135</sup>

Williams sees that protection and support for the capability of searching for the meaning of life in one's own way is no small matter: it requires careful protective action on the part of the State, and it requires, as well, an enforceable ban on all religious establishments, as enemies of the capabilities of citizens. Nonestablishment was a very new idea, which would not crop up automatically: it had to be put in place by deliberate, and extensive, legal policies. All of this machinery is required if citizens are to be protected from the rape and imprisonment of their basic human powers, or, to put it in another way, if all human beings are to breathe the air. In all these ways, Williams draws inspiration from both the Stoic idea of equal human dignity and the Aristotelian idea of human vulnerability.

In one respect, however, Williams breaks away from the Stoic/Aristotelian tradition, and it is a break of decisive importance for our contemporary attempt to build a nation that is fair to citizens with different religious convictions. Aristotle and the Stoics thought that there was just one correct account of the overall good life for a human being and that politicians could learn that account (for example, by going to Aristotle's lectures!). So, even though their respect for choice prevented them from forcing everyone to function in the desired way, they felt that they knew the goal whose preconditions they were distributing. Where religion was concerned, this made their task very easy: Aristotle is mainly concerned that citizens should have enough money to participate in the state's established religion. The Stoics believe that people always have the ability to choose the correct view,

---

<sup>133</sup> Rhode Island under his leadership not only had no religious orthodoxy, it also avoided having Sunday laws, which Williams (who had his own doubts about the correct day for worship) saw as burdensome.

<sup>134</sup> See Letter from Roger Williams to the Town of Providence, *supra* note 132, at 423–24.

<sup>135</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (discussing “peace and safety” overrides in state constitutions); see also NUSSBAUM, LIBERTY, *supra* note 124, (manuscript at chs. 2 and 4).

that is, Stoicism. Williams, by contrast, seeing the diversity of religions in society, reasons that law must not only protect ample space for all citizens to pursue a search for life's meaning in their own way, but it must also prescind from announcing or celebrating anything in religious matters. All orthodoxies are threats to the human capability of conscience.

Williams insists that, nonetheless, politics and public life can and do have a moral character, because there is an ethical space we can share as citizens who differ about ultimate religious matters. Addressing his Massachusetts opponents, who insisted that the character of a person's Christian convictions was highly relevant to his selection as a political leader, Williams declares that what is relevant to political office is a particular set of moral virtues, but that these virtues are separable from religious convictions.<sup>136</sup> Good moral principles are routinely found, he says, in people who have a religion that one may take to be in error. What politics should be doing, then, is operating within that shared moral space, making sure that it does not get hijacked by any particular doctrine, in such a way as to jeopardize both liberty and equality.<sup>137</sup>

Williams's ideas were not universally accepted. Many people felt that the interest in homogeneity outweighed an interest in ample and state-supported liberty. There came to be increasing agreement, however, that the question of establishment implicated a fundamental human capability: individual liberty and the quality of that liberty. James Madison's *Memorial and Remonstrance*, a major document concerning religious establishment that reappears frequently in modern constitutional analysis, stressed, like Williams, that establishments were a threat to individual conscience.<sup>138</sup> Madison, indeed, went further than Williams, seeing in any taxation for the support of an established church, even with strong guarantees of liberty, an implicit threat to liberty and equal liberty.<sup>139</sup>

---

<sup>136</sup> See NUSSBAUM, LIBERTY, *supra* note 124, (manuscript at ch. 2); *see also* WILLIAMS, BLOODY TENANT, *supra* note 124, at 398–99.

<sup>137</sup> See NUSSBAUM, LIBERTY, *supra* note 124, (manuscript at ch. 2); *see also* WILLIAMS, BLOODY TENANT, *supra* note 124, at 398–99.

<sup>138</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 49, 50–51 (2d ed. 2006).

<sup>139</sup> All citizens, writes Madison, should enter the polity “on equal conditions,” *id.* at 50; a tax for religious purposes, even one that is extremely benign, threatens that equality in standing and also, ultimately, threatens liberty itself, *see id.* at 49.

C. *The Eighteenth Century:*  
*Smith on Education, Paine on Social Security*

The eighteenth century saw a widespread fascination with Stoic ideas of equal dignity, which influenced the ideas of republican thinkers on both sides of the Atlantic. Most often, however, these ideas were borrowed in combination with an Aristotelian understanding of human vulnerability. The task of government thus came to be understood as that of protecting certain core human abilities so that they might develop and become effective. One could write the entire history of political philosophy in this period as a set of variations on these two themes of dignity and vulnerability. For our purposes, however, two key texts will suffice, significant in their own right and also highly influential in the American founding. The first is Adam Smith's *The Wealth of Nations*.<sup>140</sup> The second is Thomas Paine's *Rights of Man*.<sup>141</sup>

The philosophers of the Scottish Enlightenment formed the core of James Madison's education in political theory at Princeton University, a largely Presbyterian university. In 1783, asked to draw up a reading list for the Congress, Madison favored Scottish authors throughout, and prominently recommended Smith's *The Wealth of Nations* under the section entitled "Politics."<sup>142</sup> So we can assume that not only Madison but also his colleagues in Congress, provided that they did their homework, were familiar with Smith's by-then extremely famous book. Madison alludes to Smith's ideas several times in the

---

<sup>140</sup> SMITH, *THE WEALTH OF NATIONS*, *supra* note 1. Smith was already famous for his *Theory of Moral Sentiments*. I discuss the ideas of this section in MARTHA C. NUSSBAUM, "Mutilated and Deformed": Adam Smith on the Material Basis of Human Dignity [hereinafter NUSSBAUM, "Mutilated and Deformed"], in *THE COSMOPOLITAN TRADITION*, *supra* note 113 (manuscript at ch. 4); this chapter was presented as a keynote address at the Hume Society conference in July 2005 and was posted on their website prior to that meeting. For other relevant scholarship on Smith in the spirit of these remarks, see SAMUEL FLEISCHACKER, *A THIRD CONCEPT OF LIBERTY: JUDGMENT AND FREEDOM IN KANT AND ADAM SMITH* (1999); SAMUEL FLEISCHACKER, *ON ADAM SMITH'S WEALTH OF NATIONS* (2005); JERRY Z. MULLER, *ADAM SMITH IN HIS TIME AND OURS* (1993); and EMMA ROTHSCILD, *ECONOMIC SENTIMENTS* (2001).

<sup>141</sup> THOMAS PAINE, *RIGHTS OF MAN* (1791–1792), *reprinted in* *RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS* 83 (Mark Philp ed., 1995). *Rights of Man* was published relatively late in Paine's career, but its thought about equal natural rights is fully consistent with Paine's earlier writings. See Mark Philp, *Introduction to id.* at vii, xvii. On Paine's wide influence (some believed that he wrote the Declaration of Independence), see *id.* at xxv. Philp nicely remarks: "[W]hat Paine brought to these principles [that is, those of the Declaration] was first-hand experience of struggle and failure in a society divided by birth and title; what he read in them was an invitation to citizenship in a classless (and racially equal) society." *Id.* at xxv; *cf.* PAINE, *supra*, at 271 ("It is to my advantage that I have served an apprenticeship to life.").

<sup>142</sup> Roy Branson, *James Madison and the Scottish Enlightenment*, 40 *J. HIST. IDEAS* 235, 236 (1979).

*Federalist Papers*.<sup>143</sup> On topics ranging from trade to religious non-establishment, there are strong signs of Smith's influence.<sup>144</sup> There is also a great deal of evidence for the work's importance among other leading participants in the Founding, including Thomas Jefferson and Noah Webster. It figured several times in constitutional debates.<sup>145</sup>

Adam Smith's writings are suffused with Stoicism; he turns to Aristotle, however, for a correct understanding of the worth of family, friends, and many of the material conditions of human flourishing.<sup>146</sup>

Admittedly, some of the impediments to human capabilities that Smith sees in the England of his time consist in wrong-headed and intrusive legal restrictions, such as restriction on trade and the free movement of labor.<sup>147</sup> In such cases, Smith urges deregulation, and he has thus become a favorite source for libertarian minimalists. It is clear, however, that a minimalist reading of Smith is inadequate.<sup>148</sup> His touchstone is always the question: what form of action by government permits human abilities to develop and human equality to be respected? Smith favors less government action when such action inhibits the development of human capabilities, and he understands quite well that it will take law to unmake law. Thus he supports the abolition of apprenticeship, and laws against monopolies and restrictions on lobbying by powerful financial interests, which, in his view, make citizens' influence on the political process grossly unequal, and guarantee that government will be held hostage to what he calls a

---

<sup>143</sup> See Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897, 908–15 (2002).

<sup>144</sup> See *id.* at 905–15.

<sup>145</sup> See *id.* at 901–03.

<sup>146</sup> See Nussbaum, *Duties of Justice*, *supra* note 107, at 179. Smith's ideas on this topic appear to change over time and are by no means absolutely consistent. The later editions of *The Theory of Moral Sentiments*, written near the end of his life, at times appear to defend the invulnerability thesis in a modified form. See NUSSBAUM, "Mutilated and Deformed", *supra* note 140, at pt. VI. The earlier and more political *The Wealth of Nations*, however, insists strongly on the importance of government action in defense of human capabilities.

<sup>147</sup> See 1 SMITH, *THE WEALTH OF NATIONS*, *supra* note 1, at 452–98 (discussing trade restrictions); *id.* at 135–40 (attacking mandatory apprenticeship laws that impeded the movement of labor).

<sup>148</sup> ROTHSCHILD, *supra* note 140 (demolishing the minimalist reading).

“standing army” of wealthy elites.<sup>149</sup> These proposals are supported by considerations of justice as well as efficiency.<sup>150</sup>

Among Smith’s most radical arguments in favor of government intervention is a set of arguments late in *The Wealth of Nations*, calling for government provision of free compulsory public education. The context of the discussion is a set of Aristotelian observations concerning the waste of human abilities among the working classes. Early in the work, Smith emphasizes the fact that habit and education play a profound role in shaping human abilities: the philosopher and the street porter differ in education, not by nature, although the “vanity” of the former supposes otherwise.<sup>151</sup> Much of *The Wealth of Nations* is accordingly dedicated to documenting the many factors that can cause key human abilities to fail to develop. Some of these factors are straightforwardly physical. Poverty is unfavorable to life and health.<sup>152</sup> “[P]overty, though it does not prevent the generation, is extremely unfavourable to the rearing of children. The tender plant is produced, but in so cold a soil and so severe a climate, soon withers and dies.”<sup>153</sup> Elsewhere, Smith generalizes the point. Any class that cannot support itself from wages will be afflicted with “[w]ant, famine, and mortality.”<sup>154</sup>

These passages show Smith breaking with the Stoics and developing an Aristotelian account of the human being and of basic needs. He reminds his reader that human dignity is a “tender plant” that will wither if it encounters a cold soil and a severe climate. This means that we cannot take the view that the distribution of material goods is irrelevant to human dignity, for dignity requires, at the very least, life, and the lives of children are in the hands of these material arrangements.

<sup>149</sup> 1 SMITH, THE WEALTH OF NATIONS, *supra* note 1, at 471–72; *see also id.* at 84, 157–58. He also favors the abolition of the slave trade, and indeed he campaigned on behalf of this cause. *See id.* at 387–88 (arguing that slave labor is unproductive and uneconomical in many circumstances); *see also* Adam Smith, Report of 1766, in LECTURES ON JURISPRUDENCE 452 (R.L. Meek et al. eds., 1978) (describing the “tyrannical disposition” to enslave). He shows at least some sympathy with wage regulations that favor workmen. *See* 1 SMITH, THE WEALTH OF NATIONS, *supra* note 1, at 90–91. He is especially concerned that all workmen should be guaranteed that “lowest rate that is consistent with common humanity.” *Id.* at 91.

<sup>150</sup> *See* 1 SMITH, THE WEALTH OF NATIONS, *supra* note 1, at 138, 157. Smith’s concern for equal respect also extends outside national boundaries: he strenuously opposes colonization, on the grounds that it is a way of exploiting the colonized people, who lose both political autonomy and economic control. *See 2 id.* at 564–641.

<sup>151</sup> 1 *id.* at 28–29.

<sup>152</sup> Some nations are so poor that they are forced to practice infanticide, and to leave the elderly and sick “to be devoured by wild beasts.” *Id.* at 10. Even in Britain, however, Smith insists, high child mortality is characteristic of the working, and not the more prosperous, classes. *Id.* at 97.

<sup>153</sup> *Id.* Whether deliberately or not, Smith uses the comparison that I have cited in my epigraph from Pindar.

<sup>154</sup> *Id.* at 91 (discussing unemployment produced by general economic decline).

But it is in his lengthy discussion of education that Smith develops most fully his ideas about the fragility of human dignity. The question he faces is whether the state ought to take responsibility for the education of its people and, if so, in what way. He observes that the newly fashionable division of labor, combined with a lack of general education, has a very pernicious effect on human abilities:

The man whose whole life is spent in performing a few simple operations . . . has no occasion to exert his understanding . . . . He naturally loses, therefore, the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. . . . Of the great and extensive interests of his country, he is altogether incapable of judging . . . . But in every improved and civilized society this is the state into which the labouring poor, that is, the great body of the people, must necessarily fall, unless government takes some pains to prevent it.<sup>155</sup>

The danger, Smith continues, is not great for those who are not poor because they have the time and resources to obtain an adequate education before they begin work.<sup>156</sup> The common people have no such luxury.<sup>157</sup> Without education, a person “is as much mutilated and deformed in his mind, as another is in his body, who is either deprived of some of its most essential members, or has lost the use of them.”<sup>158</sup> Even if educating the common people does not lead to the nation’s overall enrichment, “it would still deserve its attention that they should not be altogether uninstructed.”<sup>159</sup>

Smith argues, however, that such a calamity is not inevitable. No state, he believes, can guarantee all citizens as extensive an education as the rich currently receive at their parents’ expense. But it can (as Scotland typically did) provide all with “the most essential parts of education,” by requiring them to learn reading, writing, and accounting before they are permitted to take on paid employment.<sup>160</sup>

Smith attains here an insight that lies at the heart of the CA. Human abilities come into the world in a nascent or undeveloped form and require support from the environment — including support for physical health and especially, here, for mental development — if they are to mature in a way that is worthy of human dignity. Smith clearly

---

<sup>155</sup> 2 *id.* at 782.

<sup>156</sup> *Id.* at 784.

<sup>157</sup> *Id.* at 784–85.

<sup>158</sup> *Id.* at 787.

<sup>159</sup> *Id.* at 788.

<sup>160</sup> *Id.* at 785. He describes a scheme for low-cost compulsory education in parish schools, in which useful subjects, such as geometry and mechanics, would replace frivolous subjects, such as Latin. *See id.* Smith does not advocate free education, because Smith thinks that if the salary of teachers were paid entirely by the state there would be too little parental oversight. Instead, he suggests a fee “so moderate, that even a common labourer may afford it,” combined with government support. *Id.*

believes that all normal human beings are capable of developing the more mature or advanced capabilities that would make their lives fully human, not “mutilated and deformed.” His discussion of the philosopher and the street porter has already made the point that the differences among men that bulk large in society are the work of habit. We simply do not have a full human life if we stunt the powers of mind in which humanness so largely resides.<sup>161</sup>

Like Adam Smith’s anticipated audience in Britain, Americans in the mid-eighteenth century were steeped in the texts of ancient Greek, and especially Roman, philosophy (besides being steeped in Smith’s own works). For the American founders, as for the modern thinkers whom they read (including Rousseau, Smith, and Kant), Roman political philosophy was of enormous importance, and, above all, the philosophical ideas of Roman Stoicism, together with the Stoics’ eclectic fellow-traveler Cicero. As Gordon Wood puts it, “[P]eople could not read enough about Cato [the Stoics’ stock example of virtue<sup>162</sup>] and Cicero.”<sup>163</sup> Not only philosophically inclined writers such as Thomas Paine, but also the general educated public, shared this passion.<sup>164</sup> No doubt, on the eve of the Revolution, Americans were fascinated by the fact that philosophy was not just an academic pursuit in ancient Rome; it was also a political movement.<sup>165</sup> Even more gripping, however, was the specific content of the Roman ideas, which, once again, Americans interpreted by focusing on the idea of equal human dignity and equal entitlement, rather than on the unpromising idea of human invulnerability. They understood all too well that government could block human capabilities, because they had experienced the hand of tyranny. They also understood that a full set of human capabilities could not be secured in a vacuum: government had a job to do. As our Declaration of Independence states this ubiquitous idea:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to se-

<sup>161</sup> See Smith, Report of 1766, *supra* note 149, at 539 (“[W]hen a person’s whole attention is bestowed on the 17th part of a pin,” it is unsurprising that “people are exceedingly stupid.”). Smith contrasts England, where boys are sent to work at age six or seven, with Scotland, where “even the meanest porter can read and write.” *Id.* at 540.

<sup>162</sup> See, e.g., SENECA, DIALOGORUM LIBRI DUODECIM, *supra* note 120.

<sup>163</sup> GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 103 (1992).

<sup>164</sup> See *id.*

<sup>165</sup> People lived and died for philosophical ideas. The conspiracy to assassinate Julius Caesar, in 44 B.C.E., was philosophical in inspiration. See Sedley, *supra* note 116. Both Cicero and Seneca, like Brutus, died violent deaths, fighting for republican institutions. See Nussbaum, *Philosophical Norms and Political Attachments: Cicero and Seneca*, *supra* note 120 (discussing the deep tension between these lives and the Stoic idea of detachment). All this by itself was enough to move well-read and thoughtful Americans who were about to embark upon a perilous political course.

cure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .<sup>166</sup>

And of course the document goes on to argue that any government that does not deliver on that task may be altered or abolished. Moreover, one of the Declaration's central complaints against George III is his *inaction*: "He has refused his Assent to Laws, the most wholesome and necessary for the public good."<sup>167</sup>

Thus, the idea that the Framers favored "negative liberty" is extremely misleading. The Framers were not libertarians. Like Smith, they knew what they did not like: tyrannical government, bilking average citizens for the benefit of selfish elites, while neglecting the welfare of working people. But a dislike of bad government was not a dislike of government per se. One striking example of the way in which a combination of Stoic equality with Aristotelian need worked its way into the Framers' conception of government is Thomas Paine's *Rights of Man*.

Like other intellectuals at the time of the Founding, Paine dislikes a lot of the government action that he sees. Government is founded on the natural rights of human beings;<sup>168</sup> its proper goal is "the good of all, as well individually as collectively."<sup>169</sup> Existing governments, however, do not pursue this goal. Instead, they operate "to create and encrease wretchedness"<sup>170</sup> in the poorer parts of society. In the long chapter entitled "Ways and Means of Improving the Condition of Europe," Paine argues for a complete overhaul of government action and especially of taxation. Taxation should cease to be regressive and become progressive. The poor-rates should be entirely abolished, and the power of elites to divert taxes away from themselves should be curtailed. (Paine mordantly describes "what is called the crown" as "a nominal office of a million sterling a year, the business of which consists in receiving the money."<sup>171</sup>) A detailed scheme of progressive taxation is proposed, starting at a rate of three pence per pound and ascending, in rather short order, to a rate of twenty shillings per pound, that is, one hundred percent!<sup>172</sup> (Paine is way ahead of Sweden at its most draconian.)

The revenue thus gained would be used to support human capabilities, in three areas above all: youth, age, and unemployment. Like

---

<sup>166</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>167</sup> *Id.* at para. 3; *see also id.* at paras. 4–5.

<sup>168</sup> *See, e.g.,* PAINE, *supra* note 141, at 248.

<sup>169</sup> *Id.* at 251; *cf. id.* at 263 ("Whatever the form or constitution of government may be, it ought to have no other object than the *general* happiness.").

<sup>170</sup> *Id.* at 263.

<sup>171</sup> *Id.* at 282.

<sup>172</sup> *Id.* at 304–06.



Smith, Paine favors state-subsidized compulsory primary education.<sup>173</sup> He notes that young people often take to crime because they have never had an education that would open employment opportunities for them, and he concludes that government inaction is to blame:

When, in countries that are called civilized, we see age going to the workhouse and youth to the gallows, something must be wrong in the system of government. . . .

Civil government does not consist in executions; but in making that provision for the instruction of youth, and the support of age, as to exclude, as much as possible, profligacy from the one, and despair from the other. Instead of this, the resources of a country are lavished upon kings, upon courts, upon hirelings, imposters, and prostitutes . . . .<sup>174</sup>

Calculating that a large proportion of England's poor are either children or people over the age of sixty,<sup>175</sup> he proposes a cash subsidy to poor families, out of surplus tax revenue, of four pounds per year for each child attending school.<sup>176</sup> He notes that in this way "the poverty of the parents will be relieved, . . . ignorance will be banished from the rising generation, and the number of poor will hereafter become less, because their abilities, by the aid of education, will be greater."<sup>177</sup> They will thereby gain employment opportunities. For families somewhat less poor, a per-child school subsidy is proposed, including money for school supplies.<sup>178</sup>

As to the "aged," Paine holds, on the basis of observation and experience (he is fifty-four when he writes), that people in their fifties are typically sound of mind (indeed their judgment is better than ever), but are beginning to flag in bodily strength and endurance. After sixty, he writes, people become unfit for work.<sup>179</sup> He therefore proposes a scheme of cash subsidy for all but the well-off, six pounds per year in one's fifties and ten pounds per year thereafter.<sup>180</sup> "This support," he repeatedly stresses, "is not of the nature of a charity, but of a right."<sup>181</sup> It is part of the general task of government to support the life cycle of citizens.<sup>182</sup>

---

<sup>173</sup> "A nation under a well regulated government, should permit none to remain uninstructed. It is monarchical and aristocratical government only that requires ignorance for its support." *Id.* at 297.

<sup>174</sup> *Id.* at 271.

<sup>175</sup> *See id.* at 293-94.

<sup>176</sup> *Id.* at 294.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 297.

<sup>179</sup> *Id.* at 294-95.

<sup>180</sup> *Id.* at 295-96.

<sup>181</sup> *Id.* at 296; *see also id.* at 295 ("[It is] not as a matter of grace and favour, but of right . . .").

<sup>182</sup> "It is painful to see old age working itself to death, in what are called civilized countries, for daily bread." *Id.* at 295.

Beyond this, Paine is aware that, particularly in cities, there are many people who temporarily cannot find work for one reason or another.<sup>183</sup> Here he makes one of his boldest proposals: a government-financed scheme of guaranteed temporary employment in a government facility where people will find a wide range of tasks available.<sup>184</sup> People are to be received with no nosy inquiries; the only condition is that they work.<sup>185</sup> In proportion to their work, they receive nutritious food, warm lodging, and cash savings to take with them when they depart. In this way, people afflicted by temporary distress can regroup, and be on the lookout for employment later. This is not exactly the WPA, and Paine has thought too little about how the dignity and autonomy of poor people could be respected in such a residential institution; but his proposal is in the spirit of the New Deal. Paine wants a lot more government action supporting basic human welfare, a lot less supporting elite self-enrichment.

Paine's ideas find a striking echo in James Madison's idea that government should combat factionalism:

1. By establishing a political equality among all.
2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches.
3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.<sup>186</sup>

Repeatedly, Paine gives his reader the likely costs of his proposals. His point is that one may honor the entitlements of poor people while remaining decently minimalist in the sense of opposing burdensome taxation, particularly for the poor and the middle classes. Supporting social security is not costly; it is the narcissism of the wealthy that drives up costs.

*D. Nineteenth and Twentieth Centuries: The Capabilities Approach  
Opposes Utilitarianism and Libertarianism*

Far from being suited only to pre-industrial societies, the CA has seen some of its most striking political applications in the modern era, in which industrial development has given rise to new threats to the capabilities of both children (sent to labor in factories at an early age) and adults (laboring under unsafe and burdensome conditions, without the leverage to contract for a better arrangement). At the same time,

---

<sup>183</sup> See *id.* at 298–99.

<sup>184</sup> See *id.* at 299 (“[T]o have in each of these places as many kinds of employment as can be contrived, so that every person who shall come may find something which he or she can do.”).

<sup>185</sup> *Id.*

<sup>186</sup> James Madison, *Parties*, NAT’L GAZETTE, Jan. 23, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 197, 197 (Robert A. Rutland et al. eds., 1983).

the modern era has seen a new awareness of the obstacles to human development imposed by traditional discrimination on the basis of race, sex, and disability, all of which have proved to be focal points for recent CA-style analysis. Post-industrial societies need the CA more than ever: both to remedy entrenched discrimination whose evils are by now evident and to combat new obstacles to human development deriving from post-industrial conditions. In such circumstances, applying the CA takes an unusual degree of historical understanding and practical imagination, since it is crucial to assess the obstacles to human freedom and choice inherent in situations of many types, in the workplace, in the public square, and in the family, some of them quite new.<sup>187</sup>

Nineteenth-century Britain saw striking and influential anticipations of contemporary American discussions about human capability.<sup>188</sup> One influential source of such arguments is John Stuart Mill, who clarified the relationship of political liberty to human self-development<sup>189</sup> and demonstrated the harm done by discrimination to the opportunities and capacities of women.<sup>190</sup> For example, Mill compared the restrictions imposed by the discriminatory legal regime governing marriage to slavery.<sup>191</sup> Mill's influence on American ideas of freedom has been large;<sup>192</sup> his ideas on gender, neglected in Britain in his lifetime, have been formative for women's movements in many na-

---

<sup>187</sup> It is not surprising that the social novel reached its peak during the Industrial Revolution, since members of the more prosperous classes urgently needed the type of understanding of the situation of the laboring poor that novels made possible. The novel has also proven a major vehicle of understanding where the struggles of traditionally deprived groups are at issue. See generally NUSSBAUM, *POETIC JUSTICE*, *supra* note 48. Dickens, for example, in *Hard Times*, refers to the surprise with which Louisa Gradgrind confronts the individual lives of workers whom she has previously known only "in crowds passing to and from their nests, like ants or beetles." CHARLES DICKENS, *HARD TIMES* 159 (Terry Eagleton ed., Methuen 1987) (1854).

<sup>188</sup> See Nussbaum, *Mill Between Aristotle and Bentham*, *supra* note 20 (discussing Mill's relationship to Aristotelian ideas); Martha C. Nussbaum, *Millean Liberty and Sexual Orientation*, 21 *LAW & PHIL.* 317, 325-27 (2002) (discussing the influence of Mill's ideas on state constitution making in the United States).

<sup>189</sup> See MILL, *ON LIBERTY*, *supra* note 14, at 56-74.

<sup>190</sup> See JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Susan Moller Okin ed., Hackett Publ'g Co. 1988) (1869) (arguing for equal educational and political rights for women). More than most, Mill lived consistently with his ideals. He went to jail in his youth for distributing contraceptive information in London and later, as a member of Parliament, introduced the first bill for female suffrage. See MICHAEL ST. JOHN PACKE, *THE LIFE OF JOHN STUART MILL* 56-59, 492 (1954).

<sup>191</sup> See MILL, *THE SUBJECTION OF WOMEN*, *supra* note 190, at 15-16, 33 (comparing archaic social norms of female behavior and women's vulnerability to rape within marriage to slavery).

<sup>192</sup> See, e.g., Nussbaum, *Millean Liberty and Sexual Orientation*, *supra* note 188, at 325-30 (discussing the influence of *On Liberty* on several state constitutions).

tions.<sup>193</sup> After Mill's death, T.H. Green, a professor of philosophy and advisor to the British Liberal Party, used Aristotelian ideas to repudiate both the influential utilitarianism and libertarian minimalism of the day.<sup>194</sup> He influentially supported a variety of social legislation initiatives<sup>195</sup> and defended their limitations on freedom of contract with an appeal to "that general freedom of [society's] members to make the best of themselves, which it is the object of civil society to secure."<sup>196</sup> Green's disciple, Ernest Barker, a distinguished scholar of ancient Greek at Cambridge University,<sup>197</sup> sowed the seeds of the CA globally, since at that time Cambridge drew graduate students from many nations. British legislative developments were well known in the United States and anticipated many of the programs of the New Deal and Great Society, including legislation protecting workers' rights, establishing compulsory education, fostering the education of poor children, and, ultimately, protecting vulnerable minorities from discrimination.

Today, the CA has assumed a renewed prominence as an approach to the ethical foundations of global development. The work of Nobel Prize-winning economist Amartya Sen has made the idea of capabilities, as an alternative to the utilitarian focus on wealth maximization, central to discussions about the goals of development.<sup>198</sup> This "Human Development Approach," exemplified in the annual *Human Development Reports* of the United Nations Development Programme,<sup>199</sup>

---

<sup>193</sup> At the Fourth World Conference on Women, a conference on women's equality in Beijing in June 1995, for example, Chinese feminists spoke of the formative influence of the Chinese translation of *The Subjection of Women* on their movement.

<sup>194</sup> See Paul Harris & John Morrow, *Introduction* to T.H. GREEN: LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION AND OTHER WRITINGS 1 (1986) (discussing Green's career); John Deigh, *Liberalism and Freedom*, in SOCIAL AND POLITICAL PHILOSOPHY 151, 151–65 (James P. Sterba ed., 2001) (discussing Green's use of an Aristotelian idea of human capability).

<sup>195</sup> The legislation Green supported included bills for free compulsory education, workplace safety regulations, a limitation on working hours, a ban on child labor, and limitations on contracting between landlords and tenant farmers.

<sup>196</sup> T.H. Green, Lecture on "Liberal Legislation and Freedom of Contract," in T.H. GREEN: LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION AND OTHER WRITINGS, *supra* note 194, at 194, 201. This lecture was given to a Liberal Party gathering in 1881, and issued as a pamphlet shortly thereafter.

<sup>197</sup> Barker made the Aristotelian pedigree of his ideas very clear. See, e.g., ERNEST BARKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE 1–16, 520–22 (Dover Publ'ns 1959) (1906).

<sup>198</sup> See, e.g., SEN, DEVELOPMENT AS FREEDOM, *supra* note 7 (discussing the essentials of his approach); Amartya Sen, *Equality of What?*, in 1 TANNER LECTURES ON HUMAN VALUES 195, 217–19 (Sterling M. McMurrin ed., 1980) (applying this approach to disability). A fine set of analyses of the implications of this work for gender issues, together with Sen's own most prominent writings on gender, is in CAPABILITIES, FREEDOM, AND EQUALITY: AMARTYA SEN'S WORK FROM A GENDER PERSPECTIVE (Bina Agarwal, Jane Humphries & Ingrid Robeyns eds., 2006).

<sup>199</sup> The reports, published annually since 1990, are available at <http://hdr.undp.org/reports>.

has begun to have significant influence by affecting the way nations report, understand, and evaluate their achievements.<sup>200</sup>

#### IV. THE CAPABILITIES APPROACH IN AMERICAN CONSTITUTIONAL LAW

The CA is an approach to basic political principles. It does not tell us how these principles are to be implemented. It does, however, suggest that many of the most central human capabilities, given their enormous importance to basic social justice, should be placed beyond majority whim through constitutionally protected status.<sup>201</sup> History shows us that legislative majorities are susceptible to panic and polarization; they can easily be led to demonize unpopular minorities and to seek restrictions of their rights. If rights of the most fundamental type can be removed as the result of a hasty popular judgment, minorities will enjoy less security and a nation's citizens will, hence, enjoy less equality.<sup>202</sup>

The special status of fundamental entitlements need not be guaranteed through a written constitution, but that is one common way of protecting them and ensuring that they are not held hostage to the vicissitudes of politics; the popularity of this approach speaks in its favor. A nation that chooses to protect human capabilities through a written constitution will require an independent judiciary and judicial review of legislation to make constitutional guarantees more than words on paper.<sup>203</sup> Minority rights are always at risk in a majority-driven world; an independent judiciary is a crucial part of a structure

---

<sup>200</sup> The Human Development and Capability Association, founded in 2004, now has about seven hundred members from seventy countries, all of whom study the further development and implementation of the approach from a variety of disciplinary perspectives. *See generally* Human Development and Capability Association, <http://www.capabilityapproach.com> (last visited Oct. 6, 2007).

<sup>201</sup> *See* Nussbaum, *Capabilities as Fundamental Entitlements*, *supra* note 7 (arguing in favor of defining a specific set of capabilities as the most important to protect).

<sup>202</sup> *See* NUSSBAUM, *LIBERTY*, *supra* note 124 (manuscript at ch. 5) (arguing that the tradition of constitutionally protected free exercise rights provided an important bulwark against the persecution of Jehovah's Witnesses and Roman Catholics). A contrasting case, supporting the same conclusion, is India, where, during the Emergency of 1975–77, Indira Gandhi succeeded in convincing her parliamentary majority to suspend a large group of “Fundamental Rights” in order that she could clamp down on her political enemies. In the wake of that disastrous epoch, the Supreme Court of India declared that a group of essential features of the Constitution could not be amended. *See* NUSSBAUM, *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE* 122–51 (2007).

<sup>203</sup> The scope of judicial review is a topic too large for this Foreword, but again, the case of India is instructive. Indian citizens can approach the Supreme Court directly by petition, and the Court has utter discretion regarding which petitions it hears; this provision of the constitution gives the Court wide quasi-legislative powers.

that protects, on a basis of equality, the rights of those who lack power in majoritarian politics.

The precise demarcation between legislative and judicial functions and a detailed account of the judicial role are not part of the CA as such. People who sympathize with its general goals can differ about institutional allocation, and to some extent different nations may reasonably do things differently, depending on their own particular traditions and problems.<sup>204</sup> In all cases, however, a political scheme will not realize the goals of the CA unless it identifies a core group of entitlements that deserve to be protected stably, regardless of majority whim, and then asks carefully whether people face unequal obstacles to the enjoyment of their basic entitlements, devoting particular attention to traditionally disadvantaged groups.

On the whole, our constitutional tradition has done very well protecting some capabilities — namely, 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, on occasion, 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. Equal Protection Clause jurisprudence, like the modern uses of the CA in the areas of gender, race, and disability, has focused on areas affected by traditional discrimination.<sup>205</sup> 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 social and economic rights, although a beginning was made in the late 1960s and 1970s.<sup>206</sup> This job has largely been left to legislative action, as in the New Deal, and the protections are thus vulnerable to changes in public opinion, as the Reagan Revolution has shown. Protection of basic material entitlements clearly involves an active legislative role, since many welfare rights require the appropria-

---

<sup>204</sup> For example, nations will need to ask how the likely candidates for judicial appointments are placed relative to the average citizen. In a nation with a low literacy rate, judges, of necessity highly educated, are likely to be very distant from the average citizen in life experience, and might not understand well the concerns of the average citizen. In such a nation there could be a strong argument for a narrower understanding of judicial competence than would be appropriate to a nation in which educational opportunity is more broadly distributed. In a nation riven by religious conflict, by contrast, a judiciary appointed for life might prove usefully resistant to sectarian animosities, providing a powerful protection for citizens' rights. Such a situation would give rise to a plausible argument for a somewhat broader judicial role.

<sup>205</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (determining that a municipality's denial of a permit to a home for people with mental disabilities did not survive rational basis review); see also *infra* pp. 71–72 (discussing *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

<sup>206</sup> See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS*, *supra* note 5, at 149–71.

tion of funds, a task beyond the power of courts. Even in such cases, however, courts still play a major role in interpreting statutory provisions,<sup>207</sup> and they also play a role in determining when cost-cutting measures pursued by legislatures are violative of fundamental rights.<sup>208</sup> In recent years, courts in other nations have frequently pursued a more ambitious program in the area of welfare rights, working in partnership with legislatures in order to ensure that the fundamental rights of citizens are safeguarded.<sup>209</sup> The CA can thus help us to see what we have done right so far and what we might do much better, if we want to be a decent society.

One thing the CA can offer constitutional law, then, is an account of the incompleteness of the U.S. Constitution. That, however, is not its only role: it can also supply, in those many cases in which our tradition has not been neglectful, a benchmark for adequate reasoning about the Constitution we actually have. The Constitution identifies a range of fundamental rights; these entitlements, however, exist only as words on paper until they are interpreted. The CA offers a distinctive set of suggestions for such interpretation. Its suggestions correspond to one strong tradition within our history of judicial interpretation, although this tradition has not always been dominant.

How, according to the CA, should judges reason when interpreting basic entitlements? As I have said, they cannot put things into constitutions that are not there. Judges must reason within the limitations of text and tradition;<sup>210</sup> if they like the idea of a housing right, they must simply wait until such a right is added to the Constitution by the usual process, unless they have a persuasive argument that it inheres in some other enumerated right.

The CA, however, does offer guidance for judicial reasoning in areas that are touched on by text and precedent. The first and most crucial suggestion is that the judge ought to think about the rights as capabilities, asking: are people really able to enjoy this right, or are there subtle impediments that stand between them and the full or equal access to the right? Judges should attend closely to history and social context, eschewing lofty formalism in favor of perception. A second and closely related suggestion is that judges should consider the equality of access to a right as part of the right itself and should be aware

---

<sup>207</sup> See *infra* section V.A, pp. 74–77.

<sup>208</sup> See *infra* pp. 60–62.

<sup>209</sup> See generally Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002).

<sup>210</sup> Those limits, naturally, are understood differently by different theories of constitutional interpretation, but all such theories agree that a constitutional text and its associated tradition of precedent supply constraints of some type on judicial reasoning. Textualists and their critics typically differ over how to find the meaning of the constitutional text, not over its relevance.

---

---

that history and social circumstance frequently affect that access. Equality should be understood not in a distanced way, as mere formal symmetry, but in terms of people's actual abilities to do or be. The CA's third suggestion is that judges should be aware that many entitlements that do not appear to be welfare rights may yet have material necessary conditions, and they should make sure that a given right is not rendered off limits to a group of people by the absence of such conditions.

These principles, abstract though they seem, correspond to some distinctive features of our tradition of constitutional interpretation — features that are in contention, often, with other styles of interpretation, and are more prominent in some areas and times than in others. The CA illuminates what is rightly done in some cases, and what is a falling-off — often, toward libertarian minimalism, lofty formalism, or both.

Where, in the U.S. Constitution, are human capabilities protected? An obvious partial answer is: “In the Bill of Rights.” The Bill of Rights does indeed identify a list of fundamental entitlements, setting these beyond majority whim. The items listed are, obviously, plural and noncommensurable, and all of them are to be protected for all citizens, no matter what a concern for overall welfare would suggest. Thus the Constitution commits us to a politics that is, at least in this sense, nonutilitarian. Even the largest gain in overall welfare or satisfaction is off limits if it is purchased at the price of even one of these freedoms.<sup>211</sup>

Beyond this small list, basic entitlements are implicit in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. A set of illustrations shows that the reach of the CA in American constitutional law is wide, despite the large gaps that exist in the areas of health and basic welfare. I begin with a relatively obvious example, showing how the CA would direct judges in interpreting a right that has been explicitly recognized in the Constitution and has nothing to do with the welfare rights with which the CA is often associated. I argue that this style of interpretation is amply attested in our legal tradition. Next, I turn to cases involving the idea of equality, showing how the CA has informed (and rightly) a series of decisions involving “separate but equal” facilities. Finally, I turn to a more contentious area,

---

<sup>211</sup> Of course, consequential overrides are sometimes built into the more detailed account of a fundamental entitlement, as they have been with both the Religion and Speech Clauses of the First Amendment. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (asserting that the freedom of speech may be limited in situations in which speech threatens to produce imminent lawless action); *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963) (stating that religious freedom may be limited by a compelling state interest).



that of education, where the CA shows its presence, but has not always prevailed.

A. *The Religion Clauses*

I have said that not just any list of rights will count as a fulfillment of the CA: those rights have to be understood in the sense of real opportunities for choice and activity on a basis of equality. Consider the First Amendment's Free Exercise Clause.<sup>212</sup> The tradition of interpretation prior to *Employment Division v. Smith*<sup>213</sup> was an exemplary fulfillment of the CA. In cases such as *Sherbert v. Verner*<sup>214</sup> and *Wisconsin v. Yoder*,<sup>215</sup> the Court asked about the unequal burdens that are faced by members of minority religions in a majority world. If those burdens are substantial, then the state may not impose them without a truly compelling interest. Adell Sherbert, a long-term employee in a South Carolina textile factory, and a Seventh-Day Adventist, was fired for refusing to work on Saturdays.<sup>216</sup> Any employee of the textile factory would have been fired for that reason, but Mrs. Sherbert had a special difficulty, because she was unable to find comparable work compatible with her religious commitments.<sup>217</sup> She was denied unemployment compensation from the state of South Carolina, on the grounds that she had refused "suitable work."<sup>218</sup> We might say that South Carolina was following Wechsler here, applying a formalistic rule from a lofty distance without asking what "suitable" really meant for Mrs. Sherbert, given her minority religion.

The Supreme Court, however, was not satisfied by this formal analysis. It asked: what was really at stake for Mrs. Sherbert, and what were her real opportunities? The answer was that they were clearly unequal to those of majority worshippers: members of the majority religion could go to church as their conscience commanded with no loss of employment, and she, on account of her minority religion, could not.<sup>219</sup> The substantial burden on her religious choice was not justified by any compelling state interest.<sup>220</sup> That inquiry into what is really at stake for people — asking whether they are *really* able to avail themselves of their basic rights on terms of equality with others — is a good paradigm of what the CA requires. The very concept of

---

<sup>212</sup> See NUSSBAUM, LIBERTY, *supra* note 124 (manuscript at ch. 4).

<sup>213</sup> 494 U.S. 872 (1990).

<sup>214</sup> 374 U.S. 398 (1963).

<sup>215</sup> 406 U.S. 205 (1972) (holding that the Free Exercise Clause required an exception to public school attendance for the Amish, with respect to the last two years of mandatory attendance).

<sup>216</sup> *Sherbert*, 374 U.S. at 399.

<sup>217</sup> *Id.* at 399 & n.2.

<sup>218</sup> *Id.* at 401 (quoting S.C. CODE ANN. § 68-114 (1962)).

<sup>219</sup> *Id.* at 399-404.

<sup>220</sup> *Id.* at 406-09.

“substantial burden” asks for CA-style reasoning: a judge dealing with such a case must ask what the plaintiff’s religious commitments are, and what the precise circumstances of the complaint are, in order to take the measure of the burden that is, or is not, imposed. The very concept of free exercise accommodation goes against lofty formalism and embodies the spirit of the CA, for it is basically the idea that a generally applicable law needs to contain exceptions for people whose conscientious commitments it burdens. It therefore directs the interpreter to understand the nature of the minority person’s struggle for liberty, asking what that person is actually able to do and be, rather than imposing an exceptionless rule on everyone.

Notice that, while the Free Exercise Clause protects a major liberty, it is also seen to protect the equality of that liberty. The *Sherbert* majority considered the burden on Mrs. Sherbert extremely unfair: “[T]o condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”<sup>221</sup> The *Sherbert* Court might well have interpreted the Free Exercise Clause to mean that ample liberty is sufficient, and equality with respect to that liberty is unimportant. But in insisting on nondiscriminatory liberty, *Sherbert* shows the role of judicial interpretation relative to the goals of the CA at its very best: taking a vaguely specified right, the Court interpreted it by asking searching questions about people’s actual abilities and possibilities in a world where minorities often labor under special burdens.

*Sherbert* also shows why a strong judicial role is an important part of realizing the CA in some areas. Legislators are often fond of formal rules driven by majority preferences, and are often insufficiently sensitive to the burdens faced by small minority groups who may also be unpopular. Judges have time to hear the entirety of a minority person’s story, and their job is understood as involving the careful consideration of it in all its particularity. The individualized nature of the judicial process prompts a CA-style inquiry.

*Smith*, which drastically curtailed the judicial role in free exercise accommodations, was, in that sense, a falling away from the CA, leaving the question of accommodation for reasons of conscience to the vicissitudes of the political process.<sup>222</sup> The majority conceded that the decision to refuse judicially mandated accommodations “place[d] at a relative disadvantage those religious practices that are not widely engaged in,” but this is called an “unavoidable consequence of democ-

---

<sup>221</sup> *Id.* at 406.

<sup>222</sup> In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that the Free Exercise Clause did not prohibit the application of Oregon drug laws to the religious use of peyote by Native Americans. *Id.* at 890.

atic government.”<sup>223</sup> The majority emphasized the idea that law must be exceptionless; the alternative would be “courting anarchy.”<sup>224</sup> The opinion repudiated a *Sherbert*-style attempt to examine closely the burdens faced by practitioners of Native American religions, or to ask how judicial action might protect the rights of Native American religious practitioners on a basis of equality with members of other religions. The defense of exceptionless rules is reminiscent of Wechsler’s lofty formalism. The formalism of the majority was all the more striking in that, while *Sherbert* and *Yoder* were not technically overruled, they were read in a surprisingly narrow way.<sup>225</sup>

Of course, *Smith* does not repudiate the goals of the CA: legislative accommodations are still permissible. Nonetheless, the Court emphasized that they are not to be relied on, given the power of majorities, and the opinion simply dismissed the idea that in such cases the goals of the Constitution must be fulfilled through a judicial role that vindicates the rights of religious minorities on a basis of equality.<sup>226</sup> Given the Court’s very plausible view of the way in which democratic majorities behave, its conception of the judicial role represents, in effect, a decision not to protect the equality of minority religious rights where majorities have not already done so. *Smith* shows clearly what is at stake in giving an independent judiciary a strong role in interpreting fundamental constitutional guarantees, and why judges should not hold too narrow, or too formalistic, a conception of their role.

In the wake of *Smith* (and the demise of the Religious Freedom Restoration Act of 1993<sup>227</sup> (RFRA) in *City of Boerne v. Flores*,<sup>228</sup> at least as applied to the states), cases such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>229</sup> still ask searching questions about fairness to minorities and the unequal burden of hostility they may face on the way to exercising their religious rights. Moreover, given

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 888.

<sup>225</sup> Thus, *Sherbert* was understood to support accommodation only in unemployment compensation cases, and *Yoder* was understood to support accommodation only for cases involving mixed rights claims (not just free exercise, but also the rights of parents, were at stake). *See id.* at 881–83.

<sup>226</sup> *See id.* at 888–90.

<sup>227</sup> Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (2000)), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>228</sup> 521 U.S. 507. RFRA had attempted to reintroduce the more protective *Sherbert* standard through legislation; it was invalidated as applied to the states in *Boerne*. *See id.* at 529–36. Congress’s attempt to accomplish through legislation what *Sherbert* previously achieved was thus held to exceed Congress’s power. However, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), attempted to reinstate at least a part of RFRA’s protections. The Court upheld RLUIPA in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

<sup>229</sup> 508 U.S. 520 (1993) (holding that city ordinances dealing with the ritual slaughter of animals were not neutral, nor of general applicability, and not justified by governmental interests).

that RFRA is still intact as applied to acts of the federal government,<sup>230</sup> small religions may still be protected comprehensively in some domains.<sup>231</sup> In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>232</sup> Chief Justice Roberts emphasized that a judicial role in connection with protecting minorities is built into RFRA itself: “RFRA . . . plainly contemplates that *courts* would recognize exceptions — that is how the law works. . . . RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required . . . .”<sup>233</sup> Recent free exercise jurisprudence thus continues to contain elements of the CA.

Meanwhile, Establishment Clause jurisprudence also provides useful examples of contextual imagining in the service of protecting human capabilities.<sup>234</sup> Ever since Roger Williams, and, very prominently, Madison’s *Memorial and Remonstrance Against Religious Assessments*, it has been understood that religious establishments threaten the equality of citizens’ standing in the public realm.<sup>235</sup> They threaten, first, the equality of liberty, holding open a permanent possibility of unequal curtailment.<sup>236</sup> But even when they do not threaten liberty, establishments make a statement: some citizens are the preferred group, and others the dispreferred.<sup>237</sup> A major strand in recent Establishment Clause jurisprudence, associated with Justice O’Connor and the Madisonian “endorsement test,” has focused on that issue. For Justice O’Connor (and, often, with her a majority of the Court), the right question to ask when considering a putative Establishment Clause violation was: would an objective observer, acquainted with all the historical and contextual facts of the case, judge that the governmental policy in question makes a statement that creates a favored

<sup>230</sup> This had remained in dispute for some time, but is made clear in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1220 (2006).

<sup>231</sup> *O Centro* concerned a Brazilian sect with only 130 members that wished to use a hallucinogen called *hoasca*, illegal under the Controlled Substances Act, in its sacred ceremony. See *id.* at 1217. The Act had already been amended to permit the sacramental use of peyote by Native Americans (the right in question in *Smith*), but the small group in the present case lacked the political clout of the Native Americans. See *id.* at 1222.

<sup>232</sup> 126 S. Ct. 1211.

<sup>233</sup> *Id.* at 1222 (citing provisions of RFRA).

<sup>234</sup> E.g., *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>235</sup> See MADISON, *supra* note 138, at 49, 50–51.

<sup>236</sup> See *id.* at 50 (stating that “it is proper to take alarm at the first experiment on our liberties”).

<sup>237</sup> *Id.* (“[T]he Bill violates that equality which ought to be the basis of every law . . . . [A]ll men are to be considered as entering into Society on equal conditions . . . . Above all are they to be considered as retaining an ‘equal title to the free exercise of Religion according to the dictates of conscience.’ . . . As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.”).

class of citizens, an in-group, and a disfavored class, an out-group?<sup>238</sup> That question is really a CA question *par excellence*, because it requires us to ask what people are actually able to do and to be in society: Are they able to enter the public square “on equal conditions,”<sup>239</sup> as Madison said? Or are they in some subtle way stigmatized by the act of government and made into an out-group? Moreover, the jurisprudence of the endorsement test has the hallmarks of detailed contextual reasoning that we have understood to be so closely linked to the implementation of the CA. In cases such as *Lynch v. Donnelly*,<sup>240</sup> *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,<sup>241</sup> *McCreary County v. ACLU of Kentucky*,<sup>242</sup> and *Van Orden v. Perry*,<sup>243</sup> the Court searchingly examined the whole history and context of the public displays in question for signs of the statement that government was making through its sponsorship. What can seem messy or unduly fussy in the Court’s recent Establishment Clause jurisprudence looks, therefore, like wise Aristotelian practical reasoning, posing the right questions about what citizens are able to be.<sup>244</sup>

### B. *Separate but Equal*

The U.S. Constitution protects human capabilities in a variety of ways. Explicit enumeration is one way, but the Fourteenth Amendment allows a marked expansion of the list of protected items. Through the Due Process Clause and the Privileges and Immunities Clause, fundamental rights such as the right to vote, the right to appeal a criminal conviction, and the right to travel between states have been seen as implicit in the notion of ordered liberty.<sup>245</sup> Equally significant is the protection afforded some important human capabilities through the Equal Protection Clause. Minorities often face unusual obstacles and burdens, and equality (often with particular reference to

<sup>238</sup> See *Lynch*, 465 U.S. at 691–94 (O’Connor, J., concurring). The test is then applied by Justice Blackmun in *Allegheny*, 492 U.S. at 594–597 (opinion of Blackmun, J.). The expanded version of the test, referring to the objective observer, is introduced in *Wallace v. Jaffree*, 472 U.S. 38, 69, 76 (1985) (O’Connor, J., concurring in judgment).

<sup>239</sup> MADISON, *supra* note 138, at 50.

<sup>240</sup> 465 U.S. 668.

<sup>241</sup> 492 U.S. 573 (1989).

<sup>242</sup> 125 S. Ct. 2722 (2005).

<sup>243</sup> 125 S. Ct. 2854 (2005).

<sup>244</sup> The fact that the approach asks the right questions does not entail that all its answers are correct: we could agree that the right questions have been posed while disagreeing about the result.

<sup>245</sup> *United States v. Guest*, 383 U.S. 745 (1966) (regarding the right to travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (regarding the right to vote); *Griffin v. Illinois*, 351 U.S. 12 (1956) (regarding the right to appeal); see also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (regarding the right to travel). A list of these and related instances is given in Justice Marshall’s dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99–100 (1973) (Marshall, J., dissenting).

minorities) often enters into the interpretation of a basic freedom, as with both of the religion clauses, where the equal liberty of minorities has been a persistent concern. The Equal Protection Clause, however, has allowed the protection of capabilities to extend more widely, as arrangements that seemed to treat all parties similarly were found unconstitutional in a range of cases because they did 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 was through that searching question that the formal symmetry of “separate but equal” arrangements was unmasked as a device for the perpetuation of hierarchy.

In *Brown*, the existence of separate arrangements that looked equal on paper was not the end of the matter for the Court. Insisting emphatically on the vital importance of education for personal development and opportunity,<sup>246</sup> the Justices pressed the question about the human capabilities of students: How have they been enabled to learn and to function? “Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?”<sup>247</sup> The answer is that there is a great inequality at the level of capability: the stigma of segregation was itself a burden that put unequal obstacles in the way of minority students. Segregation “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>248</sup> Separation is seen as discriminatory as the result of a thought process that is not lofty and formalistic (like Wechsler’s, in his critique of the reasoning in the case), but immersed in history and context.

Similarly, in *Loving v. Virginia*,<sup>249</sup> the laws of Virginia offered a simulacrum of equality in the form of formal symmetry: blacks could not marry whites, whites could not marry blacks. The State argued that this symmetry meant that the laws did “not constitute an invidious discrimination based upon race.”<sup>250</sup> The Supreme Court, however, looked beneath the formal symmetry, asking about the meaning of the prohibition on miscegenation for what people were really able to do and be. The prohibition, the Court 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 un-

---

<sup>246</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 494.

<sup>249</sup> 388 U.S. 1 (1967).

<sup>250</sup> *Id.* at 8.

equal, and was explained by “invidious racial discrimination” alone.<sup>251</sup> 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. Once again, the Court was willing to think concretely about the meaning of enforced separation for both parties. In this way, a pertinent anti-subordination principle was articulated, and this principle is both fully rational (not, in Wechsler’s sense, an exercise of “naked power”) and far more pertinent than Wechsler’s bare associational principle.

But perhaps the most resonant equal protection case, as far as the CA is concerned, is *United States v. Virginia*,<sup>252</sup> the case that opened the doors of the Virginia Military Institute (VMI) to women. Sex-based classifications, Justice Ginsburg’s majority opinion observed, 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.”<sup>253</sup> 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. “State actors controlling gates to opportunity,” however, “may not exclude qualified individuals based on ‘fixed notions concerning roles and abilities of males and females.’”<sup>254</sup> 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 Virginia Women’s Institute for Leadership (VWIL). A remedy, the majority wrote, “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

---

<sup>251</sup> *Id.* at 11.

<sup>252</sup> 518 U.S. 515 (1996).

<sup>253</sup> *Id.* at 533–34.

<sup>254</sup> *Id.* at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). 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. This part of the opinion bears a strong resemblance to J.S. Mill’s attack on gender-based stereotypes as forms of “enslavement]” for women. See MILL, *THE SUBJECTION OF WOMEN*, *supra* note 190, at 15.

the absence of [discrimination].”<sup>255</sup> 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, was “different in kind from VMI and unequal in tangible and intangible facilities.”<sup>256</sup> The analysis asked 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).<sup>257</sup> The VWIL student, it was argued, lacked many opportunities characteristic of the VMI graduate. She was taught by an inferior faculty, with fewer Ph.D.s.<sup>258</sup> Her curriculum was a “pale shadow”<sup>259</sup> of VMI, and her institution had grossly unequal financial reserves. She did not enjoy the full benefits of VMI’s alumni network.<sup>260</sup> So, she simply lacked many opportunities that the average VMI graduate had. The remedy, however attractive it may have appeared at first glance, did not pass the test of promoting truly equal capabilities.

The opinion thus reads the situation of women in a way that brings obstacles to fully equal opportunity to light, exhibiting the very type of historically precise and contextually attuned analysis that Wechsler’s lofty formalism repudiates.

### C. Poverty and Due Process

Unlike many nations, the U.S. has never embraced the idea of constitutionally guaranteed welfare rights. India and South Africa, for example, have done much more judicially to put a minimum floor under living conditions, health, and housing. Like the Britain of Green’s time, which focused on legislative enactment, the United States, during the New Deal, pursued its 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 basic welfare very much in the spirit of the CA. As Frank Michelman argued in his 1969 *Foreword* in the *Harvard Law Review*, the aim of the liberal jurisprudence of this period was not equalization, it was (as in the CA) the provision of a decent social minimum.<sup>261</sup>

---

<sup>255</sup> *United States v. Virginia*, 518 U.S. at 547 (alteration in original) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

<sup>256</sup> *Id.* at 517.

<sup>257</sup> For a discussion of the differences between the programs, see *id.* at 526, 552–53.

<sup>258</sup> *Id.* at 526.

<sup>259</sup> *Id.* at 553 (quoting *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)) (internal quotation marks omitted).

<sup>260</sup> *Id.* at 552.

<sup>261</sup> Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969). I would argue, however, that



A case that neatly captures the era's approach to basic welfare is *Goldberg v. Kelly*.<sup>262</sup> This was a procedural due process case, involving the termination of welfare benefits without an evidentiary hearing.<sup>263</sup> 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 had a right to be heard "at a meaningful time and in a meaningful manner,"<sup>264</sup> but they were made to wait until after benefits were terminated before the hearing, during which time they may have had nothing at all on which to live. The extremely poor person's situation thus "bec[ame] immediately desperate,"<sup>265</sup> and the ensuing focus on daily subsistence was likely to undermine his ability to claim welfare benefits.

Invoking *Sherbert*, Justice Brennan argued that the fact that welfare was not itself constitutionally required did not remove the constitutional obligation to administer it, once it was legislatively enacted, in an even-handed and non-exclusionary way.<sup>266</sup> Just as South Carolina was at liberty to cancel all unemployment compensation, but not at liberty to withhold it unequally from Mrs. Sherbert on account of her conscientious scruples, so New York, while free to terminate welfare, was not free to offer it in ways that discriminated against the extremely poor.

This was as far as Justice Brennan could go, so far as constitutional interpretation is concerned, given the materials at his disposal. Arguing that an evidentiary hearing served important government interests, however, he added a famous set of reflections on the purpose of government, emphasizing the importance of social welfare programs, relative to both dignity and equality:

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 "pro-

---

Michelman is too much influenced by utilitarian thought, then in its (pre-Rawls) heyday as the progressive philosophy: he understands the goal as that of a minimum level of "desire satisfaction," whereas what the record actually shows (fortunately, since, as I have argued, desire satisfaction is a very unreliable idea and one that biases policy in favor of the status quo) is attention to basic human capabilities or opportunities.

<sup>262</sup> 397 U.S. 254 (1970).

<sup>263</sup> See *id.* at 255.

<sup>264</sup> *Id.* at 267 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

<sup>265</sup> *Id.* at 264.

<sup>266</sup> See *id.* at 262.

mote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”<sup>267</sup>

As one can see, Justice Brennan’s account of the purpose of government focuses not on the satisfaction of desire, but on human capabilities.<sup>268</sup> 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 participation or activity: that is what is meant, said Justice Brennan, by “promote the general Welfare” and “secure the Blessings of Liberty.”

#### D. Education

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 citizen to pursue personal achievement and to play a meaningful role in the community. It was in this area that the clash between libertarian minimalism and the CA was at its most intense, in the times of both Smith and Green. Consequently, it is not surprising that education has been the focus of some of the most contested Fourteenth Amendment cases, such as *Brown* and *United States 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 offered must be ample enough, and at least that minimum amount must be delivered in a way that respects the equal entitlement of all people within the jurisdiction of the states.

*Plyler v. Doe*<sup>269</sup> 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 emphasized that the Equal Protection Clause applies to “any person within [a state’s] jurisdiction,”<sup>270</sup> and held that the children of illegal immigrants are plainly included within the clause’s meaning, just as they are also subject to the criminal law. Although precedent made it clear that education, unlike voting, 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 Ameri-

---

<sup>267</sup> *Id.* at 264–65 (quoting U.S. CONST. pmb.).

<sup>268</sup> His phrasing bears a striking resemblance to that of T.H. Green in his lecture on “Liberal Legislation and the Freedom of Contract,” *see* Green, *supra* note 196, although the connection is probably indirect. (Justice Brennan majored in Economics at the Wharton School of the University of Pennsylvania, and thus probably had little if any formal contact with philosophy.)

<sup>269</sup> 457 U.S. 202 (1982).

<sup>270</sup> *Id.* at 210 (quoting U.S. CONST. amend. XIV, § 1 (emphasis added)).

can life.<sup>271</sup> The analysis used ideas of capability and opportunity that have deep roots in the history of the CA.

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.”<sup>272</sup> Public education, the majority wrote, plays a “pivotal role” in “maintaining the fabric of our society” and in “sustaining our political and cultural heritage.”<sup>273</sup> Education is “necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”<sup>274</sup> 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.<sup>275</sup>

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.”<sup>276</sup> In effect, the opinion sees the equal right to educational benefits as inherent in the equal dignity of persons, given the pivotal role of education in securing human capabilities.<sup>277</sup>

The question of 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 Independent School District v. Rodriguez*,<sup>278</sup> nine years before *Plyler v. Doe*, the majority acknowledged the special status of education as a necessary condition of the meaningful exercise of other constitutional rights, including the freedom of speech and the right to vote, but denied that education was

---

<sup>271</sup> *Id.* at 221.

<sup>272</sup> *Id.* at 213.

<sup>273</sup> *Id.* at 221.

<sup>274</sup> *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)) (internal quotation mark omitted).

<sup>275</sup> *Id.* at 222.

<sup>276</sup> *Id.* at 223.

<sup>277</sup> Compare the case in India that gave rise to the addition of primary and secondary education to the list of constitutionally protected entitlements, *Unni Krishnan v. State of Andhra Pradesh*, A.I.R. 1993 S.C. 2178. The court held that the right to education flows from the right to life and is related to the dignity of the individual. *Id.* at 2231–32.

<sup>278</sup> 411 U.S. 1 (1973).

(like the right to travel) a right implicit in the Constitution. Moreover, even if a right to “some identifiable quantum of education” could possibly be seen as implicit in other constitutional rights, the Court held that there was no evidence that the Texas system’s very large inequalities of funding pushed some people below this minimum.<sup>279</sup> The provision of “basic minimal skills” is the most that might even arguably enjoy constitutional protection, and Texas appeared to provide this.<sup>280</sup>

In his famous dissent, Justice Marshall argued that the “gross disparities in . . . the Texas financing scheme” were enough to “deprive[] children in their earliest years of the chance to reach their full potential as citizens.”<sup>281</sup> While precise numerical equality in the distribution of benefits is not constitutionally required, he argued, gross discrimination in distribution is not constitutionally excusable under the Equal Protection Clause.<sup>282</sup> Citing other instances (the right to vote, the right to travel) in which the Court had recognized a fundamental right despite the absence of explicit wording to that effect,<sup>283</sup> he urged 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.<sup>284</sup> It “provide[s] the tools necessary for political discourse and debate.”<sup>285</sup> It thus involves a governmental interest of the highest order.

Justice Marshall’s dissent marks the limit of the forward march of the CA in American law, at least where social and economic rights are concerned (although the opinion correctly refuses to separate these rights from the political and civil rights that they undergird). Subsequent cases, including *Plyler v. Doe*, tread cautiously, refusing to give education the status urged by Justice Marshall. Nevertheless, education does continue to enjoy some sort of special status, as the *San Antonio* and *Plyler* majorities acknowledge.

Such ideas of equal entitlement and of the fundamental importance of education, while they did not generate further case law in the area of unequal expenditure, were not utterly infertile. In two important cases, courts used these core ideas to extend free, suitable public education to children with mental and physical disabilities. In 1972, in *Mills v. Board of Education*,<sup>286</sup> the U.S. District Court for the District of Columbia ruled in favor of a group of children with mental disabili-

---

<sup>279</sup> *Id.* at 36–37.

<sup>280</sup> *Id.* at 37.

<sup>281</sup> *Id.* at 71 & n.2 (Marshall, J., dissenting).

<sup>282</sup> *Id.* at 88–89.

<sup>283</sup> *Id.* at 99–101.

<sup>284</sup> *Id.* at 112.

<sup>285</sup> *Id.* at 113.

<sup>286</sup> 348 F. Supp. 866 (D.D.C. 1972).

ties 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.<sup>287</sup> (Notice that the opinion understood *Brown* to be about the difference between exclusion and inclusion, not about a ban on special affirmative remedies: indeed, it understood the *Brown* framework to suggest, very strongly, the need for such affirmative remedies.<sup>288</sup> Children with disabilities, the court held, need special support in order to be fully integrated into the public schools.<sup>289</sup>) Moreover, very important for our purposes, the court 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 argued.<sup>290</sup> Significantly, the court cited *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.”<sup>291</sup> Similarly, reasoned the court, “the District of Columbia’s interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources.”<sup>292</sup> Like *Goldberg v. Kelly*, the opinion emphasizes that the inclusion is not a matter of charity, but one of entitlement and basic justice.

The United States lags behind some other nations in recognizing the importance of guaranteeing some key social and economic entitlements to all and placing these beyond the vicissitudes of majority politics. Nonetheless, the CA constitutes at least one prominent strand in our thinking about what it means to protect a fundamental entitlement for all. Where an entitlement has been constitutionally recognized, the CA provides a normative benchmark for interpreting that right in a way that recognizes the equality of all citizens. This normative understanding corresponds to some prominent aspects of our legal tradition.

---

<sup>287</sup> *Id.* at 874–75. Technically, because of the legally anomalous situation of the District of Columbia, the court held that such a denial 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.” *Id.* at 875 (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967)).

<sup>288</sup> *See id.* at 874–76.

<sup>289</sup> *See id.* at 878–80 (specifying measures to be taken).

<sup>290</sup> *Id.* at 876.

<sup>291</sup> *Id.* (quoting *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970)).

<sup>292</sup> *Id.*

It also provides, in this connection, an attractive account of judicial reasoning that is sometimes the dominant approach to interpretation, although lofty formalism has also had great influence.

V. THE CAPABILITIES APPROACH IN THE 2006 TERM:  
FAILURES OF “PERCEPTION”

When cases involving central human entitlements come before the Supreme Court, many factors are rightly involved; a court cannot and should not apply a normative philosophical program, even one that seems very attractive. 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, in which these other factors do not determine a clear solution. In thinking about such cases, philosophical argument can be helpful in identifying and clarifying features of our constitutional tradition, in illuminating general goals and values that are clearly at issue, and in providing a related account of pertinent features of judicial reasoning.

The 2006 Term contained a number of difficult and disputed cases, where the weighting of relevant factors must necessarily be complex. In such cases, judges need to call on their sense of history and context, and their understanding of the human meaning of the concepts implicit in the relevant statute or constitutional text. As I argue above, that kind of experienced imagination of particulars, which Aristotle calls “perception,” proves especially crucial, and has been especially prominent, 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. Despite being a normative theory whose goals can be characterized, to some extent, in general terms, the CA consistently emphasizes the need for confrontation with the real and complex situations within which people are trying to function as equals. In that way, it is closely associated with ideals of context sensitive reasoning embedded in the common law tradition.

When assessed against the normative and methodological benchmark supplied by the CA, the 2006 Term shows some notable forward strides. It also, however, contains some ominous signs for the future. In a group of deeply disputed cases, we find a marked turning away from the realistic sort of imagining in which a judge grapples seriously with all the facts in their historical, material, and social context. In its place we find an obtuse though competent legal formalism of a type highly reminiscent of Wechsler; sometimes we also find 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 Environment and Education*

The 2006 Term includes two decisions that markedly enlarge support for human capabilities. *Massachusetts v. EPA*<sup>293</sup> affirmed that states have standing to challenge the failure of the EPA to regulate greenhouse gas emissions, thus recognizing a carefully limited right of citizens to shape the kind of relationship they have with the surrounding environment.<sup>294</sup>

More closely connected to the issues I have pursued in this Foreword, however, is *Winkelman v. Parma City School District*,<sup>295</sup> which held that the Individuals with Disabilities Education Act<sup>296</sup> (IDEA) gives rights not only to disabled children, but also to their parents, permitting parents to represent themselves in court when challenging their child's Individualized Education Program (IEP).<sup>297</sup> The case turned on the interpretation of a rather clearly written statute, so the 7–2 decision is perhaps unsurprising. The whole history of the issue, however, illustrates a fruitful partnership between judicial and legislative action in the furtherance of human capabilities.<sup>298</sup>

Concern for the entitlements of people with disabilities has been a hallmark of the modern development of the CA, both as an issue of importance in its own right and as a test that indicates the superiority of the CA to other approaches. In his first articulation of the CA, in the 1980 article *Equality of What?*, Amartya Sen argued that a formalistic approach favoring giving all citizens an identical quantity of all-purpose resources would fail to grapple well with the special needs of people with disabilities. A person using a wheelchair, he argued, will need more expenditure in order to come up to the same level of mobility than a person with “normal” mobility, given that society has been designed with the needs of the “normal” in mind.<sup>299</sup> He argued that the social aim should instead be to produce a certain level of capability in all citizens.<sup>300</sup> In *Frontiers of Justice*, I argue that the equal dignity

<sup>293</sup> 127 S. Ct. 1438 (2007).

<sup>294</sup> *Id.* at 1458; see *supra* note 15 (noting the capability of living with concern for and in relation to other species and the world of nature). For an elaboration of the implications of the CA for environmental thought, see Breena Holland, *Environment and Capability: A New Normative Framework for Environmental Policy Analysis* (August 2005) (unpublished Ph.D. dissertation, University of Chicago) (on file with the Harvard Law School Library).

<sup>295</sup> 127 S. Ct. 1994 (2007).

<sup>296</sup> 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004).

<sup>297</sup> *Winkelman*, 127 S. Ct. at 2006.

<sup>298</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 7, at 155–223 (discussing the history of disability issues and their relationship to the CA).

<sup>299</sup> See Sen, *Equality of What?*, *supra* note 198, at 203–04. Sen actually treats this case as one of straightforward natural difference, failing to note that the reasons why the person in a wheelchair is less mobile are thoroughly social: absence of ramps, wheelchair accessible buses, etc.

<sup>300</sup> *Id.* at 218–19.

of people with mental and physical disabilities gives us a major reason to prefer the CA to alternative approaches, as a source of more helpful political principles to deal with these cases. The principles involved in the cases leading up to IDEA figure in my argument as examples of the helpful recognition that equal protection requires special measures to ensure that children with disabilities really have full and equal access to education.<sup>301</sup>

As I discussed in Part IV, *Mills v. Board of Education* held that children with a wide range of mental and physical disabilities have enforceable rights to inclusion, on a basis of equality, in the public schools of the District of Columbia.<sup>302</sup> A year before, the federal district court in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*<sup>303</sup> issued a consent decree compelling Pennsylvania public schools to provide access to “appropriate” education and training programs to children with mental disabilities.<sup>304</sup> Because absence of adequate local funding was clearly an obstacle to the fulfillment of these judicially mandated obligations, a national debate ensued, leading to a major legislative initiative. In 1975, Congress passed the Education for All Handicapped Children Act,<sup>305</sup> which turned the *Mills* decision into federal law, giving a wide range of mentally disabled children enforceable rights to free suitable public education and making funds available to the states to help them meet their constitutional obligations. This law was slightly modified and elaborated in 1997 in the form of IDEA.

The guiding principle of IDEA is that children with disabilities are individuals, equal in dignity to “normal” children, and that, in consequence, education should be based on a careful, individualized consideration of a child’s educational needs. The central vehicle of this idea is the IEP, “a written statement for each child with a disability that is developed, reviewed, and revised.”<sup>306</sup> IDEA requires that states affirmatively undertake to identify and locate all children with disabilities whose needs have not been addressed.<sup>307</sup> It also requires that districts establish extensive procedural safeguards to give parents input in decisions regarding the evaluation and placement of their children, as well as access to records and rights to participation in due process

---

<sup>301</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 7, at 200–05.

<sup>302</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874–76 (D.D.C. 1972).

<sup>303</sup> 334 F. Supp. 1257 (E.D. Pa. 1971).

<sup>304</sup> *Id.* at 1258.

<sup>305</sup> Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1405–1406, 1415–1420 (2000 & Supp. IV 2004)).

<sup>306</sup> 20 U.S.C. § 1414(d)(1)(A)(i).

<sup>307</sup> *Id.* § 1412(a)(3)(A).



hearings and judicial review.<sup>308</sup> In general, IDEA obligates states to educate children with disabilities in the “[l]east restrictive environment” appropriate to meet their needs.<sup>309</sup> It thus urges “mainstreaming” of these children. But the underlying recognition of individuality is paramount; thus, if a child will profit more from special education than from mainstreaming, the state is obligated to support a special placement, which sometimes will have to be in a tuition-charging private school.

The Act has noble aspirations, and yet its implementation has been fraught with difficulty. For one thing, the funds were not appropriated for a long time, and even now the funding is not complete.<sup>310</sup> Another major problem is the IEP process, in which parents must negotiate with school committees that are not always well educated about the child’s specific disability and that often try to save money, even at the cost of not supporting a special placement for a child who clearly needs one. Autism spectrum disorders (the type of disability at issue in *Winkelman*) often pose particular problems, making mainstreaming difficult.<sup>311</sup> A whole range of human capabilities, from citizenship to intellectual and emotional development, are at stake in the IEP process, making adequate representation crucial.

Many poor parents, however, cannot afford to hire a lawyer. If they are denied the right to represent themselves, the already striking inequities of IDEA, which clearly favors educated and articulate parents, become yet more striking. When discussions with the Parma, Ohio, school district led to an impasse, the Winkelmans followed IDEA’s administrative review procedures, and when they lost, filed a complaint in federal court, followed by an appeal to the Sixth Circuit.<sup>312</sup> The Sixth Circuit had recently held that IDEA does not grant parents independent rights,<sup>313</sup> and accordingly, it ruled that the Winkelmans could not proceed unless they hired a lawyer.<sup>314</sup> The Supreme Court reversed.<sup>315</sup> As I have said, the statute, carefully read, is not ambiguous, and thus the parents’ victory breaks no new legal ground. It does, however, illustrate an ongoing dialogue and partnership between legislative and judicial action that has resulted in the

---

<sup>308</sup> See *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000–02 (2007) (discussing provisions of IDEA).

<sup>309</sup> 20 U.S.C. § 1412(a)(5).

<sup>310</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 7, at 208–11 (discussing funding and other difficulties in the law’s implementation).

<sup>311</sup> See *id.* at 206–07 (discussing difficulties with “mainstreaming” for autism spectrum children).

<sup>312</sup> *Winkelman*, 127 S. Ct. at 1998–99.

<sup>313</sup> See *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005).

<sup>314</sup> *Winkelman*, 127 S. Ct. at 1999.

<sup>315</sup> *Id.* at 2007.

---

---

protection of human capabilities for many of our most vulnerable young citizens.

In a sense, this victory for the CA is indicative of its current weakness, for it was in a statutory case, in which the statute was clearly written, that the Court protected the capabilities of a vulnerable minority. The Court did not need to engage in detailed historical and contextual imagining (although the opinion did say some useful things about the relationship between IDEA and children's capabilities<sup>316</sup>); they only needed to read the statute. Other groups, as we shall see, were less fortunate.

*B. Women's Health and Employment: Paternalism and Obtuseness*

The equality of women is both a key topic for the theorists of the CA and (as in the case of disability) a test for its adequacy, showing its superiority to utilitarian and minimalist approaches.<sup>317</sup> Women are often unable to enjoy the fruits of a nation's or a region's general prosperity, on account of unequal impediments of many kinds, in areas including education, employment, bodily integrity, health, and the ability to direct their own destiny. Confronting utilitarian approaches with the facts of women's lives therefore shows a weak point in such approaches. Similarly, the minimalist's reluctance to involve the state in the protection of a wide range of human capabilities leaves women particularly vulnerable to violence, ill health, illiteracy, and discrimination and harassment in the workplace, and pointing to these facts helps us to make a powerful case against libertarian minimalism. Women's issues show us, as well, the danger in relying on any abstract and formal approach to decisionmaking: we need to take stock of what actually impedes women's full social and political equality, and this requires a detailed understanding of individual 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 al-

---

<sup>316</sup> See *id.* at 2000–01 (elucidating the concepts of “free appropriate public education” and the role of the IEP); *id.* at 2003 (clarifying the Act's commitment to an idea of equal opportunity that entails special efforts on behalf of children with disabilities).

<sup>317</sup> See CAPABILITIES, FREEDOM, AND EQUALITY: AMARTYA SEN'S WORK FROM A GENDER PERSPECTIVE, *supra* note 198; NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 7; Amartya Sen, *Gender Inequality and Theories of Justice*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 259 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

leged fairness. A good judge in such cases must be able to imagine the real obstacles women face. This sort of imagining informed *United States v. Virginia*, as it has informed the landmark decisions on sexual harassment.<sup>318</sup>

*Ledbetter v. Goodyear Tire & Rubber Co.*<sup>319</sup> is a case in which perception, the informed and realistic understanding of a complex situation in all its historical particularity, makes all the difference. Perception, however, is in short supply in the majority's competent and closely reasoned opinion. As a matter of law, the case boils down to an exercise in analogical reasoning. We have the case to be decided, Lilly Ledbetter's claim of sex discrimination in pay. The question before the Court was whether she could 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.<sup>320</sup> On one hand, in *United Air Lines, Inc. v. Evans*,<sup>321</sup> *Delaware State College v. Ricks*,<sup>322</sup> and *Lorance v. AT&T Technologies, Inc.*,<sup>323</sup> the Court found that the plaintiff could not sue for events that took place outside the 180-day period. On the other hand, in *Bazemore v. Friday*<sup>324</sup> and *National Railroad Passenger Corp. v. Morgan*,<sup>325</sup> the Court suggested that, in cases of incremental or cumulative discrimination, each new act was itself a new offense, and thus occasion to bring suit, because it formed part of a discriminatory historical pattern; the history infects the current acts. Justice Alito attempted to show that Ledbetter's case was more like *Evans* and its siblings and to distinguish *Bazemore* (and the relevant portions of *Morgan*); in dissent, Justice Ginsburg attempted to distinguish *Evans* and its siblings, 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

---

<sup>318</sup> See NUSSBAUM, POETIC JUSTICE, *supra* note 48, at 104–11 (analyzing Carr v. Allison Gas Turbine Division, 32 F.3d 1007 (7th Cir. 1994), and arguing that the detailed account of the way in which an asymmetry of power infected the whole workplace environment was crucial to both the analysis and the result).

<sup>319</sup> 127 S. Ct. 2162 (2007).

<sup>320</sup> See *id.* at 2166.

<sup>321</sup> 431 U.S. 553 (1977).

<sup>322</sup> 449 U.S. 250 (1980).

<sup>323</sup> 490 U.S. 900 (1989).

<sup>324</sup> 478 U.S. 385 (1986) (holding that the defendant employer did have a duty to eliminate race-based salary discrepancies that originated before Title VII was enacted and that the plaintiffs could introduce statistical analyses that reflected these pre-Title VII disparities).

<sup>325</sup> 536 U.S. 101 (2002) (holding that in cases charging hostile work environment, plaintiffs may present evidence of acts that would be time-barred as the basis of an independent lawsuit if those acts constituted part of the same actionable hostile work employment practice and an actionable act falls within the statutory time period).

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. Perception of which factors are salient and which are not requires judgment based on history, context, and a general familiarity with the conditions of human life. In *Ledbetter*, 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.

Perception of this type would seem to be a necessary part of good judicial interpretation, especially regarding a statute like Title VII,<sup>326</sup> which addresses a host of issues. Congress was painting on a large canvas, and it seems implausible that they could resolve all contested issues in advance. Here, the perception of judges plays a natural and indeed an ineliminable role.

Lilly Ledbetter was a supervisor at Goodyear from 1979 until her retirement in 1998.<sup>327</sup> For most of that time, she worked as an area manager; most other area managers were men.<sup>328</sup> At first, Ledbetter's salary was in line with that of men performing similar work.<sup>329</sup> Over time, however, her pay declined by comparison to the males in the same job.<sup>330</sup> By 1997, even though Ledbetter had considerable seniority, her pay was \$3727 per month; males in the same position made between \$4286 and \$5236 per month.<sup>331</sup> Ledbetter was able to prove at trial that a pattern of discrimination at her plant, not bad performance on her part, accounted for the pay differential, and that during the 180-day filing period her pay was substantially less than that of a man doing the same work.<sup>332</sup> What makes her case a complicated one is that much of the evidence of discriminatory intent came from a period outside the 180-day period.<sup>333</sup> The majority argued 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;<sup>334</sup> in other words, she could bring suit only for pay decisions made within the 180-day period, during which time there was slight evidence of discriminatory intent.<sup>335</sup>

---

<sup>326</sup> Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

<sup>327</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2178 (Ginsburg, J., dissenting).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *See id.* at 2165–66 (majority opinion).

<sup>334</sup> *See id.* at 2169.

<sup>335</sup> *See id.* (stating that “Ledbetter . . . makes no claim that intentionally discriminatory conduct occurred during the charging period”).

This approach, insisting that a wronged employee immediately contest her pay discrimination, “overlooks common characteristics of pay discrimination,” as the dissent correctly argued.<sup>336</sup> 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.”<sup>337</sup> Moreover, comparative pay information is often hidden, and it was hidden in this case, since Goodyear kept salaries confidential.<sup>338</sup> It is only when the discrepancy becomes “apparent and sizable” that we could expect the employee to understand the nature of her situation.<sup>339</sup> 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 pointed to a group of cases in which the Court held that a suit must be filed within the 180-day period.<sup>340</sup> The opinion treated these cases as analogous to *Ledbetter*’s.<sup>341</sup> The dissent argued, however, that they had a feature that rendered them importantly distinct: they all involved a “one-time discrete act”<sup>342</sup> that was “immediately identifiable.”<sup>343</sup> In *Evans* and *Ricks*, the act was a termination of employment;<sup>344</sup> although the basis of the suit in *Lorance* was an ongoing, discriminatory system of seniority, that system was nevertheless introduced and publicly announced at a single time.<sup>345</sup> Unlike *Ledbetter*, then, the plaintiffs in these three cases were well aware of the act that was at issue, and the act was a single thing, rather than an incremental pattern unfolding over time. Pay discrimination, however, *does* unfold over time, and it is thus significantly unlike discriminatory firing. The dissent’s foregrounding of this difference was underwritten by common sense and imaginative perception of the situation of a female employee under such circumstances. The majority’s failure to consider it salient appears to result from a rather obtuse formalism, or perhaps from a consciousness that was focused solely on the consequences of the case for employers, rather than for the victims of discrimination.

---

<sup>336</sup> *Id.* at 2178 (Ginsburg, J., dissenting).

<sup>337</sup> *Id.* at 2179.

<sup>338</sup> *Id.* at 2182.

<sup>339</sup> *Id.* at 2179.

<sup>340</sup> *See id.* at 2169 (majority opinion).

<sup>341</sup> *See id.* at 2169–70.

<sup>342</sup> *Id.* at 2183 (Ginsburg, J., dissenting).

<sup>343</sup> *Id.* at 2182.

<sup>344</sup> *See Del. State Coll. v. Ricks*, 449 U.S. 250, 252 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554 (1977).

<sup>345</sup> *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 902 (1989).

On the other side, the dissent argued that *Bazemore*, a race discrimination case, sufficiently supported the conclusion that in incremental pay-differential cases, once the pay scale had been “infected by gender-based (or race-based) discrimination,”<sup>346</sup> *each new paycheck* constituted a new act of discrimination “whenever a paycheck delivers less to a woman than to a similarly situated man.”<sup>347</sup> Thus, the actions that occurred outside the 180-day period were not themselves actionable, but they were relevant to determining whether a system is “infected” by discrimination, and thus to assessing the lawfulness of the conduct within that period. (The dissent also made use of *Morgan*’s characterization of the incremental nature of hostile-environment discrimination.<sup>348</sup>) The relevance of *Bazemore* is evident when viewed through experienced perception of the nature of incremental pay discrimination. In other words, if one looks at Ledbetter’s case in the light of context and experience, it looks relevantly like *Bazemore*, whereas, if one neglects the real obstacles that stand between women and the vindication of their rights, one can make a formal move that distinguishes it.<sup>349</sup>

What the majority’s reasoning really entailed was that women will often be unable to sue for pay discrimination. They have rights on paper, but are virtually unable (in this very common type of case) to exercise them. If the statute and the precedents allowed only a single reading, then one might conclude that the Court had done its job well and fully, but that a statutory remedy was urgently required. It is clear, however, that the analysis of the precedents 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 relied and Ledbetter’s case. Therefore one must conclude, more critically, that the majority used analogical reasoning obtusely, in a way that utterly neglected the actual capabilities of women in Ledbetter’s position, showing concern only for the situation of employers.<sup>350</sup>

---

<sup>346</sup> *Ledbetter*, 127 S. Ct. at 2179 (Ginsburg, J., dissenting).

<sup>347</sup> *Id.*

<sup>348</sup> *See id.* at 2180.

<sup>349</sup> The Court’s reasoning in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), seemed similarly formalistic, in that it once again placed extraordinary obstacles between a person and the real exercise of his rights. In *Bowles*, a criminal defendant’s appeal was blocked because he missed the filing deadline, even though he was following instructions given him by the district court, which had incorrectly advised him that the extension period was seventeen days rather than fourteen days. *See id.* at 2363, 2367. The four dissenters protested: “It is intolerable for the judicial system to treat people this way . . . .” *Id.* at 2367 (Souter, J., dissenting). The dissent invoked the (Aristotelian) notion of equity, *see* ARISTOTLE, *ETHICA NICOMACHEA*, *supra* note 13, at 1143a19–20, concluding, “[w]e have the authority to recognize an equitable exception to the 14-day limit, and we should do that here.” *Bowles*, 127 S. Ct. at 2370 (Souter, J., dissenting).

<sup>350</sup> Here, in addition to lofty formalism, a link to libertarianism is suggested, since libertarians typically oppose antidiscrimination laws as unjustified infringements of employer freedom, *see*

The difference between the majority and the dissent is nicely captured in a difference of intellectual styles. The majority opinion is utterly impersonal, crisp and focused on formal analysis; in essence a very well-done example of lofty formalism. Despite the proficiency of the majority's technical analysis, the opinion made no attempt to come to grips with Ledbetter's situation, which faded utterly into the background.<sup>351</sup> In the dissent, by contrast, Ledbetter's story was presented at length, and the common nature of the problem it raised (incremental pay discrepancies) was analyzed as a problem that very often affects women in the workplace.<sup>352</sup> The majority did not mention the fact that Goodyear kept employees' pay secret; the dissent emphasized this fact, a key feature of the case.<sup>353</sup> The majority never alluded to the general purpose of Title VII; the dissent focused on the importance of interpreting the statute "with fidelity to [its] core purpose,"<sup>354</sup> charging the majority with a "cramped interpretation . . . incompatible with the statute's broad remedial purpose."<sup>355</sup> Here we do see something like the contrast between Wechslerian formalism and Aristotelian perception — though without Wechsler's pained acknowledgment of the difficulty of the issue and the urgency of the social task ahead.

The Court showed a similar lack of perception in its approach to abortion in the 2006 Term. Abortion is a difficult issue for the CA, as

---

EPSTEIN, *supra* note 33; if such laws exist, the libertarian will want to construe them as narrowly as possible. Two other cases with libertarian links, both highly technical in the issues they raise, are *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). In *Bell Atlantic*, the Court appeared to adopt a stricter view of the pleading requirement for the plaintiff in an antitrust case, *see Bell Atlantic Corp.*, 127 S. Ct. at 1974 (requiring the plaintiff to plead facts that make the claim "plausible" rather than merely possible); in *Leegin*, the Court overruled a precedent almost one hundred years old, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and held that it was no longer per se illegal under the Sherman Act for a manufacturer to agree with a distributor to set a minimum resale price; from now on, courts should use a "rule of reason" instead. *Leegin*, 127 S. Ct. at 2725. In both cases the Court, in highly disputed technical contexts, favored business and disfavored consumers. *Leegin*, however, is particularly surprising because it overrules a long-standing precedent on grounds that, as the dissenting opinion notes, appear not to conform to factors previously found relevant, particularly in statutory cases. *Id.* at 2734–37 (Breyer, J., dissenting). *Leegin* is also fascinating from the point of view of the CA and its interest in perception. Indeed, its holding that a per se rule will be replaced by a context-sensitive rule of reason should in general please the supporter of the CA. The dissent, however, argues that the per se rule was adopted because of the unusual likelihood of harms and the difficulty of separating harmful from beneficial price-fixing. *Id.* at 2729–31, 2734. In such a case, the Aristotelian would agree that there is good reason to favor a per se rule because it is unlikely a judge would have the knowledge and experience to make perception possible, a necessity for individualized judgment. *See supra* section II.C, pp. 24–33.

<sup>351</sup> *See Ledbetter*, 127 S. Ct. at 2170–72 & n.4.

<sup>352</sup> *See id.* at 2179, 2181–82 (Ginsburg, J., dissenting).

<sup>353</sup> *See id.*

<sup>354</sup> *Id.* at 2187.

<sup>355</sup> *Id.* at 2188.

it is for our society. On the one side, the CA will acknowledge that the state has a legitimate interest, up to a point, in the protection of fetal life; on the other side, the state also has a very urgent commitment to protect a wide range of capabilities that are often at issue in the decision to have an abortion: a woman's life and health, her ability to avail herself of society's opportunities on an equal basis, and her decisional freedom. Indeed, the CA provides a way of seeing how one might bring together two approaches to the abortion issue that have often been seen as antithetical: the privacy-based approach (focusing on the need to protect intimate choices from government interference) and the equality-based approach (focusing on the importance of ensuring that women are not second-class citizens). What the privacy-based approach gets right (albeit using an unclear concept<sup>356</sup>) is the importance of a woman's decisional freedom, with regard particularly to her own health, but also with regard to the overall shaping of her life. What the equality approach<sup>357</sup> gets right is the fact that such basic liberties are not adequately granted unless they are granted in a way that respects women's full equality as citizens. In order to assess whether that is the case, any adequate approach must be aware of the history of hierarchy and discrimination under which women have labored. The CA marries the privacy and equality concerns, asking what these groups are actually able to do and, as a result, be in society. In doing so, the CA asks the decisionmaker to focus on the protection of spheres of choice, but to do so in a way that takes stock of the special obstacles and burdens some groups in society face.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>358</sup> the Court's majority asked these questions, emerging with an analysis that gave due weight to both competing interests.<sup>359</sup> The Court also recognized that the issue of choice with respect to abortion has both a privacy aspect (it involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"<sup>360</sup>) and an equality aspect (it affects "[t]he ability of women to participate equally in the economic and social life of the Nation"<sup>361</sup>).

---

<sup>356</sup> See generally Martha C. Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in *INDIA'S LIVING CONSTITUTION* 242, 242–45, 254–74 (Zoya Hasan et al. eds., 2002) (arguing that the concept of privacy is confused and confusing, and that it would be better to enumerate specific decisional liberties that deserve protection).

<sup>357</sup> See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 257–61, 270–85 (1993) (outlining the equality-based approach to women's sexuality and arguing that restrictions on abortion are problematic because they co-opt women's bodies in a way the law never co-opts men's).

<sup>358</sup> 505 U.S. 833 (1992).

<sup>359</sup> *Id.* at 857 ("[O]ur cases since *Roe v. Wade*, 410 U.S. 113 (1973),] accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.").

<sup>360</sup> *Id.* at 851.

<sup>361</sup> *Id.* at 856.



In *Gonzales v. Carhart*,<sup>362</sup> a case dealing with the constitutionality of legislation banning “partial-birth abortion,” the Court appeared to turn toward a different approach, in a case whose actual holding is narrow, but whose greater implications for the future of sex equality are ominous.

*Carhart* upheld the constitutionality of the Partial-Birth Abortion Ban Act of 2003,<sup>363</sup> holding that the Act did not on its face impose unconstitutional substantial obstacles on women seeking late-term, but previability, abortions. *Carhart* shares the key failing of *Ledbetter*: a failure to recognize fully a major impediment to women’s equal possibilities.<sup>364</sup> The opinion’s reading of *Casey* and *Stenberg v. Carhart*<sup>365</sup> was bizarrely narrow. The majority made no persuasive argument as to why the failure to allow an exception for a woman’s health is not a fatal defect.<sup>366</sup> Nor did the opinion offer a cogent analysis<sup>367</sup> of the notion of “undue burden,”<sup>368</sup> which might show whether the statute in question did in fact “place a substantial obstacle in the [woman’s path].”<sup>369</sup> Surprisingly, the majority failed to make a distinction between previability and postviability abortions, a distinction that was crucial to the *Casey* framework. Moreover, the allusions to the state’s respect for fetal life<sup>370</sup> spin like an idle wheel, given that the holding does not actually protect fetal lives, in that it permits a range of alternative techniques for late-term abortion. Finally, in place of the sober formalism of *Ledbetter*, which was simply devoid of real-world understanding, we find a fanciful ideology of gender that treats women (without the slightest evidence) as frail creatures who cannot be expected to know their own minds or to make their own choices.

At issue, as *Casey* made clear, are a wide range of capabilities in women’s lives. As the *Carhart* dissent summarized, the decision whether to bear a child is vital “to a woman’s ‘dignity and autonomy,’ her ‘personhood’ and ‘destiny,’ her ‘conception of . . . her place in society,’”<sup>371</sup> her right “to participate equally in the economic and social

<sup>362</sup> 127 S. Ct. 1610 (2007).

<sup>363</sup> 18 U.S.C. § 1531 (Supp. III 2003).

<sup>364</sup> It has, however, a number of other failings as well; it is not, like *Ledbetter*, a tightly argued piece of legal reasoning.

<sup>365</sup> 530 U.S. 914 (2000).

<sup>366</sup> See *Carhart*, 127 S. Ct. at 1635–38.

<sup>367</sup> See *id.* at 1629–35.

<sup>368</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

<sup>369</sup> *Id.*

<sup>370</sup> See, e.g., *Carhart*, 127 S. Ct. at 1626 (asserting that “the government has a legitimate and substantial interest in preserving and promoting fetal life”).

<sup>371</sup> *Id.* at 1640 (Ginsburg, J., dissenting) (omission in original) (quoting *Casey*, 505 U.S. at 851–52).

life of the Nation,”<sup>372</sup> and her “ability to realize [her] full potential.”<sup>373</sup> At stake is not “some generalized notion of privacy,” but, rather, “a woman’s autonomy to determine her life’s course.”<sup>374</sup> *Casey* emphasized that “the health of the woman” was of particular importance, *even after viability*.<sup>375</sup> The State was not permitted to subject a woman to health risks even in the sense of making her choose a less safe mode of abortion. As the *Carhart* dissent emphasized, *Casey* also drew attention (as did *United States v. Virginia*) to the capability damage created by myths about women that often hold them back from the full and equal exercise of their legal rights.<sup>376</sup>

In the *Carhart* majority opinion, the risks to women’s health were dismissed by a tendentious reading of the medical evidence. It is clear that the vast preponderance of the responsible medical evidence supported the conclusion that the banned procedure is sometimes necessary to preserve a woman’s health. The congressional findings, as the dissent noted, “do not withstand inspection, as the lower courts have determined and this Court is obliged to concede.”<sup>377</sup> In *Stenberg*, moreover, the Court parsed the phrase “necessary, in appropriate medical judgment,”<sup>378</sup> making it clear that this phrase could not “require unanimity of medical opinion.”<sup>379</sup> The *Carhart* majority offered no account at all of its abrupt departure from this sensible analysis, and from the established principle that the presence of disagreement “signals the presence of risk, not its absence.”<sup>380</sup> Instead, we find vague references to “[r]espect for human life,”<sup>381</sup> without any attempt to show that a single life would be saved by forcing women into an alternative abortion procedure; suggestions of an open possibility for individuals to challenge the law in a specific case,<sup>382</sup> without any attempt to show that a woman awaiting an abortion would ever be able to avail herself of such a remedy; and, above all, pious and condescending remarks about women that are classic examples of the sort of attitude that has impeded women’s equality in the past.<sup>383</sup>

---

<sup>372</sup> *Id.* at 1641 (quoting *Casey*, 505 U.S. at 856) (internal quotation marks omitted).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Casey*, 505 U.S. at 846.

<sup>376</sup> *Carhart*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) (citing *Casey*, 505 U.S. at 856).

<sup>377</sup> *Id.* at 1643.

<sup>378</sup> *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000) (quoting *Casey*, 505 U.S. at 879 (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (quoting *Roe v. Wade*, 410 U.S. 113, 165 (1973))) (internal quotation mark omitted).

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Carhart*, 127 S. Ct. at 1634.

<sup>382</sup> *See id.* at 1638–39.

<sup>383</sup> *See, e.g., id.* at 1634.

The majority asserted that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”<sup>384</sup> It is difficult to attach any precise meaning to this sentence. (How is love supposed to be an example of respect? Some people love their spouses or their children or their pets without respecting them in the least. Respect is closely linked to autonomy, love, all too often, to paternalistic control.) Moreover, in its context, discussing the ban on partial-birth abortions, the sentence clearly expresses the unsubstantiated view that women have a deep bond of love with their fetuses, even at a relatively early stage. Is there any evidence for this? The majority then went on to repeat a stock piece of anti-abortion propaganda, namely, that women who have abortions come to regret their decisions, in ways that damage their mental health: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>385</sup> If “some” means “not none,” then no doubt some cases may be found; but reliable evidence for the Court would have to be more substantial than this. In particular, it would have to compare the regrets and impediments faced by women who are *prevented from* aborting, or who are forced to choose less safe procedures because of legal restrictions, with those women who do undergo abortions.<sup>386</sup>

The paragraph is all the more disturbing given that it had no justificatory purpose. Ostensibly, its purpose was to point out that women need full information and may not always get it. This problem, however, would naturally lead to a conclusion that the Court would be prepared to uphold a law mandating full information, not to the actual holding in the case, which had nothing to do with giving better information. What, then, might its purpose have been? It appears that the majority, having nothing at all to say in defense of its decision to ignore dangers to a woman’s health, was trying in a backhanded way to create the impression of caring about women’s health by representing itself as protecting poor, fragile women from the health-impairing consequences of their own freedom. As the dissent said, “[t]his way of thinking reflects ancient notions about women’s place in the family and under the Constitution — ideas that have long since been discredited.”<sup>387</sup> “Discredited,” however, does not, unfortunately, indicate a lack of social power. The endorsement of these ideas by the Court itself constitutes a new barrier to women’s equal capabilities.

---

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> The dissent did a good job of showing the range of relevant psychological research as it currently exists. *See id.* at 1648 n.7 (Ginsburg, J., dissenting).

<sup>387</sup> *Id.* at 1649.

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. As discussed in section V.A, Sen's *Equality of What?* used the example of aid to people with disabilities to show that the simple formula of formally similar treatment is inadequate. His argument suggests the thought that 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 provide more resources to the latter than to the former. Although Sen does not emphasize the remedial character of this extra expenditure, one should do so: the reason that a person in a wheelchair has such difficulty getting around in "normal" settings is that such settings were long designed without taking his or her situation into account. There is a history of discrimination and neglect, and it has informed the construction of buildings, the design of buses and trains, the shape of the pavement, and so forth. 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 and with a specific goal always in view: people should be truly equal with respect to their basic political and social entitlements. In a similar way, the CA has advocated spending more on the education of girls in societies where they face unequal historical obstacles to becoming fully equal participants — not for reasons of naked favoritism, but because additional spending is required to meet the objective of equal empowerment and capability.

Attempts at affirmative action have several elements, which were clearly set forth in Justice Breyer's dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>388</sup> First, they contain a "historical and remedial element"<sup>389</sup>: special attention is given to minority status in order to set right an unjust situation that existed previously. Second, they contain an "educational element"<sup>390</sup>: that is, they focus on the educational benefits of an 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."<sup>391</sup> Whether the remedies concern disability, race, or gender, they typically have all three of these elements.

The CA's approach to affirmative action makes it abundantly clear that there is a salient asymmetry between measures that aim to include

---

<sup>388</sup> 127 S. Ct. 2738 (2007).

<sup>389</sup> *Id.* at 2820 (Breyer, J., dissenting).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 2821 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

a previously excluded or disadvantaged group and measures that prefer one group because they aim to exclude or stigmatize another: for the goal is fully equal capability (or, in some cases, a high threshold level of capability for all), 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 *United States v. Virginia*, in order to defeat the contention that formally symmetrical remedies are all that the equal protection of the law requires.<sup>392</sup> In all these cases, the Court was concerned with the actual abilities of the minorities affected by the arrangements in question: what were they actually able to do and to be? The answer, in each case, was that despite the formal symmetry of the arrangements, they were grossly unequal in what they enabled people to do and to be. They could not, then, survive an equal protection challenge. In each case, the Court adopted something like the CA's account of what true equality means: not just "fine words on paper," as Justice Breyer wrote of *Brown* in *Parents Involved*,<sup>393</sup> but equality "as a matter of everyday life in the Nation's cities and schools. . . . [O]ne law . . . not simply as a matter of legal principle but in terms of how we actually live."<sup>394</sup>

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 were concerned, the Court allowed states to work hard to come up with workable measures of various sorts that aimed at ending the baneful legacy of segregation.<sup>395</sup> As a result of *Parents Involved*, most of these race-conscious remedies would now appear to be violations of the Equal Protection Clause.

The long and intricate opinions in *Parents Involved* reach a result that can be simply described: for Chief Justice Roberts and Justice Thomas, special attempts to aid minorities, looking at race as one salient factor, are no longer permitted. Three characteristics of the prevailing 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 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 Chief Justice Roberts and Justice Thomas invoke *Brown* as if it stood for the proposition that race must never be taken into account

<sup>392</sup> See *supra* section IV.B, pp. 64–67.

<sup>393</sup> *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting).

<sup>394</sup> *Id.*

<sup>395</sup> See *id.* at 2800–02.

in education, no matter whether the reason for doing so is to include or exclude.<sup>396</sup> Of course *Brown* stood for no such thing: indeed, the very measures that were struck down in *Brown* and in *Loving* were in a sense race-neutral measures — at least superficially — and they were struck down because they failed to consider how the reality of race infects 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 spoke of a “cruel irony”<sup>397</sup> in the Chief Justice’s invocation of *Brown*, saying that it reminded 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.”<sup>398</sup> Justice Breyer, similarly, showing in detail how the school measures in question were attempts to “bring about the kind of racially integrated education that *Brown v. Board of Education* long ago promised,”<sup>399</sup> denounced the prevailing opinion’s neglect of the distinction between “exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause.”<sup>400</sup> Chief Justice Roberts appears to reduce the meaning of *Brown* to little more than what I have named lofty formalism: in reality, *Brown* was the unmasking of just such formalism, in the name of a practical concern for substantive equality. It is, Justice Breyer concluded, “a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day.”<sup>401</sup>

A related characteristic of Chief Justice Roberts’s opinion is its lack of attention 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 to do 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.<sup>402</sup> The present use of race-based criteria is the result of the failure of plans that relied to a *greater* extent on race as a criterion, particularly plans involving busing. The districts have attempted over time to give children more,

---

<sup>396</sup> See *id.* at 2767 (opinion of Roberts, C.J.); *id.* at 2786 (Thomas, J., concurring).

<sup>397</sup> *Id.* at 2797 (Stevens, J., dissenting).

<sup>398</sup> *Id.* at 2798 (alterations in original) (quoting ANATOLE FRANCE, *THE RED LILY* 95 (Winfred Stephens trans., 6th ed., 1922) (1894)) (internal quotation marks omitted).

<sup>399</sup> *Id.* at 2800 (Breyer, J. dissenting) (citation omitted).

<sup>400</sup> *Id.* at 2835.

<sup>401</sup> *Id.* at 2836.

<sup>402</sup> See *id.* at 2802–09.

rather than fewer, opportunities to be educated in the schools closest to their homes. Nor, as Justice Breyer convincingly argued, do the historical facts suggest that any less race-conscious solution could solve the problem of ongoing segregation.<sup>403</sup> Looking at the history, we must see these efforts as decent if far from perfect continuations of the legacy and promise of *Brown*, and not as race-based measures that stigmatize and exclude. Chief Justice Roberts's rosy picture of an available "non-racial" way of educating children<sup>404</sup> is simply unrealistic in the light of history and current realities.

The conclusion of the prevailing opinion, which removes from local school boards an area of discretion they had long enjoyed, is shocking in light of the history of equal protection jurisprudence. 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. Concerning the first distinction, Justice Breyer showed very convincingly that the Court never limited the use of race-based remedies to cases where a court had already ordered compliance.<sup>405</sup> In fact, many districts, both in the South and elsewhere, voluntarily adopted pro-integration measures without a court order. Relying particularly on *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>406</sup> he clearly demonstrated that "the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so."<sup>407</sup> Concerning the second distinction, as Justice Breyer argued, Chief Justice Roberts's opinion then downplayed the significance of *Swann* and related cases "by frequently describing their relevant statements as 'dicta.'"<sup>408</sup> Justice Breyer plausibly contended that this distinction, like the de jure/de facto distinction, is not hard and fast, and, in light of the nation's long reliance on the challenged statements, he objected to the Court's "overly theoretical approach to case law, an approach that emphasize[d] rigid distinctions between holdings and dicta in a way that serve[d] to mask the radical nature of today's decision."<sup>409</sup> Although the CA is a theoretical approach, the proponent of the CA heartily agrees with Justice Breyer's statement. Unlike its utilitarian and minimalist rivals, the CA directs judges to consider the case in light of history and context, thinking clearly about what people are able to do

---

<sup>403</sup> See *id.* at 2802.

<sup>404</sup> See *id.* at 2768 (opinion of Roberts, C.J.).

<sup>405</sup> See *id.* at 2816 (Breyer, J., dissenting).

<sup>406</sup> 402 U.S. 1 (1971).

<sup>407</sup> *Parents Involved*, 127 S. Ct. at 2814 (Breyer, J., dissenting).

<sup>408</sup> *Id.* at 2816.

<sup>409</sup> *Id.*

---

---

in their actual circumstances. The CA is theoretical, in that it offers an overall view about what one should consider salient and seek to promote. It is also, however, quite anti-theoretical when it confronts excessively abstract uses of theory that neglect human realities. Indeed, from its inception in ancient Greece to the present day, its role has persistently been to defend experienced human perception against the oversimplifications proposed by other theoretical approaches.

I have suggested that several of the 2006 Term's major cases are characterized by a Wechslerian lofty formalism: they stand so far back from the history and experience of the parties that crucial facts cannot be seen. The prevailing opinion in *Parents Involved* is, of all the past Term's opinions, the most clearly Wechslerian. Exactly like Wechsler, the prevailing opinion purported to be balanced and fair-minded — that is what the allusion to the legacy of *Brown* clearly expresses. Nonetheless, like Wechsler, the Court ignored the asymmetry between exclusion and inclusion, which is among the most striking features of the history of race relations in the United States. Neglecting this, Chief Justice Roberts's argument can be neither accurate nor fully fair. The focus on formal analysis (the persistent use of the dictum/holding distinction, for example) obscures a failure to grapple with the historical problem. Only from a Wechslerian 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”<sup>410</sup> — 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. The statement's balanced use of words conceals this important distinction. With this formalistic approach one may contrast Justice Breyer's insistence that “[t]he historical and factual context in which these cases arise is critical,”<sup>411</sup> along with his detailed analysis of those facts.<sup>412</sup> With the prevailing opinion's emphasis on merely formal symmetry one may contrast Justice Breyer's 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.”<sup>413</sup>

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. For the libertarian minimalist, the two actions of government look similar: both represent exactly the sort of governmental engineering that the libertarian dislikes.

---

<sup>410</sup> *Id.* at 2768 (opinion of Roberts, C.J.).

<sup>411</sup> *Id.* at 2801 (Breyer, J., dissenting).

<sup>412</sup> *See id.* at 2801–11.

<sup>413</sup> *Id.* at 2836.



Although the prevailing opinion's lofty formalism is not a clear example of libertarianism (Wechsler, after all, was no libertarian), the aversion to governmental action that it expresses has underlying links with libertarianism, as well as with Wechslerian formalism. For the libertarian, as for Chief Justice Roberts, the way to end the evil of discrimination is simply to stop government intervention of all sorts on the basis of race. In human experience, however, and in the assessment of human possibilities, exclusionary and inclusionary government measures are utterly dissimilar. The CA registers this dissimilarity; Chief Justice Roberts and Justice Thomas deny it.<sup>414</sup> The link between lofty formalism and libertarianism, here, consists in an unwillingness to confront the more unpleasant aspects of our history and the motives that gave rise to them, and the need to use law to address these problems. (In that regard libertarianism, like lofty formalism, would seem to be a willfully naïve approach to human life.)

In one sense, then, Chief Justice Roberts's opinion was libertarian: it instructed governments to stop discriminating. It is important to bear in mind, however, that in another way it was not in the least libertarian: the opinion argued that the strong power of the federal government should be used to stop local communities from making choices informed by their own sense of their history.

What can be said of Justice Kennedy's concurrence, which, as the narrower holding, controls? Unlike the Chief Justice's opinion, it at least emphasized the importance of the nation's historical struggle to establish racial justice, and it understood that racism has not been fully overcome. In consequence, Justice Kennedy concluded that race-based remedies may in some instances be used,<sup>415</sup> while identifying some real defects in the plans under review.<sup>416</sup> Apart from these virtues, however, the opinion exhibited many of the characteristics of Justice Kennedy's majority opinion in *Gonzales v. Carhart*: loose reasoning, lack of definitional clarity, and a marked preference for fantasy over reality. Justice Kennedy argued that race-conscious measures may sometimes have to be used to remedy historical discrimination, but his main objection to the Seattle plan was that it used racial typing.<sup>417</sup> However, he never offered any clear account of how, in the context of elementary education, one could be race-conscious without

---

<sup>414</sup> Justice Thomas's concurrence has a strong link to libertarianism, in its aversion to governmental remedies for social problems. See *id.* at 2768–88 (Thomas, J., concurring).

<sup>415</sup> See *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>416</sup> See *id.* at 2790. Particularly troubling is the binary division into "white" and "non-white" in the Seattle plan, which causes difficulty for remedial treatment of African Americans as the Asian population rises. *Id.* at 2790–91.

<sup>417</sup> See *id.* at 2792.

using racial typing. He cited *Grutter v. Bollinger*<sup>418</sup> as an example of how racial criteria may be used along with other criteria, but this is where the opinion veers off course, for there is no relevant similarity between a law school admissions program and a program of assigning children to primary schools. In the former case, the applicants are planning to live away from home, so the main problem in the latter case, distance between home and school, simply does not exist. In the former case there is a dossier on a candidate that contains many factors, since by the age of law school application the candidate has been and done many relevant things. Little children can have no such admissions dossier, from which other factors relevant to admission might be drawn. This all-important opinion is a cipher: it did not announce a set of workable criteria that might possibly substitute for the Seattle criteria, which Justice Kennedy rejected on utterly unclear grounds.<sup>419</sup>

#### D. Religion and Standing: Mere Words on Paper?

Since the seventeenth century, it has been well understood that establishments of religion threaten individual liberty of conscience.<sup>420</sup> This threat was a central theme of James Madison's *Memorial and Remonstrance*, which focused on the evil of taxing citizens for the sup-

<sup>418</sup> 539 U.S. 306 (2003) (holding that the narrowly tailored use of race in law school admissions decisions is not prohibited by the Equal Protection Clause).

<sup>419</sup> Another case involving students' capabilities in the area of education is *Morse v. Frederick*, 127 S. Ct. 2618 (2007), which dealt with a student who held up a banner stating "BONG HiTS 4 JESUS." This case is complicated because, as the CA insists and as the Court's precedents state, the entitlements of minors are not the same as those of adults: to produce adult abilities, we sometimes need to curtail young people's freedoms, as the very idea of compulsory education acknowledges. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court noted that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.* at 682. Moreover, the Court in *Bethel* held that certain restrictions on speech were essential to protect an atmosphere of civility within which students learn skills of citizenship. *Id.* at 683. The CA agrees, and thus the capabilities question is clearly two-sided. In *Morse*, then, it is not surprising to find arguments referring to capabilities on both sides. The majority, citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which held that student expression may be limited only if school authorities reasonably believe that it will "materially and substantially disrupt the work and discipline of the school," *id.* at 513, emphasized the disrupting effect that the promotion of drug use can have on the climate of learning, following the general line of argument in *Bethel*. See *Morse*, 127 S. Ct. at 2628. The dissent is concerned that the silliness and vagueness of the sign's reference to drugs may license a wide-ranging set of restrictions on student speech. *Id.* at 2650 (Stevens, J., dissenting). Both sides have strong capability-type arguments, and thus the case is a difficult one. One might well think *Bethel* wrongly decided, because the student speech that caused so much alarm was incredibly silly and sophomoric and not particularly disruptive; once that case is a precedent, however, *Morse*'s silly sign seems no less, if no more, disruptive. Finally, both *Bethel* and *Morse* show a certain failure of imagination, in the sense that someone who lives (sympathetically) around adolescents or can imagine what it is like to be one would probably not be as shocked by the utterances in question as some of the Justices appear to be.

<sup>420</sup> See *supra* section III.B, pp. 41–45.

port of the established church. In its 1968 *Flast v. Cohen*<sup>421</sup> decision, the Court, citing Madison, adopted an unusually broad account of standing in the context of Establishment Clause challenges. In support of this view, the Court stated that:

The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power . . . .<sup>422</sup>

*Flast* concerned a specific appropriation, and thus did not address the question of spending for religious purposes that derives from general discretionary funds. The use of such funds by the Executive to hold conferences in connection with the President's Faith-Based and Community Initiatives was challenged by a citizen group in *Freedom from Religion Foundation, Inc. v. Chao*.<sup>423</sup> In 2006, a three-judge panel of the Seventh Circuit, in an opinion by Judge Posner, held that the group did have standing under *Flast* to challenge the appropriations for these conferences.<sup>424</sup> In *Hein v. Freedom from Religion Foundation, Inc.*,<sup>425</sup> the Supreme Court reversed. The opinion written by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy held that the Seventh Circuit interpreted *Flast* too broadly. The proper interpretation, in Justice Alito's eyes, was that *Flast* protects taxpayer standing only in the case of specific congressional appropriations.<sup>426</sup> Justices Scalia and Thomas, concurring in the judgment, favored overruling *Flast* altogether.<sup>427</sup> Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, agreed with the Seventh Circuit.<sup>428</sup>

*Hein*, even more than *Ledbetter*, was a difficult case from the legal point of view, in that both the prevailing opinion and the dissent had good legal arguments. Inevitably, therefore, a judge's sense of the nature of the problem and its history played a larger than usual part. Judge Posner did indeed defend a broad reading of *Flast* that is not absolutely entailed by the text (although his powerful argument was buttressed by his use of *Bowen v. Kendrick*<sup>429</sup>). Nonetheless, when one

<sup>421</sup> 392 U.S. 83 (1968).

<sup>422</sup> *Id.* at 103–04 (footnotes omitted).

<sup>423</sup> 433 F.3d 989 (7th Cir. 2006).

<sup>424</sup> *Id.* at 996–97.

<sup>425</sup> 127 S. Ct. 2553 (2007).

<sup>426</sup> *Id.* at 2568 (plurality opinion).

<sup>427</sup> *Id.* at 2584 (Scalia, J., concurring in the judgment).

<sup>428</sup> *Id.* at 2587–88 (Souter, J., dissenting).

<sup>429</sup> 487 U.S. 589 (1988).

considers the importance of the underlying issue at stake, it is difficult not to be alarmed by Justice Alito's indifference to the problem of minority conscience, a central issue in our political tradition since long before the Founding. The problem Judge Posner raised is a large one: if *Flast* were not read broadly, the Executive would be permitted to erect a national mosque using taxpayer money.<sup>430</sup> Judge Posner chose his example hypothetically, preserving a polite detachment from political reality. The reality, however, would of course be the use of taxpayer money to create a national Christian church, or in countless other ways to sponsor programs that put the official stamp of approval on Christianity and implicitly disendorse and marginalize other religions. (The taxpayer group's challenge used the language of endorsement and disendorsement, familiar from Justice O'Connor's reformulation of Madison's *Memorial and Remonstrance*, to express what they found troubling about the President's choices.)

In a case where the law is to some extent indeterminate, perception often plays the deciding role. In *Hein*, the dissenters were rightly worried about the threat to equal liberty of conscience posed by the use of taxpayer money for religious purposes. By contrast, Justice Alito's opinion, written as if the burden of an imagined flood of litigation were the major problem presented by the case, exhibited a startling indifference to an issue that is so deeply implicated in the whole history of our nation. Equal liberty of conscience, as Madison made clear, lies at the root of more or less all of our capabilities as citizens, since it affects our ability to enter the public square "on equal conditions."<sup>431</sup>

## VI. CONCLUSION: CAPABILITIES AND THE 2006 TERM

From its inception, our nation has 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 have been pursued primarily through legislative action. (Nonetheless, such capabilities still raise constitutional issues in some contexts: education often raises issues of equality, while welfare rights raise procedural due process issues.) The Court, then, has a significant role to play in protecting human capabilities through its interpretive role. Much hangs on its orientation to that task. Do the Court's opinions attempt to understand the particular struggles of historically disadvantaged groups with de-

---

<sup>430</sup> *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 994 (7th Cir. 2006).

<sup>431</sup> MADISON, *supra* note 138.

---

---

tail and realism, or do they stand so far above history that these struggles can barely be seen? Do they ask about the obstacles real people face on the way to exercising their legal rights, or do they ignore such realities in favor of a lofty formalism?

The CA has always been but one strand in our tradition of constitutional jurisprudence. It has never been unopposed, and one could easily find cases in previous Terms that exemplify the features that I have criticized in some of the 2006 Term's cases.<sup>432</sup> A group of highly contested cases, however, signal a possible change of course, a shift away from the CA toward a different type of jurisprudence altogether. It is hard to characterize this new type. The opinions studied here contain few clear elements of utilitarianism. They do contain some signs of libertarian minimalism in their tendency to restrict the scope of ameliorative government action. Above all, however, what is particularly striking about these opinions is, as I have said, their lofty Wechslerian formalism, and the sense they convey that history and people's actual situations do not matter. At the very least one can see an increasing trend toward formalist victories; we also see, in that connection, an increasing willingness on the part of the Court either to overrule precedents that were not decided in a formalist spirit or to read them very narrowly.

The cases I have discussed, however, are difficult cases, in which formalism does not actually lead to a decisive result. The appearance of clarity is frequently purchased through an omission of history. In some cases, moreover, the very concepts involved — the concept of equal protection most conspicuously — are best understood to 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 best understanding 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 *United States v. Virginia*, opinions that focused on formal symmetry were clearly masks for something worse: a determination to defend entrenched power against the demands of the powerless. Who could possibly say that laws against miscegenation impose 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

---

<sup>432</sup> One of the most obvious such cases is *Plessy v. Ferguson*, 163 U.S. 537 (1896). I argue above, for example, that *Employment Division v. Smith*, 494 U.S. 872 (1990), embodies some of the features of "lofty formalism." One could easily read *Bowers v. Hardwick*, 478 U.S. 186 (1986), along similar lines.

---

---

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 unsettling. Or perhaps out of a fear of political contestation: if only one could resolve difficult cases involving competing groups through some abstract formal device, then (so it might be thought) peace could be more easily preserved. Perhaps out of an asymmetrical cultivation of sympathy: the powerful are more familiar, more like one's friends, and the powerless just do not look as big or as significant. The CA says: Don't be like that. Get some experience. Learn about the world. Use your imagination.

One hesitates to compare the work of the current Court to the most obviously flawed judgments of the Court's (and the nation's) past. 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 do not have that purpose, at least they have that effect.

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