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Self-Reliance

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SELF-RELIANCE

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The enterprise of attributing unifying themes to the work of a Justice of the United States Supreme Court is a dangerous, perhaps even foolhardy, one. It is even worse to do so on an incomplete, even consciously impressionistic, record. Yet the essay form provides a certain license for speculation, especially for one whose claims are explicitly more limited and who makes no pretense of exhaustiveness of research or conclusiveness of judgment. At least I hope that is so, for my intention is to speculate about a theme that I find in Justice Blackmun's jurisprudence, to do so in the brief medium of the essay, and to largely focus my inquiry on a highly selected group of cases decided early in his tenure on the Court.

Many of the cases I have selected are from the 1972 Term. As that is when I clerked for Justice Blackmun, it is when I came to know his work most intimately. The 1972 Term (like the Terms surrounding it) was a formative one. For the Court it represented the point of transition from the Warren Era to the Burger Court: a remarkably interesting and challenging docket of cases whose issues or claims found their origin in the prior era,[1] and others whose resolution would chart new courses for the future.[2] For Justice Blackmun, too, it was a time of transition, for having been on the Court since 1971 his own views began to emerge from the now-larger body of opinions which had flowed from his pen.

A theme that I find emerging in Justice Blackmun's work during this formative period is liberty—an idea that is distinguishable from freedom, alone, because it speaks both of freedom and responsibility. It speaks about the human condition at a more complex level than either freedom or responsibility . . . about what it means to be a whole person possessed of the capacity for the exercise of conscious free will, a capacity that is constitutionally incomplete unless accompanied by assumption of responsibility for its consequences. This kind of liberty was not, for Justice Blackmun, the outgrowth of a social or political theory, whether individualism, communitarianism, republicanism, or any other "ism". It rested instead on a deep and profound insight into what

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1. *E.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Miller v. California, 413 U.S. 15 (1973).

2. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

it means to be human, to be a "person" capable of bearing the moral, social, and political responsibilities of freedom in the Constitutional sense. It viewed freedom as incomplete without responsibility, and therefore government action lifting responsibility to be as potentially corrosive of liberty as government action that directly denied freedom. It viewed the exercise of liberty as a social act, not one done in isolation; as an act that most often involved the participation and counsel of others . . . as well, of course, as consequences for others. But in the end the exercise of liberty—the choices that must be made—rests only with the individual, for the individual must bear the consequences of his or her liberty. The exercise of liberty, in other words, is a *self*-reliant act.

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Both before and after his retirement from the Court Justice Blackmun's body of judicial work has been regularly described with such terms as "sympathy," "humanity," "compassion," and "protective of those without power."[3] These terms, I think, are quite accurate; indeed, I have used them myself. But I have also been of the view that, standing alone, they are incomplete . . . that they lack connecting fibre and a clear foundation in constitutional theory. While sympathy is a commendable frame of mind, it does not alone contain the makings of constitutional law. Not surprisingly, when applied to Justice Blackmun's opinions such terms lack explanatory power as well, for they leave too many unexplained twists and turns in the body of his judicial work. How, for example, can sympathy or compassion account for, much less reconcile, Justice Blackmun's general deference to classifications based on wealth,[4] even near-destitution,[5] on the one hand, especially in view of his active hostility to government refusal to extend health care benefits to poor women who would choose abortion,[6] on the other?

I do not claim to have comprehensive answers to this and similar questions, but I am of the view that they cannot be fairly judged without reference to certain basic themes that animate Justice Blackmun's constitutional philosophy: a recognition of the fundamental and wide-

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3. *See, e.g.*, William J. Brennan, Jr., *Harry Blackmun*, 43 AM. U. L. REV. 694 (1994); Diane P. Wood, *Justice Blackmun and Individual Rights*, 97 DICK. L. REV. 421 (1993); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983); Lynn E. Blais, *Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas and Justice Blackmun's Capital Punishment Jurisprudence*, 97 DICK. L. REV. 513 (1993); Nina Totenberg, *Harry Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745 (1994); Herman Schwartz, *Justice Blackmun*, 43 AM. U. L. REV. 737 (1994); Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L. REV. 527 (1993); Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985).

4. *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

5. *See* United States v. Kras, 409 U.S. 434 (1973).

6. *See* Maher v. Roe, 432 U.S. 464 (1977).

ranging importance of "liberty" in his opinions; and an understanding of what constitutional liberty means for Justice Blackmun—a meaning captured, I think, by the term "self-reliance." Self-reliance is, perhaps not coincidentally, a "Midwestern" trait that resonates well with the individualism manifested in the Bill of Rights. Self-reliance connotes liberty *and* responsibility. Indeed, it implies (at least in the sense I am using it) that without individual responsibility there is no true liberty, for liberty is, in a Calvinistic sort of way, *earned and paid for*.

Such a view of liberty (or freedom, or equality) necessarily implies that governmental action that impedes the individual's *own* freedom to define his or her values and choices, or that imposes values and choices on the individual's decisions, should be met with skepticism.[7] On the other hand, government action that leaves the individual free to make choices (while also bearing the consequences) or that refrains from lifting from the individual the consequences of those choices, is generally acceptable, at least in the face of liberty interests.

In the following pages I will illustrate these strands of "self-reliance" as they are manifested in a selected group of opinions authored by Justice Blackmun. For each "strand" I draw primarily on opinions written by Justice Blackmun during the 1972 Term or the Terms closely surrounding it, turning thereafter to one or more illustrative decisions at a later point in his tenure. For example, in addressing Justice Blackmun's antipathy toward governmental impediments to the individual's liberty I point to *Roe v. Wade*,[8] *Sugarman v. Dougall*,[9] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[10] His later opinions disfavoring governmental efforts to supplant liberty or responsibility or to substitute government preferences for the individual's own include *Planned Parenthood v. Casey*,[11] *Bowers v. Hardwick*,[12] and *Rust v. Sullivan*.[13] Justice Blackmun's more accommodating attitude toward government action that is neutral with respect to liberty and responsibility (though it falls unevenly) is illustrated in *San Antonio Independent School District v. Rodriguez*[14] and *Nordlinger v. Hahn*.[15] Finally, Justice Blackmun's receptive attitude toward government action that encourages liberty or reinforces the individual's

7. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Randall P. Bezanson, *Emancipation as Freedom in* Roe v. Wade, 97 DICK. L. REV. 485 (1993).
8. 410 U.S. 113 (1973).
9. 413 U.S. 634 (1973).
10. 425 U.S. 748 (1976).
11. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).
12. 478 U.S. 186 (1986).
13. 500 U.S. 173 (1991).
14. 411 U.S. 1 (1973).
15. 112 S. Ct. 2326 (1992).

responsibility for the consequences of its exercise is manifested in *NLRB v. Granite State Joint Board*,[16] *United States v. Kras*,[17] and in his brief but revealing dissent in *Cohen v. California*.[18]

My discussion of these cases will, by necessity, be brief; I will paint with a broad (perhaps too broad) brush. But I have no doubt that more than compassion, more than sympathy, more than liberalism, is involved in Justice Blackmun's work. To conclude otherwise would be, in my judgment, to give him far too little recognition as a jurist of intellectual substance and complexity—a man who believes strongly in our common humanity and our individual freedom, but who understands as well that, as Isaiah Berlin put it, people who are free are also "doomed to choose."[19]

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It takes little effort, of course, to discover Justice Blackmun's unequivocal commitment to individual liberty . . . to the necessary freedom the individual must have to make choices about beliefs, values, and identity without significant interference from government. *Roe v. Wade*,[20] authored by Justice Blackmun and handed down in early 1973, is surely his most famous and complete articulation of the individual's freedom to make and act upon life-defining choices, a freedom he has described metaphorically as "emancipation."[21] The freedom is one of power to make choices, as well as responsibility for their consequences; it is a product not of equality but of liberty; not of gender but of what it means to be a whole person. The generalizable and fundamental nature of the liberty affirmed in *Roe* was clear in Justice Blackmun's opinion, but any doubt about its nature was dispelled in his later opinions—both dissents—in *Bowers v. Hardwick*[22] and *Rust v. Sullivan*.[23] There he could say, in the freer medium of a dissenting opinion, that *Bowers* was

> no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right

16. 409 U.S. 213 (1972) (Blackmun, J., dissenting).
17. 409 U.S. 434 (1973).
18. 403 U.S. 15 (1971).
19. ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 13 (Henry Hardy ed., 1991).
20. 410 U.S. 113 (1973).
21. *See* Bezanson, *supra* note 7.
22. 478 U.S. 186 (1986).
23. 500 U.S. 173 (1991).

most valued by civilized men,' namely, 'the right to be let alone.'[24]

And he could say in *Rust* that "*Roe v. Wade* and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination. . . . the idea that 'liberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions."[25]

Justice Blackmun's commitment to individual freedom was also reflected in two other decisions, one from the 1973 Term and one from 1974, though they are not generally seen in this light. The first is *Sugarman v. Dougall*,[26] where the Court in an opinion by Justice Blackmun extended the equal protection guarantee to prohibit discrimination against legal aliens in most government employment.[27] The restriction stricken by the Court was offensive not only to equal protection principles, but more fundamentally to an individual's ability to exercise control over his or her *own* destiny free from obstacles resting on "irrational parochialism and prejudice,"[28] and thus bearing no relationship to the individual's ability.

Justice Blackmun's equal protection opinions reflect a larger concern than inequality. They reflect instead a concern with paternalism borne of stereotype—a moral arrogance that those who are different cannot be trusted with their own liberty and therefore can be forced, as Justice Blackmun put it, to abide by the majority's "concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost."[29]

The connection to freedom from artificial government restraints on the "market" of individual choice and accomplishment is perhaps more explicit in the decisions, just a few years later, in *Bigelow v. Virginia*[30] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

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24. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (citations omitted) (Blackmun, J., dissenting).

25. Rust v. Sullivan, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting).

26. 413 U.S. 634 (1973).

27. Sugarman v. Dougall, 413 U.S. 634 (1973). *See also* Graham v. Richardson, 403 U.S. 365 (1971) (extending equal protection guarantee to prohibit discrimination against legal aliens in welfare assistance programs).

28. Karlan, *supra* note 3, at 533.

29. Beal v. Doe, 432 U.S. 438, 462–63 (1977). As Pamela Karlan so nicely put it:

> The Justice has identified the flaw in our constitutional reasoning as lying "in the way we treat those who are not exactly like us, in the way we treat those who do not behave as we do, in the way we treat each other." Indeed, the Justice's language, far from distinguishing "us" from "them", teaches us that when "we" mistreat "one another" we are in fact mistreating ourselves.

Karlan, *supra* note 3, at 538 (quoting Harry A. Blackmun, *John Jay and the Federalist Papers*, 8 PACE L. REV. 237, 247 (1988)).

30. 421 U.S. 809 (1975).

Council, Inc..[31] These decisions, both written by Justice Blackmun, first announced significant constitutional protection for commercial speech.[32] While they are important First Amendment decisions, I think it would be a mistake to understand them only in those terms. Instead, they are part of a larger mosaic of jurisprudence that reflects individual liberty of choice—in this case choice of information—and significantly restricts government's authority to substitute its own vision of the "good" or "right" for the individual's freedom—and responsibility—to decide. The commercial speech cases are thus more closely related than most would imagine to Justice Blackmun's opinion in *Planned Parenthood v. Casey*,[33] where he expressed concern about government paternalism that takes the form of shaping the information upon which individuals make personal and moral choices, thereby intruding government's moral preferences on the otherwise "free" choices of individuals.[34] Whether government shapes information by direct restriction, as in commercial speech cases, or by mandatory counseling and one-sided moral suasion, as in *Casey* and *Rust v. Sullivan*, such actions undermine the very freedom of individual choice that they often declare but, in fact, only nominally preserve.

The idea of freedom expressed in *Roe v. Wade* is but part of a larger idea of liberty underlying Justice Blackmun's work. To view his other opinions as existing only in separate and tidy doctrinal boxes—commercial speech; equality—is to miss the larger theme. The commercial speech cases are, to be sure, speech cases involving the First Amendment, but they are also parts of a larger and coherent idea of liberty; the same is true of equal protection cases such as *Sugarman*. To borrow from Justice Blackmun's turn of phrase in *Bowers v. Hardwick*, they are no more only about speech or equality "than *Stanley v. Georgia* was about a fundamental right to watch obscene movies" or *Bowers* was about a right to engage in homosexual sodomy.[35]

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I began this essay, however, with the theme "self-reliance," and I need to explain how this discussion of liberty relates to the idea of self-reliance. To do so I will touch briefly upon a number of cases that, at first glance, seem problematic and perhaps inconsistent with the cases discussed above, but on reflection are not only consistent, but can best be

31. 425 U.S. 748 (1976).

32. *See* Bigelow v. Virginia, 421 U.S. 809, 825 (1975); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

33. 112 S. Ct. 2791 (1992) (plurality opinion).

34. *See id.* at 2807, 2818; Bezanson, *supra* note 7, at 488-89.

35. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

explained by the idea that freedom carries with it responsibility for the results of its exercise, and that the *exercise* of freedom is something that is earned, not simply conferred. It is in these senses that the complementary ideas of individual freedom and individual responsibility for its exercise are combined in my use of the Midwestern idea of "self-reliance."

Two opinions written early in Justice Blackmun's service on the Court are often viewed as discordant with his otherwise expansive view of liberty, and therefore as requiring either explanation or, simply, forgiveness. These are Justice Blackmun's dissent in *Cohen v. California*,[36] where he pithily described Cohen's attempt at expression as an "absurd and immature antic . . . mainly conduct and little speech,"[37] and his opinion for the Court in *United States v. Kras*,[38] where he refused to invalidate the $50.00 filing fee for a personal bankruptcy petition, when applied to an unemployed indigent with five dependents, observing that the $1.28/week payment schedule for the fee was "a sum less than the payments Kras makes on his couch of negligible value in storage, and less than the price of a movie and little more than the cost of a pack or two of cigarettes."[39]

The *Cohen* case presented a claim, in Justice Blackmun's view, that demeaned the First Amendment guarantee, that reduced its importance by pressing it into service in defense of conduct that not only seemed—but was—immature, insensitive, capricious, and hardly commensurate with the serious purposes of freedom of speech. For Justice Blackmun the important issue in the *Cohen* case was whether Cohen's actions amounted to speech—a term whose meaning derives not from the dictionary, but from the important purposes served by the word in the Constitution. For him, the act of indiscriminate—almost aimless—circulation of words that possessed no unambiguous meaning, much less intent to communicate that meaning to others for a purpose, was not speech. Speaking is an intentional and purposeful act that presupposes a minimal level of maturity; undertaken, in other words, with at least some sense of the importance of liberty itself and the purposes to which it is devoted. Cohen's "absurd and immature antic" was child's play . . . the speech equivalent of a temper tantrum, "mainly conduct and little speech."[40] To spend the First Amendment liberty on

36. 403 U.S. 15 (1971).
37. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).
38. 409 U.S. 434 (1973).
39. United States v. Kras, 409 U.S. 434, 449 (1973).
40. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

the defense of frivolousness was, for Justice Blackmun, to waste it and to cheapen it in the process.

Similar sentiments, I suspect, can be attributed to the *Kras* case, an unfortunately-named, carefully planned part of a litigation strategy that forced[41] the Court to define the meaning of the grand constitutional concepts of due process and equality in the context of a person's refusal to pay $1.28 per week until $50.00 had been paid. One could easily be impatient with the bureaucrat who, faced with a request for waiver and the possibility of litigation, was unimaginative or mean-spirited enough to dig in his or her heels. But for Justice Blackmun, who was charged with the duty to decide, like it or not, it seemed doubtful that a person seriously intent on straightening matters out in bankruptcy, who received with his dependents over $400.00 in monthly public assistance, could not find $5.00 each month to "pay the price" for his right to petition. Liberty must not only be taken seriously, its exercise must be earned—paid for, at least, in the coin of earnestness and good faith.

Justice Blackmun's skepticism about claims that he saw as contrived or insufficiently serious, and thus insulting to those who might genuinely suffer disability at the hands of government, was often manifested in the form of explicit expressions of impatience—with the litigants and with the risks their claims posed for the frequently important substantive claim. The *Cohen* and *Kras* cases were not the only examples; nor was the impatience always—or even usually—directed toward the private litigants. Indeed, Justice Blackmun reserved some of his strongest language for government. In *Logan v. Zimmerman Brush Co.*[42] he responded to the State's rationale for denying an employment discrimination hearing on grounds of lateness (caused by the State's scheduling mistake) by demanding that the State's justification "must be something more than the exercise of a strained imagination."[43] Like Cohen's and Kras's, the State's conduct too was held by Justice Blackmun to a standard of good faith and seriousness, for the Court's duty, as he said in *Bakke*, was "expounding a *Constitution*."[44]

A related idea of responsibility for the exercise of one's liberty or freedom, in the sense of paying the price of its consequences, is manifested in a little-known lone dissent during the 1972 Term in *NLRB v. Granite State Joint Board.*[45] The case involved a union's imposition

41. The case came to the Court on appeal, not on certiorari.

42. 455 U.S. 422 (1982).

43. Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982) (Blackmun, J., separate opinion).

44. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 408 (1978) (Blackmun, J., separate opinion).

45. 409 U.S. 213 (1972).

of a fine on strike-breaking workers who voted in favor of the strike and of the union's authority to levy fines on those members who did not stand firm.[46] The Court (all of the Justices except Justice Blackmun) concluded that the strike-breaking fine could not be enforced because the workers had resigned from the union before the fine was levied (but not until after the strike was underway), and had not been specifically notified in the union contract that a post-resignation fine could be levied. In lone dissent Justice Blackmun strongly disagreed, stating that "the three factors of a member's strike vote, his ratification of strike-breaking penalties, and his actual participation in the strike, [are] far more reliable indicia of his obligation to the union and its members than" the absence of specific (and "boilerplate") notice in the union contract. "Union activity," he continued, "by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment."[47] The members had freely exercised their rights to band together with others, and in doing so had assumed personal responsibility for the consequences of their own choices. Neither rights nor responsibilities, in short, were to be taken lightly, and the enjoyment of those rights should be earned—at least deserved.

Finally, at least brief mention should be made of Justice Blackmun's generally[48] deferential attitude to government actions that fall unevenly on grounds of wealth. Without pretense of exhaustiveness, his votes in three cases serve to manifest Justice Blackmun's relatively complex view and to relate it to what has already been said about liberty and responsibility. The first case is *San Antonio Independent School District v. Rodriguez*,[49] an opinion Justice Blackmun joined but did not write, which upheld against constitutional attack a property tax school funding system that yielded large and seemingly idiosyncratic variations in funding based, in significant (though not exclusive) part, on wealth.[50] The second and more recent opinion is *Nordlinger v. Hahn*,[51] written by Justice Blackmun, which sustained the property tax valuation system

46. NLRB v. Granite State Joint Board, 409 U.S. 213 (1972).

47. *Id.* at 221.

48. As with much of Justice Blackmun's judicial work, the answer is more complex than even the word "generally" would imply. He has joined the view that classifications that discriminate explicitly and purposefully against the poor are suspect, James v. Valtierra, 402 U.S. 137, 143 (1971) (dissenting opinion joined by Blackmun, J.), but that classifications based on or falling along wealth lines, in the absence of invidious purpose or the attendant denial of a substantive constitutional interest (such as speech, liberty, etc.), should be judged by relatively forgiving standards of review. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981); Plyler v. Doe, 457 U.S. 202, 231 (1982) (Blackmun, J., concurring).

49. 411 U.S. 1 (1973).

50. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

51. 112 S. Ct. 2326 (1992).

created by Proposition 13 in California—a system that has produced wild variations in taxable value that bear no relation to current market value.[52]

In both cases the challenged statutes visited significant burdens on those who were poor, or rested on criteria whose principal consequence in practice was wealth-based discrimination. For Justice Blackmun, however, the wealth-based disparities bore no necessary and systematic relation to liberty in either case. A general rule of deference to wealth-based legislative classifications was warranted, in Justice Blackmun's view, because he did not see wealth as a prerequisite to liberty, nor did he view its absence an obstacle to liberty's exercise. Only when wealth is employed as a surrogate for direct denial of an exercise of liberty, as with the denial of public funding for the exercise of the woman's right to consider and have an abortion,[53] is liberty, as Justice Blackmun uses the term, truly at stake.

This more elaborated view of the relationship between wealth-based distinctions in particular, and legislative classifications in general, on the one hand, and liberty interests, on the other, is made explicit in his concurring opinion in *Plyler v. Doe*,[54] where he concluded that a Texas statute denying free public education to illegal alien children violated the Constitution.[55] His opinion is worth quoting at some length.

> I joined [the opinion of] the Court in *Rodriguez*, and I continue to believe that it provides the appropriate model for resolving most equal protection disputes. . . . [But that] formulation does not settle every issue of "fundamental rights" arising under the Equal Protection Clause.
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> . . . Children denied an education are placed at a permanent and insurmountable competitive disadvantage, . . . Other benefits provided by the State, such as housing and public assistance, are of course important; to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are in a sense unique, for they . . . involv[e] the State in the creation of *permanent* class distinctions. . . . This conclusion is fully consistent with *Rodriguez*. The Court there reserved judgment on the constitutionality of a state system that

52. Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

53. *See* Maher v. Roe, 432 U.S. 464 (1977) (citing Beal v. Doe, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting)).

54. 457 U.S. 202 (1982).

55. Plyler v. Doe, 457 U.S. 202, 231 (1982) (Blackmun, J., concurring).

> "occasioned an absolute denial of educational opportunities to any of its children," noting that "no charge fairly could be made that the system [in *Rodriguez*] fail[ed] to provide each child with an opportunity to acquire . . . basic minimal skills."[56]

Justice Blackmun denied, both as a constitutional matter and as a reality of life's experience, that relative wealth or class had much to do with one's ability to enjoy liberty or experience its fruits; indeed, to reason in the opposite (that relative poverty represented a denial of liberty) was to excuse peoples' indifference to liberty or responsibility for its exercise.[57] What was important to Justice Blackmun, therefore, was not inequality itself, but its consequences and its *real* relationship to the individual's opportunity to exercise freedom mindful also of his or her responsibility for the choices so made.

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Perhaps I have erred in trying to draw together a disparate and potentially idiosyncratic set of Justice Blackmun's decisions in order to identify the connecting fibre of "liberty" in Justice Blackmun's privacy, equal protection, speech, due process, and even labor opinions. Some may prefer to see them as distinct and occasionally discordant notes in an otherwise substantial record of compassion, sympathy for those less able to help themselves, and skepticism about government interference with essentially personal matters. What I am suggesting, however, is that they need not be seen as discordant; and if they are consistent they need not be seen as inconsistent with compassion, sympathy, and skepticism about intrusive government.

For Justice Blackmun what was most important was the individual's liberty in our constitutional scheme—the liberty to act, to choose, to believe, to express, to work. Equality was important, for example, but it was most important in relation to the exercise of liberty and not as a means of shielding the individual from its consequences. Speech was important, but its central value was one of individual liberty—of the speaker or, in the commercial speech cases, of those whose liberty to make their own decisions was made more complete by it. The individual's freedom to organize and collectively bargain was an important legislative right, but for the individual who chose to do so the liberty was purchased with responsibilities, too.

Liberty to speak no more meant a right to indeterminate babble than freedom to work meant a guaranteed job. When government

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56. *Id.* at 232-35 (Blackmun, J., concurring) (citations omitted) (emphasis added).
57. *Cf.* Michael M. v. Superior Court, 450 U.S. 464, 481 (1981) (Blackmun, J., concurring).

regulation made the going more difficult for some, but did not prevent their succeeding, or did not change the standard of success or failure from one that everyone, with effort, could strive for, Justice Blackmun had a relatively expansive view of government power.[58] There are perhaps no better illustrations of this than his concurrence in *Regents of the University of California v. Bakke*,[59] where he urged deference to educational judgment with the words "[i]n order to get beyond racism, we must first take account of race;"[60] or his dissenting opinion in *City of Richmond v. Croson*,[61] where he would have upheld a race-conscious municipal contracting set-aside, especially when enacted "*on its own* . . . [by] the City of Richmond, Virginia, the cradle of the Old Confederacy."[62]

For Justice Blackmun it was the individual's capacity to exercise liberty, not the relative ease with which it could be exercised, that was constitutionally crucial. Government efforts to prevent its exercise or to exercise it for the individual were serious threats to freedom. But with liberty came the expectation of seriousness of purpose and responsibility for its exercise. When the individual's action deprecated the liberty being claimed, failed to respect its importance, or reflected indifference to the responsibilities that exercising freedom implies, Justice Blackmun would view the individual's claim with skepticism and impatience. With liberty came the expectation, in other words, that the individual claiming a right to liberty would, to the extent possible, be self-reliant in its exercise . . . independent of rather than dependent on government; possessed of true moral agency.

This, of course, was the essence of *Roe v. Wade*. Without freedom *and* responsibility for the most personal *and difficult* of life's choices, a woman could not be a whole person, a person possessed of independent free will and the responsibility for its exercise. But *Roe v. Wade* was not just about women, it was about persons; it was not just about abortion, it was about liberty; it was not just about freedom, it was about responsibility. For Justice Blackmun, constitutional law was serious business. It still is. And it also remains true that without responsibility freedom cannot exist . . . that if we are genuinely free to choose we are, by necessity, also "doomed to choose."

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58. *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

59. 438 U.S. 265 (1978).

60. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 406 (1978) (Blackmun, J., separate opinion).

61. 488 U.S. 469 (1989).

62. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting) (emphasis added).