Judicial Inconsistency as Virtue: The Case of Justice Stevens

Justin Driver

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles
Part of the Law Commons

Recommended Citation
Judicial Inconsistency as Virtue: The Case of Justice Stevens

JUSTIN DRIVER*

TABLE OF CONTENTS

I. THE STEVENS SHIFT ........................................ 1265
   A. ABORTION ........................................... 1266
   B. CRIMINAL PROCEDURE .............................. 1267
   C. AFFIRMATIVE ACTION .............................. 1268

II. JUDICIAL CONSISTENCY’S VICE, JUDICIAL INCONSISTENCY’S VIRTUE . 1270

III. JUDICIAL INCONSISTENCY APPLIED .................... 1274

INTRODUCTION

As Justice John Paul Stevens approached the end of his career on the Supreme Court, he contended that his lengthy service as an Associate Justice featured a jurisprudence of marked consistency. In 2007, when an interviewer asked what accounted for his being perceived initially as a “moderate conservative” and later as a liberal stalwart, Justice Stevens responded: “There are more members of the court now who are not moderate conservatives. . . . There are changes in the court that have to be taken into account.”1 Later that year, he sharpened his answer for a profile that ran in the New York Times Magazine. “I don’t think that my votes represent a change in my own thinking,” Justice

* Assistant Professor, University of Texas School of Law. © 2011, Justin Driver. I would like to thank the Editors of The Georgetown Law Journal for organizing this symposium to examine the career of Justice Stevens. I received particularly valuable comments on an earlier draft of this Essay from Laura Ferry, William Forbath, Jacob Gersen, Sanford Levinson, David Pozen, Lucas Powe, and David Rabban. Charles Mackel, Christine Tamer, and Mark Wiles provided excellent research assistance.

Stevens stated. "I’m just disagreeing with changes that the others are making." 2

Legal scholars and journalists have also advanced the notion that Justice Stevens generally remained constant as the Court around him changed. Professor Cass R. Sunstein built upon this narrative in suggesting that the shift in perception of Stevens’s place on the Court illuminated how dramatically the institution had turned to the right. "For a long period, Justice Stevens was well known as a maverick and a centrist—independent-minded, hardly liberal, and someone whose views could not be put into any predictable category," Sunstein wrote. "He is now considered part of the Court’s ‘liberal wing.’ In most areas, Justice Stevens has changed little if at all; what has changed is the Court’s center of gravity." 3 Charles Lane pithily expressed the point in the Washington Post: "As the country, the court and the GOP moved right, Stevens did not."4

By the time Justice Stevens retired last year, this notion had hardened into conventional wisdom. The ABA Journal story announcing Stevens’s departure tellingly began: “The more things changed, the more John Paul Stevens stayed the same.” 5

Like many oft-repeated narratives, this one is not wholly inaccurate. Indeed, it cannot be denied that the Court grew increasingly conservative during the course of Justice Stevens’s tenure. As Justice Stevens himself often suggested, nearly every Justice who has retired since he joined the Court in 1975 has been replaced by a more conservative Justice. 6 But it is incorrect to suggest that, as the Court became more conservative, Stevens generally remained in the same place. Instead, he moved sharply to the left—especially in cases raising society’s most divisive legal questions. Examining Justice Stevens’s early years on the Court reveals a Justice who cast votes and wrote opinions that would be inconceivable if he had issued them during his later years.

The goal here, however, is not to play an elaborate game of jurisprudential gotcha. To the contrary, this Essay contends that such games, played with

---

4. Charles Lane, With Longevity on Court, Stevens’s Center-Left Influence on Court Has Grown, WASH. POST, Feb. 21, 2006, at A1; see also Adam Liptak, At 89, Stevens Contemplates the Law, and How to Leave It, N.Y. TIMES, Apr. 4, 2010, at A1 (“His views have generally remained stable ... while the court has drifted to the right over time.”).
6. See, e.g., Rosen, supra note 2, at 52. Setting aside Justice Sotomayor’s replacement of Justice Souter and Justice Kagan’s replacement of Justice Stevens (because it is too early in their tenures yet to have a firm grasp on their jurisprudential values), the one generally acknowledged exception to this rule is Justice Ginsburg’s replacement of Justice White. See Adam Liptak, The Most Conservative Court in Decades, N.Y. TIMES, July 25, 2010, at A1.
perhaps greatest fervor by Supreme Court Justices themselves, are symptomatic of a larger problem that pervades legal discourse. At its core, the problem involves the excessive emphasis that the legal community places upon judges maintaining voting records free of contradiction. Not only has judicial consistency been overvalued, but judicial inconsistency itself often contains considerable virtue, as it demonstrates a willingness to engage in continued contemplation and reflection—traits that excellent judges must possess. Rather than categorically perceiving a claim of judicial inconsistency as an epithet, such a claim should at least potentially be understood as a compliment.

The remainder of this Essay proceeds as follows. Part I documents how at the outset of his career Justice Stevens often cast conservative votes in hot-button cases before transforming into the Court’s most outspoken liberal. With Justice Stevens’s transformation established as a point of departure, Part II suggests that the legal community unduly emphasizes the virtue of a judge maintaining a consistent judicial record, and contends that judicial inconsistency contains under-appreciated virtue. Part III notes that, despite the abstract valorization of consistency, actual instances of judicial inconsistency often serve to enhance rather than diminish a judge’s reputation. As befits this brief Essay, a brief conclusion follows.

I. THE STEVENS SHIFT

This Part chronicles Justice Stevens’s initially conservative jurisprudential views in three highly salient areas: abortion, criminal procedure, and affirmative action. Justice Stevens’s jurisprudence doubtlessly underwent marked change in other significant doctrinal areas. Nevertheless, these three issues merit particular scrutiny because few matters have been—or remain today—as ideologically

---

7. In Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), Justice Alito’s opinion for the Court appeared to engage in jurisprudential gotcha. Justice Alito explicitly mentioned that it was Justice Stevens who—though he was in dissent in Ledbetter—wrote the Court’s opinion in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), a key precedent that the Court claimed recommended the result it reached. See Ledbetter, 550 U.S. at 625 (“As Justice Stevens wrote for the Court . . . .”). Justice Stevens was not exactly a stranger to the technique. See Bradley C. Canon, Justice John Paul Stevens: The Lone Ranger in a Black Robe, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 343, 346 (Charles M. Lamb & Stephen C. Halpern eds., 1991) (“Another favorite Stevens tactic was to cite particular justices against themselves.”).

8. This Essay takes a broad understanding of judicial inconsistency, meaning that it considers instances both when judges espouse conflicting views in cases involving precisely the same legal question and when judges adopt a position that seems discordant with their earlier jurisprudence.

9. Compare FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (“To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”), with FCC v. FOX Television Stations, Inc., 129 S. Ct. 1800, 1824-25 (2009) (Stevens, J., dissenting) (contending that the FCC’s policy prohibiting “fleeting expletives” was impermissible); compare also Gregg v. Georgia, 428 U.S. 153, 207 (1976) (Stevens, J., joining) (upholding the validity of the death penalty), with Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) (announcing that he had arrived at the conclusion that capital punishment violates the Eighth Amendment).
charged as reproductive rights, crime, and race.\textsuperscript{10}

\section*{A. ABORTION}

Some commentators have asserted that Justice Stevens has consistently voted with liberals in the line of cases that began with \emph{Roe v. Wade}.\textsuperscript{11} But this assertion is demonstrably false. In 1976, the Court confronted a Missouri statute that required a married woman—in order to obtain an abortion—to receive consent from her husband and required a young woman under the age of eighteen to receive consent from her parents.\textsuperscript{12} Although Stevens voted to invalidate the spousal consent provision, he wrote a dissenting opinion explaining that he would uphold the parental consent provision.\textsuperscript{13} Justice Stevens’s opinion emphasized that “the consequences of her decision may have a profound impact on her entire future life” and made clear that he rejected the notion that “the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.”\textsuperscript{14}

Justice Stevens’s language here bears some resemblance to the much-criticized language that Justice Anthony Kennedy used four years ago in \emph{Gonzales v. Carhart}, the decision that validated the federal ban on the procedure that pro-life advocates labeled “partial-birth abortion.”\textsuperscript{15} “The State has an interest in ensuring so grave a choice is well informed,” Justice Kennedy wrote.\textsuperscript{16} “It is self-evident that a mother who comes to regret her choice to abort

\textsuperscript{10} Intriguingly, one of the few areas in which commentators have suggested that Justice Stevens shifted is an area where he appears to have long been consistent: gay rights. Robert Bork asserted last year: “It’s in recent years that Stevens has most become an activist judge, on issues like homosexual rights.” Jeffrey Toobin, \textit{After Stevens}, \textsc{New Yorker}, Mar. 22, 2010, at 39, 45 (internal quotation marks omitted). Apart from whether one agrees with Bork’s characterization of judicial decisions recognizing gay rights as “activis[m],” Stevens seems to have arrived at the Court with a progressive vision in this area. Shortly after joining the Court, Justice Stevens, along with Justice Marshall and Justice Brennan, sought to hear oral argument in a case where a three-judge district panel upheld Virginia’s anti-sodomy provision. Instead, however, the Court summarily affirmed the lower court’s decision. \textit{See} Bob \textsc{Woodward} \& Scott \textsc{Armstrong}, \textit{The Brethren: Inside the Supreme Court} 516 (1st paperback ed. 2005).

\textsuperscript{11} 410 U.S. 113 (1973); \textit{see}, e.g., Toobin, \textit{supra} note 10, at 41 (“Stevens has always supported abortion rights . . . .”).


\textsuperscript{13} \textit{Id.} at 102 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{14} \textit{Id.} at 102–03.


\textsuperscript{16} \textit{Gonzales}, 550 U.S. at 159 (majority opinion). \textit{But see id.} at 185 (Ginsburg, J., dissenting) (“This way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”); Jeannie Suk, \textit{The Trajectory of Trauma: Bodies and Minds of Abortion Discourse}, 110 \textsc{Columbia L. Rev.} 1193, 1194–97 (2010) (identifying the trauma-based rhetoric in Justice Kennedy’s \textit{Gonzales} opinion as a recent iteration of a phenomenon that enjoys a long history).
must struggle with grief more anguished and sorrow more profound . . . ."17 Yet, it is important not to exaggerate the similarities between the two opinions. After all, Justice Kennedy's opinion regarded adults, and Justice Stevens's regarded minors. And the law often protects children in ways that it does not protect adults.18 Nevertheless, given that Justice Stevens has openly criticized the tone of Justice Kennedy's Gonzales opinion,19 it seems worth considering whether Justice Stevens would phrase his concerns of 1976 in precisely the same terms if he were to write that opinion today. More to the point, of course, if a parental consent provision were to have come before the Court even as early as the 1980s, it seems highly unlikely that Justice Stevens would have required a young woman to bring a pregnancy to term if she could not obtain permission from her parents for an abortion.

B. CRIMINAL PROCEDURE

Justice Stevens is correctly understood to have provided the Court's leading liberal voice on behalf of criminal defendants at the end of his career.20 But his early voting record provided little reason to believe that things would turn out that way. Indeed, three decisions regarding the criminally accused—all selected from his first full year on the Court—vividly reveal Justice Stevens's marked leftward turn in this arena.

In Doyle v. Ohio, the Court contemplated whether a prosecutor could constitutionally cross-examine a defendant regarding his failure to offer an exculpatory story immediately after being arrested and receiving Miranda warnings.21 Justice Powell, writing on behalf of the Court, held that permitting prosecutors to impeach criminal defendants at trial with post-arrest silence would violate due process.22 While it is easy to imagine the Justice Stevens of 2006 writing an impassioned concurrence insisting that the invalidated prosecutorial practice threatened to nullify Miranda,23 the Justice Stevens of thirty years earlier

17. Gonzales, 550 U.S. at 159. It seems worth noting here that Justice Kennedy ill-advisedly uses the word "mother" rather than "woman" for the person who has received an abortion. All people who receive abortions are women, but not all women who receive abortions are mothers.


19. See Rosen, supra note 2, at 54 (reporting that Stevens found "Kennedy's rhetoric about the need to protect women from the emotional trauma of abortions" to be "frustrating").


22. Id. at 618.

23. See Florida v. Powell, 130 S. Ct. 1195, 1210 (2010) (Stevens, J., dissenting) (contending, against the Court's opinion written by Justice Ginsburg and joined by Justice Sotomayor, that the standard warning used by Tampa Bay police officers informing defendants of their rights upon arrest inadequately conveyed the Miranda right to "have counsel present during interrogation").
instead wrote the lead dissent.\textsuperscript{24}

In \textit{South Dakota v. Opperman}, the Court issued a foundational criminal procedure opinion, decided by a 5–4 margin, finding that the warrantless inventory search of an impounded automobile did not violate the Fourth Amendment.\textsuperscript{25} Justice Stevens—over the dissent of Justices Brennan, Marshall, Stewart, and White—joined with President Richard Nixon’s four Supreme Court appointees to form the majority.\textsuperscript{26} By the end of his time on the Court, in sharp contrast to his vote in \textit{Opperman}, the Fourth Amendment had few friends as staunch as Justice Stevens.\textsuperscript{27}

Finally, in \textit{United States v. Martinez-Fuerte}, Justice Stevens joined the Court’s opinion holding that officials at fixed checkpoints near the U.S.–Mexico border could determine which people to select for enhanced inspection “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry.”\textsuperscript{28} Writing for himself and Justice Marshall, Justice Brennan issued a bitter dissent, noting “[t]hat deep resentment will be stirred by a sense of unfair discrimination” given that “[e]very American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today’s decision that” their rights are more vulnerable than those of “non-Mexican appearing motorists.”\textsuperscript{29} Justice Brennan’s dissent, attuned as it is to the perceptions of law-abiding racial minorities, is strikingly reminiscent of opinions written by the latter-day Justice Stevens.\textsuperscript{30}

C. AFFIRMATIVE ACTION

Justice Stevens also shifted dramatically to the left regarding the government’s use of race-conscious measures designed to increase diversity. During his early years on the Court, Justice Stevens may well have been the institu-

\textsuperscript{24} Doyle, 426 U.S. at 620 (Stevens, J., dissenting).
\textsuperscript{25} 428 U.S. 364, 365, 376 (1976).
\textsuperscript{26} Id. at 365, 384, 396.
\textsuperscript{27} See, e.g., Scott v. Harris, 550 U.S. 372, 389–90 (2007) (Stevens, J., dissenting) (concluding in a lone dissent that police officers violated the Fourth Amendment’s provision regarding seizures when they rammed a fleeing suspect’s automobile from behind following a high-speed chase); Thornton v. United States, 541 U.S. 615, 633–34 (2004) (Stevens, J., dissenting) (contending that the Court was incorrect to conclude that the Fourth Amendment permitted police officers, pursuant to an arrest, to search the passenger compartment of a car and any containers therein). I do not mean to suggest, of course, that Justice Stevens was uniformly pro-defendant. See Ward Farnsworth, \textit{Dissents Against Type}, 93 Minn. L. Rev. 1535, 1547 (2009) (observing that Stevens’s judicial “type” has “never quite been” “one who always votes for the defendant”).
\textsuperscript{28} 428 U.S. 543, 563 (1976).
\textsuperscript{29} Id. at 572–73 (Brennan, J., dissenting).
\textsuperscript{30} See, e.g., Illinois v. Wardlow, 528 U.S. 119, 132–33 (2000) (Stevens, J., concurring in part and dissenting in part) (“Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer’s sudden presence. For such a person, unprovoked flight is neither ‘aberrant’ nor ‘abnormal.’”); City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999) (opinion of Stevens, J.) (observing the racially disparate effect of Reconstruction-era vagrancy laws).
tion's fiercest proponent of colorblindness. In *Regents of the University of California v. Bakke*, Justice Stevens wrote on behalf of a four-Justice plurality finding that U.C. Davis Medical School's affirmative action program violated Title VI of the Civil Rights Act of 1964. Although Justice Stevens's opinion formally reached only the statutory ground, the opinion's underlying reasoning could be read as mitigating against the proposition that the government could permissibly treat individuals differently on the basis of race. Justice Stevens felt so strongly about the issue in 1978, moreover, that he orally delivered his opinion from the bench, using language that sounds to modern ears as though it came from the lips of Chief Justice John G. Roberts: "The University of California through its special admissions policy excluded Allan Bakke from participation in its program of medical education because of his race." Two years later, in *Fullilove v. Klutznick*, Justice Stevens raised the stakes, notoriously comparing the federal government's efforts to assist minority-owned businesses to Nazi Germany's treatment of Jews. In dissenting from the Court's finding that the federal program did not violate the Equal Protection Clause, Justice Stevens stated: "Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes."

The Court eventually (at least purportedly) embraced Justice Stevens's call to treat race-conscious programs designed to assist racial minorities with the same heavy skepticism as programs designed to hurt them. By the time the Court did so in 1995 in *Adarand Constructors, Inc. v. Pena*, however, Justice Stevens had changed his mind about the wisdom of that approach. In perhaps the most powerful opinion he wrote during his thirty-five terms on the Court, Justice

32. See id. at 412–18.
35. Id. at 547.
Stevens warned of the perils of foolish consistency. 37 “We should reject a concept of ‘consistency’ that would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African-Americans that was prevalent for much of our history,” Justice Stevens wrote. “The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.” 38

Stevens’s Adarand dissent is, to be sure, principally concerned with a type of consistency that differs from the type examined in this Essay. In Adarand, Stevens addressed what might be referred to as contextual consistency, whereas this Essay addresses temporal consistency. Although Supreme Court Justices by the nature of their jobs must spend some time problematizing and identifying the appropriate boundaries of contextual consistency, they tend to accept reflexively (even if they do not always honor) the value of temporal consistency. Supreme Court Justices, along with other members of the legal profession, would be well advised to demonstrate greater consistency in their questioning of consistency.

II. JUDICIAL CONSISTENCY’S VICE, JUDICIAL INCONSISTENCY’S VIRTUE

Justice Stevens is not the first judge to advance a narrative of judicial consistency in the face of an apparently inconsistent record. Indeed, Justice Stevens’s claims might be understood as taking a page from a playbook that Justice Harry A. Blackmun perfected some two decades earlier. Although Justice Blackmun amassed a generally conservative record upon joining the Court in 1970, over time he became one of the Court’s leading liberals. 39 When asked about this migration from right to left, Blackmun, too, contended that the Court had merely changed around him. 40 “I don’t believe I’m any more liberal, as such, now than I was before,” Blackmun stated in 1983. 41 Nine years later, however, Justice Blackmun seemed to have changed his mind about having changed his mind. “I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed,” Blackmun stated. “And if one didn’t grow and develop down there I would be disap-

37. See Ralph Waldo Emerson, Self-reliance and Other Essays 24 (Stanley Appelbaum ed., 1993) (“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”).
38. Adarand, 515 U.S. at 244–45.
pointed in that person as a Justice. I would hope that in 1992 almost 20 years after Roe against Wade that I have grown a little bit in my constitutional philosophy and my constitutional resolution."\(^{42}\)

One need not be clairvoyant to understand why Justice Blackmun and Justice Stevens sought to contend—against substantial evidence to the contrary—that their respective constitutional visions remained unaltered over time. The explanation, of course, is that judges and legal scholars almost uniformly extol the virtue of judicial consistency.\(^{43}\) Justice Oliver Wendell Holmes is far from alone in believing that doctrinal consistency constitutes nothing less than a prerequisite for being considered among the first rank of Justices.\(^{44}\) In that same vein, three years before he joined the federal bench, Chief Judge Frank Easterbrook contended that, though doctrinal consistency may be impossible for the Supreme Court to achieve as a multi-member institution, it was reasonable to expect individual Justices to issue consistent rulings.\(^{45}\) "Because each Justice is dictator of his own decisions," Easterbrook stated, "he may be faulted for failing [to follow an earlier judgment]. There is no reason why we cannot ask each Justice to develop a principled jurisprudence and to adhere to it consistently."\(^{46}\)

There are, of course, legitimate reasons justifying the legal community's emphasis upon the value of consistency. Apart from its intrinsic value,\(^{47}\) consistency is the bedrock of law's stability, without which it would be difficult for people to order their affairs. The articulation of broad principles designed to ensure that like cases are treated alike is, for many esteemed judges, the very quintessence of law.\(^{48}\) Moreover, as Professors Lewis Kornhauser and Lawrence Sager have observed, "It is our desire for consistency that in significant

---

42. Paul R. Baier, Mr. Justice Blackmun: Reflections from the Cours Mirabeau, 43 AM. U. L. REV. 707, 714 (1994) (quoting audio tape: Justice Harry A. Blackmun, LSU Law Center Summer Program, Aix-en-Provence, France (July 6–9, 1992)). Justice Blackmun's comment echoed one that Chief Justice Earl Warren made at the end of his tenure, when he stated that he did not "see how a man could be on the Court and not change his views substantially over a period of years ... for change you must if you are to do your duty on the Supreme Court." See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 70 (3d ed. 1992).

43. See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 109 (1991) (observing that there is "virtue in consistency").

44. Justice Holmes himself fell short of the mark on this particular score. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 453 (1993) ("Since [Holmes] assumed that doctrinal consistency and theoretical integrity were prerequisites for judicial eminence, he used 'forms of words' to create an appearance of consistency and integrity."). For a leading account of what led Justice Holmes to change his mind regarding the protections that should be afforded freedom of speech in Abrams v. United States, 250 U.S. 616 (1919), see David M. Rabban, The Emergence of First Amendment Doctrine, 50 U. CHI. L. REV. 1207, 1305–17 (1983).


46. Id.

47. See George D. Braden, The Search for Objectivity in Constitutional Law, 57 YALE L.J. 571, 576 (1948) (describing consistency as "intellectually satisfying").

48. See, e.g., Henry J. Friendly, Indiscretion About Discretion, 31 EMORY L.J. 747, 758 (1982) ("[B]road judicial review is necessary to preserve the most basic principle of jurisprudence that we must act alike in all cases of like nature." (internal quotation marks omitted)).
part animates and shapes the rule of stare decisis." As many have suggested, the entirety of constitutional law cannot be placed up for grabs each time the Court hears a new case.

Some instances of judicial inconsistency are, moreover, perfectly legitimate to criticize. Consider, for example, judges who change their public opinions when they are confronted with intense and direct public pressure condemning a particular decision—not because they have experienced a genuine change of heart, that is, but because they fear some sort of reprisal. Chief Justice Warren apparently suggested that such untoward motivation led Justice Frankfurter’s perceptible retreat in upholding the rights of Communists during the 1950s. "Felix changed on Communist cases because he couldn’t take criticism," Warren reportedly griped. Some commentators have suggested that a similar public outcry prompted Justices Stewart and White to validate the constitutionality of capital punishment in Gregg v. Georgia, only four years after they had cast profound doubt on its continued validity in Furman v. Georgia.

Recognizing that judicial consistency contains some value, however, does not mean that it should be regarded as absolute. The considerable downside of venerating judicial consistency can perhaps best be glimpsed by examining the sentiment as expressed in a prospective rather than in a retrospective manner. Justice Clarence Thomas, not long after being confirmed, is reported to have informed his law clerks: "I ain’t evolving." Nearly twenty years later, it seems safe to conclude that Justice Thomas has kept his vow. But at what cost? The forward-looking pledge of consistency views the judge as Ulysses, binding himself to the mast to resist the siren songs of new conditions, new evidence, and new thought.

There is no shame in a judge rethinking old ideas. To the contrary, it is often the mark of professionals who remain engaged both with the world and with their craft. Expecting newly minted Justices to arrive at the Supreme Court with their jurisprudential visions fully formed seems neither realistic nor desirable. Indeed, if Justices somehow managed to avoid changing their minds about a single major issue during their entire tenures on the Court, this would be cause not for celebration, but for lament. Judge Richard Arnold put the point well: "Consistency is a virtue, but it is not the only virtue, and people who never

49. Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 YALE L.J. 82, 104 (1986).
52. 408 U.S. 238 (1972); see, e.g., Corinna Barrett Lain, Deciding Death, 57 DUKE L.J. 1, 22–24 (2007) (contending that "extralegal context" motivated Justice Stewart and Justice White to uphold capital punishment’s constitutionality in Gregg).
54. This statement does not contend, of course, that Justice Thomas has never reversed course. See Apprendi v. New Jersey, 530 U.S. 466, 520 (2000) (Thomas, J., concurring) (stating that the reasoning used in a previous case was "an error to which I succumbed").
change their minds may have simply stopped thinking." But if continued contemplation and reflection are necessary traits for an excellent judge, one might go a step further than Judge Arnold and acknowledge that judicial inconsistency, too, can be a virtue.

In contemplating the actual vice of inconsistency, moreover, it is essential not to conflate an individual judge's consistency with law's consistency. The two concepts are surely interwoven in myriad ways. Simply because an individual Justice changes his or her mind, however, does not mean that legal doctrine will necessarily follow suit. But even assuming that the law changed every time that a Justice altered course on a legal question, the emphasis attached to an individual's judicial consistency may nevertheless be excessive. The old legal aphorism—holding that it is usually more important that a legal question be settled than that it be settled correctly—is surely accurate. But usually does not mean always.

Given that Justices today serve for considerably lengthier periods than they did not long ago, the willingness of Justices to rethink their constitutional views is a matter of increased significance during the modern judicial era. Many scholars readily acknowledge that the prevailing understanding of the Constitution has changed over time and believe that ours is a more just society for having done so. It would seem strange and unwise, then, to advocate a conception of judging that would limit such conceptual changes only to instances of judicial turnover. Yet worshipping at the altar of judicial consistency serves to constrain our constitutional understanding in precisely this manner. Justices who freeze their jurisprudential understandings at the exact moments they join the Court will, at the end of their seemingly ever-lengthier tenures,

55. See Richard S. Arnold, Mr. Justice Brennan—An Appreciation, 26 Harv. C.R.-C.L. L. Rev. 7, 11 (1991). Professor Laurence H. Tribe has similarly noted that a President who nominates a Justice to the Supreme Court must engage in a certain amount of guesswork regarding how the nominee's views will evolve over time: "Previous actions and attitudes are of necessity an imperfect crystal ball, for most of us would prefer that those sitting on our nation's most august tribunals have minds capable of growth." Laurence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 90 (1985).

56. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

57. Cf. Tribe, supra note 55 ("The sole dissenting vote from the notorious 'separate but equal' decision in Plessy v. Ferguson in 1896 was cast by Southerner John Marshall Harlan. When the former slave owner was ridiculed for his evident change of mind and heart, Harlan replied that he preferred to be remembered as being right, rather than consistent.").

58. See Linda Greenhouse, How Long Is Too Long For the Court's Justices?, N.Y. Times, Jan. 16, 2005, at C5 ("From 1789 to 1970, the average Supreme Court justice served for 15.2 years . . . . But since 1970, the average tenure has risen to 25.5 years . . . .").

59. See, e.g., David A. Strauss, The Living Constitution 2 (2010) ("It seems inevitable that the Constitution will change . . . . This is a good thing, because an unchanging constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that would keep us from making progress and prevent our society from working in the way it should.").
almost certainly end up espousing antiquated constitutional conceptions. Praising judicial inconsistency serves to advance a constitutional understanding that invites greater dynamism than may otherwise be possible.

Acknowledging this dynamism also requires rejecting the misguided idea that applauding judicial inconsistency amounts to nothing more than liberal praise for Republican-appointed Justices sliding leftward. Justice Thomas's purported disavowal of judicial "evolution" may stem principally from the notion that those who use such terminology view the conservative judge as Cro-Magnon Man and view the liberal judge as his fully evolved descendant. Sincere praise for judicial inconsistency cuts both ways. It simply will not do to portray a Justice who moves from right to left on a particular issue as acquiring the wisdom of the ages and to portray a Justice who makes the journey in reverse as one who has lost his marbles.

Adherents to judicial inconsistency's virtue, then, must respect not only the leftward trajectory of Justice Stevens; they must also respect the rightward trajectory of Justice Byron White. In the realm of employment discrimination, for instance, Justice White joined the Court's liberal decision in Griggs v. Duke Power Co. in 1971, but eighteen years later he sided with the Court's conservative bloc to author Wards Cove Packing Co. v. Atonio. Supporters of judicial inconsistency need not agree with Justice White's outcome in Wards Cove, but they should respect the process by which he reached it.

III. JUDICIAL INCONSISTENCY APPLIED

It would be surprising, of course, if judges were utterly unconcerned with the level of esteem in which various communities held them. Judges—like mem-

---

61. See, e.g., John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography 541 (1994) (stating that Justice Powell thought that Justice White had drifted to the right over time). Not everyone, of course, agrees that Justice White did in fact shift rightward over time. Rather, some commentators have suggested that Justice White, throughout his judicial tenure, embodied the brand of liberalism associated with the president who nominated him to the Court. See, e.g., Dennis J. Hutchinson, The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White 445 (1998) ("Byron White and John Kennedy were tough on crime, tough on communists, friendly to organized labor, and shared a growing conviction that federal intervention was necessary if racial equality was to be more than a pious objective.").
63. 490 U.S. 642, 650–51 (1989) (finding that statistics showing a high percentage of minority employees in cannery positions and a low percentage in noncannery positions failed to establish a prima facie case of disparate impact in the absence of statistics showing the percentage of qualified minority applicants for noncannery positions).
64. See Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 15 (1993) (contending that "a potentially significant element in the judicial utility function is reputation, both with other judges . . . and with the legal profession at large");
bers of other professions—are not eager to expose themselves to charges of either fickleness or incompetence. Reputational concerns may explain why, on the few occasions that Justices have actually acknowledged that a current position deviates from a prior one, the convention is to approach the matter as many people approach the removal of a Band-Aid: as quickly as possible, so as to minimize the pain. Today, Justices generally cite one of three available quips held in reserve for such occasions. In 1949, Justice Frankfurter coined the most commonly invoked language to acknowledge a change of judicial heart: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” In *Massachusetts v. United States*, Justice Robert Jackson—perhaps the most skilled writer in the Court’s history—noted, “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.” Finally, for those drawn to about-faces of an earlier vintage, Justice Joseph Story provided: “My own error ... can furnish no ground for its being adopted by this Court ....”

When it comes to citations acknowledging instances of judicial inconsistency, at least as important as the sentiment being communicated is the reputation of the judge who did the communicating. It is surely no accident that the three Justices commonly invoked these days to excuse inconsistencies have enjoyed strong juridical reputations. Even had a jurist held in the lowly esteem of, say, Chief Justice Fred M. Vinson somehow managed—despite himself—to dream up a wonderful witticism regarding a change of judicial mind, it seems safe to conclude that just about no one would use it. The none-too-subtle message being conveyed is: great judges have been inconsistent in the past, and my inconsistency here should not preclude me from attaining that status.

Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. Cin. L. Rev. 615, 630 (2000) (suggesting that Justices, “for all that life tenure gives them, are still human, and thus still somewhat vulnerable to the pull of reputation, the desire for esteem, and the wish to avoid public criticism”).

65. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. Pa. J. Const. L. 903, 952–53 (2005) (observing that Justices are “reluctan[t] to admit they have made mistakes” because “[s]uch admissions might make the Justices appear to be indecisive or incompetent”).


68. See Andrews v. Styrap, (1872) 26 L.T. 704 (Exch.) 706 (“The matter does not appear to me now as it appears to have appeared to me then.”).

69. If the sheer quality of the turn of phrase were the guiding criterion, Baron Bramwell’s *bon mot* would surely have acquired more than a meager two citations from Supreme Court Justices. See Andrews v. Styrap, (1872) 26 L.T. 704 (Exch.) 706 (“The matter does not appear to me now as it appears to have appeared to me then.”).

70. Cf. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 302 (2004) (recounting Justice Frankfurter’s reaction to the death of Chief Justice Vinson on the verge of the *Brown* decision as “the first indication I have ever had that there is a God” (internal quotation marks omitted)).
But if Justices change their minds regarding a particular issue, they should not simply invoke revered judges and then quickly change the subject. Instead, Justices should venture at least some explanation of what, precisely, they saw on the road to Damascus. Despite the premium that the legal community (at least as a formal matter) places on judicial consistency, examining the evidence at hand suggests that Justices seriously overestimate the damage that acknowledging inconsistencies inflicts upon judicial reputations. Indeed, rather than perceiving instances of judicial inconsistency as detrimental, many commentators have instead heaped praise upon Justices who understood that the first thought is not always the best thought.

A lengthy period of time need not elapse before Justices may, without experiencing reputational decline, announce that they have reconsidered their analyses. In *Minersville School District v. Gobitis*, decided in 1940, Justices Black, Douglas, and Murphy joined the Court’s 8–1 decision upholding a school district’s requirement that all students—including Jehovah’s Witnesses—recite the Pledge of Allegiance.\(^7^1\) Just two years later, however, the trio wrote a joint dissenting opinion in *Jones v. City of Opelika* repudiating *Gobitis*.\(^7^2\) “Since we joined in the opinion in the *Gobitis* case,” the Justices wrote, “we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government... has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be.”\(^7^3\) Many commentators both at the time and in the intervening years have praised the authors for their reversal.\(^7^4\)

Although the two cases were not on all fours,\(^7^5\) the joint dissenting opinion in *Opelika* had the benefit of announcing that members of the Court were uncomfortable with turning a blind eye to the subordination of religious minorities. One year after *Opelika*, the Court famously reversed course and overturned *Gobitis*.*\(^6^\)

Commentators do not appear to downgrade Justices for judicial inconsistency, even if those Justices played a pivotal role in developing the doctrine that they ultimately reject. Indeed, it is difficult to imagine a Justice being more closely identified with a particular line of cases than Justice Brennan was.

---

\(^7^1\) 310 U.S. 586, 591–92, 599–600 (1940).
\(^7^2\) 316 U.S. 584, 623–24 (1942) (Black, J., Douglas, J., and Murphy, J., dissenting).
\(^7^3\) Id.
\(^7^4\) See G. Edward White, *The Constitution and the New Deal* 148 (2000) (noting that, through the dissenting opinion in *Opelika*, “the textually protected status and the democratic status of speech rights were once again intertwined”); John Raeburn Green, *Liberty Under the Fourteenth Amendment*, 27 Wash. U. L.Q. 497, 525 (1942) (commenting of *Opelika* that, while there was little redeemable about the Court’s opinion, the case “in the long run will mark an advance for [religious] liberty, because of the dissenting opinions”).
\(^7^5\) *Opelika* involved the permissibility of collecting licensing fees for proselytizing, not the Pledge of Allegiance. *See Opelika*, 316 U.S. at 585–86 (majority opinion).
identified with the Court’s effort to police obscenity. In 1957, Brennan wrote the Court’s opinion in *Roth v. United States,* its initial foray into the obscenity field, and he was repeatedly charged with the Sisyphean task of attempting to articulate workable standards to govern this murky terrain. In 1973, however, Justice Brennan wrote in *Paris Adult Theatre I v. Slaton* that he was “reluctantly forced to the conclusion” that the quest to defeat obscenity had proved to be a losing battle. “I am convinced that the approach initiated 16 years ago in *Roth v. United States,*” Justice Brennan wrote, “and culminating in the Court’s decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.” Rather than coming in for criticism, Justice Brennan’s reversal in obscenity has been hailed for its refusal to permit prior thinking to carry the day.

Perhaps the most well-known instance of judicial inconsistency is Justice Blackmun’s shifting view of capital punishment. In 1972, two years after becoming an Associate Justice, Blackmun, along with President Nixon’s three other Court appointees, dissented from the Court’s decision in *Furman v. Georgia,* which cast profound doubt on the death penalty’s continued constitutional vitality. Although Justice Blackmun (unlike the other *Furman* dissenters) noted his “distaste, antipathy, and, indeed, abhorrence, for the death penalty,” he nevertheless insisted that personal views should have no bearing on whether the practice violated the Eighth Amendment. In 1994, just months before his departure from the Court, Justice Blackmun announced his conversion to death penalty abolitionism in an otherwise unremarkable case. “From this day forward,” Justice Blackmun wrote, “I no longer shall tinker with the machinery of death.” This line is perhaps the most widely praised of Blackmun’s entire judicial career, a career not widely considered among the upper echelon of Supreme Court Justices, but one that does not want for its share of truly memorable lines.

---

77. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION, 249-64, 365-68 (2010) (detailing Brennan’s long struggle to define obscenity and ultimately his retreat from the endeavor).
78. 354 U.S. 476, 479 (1957).
81. *Id.* at 73–74 (citation omitted).
82. See Jeffrey Rosen, *We Hardly Know It When We See It: Obscenity and the Problem of Unprotected Speech,* in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 64, 64–65 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (contending that “it’s hard not to admire the painstakingly incremental quality of Justice Brennan’s intellectual evolution” regarding obscenity).
83. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).
84. *Id.* at 405, 411.
86. See GREENHOUSE, supra note 39, at 178.
87. See Webster v. Reprod. Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part and dissenting in part) (“But the signs are evident and very ominous, and a chill wind blows.”);
CONCLUSION

It is far too early at this hour to know whether history will include John Paul
Stevens among the finest Justices to have ever served on the Supreme Court.
Judicial reputations, not unlike presidential reputations, can rise and fall dramati-
cally over a period that sometimes stretches decades. What can be said with
certainty, though, is that if Justice Stevens should be excluded from the judicial
pantheon, it will not be inconsistencies that deprive him of the rank.

DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J.,
(Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond racism, we must first
take account of race. There is no other way. And in order to treat some persons equally, we must treat
them differently.").