The Stevens Myth
Why has everyone fallen for John Paul Stevens's self-serving narrative?

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LEGAL CIRCLES HAVE BEEN A BUZZ for the last eight months with the news that Justice John Paul Stevens had hired only one law clerk to begin working this summer. This move, Supreme Court watchers observed, strongly suggested that Stevens's thirty-fifth term at the Court would be his last. As journalists and scholars begin contemplating his place in history, Stevens himself has not-so-subtly attempted to burnish his judicial legacy. In a series of interviews over the last few years, Stevens has repeatedly attempted to portray his views as fundamentally unaltered since he joined the Court. This claim is somewhat counterintuitive, as he was elevated by Republican President Gerald Ford but has become the leader of the Court's liberal bloc. "I don't think that my votes represent a change in my own thinking," Stevens told TNR's legal-affairs editor Jeffrey Rosen for a 2007 profile in *The New York Times Magazine*. "I'm just disagreeing with changes that the others are making." When Stevens encounters his old opinions these days, he professes keen admiration for what he sees. "We're getting to a point that our cases are revisiting issues that I wrote on 10, 20, 30 years ago," he confided to journalist Joan Biskupic last year. "I really have felt pretty good about re-reading the opinions I wrote many years ago. I have to confess that."

Commentators have embraced Stevens's preferred self-image, largely portraying him as an island of stasis amid a sea of dynamism. Adam Liptak dutifully relayed the justice's assessment in the *Times* earlier this month: "His views have generally remained stable," Stevens said, while the court has drifted to the right over time." But, while the Court, the GOP, and the nation as a whole became more conservative during Stevens's tenure, these trends do not negate the fact that Stevens has also tacked hard to the left. Indeed, examining his early opinions these days, he professes keen admiration for what he sees. "We're getting to a point that our cases are revisiting issues that I wrote on 10, 20, 30 years ago," he confided to journalist Joan Biskupic last year. "I really have felt pretty good about re-reading the opinions I wrote many years ago. I have to confess that."

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ON THE QUESTION OF government's ability to take account of race, Stevens has attempted to maintain a veneer of consistency with some particularly intricate tap dancing. In a 1980 case validating a federal program designed to steer business to minority-owned companies, Stevens dissented and, in a notorious footnote, compared the program to laws from Nazi Germany. Stevens has sought to explain his subsequent embrace of race-conscious measures in educational settings by emphasizing the different contexts. Unlike affirmative action in business (where the group of beneficiaries is constrained), Stevens told Rosen that, in the educational world, "the whole student body profits from having diversity in the classes. So I really don't think I've changed my views about this."

During the course of his career, however, Stevens has voted both to strike down affirmative action in higher education and to uphold affirmative action in business. In 1978, Stevens wrote an opinion seeking to invalidate a medical school's efforts to achieve a racially diverse student body. Although he admittedly would have decided the case on statutory (rather than constitutional) grounds, Stevens appealed to the very same colorblind principle that motivates affirmative action opponents today: "The University of California through its special admissions program excluded Allan Bakke from participation in its program of medical education because of his race." Stevens began in his oral statement from the bench. In 1995, moreover, the Court adopted Stevens's earlier skepticism of programs designed to aid minority-owned companies (albeit not his reasoning that such programs smacked of the Third Reich). By then, Stevens had changed positions, and he wrote a powerful dissent urging the Court to recognize the distinction between inclusive and exclusive uses of race. It may well be that treating all racial classifications identically "doesn't make any sense," as Stevens told Rosen in the wake of the Court's invalidation of two voluntary school-integration programs. If that is so, however, Stevens passionately advocated a senseless position for many years.

Although Jeffrey Toobin's recent *New Yorker* profile granted that Stevens has "evolved" on race and capital punishment, it nonetheless furthered an erroneous conception of consistency in other high-profile areas. The piece quotes former federal judge Abner Mikva, an old friend from Chicago, describing Stevens as fiscally conservative, but noting that "he was always a great progressive on civil rights and social rights." In this vein, Toobin asserts: "Stevens has always supported abortion rights and an expansive notion of freedom of speech." The truth, though, is a good deal more complicated.

In an abortion case decided in 1976, Stevens split his judicial ticket on two consent requirements contained in a Missouri statute. Although he voted with the liberal majority to invalidate a spousal consent provision, Stevens also sided with the conservatives in dissent, believing that Missouri could require a pregnant young woman under the age of 18 to obtain permission from her parents before receiving
Stevens, today a free speech champion, tilted right in 1970s cases involving adult films and George Carlin.

airing George Carlin’s “Filthy Words” routine. Carlin identified seven vulgarities that were unsuitable for broadcast (“shit, piss, fuck, cunt, cocksucker, mother-fucker, and tits”), and then delighted in exploring myriad linguistic permutations. Stevens reasoned that FCC regulation was permissible in light of the broadcast media’s “uniquely pervasive presence in the lives of all Americans” and because the media “is uniquely accessible to children.” Justice Brennan, joined by Justice Marshall, disdainfully dissented: “I find the Court’s misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.” Or, as the point might be pressed in the words of Carlin’s routine: “I’ve had that shit up to here.”

Turning to cases involving criminal defendants, Stevens told Rosen that his father’s (apparently wrongful) conviction for embezzlement influenced his judicial thinking. This conviction taught Stevens “that the criminal justice system can misfire sometimes.” Examining Stevens’s first full year on the Court nevertheless reveals a justice who often appears unsympathetic to criminal defendants’ rights. To select only one of the many available examples, Stevens wrote a dissent in Doyle v. Ohio contending that it should be constitutional for a prosecutor to cross-examine a defendant regarding his failure to offer an exculpatory story immediately after being arrested and receiving Miranda warnings. It is difficult to understand how such a view would not have effectively eviscerated the right to remain silent. Today, in stark contrast, Stevens views Miranda as sacrosanct, leading him in February to be one of only two dissenters who would have held unconstitutional a Florida police department’s minor deviation from the standard warnings.

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