

**Michael Polelle's synopsis of his presentation on
*Six Amendments: How and Why We Should Change
the Constitution*, by John Paul Stevens
(Little, Brown & Co., 2014)**

In this reviewer's opinion, Justice Stevens is to be commended for proposing changes that require public participation through the amending process rather than having the Court effectively act as an informal "amender" of the Constitution, a role it was never given. This former Supreme Court Justice proposes the Constitution be amended in six different ways to avoid future crises before they occur:

1. **The Anti-Commandeering Rule.** Art. VI (Supremacy Clause) of the Constitution omits "public officials" from following federal law even though "judges" are named. Can the federal government impose duties on local officials to carry out federal policy without violating state sovereignty? Ruling that it can't, the Supreme Court held in a close vote that federal law can't impose obligations on local law enforcement to determine whether the sale of a firearm would be unlawful. He would cure this by adding the words "public officials" to Art. VI. He would amend Art. VI by adding "public officials."

2. **Political Gerrymandering.** In 1962, the Supreme Court reversed the principle that courts should avoid the "political thicket" of legislative redistricting. It held that the principle of "one person-one vote" means equal protection under the 14th

Amendment could be violated by political gerrymandering. So many exceptions and qualifications have limited court intervention, however, that Justice Stevens proposes that a state have the burden of showing that neutral criteria have been used, such as "natural, political, or historic boundaries," but "enhancing the political power of the party in control of state government" would not be a valid criterion. Unfortunately, it is difficult, if not impossible, to distinguish his "neutral" factors from those that would be considered invidious discrimination under the 14th Amendment. Why not, in an age of computers, just have districts drawn impartially with relatively equal populations and take the human (and inherently biased) factor out of redistricting?

3. **Campaign Finance**. He would reverse Citizens United and adopt an amendment stating that neither the 1st Amendment nor any other part of the Constitution prohibits Congress or the states from reasonably regulating campaign financing. In the reviewer's opinion, he doesn't go far enough because his amendment would still allow corporations to be treated as "persons" under the 1st Amendment even though they are not "persons" under 4th Amendment protection nor under the Privileges and Immunities of Art. IV, Sec. 2. The claim that "campaign money" is "speech" under the 1st Amendment ignores the reality that campaign money is not inherently part of speech. Money may talk, but it also is used in ways ranging from bribery to buying donuts on election day that have no reasonable connection to 1st

Amendment speech protection. I doubt anyone would claim the campaign money found on the Watergate burglars would be considered "free speech" money. Overstretching the 1st Amendment to cover all kinds of "symbolic speech" is precisely the evil Justice Hugo Black warned against: expanding free speech via symbolic speech could ultimately mean less protection for real speech.

4. **Sovereign Immunity**. Art. III clearly allowed a citizen to sue another state in federal court. But two years later, public outrage led to the 11th Amendment that barred such a suit. Justice Stevens believes the 11th Amendment is outdated and that the adage, "the king can do no wrong," has no place in a democratic society. Government should pay for its wrong just like any other entity. He would amend the Constitution to say that neither the 11th Amendment nor any other part of the Constitution prevents any state from being sued. It seems to this reviewer that he could have accomplished the same result by simply repealing the 11th Amendment, which would lead Art. III of the Constitution to operate without any qualification.

5. **Death Penalty**. Justice Stevens would simply abolish the death penalty by amending the 8th Amendment's "cruel and unusual" penalty clause with the added phrase, "such as the death penalty inflicted." It is refreshing that Justice Stevens is willing to put the issue up for amendment and have a public debate rather than have nine unelected judges decide what is

“cruel and unusual.”

6. **The 2nd Amendment (Gun Control)**. On the equally controversial issue of gun control, he would amend the 2nd Amendment to make it clear that the right to bear arms exists only “when serving in the Militia.” This would revert to an earlier view of the Supreme Court before the Heller case belatedly discovered a right to bear arms independent of militia service. Again, in the reviewer’s opinion, Justice Stevens deserves credit for forcing a public debate on these issues through the amendment process instead of having the Court pull rabbits out of a constitutional hat under the pretense that it is merely “interpreting” the Constitution.