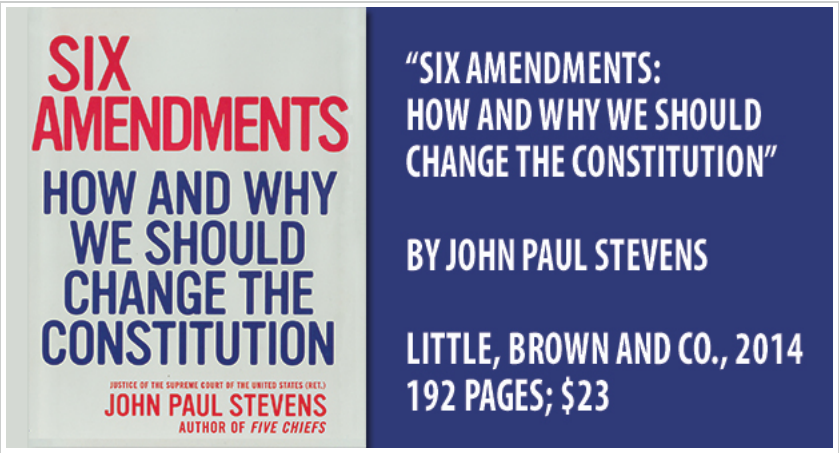
MASSACHUSETTS LAWYERS WEEKLY

Retired justice trades interpreting Constitution for rewriting it

By: Alex G. Philipson July 31, 2014



No matter how exalted a U.S. Supreme Court justice may be, you're still only one of nine. Without five votes, your opinion isn't law; it's just commentary.

True, a dissenting view today may garner a majority tomorrow. But that tomorrow requires a change in the court's personnel, or a change in its members' thinking — neither of which happens quickly or easily.

Justice John Paul Stevens, who retired from the court in 2010, was a forceful dissenter on many topics, including loosening restrictions on campaign finance and gun control. Equally disappointing to him were some of the court's rulings on sovereign immunity, political gerrymandering, the death penalty and Congress's power to tell state officials what to do.

But while a minority position can sometimes eventually sway a majority, Stevens knows that, under Chief Justice John G. Roberts Jr., the court is not likely to adopt his dissenting ideas any time soon. Plus, Stevens no longer has a judicial vote with which to influence the other justices.

And so, off the bench, Stevens has decided to address a different audience: you and me and our elected representatives. Thus the "we" in the title of his new book, "Six Amendments: How and Why We Should Change the Constitution." It is his second book since leaving the court; his first was "Five Chiefs: A Supreme Court Memoir." After a career of explaining the words of the Constitution, Stevens now wants to rewrite them.

But "Six Amendments" is no treatise. It aims for a general audience, complete with footnotes explaining how to read legal citations. Adding to its popular appeal, the book is short: the main text fills only 133 pages (an appendix contains the Constitution). Still, the subject is anything but lightweight.

"Six Amendments" grew out of Stevens' horror at the massacre at the Sandy Hook Elementary School, in Newtown, Connecticut, in 2012, and the equally frightening shooting at Virginia Tech, in 2007. Two of Stevens' proposed amendments concern gun control. He waits until the final chapter to discuss the right to bear arms, choosing to begin with Congress's power to regulate gun purchases.

According to Stevens, the court got it wrong in *Printz v. U.S.* when, in 1997, it struck down the provision of the Brady Act requiring local sheriffs to run background checks on gun buyers. Over Stevens' dissent, the court held that Congress cannot make state officials perform federal duties. Stevens laments this "anti-commandeering rule," suggesting that, had his dissenting view prevailed, the Virginia Tech killings perhaps could have been prevented.

At a time when school shootings recur with distressing frequency, though, Stevens asserts that we cannot wait for the court to overrule *Printz*. Instead, we must amend the Supremacy Clause of Article VI to require that federal law be followed not only by judges but also by "other public officials."

And yet, more is needed for effective gun control. Besides Article VI, Stevens has the Second Amendment in his sights. Recalling his dissents in *District of Columbia v. Heller* (recognizing a right to keep a handgun in one's home for self-defense), and *McDonald v. Chicago* (limiting a city's power to outlaw gun possession), Stevens "remain[s] convinced that both decisions misinterpreted the law and were profoundly unwise."

The court's reasoning in *Heller* and *McDonald* was mistaken, he insists, in uncoupling the Second Amendment from the context in which it arose: a concern "that a national standing army might pose a threat to the security of the separate states." More important, Stevens says the decisions undermine our ability to deal with "the roughly eighty-eight firearm-related deaths that occur every day."

The fix? Add five words to the Second Amendment to clarify that it refers to the "right of the people to keep and bear Arms *when serving in the militia*."

Shifting from literal to political firepower, Stevens condemns the court's campaign-finance decisions that have opened the spigot for corporate-backed political advertising. He sums up his disgust with *Citizens United v. Federal Election Commission*, decided in 2010, this way: "Unlimited expenditures by nonvoters in election campaigns … impairs the process of democratic self-government by making successful candidates more beholden to the nonvoters who supported them than to the voters who elected them."

Stevens wants an amendment that would allow Congress and the states to impose "reasonable limits" on the amount of money that political candidates or their supporters could spend in election campaigns. This "reasonableness" would be measured, he says, "by examining the interests of the entire electorate rather than just the interests of the wealthiest candidates."

But like the myriad other rules of law that depend on the meaning of "reasonable," such an amendment would surely swell the courts' dockets. Even so, that litigation may be a price worth paying.

Politics is at the root of another of Stevens' constitutional amendments. He blames political gerrymandering for making elected officials more doctrinaire and less willing to compromise with members of the opposing party — factors that led to the government shutdown in October 2013.

The courts should cure political gerrymandering just as they have remedied racial gerrymandering, he asserts. We thus need an amendment requiring that election districts be "compact and composed of contiguous territory," unless some neutral reason (e.g., historical boundaries or demography) justifies a departure.

The amendment would stipulate that "[t]he interest in enhancing or preserving the political power of the party in control of the state government is not such a neutral criterion."

Aside from how we select our government officials, Stevens cares about how we can hold them responsible for their wrongdoing. The doctrine of sovereign immunity, he submits, "never should have been adopted in a democracy."

The premise of this immunity, that "the king can do no wrong," contradicts the very basis on which our country was founded. And given that Congress has the power to impose obligations on the states, Stevens reasons, Congress should have the power to provide effective remedies for violations of those obligations.

"It is simply unfair to permit state-owned institutions to assert defenses to federal claims that are unavailable to their private counterparts." A constitutional amendment is thus needed to abolish sovereign immunity for states that violate federal or constitutional rights.

Rounding out the book, Stevens suggests that we revise the Eighth Amendment to specify that "cruel and unusual punishments" include the death penalty. The risk of executing innocent persons — brought into stark relief by recent DNA exonerations — is simply too great not to outlaw the death penalty, Stevens submits. For him, life imprisonment can serve the goals of deterrence and protecting the public at least as well as executions can.

What all of Stevens' proposals have in common is the ability to stoke the passions of politicians and the public alike. Consequently, by the end of the book one is left with this nagging thought: amending the Constitution is at least as difficult as getting the court to reverse its own decisions. But Stevens never addresses that challenge.

He acknowledges that to propose an amendment takes agreement by two-thirds of both houses of Congress, or takes a constitutional convention requested by two-thirds of state legislatures. And he recognizes that to ratify an amendment requires approval by three-fourths of the states.

With obstacles like those, it is no wonder that, in the last 40 years, the Constitution has been amended only once (in

1992, to prohibit Congress from changing its salary between elections).

Why, then, should we think that amending the Constitution would succeed where waiting for the court to overrule its precedents would fail?

Sure, legislators are answerable to the electorate in ways that the justices are not. And Senate democrats have recently floated an amendment that would at least undo the campaign-finance ramifications of *Citizens United* and its successor, *McCutcheon v. Federal Election Commission*. But is today's Congress any more likely to reverse the court's decisions than is the court itself? In the prophetic words of the Magic 8-Ball, "Don't count on it."

Despite all this, Stevens remains optimistic. He writes: "As time passes, I am confident that the soundness of each of my proposals will become more and more evident, and that ultimately each will be adopted."

Still, in the race between our legislators and the justices to adopt any of Stevens' proposals — a race between the tortoise and the snail — it remains to be seen who will win.

"Six Amendments: How and Why We Should Change the Constitution"

By John Paul Stevens

Little, Brown and Co., 2014

192 pages; $23

Alex G. Philipson is founder of the appellate boutique Philipson Legal in Newton Centre.

Issue: AUG. 4 2014 ISSUE