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## Six Overrulings

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## SIX OVERRULINGS

*Andrew Koppelman\**

SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION. By *John Paul Stevens*. New York, Boston and London: Little, Brown and Company. 2014. Pp. vii, 133. \$23.

### INTRODUCTION

John Paul Stevens,<sup>1</sup> who retired in 2010 at the age of ninety after more than thirty-four years on the Supreme Court, has capped his astoundingly distinguished career by becoming an important public intellectual. He reviews books,<sup>2</sup> gives high-profile interviews, wrote a memoir of the chief justices he has known,<sup>3</sup> and has now written a second book.

*Six Amendments* revisits half a dozen old, lost battles. Stevens appeals over the heads of his colleagues to a higher authority: the public. Now that he is off the Court, Stevens explains why six decisions in which he dissented should be overruled by constitutional amendment.

Four of his proposed amendments would discard judicially constructed doctrines that, in his view, improperly constrain legislatures. Stevens would allow broader limits on private contributions to political campaigns. He would abandon limits on the regulation of private possession of firearms. He would discard the anti-commandeering doctrine, which empowers state officials to refuse to enforce federal law, and the sovereign immunity principle, which holds that even clear legal wrongs committed by public officials cannot be remedied in court.

The other two amendments would involve new judicial interventions in areas where the Court now allows broad legislative discretion: partisan gerrymandering, which Stevens thinks should be subjected to judicial oversight, and the death penalty, which he would abolish.

The book is wonderful when it addresses points of procedure that are likely to be abstruse to the ordinary reader. Most people have never heard of

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1. Associate Justice, Supreme Court of the United States (retired).
2. See, e.g., John Paul Stevens, *The Court & the Right to Vote: A Dissent*, N.Y. REV. BOOKS, Aug. 15, 2013, at 37, available at <http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent>; John Paul Stevens, *Should Hate Speech Be Outlawed?*, N.Y. REV. BOOKS, June 7, 2012, at 18, available at <http://www.nybooks.com/articles/archives/2012/jun/07/should-hate-speech-be-outlawed>.
3. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011).

the anti-commandeering rule or sovereign immunity. Stevens lays out each of these points with impressive compression and clarity, showing where the pertinent doctrines came from, why they matter, how the Court reached the result it did, and why its reasoning was wrong. For these discussions alone, this book should be read by any American who wants to understand the Supreme Court's strange judge-made limitations on federal power. In other parts of the book, Stevens briefly sketches and augments views that he has elaborated elsewhere, and so these parts are less useful to the nonspecialist.

In this Review, I will consider each of Stevens's six amendments, giving sustained attention to the arguments concerning campaign finance and the death penalty—arguments that he has not made in earlier writings.

### I. ABOLISHING THE ANTI-COMMANDEERING RULE

The anti-commandeering rule, which the Supreme Court announced in *Printz v. United States*,<sup>4</sup> forbids Congress from requiring state and local officials to enforce federal law. It was settled decades ago that state courts had no such privilege; they were bound to enforce federal law whether they wanted to or not.<sup>5</sup> Despite the acknowledged supremacy of federal law, however, the Court struck down a statute requiring local law enforcement officers to check the backgrounds of gun purchasers.<sup>6</sup> As Stevens observes, “the burden imposed on local officials was trivial, while the benefits of the background checks were significant” (p. 18). The Court thought that “laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.”<sup>7</sup>

The state rights in question are not enumerated anywhere in the Constitution. Rather, they are inferences from the general structure of our constitutional system, in which the states are independent of the federal government.<sup>8</sup> In his dissent in *Printz*, Stevens argued that the Court would accomplish the opposite of what it intended by requiring the federal government to “create vast national bureaucracies to implement its policies.”<sup>9</sup> In his book, he makes the same argument in less technical terms (p. 28).

His first proposed amendment, then, is to change the Supremacy Clause by adding the words in italics below:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges *and other public officials* in every State shall be bound

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4. See 521 U.S. 898, 935 (1997).

5. *Testa v. Katt*, 330 U.S. 386, 394 (1947).

6. *Printz*, 521 U.S. at 933–34.

7. *Id.* at 925.

8. See *id.* at 918–22. This is also true of the sovereign immunity rule discussed *infra* Part II.

9. *Printz*, 521 U.S. at 959 (Stevens, J., dissenting).

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>10</sup>

The question of whether states need judge-made, categorical rights against federal power is more complex than Stevens can fully address—and more complex than can be addressed here. One’s judgment about this question is likely to depend, like most rights-based arguments, on some combination of optimism about what will happen if the right is created and distrust of the state.<sup>11</sup> Here, one needs to believe that this limitation will not hamstring the federal government in a way that is bad for the country, and that the limitation is necessary in order to stop Congress from doing bad things.<sup>12</sup> It is at least equally relevant that the Constitution’s fundamental purpose, the reason the country abandoned the Articles of Confederation, is to give Congress adequate power to solve the country’s problems.<sup>13</sup> The Court’s rigid rule impairs more than the ability of the federal government to control guns.<sup>14</sup> Stevens wrote the following in his dissent: “Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.”<sup>15</sup> The Court has no resources other than its own prudential judgments to deal with such situations. As a result, there is no good reason not to trust Congress to make such determinations.

## II. ABOLISHING STATE SOVEREIGN IMMUNITY

The notion of state sovereign immunity from suits under federal law is another innovation of the modern Court (pp. 91–92, 104). Stevens shows that it is a *huge* innovation—one masquerading as tradition (p. 105). In England, the prerogatives of the king included immunity from being sued without his consent. The early Supreme Court ignored that doctrine. We have no king here (pp. 81–82).

Article III of the Constitution gives federal courts jurisdiction in “diversity” cases, in which a citizen of one state sues a citizen of another state, and in “federal question” cases, which involve federal law.<sup>16</sup> In 1793, the Court allowed a diversity suit against a state government.<sup>17</sup> This was unpopular and

10. See p. 29; U.S. CONST. art. VI, cl. 2.

11. See ANDREW KOPPELMAN WITH TOBIAS BARRINGTON WOLFF, *A RIGHT TO DISCRIMINATE? HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION* 2–3 (2009).

12. See, e.g., Steven G. Calabresi, *Revising the Founders*, WALL ST. J., July 15, 2014, at A13 (making such arguments in his review of *Six Amendments*).

13. See ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* 40 (2013).

14. See *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

15. *Id.*

16. U.S. CONST. art. III, § 2, cl. 1.

17. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 428 (1793).

provoked enactment of the Eleventh Amendment, which provides that the “Judicial power of the United States” does not extend to suits against a state by citizens of another state.<sup>18</sup> The Eleventh Amendment by its terms applies only to diversity cases, not federal question cases (p. 84). In the Reconstruction period, however, the Court began to extend the amendment beyond its terms (pp. 86–92). That extension has now reached explosive proportions (pp. 98–106).

The expansion of sovereign immunity, Stevens succinctly shows, is an artifact of the Reconstruction-era Supreme Court’s hostility to federal interference with state prerogatives, itself a reflection of the nation’s abandonment of the former slaves (pp. 86–92). A Court that permitted lynchings and Klan violence was not much troubled by states’ refusal to pay their debts (p. 92). In 1882, the Court rejected a similar sovereign immunity defense by the federal government, holding that such a defense was inconsistent with the protection of property under the Due Process Clause.<sup>19</sup> In 1974, however, the Court held that the “Eleventh Amendment”—one must put the term in scare quotes, because the plain language of the text cannot plausibly be read to require this result—bars Congress from imposing monetary liability upon states for violations of federal law.<sup>20</sup>

As an interpretation of the text of the Eleventh Amendment, this is embarrassing. But this reasoning has been casually endorsed and even expanded upon by such professed originalists as Chief Justice Rehnquist and Justices Scalia and Thomas. Their purported deployment of original-meaning textualism here is evidently a screen for raw judicial lawmaking.<sup>21</sup> In his recent coauthored treatise on interpretation, Justice Scalia recites with approval the familiar canon *expressio unius est exclusio alterius*—“The expression of one thing implies the exclusion of others.”<sup>22</sup> He has yet to explain how this canon can be consistent with his sovereign immunity decisions.

The Court later placed a “rather bizarre limitation” (p. 99) on this rule: Congress may abrogate state sovereign immunity when legislating under the Fourteenth Amendment or the Bankruptcy Clause, but it may not do so

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18. The amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

19. *United States v. Lee*, 106 U.S. 196, 219–21 (1882). *Lee* is quoted at length by Stevens. Pp. 95–97.

20. *Edelman v. Jordan*, 415 U.S. 651, 674–77 (1974).

21. For further evidence that this is how their “textualism” operates in practice, see Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 731–44 (2009), and Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 BOUNDARY 2: INT’L J. LITERATURE & CULTURE, Summer 2014, at 227, 233–36 (book review), available at <http://boundary2.dukejournals.org/content/41/2/227.full.pdf>.

22. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012).

under any of its other enumerated powers.<sup>23</sup> The Court further held that federal law cannot make states monetarily liable in state courts,<sup>24</sup> though it then “explained that the source of the state’s sovereign immunity defense was not the Eleventh Amendment after all, but rather an unwritten rule that was [somehow] embodied in the ‘plan of the Convention.’”<sup>25</sup>

Stevens thinks the whole structure is indefensible:

It is simply unfair to permit state-owned institutions to assert defenses to federal claims that are unavailable to their private counterparts. A university should be equally responsible for copyright or patent infringement whether it is owned privately or by a state. It does not make sense to provide a police officer employed by the state of New York with a defense to a claim that he violated a suspect’s constitutional rights that is not available to an officer employed by the city of New York. (p. 106)

To remedy this structural problem, Stevens proposes adding the following language to the Constitution: “Neither the Tenth Amendment, the Eleventh Amendment, nor any other provision of this Constitution, shall be construed to provide any state, state agency, or state officer with an immunity from liability for violating any act of Congress, or any provision of this Constitution” (p. 106).

Of all the amendments that Stevens proposes, this one is especially redundant, because there is no way, as a matter of linguistic meaning, that the Tenth or Eleventh Amendments can reasonably be construed to create such immunities. The Eleventh Amendment, as I have explained, is limited by its express terms to diversity cases. The Tenth Amendment’s plain language “states but a truism that all is retained which has not been surrendered.”<sup>26</sup> But we are where we are.

### III. AUTHORIZING CAMPAIGN FINANCE REFORM

Campaign finance reform legislation typically restricts campaign contributions and independent expenditures on elections. Such restrictions raise First Amendment issues because they restrain political communication, but some argue that the restrictions are necessary to serve the compelling purpose of preventing political corruption.<sup>27</sup> Stevens’s views on this issue are already well known because of his celebrated dissent in *Citizens United v. FEC*,<sup>28</sup> but he adds to them here by raising a concern about the illegitimate participation of nonvoters in elections (p. 59). His new arguments, however, are less persuasive than those he made earlier.

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23. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362–63 (2006) (Bankruptcy Clause); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (Fourteenth Amendment).

24. *Alden v. Maine*, 527 U.S. 706, 712 (1999).

25. P. 105 (quoting *Alden*, 527 U.S. at 760).

26. *United States v. Darby*, 312 U.S. 100, 124 (1941).

27. *See, e.g.*, p. 78.

28. 558 U.S. 310, 393 (2010) (Stevens, J., dissenting).

Sometimes, when private interests spend large amounts of money to help officeholders win elections, these interests are rewarded with disproportionate influence over how the officeholders wield their power. In the limit case, large donors can effectively purchase influence and then write legislation, confident that legislators who owe them favors will rubber-stamp what they have produced. Officeholders also must spend hours every day fundraising, which distracts them from their duties and socializes them to be particularly responsive to the concerns of those who can afford to contribute. Campaign finance restrictions are designed to prevent these pathologies.<sup>29</sup>

Opponents of such restrictions offer two responses. First, they challenge reform's empirical basis, claiming that large donations and independent expenditures do not purchase political influence. If the empirical predicate of legislation is false, then it cannot constitute a compelling interest. Everything turns on the correct description of the world. This issue is hotly contested.

When it invalidated the McCain–Feingold campaign finance law in *Citizens United*,<sup>30</sup> the Supreme Court offered a second answer. It declared these empirical claims of purchased political power irrelevant. When campaign speech by private donors is limited, “the electorate [is] deprived of information, knowledge, and opinion vital to its function.”<sup>31</sup> Any restriction on campaign speech “uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”<sup>32</sup> Even if private parties spend large amounts to influence elections, and even if these parties succeed in swaying the result and so purchase the winner's gratitude (or fear), this willingness to spend “presupposes that the people have the ultimate influence over elected officials.”<sup>33</sup> The donor may have frequent access to the official, and the official may respond to each of the donor's concerns with an abject eagerness to please, but this is not corruption unless it can be shown that there is a direct, one-for-one trade of financial support for legislative favors.<sup>34</sup> “The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”<sup>35</sup> As the Court conceives the world, the alleged corruption is invisible and irrelevant.

Stevens, in his dissent in *Citizens United*, explained why the majority's concept of political corruption was unduly narrow:

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29. E.g., Bipartisan Campaign Reform (McCain–Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered titles of the U.S. CODE), *invalidated in part by Citizens United*, 558 U.S. 310.

30. 558 U.S. at 372.

31. *Id.* at 354 (quoting *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring)).

32. *Id.* at 356.

33. *Id.* at 360.

34. *Id.* at 359.

35. *Id.*

Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.<sup>36</sup>

On the empirical question of whether the restrictions were necessary, Stevens protested that, because the majority had improperly expanded the scope of the challenge to the law, no adequate record had been developed by the court below.<sup>37</sup> The law was based on "a virtual mountain of research on the corruption that previous legislation had failed to avert,"<sup>38</sup> and the Court invalidated the law "without a shred of evidence"<sup>39</sup> about its effects. Since leaving the Court, Stevens has continued to criticize this decision and the Court's subsequent expansion of it in *McCutcheon v. FEC*,<sup>40</sup> which struck down a law limiting how much individuals could contribute, in the aggregate, to congressional campaigns.<sup>41</sup> He proposes the following amendment: "Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns" (p. 79).

Stevens makes his arguments for this change primarily outside the book. In *Six Amendments*, he declares:

I shall not repeat the arguments that I advanced in my eighty-six-page dissent [in *Citizens United*] . . . Instead, I shall explain why it is unwise to allow persons who are not qualified to vote—whether they be corporations or nonresident individuals—to have a potentially greater power to affect the outcome of elections than eligible voters have. (p. 59)

Restricting the discussion in this way raises doubts about who the book's audience is supposed to be. *Six Amendments* is addressed to the general public. This is a short book, short enough that the publishers evidently felt it necessary to pad it by tossing in the entire text of the U.S. Constitution (together with the names of all the signers!) as an appendix. This adds 32 pages to what would have been a 133-page volume. What possible reader doesn't have a copy of the Constitution but is already familiar with the *Citizens United* dissent?

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36. *Id.* at 447–48 (Stevens, J., dissenting).

37. *Id.* at 399–400.

38. *Id.* at 400.

39. *Id.*

40. 134 S. Ct. 1434 (2014).

41. *E.g.*, Adam Liptak, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction'*, N.Y. TIMES, Apr. 22, 2014, at A14, available at <http://www.nytimes.com/2014/04/22/us/politics/justice-stevens-prescription-for-giant-step-in-wrong-direction.html>.



In *Six Amendments* Stevens focuses, as promised, on nonvoter expenditures, which he thinks produce their own kind of corruption: “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” (p. 78). This is a weaker argument than the ones he offered in his *Citizens United* dissent. But I will discuss it at some length because it is the only entirely new claim in the book.

The *Citizens United* Court thought that any restriction on campaign expenditures impaired voters’ access to information: “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>42</sup> Stevens, by contrast, thinks that the free speech concerns are attenuated in this context: “Statutory limitations on the quantity of speech are less troublesome than limitations based on the content of speech and, of course, far less troublesome than limitations based on the viewpoint being expressed in the speech” (p. 64). The interest in access to information is weighty, Stevens concedes, but he argues that

its force diminishes as the volume of speech increases. I believe most members of the television audience share my opinion that at least 75 percent—perhaps even 90 percent—of the campaign commercials could be omitted without depriving viewers of any useful data (indeed, many voters are likely to see the same exact commercial many times in an election cycle). (p. 74)

Even if this claim is correct, it cannot justify a bar on nonvoter speech. Nonvoters may have distinctive things to say.

Stevens emphasizes that the Court has held several times that “restrictions on speech seeking to persuade voters to vote for or against a particular candidate may receive less First Amendment protection than speech about other issues” (p. 67). For example, campaign-related speech has been restricted in the immediate vicinity of polling places.<sup>43</sup>

More significantly, the Court has upheld a law barring foreign nationals from making expenditures supporting the election or defeat of any candidate.<sup>44</sup> This restriction “furthered the federal interest in preserving the power of the voters to control the outcome of elections—an interest that would be impaired if nonvoters had an unlimited right to make campaign expenditures” (p. 77).

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42. *Citizens United*, 558 U.S. at 339. Here, the Court adopts arguments that have been pressed for decades by my colleague Martin Redish. See, e.g., MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* (2001); Martin H. Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900 (1971). For a description and critique, see Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 Nw. U. L. REV. 647 (2013).

43. *Burson v. Freeman*, 504 U.S. 191 (1992).

44. *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (mem.), *aff'g* 800 F. Supp. 2d 281, 288 (D.D.C. 2011).

This law does more than simply avoid a flood of duplicative advertising. Foreign nationals may have a distinctive perspective that American voters ought to know about. The enormous power of the United States creates a democratic deficit of its own: the American president makes decisions that have a huge effect on people across the globe, yet those people don't have a vote. The restriction that Stevens approves of forbids even the expression of an opinion to American voters about candidates. In 2004, huge majorities around the globe hoped that President Bush, who had made decisions that killed half a million civilians in Iraq,<sup>45</sup> would not be reelected.<sup>46</sup> Not only did they have no vote; it would have been illegal for them to inform Americans what they thought.

Even American voters, in Stevens's view, have no legitimate role in electing representatives from districts in which they do not reside. In his criticism of *McCutcheon*, which invalidated restrictions on an individual's combined contributions to multiple congressional campaigns, Stevens said that the case was one "where the issue was electing somebody else's representatives."<sup>47</sup> In the book, he argues that "persons who are not qualified to vote," such as corporations or nonresidents of a congressional district, should not have disproportionate power to decide an election (p. 59).

This argument is inconsistent with Stevens's earlier account of representation in his opinion for the Court in *U.S. Term Limits, Inc. v. Thornton*.<sup>48</sup> In that case, he declared that members of Congress represent not only their states but the people of the United States as a whole.<sup>49</sup> "The Constitution . . . creates a uniform national body representing the interests of a single people."<sup>50</sup> This view is also consistent with an obvious reality. Just like foreign nationals, every American is affected by what the federal government does. What it does is not determined only by a person's own representative. It may matter a great deal to me who the senator from Texas is—one of that state's

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45. See Salman Rawaf, *The 2003 Iraq War and Avoidable Death Toll*, 10 PLOS MED., Oct. 2013, at e1001532, 1 (2013), <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001532>.

46. See Jaime Holguin, *Polls: World Not Pleased With Bush*, CBS NEWS, Mar. 4, 2004, <http://www.cbsnews.com/news/polls-world-not-pleased-with-bush>; *In 18 of 21 Countries Polled, Most See Bush's Reelection as Negative for World Security*, GLOBESCAN (Jan. 19, 2005), [http://www.globescan.com/news\\_archives/bbcpoll.html](http://www.globescan.com/news_archives/bbcpoll.html); *Global Public Opinion in the Bush Years (2001-2008)*, PEW RES. GLOBAL ATTITUDES PROJECT (Dec. 18, 2008), <http://www.pewglobal.org/2008/12/18/global-public-opinion-in-the-bush-years-2001-2008>. In Britain in 2006, voters thought that Bush was a greater danger to world peace than either the North Korean leader, Kim Jong-il, or the Iranian president, Mahmoud Ahmadinejad. Julian Glover, *British Believe Bush Is More Dangerous Than Kim Jong-il*, GUARDIAN, Nov. 2, 2006, at 1, available at <http://www.theguardian.com/uk/2006/nov/03/terrorism.northkorea>.

47. Liptak, *supra* note 41.

48. 514 U.S. 779 (1995).

49. *Id.* at 820–22.

50. *Id.* at 822. "Members of Congress are chosen by separate constituencies, but . . . they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government." *Id.* at 837–38.

current senators almost destroyed the creditworthiness of the United States,<sup>51</sup> which could have precipitated a worldwide financial catastrophe.<sup>52</sup> And so I, living in Illinois, have a pressing democratic interest in informing the people of Texas why they should not reelect that senator. The only way I can hope to do that is by contributing to his opponent's campaign or by joining with others to buy political advertisements.

Money has a corrupting effect on politics. It does not follow that the legislature should be trusted to regulate it. Campaign finance reform is a hard issue in free speech law, which involves interests of the first magnitude on both sides. In his book, Stevens has articulated nicely some of those interests. Here again, however, Stevens's discussion is too brief to offer a full account of the problem or a full defense of his solution.

#### IV. AUTHORIZING GUN CONTROL

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>53</sup> For most of American history, the amendment was not held to create any individual right to possess firearms (pp. 126–27). In 2008, however, the Court declared that there was such a right.<sup>54</sup> The argument between the *Heller* majority and Stevens's dissent turned on the significance of the prefatory clause: Is the right in question one that covers only service in the militia, or does it also encompass individual self-defense? Both opinions were extended essays in originalism, aiming to show that their legal conclusion followed from the intentions of the framers. The main effect of this inconclusive exercise was to show how politically manipulable the originalist approach can be.<sup>55</sup> The majority held that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation"<sup>56</sup> but "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled

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51. See Ashley Parker & Jonathan Weisman, *G.O.P. Senate Leaders Avert Debt Ceiling Crisis*, N.Y. TIMES, Feb. 13, 2014, at A1, available at <http://www.nytimes.com/2014/02/13/us/politics/senate-debt-ceiling-increase.html> (filibuster by Senator Cruz risked default on national debt).

52. Steven Erlanger, *Default Threat Generates Fear Around Globe*, N.Y. TIMES, Oct. 8, 2013, at A1, available at <http://www.nytimes.com/2013/10/08/us/politics/default-threat-makes-impasse-in-washington-a-global-fear.html>; Yalman Onaran, *A U.S. Default Seen as Catastrophe Dwarfing Lehman's Fall*, BLOOMBERG (Oct. 7, 2013, 11:27 AM), <http://www.bloomberg.com/news/2013-10-07/a-u-s-default-seen-as-catastrophe-dwarfing-lehman-s-fall.html>.

53. U.S. CONST. amend. II.

54. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). It has since imposed a similar restriction on gun control by state governments. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

55. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191–93 (2008). Originalism nonetheless has a useful role to play in constitutional interpretation. For a qualified defense, see Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

56. *Heller*, 554 U.S. at 592.

shotguns”<sup>57</sup>—a distinction that was never imagined by any member of the founding generation.

Here, Stevens’s bottom line is sensibly compressed into one sentence concerning the rules for private possession of firearms: “Legislatures are in a far better position than judges to assess the wisdom of such rules and to evaluate the costs and benefits that rule changes can be expected to produce” (p. 126). He therefore proposes to amend the Second Amendment to insert the words I have italicized: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed” (p. 132). This chapter, only eight pages long, is remarkably perfunctory. It cannot introduce anyone to the issues, and it merely underlines concerns that Stevens has laid out at length elsewhere. Stevens also insinuates that a different reading of the Second Amendment would have prevented atrocities such as the Sandy Hook massacre, but in fact the effectiveness of gun-control laws is contested and uncertain.<sup>58</sup>

#### V. PROHIBITING GERRYMANDERING

Gerrymandering is the practice of drawing the lines of electoral districts in a way calculated to favor one party, a process that can distort the will of the electorate:

[I]n Illinois, where Democrats drew the maps, Republican candidates for Congress won 45 percent of the popular vote but only a third of the House seats . . . . On the other hand, in states where Republicans were in control, their candidates for Congress won 71 percent of the seats with only about 56 percent of the vote. (pp. 36–37)

Partisan line-drawing also creates very safe seats, in which there is no danger that the incumbent will lose reelection.

Neither Congress nor the courts have shown any interest in remedying this dysfunction. Stevens observes that the Supreme Court has even exacerbated the problem by insisting that each district contain an equal number of voters, which often requires abandoning “natural or historic boundary lines” (p. 39). The Court held that unconstitutionality could be shown by “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”<sup>59</sup> But this requirement, Stevens observes, “has never been satisfied” and in practice “create[d] an impenetrable bar to recovery” (p. 48).

A better rule, Stevens argues, would be the following: “While a state legislature is not entirely prohibited from acting with a consciousness of politics, naked partisan advantage should not provide the ‘dominant and

57. *Id.* at 625.

58. See generally Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40 (2005).

59. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion).

controlling rationale' in drawing district lines" (p. 36). He would codify this rule with the following amendment:

Districts represented by members of Congress, or by members of any state legislative body, shall be compact and composed of contiguous territory. The state shall have the burden of justifying any departures from this requirement by reference to neutral criteria such as natural, political, or historical boundaries or demographic changes. The interest in enhancing or preserving the political power of the party in control of the state government is not such a neutral criterion. (p. 55)

This language would not direct the courts to discern the rationale for district lines, but the absence of compactness would function as a proxy for constitutionally forbidden motives. Such a proxy is not unfamiliar. The Court has explained that strict scrutiny of racial classifications serves a similar function.<sup>60</sup>

Here, Stevens has made a powerful case for the Court to intervene. In a democracy, the voters are supposed to choose their representatives, not the other way around. The gerrymandering question is "similar to the question whether a political party may use public funds to pay campaign or personal expenses" (p. 50). The most parsimonious defense of judicial review proposes to assign to the judiciary only that task with which the legislature cannot be trusted: "to keep the machinery of democratic government running as it should."<sup>61</sup> Legislators will never support reforms that make it more likely that voters will unseat them. If ever there were an issue that the legislature cannot be trusted to fix, this is it.<sup>62</sup>

## VI. ABOLISHING THE DEATH PENALTY

When Stevens joined the Supreme Court in 1975, the Court had effectively abolished the death penalty everywhere in the United States.<sup>63</sup> And while Stevens voted in *Gregg v. Georgia* to reinstate it,<sup>64</sup> he ultimately concluded that the death penalty violated the Eighth Amendment.

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60. See *Johnson v. California*, 543 U.S. 499, 506 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989). Elena Kagan, before she joined the Supreme Court, argued that free speech doctrine is likewise dominated by proxies for bad motivation. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

61. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980).

62. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

63. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the death penalty constitutes cruel and unusual punishment).

64. 428 U.S. 153 (1976) (plurality opinion of Stewart, Powell & Stevens, JJ.). Stevens reportedly said that he regretted this vote. See John Paul Stevens, WIKIPEDIA, [http://en.wikipedia.org/wiki/John\\_Paul\\_Stevens](http://en.wikipedia.org/wiki/John_Paul_Stevens) (last visited Sept. 27, 2014) (citing Nina Totenberg, Justice Stevens: An Open Mind on a Changed Court, NPR (Oct. 4, 2010, 12:01 AM), <http://>

Stevens has succinctly and clearly explained his change of mind. He does not provide that explanation in this book's cursory discussion, however. One must look instead to his concurring opinion in *Baze v. Rees*,<sup>65</sup> written shortly before he retired, and a piece he wrote soon after retiring in the *New York Review of Books*.<sup>66</sup>

In his jointly authored *Gregg* opinion, Stevens wrote that the death penalty could be justified by considerations of incapacitation, deterrence, and retribution.<sup>67</sup> In *Baze*, he declared that “[i]n the past three decades . . . each of these rationales has been called into question.”<sup>68</sup> Life imprisonment without parole is an equally effective method of incapacitation. The death penalty's deterrent effect has not been demonstrated.<sup>69</sup>

That leaves retribution. The *Gregg* opinion declared: “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”<sup>70</sup> In *Baze*, Stevens claimed that this interest was undercut by the move toward increasingly humane forms of execution: “by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim.”<sup>71</sup> In *Six Amendments*, he argues that the interest in retribution is undercut in a different way: the long delay between sentencing and execution in the typical death penalty case “surely demonstrates that it is not necessary to put the defendant to death in order to vindicate the state's interest in obtaining retribution for a heinous crime” (p. 115).

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[www.npr.org/templates/story/story.php?storyId=130198344](http://www.npr.org/templates/story/story.php?storyId=130198344); *Retired Supreme Court Justice Regrets 1976 Vote Upholding the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/retired-supreme-court-justice-regrets-1976-vote-upholding-death-penalty> (last visited Sept. 27, 2014) (same). This is not accurate, however. “I told Nina Totenberg that my vote in *Jurek v. Texas* [428 U.S. 262 (1976), a companion case decided together with *Gregg*] was incorrect because the instruction was effectively mandatory,” he now reports. “I did not tell her (or anyone else) that I regretted my vote in *Gregg v. Georgia*.” *Gregg* required that the sentencing authority be allowed to consider the character of the individual defendant. Stevens now thinks that the statute in *Jurek* did not satisfy this requirement. Email from John Paul Stevens to Andrew Koppelman (Sept. 22, 2014, 3:44 PM) (on file with author); see also EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 439–40, 492 (2013) (carefully parsing Stevens's statements on the topic).

65. 553 U.S. 35, 82–86 (2008) (Stevens, J., concurring).

66. John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8, available at <http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence>.

67. *Gregg*, 428 U.S. at 183 & n.28 (plurality opinion).

68. *Baze*, 553 U.S. at 78 (Stevens, J., concurring).

69. *Id.* at 79. In his earlier *Gregg* opinion, Stevens argued that this uncertainty justified deferring to the legislature, *Gregg*, 428 U.S. at 186–87, but now he has shifted the burden of proof without explanation.

70. *Gregg*, 428 U.S. at 183 (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

71. *Baze*, 553 U.S. at 80–81 (Stevens, J., concurring).

These reflections are non sequiturs. They show that any retribution that death inflicts is buffered by nonretributive considerations of dignity and due process. They do not show that a system without a death penalty would exact adequate retribution for the worst crimes. Adolf Eichmann died by hanging two decades after he engineered the Holocaust,<sup>72</sup> and he really was not going to do it again, but neither the delay nor the instant death prove that his execution was inappropriate. That would require a persuasive philosophical account of the relation between degrees of punishment and the function of retribution. We have no such account.<sup>73</sup> The question of whether retribution can justify the death penalty is one about which there is little to rely on beyond raw intuitions. Stevens contrasts reason with emotion,<sup>74</sup> but it is hard to imagine thinking about this issue without relying on emotion.<sup>75</sup>

Stevens has also evidently changed his mind because the Court has abandoned the constraints on the death penalty that he thought were the law in 1976. The Court in *Gregg* held that, “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”<sup>76</sup> Stevens thought it crucial that “any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”<sup>77</sup>

The trouble is that “more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.”<sup>78</sup> For instance, there is ample evidence that a “death-qualified jury”—a jury composed only of people who support the death penalty—is biased toward

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72. See DEBORAH E. LIPSTADT, *THE EICHMANN TRIAL* 146–47 (2011) (describing the execution).

73. The legitimacy of retribution is articulately defended in G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 127–31 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 122–43 (1988); and Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659 (1992). For an important synthesis of these works into a unified theory of wrongdoing and retribution, see Joshua Kleinfeld, *Embodied Ethical Life and Criminal Law* (Sept. 27, 2014) (unpublished manuscript) (on file with author). None of these defenses helps to determine whether the death penalty is excessive.

74. *E.g.*, *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (Stevens, J., plurality opinion) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”); *see also Baldwin v. Alabama*, 472 U.S. 372, 399 (1985) (Stevens, J., dissenting) (repeating that sentence).

75. The reason–emotion distinction also does not withstand scrutiny. *See* MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001).

76. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion).

77. *Baldwin*, 472 U.S. at 399 (Stevens, J., dissenting) (quoting *Gardner*, 430 U.S. at 358 (Stevens, J., plurality opinion)).

78. *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring).

conviction.<sup>79</sup> Introducing “victim-impact evidence” that describes the impact of a death on the victim’s family encourages jurors “to make life or death decisions on the basis of emotion rather than reason.”<sup>80</sup> The Court has disregarded evidence that murderers of whites are far more likely to be sentenced to death than murderers of blacks.<sup>81</sup>

For all these reasons, Stevens proposes to add the following italicized words to the Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *such as the death penalty* inflicted” (p. 123; emphasis added).

This is another excessively brief chapter. The death penalty is such a complex issue that no single essay could do it justice, but here, again, one does not even get a complete picture of Stevens’s own views.

One question that hangs over the entire book is why, of all the issues on which he dissented in the Supreme Court, Stevens has chosen to focus on these six. The question is particularly poignant with respect to the death penalty, which has become a classic study in misplaced discursive priorities.

The familiar saying is that “death is different.”<sup>82</sup> But death isn’t really *that* different from what happens all over the American criminal justice system. Innocent people are routinely convicted on the basis of false and coerced confessions, questionable eyewitness procedures, invalid forensic testimony, and corrupt statements by jailhouse informers.<sup>83</sup> Many public defender offices are underfunded and understaffed.<sup>84</sup> There are 2.3 million

79. *Id.*

80. *Id.* at 85.

81. *McCleskey v. Kemp*, 481 U.S. 279, 291–97 (1987). Stevens recently reflected, about his vote to reinstate the death penalty, that

I thought, at the time, that if the universe of defendants eligible for the death penalty is sufficiently narrow, so that you can be confident that the defendant really merits that severe punishment, that the death penalty was appropriate.” But, over the years, “the [C]ourt constantly expanded the cases eligible for the death penalty, so that the underlying premise for my vote . . . has disappeared in a sense.

Totenberg, *supra* note 64. Stevens’s comments do not explain, however, why reinstating the protections that the Court has abandoned—rather than abolishing the death penalty altogether—could not serve as an appropriate remedy.

82. “[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell & Stevens, JJ.). The Court later summarized this passage as declaring “that execution is the most irremediable and unfathomable of penalties; that death is different.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion).

83. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186–89 (2008).

84. KAREN HOUPPERT, *CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE* (2013); NAT’L RIGHT TO COUNSEL COMM., *CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 59–64 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.



prisoners,<sup>85</sup> and the conditions in many prisons are grotesque.<sup>86</sup> Notably, the aggressive use of solitary confinement has produced a modern form of torture.<sup>87</sup> Because African Americans are disproportionately jailed for offenses that whites commit just as often, a huge segment of the black population is now in prison,<sup>88</sup> and after release these people are denied health and housing benefits, college aid, and the right to vote.<sup>89</sup> Most juvenile prisoners are there for offenses that most youth commit, such as truancy, shoplifting, and disturbing the peace.<sup>90</sup> Black children are almost five times as likely to be locked up as white children who commit the same offenses.<sup>91</sup> Being incarcerated in a juvenile facility is a better predictor of adult criminality than gang involvement or delinquency itself; juvenile prisons essentially manufacture criminals.<sup>92</sup> Because mental health care in this country is so deficient, there is also a huge population of mentally ill prisoners who should not be in prison at all.<sup>93</sup> The effect on the children of prisoners is catastrophic.<sup>94</sup>

American public discourse rarely focuses on this massive engine of destruction of human lives.<sup>95</sup> The endless debate over the death penalty sucks all the air out of the room. Even with respect to innocence, which has become one of Stevens's central concerns, death gets too much attention. If you are innocent, there is a much better chance that your conviction will be reversed if you have been sentenced to death, because then public interest litigators will rise to your defense. A ten-year sentence will go unnoticed. There are too many of them.

Stevens emphasizes that death is irreversible (p. 122). But everything I have just described is irreversible. Whatever you think of the death penalty,

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85. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009).

86. MICHAEL G. SANTOS, *INSIDE: LIFE BEHIND BARS IN AMERICA* (2006).

87. LISA GUENTHER, *SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES* (2013); see also TERRY KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 54–64 (1999); SHARON SHALEV, *SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT* 140–69 (2009).

88. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97–100 (rev. ed. 2012).

89. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1291–94 (2004).

90. See generally NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* (2014).

91. *Id.* at 13.

92. *Id.* at 7–8.

93. PATRICIA E. ERICKSON & STEVEN K. ERICKSON, *CRIME, PUNISHMENT, AND MENTAL ILLNESS: LAW AND THE BEHAVIORAL SCIENCES IN CONFLICT* (2008); KUPERS, *supra* note 87 *passim*; MARY BETH PFEIFFER, *CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL* (2007).

94. NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (2005).

95. Stevens himself is an exception. See John Paul Stevens, *Our 'Broken System' of Criminal Justice*, N.Y. REV. BOOKS, Nov. 10, 2011, at 56, available at <http://www.nybooks.com/articles/archives/2011/nov/10/our-broken-system-criminal-justice>.

you should not let it distract you from the larger system within which it operates.<sup>96</sup>

#### CONCLUSION

Sanford Levinson observes that the decisions discussed in this book are not likely to be reversed through constitutional amendments.<sup>97</sup> None of these six amendments has any possibility of being adopted through the cumbersome procedures of Article V. Still, Levinson contends, the law might well change in the way that Stevens hopes:

If one agrees with Stevens' critique, the most cogent response is simply to support the Democratic candidate for president in 2016 (and thereafter) and Democratic senators who would have the power to confirm Democratic presidents' nominees to the court. This is far more likely to achieve desirable results than the near-quixotic path of amendment.<sup>98</sup>

Moreover, if the earlier decisions were mistaken interpretations of the Constitution, amendments are unnecessary because the problem is not with the constitutional text. Contrast the Thirteenth Amendment, whose supporters thought that the Constitution specifically protected slavery.<sup>99</sup> The line between a bad Constitution and bad interpretations is not a bright one. The range of plausible interpretations shifts over time.<sup>100</sup> But Stevens's own dissenting opinions commit him to the view that the written Constitution is just fine the way it is and that reversals of these opinions would be entirely consistent with the existing text.<sup>101</sup>

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96. I express no view here about whether death can ever be an appropriate sanction or whether the English language can appropriately capture prospectively the characteristics of homicides and their perpetrators that arguably sometimes make it appropriate. *Cf.* *McGautha v. California*, 402 U.S. 183, 204 (1971). If in the contemporary United States “the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake,” *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting), with ineradicable racist inflection, *see* ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 43–46 (1996), then it is illegitimate even if it would be appropriate in some other possible world.

97. Sanford Levinson, *Poor Interpreters of a Defective Constitution*, *ALJAZEERA AM.* (May 31, 2014, 12:00 AM), <http://america.aljazeera.com/opinions/2014/5/supreme-court-constitutionamendmentstevens.html>.

98. *Id.*

99. *See* ABRAHAM LINCOLN, *First Inaugural Address*, in *SPEECHES AND WRITINGS: 1859–1865*, at 215, 215–217 (Don E. Fehrenbacher ed., 1989).

100. JACK M. BALKIN, *LIVING ORIGINALISM* (2011); *see also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *V.A. L. REV.* 1045, 1068–71 (2001).

101. Perhaps he thinks that overruling precedents because of a change of personnel is improper. Part of his disagreement with some of the Court's death penalty holdings, such as its decision to permit victim impact statements after initially forbidding them, is that these holdings are “a disappointing departure from the ideal that the Court, notwithstanding changes in membership, upholds its prior decisions.” Stevens, *supra* note 66. Stevens has often emphasized the importance of following precedent. John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 *N.Y.U. L. REV.* 1 (1983) [hereinafter Stevens, *Judge-Made Rule*]; Jeffrey

Stevens is so smart that it is impossible to believe that he doesn't understand this. Levinson thinks that Stevens "cannot escape his mindset as a judge."<sup>102</sup> Stevens is indeed still constrained by his judicial role, and he is acting within that constraint. The constraint operates directly upon his new role as a public intellectual. It would not be news if Stevens merely repeated that he agreed with his own earlier dissents.

It is hard to imagine that Stevens's book would be equally effective if it were titled *Six Supreme Court Decisions That Should Be Reversed* or *I Still Think I Was Right*. His particular way of attacking these decisions raises the stakes. It is designed to get your attention. Which is fine, because the book deserves your attention. Justice Stevens is one of the most influential thinkers about the Constitution. This book is important, then, not so much for its execution, which is uneven, but for the fact of its existence.

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Toobin, *After Stevens*, NEW YORKER, Mar. 22, 2010, at 38, 41, available at <http://www.newyorker.com/magazine/2010/03/22/after-stevens>. On the other hand, in landmark cases, precedent rarely constrained him. SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992*, at 87 (1995); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 298 (1999). "The rule of *stare decisis* has never required adherence to a former determination that is most evidently contrary to reason, or that is 'plainly unreasonable and inconvenient.'" Stevens, *Judge-Made Rule*, *supra*, at 5 (quoting Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 30 A.B.A. J. 501, 503 (1945)).

102. Levinson, *supra* note 97.