



## Justice Stevens Is Right: Good Or Bad, Death Penalty Is Constitutional

*Just because you think something is a bad idea doesn't make it unconstitutional.*

By Ilya Shapiro  
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Justice John Paul Stevens has been getting lots of attention lately for his views on the Second Amendment—[he still doesn't like the individual right to keep and bear arms, and would amend the Constitution to get rid of it](#)—but it's his views on the death penalty that have provoked the more troubling reaction.

Here's the back-story: Justice Stevens has published a book, [Six Amendments: How and Why We Should Change the Constitution](#). Three of [these amendments](#) are structural: (1) requiring state officials to enforce federal law; (2) eliminating state sovereign immunity; and (3) doing away with political gerrymandering. The other three are from the populist-progressive playbook: (4) the aforementioned Second Amendment tweak (which [doesn't make sense](#) as drafted); (5) allowing Congress and state legislatures to ~~cancel political speech~~ limit the money people can spend on election campaigns; and (6) outlawing the death penalty.

*The Atlantic's* Andrew Cohen latched onto this last one, [lamenting](#) that Stevens is:

a man who consistently upheld capital convictions and the death penalty itself for over 35 years, who helped send hundreds of men and women to their deaths by failing to hold state officials accountable for constitutional violations during capital trials, who more recently endorsed dubious lethal injection standards because he did not want to buck up against court precedent, now wants the Eighth Amendment to read this way, with five new words added: “. . .nor cruel and unusual punishments *such as the death penalty* inflicted.”

(The reference to lethal-injection standards relates to the 2008 case of [Baze v. Rees](#), which upheld Kentucky's particular method of execution. Stevens concurred in that ruling but [wrote separately](#) to question “the justification for the death penalty itself.”)

Now, I don't have any particular ax to grind regarding the death penalty as a policy matter—it's probably warranted for serious crimes, but there are real problems with the way our justice

system administers it—but as a question of law, it’s hard to argue that it’s always unconstitutional. The Fifth Amendment references “capital” crimes and outlaws putting someone’s “life” in jeopardy twice for the same crime, and both the Fifth and Fourteenth Amendments protect against being deprived of “life” without due process of law.

To be sure, the Eighth Amendment does prohibit “cruel and unusual punishments,” but that just means that the death penalty can’t be applied in a particularly inhumane way (for example, vivisection).

Moreover, debates over the death penalty almost always occur in the context of state criminal law, over which the federal government has little authority. Yes, there’s a federal criminal code—much of which is itself of dubious constitutional authority given the outlandish reading courts have given Congress’s power to regulate interstate commerce—but it imposes capital punishment exceedingly rarely (three times in the last 50 years, not counting military justice).

All the highest-profile Supreme Court cases thus force the justices to consider whether a state’s imposition of the ultimate punishment is “cruel or unusual,” not whether the death penalty is unconstitutional altogether. So if you want to abolish the death penalty, you either have to go state-by-state—18 states have done away with it, 6 since 2007—or, as Justice Stevens suggests, you have to amend the Constitution.

But just because someone, even a Supreme Court justice, concludes that the death penalty is a bad idea, or immoral, or otherwise inappropriate, doesn’t make it unconstitutional. There can certainly be bad policies that are constitutional—or, for that matter, good policies that are unconstitutional.

Indeed, given that it’s my wont to label [legislation](#) and [government action](#) as unconstitutional, I’m frequently asked if there are any policies I like that I nevertheless think violate our founding charter. It’s a hard question, given that the Constitution is fundamentally a classical liberal, or [libertarian](#), document, which fits with my political philosophy. Nevertheless, my top two examples are environmental regulation—properly conceived; it’s inefficient to have a tort-law based system of regulating pollution that crosses state lines—and federal tort reform.

But regardless of my personal views, too many commentators conflate that with which they agree with that which the constitution requires. Justice Stevens, even if he [errs in his understanding](#) of the right to armed self-defense and [shouldn’t be proposing](#) amendments, gets that right.

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