EQUIPOISE, COLLECTIVE RIGHTS AND THE FUTURE OF THE DEATH PENALTY: *Kansas v. Marsh*, 126 S. Ct. 2516 (2006)

The evaluation of evidence is an inherently subjective process, yet deliberating jurors are routinely expected to rummage for purportedly objective criteria such as "reasonable doubt." No less troublesome is the concept of equipoise. In the context of capital punishment, equipoise occurs when jurors determine that mitigating and aggravating factors presented to them at the sentencing phase are of equal weight.[1] These factors often can not be objectively balanced, as there is no limit to what evidence a defendant may present to dissuade the jury from sentencing him to death.[2] Nevertheless, in the event of equipoise, jurors in Kansas are required to impose the death penalty.[3]

Last Term, in *Kansas v. Marsh*,[4] the Supreme Court upheld the constitutionality of a Kansas statute mandating a sentence of death where mitigating and aggravating factors are in equipoise. The decision was a straightforward application of Supreme Court precedent. The case is fascinating, however, not for the merits of the majority opinion but for the heated dissents by Justices Stevens and Souter and the response to them in a concurrence by Justice Scalia.[5] Justice Souter's dissent, joined by the three other dissenting Justices, reveals that the Court is bitterly divided on the future of the death penalty. Jus-

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1. State v. Marsh, 102 P.3d 445, 457 (Kan. 2004), *rev'd*, 126 S. Ct. 2516 (2006).

2. Kansas's capital sentencing statute, for example, lists examples of mitigating circumstances that a jury may consider, but notes that mitigating circumstances are not limited to those named. KAN. STAT. ANN. § 21-4626; *see Marsh*, 102 P.3d at 468 (Davis, J., dissenting) (noting the open-ended allowance of mitigating factors under Kansas law).

3. Under KAN. STAT. ANN. § 21-4624(e), "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." *See also Marsh*, 102 P.3d at 461–62, *rev'd on other grounds*, 126 S. Ct. 2516 (construing the statute as requiring a sentence of death upon a finding of equipoise).

4. 126 S. Ct. 2516 (2006).

5. *Id.* at 2529–39 (Scalia, J., concurring); *id.* at 2539–41 (Stevens, J., dissenting); *id.* at 2541–46 (Souter, J., dissenting).

tice Souter questioned the constitutionality of capital punishment in light of the increasing number of former death row inmates exonerated by DNA evidence.[6] This concern could foreshadow a broader attack on the death penalty by the Court's liberal wing that may culminate in an explicit move to overturn it. Moreover, both Justice Stevens and Justice Scalia use *Marsh* to delve into a debate concerning grants of certiorari. Justice Stevens argued that the Court should generally refrain from reviewing capital cases in which the state is the petitioner, as those cases do not implicate the Court's interest in preventing wrongful executions.[7] This claim, and Justice Scalia's response,[8] present the potentially far-reaching question of whether the Supreme Court should protect the freedom of a state and its citizens to enact criminal legislation as vigorously as it protects the rights of individual defendants.

On June 17, 1996, Michael L. Marsh II broke into the Wichita home of Marry Ane Pusch and lay in wait.[9] Marsh planned to hold Marry Ane hostage when she returned home and to demand ransom from her husband.[10] Carrying Marry Elizabeth, her 19-month-old daughter, Marry Ane arrived earlier than Marsh expected.[11] In his surprise, Marsh shot Marry Ane three times in the head and then stabbed her in the heart.[12] Marsh then set the house aflame and fled the scene, leaving Marry Elizabeth to suffer fatal injuries in the blaze.[13]

The jury found Marsh guilty of capital murder of Marry Elizabeth, first-degree murder of Marry Ane, aggravated arson, and aggravated burglary.[14] At the sentencing phase, the prosecution relied upon three statutorily provided aggravating circumstances[15] in seeking the death penalty: that "Marsh knowingly or purposely killed or created a great risk of death to more than one person"; that Marsh "committed the crime in order to prevent a lawful arrest or prosecution"; and that Marsh "committed the crime in an especially heinous, atro-

6. *Id.* at 2544–46 (Souter, J., dissenting).
7. *Id.* at 2539–41 (Stevens, J., dissenting).
8. *Id.* at 2529–31 (Scalia, J., concurring).
9. *Marsh*, 126 S. Ct. at 2520; *see also* State v. Marsh, 102 P.3d 445, 453 (Kan. 2004).
10. *Marsh*, 102 P.3d at 453.
11. *Id.*
12. *Id.* at 452–53.
13. *Id.* at 452.
14. *Marsh*, 126 S. Ct. at 2520.
15. In seeking the death penalty, Kansas prosecutors are limited to eight aggravating circumstances specifically enumerated in KAN. STAT. ANN. § 21-4625.

cious, or cruel manner."[16] The jury found that all three aggravating circumstances existed beyond a reasonable doubt and "were not outweighed by any mitigating circumstances."[17] Marsh was sentenced to death.[18]

Marsh argued on appeal that, in requiring the imposition of the death penalty in the event of equipoise, title 21, section 4624(e) of the Kansas Statutes created a presumption in favor of death in violation of the United States Constitution.[19] The Kansas Supreme Court had previously considered the constitutionality of the equipoise rule in *State v. Kleypas*.[20] While *Kleypas* held that the equipoise rule is facially unconstitutional,[21] it applied the canon of constitutional avoidance and construed section 4624(e) as requiring the death penalty only where aggravating circumstances outweigh mitigating circumstances.[22] In *State v. Marsh*, the Kansas Supreme Court overruled *Kleypas*, holding that section 4624(e) unambiguously requires imposition of the death penalty in the event of equipoise and is therefore facially unconstitutional under the Eighth and Fourteenth Amendments.[23]

The United States Supreme Court reversed.[24] Writing for the Court, Justice Thomas[25] held that section 4624(e) is "controlled by" *Walton v. Arizona*[26] and thus is constitutional.[27] The Court in *Walton* had sought to resolve a conflict between jurisdictions regarding the constitutionality of title 13, section 703 of the Arizona Revised Statutes—Arizona's capital sentencing stat-

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16. *Marsh*, 102 P.3d at 453 (citing KAN. STAT. ANN. § 21-4625).

17. *Marsh*, 126 S. Ct. at 2520.

18. *Id.*

19. *Id.* at 2520–21.

20. 40 P.3d 139, 224 (Kan. 2001).

21. *Id.* at 227 ("If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.'") (quoting Walton v. Arizona, 497 U.S. 639, 687–88 (1990) (internal citation omitted) (Blackmun, J., dissenting)).

22. *Id.* at 234.

23. *Marsh*, 102 P.3d at, 458, 464.

24. *Marsh*, 126 S. Ct. at 2529.

25. Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined the opinion.

26. 497 U.S. 639 (1990), *overruled on other grounds*, Ring v. Arizona, 539 U.S. 584 (2002).

27. *Marsh*, 126 S. Ct. at 2522.

ute.[28] Despite a prior decision by the Ninth Circuit in *Adamson v. Ricketts*[29] that section 703 was unconstitutional in part because it imposes on the defendant the burden of proving at the capital sentencing phase that the mitigating factors outweigh the aggravating factors, the Arizona Supreme Court in *State v. Walton*[30] upheld the statute's constitutionality. A plurality of the U.S. Supreme Court in *Walton* then held that while the Constitution guarantees that the existence of aggravating circumstances must be proven beyond a reasonable doubt, a state may allocate the burden of proving mitigating circumstances in any way that its legislators choose.[31]

In *Marsh*, the Court held that although the *Walton* plurality did not use the term 'equipoise,' "the question presented in [*Marsh*] was squarely before [the] Court in *Walton*."[32] While the majority observed that the Arizona capital sentencing statute at issue in *Walton* is distinguishable from section 4624(e) insofar as the former placed the burden on the defendant to prove that sufficient mitigating circumstances exist to outweigh any aggravating factors and the latter placed the burden on the prosecution to prove the existence of aggravating factors that outweigh any mitigating factors, it argued that this distinction cut in favor of the Kansas statute.[33] The Court therefore held that, under *Walton*, a capital sentencing statute may require a jury to impose the death penalty when it finds that mitigating and aggravating circumstances are of equal weight.[34]

Justice Thomas then held that even if *Walton* does not apply to the equipoise rule, section 4624(e) is nonetheless constitutional on its face.[35] While a defendant must have the unfettered ability to present mitigating evidence under the individualized sentencing requirement,[36] the majority noted that the Court has

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28. *Walton*, 497 U.S. at 646–47.

29. 865 F.2d 1011, 1043–44 (9th Cir. 1988).

30. 769 P.2d 1017, 1030–31 (Ariz. 1989).

31. *Walton*, 497 U.S. at 649–50.

32. *Marsh*, 126 S. Ct. at 2523.

33. *Id*. at 2524.

34. *Id.*

35. *Id.*

36. Under the individualized sentencing requirement, jurors must be granted discretion to consider factors specific to the character of the defendant and the nature of the alleged crime before they may impose the death penalty. *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (plurality opinion) (striking down a capital sentencing statute requiring imposition of the death penalty upon conviction for first-degree murder).

"never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."[37] Rather, the Court has repeatedly upheld statutes that provide juries with "guided discretion"[38] at the capital sentencing phase "by providing [them] with criteria by which [they] may determine whether a sentence of life or death is appropriate."[39] The majority argued that in requiring the death penalty in the event of equipoise, Kansas's capital sentencing statute merely provided such "guided discretion."[40] Furthermore, the majority rejected Marsh's claim that equipoise reflects juror confusion or indecision, holding instead that it is a "measured" conclusion by jurors that mitigating and aggravating circumstances are of equal weight.[41]

Justice Stevens issued a solo dissent. He first briefly argued that the *Walton* plurality did not address equipoise and is therefore not controlling over the issue before the Court in *Marsh*.[42] Citing Justice Blackmun's dissent in *Walton*, Justice Stevens stated that "the *Walton* plurality painstakingly avoided an express endorsement" of the equipoise rule.[43] Justice Stevens asserted that, for this reason, *Walton* did not mandate the Court's decision in *Marsh*.[44]

Justice Stevens went on to argue that the Supreme Court should not have granted review of *State v. Marsh*.[45] Unlike *Walton*, where the Arizona Supreme Court had affirmed the

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37. *Marsh*, 126 S. Ct. at 2525 (citing Franklin v. Lynaugh, 487 U.S. 164, 179 (1988)) (citation and internal quotation marks omitted).

38. *Id.* at 2526 (citation and internal quotation marks omitted).

39. *Id.* (citing Blystone v. Pennsylvania, 494 U.S. 299 (1990), Boyde v. California, 494 U.S. 370 (1990), and Walton v. Arizona, 497 U.S. 639 (1990)).

40. *Id.* at 2526 (quoting *Walton*, 497 U.S. at 659) (internal quotation marks omitted).

41. *Id.* at 2528.

42. *Marsh*, 126 S. Ct. at 2539 (Stevens, J., dissenting).

43. *Id.*

44. *Id.* Ironically, both Justice Thomas and the dissenters in *State v. Marsh* used this portion of Justice Blackmun's dissent as evidence that the *Walton* plurality addressed the equipoise rule. Justice Blackmun's dissent, *Walton*, 497 U.S. at 688–89, and Adamson v. Ricketts, 865 F.2d 1011, 1043–44 (9th Cir. 1988) explicitly addressed the equipoise rule, which suggests that the *Walton* plurality was well aware that equipoise was at issue. The plurality's silence is perhaps indicative that the *Walton* plurality intentionally tailored its opinion to avoid the equipoise rule, as Justice Stevens suggests, but no evidence supports that claim except for the assertions in Justice Blackmun's dissent. However, as Justice Thomas noted in *Marsh*, the issue before the plurality in *Walton* encompassed the equipoise rule, even if the plurality never explicitly acknowledged that fact. *Marsh*, 126 S. Ct. at 2523–24.

45. *Marsh*, 126 S.Ct. at 2539–40 (Stevens, J., dissenting).

imposition of the death sentence, in *Marsh* "the State of Kansas petitioned [the Court] to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required."[46] Justice Stevens noted that the federal interest in ensuring that no person be convicted or sentenced in violation of the Constitution is absent when the state is the petitioner.[47] For that reason, he deemed petitions by states over their own courts' decisions less urgent than petitions by defendants who allege to have been convicted or sentenced in violation of the Constitution.[48] Additionally, because state decisions are not binding on other states, Justice Stevens argued that the Court's decision in *Marsh* was justified solely by an "interest in facilitating the imposition of" a death sentence in Kansas.[49] He therefore chastised the Court for failing to exercise a "better practice of restraint" in granting certiorari.[50]

Justice Souter filed a separate dissent,[51] arguing the Eighth Amendment requires that a "'tie g[o] to the defendant' when life or death is at issue."[52] Justice Souter supported his argument by asserting that the Constitution sets two conditions for the imposition of the death penalty.[53] First, under the individualized sentencing requirement, the jury's decision to impose death must be based solely on evidence concerning the defendant and the crime for which he had been convicted.[54] Second, the death penalty must be reserved for the "worst of the worst" offenses within the universe of capital crimes.[55] Justice Souter argued that the Kansas capital sentencing statute violates the former requirement insofar as it obligates jurors to impose the death penalty based on equipoise, rather than a fact specific to

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46. *Id.* at 2540; *see Walton*, 497 U.S. at 639.

47. *Marsh*, 126 S. Ct. at 2540 n.* (Stevens, J., dissenting).

48. *Id.*

49. *Id.* at 2540 (quoting California v. Ramos, 463 U.S. 992, 1031 (1983)).

50. *Id.* at 2541.

51. Justices Stevens, Ginsburg, and Breyer joined Justice Souter's dissent.

52. *Marsh*, 126 S. Ct. at 2541 (Souter, J., dissenting) (quoting State v. Kleypas, 40 P.3d 139, 232 (Kan. 2001))

53. *Id.* at 2542.

54. *Id.* at 2542–43 (citing Spazino v. Florida, 468 U.S. 447, 460 (1984)).

55. *Id.* at 2543 ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." (citation and internal quotation marks omitted)).

the defendant or crime.[56] He added that the equipoise rule violates the latter requirement because it requires capital punishment in "doubtful cases," rather than limiting the death penalty to those heinous enough to meet a stricter threshold.[57]

Justice Scalia issued a solo concurrence disagreeing with Justices Stevens and Souters' dissents. Justice Scalia first pointed out that, although the Kansas decision in *State v. Marsh* would have limited precedential effect in other jurisdictions, this is true of every decision by a state court.[58] Taken to its extreme, Justice Stevens's argument would proscribe the Supreme Court from ever granting certiorari over state decisions concerning federal law.[59] Justice Scalia also noted that one of the Supreme Court's duties, and a frequent ground for granting certiorari, is to ensure uniform application of federal law across multiple jurisdictions.[60] Justice Scalia emphasized the importance of this duty, as Supreme Court review is often the only means of ensuring that state legislation is not thwarted by misapplication of federal laws or the Constitution.[61]

The issue at the heart of *Marsh v. Kansas* is founded on a misguided conception of juror deliberation. As Justice Davis of the Kansas Supreme Court argued in his dissent, the concept of equipoise takes the metaphor of balancing mitigating and aggravating factors too literally.[62] Unlike evidence presented in a trial, where jurors must evaluate the likelihood that alleged events occurred based on controlled and relatively objective evidence, capital sentencing requires a process of "assessing intangibles."[63] While aggravating factors in states such as Kan-

56. Justice Souter ignored that a Kansas jury can only reach equipoise by considering factors presented in a hearing that complied with the individualized sentencing requirement. Justice Souter's argument is therefore vastly over-inclusive, as it cuts against the entire practice of providing jurors with guided discretion by setting mandatory thresholds for the imposition of the death penalty. *Id.*

57. *Id.* at 2543–44 (quoting State v. Kleypas, 40 P.3d 139, 232 (Kan. 2001)).

58. *Marsh*, 126 S. Ct. at 2530 (Scalia, J., concurring).

59. *Id.* at 2530.

60. *See id.* at 2531 ("Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each state Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt.").

61. *Id.*

62. *Marsh*, 102 P.3d. at 468 (Davis, J., dissenting).

63. *Id.*

sas are fairly objective,[64] the Constitution requires that defendants be allowed to put forward any mitigating factors of their choosing.[65] Beyond the emotional testimony often presented at the capital sentencing stage,[66] jurors in Kansas may consider questions such as whether the defendant deserves to live and whether a prison term is sufficient punishment.[67] These considerations are likely too subjective to ever yield a rational conclusion that aggravating and mitigating factors are "tied."[68] Therefore, as Justice Davis argued, jurors will rarely if ever actually conclude that equipoise exists.[69]

Two additional facets of *Marsh* are also intriguing. The first is that the Kansas Supreme Court decision was unmistakably incorrect. As the dissenters in *State v. Marsh* note, federal constitutional precedent cut strongly against the Kansas Supreme Court decision.[70] Even if *Walton* did not address equipoise—which is difficult to accept given that both the Ninth Circuit in *Adamson*[71] and the Supreme Court dissenters in *Walton*[72] recog-

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64. For example, Kansas juries are able to find as an aggravating factor that "the defendant authorized or employed another person to commit the crime." KAN. STAT. ANN. § 21-4625.

65. This rule stems from the individualized sentencing requirement, discussed in *supra* note 36. *See Marsh*, 126 S. Ct. at 2523 (discussing the relationship between the individualized sentencing requirement and the unfettered access to mitigating factors states are required to allow jurors).

66. *See, e.g.*, Harriet Ryan, *Experts: Scott Peterson's Life Hangs on Emotional Testimony from Both Families*, Nov. 15, 2004, http://www.courttv.com/trials/peterson/111504_ctv.html (Nov. 15, 2004) (discussing the tenor of testimony anticipated at penalty phase of Scott Peterson's trial for the murder of his wife and unborn child); Sarah Kershaw & Marc Santora, *Jury Sentences Wendy's Killer to Be Executed*, N.Y. TIMES, Nov. 27, 2002, at A1 (discussing emotional testimony at sentencing phase of death penalty case).

67. KAN. STAT. ANN. § 21-4626(9); *see Marsh*, 102 P.3d at 468–69 (Davis, J., dissenting).

68. Consider, for example, the capital sentencing statute at issue in Boyde v. California, 494 U.S. 370, 374 (1990), which read, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." That the California legislature did not address the possibility of equipoise suggests that they did not conceive of the balancing equation as the type of consideration that could result in a so-called tie.

69. *Marsh*, 102 P.3d at 468–69 (Davis, J., dissenting).

70. *Id.* at 475 (Nuss, J., dissenting) ("There is no question that the issue of death at equipoise was squarely before the *Walton* Court.").

71. To be precise, the *Adamson* court did not explicitly use the term "equipoise." *Adamson*, however, invalidated Title 13, Section 703 of the Arizona Revised Statutes because it imposed the burden of proving that mitigating circumstances outweigh aggravating circumstances on the defendant, and thereby created a "pre-

nized that equipoise was at issue in addressing the constitutionality of Arizona's capital sentencing statute—the plurality highlighted extensive Supreme Court precedent allowing states to narrow jurors' discretion in assessing mitigating factors.[73] The second intriguing facet of *Marsh* is that, had it stood, its impact on capital punishment in Kansas would have been negligible. While capital punishment is a contentious issue, *State v. Marsh* would at most require the Kansas legislature to reword section 4624(e) to ensure that a tie goes to the defendant rather than the state. The statute would have remained almost entirely intact in wording and effect.[74]

It should not be surprising, then, that so little of Justice Stevens's and Souter's dissents address the actual issue before the Court; both jurists offer brief criticism of the equipoise rule and proceed to discuss matters with broader implications. The shift in Justice Souter's dissent from a discussion of the Kansas balancing equation to the general soundness of capital convictions is particularly striking. Commentators have noted that the dissent indicates that the four Justices signed on to it are "palpably uncomfortable" with the death penalty and may be ready to strike it down as unconstitutional.[75] This conclusion is likely premature, since Justice Souter explicitly recognized that more research into the reliability of capital convictions is required.[76] Nevertheless, it is noteworthy that the justices utilized *Marsh*, which will not stand among the most far-reaching decisions in the Court's death penalty jurisprudence, to express ardent doubts on the constitutionality of capital convictions. At the very least, the vigor with which Justice Souter discussed purportedly erroneous capital convictions suggests that his arguments and the studies he cited will resurface in future decisions.

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sumption of death." This conclusion is fundamentally equivalent to objecting to the equipoise rule. Adamson v. Ricketts, 865 F.2d 1011, 1043–44 (9th Cir. 1988).

72. Walton v. Arizona, 497 U.S. 639, 687–88 (1990) (Blackmun, J., dissenting).

73. Kansas v. Marsh, 126 S. Ct. 2516, 2524–27 (2006).

74. Granted, had the Kansas Supreme Court decision stood, prosecutors would no longer be able to inform jurors at the sentencing phase that a tie goes to the state. Since it is unclear whether equipoise is even possible, as discussed above, this statement is likely inconsequential. Moreover, it is unclear whether it would have a substantial effect on juror deliberation in the few cases where it might conceivably be applicable.

75. *See* Tony Mauro, *Death Penalty Disquiet Echoes Earlier Time*, LEGAL TIMES, July 10, 2006, at 10.

76. *Marsh*, 126 S.Ct. at 2545 (Souter, J., dissenting).

Although Justice Stevens's dissent is not likely to significantly impact future Supreme Court grants of review, it raises a fascinating question as to the scope and nature of constitutional protections.[77] For Justice Stevens, one of the foremost interests of the Court in granting certiorari is protecting individuals' constitutional rights, especially in the context of capital punishment.[78] Justice Stevens criticized Justice Scalia for overlooking the absence of this interest in cases where a state is the petitioner,[79] but Justice Scalia did no such thing. Justice Scalia did not discount the importance of reviewing state court decisions upholding a capital conviction, but merely argued that the Court also has a strong interest in ensuring that state courts do not thwart popular will by overextending constitutional rights.[80] While Justice Stevens is correct that cases in which states are petitioners, by definition, do not implicate the Court's interest in protecting defendants, this point does not negate the urgency of ensuring the proper application of the Constitution in evaluating state laws.

Although he did not overtly make such a point, Justice Scalia's argument promulgates a vision of the Constitution as protecting more than individual rights. Under Justice Scalia's vision, the Constitution also protects the collective will of individuals both insofar as their legislative representatives set forth criminal statutes and insofar as they as jurors impose the death penalty. Justice Scalia came closest to acknowledging this protection when he quoted Justice Black's dissenting opinion in *In re Winship*,[81] which recognized "the most fundamental individual liberty of our people—the right of each man to participate

77. Interestingly, Justice Stevens is one of the only Justices to have questioned the practice of granting certiorari to state petitions of their own high court decisions. The argument appears to have been originated by Lawrence Sager in an article that appeared in a 1978 *Harvard Law Review* article. Sager argued that the Supreme Court should allow state courts to construe the Constitution as providing broader rights than those recognized by the Supreme Court. Lawrence Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1242–63 (1978). In essence, Sager argued in favor of Justice Scalia's "crazy quilt." His article has been cited by numerous secondary sources but by few cases. Sager's argument, however, was cited by a dissent penned by Justice Ginsburg and joined only by Justice Stevens in *Arizona v. Evans*, 514 U.S. 1, 30–31 (1995) (Ginsburg, J., dissenting).

78. *See Marsh*, 126 S. Ct. at 2540 n.* (Stevens, J., dissenting).

79. *Id.*

80. *Id.* at 2530–31 (Scalia, J., concurring).

81. 397 U.S. 358, 385 (1970) (Black, J., dissenting).

in the self-government of his society."[82] Moreover, even if Justice Scalia did not imply the literal existence of collective constitutional rights, those rights are effectively created when the Court undertakes an obligation to reverse decisions that strike down legislation through erroneous constitutional interpretation.[83] At first glance, this conception of the Constitution may seem odd, since it is traditionally viewed as holding government action at bay, rather than restraining courts from hampering governmental action.[84] Yet this conception comports with the traditional responsibilities of judges to ensure that the Constitution is properly applied by all levels of the government and to thereby "'impartially discharge . . . all the duties' of the office."[85]

Furthermore, Justice Scalia's concurrence is consistent with the established conception of crime as a social evil.[86] A defendant convicted of a capital offense has committed a crime not only against his victim but also against all of society. In misapplying the Constitution and sentencing defendants such as Marsh to a life term in prison rather than imposing death, a court thwarts the collective will of Kansas's voters and jurors in branding the murder of Marry Ane Pusch's daughter as a social harm meriting execution. The erroneous expansion of a defendant's rights does not occur in a vacuum, for it wrongfully

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82. *See Marsh*, 126 S. Ct. at 2531 (Scalia, J., concurring). He also stated that "[w]hen a federal constitutional interdict against the duly expressed will of the people of a State is erroneously pronounced by a State's highest court, no authority in the State—not even a referendum agreed to by all its citizens—can undo the error. Thus, a general presumption against such review displays not respect for the States, but a complacent willingness to allow judges to strip the people of the power to govern themselves. When we correct a state court's federal errors, we return power to the State, and to its people." *Id.*

83. *See also* Nathan Frost et al., *Courts Over Constitutions Revised: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 340–41 (2004).

84. *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1003 (2003) ("Constitutions govern governments: they create governments, grant them powers, and impose limits on the exercise of granted powers. In the American legal order, constitutional rights are conventionally understood to apply to and restrain the level of government created by the constitution in which those rights appear.").

85. *Marsh*, 126 S. Ct. at 2531 (Scalia, J., concurring) (quoting 28 U.S.C. § 453).

86. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW 25–26 (4th ed. 2003) (stating that the purposes of criminal law are "to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable"); Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402–04 (1958) (describing the traditional notion of crime as an injury to the public in general).

curtils the right of society to implement criminal statutes, punish offenders, and deter future violations.

To the extent that *Marsh* foreshadows the future of Supreme Court capital jurisprudence, it reveals a bitterly divided Court unlikely to significantly change the status quo in the near future. While Justice Souter hinted at an impending push to overturn the death penalty, his camp remains the minority, and Chief Justice Roberts has made no secret of his intention to bring a minimalist philosophy to the Court.[87] Thus, if *Marsh* can be taken as a sign of the direction of the Court under its new chief justice, the Court may largely maintain the existing scope of the death penalty. On the other hand, the Supreme Court has chipped away at various applications of the death penalty since *Furman v. Georgia*,[88] particularly in recent years.[89] With the addition of one more judge who shares Justice Souter's concerns, *Marsh* may soon be regarded an anomalous decision. Either way, the one certainty left by *Marsh* is that the stage is set for the nation's high court to once again question the constitutionality of the death penalty with an effect as wide-reaching as the landmark decisions on capital punishment three decades ago.[90]

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87. *See* Dahlia Lithwick, *Charm Offensive: So Far, the New Chief Justice of the U.S. Supreme Court Has Gotten Raves—From the Public, the Media and His Own Peers*, THE AM. LAW., August 2006, at 178.

88. 408 U.S. 238 (1972).

89. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding that it is unconstitutional to execute defendants who were under the age of 18 at the time their crimes were committed); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute mentally retarded defendants); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that it is unconstitutional to execute a prisoner who is insane); Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion) (holding imposition of the death penalty for rape unconstitutional because the sentence is disproportionate to the crime).

90. Gregg v. Georgia, 428 U.S. 153 (1976); *Furman*, 408 U.S. 238.