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STEVENS'S RATCHET: WHEN THE COURT SHOULD DECIDE NOT TO DECIDE

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Hidden underneath the racy death penalty issues in *Kansas v. Marsh* lurks a seemingly dull procedural issue addressed only in separate opinions by Justices Stevens and Scalia: whether the Court should have heard the case in the first place. As he did in three cases from the Court's 2005 term, Justice Stevens argued in *Marsh* that the Court has no legitimate interest in reviewing state court decisions that overprotect federal constitutional rights. Instead, the Supreme Court should exercise its *certiorari* power to tip the scales against states and in favor of individuals. Granting *certiorari* in *Marsh*, Stevens argued, was not motivated by a desire to create uniformity in interpretation of federal law, but was motivated by "[n]othing more than an interest in facilitating the imposition of the death penalty."

Justice Scalia vehemently disagreed, writing that Stevens's argument rested on a "misguided view of federalism" and ignored the need for integrity and uniformity of federal law. He believes that would create a "crazy quilt," in which each state could interpret the federal Constitution as it saw fit so long each such interpretation gave individuals more protection than necessary.

"Crazy quilt" is certainly an exaggeration, but there is no denying that Justice Stevens's proposal would give states new power in federal constitutional interpretation. This new power is reminiscent of Justice Brennan's conception of Congress's enforcement power under Section 5 of the Fourteenth Amendment as a one-way ratchet. Congress, Justice Brennan explained in *Katzenbach v. Morgan*, is within its enforcement powers when it grants citizens rights greater than those required by the Constitution and the Court should not intervene even if the rights granted are contrary to its precedent. Only when Congress attempts to move in the other direction—to infringe upon constitutionally protected rights—should the Court get involved.

Justice Stevens's argument, which I will call Stevens's Ratchet, originated in the Justice's dissenting opinion in a 1983 case, *Michigan v. Long*. In *Long* the Court greatly increased its ability to review state court decisions that may have rested on either federal or state grounds by presuming that, absent a clear statement to the contrary, such decisions do not rest upon an independent state law ground and can be reviewed by the Court. In his dissent, Justice Stevens argued against the Court's new presumption not only as bad law, but also as bad policy. The Court's scarce resources, he wrote, should not be used when a

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state complains that the state court has interpreted federal rights too broadly. Describing the case as one that concerned the relationship between two sovereigns, Justice Stevens compared it to a prosecution that occurred in Finland rather than in Michigan. The United States might be concerned with procedure in a Finnish court that resulted in the conviction of an American, but not if it resulted in an acquittal. So too, the Supreme Court should only review state court decisions when a citizen's constitutional rights have been violated, not when they have been over-enforced.

In his *Long* dissent, Justice Stevens hoped that the Court would one day reconsider its expansion of its jurisdiction over state court decisions, but as *Marsh* shows, there has been no such reconsideration. Since 1983, Justice Stevens has repeatedly found himself dissenting in such cases. Before the Court's 2005 term, these dissents came once every few years, but in the most recent term Stevens was moved to remind the Court of his view in three different cases: *Marsh*, *Washington v. Recuenco*, and *Brigham City v. Stuart*.

In his *Marsh* dissent, Justice Stevens quoted liberally from a similar dissent he wrote in *California v. Ramos*, decided on the same day as *Long*. In *Ramos*, Justice Stevens had argued that the Court should not have reviewed a decision by the California Supreme Court which held unconstitutional a jury instruction informing jurors of the Governor's power to commute a life sentence without parole. To apply his reasoning from *Ramos* to *Marsh*, Justice Stevens had only to reproduce seven passages from his *Ramos* dissent and substitute "Kansas" for "California." In both cases, Justice Stevens suggested that the Court's decision to grant *certiorari* was not motivated by a desire to answer a question of federal constitutional law, but by a desire to ease the imposition of the death penalty.

Justice Stevens's concurrence in *Brigham City v. Stuart* is unique among opinions expressing the Ratchet because he did not disagree with the Court's ultimate holding. Stevens concurred in the Court's unanimous judgment—a simple holding that police had not violated the Fourth Amendment—but as he did in *Marsh* and others he argued that *certiorari* never should have been granted. Restating the Ratchet, Justice Stevens wrote that "[f]ederal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires."

Last term's third Ratchet case, *Washington v. Recuenco*, is also unique because it did not involve the interpretation of a federal constitutional right, but rather the question of the correct remedy for a concededly violated right. While the Court reversed the Washington Supreme Court's determination that a *Blakely* violation is a structural error requiring resentencing, Justice Stevens again argued that the Court should never have granted *certiorari* only to overrule a state court's decision to afford greater constitutional rights than the majority thought were required.

It is interesting to ask why Stevens's Ratchet came up three times during the Court's most recent term. Justice Brennan's Ratchet originated in the 1960s, as part of the Court's move to expand federal rights and federal powers to combat what it saw as great infringements upon those rights by states. Justice Stevens, however, is propounding his Ratchet to stop a Court in the

midst of a program of contracting federal rights and federal powers. If the Court were to refuse to hear state cases which overextended rights, they would have fewer chances to roll those rights back. But Stevens's Ratchet is much more than just a liberal shield against conservative intervention on the side of prosecutors in their battles with state courts. It represents a view of the Supreme Court as an impartial enforcer of individual rights and not as an active participant in internal state battles. Additionally, it serves as an exhortation to the Supreme Court to refrain from unnecessary lawmaking.

At the core of Stevens's ratchet is the Justice's conception of judicial restraint as an interest that does not apply to the *merits* of judicial decisionmaking, but to the *process*. This conception is distinct from the approach to judicial restraint recently expounded upon by Chief Justice Roberts. In a commencement speech at Georgetown University, Roberts told graduates that to provide better guidance to lawyers and lower courts, the Supreme Court should write opinions which embody a high level of consensus. He argued that to achieve that consensus the Court should exercise restraint and rule as narrowly as possible. Justice Stevens's process-based judicial restraint is distinct because it does not focus upon *how* to decide cases, but upon *which* cases actually need deciding. As Justice Stevens explained in a 1982 speech, the Court should not waste its time on cases in which a state court overprotects federal rights because "the state decision affect[s] only a limited territory and [does] not create a conflict with any other decision on a question of federal law, and . . . the state court ha[s] the power to reinstate its original judgment by relying on state law."

Justice Stevens's suggestion that the Court hear fewer cases sounds innocent enough, but his selection of which cases to exclude was enough to provoke Justice Scalia in *Marsh*. The idea that states may act as laboratories of constitutional interpretation is consistent with an important element of experimentation in our federal system, but it clashes with an equally important element: uniform application of federal law. While Congress and the Executive have some power to determine what decisions are left to local actors and which are made at the highest levels of government, the choices have already been made for those rights enshrined in the Constitution. Justice Scalia argued in his *Marsh* concurrence that it is the Supreme Court's role to ensure that those choices are respected, no matter who stands to benefit, and Stevens's Ratchet would insert an improper override to the constitutional division of labor between the states and the federal government. Even though the federal government would not lose the power to enforce constitutional rights, it would lose the power to set the boundaries for state conduct consistent with those rights. The Court would lose the power to complain when rights are overenforced.

But an exception to the division of power between the states and the federal government *is* consistent with the federal government's constitutional role as protector of individual rights. To enforce the Fourteenth Amendment, the Court should *only* be concerned when a state does not provide enough due process, not when it provides too much. This is exactly the one-way ratchet that the Court once applied to Congressional powers under

Section 5. And like that ratchet, Stevens's Ratchet would not allow any substantive constitutional interpretation outside the Supreme Court because it only allows overprotection of rights; it never allows reinterpretations of them. Because the ratchet can still go the other way, Justice Scalia's "crazy quilt" fears are unfounded. Justice Stevens is not making an argument about *how* to interpret the Constitution, but *when* to interpret it.

Justice Stevens's ratchet demonstrates a unique view of the Court's role: the Court should not be a panel of distinguished scholars writing on whatever interesting subjects come their way, but should instead restrict its efforts to those cases where it is truly needed. The Court's intervention is not needed when the courts of Michigan, Kansas, or even Finland provide more protection to a defendant than she would receive in federal court even if the protection rests upon constitutional law. As Justice Stevens explained in a footnote in his *Marsh* opinion, there is a "separate federal interest in ensuring that no person be convicted or sentenced in violation of the Federal Constitution." Applying Stevens's Ratchet would take that interest seriously.