

Gimme an S

The Roberts Court splits over grammar.

BY JONATHAN M. STARBLE

As one of its final acts last term, the U.S. Supreme Court issued *Kansas v. Marsh*, a case involving the constitutionality of a state death-penalty statute. The 5-4 decision exposed the deep divide that exists among the nation's intellectual elite regarding one of society's most troubling issues—namely, whether the possessive form of a singular noun ending with the letter *s* requires an additional *s* after the apostrophe.

The issue reached a crescendo in *Marsh* primarily because of two circumstances. First, the statute in question originated from a state with a name ending in *s*. Second, the majority opinion was written by a justice whose last name ends in *s*. Given the confluence of these factors, it was inevitable that the justices' philosophical differences on matters of American usage would be thrust into the spotlight.

A BITTER DIVIDE

Justice Clarence Thomas, writing for the Court (and joined by Chief Justice John Roberts Jr. and Justices Samuel Alito Jr., Anthony Kennedy, and Antonin Scalia), concluded that the Kansas statute was not unconstitutional. In reaching this conclusion, Thomas repeatedly referred to the relevant law as *Kansas'* statute.

In response, Justice David Souter wrote a dissent that was joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and John Paul Stevens. The dissent revealed Souter's bitter disagreement with both the substantive conclusion of the majority and the grammatical philosophy of the opinion's author.

Whereas Thomas apparently believes that whenever a singular noun ends in *s*, an additional *s* should *never* be placed after the apostrophe, Souter has made equally clear his conviction that an

s should *always* be added after the apostrophe when forming a singular possessive, regardless of whether the nonpossessive form already ends in *s*. With this acrimonious undercurrent simmering in the background, Souter boldly began his *Marsh* dissent as follows: "*Kansas's* capital sentencing statute provides . . ." This dramatic and gratuitous use of the possessive was an obvious attack on Thomas, who, as one of three *s*-ending members of the Court, is viewed as a role model for the millions of children who grow up with the stigma of grammatical ambiguity attached to their names.

Is it fair to deprive a small minority of the population of the right to assert possession in the same manner as everyone else? Whereas Souter would answer an unequivocal no, Thomas would likely point out that he has gone his whole life with only one *s*. Because it worked for him, no one else in a similar situation should receive any preferential treatment. People who happen to be born with names ending in *s* should pull themselves up by their own bootstraps and learn to go without the additional letter. After all, it builds character.

Scalia, on the other hand, would probably take exception to the stance taken by Thomas. In *Marsh*, Scalia wrote a separate opinion that concurred with the substance of the majority opinion but nonetheless revealed a clear ideological discord with Thomas. Unlike his colleague, Scalia appears to believe that most singular nouns ending in *s* still demand an additional *s* after the apostrophe. Thus, in his *Marsh* concurrence, Scalia repeatedly referred to the relevant law as *Kansas's* statute. He similarly added an *s* to form the words *Ramos's* and *witness's*.

Yet in other parts of the opinion, Scalia added only an apostrophe to form the words *Stevens'*, *Adams'*, and *Tibbs'*. Based on this, it would seem that he believes the extra *s* should be omitted if the existing *s* is preceded by a hard consonant sound. So, whereas Thomas makes his *s* determination based strictly on spelling,

Scalia appears to look beyond the spelling and examine pronunciation as well.

In addition to the opinions by Thomas, Souter, and Scalia, the Marsh case generated an additional dissent by Stevens, who disagreed with the substance of the majority but declined to address the *s* issue. A review of recent opinions, however, reveals that Stevens and the remaining five justices side squarely with Thomas.

WHAT ABOUT ARKANSAS?

Whenever the Court issues a landmark constitutional decision, commentators immediately debate how the holding will apply to other states that have similar statutory schemes. Such questions are particularly interesting in the wake of *Marsh*, as there are four other states with names ending in *s*.

Texas, like Kansas, has a vowel as both its penultimate letter and its penultimate sound. Thus, for purposes of determining whether an additional *s* should be used, Texas is both visually and aurally identical to Kansas. If the current Court were to consider the Texas death-penalty statute, one would expect the grammatical opinions of the justices to be identical to those expressed in *Marsh*.

If, however, the statute at issue were from Massachusetts, then Scalia would likely side with the Group of Seven, making Souter the sole justice who would add an *s* at the end. (Last year, in *Shepard v. United States*, Souter did indeed pen the word *Massachusetts's*, thereby bravely opining that even a four-syllable proper noun ending in a double consonant before the final *s* is entitled to an additional *s*, regardless of the awkwardness of the resulting pronunciation.)

But what about Arkansas? From a spelling perspective, the state bears an uncanny resemblance to Kansas. Yet from a pronunciation perspective, the two states diverge. Whereas the final sound in Kansas is a vowel-consonant combination, the second *s* in Arkansas is silent, thus making the final sound a short vowel. If faced with this situation—or with a statute from Illinois—Souter would add an *s* and the Group of Seven probably would not, based on previous opinions.

As for Scalia, one would assume that a noun with a vowel as its penultimate letter *and* its final sound would present the most compelling possible case for adding an *s* after an apostrophe. Yet in a 2003 opinion, *Kentucky Association of Health Plans v. Miller*, Scalia repeatedly referred to the possessive of Illinois as *Illinois'* rather than *Illinois's*. He has also shown other inconsistencies, such as his repeated use of the word *Congress'*, which is inexplicable in light of his acknowledgment of the word *witness's* in his *Marsh* concurrence and his use of the word *Congress's* in his 2004 majority opinion in *Vieth v. Jubelirer*.

In reviewing Scalia's lack of a pattern, the most logical conclusion is that he simply doesn't care very much for the *s* debate. In fairness, the issue does not easily lend itself to an "originalist" examination, because the Constitution contains no possessive forms of *s*-ending singular nouns. (In Article I, Sections 8 and 9, the Framers diplomatically avoided the thorny issue by using the phrase "consent of the Congress," instead of "*Congress's* consent" or "*Congress'* consent.")

MASS ILLOGIC

By a margin of 7-2, the strict anti-*s* view appears to be the clear

preference of the land's highest court. Yet experts on American usage overwhelmingly agree that Souter's approach is the only one that is proper. As explained by Bryan Garner, author of *A Dictionary of Modern American Usage*, most authorities on the subject recognize only two types of singular nouns for which it is acceptable to omit the additional *s*: biblical or classical names, such as Jesus, Moses, or Aristophanes, and nouns formed from plurals, such as General Motors or *Legal Times*. (Journalists are often more liberal in excluding the additional *s*, but that is typically based on the pragmatic goal of conserving print space rather than on any ideological grounds.)

The surprisingly popular practice of omitting the final *s* in all *s*-ending words is both technically improper and completely illogical. Indeed, the use of an additional *s* accurately reflects proper pronunciation. Whereas an ' produces a clear sound, a mere apostrophe produces no sound at all. Accordingly, if one were to pronounce the sentence, "Kansas' statute is constitutional," it would sound exactly the same as the sentence, "Kansas statute is constitutional." That wouldn't make any sense. Furthermore, it is hard to imagine that law clerks for Justice Thomas go around saying to people, "Hello, I'm Justice Thomas clerk." (Of course, the same analysis applies to people like Jesus and Moses, but they are apparently entitled to some type of "grandfather" exception.)

Don't get me wrong. I realize that the written opinions of the Supreme Court consistently exhibit a high level of adherence to accepted rules of proper American usage. I also recognize that there is a limit to how much influence the Court can have on the written and spoken word. I have lost all hope, for instance, that the Court can do anything to reverse the epidemic currently gripping the nation—that is, the widespread misunderstanding of the objective case for pronouns, which has resulted in millions of highly educated people who repeatedly write and say things such as "This is just between you and I," and "If you have any questions, please feel free to call Mary Jones or myself." (In each of these examples, the correct pronoun choice is *me*.)

Nevertheless, the time is now for leadership and unity. If the highly visible writers on the Supreme Court cannot be good role models on the relatively noncontroversial question of whether an *s* should be used to form a possessive, then what chance is there that the nation will receive unified guidance on some of the more legitimate debates of our time, such as split infinitives, the use of a comma before the final element of a series, *which* versus *that*, and the use of a plural pronoun in place of a singular pronoun for the purpose of achieving gender neutrality?

Perhaps the justices can convene next summer to take a closer look at all these important issues. Grammarians anxiously await.

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Editor's note: *Legal Times* admits to following Associated Press style, which omits the *s* after the apostrophe in creating possessives of all singular proper names ending in *s*, not just biblical and classical names.