

9-15-2017

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Recommended Citation

Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Method, and the Limits(?) of Originalism*, No. 17-42 Boston University School of Law, Public Law Research Paper (2017).

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**CONFRONTING *CRAWFORD*: JUSTICE
SCALIA, THE JUDICIAL METHOD, AND
THE LIMITS(?) OF ORIGINALISM**

Boston University School of Law
Public Law & Legal Theory Paper No. 17-42

84 U. CHI. L. REV. – (2017) (forthcoming)

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Confronting Crawford: Justice Scalia, the Judicial Method, and the Limits(?) of Originalism

Gary Lawson*

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Abstract

Crawford v. Washington, which revamped (and even revolutionized) interpretation and application of the Sixth Amendment’s Confrontation Clause, just might be Justice Scalia’s most important majority opinion, for three reasons. First, its impact on the criminal justice system has been immense, and even if the case is overruled in the near future, as seems quite possible, that effect will still likely exceed the concrete impact of any other opinion that he wrote. Second, and more importantly, Crawford emphasizes the trite but crucial point that methodology matters. Crawford has generally been a boon to criminal defendants and a bane to prosecutors. When Justice Scalia was appointed to the Court in 1986, a very crude version of the “attitudinal model” dominated both academic and popular views about how Supreme Court justices were likely to decide cases. Almost everyone expected Justice Scalia to be a Warren Burger clone who would reflexively vote to lock up guilty criminals. When he instead decided some cases based on meaning and methodology rather than results, the legal community had difficulty processing the point. If that seems strange to modern eyes, so that a 2004 decision such as Crawford does not appear inexplicable, it is at least partly because of Justice Scalia’s influence in the ensuing decades, which has helped moved methodology to the forefront of jurisprudence. Third, Crawford is an outstanding exemplar of Justice Scalia’s originalist methodology in both action and inaction. Actively, the textual, structural, historical, and purposive moves in Crawford exemplify the “fair reading” interpretative methodology that Justice Scalia spent much of his life advancing. On the other hand, that methodology was applied to the “wrong” text, because Crawford (and all subsequent Confrontation Clause cases) involved state rather than federal prosecutions, to which the Sixth Amendment literally does not apply unless the most dramatic form of text-for-text incorporation is the correct original meaning of the Fourteenth Amendment. Crawford thus focuses attention on how originalism as a method of interpretation does not always easily translate into originalism as a form of adjudication.

If you conduct an on-line search for something like “Justice Scalia’s most important opinions” or “Justice Scalia’s most influential opinions,” you will (or at least I did) almost always end up with a list that is top-heavy with dissents. That is not surprising. Dissenting opinions gave Justice Scalia the most freedom to exercise his considerable skills as a writer and

were therefore more likely to produce memorable one-liners. They were also the best occasions for him to express his views candidly and forcefully and thus served as the best vehicles for elaboration of his broad jurisprudential and doctrinal positions. Majority opinions need four other justices to sign on, and while finding four justices to share Justice Scalia’s outlook was a dream to some,¹ the Court in his time never even approached that ideal. Indeed, the only majority opinion that seems to pop up with any consistency in these “best of” lists is *District of Columbia v. Heller*.²

Without in any way downplaying the significance of *Heller*, I want to offer another candidate for the title of “most important majority opinion” authored by Justice Scalia that I think tops *Heller*, and all of his other majority opinions, across virtually all relevant dimensions of importance: *Crawford v. Washington*.³ *Crawford* did not make headlines on the nightly news when it was decided (or at least I don’t recall them). I doubt whether many interest groups have *Crawford* on their list of cases about which to quiz or evaluate nominees for the Supreme Court; it certainly does not seem to have been on anyone’s agenda during the confirmation hearings for Justice Scalia’s successor, Neil Gorsuch. Perhaps it should have been, because *Crawford* is among the most important constitutional cases in modern times.

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¹ “A nightmare to others!” Merlin, *Excalibur* (Warner Bros. 1981).

² 554 U.S. 570 (2008). For a typical example from the popular press that compactly combines both points that I just made, see the *Washington Post* story just after Justice Scalia’s death: “Justice Scalia was far better known for fiery dissents than for landmark majority opinions. One exception was the court’s groundbreaking 2008 decision in *District of Columbia v. Heller*.” https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html?utm_term=.57c4ca8cff81.

³ 541 U.S. 36 (2004).

Crawford set forth a new -- or, if one thinks it accurately captured original meaning, a very old -- methodology for determining when the use by prosecutors of out-of-court statements violates a criminal defendant's right "to be confronted by the witnesses against him."⁴ In the decades prior to *Crawford*, the Confrontation Clause of the Sixth Amendment was given a very narrow reading by the Court to prohibit only the use of out-of-court statements which both made it through non-constitutional hearsay law because of relatively novel or eccentric hearsay exceptions *and* were deemed by the Court to be "unreliable" to boot. *Crawford* enormously expanded the scope of application of the Confrontation Clause to all "testimonial" out-of-court statements -- very roughly meaning statements whose primary purpose or expectation is to provide evidence against a defendant -- unless there has been a prior opportunity for the defendant to cross-examine the declarant of the statement *and* the statement's declarant is unavailable to testify. This category of "testimonial" statements includes documentary statements made with an eye towards establishing someone's guilt, such as laboratory reports of DNA results and drug analyses. Even if state or federal law has a hearsay exception to allow in those reports, and it almost always does, the Confrontation Clause, as interpreted by *Crawford* and subsequent opinions,⁵ requires the analyst who made the statements in the report to testify or otherwise be subject at some point to cross-examination before those statements are admissible.⁶

⁴ U.S. CONST. amend. VI.

⁵ See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

⁶ There are exceptions. The *Crawford* rule only applies to statements admitted as evidence of their truth, see 541 U.S. at 59 n.9; and, as with most constitutional protections, the rights protected under *Crawford* can be waived or forfeited. See *Giles v. California*, 554 U.S. 353 (2008). The "non-truth" exception is potentially quite important if it extends, as four justices have maintained it does, to statements that underlie or account for expert testimony. See *Williams v. Illinois*, 567 U.S. 50, -- (2012) (plurality opinion).

The monumental importance of this doctrine can best be seen by its enemies, who now include Justices Alito, Breyer, Kennedy, and Roberts. When faced with the application of the *Crawford* doctrine to laboratory reports, those four justices – who one would not often group together as a voting bloc – now seem willing to toss out the entire *Crawford* framework rather than face its consequences.⁷ After little more than a decade, what I am describing as Justice Scalia’s most important majority opinion is in real danger of ending up on the dustbin of history.

Even if *Crawford* is overruled tomorrow, it will still be Justice Scalia’s most important majority opinion. The enormous influence it has had on the course of criminal justice is only one relatively minor reason why *Crawford* is so fundamental. There are at least two far more important reasons to focus on the decision even if it does not survive. For one thing, it is perhaps the most illustrative example of Justice Scalia’s originalist methodology for constitutional interpretation, highlighting both the strengths and weaknesses -- and I am ultimately going to focus on one very big potential weakness -- of that approach. *Heller* certainly does duty for that task as well, but *Crawford* might be even more powerful, partly because it led to the overruling of decades of prior case law but mostly because it starkly illustrates the problems of applying a jurisprudence of original meaning in a world shaped by non-originalist precedents. For another, and I think even more crucial, thing, *Crawford* brings home Justice Scalia’s most enduring contribution to jurisprudence: the idea that *methodology matters*. That might seem trite, but those young ‘uns who did not live through the period before Justice Scalia joined the Court may not appreciate how revolutionary that simple idea was to the legal community in past times.

⁷ See *Bullcoming v. New Mexico*, 564 U.S. 647, 684 (2011) (Kennedy, J., dissenting).

Justice Scalia was a very powerful repudiation of at least a primitive version of the “attitudinal model” of judicial decisionmaking, and *Crawford* is one of the leading exhibits for that claim.

Part I of this brief comment explores that jurisprudential contribution by recalling just how strange, and even unthinkable, it seemed to many people in 1986 that someone might actually decide cases based on methodology rather than party politics. Part II looks more specifically at the reasoning in *Crawford* to see how it exemplifies Justice Scalia’s constitutional methodology. Part III briefly discusses how those jurisprudential and methodological points meld to present some difficult, under-examined problems for originalist jurists.

I. “The Way You Do the Things You Do”⁸

When Judge Antonin Scalia was nominated for the Supreme Court in 1986, he was something of an unknown quantity to many people. As a judge on the D.C. Circuit, he had written primarily administrative law opinions, which do not generally make for scintillating reading for any but the most resolute administrative law junkies. His scholarship as an academic addressed such hot-button topics as the promotion procedures for administrative law judges⁹ and the history of judicial review of decisions of the public land office.¹⁰ Unlike Robert Bork, who was to follow him as a nominee, Judge Scalia had a relatively thin paper trail. The confirmation hearing on his nomination did not draw out his positions very much. This hearing took place

⁸ The Temptations, *The Way You Do the Things You Do*, MEET THE TEMPTATIONS (Gordy 1964).

⁹ See Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. CHI. L. REV. 57 (1979).

¹⁰ See Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

before “Bork” became a verb, and to call it uneventful does not do justice to its degree of dullness. Judge Scalia did not answer any questions about specific issues or cases. He would not even (to the great consternation of Senator Arlen Specter) say flat-out whether he thought that *Marbury v. Madison* was rightly decided -- because, he insisted, someone might want to argue the point in the future, so why tip one’s hand?¹¹ What to make of this enigmatic figure who the Senate confirmed by a 98-0 vote?

People knew at least two things: he was nominated by a conservative Republican president and he had a reputation as a conservative. In 1986, that was enough to create at least one widespread expectation: Justice Scalia would vote to lock up guilty crooks. That, after all, was what Republican presidents had been appointing conservative justices to do for a decade and a half, wasn’t it? Isn’t that why Richard Nixon appointed William Rehnquist, Lewis Powell, and Harry Blackmun (who was actually quite a law-and-order judge in his early years, before he “grew” in office into a liberal icon)? Isn’t that why Ronald Reagan picked Sandra Day O’Connor? To get rid of the Warren Court’s coddling of criminals?

There was much to support this expectation. Although a strong form of the “attitudinal model” of judging – the view “that justices decide cases on the basis of their personal attitudes about social policy and not on the basis of any genuine fidelity to law”¹² – commands far from universal assent in the legal culture,¹³ a great many people expect, and in 1986 expected,

¹¹ Hearings before the Committee on the Judiciary on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States, United States Senate, 99th Cong., 2d Sess., 33-34, 83-86 (1986).

¹² Michael J. Gerhardt, *Attitudes about Attitudes*, 101 MICH. L. REV. 1733, 1733 (2003) (reviewing Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002)).

¹³ While the attitudinal model would not have survived as long as it has if it did not have considerable predictive and explanatory power, it would be surprising if other, and perhaps more complex, models did not compete for attention. For a brief survey of the array of models, see Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016).

Supreme Court justices to vote the party line in important cases. When Justice Scalia joined the Court, a strict pro-prosecution stance was a widely held expectation.

In point of fact, I doubt whether Justice Scalia had thought very deeply about constitutional criminal procedure before he joined the Court. It did not come up much on the D.C. Circuit, and it was far outside his scholarly wheelhouse. Nonetheless, if he was the sort of judge who was inclined to vote on the basis of policy preferences, it would not have been at all surprising to see him slotting into Warren Burger's predictable pro-prosecution voting pattern. But, of course, Justice Scalia was not inclined to vote on the basis of policy preferences. He was inclined to read constitutional provisions and try to figure out what they actually mean. Since many provisions in the Bill of Rights are there precisely to protect criminal suspects or defendants, his arrival on the Court was not uniformly good news for the prosecution.

The extent to which a crude form of an attitudinal model shaped public understandings of the Court in general and of Justice Scalia in particular during his first term is well illustrated by the popular reaction to a relatively obscure case called *Arizona v. Hicks*.¹⁴ The police had entered an apartment in response to a shooting apparently emanating from that unit. No one doubted that warrantless entry into the unit was justified by exigent circumstances. While in the unit, an officer "noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment."¹⁵ The officer moved the equipment in order to read the serial numbers and called in those numbers. The stereo equipment had been stolen in an armed robbery, and the defendant was indicted for that crime. The question was whether the evidence – the serial numbers – had been obtained through an

¹⁴ 480 U.S. 321 (1987).

¹⁵ *Id.* at 323.

unconstitutional search. Justice Scalia, writing for a 6-3 majority that included the Court's entire liberal bloc, said that while the stereo equipment itself was in plain view, the serial numbers were not and accordingly required a "search" in order to discover them. That search, in turn, needed to be supported by probable cause, rather than some lesser standard such as reasonable suspicion, and having the police note that the equipment looked out of place in a seedy apartment was not probable cause.

Hicks was obviously guilty of the charged crime. Without the evidence obtained from the search, he would go free. "But," wrote Justice Scalia, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."¹⁶ Justices Powell, O'Connor, and Rehnquist dissented.

I was clerking for Justice Scalia when that case was decided. I distinctly recall that the reaction of the assembled punditry was nothing short of astonishment. "Is Justice Scalia a closet liberal?"¹⁷ "Is this John Paul Stevens all over again?"¹⁸ Shock and surprise came from both sides of the aisle. The *New York Times* opened its column on the *Hicks* case by noting: "Associate Justice Antonin Scalia, confounding predictions that he would invariably side with Chief Justice William H. Rehnquist and with the police against criminal defendants, wrote an opinion refusing to expand police search powers in a decision issued today."¹⁹ The *Los Angeles Times* began its report on the case by observing that Justice Scalia was writing for the Court's "liberal faction" and that he had "already shown himself to be far more independently minded

¹⁶ *Id.* at 329.

¹⁷ I am sure that I heard this exact phrase at some point, but I cannot (30 years later) pinpoint it.

¹⁸ Ditto.

¹⁹ Stuart Taylor, *Opinion by Scalia Opposes Broad View of Police Power*, NEW YORK TIMES, Mar. 4, 1987.

than expected.”²⁰ The *Washington Post* chimed in with an opening line that read: “Supreme Court Justice Antonin Scalia surprised court observers and perhaps his conservative colleagues yesterday by joining with liberals and writing a decision that restricts police power to conduct searches.”²¹ Something was definitely off here. Wasn’t he supposed to vote against guilty crooks? James J. Kilpatrick, a noted conservative commentator,²² certainly thought so, and he complained that Justice Scalia’s opinion in *Hicks* was “patent nonsense”: “You may search Scalia’s opinion in vain for one word of sympathy for the police or for the owner of the stolen equipment. It would have been evident to a child of 10 that in entering Hicks’ apartment, the police had come upon the lair of a dangerous criminal. Were the police to seize the weapons and close their eyes to everything else?”²³ Evidently, “sympathy for the police” was the presumed basis for conservative judicial decisions.

The point here is just to illustrate how deeply ingrained was the idea in the mid-1980s that to be a “conservative” justice meant simply that one would vote against guilty criminals. It was *not* generally thought that conservative justices were supposed to apply a decisionmaking methodology based on abstract understandings of the Constitution and the interpretative enterprise, without regard to the consequences in particular cases. Concededly, if one’s model of a conservative justice was Warren Burger, one could be forgiven for holding that view. But the

²⁰ David G. Savage, *Scalia Joins Liberal Faction in Limiting Police Searches*, LOS ANGELES TIMES, Mar. 4, 1987.

²¹ Al Kamen, *Scalia Writes Decision Limiting Police Searches*, THE WASHINGTON POST, Mar. 4, 1987.

²² Some of us old fogeys remember Kilpatrick as the conservative foil to liberals Nicholas Von Hoffman and Shana Alexander on the *Sixty Minutes* “point-counterpoint” segment. Dan Aykroyd memorably parodied Kilpatrick (with Jane Curtin shadowing Alexander) in recurring sketches on *Saturday Night Live*.

²³ James Kilpatrick, *High Court Flat-Out Cuckoo – Scalia Part of Judicial Lunacy*, ORLANDO SENTINEL, Mar. 23, 1987.

result of that view was that the legal commentariat had no idea how to process or handle Justice Scalia. He was a creature with which they were unfamiliar.

Thirty years later, the confirmation process for Neil Gorsuch reveals some modest but notable changes in public discourse after Justice Scalia's tenure. Yes, interest groups continue to employ the crudest caricature of the attitudinal model by relentlessly emphasizing result-oriented side-picking,²⁴ but more sophisticated (and/or honest) public observers now seem to recognize at least some relevance for methodology. For example, an ABC News on-line fact sheet on Judge Gorsuch's confirmation hearing began:

Gorsuch, 49, is a judge on the 10th Circuit Court of Appeals in Denver. He was nominated by President George W. Bush in 2006 and confirmed by the Senate in a voice vote. Gorsuch clerked for Judge David B. Sentelle on the United States Court of Appeals for the D.C. Circuit and then for Justices Byron White and Anthony Kennedy on the Supreme Court. He attended Harvard Law and has a Ph.D. from Oxford, where he was a Marshall scholar. In legal circles, he's considered a gifted writer. *Like Scalia, he's a textualist and an originalist.*²⁵

Notice that the first substantive legal description of Justice Gorsuch in this account zeroes in on his methodology. I recall nothing remotely like this from any source in 1986 during Justice Scalia's confirmation. To be sure, later in the article, one gets a healthy dose of "he sided

²⁴ See Matt Flegenheimer, *Democrats' Line of Attack on Gorsuch: No Friend of the Little Guy*, N.Y. Times, Mar. 13, 2017, https://www.nytimes.com/2017/03/13/us/politics/democrats-judge-gorsuch-confirmation-hearing.html?_r=0.

²⁵ Audrey Taylor & Geneva Sands, *Judge Neil Gorsuch, What You Need to Know about the SCOTUS Nominee*, Mar. 20, 2017, <http://abcnews.go.com/Politics/judge-neil-gorsuch-scotus-nominee/story?id=45008516> (emphasis added).

with/against,”²⁶ but that is *all* that one would have seen thirty years ago. The CBS News account of Justice Gorsuch’s confirmation hearing reverses the order of emphasis, leading with a “he sided with/against” analysis but also including a prominent mention, however inaccurate it might be, of judicial methodology:

Gorsuch sided with Hobby Lobby in the [Obamacare contraception case](#) and wrote a book about assisted suicide that indicated his pro-life views. Before joining the bench, Gorsuch took few if any controversial positions as a D.C. lawyer in private practice or during his brief stint in the civil division of the Justice Department under former President George W. Bush.

As a judge, Gorsuch has said he follows the conservative philosophy embodied by Scalia during Scalia’s nearly two decades on the nation’s top court, one that depends on strict constructionism – a firm reliance on the text of the Constitution for judicial interpretation.²⁷

NBC News, on the other hand, went full attitudinal: a lengthy article on Justice Gorsuch on the eve of his Senate hearing had no mention at all of methodology but focused only on the results in particular hot-button cases.²⁸ It is nonetheless noteworthy that at least some public observers in 2017 think that decisionmaking methodology is worth mentioning. That is not something that people my age have grown up taking for granted.

²⁶ *See id.* (“He sided with Christian employers and religious organizations in the *Burwell v. Hobby Lobby* and *Little Sisters of the Poor* cases.”).

²⁷ *Who is Neil Gorsuch, Supreme Court justice nominee?*, Mar. 20, 2017, <http://www.cbsnews.com/news/who-is-neil-gorsuch-supreme-court-justice-nominee/>.

²⁸ *See* Ari Melber & Meredith Mandell, *Who Is Judge Gorsuch? Clues in Key Rulings*, Mar. 20, 2017, <http://www.nbcnews.com/politics/supreme-court/who-judge-gorsuch-clues-key-rulings-n735711>.

It is surely too much to say that Justice Scalia single-handedly put onto the map the idea that judges might actually apply methodologies rather than reach results. It is not, however, too much to say that Justice Scalia's presence on the Court drove much of the conversation on that subject since 1986 – and that without him the conversation would look very different, if it existed at all.

II. “Can I Get a Witness?”²⁹

Crawford v. Washington is perhaps the most dramatic illustration of Justice Scalia's methodology triumphing over results. If prosecutors cannot use evidence gained from moving around stereo equipment in seedy apartments, life goes on for law enforcement. If prosecutors must produce laboratory analysts in court and cannot use most testimonial hearsay without an opportunity on the part of defendants to confront the declarants, the number of guilty criminals who escape justice, and the cost of convicting those who do not, is surely going to be much higher. Reading the Confrontation Clause as it was read in *Crawford* revolutionizes the process of criminal justice.

The pre-Scalia Court had neatly avoided this problem. For most of the country's history, no avoidance tactics were really necessary, because the scope of application of the Confrontation Clause was minimal. Virtually all criminal prosecutions are brought at the state level, and the Bill of Rights, of which the Confrontation Clause is a part, does not apply to the states of its own force. And while the Fourteenth Amendment was ratified in 1868, the Confrontation Clause was

²⁹ Grand Funk Railroad, *Some Kind of Wonderful*, ALL THE GIRLS IN THE WORLD BEWARE!!! (Capitol Records 1974).

not held to be “incorporated” against the states via the Fourteenth Amendment until 1965.³⁰ Thus, prior to 1965, there were exactly zero opportunities for the federal courts to opine on Confrontation Clause issues in state criminal cases.³¹ And for the nearly two centuries of the nation’s history up to that point, there were relatively few federal criminal prosecutions of any kind. Some of us grew up with the expression “don’t make a federal case out of it” as part of the surrounding culture. The assumption was that a federal case was a big, rare deal, meaning that few occasions to apply the Confrontation Clause would ever arise. Moreover, “in federal prosecutions any out-of-court statement that might have been excluded from evidence in common law litigation via the Confrontation Clause could also be excluded by bringing it within the rule against hearsay.”³² Accordingly, there was meager federal case law involving the meaning of the Confrontation Clause prior to 1965.

The incorporation of the clause in that year, perhaps coupled with the increasing federalization of crime, opened the floodgates for federal court litigation involving the Sixth Amendment. In 1980, after 15 years of the onslaught, the Court summarized and systematized its holdings up to that point in *Ohio v. Roberts*,³³ a case that really only involved whether the state had made adequate efforts to locate a witness but which set forth the guiding doctrine for Confrontation Clause jurisprudence for a quarter century: “[W]hen a hearsay declarant is not present for cross-examination at trial . . . , his statement is admissible only if it bears adequate

³⁰ See *Pointer v. Texas*, 380 U.S. 400 (1965).

³¹ See Richard D. Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 447 (“So long as the Confrontation Clause was a limitation only on the federal judicial system, its bounds, and its relationship to hearsay doctrine, did not matter very much”).

³² Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014 (1998).

³³ 448 U.S. 56 (1980).

‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”³⁴ In other words: If evidence was admitted by virtue of a hearsay exception that the justices on the Court circa 1980 would have learned about in law school half a century earlier, it automatically counts as “reliable” and its admission therefore does not violate the Confrontation Clause. If it is admitted pursuant to some newfangled hearsay exception (for example, the “catch-all” exception represented by Federal Rule of Evidence 807³⁵), then the Court will decide case by case whether the evidence is sufficiently reliable to be admitted over a Confrontation Clause exception. In all instances, the clause is read to exclude unreliable or untrustworthy evidence and nothing more.

This approach has the considerable virtue of largely merging constitutional and non-constitutional law regarding out-of-court statements into a single inquiry. It also has the considerable virtue of leaving very few cases for the federal courts to decide, as most out-of-court statements will be admitted, if at all, pursuant to well-established hearsay exceptions, leaving no additional constitutional analysis to be done. It has the further virtue of sounding good as a matter of policy; who would want to admit unreliable evidence or exclude reliable evidence? And it has the additional virtue, if one inclines to pro-prosecution results, of letting relatively few guilty crooks walk because of this particular legal technicality. It has the decided vice, however, of bearing no plausible relationship to the words of the Confrontation Clause,³⁶

³⁴ *Id.* at 66.

³⁵ *See Idaho v. Wright*, 497 U.S. 805 (1990).

³⁶ *See* Richard D. Friedman, *Crawford Surprises: Mostly Unpleasant*, 20 CRIM. JUST. 36, 36 (2005) (“The doctrine of *Ohio v. Roberts* . . . had so little to do with the constitutional text, or with the history or principle behind it, that eventually it was bound to be discarded”).

which neither contains nor intimates the words “reliability” or “trustworthiness” (much less “indicia of”), or to the clause’s context, which focused not on the reliability of evidence as such but on the subjection of evidence to a particular procedural mechanism. As Justice Scalia put it:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point in which there could be little dissent), but about how reliability can best be determined.³⁷

If one looks at the Confrontation Clause’s words -- “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” – one would think that the blindingly obvious questions to be asked about the clause’s meaning are: Who is a “witness[]” and what does it mean to “confront[]” those “witnesses”? It took the Supreme Court more than two centuries to ask those blindingly obvious questions. It happened in 2004, in an opinion written by Justice Scalia.

Michael Crawford was convicted of assault for stabbing Kenneth Lee. Crawford claimed self-defense, arguing that he thought that Lee was pulling a weapon on him. Crawford’s wife, Sylvia, had given a tape-recorded statement to the police, with neither Crawford nor his counsel present for cross-examination, that at least arguably called into question whether Lee really was pulling a weapon when Crawford stabbed him. Sylvia did not testify at trial because of marital privilege, but the government played her tape-recorded statement to the jury.

³⁷ 541 U.S. at 61.

The recording was admissible under Washington state evidence law because, although it was hearsay, it was a statement against Sylvia's penal interest under Washington's Rule 804(b)(3), as it flagged her as a possible accessory to a crime. Applying *Ohio v. Roberts*, the Washington courts had previously decided that a hearsay exception for statements against penal interest was *not* "firmly rooted" unless it contained a requirement of corroboration of the statement,³⁸ which Washington's Rule 804(b)(3) at that time did not, except in limited cases that did not extend to Sylvia's statements in *Crawford*.³⁹ The Washington courts accordingly tried to decide whether Sylvia's statements had sufficient "indicia of reliability" to satisfy the Sixth Amendment as construed by *Roberts*. The state court of appeals said no,⁴⁰ and the state supreme court said yes.⁴¹

In a sweeping opinion by Justice Scalia, the United States Supreme Court discarded the *Roberts* framework, which "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."⁴² Justice Scalia wrote that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."⁴³ Here is where Justice Scalia's methodology went on

³⁸ *State v. Parris*, 98 Wash.2d 140, 147-48, 654 P.2d 77, 80-81 (1982). The United States Supreme Court subsequently agreed that the exception for statements against penal interest was not "firmly rooted." *See Lilly v. Virginia*, 527 U.S. 116 (1999).

³⁹ At the time of the decision, Washington's rule read: "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." WASH. ER 804(b)(3) (1979). The words "and offered to exculpate the accused" have since been deleted.

⁴⁰ *State v. Crawford*, 107 Wash. App. 1025 (Ct. App.2002).

⁴¹ *State v. Crawford*, 147 Wash.2d. 424 (2002).

⁴² 541 U.S. at 62.

⁴³ *Id.*

full display. Judicial decisionmaking, said Justice Scalia, is all about reading the Constitution and figuring out what it means. The Confrontation Clause, said Justice Scalia, is all about who are “witnesses” and what it means to be “confronted with” those witnesses. Any other inquiries are simply beside the point.

To be sure, the questions posed by the Confrontation Clause’s text are not necessarily easy ones. It is not self-evident what it means to be a “witness[.]” Answering those questions requires an interpretative approach more sophisticated than simply reading the words and declaring victory.

Linguistically, it is possible to say that “witnesses” are people who show up in court and testify. If that is what the term means in the Sixth Amendment, then the clause would apply *only* to people testifying in court, not to the introduction of out-of-court statements, whether introduced by those “witnesses” or otherwise. That is not a completely worthless constitutional provision, but it comes close. As Justice Scalia pointed out in *Crawford*, it does not accomplish much to cross-examine a witness who is reading someone else’s out-of-court statement.⁴⁴ In 1791, it is doubtful whether very many people worried about prosecutors and judges bringing in witnesses at a criminal trial who would then misread other people’s testimony. They most likely did worry a lot about the out-of-court testimony itself, such as *ex parte* affidavits, substituting for live testimony, either directly or indirectly through the testimony of live witnesses who are recounting what those affidavits contain.

It would also be linguistically possible to understand the term “witnesses” to mean “those persons whose statements are offered at trial,”⁴⁵ which would make the clause applicable to *all*

⁴⁴ See *id.* at 50-51.

⁴⁵ 541 U.S. at 43.

out-of-court statements used in any fashion by the prosecution. Again, that is an unlikely account of the Confrontation Clause; no one ever suggested that it rendered constitutionally irrelevant the entire body of hearsay law in criminal cases. Surely the clause applies to some out-of-court statements but not to others. Accordingly, the search was on for a linguistically sound understanding of the word “witnesses” that provides the most likely public meaning of the term in the specific context of the Sixth Amendment.

For that search, Justice Scalia turned to two of his favorite interpretative sources: pre-founding history and the founding-era dictionary. The former revealed that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”⁴⁶ The latter indicates that the Confrontation Clause “applies to ‘witnesses’ against the accused -- in other words, those who ‘bear testimony.’” 2 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁴⁷

A “witness[]” for purposes of the Confrontation Clause is thus someone who “bear[s] testimony” against a criminal defendant – or, put another way, the Confrontation Clause is interested only in “testimonial” statements. The exact contours of that term “testimonial” were not precisely identified by the Court in *Crawford*, and later cases continue to leave some doubt

⁴⁶ *Id.* at 50.

⁴⁷ *Id.* at 51.

about which kinds of statements are “testimonial,” and whose introduction thus makes their declarants constitutional “witnesses,” for purposes of *Crawford*.⁴⁸ Justice Thomas, for example, has consistently had a narrower conception of the scope of the Confrontation Clause than did Justice Scalia.⁴⁹ The details and/or resolution of those disputes about which kinds of statements are “testimonial” are not my topic here. The point is only that the framework for those disputes that was developed in *Crawford* emerged from a methodology that looked, not to the policy consequences of the interpretation, nor to the extent to which it reduces the workload of the federal courts, but to the public meaning of the words of the Confrontation Clause as they would have been understood by a reasonable audience in 1791. Whether or not the *Crawford* Court got that inquiry exactly right is less important than the fact that it actually tried to do so.

Nor, as *Crawford* illustrates, can one approach that interpretative task through a straightforward, acontextual parsing of words, though the parsing of words is the necessary starting point. If words were the end of the inquiry, the inherent ambiguity in the term “witnesses,” which can linguistically bear at least three meanings, would shut down the search for meaning at a dead end. The words can only be understood in light of reasonable assumptions about their *purpose*, understanding that term “purpose” to refer, not to the subjective intentions of any specific person or persons, but to the very point of using words in the specific context in which they are found.

Crawford thus perfectly illustrates the interpretative approach that Justice Scalia and Bryan Garner described in *Reading Law: The Interpretation of Legal Texts*:

⁴⁸ See, e.g., *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012).

⁴⁹ See, e.g., *Williams*, 567 U.S. at – (Thomas, J., concurring in the judgment).

The interpretive approach we endorse is that of the “fair reading”:
determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research. It also requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting – that is, the words that surround it in a specific utterance.⁵⁰

If one wanted to point to a case that applies this interpretative framework to a difficult question, *Crawford* – which goes into much more detail on the original meaning of the Confrontation Clause than I have suggested here – is the perfect exemplar.

Once the Confrontation Clause is understood to apply to all “testimonial” statements, because those statements make the declarants “witnesses” who must be “confronted,” it is a short step to the proposition that statements in laboratory reports made with the understanding that they would likely be used as evidence in a criminal prosecution are “testimonial” statements. The Court, in another opinion by Justice Scalia, took that short step in 2009 in *Melendez-Diaz v. Massachusetts*.⁵¹ This is a big problem for prosecutors. Dragging laboratory analysts into court

⁵⁰ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012).

⁵¹ 557 U.S. 305 (2009).

to testify at trials is a major imposition,⁵² and – with no slight at all intended at laboratory analysts – not all laboratory analysts will make good witnesses. Just think of Annie Dookhan.

This extension of *Crawford* to the realm of scientific evidence revealed some serious fault lines on the Court. *Crawford* was a 7-2 decision on the reasoning, with Chief Justice Rehnquist and Justice O'Connor concurring in the result because the Court could have decided the case without overruling *Roberts*; and the Court's immediately subsequent cases elaborating on the *Crawford* framework, also written by Justice Scalia, were near-unanimous.⁵³ *Melendez-Diaz*, however, was 5-4, with Justices Kennedy, Breyer, Alito, and Roberts dissenting. The dissenters tried to argue that laboratory analysts were not really the kind of "witnesses" that the Framers had in mind for confrontation,⁵⁴ but that is tough argument to sell. A person who reports on what a machine spat out bears testimony against a defendant just as much as does a person who claims to have seen the defendant sell drugs on the street. Surely an eighteenth-century statute prescribing that witnesses take oaths would apply to what the dissent calls "unconventional" witnesses if they appeared in court. To make the out-of-court character of the witness crucial resurrects the larger idea that only in-court testifiers are constitutional "witnesses," which, as we saw, is a linguistically possible position but one that is hard to square with the history and context of the Confrontation Clause. Perhaps recognizing this weakness, virtually all of the lengthy dissent in *Melendez-Diaz* was devoted to considerations of policy,

⁵² See *Bullcoming v. New Mexico*, 654 U.S. 647, 683-84 (Kennedy, J., dissenting).

⁵³ See *Davis v. Washington*, 547 U.S. 813. Justice Thomas concurred in the result in *Davis*, which involved statements made during a 9-1-1 call that everyone agreed were not "testimonial" because they were calls for help rather than attempts to provide evidence, but dissented from the result in the companion case of *Hammon v. Indiana* because the out-of-court statement in that case – a conversation with police in the declarant's home that the majority viewed as "testimonial" – lacked the formality or solemnity of a deposition or a custodial interrogation.

⁵⁴ See 557 U.S. at 330 ("the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses") (Kennedy, J., dissenting).

arguing that applying the Confrontation Clause to producers of scientific evidence will disrupt the trial process with little likely gain in accuracy. “Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process.”⁵⁵ James J. Kilpatrick could not have put it better. Where was Justice Scalia’s sympathy for the police?

To be sure, the dissent’s policy concern is understandable. Before the advent of scientific evidence such as spectroscopic analysis and blood tests, how would one prove that a drug seized was cocaine or that a defendant was drunk? One would put some police officer on the stand and ask them whether it looked (or tasted) like cocaine or whether the defendant looked (or smelled) drunk. As the trial judge noted in *Bullcoming v. New Mexico*⁵⁶: “when he started out in law practice, ‘there were no breath tests or blood tests. They just brought in the cop, and the cop said, “Yeah, he was drunk.” ’ ”⁵⁷ If the burden of introducing scientific evidence becomes too great, perhaps prosecutors will go back to the presumably less reliable (Annie Dookhan aside) old ways. This concern came to the fore in *Williams v. Illinois*, in which the four dissenters in *Melendez-Diaz* got Justice Thomas to vote with them because the statements in that case (a DNA report from a private laboratory) were not formalized enough to meet Justice Thomas’s criteria for a testimonial statement. As the plurality opinion put it: “If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable.”⁵⁸

⁵⁵ *Id.* at 342.

⁵⁶ 564 U.S. 647 (2011).

⁵⁷ *Id.* at 656 n.3.

⁵⁸ 567 U.S. at --.

These concerns had arisen in *Bullcoming*, with Justice Ginsburg writing the opinion for the majority which included Justice Scalia. Here the State of New Mexico did put on a live witness to explain a laboratory report (in this case a blood alcohol test), but the witness was not the person who actually wrote the statements in the report. (Where was that person? We do not know; he was “on uncompensated leave.”⁵⁹) The Court held that testimonial statements can only be admitted through the persons who actually made them. The four dissenters from *Melendez-Diaz* renewed their objections to applying the Confrontation Clause to statements involving scientific evidence. The dissent decried the majority’s position as “a hollow formality” and a rejection of “the concept that reliability is a legitimate concern,” claiming that “[t]he protections in the Confrontation Clause . . . are designed to ensure a fair trial with reliable evidence.”⁶⁰ I would expect that Justice Scalia would regard the charge of hollow formalism as high praise and a focus on reliability as the substitution of policy concerns for constitutional language. His fellow “conservative” justices (with apologies to Justice Breyer) obviously had in mind quite different decisionmaking criteria than did Justice Scalia.

Importantly, the dissent claimed that the Court’s abandonment of *Ohio v. Roberts* “seemed to have two underlying jurisprudential objectives. One was to delink the intricacies of hearsay law from a constitutional mandate; and the other was to allow the States, in their own courts and legislatures and without this Court’s supervision, to explore and develop sensible, specific evidentiary rules”⁶¹ Shades of the attitudinal model circa 1985! Isn’t it possible that Justice Scalia, in writing *Crawford*, had as his “jurisprudential objective[.]” getting the right

⁵⁹ 564 U.S. at 662.

⁶⁰ *Id.* at 677, 678.

⁶¹ *Id.* at 681.

interpretation of the Sixth Amendment rather than serving some policy goals? Justice Scalia surely thought so. In 2011, after Justice Scalia had been on the Court for 25 years, even his “conservative” colleagues did not always get it.

III. “So I Wanna Know, What’s the Name of the Game? Does It Mean Anything to You?”⁶²

Is *Crawford* a triumph for originalist methodology? The question is much more difficult than it seems at first glance. The answer depends, as a former president might say, on what “originalist” means.

All of the Court’s post-*Crawford* Confrontation Clause cases, as well as *Crawford* itself, have involved *state* criminal prosecutions. That means that *none* of those cases, including *Crawford*, has actually implicated the text of the Confrontation Clause as a matter of original meaning.

The Confrontation Clause, as with the rest of the Bill of Rights, does not apply to the states. The text, if any, that limits the criminal procedures of states is section one of the Fourteenth Amendment, which reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁶³ It is possible, I suppose, that this provision incorporates the precise text of the Confrontation Clause against the states, though that seems a very unlikely account of the language actually used. It is perhaps more possible that the

⁶² Abba, *The Name of the Game*, ABBA: THE ALBUM (Atlantic 1977).

⁶³ U.S. CONST. amend. XIV, § 1.

Privileges or Immunities Clause of the Fourteenth Amendment makes applicable to the states most or even all of the *principles* represented by the specific provisions in the Bill of Rights, though it is less clear whether that application extends to all violations of those principles or only to discriminatory violations of those principles. Finally, it is also possible that the text of the Fourteenth Amendment contains its own substantive requirements independent of the Bill of Rights, and the extent of any overlap between those two texts is therefore entirely contingent.

It is quite far from my task here, or anywhere else, to sort out the original meaning of section one of the Fourteenth Amendment. The only point here is that the original meaning of that provision, rather than the original meaning of the Confrontation Clause, needs to be the real focus of originalist analysis if one want to know how the Constitution limits state prosecutors' use of out-of-court statements. The dissenting justices in the post-*Crawford* world have a point. Application of the Confrontation Clause, as construed (let us assume for the moment correctly) by *Crawford*, has consequences when applied to state criminal prosecutions that are immeasurably greater than would be the consequences of a provision applicable only to the federal government. The same, of course, could be said of all of the other Bill of Rights provisions, from the Establishment Clause to the Takings Clause. In short, Justice Scalia might be completely right about the meaning of the Confrontation Clause, and the post-*Crawford* dissenters might be completely right about the absurdity of applying that meaning to state proceedings if no straightforward variant of the incorporation doctrine is correct as a matter of original meaning.

Of course, no Court in the foreseeable future is going to do away with the incorporation doctrine, even if that is the "correct" answer as a matter of original meaning. That is a brute fact. Given that fact, what to do with cases such as *Crawford*? Does one simply run with the original

meaning of the clause, even in a context in which that original meaning has no application as an original matter, and even when such (mis)application threatens to distort the original constitutional structure? Or does one invent a new meaning for the Confrontation Clause, in a kind of cy pres action, which best preserves the overall plan of the document, whatever that might mean apart from the document's actual text and regardless of how that new meaning feeds back into cases involving the federal government, to which the Confrontation Clause really does apply?

This is a subspecies of a large set of second-best problems in legal theory that might well have no solution. At least, I have never come up with a systematic solution to second-best problems, in this or any other context.⁶⁴ I am hardly the only person to notice the problem,⁶⁵ and this is not the place in which to engage in extensive discussion of such topics. All I will say here is that Justice Scalia, in deciding a case such as *Crawford*, was not really engaged in the enterprise of interpretation, originalist or otherwise. He was engaged in the enterprise of adjudication, which, as I detail at some length elsewhere,⁶⁶ is a quite different cognitive operation from interpretation. Interpretation is about ascertaining communicative meaning; adjudication is about resolving real-world disputes. The relationship, both logical and empirical, between originalist interpretation and originalist adjudication remains an object that cries out for more study.

⁶⁴ For some tentative explorations of second-best problems in connection with proof, see GARY LAWSON, *EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS* 133-46 (2017).

⁶⁵ See, e.g., Michael Lewyn, *When Scalia Wasn't Such an Originalist*, 32 *TOURO L. REV.* 747 (2016); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 *CORNELL L. REV.* 1 (1994).

⁶⁶ See Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 *NOTRE DAME L. REV.* 2143 (2017).

I have elsewhere explored how those two different enterprises played out in Justice Scalia's judicial writings.⁶⁷ Suffice it to say that Justice Scalia was interested primarily in adjudication, not interpretation. "Virtually all of Justice Scalia's writings have been directed towards articulating a theory of adjudication, not a theory of interpretation. He was instructing judges, and indirectly lawyers, about how to decide cases. Accordingly, his instructions on how to construe texts were not really designed to interpret those texts, in the sense of finding their meaning as accurately as possible, but were instead designed to provide instructions on how to decide cases."⁶⁸ For Justice Scalia, interpretation was the handmaiden of adjudication, and he generally justified his interpretative moves by reference to adjudicatory norms and goals rather than epistemological norms. In *Reading Law*, Justice Scalia and Bryan Garner drew their definition of "interpretation" from a 1900 legal encyclopedia: "the ascertainment of the thought or meaning of the author of, or the parties to, *a legal document*, as expressed therein, according to the rules of language *and subject to the rules of law*."⁶⁹ Thus, "Justice Scalia was not really trying to set forth a methodology for interpreting texts, or even for ascertaining the meaning of distinctively legal texts. He was setting forth a methodology for resolving legal disputes in which texts are invoked by one or the other party. Interpretative meaning plays a role in that methodology, but the role is far from exclusive, and it is often decidedly secondary."⁷⁰

⁶⁷ *See id.*

⁶⁸ *Id.* at 2158.

⁶⁹ H.T. Tiffany, *Interpretation and Construction*, in 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1, 2 (David S. Garland & Lucius P. McGehee eds. 2d ed., 1900) (emphasis added) (quoted in SCALIA & GARNER, *supra* note 1, at 53).

⁷⁰ Lawson, *supra* note 66, at 2161.

In my own work, I try to stick to interpretation rather than adjudication,⁷¹ but that is a story for another time.

From within Justice Scalia's framework, it is not at all obvious how to approach a problem such as *Crawford*, in which the "adjudicatory meaning" of the Fourteenth Amendment is taken to prescribe looking to the "interpretative meaning" of the Sixth Amendment and then to apply that interpretative meaning in adjudicatory contexts to which it might not have been suited. Would the Sixth Amendment have been written and ratified in its current form if, in 1791, it was intended to apply to states as well as to the federal government? The world may never know.

Crawford was, I think, a genuine triumph of originalist interpretation. Whether it was a triumph of originalist adjudication depends on the answers to some very important questions that cannot be derived from originalism as a theory of interpretation but that can come only from a normative theory of judging – and indeed from a normative theory that prescribes how to navigate the world of second-best. Put crudely: If one is trying to decide cases in accordance with the original meaning of the Constitution, and not just the original meaning of one small part of that document taken out of context, maybe Michael Crawford, and James Hicks for that matter, really belonged in jail.

As is so often the case, Justice Scalia's writings present us with issues in an unusually clear and stark fashion, even if they do not always lead us straight to the answers.

⁷¹ See, e.g., Gary Lawson, *Reflections of an Empirical Reader (or, Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457 (2016); Gary Lawson, *Originalism without Obligation*, 93 B.U. L. REV. 1309 (2013).