

WHEN ORIGINALISM ATTACKS:  
HOW JUSTICE SCALIA’S RESORT TO  
ORIGINAL EXPECTED APPLICATION IN  
*CRAWFORD V. WASHINGTON* CAME BACK TO  
BITE HIM IN *MICHIGAN V. BRYANT*

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I. INTRODUCTION

Two recent dustups illustrate the hazards attendant to Justice Scalia’s habit of anchoring constitutional meaning to antiquity and superficiality. First, there was his insistence that the Equal Protection Clause does not protect women.<sup>1</sup> That assertion likely resulted from a hopelessly shallow

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1. *Legally Speaking: The Originalist*, CAL. LAW. (Jan. 2011), <http://www.callawyer.com/story.cfm?eid=913358&evid=1> (last visited July 8, 2011). The following is an excerpt of an interview with Justice Scalia:

[Question:] In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don’t think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we’ve gone off in error by applying the 14th Amendment to both?

[Answer:] Yes, yes. Sorry to tell you that . . . . But, you know, if indeed the current society has come to different views, that’s fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only

semantic understanding of the clause—one that ignored underlying principles altogether—and his familiar insistence that the words of the Constitution only apply to circumstances now as the words applied to circumstances that existed centuries ago.<sup>2</sup> This trend continued in *Crawford v. Washington* when Justice Scalia, writing for the majority, held that because the Sixth Amendment's Confrontation Clause was only satisfied by formal cross-examination in 1791,<sup>3</sup> cross-examination alone can satisfy the Confrontation Clause's strictures today.<sup>4</sup> Then came Justice Scalia's dissent in *Michigan v. Bryant*,<sup>5</sup> in which he had something of a judicial nervous breakdown.

Faced with the rigidity of the holding in *Crawford* and facts begging for some flexibility, Justice Sotomayor wrote the opinion for the majority in *Bryant*.<sup>6</sup> Justice Scalia correctly characterized the opinion as an embarrassment, but he failed to appreciate his own complicity in spawning it.<sup>7</sup> When Justice Scalia's interpretive anxieties manifest in absurdly narrow and shallow rulemaking, the Court in later cases can do little but undertake intellectual contortionism, trying to unmoor itself from the head-scratching outcomes that would otherwise result when applying

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issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. You don't like the death penalty anymore, that's fine. You want a right to abortion? There's nothing in the Constitution about that. But that doesn't mean you cannot prohibit it. Persuade your fellow citizens it's a good idea and pass a law. That's what democracy is all about. It's not about nine superannuated judges who have been there too long, imposing these demands on society.

*Id.* (alteration in original).

2. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) (explaining Justice Scalia "insists that the concepts and principles underlying those words [of the Constitution] must be *applied* in the same way that they would have been applied when they were adopted.").

3. The first ten amendments to the U.S. Constitution became effective in 1791.

4. *Crawford v. Washington*, 541 U.S. 36, 54–56 (2004).

5. *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

6. *See id.* at 1150 (majority opinion) (detailing how the case involved a dying declarant who identified his killer by name and address in a statement made while not under cross-examination).

7. *See generally id.* at 1168 (Scalia, J., dissenting) (asserting the majority's opinion was "transparently false" and distorted the prudential history of the Confrontation Clause).

Justice Scalia's constrictive rules.

For purposes of this Article, the Author will abide his preference for Professor Jack Balkin's interpretive method of text and principle.<sup>8</sup> To begin, Professor Balkin takes the refreshing posture that not all in the interpretive universe must be an *ex adverso* contest between stilted strict construction and flighty organic fancy.<sup>9</sup> Instead, Professor Balkin endorses textualism to the extent that it demands fidelity to the written commands of the Constitution;<sup>10</sup> without this fidelity, individuals would find themselves in an unprincipled interpretive free-for-all. Professor Balkin also insists on fidelity to the underlying principles of the text.<sup>11</sup> What is explicit from the text is often abstract and general; thus, principles supply most of what is implicit in the text.<sup>12</sup>

One would think adherence to text and principle would be the natural inclination of any faithful interpreter. But Justice Scalia cannot bring himself to honor either the text or its underlying principles. With regard to text, Justice Scalia anchors himself to the past and replaces broadly worded language by embedding the Court's precedents with "original expected application."<sup>13</sup> With regard to underlying principles, Justice Scalia anchors himself semantically to superficial meaning, insisting that although individuals may probe what the Constitution's words meant when they were drafted, the purposes that animated constitutional rules may not be probed.<sup>14</sup>

Part II of this Article discusses Professor Balkin's text and principle method of interpretation and illustrates how the method should work in practice. Part III discusses Justice Scalia's interpretive intransigence; like other conservatives, he seems to suffer from anxieties about historical progress and idealistic depth that keep him anchored to narrow interpretations in both temporal and semantic dimensions. Part IV discusses how this anchoring impulse led Justice Scalia to propound a rule

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8. See generally Balkin, *supra* note 2.

9. See *id.* at 293 (noting the choice between one or the other is a false dichotomy).

10. See *id.* at 293, 295.

11. See *id.*

12. See *id.* at 304.

13. See *id.* at 295–97 (explaining this approach embraces the text as "people living at the time the text was adopted would have expected it would be applied").

14. See *infra* Part III (discussing Justice Scalia's interpretive approach).

in *Crawford*<sup>15</sup> that ignored the animating principles underlying the Confrontation Clause and any possibility of temporal progress. This interpretive approach led to the intellectual nightmare that is *Bryant*.<sup>16</sup> The lesson here is clear: Justice Scalia's brand of originalism and textualism does not work. Judged against contemporary jurisprudential standards, it produces absurd doctrinal mutations—like, for example, assertions that “the Equal Protection Clause does not protect women”<sup>17</sup> and “the Framers said confront, but they actually meant cross-examine.”<sup>18</sup> When untenable rules supply the Court's judicial inputs, judicial outputs will be tortured and dishonest. More specifically, hopelessly narrow rules invite desperate attempts to escape them. In a sense, then, the jurisprudential ink bombs created by conservative anchoring tend to detonate not in the opinions wherein they are embedded, but in the later cases where resulting rules must be misapplied in order to avoid the absurd results obtained if they were applied properly.

## II. TEXT AND PRINCIPLE

Professor Balkin describes his interpretive method this way:

The task of interpretation is to look to original meaning and underlying principle and decide how best to apply them in current circumstances. I call this the method of *text and principle*. This approach . . . is faithful to the original meaning of the constitutional text and the purposes of those who adopted it. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles. Although the constitutional text and principles do not change without subsequent amendment, their application and implementation can. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees.<sup>19</sup>

Professor Balkin explains how to apply interpretive methodology in a

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15. *Crawford v. Washington*, 541 U.S. 36 (2004).

16. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

17. *Cf. CAL. LAW.*, *supra* note 1 (reprinting Justice Scalia's statement that it was error to apply the Fourteenth Amendment protections to women).

18. *Cf. Crawford*, 541 U.S. at 53–56 (holding Confrontation Clause safeguards satisfied through cross-examination alone).

19. Balkin, *supra* note 2, at 293–94.

way that is faithful to text and underlying principle with the following:

We look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than those who had the authority to create the text sought to refer to. We look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace. If we read the text to presume or embrace other principles, then we may be engaged in a play on words and we will not be faithful to the Constitution's purposes. Just as we look to the public meaning of words of the text at the time of enactment, we discover underlying constitutional principles by looking to the events leading up to the enactment of the constitutional text and roughly contemporaneous with it. Sometimes the text refers to terms of art or uses figurative or non-literal language. For example, the Copyright Clause in Article I, Section 8 speaks of "writings," which is a non-literal use. It refers to more than written marks on a page but also includes printing and (probably) sculpture, motion pictures, and other media of artistic and scientific communication. The term "due process of law" in the Fifth and Fourteenth Amendments is a term of art; it has a specialized legal meaning over and above the concatenation of the words in the phrase. In cases like these we must try to figure out what principles underlie the term of art or the use of figurative or non-literal language.

Underlying principles are necessary to constitutional interpretation when we face a relatively abstract constitutional command rather than language that offers a fairly concrete rule, like the requirement that there are two houses of Congress or that the President must be 35 years of age. When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement. But where the text is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it. Because the text points to general and abstract concepts, these underlying principles will usually also be general and abstract. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations. Nevertheless recourse to underlying principles limits the direction and application of the text and therefore is essential to fidelity to the

Constitution.<sup>20</sup>

Professor Balkin's method seems to offer the hope of an intellectually disciplined and honest approach that appeals to both textualists who value the methodology's fidelity to text and original meaning<sup>21</sup> and living constitutionalists who value the novel applications of underlying principles that might occur over time.<sup>22</sup> Professor Balkin explains,

A . . . larger purpose of my argument is to demonstrate why the debate between originalism and living constitutionalism rests on a false dichotomy. Originalists generally assume that if we do not apply the constitutional text in the way it was originally understood at the time of its adoption we are not following what the words mean and so will not be faithful to the Constitution as law. But they have tended to conflate two different ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is. Indeed, many originalists who claim to be interested only in original meaning, like Justice Antonin Scalia, have encouraged this conflation of original meaning and original expected application in their practices of argument. Living constitutionalists too have mostly accepted this conflation without question. Hence they have assumed that the constitutional text and the principles it was designed to enact cannot account for some of the most valuable aspects of our constitutional tradition. They object to being bound by the dead hand of the past. They fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation's future. By accepting mistaken premises about interpretation—premises that they share with many originalists—living constitutionalists have unnecessarily left themselves open to the charge that they are not really serious about being faithful to the Constitution's text, history and structure.

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20. *Id.* at 304–05 (citations omitted).

21. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 23–25 (Amy Gutmann ed., 1997) (“[W]hile the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”).

22. *See* Balkin, *supra* note 2, at 293 (“[Living constitutionalists] object to being bound by the dead hand of the past. They fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation's future.”).

The choice between original meaning and living constitutionalism, however, is a false choice. I reject the assumption that fidelity to the text means fidelity to original expected application.<sup>23</sup>

Justice Scalia's reticence to adopt the method of text and principle will be discussed in Part III, although a mundane illustration of text and principle, and Justice Scalia's disposition toward it, might be helpful here. Imagine a young mother writing a list of life's rules for her two boys: Adam, age four; and Ben, age two. She selects each rule with purpose, good humor, and love. She hopes the rules she writes down, which she intends to laminate and adhere to the family's refrigerator for many years to come, will help her boys grow into fine young men. Because Adam recently tried to hit his younger brother Ben when the two tussled, she includes the following: "Rule 7. Don't hit your little brother, even when he hits you first."

As the children grow older, they come to revere the laminated rules, which gain more aura of sacred text with every tatter and stain the laminate endures. The kids come to call them "Mom's Constitution." Fifteen years pass, and now what used to be a family of four has become a family of six: two parents and four boys. One day the youngest boy, Timmy, age three, gets a bit too feisty while teasing the second youngest, John, age six, and pokes John in the eye. John is angry and wants revenge. The next morning, knowing Timmy is too young to know better, John tells Timmy to roll in a patch of poison ivy. Timmy does, and he gets a terrible rash.

Mom grounds John for a week for violating Rule 7. Is she right? If text and principle are applied, the answer is probably yes. The reason underlying the rule seems fairly obvious: one sibling ought not take advantage of another sibling's youth, diminutive dimensions, or weakness to cause that sibling, or any other child, injury. With this animating principle in mind, it seems an absurdly narrow interpretation of the rule—semantic mischief—that would render John guiltless.

To identify the underlying principle, one must ask why a rule exists. Because principles range from specific to abstract, the first answer will likely be superficial. Therefore, one must keep probing, asking why or so what until reaching not just any purpose served by the rule, but the animating purpose that drove the drafter or drafters of the rule to create it. Justice Scalia might characterize this exercise as a method-free guessing

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23. *Id.* at 292–93 (citations omitted).

game.<sup>24</sup> But Justice Scalia's admonitions about interpretive guessing only hold water when applied to questions about what a drafter meant, not why she drafted the rule. Guessing what drafters meant when they wrote text invites mischief; asking why they wrote it merely provides context.

Common sense often supplies the reasons for the existence of a rule. For example, one would ask, why would a parent write Rule 7? Common sense provides that a parent would write such a rule because an older child should not hit a younger child. Why? Because an older child is generally bigger and smarter. So what? Well, a bigger, older, and smarter child is in a position to take advantage of a younger and smaller child's physical and mental disadvantages. So what? Well, no one wants a younger child in a position where he does not have the mental or physical ability to defend himself; it is dangerous and unfair. Again, by asking why and so what until getting to the drafter's motivation, the animating purpose is uncovered.

Note, the rule might have other benefits too. The rule might teach older kids responsibility, loyalty, and citizenship. Those, however, would be collateral principles underlying the rule, not the animating or motivating purpose for writing the rule.

This approach has its limits. One cannot keep asking why or so what until reaching an absurd level of abstraction. After all, almost any rule could be probed until it leads to some universal truth such as, "We should love each other and ourselves." Ultimately, for example, this is a principle served by Rule 7—it promotes love. While that may be true, it can hardly be said the drafter of the rule had that principle in mind when drafting the rule. One looks to uncover the animating purpose rather than all purposes served by a rule's promulgation.

Were Justice Scalia to interpret Rule 7, he would first anchor the rule temporally by looking to its original expected application, not necessarily its intended meaning.<sup>25</sup> Since Adam was the only older brother and Ben was the only younger brother when the rule was drafted, Justice Scalia would achieve simplicity by insisting the rule only protects Ben. By

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24. Scalia, *supra* note 21, at 41–47 (criticizing the Living Constitution approach because of its flexibility and lack of guiding principles).

25. *See id.* at 37–38 (explaining Justice Scalia looks for "the original meaning of the text, not what the original draftsmen intended"). "[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning . . . and *current* meaning." *Id.* at 38.

employing this approach, he would essentially excise the words “younger brother” and replace them with “Ben.”

To semantically moor the rule, Justice Scalia would ignore the rule’s underlying reasons; it would not matter why it is wrong to hit or why it is wrong to target someone younger.<sup>26</sup> Justice Scalia would simply declare with disarming certitude, “Sorry, nobody ever thought Rule 7 would apply to trickery or poison ivy. You can always amend the rule if that’s what you mean.”<sup>27</sup> The problem with such dismissiveness, of course, is that a rule should not need to be amended every time new circumstances arise; Rule 7 really does apply to what John did to Timmy if the animating—one might even say obvious—purpose is honored.

Anchoring oneself to hidebound books in an intellectual monastery where no one ever asks why seems like the habit of an individual who is ill-inclined to trust the fates, the possibilities of discovery, or the goodness of humanity as it has evolved under God’s hand. The question is whether one who cannot begin to trust these things is suited to read to the rest of us from a document written by men who surely did.

### III. JUSTICE SCALIA’S TEMPORAL AND SEMANTIC ANCHORING

Justice Scalia knows how to apply text and principle when he wants to. To illustrate, I turn to Justice Scalia’s book, *A Matter of Interpretation: Federal Courts and the Law*.<sup>28</sup> In that book, Justice Scalia discusses a case from 1993, *Smith v. United States*:

The statute at issue provided for an increased jail term if, “during and in relation to . . . [a] drug trafficking crime,” the defendant “uses . . . a firearm.” The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had “used a firearm during and in

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26. See *id.* at 29–30, 37–38 (explaining Justice Scalia thinks the original meaning of the text is applicable, rather than the reason the rule was implemented or what its current meaning is).

27. See, e.g., CAL. LAW., *supra* note 1 (“You don’t need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. . . . Persuade your fellow citizens it’s a good idea and pass a law. That’s what democracy is all about. It’s not about nine superannuated judges who have been there too long, imposing these demands on society.”).

28. Scalia, *supra* note 21.

relation to a drug trafficking crime.”<sup>29</sup>

Justice Scalia explained,

[A] proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase “uses a gun” fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, “Do you use a cane?” you are not inquiring whether he has hung his grandfather’s antique cane as a decoration in the hallway.<sup>30</sup>

Justice Scalia also stated,

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.<sup>31</sup>

This distinction accords with Justice Scalia’s observation that “[i]n textual interpretation, *context is everything*, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”<sup>32</sup> With this nod to context in mind, one might say, although Justice Scalia calls himself a “good textualist,” he more precisely aspires to be a “reasonable contextualist.”<sup>33</sup>

For example, Justice Scalia would probably agree the *Smith* Court considered text, but not context.<sup>34</sup> However, an adequate definition of “context,” in the sense Justice Scalia uses it, is difficult to provide. “Context” is generally defined as “the set of circumstances or facts that surround a particular event, situation, etc.”<sup>35</sup> The breadth of this definition

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29. *Id.* at 23 (alteration in original) (discussing *Smith v. United States*, 508 U.S. 223 (1993)).

30. *Id.* at 24.

31. *Id.* at 23.

32. *Id.* at 37 (emphasis added).

33. *See id.* at 24.

34. *See Smith*, 508 U.S. at 240 (applying the “plain language” meaning of the word “use” in the statute, which encompassed use in barter and use as a weapon); *see also supra* text accompanying note 33.

35. WEBSTER’S DICTIONARY 439 (2d ed. 2001).

is helpful in illustrating how deep context can be. But a definition this broad also poses problems:

You will find it frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to "the intent of the legislature." This principle, in one form or another, goes back at least as far as Blackstone. Unfortunately, it does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of a statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the objective of our inquiry? In selecting the words of the statute, the legislature might have misspoken. Why not permit that to be demonstrated from the floor debates? Or indeed, why not accept, as proper material for the court to consider, later explanations by the legislators—a sworn affidavit signed by the majority of each house, for example, as to what they *really* meant?<sup>36</sup>

The definition of "context" above tempts carelessness since questions about what the drafter meant to convey or how she meant to express it must be avoided. Thus, it is Justice Scalia's example, rather than any definition, that gives "context" its most helpful meaning.

Consider this general rule: do not use a weapon in the commission of a crime. In *Smith*, the Court focused only on the text in holding the defendant violated the rule.<sup>37</sup> However, as Justice Scalia seems to insist, this interpretation misses the context.<sup>38</sup> What Justice Scalia likely means is not that the Court missed what the drafters thought they were saying or trying to say, but that the Court misinterpreted what the drafters actually did say by failing to take account of why they said it. When analyzing, individuals are not to speculate what the drafter meant by the written text, but analysis may—indeed it must—include asking why the drafter wrote it to give what the drafter wrote its proper context.

Law professors are fond of asking why, and asking so what might be useful here too. Notice the question is still not what the drafter meant to say; instead, these questions are merely probing for context. Justice Scalia's problem with the Court in *Smith*, although he did not state the issue so explicitly, was that the Court never asked why or so what.<sup>39</sup> Had

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36. Scalia, *supra* note 21, at 16 (citation omitted).

37. *Smith*, 508 U.S. at 240–41.

38. See Scalia, *supra* note 21, at 23–24.

39. *Smith*, 508 U.S. at 242–46 (Scalia, J., dissenting) (providing examples of

the Court asked those questions and arrived at satisfactory answers, it might have understood the underlying principles of the rule, which in turn might have produced a reasonable interpretation.

As explained above, common sense usually helps. So, to begin, why did the drafters of the rule write a rule that prohibited use of a weapon in the commission of a crime? Because a firearm is a dangerous weapon and crime often involves dangerous situations. So what? Well, if the perpetrator has a dangerous weapon, and he is in a dangerous situation, it is more likely somebody will be shot, injured, or killed.

Given this context, Justice Scalia correctly interpreted the statute such that it was only violated if the defendant used a firearm in a way that made it more likely for somebody to be shot, injured, or killed.<sup>40</sup> The Court's holding that the defendant violated the statute without using a firearm in a way that made it more likely for somebody to get shot, injured, or killed reflected an interpretation of the rule that lacked deep context, or worse, any context or principles at all.<sup>41</sup> The Court assumed the rule existed for its own sake.<sup>42</sup> Justice Scalia was right: this is silly.<sup>43</sup>

If Justice Scalia knows how to apply text and principle, the question is why does he fail to do so with regard to constitutional interpretation? Could it be that textualists tend to be socially conservative,<sup>44</sup> which means

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the majority's failure "to grasp the distinction between how a word *can* be used and how it *ordinarily is* used").

40. *See id.* at 242.

41. *Id.* at 241 (majority opinion) (holding defendant guilty not for using the gun as a weapon, but to barter).

42. *See id.* at 235 (noting Congress separated out the sections of this law for a reason and the Court should apply it as such).

43. *See id.* at 242–43 (Scalia, J., dissenting) (explaining the Court misinterprets "normal" and "ordinary" application of the word in its analysis).

44. *See* Simon Lazarus, *More Polarizing Than Rehnquist*, THE AMERICAN PROSPECT (May 14, 2007), [http://www.prospect.org/cs/articles?article=more\\_polarizing\\_than\\_rehnquist](http://www.prospect.org/cs/articles?article=more_polarizing_than_rehnquist). The article states:

In the evolving record of oral arguments and decisions, evidence is sparse that the justices are muting their differences. Most significantly, there is little evidence that Roberts has tried particularly hard to lead the way toward any such synthesis. On the contrary, at least in the big, controversial cases, the new Court is, if anything, more polarized than Rehnquist's was. News stories on decisions have cast the Court as split between robotic "conservative" and "liberal" blocs, with Anthony Kennedy the swing justice in the middle. In these reports, Roberts does not lead; he is twinned with his fellow Bush appointee Samuel Alito as half of a lockstep duo that has reinforced hard-line

textualists are usually looking for ways not to find fundamental individual rights<sup>45</sup> and ways not to enforce notions of nondiscrimination.<sup>46</sup> These aversions would make probing for underlying principles a dubious exercise. A narrower incarnation of textualism would appeal to social conservatives because it ties the country more closely to the past when “traditional values” had a better foothold. Social conservatives would likely also favor narrow textualism since it provides more resistance to freewheeling notions of equality and personal autonomy<sup>47</sup>—or what ideologues might call “hedonism.”<sup>48</sup> Modern political conservatism, in the form of the Republican Party, is closely linked to this form of social and religious dogmatism:

In 2005 42 percent of Americans described themselves to survey takers as born-again, only slightly below the readings in 2001 and 2002. George W. Bush reassured the faithful that summer and autumn by endorsing the teaching of “intelligent design”—implicit godly design, to be sure—alongside evolution in U.S. schools, and by choosing nominees who were conservatives on the abortion issue to fill two U.S. Supreme Court vacancies. Because the retiring Sandra Day O’Connor had been a swing vote in earlier high-court rulings, her replacement

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conservatives Antonin Scalia and Clarence Thomas.

Of course, because the consistently right-leaning Alito has replaced the pragmatic centrist Sandra Day O’Connor, the new Court will be, as all commentators observe, “conservative.” But what sort of conservative Court will it be, and what sort of leadership will the new chief justice provide? Will he be a true judicial conservative, practicing the restraint that he and other conservative leaders have long preached? Or will he solidify a bloc transparently driven by political ideology, constantly pushing doctrinal envelopes to overturn or undermine liberal laws and policies, mirroring the “liberal activism” ritually decried by conservatives?

*Id.*

45. Cf., e.g., MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* 154–79 (2007) (discussing the right-wing movement’s attack on court decisions such as *Lawrence v. Texas* and *Roe v. Wade* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973))).

46. See, e.g., Joey Garrison, *Conservatives Open Playbook to Defeat Nondiscrimination Bill*, THE CITY PAPER (Jan. 23, 2011), <http://nashvillecitypaper.com/content/city-news/conservatives-open-playbook-defeat-nondiscrimination-bill>.

47. See, e.g., Balkin, *supra* note 2, at 291–92 (detailing how strict construction and textualists do not recognize the right of privacy and instead claim it is “made up out of whole cloth”).

48. WEBSTER’S DICTIONARY 886 (2d ed. 2001) (“Hedonism: the doctrine that pleasure or happiness is the highest good.”).

was expected to be decisive. The president also reassured the faithful by renewing his promise to veto any legislation to liberalize stem-cell research, its lopsided public support notwithstanding.<sup>49</sup>

Conservatives' political, religious, and social proclivities cannot be extricated from their own—and especially Justice Scalia's—disdain for “substantive due process”:

My favorite example of a departure from text—and certainly the departure that has enabled judges to do more freewheeling law-making than any other—pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments to the United States Constitution . . . . It has been interpreted to prevent the government from taking away certain liberties *beyond* those, such as freedom of speech and of religion, that are specifically named in the Constitution. (The first Supreme Court case to use the Due Process Clause in this way was, by the way, *Dred Scott*—not a desirable parentage.)<sup>50</sup>

The Author believes that rigid conservatives' disdain for liberal sexual mores, including such practices as sodomy, contraception, and reproductive choice-making, compels their animosity for the constitutional doctrine affording constitutional protection to those very practices. Conservatism is contemporarily understood as a political and social philosophy that promotes the maintenance of traditional institutions and practices, and opposes radical change.<sup>51</sup> The modern use of the term is commonly traced to the works of Edmund Burke, in which Burke reacted to what he perceived as the excesses of the French Revolution.<sup>52</sup> At its most essential, conservatism opposes change that is justified by idealism or abstract ideas, and not rooted in existing practices.<sup>53</sup>

This is a helpful explanation of conservatism, as it identifies some of the key conservative objectives previously mentioned—maintenance of the current order, slowing or stopping change, establishing order, and imposing

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49. KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* 353 (2006) (citations omitted).

50. Scalia, *supra* note 21, at 24.

51. IAIN MCLEAN & ALISTAIR MCMILLAN, *THE CONCISE OXFORD DICTIONARY OF POLITICS* 112–13 (3d ed., 2009); *BRITANNICA CONCISE ENCYCLOPEDIA* 453 (2006).

52. *BRITANNICA CONCISE ENCYCLOPEDIA*, *supra* note 51, at 297.

53. MCLEAN & MCMILLAN, *supra* note 51.

authority.<sup>54</sup> Furthermore, it also prescribes the temporal preferences of conservatives—some want to preserve current institutions and traditions, while some want to revisit the past—and describes the psychological depth of conservatism: a philosophy, a worldview, and an attitude.<sup>55</sup> Note that conservatism has both temporal and spatial properties. In the temporal sense, conservatives value past or present; they view the passage of time as portending danger and decay. In the spatial sense, the more distant an idea or attitude is from accepted traditions and norms, the more suspicious conservatives become. To simplify, conservatives view that which is closer to them as good and that which is farther from them as bad, both in time and in thought.

While this is a helpful description of conservatism, it does not adequately describe the individual conservative. The description only reveals what the conservative believes, not who the conservative is. One scientific study revealed, “on average, conservatives show more structured and persistent cognitive styles, whereas liberals are more responsive to informational complexity, ambiguity and novelty.”<sup>56</sup> Whether one calls this a bent worldview or attitude, this study suggests that conservatives and liberals actually think differently. And again, it is easy to see both temporal and spatial distinctions. In the temporal sense, the key characteristic enumerated above is novelty, which means newness.<sup>57</sup> A conservative is less likely to view with favor that which is newer in time—or presumably worse yet, awaiting in the future—while a liberal values the passage of time as positive.<sup>58</sup> In the spatial sense, conservatives prefer informational simplicity and certainty—closeness or likeness in thought—while liberals value complexity and ambiguity—ideas or possibilities distant from those already known or accepted.<sup>59</sup>

If there is an emotion seemingly best associated with preference for rigid structures of command and authority, resistance to change, complexity, ambiguity, promotion of traditionalism, stability, and

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54. See *supra* notes 51–53 and accompanying text.

55. See *id.*

56. David M. Amodio et al., *Neurocognitive Correlates of Liberalism and Conservatism*, 10 NAT. NEUROSCIENCE 1246, 1246 (2007).

57. *Id.*

58. *Cf. id.* at 1247 (concluding stronger conservatism is associated with less neurocognitive sensitivity to mismatches between one’s habitual response tendency and a response required by the current situation).

59. *Cf. id.* at 1246 (noting conservatives prefer order and structure compared to liberals who are more open to new experiences).

continuity, it is anxiety. In the article *Dispositional Anxiety and Risk-Avoidant Decision-Making*, Maner and colleagues link risk-avoidant decision-making with anxiety based on associations with psychological responses to threats and pessimistic appraisals of future events.<sup>60</sup>

Notice that like conservative philosophy and thought, anxiety has both temporal and spatial properties. Temporal anxiety is marked by aversion to new experience and pessimism about future outcomes; spatial anxiety is marked by decision-making processes geared toward avoiding risk.<sup>61</sup> Put another way, anxiety produces impulses to avoid moving in time or space. Intellectually, this would mean anxiety creates aversion to ideas new in time or different in nature—far from now or far from accepted.

It seems evident, then, that a conservative judge whose brain simply works this way will undertake the chore of textual interpretation from an entirely different place, emotionally and cognitively, than a more liberal judge.<sup>62</sup> This may go a long way in explaining why judges like Justice Scalia, although they know how to apply text and principle when interpreting banal codes like the gun law at issue in *Smith*, balk when it comes to interpreting the much more idealistically audacious Constitution of the United States.<sup>63</sup>

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60. Jon K. Maner et al., *Dispositional Anxiety and Risk-Avoidant Decision-Making*, 42 PERSONALITY AND INDIVIDUAL DIFFERENCES 665, 666 (2007), available at <http://www.sciencedirect.com/science/article/pii/S019188690600328X> (citations omitted).

61. *See id.*

62. *See supra* notes 56–59 and accompanying text.

63. Compare *Smith v. United States*, 508 U.S. 223, 241–47 (1993) (Scalia, J., dissenting) (using more than the literal meaning of the words to interpret the statute), with *Crawford v. Washington*, 541 U.S. 36, 53–56, 68–69 (2004) (holding the Sixth Amendment requires an opportunity for cross-examination even though such wording is not in the Confrontation Clause). I note here a possible point of contention that warrants further inquiry in future scholarship. Professor Balkin says Justice Scalia “also agrees that the original meaning of the text should be read in light of its underlying principles.” Balkin, *supra* note 2, at 296. Although Justice Scalia might pay lip service to underlying principles, it seems unlikely he would apply them in any meaningful way in constitutional, rather than statutory, interpretation. In explaining Justice Scalia’s originalist approach in the Second Amendment case, *District of Columbia v. Heller*, Professor Jamal Greene wrote:

So fastidious was Justice Scalia’s devotion to the legal authority of the original meaning of [the Second Amendment’s operative clause] that he was unmoved by his own concession that the “prefatory” clause—“a well-regulated militia, being necessary to the security of a free state”—announces that the Amendment’s original purpose was military related. This preference for

For example, take the Equal Protection Clause, which provides that no state shall “deny to any *person* within its jurisdiction the equal protection of the laws.”<sup>64</sup> The issue in *United States v. Virginia (VMI)* was whether equal protection principles required Virginia Military Institute to change its male-only college admission policy.<sup>65</sup> This case is likely the culprit behind Justice Scalia’s assertion that the Equal Protection Clause does not apply to women.<sup>66</sup>

In *VMI*, Justice Ginsburg and the majority held the Equal Protection Clause applies to women<sup>67</sup> and that Virginia violated the Equal Protection Clause because Virginia Military Institute excluded otherwise qualified female applicants and sent them to another institute.<sup>68</sup> If his statement quoted in the *California Lawyer* is accurate, Justice Scalia would have held the Equal Protection Clause does not apply to gender at all.<sup>69</sup>

Justice Ginsburg, writing for the majority, stated,

Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.<sup>70</sup>

This statement illuminates the more liberal, living constitutionalist view. Justice Ginsburg’s view must be that the Equal Protection Clause evolved from a command that states are not to abuse persons within their jurisdiction into a command that states affirmatively provide an “equal

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meaning over purpose is consistent with Justice Scalia’s announced devotion to original meaning over original intent.

Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325, 335 (2009) (citing *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008)).

64. U.S. CONST. amend. XIV (emphasis added).

65. *United States v. Virginia*, 518 U.S. 515, 519 (1996).

66. *See id.* at 566–603 (Scalia, J., dissenting) (criticizing the majority opinion, which held the policy of excluding admittance to women at Virginia Military Institute violated the Equal Protection Clause). To the extent Justice Scalia overreacted to the *VMI* case, his outburst is a reminder that “bad facts make bad law.” *See Haig v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting).

67. *See Virginia*, 518 U.S. at 532 (discussing the strides taken since gender equality was recognized in *Reed v. Reed* (citing *Reed v. Reed*, 404 U.S. 71 (1971))).

68. *See id.* at 558.

69. *See CAL. LAW.*, *supra* note 1 and accompanying text.

70. *Virginia*, 518 U.S. at 532 (citing *Reed*, 404 U.S. 71 (1971)).

opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”<sup>71</sup>

Thinkers like Ronald Dworkin tend to prefer “top-down” constitutional analyses, seeking out universal egalitarian principles and interpreting text in a way that serves those principles without strict fidelity to text or historical context.<sup>72</sup> The problem with this thinking, as reflected in Justice Ginsburg’s position, is that it can reach a point where a connection to the text of the Constitution seems to no longer exist; it appears she simply penciled out “protection” and penciled in “treatment” or “opportunity.”<sup>73</sup> *VMI* thus seems to be the kind of liberal, tweed-and-sandal-wearing interpretation of constitutional text that Justice Scalia has some reason to mock. But those who purport to be textualists come similarly unmoored when text and context provide answers at odds with their own views.

The drafters of the Fourteenth Amendment likely chose the word “protection” because they were responding to the “Black Codes” of the post-Civil War era and the harm those codes inflicted on their target—African-Americans who were former slaves.<sup>74</sup>

After the war most southern states passed so-called Black Codes in 1865 and 1866, virtually reimposing the caste divisions of the old slave system. Several states decreed that Negroes could be employed only as workers in agriculture or domestic service. Mississippi prohibited black ownership or leasing of rural property, while Negro children had to be apprenticed to white masters. Some states forbade Negroes the ownership of weapons or alcohol. They were generally denied the right to vote, were barred from serving on juries, and kept from testifying in cases where whites were the parties.<sup>75</sup>

Post-war Reconstruction largely stalled in the South in 1876:

After Reconstruction ended in 1876, much of the leadership in the

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71. *See id.*

72. *See generally* RICHARD A. POSNER, *OVERCOMING LAW* 171–97 (1995) (discussing the “top down” approach to constitutional theorizing).

73. *See Virginia*, 518 U.S. 515.

74. *See* HARVEY FIRESIDE, *SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM* 119 (2004); *see generally* THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965) (providing a historical analysis of the Black Codes).

75. FIRESIDE, *supra* note 74, at 34–35.

former rebellious states came from Confederate army veterans and officials. They had also been prominent in the immediate postwar era, when “Johnson governments” had enacted stringent Black Codes that sought to keep former slaves in a perpetually subservient status. Foreshadowing the law challenged by the *Plessy* case in Louisiana, provisions of these codes required racial segregation. In 1865, Florida, for example, had forbidden any black or mulatto to “intrude himself into any railroad car or other public vehicle set apart for the exclusive accommodation of white people,” with a breach punishable by thirty-nine lashes. Laws such as this had been annulled by the 1867 Reconstruction Act but periodically reemerged under state authority.<sup>76</sup>

The Fourteenth Amendment and other measures were directed at undoing the Black Codes:

A year after passing the Thirteenth Amendment, Congress ratified the Civil Rights Act of 1866, which was drafted to override the Black Codes, to offer an inclusive definition of citizenship, and to safeguard the freedmen’s civil rights. President Johnson vetoed the bill on March 27, but it was passed over his veto on April 9, 1866. The Act’s central provisions were then given extra *protection* by Congress against the threat of later erosion and *inserted into the newly drafted Fourteenth Amendment*.<sup>77</sup>

In his oral argument in *Brown v. Board of Education*,<sup>78</sup> Thurgood Marshall stated:

They can’t take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact that I made it clear in the opening argument that I was relying on it, done anything to distinguish this [segregation] statute from the Black Codes, which they must admit, because nobody can dispute, say anything anybody wants to say, one way or the other, *the Fourteenth Amendment was intended to deprive the states of power to enforce Black Codes or anything else like it.*

We charge that [segregation laws] are Black Codes. They obviously are Black Codes if you read them. [The states] haven’t denied that they are Black Codes, so if the Court wants to very narrowly decide

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76. *Id.* at 74–75.

77. *Id.* at 119 (emphasis added).

78. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

this case, they can decide on that point.<sup>79</sup>

From this historical context, the principles underlying the Fourteenth Amendment came into view. On a superficial level, the Fourteenth Amendment can be understood merely as a response to slavery; however, a satisfactory understanding of the Amendment goes much deeper. The legal measures drafted after the end of the Civil War were intended not just to ameliorate the vestiges of slavery, but also to address post-slavery state lawmaking that unfairly targeted an identifiable class of persons. While the Thirteenth Amendment technically ended slavery,<sup>80</sup> the majoritarian hostilities toward blacks soon moved away from a desire to literally enslave them toward the unfortunate majoritarian impulse to abuse any identifiable minority—an impulse more accurately described as an attempt to metaphorically enslave this minority by debasing its humanity.

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of “laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.” Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth

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79. THE LIBRARY OF BLACK AMERICA, THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 43 (Mark V. Tushnet ed. 2001) (emphasis added).

80. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”).

Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be *protected* from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights.<sup>81</sup>

So the Thirteenth Amendment technically ended slavery, but slavery's vestiges still survived the Civil War and the Thirteenth Amendment.<sup>82</sup> This survival occurred especially in the form of the Black Codes, which arguably sought to keep former slaves in a perpetual state of subservience.<sup>83</sup> Though progressives drafted civil rights provisions in an effort to protect former slaves from laws like the Black Codes, those efforts were not effective.<sup>84</sup>

Critically, the drafters of the Equal Protection Clause did not write that states must stop the unequal treatment of former slaves; they wrote that states must not deny any persons under their jurisdiction the equal protection of the laws.<sup>85</sup> Justice Scalia himself warned of the hazards—usually when interpreting statutes—of any attempt to discern what was meant from what was actually written:

[I]f one accepts the principle that the object of judicial interpretation is to determine the intent of the [drafter], [then] being bound by genuine

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81. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390–91 (1978) (Marshall, J., concurring in part and dissenting in part) (emphasis added) (citation omitted).

82. *See id.* at 390.

83. *See id.*

84. *See id.* at 390–91.

85. U.S. CONST. amend. XIV (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

but unexpressed . . . intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed . . . intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the [drafter] said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the [drafter] meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law.<sup>86</sup>

This warning notwithstanding, Justice Scalia claims the Equal Protection Clause means ethnic groups, even though it says “persons.”<sup>87</sup> Justice Scalia’s position is that any contrary view ignores the context of the Equal Protection Clause, and as previously noted, he has stated “context is everything” in regard to the Constitution.<sup>88</sup>

But what context is needed to understand what “person” means? The “context” proffered by an originalist might be every bit as mischievous as whatever “evolving standards” might be proffered by a living constitutionalist. When Justice Scalia’s views give him pause about the principles embedded in the text of the Constitution, he can simply say the text is ambiguous given context. Of course, the problem in such a circumstance is that ambiguity would not exist unless he created it by looking beyond the plain text. The problem Justice Scalia insists to avoid is now back—the text does not mean what it says, but rather what he thinks the wise drafter would have said. Ultimately, the text now says whatever Justice Scalia says the text ought to say.<sup>89</sup>

The great interpretive debate boils down to this: if one must look beyond the literal words of the Constitution to illuminate the Constitution’s meaning, then where? And says who? Living constitutionalists—or what Justice Scalia calls “constitutional

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86. Scalia, *supra* note 21, at 17–18.

87. See *United States v. Virginia*, 518 U.S. 515, 567–76 (1996) (Scalia, J., dissenting) (noting the Equal Protection test applied by the Court’s majority should not extend to women, because they are hardly a “discrete and insular minorit[y]”).

88. See *id.* (discussing the context of the Equal Protection clause in relation to the single-sex military education provided by the Virginia Military Institute); Scalia, *supra* note 21, at 37.

89. See Scalia, *supra* note 21, at 17–18.

evolutionists”—argue one should interpret the Constitution as a document that makes sense under evolving standards.<sup>90</sup> Conservatives say the Constitution today means precisely what it meant when it was drafted.<sup>91</sup>

As suggested earlier, the most limited or restrictive historical, originalist, understanding of the Equal Protection Clause is that it was directed only at ending discrimination against former slaves even though the clause says equal protection cannot be denied to any person.<sup>92</sup> Surely the drafters of the Equal Protection Clause did not have in mind discrimination against Italian, Irish, or Asian cultures. It was certainly not the drafters' concern to simply address racism; they were only concerned with ethnicity to the extent it happened to be the characteristic associated with the humanitarian debasing perpetrated by the political majority—the inhumanity of slavery and the Black Codes.<sup>93</sup>

Since the most superficial original purpose behind the Equal Protection Clause was to ameliorate a system targeting former slaves—not African-Americans as such—it is important to note all former slaves are now dead, rendering the clause nothing more than a historic relic to any real originalist. Why then does Justice Scalia agree the Fourteenth Amendment still has any meaning at all?

In addition to protecting former slaves, does the Equal Protection Clause protect the progeny of former slaves against insidious discrimination? Interestingly, Justice Scalia answers this question in the affirmative, as the Equal Protection Clause protects all persons of African-American racial descent.<sup>94</sup> Equal protection also applies to people who are

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90. *See id.* at 41–43 (discussing and criticizing the living constitution theory of interpretation).

91. *See id.* at 44–47.

92. *See* *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (“[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that the superior race enjoy.”); *Slaughter-House Cases*, 83 U.S. 36, 71 (1872) (stating “no one [could] fail to be impressed with the one pervading purpose found in [all of the Reconstruction amendments],” which was “the freedom of the slave race”); *but see* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring) (arguing the Fourteenth Amendment does more than bring former slaves into society—it allows measures to remedy former state-based discrimination).

93. *See* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390 (1978) (delineating the atrocities the Fourteenth Amendment attempted to remedy).

94. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (“In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was ‘designed to maintain

Caucasian or only partly African-American.<sup>95</sup> What about women? Finally, and now famously, Justice Scalia says no.<sup>96</sup> But having already leapt from the originalist idea of former slaves and concluded the Equal Protection Clause also applies to all ethnic groups, why stop there? Of course, the only honest answer—and one no one will hear from Justice Scalia—is, “Because I said so.”

The difficulty in this exercise is manifest; a workable standard is sought. The standard of ethnicity—the one proffered by Justice Scalia—is invented; it has to be because it goes beyond what is explicit. Since it is invented, it is necessary to decide whether it is the most reasonable of limitless possible inventions.

Surely the drafters of the Equal Protection Clause were concerned with the plight of former slaves,<sup>97</sup> and surely there is a link between the plight of former slaves and the ethnicity of former slaves. It seems, then, the invented standard of ethnicity is reasonable so far. But to stop there and say the clause is only about ethnicity is as arbitrary as stopping later and saying it is about all humanity. It ignores both the question why and a more pointed question for reasonable textualists which is, why did the drafters not simply say no state may discriminate against anyone on the basis of ethnicity. So what is it about ethnicity that leads all to agree the clause prohibits states from using the characteristic of ethnicity as a basis for discriminating? Indeed, this is a question Justice Scalia must have asked already to conclude the Equal Protection Clause applies to ethnicity in the first place.

For one thing, as noted, there is the history of the Fourteenth Amendment.<sup>98</sup> But again, history only directly links the Fourteenth Amendment to former slaves, not to ethnicity in general.<sup>99</sup> To get to ethnicity requires a leap. But the leap makes sense because it was African-Americans who were enslaved, and they were enslaved on the basis of their ethnicity. Now the analysis is getting somewhere. But now keep asking.

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White Supremacy.’ A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race.” (citations omitted)).

95. See, e.g., *Parents Involved*, 551 U.S. at 729–32, 745–46 (2007) (holding race-based classifications were impermissible in the context of high school admissions programs).

96. See CAL. LAW., *supra* note 1.

97. See *Bakke*, 438 U.S. at 390–91.

98. See *supra* notes 74–84 and accompanying text.

99. See *id.*

So what? Who cares why former slaves were enslaved? Common sense provides that if one is looking to discover what the drafters of the Fourteenth Amendment were concerned about, it is crucial to get to why they were concerned about it.<sup>100</sup> The authors were not just concerned people were enslaved; instead, they were concerned we would enslave people based on ethnicity.<sup>101</sup>

So the authors were concerned about ethnicity. Why? This is where Justice Scalia says the questions must stop. If questioning continues, one might get to the bottom of the matter. If the answer were to be discovered, the floodgates would open to every manner of justice. But again, once one starts asking why, there is no principled reason to stop at the first answer. Indeed, intellectual rigor requires continued questioning. So now press on: why did the idea of ethnicity-based discrimination bother the drafters of the Fourteenth Amendment so much they wrote a constitutional amendment forcing states to stop the unequal protection of persons under their jurisdiction?

The answer is that ethnicity is something each person is born with. It is not something chosen. It is not, as Dr. Martin Luther King Jr. ultimately said, the marker of a man's character,<sup>102</sup> and therefore cannot be used as a proxy for moral fault or uncleanness.<sup>103</sup> There is also the issue of numbers. Since minorities are numerical minorities, they cannot protect themselves in a system built on majoritarian rule. The world is a Darwinian swamp where each person strives to out-evolve the other and is concerned

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100. This approach seems to have the benefit of assuaging Justice Scalia's belief that there should be some connection between what the lawmaker meant and what the lawmaker wrote. Justice Scalia's point is what the lawmaker meant should be our primary concern when applying what the lawmaker wrote. *See* *Smith v. United States*, 508 U.S. 223, 242–46 (1993) (Scalia, J., dissenting) (providing examples of the majority's failure "to grasp the distinction between how a word *can* be used and how it *ordinarily is used*"). This is not judicial activism so much as it is, or should be, common sense.

101. *See* U.S. CONST. amend. XIV (providing a classification much broader than only those enslaved—"no state may deny *any* person" does not refer only to those enslaved) (emphasis added).

102. *See* Martin Luther King Jr., *I Have A Dream*, AMERICAN RHETORIC (Aug. 28, 1963), <http://www.americanrhetoric.com/speeches/mlkihavedream.htm> ("[T]hey will not be judged by the color of their skin but by the content of their character.").

103. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 402–403 (1994) (stating race is a "morally neutral characteristic" but sexual orientation is "morally controversial").

primarily, if not exclusively, with his own. This is democracy's great weakness. Pick your secular poison: call it Nietzsche's "will to power"<sup>104</sup> or Darwin's "survival of the fittest." In the majoritarian universe, morality does not "bend toward justice."<sup>105</sup> It bends toward dominance.<sup>106</sup>

To concern ourselves with something less base than this, people have been forced to create an ecosystem where minority rights matter. Such a system must be man-made if it is to exist at all, and those who drafted the Fourteenth Amendment knew it. This is not the stuff of laissez-faire morality. If minorities are not to be subsumed at the expense of the majority's own humanity, it must be written down on something regarded as a holy document that minority rights matter. So there it is: the Equal Protection Clause. It tells us not to target people who cannot protect themselves from majoritarian hostility just because we can and not to target characteristics that fail to reflect bad character. That is what the Equal Protection Clause means. It is no more about mere ethnicity than Christ's command to "love thy neighbor" was about sending greeting cards to the people next door.<sup>107</sup>

But to Justice Scalia, women, gays, or any other group besides ethnic groups are like little Timmy from Part I—they are not the persons to whom

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104. See generally FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST 127–99 (R.J. Hollingdale trans., 1990) (providing the theory of the "will to power" and sharply criticizing Christianity).

105. The Author's reference here is to President Barack Obama, who purports to quote Dr. Martin Luther King Jr. as saying, "[T]he arc of the moral universe is long, but it bends toward justice." Brent Staples, *Savoring the Undertones and Lingering Subtleties of Obama's Victory Speech*, N.Y. TIMES (Nov. 7, 2008), <http://theboard.blogs.nytimes.com/2008/11/07/savoring-the-undertones-and-lingering-subtleties-of-obamas-victory-speech>.

106. Cf. JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 252 (R.J. White ed., 1967).

[God] is an infinitely wise and powerful Legislator whose own nature is confessedly inscrutable to man, but who has made the world as it is for a prudent, steady, hardy, enduring race of people who are neither fools nor cowards, who have no particular love for those who are, who distinctly know what they want, and are determined to use all lawful means to get it. Some such religion as this is the unspoken deeply rooted conviction of the solid, established part of the English nation. They form an anvil which has worn out a good many hammers, and will wear out a good many more, enthusiasts and humanitarians notwithstanding.

*Id.*

107. *Matthew* 19:19.

the rule applied when it was originally drafted. And just as tricking a sibling into rolling in poison ivy is not the same as hitting him, discriminating against women is not the same as enslaving black people. All of this completely misses temporal progress and underlying principles. The point is that Justice Scalia wants to ignore progress and principles because to honor them would feed on his temporal and spatial anxieties. To Justice Scalia and like-minded conservatives, simplicity is the penultimate constitutional value. This brings us to the Confrontation Clause.

#### IV. HOW ORIGINALISM INVITES JUDICIAL CONTORTIONISM

Justice Scalia's fondness for the original application of constitutional text has been especially crucial in the Supreme Court's recent approach to the Confrontation Clause.<sup>108</sup> In his 2004 opinion in *Crawford v. Washington*, Justice Scalia went beyond evaluating the historical context of the Confrontation Clause and effectively rewrote it.<sup>109</sup>

The purpose of the Confrontation Clause is to exclude evidence that is untested by adversarial methods and, therefore, is untrustworthy.<sup>110</sup> Thus, pre-*Crawford* analysis focused on the reliability of evidence in the absence of any possible cross-examination when determining its admissibility.<sup>111</sup> In *Crawford*, Justice Scalia, writing for the Court, held the unreliability of evidence not subject to cross-examination to be simply presumed.<sup>112</sup> According to Justice Scalia, there is only one way to ensure testimonial evidence is meaningfully confronted: expose the evidence to cross examination.<sup>113</sup>

While it is true a mechanism other than cross-examination to ensure confrontation is hard to imagine, Justice Scalia went a step further and concluded it would be impossible.<sup>114</sup> In this sense, Justice Scalia imposed

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108. U.S. CONST. amend. VI.

109. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (setting forth the requirements necessary to meet the Confrontation Clause safeguards when out-of-court statements are at issue).

110. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

111. *Id.*

112. *Crawford*, 541 U.S. at 66–69 (noting confrontation through cross-examination is the “only indicium of reliability sufficient to satisfy constitutional demands”).

113. *Id.*

114. See *id.* at 66, 68 (explaining the common law required a prior opportunity for cross-examination, the only way to meet the Confrontation Clause test).

the limit of his own imagination—because he cannot conceive of it, it does not exist. The upshot is that although the framers said confrontation, they meant cross-examination.

Under *Crawford*, then, uncross-examined testimony is never reliable enough to establish its admissibility, and the only remaining question about such testimony in a Confrontation Clause case is whether it was, in fact, testimony.<sup>115</sup> If the evidence is uncrossed and testimonial, it must be excluded.<sup>116</sup> The predictable result was *Michigan v. Bryant*, a case involving a dying declarant who, before he died, identified his killer by name and address in an uncross-examined statement.<sup>117</sup> His statement was obviously testimonial—he was answering police questions about a crime that already happened—but somehow the Court held otherwise.<sup>118</sup>

Since Justice Scalia recast confrontation to mean cross-examination in *Crawford* and thereby removed the issue of evidentiary reliability from the Court's purview entirely when admitting testimonial evidence,<sup>119</sup> the Court peered through its result-oriented glasses in *Bryant* and saw how injustice might result. Without the uncrossed and uncrossable testimony of the dead declarant, it could not say any longer that the evidence should be admitted because it was sufficiently reliable; now the Court's only "out" was to conclude the evidence was not testimonial, even if it obviously was.<sup>120</sup> This is exactly what the Court did,<sup>121</sup> chasing that lemming *Crawford* right off the cliff of intellectual honesty and into the river below—where cases like *Slaughter-House*<sup>122</sup> send judges like Antonin Scalia to drown in the rapids called "substantive due process" and the like.<sup>123</sup>

In *Bryant*, the Court undertook a contortionist debate about whether the testimonial nature of one's statement should be adjudged from the perspective of the police or the declarant and, in any event, what factors might establish when a statement constitutes testimony.<sup>124</sup> And in dissent,

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115. *Id.* at 68.

116. *Id.*

117. *Michigan v. Bryant*, 139 S. Ct. 1143, 1150 (2011).

118. *See id.* at 1166 (providing facts and analysis that would be assumed to result in the court holding the evidence to be testimonial).

119. *See Crawford*, 541 U.S. at 68–69 (providing testimonial evidence must be cross-examined in order to be admitted).

120. *See Bryant*, 139 S. Ct. at 1166–67.

121. *Id.*

122. *Slaughter-House Cases*, 83 U.S. 36 (1872).

123. *See Scalia, supra* note 21, at 24.

124. *See Bryant*, 139 S. Ct. at 1153–57.

Justice Scalia was right: the whole thing was a farce and an end-run around the issue of reliability.<sup>125</sup> But had Justice Scalia not rewritten a clause of the Constitution to his own liking, the Court would likely at least still have debated whether the evidence at issue was reliable enough to deem that it was, in some functional way, confronted.<sup>126</sup> Justice Scalia would probably still have said no and therefore dissented, but at least he would not be accusing the Court of inventing new ways around his own nontextual rules.

In *Crawford*, Justice Scalia said, “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>127</sup> This statement seems arguable. If it is correct, however, then the question should simply have changed from whether testimony was obviously reliable to whether testimony was obviously confronted.

What Justice Scalia should have said in *Crawford* was that he could not imagine how one might confront testimony without subjecting it to cross-examination. Instead, he said cross-examination is what the Framers meant when they said confrontation.<sup>128</sup> In doing so, Justice Scalia left the confines of textualism and tiptoed over to Eden, falling under the spell of an elitist serpent and nibbling from the apple of arrogance that goads one to seek the forbidden entitlement—one’s own conception of what the text means even if that is not what it says. How could Justice Scalia surrender to nontextual temptation and cast himself into the depths of dissenting despair as in *Bryant*?<sup>129</sup> Judicial original sin has its price.

Turning to the principles and historical context animating the Confrontation Clause, the following summary is helpful:

A literal reading of the Confrontation Clause suggests that it codifies a procedural protection: in every criminal trial, a defendant has the right to “confront[ ],” meaning (among other things) to cross-examine, each witness who testifies against her or him. The historical context surrounding this Clause lends further support to this reading. Prior to America’s independence, dissatisfaction with the British practice of ex

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125. See *id.* at 1168 (Scalia, J., dissenting) (describing the majority’s approach as a “vain attempt to make the incredible plausible”).

126. See *infra* notes 127–31 and accompanying text.

127. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

128. *Id.* at 67–68 (noting the use of reliability tests instead of straight cross-examination violates the Framers’ design).

129. *Bryant*, 139 S. Ct. at 1168 (Scalia, J., dissenting).

parte prosecution—as seen in Sir Walter Raleigh’s trial—was prevalent among the American colonists. . . . In reaction to such practices, many early decisions construed the right of confrontation quite strictly, some even going so far as to hold any out-of-court statements inadmissible even when the defendant was able to cross-examine the speaker at the time the statements were made.

During the twentieth century, the Supreme Court reframed Sixth Amendment jurisprudence in terms of what it perceived to be the ultimate goal of the Sixth Amendment: ensuring reliable outcomes at trial.<sup>130</sup>

Justice Scalia himself supplied a thoroughgoing historical narrative about the Confrontation Clause:

The right to confront one’s accusers is a concept that dates back to Roman times. The founding generation’s immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that “occasioned frequent demands by the prisoner to have his ‘accusers,’ *i.e.* the witnesses against him, brought before him face to face.” In some cases, these demands were refused.

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century. These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. Whatever the original purpose, however, they came to be used as evidence in some cases . . . .

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the

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130. David H. Kwasniewski, Note, *Confrontation Clause Violations as Structural Defects*, 96 CORNELL L. REV. 397, 407–08 (2011) (citations omitted).

1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." The judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated.<sup>131</sup>

Early American courts seem to have been acutely sensitive to the concerns underlying the adoption of the Confrontation Clause. For example,

South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent." The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal

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131. *Crawford*, 541 U.S. at 43–45 (alteration in original) (citations omitted).

examination.”<sup>132</sup>

Given this historical background, the Court, per Justice Scalia, stated two inferences were to be drawn:

First, 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. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.<sup>133</sup>

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. . . [Second,] the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.<sup>134</sup>

With regard to the first inference, Justice Scalia seems on firm ground, but note his interpretive sleight of hand with regard to the second. Seeking to anchor constitutional meaning to the historical past, Justice Scalia identifies what he regards as the original expected application of the text—cross-examination alone satisfied the confrontation requirement in 1791—and embeds this application in the precedents of the Court by saying the Framers would not have applied it more broadly.<sup>135</sup> Once Justice Scalia is done, the word “confront” has, for all intents and purposes, been excised and replaced with “cross-examine.”<sup>136</sup> Because Justice Scalia can envision only one way to satisfy the requirement, that way is now the only way.<sup>137</sup> So note again how the temporal anchoring adopted by the Court has the effect of imposing on the entire nation the limits of one Justice’s imagination.

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132. *Id.* at 49–50 (alteration in original) (quoting *State v. Campbell*, 30 S.C.L. 124, 125 (App. L. 1844)).

133. *Id.* at 50.

134. *Id.* at 53–54.

135. *See id.* at 53–54, 57–59.

136. *See id.* at 68–69.

137. *See id.*

This is not to say Justice Scalia was unwarranted in focusing on cross-examination. There is no better way to ensure the trustworthiness of evidence, which was the animating concern of the Confrontation Clause.<sup>138</sup> For example,

The following are common goals of cross examination: a) Highlight inconsistencies with other witness' testimony; b) Demonstrate bias on the part of the witness; c) Attack the witness' credibility through impeachment or other means; d) Highlight errors or confusion in the witness' testimony (but be careful not to allow the witness to correct or clarify); e) Identify the portions of your own case that the witness can corroborate; f) Identify and highlight portions of the witness' testimony that bolster your own case or defense.<sup>139</sup>

As one commentator put it,

[W]itnesses do not speak all (or even part) of the truth all of the time in court any more than they do out of court. . . . Cross-examination lets us determine the ones who do. Presently there is no scientific device to substitute for cross-examination. The lie-detector and the various sedative drugs and hypnotic devices, psychological and psychiatric tools, may help in the courtroom search for the "whole truth." . . . But since their utility has yet to be proven, we are left only with cross-examination.<sup>140</sup>

If there is no better way for exposing truth today than the caustic acid of cross-examination, it would have been hard for the drafters of the Sixth Amendment to conceive of a more effective method when it was adopted. But this leaves the unsettling question, if the drafters knew cross-examination existed, as they surely did, and they meant testimonial evidence must always be cross-examined before being admitted against a defendant in a criminal trial, then why did they not just say, "In all criminal prosecutions, the accused shall enjoy the right to cross-examine the witnesses against him"?<sup>141</sup> Perhaps Justice Scalia has his history wrong after all:

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138. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (citing *Crawford*, 541 U.S. 36).

139. Gregory A. Hearing & Brian C. Ussery, *Guidelines for an Effective Cross-Examination: The Science Behind the Art*, 809 PLI/LIT 663, 666 (2009).

140. Melvin M. Belli, Book Note, 71 COLUM. L. REV. 370, 370-71 (1971) (reviewing J.W. EHRLICH, *THE LOST ART OF CROSS-EXAMINATION* (1970)).

141. Cf. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

In *Crawford*, Justice Scalia's opinion for the Court purported to find that the original meaning of the Confrontation Clause limited the scope of the confrontation right to "testimonial" statements comparable to framing-era depositions of witnesses to crimes. Additionally, Justice Scalia asserted that framing-era doctrine subjected the admission of an out-of-court statement of an unavailable witness in a criminal trial to a strict cross-examination rule: the statement was admissible if, but only if, the defendant had had a prior opportunity to cross-examine the unavailable witness. I argue . . . that neither of those claims was validly derived from history.

The former claim limiting the scope of the right to testimonial statements amounts to a political choice posing as a historical mandate. The more accurate historical statement is that the Framers did not address whether the Confrontation Clause should apply to nontestimonial hearsay evidence because they never anticipated that informal hearsay statements could come to be viewed as valid evidence in criminal trials—as they have.

The latter claim regarding a rigid cross-examination rule is simply erroneous history. Framing-era authorities did not articulate a general rule regarding the admissibility of depositions of unavailable witnesses. Rather, those authorities differentiated between misdemeanor and felony prosecutions. The authorities did not indicate that there was any legal authority for taking witness depositions at all in misdemeanor cases; hence, it is doubtful that depositions would have been admissible in misdemeanor trials even in the unlikely event that there had been a prior opportunity for cross-examination.

The situation was quite different in felony cases, in which more importance was accorded to obtaining a conviction. Two statutes enacted during the reign of Mary Tudor, the so-called Marian statutes, *required* that justices of the peace make written records of the sworn depositions of witnesses of a felony at the time an arrest was made and send those depositions on to the felony trial court. Moreover, these sworn Marian depositions, which were a standard aspect of felony prosecutions, were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial. Indeed, depositions were inadmissible in felony cases only in the odd instance when they were improperly taken outside of the statutory procedure. Thus, because Marian procedure was standard for felony prosecutions in framing-era America as well as in England, the use of Marian

witness depositions as evidence in framing-era felony trials disproves Scalia's claim that the original meaning of the Confrontation Clause included a rigid cross-examination rule. In contrast to Justice Scalia's claim, it does not appear that a prior opportunity for cross-examination had any effect on the admissibility or inadmissibility of the deposition of an unavailable witness in a framing-era criminal trial.<sup>142</sup>

Another commentator questioned the English common law roots from which Justice Scalia drew his conclusion:

Justice Scalia's opinion . . . gives no explanation why it can be concluded that the Confrontation Clause constitutionalized common law as stated in English decisions when other parts of the Sixth Amendment expressly rejected English common law. . . . English common law was not the source for much of the Sixth Amendment, and by assuming that it was for confrontation, *Crawford's* reasoning undercuts longstanding Sixth Amendment jurisprudence.<sup>143</sup>

More interestingly, Chief Justice Rehnquist suggested the Framers chose the word "confrontation" deliberately to accommodate the possibility that appropriate alternatives to cross-examination did or would exist.

Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: "I know of no principle in the preservation of

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142. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107–08 (2005) (footnotes omitted).

143. Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 219–20 (2005).

which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.” Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an “inroad” on the right to confrontation, had been introduced.

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply “cannot be replicated, even if the declarant testifies to the same matters in court.” Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission “actually furthers the ‘Confrontation Clause’s very mission’ which is to ‘advance the accuracy of the truth-determining process in criminal trials.’” Similar reasons justify the introduction of spontaneous declarations, statements made in the course of procuring medical services, dying declarations, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. “[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.” In such a case, as we noted over 100 years ago, “The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” By creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function and ignores this longstanding guidance.<sup>144</sup>

Aside from the possibility of Justice Scalia being wrong about history in this regard, there also exists the possibility that, as Chief Justice Rehnquist suggested, the drafters of the Sixth Amendment simply appreciated the limits of their own prescience—maybe someday new

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144. *Crawford v. Washington*, 541 U.S. 36, 73–74 (2004) (Rehnquist, C.J., concurring) (alterations in original) (citations omitted).

techniques of confrontation would come into being, either equal to or surpassing the efficacy of cross-examination, or maybe they would not. Surely if such means were to be discovered, Justices' interpretation should not bar their use or, worse yet, foreclose their development with an inflexible rule, rendering cross-examination the only method for achieving confrontation.

One commentator foresaw a bright future for the streamlined Confrontation Clause spawned by *Crawford*:

*Crawford's* originalism and formalism succeeded, in part, because pre-*Crawford* case law was an unprincipled, inconsistent, ad hoc, dismal failure. *Crawford* also had good soil in which to root its decision, because the Founding-era history clearly reveals the key purpose behind the Confrontation Clause. And while it will take time for common-law adjudication to map out *Crawford's* contours, its broad outlines are clear, simple, and hard to evade.<sup>145</sup>

This optimism appears to have been premature. After all, *Crawford* ultimately spawned *Bryant*.<sup>146</sup> Dissenting in *Bryant*, Justice Scalia wrote,

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford v. Washington*, I dissent.<sup>147</sup>

It would have been more accurate for Justice Scalia to say, “Because I

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145. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?* 94 GEO. L.J. 183, 185 (2005).

146. See *supra* notes 117–25 and accompanying text.

147. *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (citing *Crawford*, 541 U.S. 36).

continue to adhere to the Confrontation Clause that I redrafted.” At any rate, as I noted earlier, Justice Scalia was largely correct in his assessment of the majority’s reasoning. One can see what happened in *Bryant*: the Court wanted to hold that the statement was admissible because it was made by a dying man who had no known motive to lie, meaning he was likely telling the truth.<sup>148</sup> Put another way, to the majority, the statement seemed to be reliable. Because the issue of reliability was resolved by Justice Scalia in *Crawford*, which held reliability can only be established by cross-examination, the Court could only reach the result it wanted in *Bryant* by saying the statement was not testimonial.<sup>149</sup> As Justice Scalia intimated, this reasoning is absurd.<sup>150</sup> However, Justice Scalia failed to atone for his own part in all this mischief. Had he not anchored the Court to an unworkable, narrow, original expected application of the Confrontation Clause, the Court would not have had to resort to such unseemly contortions to reach its preferred result.

Taken together, *Crawford* and *Bryant* show the following: Justice Scalia and other conservative jurists value simplicity. To achieve that simplicity, Justice Scalia anchors the Court to the past by embedding what he deems to be the original expected application of the text in the Court’s precedent. So regardless of how broad the text in question, the narrower interpretation he has given is now governing law. There is an emotive component here as well. Once original expected application is embedded, disturbing it will come at the cost of a judicial dressing down by Justice Scalia. Further, one can see how embedding original expected application in precedent—especially when Justice Scalia thinks there is only one application of the text originally expected—leads to interpretations so narrow they invite judicial mischief in future cases.

Finally, one can see Justice Scalia ignores underlying principles by failing to ask why constitutional text exists in the first place. Had he sought out the purpose for requiring confrontation by probing for deeper meaning rather than limiting his analysis to a historical inquiry into the original meaning of the clause, he would have seen the Court’s prior focus on reliability was the most reasonable approach. In his effort to craft a simpler and easier rule than pre-*Crawford* cases applied, he merely planted the originalist ink bomb in *Crawford* that exploded in *Bryant*. So

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148. See *supra* notes 118–21 and accompanying text.

149. See *Bryant*, 131 S. Ct. at 1166; *Crawford*, 541 U.S. at 68–69 (allowing consideration of indicia of reliability when admitting nontestimonial evidence).

150. See *Bryant*, 131 S. Ct. at 1168.

originalism is not so tidy after all. Additionally, as the emotive intensity of Justice Scalia's *Bryant* dissent illuminates,<sup>151</sup> it does less to ameliorate anxiety than he might have hoped.

#### V. CONCLUSION

Justice Scalia personifies the philosophical anxieties that lead judges to adopt species of textualist and originalist methods that anchor meaning to centuries past. The resulting constitutional rules are so narrow they are impossible to apply without producing absurd results. Thus, Justice Scalia's brands of originalism and textualism, which are effectuated by embedding original expected application in Court precedent and willfully ignoring semantic depth, invite future courts to manifest the kind of intellectual dishonesty and contortionism exemplified in *Bryant*. The question is whether judges with impulses to constrict constitutional meaning and choke the most idealistic underpinnings of the Constitution out of it are suited to interpret the audacious document in the first place. At the very least, if conservative judges insist on continuing fidelity to such a banal approach, they ought to understand that the judicial consequences caused by their simplistic and naïve rulemaking will haunt them in future cases.

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151. *Id.*