

Confronting *Crawford*: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism

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If you conduct an online search for something like “Justice Scalia’s most important opinions” or “Justice Scalia’s most influential opinions,” you will (or at least I did) almost always end up with a list that is top-heavy with dissents. That is not surprising. Dissenting opinions gave Justice Antonin Scalia the most freedom to exercise his considerable skills as a writer and were therefore more likely to produce memorable one-liners. They were also the best occasions for him to express his views candidly and forcefully and thus served as the best vehicles for elaboration of his jurisprudential and doctrinal positions. Majority opinions need four other justices to sign on, and while finding four justices to share Scalia’s outlook was a dream to some,¹ the Court in his time never approached that ideal. Indeed, the only majority opinion that seems to pop up with any consistency in these “best of” lists is *District of Columbia v Heller*.²

Without in any way downplaying the significance of *Heller*, I want to offer another candidate for the title of “most important majority opinion” authored by Scalia that I think tops *Heller*, and all of his other majority opinions, across virtually all relevant dimensions of importance: *Crawford v Washington*.³ *Crawford* did not make headlines on the nightly news when it was decided (or at least I don’t recall them). I doubt whether many interest groups have *Crawford* on their list of cases about which to quiz

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¹ “A nightmare to others!” Merlin, played by Nicol Williamson, in *Excalibur* (Warner Bros 1981).

² 554 US 570 (2008). For a typical example from the popular press that compactly combines both points that I just made, see the *Washington Post* story from just after Scalia’s death: “Justice Scalia was far better known for fiery dissents than for landmark majority opinions. One exception was the court’s groundbreaking 2008 decision in *District of Columbia v. Heller*.” Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79* (Wash Post, Feb 13, 2016), archived at <http://perma.cc/A35B-R9YE>.

³ 541 US 36 (2004).

or evaluate nominees for the Supreme Court; it certainly does not seem to have been on anyone's agenda during the confirmation hearings for Scalia's successor, Justice Neil Gorsuch. Perhaps it should have been, because *Crawford* is among the most important constitutional cases in modern times.

Crawford set forth a new—or, if one thinks it accurately captured original meaning, a very old—methodology for determining when the use by prosecutors of out-of-court statements violates a criminal defendant's right "to be confronted with the witnesses against him."⁴ In the decades prior to *Crawford*, the Court read the Confrontation Clause of the Sixth Amendment very narrowly to prohibit only the use of out-of-court statements that both made it through nonconstitutional hearsay law because of relatively novel or eccentric hearsay exceptions *and* were deemed by the Court to be "unreliable" to boot.⁵ *Crawford* enormously expanded the scope of application of the Confrontation Clause to all "testimonial" out-of-court statements—very roughly meaning statements whose primary purpose or expectation when made was to provide evidence against a defendant⁶—unless there has been a prior opportunity for the defendant to cross-examine the declarant of the statement *and* the statement's declarant is unavailable to testify.⁷ This category of "testimonial" statements includes documentary statements made with an eye toward establishing someone's guilt, such as police laboratory reports of DNA results and drug analyses. Even if the applicable state or federal law has a hearsay exception to admit those reports—and it almost always does—the Confrontation Clause, as interpreted by *Crawford* and subsequent opinions,⁸ requires the analyst who made the statements in the report to testify or otherwise be

⁴ US Const Amend VI.

⁵ See *Crawford*, 541 US at 60 ("*Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay evidence exception' or bears 'particularized guarantees of trustworthiness.'"), quoting *Ohio v Roberts*, 448 US 56, 66 (1980).

⁶ *Crawford*, 541 US at 51, 68 (noting that "[t]estimony' . . . is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact'" but declining to provide "a comprehensive definition of 'testimonial'" (alterations omitted).

⁷ *Id* at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

⁸ See, for example, *Melendez-Diaz v Massachusetts*, 557 US 305, 308–09, 329 (2009) (holding that, under *Crawford*, admission of certificates from laboratory analysts without an opportunity to cross-examine the analysts violated the Confrontation Clause).

subject at some point to cross-examination before those statements are admissible.⁹

The monumental importance of this doctrine can best be seen through its enemies, who now include Justices Samuel Alito, Stephen Breyer, and Anthony Kennedy, and Chief Justice John Roberts. When faced with the application of the *Crawford* doctrine to laboratory reports, those four justices—who one would not often group together as a voting bloc—now seem willing to toss out the entire *Crawford* framework rather than face its consequences.¹⁰ After little more than a decade, what I am describing as Scalia’s most important majority opinion is in real danger of ending up in the dustbin of history.

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

⁹ There are exceptions. The *Crawford* rule applies only to statements admitted as evidence of their truth, see *Crawford*, 541 US at 59 n 9, and as with most constitutional protections, the rights protected under *Crawford* can be waived or forfeited, see *Giles v California*, 554 US 353, 367–68 (2008) (describing the doctrine of “forfeiture by wrongdoing”). The “nontruth” exception is potentially quite important if it extends, as four justices have maintained it does, to statements that underlie or account for expert testimony. See *Williams v Illinois*, 567 US 50, 58 (2012) (Alito) (plurality) (“Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.”).

¹⁰ See *Bullcoming v New Mexico*, 564 US 647, 684 (2011) (Kennedy dissenting) (“[I]t bears remembering that the *Crawford* approach was not preordained. . . . It is time to return to solid ground.”).

joined the Court may not appreciate how revolutionary that simple idea was to the legal community in past times. Scalia was a very powerful repudiation of at least a primitive version of the “attitudinal model” of judicial decision-making, which very roughly purports to explain judicial decisions based on political ideology and ideological factors,¹¹ and *Crawford* is one of the leading exhibits for that claim.

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

I. “THE WAY YOU DO THE THINGS YOU DO”¹²

When then-Judge Antonin Scalia was nominated for the Supreme Court in 1986, he was something of an unknown quantity to many people. As a judge on the DC Circuit, he had written primarily administrative-law opinions, which do not generally make for scintillating reading for any but the most resolute administrative-law junkies. His scholarship as an academic addressed such hot-button topics as the promotion procedures for administrative-law judges¹³ and the history of judicial review of decisions of the public land office.¹⁴ Unlike Judge Robert Bork, who was to follow him as a nominee, Scalia had a relatively thin paper trail at the time of his nomination. The confirmation hearing on his nomination did not draw out his positions very much. This hearing took place before “Bork” became a verb, and to call it uneventful does not do justice to its degree of dullness. Scalia did not answer any questions about specific issues or cases. He would not even (to the great consternation of Senator Arlen Specter) say flat out whether he

¹¹ See notes 18–19 and accompanying text.

¹² The Temptations, *The Way You Do the Things You Do*, in *Meet the Temptations* (Motown 1964).

¹³ See generally Antonin Scalia, *The ALJ Fiasco—a Reprise*, 47 U Chi L Rev 57 (1979).

¹⁴ See generally Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich L Rev 867 (1970).

thought that *Marbury v Madison*¹⁵ was rightly decided—because, he insisted, someone might want to argue the point in the future, so why tip one’s hand?¹⁶ What to make of this enigmatic figure whom the Senate confirmed by a 98–0 vote?¹⁷

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

There was much to support this expectation. Although a strong form of the “attitudinal model” of judging—the view “that justices decide cases on the basis of their personal attitudes about social policy and not on the basis of any genuine fidelity to law”¹⁸—commands far from universal assent in the legal culture,¹⁹ a great many people expect, and in 1986 expected, Supreme Court justices to vote the party line in important cases. When Scalia joined the Court, a strict pro-prosecution stance was a widely held expectation.

In point of fact, I doubt whether Scalia had thought very deeply about constitutional criminal procedure before he joined the Court. It did not come up much on the DC Circuit, and it was far outside his scholarly wheelhouse. Nonetheless, if he were the sort of judge who was inclined to vote on the basis of policy preferences, it would not have been at all surprising to see

¹⁵ 5 US (1 Cranch) 137 (1803).

¹⁶ *Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary*, 99th Cong, 2d Sess 33–34, 83–88 (1986).

¹⁷ *Supreme Court Nominations: Present–1789* (US Senate), archived at <http://perma.cc/3GHP-REXB>.

¹⁸ Michael J. Gerhardt, Book Review, *Attitudes about Attitudes*, 101 Mich L Rev 1733, 1733 (2003).

¹⁹ While the attitudinal model would not have survived as long as it has if it did not have considerable predictive and explanatory power, it would be surprising if other, and perhaps more complex, models did not compete for attention. For a brief survey of the array of models, see generally Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 Wm & Mary L Rev 2017 (2016).

him slotting into Justice Warren Burger's predictable prosecution voting pattern.²⁰ But, of course, Scalia was not inclined, as a first-best strategy, to vote on the basis of policy preferences. He was inclined to read constitutional provisions and try to figure out what they actually mean. Because many provisions in the Bill of Rights are there precisely to protect criminal suspects or defendants and contain relatively straightforward commands to that effect, his arrival on the Court was not uniformly good news for the prosecution.

The extent to which a crude form of an attitudinal model shaped public understandings of the Court in general and of Scalia in particular during his first term is well illustrated by the popular reaction to a relatively obscure case called *Arizona v Hicks*.²¹ The police had entered an apartment in response to an apparent shooting in that unit. No one doubted that warrantless entry into the unit was justified by exigent circumstances. While in the unit, an officer "noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment."²² The officer moved the equipment in order to read the serial numbers and called in those numbers. The stereo equipment had been stolen in an armed robbery, and the defendant was indicted for that crime. The question was whether the evidence—the serial numbers—had been obtained through an unconstitutional search. Scalia, writing for a 6–3 majority that included the Court's entire liberal bloc, said that while the stereo equipment itself was in plain view, the serial numbers were not, and accordingly a "search" was required in order to discover the numbers. That search, in turn, needed to be supported by

²⁰ Indeed, in one of the few criminal procedure opinions that he wrote on the DC Circuit, Scalia, for an en banc majority, held that there was no violation of the Fifth Amendment's prohibition on self-incrimination when the government used a doctor's testimony from a court-ordered psychiatric examination to rebut a defendant's insanity defense. See *United States v Byers*, 740 F2d 1104, 1109–15 (DC Cir 1984) (en banc). The opinion openly invoked policy concerns, albeit concerns that were drawn from prior Supreme Court decisions. See *id* at 1114:

Our judgment that these practical considerations of fair but effective criminal process affect the interpretation and application of the Fifth Amendment privilege against self-incrimination is supported by the long line of Supreme Court precedent holding that the defendant in a criminal or even civil prosecution may not take the stand in his own behalf and then refuse to consent to cross-examination.

²¹ 480 US 321 (1987).

²² *Id* at 323.

probable cause, rather than some lesser standard like reasonable suspicion, and having the police note that the equipment looked out of place in a seedy apartment was not probable cause.²³

James Hicks was obviously guilty of the charged crime. Without the evidence obtained from the search, he would go free. “But,” wrote Scalia, “there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”²⁴ Powell, O’Connor, and Rehnquist dissented.

I was clerking for Justice Scalia when that case was decided, and I distinctly recall that the reaction of the assembled punditry was nothing short of astonishment. “Is Justice Scalia a closet liberal?”²⁵ “Is this John Paul Stevens all over again?”²⁶ Shock and surprise came from both sides of the aisle. *The New York Times* opened its column on the *Hicks* case by noting: “Associate Justice Antonin Scalia, confounding predictions that he would invariably side with Chief Justice William H. Rehnquist and with the police against criminal defendants, wrote an opinion refusing to expand police search powers in a decision issued today.”²⁷ The *Los Angeles Times* began its report on the case by observing that Scalia was writing for the Court’s “liberal faction” and that he had “already shown himself to be far more independently minded than expected.”²⁸ *The Washington Post* chimed in with an opening line that read: “Supreme Court Justice Antonin Scalia surprised court observers and perhaps his conservative colleagues yesterday by joining with liberals and writing a decision that restricts police power to conduct searches.”²⁹ Something was definitely off here. Wasn’t he supposed to vote against guilty crooks? James J. Kilpatrick, a noted conservative commentator,³⁰ certainly thought so, and he

²³ Id at 323–26.

²⁴ Id at 329.

²⁵ I am sure that I heard this exact phrase at some point, but I cannot (thirty years later) pinpoint it.

²⁶ Ditto.

²⁷ Stuart Taylor Jr, *Opinion by Scalia Opposes Broad View of Police Power* (NY Times, Mar 4, 1987), online at <http://www.nytimes.com/1987/03/04/us/opinion-by-scalia-opposes-broad-view-of-police-power.html> (visited July 7, 2017) (Perma archive unavailable).

²⁸ David G. Savage, *Scalia Joins Liberal Faction in Limiting Police Searches* (LA Times, Mar 4, 1987), archived at <http://perma.cc/2XWS-TRFP>.

²⁹ Al Kamen, *Scalia Writes Decision Limiting Police Searches*, Wash Post A9, A9 (Mar 4, 1987).

³⁰ Some of us old fogeys remember Kilpatrick as the conservative foil to liberals Nicholas von Hoffman and Shana Alexander on the *Sixty Minutes* “Point/Counterpoint”

complained that Scalia's opinion in *Hicks* was "patent nonsense":

You may search Scalia's opinion in vain for one word of sympathy for the police or for the owner of the stolen equipment. It would have been evident to a child of 10 that in entering Hicks' apartment, the police had come upon the lair of a dangerous criminal. Were the police to seize the weapons and close their eyes to everything else?³¹

Evidently, "sympathy for the police" was the presumed basis for conservative judicial decisions.

The point here is just to illustrate how deeply ingrained was the idea in the mid-1980s that to be a "conservative" justice meant simply that one would vote against guilty criminals. It was *not* generally thought that conservative justices were supposed to apply a decision-making methodology based on abstract understandings of the Constitution and the interpretive enterprise, without regard to the consequences in particular cases. Concededly, if one's model of a conservative justice was Burger, one could be forgiven for holding that view. But the result of that view was that the legal commentariat had no idea how to process or handle Scalia. He was a creature with which they were unfamiliar.

Thirty years later, the confirmation process for Justice Gorsuch reveals some modest but notable changes in public discourse after Scalia's tenure. Yes, interest groups continue to employ the crudest caricature of the attitudinal model by relentlessly emphasizing result-oriented side picking,³² but more sophisticated (and/or honest) public observers now seem to recognize at least some relevance for methodology. For example, an ABC News online fact sheet on Gorsuch's confirmation hearing began:

Gorsuch, 49, is a judge on the 10th Circuit Court of Appeals in Denver. He was nominated by President George W. Bush in 2006 and confirmed by the Senate in a voice vote. Gorsuch

segment. Dan Aykroyd memorably parodied Kilpatrick (with Jane Curtin shadowing Alexander) in recurring sketches on *Saturday Night Live*.

³¹ James Kilpatrick, *High Court Flat-Out Cuckoo—Scalia Part of Judicial Lunacy* (Orlando Sentinel, Mar 23, 1987), archived at <http://perma.cc/953C-GWP9>.

³² See Matt Flegenheimer, *Democrats' Line of Attack on Gorsuch: No Friend of the Little Guy* (NY Times, Mar 13, 2017), online at <http://www.nytimes.com/2017/03/13/us/politics/democrats-judge-gorsuch-confirmation-hearing.html> (visited July 7, 2017) (Perma archive unavailable).

clerked for Judge David B. Sentelle on the United States Court of Appeals for the D.C. Circuit and then for Justices Byron White and Anthony Kennedy on the Supreme Court. He attended Harvard Law and has a Ph.D. from Oxford, where he was a Marshall scholar. In legal circles, he's considered a gifted writer. Like Scalia, he's a textualist and an originalist.³³

Notice that the first substantive legal description of Gorsuch in this account zeroes in on his methodology. I recall nothing remotely like this from any source in 1986 during Scalia's confirmation. To be sure, later in the article, one gets a healthy dose of "he sided with/against,"³⁴ but that is *all* that one would have seen thirty years ago. The CBS News account of Gorsuch's confirmation hearing reverses the order of emphasis, leading with a "he sided with/against" analysis but also including a prominent mention, however inaccurate it might be, of judicial methodology:

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

As a judge, Gorsuch has said he follows the conservative philosophy embodied by Scalia during Scalia's nearly two decades on the nation's top court, one that depends on strict constructionism—a firm reliance on the text of the Constitution for judicial interpretation.³⁵

NBC News, on the other hand, went full attitudinal: a lengthy article on Gorsuch on the eve of his Senate hearing had no mention at all of methodology but focused only on the results in particular hot-button cases.³⁶ It is nonetheless noteworthy that

³³ Audrey Taylor and Geneva Sands, *Judge Neil Gorsuch, What You Need to Know about the SCOTUS Nominee* (ABC News, Mar 20, 2017), archived at <http://perma.cc/S4N2-YWG7> (emphasis added and formatting omitted).

³⁴ See *id.* ("He sided with Christian employers and religious organizations in the *Burwell v. Hobby Lobby and Little Sisters of the Poor* cases.")

³⁵ *Who Is Neil Gorsuch, Supreme Court Justice Nominee?* (CBS, Mar 20, 2017), archived at <http://perma.cc/V3ZL-CKWQ>.

³⁶ Ari Melber and Meredith Mandell, *Who Is Judge Gorsuch? Clues in Key Rulings* (NBC, Mar 20, 2017), archived at <http://perma.cc/J3JY-ZV5U>.

at least some public observers in 2017 think that decision-making methodology is worth mentioning. That is not something that people my age have grown up taking for granted.

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

II. "CAN I GET A WITNESS?"³⁷

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

The pre-Scalia Court had neatly avoided this problem. For most of the country's history, no avoidance tactics were really necessary, because the scope of application of the Confrontation Clause was minimal. Virtually all criminal prosecutions are brought at the state level, and the Bill of Rights, of which the Confrontation Clause is a part, does not apply to the states of its own force. And while the Fourteenth Amendment was ratified in 1868, the Confrontation Clause was not held to be "incorporated" against the states via the Fourteenth Amendment until 1965.³⁸ Thus, prior to 1965, there were essentially no opportunities for the federal courts to opine on Confrontation Clause issues in state criminal cases.³⁹ And for the nearly two centuries of the nation's history up to that point,

³⁷ Grand Funk Railroad, *Some Kind of Wonderful*, in *All the Girls in the World Beware!!!* (Capitol Records 1974).

³⁸ See *Pointer v Texas*, 380 US 400, 403 (1965).

³⁹ See Richard D. Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2003–2004 *Cato S Ct Rev* 439, 447 ("So long as the Confrontation Clause was a limitation only on the federal judicial system, its bounds, and its relationship to hearsay doctrine, did not matter very much.").

there were relatively few federal criminal prosecutions of any kind. Some of us grew up with the expression “don’t make a federal case out of it” as part of the surrounding culture. The assumption was that a federal case was a big, rare deal, meaning that few occasions to apply the Confrontation Clause would ever arise. Moreover, “in federal prosecutions any out-of-court statement that might have been excluded from evidence in common law litigation via the Confrontation Clause could also be excluded by bringing it within the rule against hearsay.”⁴⁰ Accordingly, there was meager federal case law involving the meaning of the Confrontation Clause prior to 1965.

The incorporation of the clause in that year, perhaps coupled with the increasing federalization of crime, opened the floodgates for federal-court litigation involving the Sixth Amendment.⁴¹ In 1980, after fifteen years of the onslaught, the Court summarized and systematized its holdings up to that point in *Ohio v Roberts*,⁴² a case that really involved only whether the state had made adequate efforts to locate a witness but that set forth the guiding doctrine for Confrontation Clause jurisprudence for a quarter century:

[W]hen a hearsay declarant is not present for cross-examination at trial, . . . his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁴³

In other words: If evidence was admitted by virtue of a hearsay exception that the justices on the Court circa 1980 would have learned about in law school half a century earlier, it automatically counts as “reliable” and its admission therefore does not violate the Confrontation Clause. If it is admitted pursuant to some newfangled hearsay exception (for example, the “catch-all” exception represented by Federal Rule of

⁴⁰ Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Georgetown L J 1011, 1014 (1998).

⁴¹ Some casual Westlaw searches confirm the increase in Confrontation Clause litigation. A simple search of the federal-courts database for “confronted /2 witnesses” shows 115 hits for all time before 1965 and 114 hits from 1965 to 1980. A search for “confrontation clause,” a term that does not appear to have been in much use in premodern times, yields 477 hits for 1965 to 1980.

⁴² 448 US 56 (1980).

⁴³ *Id.* at 66.

Evidence 807 and included in some state rules of evidence), then the Court will decide case by case whether the evidence is sufficiently reliable to be admitted over a Confrontation Clause exception.⁴⁴ In all instances, the clause is read to exclude unreliable or untrustworthy evidence and nothing more.

This approach has the considerable virtue of largely merging constitutional and nonconstitutional law regarding out-of-court statements into a single inquiry. It also has the considerable virtue of leaving very few cases for the federal courts to decide, as most out-of-court statements will be admitted, if at all, pursuant to well-established hearsay exceptions, leaving no additional constitutional analysis to be done. It has the further virtue of sounding good as a matter of policy; who would want to admit unreliable evidence or exclude reliable evidence? And it has the additional virtue, if one inclines to pro-prosecution results, of letting relatively few guilty crooks walk because of this particular legal technicality. It has the decided vice, however, of bearing no plausible relationship to the words of the Confrontation Clause,⁴⁵ which neither contains nor intimates the words “reliability” or “trustworthiness” (much less “indicia of”), or to the clause’s context, which focused not on the reliability of evidence as such but on the subjection of evidence to a particular procedural mechanism. As Scalia put it:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point in which there could be little dissent), but about how reliability can best be determined.⁴⁶

If one looks at the Confrontation Clause’s words—“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁴⁷—one would think that the blindingly obvious questions to be asked about the

⁴⁴ See *Idaho v Wright*, 497 US 805, 817 (1990).

⁴⁵ See Richard D. Friedman, *Crawford Surprises: Mostly Unpleasant*, 20 *Crim Just* 36, 36 (Summer 2005) (“The doctrine of *Ohio v. Roberts* . . . had so little to do with the constitutional text, or with the history or principle behind it, that eventually it was bound to be discarded.”).

⁴⁶ *Crawford*, 541 US at 61.

⁴⁷ US Const Amend VI.

clause's meaning are: Who is a "witness" and what does it mean to "confront" those "witnesses"? It took the Supreme Court more than two centuries to ask those blindingly obvious questions. It happened in 2004, in an opinion written by Scalia.

Michael Crawford was convicted of assault for stabbing Kenneth Lee. Crawford claimed self-defense, arguing that he thought that Lee was pulling a weapon on him. Crawford's wife, Sylvia, had given a tape-recorded statement to the police, with neither Crawford nor his counsel present for cross-examination, that at least arguably called into question whether Lee really was pulling a weapon when Crawford stabbed him. Because of marital privilege, Sylvia did not testify at trial, but the government played her tape-recorded statement to the jury.⁴⁸

The recording was admissible under Washington state evidence law because, although it was hearsay, it was a statement against Sylvia's penal interest under Washington's Rule 804(b)(3), as it flagged her as a possible accessory to a crime. Applying *Roberts*, the Washington courts had previously decided that a hearsay exception for statements against penal interest was *not* "firmly rooted" unless it contained a requirement of corroboration of the statement,⁴⁹ which Washington's Rule 804(b)(3) at that time did not, except in limited cases that did not extend to Sylvia's statements in *Crawford*.⁵⁰ The Washington courts accordingly tried to decide whether Sylvia's statements had sufficient "indicia of reliability" to satisfy the

⁴⁸ *Crawford*, 541 US at 38–41.

⁴⁹ *State v Parris*, 654 P2d 77, 80–81 (Wash 1982). The US Supreme Court subsequently agreed that admission of hearsay stemming from statements against penal interest was a violation of the Confrontation Clause, with a plurality of the Court concluding that the hearsay exception allowing these statements was not "firmly rooted." See *Lilly v Virginia*, 527 US 116, 134 (1999) (Stevens) (plurality).

⁵⁰ At the time of the decision, Washington's rule read:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Wash Rule Evid 804(b)(3) (1979). The words "and offered to exculpate the accused" have since been deleted. See Wash Rule Evid 804(b)(3).

Sixth Amendment as construed by *Roberts*.⁵¹ The state court of appeals said “no,” and the state supreme court said “yes.”⁵²

In a sweeping opinion by Scalia, the US Supreme Court discarded the *Roberts* framework, which “allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”⁵³ Scalia wrote that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”⁵⁴ Here is where Scalia’s methodology went on full display. Judicial decision-making, said Scalia, is all about reading the Constitution and figuring out what it means. The Confrontation Clause, said Scalia, is all about who are “witnesses” and what it means to be “confronted with”⁵⁵ those witnesses. Any other inquiries are simply beside the point.

To be sure, the questions posed by the Confrontation Clause’s text are not necessarily easy ones. In particular, it is not self-evident what it means to be a “witness.” Answering that question requires an interpretive approach more sophisticated than simply reading the text and declaring victory.

Linguistically, it is possible to say that “witnesses” are people who show up in court and testify. If that is what the term means in the Sixth Amendment, then the clause would apply *only* to people testifying in court, not to the introduction of out-of-court statements, whether introduced by those “witnesses” or otherwise. That is not a completely worthless constitutional provision, but it comes close. As Scalia pointed out in *Crawford*, it does not accomplish much to cross-examine an in-court witness who is merely reading someone else’s out-of-court statement.⁵⁶ It is doubtful whether very many people in 1791

⁵¹ *State v Crawford*, 54 P3d 656, 662 (Wash 2002).

⁵² *Id* at 658, 664.

⁵³ *Crawford*, 541 US at 62.

⁵⁴ *Id*.

⁵⁵ Before *Crawford*, Scalia had opined on what it means to be “confronted by” witnesses when he dissented from a judgment allowing child witnesses to testify by closed-circuit television instead of facing defendants in court. See *Maryland v Craig*, 497 US 836, 862 (1990) (Scalia dissenting) (quotation marks, citation, and alterations omitted):

According to the Court, we cannot say that face-to-face confrontation with witnesses appearing at trial is an indispensable element of the Sixth Amendment’s guarantee of the right to confront one’s accusers. That is rather like saying “we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment’s guarantee of the right to jury trial.”

⁵⁶ See *Crawford*, 541 US at 50–51.

worried about prosecutors and judges bringing in witnesses at a criminal trial who would then misread other people's testimony. They most likely did worry a lot about the out-of-court testimony itself, such as *ex parte* affidavits, substituting for live testimony, either directly or indirectly through the testimony of live witnesses who are recounting what those affidavits contain.⁵⁷

It would also be linguistically possible to understand the term "witnesses" to mean "those whose statements are offered at trial,"⁵⁸ which would make the clause applicable to *all* out-of-court statements used in any fashion by the prosecution. Again, that is a historically unlikely account of the Confrontation Clause; no one ever suggested that it rendered constitutionally irrelevant the entire body of hearsay law in criminal cases (though that is surely an arguable position if one wants to take it). Surely the clause applies to some out-of-court statements but not to others. Accordingly, the search was on for a linguistically sound understanding of the word "witnesses" that provides the most likely public meaning of the term in the specific context of the Sixth Amendment.

For that search, Scalia turned to two of his favorite interpretive sources: pre-Founding history and the Founding-era dictionary. The former revealed that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."⁵⁹ The latter indicates that the Confrontation Clause

applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.⁶⁰

A witness for purposes of the Confrontation Clause, said Scalia, is thus someone who bears testimony against a criminal defendant—or, put another way, the Confrontation Clause is interested only in "testimonial" statements. The exact contours

⁵⁷ See *id.* at 50–56.

⁵⁸ *Id.* at 43.

⁵⁹ *Id.* at 50.

⁶⁰ *Crawford*, 541 US at 51 (alterations in original and citations omitted) (noting a definition provided by Webster's 1828 dictionary).

of that term “testimonial” were not precisely identified by the Court in *Crawford*, and later cases continue to leave some doubt about which kinds of statements are “testimonial,” such that their introduction makes their declarants constitutional “witnesses,” for purposes of *Crawford*.⁶¹ Justice Clarence Thomas, for example, has consistently had a narrower conception of the scope of the Confrontation Clause than did Scalia.⁶² The details and resolution of those disputes about which kinds of statements are “testimonial” are not my topic here. The point is only that the framework for those disputes that was developed in *Crawford* emerged from a methodology that looked not to the policy consequences of the interpretation, nor to the extent to which it reduces the workload of the federal courts, but to the public meaning of the words of the Confrontation Clause as they would have been understood by a reasonable audience in 1791. Whether the *Crawford* Court got that inquiry exactly right is less important than the fact that it actually tried to do so.

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

⁶¹ See, for example, *Davis v Washington*, 547 US 813, 827–28 (2006) (deciding 911 calls are ordinarily not testimonial); *Melendez-Diaz v Massachusetts*, 557 US 305, 310 (2009) (finding that forensic certificates fall within the “core class of testimonial statements”); *Michigan v Bryant*, 562 US 344, 359 (2011) (describing when statements made to police during an ongoing emergency are testimonial); *Bullcoming v New Mexico*, 564 US 647, 664–65 (2011) (holding that the testimonial nature of a forensic certification does not turn on whether it was notarized); *Williams v Illinois*, 567 US 50, 58 (2012) (Alito) (plurality) (determining that the Confrontation Clause does not bar the use of a testimonial statement when it is not used to prove the truth of the matter asserted).

⁶² See, for example, *Williams*, 567 US at 103 (Thomas concurring in the judgment) (finding the clause inapplicable when an expert relied on certain out-of-court statements because such “statements lacked the requisite ‘formality and solemnity’”).

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

The interpretive approach we endorse is that of the “fair reading”: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research. It also requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.⁶³

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

Once the Confrontation Clause is understood to apply to all “testimonial” statements, because those statements make the declarants “witnesses” who must be “confronted,” it is a short step to the proposition that statements in laboratory reports made with the understanding that they would likely be used as evidence in a criminal prosecution are testimonial statements. The Court, in another opinion by Scalia, took that short step in 2009 in *Melendez-Diaz v Massachusetts*.⁶⁴ This was a big problem for prosecutors. Dragging laboratory analysts into court to testify at trials is a major imposition,⁶⁵ and—with no slight at all intended at laboratory analysts—not all laboratory analysts will make good witnesses. Just think of Annie Dookhan.⁶⁶

⁶³ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (Thomson/West 2012).

⁶⁴ 557 US 305 (2009).

⁶⁵ See *Bullcoming*, 564 US at 683–84 (Kennedy dissenting).

⁶⁶ Annie Dookhan worked in a Massachusetts crime laboratory and tampered with evidence on a massive scale, implicating convictions in twenty-four thousand cases. She served three years in prison, and reinvestigation of the cases for which she processed

This extension of *Crawford* to the realm of scientific evidence revealed some serious fault lines on the Court. *Crawford* was a 7–2 decision on the reasoning, with Chief Justice Rehnquist and Justice O’Connor concurring only in the result because the Court could have decided the case without overruling *Roberts*;⁶⁷ and the Court’s immediately subsequent cases elaborating on the *Crawford* framework, also written by Scalia, were near-unanimous.⁶⁸ *Melendez-Diaz*, however, was 5–4, with Justices Kennedy, Breyer, and Alito and Chief Justice Roberts dissenting. The dissenters tried to argue that laboratory analysts were not really the kind of witnesses that the Framers had in mind for confrontation,⁶⁹ but that is a tough argument to sell. A person who reports on what a machine spat out bears testimony against a defendant just as much as does a person who claims to have seen the defendant sell drugs on the street. Surely an eighteenth-century statute prescribing that witnesses take oaths would apply to what the dissent called “unconventional witnesses”⁷⁰ if they appeared in court. To make the out-of-court character of the witness crucial resurrects the larger idea that only in-court testifiers are constitutional witnesses, which, as discussed above, is a linguistically possible position but one that is hard to square with the history and context of the Confrontation Clause.

Perhaps recognizing this weakness, virtually all of the lengthy dissent in *Melendez-Diaz* was devoted to considerations

evidence has occupied the Massachusetts criminal justice system for quite some time now. See Shawn Musgrave, *DAs Say Dookhan Drug-Tampering Case Nearing an End* (Boston Globe, Mar 25, 2017), online at <http://www.bostonglobe.com/metro/2017/03/25/most-drug-cases-handled-former-state-chemist-annie-dookhan-have-been-vacated-case-nears-end/yfa6MU9P8HLdA3irE4tgnM/story.html> (visited July 27, 2017) (Perma archive unavailable).

⁶⁷ *Crawford*, 541 US at 69 (Rehnquist concurring in the judgment).

⁶⁸ See, for example, *Davis*, 547 US at 815. Thomas concurred in the result in *Davis*, which involved statements made during a 911 call that all of the justices agreed were not testimonial because they were calls for help rather than attempts to provide evidence. *Id.* at 840 (Thomas concurring in the judgment in part and dissenting in part). But Thomas dissented from the result in the companion case of *Hammon v Indiana* (which was consolidated with *Davis* at the Supreme Court) because the out-of-court statement in that case—a conversation with police in the declarant’s home that the majority viewed as testimonial—lacked the formality or solemnity of a deposition or a custodial interrogation. *Id.* at 840–42 (Thomas concurring in the judgment in part and dissenting in part).

⁶⁹ See *Melendez-Diaz*, 557 US at 330 (Kennedy dissenting) (“[T]he Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses.”).

⁷⁰ See *id.* (Kennedy dissenting).

of policy, arguing that applying the Confrontation Clause to producers of scientific evidence will produce “a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause” with “vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence.”⁷¹ The dissent focused on numerous ways in which applying the Confrontation Clause to scientific evidence will disrupt the trial process with little likely gain in accuracy. Does everyone involved in the production of such evidence, from the person who calibrates the machine to the person who signs the final report, have to be subject to cross-examination?⁷² Defendants can run their own tests on evidence and call their own experts, or even subpoena prosecution analysts if they wish.⁷³ The Court’s rule will serve no purpose because almost never will cross-examination of analysts produce valuable information, and it will simply gum up the system by hauling laboratory personnel into court for meaningless appearances.⁷⁴ The bottom line for the dissent was: “Guilty defendants will go free, on the most technical grounds, as a direct result of today’s decision, adding nothing to the truth-finding process.”⁷⁵ Kilpatrick could not have put it better. Where was Scalia’s sympathy for the police?

To be sure, the dissent’s policy concern is understandable. Before the advent of scientific evidence like spectroscopic analysis and blood tests, how would one prove that a drug seized was cocaine or that a defendant was drunk? One would put some police officer on the stand and ask him whether it looked (or tasted) like cocaine or whether the defendant looked (or smelled) drunk. As the trial judge noted in *Bullcoming v New Mexico*:⁷⁶

⁷¹ Id at 331–32 (Kennedy dissenting).

⁷² See id at 332–35 (Kennedy dissenting). Well, yeah, said the majority. See id at 311 n 1 (“It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.”).

⁷³ See *Melendez-Diaz*, 557 US at 337–38 (Kennedy dissenting). Well, yeah, said the majority, but so what? See id at 324 (“[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”).

⁷⁴ See id at 338–42 (Kennedy dissenting). Well, maybe, said the majority, but so what? See id at 325 (“The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”).

⁷⁵ Id at 342 (Kennedy dissenting).

⁷⁶ 564 US 647 (2011).

“[W]hen he started out in law practice, there were no breath tests or blood tests. They just brought in the cop, and the cop said, ‘Yeah, he was drunk.’”⁷⁷ If the burden of introducing scientific evidence becomes too great, perhaps prosecutors will go back to the presumably less reliable (Dookhan aside) old ways. This concern came to the fore in *Williams v Illinois*,⁷⁸ in which the four dissenters in *Melendez-Diaz* got Thomas to vote with them for the result because the statements in that case (a DNA report from a private laboratory) were not formalized enough to meet Thomas’s criteria for a testimonial statement.⁷⁹ As the plurality opinion put it: “If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable.”⁸⁰

These concerns had arisen in *Bullcoming*, with Justice Ruth Bader Ginsburg writing the opinion for the majority, which included Scalia. Here, the state of New Mexico did put on a live witness to explain a laboratory report (in this case a blood alcohol test), but the witness was not the person who actually wrote the statements in the report. (Where was that person? We do not know; he “was on uncompensated leave.”⁸¹) The Court held that testimonial statements can be admitted only through the persons who actually made them.⁸² The four dissenters from *Melendez-Diaz* renewed their objections to applying the Confrontation Clause to statements involving scientific evidence. The dissent decried the majority’s position as “a hollow formality” and a rejection of “the concept that reliability is a legitimate concern,” claiming that “[t]he protections in the Confrontation Clause . . . are designed to ensure a fair trial with reliable evidence.”⁸³ I would expect that Scalia would regard the charge of hollow formalism as high praise and a focus on reliability as the substitution of policy concerns for constitutional language. His fellow “conservative” justices (with no suggestion

⁷⁷ Id at 656 n 3 (quotation marks omitted).

⁷⁸ 567 US 50 (2012).

⁷⁹ Id at 110–13 (Thomas concurring in the judgment).

⁸⁰ Id at 58 (Alito) (plurality).

⁸¹ *Bullcoming*, 564 US at 662.

⁸² Id at 652.

⁸³ Id at 677–78 (Kennedy dissenting).

intended of guilt by association for Breyer) obviously had in mind quite different decision-making criteria than did Scalia.

Importantly, the dissent claimed that the Court's abandonment of *Roberts* "seemed to have two underlying jurisprudential objectives. One was to delink the intricacies of hearsay law from a constitutional mandate; and the other was to allow the States, in their own courts and legislatures and without this Court's supervision, to explore and develop sensible, specific evidentiary rules."⁸⁴ Shades of the attitudinal model circa 1985! Isn't it possible that Scalia, in writing *Crawford*, had as his "jurisprudential objective" getting the right interpretation of the Sixth Amendment rather than serving some policy goals? Scalia surely thought so. In 2011, after Scalia had been on the Court for twenty-five years, even his "conservative" colleagues did not always get it.

III. "SO I WANNA KNOW, WHAT'S THE NAME OF THE GAME? DOES IT MEAN ANYTHING TO YOU?"⁸⁵

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

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

The Confrontation Clause, as with the rest of the Bill of Rights, does not apply to the states. The text, if any, that limits the criminal procedures of states is § 1 of the Fourteenth Amendment, which reads in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁸⁶

⁸⁴ Id at 681 (Kennedy dissenting).

⁸⁵ ABBA, *The Name of the Game*, in *ABBA: The Album* (Atlantic 1977).

⁸⁶ US Const Amend XIV, § 1.

It is possible, I suppose, that this provision incorporates the precise text of the Confrontation Clause against the states,⁸⁷ though that seems a very unlikely account of the language actually used. It is perhaps more likely that the Privileges or Immunities Clause of the Fourteenth Amendment makes applicable to the states most or even all of the *principles* represented by the specific provisions in the Bill of Rights, though it is less clear whether that application extends to all violations of those principles or only to discriminatory violations of those principles. Finally, it is also possible that the text of the Fourteenth Amendment contains its own substantive requirements independent of the Bill of Rights, and the extent of any overlap between those two texts is therefore entirely contingent.

It is quite far from my task here, or anywhere else, to sort out the original meaning of § 1 of the Fourteenth Amendment. The only point here is that the original meaning of that provision, rather than the original meaning of the Confrontation Clause, needs to be the real focus of originalist analysis should one want to know how the Constitution limits state prosecutors' use of out-of-court statements. The dissenting justices in the post-*Crawford* world have a point. Application of the Confrontation Clause, as construed (assume for the moment correctly) by *Crawford*, has consequences when applied to state criminal prosecutions that are immeasurably greater than would be the consequences of a provision applicable only to the federal government. The same, of course, could be said of all of the other Bill of Rights provisions, from the Establishment Clause to the Takings Clause. In short, Justice Scalia might be completely right about the meaning of the Confrontation Clause, and the post-*Crawford* dissenters might be completely right about the absurdity of applying that meaning to state proceedings if no straightforward variant of the incorporation doctrine is correct as a matter of original meaning.⁸⁸

⁸⁷ Consider Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (Cambridge 2014).

⁸⁸ The interpretive effects of the incorporation doctrine are potentially quite profound. If the Fourteenth Amendment incorporates Bill of Rights provisions, does it incorporate their 1791 meaning? Their 1868 meaning? Their contemporary meaning? If there is a difference in meaning between 1791 and 1868, and one applies the 1868 meaning to the states, does one also apply the 1868 meaning to the federal government? Precisely this latter result has happened with the one provision in the Fourteenth Amendment that overlaps with the Bill of Rights with no need for incorporation: the Due Process of Law Clause. I explore that interpretive feedback, which has resulted in

Of course, no Court in the foreseeable future is going to do away with the incorporation doctrine, even if that is the “correct” answer as a matter of original meaning. That is a brute fact. Given that fact, what to do with cases like *Crawford*? Does one simply run with the original meaning of the clause, even in a context in which that original meaning has no application as an original matter, and even when such (mis)application threatens to distort the original constitutional structure? Or does one invent a new meaning for the Confrontation Clause, in a kind of *cy pres* action, which best preserves the overall plan of the document, whatever that might mean apart from the document’s actual text and regardless of how that new meaning feeds back into cases involving the federal government, to which the Confrontation Clause really does apply?

This is a subspecies of a large set of second-best problems in legal theory that might well have no solution. At least, I have never come up with a systematic solution to second-best problems, in this or any other context.⁸⁹ I am hardly the only person to notice the problem,⁹⁰ and this is not the place in which to engage in extensive discussion of such topics. All I will say here is that Scalia, in deciding a case like *Crawford*, was not really engaged in the enterprise of interpretation, originalist or otherwise. He was engaged in the enterprise of adjudication, which, as I detail at some length elsewhere,⁹¹ is a quite different cognitive operation from interpretation. Interpretation is about ascertaining communicative meaning; adjudication is about resolving real-world disputes. The relationship, both logical and empirical, between originalist interpretation and originalist adjudication remains an object that cries out for more study.

serious distortion of the original meaning of the Fifth Amendment, elsewhere. See Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 BYU L Rev *42–59 (forthcoming), archived at <http://perma.cc/8HKB>

-Z88D. The Court has not shown much interest in applying constitutional provisions differently to states and the federal government even when it might make interpretive sense to do so, though that is a subject for another project.

⁸⁹ For some tentative explorations of second-best problems in connection with proof, see Gary Lawson, *Evidence of the Law: Proving Legal Claims* 133–46 (Chicago 2017).

⁹⁰ See generally, for example, Michael Lewyn, *When Scalia Wasn't Such an Originalist*, 32 Touro L Rev 747 (2016) (defending Scalia’s choice to rely on *stare decisis* and other facts when the originalist evidence was inconclusive); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L Rev 1 (1994).

⁹¹ See Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 Notre Dame L Rev 2143, 2155–62 (2017).

I have elsewhere explored how those two different enterprises played out in Scalia's judicial writings.⁹² Suffice it to say that Scalia was interested primarily in adjudication, not interpretation:

Virtually all of Justice Scalia's writings have been directed towards articulating a theory of adjudication, not a theory of interpretation. He was instructing judges, and indirectly lawyers, about how to decide cases. Accordingly, his instructions on how to construe texts were not really designed to interpret those texts, in the sense of finding their meaning as accurately as possible, but were instead designed to provide instructions on how to decide cases.⁹³

For Scalia, interpretation was the handmaiden of adjudication, and he generally justified his interpretive moves by reference to adjudicatory norms and goals rather than epistemological norms. In *Reading Law*, Scalia and Professor Garner drew their definition of "interpretation" from a 1900 legal encyclopedia: "the ascertainment of the thought or meaning of the author of, or the parties to, *a legal document*, as expressed therein, according to the rules of language *and subject to the rules of law*."⁹⁴ Thus:

Justice Scalia was not really trying to set forth a methodology for interpreting texts, or even for ascertaining the meaning of distinctively legal texts. He was setting forth a methodology for resolving legal disputes in which texts are invoked by one or the other party. Meaning plays a role in that methodology, but the role is far from exclusive, and it is often decidedly secondary.⁹⁵

In my own work, I try to stick to interpretation rather than adjudication,⁹⁶ but that is a story for another time.

From within Scalia's framework, it is not at all obvious how to approach a problem like *Crawford*, in which the "adjudicatory

⁹² See *id.*

⁹³ *Id.* at 2158.

⁹⁴ Scalia and Garner, *Reading Law* at 53 (cited in note 63) (emphasis added), quoting H.T. Tiffany, *Interpretation and Construction*, in David S. Garland and Lucius P. McGehee, eds, 17 *The American and English Encyclopædia of Law* 1, 2 (Edward Thompson 2d ed 1900).

⁹⁵ Lawson, 92 *Notre Dame L Rev* at 2161 (cited in note 91).

⁹⁶ See generally, for example, Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?)*, 96 *BU L Rev* 1457 (2016); Gary Lawson, *Originalism without Obligation*, 93 *BU L Rev* 1309 (2013).

meaning” of the Fourteenth Amendment is taken to prescribe looking to the “interpretive meaning” of the Sixth Amendment and then to apply that interpretive meaning in adjudicatory contexts to which it might not have been suited. Would the Sixth Amendment have been written and ratified in its current form if, in 1791, it was intended to apply to states as well as to the federal government? The world may never know.

Crawford was, I think, a genuine triumph of originalist interpretation whether or not it got the right answer, simply by virtue of the effort that it exerted to find that answer. Whether it was a triumph of originalist adjudication as well depends on the answers to some very important questions that cannot be derived from originalism as a theory of interpretation but that can come only from a normative theory of judging—and indeed from a normative theory that prescribes how to navigate the world of second best. Put crudely: if one is trying to decide cases in accordance with the original meaning of the Constitution—and not just the original meaning of one small part of that document taken out of context—maybe *Crawford*, and *Hicks* for that matter, really belonged in jail.

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