

ORIGINALISM AS AN ANCHOR FOR THE SIXTH AMENDMENT

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Originalism is sometimes criticized as merely a means to justify conservative results.¹ And cases do indeed exist in which the Supreme Court has divided along liberal-conservative lines, and conservatives have played originalism as a purported trump card. Last Term's decision in *District of Columbia v. Heller*,² interpreting the Second Amendment as including an individual right to bear arms, is a recent example.

When it comes to criminal procedure, however, things are not so simple. This Essay examines two lines of cases: first, those involving the Court's reinvigoration of the Sixth Amendment right to jury trial, and second, those involving the Court's recent reconception of the Sixth Amendment right to confrontation. In both of these areas, the Court has divided sharply across ideological lines. Specifically, in both lines of cases, the Court acted primarily through a core five-member majority: Justices Scalia, Thomas, Stevens, Ginsburg, and Souter. On the other hand, the dissenters initially were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer. Chief Justice Roberts and Justice Alito have stepped quite comfortably into the shoes of Chief Justice Rehnquist and Justice O'Connor.³

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1. See, e.g., CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 39–41 (2007); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 501 (1996).

2. 128 S. Ct. 2783 (2008).

3. A quick aside: I represented defendants in three of the four cases discussed in this Essay. So when President George W. Bush had two vacancies on the Supreme Court and told the country that he would appoint more jurists in the mold of Justices Scalia

This debate requires thought. One cannot simply say, “I am conservative, so I think *x* should win the case.” Instead, one must ask whether one really believes in originalism, and, if so, what an originalist approach to the Constitution in general, and to the Sixth Amendment in particular, really entails.

To this end, this Essay will advance two brief points. First, it will argue that the Court recently has used originalism to decide both easy cases and hard cases arising under the Sixth Amendment. The easy cases involve modern situations closely paralleling ones with which the Framers were familiar; the hard ones involve modern phenomena and thus require more extrapolation. Second, this Essay will contend that the Court is right to use originalism as an anchor even in the hard cases. Without this anchor, the Court has nothing but its policy preferences to guide it, and the very purpose of the Sixth Amendment is to prevent cases from being decided solely on those terms.

I. THE RIGHT TO JURY TRIAL

The Supreme Court’s internal debate about the scope of the right to jury trial has been going on now for a little over a decade. The debate arose primarily because of a modern innovation by state legislatures and Congress. Historically, when a legislature wanted to punish more severely a particular manner of committing a crime, it simply created an aggravated version of the crime, under which the prosecution would charge and prove the aggravating factor just as any other element of a criminal statute.⁴ The prosecution, for example, had to prove that the defendant used a gun in order to convict him of armed robbery instead of robbery. The prosecution had to prove serious bodily injury to convict the defendant of first degree assault instead of a lesser degree of assault. And so on.

Juries traditionally passed judgment on allegations that exposed defendants to heightened punishment not only—or even primarily—because juries were necessarily better factfinders

and Thomas, I was probably one of the only people who regularly represents criminal defendants who said: “That’s fantastic.” By my way of thinking, I would pick up two votes. However, President Bush appointed two new Justices who approach these cases much more like Chief Justice Rehnquist did.

4. See *Apprendi v. New Jersey*, 530 U.S. 466, 480 (2000); *id.* at 501–05 (Thomas, J., concurring).

than judges. Instead, the common law assigned this duty to juries so that they could engage in what is most accurately described as a limited nullification power—though the Supreme Court has shied away from this term.⁵ At the time of the founding, most felonies were punishable by death. Juries recognized that if they convicted defendants of certain crimes, they would subject the defendants to the death penalty. But juries traditionally had, and often exercised, the power to return verdicts on lesser offenses when the jurors thought that a defendant's wrongdoing was not severe enough to warrant the death penalty. Juries thus served as an institution of public consciousness, interposed between the prosecution and the judge, that guaranteed "the people's . . . control in the judiciary."⁶

Starting in the 1980s, however, legislatures attempted to recalibrate this framework by designating sentencing "factors."⁷ A sentencing factor is a particular fact that the legislature determines should subject the defendant to an (often severely) increased sentence. But instead of leaving that fact to be pleaded and proven like any other offense element, legislatures often have decided to allow prosecutors to prove the fact by a preponderance of the evidence to the judge at sentencing, instead of beyond a reasonable doubt to the jury.

The Court first addressed the constitutionality of this legislative practice in 2000 in *Apprendi v. New Jersey*.⁸ For a long time, the New Jersey Code had made possession of a firearm with an unlawful purpose a crime punishable by ten years in prison.⁹ The state legislature then adopted a new rule that if the defendant picked his victim on the basis of racial animus, a ten-year increase in the sentence (from ten to twenty years) was permissible.¹⁰ Charles Apprendi was convicted of assault and sentenced to twelve years on the basis of this new law.¹¹

5. The closest the Court has come to the word "nullification" is its oft-noted description of the jury as the "circuitbreaker in the State's machinery of justice." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

6. *Id.*

7. See U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2-3 (2009), available at http://www.ussc.gov/general/USSC_Overview_200906.pdf.

8. 530 U.S. 466.

9. *Id.* at 469-70.

10. *Id.*

11. *Id.* at 471.

A five-Justice majority of the Supreme Court held that this sentence violated Mr. Apprendi's Sixth Amendment right to jury trial.¹² In my view, *Apprendi* was a fairly easy case because it involved a classic example of an aggravated crime.¹³ The legislature determined that a certain *mens rea* made a defendant more culpable and, therefore, decided to subject him to greater punishment. That *mens rea* functioned exactly like an element of a greater offense.

Four years after *Apprendi*, the Court considered a much more difficult case: *Blakely v. Washington*.¹⁴ The case involved the constitutionality of an aggravated sentence under a state sentencing guidelines regime.¹⁵ Whatever one might think of the legislative action in New Jersey that gave rise to the *Apprendi* case, sentencing guideline regimes certainly are not *intended* to deprive defendants of any rights, nor are they intended to manipulate the burden of proof. What they are intended to do is regularize criminal punishment and give judges a consistent framework for ratcheting up sentences when particularly egregious facts are present.

It was not easy for me, as the lawyer representing Mr. Blakely, to tell the Court that the proceedings leading to his enhanced sentence constituted a historic kind of violation of the Sixth Amendment right to jury trial. Sentencing guidelines are a purely modern innovation, so I could not say that the common law cases clearly indicated how the Court should decide Mr. Blakely's case. What I had to do was point out that the Court established a rule in *Apprendi* that is based on an originalist interpretation of the Sixth Amendment right to jury trial. Having done that, I argued that the Court should apply it to these modern circumstances. Otherwise, the same problems that gave rise to the need for the rule's common law predecessor would rear their ugly heads here as well.

In other words, even though binding sentencing guidelines systems are perfectly well-intentioned, they create a very real possibility for the same type of abuse the Framers intended the

12. *Id.* at 497.

13. To the extent Professor Bibas does not challenge me on this point, others have already done so. See Rory K. Little & Theresa Chen, *The Lost History of Apprendi and the Blakely Petition for Rehearing*, 17 FED. SENT'G. REP. 69 (2004).

14. 542 U.S. 296 (2004).

15. *Id.* at 298.

Sixth Amendment to preclude. In a system that treats any fact that allows an increased sentence as an element of a crime, prosecutors must charge and prove all of the allegations that are essential to a defendant's punishment. Yet sentencing guidelines undermine the Framers' design because they require no such thing. Instead, they allow prosecutors to charge basic offenses and get verdicts from juries that expose defendants only to certain levels of punishment, and then to urge judges to sentence defendants based on a probability that the defendants committed more serious conduct. (Indeed, guidelines allow judges to take such steps *sua sponte*.) Such a system, I contended in *Blakely* impinges on the jury's ability to serve as a check on the prosecution and utterly defeats its ability to control the judiciary.

The Court agreed. The same five-Justice majority that voted together in *Apprendi* held that the Sixth Amendment right to jury trial applies to sentencing guideline regimes.¹⁶ Six months later, the same five Justices held that the federal guidelines system suffered from the same infirmity as Washington State's system.¹⁷

II. THE RIGHT TO CONFRONTATION

The confrontation cases follow a similar storyline. The Confrontation Clause of the Sixth Amendment provides that the defendant has a right to be "confronted with the witnesses against him."¹⁸ This text seems to require a particular procedure with respect to the prosecution's witnesses: namely, one in which a confrontation occurs. Shortly after the Supreme Court incorporated this right against the states in 1965,¹⁹ however, the Court stopped paying attention to that text or the history behind it.

Instead, under an approach it enshrined in *Ohio v. Roberts*,²⁰ the Court resolved to be guided solely by the *purpose* of the Confrontation Clause.²¹ That purpose, as the Court defined it, was to guarantee the reliability of the prosecution's evidence.²² Hence, in any case in which the prosecution wanted to intro-

16. *Id.* at 313–14.

17. *Booker v. United States*, 543 U.S. 220, 225, 267 (2005).

18. U.S. CONST. amend VI.

19. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

20. 448 U.S. 56 (1980).

21. *Id.* at 65.

22. *Id.*

duce out-of-court statements from a nontestifying witness, the statements were admissible if the trial judge deemed them reliable. Reliability turned on whether the trial judge determined that cross-examination would be unlikely to bear fruit. The *Roberts* framework remained the law for a generation.

In 2004, I argued *Crawford v. Washington*,²³ challenging the Court's reliability-based approach to the Confrontation Clause. First, I said that the text of the clause does not say anything about reliability or hearsay.²⁴ What the clause sets forth is a rule about the way the prosecution has to present its witnesses' testimony. The prosecution must bring its witnesses into court so the defendant can be confronted with them. Specifically, the prosecution must have its witnesses testify in the defendant's presence, and in front of the jury, and be subject to cross-examination.²⁵

The history of the right removes any doubt about whether the Confrontation Clause requires the prosecution to proceed in this manner in every case, regardless of how little the judge might think cross-examination would accomplish. Let me explain why this is true by way of one more autobiographical note: I was living in Seattle while I was researching and writing my brief for *Crawford*. One day, I was in the library at the University of Washington School of Law going through dusty old treatises and common law texts, trying to determine how the Founders understood the right to confrontation. I picked up a transcript of the 1603 trial of Sir Walter Raleigh.²⁶ When I opened the book that contained Raleigh's trial, dust literally fell out. What I read on the pages was remarkable. Here, in the transcript of a case that scholars, as well as the Supreme Court itself, long had acknowledged as one of the rallying cries for the right to confrontation, the prosecution made the exact same arguments that modern prosecutors were successfully making under the *Roberts* framework.

Sir Walter Raleigh was charged with being part of a conspiracy to commit treason. While in custody, an alleged accomplice,

23. 541 U.S. 36 (2004).

24. Brief for Petitioner at 27–30, *Crawford*, 541 U.S. 36 (No. 02-9410).

25. *Id.* at 9.

26. THE TRIAL OF SIR WALTER RALEIGH, KNT. AT WINCHESTER, FOR HIGH TREASON (1603) reprinted in 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–61 (T.B. Howell ed., 1809).

Lord Cobham, accused Raleigh of being part of the conspiracy.²⁷ Instead of bringing Cobham into court, however, the prosecution sought merely to introduce his out-of-court statements. The prosecution argued that the statements were reliable because it had not made Cobham any promises of leniency, Cobham had implicated himself in the treason, and Cobham had not made his statements under pressure from the authorities. In short, the prosecution argued that Cobham's accusation was reliable, such that cross-examination was unnecessary. Raleigh vigorously objected, demanding to be confronted with his accuser.²⁸ However, the court overruled his objections,²⁹ and Raleigh was convicted and sentenced to death.³⁰

I understand that originalism does not always provide a clear answer to a modern constitutional question. Among other things, problems of translation can make it difficult to draw lessons from trials that happened centuries ago in different legal systems. But if history has any force at all in constitutional interpretation, it is hard to deny that what happened in Raleigh's trial was the precise equivalent of what the *Roberts* framework allowed to happen every day in cases like Michael Crawford's.

With this history in mind, I argued in my *Crawford* brief that the Confrontation Clause erects a clear bar against the prosecution introducing its witnesses' testimony against the accused without putting those witnesses on the stand.³¹ In other words, the prosecution may not introduce "testimonial statements" unless the defendant has an opportunity for cross-examination. The Court, in a thoroughgoing originalist opinion by Justice Scalia, agreed.³² Again, if one cares at all about history, *Crawford* was a rather easy case. The statement at issue, a potential accomplice's accusations during a stationhouse interrogation, closely paralleled the exact type of statements the Framers adopted the Confrontation Clause to regulate. And on this basis, the Court reversed the defendant's conviction.³³

27. *Id.* at 1–2.

28. *Id.* at 15–16.

29. *Id.* at 24.

30. *Id.* at 31.

31. Brief for Petitioner, *supra* note 24, at 11.

32. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

33. *Id.*

Last year I argued another confrontation case called *Melendez-Diaz v. Massachusetts*.³⁴ One could maintain, in the parlance of the SAT, that *Melendez-Diaz* was to *Crawford* as *Blakely* was to *Apprendi*. In other words, whereas *Crawford* was an easy case, *Melendez-Diaz* was a hard case.

Melendez-Diaz presented the question whether forensic laboratory reports constitute testimonial evidence.³⁵ The law at the time of the founding certainly does not provide a foolproof answer to how the Framers would have thought about forensic evidence. Forensic evidence, at least as we define the concept today, did not exist at the time of the Founding.³⁶ Thus, just as in *Blakely*, the Court in *Melendez-Diaz* found itself having to decide whether to apply an originalist-based rule to a truly modern phenomenon. And, just as in *Blakely*, Justice Scalia wrote an opinion for five Justices applying the Sixth Amendment in this new context.³⁷ The Court explained that affidavits are quintessentially testimonial statements, that forensic reports are basically affidavits transmitting scientific findings for investigatory and evidentiary use, and that there is no logical justification for exempting forensic analysts from the rules that apply to other prosecutorial witnesses who give incriminating testimony.³⁸

Justice Kennedy's dissent in *Melendez-Diaz*³⁹ looks much like the dissents that Justices O'Connor and Breyer wrote in *Blakely*.⁴⁰ Justice Kennedy's dissent shows little interest in history. Instead, it focuses on general purposes and consequences. Specifically, it contends that the Confrontation Clause, for functional reasons, should limit its reach to percipient witnesses, because extending the clause's reach to forensic analysts will impose significant bur-

34. 129 S. Ct. 2527 (2009).

35. *Id.* at 2530.

36. With the help of one of my students at Stanford, I did some research. But the best evidence we were able to find was a line of cases from the nineteenth century involving prosecutions for adulterating milk. See *Commonwealth v. Waite*, 93 Mass. 264, 266 (1865); *State v. Campbell*, 13 A. 585, 586 (N.H. 1888); *State v. Newton*, 45 N.J.L. 469, 472 (1883); all cited in *Melendez-Diaz*, 129 S. Ct. at 2539 n.9. Apparently, the practice in these cases was to bring chemists into court to recite their findings, and some state courts suggested that this was necessary to avoid confrontation problems. But, for obvious reasons, that history only goes so far.

37. *Melendez-Diaz*, 129 S. Ct. 2527.

38. *Id.* at 2531–42.

39. *Id.* at 2543–58 (Kennedy, J., dissenting).

40. *Blakely v. Washington*, 542 U.S. 296, 314–26 (O'Connor, J., dissenting); *id.* at 328–47 (Breyer, J., dissenting).

dens on prosecutors.⁴¹ In the dissent's view, the threat of imposing such burdens on well-meaning prosecutors and legislators, none of whom intend to base convictions on unreliable evidence, is reason enough to forego applying the clause in this context.⁴²

III. DEFENDING SIXTH AMENDMENT ORIGINALISM

I believe, for three basic reasons, that it is a welcome and appropriate development for the Supreme Court to be taking originalism seriously in criminal procedure, even when the Court is confronting unquestionably modern circumstances in cases such as *Blakely* and *Melendez-Diaz*.

First, the very nature of the Sixth Amendment commands fidelity to its roots. The Amendment contains very few provisions. There is the right to counsel. There is the right to trial by jury. There is the right to be confronted with the witnesses against you. There are a few other clauses, but it is not a long list. It is not a lot to ask, nor would the Framers have thought it a lot to ask, to apply that handful of precious rights with a serious vigor.

Apart from those rights the Constitution enshrines, legislatures and other policy-making bodies have a great deal of flexibility to enact procedural rules and regulations. But these entities lack the authority to reprise the debates that led the Framers to insist on the short list of particular procedures they wanted followed, as the Sixth Amendment puts it, "in all criminal prosecutions."⁴³ No matter how inefficient or burdensome those procedures may seem today, and no matter how superior an alternative might seem, those procedures are absolutes and must be enforced.⁴⁴

Second, the Court's holdings in *Blakely* and *Melendez-Diaz* rightly reflect a distrust of governmental power—more specifically, of inquisitorial systems of criminal justice—that the founding generation thought essential to a criminal justice system. It is tempting to brush aside this distrust as a relic of the

41. *Melendez-Diaz*, 129 S. Ct. at 2543–44.

42. *Id.* at 2549.

43. U.S. CONST. amend. VI.

44. I should make clear that I do not think, as Professor Bibas suggests, that insisting on such rights requires us to import other practices that existed during the Founding era, such as all-male juries or unlimited evidence of defendants' other bad acts, into modern criminal trials. The Constitution does not lock in any practices except the rules it enshrines.

past, irrelevant to modern society. After all, as the Court acknowledged in *Crawford*, the Framers of the Sixth Amendment were concerned primarily with great state trials such as Raleigh's trial for treason, not "run of the mill" assault prosecutions like Michael Crawford's.⁴⁵ But the need for vigilance that undergirds the Sixth Amendment is quite necessary today, in just such run-of-the-mill cases. Our modern criminal justice system is verging on an assembly line—a machinery that is all too often built to process cases and convictions with minimal adversarialism. And the people caught up in that system are all too often the poor and disenfranchised—people whose prosecutions generate no public scrutiny whatsoever. We need to have certain backstops that these defendants can insist upon, or else they just get churned through the system without any protections at all.

The third, related reason these decisions are correct is that they insist on bright-line rules that curb the power of judges. One predominant theme of the dissents in *Melendez-Diaz* and *Blakely* is that we should allow judges to administer the Sixth Amendment by means of flexible standards.⁴⁶ Judges, the dissents argue, will have an intuitive sense of how far is too far. They will make sure defendants get fair trials and are not unjustly convicted.

I have enormous respect for federal and state trial judges across the country. I assume that they all try hard to do a good job and to be fair. But the Framers properly understood that when judges can decide criminal cases according to their own pragmatic policy preferences, the temptation is simply too strong to sacrifice defendants' rights at the altars of efficiency and a perceived need to protect public safety. Let me put it this way: whenever I pick up an appellate opinion that starts by saying it is going to balance the interests of the state in apprehending and prosecuting criminals against the interests of the defendant, I know who is going to win that case.

What we need are a few firm, bright-line rules that defendants have a right to insist upon when necessary, and that judges are bound to enforce, even when they do not necessarily want to. That is what the Sixth Amendment is all about. And that is why originalism is a necessary anchor in this realm of jurisprudence.

45. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

46. See *Melendez-Diaz*, 129 S. Ct. at 2543–58 (Kennedy, J., dissenting); *Blakely v. Washington*, 542 U.S. 296, 314–28 (O'Connor, J., dissenting); *id.* at 328–47 (Breyer, J., dissenting).