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## THE LIMITS OF TEXTUALISM IN INTERPRETING THE CONFRONTATION CLAUSE

STEPHANOS BIBAS\*

In evaluating textualism's role in interpreting the Bill of Rights, this Essay will focus on the criminal procedure provisions, which often get overlooked because they are not taught in most constitutional law courses, and primarily on the Confrontation Clause of the Sixth Amendment.

The argument here is two cheers for textualism. To interpret the Sixth Amendment, lawyers and judges have increasingly relied on textualism, as they should. Indeed, it should even be the principal method of interpretation. But the excesses that have turned textualism into the only method with all the answers are somewhat troubling. This is an area in which we see disagreement among the Republican appointees on the Supreme Court, with Justice Scalia taking the most textualist, most pro-defendant position;<sup>1</sup> Justice Kennedy, Chief Justice Roberts, and Justice Alito saying, "No, you've gone too far;"<sup>2</sup> and, oddly, Justice Thomas as one of two swing Justices in the area.<sup>3</sup> All of this goes to show how little we get when we try to squeeze the last possible drops out of textualism.

In the Sixth Amendment context, textualism helps judges and lawyers get away from raw policy analysis and guides their inquiry toward whether or not a defendant has confronted a witness. We do, however, tend to confuse textualism with originalism, which has so many broad and ambiguous meanings that it sometimes smuggles in the Framers' subjective in-

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1. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143, 1168–76 (2011) (Scalia, J., dissenting); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009).

2. See, e.g., *Melendez-Diaz*, 557 U.S. at 330–57 (Kennedy, J., dissenting); *Bryant*, 131 S. Ct. 1150.

3. See, e.g., *Melendez-Diaz*, 557 U.S. at 329–30 (Thomas, J., concurring).

tent. We further confuse textualism with formalism, even though the text often does not direct us to a formalistic bright-line rule, much as Justice Scalia sometimes might like it to.

To illustrate this point, this Essay will start with the text of the Sixth Amendment. The relevant clause guarantees: “[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”<sup>4</sup> For several decades, beginning with *Ohio v. Roberts*,<sup>5</sup> the Supreme Court interpreted the clause as establishing only a preference for face-to-face confrontation. Because that preference was not absolute, courts developed multi-factor balancing tests for deciding whether evidence was reliable.<sup>6</sup> Clearly, the text does not direct courts to balance any factors. One can understand Justice Scalia’s ire, because the Framers could not have anticipated that the Sixth Amendment would be interpreted as a mere preference that can be outweighed by any number of considerations.<sup>7</sup>

Thus, in 2004, seven members of the Court swept that rule away in *Crawford v. Washington*<sup>8</sup> and said: “No. The text says the defendant shall be confronted with the witnesses against him. That’s not a preference; that’s a rule.”<sup>9</sup> Accordingly, judges must look at what a witness is, at what confrontation means, and at the historical incidents against which this rule was designed to guard.

Note first that the text by itself does not provide the answer. It has to be supplemented with an originalist context. The text, read alone, could mean any one of three things. One plausible textualist reading is that a witness means only a person who actually testifies in court. This was the position of the great evidence scholar John Henry Wigmore and of Justice John Marshall

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4. U.S. CONST. amend. VI.

5. 448 U.S. 56 (1980).

6. See *Crawford v. Washington*, 541 U.S. 36, 63–65 (2004).

7. *Cf. id.* at 53–54.

8. *Id.*

9. See *id.* at 55–56 (“We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.”).

Harlan, the younger.<sup>10</sup> The Court in *Crawford* ultimately rejected this reading, however, but not because it fails to square with the text.<sup>11</sup> Indeed, it may well be the strictest reading of the text, but it does not square with the historical backdrop against which the text was adopted—namely, a series of treason trials in the 16th and early 17th centuries. The most notable of these was the trial of Sir Walter Raleigh, in which he was prosecuted based on unsworn, out-of-court statements that were extracted with thumb screws and the rack.<sup>12</sup> Raleigh insisted: “I’m being tried by the Spanish Inquisition. I want to bring this witness into court because he’ll recant,”<sup>13</sup> but his request was denied and he was eventually put to death.<sup>14</sup> His conviction was widely viewed as an injustice, and all contemporary discussions of the right of confrontation referred to this incident.<sup>15</sup>

“Witness” could also be read in the colloquial sense, as a person who sees the crime. “Eyewitness,” after all, is the most common lay understanding of the term “witness.” That reading is more or less the position that the Chief Justice, as well as Justices Alito, Kennedy, and Breyer, have been taking in recent cases.<sup>16</sup> Alternatively, “witness” could be read in the more technical legal sense of anybody whose statements are being used as evidence. But, under this understanding, must the statements be used to prove the truth of the matter asserted, effectively smuggling in hearsay law? Or is a witness anyone whose statements are used, period? Or must the statements be formalized, as Justice Thomas would require?<sup>17</sup> The text does not answer those questions.

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10. See *id.* at 42–43 (citing 3 J. WIGMORE, EVIDENCE § 1397, at 104 (2d ed. 1923)); see also *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring); *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring).

11. See *Crawford*, 541 U.S. at 51.

12. See *id.* at 44.

13. See *id.* For a transcript of Sir Raleigh’s trial, see 1 DAVID JARDINE, CRIMINAL TRIALS 400 (London, Charles Knight 1832).

14. See 541 U.S. at 44.

15. See *id.*

16. See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

17. See, e.g., *Melendez-Diaz*, 557 U.S. at 329 (Thomas, J., concurring); *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in part and dissenting in part).

Now, a lot of textualists will say that textualism is closely related to originalism. Professor Volokh is in good company. Justice Scalia takes that position,<sup>18</sup> and I think most would agree that the text at a minimum has to ban travesties like the trial of Sir Walter Raleigh. It makes perfect sense to read the Confrontation Clause to ban the use of out-of-court interrogations that provide the key evidence against a defendant and function as substitutes for live fact-witness testimony.

The problem, however, is that one cannot know what “witness” means from the text alone. So Justice Scalia has to use a maneuver. He turns the word “witness” into “testimony.”<sup>19</sup> As a result, the past decade of Confrontation Clause cases have focused on whether particular statements are “testimonial.”<sup>20</sup> But “testimonial” does not show up in the text of the Sixth Amendment. In addition, the right to be confronted is explicitly in the text, but Justice Scalia has turned “confrontation” into “cross-examination.” It is not clear, however, that cross-examination is either necessary or sufficient to satisfy the Sixth Amendment’s Confrontation requirement. In the paradigmatic Raleigh trial context, that is probably what it means. But courts can also apply this text to a set of concerns that were not present in the eighteenth century. For instance, many contemporary cases involve not only fact witnesses, but expert witnesses as well. Where an expert witness is involved, live, face-to-face cross-examination is less important than exposing the underlying irregularities of scientific methods and challenging the relevance of scientific evidence.<sup>21</sup>

As a result, at least seven Justices have been in the majority in *Crawford* and *Davis v. Washington*, holding that a court can

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18. See, e.g., Josh Blackman, *The Second Amendment and Rocket Launchers*, JOSH BLACKMAN’S BLOG, (Jul. 29, 2012), <http://joshblackman.com/blog/2012/07/29/the-second-amendment-and-rocket-launchers/>, [<http://perma.cc/P258-E9EH>] (quoting *Think Progress: Interview with Antonin Scalia* (Fox News television broadcast Jul. 29, 2012) (Scalia: “Originalism is a sort of sub-species of textualism.”)). See also generally 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 3 (Amy Gutmann ed., 1997).

19. See, e.g., *Crawford*, 541 U.S. at 51 (citation omitted) (“[The Confrontation Clause] applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”).

20. See, e.g., *Bullcoming*, 131 S. Ct. at 2710.

21. See generally Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99 (2013).

admit into evidence a 911 call (which is not “testimony” by a “witness”), but not out-of-court questioning of a domestic violence witness.<sup>22</sup> That is all arguably faithful enough to the context in which the Confrontation Clause arose. But then, when the Court tried to extend that logic to expert witnesses, it produced a series of very closely divided, fractured opinions—*Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, and *Williams v. Illinois*—where bare majorities of the Court extended this framework to lab analysts and certificates.<sup>23</sup> That reasoning, however, is not as convincing if one questions the link from “witness” to “testimony” or “testimonial.”

Thus, my opinion differs from that of my colleague Professor Volokh. It is not always clear that there were preexisting legal concepts at the time the Constitution was ratified that the Framers meant to preserve, at least in the Sixth Amendment area. Maybe the legal context is clearer under the Second Amendment. But with respect to the Sixth Amendment, though there may have been a settled rule for eyewitnesses or fact witnesses, there probably was not one for expert witnesses. That is why one sees the Court struggling to identify legal analogies. Is a lab analyst more like a copyist who certifies that he copied every word on the document correctly, or a custodian of records who certifies that there was no record in the files? Neither of those analogies is very close. When the analogy is close, it makes sense to use originalism to supplement textualism. But when there is not a close analogue and where the text is susceptible to several plausible readings, how does one get to the answer?

Lest you think I am going squishy, no less an authority than Justice Thomas says that this clause’s interpretation has become “disconnected from history and unnecessary to prevent abuse.”<sup>24</sup> These vague, strained analogies have drifted pretty far from the Sir Walter Raleigh trial.

It is not clear that there was a preexisting concept of what “confrontation” meant in a criminal trial that the Framers meant to freeze in amber. And, ironically, as much as the cases

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22. *Davis*, 547 U.S. at 828, 832–34.

23. *Williams v. Illinois*, 132 S. Ct. 2221 (2012). See, e.g., *Melendez-Diaz*, 557 U.S. at 310–11 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)) (Certificates that are “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination’” are testimonial.).

24. *Davis*, 547 U.S. at 838 (Thomas, J., concurring in part and dissenting in part).

try to get away from modern hearsay law, they are freezing in place eighteenth-century hearsay law, which was fairly cryptic and very much in flux.<sup>25</sup> It was a set of technical doctrines that were not widely known or understood. The People could not have meant to enshrine these technicalities when they enacted the Sixth Amendment. It is likely that they did mean to stop the Raleigh trial-type abuses, but they did not mean to enact every jot, tittle, and iota of eighteenth-century evidence law.

So the final point here is: When history runs out, what are we going to do? Are we going to squint? Are we going to draw strained analogies, or are we going to say the text takes us this far, to this point, and then after this point, we have to look at how the common law has developed? Is this a right that is subject to having its contours refined somewhat over the years, even if the core of the right really does need to be frozen in the eighteenth century? I think it is appropriate to use textualism as a starting point, and in many cases it might wind up getting us an answer. But when we go beyond that, when we purport to use increasingly strained forms of textualism supplemented by originalism to supply all the answers, we may undercut textualism's core meaning and respectability.

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25. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 46–55 (2009).