
Brendan T Beery
When Originalism Attacks: How Justice Scalia’s Resort to Original Expected Application in \textit{Crawford v. Washington}\textsuperscript{1} Came Back to Bite Him in \textit{Michigan v. Bryant}\textsuperscript{2}

Brendan T. Beery

INTRODUCTION

Two recent dust-ups illustrate the hazards attendant to Justice Scalia’s habit of anchoring constitutional meaning to antiquity and superficiality. First there was his insistence that the Equal Protection Clause does not protect women.\textsuperscript{3} That assertion resulted from a hopelessly shallow semantic reading of the clause—one that ignored underlying principles altogether—and from his familiar insistence that the Constitution only applies now to circumstances as they existed centuries ago.\textsuperscript{4} Then came Justice Scalia’s dissent in \textit{Michigan v. Bryant},\textsuperscript{5} in which he had something of a judicial nervous breakdown. In \textit{Crawford v. Washington},\textsuperscript{6} Justice Scalia had held that because the Confrontation Clause was only understood to have been satisfied by formal cross-examination circa 1791,\textsuperscript{7} only cross-examination can satisfy that clause’s strictures today.\textsuperscript{8}

\textsuperscript{1} Crawford v. Washington, 541 U.S. 36 (2004).


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

[Answer:] Yes, yes. Sorry to tell you that. . . . But, you know, if indeed the current society has come to different views, that’s fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don’t need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. You don’t like the death penalty anymore, that’s fine. You want a right to abortion? There’s nothing in the Constitution about that. But that doesn’t mean you cannot prohibit it. Persuade your fellow citizens it’s a good idea and pass a law. That’s what democracy is all about. It’s not about nine superannuated judges who have been there too long, imposing these demands on society.
\end{quote}

\textsuperscript{4} See Jack Balkin, \textit{Abortion and Original Meaning}, 24 Const. Com. 291, 296 (2007)(explaining that Justice Scalia “insists that the concepts and principles underlying [the Constitution’s] words must be applied in the same way that they would have been applied when they were adopted.”).

\textsuperscript{5} Bryant, \textit{supra}, note 2, 562 U.S. ___ (No. 09-150)(2011).


\textsuperscript{7} 1791 was the effective date of the Constitution’s first ten amendments. \textit{See} U.S. Const., Amends. I-X.
Faced with the rigidity of this holding and facts that begged for flexibility, Justice Sotomayor wrote the majority’s opinion in *Bryant*. Justice Scalia correctly characterized her opinion as an institutional embarrassment, but he failed to appreciate his own complicity in spawning it. When Justice Scalia’s anxieties manifest in absurdly narrow and shallow rule-making, the Court in later cases can do little but undertake intellectual contortionism trying to unmoor itself from the head-scratching outcomes invited by his constrictive rules.

For purposes of this Article, I will abide my own preference for Professor Jack Balkin’s interpretive method of text and principle. To begin with, Professor Balkin takes the refreshing posture that not all in the interpretive universe must be an *ex adverso* contest between stilted strict construction and flighty organic fancy. Professor Balkin endorses textualism to the extent that it demands fidelity to the written commands of the Constitution; without this fidelity, we would find ourselves in an unprincipled interpretive free-for-all. Professor Balkin also insists on fidelity to the underlying principles of the text. What is *explicit* from the text is often vague and general; principles supply what is *implicit* in the text.

One would think that adherence to text and principle would be any faithful interpreter’s natural inclination. But Justice Scalia can bring himself to honor neither the text nor its underlying principles. With regard to text, Justice Scalia anchors constitutional meaning to the past by replacing broadly worded text with the narrowest possible subset of original expected applications. With regard to underlying principles, Justice Scalia anchors the Constitution semantically to the surface, insisting that although we may probe what the Constitution’s words meant when they were drafted, we may not probe the purposes that animated constitutional rules.

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8 Crawford, *supra*, note 1, 541 U.S. at 55.

9 See *Bryant*, *supra*, note 2, at slip. op. 2 (explaining that the case involved a dying declarant who, before he died, identified his killer by name and address in an uncross-examined statement.).

10 See generally, *id.*, (Scalia, J., dissenting).

11 See *id*.


13 *Id.*, at 292.


15 See Balkin, *Abortion and Original Meaning*, *supra*, note 4, at 293.

16 See *id.*, at 304.

17 See *id.*, at 295-297.

18 See generally, Part II, infra.
In Part I of this Article, I will discuss Professor Balkin’s method of text and principle and illustrate how that method should work in practice. In Part II, I will discuss Justice Scalia’s interpretive intransigence; like other conservatives, he seems to suffer from anxieties about historical progress and idealistic depth that keep him anchored to narrow interpretations in both temporal and semantic dimensions. In Part III, I will discuss how this anchoring impulse led Justice Scalia to propound a rule in Crawford that ignored any possibility of temporal progress and the animating principles underlying the Confrontation Clause. That interpretive approach led to the intellectual nightmare that is Bryan. The lesson here is clear: Justice Scalia’s brand of originalism and textualism does not work. Judged against contemporary jurisprudential standards, it produces absurd doctrinal mutations—like “the Equal Protection Clause doesn’t protect women” and “the framers said confront but they actually meant cross-examine.” When untenable rules supply the Court’s judicial inputs, judicial outputs will be tortured and dishonest. More specifically, hopelessly narrow rules invite desperate attempts to escape them. In a sense, then, the jurisprudential ink bombs created by conservative anchoring tend to detonate not in the opinions wherein they are embedded, but in the later cases in which resulting rules must be misapplied to avoid the absurd results that would obtain if they were applied properly.

I. Text and Principle

Professor Balkin describes his interpretive method this way:

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

Explaining how to apply interpretive methodology in a way that is faithful to text and underlying principle, Professor Balkin explains,

19 See id.
We look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than those who had the authority to create the text sought to refer to. We look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace. If we read the text to presume or embrace other principles, then we may be engaged in a play on words and we will not be faithful to the Constitution’s purposes. Just as we look to the public meaning of words of the text at the time of enactment, we discover underlying constitutional principles by looking to the events leading up to the enactment of the constitutional text and roughly contemporaneous with it. . . .

Underlying principles are necessary to constitutional interpretation when we face a relatively abstract constitutional command rather than language that offers a fairly concrete rule, like the requirement that there are two houses of Congress or that the President must be 35 years of age. When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement. But where the text is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it. Because the text points to general and abstract concepts, these underlying principles will usually also be general and abstract. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations. Nevertheless recourse to underlying principles limits the direction and application of the text and therefore is essential to fidelity to the Constitution.21

Professor Balkin’s method seems to offer the hope of an intellectually disciplined and honest approach that has appeal for both textualists,22 who would value the methodology’s fidelity to text and original meaning, and living constitutionalists,23 who would value the novel applications that underlying principles might find over time. Professor Balkin explains,

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21 Balkin, Abortion and Original Meaning, supra, note 4, at 304-305.

22 See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Princeton University Press 1997), 23-25 (describing a “good textualist” as one who is neither a “literalist” nor a “nihilist,” and stating, “Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”).

23 Balkin, Abortion and Original Meaning, supra, note 4, at 293 (explaining that “[l]iving constitutionalists]” “object to being bound by the dead hand of the past. They fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation’s future.”).
[A] larger purpose of my argument is to demonstrate why the debate between originalism and living constitutionalism rests on a false dichotomy. Originalists generally assume that if we do not apply the constitutional text in the way it was originally understood at the time of its adoption we are not following what the words mean and so will not be faithful to the Constitution as law. But they have tended to conflate two different ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is. Indeed, many originalists who claim to be interested only in original meaning, like Justice Antonin Scalia, have encouraged this conflation of original meaning and original expected application in their practices of argument. Living constitutionalists too have mostly accepted this conflation without question. Hence they have assumed that the constitutional text and the principles it was designed to enact cannot account for some of the most valuable aspects of our constitutional tradition. They object to being bound by the dead hand of the past. They fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation's future. By accepting mistaken premises about interpretation—premises that they share with many originalists—living constitutionalists have unnecessarily left themselves open to the charge that they are not really serious about being faithful to the Constitution’s text, history and structure.

The choice between original meaning and living constitutionalism, however, is a false choice. I reject the assumption that fidelity to the text means fidelity to original expected application.24

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

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

24 Id., at 292-293 (footnote omitted).
Mom grounds John for a week for violating Rule 7. Is she right? If we apply text and principle, the answer is probably yes. The reason underlying the rule seems fairly obvious: one sibling ought not to take advantage of another sibling’s youth, diminutive dimensions, or weakness to cause that sibling (or any other child?) injury. With this animating principle in mind, it seems an absurdly narrow interpretation of the rule—semantic mischief—that would render John guiltless.

To identify underlying principle, one must ask why a rule exists. Because principles range from specific to abstract, the first answer will likely be superficial. One must therefore keep probing, asking why or so what until reaching not just any purpose that is served by the rule, but the animating purpose that drove the rule’s drafter or drafters to create it.

Common sense often supplies the reasons for a rule’s existence. For example, we would ask about Rule 7, why would a parent write that rule? The answer: because an older kid shouldn’t hit a younger kid. Why? Because a older kid is likely to be bigger and smarter. So what? Well, a bigger, older, smarter child is in a position to take advantage of a smaller child’s physical and mental disadvantages. So what? Well, we don’t want a younger kid in a position where he or she won’t have the mental or physical ability to defend himself or herself. It’s dangerous and unfair. There we have it: by asking why and so what until we got to what motivated the drafter to draft the rule, we uncovered animating purpose. An interpreter who has achieved this depth of understanding will properly interpret the rule such that any time an older child uses his or her superior physical or mental stature to injure a younger child, Rule 7 has been violated.

This approach has its limits. One cannot keep asking why or so what until reaching an absurd level of abstraction. After all, almost any rule could be probed until it leads to some universal truth like “we should love each other and ourselves.” Ultimately, for example, that’s a principle served by Rule 7: it promotes love. While that may be true, it can hardly be said that the rule’s drafter had that principle in mind when drafting the rule. We are looking for animating purpose, not all purposes served by a rule’s promulgation.

Were Justice Scalia to interpret Rule 7 the same way he has interpreted the Equal Protection Clause (which I will discuss more thoroughly below), he would first anchor the rule temporally by looking to its original expected application. Since Adam was the only older brother and Ben the only younger brother when the rule was drafted, Justice Scalia would achieve simplicity by insisting that the rule only protects Ben; he would essentially excise the words younger brother and replace them with Ben.

To moor the rule semantically, Justice Scalia would ignore the rule’s underlying reasons; it wouldn’t matter why it’s wrong to hit or why it’s wrong to target someone younger. Justice Scalia would simply declare with disarming certitude, “Sorry, nobody ever thought Rule 7 would apply to trickery or poison ivy. You can always amend the rule if that’s what you mean.” The problem with such dismissiveness, of course, is that we shouldn’t need to amend the rule every time new circumstances arise; it really does apply to what John did to Timmy if we honor its animating (and one might even say obvious) purpose.
Anchoring oneself to hidebound books in an intellectual monastery where one never asks why seems a thing to do for someone who is ill-inclined to trust the fates, the possibilities of discovery, or the goodness of humanity as it has evolved under God’s hand. The question arises whether one who reflects this distrustful worldview, if he cannot begin to trust, is suited to read to the rest of us from a document whose drafters surely did.

II. Justice Scalia’s Temporal and Semantic Anchoring


The statute at issue provided for an increased jail term if, “during and in relation to . . . [a] drug trafficking crime,” the defendant “uses . . . a firearm.” The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had “used a firearm during and in relation to a drug trafficking offense.”27

Justice Scalia explained that “a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase ‘use a gun’ fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, ‘Do you use a cane?’ you are not inquiring whether he has hung his grandfather’s antique cane as a decoration in the hallway.”28

Justice Scalia has said, “Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”29 This distinction accords with Justice Scalia’s observation that “[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases

27 Scalia, A Matter of Interpretation, supra, note 21, at 23.
28 Id., at 23-24.
29 Id., at 23.
an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”

With this nod to context in mind, one might say that although Justice Scalia calls himself a “good textualist,” he more accurately aspires to be a “reasonable contextualist.”

An adequate definition of context in the sense Justice Scalia uses it is difficult to provide. “Context” generally means “the whole situation, background, or environment relating to a particular event, personality, creation, etc.” The breadth of this definition is helpful in illustrating how deep context can be, but a definition this broad also poses problems:

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

The definition of context above tempts carelessness since we must avoid questions about what the drafter meant to say or how he meant to say it. Thus, it is Justice Scalia’s example rather than any definition that gives context its most helpful meaning.

Consider the rule don’t use a weapon in the commission of a crime (I’ve taken the liberty of re-drafting for simplicity). In Smith, the Court held that the defendant violated the rule because it focused only on the text. As Justice Scalia would rightly insist, we’re missing the context. What Justice Scalia would mean by that (if I may be so bold) is not that we’re missing what the drafters thought they were saying or trying to say, but what they did say if we’ll just look at why they said it.

We law professors are fond of asking why, and there is another question we ask that might be useful here, too: so what? (Notice we are still not asking what the drafter meant to say; we are merely probing for context). Justice Scalia’s problem with the Court in Smith (although he didn’t state as much explicitly) was that the Court never asked why or so what. Had the court

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30 Id., at 37 (emphasis added).
31 Id., at 24.
33 Scalia, A Matter of Interpretation, supra note 21, at 16 (emphases in original).
asked those questions (and gotten satisfactory answers), it would have understood the rule’s underlying principles, which in turn would have produced a reasonable interpretation.

As I explained above, common sense usually helps. So let us begin: Why did the drafters of the rule don’t use a weapon in the commission of a crime draft that rule? Because a firearm is a dangerous weapon and a crime is a dangerous situation. So what? Well, if the perpetrator has a dangerous weapon and he’s in a dangerous situation, it’s more likely that somebody is going to get shot and be injured or killed. Now we see the animating purpose underlying the rule; note that we did not stop asking why or so what until we did (we didn’t ask just once).

Given this context, Justice Scalia correctly interpreted the statute such that it was only violated if the defendant used a firearm in a way that made it more likely that somebody was going to get shot and be injured or killed. The Court’s holding that the defendant violated the statute without using a firearm in a way that made it more likely that somebody was going to get shot and be injured or killed reflected a superficial interpretation of the rule in that it lacked deep context or, maybe worse, any context or principles at all. The Court assumed that the rule existed for its own sake. Justice Scalia was right; this is silly.

The question arises why, if Justice Scalia knows how to apply text and principle, he fails to do so with regard to constitutional interpretation. For one thing, textualists tend to be socially conservative, which means that textualists are usually looking for ways not to find fundamental individual rights and not to find new ways to enforce notions of non-discrimination. These aversions make probing for underlying principle a dubious exercise. A narrower incarnation of

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34 For a thought-provoking treatment of this less-than-controversial assertion, see Simon Lazarus, “More Polarizing Than Rehnquist,” The American Prospect (May 14, 2007), available at (http://www.prospect.org/cs/articles?article=more_polarizing_than_rehnquist) (last visited March 9, 2011) (stating, In the evolving record of oral arguments and decisions, evidence is sparse that the justices are muting their differences. Most significantly, there is little evidence that Roberts has tried particularly hard to lead the way toward any such synthesis. On the contrary, at least in the big, controversial cases, the new Court is, if anything, more polarized than Rehnquist’s was. News stories on decisions have cast the Court as split between robotic “conservative” and “liberal” blocs, with Anthony Kennedy the swing justice in the middle. In these reports, Roberts does not lead; he is twinned with his fellow Bush appointee Samuel Alito as half of a lockstep duo that has reinforced hard-line conservatives Antonin Scalia and Clarence Thomas.

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


textualism appeals to social conservatives because it ties us more closely to the past, when “traditional values” had a better foothold, and because it provides more resistance to freewheeling notions of equality and personal autonomy (or what ideologues might call hedonism). Modern political conservatism, in the form of the Republican Party, is closely linked to social and religious dogmatism:

In 2005 42 percent of Americans described themselves to survey takers as born-again, only slightly below the readings in 2001 and 2002. George W. Bush reassured the faithful that summer and autumn by endorsing the teaching of “intelligent design”—implicit godly design, to be sure—alongside evolution in U.S. schools, and by choosing nominees who were conservative on the abortion issue to fill two U.S. Supreme Court vacancies. Because the retiring Sandra Day O’Connor had been a swing vote in earlier high-court rulings, her replacement was expected to be decisive. The president also reassured the faithful by renewing his promise to veto any legislation to liberalize stem-cell research, its lopsided public support notwithstanding.37

The political, religious, and social proclivities of conservatives cannot be unrelated to the disdain conservatives (and especially Justice Scalia) have for “substantive due process”:

My favorite example of a departure from text—and certainly the departure that has enabled judges to do more freewheeling law-making than any other—pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments to the United States Constitution . . . It has been interpreted to prevent the government to take away certain liberties beyond those, such as freedom of speech and of religion, that are specifically named in the Constitution. (The first Supreme Court case to use the Due Process Clause in this way was, by the way, Dredd Scott—not a desirable parentage.)38

Rigid conservatives’ disdain for liberal sexual mores that abide such practices as sodomy, contraception, and reproductive choice-making obviously compel their disdain for the constitutional doctrine that affords those very practices constitutional protection.

For a good reflection of the contemporary understanding of more fundamental conservative philosophy, I turn (where else?) to Wikipedia: Conservatism is

a political and social philosophy that promotes the maintenance of traditional institutions and supports, at the most, minimal and gradual change in society. Some conservatives


38 Scalia, A Matter of Interpretation, supra, note 21, at 24.
seek to preserve things as they are, emphasizing stability and continuity, while others oppose modernism and seek a return to the way things were. The first established use of the term in a political context was by Francois-Rene de Chateaubriand in 1819, following the French Revolution. The term has since been used to describe a wide range of views.

Political Science often credits the Irish politician Edmund Burke (who served in the British House of Commons and opposed the French Revolution) with many of the ideas now called conservative. According to . . . a former chairman of the British Conservative Party, “Conservatism is not so much a philosophy as an attitude, a constant force, performing a timeless function in the development of a free society, and corresponding to a deep and permanent requirement of human nature itself.”

Robert Eccleshall states, “It is the persistent image of society as a command structure in which the responsibilities of leadership can be exercised within the framework of a strong state manifested in divine-right royalism ... that distinguishes English conservatism from rival ideologies.”

This is a helpful explanation. It identifies key conservative objectives (maintain the current order; slow or stop change; establish order; impose authority), prescribes the temporal range of conservatives (some want to preserve current institutions and traditions; some want to revisit the past) and describes the psychological depth of conservatism (it is a philosophy, a worldview, and also an attitude). Note that conservatism has both temporal and spatial properties. In the temporal sense, conservatives value past or present; they view the passage of time as portending danger and decay. In the spatial sense, the more distant an idea or attitude is from accepted traditions and norms, the more suspicious the conservative becomes. To simplify, conservatives consider that which is closer to them good and that which is farther from them bad, both in time and in thought.

While this is a helpful description of conservatism, it does not adequately describe the conservative. It gets at what conservatives believe, but not who they are. One scientific study showed that, “on average, conservatives show more structured and persistent cognitive styles, whereas liberals are more responsive to informational complexity, ambiguity and novelty.”

Again it is easy to see both temporal and spatial distinctions. In the temporal sense the key characteristic enumerated above is novelty (newness). A conservative is less likely to view with favor that which is newer in time (or presumably worse yet awaiting in the future), while a liberal values the passage of time as positive. In the spatial sense, conservatives prefer


informational simplicity and certainty (closeness or likeness in thought) while liberals value complexity and ambiguity (ideas or possibilities that are distant from those already known or accepted).

If there is an emotion that seems best associated with resistance to change and complexity or ambiguity; promotion of traditionalism and stability and continuity; and preference for rigid structures for command and authority, it is anxiety:

Individual differences in the tendency to experience particular emotions can play a strong role in shaping cognitive processes associated with decision-making. Emotions serve as salient forms of information, signaling the presence of particular threats to be avoided or rewards to be acquired. Emotions, in turn, promote cognitive responses facilitating the avoidance of threat and the acquisition of rewards. With respect to decision-making, some emotions (e.g., anger) promote decision-making biases that increase one’s tolerance for risk, whereas other emotions (e.g., disgust) promote decision-making processes associated with risk-avoidance.

There are reasons for hypothesizing a link between anxiety and basic forms of risk-avoidant decision-making. Anxiety signals the presence of potential threat and promotes psychological responses that help individuals reduce their vulnerability to threat. Because threat avoidance has been implicated as a core component of risk-avoidant decision-making, we hypothesize that individuals high in dispositional anxiety would be especially likely to exhibit pronounced forms of risk-avoidant decision-making.

Another reason to think that anxiety is associated with risk-avoidant decision-making is that anxiety promotes pessimistic appraisals of future events. Individuals with high trait anxiety, for example, report heightened perceptions of negative outcomes, across a range of behavioral contexts. The pessimistic outcome appraisals of anxious individuals often focus on their own anticipated emotions – anxious individuals typically anticipate high levels of distress given the occurrence of a negative event. Such appraisals play an integral role in guiding choice, as decisions are often viewed in terms of their potential to cause strong negative emotions.41

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

It seems evident that a judge whose brain simply works this way will undertake the chore of textual interpretation from an entirely different place, emotionally and cognitively, than a more liberal judge. This may go a long way in explaining why judges like Justice Scalia, although they know how to apply text and principle when interpreting banal codes like the gun law at issue in Smith, balk when it comes to interpreting the much more idealistically audacious Constitution of the United States.\footnote{I note here a possible point of contention that warrants further inquiry in future scholarship. Professor Balkin says that Justice Scalia “also agrees that the original meaning of the text should be read in light of its underlying principle.” Balkin, Abortion and Original Meaning, supra, note 4, at 296. Although Justice Scalia might pay lip service to underlying principle, it seems unlikely that he agrees to apply it in any meaningful way with regard to constitutional rather than statutory interpretation. Explaining Justice Scalia’s originalist approach in the Second Amendment case, Dist. Of Columbia v. Heller, 554 U.S. 570 (2008), Professor Jamal Greene writes, “So fastidious was Justice Scalia’s devotion to the legal authority of the original meaning of the [Second Amendment’s operative clause] that he was unmoved by his own concession that the “prefatory” clause—“a well-regulated militia, being necessary to the security of a free state”—announces that the Amendment’s original purpose was military related. This preference for meaning over purpose is consistent with Justice Scalia’s announced devotion to original meaning over original intent.” Jamal Green, Heller High Water? The Future of Originalism, 3 Harv. L. & Pol’y Rev. 325, 335 (2009).}

Take, for example, the Equal Protection Clause.\footnote{U.S. Const., Amend. XIV.} The Fourteenth Amendment provides that no state may deny “to any person within its jurisdiction the equal protection of the laws.”\footnote{Id. (emphasis added).} United States v. Virginia\footnote{United States v. Virginia, 518 U.S. 515 (1996).} (VMI) is likely the culprit behind Justice Scalia’s assertion that the Equal Protection Clause does not apply to women (to the extent Justice Scalia overreacted to the VMI case, his outburst reminds us that “bad facts make bad law”\footnote{See Haig v. Agee, 453 U.S. 280, 319 (1981)(Brennan., J., dissenting).}). The issue in VMI was whether equal-protection principles required Virginia to change its men-only admission policy.\footnote{See VMI, supra, note 45, at 519.}

In VMI, Justice Ginsberg and the majority held that 1) the Equal Protection Clause did apply to women\footnote{Id., at 531.} and 2) Virginia violated the Equal Protection Clause inasmuch as the Virginia Military Institute’s admission policy did not treat otherwise qualified female applicants the way it treated male applicants.\footnote{Id., at 558.} If his statement quoted in the California Lawyer is accurate, Justice Scalia would have held that the Equal Protection Clause did not apply to gender at all.

Justice Ginsberg stated, “Since Reed [v. Reed]\footnote{Reed v. reed, 404 U.S. 71 (1971).} the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a
law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."\(^51\) This statement illuminates the more liberal living constitutionalist view: Justice Ginsberg’s view must be that Equal Protection Clause has evolved from a command that states not abuse persons within their jurisdiction into a command that states affirmatively provide an “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”\(^52\)

Thinkers like Ronald Dworkin and John Hart Ely tend to prefer “top-down” constitutional analyses that seek out universal egalitarian principles; they interpret text in a way that serves those principles without strict fidelity to text or historical context.\(^53\) The problem with this thinking, as reflected in Justice Ginsberg’s position, is that it can reach a point where there no longer seems to exist any connection to the text of the Constitution. In Justice Ginsberg’s case, she has simply penciled out “protection” and penciled in “treatment” or “opportunity.” \(^54\) VMI thus seems the kind of liberal, tweed-and-sandal-wearing interpretation of constitutional text that Justice Scalia has some reason to mock.\(^54\) But those who purport to be textualists come similarly unmoored when text and context provide answers at odds with their own views.

The drafters of the Fourteenth Amendment likely chose the word *protection* because they were responding to the “Black Codes” of the post-Civil-War era and the harm those codes inflicted on their target: African Americans (former slaves).\(^55\)

After the war most southern states passed so-called Black Codes in 1865 and 1866, virtually reimposing the caste divisions of the old slave system. Several states decreed that Negroes could be employed only as workers in agriculture or domestic service. Mississippi prohibited black ownership or leasing of rural property, while Negro children had to be apprenticed to white masters. Some states forbade Negroes the ownership of weapons or alcohol. They were generally denied the right to vote, were barred from serving on juries, and kept from testifying in cases where whites were the parties.\(^56\)

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\(^{51}\) VMI, *supra*, note 45, 513 U.S. at 532.

\(^{52}\) *Id.*


\(^{54}\) *See Scalia, A Matter of Interpretation, supra* note 21, at 73 (comment by Professor Laurence Tribe).

\(^{55}\) *See generally*, Theodore B. Wilson, *The Black Codes of the South* (Univ. of Alabama Press 1965).

\(^{56}\) Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court decision that Legalized Racism* (Carroll & Graff Publishers 2004) at 34-35.
Post-war “Reconstruction” largely stalled in the South in 1876:

After Reconstruction ended in 1876, much of the leadership of the former rebellious states came from Confederate army veterans and officials. They had also been prominent in the immediate postwar era, when “Johnson governments” had enacted stringent Black Codes that sought to keep former slaves in perpetual subservient status. Foreshadowing the law challenged by the *Plessy* case in Louisiana, provisions of those codes required racial segregation. In 1865, Florida, for example, had forbidden any black or mulatto to “intrude himself into any railroad car or other public vehicle set apart for the exclusive accommodation of white people,” with a breach punishable by thirty-nine lashes. Laws such as this had been annulled by the 1867 Reconstruction Act but periodically reemerged under state authority.58

The Fourteenth Amendment and other measures were directed at un-doing the Black Codes:

A year after passing the Thirteenth Amendment,59 Congress ratified the Civil Rights Act of 1866, which was drafted to override the Black Codes, to offer an inclusive definition of citizenship, and to safeguard the freedmen’s civil rights. President Johnson vetoed the bill on April 9, 1866. The Act’s central provisions were then given extra protection by Congress against the threat of later erosion and inserted into the newly drafted Fourteenth Amendment.60

In his oral argument in *Brown v. Board of Education*,61 Thurgood Marshall, then an attorney, stated as follows:

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

57 The reference is to *Plessy v. Ferguson*, 163 U.S. 537 (1896).

58 Fireside, *Separate and Unequal*, supra, note 56, at 75.

59 The Thirteenth Amendment provides, “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const., Amend. XIII.


We charge that [segregation laws] are Black Codes. They obviously are Black Codes if you read them. [Attorneys for Southern states] haven’t denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide on that point.62

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

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

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it

seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights.63

So the Thirteenth Amendment technically ended slavery. But slavery’s vestiges survived the Civil War and the Thirteenth Amendment intact, especially in the form of the Black Codes, which sought to keep former slaves in a perpetual state of subservience. Progressives drafted civil-rights provisions in an effort to protect former slaves from laws like the Black Codes. (As noted above, those efforts were not effective, but they were made for that purpose.)

Critically, the drafters of the Equal Protection Clause didn’t write that states must stop the unequal treatment of former slaves; they wrote that states must provide all persons under their jurisdiction the equal protection of the laws. Justice Scalia himself has warned of the hazards of any attempt to discern what was meant from what was actually written (usually when interpreting statutes):

[I]f one accepts the principle that the object of judicial interpretation is to determine the intent of the [drafter], [then] being bound by genuine but unexpressed . . . intent rather than the law is only the theoretical threat. The practical threat is that, under the guise or even the self-delusion of pursuing unexpressed . . . intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the [drafter] said, but on the basis of what it meant, and are assured that there is no necessary connection between the two, your best shot at figuring out what the [drafter] meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that the law means what you think it ought to mean—which is precisely how judges decide things at common law.64

This warning notwithstanding, Justice Scalia claims that the Equal Protection Clause means ethnic groups even though it says persons; he says any contrary view ignores the context of the Equal Protection Clause, and, as noted above, Justice Scalia has said with regard to the Constitution, “context is everything.”65


64 Scalia, A Matter of Interpretation, supra, note 21, at 17-18 (emphases in original).

65 Id, at 37.
This is not unusual; when Justice Scalia’s views give him pause about the principles embedded in the Constitution’s text, he simply says that the text is ambiguous given context. The problem in such circumstances, of course, is that there would be no ambiguity unless he created it by looking beyond the plain text. We’re back to the problem Justice Scalia insists we avoid: the text doesn’t mean what it says, but what he thinks the wise drafter would have said, so now it says whatever he says it ought to say.\footnote{66}{See id., at 17-18.}

The great interpretive debate boils down to this: If we must look beyond the literal words of the Constitution to illuminate the Constitution’s meaning, then where? And says who? Living constitutionalists (or what Justice Scalia calls “constitutional evolutionists”) argue that we should interpret the Constitution as a document that makes sense under evolving standards\footnote{67}{See id., at 41-43.}; conservatives say that the Constitution means today precisely what it meant when it was drafted.\footnote{68}{See id., at 44-48.}

As I suggested earlier, the most limited or restrictive historical (originalist) understanding of the Equal Protection Clause is that it was directed at ending discrimination against former slaves\footnote{69}{See Slaughter-House Cases, 83 US 36 (1873) (1873) (“[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] ... we mean the freedom of the slave race”); Strauder v. West Virginia, 100 U.S. 303, 306 (1880) (“[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated ... all the civil rights that the superior race enjoy”); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 772 n 19 (2007)(Thomas, J., concurring).} even though the clause says that equal protection is guaranteed to all \textit{persons}. Surely the drafters of the Equal Protection Clause did not have in mind discrimination based on Italian-ness or Irish-ness or Asian-ness. They were only concerned with ethnicity to the extent that it happened to be the characteristic associated with the humanitarian debasing perpetrated by the political majority: the inhumanity of slavery and the Black Codes. It was certainly not the drafters’ concern simply to address racism.

Since the most superficial original purpose behind the Equal Protection Clause was to ameliorate a system that targeted former slaves (not African Americans as such), it becomes important to note that all former slaves are now dead, rendering the clause nothing more than an historic relic to any real originalist.\footnote{70}{Accord, Posner, \textit{Overcoming Law}, supra, note 51, at 247 (discussing conservative Robert Bork’s book \textit{The Tempting of America} and stating, \textit{[O]n its face the equal protection clause guarantees not legal equality but merely equal protection of whatever laws there happen to be, and its background was the refusal of law enforcement authorities in southern states to protect the freedmen against the private violence of the Ku Klux Klan. Language and}} Why, then, does Justice Scalia agree that it still has any meaning at all?

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\textit{\footnote{66}{See id., at 17-18.} \footnote{67}{See id., at 41-43.} \footnote{68}{See id., at 44-48.} \footnote{69}{See Slaughter-House Cases, 83 US 36 (1873) (1873) (“[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] ... we mean the freedom of the slave race”); Strauder v. West Virginia, 100 U.S. 303, 306 (1880) (“[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated ... all the civil rights that the superior race enjoy”); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 772 n 19 (2007)(Thomas, J., concurring).} \footnote{70}{Accord, Posner, \textit{Overcoming Law}, supra, note 51, at 247 (discussing conservative Robert Bork’s book \textit{The Tempting of America} and stating, \textit{[O]n its face the equal protection clause guarantees not legal equality but merely equal protection of whatever laws there happen to be, and its background was the refusal of law enforcement authorities in southern states to protect the freedmen against the private violence of the Ku Klux Klan. Language and}}}
\end{flushright}
In addition to protecting former slaves, does the Equal Protection Clause protect the progeny of former slaves against insidious discrimination? Interestingly, Justice Scalia answers this question in the affirmative: Yes, he says.\textsuperscript{71} And what about their progeny? Again, Justice Scalia says yes.\textsuperscript{72} Does the Equal Protection Clause protect all persons of African American descent? Yes, Justice Scalia says again, of course it does.\textsuperscript{73} What about people who are only partly African American, or Caucasians? Yes, them too.\textsuperscript{74} What about women? Finally, and now famously, Justice Scalia says no.\textsuperscript{75} But having already leapt from the originalist idea of former slaves and concluded that the Equal Protection Clause also applies to all ethnic groups, why stop there? The only honest answer, of course, and one we’ll not hear from Justice Scalia, is “because I said so.”

The difficulty in this exercise is manifest. We seek a workable standard. The standard of ethnicity—the one Justice Scalia proffers—is invented; it has to be, because it goes beyond what is explicit. Since it is invented, we must decide whether it is the most reasonable of our limitless possible inventions.

Surely the drafters of the Equal Protection Clause were concerned with the plight of former slaves, and surely there is a link between the plight of former slaves and the ethnicity of former slaves. It seems, then, that the invented standard of ethnicity is, so far, reasonable. But to stop there and say that the clause is only about ethnicity is as arbitrary as stopping later and saying it is about all humanity. It ignores the question why, and the more pointed question (for reasonable textualists) why the drafters, if they had meant to end there, hadn’t simply said that no background combine to suggest that, as Walter Berns believes, all that the clause forbids is the selective withdrawal of legal protection on racial grounds: a state cannot make black people outlaws by refusing to enforce the state’s criminal and tort law when the victims of a crime or tort are black. \textit{To the consistent originalist that she be the extent of the clause’s reach.}(emphasis added).

The quote above is not as helpful to social conservatives as they might hope because it purports to tell us what the drafters of the Fourteenth Amendment meant, not why they drafted the Fourteenth Amendment. It tells us that some of the drafters probably just wanted to stop states from withdrawing legal protections from African Americans but tells us nothing about why they thought selective enforcement of the laws on the basis of race was unacceptable. At best it provides superficial context; at worst it provides no context at all.

\textsuperscript{71} See Parents Involved in Community Schools, \textit{supra}, note 77, 551 U.S. at 745-746 (2007)(in which Justice Scalia joined the majority in holding that race-based classifications were impermissible in the context of high-school admissions programs; Lawrence v. Texas, 539 U.S. 558, 600 (2003)(Scalia., J dissenting)(citations omitted)(in which Justice Scalia wrote, “In \textit{Loving}, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because e Virginia statute was ‘designed to maintain White Supremacy.’ A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race.”).

\textsuperscript{72} See supra, note 70.

\textsuperscript{73} See id.


\textsuperscript{75} See California Lawyer, \textit{supra}, note 3.
state may discriminate against anyone on the basis of ethnicity. So what is it about ethnicity that leads us all to agree that the clause prohibits states from using that characteristic—ethnicity—as a basis for discriminating? Indeed, this is a question Justice Scalia must already have asked to conclude that the Equal Protection Clause applies to all ethnicities in the first place.

For one thing, as I have noted, there is the history of the Fourteenth Amendment. But again, history only directly links the Amendment to former slaves, not to ethnicity generally. To get to ethnicity we have taken a leap. But the leap makes sense: it was African Americans who were enslaved, and they were enslaved on the basis of their ethnicity. We’re getting somewhere. But we must keep asking, so what? Who cares why former slaves were enslaved? Common sense tells us that if we are trying to discover what the authors of the amendment were concerned about, we must get to why they were concerned about it. They weren’t just concerned that people were enslaved; they were concerned that we would enslave people based on ethnicity.

So the authors were concerned about ethnicity. Why? This is where Justice Scalia says we must stop asking. If we continue to ask this question, we might get to the bottom of the matter, and if we were to discover the answer, we would be opening the floodgates to every manner of justice. But again, once we start asking why, there is no principled reason to stop at the first answer. Indeed, intellectual rigor requires that we not stop asking. So let us press on: Why did the idea of ethnicity-based discrimination bother the authors of the Fourteenth Amendment so much that they wrote a constitutional amendment telling states to stop the unequal protection of persons under their jurisdiction?

The answer: because ethnicity is something we’re born with. It’s not something we choose. It is not, as Martin Luther King would ultimately have to lecture us, the marker of a man’s character, and can therefore not be used as a proxy for moral fault or uncleanness. And there is also the issue of numbers. Since minorities are minorities, they cannot protect themselves in a system built on majoritarian rule. We swim in a Darwinian swamp, each striving to out-evolve the other, concerned primarily if not exclusively with our own. This is democracy’s great weakness. Pick your secular poison: call it Nietzsche’s “will to power” or

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76 This approach would seem to have the benefit of assuaging Justice Scalia’s concern that there be some connection between what the law maker meant and what the law maker wrote; the point is that what the law maker meant should be our primary concern when applying what he wrote. This is not “judicial activism” so much as it is, or should be, common sense.

77 See Martin Luther King “I have A Dream” Speech, American Rhetoric webpage (“Top 100 Speeches”), available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm (last visited March 7, 2011); Cf. Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 Notre Dame L. Rev. 393, 402-405 (1994) (stating that race is a “morally neutral characteristic” but opining that sexual orientation is not like race because it is “morally controversial”).

78 The reference here is to Charles Darwin, author of On the Origin of Species (1859).

Darwin’s “survival of the fittest”\textsuperscript{80}; in the majoritarian universe, space and time do not “bend
toward justice.”\textsuperscript{81} They bend toward dominance.\textsuperscript{82}

To concern ourselves with something less base than this, we’ve had to create an
ecosystem where minority rights matter. Such a system must be imposed if it is to exist at all,
and those who drafted the Fourteenth Amendment knew it. This is not the stuff of laissez-faire
morality. If minorities are not to be subsumed at the expense of the majority’s own humanity, it
will have to be written down on something regarded as rather a sacred document that the
majority must behave itself. So there it is: the Equal Protection Clause. It says to us, don’t target
people who cannot protect themselves from majoritarian hostility just because you can; and don’t
target characteristics that fail to reflect bad character. \textit{That} is what the Equal Protection Clause
\textit{means}. It is no more about mere ethnicity than Christ’s command to “love thy neighbor”\textsuperscript{83} was
about sending greeting cards to the people next door.

But to Justice Scalia, women (or gays, or any other group besides ethnic groups) are like
little Timmy from Part I: they are not the persons to whom the rule applied when it was
originally drafted; Justice Scalia tries to anchor the clause’s meaning to the past by replacing the
broad word \textit{person} with a narrower subset of those to whom the clause was originally expected
to apply: former slaves (and, because Justice Scalia has probed deeply enough to reach ethnicity,
but not deeply enough to reach animating purpose, he includes ethnicity, too). And just like
tricking a sibling into rolling in poison ivy isn’t the same as hitting, discriminating against
women isn’t the same as enslaving black people. All of this completely misses temporal
progress and underlying principle, but the point is that Justice Scalia \textit{wants} to miss progress and
principle because to honor them would feed on his temporal and spatial anxieties. To Justice

\textsuperscript{80} See Herbert Spencer, \textit{Principles of Biology} (1864).

\textsuperscript{81} My reference here is to President Barack Obama, who purports to quote Martin Luther King saying, “The arc of
history is long, but it bends toward justice.” \textit{See} Brent Staples, “Savoring the Undertones and Lingering Subtleties
of Obama’s Victory Speech,” N.Y. Times (November 2, 2008), \textit{available at
speech/?scp=1&sq=Obama%20arc%20of%20history%20is%20long%20but%20it%20bends%20toward%20justice
&st=cse} (last visited March 7, 2011).

\textsuperscript{82} \textit{Cf} James Fitzjames Spehen, \textit{Liberty, Equality, Fraternity} (1873) at 252:

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

(1873) at 252.

\textsuperscript{83} Matthew 19:19.
Scalia and like-minded conservatives, *simplicity* is the penultimate constitutional value. This brings us to the Confrontation Clause.

**III. How Originalism Invites Judicial Contortionism**

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

The purpose of the Confrontation Clause was to exclude evidence that was untested by adversarial methods and was therefore untrustworthy; thus, pre-*Crawford* cases focused on the *reliability* of evidence in the absence of any possible cross-examination to determine its admissibility. In *Crawford*, Justice Scalia, writing for the Court, held that the unreliability of uncross-examined evidence was simply to be presumed. According to Justice Scalia, there exists only one way to ensure that testimonial evidence is meaningfully confronted: expose that evidence to cross examination.

While it is true that a mechanism other than cross-examination for ensuring confrontation is hard to imagine, Justice Scalia went a step further and concluded that it would be impossible. In this sense, Justice Scalia has imposed upon us the limit of his own imagination: because he can’t conceive of it, it doesn’t exist. The upshot is that although the framers *said* confrontation, they *meant* cross-examination.

Under *Crawford*, then, uncross-examined testimony is never reliable enough to establish its admissibility, and the only remaining question about such testimony in a Confrontation Clause case is whether it was, in fact, testimony; if it was un-crossed and testimonial, it is to be excluded. The predictable result was *Michigan v. Bryant*, a case involving a dying declarant who, before he died, identified his killer by name and address in an uncross-examined

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84 U.S. Const., Amend. VI.


86 See Ohio v Roberts, 448 US 56, 66 (1980).

87 See *id*.

88 Crawford, *supra*, note 1, 541 U.S. at 55.

89 See *id*.

90 See *id*.

91 Crawford, *supra*, note 1, 541 U.S. at 68.

92 Bryant, *supra*, note 2, 562 U.S. ____ (No. 09-150).
statement.\textsuperscript{93} His statement was obviously testimonial—he was answering police questions about a crime that had already happened.\textsuperscript{94}

Since Justice Scalia recast confrontation to mean cross-examination in \textit{Crawford} and thereby removed the issue of evidentiary reliability from the Court’s purview entirely, when the Court peered through its result-oriented glasses in \textit{Bryant} and saw how injustice might result without the un-crossed and un-crossable testimony of the dead declarant, it couldn’t say any longer that the evidence should be admitted because it was sufficiently reliable. Now the Court’s only “out” was to say that the evidence wasn’t testimonial—even if it obviously was. This is exactly what the Court did,\textsuperscript{95} chasing that lemming \textit{Crawford} right off the cliff of intellectual honesty and into the river below, where cases like \textit{Slaughter-House}\textsuperscript{96} send judges like Antonin Scalia to drown in rapids called “substantive due process” and the like.\textsuperscript{97}

In \textit{Bryant}, the Court undertook a contortionist debate about whether the testimonial nature of one’s statement should be adjudged from the perspective of the police or the declarant, and, in any event, what factors might establish testimonial-ness.\textsuperscript{98} And in dissent, Justice Scalia was right: the whole thing was a farce and an end-run around the issue of reliability.\textsuperscript{99} But had Justice Scalia not rewritten a clause of the Constitution to his own liking, the Court would at least still have been debating whether the evidence at issue was reliable enough to deem that it was, in some functional way, confronted. Justice Scalia would probably still have said no and therefore dissented, but at least he wouldn’t be accusing the Court of so transparently inventing new ways around his own nontextual rules that it “demeans the institution.”\textsuperscript{100}

In \textit{Crawford}, Justice Scalia said, “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”\textsuperscript{101} This statement seems arguable, but if it is correct, then the question should simply have been changed from whether testimony is obviously reliable to whether testimony was obviously confronted.

What Justice Scalia should have said in \textit{Crawford} was that he could not imagine how one might confront testimony without subjecting it to cross-examination; instead, he said that cross-

\begin{itemize}
  \item \textsuperscript{93} Bryant, \textit{supra}, note 2, at slip op p 2.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Crawford, \textit{supra}, note 1, 541 U.S. at 31-32.
  \item \textsuperscript{96} Slaughter-House Cases, \textit{supra}, note 69, 83 US 36 (1873).
  \item \textsuperscript{97} See Scalia, \textit{A Matter of Interpretation}, \textit{supra}, note 21, at 24.
  \item \textsuperscript{98} See generally, Bryant, \textit{supra}, note 2, 562 U.S. ___ (No. 09-150).
  \item \textsuperscript{99} See id. (Scalia, J., dissenting).
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Crawford, \textit{supra}, note 1, 541 U.S. at 62.
\end{itemize}
examination is what the framers meant when they said confrontation. In doing that, Justice Scalia left the confines of textualism and tiptoed over to Eden, falling under the spell of an elitist snake and nibbling from the apple of knowledge that deludes one into seeking the forbidden entitlement—one’s own conception of what text means even if that’s not what it says. How could his surrender to nontextual temptation not have cast Justice Scalia into the depths of dissenting despair where he found himself in Bryant? Judicial original sin has its price.

Turning to the principles or historical context that animated the Confrontation Clause, the following summary is helpful:

A literal reading of the Confrontation Clause suggests that it codifies a procedural protection: in every criminal trial, a defendant has the right to “confront[,]” meaning (among other things) to cross-examine, each witness who testifies against her or him. The historical context surrounding this Clause lends further support to this reading. Prior to America’s independence, dissatisfaction with the British practice of ex parte prosecution—as seen in Sir Walter Raleigh’s trial—was prevalent among the American colonists. . . . In reaction to such practices, many early decisions construed the right of confrontation quite strictly, some even going so far as to hold any out-of-court statements inadmissible even when the defendant was able to cross-examine the speaker at the time the statements were made.

During the twentieth century, the Supreme Court reframed Sixth Amendment jurisprudence in terms of what it perceived to be the ultimate goal of the Sixth Amendment: ensuring reliable outcomes at trial.102

Justice Scalia himself has supplied a thorough-going historical narrative about the Confrontation Clause:

The right to confront one’s accusers is a concept that dates back to Roman times. . . . The founding generation’s immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. . . . Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that “occasioned frequent demands by the prisoner to have his ‘accusers,’ i.e. the witnesses against him, brought before him face to face.” . . . In some cases, these demands were refused.

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

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: “Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour.” Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ....” The judges refused and, despite Raleigh's protestations that he was being tried “by the Spanish Inquisition,” the jury convicted, and Raleigh was sentenced to death.

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

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

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

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103 Crawford, supra, note 1, 541 U.S. at 43-45 (citations omitted).
carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination."\(^{104}\)

Given this historical background, the Court, per Justice Scalia, stated that two inferences were to be drawn.\(^{105}\) First, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind."\(^{106}\) Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."\(^{107}\)

With regard to the first inference, Justice Scalia seems on firm ground. But note his interpretive sleight of hand with regard to the second. Seeking to anchor constitutional meaning to the historical past, Justice Scalia identifies what he regards as the original expected application of the text (only cross-examination would have satisfied the confrontation requirement in 1791), and embeds that narrow subset in the Court’s precedents by claiming with his familiar disarming certitude that the Framers would not have applied it more broadly. Once Justice Scalia is done, the word *confront* has, for all intents and purposes, been excised and replaced with *cross-examine*. Since Justice Scalia can envision only one way to satisfy the requirement, that way is now the only way. So note again that temporal anchoring has the effect of imposing on the entire nation the limits of one Justice’s imagination.

This is not to say that Justice Scalia was unwarranted in focusing on cross-examination. What better way could there be to ensure the trustworthiness of evidence that was the concern that animated the Confrontation Clause?

The following are common goals of cross examination: a) Highlight inconsistencies with other witness’ testimony; b) Demonstrate bias on the part of the witness; c) Attack the witness’ credibility through impeachment or other means; d) Highlight errors or confusion in the witness’ testimony (but be careful not to allow the witness to correct or clarify); e) Identify the portions of your own case that the witness

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\(^{104}\) Id. at 49-50, quoting State v. Campbell, 30 S.C.L. 124, 125(1844 WL 2558) (App. L. 1844).

\(^{105}\) Crawford, *supra*, note 1, 541 U.S. at 50.

\(^{106}\) Id.

\(^{107}\) Id. at 53-54.
can corroborate; f) Identify and highlight portions of the witness’ testimony that bolster your own case or defense.108

As one commentator has put it,

. . . [W]itnesses do not speak all (or even part) of the truth all of the time in court any more than they do out of court. . . . Cross-examination lets us determine the ones who do. Presently there is no scientific device to substitute for cross-examination. The lie-detector and the various sedative drugs and hypnotic devices, psychological and psychiatric tools, may help in the courtroom search for the “whole truth”. . . But since their utility has yet to be proven, we are left only with cross-examination.109

If no better way for exposing truth exists today than the caustic acid of cross-examination, it would have been hard for the drafters of the Sixth Amendment to conceive of a more effective method when that amendment was adopted. But this leaves us with the unsettling question, if the drafters knew that cross-examination existed, and they surely did, and they meant that testimonial evidence must always be cross-examined before being admitted against a defendant in a criminal trial, then why didn’t they just say, “[I]n all criminal prosecutions, the accused shall enjoy the right . . . to cross-examine the witnesses against him”? One possibility is that Justice Scalia has his history wrong after all:

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

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


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

The situation was quite different in felony cases, in which more importance was accorded to obtaining a conviction. Two statutes enacted during the reign of Mary Tudor, the so-called Marian statutes, required that justices of the peace make written records of the sworn depositions of witnesses of a felony at the time an arrest was made and send those depositions on to the felony trial court. Moreover, these sworn Marian depositions, which were a standard aspect of felony prosecutions, were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial. Indeed, depositions were inadmissible in felony cases only in the odd instance when they were improperly taken outside of the statutory procedure. Thus, because Marian procedure was standard for felony prosecutions in framing-era America as well as in England, the use of Marian witness depositions as evidence in framing-era felony trials disproves Scalia’s claim that the original meaning of the Confrontation Clause included a rigid cross-examination rule. In contrast to Justice Scalia’s claim, it does not appear that a prior opportunity for cross-examination had any effect on the admissibility or inadmissibility of the deposition of an unavailable witness in a framing-era criminal trial.\textsuperscript{110}

Another commentator has questioned the English common-law roots from which Justice Scalia drew his conclusion: “Justice Scalia’s opinion . . . gives no explanation why it can be concluded that the Confrontation Clause constitutionalized common law as stated in English decisions when other parts of the Sixth Amendment expressly rejected English common law. . . . English common law was not the source for much of the Sixth Amendment, and by assuming that it was for confrontation, Crawford’s reasoning undercuts longstanding Sixth Amendment jurisprudence.”\textsuperscript{111}

More interestingly, Chief Justice Rehnquist suggested that the framers had chosen the word \textit{confrontation} deliberately to accommodate the possibility that appropriate alternatives to cross-examination did or would exist:


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

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: “I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.” Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an “inroad” on the right to confrontation, had been introduced.

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

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. “[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.” In such a case, as we noted over 100 years ago, “The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” By creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function and ignores this longstanding guidance.\textsuperscript{112}

\textsuperscript{112} Crawford, \textit{supra}, note 1, 541 U.S. at 73-74 (Rehnquist, C.J., dissenting in part and concurring in the result).
Aside from the possibility of having been wrong about his history in this regard, there also exists the possibility that, as Chief Justice Rehnquist suggested, the drafters of the Sixth Amendment simply appreciated the limits of their own prescience: maybe someday we would come up with techniques of confrontation that equaled or surpassed the efficacy of cross-examination, and maybe we wouldn’t. Surely if we were to discover such means, we should not bar their use or, worse yet, foreclose their development with an inflexible rule rendering cross-examination the only method for achieving confrontation.

One commentator foresaw a bright future for the streamlined Confrontation Clause spawned by Crawford: “Crawford’s originalism and formalism succeeded, in part, because pre-Crawford case law was an unprincipled, inconsistent, ad hoc, dismal failure. Crawford also had good soil in which to root its decision, because the Founding-era history clearly reveals the key purpose behind the Confrontation Clause. And while it will take time for common-law adjudication to map out Crawford’s contours, its broad outlines are clear, simple, and hard to evade.”\(^\text{113}\) This optimism appears to have been premature. After all, Crawford ultimately spawned Bryant. Dissenting in Bryant, Justice Scalia wrote,

Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in Crawford . . ., I dissent.\(^\text{114}\)

Justice Scalia would have been more accurate to say, “Because I continue to adhere to the Confrontation Clause that I redrafted, . . .” but I digress. As I noted earlier, Justice Scalia was largely correct in his assessment of the majority’s reasoning. One can see what happened in Bryant: the Court \textit{wanted} to hold that the statement was admissible because it was made by a dying man who had no known motive to lie; he was likely telling the truth. Put another way, the statement seemed to the majority to have been reliable. But because the issue of reliability was resolved by Justice Scalia in Crawford (reliability can only be established by cross-examination), the Court could only reach the result it wanted to reach by saying that the statement wasn’t


\(^{114}\) Bryant, \textit{supra}, note 2, slip. op. at 1 (Scalia, J., dissenting).
testimonial. As Justice Scalia intimated, that reasoning is absurd, but Justice Scalia failed to atone for his own part in all this mischief; had he not anchored the Court to an unworkably narrow original expected application of the Confrontation Clause, the Court wouldn’t have had to resort to such unseemly contortions to reach its preferred result.

In any event, taken together, Crawford and Bryant show us the following: Justice Scalia and other conservative jurists value simplicity. To achieve that simplicity, Justice Scalia anchors the Court to the past by embedding what he deems to be the original expected application of the text in the Court’s precedents so that, regardless how broad the text in question, the narrower interpretation he has given it is now governing law. There is an emotive component here as well; once original expected application is embedded, disturbing it will come at the cost of a judicial dressing down by Justice Scalia. Further, we see that embedding original expected application in precedent, especially when Justice Scalia thinks there was only one application of the text originally expected, leads to interpretations so narrow that they invite judicial mischief in future cases. Finally, we see again that Justice Scalia ignores underlying principles by failing to ask why constitutional text exists in the first place. Had he sought out the purpose for requiring confrontation by probing semantically for deeper meaning rather than limiting his analysis to a historical inquiry about what the clause was originally understood to mean, he would have seen that the Court’s prior focus on reliability, even if it was challenging in its application, was the most reasonable approach. And alas, in his effort to craft a simpler and easier rule than pre-Crawford cases applied, he merely planted the originalist ink bomb in Crawford that exploded in Bryant. So originalism isn’t so tidy after all (and, as the emotive intensity of Justice Scalia’s Bryant dissent illuminates, it does less to ameliorate anxiety than he might have hoped).

Conclusion

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