

Justice Thomas, Criminal Justice, and Originalism's Legitimacy

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After a quarter of a century on the Supreme Court, Justice Clarence Thomas's jurisprudence in the field of criminal law offers no shortage of themes to discuss, but it especially shows how he has advanced originalism as a respected methodology.¹ Often both the political and academic commentary about originalism focuses on Justice Antonin Scalia. In the wake of his death a year ago, that focus has been understandable. Justice Scalia left a tremendous legacy. His scholarly output, outsized personality, and zealous advocacy on behalf of originalism have bestowed great benefits on our legal culture by focusing the attention of judges and attorneys toward neutral principles and away from subjective policy preferences.² But if Justice Scalia bore significant responsibility for advancing the popular understanding of originalism, then Justice Thomas deserves singular credit for strengthening the case for its legitimacy.

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1. "Methodology," as used in this Essay, refers to the philosophy that judges should adjudicate constitutional issues by discerning the original meaning of constitutional provisions and accepting those meanings as authoritative, not the various methods judges use to discern original meaning.
 2. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); see also Jess Bravin, *Supreme Court Justice Antonin Scalia Dies at 79*, WALL ST. J. (Feb. 14, 2016, 5:41 PM), <http://www.wsj.com/articles/supreme-court-justice-antonin-scalia-dead-at-79-1455404229> [<http://perma.cc/SP3P-XLQE>] (describing Scalia as having "revived a focus on the Constitution's original meaning").

By writing well-reasoned originalist opinions that can be evaluated on neutral grounds—such as the strength of the historical evidence or the coherence of the textual analysis—Justice Thomas has advanced the methodology of originalism in two ways. First, by providing a *second* originalist voice on the Supreme Court, Justice Thomas has made it impossible for lawyers and judges to ignore originalist arguments. Second, and more importantly, by writing opinions that often disagreed with those of Justice Scalia, Justice Thomas has rebutted the conventional criticism that originalism is a wooden or results-oriented methodology.

Justice Thomas's jurisprudence in criminal law provides several examples of how his additional presence on the Supreme Court has helped aim litigants' attention toward where originalists focus: text and history. For one, Justice Thomas sparked the development of precedents about the original meaning of the Confrontation Clause.³ Before the appointments of Justices Scalia and Thomas, courts reviewed challenges under the Confrontation Clause to the admission of hearsay evidence under the rule established by *Ohio v. Roberts*.⁴ That rule required courts to consider whether the hearsay bore "indicia of reliability."⁵ If a court determined that the hearsay was reliable, then the prosecution could introduce it as evidence at trial without producing the declarant for cross-examination.

Roberts is no longer good law,⁶ and Justice Thomas deserves special credit for the discarding of its malleable standard. In *White v. Illinois*,⁷ during his first term on the Supreme Court, Justice Thomas wrote a concurring opinion, joined by Justice Scalia, which discussed how the text and the history of the Sixth Amendment did not appear to support *Roberts*, and his opinion invited litigants to challenge that precedent.⁸ When litigants did so twelve years later in *Crawford v. Washington*,⁹ the parties made originalist arguments,¹⁰ and Jus-

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

4. 448 U.S. 56 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

5. *Id.* at 66.

6. *See Crawford*, 541 U.S. at 68-69 ("*Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.>").

7. 502 U.S. 346 (1992).

8. *See id.* at 358-66 (Thomas, J., concurring in part and concurring in the judgment).

9. 541 U.S. 36.

10. *See* Brief for Petitioner at 16-21, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940, at *16-21 (discussing the Framers' understanding of the Confrontation Clause); *see also Crawford*

tice Scalia wrote a powerful opinion that abrogated *Roberts's* “indicia of reliability” test as not “faithful to the original meaning of the Confrontation Clause.”¹¹ Seven Justices joined that opinion, surely one of the most overtly originalist opinions in the last two decades, and it strengthened the case for originalism as a legitimate method of constitutional adjudication. Justice Thomas helped lay the foundation for this shift when he first exposed *Roberts's* deficiencies in *White* and encouraged litigants to think and argue about the Confrontation Clause in originalist terms.¹²

Consider, too, the effect Justice Thomas has had on sentencing law. Four years ago in *Alleyne v. United States*,¹³ Justice Thomas wrote an opinion for the Court that overruled *Harris v. United States*¹⁴ in part because it was “inconsistent . . . with the original meaning of the Sixth Amendment.”¹⁵ And he did so without Justice Scalia, who dissented. By providing a second originalist voice on the Court, Justice Thomas increased the likelihood of success for parties who litigated their appeals using originalist methods of analysis. Justice Thomas's opinion in *Alleyne* also caused several non-originalist judges to acknowledge originalism as an authoritative methodology. Not only did Justices Ginsburg, Sotomayor, and Kagan join the statement that *Harris* was “inconsistent . . . with the original meaning of the Sixth Amendment,”¹⁶ but Justice Sotomayor wrote a concurring opinion, joined by Justices Ginsburg and Kagan, that began by reiterating that the Court's ruling was consistent with “the original meaning of the Sixth Amendment.”¹⁷ Those statements make sense only if originalism can be a legitimate and authoritative methodology.

Justice Thomas has also advanced originalism in a second way: By disagreeing with Justice Scalia on originalist grounds, Justice Thomas has made clear that originalism is not a political tool for reaching “conservative” results. Some commentators have portrayed originalism as a façade jurists and academ-

ford, 541 U.S. at 42 (“Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.”)

11. *Id.* at 60.

12. Cf. Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J.F. 94 (2015), <http://www.yalelawjournal.org/forum/justice-thomas-and-the-originalist-turn-in-administrative-law> [<http://perma.cc/HJ7Y-EYVK>] (arguing that Justice Thomas has constructed a similar foundation in administrative law).

13. 133 S. Ct. 2151 (2013).

14. 536 U.S. 545 (2002), overruled by *Alleyne*, 133 S. Ct. 2151.

15. *Alleyne*, 133 S. Ct. at 2155.

16. *Id.*

17. *Id.* at 2164 (Sotomayor, J., concurring).

ics hide behind to pursue their policy preferences.¹⁸ But although no methodology is immune from abuse, Justice Thomas's opinions have established that the advantage of originalism is not that it provides a foolproof method for arriving at uniform results, but that it offers neutral principles suitable for a judiciary in a democratic republic with separated powers. By engaging in debates with Justice Scalia, Justice Thomas has focused our attention on the neutral materials in law—text and history—and weakened the criticism that originalism is results oriented. Originalism may not eliminate reasonable disagreement among jurists, but it helps to discipline legal debates.

Justices Thomas and Scalia reached opposite conclusions in cases under the Confrontation Clause and the Excessive Fines Clause, for example, but each sought to apply the original meaning of those Clauses. Each reviewed the text and historical record and reached a separate conclusion about what the law is.

Although Justices Thomas and Scalia agreed generally about the original meaning of the Confrontation Clause in *White* and *Crawford*, they later disagreed about specific applications of that Clause. They agreed in *Davis v. Washington* that the Confrontation Clause allowed prosecutors to introduce statements made by a caller to a 911-responder without producing that caller at trial,¹⁹ but disagreed about whether the Clause allowed prosecutors to introduce a statement that a battered woman gave to police officers without producing her as a witness.²⁰ They also agreed, in *Melendez-Diaz v. Massachusetts*²¹ and *Bullcoming v. New Mexico*,²² that the Confrontation Clause bars prosecutors from introducing lab reports that certify the results of a chemical drug or a blood-alcohol test without producing the chemist who performed the test.²³ But Justice Thomas, in *Williams v. Illinois*, unlike Justice Scalia, voted to allow

18. See, e.g., Jack M. Balkin, *Why Are Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 309, 313-14, 319-21 (Richard Nobles & David Schiff eds., 2014) (arguing that originalism is used as and has its roots in a political methodology to reverse disliked doctrine); Peter J. Smith, *Originalism and Level of Generality*, 51 *GA. L. REV.* 1, 53-65, 72 (2017) (arguing that jurists and academics frame issues at varying levels of generality so they can use originalism for results-oriented purposes).

19. See 547 U.S. 813, 826-28 (2006); *id.* at 840-42 (Thomas, J., concurring in the judgment in part and dissenting in part).

20. See *id.* at 829-32 (concluding that the statements were inadmissible because they were testimonial); *id.* at 840-42 (Thomas, J., concurring in the judgment in part and dissenting in part) (concluding the opposite).

21. 557 U.S. 305, 308, 329 (2009).

22. 564 U.S. 647, 663-65 (2011).

23. See *Melendez-Diaz*, 557 U.S. at 329-30 (Thomas, J., concurring).

an expert to testify about an unsworn DNA test that had served as one of the bases for his opinion.²⁴

The Justices' disagreements were not about whether courts should favor the accused or the government in criminal prosecutions; their disagreements instead stemmed from differences in applying shared first principles. Justice Scalia maintained that the original meaning of the Confrontation Clause barred the admission of statements made with an investigatory or prosecutorial purpose.²⁵ So in all three decisions about lab reports, he voted to exclude the reports and touted the virtues of confrontation in exposing the biases and errors of witnesses.²⁶ Justice Thomas, however, contended that the Confrontation Clause was adopted to invalidate the Marian procedures in England where government officials examined witnesses and introduced transcripts of those proceedings as evidence against the accused without producing the witnesses.²⁷ On Justice Thomas's reading, the Confrontation Clause applies only to statements contained in formal testimonial materials that approximate those examinations, such as "affidavits, depositions, prior testimony, or confessions."²⁸ This view led Justice Thomas to vote with Justice Scalia in the first two lab report cases because the reports bore a "striking resemblance" to formal testimonial materials,²⁹ but it led Justice Thomas to disagree with Justice Scalia in the expert witness case because the lab report had never been certified as accurate by its drafter and lacked the solemnity of an affidavit or deposition.³⁰

The two Justices engaged in a similar debate about the Excessive Fines Clause of the Eighth Amendment.³¹ Justice Thomas wrote the first opinion of the Supreme Court to rule that a fine violated the Eighth Amendment.³² *United States v. Bajakajian* involved a statute that required an individual to disclose to the government how much money he was transporting outside the United

24. 132 S. Ct. 2221, 2255, 2260 (2012) (Thomas, J., concurring in the judgment).

25. *E.g.*, *Davis*, 547 U.S. at 822.

26. *See, e.g., id.*

27. *E.g.*, *Davis*, 547 at 835-37 (Thomas, J., concurring in the judgment in part and dissenting in part).

28. *E.g.*, *Ohio v. Clark*, 135 S. Ct. 2173, 2186 (2015) (Thomas, J., concurring in the judgment) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

29. *See Williams*, 132 S. Ct. at 2261 (Thomas, J., concurring in the judgment) (quoting *Davis*, 547 U.S. at 837).

30. *Id.* at 2255, 2260.

31. *See U.S. CONST. amend. VIII* ("Excessive bail shall not be required, nor excessive fines imposed . . .").

32. *United States v. Bajakajian*, 524 U.S. 321 (1998).

States if the value exceeded \$10,000.³³ Failure to do so would result in forfeiture of the entire amount.³⁴ Justice Thomas wrote for a five-Justice majority that the resulting fine—\$357,000 in that case—was excessive.³⁵ Justice Scalia joined Justice Kennedy’s dissent, which argued that the Court should have deferred to Congress and upheld the fine.³⁶ Their disagreement in this case and others belies the trope that certain Justices favor the accused as a matter of course and that others are invariably tough-on-crime. Justice Thomas has routinely “sided” with the defendant, Justice Scalia with the government, and vice versa.³⁷

The dueling opinions in *Bajakajian* are a good example of appropriate disagreement between originalists. Several federal statutes enacted by the First Congress contemporaneously with the Eighth Amendment allowed either the forfeiture of the entire amount of goods or a monetary penalty proportional to the goods’ value.³⁸ Justice Thomas reviewed those laws and determined that they were not analogous to the law in *Bajakajian*. He concluded that the statutes allowing forfeiture of all goods involved in a customs offense pertained to in rem actions directed against the property, not the owner.³⁹ And the statutes that required monetary forfeitures proportionate to the value of the goods involved were remedial, not punitive, because they reimbursed the government for losses incurred by customs evasion.⁴⁰ Justice Thomas concluded that the forfeiture in *Bajakajian* was neither in rem nor remedial and thus could not be justified under those historical examples.⁴¹ The dissent rejected Justice Thomas’s classification of the historical forfeiture statutes and argued that in any event the forfeiture provision could be considered remedial because it merely compensated for the government’s investigative and enforcement expenses—expenses that were difficult to quantify.⁴² Once again, the debate was fought on the battlefield of originalism, and originalism, as a methodology, triumphed.

33. *Id.* at 325 & n.1.

34. *Id.*

35. *Id.* at 337-40.

36. *Id.* at 344 (Kennedy, J., dissenting).

37. For example, Justice Thomas ruled in favor of the criminal defendant, unlike Justice Scalia, in *Alleyne* and *Bajakajian*. But their votes were reversed in *Navarette v. California*, discussed below, and *Williams*.

38. *Bajakajian*, 524 U.S. at 340 (majority opinion).

39. *Id.* at 330-31, 340.

40. *Id.* at 341-44.

41. *Id.* at 344.

42. *Id.* at 345-47, 351-53 (Kennedy, J., dissenting).

Of course, not every originalist debate concerns the particulars of a historical record. Sometimes, the debate concerns the application of an agreed-upon general rule to a modern problem. In those cases, Justice Thomas's and Justice Scalia's dueling opinions have illustrated that originalism is not a methodology of results, but of process. Reasonable jurists can and do reach different conclusions by applying that process without invoking pragmatic or policy-oriented reasoning.

For example, the two Justices clashed over the meaning of the term "unreasonable" in the Fourth Amendment⁴³ three years ago in *Navarette v. California*.⁴⁴ There, a caller dialed 911 to report that somebody had run her off the road.⁴⁵ She described the car as a silver Ford F-150, reported the license plate, and stated the direction the vehicle was traveling.⁴⁶ A police officer discovered the vehicle near where the caller had reported it would be and stopped the vehicle. Of course, because this decision reached the Supreme Court of the United States, it should be unsurprising that the driver was trafficking about thirty pounds of marijuana.⁴⁷

Justice Thomas wrote for the five-Justice majority to uphold the search. He concluded that the search was reasonable in part because the caller had given the police enough information to establish that she was an eyewitness to suspicious behavior.⁴⁸ Although the tip was anonymous, Justice Thomas reasoned that the caller was unlikely to fabricate her account in the light of the technical capacities of police to detect the identities of false reporters.⁴⁹ Justice Scalia, joined by three other Justices, vigorously dissented and would have required the anonymous tipster to provide more specific information, such as where the suspect would next stop, to justify the search.⁵⁰

A second area where Justices Thomas and Scalia agreed on a legal rule but disagreed on how to apply it was in determining whether statutory mandatory minimum sentences violated the right to a jury trial. Both Justices agreed with the rule established in *Apprendi v. New Jersey* that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maxi-

43. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

44. 134 S. Ct. 1683 (2014).

45. *Id.* at 1686.

46. *Id.* at 1686-87.

47. *Id.* at 1687.

48. *Id.* at 1689.

49. *Id.* at 1689-90.

50. *See id.* at 1692-93, 1695 (Scalia, J., dissenting).

mum must be proved to a jury beyond a reasonable doubt.⁵¹ And both voted to invalidate mandatory sentencing guidelines that required judges to find facts that would increase sentencing ranges.⁵² But the Justices disagreed about why mandatory sentencing guidelines were problematic. Justice Scalia saw the problem as permitting fact-finding to *increase* the *ceiling* of a judge's discretion in a way that could disadvantage a defendant. Justice Thomas, on the other hand, saw the problem as *changing* the *range* of discretion, even if the sentencing ceiling remained unchanged.

This difference led the Justices to opposite positions in *Alleyne*, discussed above. Justice Thomas wrote for the majority that facts that trigger statutory mandatory *minimum* sentences must be proved to a jury because the facts "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment."⁵³ Justice Scalia joined a dissent written by Chief Justice Roberts that viewed the application of a statutory mandatory minimum as a limit on the discretion of the judge that in no way affected the role of the jury.⁵⁴

As an aside, I respectfully disagree with both Justices Scalia's and Thomas's decisions to join in the majority opinions in *Blakely*⁵⁵ and *Booker*,⁵⁶ the foundational decisions underlying *Alleyne*. The notion that mandatory guidelines that regulate judicial discretion within a statutory range of punishment to reduce sentencing disparities somehow violates a defendant's right to a jury trial even though it is entirely permissible for judges, in an indeterminate system, to find sentencing facts and impose punishments anywhere within a broad statutory range has never made sense to me. I side with another Yale, Justice Samuel Alito, on that one.⁵⁷ But accepting the logic of *Blakely* and *Booker* that the Sixth Amendment requires a jury to find all facts essential to the potential penalty,⁵⁸ only Justice Thomas's position in *Alleyne* makes sense.

In both *Navarette* and *Alleyne*, Justices Thomas and Scalia agreed on the underlying rule but disagreed about how that rule should apply in a modern context. Together, they disproved the notion that an originalist methodology is useful only for adjudicating eighteenth- and nineteenth-century appeals or that

51. See 530 U.S. 466, 490 (2000).

52. See *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

53. *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013) (citing *Apprendi*, 530 U.S. at 483 n.10).

54. See *id.* at 2167-70 (Roberts, C.J., dissenting).

55. *Blakely*, 542 U.S. 296.

56. *Booker*, 543 U.S. 220.

57. See *Gall v. United States*, 552 U.S. 38, 64-66 (2007) (Alito, J., dissenting).

58. See, e.g., *Blakely*, 542 U.S. at 301.

originalism is merely a justification for “conservative” results. Their dueling opinions proved that originalism inevitably produces occasional disagreement. But that disagreement is constrained by fundamental principles about what law is, and it contrasts favorably with methodologies that rely on more subjective notions about policy and pragmatism.

By leading, joining, and occasionally challenging Justice Scalia, Justice Thomas, over the last quarter of a century, has accomplished what no originalist by himself could: through principled adjudication, proving that originalism can be an objective methodology for adjudication. His contributions have increased respect for originalism exponentially and made its vocabulary a staple of constitutional adjudication. And for those contributions, all originalists owe him a debt of gratitude.

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