

# Scalian Skepticism and the Sixth Amendment in the Twilight of the Rehnquist Court

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## Introduction

WHEN PRESIDENT NIXON APPOINTED Associate Justice William Rehnquist to the Supreme Court in 1971, he expected Rehnquist to be a “law-and-order” justice who would help roll back some of the perceived excesses of the Warren Court. Presidents, famously, don’t always get what they expect with Supreme Court Justices<sup>1</sup>—Nixon did. Rehnquist consistently sided with the government in criminal cases during his tenure on the Burger Court and managed, as Chief Justice, to implement much of the constitutional criminal procedure vision that made Rehnquist appealing to both Nixon and later to President Reagan, who elevated Rehnquist to Chief Justice.<sup>2</sup>

Rehnquist’s approach, however, was judicious. Rather than explicitly overruling precedent,<sup>3</sup> he frequently pruned back and re-

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1. Richard J. Lazarus, *Rehnquist’s Court*, 47 ST. LOUIS U. L.J. 861, 862 (2003) (“History is notoriously littered with Presidents who have been unpleasantly surprised by the subsequent votes of Justices whom they nominated for the Court.”). Lazarus identifies Chief Justice Warren and Justices Brennan, White, Blackmun, Stevens, and Souter as examples of justices who disappointed the presidents who appointed them. *Id.*

2. See *id.* at 863 (noting that Nixon got “just what he wanted” with Justice Rehnquist, who reflected the President’s views on both criminal procedure and federalism); Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659, 660 (2003) (“[T]hroughout its existence, the Rehnquist Court has consistently ruled against criminal defendants and in favor of the government.”).

3. See David M. Burke, *The “Presumption of Constitutionality” Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL’Y 73, 74–75 (1994) (“[I]ts critics have unjustly accused the Rehnquist Court of running roughshod over precedent . . . . [T]he rate at which the Rehnquist Court has expressly overruled precedent is less than that of both the brazenly activist Warren Court and the less audacious

shaped Warren-era rulings, such as *Mapp v. Ohio*<sup>4</sup> and *Miranda v. Arizona*.<sup>5</sup> In other cases, he exploited and expanded upon police-friendly Warren-era precedent, such as *Terry v. Ohio*.<sup>6</sup> While generating less attention than his doctrinal developments in the area of federalism,<sup>7</sup> Rehnquist's development of modern criminal procedure jurisprudence is a significant legacy.<sup>8</sup> Rehnquist's sustained effort to pare back the expansive interpretations of defendants' constitutional rights in the Warren era has been accompanied by equally or more significant restrictions on habeas corpus review.<sup>9</sup>

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but nonetheless activist Burger Court." (footnote omitted)); cf. William Kristol, *The Judiciary: Conservatism's Lost Branch*, 17 HARV. J.L. & PUB. POL'Y 131, 131–32 (1994) ("During the Reagan-Bush era, liberal constitutional doctrines were not rolled back to the extent hoped for by many in the conservative movement . . . . In criminal justice, though some practical effects of Warren and Burger Court decisions were significantly limited, the basic structure erected by liberals remains." (footnote omitted)).

4. 367 U.S. 643 (1961) (applying the exclusionary rule to the states for Fourth Amendment violations).

5. 384 U.S. 436 (1966) (holding that custodial interrogation is inherently coercive and must be preceded by warnings). Several cases have limited the impact of *Mapp* and *Miranda*, including: *Illinois v. Gates*, 462 U.S. 213 (1983) (developing a flexible "totality of the circumstances" test for determining probable cause in the Fourth Amendment context); *New York v. Quarles*, 467 U.S. 649 (1984) (developing a public safety exception to *Miranda*); and *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming *Miranda* but noting that its impact has been blunted through later doctrinal developments).

6. 392 U.S. 1 (1968) (allowing an officer to "stop and frisk" a suspect upon reasonable suspicion).

7. Extensive scholarship has been devoted to Rehnquist's contributions in the area of federalism. See, e.g., Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 569 (2003) (focusing largely on federalism in analyzing the Rehnquist Court). Conversely, Rehnquist's criminal procedure has sometimes been overlooked. See Chemerinsky, *supra* note 2, at 660 (noting that Professor Merrill's analysis of the Rehnquist Court "quite strikingly . . . omits" criminal procedure cases). But see Charles J. Ogletree, Jr., *The Rehnquist Revolution in Criminal Procedure*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 55, 55–69 (Herman Schwartz ed., 2002). Recent developments suggest Rehnquist's federalism legacy may be at risk. See Michael Halley, *With Recent Supreme Court Rulings, Era of States' Rights is Over*, L.A. DAILY J., July 14, 2005, at 8. An analysis of Rehnquist's federalism legacy, however, is beyond the scope of this Article.

8. See Chemerinsky, *supra* note 2, at 661 ("As the Rehnquist era nears its completion, there can be little doubt that William Rehnquist was enormously successful—perhaps as much as any Chief Justice in history—in shaping constitutional law to his ideological vision."); see also Ogletree, *supra* note 7, at 55–69.

9. See, e.g., *Gonzalez v. Crosby*, 545 U.S. 524 (2005) (opinion written by Scalia and joined by Chief Justice Rehnquist); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) (opinion written by Chief Justice Rehnquist); *Felker v. Turpin*, 518 U.S. 1051 (1996) (opinion written by Chief Justice Rehnquist); *Teague v. Lane*, 489 U.S. 288 (1989) (opinion written by O'Connor and joined by Chief Justice Rehnquist); *Sumner v. Mata*, 449 U.S. 539 (1981) (opinion written by Justice Rehnquist); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (opinion written by Justice Rehnquist); *Stone v. Powell*, 428 U.S. 465 (1976) (opinion written by Powell and joined by Justice Rehnquist).

Rehnquist's efforts to implement his vision often met strong opposition. Particularly in Rehnquist's years as an Associate Justice, Justices Brennan and Marshall were his most consistent adversaries in cases involving the rights of criminal defendants.<sup>10</sup> Their dissent from Rehnquist's vision was perhaps a foregone conclusion, given their central role in the development of Warren-Court jurisprudence and strong commitment to individual rights. In the waning years of the Rehnquist Court, however, Justice Scalia emerged, perhaps surprisingly, as a critic of Rehnquist's approach to many aspects of criminal procedure. The pragmatic balancing approach to the Fourth Amendment that has been emblematic of Rehnquist is anathema to Scalia, who prefers clear rules and a return to Fourth Amendment "first principles."<sup>11</sup> In the confessions law context, Scalia was scathing in his criticism of Rehnquist's opinion in *Dickerson v. United States*.<sup>12</sup> In that opinion, Rehnquist tepidly reaffirmed *Miranda* in the wake of many other decisions, authored or joined by Rehnquist, that undermined *Miranda* and suggested that he did not agree with the underlying decision.<sup>13</sup> Perhaps most significantly, Scalia garnered majorities in two recent Sixth Amendment cases that—at least arguably—vindicated the rights of defendants in the sentencing and Confrontation Clause contexts.<sup>14</sup>

In the Fourth and Fifth Amendment contexts, Rehnquist left the Court with a body of criminal procedure jurisprudence strongly favoring the government and made significant inroads into the largely pro-defendant legacy of the Warren Court. While the Burger Court has been described as the "counterrevolution that wasn't,"<sup>15</sup> Rehnquist

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10. See, e.g., *New York v. Quarles*, 467 U.S. 649, 674 (1984) (Marshall dissenting, with Brennan and Stevens, from opinion written by Justice Rehnquist creating "public safety" exception to *Miranda*); *Illinois v. Gates*, 462 U.S. 213, 274 (1983) (Brennan dissenting, with Marshall, from opinion written by Justice Rehnquist applying "totality of the circumstances" test for determining probable cause).

11. This phrase is taken from Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). Also see Scalia's majority opinion in *Virginia v. Moore*, 128 S. Ct. 1598, 1603–04 (2008) (citing Amar's emphasis on a founding-era understanding of the Fourth Amendment with approval).

12. 530 U.S. 428 (2000).

13. See discussion *infra* Part II.

14. *Blakely v. Washington*, 542 U.S. 296 (2004); *Crawford v. Washington*, 541 U.S. 36 (2004); see also Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

15. See, e.g., THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983) [hereinafter, THE BURGER COURT]; KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 16 (2002) (crediting a "student of the Burger Court" for the phrase). *But see Preface* to THE BURGER COURT, *supra*, at xi–xii.

engineered a strategic mitigation project that largely succeeded, de facto, in undoing much of the work of the Warren Court. This Article will focus, however, on the relative failures of Rehnquist's vision in the Sixth Amendment context, where Scalia's insistence on clear rules trumped Rehnquist's more pragmatic approach.<sup>16</sup>

While it is conventional to assess the impact of a particular Chief Justice's "Court,"<sup>17</sup> I focus somewhat differently on the role of Rehnquist as an individual Justice. This is for two reasons. First, Rehnquist was an important member of the Burger Court before he assumed the role of Chief Justice, and many of his doctrinal innovations were developed or rooted in that period. Second, as one scholar has recently noted, the Court is "composed of nine individual justices, each with his or her own legal philosophy."<sup>18</sup> The Rehnquist Court was particularly "fractured" and reached "consistent and predictable 5-4 votes along many issues, which makes it all the more difficult to talk in terms of a unitary, dominant judicial philosophy."<sup>19</sup> It is not difficult, however, to discern a unitary and dominant judicial philosophy with respect to the late Chief Justice,<sup>20</sup> a philosophy Kenneth Starr de-

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16. See Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1012-13 (2004) ("In a number of cases, Justice Scalia has sided with criminal defendants against the government because he believed that a clear rule supported that result." (footnote omitted)); cf. *id.* at 1012 ("Professor Kannar has demonstrated persuasively that Justice Scalia's Fourth and Sixth Amendment jurisprudence is more a reflection of Scalia's rigid formalism than of any substantive predilections for or against criminal defendants or, for that matter, any judgments about originalism in constitutional interpretation." (citing George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1302, 1321-23 (1990))).

17. Cf. Merrill, *supra* note 7, at 569 (2003) (noting that although the Court is "implicitly assumed to have a certain unity of character under each Chief Justice, . . . [a] closer look at history reveals that this assumption of a natural Court defined by the tenure of each Chief Justice is often misleading"); *id.* at 569-70 (arguing that there have been two Rehnquist Courts, with the second defined as the period between October 1994 and the time of his writing, when the makeup of the Court was stable).

18. Ogletree, *supra* note 7, at 56.

19. *Id.*; cf. Yale Kamisar, *The Warren Court (Was it Really So Defense-Minded?)*, *The Burger Court (Is it Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT*, *supra* note 15, at 81 ("Justice Rehnquist may be willing and eager to dismantle the work of the Warren Court in the search and seizure area, but it has become increasingly clear that neither he nor he and the [C]hief [J]ustice constitute 'the Burger Court.'").

20. See EDWARD P. LAZARUS, *CLOSED CHAMBERS* 105 (1998) (describing Rehnquist's role as head of the Justice Department's Office of Legal Counsel at the time of his nomination). Lazarus writes: "In that role, Rehnquist had urged sharp cutbacks in federal habeas corpus, defended the legality of wiretapping, preventive detention, and 'no-knock' searches, and urged strong countermeasures to even nonviolent civil disobedience by protesters he denounced as 'the new barbarians.'" *Id.*; cf. Roderick E. Walston, *Blackmun's Philosophical Shift Hurt U.S. Jurisprudence*, L.A. DAILY J., June 10, 2005, at 10 (describing

scribed as “uncompromisingly conservative.”<sup>21</sup> That view was often, but not always, reflected in the views of “his” Court. The Rehnquist Court is the Court that invalidated the federal sentencing guidelines in *United States v. Booker*<sup>22</sup> and radically reshaped Confrontation Clause jurisprudence in *Crawford v. Washington*.<sup>23</sup> But those cases in no way reflected Rehnquist’s own jurisprudential preferences. Rehnquist was a consistent supporter of the federal guidelines and supported a pre-*Crawford* understanding of the Confrontation Clause. Over Rehnquist’s differing views,<sup>24</sup> both *Booker* and *Crawford* reflected the competing views of Scalia with regard to the scope of the rights to trial by jury and the Confrontation Clause.<sup>25</sup>

Part I of this Article will briefly sketch the judicial philosophy of Justice Scalia as contrasted with that of Rehnquist. The remainder of the Article will then analyze how those competing visions were reflected in the Court’s Fourth, Fifth, and Sixth Amendment jurisprudence before the death of Chief Justice Rehnquist. Part II will briefly outline Rehnquist’s impact on modern search and seizure law and Fifth Amendment confessions jurisprudence, where he presided over an increasingly police-friendly approach to the Fourth Amendment

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Justice Rehnquist’s “well-developed views of jurisprudence,” which remained constant over his career on the Court).

21. STARR, *supra* note 15, at 15.

22. 543 U.S. 220 (2005).

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

24. As discussed more fully below, Chief Justice Rehnquist dissented from the “merits” majority opinion in *Booker*, though he joined the “remedial” majority opinion, from which Scalia dissented. The *Booker* merits majority flowed naturally from earlier Scalia opinions in the sentencing context, from which Chief Justice Rehnquist dissented. In *Crawford*, Chief Justice Rehnquist filed a concurring opinion, protesting Scalia’s majority decision to reformulate the traditional Confrontation Clause test.

25. See discussion *infra* Parts III–IV; see also discussion *supra* note 24. As is explained *supra*, *Booker* was a complex opinion with a merits majority and a remedial majority made up of different groupings of justices. Scalia joined the merits majority (“*Booker A*”), which found the federal guidelines unconstitutional as they then existed. See M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 534, 558–64 (2005). “[I]n *Booker A*, the Court held that a Sixth Amendment violation occurs when a judge increases a defendant’s sentence based upon factual findings made by the judge rather than a jury.” *Id.* at 534. A different majority, the remedial majority (“*Booker B*”), salvaged the guidelines by rendering them no longer mandatory and by imposing a reasonableness standard on appeal. *Id.* Scalia joined Stevens’s opinion in *Booker A* and Chief Justice Rehnquist dissented; Chief Justice Rehnquist joined Breyer’s majority opinion in *Booker B* and Scalia dissented. *Id.* n.6. *Booker A* was a “natural outgrowth” of *Blakely v. Washington*, 542 U.S. 296 (2004), authored by Scalia, which invalidated factual findings “made by the judge rather than a jury” in a state sentencing scheme. Darmer, *supra*, at 534; see also *infra* notes 180–93 and accompanying text.

and where his efforts to blunt the impact of *Miranda* represented an almost categorical triumph. Part III will then trace the differences between Scalia and Rehnquist with regard to Sixth Amendment jurisprudence, examining how those competing visions played out in the context of the sentencing guidelines cases. Part IV will describe Scalia's radical reshaping of Confrontation Clause jurisprudence.

A comprehensive assessment of all aspects of constitutional criminal procedure in the Rehnquist era is beyond the scope of this piece. Rather, this Article focuses on the "lightning rod" issues of the Warren Court era that largely motivated Rehnquist's appointment to the Court and on the Sixth Amendment areas, which generated considerable attention in the twilight years of the Rehnquist Court. In all of these areas, Scalia has been a sometimes critic of the late Chief Justice, often attacking his methodology, if not his results.

## I. Two Conservative Justices; Two Quite Different Approaches

Both Scalia and Rehnquist have been described as "brilliant"<sup>26</sup> (though Scalia perhaps more frequently so). Both have impeccable conservative credentials and little sentimentality when it comes to criminal defendants. Their approaches to criminal procedure, however, frequently diverged.

### A. Scalia's Democratic Formalism<sup>27</sup>

President Reagan appointed Associate Justice Antonin Scalia to the bench in 1986, filling the vacancy created by the retirement of Chief Justice Burger and Rehnquist's ascension to Chief Justice.<sup>28</sup> As Mark Tushnet recently wrote about Scalia's move into Rehnquist's seat and the latter's move up to Chief Justice, "[c]onservatives luxuriated in the thought that Rehnquist and Scalia would lead the Court sharply to the right."<sup>29</sup> Any assumption that Scalia would simply act in lock-step with the Chief Justice Rehnquist, however, proved unfounded. Rather, in several cases, Scalia "sided with criminal defen-

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26. See STARR, *supra* note 15, at 15 (describing Rehnquist); Laurence H. Tribe, *Rehnquist Was Brilliant Colleague Who Always Got Right to the Point*, L.A. DAILY J., Sept. 8, 2005, at 8 (same); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 367 (1993) (describing Scalia).

27. This phrase is taken from Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).

28. See MARK TUSHNET, A COURT DIVIDED 32 (2005).

29. *Id.* at 36.

dants against the government because he believed that a clear rule supported that result.”<sup>30</sup> The sentencing guidelines and Confrontation Clause cases are examples of this.<sup>31</sup>

Other writers have thoroughly excavated Scalia’s jurisprudence,<sup>32</sup> and it is beyond the scope of this Article to provide an exhaustive description or critique of that jurisprudence.<sup>33</sup> Most scholars would agree that important components of his approach are an emphasis on constitutional text, commitments to “original meaning” and the “rule of law” and a commitment to the separation of powers doctrine<sup>34</sup> that is skeptical of an expansive role for the judiciary in a democracy.

In 1989, Scalia outlined his view of the “Rule of Law” at the Oliver Wendell Holmes, Jr. Lecture at Harvard University.<sup>35</sup> In that lecture, Scalia sought to explore “the dichotomy between general rules and personal discretion within the narrow context of *law that is made by the courts*.”<sup>36</sup> He criticized the incrementalist approach of the common-law system of deciding cases on narrow grounds, an approach that leaves a large measure of discretion to future courts.<sup>37</sup> Instead, he advocated that courts establish “as soon as possible a clear, general principle of decision.”<sup>38</sup> In his view, this paradigm leads to a better

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30. Segall, *supra* note 16, at 1013.

31. See discussion *infra* Parts III–IV.

32. See, e.g., David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1378 (1999) (noting that Scalia “has spawned a veritable academic cottage industry” and that more than fifty recent articles “focus exclusively on some aspect of his jurisprudence”); Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 224 (1997) (noting that “Scalia has been the focus of a maelstrom of scholarly attention”); Segall, *supra* note 16 (thoroughly describing Scalia’s rule-oriented judicial philosophy); Kannar, *supra* note 16 (analyzing the role of religion in developing Scalia’s jurisprudence).

33. In his comprehensive article, Professor Zlotnick describes Scalia’s constitutional methodology. See Zlotnick, *supra* note 32, at 1380–1402. He further “establishes a framework for the existing critiques of [Scalia’s] jurisprudence.” *Id.* at 1379; see also *id.* at 1403–26; Sunstein, *supra* note 27 (questioning whether Scalian formalism promotes democratic ideals); Segall, *supra* note 16 (contrasting Scalia’s judicial philosophy with critiques of legal rules and the rule of law made by critical legal studies scholars).

34. See Zlotnick, *supra* note 32, at 1388–1401; Fox & McAllister, *supra* note 32, at 225; see also Segall, *supra* note 16, at 999–1004 (analyzing Scalia’s own academic writings for focus on rule of law and originalism).

35. The lecture was later published as an essay in the University of Chicago Law Review. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

36. *Id.* at 1176. Accordingly, Scalia does not shy away from acknowledging that judges “make law.” Cf. Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL’Y 155, 155–56 (1994) (arguing that judges make law but deny that they do).

37. Scalia, *supra* note 35, at 1177.

38. *Id.* at 1179.

appearance of equal treatment, greater predictability and constraint of judges, and the emboldening of judges to stand up to the popular will.<sup>39</sup>

In 1997, the Princeton University Press published an essay by Scalia on statutory construction and constitutional interpretation.<sup>40</sup> In that essay he described himself as a “textualist,” and differentiated that term from “so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute.”<sup>41</sup> According to Scalia, a text should not be construed either “strictly” or “leniently,” but rather “reasonably, to contain all that it fairly means.”<sup>42</sup>

In defending textualism, Scalia readily acknowledged that textualism is “‘formalistic.’”<sup>43</sup> So, says Scalia, is the requirement that a very guilty defendant must be convicted after a criminal trial before he can be punished by the state:

A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime; and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism. It is what makes a government a government of laws and not of men.<sup>44</sup>

In his review of Scalia’s essay, Professor Cass R. Sunstein notes that Scalia intended to “defend a species of *democratic formalism*.”<sup>45</sup>

39. *Id.* at 1179–80. On this last point, Scalia explains:

The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases. It is very difficult to say that a particular convicted felon who is the object of widespread hatred must go free because, on balance, we think that excluding the defense attorney from the line-up process in this case may have prevented a fair trial. It is easier to say that our cases plainly hold that, absent exigent circumstances, such exclusion is a *per se* denial of due process.

*Id.* at 1180. For a thorough analysis of the lecture, see Segall, *supra* note 16, at 999–1002.

40. The essay was published in a book that also included commentary on Scalia’s essay and his response. See SCALIA, *supra* note 27. For a review of the book, see Donald J. Kochan, *The Other Side of the Coin: Implications for Policy Formation in The Law of Interpretation*, 6 CORNELL J.L. & PUB. POL’Y 463 (1997).

41. *Id.* at 23.

42. *Id.* To illustrate his view of textualism, he pointed to *Smith v. United States*, 508 U.S. 223 (1993). The majority in that case found that a defendant “use[d] . . . a firearm” during a drug trafficking crime when he offered an unloaded firearm in exchange for drugs, thus subjecting the defendant to a sentencing enhancement. *Id.* at 225. Scalia criticized the majority, noting that a “proper textualist [like himself] . . . would surely have voted to acquit.” SCALIA, *supra* note 27, at 23–24.

43. SCALIA, *supra* note 27, at 25.

44. *Id.*

45. Sunstein, *supra* note 27, at 530.



We might even say that Justice Scalia is the clearest and most self-conscious expositor of democratic formalism in the long history of American law . . . . Above all, he seeks to develop rules of interpretation that will limit the policymaking authority and decisional discretion of the judiciary, the least accountable branch of government.<sup>46</sup>

Scalian opinions frequently return to the theme of judges as representing a counter-majoritarian force whose role should be sharply circumscribed.<sup>47</sup> For example, in his dissent from Justice Rehnquist's 7-2 *Dickerson* decision affirming *Miranda*, Scalia protested that *Miranda* "has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people."<sup>48</sup>

## B. Rehnquist's Pragmatic Paternalism

While he espoused many of the same views as Scalia in terms of fidelity to constitutional text and the role of the judiciary as appropriately limited,<sup>49</sup> Rehnquist's criminal procedure jurisprudence reflected a more pragmatic bent than Scalia's. As Professor Laurence Tribe stated in the wake of the late Chief Justice's death, "Rehnquist was attentive to legal doctrine but impatient with legalisms that ignored reality. His strong pragmatic streak, differentiating him from those on his right, was manifest."<sup>50</sup> In addition, despite protests regarding the judiciary's limited role, many strands of Rehnquist's criminal procedure jurisprudence reveal a large scope of sanguinity

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46. *Id.*

47. Cf. Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

48. *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

49. For example, in *Furman v. Georgia*, 408 U.S. 238 (1972), where Justice Rehnquist dissented from the invalidation of state death penalty provisions, he wrote: "The task of judging constitutional cases imposed by [Article] III cannot . . . be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment. Today's decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes." *Id.* at 468 (Rehnquist, J., dissenting). Chief Justice Burger and Justices Blackmun and Powell joined Justice Rehnquist's dissent. Justice Rehnquist also took this view in his extrajudicial writings and in interviews. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (criticizing the notion that the Court should take action simply because other branches of Government have failed to); see also John A. Jenkins, *The Partisan: A Talk With Justice Rehnquist*, N.Y. TIMES MAGAZINE, Mar. 3, 1985, at 28, 34 (quoting Rehnquist for the proposition that the Court, as an "undemocratic" institution, should have a "circumscribed" role).

50. Tribe, *supra* note 26.

regarding an expansive judicial role. Indeed, many cases reveal a “judges know best” mentality, and Rehnquist was quick to find “harmless error” in cases where judges committed constitutional errors when presiding over cases involving obviously guilty defendants.<sup>51</sup> He also displayed far less concern than Scalia about judges invading the province of the jury.<sup>52</sup> In this way, I characterize his views as “paternalistic.”

Where a Scalian opinion typically focuses closely on the text of the amendment at issue, Rehnquist spent much more time—and paid much more deference to—precedent.<sup>53</sup> As others have noted, Rehnquist also had a tendency to focus, early in his opinions, on the facts—often involving despicable deeds done by defendants now demanding that their convictions be overturned.<sup>54</sup> This approach would lead an average citizen almost instinctively to root for the police and against any chance for the defendant’s release. With Rehnquist’s focus on facts and businesslike discussion of precedent, with doctrine being sometimes moderately narrowed, sometimes modestly expanded, he very much appeared to be the “reasonable judge.” He was often measured, deliberate, and ultimately, in a layperson’s sense, “fair.” While the target of harsh academic criticism,<sup>55</sup> Rehnquist’s approach largely reflected the political mainstream,<sup>56</sup> which is one reason why it has traction.

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51. See *Neder v. United States*, 527 U.S. 1 (1999); see also discussion *infra* Part III.

52. See *Neder*, 527 U.S. at 16–17.

53. Compare *Maryland v. Craig*, 497 U.S. 836, 860–70 (Scalia dissenting from majority holding that Sixth Amendment does not categorically require face-to-face confrontation), with *White v. Illinois*, 502 U.S. 346 (1992) (opinion written by Chief Justice Rehnquist on confrontation clause).

54. See, e.g., *White*, 502 U.S. at 349–51 (detailing allegations of sexual abuse of a four-year-old girl).

55. See Stephanos Bibas, *The Rehnquist Court’s Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078, 1078 (2006) (“The conventional academic wisdom criticizes the Rehnquist Court’s criminal procedure decisions and, in particular, its self-incrimination case law.”).

56. Cf. *id.* at 1086–87 (noting that “one of the Warren Court’s great mistakes was articulating and imposing top-down theories without regard for their real-world import and impact”); Keith E. Whittington, *William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 9 (Earl M. Maltz ed., 2003) (noting that Nixon’s presidential campaign attack on the Warren Court was “a winning issue, as the public rated crime as one of the most important problems facing the nation in 1968, and a large majority believed that the courts did not deal with criminals harshly enough” (quotation omitted)); Bibas, *supra* note 55, at 1086–87 (noting that rather than attacking Warren precedent with sweeping rules of its own, Rehnquist’s incrementalist approach “gradually moved self-incrimination doctrine onto firmer foundations: deterrence, coercion, and admission of reliable statements and fruits”).

In addition, Rehnquist's innovations were modest, rather than bold,<sup>57</sup> or at least they purported to be. "The law is at best an inexact science," Rehnquist said in his extrajudicial writing, "and the cases our Court takes to decide are frequently ones upon which able judges in lower courts have disagreed. There simply is no demonstrably 'right' answer to the question involved in many of our difficult cases."<sup>58</sup> Scalia might well demur.<sup>59</sup>

Rehnquist was also comfortable with the Court's ultimate authority to "say what the law is."<sup>60</sup> In affirming *Miranda* in his *Dickerson* opinion, he made plain that legislative efforts to supplant *Miranda* in 18 U.S.C. § 3501<sup>61</sup> were impotent: "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."<sup>62</sup> Indeed, as Professors Dorf and Friedman memorably put it, section 3501 was a "slap at the Court, and if any Court was likely to slap back" it was Rehnquist's.<sup>63</sup>

Linda Greenhouse, who has covered the Supreme Court for the *New York Times* since 1978,<sup>64</sup> five years after Rehnquist joined the Court, recently described the late Chief Justice as "perhaps the leading modern expositor of judicial supremacy" who "committed his tenure to the maximum exercise of the Supreme Court's power."<sup>65</sup>

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57. See STARR, *supra* note 15, at 21 (2002) (describing Chief Justice Rehnquist a "judicial pragmatist, a respecter of legal precedent, wary of sudden change"); Bibas, *supra* note 55, at 1086–87 (describing Rehnquist's incrementalist approach). *But see* STARR, *supra* note 15, at 16–17 (describing Rehnquist as more of a maverick as an Associate Justice, earning the nickname "Lone Ranger" for his solitary dissents and for "attack[ing] Warren Court precedents with relish"); SCHWARTZ, *supra* note 26, at 317 (describing the Lone Ranger doll that Rehnquist's law clerks gave him as a gift). Schwartz also notes that Rehnquist dissented alone fifty-four times as an Associate Justice—"a Court record." *Id.*

58. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 255 (2001).

59. See Segall, *supra* note 16, at 1042 ("Justice Scalia likes his law simple, precise, and clear: examine text and tradition and if at all possible, articulate a broad general rule.").

60. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

61. For a fuller discussion of 18 U.S.C. § 3501 (1968), see M.K.B. Darmer, *Lessons From the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 268–69 & nn. 197–99 (2002).

62. *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

63. Michael J. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 72 (citing Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 895 (2000)) (characterizing section 3501); *cf.* Kevin McNamee, *Do as I Say and Not as I Do: Dickerson, Constitutional Common Law and the Imperial Supreme Court*, 28 FORDHAM URB. L.J. 1239 (characterizing the Rehnquist Court as "imperial").

64. See Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES, July 13, 2008, at WK1; *see also, e.g.*, Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 ARIZ. L. REV. 251 (2003) [hereinafter Greenhouse, *The Last Days*] (discussing Rehnquist's impact on the Court).

65. Greenhouse, *The Last Days*, *supra* note 64, at 257.

In the Fourth and Fifth Amendment contexts, he exercised this power remarkably effectively.

## II. Rehnquist's Successful Fourth and Fifth Amendment Jurisprudence

The two cases that came to symbolize the perceived excesses of the Warren Court in protecting the rights of criminal defendants were *Mapp v. Ohio* and *Miranda v. Arizona*.<sup>66</sup> *Mapp*, which involved an unlawful search, applied the exclusionary rule to the states in search and seizure cases, effectively limiting the evidence that could be used at trial if a search violated a defendant's rights under the Fourth Amendment.<sup>67</sup> *Miranda* held that custodial interrogation was "inherently coercive," and for the first time applied the Fifth Amendment's prohibition on compelled self-incrimination to stationhouse questioning, requiring officers to provide warnings to arrestees before questioning them.<sup>68</sup> Both opinions were widely criticized in pro-police quarters, and Nixon appointed Rehnquist to the Court as a counterweight to those decisions.<sup>69</sup>

Though Rehnquist failed to overrule *Mapp* as he set out to do, he authored and joined important opinions that blunted the impact of *Mapp*. For example, he created a "good faith" exception to the warrant requirement,<sup>70</sup> and loosened the standard for probable cause.<sup>71</sup> He also generally presided over an "exception-based" jurisprudence in the Fourth Amendment context, where the Court paid lip service to its supposed preference for warrants but carved out an ever-expanding list of exceptions to the general rule requiring warrants.<sup>72</sup>

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66. Kamisar, *supra* note 19.

67. 367 U.S. 643 (1961).

68. 384 U.S. 436 (1966).

69. See Whittington, *supra* note 56, at 9–11.

70. *United States v. Leon*, 468 U.S. 897, 913 (1984) (creating a good faith exception to the exclusionary rule).

71. *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (applying a totality of the circumstances test to anonymous informant tips and rejecting the two-prong probable cause test from *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969)).

72. For example, Chief Justice Rehnquist's majority opinion in *Thornton v. United States*, 541 U.S. 615 (2004), carved out a new exception to the warrant requirement, permitting the warrantless search of a "recent occupant" of a car. *Id.* at 623–24; cf. Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273, 275 (1987) (describing the Burger Court's retreat from Warren Court decisions, and noting that "the [Burger] Court's major search decisions have been essentially uniform in favoring the police").

With regard to *Miranda*, Rehnquist had an even more direct impact, taking charge of the doctrine and reshaping it to his preferred limits. In 1974, it was Associate Justice Rehnquist who first described the *Miranda* warnings as merely “prophylactic,” as distinct from constitutionally required.<sup>73</sup> That description, in *Michigan v. Tucker*, helped launch a series of cases creating exceptions to *Miranda* and restricting its natural implications.<sup>74</sup> The rationale in many of the Court’s later limiting decisions derived directly from Rehnquist’s opinion in *Tucker*.<sup>75</sup> When Rehnquist ultimately wrote the 7-2 majority opinion “reaffirming” *Miranda* in 2001 in *Dickerson v. United States*,<sup>76</sup> it was no longer Earl Warren’s *Miranda*—it was Rehnquist’s.

While joining many of its opinions, Justice Scalia was at times a blistering critic of the Rehnquist Court’s jurisprudence in both the Fourth and Fifth Amendment contexts. He has disparaged the exception-riddled “warrant requirement,”<sup>77</sup> preferring fewer balancing tests, more bright lines and historical context, and—of course—more fidelity to constitutional text.<sup>78</sup> In the Fifth Amendment context,

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73. *Michigan v. Tucker*, 417 U.S. 433, 446 (1974).

74. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that the “fruits” of a *Miranda* violation were admissible, such that a statement preceded by warnings could be used despite the exclusion of an earlier statement that was not preceded by warnings); *New York v. Quarles*, 467 U.S. 649 (1984) (opinion written by Justice Rehnquist creating a “public safety” exception to the *Miranda* warnings requirements).

75. *Tucker* itself permitted the trial testimony of a witness discovered as a result of an unwarned statement taken before *Miranda* was decided. *Tucker*, 417 U.S. at 452; see also Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100 (noting that ten of eleven then-recent Supreme Court decisions interpreted *Miranda* so as not to require exclusion of the confession at issue); Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 746 (1999) (“Rather than overturn *Miranda*, the Burger and later Rehnquist Courts set about to limit its reach by interpreting *Miranda*’s requirements narrowly and crafting exceptions to its commands.”); cf. Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 402 (2001) (“Although the Court limited the potential effects of *Miranda* in subsequent decades, the central holding was repeatedly reaffirmed and even extended.”). For a fuller discussion of the Burger and Rehnquist Courts’ treatment of *Miranda*, see Darmer, *supra* note 61, at 264.

76. 530 U.S. 428 (2000). For a thorough discussion of *Dickerson* from several different perspectives, see Symposium, *Miranda After Dickerson: The Future of Confessions Law*, 99 MICH. L. REV. 879 (2001).

77. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in part) (describing that the “warrant requirement” has become “so riddled with exceptions” that it is “basically unrecognizable”). In *Thornton*, Scalia concurred with Chief Justice Rehnquist’s majority opinion extending an earlier rule, and suggested that the underlying rule should be revisited. 541 U.S. at 625–32 (Scalia, J., concurring).

78. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (opinion written by Scalia over Chief Justice Rehnquist’s dissent, finding that use of a thermal imaging device directed at a home constituted a Fourth Amendment “search” requiring a warrant). For a more thor-

Scalia preferred forthrightly to overrule *Miranda*, and was sharply critical of Rehnquist for failing to do so in *Dickerson*.<sup>79</sup> With some exceptions,<sup>80</sup> however, Rehnquist's pragmatic approach in these areas won out over Scalia's more purist one. In *Dickerson*, for example, Rehnquist's spare majority opinion garnered a solid majority of seven, achieving stability in the Court's confessions law jurisprudence,<sup>81</sup> whereas Scalia's dogmatic and vitriolic dissenting opinion garnered only Justice Thomas's additional vote.<sup>82</sup>

### III. Judicial Fact Finding and the Unraveling of the Sentencing Guidelines

Concerning the Sixth Amendment as well as the Fourth and Fifth, Rehnquist's views were more pragmatic, Scalia's more purist. Scalia's and Rehnquist's sharply diverging views on the Sixth Amendment are illustrated in *Neder v. United States*,<sup>83</sup> a case decided well before the later sentencing guidelines and Confrontation Clause cases. In *Neder*, the trial judge erred in failing to submit to the jury the question of whether misstatements in tax returns were material.<sup>84</sup> Chief Justice Rehnquist, who wrote the majority opinion, determined that the error was harmless.<sup>85</sup> In doing so, he displayed supreme confidence in the verdict, noting that the Government's evidence at trial established the defendant's failure to report five million dollars in income, a failure that "incontrovertibly establishes that Neder's false statements were material . . . . In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence . . . the erroneous instruction is properly found to be harmless."<sup>86</sup>

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ough discussion of Scalia's Fourth Amendment jurisprudence, see Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia's Fourth Amendment*, 79 WASH. U. L.Q. 1013 (2001).

79. *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

80. See, e.g., *Kyllo*, 533 U.S. 27.

81. As Professor Stephen F. Smith noted, "[a]fter *Dickerson*, it would appear that *Miranda* law is finally at an equilibrium that almost all of the Justices—including supporters and critics of *Miranda*—can accept." *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1111 (2002).

82. *Dickerson*, 530 U.S. at 444 (Scalia, J., dissenting).

83. 527 U.S. 1 (1999).

84. *Id.* at 4.

85. The Court was unanimous in holding that materiality is, in fact, an element of the federal mail, wire, and bank fraud statutes. *Id.* at 25. In a 5-4 decision, the Court also held that the lower court's error in submitting the issue of materiality to the jury was harmless. *Id.* at 4.

86. *Id.* at 16-17.

Justice Scalia pointedly disagreed, describing the Sixth Amendment jury trial guarantee as the “spinal column of American democracy.”<sup>87</sup> Criticizing the Court’s ruling for being based in part on “self-esteem” and “pragmatism,”<sup>88</sup> he emphasized that:

[T]he Constitution does not trust judges to make determinations of criminal guilt. Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution.<sup>89</sup>

Though *Neder* dealt with neither the sentencing guidelines nor the right to confrontation, Scalia’s skepticism about judges ultimately animated both *Crawford* and *Booker*.<sup>90</sup>

Rehnquist’s sanguinity regarding the significance of a judge’s role at sentencing was evident in *McMillan v. Pennsylvania*.<sup>91</sup> That 1986 case pre-dated the federal guidelines but endorsed the kind of judicial fact finding under a “preponderance of the evidence” standard that characterized the later federal guidelines system.<sup>92</sup>

In *McMillan*, the Court confronted a challenge to Pennsylvania’s mandatory minimum sentencing scheme, which required judges to impose a five-year sentence upon any defendant who visibly possessed a firearm during the commission of an underlying offense.<sup>93</sup> The scheme called for sentencing judges to make the factual finding regarding such firearm possession by a “preponderance of the evidence,” a finding that the Pennsylvania legislature explicitly deemed a “sentencing factor” rather than an element of the underlying offense.<sup>94</sup>

Although several state sentencing judges operating under this system found the scheme unconstitutional, the Pennsylvania Supreme Court disagreed, finding, among other things, that “the risk of error” was “comparatively slight” because “visible possession is a simple,

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87. *Id.* at 30 (Scalia, J., concurring in part and dissenting in part).

88. *Id.* at 39.

89. *Id.* at 32.

90. While Stevens, Scalia’s ally in this area, wrote the *Booker* majority opinion invalidating the sentencing guidelines, it was a natural outgrowth of Scalia’s Sixth Amendment opinion in *Blakely v. Washington*, 542 U.S. 296 (2004).

91. 477 U.S. 79 (1986).

92. See *United States v. Watts*, 519 U.S. 148 (1997); see also Darmer, *supra* note 25, at 544–45 (noting controversies associated with “real offense sentencing” under the preponderance standard).

93. *McMillan*, 477 U.S. at 81.

94. See *infra* notes 100–01 and accompanying text.

straightforward issue susceptible of objective proof.”<sup>95</sup> The United States Supreme Court affirmed, relying on prior precedent for the notion that “in determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive . . . .”<sup>96</sup> Endorsing federalism principles, moreover, Rehnquist noted that “we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”<sup>97</sup>

Moving beyond the burden of proof issue, Rehnquist gave short shrift to petitioners’ Sixth Amendment claim, explicitly noting that it merited “little discussion.”<sup>98</sup> While petitioners argued that the jury was required to determine all “ultimate facts” regarding the offense, the Court disagreed: “Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, *even where the sentence turns on specific findings of fact.*”<sup>99</sup> He gave considerable deference to the ability of the Legislature to mark out the difference between “elements of the offense”—which must be proved to a jury beyond a reasonable doubt, and “sentencing factors”—which need only be established to a judge’s individual satisfaction, by a preponderance of the evidence.<sup>100</sup> Rehnquist himself coined the term “sentencing factor” in this opinion,<sup>101</sup> a term that was to become critical in the future battle over sentencing guidelines.

*McMillan* was decided in June 1986, before Scalia assumed Rehnquist’s associate justiceship later that year. Early on, however, Scalia marked out a different view of the appropriate roles of legislatures, judges, and juries in the sentencing context.

### A. The Federal Sentencing Guidelines—Background

The United States Sentencing Guidelines took effect on November 1, 1987, just one year after Justice Scalia ascended to the Supreme

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95. *McMillan*, 477 U.S. at 84.

96. *Id.* at 85.

97. *Id.*

98. *Id.* at 93.

99. *Id.* (emphasis added).

100. *Id.*

101. See *Apprendi v. New Jersey*, 530 U.S. 466, 485 (noting that “for the first time, [the *McMillan* Court] coined the term ‘sentencing factor’ to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge” (quoting *McMillan*, 477 U.S. at 86)).



Court. The Sentencing Reform Act of 1984 created the Sentencing Commission, which was tasked with creating guidelines to constrain the wide-ranging discretion judges had previously enjoyed in sentencing defendants.<sup>102</sup> Prior to the United States Sentencing Guidelines (“Guidelines”), many commentators agreed that the discretionary regime had led to substantial sentencing disparities, with similarly situated defendants in different federal courtrooms receiving significantly different sentences for the same crimes.<sup>103</sup>

The Guidelines sought to regularize the sentencing process and make it more predictable. They are an intricate overlay with respect to the federal penal code, requiring that sentencing judges make a series of factual findings after conviction to determine where within a broad statutory range a defendant should be punished.<sup>104</sup> Integral to the Guidelines scheme is that sentencing decisions are largely driven by those specific factual findings. For example, if a defendant distributed ten kilograms rather than five grams of cocaine, he<sup>105</sup> would receive a higher sentence. If he killed or maimed a victim in the course of a bank robbery, he would receive a higher sentence than if he had simply brandished a weapon.

While *Booker* ultimately found that such judicial fact finding violated the Sixth Amendment right to jury trial where the facts found increased the defendant’s sentence, a specific challenge to such fact finding was not made for many years, despite being the source of sustained academic criticism.<sup>106</sup> Rather, initial attacks on the Guidelines raised entirely different issues. In *Mistretta v. United States*,<sup>107</sup> Scalia was the lone dissenter in a case that upheld the Guidelines against consti-

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102. See generally Darmer, *supra* note 25, at 539–45 (describing the history of the federal sentencing guidelines).

103. See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); see also Darmer, *supra* note 25, at 539–40 (describing Frankel’s influential work bringing disparities to light, and the bipartisan support of liberal and conservative Senators bringing about reform).

104. For a fuller description, see Darmer, *supra* note 25, at 540–45. For a thoughtful book on the Guidelines, see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

105. My use of the male pronoun to refer to criminal defendants reflects the reality that the vast majority of criminal defendants are male. See U.S. SENTENCING COMM’N, ANNUAL REPORT 33 (2006) (noting that males comprised 86.7% of all offenders sentenced in 2006).

106. See Darmer, *supra* note 25, at 544–45 (describing criticism lodged by others).

107. 488 U.S. 361 (1989).

tutional claims that the system violated both separation of powers and non-delegation doctrines.<sup>108</sup>

At first blush, it is remarkable that Scalia could have transformed the Court's thinking so completely that it went from near-unanimity on the Guidelines' ultimate constitutionality to a majority finding of unconstitutionality. It turns out, however, that once the Court began to focus on the Guidelines requirement that judges *find facts* beyond (or even contrary to) those found by the jury in enhancing sentences, Justice Scalia joined forces with the Court's most liberal member, John Paul Stevens, in moving the Court towards invalidating the system.<sup>109</sup> In the series of cases described in Section B below, the Court found that a system based upon judicial fact finding was inconsistent with the Constitution's irreducible demands under the Sixth Amendment.

## B. Due Process and Sixth Amendment Challenges

Following *Mistretta*, the Court consistently rejected challenges to the Guidelines until its jurisprudence "began to unravel."<sup>110</sup> *Apprendi v. New Jersey*<sup>111</sup> explicitly raised a constitutional challenge to judicial fact finding in sentencing. While it is conventional to mark *Apprendi* as the beginning of the end of the Guidelines, the seeds of their destruction were actually planted in Stevens's dissenting opinion in *McMillan v. Pennsylvania*, in which he disagreed with Rehnquist's view on the amount of deference given to state legislatures in defining elements of an offense.<sup>112</sup> Locating his objection in the Due Process Clause, Ste-

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108. Indeed, the other eight justices were unusually strongly united in the view that the Guidelines were constitutional. Blackmun authored the majority opinion, which was joined in full by Chief Justice Rehnquist, White, Marshall, Stevens, O'Connor, Kennedy, and in all but one footnote, by Brennan. Scalia asserted that despite their "modest name," the Guidelines "have the force and effect of laws." 488 U.S. at 413 (Scalia, J., dissenting). The majority conceded as much because, with limited exceptions, the Guidelines required judges to sentence within a narrow range determined by the factual nature of the crime (as found by the judge) and the defendant's criminal history. Scalia dissented, however, noting that he could find "no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws." *Id.* Rehnquist, on the other hand, joined Blackmun's majority opinion in *Mistretta* and was a steadfast advocate of the Guidelines system thereafter.

109. Scalia joined Stevens's majority opinion in *Booker A*, which found the current Guidelines unconstitutional. See discussion *supra* note 25. Both Scalia and Stevens dissented from the remedial portion of the opinion, which I have referred to as *Booker B. Id.*

110. See David J. Gottlieb, *The Constitutionality of the Sentencing Guidelines*, in PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES 10–17 (4th ed. 2005).

111. 530 U.S. 466 (2000).

112. For a discussion of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), see *supra* notes 91–101 and accompanying text.

vens found that “[o]nce a State defines a criminal offense,” the State must then “prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.”<sup>113</sup> Accordingly, Stevens concluded that Pennsylvania’s mandatory minimum sentencing scheme violated the Constitution because it required a judge to impose five years’ additional punishment for visible possession of a firearm even though such “possession” was never proved beyond a reasonable doubt.<sup>114</sup> The majority, however, agreed with Rehnquist’s analysis that a judge could properly make such a finding by a preponderance of the evidence.<sup>115</sup>

The issue of whether an aspect of the defendant’s conduct is an “element of the offense” or merely a “sentencing factor,” about which Rehnquist and Stevens disagreed in *McMillan*, emerged again more than a decade later in *Almendarez-Torres v. United States*.<sup>116</sup> Rehnquist and Scalia were on opposite sides of that case, and Scalia’s dissenting opinion in *Almendarez-Torres* was important for later developments in Sixth Amendment sentencing jurisprudence.

*Almendarez-Torres* involved a conviction under the “illegal reentry” statute, 8 U.S.C. § 1326, which provides different penalties for an alien who illegally re-enters the country following deportation, depending upon whether such alien has previously been convicted of an aggravated felony. The difference in penalty is significant. Subsection (a) provides a maximum penalty of two years’ imprisonment, whereas subsection (b) provides a maximum penalty of twenty years for an alien previously convicted of an aggravated felony.<sup>117</sup>

Breyer wrote the 5-4 majority opinion in *Almendarez-Torres*, finding that subsection (b) was merely “a penalty provision, which simply authorizes a court to increase the sentence for a recidivist.”<sup>118</sup> Thus, according to the majority, there was no constitutional error if the judge made that decision. In the opinion, which Rehnquist joined, Breyer relied heavily upon Rehnquist’s prior opinion in *McMillan*.<sup>119</sup>

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113. *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting). Marshall, who dissented separately, joined by Brennan and Blackmun, agreed with “much in Justice [Stevens’s] dissent” and agreed, in particular, that “[w]hether a particular fact is an element” that “must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States.” *Id.* at 93 (Marshall, J., dissenting).

114. *Id.* at 95–96. (Stevens, J., dissenting).

115. See discussion *supra* notes 98–100 and accompanying text.

116. 523 U.S. 224 (1998).

117. 8 U.S.C. § 1326(a)–(b)(2) (2008).

118. 523 U.S. at 226.

119. See *id.* at 242. For a discussion of *McMillan*, see *supra* notes 91–100 and accompanying text.

Acknowledging differences between the two cases, Breyer noted that recidivism is a traditional basis for a sentencing judge to increase a defendant's sentence.<sup>120</sup>

Scalia disagreed, noting that *Almendarez-Torres* involved the "difficult question whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury."<sup>121</sup> That question was at the heart of not only that case, but also later cases directly challenging the constitutionality of sentencing guidelines. In determining that a jury finding beyond a reasonable doubt was required, Scalia's opinion bore traces of the earlier protestation Stevens had lodged against Rehnquist's majority opinion in *McMillan*.

*Almendarez-Torres* and the cases that followed were closely divided. In addition to Chief Justice Rehnquist, Justices O'Connor, Kennedy, and Thomas joined the majority in *Almendarez-Torres*, while Justices Stevens, Souter, and Ginsburg joined Scalia's dissent.

In *Monge v. California*,<sup>122</sup> Scalia asserted, again in dissent, the view that the Sixth Amendment right to jury trial prevented a retrial of sentencing proceedings. The majority resolved the case on double jeopardy grounds, ruling that there was no violation of that protection,<sup>123</sup> and though Scalia agreed with the double jeopardy analysis he found a violation of the Sixth Amendment, more forcefully articulating his earlier suggestion in *Almendarez-Torres*.

Scalia repeated this position the following year by concurring in *Jones v. United States*,<sup>124</sup> which involved the federal carjacking statute.<sup>125</sup> The statute provided a sliding scale of penalties depending upon how seriously the perpetrator injured his victim.<sup>126</sup> Jones was charged simply with carjacking absent specific reference to the statute's penalty provisions; indeed, the judge advised the defendant at arraignment that the maximum penalty he faced for his crime was fifteen years.<sup>127</sup> After Jones was convicted by the jury of simple carjacking, the judge presided over sentencing proceedings and ultimately found, by a preponderance of the evidence, that Jones had inflicted

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120. See *Almendarez-Torres*, 523 U.S. at 243.

121. *Id.* at 248 (Scalia, J., dissenting).

122. 524 U.S. 721 (1998).

123. *Id.* at 724.

124. 526 U.S. 227, 253 (1999) (Scalia, J., concurring).

125. 18 U.S.C. § 2119 (2008).

126. See *id.* § 2118(a)-(c).

127. *Jones*, 526 U.S. at 230-31.

“serious bodily injury” upon the victim, leading the judge to impose an enhanced sentence.<sup>128</sup>

In an opinion for a 5-4 majority setting aside the sentence, Justice Souter found that the “fairest reading” of the statute was that “serious bodily harm” was an element of the offense, not just a sentencing enhancement that could be based upon a judge’s finding.<sup>129</sup> In a footnote which later took on great significance, he stated that “under the Due Process Clause of the Fifth Amendment . . . any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”<sup>130</sup>

Justices Stevens and Scalia each concurred separately. Scalia’s brief concurrence noted the evolution in his thinking since *Almendarez-Torres*: “In dissenting in *Almendarez-Torres* I suggested the possibility, and in dissenting in *Monge*, I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.”<sup>131</sup> Stevens agreed with that proposition but added that “[i]t is equally clear that such facts must be established by proof beyond a reasonable doubt,”<sup>132</sup> reiterating the position taken in his *McMillan* dissent.<sup>133</sup> While agreeing that judicial fact finding that enhances a defendant’s sentence violates the Constitution, Stevens has consistently rooted his primary objection in the Due Process Clause of the Fifth Amendment, and Scalia in the jury trial right of the Sixth.<sup>134</sup>

The Court’s *Jones* decision, which set aside the defendant’s enhanced sentence, generated a strong dissent. Perhaps predicting the case’s ultimate impact on sentencing guidelines, the dissent criticized the majority’s approach and found it inconsistent with *Almendarez-Torres*. In an opinion written by Justice Kennedy, the dissent asserted that:

Our precedents admit of no real doubt regarding the power of Congress to establish serious bodily injury and death as sentencing factors rather than offense elements, as we made clear in *Al-*

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128. *Id.*

129. *Id.* at 239.

130. *Id.* at 243 n.6.

131. *Id.* at 253 (Scalia, J., concurring) (citations omitted).

132. *Id.* (Stevens, J., concurring).

133. See discussion *supra* notes 112–14 and accompanying text.

134. Compare *McMillan v. Pennsylvania*, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting), with *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1997) (Scalia, J., dissenting).

*mendez-Torres*. Departing from this recent authority, the Court's sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States.<sup>135</sup>

As Professor Stephanos Bibas noted, "*Jones* was the mirror image of *Almendarez-Torres*"<sup>136</sup> in terms of the lineup of justices. The majority in *Jones*, made up of the four *Almendarez-Torres* dissenters: Scalia, Stevens, Ginsburg, and Souter, plus Justice Thomas (who had "changed sides"<sup>137</sup>) found a significant constitutional problem with judicial fact finding leading to a higher sentence. This group, as further analyzed by Bibas, "distrusted legislatures and judges, exalted juries, relied on traditions of jury fact-finding, and adopted a strong rule of construction to avoid constitutional doubts."<sup>138</sup> The *Jones* dissenters—Kennedy, Rehnquist, O'Connor, and Breyer—conversely "wanted to defer to legislatures, stressed traditional leeway for judicial fact-finding at sentencing, and forecast that the elements rule would cause grave practical problems."<sup>139</sup>

Rehnquist had earlier emphasized deference to legislatures in upholding Pennsylvania's mandatory minimum sentencing scheme in *McMillan*.<sup>140</sup> That case was decided in 1986 on a 5-4 margin, with Stevens, Marshall, Brennan, and Blackmun in dissent. With the departure of the latter three liberals from the Court in the intervening years, it might have been expected that a stronger coalition would have formed around the views expressed by Rehnquist in that earlier case. Instead, while the *Jones* majority found its holding to be consistent with *McMillan*, its focus was not on *McMillan*'s core holding but on dicta suggesting that its result might have been different if gun possession in that case had "exposed a defendant to a sentence beyond the maximum that the statute otherwise set."<sup>141</sup>

Indeed, in the next important case in this line, *Apprendi v. New Jersey*, Justice Thomas, in a concurring opinion, criticized Rehnquist's earlier *McMillan* opinion as starting a "revolution in the law regarding the definition of 'crime.'"<sup>142</sup> In Thomas's view, the Court's *Apprendi*

135. *Jones*, 526 U.S. at 254 (Kennedy, J., dissenting).

136. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1115 (2001).

137. *Id.* at 1111.

138. *Id.* at 1115.

139. *Id.*

140. See *supra* notes 91-101 and accompanying text.

141. *Jones v. United States*, 526 U.S. 227, 242 (1999) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

142. *Apprendi v. New Jersey*, 530 U.S. 466, 518 (2000) (Thomas, J., concurring).

opinion (invalidating a sentencing enhancement), “far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.”<sup>143</sup>

Justice Stevens authored the majority opinion in *Apprendi*, finding that a judicially imposed sentencing enhancement for the commission of a hate crime violated the defendant’s Due Process rights.<sup>144</sup> New Jersey’s hate crime law doubled the sentencing ranges for the weapons possession charges to which Apprendi pled guilty.<sup>145</sup> The sentencing court had found, by a preponderance of the evidence, that Apprendi was guilty of a hate crime.<sup>146</sup> The Supreme Court, relying upon the constitutional concern articulated in its recent 5-4 *Jones* opinion, found that a defendant is entitled to a jury finding of any fact, “[o]ther than the fact of a prior conviction . . . that increases the penalty for a crime beyond the prescribed statutory maximum.”<sup>147</sup> Endorsing the rule statement articulated in his own and Scalia’s earlier concurrences in *Jones*, Stevens now wrote for the majority that “it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”<sup>148</sup>

The *Jones* dissenters, including Rehnquist, dissented again in *Apprendi*. O’Connor and Breyer wrote separate dissenting opinions; Rehnquist joined both. Breyer outlined the history and reasons behind sentencing guidelines and vigorously defended the constitutionality of judicial fact finding in systems such as the United States Sentencing Guidelines, in which he was deeply invested.<sup>149</sup> Responding specifically to Breyer’s dissent, which extolled the virtues of the Guidelines, Scalia derided Breyer’s views as describing a “bureaucratic realm of perfect equity” that failed to appreciate the commands of the Constitution.<sup>150</sup>

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143. *Id.*

144. *Id.* at 491–92 (majority opinion).

145. *Id.* at 468–69.

146. *Id.* at 471.

147. *Id.* at 490.

148. *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999)).

149. *Id.* at 555–66 (Breyer, J., dissenting). For a discussion of Breyer’s role in developing the Guidelines, see Darmer, *supra* note 25, at 553 n.16. See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1998).

150. *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring).

Several years later in *Blakely v. Washington*,<sup>151</sup> Scalia authored the majority opinion applying the logic of *Apprendi* to a state sentencing scheme bearing a strong resemblance to the federal guidelines system. Writing for the same 5-4 majority that previously decided *Apprendi* and *Jones*, Scalia applied the rule of *Apprendi* and invalidated a sentence based upon judicial fact finding, locating the defect squarely in the Sixth Amendment.<sup>152</sup> Scalia's forceful opinion expanded upon *Jones* and *Apprendi* and articulated a clear vision of the important role of the jury in delimiting a defendant's sentence.

Blakely had kidnapped his estranged wife and later pled guilty to second-degree kidnapping involving both domestic violence and a firearm, a Class B felony.<sup>153</sup> His sentence of ninety months was at issue in the case.<sup>154</sup> Under the terms of the plea agreement, the contemplated sentencing range was forty-nine to fifty-three months, reflecting the "standard range" for the underlying crime.<sup>155</sup> Under Washington's law, the sentencing judge could impose a sentence higher than the standard range only if the judge found "'substantial and compelling reasons'" to justify it.<sup>156</sup> The judge imposed a higher sentence in this case upon finding that Blakely had acted with "'deliberate cruelty.'"<sup>157</sup> Scalia found that the sentence violated *Apprendi* because the judge imposed it acting alone, without benefit of jury findings or the defendant's admission.<sup>158</sup> The sentence was three years longer than the fifty-three month sentence prescribed as the maximum of the "standard range."<sup>159</sup>

The State argued that Blakely's sentence was consistent with *Apprendi* because the relevant "statutory maximum" was ten years, the

151. 542 U.S. 296 (2004).

152. Stevens's majority opinion in *Apprendi* was based upon the Due Process Clause, see *Apprendi*, 530 U.S. at 469, as was his earlier opinion in *McMillan v. Pennsylvania*, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting).

153. *Blakely*, 542 U.S. at 298-99. Blakely pled guilty pursuant to a plea agreement with the government. *Id.*

154. This discussion of *Blakely* borrows heavily from my discussion of that case in Darmer, *supra* note 25, at 549-53.

155. *Blakely*, 542 U.S. at 299.

156. *Id.* (quoting WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000)).

157. *Id.* at 300 (quoting WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii)). The judge made an initial sentencing determination after hearing testimony from the defendant's wife. *Id.* The defendant objected to the increase in his contemplated sentence, and the judge then conducted a three-day hearing in which he heard from several witnesses. *Id.* At the conclusion of that hearing, he issued a series of factual findings and adhered to his initial sentencing determination. *Id.* at 300-01.

158. *Id.* at 303-04.

159. *Id.*



maximum statutory term for Class B felonies.<sup>160</sup> Scalia rejected this argument: “Our precedents make clear . . . that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”<sup>161</sup> Scalia made plain that judicial fact finding that increases a sentence is barred, regardless of whether the increase is pursuant to statute or a narrower Guidelines-type provision. As he put it: “[t]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”<sup>162</sup> The judge “exceeds his proper authority” and violates the defendant’s Sixth Amendment right to trial by jury when he “inflicts punishment that the jury’s verdict alone does not allow . . . .”<sup>163</sup>

Scalia suggested that the majority’s holding was an application, rather than an expansion, of *Apprendi*.<sup>164</sup> He also asserted that a rejection of *Apprendi*’s logic left two alternatives. In the first, the Legislature has carte blanche to label elements of the crime merely “sentencing factors” to be determined by the judge. Scalia used the dramatic example of a judge sentencing a man for murder when a jury had convicted him only of illegally changing lanes while fleeing the scene of the crime, suggesting that such a scheme subverts the constitutional role of the jury.<sup>165</sup> He then asserted: “The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”<sup>166</sup> The second alternative, Scalia said, was too subjective: “The second alternative is that legislatures may establish legally essential sentencing factors *within limits*—limits crossed when, perhaps, the sentencing factor is a ‘tail which wags the dog of the substantive offense.’”<sup>167</sup> Scalia asserted that the Framers included a constitutional right to trial by jury because “they were unwilling to trust government to mark out the role of the

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160. *Id.* at 303.

161. *Id.*

162. *Id.* at 303–04.

163. *Id.* at 304.

164. *Id.* at 305–06.

165. *Id.* at 306.

166. *Id.* at 306–07.

167. *Id.* at 307 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

jury.”<sup>168</sup> Once the Legislature determines that certain facts require punishment, those facts must be found by a jury.

Scalia conceded that judicial fact finding is also endemic to indeterminate sentencing schemes. Indeterminate sentencing allows judges broad discretion to sentence defendants within broad statutory ranges. Judges often impose sentences after making factual determinations about, for example, the circumstances of the offense or the defendant’s prior criminal history. When judges find facts in those contexts, however, Scalia noted that those facts “do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.”<sup>169</sup> In Scalia’s view, *Blakely* was sentenced to three years more than he should have been based on the crime to which he pled guilty.<sup>170</sup> “The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbors,’ rather than a lone employee of the State.”<sup>171</sup> Rather, the right to jury trial is a “fundamental reservation of power in our constitutional structure.”<sup>172</sup>

The *Blakely* decision generated three separate dissents. The first, written by Justice O’Connor and joined in large part by the Chief Justice,<sup>173</sup> bitterly lamented that what she had “feared most”<sup>174</sup> has now

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168. *Id.* at 308. The Court then disputed the State’s claim that it was, in effect, deconstitutionalizing all determinate sentencing schemes. *Id.* Rather, the Court stated that *Blakely* dealt with how such schemes can be implemented consistent with the Sixth Amendment. *Id.*

169. *Id.* at 309. As others have noted, there is a certain oddity—and perhaps a legal fiction—implicit in Justice Scalia’s notion of a criminal defendant “bargaining” for a particular sentence when he commits a crime. In Scalia’s view:

In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by jury.

*Id.*

170. *Id.* at 313.

171. *Id.* at 313–14 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (Univ. of Chicago Press 1979) (1769)).

172. *Id.* at 306.

173. *Id.* at 314 (O’Connor, J., dissenting). O’Connor’s dissent was joined by Breyer in its entirety and in part by Chief Justice Rehnquist and Kennedy. Rehnquist and Kennedy did not join Part IV–B of O’Connor’s dissent, which specifically found that the majority’s opinion doomed the Guidelines.

come to pass: "Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."<sup>175</sup> She accused the majority of "doctrinaire formalism" in rejecting Washington's scheme on Sixth Amendment grounds and expressed a preference for a "balanced case-by-case approach" to constitutional challenges to sentencing.<sup>176</sup> In her view, the majority's "rigid rule" would destroy progress made in sentencing reform.<sup>177</sup> Of course, this "balancing test" approach to constitutional rights is anathema to Scalia.

While it is Breyer<sup>178</sup> and O'Connor, rather than Rehnquist, who have been most closely associated with a spirited defense of the Guidelines, they have relied upon the principle articulated by Rehnquist years earlier in the *McMillan* case. In *McMillan*, Rehnquist concluded that it is largely up to the Legislature to determine what are elements of a criminal offense (requiring proof to a jury beyond a reasonable doubt) and what are mere sentencing factors that can enhance a defendant's sentence based upon judicial findings.<sup>179</sup>

Scalia's view is different. While he would agree that it is up to the Legislature to determine what conduct is criminally punishable, when a crime is defined by reference to specific facts, those facts must be found by a jury.<sup>180</sup> Thus, in *Apprendi*, where the Legislature provided that a crime of violence *motivated by hate* should be punished more severely, Scalia joined Stevens's opinion finding that the jury must find the mens rea.<sup>181</sup> Similarly, in *Blakely*, Scalia's majority opinion made clear that where a statute called for an enhanced sentence if

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174. *Id.* at 326. O'Connor first articulated this concern in *Apprendi v. New Jersey*, 530 U.S. 466, 549–59 (2000) (O'Connor, J., dissenting).

175. *Blakely*, 542 U.S. at 326 (O'Connor, J., dissenting).

176. *Id.* at 321.

177. *Id.* O'Connor also took issue with the majority's claim to "the mantle of history and original intent." *Id.* at 323. Relying on her earlier dissent in *Apprendi*, she explained that broad sentencing discretion was a concept unknown to the Framers, so they never had to consider the constitutional implications of a choice between "submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offense and offenders." *Id.*

178. Justice Breyer was one of the first members of the United States Sentencing Commission, which promulgated the Guidelines. See Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 717–18 (2005) (discussing Breyer's commitment to the Guidelines); see also STITH & CABRANES, *supra* note 104, at 49–50 (describing Breyer's background and noting that he was Senator Edward Kennedy's "personal designee" on the Commission).

179. See *supra* notes 99–100 and accompanying text (discussing *McMillan*).

180. See, e.g., *Blakely*, 542 U.S. at 306–09, 313–14.

181. See *Apprendi v. New Jersey*, 530 U.S. 466, 492–93 (2000).

kidnapping was committed with "deliberate cruelty," a finding of such cruelty must be left to a jury rather than the judge.<sup>182</sup>

This position has been criticized as being unduly formalistic, in part because there is an easy evasion that the Legislature can make to avoid jury fact finding: it can simply define crimes in broad, non-specific terms, providing broad discretion to judges to impose sentences for the myriad ways in which the crime can be committed. Thus, a legislature could provide for a broad term of five years to life for kidnapping, leaving it to a judge at sentencing to impose a long sentence if, for example, the defendant acted with "deliberate cruelty" in the judge's view.

Indeed, this "loophole" led to the Court's bizarre and fractured ruling in *United States v. Booker*. In the first part of the opinion ("*Booker A*"), the Court invalidated the Guidelines on the ground that the judicial fact finding endemic to the Guidelines violated the Sixth Amendment per *Blakely*. The second part of the opinion ("*Booker B*") then purported to salvage the Guidelines by severing the provision making them mandatory, essentially creating an advisory guidelines system.<sup>183</sup>

Justice Stevens wrote *Booker A* (also referred to as the "merits majority"<sup>184</sup>), extending the logic of *Blakely*, predictably, to the Guidelines. He wrote for the same majority that had earlier decided *Jones* and *Apprendi* as well as *Blakely*: Justices Scalia, Souter, Ginsburg, and Thomas. Justice Breyer wrote *Booker B* (also referred to as the "remedial majority"<sup>185</sup>) for a majority made up of the *Jones-Apprendi-Blakely* dissenters (Rehnquist, O'Connor, Kennedy, and Breyer) plus Justice Ginsburg.<sup>186</sup> *Booker B* recast the Guidelines as "advisory" in order to avoid the Sixth Amendment problem. Judges could then continue to make the factual findings contemplated by the Guidelines<sup>187</sup>—factual findings that the *Booker B* majority thought it was important that judges, rather than juries, continue to make. *Booker B* found 18 U.S.C.

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182. *Blakely*, 542 U.S. at 313–14.

183. See generally Darmer, *supra* note 25, at 534, 558–64 (describing the two holdings of *Booker*).

184. Klein, *supra* note 178, at 695.

185. *Id.*

186. For a discussion of why Ginsburg may have "switched sides," see Klein, *supra* note 178, at 717 (citing Ginsburg's sympathy for Breyer as one possibility).

187. The Guidelines provide that judges make a number of factual findings, one of their more controversial features. See Darmer, *supra* note 25, at 544–45. Judges make their findings and then sentence according to a grid provided in the Guidelines. See *id.* at 540–43. As Stith and Cabranes stated, the judge's role under the Guidelines "is largely limited to factual determinations and rudimentary arithmetic operations." STITH & CABRANES, *supra* note 104, at 83.

§ 3553(b)(1), the mandatory provision, to be incompatible with *Booker A*'s Sixth Amendment holding, and accordingly simply severed that provision.<sup>188</sup> The Court also struck the provision establishing a de novo standard of review on appeal, replacing it with an implicit "reasonableness" review.<sup>189</sup>

In dissenting from *Booker B*, Scalia noted that it was ironic that, in order to "rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing."<sup>190</sup> The Guidelines were largely motivated by a desire to eliminate discretion in sentencing. Prior to *Booker*, the Guidelines worked by providing that judges sentence within narrow ranges and by providing little discretion to deviate from those ranges.

As I have argued elsewhere, while Stevens's *Booker A* opinion was "a natural outgrowth of the Court's recent jurisprudence, *Booker B* produced a jarring result in attempting to salvage as many current features of the Guidelines as possible while effecting an end-run around the Sixth Amendment requirements *Booker A* recognized."<sup>191</sup> The dissenters persuasively argued that the majority's analysis was flawed by elevating "above all else the solitary role of the judge in finding the 'real facts,' and emphasiz[ing], as Justice Scalia noted, the 'manner of achieving' uniformity rather than the actual achievement of uniformity that was Congress's overriding goal" in promulgating the Guidelines.<sup>192</sup> The *Booker B* majority accepted and indeed promoted judicial fact finding.

Accordingly, Scalia's triumph in this area of sentencing jurisprudence could be viewed as incomplete. Rehnquist was part of the *Booker B* majority that salvaged the Guidelines. But they are Guidelines much eviscerated. In response to *Apprendi* and then *Blakely*, far more factual matters affecting sentences are already found by juries in both state and federal courts. And while *Booker B* sought desperately to preserve the status quo with respect to the Guidelines, the constraints of *Booker A* mean that, importantly, judges are no longer *required* to make factual findings that lead inevitably to increased sentences—a key component of the Guidelines that has long been the subject of

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188. *United States v. Booker*, 543 U.S. 220, 245 (2005).

189. *See Darmer*, *supra* note 25, at 560–61.

190. 543 U.S. at 304 (2005) (Scalia, J., dissenting) (disagreeing with the majority's holding in *Booker B*).

191. *Darmer*, *supra* note 25, at 564.

192. *Id.*

criticism.<sup>193</sup> Fundamentally, Scalia—who has always been skeptical of the Guidelines system—has managed to re-work the Guidelines by forming an alliance with Stevens, in the process affecting not only the Guidelines but sentencing more broadly. In any system in which particular facts *require* an increase to the sentence that would otherwise apply, those facts must be found by a jury.

#### IV. “Testimonial Statements” and the Confrontation Clause

In the Confrontation Clause context, Scalia has consistently advocated a strict interpretation giving full effect to the right to both confront and cross-examine adverse witnesses.<sup>194</sup> Rehnquist, however, advocated more of a balancing approach. In *Maryland v. Craig*,<sup>195</sup> for example, Rehnquist joined O'Connor's 5-4 majority opinion holding the Sixth Amendment did not categorically prohibit a child in a sexual abuse case from testifying against the defendant via closed-circuit television and outside the defendant's presence. The Court found that the “central concern of the Confrontation Clause” is reliability, which can be achieved through means other than face-to-face confrontation.<sup>196</sup> The Court balanced the preference for face-to-face confrontation against the state's compelling interest in protecting alleged child abuse victims from courtroom trauma.

Scalia wrote a stinging dissent,<sup>197</sup> asserting: “Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”<sup>198</sup> Finding that the Sixth Amendment contained a clear categorical right to confrontation, he accused the Court of supporting its “antitextual conclusion by cobbling together scraps of dicta” from cases, such as those involving classic hearsay statements, “that have no bearing here.”<sup>199</sup>

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193. *See id.* at 544–45.

194. For example, in *Coy v. Iowa*, 487 U.S. 1012 (1988), Scalia authored a majority opinion, over Blackmun's dissent, which was joined by Justice Rehnquist, finding that the use of a “screen” to shield a complaining witness from the defendant violated the latter's Confrontation Clause rights. *Id.* at 1020–22.

195. 497 U.S. 836 (1990).

196. *Id.* at 845–46.

197. He was joined by Brennan, Marshall, and Stevens. *See id.* at 860 (Scalia, J., dissenting).

198. *Id.*

199. *Id.* at 863. In Scalia's view, the Sixth Amendment “does not literally contain a prohibition upon [hearsay],” and thus case law dealing with hearsay is inapposite. *Id.* at 864–65.

Scalia's dissent is a paradigmatic example of his hostility to the balancing test approach of constitutional adjudication. He countered the majority's concern for traumatized children with a searing historical account of individuals wrongly charged with child sexual abuse crimes.<sup>200</sup> He then focused on direct confrontation as a means to unveil false accusations.<sup>201</sup> Ultimately, however, he pronounced that whether cross-examination effectively undermines false testimony does not determine the Constitutional requirement. In his words: "In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it."<sup>202</sup> Rather, should society determine that the Confrontation Clause disserves the goal of seeking the truth, such a constitutional "defect" can be cured by amendment.<sup>203</sup> In the meantime, the judiciary is simply not at liberty to ignore it, and the majority "has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it."<sup>204</sup>

Two terms later, the Court was confronted with a Confrontation Clause challenge to hearsay statements in *White v. Illinois*.<sup>205</sup> Rehnquist wrote the majority opinion rejecting the challenge. The case again involved allegations of sexual assault of a child.<sup>206</sup> The accusations were deeply troubling, and Rehnquist characteristically outlined them in some detail at the beginning of his opinion.<sup>207</sup> The victim never testified at trial, but statements she had previously made were introduced under hearsay exceptions for spontaneous statements and statements made in pursuit of medical treatment.<sup>208</sup>

Scalia joined Thomas's concurring opinion, which foreshadowed a new approach to Confrontation Clause analysis.<sup>209</sup> While agreeing that the Court had reached the right result under prior precedent, Thomas suggested that "our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself."<sup>210</sup> In *Ohio v. Roberts*,<sup>211</sup> for example, the

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200. *Id.* at 868–69.

201. *Id.* at 869–70.

202. *Id.*

203. *Id.*

204. *Id.* at 870.

205. 502 U.S. 346 (1992).

206. *Id.* at 349.

207. *Id.* at 349–51.

208. *Id.* at 350–51.

209. *See id.* at 358 (Thomas, J., concurring).

210. *Id.*

211. 448 U.S. 56 (1980).

Court had earlier interpreted the Clause to mean that hearsay testimony from an unavailable witness could be admitted if it fell within a “firmly rooted” hearsay exception or bore “particularized guarantees of trustworthiness.”<sup>212</sup> *Roberts* thus implied that the chief concern of the Confrontation Clause was “unreliable hearsay,” a proposition with which the concurrence took issue.<sup>213</sup> The concurrence suggested that reliability is a due process concern, whereas the text and history of the Confrontation Clause were focused specifically on a particular category of out-of-court statements found in “formalized testimonial materials,” including “affidavits, depositions, prior testimony, or confessions.”<sup>214</sup> According to Thomas’s opinion, “[i]t was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process . . . .”<sup>215</sup>

The seeds of this focus on “testimonial statements” took root in Scalia’s later opinion in *Crawford v. Washington*.<sup>216</sup> And while Thomas had earlier emphasized the narrowing of the Confrontation Clause through an emphasis on “testimonial” materials, Scalia’s opinion, echoing some of Thomas’s themes, also emphasized the critical role of cross-examination for that species of hearsay.<sup>217</sup> Thus, Scalia’s opinion explicitly vindicated a defendant’s rights.

*Crawford* had been convicted, in part, upon his wife’s out-of-court statements made to the police about the circumstances of an assault. Focusing on historic abuses such as those that occurred when Sir Walter Raleigh was convicted based upon untested accusations, Scalia argued that the Sixth Amendment was chiefly concerned with “testimonial statements,” for which there was an absolute right to confrontation in the form of cross-examination.<sup>218</sup> Relying on the formulation suggested by Justice Thomas in his earlier opinion in *White*, and otherwise leaving the precise definition of “testimonial” to be more fully developed in later cases, Scalia maintained that testimony in prior judicial proceedings and statements made to police officers fell clearly within the definition.<sup>219</sup>

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212. *White*, 502 U.S. at 363 (Thomas, J. concurring) (quoting *Roberts*, 448 U.S. at 66).

213. *Id.*

214. *Id.* at 365.

215. *Id.*

216. 541 U.S. 36 (2004).

217. *See id.* at 53–56.

218. *Id.* at 44–45, 59.

219. *Id.* at 68.



In laying out this formulation, Scalia found that the *Roberts* test had failed to vindicate constitutional rights: “The unpardonable vice of the *Roberts* test . . . is . . . its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>220</sup> According to Scalia, the lower courts’ inconsistent treatment of the wife’s statements in *Crawford*—admitted by the trial court, ruled inadmissible by the appellate court and then again found admissible by the state supreme court—put “*Roberts*’ failings . . . on full display.”<sup>221</sup> Scalia thus found that this was “one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.”<sup>222</sup> Scalia’s opinion set aside *Crawford*’s conviction on the ground that the introduction of his wife’s testimonial hearsay violated his Confrontation Clause rights.<sup>223</sup>

While agreeing that *Crawford*’s conviction should be set aside, Rehnquist filed a separate concurring opinion, dissenting from the Court’s decision to “overrule” *Roberts*.<sup>224</sup> In his view, the “testimonial” formulation had no more to recommend it than did the Court’s prior longstanding approach. Accordingly, Rehnquist found the new approach to be unnecessary: “The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases.”<sup>225</sup> Rehnquist’s loyalty to *Roberts*, however, was not widely shared; only one other Justice joined his concurrence. While conceding Rehnquist’s point in concurrence that the case could have been resolved by simply performing the proper *Roberts* analysis and finding the wife’s statements unreliable, Scalia found that such an approach would only have compounded the Sixth Amendment problem. In Scalia’s view, cross-examination was the only appropriate vehicle for testing the reliability of the statement: “The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”<sup>226</sup>

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220. *Id.* at 63.

221. *Id.* at 65–66.

222. *Id.* at 67.

223. *Id.* at 68–69.

224. *Id.* at 69 (Rehnquist, C.J., concurring).

225. *Id.* at 76.

226. *Id.* at 67 (majority opinion).

Continuing with the theme about the appropriately limited role of judges that has animated his sentencing jurisprudence, Scalia said the following:

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . . They were loath to leave too much discretion in judicial hands . . . . By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.<sup>227</sup>

Scalia garnered a substantial majority in overruling *Roberts* and taking a new approach to the Confrontation Clause. Only Justice O'Connor joined Rehnquist's opinion.

Moreover, in the Court's next case dealing with the Confrontation Clause in *Davis v. Washington*,<sup>228</sup> Scalia again achieved near-unanimity in an opinion that dealt with two domestic violence cases.<sup>229</sup> In those cases, Scalia expanded upon the definition of "testimonial." He found statements "non-testimonial" and thus admissible when made in response to police interrogation "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." He found statements "testimonial" and thus inadmissible when the interrogation's primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution."<sup>230</sup> Scalia achieved a unanimous result in one case, finding statements made to a 911 operator non-testimonial.<sup>231</sup> In the second case, where Scalia found statements to be testimonial when made to a police officer at the scene of a recent domestic violence episode, only Justice Thomas dissented.<sup>232</sup> In the

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227. *Id.* at 67–68.

228. 126 S. Ct. 2266 (2006). This case was argued and decided after Chief Justice Rehnquist's death.

229. The companion case to *Davis* was *Hammon v. Indiana*. See *id.*

230. *Id.* at 2273–74.

231. *Id.* at 2276–78.

232. *Id.* at 2281 (Thomas, J., concurring in part and dissenting in part).

course of his majority opinion, Scalia reiterated that *Crawford* had overruled the “reliability” approach of *Roberts*.<sup>233</sup>

## Conclusion

Rehnquist did not simply preside over a Court that greatly influenced criminal procedure law; he personally shaped much of that law himself. In the waning years of his Court, however, he was unable to maintain control of the Court’s sentencing or Confrontation Clause jurisprudence. The deliberate, incrementalist approach he so successfully followed in developing a more pro-police Fourth and Fifth Amendment jurisprudence did not work for him in two key Sixth Amendment contexts. With regard to the Confrontation Clause, he clung to earlier formulations that his colleagues had grown disenchanted with, and Scalia’s “testimonial” approach won support both from fellow textualist Thomas as well as the Court’s more liberal members.

In the sentencing cases, Rehnquist took a passive role, writing none of the myriad opinions filed in *Almendarez-Torres*, *Jones*, *Apprendi*, *Blakey*, or *Booker*. Conversely, Scalia’s lone objection to the Guidelines when they were first promulgated evolved into a sustained, Sixth Amendment–based attack on judicial fact finding that was a critical—and ultimately vulnerable—lynchpin of the Guidelines system. Rehnquist’s ready acceptance of the legitimacy of judicial fact finding, articulated pre-Guidelines in *McMillan*, ultimately could not sustain Stevens’s early reservations when invigorated and refined by Scalia’s Sixth Amendment vision.

The lack of a Sixth Amendment “whipping boy” may have enervated Rehnquist’s jurisprudence, as well. The Warren Court’s most famous Sixth Amendment decision, *Gideon v. Wainwright*,<sup>234</sup> stood in sharp contrast to *Mapp* and *Miranda* by being both the product of a unanimous Court and a case that was well received by the public at large.<sup>235</sup> Moreover, the interests vindicated by *Booker* and *Crawford* involved different aspects of the Sixth Amendment than those at issue in *Gideon*. Sentencing guidelines were not part of the legal landscape when Rehnquist joined the Court, and Confrontation Clause jurisprudence was not a central aspect of the “Warren Revolution.” Unlike *Mapp* and *Miranda*, where Rehnquist had a clear agenda, there was no

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233. *Id.* at 2280 (majority opinion).

234. 372 U.S. 335 (1963).

235. *Cf.* Bradley, *supra* note 72, at 279 (noting that Rehnquist “has never expressed any disagreement” with the *Gideon* line of cases).

clear Sixth Amendment mission when Rehnquist joined the Court. When Sixth Amendment issues developed later on the Court, Rehnquist failed either to articulate a clear vision (in the sentencing guideline cases) or to persuade his colleagues to adhere to the old regime (in Confrontation Clause jurisprudence). Scalia, in contrast, started out openly hostile to the Guidelines as well as to much of the Court's Confrontation Clause jurisprudence.

How the *Booker* and *Crawford* issues will sort themselves out in the future remains to be seen. Not as much of a pragmatist as Rehnquist, Scalia is less concerned with such issues as how sentencing guidelines will work in a post-*Booker* world or how, for example, domestic violence cases can be successfully prosecuted post-*Crawford*.<sup>236</sup> What is plain, however, is that lower courts and legislatures grappling with these issues are dealing with issues that Rehnquist did not bequeath. In the waning days of the Rehnquist Court, the Sixth Amendment was Scalia's.

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236. Cf. *Davis*, 126 S. Ct. 2266 (2006) (finding statements non-testimonial and admissible in one domestic violence case and testimonial and thus inadmissible in a companion case).