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RETHINKING THE RIGHT-TO-COUNSEL-OF-CHOICE BALANCING TEST: AN ORIGINALIST APPROACH

JOSEPH M. CAPOBIANCO†

Although balancing tests are common in criminal procedure, the United States Supreme Court has grown skeptical of them. In fact, in Ramos v. Louisiana, *decided in the 2020 term, the Court replaced one of the last remaining balancing tests for the core of a criminal procedure right. This replacement follows on the heels of other similar replacements in recent decades.*

Legitimacy concerns drive the Court's slow elimination of balancing tests. The Court appears concerned that many of these balancing tests are unjustified and unexplained and therefore raise the specter of injustice and abuse. The only balancing tests remaining—for such rights as the speedy trial right—rest on substantial, explicit justifications. Indeed, these few remaining balancing tests for the core of criminal procedure rights are explained at length by the Court.

The right-to-counsel-of-choice balancing test is not explained, however. It therefore raises many of the concerns for legitimacy expressed by the Court. To remedy these concerns, this article seeks to fortify the justifications for the balancing test, lest it suffer the same fate as the one in Ramos. *But this article finds these justifications to be incomplete: they are only persuasive in conflict-of-interest cases. In all others, the justifications collapse.*

This article therefore rethinks the balancing test and proposes an alternate way to apply the right to counsel of choice. This article proposes adopting an originalist approach to the right to counsel of choice and seeks to explain how an originalist approach would supplant the current test. This article concludes that an originalist approach would be a workable and effective way to apply the right to counsel of choice.

I. INTRODUCTION

The United States Supreme Court has made it clear: few balancing tests are safe.[1] In *Ramos v. Louisiana*,[2] decided last term, the Court did away with a balancing test it had endorsed for the core of the jury trial right.[3] The test asked judges to decide what features of a jury trial (i.e., unanimity) were "important enough" to impose on states and whether there were countervailing interests

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1. *See* discussion *infra* Part II (examining this further).
2. 140 S. Ct. 1390 (2020).
3. *Id.* at 1391.

weighing against requiring the feature.[4] The Court found no persuasive reasons for keeping this test—but it did find harms.[5] For the Court, this test amounted to a "breezy cost-benefit analysis" to determine which features were strong enough to overcome other interests.[6] Such an analysis was manipulable.[7] It also raised legitimacy issues by leaving constitutional rights to judicial whim.[8] Because the harms were many and there was no stated reason for using the test, the Court replaced the balancing test with a formalistic test.[9]

As shown in *Ramos*, the Court is skeptical of balancing tests because of potential legitimacy issues.[10] The Court fears that categorical constitutional guarantees become watered down by being subject to judicial manipulation.[11] And the uncertainty of balancing tests often reach results that can seem confusing and arbitrary.[12] Watered-down rights and arbitrary-seeming results raise the appearance of an illegitimate system and invite abuse, which in turn may make the defendant unable to accept the judgment or it may cause society to view the results with a more skeptical eye.[13] These legitimacy concerns are particularly relevant because members of the current Court, especially Chief Justice John Roberts, worry about the legitimacy of the Court—making the counsel-of-choice balancing test likely to face future questions on its applicability.[14] Indeed, pursuant to this concern for legitimacy, the trend on the Court has been, in the last two decades, replacing balancing tests in the Sixth Amendment with categorical guarantees.[15]

Nevertheless, balancing tests can be saved—justifications for the balancing can remedy legitimacy concerns.[16] While balancing tests are pervasive in criminal procedure, at least at the margins,[17] balancing tests for the *core* of Sixth

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4. *Id.*

5. *Id.* at 1401.

6. *Id.* at 1401-02 (stating "[a]s judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain.").

7. *See id.*

8. *See id.* at 1401-02, 1408 (describing concern with a balancing test for the "ancient guarantee of a unanimous jury verdict" subject to a court's "own functionalist assessment" and "breezy cost-benefit analysis" that would "leave [the defendant] in prison for the rest of his life[.]").

9. *See generally id.* at 1401-02; 1407-08 (discussing the inadequacy of the previous test and then explaining the benefits of a formalistic test).

10. *Id.* at 1401-02.

11. *See* Crawford v. Washington, 541 U.S. 36, 67-68 (2004).

12. *See* John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 SUP. CT. REV. 117, 118 (2016) (discussing balancing tests and stating, "Seemingly unremarkable governmental interests prevail while a stronger one faltered this past Term.").

13. *See* discussion *infra* Part III (describing the potential harms from a balancing test).

14. Maggie Jo Buchanan, *Chief Justice Roberts and the Legitimacy of the Judiciary*, CTR. FOR AM. PROGRESS (Feb. 27, 2020), https://perma.cc/2KWS-R3YF ("[Chief Justice] Roberts has gained a reputation for wanting the court to at least appear apolitical as a sign of its legitimacy.").

15. *See Ramos*, 140 S. Ct. at 1391-92 (requiring unanimous verdict in jury trials); *Crawford*, 541 U.S. at 68-69 (emphasizing right to confront witnesses at trial).

16. *See Ramos*, 140 S. Ct. at 139-92 (requiring unanimous verdict in jury trials); *Crawford*, 541 U.S. at 68-69 (emphasizing right to confront witnesses at trial).

17. The confrontation clause is one example. *E.g.*, *Crawford*, 541 U.S. at 68-69 (holding that the confrontation clause prevents unconfronted testimonial statements); Michigan v. Bryant, 562 U.S. 344, 344-48 (2011) (balancing certain factors to determine what is testimonial). So is the jury trial right. *Ramos*, 140 S. Ct. at 1391 (holding that the jury trial requires everything it did at the founding); Blanton

Amendment rights are somewhat unique today. Only a few rights, like the speedy trial right and the public trial right, for example, use a balancing test for the core of the right.[18] And the Court in both these contexts has explained at length why a balancing is appropriate: usually because of the competing constitutional interests in the right or difficulty in assessing the right.[19] These justifications for the balancing test help to remedy some of the legitimacy harms that unnerved the *Ramos* Court by providing the purposes served by the right and the balancing test itself—thereby reducing the potential for abusing the test and mitigating the appearance of injustice.[20]

Given this state of affairs, the right-to-counsel-of-choice balancing test must be reexamined. The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."[21] This clause protects a right to counsel of one's choice,[22] which ensures a defendant's choice in representation and serves broad and important autonomy values for the defendant.[23] The core of the right—meaning the majority of its application—uses a balancing test to determine when it is violated.[24] Much like the balancing test replaced in *Ramos*, the balancing test for right to counsel of choice asks if the defendant's interest (in his or her counsel of choice) is "important enough" to overcome opposite interests (like administrative efficiency or ethics).[25] And it requires judges to conduct a "breezy cost-benefit analysis" to determine which interest is stronger.[26]

But also like in the balancing test in *Ramos*, there is no stated explanation why the Court uses the balancing test for the right to counsel of choice. The right is "grossly undertheorized."[27] The Court itself has not explained why a balance is particularly appropriate in this context,[28] as it has with other rights.[29] When the

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v. City of N. Las Vegas, 489 U.S. 538, 543-45 (1989) (balancing factors to determine if the jury trial applies).

18. Barker v. Wingo, 407 U.S. 514, 530-31 (1972) (speedy trial right); Waller v. Georgia, 467 U.S. 39, 45-46 (1984) (public trial right).

19. *See Barker*, 407 U.S. at 528-33 (explaining why a bright-line rule was inappropriate and a balancing of factors was necessary); *Waller*, 467 U.S. at 45-46 (describing the interests at stake and the need for a balancing approach).

20. *See Barker*, 407 U.S. at 530-33 (explaining why the balancing test is used and what it hopes to achieve); *see also* discussion *infra* Part III (describing potential harms from a balancing test).

21. U.S. CONST. amend. VI.

22. Luis v. United States, 578 U.S. 5, 12 (2016).

23. *See* discussion *infra* Part II.A (describing the value in retaining one's counsel of their own choice).

24. *See* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (describing the importance of having an attorney for one's defense); *see also* discussion *infra* Part II.A (presenting cases that used a balancing test to define the right to counsel).

25. *See generally* Morris v. Slappy, 461 U.S. 1 (1983) (holding that the Sixth Amendment does not require a meaningful relationship between the accused and his or her counsel); *see also* discussion *infra* Part I.B (describing current case law and the right-to-counsel-of-choice balancing test).

26. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1401 (2020) (criticizing cost-benefit analysis test for determining defendant's right to a unanimous jury verdict in criminal trials).

27. Rappaport, *supra* note 12, at 156.

28. *See* Wheat v. United States, 486 U.S. 153, 158-162 (1988).

29. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 533 (1972) (explaining why a balancing test in the context of the right to a speedy trial is appropriate).

Court created the balancing test in *Wheat v. United States*, it just stated that the right was circumscribed and could be overcome by other interests.[30] Furthermore, commentators have failed to explain the balancing. Most scholarship in this area tries to articulate a theory of the right to counsel of choice that unites the case law and adequately predicts future cases.[31] But none have addressed why the balancing test is appropriate or described potential justifications for the approach.

This article seeks to remedy any legitimacy concerns with the right-to-counsel-of-choice balancing by providing these justifications. But this article finds that the justifications are persuasive in some contexts but not others.[32] This article finds that the potential justifications for the balancing test are persuasive in cases where the right to counsel of choice is in tension with other constitutional rights, like the right to conflict-free counsel.[33] But the potential justifications are not persuasive when it is used in cases where there is only a general governmental interest, and not a constitutionally protected interest, on the other side of the balance.[34] This article concludes that while there may be possible justifications for the use of a balancing test, they are mostly unpersuasive, and the Court must do more to justify its use of the test or find a new test.[35]

A new test, using an originalist approach, would be an effective and workable replacement. In *Ramos*, the Court applied an originalist approach with success.[36] The same can (and should) happen in the right-to-counsel-of-choice context.[37]

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30. *See generally Wheat*, 486 U.S. at 158-62 (discussing the court's interest in counsel conflict waiver decisions but not justifying the restriction on choice of counsel).

31. For example, in 1992, one commentator implored the Court to identify the interests at stake. Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: And Exercise in the Weighting of Unarticulated Values,* 43 S.C. L. REV. 345, 385 (1992) ("This Article is premised on the assumption that the Court's articulation of the values underlying the right to counsel of choice can and will make a significant difference in its implementation."). But still in 2016, commentators were at a loss for what the unifying theory might be because the Court had not said what values the right protects and what interests it serves. Rappaport, *supra* note 12, at 156 ("If one can say nothing else, it is that the right to counsel of choice is grossly undertheorized. . . ."). Most of the commentary, however, critiques the doctrine and argues for a stronger right. Janet C. Hoeffel, *Toward A More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525, 528 (2007) ("The opinion suggests that Sixth Amendment right to counsel jurisprudence needs to be revisited and revised to give both the indigent and nonindigent defendant a stronger constitutional interest in an ongoing attorney-client relationship."); Catherine Burnett, *Choosing Choice: Empowering Indigent Criminal Defendants to Select Their Counsel*, 60 S. TEX. L. REV. 277, 282 (2019) ("[A] recommendation that informed client choice finds its way into the mainstream of alternatives for providing counsel for the indigent criminal defendant."); Sharon Finegan, *The Replacements: Conflicting Standards for Obtaining New Counsel Under the Sixth Amendment*, 65 CLEV. ST. L. REV. 129, 154 (2017) ("[S]uch a right should not be easily undercut by mere anticipation of delay in trial proceedings.").

32. *See* discussion *infra* Part IV.B (explaining that potential justifications for the Court's balancing approach are less persuasive in non-conflict-of-interest cases).

33. *See* discussion *infra* Part IV.A (describing the tension between the Court's balancing approach and constitutional protections).

34. *See* discussion *infra* Part IV.B (explaining that potential justifications for the Court's balancing approach are less persuasive in non-conflict-of-interest cases).

35. *See* discussion *infra* Part VI (concluding the Court should adopt an originalist approach).

36. Ramos v. Louisiana, 140 S. Ct. 1390, 1405-08 (2020) (declining to defer to *stare decisis* in favor of an originalist approach when interpreting the Constitution).

37. *See* discussion *infra* Part V (justifying an originalist approach in further detail).

The history of this right is not subject to vehement dispute.[38] And the history of the right offers a functional right today: looking to history and applying it to the modern context would not upset or otherwise disrupt the current doctrine.[39] And while adopting an originalist approach may not solve every issue, it will at least begin to solve the legitimacy concerns and likely lead to a more easily applied right.[40]

This article proceeds in five parts. In part II, this article looks at the history of the right to counsel of choice and the Court's creation of a balancing test for this right—which was created without a justification.[41] This part also looks at the lower courts' theoretical development of the right (which is nonexistent) and the way the right works in practice before these courts (defendants usually lose).[42] In part III, this article identifies possible legitimacy issues that flow from the lack of justification and why justifications for the balancing can remedy these legitimacy issues.[43] Part IV then proposes its own justifications.[44] This part, however, concludes that, while there are some potential justifications for a balancing test in the right-to-counsel-of-choice context, the justifications are only persuasive in conflict-of-interest cases.[45] Part V addresses implications from this article's conclusions and then puts forth an argument for adopting an originalist approach.[46] It also provides a glimpse into how the approach would work.[47] Part VI briefly concludes.[48]

II. THE COURT USES A BALANCING TEST FOR THE RIGHT TO COUNSEL OF CHOICE—BUT HAS NOT EXPLAINED WHY.

The Supreme Court has addressed the right to counsel of choice substantively in five cases.[49] And the circuit and district courts have applied the right more often but with little depth.[50] The current doctrinal test is a balancing test—in each case, the court "balances" the right to counsel of choice and other interests.[51] But

38. *See* discussion *infra* Part V (justifying an originalist approach in further detail).
39. *See* discussion *infra* Part V (justifying an originalist approach in further detail).
40. *See* discussion *infra* Part V (justifying an originalist approach in further detail).
41. *See* discussion *infra* Part II.B (discussing the Court's case history and their rationale).
42. *See* discussion *infra* Part II.C (describing trial court outcomes and the tendency they are upheld upon appellate review).
43. *See* discussion *infra* Part III (discussing the manipulability of the test and its potential for abuse).
44. *See* discussion *infra* Part IV (proposing possible justifications and finding them unpersuasive outside of the context of conflict-of-interest cases).
45. *See* discussion *infra* Part IV (proposing possible justifications and finding them unpersuasive outside of the context of conflict-of-interest cases).
46. *See* discussion *infra* Part V.A (proposing the substitution of an originalist approach for the current functionalist approach).
47. *See* discussion *infra* Part V.B (discussing a successful application of an originalist approach).
48. *See* discussion *infra* Part VI (concluding with a recommendation of an originalist approach).
49. *See* discussion *infra* Part II.B (describing the Court's development of a right-to-counsel-of-choice balancing test from 1954 through 2016).
50. *See* discussion *infra* Part II.C (discussing the lower courts' application of the balancing test).
51. *See* discussion *infra* Part II.C (discussing the lower courts' application of the balancing test).

the Court has not explained in detail why this balancing is appropriate for this right. Nor have lower courts done so.

Subpart A briefly explores the history of the right to counsel of choice, finding that it was a part of the original meaning of the Sixth Amendment. Subpart B explores the Supreme Court cases addressing the right to counsel of choice. Subpart C explores circuit and district court cases.

A. RIGHT TO COUNSEL OF CHOICE AS THE ROOT MEANING OF THE SIXTH AMENDMENT.

The origins of the right to counsel of choice "are murky, at best."[52] But the origin of the right to counsel of choice can be understood by looking to the origins of the right to counsel itself, which "did not receive favorable treatment in either English or early colonial jurisprudence."[53] In English jurisprudence, the right to have counsel by one's side was permitted in very few cases.[54] Only when the defendant was accused of a misdemeanor or treason could he or she bring counsel.[55] But this right did not extend to felony cases—where it arguably was needed most.[56]

In early America, this practice and hostility toward assistance of counsel was followed for much of the colonial era.[57] But the colonial system changed and grew differently from the English system.[58] The most important difference was that public, professional prosecutors wielded considerable power against the accused in the colonies.[59] Therefore, a power imbalance existed.[60] And counsel was needed in *all* criminal cases to protect both the fairness of trial and the rights of the accused against a strong government.[61] This was the purpose of the Sixth Amendment.[62]

The modern conception of the right to counsel of choice, as articulated by the Court, recognized this history.[63] In *Powell v. Alabama*, the Court first mentioned the right to counsel of choice and its history, affirming the right's place in the

52. Hoeffel, *supra* note 31, at 528.

53. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 40 (1991).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 41.

59. *Id.*

60. *Id.*

61. *Id.* (citing FRANCIS HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 27 (1951)).

62. *Id.* But there was one important wrinkle: this early right to bring counsel of choice did not include the right to *appointed* counsel in any case. *Id.* Rather, "the right to counsel meant the right to retain counsel *of one's own choice and at one's expense*." *Id.* at 42 (emphasis added). "The Sixth Amendment abolished the rule prohibiting representation in felony cases, but was 'not aimed to compel the State to provide counsel for a defendant.'" Luis v. United States, 578 U.S. 5, 25 (2016) (Thomas, J., concurring).

63. Powell v. Alabama, 287 U.S. 45, 61-66 (1932).

constellation of constitutional rights.[64] This 1932 case involved the Scottsboro Boys, who were accused of rape and prosecuted in a mob-like atmosphere.[65] In its opinion, the Court identified the right to counsel of choice as a fundamental right:[66] "[i]t is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."[67] The Court continued:

> [I]n our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.[68]

The *Powell* Court, in recognizing the importance of the right to counsel of one's choice, denied that the lower court's interest in efficiency could alone overcome this right.[69]

Powell shows why this right is so valuable for defendants and embodies the "root meaning" of the Sixth Amendment.[70] In a prosecution by a White mob, where the African American boys were "young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers," an attorney with a meaningful relationship with these boys was essential.[71] Otherwise, the sentiment of the local community, which was aroused "with especial horror" at the crimes alleged to have been committed, may deter a zealous attorney.[72] And this was especially likely because this was a White mob seeking to prosecute African American boys before an all-White jury.[73] The court, however, denied them any time to find an attorney, beginning trial six days after the indictment.[74] In fact, the attorney who did represent them just happened to show up at the request of interested persons—and even he was reluctant to take the case.[75] The

64. *See id.* at 53.

65. *Id.* at 49-51.

66. *Id.* at 71-72.

67. *Id.* at 53. This case was not directly a "counsel of choice" case. Hoeffel, *supra* note 31, at 529. Rather, given the circumstances of the case, which involved a mob-like prosecution of Black boys in Alabama, the Court recognized that the trial of the boys should have been overturned for a number of reasons. *Powell*, 287 U.S. at 71 ("[E]ven if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure [to do so] . . . was likewise a denial of due process within the meaning of the Fourteenth Amendment."). Therefore, some do not consider the right to counsel of choice as fully enshrined and cognizable until later cases. *See* Hoeffel, *supra* note 31, at 529.

68. *Powell*, 287 U.S. at 68-69. A decade later, the Court again briefly re-emphasized the fundamental nature of the right in Chandler v. Fretag, 348 U.S. 3 (1954).

69. *Powell*, 287 U.S. at 59 ("The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.").

70. Luis v. United States, 578 U.S. 5, 7 (2016).

71. *Powell*, 287 U.S. at 56-58.

72. *See id.* at 57-58 (describing the hostility of the community and delayed appointment of representation).

73. *Id.* at 50-51.

74. *Id.* at 53.

75. *Id.* at 53-54.

"nonresident" boys were denied any opportunity to contact family or friends and obtain *their* choice of attorney—and this made all the difference in the circus-like, hostile atmosphere where the boys did not have the assistance they needed.[76]

B. SUPREME COURT RIGHT-TO-COUNSEL-OF-CHOICE DOCTRINE: A BOUNDLESS BALANCING TEST.

In the decades following *Powell*, the Court began to craft its balancing test for determining which limitations on a defendant's ability to freely select an attorney violated the Sixth Amendment.[77] The seeds of the Court's balancing test began in *Morris v. Slappy*.[78] This case is the Court's first post-*Powell* foray into formulating the contours of a right-to-counsel-of-choice doctrine.[79] The Court in *Slappy*—creating some tension with *Powell*—held that a court's interest in efficiency *could* overcome the right and that the right did not protect a "meaningful attorney–client relationship."[80] In *Slappy*, the defendant asked to be represented by his first public-appointed attorney, who was in the hospital at the time, rather than the second public-appointed attorney.[81] The lower court rejected his request.[82] It claimed that the second attorney was prepared and sufficient.[83] The Supreme Court agreed, saying that the trial courts should have broad discretion in granting continuances because scheduling is a difficult job.[84] An indigent defendant's interest in a "meaningful relationship" with his or her attorney did not exist, and if it did, it did not outweigh the court's interest in efficiency.[85]

In the next case, *Wheat*, the Court developed the balancing test. In *Wheat*, an attorney had represented two defendants who had been involved in a drug conspiracy.[86] A third defendant later sought to have that attorney represent him as well.[87] The government opposed the representation on the grounds that it would create a conflict of interest.[88] The government argued that the defendants would need to testify against each other but "ethical proscriptions would forbid"

76. *See id.* at 52.

77. *See* Hoeffel, *supra* note 31, at 528-30.

78. *See* 461 U.S. 1, 11-15 (1983) (balancing state interests and the constitutional rights of the accused).

79. *See* Hoeffel, *supra* note 31, at 526.

80. *Slappy*, 461 U.S. at 14.

81. *Id.* at 6-8.

82. *Id.* at 6-7.

83. *Id.*

84. *Id.* at 11. The concurrence in this case was similar to the dissent in *Wheat*. It emphasized that the right to counsel of choice is fundamental, and therefore, the relationship between attorney and client must be as well. *Compare id.* at 20 (Brennan, J., concurring) *with* Wheat v. United States, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting) (emphasizing the right of the accused to select counsel of his or her choice).

85. *Slappy*, 461 U.S. at 13-14. This was more or less the extent of the analysis. But the Court also added that the victim's interest in efficient administration of justice here helped offset the defendant's rights. *Id.* at 14.

86. *Wheat*, 486 U.S. at 155.

87. *Id.*

88. *Id.*

the attorney from meaningfully cross-examining either defendant.[89] The defendants argued that the possibility of such cross examination was speculative, and regardless, they all agreed to waive any conflict of interest.[90]

The Court balanced the interests and found the defendant's lacking.[91] The Court began its analysis by identifying that the interest served by the right to counsel of choice was an interest in a fair trial: "[The right] guarantee[s] an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."[92] Next, the Court said that the right to counsel of choice was a limited right; a person could not employ a lawyer who was not a member of the bar or one who declined to represent him.[93] Indeed, the Court said that the "right" was rather a "presumption" in favor of counsel of choice that could be overcome by countervailing interests.[94] One of these interests was the "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession."[95] In weighing the interests, the district court was to be given considerable discretion.[96] Applying this framework, the Court held that the district court's decision to deny counsel of choice was permissible because there was a possible conflict of interest—and that was enough to overcome the defendant's right.[97]

Next, in *Caplin & Drysdale, Chartered v. United States*,[98] the Court addressed the right in the context of asset forfeiture.[99] The defendant claimed a forfeiture law—which allowed the government to restrain him from using forfeitable funds before conviction—violated his right to counsel of choice.[100] The Court disagreed.[101] The Court held that the law only limited *tainted*,

89. *Id.* at 156.

90. *Id.*

91. *Id.* at 164.

92. *Id.* at 159.

93. *Id.*

94. *See id.* at 164 ("The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.").

95. *Id.* at 160.

96. *Id.* at 164.

97. *Id.* ("[The] presumption [of counsel of choice] may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict . . . ."). The dissent's opinion, on the other hand, placed more weight on the defendant's interest in right to counsel of choice. The main dissent, penned by Justice Thurgood Marshall, agreed largely with what the majority had written about the right—it was circumscribed in several respects. *Id.* at 165 (Marshall, J., dissenting). But the dissent argued that since there was a fundamental right at stake the Court should make the presumption quite strong; it should not be something easily overcome. *Id.* at 168. And further, the trial court should not be given such discretion, because this could lead to a lack of protection of the right. *Id.* at 166-69. Applying this to the case before it, the dissent argued that much of the conflicts the majority worried about were speculative and even if they were not, the attorney could have still assisted the defendant at trial in a more reduced capacity. *Id.* at 169-71. Accordingly, the denial of counsel of choice for conflict purposes could be valid but was not in this case because the government's interest here was not strong. *Id.* at 172.

98. 491 U.S. 617 (1989). There was also a companion case, United States v. Monsanto, 491 U.S. 600 (1989), not mentioned here.

99. *Caplin*, 491 U.S. at 631.

100. *Id.* at 624.

101. *Id.* at 625-26.

forfeitable funds.[102] It did not limit his use of nonforfeitable funds to get an attorney, and it did not prevent any attorney from representing him for free.[103] Rather, the Court said the law merely limited the defendant from using forfeitable funds to hire a risk-adverse attorney (i.e., where the attorney was afraid of the money being forfeited upon conviction).[104]

Framing the law this way, the Court held that it was constitutional.[105] The law, the Court said, merely prevented the use of tainted funds (the fruits of a crime), which due to a "relation-back" provision in the statute, are technically considered government property.[106] This conceptualization reduced the defendant's interest while also strengthening the government's interest.[107] Indeed, the Court stated: "It is our view that there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense."[108] The Court concluded that any financial penalty on a defendant like this, including a tax, did not automatically violate the Sixth Amendment just because the defendant's right was slightly burdened.[109]

The next (and last) counsel-of-choice case was another forfeiture case, *Luis v. United States*.[110] The question in this case was whether the government could

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102. *Id.* at 627.

103. *Id.* at 625.

104. *Id.*

105. *Id.* at 635.

106. *Id.* at 627.

107. *See id.* (explaining that under forfeiture laws, criminal acts convey title to the United States, not the accused).

108. *Id.* at 631.

109. *Id.* at 631-32. The dissent, penned by Justice Harry Blackmun, was in sharp disagreement with the Court. *Id.* at 635-56 (Blackmun, J., dissenting). He began his dissent with one idea: "that it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial." *Id.* at 635. The dissent argued that by allowing a government interest to override the right to counsel of choice, the majority had "lost track of . . . 'the primary, preferred component of the basic right' protected by the Sixth Amendment." *Id.* at 645 (quoting United States v. Harvey, 814 F.2d 905, 923 (4th Cir. 1987)). Ultimately, the dissent found the balance to tip in favor of the defendant: "Interests as ephemeral as [the government's] should not be permitted to defeat the defendant's right to the assistance of his chosen counsel." *Id.* at 655.

110. 578 U.S. 5 (2016). There was one case between these two, *Gonzalez-Lopez*. United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). *Gonzalez-Lopez* dealt with the single question of whether the defendant needed to show prejudice if the right to counsel of choice was violated. *Id.* at 148. The majority held that no showing of prejudice was necessary because the right to counsel of choice was the root meaning of the Sixth Amendment. *Id.* The Court held that, although the *Wheat* Court had said the interest in a fair trial was an interest served by the right to counsel of choice, the interest was not the only purpose of the right. *Id.* at 144. The purpose of the right—according to the *Gonzalez-Lopez* Court—was "that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Id.* at 146. The Court concluded, however, that despite its language the right was still limited—it could be overcome by scheduling concerns, or ethical rules, or the court's interest in the appearance of fairness. *Id.* at 152. The dissent, written by Justice Samuel Alito and joined by three other justices, is notable because of the extremely restrictive language it deployed when describing the right. *See id.* at 152-162 (Alito, J., dissenting). For example, the dissent said that the Sixth Amendment was designed only to provide the assistance of counsel at trial. *Id.* at 153-54. And the Sixth Amendment's purpose was not to allow the defendant to bring in any lawyer he or she preferred. *Id.* at 154. The dissent did acknowledge that there was a "limited" right to counsel of choice: "[b]ut from the beginning, the right to counsel of choice has been circumscribed." *Id.* In the dissent's view, the right to counsel can be limited,

use a pretrial restraint on the defendant's use of *untainted* funds to pay an attorney.[111] The defendant in this case committed a fraud worth forty-five million dollars.[112] Although the defendant had spent much of it, the government hoped to restrain about two million dollars, which was suspected to be left over, for use as restitution or other penalties in the case of conviction.[113] The district court, however, entered an order restraining up to forty-five million dollars' worth of assets of the defendant.[114] Before the Court, both parties agreed that this order restrained untainted funds (funds unrelated to the crime) and prevented the defendant from paying his attorney of choice.[115]

A four-justice plurality opinion concluded that this restraint violated the right to counsel of choice because these were *untainted* funds (as opposed to the *tainted* funds at issue in *Caplin*).[116] The plurality reached its conclusion by applying a balancing test weighing "[t]he nature and importance of the constitutional right taken together with the nature of the assets . . . ."[117] On one side of the balance was the constitutional right, which "[g]iven the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust . . . [w]e . . . emphasize that the constitutional right at issue here is fundamental . . . ."[118] On the other side was the government interest in securing payment for restitution and criminal fees.[119]

The plurality distinguished *Caplin* because the money restrained in *Luis* was the defendant's rightful property, while in *Caplin*, the property restrained had been shown under a probable cause standard to be the fruits of a crime (and therefore government property).[120] In other words, the *Caplin* property was tainted; the property here was not. Thus, the plurality said the government had a substantial interest in the property in *Caplin*, whereas in *Luis*, that interest was weaker.[121] The plurality held that the government's interests were not as strong as in *Caplin* because the funds were not considered government property, and the government can still just restrain the *tainted* funds before trial if it wants—weakening its interest in the *untainted* funds further.[122] The plurality was also concerned that if these funds were restrained, the defendant would be forced to rely on public

without question, by "mundane case-management considerations." *Id.* at 155. In other words, the dissent concluded that as long as the defendant receives some effective assistance by an attorney at trial, it should not matter who is giving that assistance—effectively eliminating the right to counsel of choice. *Id*. at 155 ("These limitations on the right to counsel of choice are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation.").

111. Luis v. United States, 578 U.S. 5, 10 (2016).
112. *Id.* at 9.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 16-18.
117. *Id.* at 10.
118. *Id.* at 11-12.
119. *Id.* at 12.
120. *Id.* at 13-14; Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 627 (1989).
121. *Luis*, 578 U.S. at 17.
122. *Id.* at 18.

defenders, who the plurality was skeptical could provide the same level of assistance as private counsel.[123]

C. LITTLE THEORETICAL DEVELOPMENT HAS OCCURRED AT THE CIRCUIT AND DISTRICT COURT LEVEL AND DEFENDANTS USUALLY LOSE.

The theoretical development at the lower courts is sparse. Circuit courts have identified a variety of somewhat conflicting purposes the right purportedly serves, including the interest in "an effective advocate,"[124] "adversarial process,"[125] or "fair trial."[126] And these courts have crafted different tests within the balancing framework to decide when an order or rule violates the right to counsel of choice.[127] These tests include two-factor tests,[128] three-factor tests,[129] five-factor tests,[130] and others.[131] As the district courts apply these tests, circuit courts rarely reverse the trial court.[132] Indeed, most appellate courts apply an abuse of discretion standard in reviewing the lower court.[133] Others have articulated the review as an "arbitrariness" review, only reversing if the district court did not

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123. *Id.* at 21 ("These defendants, rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. As the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards.").

124. *E.g.*, United States v. Bikundi, 80 F. Supp. 3d 9, 16 (D.D.C. 2015) (recognizing that the "'essential aim' of the Sixth Amendment 'is to guarantee an effective advocate' . . . ." (quoting Wheat v. United States, 486 U.S. 153, 159 (1988))); United States v. Roach, 912 F. Supp. 2d 1153, 1167 (D.N.M. 2012) (similarly quoting *Wheat*'s recognition of the Sixth's Amendment's aim is to guarantee a criminal defendant an effective advocate).

125. *E.g.*, United States v. Alfonzo-Reyes, 592 F.3d 280, 293 (1st Cir. 2010) (stating that the focus of the Sixth Amendment is on the adversarial process); United States v. Hanhardt, 155 F. Supp. 2d 861, 868 (N.D. Ill. 2001) (likewise stating that the focus of the Sixth Amendment is on the adversarial process).

126. *E.g.*, United States v. Hughey, 147 F.3d 423, 428 n.2 (5th Cir. 1998) (stating the purpose of the Sixth Amendment is to provide a fair trial).

127. *See, e.g.*, United States v. Franklin, 177 F. Supp. 2d 459, 464 (E.D. Va. 2001) (applying a two-pronged test balancing the defendant's individual right to counsel of choice while maintaining the integrity of the proceedings); United States v. Lacerda, 929 F. Supp. 2d 349, 356-62 (D.N.J. 2013) (applying a three-factor test evaluating the conflicts of interest, potential substantial hardship for a defendant, and the likelihood of harm to others).

128. *Franklin*, 177 F. Supp. 2d at 464 (applying a two-pronged test).

129. *Lacerda*, 929 F. Supp. 2d at 356-62 (applying a three-factor test for evaluating motion to disqualify).

130. United States v. Robinson, 662 F.3d 1028, 1032 (8th Cir. 2011).

131. Randolph v. Wetzel, No. 1:06-CV-901, 2020 WL 2745722, at *10-11 (M.D. Pa. May 27, 2020) (applying balancing test on a "scale" weighing defendant's interest and "countervailing" interests); Steed v. Warren, No. 2:06–CV–13932, 2009 WL 2346260, at *3 (E.D. Mich. July 29, 2009) (stating a defendant's right to counsel is not absolute and is balanced against court demands).

132. *E.g.*, United States v. McKeighan, 685 F.3d 956, 968, 973 (10th Cir. 2012) (stating appellant's claim could not succeed under either a plain-error standard or an abuse of discretion standard); United States v. Basham, 561 F.3d 302, 325 (4th Cir. 2009) (finding the lower court did not commit a reversible error); United States v. Cordy, 560 F.3d 808, 815-16 (8th Cir. 2009) (ruling that the lower court did not abuse its discretion).

133. *E.g.*, *McKeighan*, 685 F.3d at 968 (applying an abuse of discretion standard to the review of the district court's denial of appellant's motions); *Cordy*, 560 F.3d at 815 (reviewing a denial of a request for a continuance for an abuse of discretion).

address the right at all or gave no valid reason for ruling against the defendant.[134] And finally, others have held that the right to counsel of choice does not exist and no searching review is necessary.[135]

District courts apply these tests and recognize their broad discretion.[136] They also often provide reasoning for their balancing decisions. But this reasoning is thin: the courts often just acknowledge the right to some extent and then apply their test for the ethical rule or conflict analysis—basically ignoring the right after they have mentioned it.[137]

The circuit and district court cases can be divided into three buckets: (1) ethical rule cases (including conflict-of-interest and non-conflict-of-interest ethical cases); (2) administrative efficiency cases; (3) and forfeiture cases. These are the most common types of right-to-counsel-of-choice cases. And there is one consistency between all these cases: defendants usually lose.[138] In ethical cases, defendants lose often because courts merely apply the ethical rule without fully recognizing the independent significance of the Sixth Amendment right in tension with the ethical rule.[139] In administrative efficiency cases, defendants lose often because trial courts are given wide latitude to control their docket and only are overruled when they make an arbitrary decision denying a continuance.[140] In forfeiture cases, defendants also lose often, and the Court's bright-line rule appears to be illusory.[141] In all, defendants lose because their right to counsel of choice often is overcome by other interests—such as an interest in judicial

134. *E.g.*, Fuller v. Diesslin, 868 F.2d 604, 611 (3d Cir. 1989) (finding no reason to deny *pro hac vice* admission and the trial court's decision therefore arbitrary).

135. United States v. Hughey, 147 F.3d 423, 428 ("Indeed, 'there is no constitutional right to representation by a particular attorney.'" (quoting Neal v. Texas, 870 F.2d 312, 315 (5th Cir. 1989))).

136. *See generally* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (applying the abuse of discretion test); United States v. Monsanto, 491 U.S. 600 (1989) (applying an "arbitrariness" review).

137. *See Caplin*, 491 U.S. at 623-25 (addressing the Sixth Amendment right to counsel and applying the abuse of discretion test).

138. *See, e.g.*, United States v. Alfonzo-Reyes, 592 F.3d 280, 295 (1st Cir. 2010) (finding that the district court did not abuse its discretion in disqualifying attorney); United States v. Basham, 561 F.3d 302, 324 (4th Cir. 2009) (finding that the district court did not abuse its discretion in disqualifying attorney); United States v. Edelmann, 458 F.3d 791, 808 (8th Cir. 2006) (stating that the district court acted reasonably in removing defendant's attorney); United States v. Schneider, 322 F. Supp. 3d 1294, 1295 (S.D. Fla. 2018) (granting motion to disqualify counsel); United States v. Lacerda, 929 F. Supp. 2d 349, 365 (D.N.J. 2013) (granting motion to disqualify counsel); Dixon v. Warden, S. Ohio Corr. Facility, 940 F. Supp. 2d 614, 625 (S.D. Ohio 2013) (denying motion for continuance); Steed v. Warren, No. 2:06–CV–13932, 2009 WL 2346260, at *3 (E.D. Mich. July 29, 2009) (denying motion for continuance); United States v. Hanhardt, 155 F. Supp. 2d 861, 880 (N.D. Ill. 2001) (denying motion for continuance). *But see* Randolph v. Wetzel, No. 1:06-CV-901, 2020 WL 2745722, at *12 (M.D. Pa. May 27, 2020) (granting the defendant a new trial, finding the trial court's denial of the motion for continuance was arbitrary and violated the defendant's Sixth Amendment rights).

139. *See, e.g.*, *Alfonzo-Reyes*, 592 F.3d at 294-95 (finding that the district court did not abuse its discretion in disqualifying appellant's attorney who had an actual conflict of interest); *Basham*, 561 F.3d at 323-24 (finding that the district court did not abuse its discretion in disqualifying appellant's attorney who had a potential conflict of interest); *Edelmann*, 458 F.3d at 808 (finding that the district court did not abuse its discretion in disqualifying appellant's attorney who had an actual conflict of interest).

140. *See* discussion *infra* note 148 (discussing cases where defendants lose their counsel due to administrative efficiency concerns).

141. *See* United States v. Balsiger, 910 F.3d 942, 951 (7th Cir. 2018).

economy, professionalism, or fairness. The courts will often begin with an acknowledgement of the right and then balance other interests or apply normal conflict or ethical rules.[142]

Here are illustrations. First, take the ethical rules cases. Defendants lose often because courts merely apply the ethical rule with short mention of the Sixth Amendment right.[143] For example, in *United States v. Lacerda*, the court first applied an ethical rule and determined that the defense counsel had a conflict.[144] Next, the court asked if it would be a "substantial hardship" on the defendant to disqualify counsel.[145] In expending about two sentences on the right to counsel of choice, the court easily found that there would be no hardship for reasons unrelated to the right.[146] *Larceda* is not an outlier. One commentator studied civil and criminal disqualification decisions and found that, despite the Sixth Amendment right to counsel of choice, criminal defendants paradoxically tend to have *weaker* rights to counsel of choice.[147]

Second, take the administrative efficiency cases. Defendants lose often because trial courts are given wide latitude to control their docket and only are overruled when they make an arbitrary decision denying a continuance.[148] For example, in *United States v. Hanhardt*, a defense counsel moved for a continuance to accommodate an arbitration he had in the same month of the trial.[149] The court denied the motion because, it stated, a court's convenience can overcome the

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142. *See, e.g.*, *id.* at 949-51 (acknowledging the right to counsel before applying the abuse of discretion standard to a denial of continuance); United States v. Zimny, 873 F.3d 38, 51-52 (1st Cir. 2017) (acknowledging the right to counsel before applying the abuse of discretion standard to a denial of continuance); United States v. Robinson, 662 F.3d 1028, 1031-32 (8th Cir. 2011) (acknowledging the right to counsel before applying the abuse of discretion standard to a denial of continuance); United States v. Mulero-Vargas, 358 F. Supp. 3d 183, 188 (D.P.R. 2019), *aff'd*, 375 F. Supp. 3d 166 (D.P.R. 2019) (acknowledging the right to counsel before applying the ethical rule); United States v. Franklin, 177 F. Supp. 2d 459, 463-65, 467 (E.D. Va. 2001) (applying the ethical rule analysis after a two-paragraph acknowledgement of the right to counsel of choice).

143. *See supra* note 139 and accompanying text (discussing cases where district courts did not abuse its discretion in disqualifying attorneys).

144. United States v. Lacerda, 929 F. Supp. 2d 349, 357, 360 (D.N.J. 2013).

145. *Id.* at 360.

146. *Id.* at 360-61; *see also Franklin*, 177 F. Supp. 2d at 465-67 (E.D. Va. 2001) (discussing ethical rules in a case concerning the right to counsel of choice). In *Franklin*, the Court first found that the attorney's behavior violated an ethical rule. *Id.* at 469. The Court then proceeded to "balance" the right to counsel of choice against the ethical violation with a two-factor test. *Id.* The first factor was whether the unethical conduct occurred—a redundant inquiry since the court already found an ethical violation. *Id.* And second, the court asked if the balance favored the defendant's right. *Id.* The court recited the attorney's unethical behavior as its reasoning for finding the defendant's right lost. *Id.*

147. Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 374, 376-77 (2014) (stating "that when compared to civil litigants and even the prosecution, criminal defendants generally have weaker, not stronger, rights to counsel and to ethical representation . . . .").

148. Dixon v. Warden, S. Ohio Corr. Facility, 940 F. Supp. 2d 614, 625 (S.D. Ohio 2013) (denying a motion for continuance); Steed v. Warren, No. 2:06–CV–13932, 2009 WL 2346260, at *3 (E.D. Mich. July 29, 2009) (denying motion for continuance because "[t]he important right to counsel of choice is not absolute; it must be balanced against the court's authority to control its own docket, and a court must beware that a demand for counsel may be utilized as a way to delay proceedings or trifle with the court." (citation omitted)); United States v. Hanhardt, 155 F. Supp. 2d 861, 880 (N.D. Ill. 2001) (denying a motion for continuance).

149. *Hanhardt*, 155 F. Supp. 2d at 866.

defendant's interest.[150] The court said it did not need to articulate why it set the court date when it did.[151] The burden was on the moving party to explain why its reasons were persuasive.[152] And the court found, *inter alia*, an arbitration to be not as important as the trial, so the motion was denied.[153] The court decided ultimately that the infringement on the right to counsel of choice was irrelevant because the adversarial process was still protected in this case.[154]

Third, take the forfeiture cases. As discussed, the Court has drawn a bright-line rule between tainted and untainted funds in this context, but this bright-line is often illusory.[155] There are not many of these cases, but one example is *United States v. Balsiger*, where the court faced the question of whether a *lis pendens* violated the right to counsel of choice under *Luis*.[156] The parties had agreed that the subject of the *lis pendens*, the defendant's home, "was an untainted asset."[157] But the court held that the *lis pendens* did not violate the defendant's Sixth Amendment right to counsel of choice.[158] The court reasoned that while the *lis pendens* delayed the defendant's ability to retain an attorney (because the *lis pendens* operated to slow his ability to sell his home), he was able to sell his home well before trial.[159] There were about eight months between the sale of his house and the beginning of trial where he could have used the funds from the sale of his house to retain an attorney.[160] Accordingly, the *lis pendens* did not operate to deny him the right to counsel of choice.[161]

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150. *Id.* at 875.

151. *Id.*

152. *Id.* at 874.

153. *Id.* at 876.

154. *Id.* As shown by this case, there is an almost insurmountable barrier for defendants who are themselves victims of an attorney's mistakes. This issue is an important one for these defendants:

> Administrative convenience always weighs against granting the motion, and courts are often impatient with defendants who request new counsel on the eve of trial, expressing frustration with the lack of timeliness and threatened disruption of the case. Although some defendants are probably crafty manipulators, others appear to be victims of lawyer incompetence or neglect, raising the issue in the only way they understand. The defendant may realize there is a problem only as the trial date approaches and the defendant discovers defense counsel's strategy and level of preparation for trial. Moreover, the defendant may see no other opportunity to raise the issue.

Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1262 (2006).

155. *See* United States v. Balsiger, 910 F.3d 942, 951-52 (7th Cir. 2018) (explaining in forfeiture cases the bright-line rule appears illusory).

156. *Id.* at 950.

157. *Id.*

158. *Id.* The court also noted, however, it could not "foreclose a circumstance where a *lis pendens* operates to infringe on a defendant's right to choice of counsel. . . ." *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 951. *See generally* Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 806-17 (1989) (arguing that these cases should be treated differently from others because forfeiture cases have the potential to completely deny counsel of choice to a defendant, while administrative and ethical cases may only deny counsel of first choice).

III. THIS UNEXPLAINED BALANCING TEST RAISES LEGITIMACY ISSUES—ISSUES THAT CAN BE REMEDIED ONLY BY A JUSTIFICATION FOR THE TEST.

Balancing tests have the potential for legitimacy issues. It is easy to see why: balancing tests are manipulable and create the potential for abuse.[162] The Court has explained that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."[163] Balancing tests often have the appearance of scientific certainty, but in reality, a court reaches its results by placing certain "mystery" values on the scale.[164]

Manipulable balancing and abuse raise some issues. First, manipulable balancing leads to results that threaten to create injustice—or at least the appearance of injustice.[165] Manipulable balancing tests are highly uncertain.[166] Mystery values cause courts to reach divergent results in similar cases—when one would expect a similar result to occur.[167] They can also cause the opposite: they may lead to consistent results that make the test seem less like a balancing test and more like a rubber stamp (as with the right to counsel of choice).[168]

From these divergent and potentially manipulable results, a defendant may perceive injustice. The Court often fails to take into consideration the range of interests it should take into account when balancing.[169] And this creates the "mystery" of sorts as to what the court is doing.[170] The balancing test disengages spectators from the discourse and creates almost a "demonstration" rather than an analysis of any kind.[171] And the balancing also disengages courts from the right at issue—as shown by the short mention of the purposes of the right found in the case illustrations above.[172] By disengaging spectators and creating a "mystery" of how the court reached its conclusion, it becomes more difficult for a defendant to accept an outcome—especially (as here) when defendants almost always lose

162. Winick*, supra* note 161, at 852. (describing the possibility of abuse due to broad prosecutorial discretion).

163. Crawford v. Washington, 541 U.S. 36, 67-68 (2004).

164. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987).

165. *Cf.* Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 29 (2013) ("A balancing test may lead to some disparity and possibly injustice, but the more objective information expected and used in the decision, the less likely that the decision will be a blind one.").

166. *See* Barker v. Wingo, 407 U.S. 514, 522-23 (1972) ("Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right."). Balancing tests force courts to decide cases on an ad hoc basis, which is difficult and may increase process costs. *Id.* at 530.

167. *Crawford*, 541 U.S. at 68.

168. *E.g.*, Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1167 (11th Cir. 2020) (Rosenbaum, J., dissenting) ("A 'balancing test' that automatically credits the [one side] . . . and accounts for nothing else is no balancing test at all; it's a rubber stamp.").

169. Aleinikoff, *supra* note 164, at 977 (stating "[I]n practice, the Court never makes a full inventory of the relevant interests.").

170. *Id.* at 993 (describing the uncertainty involved in balancing tests).

171. *Id.* (stating, "Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.").

172. *See* discussion *supra* Part II (discussing such cases).

on this constitutional right and courts rarely pay much attention to the right itself in their analysis.[173] This is a concern the Court has been especially mindful of in the past.[174]

Society may also perceive injustice. Divergent results (or rubber-stamp results) often also create inconsistencies and muddy areas of law—creating more potential injustice.[175] Opinions are written to justify decisions not just to litigants but to future parties.[176] Balancing fails in this function—it creates unreliable rules that vary from decision to decision.[177] The balancing test "is simply lawless."[178] These unreliable rules may affect the way society views these cases and foster distrust in the court system.[179] Indeed, the Court here too has expressed concerns on fashioning judicial rules that raise the specter of societal skepticism of results.[180]

Second, the potential for abuse fosters injustice or the appearance of it too.[181] For example, prosecutors may file multiple motions for disqualifying counsel that removes unconflicted counsel.[182] Under a balancing test, general concerns about a defense counsel may translate into disqualification if, on average, the prosecution can file motions to disqualify in every case and the judge has an amorphous balancing test to apply.[183] Thus, the defendant may be stripped of his or her right and prosecutors given a decisive advantage to remove particularly effective counsel.[184]

These potential injustices inherently raise legitimacy concerns.[185] A court's power derives from its ability to have others understand and accept its judgments.[186] However, as discussed, balancing tests inhibit the ability of the defendant and society to accept its judgments.[187] Furthermore, the potential for abuse, and ability to give a prosecutor a decisive advantage, will lower the expectation of a fair trial—once again, lowering the legitimacy of the courts.[188]

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173. *See* discussion *supra* Part I (describing legitimacy concerns involved with balancing tests).

174. *Cf.* Faretta v. California, 422 U.S. 806, 834 (1975) (stating a defendant bears the consequences of a conviction in the Court's analysis of a defendant's right to conduct his own defense).

175. *See* Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1167 (11th Cir. 2020) (Rosenbaum, J., dissenting).

176. Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 646 (1988).

177. *Id.* at 648.

178. *Id.* at 650.

179. *See id.*

180. *See id.*

181. *See* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 723 (1992).

182. *See id.* at 723 ("[J]udges faced with prosecutorial efforts to remove defense counsel should be especially careful to ensure that such removal is necessary to the appearance and reality of fairness and is not simply another tactical tool in the prosecutor's arsenal.").

183. *Id.* ("[C]ourts should be especially careful not to permit general concerns regarding relational representation to strip a defendant of his chosen counsel.").

184. *See id.*

185. *See* McFadden, *supra* note 176, at 650.

186. *Id.* at 646.

187. *Id.*

188. Karlan, *supra* note 181, at 723.

These legitimacy concerns, however, can be resolved by justifications. The problem with balancing tests—as identified by critics—is that the Court spends little time "exploring the difficult analytic and operational problems the method presents."[189] The Court, therefore, often leaves few guideposts to help lower courts reach consistent decisions because the values sought to be protected by the balancing are unstated.[190] It needs to justify balancing. Critics have urged that the Court must "take balancing seriously" by engaging in a deep investigation of values to effectively balance.[191] Because, as discussed above, without an explanation of why the balancing is relevant, it is difficult to know what the Court is doing.[192] And the Court appears to be failing to take into consideration certain interests.[193]

The Court has used justifications to resolve concerns with balancing in other contexts. For other Sixth Amendment rights, like the speedy trial and public trial right, which also use balancing tests, the Court has explained *at length* why the balancing test is appropriate.[194] For example, in *Barker v. Wingo*, the Court's first speedy trial case, the Court explained fully why a balancing test was appropriate.[195] The Court emphasized that this balancing test was needed, in part, because the speedy trial right was "generically different from any of the other rights enshrined in the Constitution for the protection of the accused."[196] And the Court provided clear direction to the lower courts in applying this test by explicating *why* the balancing was appropriate and why bright-line rules were inappropriate; it emphasized that bright-line rules would fail to capture the slippery nature of the right, which protected a variety of sometimes diverging interests.[197] The Court held that the right was special in that deprivation of the right sometimes benefited the defendant.[198]

Similarly, in *Waller v. Georgia*, the Court's early public trial right case, the Court identified that the right to a public trial (under the First and Sixth Amendments) protected both the defendant's and public's interests.[199] In this way, the right *itself* protected two interests.[200] The Court, however, also identified

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189. Aleinikoff, *supra* note 164, at 972; *see also id.* at 993 ("Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine.").

190. *Id.* at 976 ("The most troubling consequence of the problem of deriving a common scale are those cases in which the Court simply does not disclose its source for the weights assigned to the interests.").

191. *See id.*

192. *Id.* at 993.

193. *Id.* at 977.

194. *See*, *e.g.*, Barker v. Wingo, 407 U.S. 514, 519-30 (1972) (discussing how the right to a speedy trial is different than other constitutional rights and, therefore, deserves to be a balancing test); Waller v. Georgia, 467 U.S. 39, 45-46 (1984) (discussing the interests at stake and why balancing is appropriate for the right to a public trial).

195. *Barker*, 407 U.S. at 519-22 (discussing why the right was "slippery").

196. *Id*. at 519.

197. *Id.* at 519-22.

198. *Id.* at 521.

199. *Waller*, 467 U.S. at 46-47.

200. *See id.*

other constitutional interests at stake, like the First Amendment, and the opposing interests that were in tension, like the government's interest in privacy.[201] All these divergent constitutional interests supported a balancing approach.[202]

When the Court provides an explanation, it provides a north star for judges; they can potentially reach more consistent results, avoid diverging conclusions, and prevent abuse—thereby lowering the temperature on illegitimacy.[203] For example, in *Waller*, the Court recognized the importance of the defendant's interest in a fair trial, which is in tension with the government's interest in privacy.[204] And the Court identified the purposes served by both powerful rights.[205] Because a fair trial was "[t]he central aim of a criminal proceeding," the Court was able to conclude that the opposing right had to yield.[206] In *Wheat*, such an analysis was absent.[207] There was no explanation why an interest in administrative efficiency was so powerful as to necessitate that the right to counsel of choice yield in some cases.[208] By failing to articulate the interests and why these interests needed to be balanced, courts have no way to calibrate the test to the interests' purposes and the interests' comparative strengths. This contributes to the divergent results and abuse—judges with no north star cannot be blamed for coming to diverging conclusions and permitting abuse.

IV. TO REMEDY LEGITIMACY CONCERNS, THE BALANCING TEST MAY BE EXPLAINED BY A VARIETY OF POTENTIAL JUSTIFICATIONS, BUT THESE JUSTIFICATIONS ARE LESS PERSUASIVE IN THE NON-CONFLICT-OF-INTEREST CASES.

This article addresses these potential legitimacy issues by putting forth several justifications for the right to counsel of choice's balancing test. But this article ultimately concludes that these justifications are only persuasive in the conflict-of-interest cases. As such, this article finds the legitimacy issues still remain with respect to non-conflict-of-interest ethical cases, administrative efficiency cases, and forfeiture cases.

A. POTENTIAL JUSTIFICATIONS FOR THE COURT'S BALANCING APPROACH.

There are five potential explanations for the Court's balancing approach. First, an inflexible, formalistic approach may disrupt the criminal justice structure

201. *Id.* at 44-45.
202. *Id.*
203. *See, e.g.*, *id.* at 45-47 (providing an explanation of what interests to balance). *But see, e.g.*, Wheat v. United States, 486 U.S. 153, 158-64 (1988) (failing to provide an explanation of the interests to balance).
204. *Waller*, 467 U.S. at 45-46.
205. *Id.*
206. *Id.* at 46, 48.
207. *Wheat*, 486 U.S. 158-64.
208. *Id.*

to an intolerable degree. Second, the right to counsel of choice may *hurt* the defendant in some situations, creating an unstable interest that necessitates a functionalist test. Third, the remedy for the denial of the right—reversal—is "strong medicine" and necessitates a squishier test. Fourth, any bright-line rule will look like the Court is legislating or rulemaking. And last, the approach may be a relic from its time period. This article does not endorse any of these explanations as dispositive; the right answer may be a mix of all of these reasons, some of them, or just one.

1. Disruption.

First, a formalistic approach may disrupt the criminal justice system by preventing a court from taking a flexible approach to claims.[209] Indeed, as a preliminary matter, it should be noted requiring an absolute procedural guarantee of a right to counsel of choice—similar to the procedural guarantees in the jury trial right—would not work.[210] The disruption would be intolerable.

Some commentators have therefore put forth arguments for a middle ground, but these arguments face disruption issues as well.[211] Commentators have argued that formalistic rules can work—not as a complete replacement to balancing—but as a supplement.[212] One proposed rule would leave the balancing intact but add a bright-line rule: Any defendant has an (almost) unfettered right to continue the relationship with their current counsel.[213] This rule, for example, would limit a court's schedule from divesting the defendant of their chosen counsel if their chosen counsel cannot attend trial on a certain day; the court must grant a defendant's motion for continuance to reasonably accommodate a counsel's schedule unless there is "manifest injustice"—a high standard.[214]

But take *Hanhardt*, mentioned above, where a defendant moved for a continuance because the attorney had another obligation that same month.[215] In an isolated case, granting a motion is not a big deal. But *in the aggregate*, accommodating every attorney's schedule is nearly impossible. Even if a court could deny a continuance motion in cases of "manifest injustice," the thumb on the scale in favor of the defendant would likely lead courts to grant even *more* continuances even when there would be no manifest injustice because of the

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209. This article takes the position that this disruption rationale not only drove the Court's choice of test for this right but also may be the motivating factor behind its decisions. *Cf.* Rappaport, *supra* note 12, at 147 (arguing that an anti-socialization rationale drives the Court's decisions).

210. *See* Hoeffel, *supra* note 31, at 546-48

211. *See, e.g.*, *id.* (discussing certain circumstances under which a defendant's right to counsel of choice should be given more weight in the balancing test).

212. *See id.*

213. *Id.* at 540 ("[proposing a] Sixth Amendment right of any defendant to continue a relationship with counsel without undue interference from the trial court").

214. *Id.* at 548.

215. United States v. Hanhardt, 155 F. Supp. 2d 861, 866 (N.D. Ill. 2001).

remedy's severity.[216] In such a case, the court would be forced to allow the defendant to "delay the trial of an 'accused' for any reason at all."[217] This would likely cause significant disruption.

In comparison, however, in *Ramos v Louisiana*, a categorical guarantee *did* work in the jury trial context despite disruption.[218] In *Ramos*, the Court held the jury trial right required unanimity, and the absence of this absolute requirement was cause for reversal.[219] Therefore, the *Ramos* plurality wrote that compelling Oregon and Louisiana, which lacked this requirement, to retry hundreds of criminal convictions was necessary because "[status quo interests] cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties."[220] In other words, despite significant disruption to two criminal justice systems, the plurality placed the procedural guarantee ahead of disruption.[221]

But the disruption is more significant with the right to counsel of choice, and no Justice has therefore argued for an absolutist approach or even a middle ground.[222] If a defendant had an unfettered right to counsel of choice, most—if not all—ethical rules may be rendered inapplicable to the criminal context.[223] Forfeiture laws may be unconstitutional.[224] And a defendant would have unmitigated power to delay proceedings.[225]

Indeed, the Court has explicitly said that fears of disruption have motivated its decisions.[226] In *Wheat*, the Court was explicit about two potential disruptions, which pushed it to rule against the defendant.[227] First, the Court said its own constitutional conflict-of-interest rules would put the trial court in a catch-22 if the defendant's right won out.[228] If a defendant's right could overcome a conflict of

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216. *Cf.* Barker v. Wingo, 407 U.S. 514, 522 (1972) (stating that "[t]his is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried").

217. Doggett v. United States, 505 U.S. 647, 651 (1992).

218. Ramos v. Louisiana, 140 S. Ct. 1390, 1405-06 (2020).

219. *Id.* at 1400.

220. *Id.* at 1408.

221. *See id.*

222. *See* discussion *supra* Part II (describing Supreme Court cases where all justices have accepted at least some exceptions to the unfettered right to counsel of choice).

223. *Cf.* United States v. Franklin, 177 F. Supp. 2d 459, 469 (E.D. Va. 2001) (finding the ethical rule to outweigh the right to counsel of choice because of its societal importance).

224. *Cf.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989) (describing the compelling public interest in forfeiture laws).

225. *Cf.* Doggett v. United States, 505 U.S. 647, 651 (1992) ("[T]he Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an 'accused' for any reason at all").

226. *See* Wheat v. United States, 486 U.S. 153, 161 (1988) (describing district courts' legitimate interest in ensuring judgments are upheld on appeal).

227. *Id.* at 160-62.

228. *Id.* at 161 ("If a district court agrees to the multiple representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance. On the other hand, a district court's refusal to accede to the multiple representation may result in a challenge such as petitioner's in this case." (internal citation omitted)).

interest, then a trial court could not prevent conflicted counsel from appearing.[229] But this would permit an effective assistance of counsel claim down the road if counsel is permitted and a right to counsel of choice claim if counsel is denied.[230] "[N]o matter which way they rule" the trial court would be overturned.[231] The trial judge would not "be free from future attacks over . . . the fairness of the proceedings in his own court . . . ."[232]

Second, the Court feared disruption to state ethical rules.[233] State and American Bar Association rules put limitations on multiple representations.[234] And the Federal Rules of Criminal Procedure themselves impose duties on trial courts to investigate conflicts.[235] The Court feared that if the defendant's right to choose won, these ethical and federal rules would not apply and there would be "unregulated" multiple representations or other conflicts.[236]

Fears of disruption likewise motivated the *Caplin* Court.[237] In *Caplin*, the Court was explicit about two potential disruptions if the defendant's right won.[238] First, the Court feared it would upset the "long-recognized and lawful practice" of forfeiting assets.[239] Forfeiture is a beneficial activity because "assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways."[240] The sums of money raised for law-enforcement through forfeiture is "substantial."[241] So a ruling preventing forfeiture "would be peculiar."[242] And a ruling against forfeiture would call into question other similar laws burdening a defendant's right to choose. It "would suggest that the Government could never impose a burden on assets within a defendant's control that could be used to pay a lawyer."[243] Defendants would then theoretically be exempted from taxation under this rule.[244] A second concern was upsetting Congress' statutory regime. The forfeiture law was part and parcel of "[RICO]

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229. *Id.*

230. *Id.* ("As the Court of Appeals accurately pointed out, trial courts confronted with multiple representations face the prospect of being 'whip-sawed' by assertions of error no matter which way they rule.").

231. *Id.*

232. *Id.* at 162 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).

233. *Id.* at 160.

234. *Id.*

235. *Id.* at 161.

236. *Id.* at 160.

237. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 627-30 (1989).

238. *See id.*

239. *Id.* at 627.

240. *Id.* at 629 (citation omitted).

241. *Id.*

242. *Id.* at 628.

243. *Id.* at 631 (citation omitted).

244. *Id.* at 631-32 ("Criminal defendants, however, are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney.").

and CCE" that aim "to lessen the economic power of organized crime and drug enterprises."[245] The over-inclusiveness of these laws was just a "harsh reality."[246]

And finally, take *Luis*. Like the other counsel of choice cases, the Court made its practicality concerns explicit. The Court stated that "as a practical matter" permitting the government's interest to win would "erode the right to counsel to a considerably greater extent" than tolerable.[247] Such a ruling would permit Congress to pass forfeiture laws with "no obvious stopping place."[248] Statutes could authorize forfeiture for any type of illegal behavior—theoretically, destroying the right to counsel of choice in full.[249] Defendants would need to fall back on public defenders, which the Court found could not support the new influx of defendants.[250] Given that "only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards[,]" permitting Congress to render defendants indigent easily would overwhelm this system.[251] And relatedly, sending all defendants to public defenders would all but socialize the defense bar—a fear members of the Court and some commentators have found to be very harmful.[252] Finally, the Court emphasized that the different result in *Luis* could be explained by the *absence* of the practical concerns in *Caplin*.[253] Unlike *Caplin*, there was no danger of overruling a complex statutory scheme.[254] Nor was there any potential disruption of the government's ability to fund law enforcement through restitution and forfeiture.[255]

2. *Unstable Interest.*

Second, the defendant's interest in his or her right may change—it may sometimes *benefit* the defendant to be deprived of the right. Some courts and at least one commentator have posited that the right to counsel of choice may actually hurt a defendant.[256] Counsel in right-to-counsel-of-choice cases often suffer from

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245. *Id.* at 630.

246. *Id.* (citations omitted).

247. Luis v. United States, 578 U.S. 5, 20 (2016).

248. *Id.* at 21.

249. *Id.*

250. *Id.* at 21-22.

251. *Id.*

252. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 645 (1989) (Blackmun, J., dissenting); Rappaport, *supra* note 12, at 118 (arguing that a socialized defense bar would violate the Sixth Amendment).

253. *Compare Luis*, 578 U.S. at 18-19 *with Caplin*, 491 U.S. at 626-28 (discussing "tainted" and "untainted" property).

254. *See Luis*, 578 U.S. at 15 ("For another thing, Justice KENNEDY's broad rule ignores the statutory background against which *Caplin & Drysdale* and *Monsanto* were decided. The Court in those cases referenced § 853(c) more than a dozen times.").

255. *Id.* at 19.

256. Swisher, *supra* note 147, at 400 ("Although the Sixth Amendment in this context has been rendered a curse or at least a paper tiger, perhaps that is a surprisingly good thing."). *E.g.*, United States v. Mulero-Vargas, 358 F. Supp. 3d 183, 192 (D.P.R. 2019), *aff'd*, 375 F. Supp. 3d 166 (D.P.R. 2019)

"material-to-egregious" conflicts of interest.[257] These conflicted attorneys would not be able to provide the "effective assistance of counsel" guaranteed by the Sixth Amendment.[258] As such, affording the district court's "greater—and somewhat unreviewable—ability to stop serious conflicts of interest by ordering disqualification of the conflicted lawyer" can be beneficial to prevent the defendant from waiving his or her right to be free from conflicted counsel.[259] Accordingly, for some small percentage of defendants pressured into a joint representation with a co-defendant or those who may not fully understand the extent and limitations of their attorney's conflict, the deprivation of this right can actually protect them.[260] The Court has held that when deprivation of a right works in favor of a defendant like this, this counsels toward a functionalist, balancing approach.[261]

3. Harsh Remedy.

Third, the accessibility of the remedy for the denial of the right—reversal—necessitates a functionalist approach.[262] The Court may be afraid of an accessible get-out-of-jail-free card.[263] There are many reasons to disqualify an attorney.[264] And the remedy for an erroneous disqualification is extreme—reversal.[265] Therefore, a functionalist approach may ease some concerns about defendants "go[ing] free" on the technicalities of a bright-line rule.[266] Indeed, the Court has expressed concerns at harsh results with some Sixth Amendment rights.[267] And, specifically in the right-to-counsel-of-choice context, the Court and some current Justices have explicitly said that the accessibility to a severe remedy is a concern.[268] For example, in *Wheat*, the Court expressed concerns that an inflexible right to counsel of choice would make the remedy of reversal overly accessible to defendants by putting the Court in a catch-22 between denying the right to counsel of choice or the right to conflict-free counsel.[269] And similarly, Justice Alito, joined by three other Justices in *Gonzalez-Lopez*, worried about the "severe" result of reversal if an appellate court determines that "the trial judge made a marginally incorrect ruling in applying" its rules within the balancing

("[D]isqualification will preserve the orderly administration of justice and Mulero's right to conflict-free representation").

257. Swisher, *supra* note 147, at 400.

258. *See* Strickland v. Washington, 466 U.S. 668, 669 (1984).

259. Swisher, *supra* note 147, at 402-03.

260. *Id.* at 403.

261. Barker v. Wingo, 407 U.S. 514, 521-22 (1972).

262. *Id.* at 522.

263. *Id.*

264. *See* discussion *supra* Part II (presenting different reasons to disqualify an attorney).

265. *See* discussion *supra* Part II.B (accepting lower court's discretion to disqualify counsel instead of reversing).

266. *Barker*, 407 U.S. at 522.

267. *Id.*

268. United States v. Gonzalez-Lopez, 548 U.S. 140, 161-62 (2006) (Alito, J., dissenting).

269. *See* Wheat v. United States, 486 U.S. 153, 159, 162-63 (1988).

test.[270] Accordingly, this concern of easy access to a severe reversal may have motivated the Court's high deference to lower courts and functional balancing test.

4. Fear of Appearance of Legislating in Regulated Area of Law.

Fourth, any bright-line rule will look like judicial legislating or rulemaking.[271] The fear here is not disruption but of setting a constitutional minimum that may appear like a policy choice.[272] For example, the Court has hesitated to draw a bright-line rule in the speedy trial context because it feared that it may appear that it is fulfilling a legislative role by making policy decisions in an area governed by positive law.[273] Here there likely is even more hesitation. State law heavily regulates attorneys with regard to admittance to the bar and other ethical rules.[274] And the Court has expressed skepticism of interfering into this state sphere of regulation—which, to the Court, raises federalism concerns.[275] The Court's regulation of this sphere must therefore be "less precise" to permit states to legislate for themselves.[276] In fact, consistent with this view, many commentators, in advocating for changing counsel of choice rules, have focused their advocacy on legislation.[277]

5. Relic of Its Time Period.

And finally, the functionalist approach may merely be a creature of the time period in the way the Court approached criminal procedure rights. *Barker* was decided in 1972, *Apodaca v. Oregon*[278] was decided in 1972, and *Ohio v. Roberts*[279] was decided in 1980. *Wheat*, decided in 1988, occurred only a few

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270. *Gonzalez-Lopez*, 548 U.S. at 161 (Alito, J., dissenting).

271. *See* Barker v. Wingo, 407 U.S. 514, 523 (1972) ("[Applying bright line rule to speedy trial right] would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States . . . .").

272. *Id.*

273. *Id.*

274. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020) (outlining the guidelines for bar admission and ethics for attorneys); 27 N.C. ADMIN. CODE Ch. 2 (2003) (outlining the professional responsibilities and ethical obligations for attorneys in the state).

275. *See* Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855, 879 (1995) (describing the Supreme Court's difficult-to-reach test to overturn a state regulation).

276. *Barker*, 407 U.S. at 523.

277. *See, e.g.*, Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 52 (1997) ("It is proposed that the state and federal government should adopt legislation that requires that all defendants— the wealthy, the middle-class, and the poor—will be represented by counsel that is appointed and paid for by the courts."); Catherine Burnett, *Choosing Choice: Empowering Indigent Criminal Defendants to Select Their Counsel*, 60 S. TEX. L. REV. 277, 281 (2019) ("For those policymakers struggling to bridge the divide between system-delivered counsel and client-selected counsel, this Article proposes another option, one that incorporates concepts of well-chosen defaults, principled choice options, and personal freedom in making those choices.").

278. 406 U.S. 404 (1972) (jury trial right).

279. 448 U.S. 56 (1980) (confrontation clause).

years after these cases. Like *Wheat*, in each case, *Apodaca*, *Barker*, and *Roberts*, the Court adopted a balancing test for a criminal procedure right.[280] And in each of these cases, the Court identified an interest the right served and sought to functionally calibrate the application of the right to suit that interest.[281] As such, *Wheat* fit within the Court's treatment of Sixth Amendment rights during this time period. And its functional approach can be explained, in part, perhaps by the Court's treatment of these related rights.

B. THE JUSTIFICATIONS FOR THE BALANCING TEST ARE LESS PERSUASIVE IN NON-CONFLICT-OF-INTEREST CASES.

The justifications for the use of a balancing test are less persuasive in non-conflict-of-interest cases. As just discussed, there are a variety of justifications for the Court's use of a balancing test in right-to-counsel-of-choice cases.[282] However, these justifications are significantly weakened and unpersuasive when conflict-of-interest cases are removed from the analysis. Conflict-of-interest cases involve a constitutional interest—in conflict-free counsel—in tension with the right to counsel of choice. Non-conflict-of-interest cases, including other ethical rule cases, administrative cases, and forfeiture cases, do not involve other constitutional interests in tension with the right to counsel of choice.[283] This is the key difference.

And this difference—the absence of a constitutional interest in tension—dilutes the persuasiveness of the second and third justifications. For the second justification (that deprivation of the right may benefit the defendant), it is inapt in non-conflict-of-interest cases. For example, deprivation of the right to counsel of choice would not help a defendant in a forfeiture case, where they would just simply lose their counsel of choice.[284] Nor is this persuasive in an administrative efficiency case, where the defendant may be spared from a busy counsel, but the deprivation of the right is not nearly as significant as in the conflict context, where the defendant's opposing constitutional right to conflict-free counsel is protected.[285] Similarly, for the third justification, the main concern was that the

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280. Wheat v. United States, 486 U.S. 153, 157, 163; *see generally Apodaca*, 406 U.S. 404 (establishing a balancing test for the jury trial right); *Barker*, 407 U.S. 514 (establishing a balancing test for the speedy trial right); *Roberts*, 448 U.S. 56 (establishing a balancing test for the right to confrontation).

281. *Wheat*, 486 U.S. at 157, 163; *Apodaca*, 406 U.S. at 410-11 (describing the purpose of the right to a jury trial as requiring adequate representation of the commonsense judgement of the community); *Barker*, 407 U.S. at 519-22 (describing the policy reasons behind the right to a speedy trial); *Roberts*, 448 U.S. at 65-66 (discussing the ways in which the confrontation clause ensures the integrity of the factfinding process).

282. *See* discussion *supra* Part IV.A (discussing justifications for counsel of choice balancing test, including judicial disruption, the instability of defendant interests, prevention of reversals, fear of judicial legislating, and time).

283. *See* discussion *supra* Part II.C (describing balancing tests used in non-conflict-of-interest cases).

284. *See, e.g.*, United States v. Balsiger, 910 F.3d 942, 949-52 (7th Cir. 2018) (discussing the denial of a continuance resulting from the representation of the defendant's counsel of choice).

285. *See, e.g.*, United States v. Hanhardt, 155 F. Supp. 2d 861, 868 (N.D. Ill. 2001) (stating that the Sixth Amendment "does not encompass a right to counsel who cannot comply with the court's reasonable schedule").

court would be in a catch-22 with an accessible remedy of reversal: either deny the right to counsel of choice and risk reversal or permit the right to counsel of choice but risk the counsel being conflicted.[286] This catch-22 is absent in other cases because *allowing* the right to counsel of choice in administrative efficiency, forfeiture cases, and other ethical cases would not risk violating a separate constitutional right.

The dilution of these justifications is important because the Court primarily relied upon these justifications in crafting its balancing test for the speedy trial and public trial right. As discussed above, the Court's speedy trial balancing test was necessary because of the divergent *constitutional* interests at stake, harshness of the remedy, and potential for the deprivation of the right to benefit the defendant.[287] So too with the public trial right, much of the analysis focused on these issues and found them essential for creating the balancing test.[288]

And with these two justifications diluted, the remaining justifications become less persuasive standing alone. The remaining justifications are the first (disruption), fourth (fear of legislating), and fifth (relic of time period).[289] The first justification, while compelling, may not be as persuasive as it seems. Disruption is a valid concern. And a balancing test gives the Court the flexibility to avoid disruption while still (rarely) protecting the defendant's right. But disruption can be avoided through formalistic rules as well. The Court has not engaged in any historical analysis of the right.[290] There may, therefore, be exceptions to an absolute right to counsel of choice the Court can identify from history. The Court has done this with other rights.[291] This is not to say that every formalistic rule would avoid disruption, or that an originalist approach can avoid disruption. But at the very least, it is possible to eliminate the balancing test and identify a historical or other approach that mitigates possible disruption.

For the fourth justification, the Court's fear of legislating is real, but it has not stopped the Court in other contexts. Take, for example, the Confrontation Clause jurisprudence. The Court in *Roberts* (and for a long time before) had taken a functionalist view of the Confrontation Clause.[292] The test created by the Court admitted evidence only when it was consistent with the purpose of the

286. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 522 (1972) (expressing concern that the only remedy for the denial of a defendant's Sixth Amendment right is reversal).

287. *See* discussion *supra* Part III (exploring the justifications for the balancing test regarding the right to a speedy trial).

288. *See* discussion *supra* Part III (exploring the justifications for the balancing test regarding the right to a public trial).

289. *See* discussion *supra* Part IV.A (describing these justifications for balancing of interests in detail).

290. *See* Rappaport, *supra* note 12, at 120.

291. *See, e.g.*, Crawford v. Washington, 448 U.S. 36, 50-56 (1980) (looking to the historical record when analyzing the Confrontation Clause).

292. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); *see also Crawford*, 541 U.S. at 72-73 (Rehnquist, C.J., concurring) (stating that courts had not distinguished between testimonial and nontestimonial statements).

Confrontation Clause: reliability.[293] The approach, therefore, conformed with the hearsay evidence rules themselves.[294] But the Court changed directions. In *Crawford v. Washington* the Court adopted a "strict rule" that guaranteed the defendant a procedural tool: rather than assessing whether testimony should be admitted based off whether it was reliable, the new test prevented any testimonial statements from being offered into evidence if the defendant could not cross-examine them.[295] This new constitutional rule looked a lot like legislating because it created a rule that affected a lot of the evidence rules in place in both federal and state courts.[296]

For the fifth justification, if the test is a relic from its time period, that may explain *why* it exists, but it does not justify it. This is especially so because most of the cases from the same time period have now eliminated their balancing tests and replaced them with formalistic rules.[297]

V. IMPLICATIONS OF AN UNJUSTIFIED BALANCING TEST: TOWARD AN ORIGINALIST APPROACH.

The Court's balancing test appears to be unjustified in non-conflict cases. For non-conflict cases, there are therefore still questions of legitimacy. Unless other justifications are identified, these questions will remain. But, while commentators focus on descriptive arguments explaining the Court's right-to-counsel-of-choice decisions,[298] this article's conclusions and analysis will encourage more normative arguments on the proper way to approach this important right.

This article proposes its own normative argument: one potential way to define the scope of the right is through a historical, originalist approach, as the Court did with the jury trial right in *Ramos*.[299] This part seeks to develop this idea. First, this part looks to historical practice and traces the outlines of a novel approach to the right to counsel of choice in the same way the Court did in

293. Adam A. Field, *Beyond* Michigan v. Bryant*: A Practicable Approach to Testimonial Hearsay and Ongoing Emergencies*, 2012 U. ILL. L. REV. 1265, 1273-74 (2012) ("[The Court] framed the Confrontation Clause as a substantive guarantee against convictions by unreliable evidence. In other words, the right of confrontation was not offended if the offered hearsay evidence bore certain 'indicia of reliability.'").

294. *See id.* at 1273 ("[T]he Court eventually decided to effectively abandon the pursuit and conform the Clause's meaning to common law hearsay protections.").

295. *Id.* at 1277. *But see* Giles v. California, 554 U.S. 353, 358 (2008) ("We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted.").

296. *See Crawford*, 448 U.S. at 68-69.

297. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1397, 1402 (2020) (replacing the functional assessment of a defendant's right to a jury with a formalistic one); *Crawford*, 448 U.S. at 50, 61 (discussing that the Court's previous "reliability" test in the setting of the right to confrontation).

298. *See generally* Rappaport, *supra* note 12 (discussing the various theories justifying the right to counsel of choice).

299. *Ramos*, 140 S. Ct. at 1396-97.

Ramos.[300] Next, this part looks at Justice Thomas's opinion in *Luis* and offers an example of how an originalist approach could make application of the right to counsel of choice easier while staying faithful to the constitution.[301] His opinion shows that it would be possible to still reach the same results in these cases (absent a balancing), mitigate legitimacy problems, and avoid the disruption concern if the Court looks to historical practice that creates exceptions to the right to counsel of choice.[302]

A. AN ORIGINALIST APPROACH: HISTORICAL PRACTICE AND OUTLINES OF A MODERN APPROACH.

This subsection begins by describing the history of early American legal ethics and administrative rules. It then describes how the rules would inform a modern-day approach to the right to counsel of choice.

Historical practice offers plenty of insights. Lawyers in Europe before the colonization of America were subject to a variety of administrative and ethical restrictions.[303] Although not as comprehensive as today's rules governing attorney conduct, they were detailed.[304] There were ethical rules: they required attorneys, *inter alia*, to conduct themselves with truth and fairness—for example, attorneys were required to inform the court of any falsehoods.[305] And they were required to meet minimal standards such as "competency, diligence, loyalty, confidentiality, reasonable fees, and service to the poor."[306] There were also administrative efficiency requirements on attorneys, such as requiring attorneys to explore settlement alternatives during litigation or requiring attorneys to avoid delaying proceedings.[307]

Lawyers in the colonies were treated quite differently at first. Colonists were originally quite distrustful of lawyers.[308] And some lawyers were not even trained in law.[309] Overtime, however, colonies developed rules to govern attorneys (albeit at somewhat varying degrees).[310] These rules were codified in a variety of statutes, court rules, and in some cases, bar association rules.[311]

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300. *See* discussion *infra* Part V.A (providing an overview of early American lawyers and outlines an originalist approach to right to counsel cases).

301. *See* discussion *infra* Part V.B (providing an overview of Justice Thomas's concurrence and application).

302. *See* Luis v. United States, 578 U.S. 5, 24-35 (2016) (Thomas, J., concurring).

303. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1386 (2004).

304. *Id.* at 1412.

305. *Id.*

306. *Id.* at 1412-13. It does not appear that the attorney-client privilege took root from Europe in the colonies until the 1820s. *Id.* at 1420.

307. *Id.* at 1410, 1412.

308. *Id.* at 1413.

309. *Id.*

310. *Id.* at 1413-14.

311. *Id.* at 1416.

A variety of licensure and ethical rules governed lawyers in early America. Indeed, research suggests that lawyers as early as 1700s were subject to licensure and admission requirements.[312] In other words, much like today, in early America, there were certain requirements that limited a lawyer's ability to practice in court. For example, lawyers in early Virginia had to take oaths and pass an examination.[313] And lawyers in early North Carolina were required to be "skilful [sic] and of honest disposition" to practice,[314] while lawyers in South Carolina were to be "good and virtuous."[315] There were also specific rules that governed the behavior of attorneys. Similar to modern day ethical rules, courts in early America required candor[316] and prohibited excessive fees.[317] Moreover, there were laws in place which governed the efficient functioning of the courts and prevented attorneys from delaying proceedings.[318] In North Carolina, a statute prohibited dilatory tactics by lawyers and prohibited lawyers from acting in their self-interest at the expense of their clients.[319] And a statute in South Carolina condemned "vexatious suits."[320]

Furthermore, in early America, courts had the ability to remove lawyers for the purpose of administrative efficiency. For example, as discussed, North Carolina prohibited attorneys to delay proceedings.[321] So too in New York, which prohibited "the willful delay of suits."[322] And attorneys were required to follow the orders of court (however unusual).[323] Indeed, in this time period, states exercised considerable control over attorneys, using disbarment for transgression of ethical rules.[324] In Virginia, for example, for those lawyers that committed "professional misconduct"—i.e., the lawyer violated one of several acts detailing the conduct of lawyer—the General Court in Virginia was given the power to suspend or otherwise disbar the attorney.[325] And in South Carolina, statutes prohibited the practicing in court by non-attorneys, threatening potential imposters with severe penalties.[326]

This history sets the stage for thinking about an originalist approach to the right to counsel of choice. As discussed, there are three main buckets of right-to-

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312. Anton-Hermann Chroust, *Legal Profession in America*, 34 NOTRE DAME L. REV. 44, 50-51, 56, 60, 63 (1958).

313. *Id.* at 50-51.

314. *Id.* at 60.

315. *Id.* at 56.

316. Andrews, *supra* note 303, at 1415.

317. Chroust, *supra* note 312, at 49, 60 (discussing how attorneys must not impose excessive fees and how they could be disbarred for doing so); BEVERLY ZWEIBEN, HOW BLACKSTONE LOST THE COLONIES 21 (1990).

318. Chroust, *supra* note 312, at 60.

319. *Id.*

320. *Id.* at 56.

321. *Id.* at 60.

322. Andrews, *supra* note 303, at 1417.

323. *See id.* at 1422-23 (describing courts that required an attorney to argue for the other side in some circumstances).

324. Chroust, *supra* note 312, at 51.

325. *Id.*

326. *Id.* at 56.

counsel-of-choice cases: ethical rule cases, administrative efficiency cases, and forfeiture cases.[327] For ethical rules cases, using history to interpret the scope of the right provides an easy solution. As discussed above, ethical rules existed back in the founding era.[328] And they constrained attorney behavior, subjecting attorneys to disqualification for violation of the rules.[329] Informed by this history, courts can interpret the breadth of the right to counsel of choice with ease: the right never overcame ethical rules and was never intended to do so. Indeed, history is clear that these ethical rules were important for the courts and, even if there existed a right to bring a counsel of choice, that counsel needed to follow the rules.[330]

Next, for administrative efficiency cases, history once again offers a relatively straightforward answer to how to apply the right to counsel of choice. As discussed above, attorneys were subject to control by the courts; they were required to follow the court's orders.[331] And attorneys were prohibited from dilatory tactics that delayed court proceedings.[332] Attorneys that violated these orders or engaged in dilatory tactics were subject to sanction by the court.[333] Finally, there were laws that governed the functioning of the courts and speed of proceedings.[334] Accordingly, this history, at least, would suggest that the right to counsel of choice was not intended to overcome a court's order setting trial dates or ordering attorneys to meet certain deadlines.

Last, as discussed below, historical practice informs the proper way to approach forfeiture cases and leads to a relatively clear conclusion.[335] While there may be some difficulties with an originalist approach for any of these types of cases, this discussion at least anticipates that this originalist approach would be relatively straightforward to apply, without disrupting much of the status quo in right-to-counsel-of-choice law (i.e., the rules will remain basically the same). And this approach will likely ameliorate many of the issues with the balancing discussed throughout this article.

B. CASE STUDY OF AN ORIGINALIST APPROACH FOR THE RIGHT TO COUNSEL OF CHOICE.

In *Luis v. United States*, discussed in detail above, the plurality opinion applied a balancing test to determine that pretrial freeze of untainted assets

327. *See* discussion *supra* Part II.C (dividing lower court cases into three different categories).

328. Andrews, *supra* note 303, at 1415; Chroust, *supra* note 312, at 49, 51, 60.

329. Chroust, *supra* note 312, at 49, 51.

330. *See id.*

331. *See* Andrews, *supra* note 303, at 1422-23 (describing courts that required an attorney to argue for the other side).

332. *Id.* at 1412, 1417; Chroust, *supra* note 312, at 60.

333. Chroust, *supra* note 312, at 60.

334. *See id.* at 50, 59

335. *See* discussion *infra* Part V.B (examining this further).

violated the right to counsel of choice.[336] This opinion triggered two dissents, each critical of the way *Luis* distinguished previous cases.[337] Justice Clarence Thomas, who penned a concurrence, was unique from the others in that he addressed not precedent and its application but originalism.[338]

Thomas began by briefly describing the historical backdrop before the Sixth Amendment was adopted.[339] He described the Sixth Amendment as seeking to "abolish[] the rule prohibiting representation in felony cases . . . ."[340] And stated that the right to counsel of choice was therefore the root meaning of the Sixth Amendment.[341] Next, he began a historical analysis of forfeiture laws. He identified that forfeiture laws in England were a standard punishment for felonies.[342] But not so in America.[343] In fact, the First Congress banned forfeiture laws.[344]

He then connected the right to pay one's attorney of choice for one's defense with the right to choose one's attorney of choice.[345] He explained that the right to do something necessarily includes the right to do other things needed to actually exercise that right.[346] In other words, "Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise."[347] For example, the right to keep and bear arms includes the right to keep and bear bullets for those arms.[348] And "[t]he same goes for the Sixth Amendment and the financial resources required to obtain a lawyer."[349] He stated that the government's ability to remove the right to pay an attorney would "eviscerate the Sixth Amendment's original meaning and purpose."[350]

Justice Thomas next recognized that the history of forfeiture laws supported a tainted/untainted dichotomy.[351] He stated that pretrial freezes were unheard of until recent times, and in the common law, a defendant would only be subjected to forfeiture upon a conviction.[352] "Although the defendant's goods could be appraised and inventoried before trial, he remained free to 'sell any of them for

336. Luis v. United States, 578 U.S. 5, 7 (2016).
337. *Id.* at 35-51 (Kennedy, J., dissenting); *Id.* at 51-53 (Kagan, J., dissenting).
338. *See id.* at 24-35 (Thomas, J., concurring).
339. *Id.* at 25.
340. *Id.*
341. *Id.*
342. *Id.* at 27.
343. *Id.*
344. *Id.* at 28.
345. *Id.* at 26.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 27.
350. *Id.*
351. *Id.* at 28-29.
352. *Id.* at 29.

his own support in prison, or that of his family, or to assist him in preparing for his defence [sic] on the trial.'"[353]

Pretrial freezes of *tainted* funds, however, were permissible.[354] He looked to civil *in rem* forfeiture and Fourth Amendment law, which he contended were consistent with permitting seizure of tainted funds.[355] He acknowledged that some American statutes "did provide for civil forfeiture of untainted substitute property."[356] But he stated that the general rule was to prohibit pretrial freeze of untainted property.[357] Furthermore, Justice Thomas was concerned that if the government had the ability to forfeit funds on the mere expectancy of conviction of the defendant, it could essentially take away the right to counsel of choice by limiting the defendant's ability to pay.[358] And he concluded that pretrial freeze of untainted property, as occurred in this case, violated the constitution: "[T]he Constitution requires the Government to respect the longstanding common-law protection for a defendant's untainted property."[359]

Justice Thomas's opinion shows how an originalist approach would work in practice. He shows that a justice or judge deciding a right-to-counsel-of-choice case can look to history and (normally) easily discern clear answers to questions on the scope of the right. His opinion also shows how the originalist approach will not disrupt the current status quo in this area of the law—in fact, many of the current rules will stand. The only change will be the mitigation of the legitimacy concerns discussed above, that are fostered by an unexplained balancing test.[360]

VI. CONCLUSION

With a growing concern for legitimacy and growing skepticism of balancing tests on the Court, the right-to-counsel-of-choice balancing test will face questions in the future. *Ramos* was an alarm bell.[361] It signaled another step in a direction the Court had been taking for the last two decades. The Court has embarked on a slow but consistent march toward eliminating the criminal procedure balancing rights: first in the Confrontation Clause and now the jury trial right.[362] These changes have been due to the concerns for legitimacy and manipulability of the balancing standards. But this does not mean these tests cannot be saved: both the

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353. *Id.* at 30 (emphasis omitted) (quoting 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 737 (5th ed. 1847)).

354. *Id.*

355. *Id.* ("The civil *in rem* forfeiture tradition tracks the tainted-untainted line. It provides no support for the asset freeze here.").

356. *Id.* at 31.

357. *Id.*

358. *Id.* at 35.

359. *Id.*

360. *See* discussion *supra* Part III (discussing the legitimacy concerns of the balancing test).

361. *See* discussion *supra* Part I (analyzing the *Ramos* Court's decision).

362. *See* discussion *supra* notes 296-97 (discussing how the Court has abandoned its functionalist approach to the Confrontation Clause in favor of a strict rule in *Crawford*); discussion *supra* notes 2-9 (discussing how the Court abandoned a functionalist approach for a formalistic one in the context of the jury right in *Ramos*).

speedy trial and public trial right continue using balancing tests because they have *some* reason or justification for doing so.[363] The right to counsel of choice's balancing test, however, does not seem to have justifications. Many of the potential justifications are strong, but only persuasive in the conflict-of-interest cases. In these cases, there is a separate, strong interest that counterbalances the right to counsel of choice. As such, a necessarily squishier balancing test helps accommodate both rights. In non-conflict-of-interest cases, justifications fall apart, and the balancing is left where it began: unjustified.

So, what should the Court do? This article recommends adopting an originalist approach to the right to counsel of choice. This approach is supported by a rich history. And this approach will offer a way to keep the current status quo—maintaining the same tests and same results—while also mitigating the legitimacy concerns of the balancing test.

363. *See* discussion *supra* notes 196-99 (discussing the balancing test of the speedy trial right used in *Barker* and the interests weighed); discussion *supra* notes 200-03 (discussing the balancing of interests in *Waller*, a public trial right case).