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THE TWO WORST JUSTICES: WHAT MAKES A BAD SUPREME COURT JUDGE?

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Introduction

There have been criticisms of Supreme Court Justices of the remote past; many denunciations, in fact. Just as an example, Chief Justice Roger Taney, the author of the *Dred Scott* decision, came to be hated by slavery abolitionists.[1] The reason may have been the holding: that although Scott was a free man, he was still enslaved, an idea repugnant today and strongly disliked at the time.[2] Or it may have been the reasoning, which was to the effect that as a former slave, Scott was mere "property." Or it might have been the impact of the decision on the Civil War.[3] And commentators have added other candidates for worst justice of all time, including Justices McReynolds, Moore, and Chase.[4]

But this article is about two modern justices. The two worst, in this author's judgment. This judgment, of course, demands a foundation in principles that are independent of the outcomes of the decisions the justices made. The criteria this article employs are four: how well the reasoning stands up to criticism, how well the justices have been able to recognize and deal respectfully with opposing views, whether they have avoided egotism and idiosyncratic preferences, and how the decisions that are the aftermath of the opinions have worked out.[5]

To end the suspense, let me disclose at this point that the two candidates here are Justices Blackmun and Scalia. This conclusion may surprise many people, especially those who are accustomed to seeing Justice Scalia as brilliant.[6] The ranking, however, is assigned independently of the outcomes of the justices' opinions.

Part I of this article covers Justice Blackmun. Subpart A concerns itself with what has been called the justice's "other wrong decision"[7]: his profoundly misdirected baseball-antitrust opinion. Then, subpart B considers his abortion opinions. A third subpart, C, concerns a decision that has not elicited the controversy it should have,

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[1] https://www.history.com/topics/black-history/dred-scott-case.

[2] *Id.*

[3] *Id.*

[4] *See* https://www.findlaw.com/legalblogs/supreme-court/who-are-the-worst-supreme-court-justices-of-all-time.

[5] *See, infra, e.g.,* Pt. I(B)(9) of this article (applying these criteria to Justice Blackmun's opinion in *Roe v. Wade).*

[6] *See* Meghan J. Ryan, *Justice Scalia's Bottom-Up Approach to Shaping the Law,* 25 Wm. & Mary Bill of Rts. J. 297, 313-14 (2016).

[7] *See infra Pt.* I of this article (quoting source supporting this assertion).

his child-neglect-due-process decision, which refuses to consider whether a child has any interest in termination of parental rights after being neglected.

Part II is about Justice Scalia. Subpart A covers the fallout from his Confrontation Clause opinions, which begin with weak reasoning and which have tied the Court in knots. Subpart B evaluates these opinions and their aftermath. Subpart C concerns Justice Scalia's opposition to the Court's decision upholding the Sentencing Commission, in which his rhetoric was inappropriate.

I. Justice Blackmun: Why He is One of the Two Worst

Justice Blackmun's opinions demonstrate a tendency toward egocentrism. Their reasoning is unconvincing and has evoked criticism on this ground. The aftermath has included quagmires. He did not demonstrate respect for his colleagues' different judgments, and in fact he insulted them. A look at three sets of opinions will illustrate the basis for these conclusions.

A. Justice Blackmun's "Other Wrong Decision": Baseball and Antitrust

(1) Baseball's Beginning as a Cartel. Major league baseball has been and still is a cartel, as much so as the Organization of the Petroleum Exporting Countries (OPEC).[8] It was set up as the National League of Professional Baseball Clubs by owners who jealously excluded anyone who tried to compete with them, who were able to offer take-it-or-leave-it contracts to their players, and who decided which cities would participate in the American pastime.[9]

Not that other entrepreneurs didn't try to join in. Monopoly profits drew challenges. In 1881, there was the American Association, in 1884, the Union Association, in 1901 the Players League, all of which failed.[10] In 1901, the American League was born, and it survived to become a part of the cartel.[11]

In 1914 a new interloper came along. The Federal League set up teams in eight cities. The owners poached major league stars and even forced the Baltimore Orioles to trade that team's most famous player, Babe Ruth, to the Boston Red Sox.[12] The bigger two leagues eventually paid the owners to desist from their challenge. But the

[8] *See* Paul Moreno, *Justice Blackmun's Other Wrong Supreme Court Decision,* Wall St. J. May 28, 2022, at A13 (hereinafter cited as Moreno). Professor Moreno is a professor of history but writes felicitously about the law.
[9] *See Id.*
[10] *See Id.*
[11] *See Id.*
[12] *See Id.*

Baltimore Terrapins refused to go along. Their owners sued both the National League and the Federal League. They won in the trial court but lost in the court of appeals, and the Supreme Court then stepped in.[13]

(2) Rounds One and Two in the Supreme Court. The case reached the Supreme Court in 1922 as *Federal Baseball Club v. National League of Professional Baseball Clubs*.[14] The Sherman Act had become law 32 years earlier and had been tweaked by the Clayton Act eight years before.[15] Justice Oliver Wendell Holmes wrote that baseball was not interstate commerce. Yes, the teams moved between cities and were transported across lines, but they played always in-state, in fixed stadiums. Baseball was not "commerce among the states," and it did not qualify for coverage under the antitrust laws or fit within Congress's power to regulate.[16]

This approach to interstate commerce was consistent with the Court's decisions at the time.[17] Then came the major changes of the 1930's. The Court responded to the New Deal legislation of President Roosevelt with decisions like *Wickard v. Filburn,*[18] which expanded the Commerce Clause to local farming operations, on the theory that they affected interstate commerce even if the farms themselves were stationary. But somehow, major league baseball remained untouched and remained a cartel.

The issue arose again: round two in the Supreme Court. In *Toolson v. New York Yankees,*[19] the Court again held that professional baseball was exempt from the antitrust laws. The holding was based on *Federal Baseball,* largely as a matter of *stare decisis.*

(3) Enter Curt Flood. Much later, the St. Louis Cardinals traded their signature outfielder, Curt Flood, to the Philadelphia Phillies.[20] Flood vehemently objected and, with the civil rights era proceeding, argued that he was subject to a kind of chattel servitude. And he sued Baseball Commissioner Bowie Kuhn under the antitrust laws.[21]

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[13] *See Id.*
[14] 259 U.S. 200 (1922).
[15] *See* Moreno.
[16] Federal Baseball, 259 U.S. at 208-09.
[17] *See* Moreno.
[18] 317 U.S. 111 (1942).
[19] 346 U.S. 356 (1953).
[20] *See* Moreno.
[21] *See Id.*

(4) Round Three in the Supreme Court, Featuring Justice Blackmun. Flood lost in the lower courts and, with Justice Blackmun writing the opinion, lost again in the Supreme Court. The opinion in *Flood v. Kuhn*[22] consisted mostly of a dilatory misdirection that obscured the reasoning and an idiosyncratic approach to the subject of the case.[23] These two factors, the quality of the reasoning and an effort toward neutrality rather than egocentrism, are among the criteria that this article employs for evaluating the two worst justices.

The first section of the Blackmun opinion is a sentimental, excessive, and irrelevant kind of love song to professional baseball, beginning with its headline:[24]

> **The Game**
>
> It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

Justice Blackmun followed up with an account of the early Cincinnati Red Stockings and the day when the "National Association of Professional Baseball Players was founded and the professional league was born."[25]

The next paragraph told us, "The ensuing colorful days are well known," and then continued the justice's gratuitous praise of baseball:[26]

> The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve 'clause'; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or

[22] 407 U.S. 258 (1972).
[23] *Id.* at Pt. I.
[24] *Id.*
[25] *Id.*
[26] *Id.*

> 'junior circuit,' in 1901, rising from the minor Western Association; the first World Series in 1903 . . . .

This sentence carried on, with semicolon after semicolon (eleven in all), mentioning such historic events as a "disruption" in 1904, the "troublesome" 1919 series, and the installation of the major league draft.[27]

None of that information was necessary to the resolution of the controversy before the Court. Neither was the next paragraph, which topped the eleven semicolons of the previous. "Then there are the many names," wrote Justice Blackmun, ". . . that have sparked the diamond and its environs and that have provided tinder for recaptured thrills":[28]

> Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner . . . .

and many more names, familiar and not so familiar, from Dazzy Vance to Dizzy Dean. "The list seems endless."[29]

The author of this article has played amateur baseball for many years in leagues in my city, well into my seventies. During most of this time, I worked out with my university's team, the Cougars, and I made many pilgrimages to Dodgertown in Vero Beach, Florida, to play baseball and talk to some of the greats—Carl Erskine, Preacher Roe, and Duke Snyder. I would enjoy Justice Blackmun's hymn to baseball in another setting. But it seems out of place in a Supreme Court opinion, inserted principally, it appears, to direct focus away from Justice Blackmun's analysis of the case.

The second part of the opinion is labeled "The Petitioner" and introduces Curt Flood.[30] But this part, like the first part, has little to do with the case. It gives a long description of Flood's accomplishments and troubles. He batted .335 in his best year and hit extremely well over his entire career. He was excellent as an outfielder, too, and won seven Golden Glove Awards.[31] He was told of his having been traded after the deal was complete. He sat out that year, refusing to play for

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at Pt. II.
[31] *Id.*

the Phillies, spent a brief time with the Washington Senators, and had not played since at the time of the Supreme Court's opinion.[32] With asides involving other statistics, the opinion moves on.

Then, after describing Flood's complaint, the opinion finally moves to "The Present Litigation."[33] But it does not begin with the present litigation; instead, Justice Blackmun lards on more praise of professional baseball by quoting passages from the trial court's opinion denying a preliminary injunction:[34]

> Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage [Justice Blackmun had called it the national pastime earlier in his opinion but decided to repeat the phrase]. Major league professional baseball . . . provides a special source of inspiration . . . .
>
> . . . [B]aseball is everybody's business. . . . [I]t would be unfortunate indeed if a fine sport and profession . . . were to suffer in the least because of undue concentration . . . on commercial and profit considerations. The game is on higher ground; it behooves everyone to keep it there.

This promotion of professional baseball to a "higher ground" is apparently the principal part of the trial judge's legal reasoning. With this background, Justice Blackmun observes that the preliminary in junction has been denied.[35]

At the trial on the merits, the district judge denied the injunction. He held that *Federal Baseball* and *Toolson* were controlling. On appeal, the Second Circuit felt "compelled to affirm."[36]

In the next part, Justice Blackmun began by quoting extensively from the holding in *Federal Baseball,* particularly reasoning to the effect that professional baseball was not interstate commerce.[37] It then quoted from *Toolson,* which held that[38]

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[32] *Id.*
[33] *Id.* Pt. III.
[34] *Id., quoting* 309 F. Supp. 793, 979 (S.D.N.Y. 1970).
[35] 407 U.S. at Pt. III.
[36] 443 F.2d 264, 265 (1971).
[37] 407 U.S. at Pt. V.
[38] *Id.*

> Congress has had the ruling under consideration but has not seen fit to bring such business under these [antitrust] laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

"Without re-examination of the underlying issues," said the Court, "the judgments below are affirmed," on the basis of *Federal Baseball.* The Court added that the Petitioner "had argued flatly that *Federal Baseball* 'is wrong and must be overruled.'"[39]

The Court proceeded to distinguish *United States v. Shubert,*[40] which was an antitrust action against defendants engaged in the production of legitimate theatrical attractions. The District Court had dismissed the complaint on the authority of *Federal Baseball* and *Toolson.* [41] The Supreme Court reversed. It held that *Toolson* had been based upon a "unique combination of circumstances," those being principally reliance for over thirty years on *Federal Baseball* without Congressional intervention.[42] Next, the Court went on to distinguish professional boxing,[43] football,[44] and basketball,[45] in which the Court had applied the antitrust laws, each on similar grounds.[46]

Justice Blackmun then finished the plurality's antitrust reasoning by flatly saying, among other observations, that "[p]rofessional baseball is a business and it is engaged in interstate commerce." But "baseball is . . . an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball."[47]

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[39] *Id.*
[40] 347 U.S. 950 (1954).
[41] 120 F. Supp. 15 (1953).
[42] 407 U.S. at Pt. IV.
[43] United States v. International Boxing Club, 348 U.S. 236 (1955).
[44] Radovich v. National Football League, 352 U.S. 445 (1957).
[45] Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971)(Douglas, J., as circuit justice).
[46] 407 U.S. at Pt. IV.
[47] *Id.*

(5) An Evaluation of Justice Blackmun's Performance in *Flood v. Kuhn*. Two justices, Justice White and Chief Justice Burger, concurred separately in the judgment or opinion. Both declined to concur in part I of the opinion, which contained Justice Blackmun's most fulsome praise for professional baseball.[48] The Chief Justice wrote that he had "grave reservations" about the correctness of *Toolson* but had concluded that exempting baseball from the antitrust laws was the "least undesirable" disposition.[49] Justice Powell took no part in the decision.[50] Justices Brennan, Douglas, and Marshall dissented. Justice Douglas called *Federal Baseball* "a derelict in the stream of the law,"[51] wrote that although he had concurred in *Toolson* he had "lived to regret it,"[52] and added, "The unbroken silence of Congress should not prevent us from correcting our own mistakes."[53] "Only a romantic view" of the subject, Justice Douglas said, had enabled Justice Blackmun to reach the holding he had.[54]

In such cases as *Payne v. Tennessee,*[55] the Court has held that *"[s]tare decisis* is not an inexorable command." In *Payne,* the Court identified criteria from previous cases in which departure from *stare decisis* has been justified. The Court pointed out that overruling of past holdings is most to be recommended when prior decisions have been (1) "unworkable," (2) "badly reasoned," (3) not involved in "contract or property rights" cases in which "reliance interests" are important, (4) decided by the "narrowest of margins" (5) over "spirited dissents," (6) having been "questioned" in later decisions by members of the Court, (7) having "defied consistent application" by lower courts, and (8) having had their texts "interpreted differently" by the members of the Court."[56]

In *Flood v. Kuhn,* Justice Blackmun did not systematically consider whether a departure from *stare decisis* was justified. On the contrary, in true result

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[48] *Id.* at 285-86.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 286.
[52] *Id.* at n.1.
[53] *Id.*
[54] *Id* at 288.
[55] 501 U.S. 808, 828 (1991).
[56] *Id.* at 828-30.

orientation, he mentioned principally those criteria that justified his decision.[57] He explained away the "aberrational" character of baseball's status by saying that it had been recognized in prior cases over half a century,[58] although this characterization would seem to mean only that departure from *stare decisis* should be considered. The claim was not one of "property or contract," but Justice Blackmun emphasized "confusion and retroactivity problems" that would result from overruling *Toolson.* Justice Marshall responded by pointing out that if there were "reliance interests that club owners may assert, they can be satisfied by making our decision prospective only."

Justice Blackmun did not consider whether *Federal Baseball* or *Toolson* had been "unworkable" or "badly reasoned," except by characterizing them as "aberrational." He did not recognize that the claim was not for "property or contract," but said that there would be "confusion and retroactivity problems" In departing from *stare decisis.*[59] These problems would be lesser than those in many cases*,* and Justice Marshall, in dissent, pointed out that any "reliance" interests could be avoided by making the decision prospective only.[60]

Furthermore, Justice Blackmun did not weigh issues such as "spirited dissents," including Justice Douglas's later statement about *Toolson,* in dissent, to the effect that he had lived to regret joining in it.[61] He did not consider the Chief justice's grave reservations in the light of later consideration of the decision.[62] He did not consider whether the decision had "defied consistent application" in the lower courts, which had followed *Toolson* in cases about other professional sports, only to be reversed by the Supreme Court.[63] Nor did he consider whether different texts had been "interpreted differently" by members of the Court.[64]

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[57] Flood, 407 U.S. at 282-83.
[58] *Id.*
[59] *Id.* at 283.
[60] *Id.* at 293.
[61] *See supra* note 52 and accompanying text.
[62] *Id.* at 283.
[63] *See supra* notes 43-45.
[64] *See supra* note 56.

There have been, in fact, cases in which the Court has overruled prior decisions, and even long lines of prior decisions. And it has done so without asking whether Congress has seen fit to correct the Court's mistakes. Perhaps the most famous such example is *Brown v. Board of Education,*[65] the school desegregation case, which overruled *Plessy v. Ferguson,*[66] the separate-but-equal case, and its progeny.

Justice Blackmun once said that his praise of baseball in *Flood v. Kuhn* was a "sentimental journey" for him.[67] There could be no finer showing that, as in other cases, he had focused egocentrically on Curt Flood's case rather than using neutral reasoning.

In summary, with respect to the four criteria listed in the introduction to this article, Justice Blackmun performed poorly. The main issue was whether *Federal Baseball* and Toolson should be overruled, and his opinion did not analyze criteria for overruling a prior decision. His approach to the case did not attempt to avoid egocentrism. His discussion of opposing views was nonexistent. The aftermath is that professional baseball remains a cartel, and the decision is contrary to decisions in other professional sports.

B. Roe v. Wade: Justice Blackmun's Biggest Opinion

There probably has not been an opinion in the modern era that has attracted so much debate as *Roe v. Wade.*[68] The majority opinion is by Justice Blackmun. Characteristically, the opinion's aftermath reflects the justice's egocentrism.[69]

(1) Some Background: *Griswold v. Connecticut*. To evaluate *Roe,* one must backtrack to a previous case, *Griswold v. Connecticut.*[70] The case concerned a state-law prohibition upon certain methods of birth control. Justice Douglas, in an extraordinary opinion, skipped through the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution and gave holdings of cases decided under them.

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[65] 349 U.S. 294 (1955).
[66] 163 U.S. 537 (1896).
[67] *See* Moreno.
[68] 410 U.S. 113 (1970).
[69] *See infra* Pt. I(B)(6) of this article.
[70] 381 U.S. 479 (1965).

Then he amalgamated, from the Amendments and cases, a free-floating right of privacy:[71]

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> We have had many controversies over these penumbral rights of "privacy and repose." [Here were citations to six decisions of the Court.] These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

This penumbral reasoning is a hashed metaphor. A penumbra is a partial shadow; specifically, it is "the partially shaded outer region of the shadow cast by an opaque object."[72] The word is commonly used in astronomy to designate the outer shadow cast in an eclipse.[73] It is difficult to envision a penumbra, a shadow, casting "emanations" that could "form" anything.

More importantly, the reasoning is sophistry. A similar technique could make the Constitution say almost anything. In fact, Justice Black said almost as much in dissent:[74]

> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and

[71] *Id.* at 484.
[72] *See* Google.com/search/penumbra+definition.
[73] *See Id.*
[74] *Id.* at 509.

> more or less restricted in meaning. 'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning . . . .

Although the Court has relied upon the *Griswold* holding, it has not used the penumbra reasoning ever again as in that opinion.[75]

(2) The *Roe* Opinion. In *Roe,* Justice Blackmun commendably avoided penumbral reasoning. He based the decision on the Fourteenth Amendment (and apparently on the Due Process Clause, although he did not identify that Clause explicitly):[76]

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

The justice added that it was only "fundamental" liberties that were thus protected.[77]

But there was nothing in the Constitutional text, or in prior decisions, that marked the interest in abortion as fundamental. Therefore, Justice Blackmun literally made up a special right. He wrote, "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."[78]

(3) Justice Blackmun's "Judicial Alchemy": Creation of a Constitutional Right by Relying on the Claimant's Interest. Then the justice engaged in what can only be called constitutional alchemy,[79] transforming the otherwise plain, leaden interest in terminating a pregnancy into the gold of a high-ranking right:[80]

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a

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[75] Westlaw search of the term Griswold /s penumbra, June 6, 2023.
[76] Roe, 410 U.S. at 153.
[77] *Id.* at 152.
[78] *Id.* at 153.
[79] *See* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy,* 19 Harv. J. L. & Pub. Pol'y 795 (1996)(analyzing *Roe* in this way).
[80] Roe, 410 U.S. at 153.

> child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

This reasoning was all there was to it. Justice Blackmun turned to the interests of the state in regulating, held that the abortion right was not absolute, and announced the decision of the Court: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[81]

This kind of reasoning, like that in *Griswold,* is manipulable. One need only imagine that the opinion were to be written, instead, by a dedicated opponent of abortion. I have elsewhere supplied a passage that could have been written by a fictional justice with bias opposite that of Justice Blackmun:[82]

> *The advantage* that the State would bring upon the pregnant woman *by preventing this mistake* is apparent. Specific and *direct improvements medically diagnosable* even in early pregnancy may be involved. Maternity, or additional offspring, *may bring to the woman an unexpectedly joyous future. Psychological advantages* may be imminent. Mental and physical *health may be improved by childcare.* There is also the *happiness*, for all concerned*, associated with the previously unexpected but now wanted child,* and there is the *delight of bringing a child into a family that thought it was unable*, psychologically and otherwise, to care for it, but that *now finds it to be life's greatest joy*. In other cases, as in this one, *the continuing public support for a woman* who has *avoided the error of abortion* may be involved. All these are factors that *justify the State's prohibition* here.

This fictional passage, with the author's italics, is perfectly parallel to Justice Blackmun's alchemy in the real Roe v. Wade. And arguably, it would be at least as persuasive to its intended audience of hypothetical, pro-life Supreme Court justices.

(4) Is *Roe* a "Very Bad" Decision Because It Is "Not Constitutional Law?"
In *Juliana v. United States,*[83] a group of fifteen plaintiffs in Montana who wanted to protect the environment from climate change sought "an order requiring the government to develop a plan" to "phase out fossil fuel emissions and draw down

[81] *Id.* at 154.
[82] David Crump, *supra* note 72, at 856 (emphasis added).
[83] 947 F.3d 1159 (2020).

excess atmospheric CO2."[84] They based their claim upon an unenumerated right allegedly protected by the Due Process Clause, just as Justice Blackmun had done.[85] The Court reasoned:[86]

> . . . [F]ederal courts have no commission to allocate political power and influence without standards to guide in the exercise of such authority. Absent those standards, federal judicial power could be "unlimited in scope and duration," and would inject the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role. Because it is axiomatic that 'the Constitution contemplates that democracy is the appropriate process for change, some questions—even those existential in nature—are the province of the political branches. . . .

One major newspaper reported on the case by saying, "Montana Kids Claim a Right Not to Worry about the Weather,"[87] because eleven-year-old Mika K. was described in the complaint as being "anxious" about the concern that "as the climate crisis worsens, he will lose his family home to climate disruption."[88] Such is the stuff of some constitutional rights claims after *Roe.*

And the story did not end there. Eventually, the plaintiffs were allowed to amend. They sued, now, under state law. Their claim now was based on the state constitution, which guaranteed the right to "a clean and healthful environment."[89] The state's defense was that no existing laws required action on climate change, and there was nothing for the trial court to interpret. Further, the court had no way to fashion relief.[90] There was a wave of similar suits in other states,[91] and this is the continuing nature of constitutional interpretation.

Professor Bobbitt has identified six modalities of constitutional argument,[92] and *Roe,* like *Juliana,* contains virtually none of them. The *Roe* opinion does not cite any constitutional text by which the claimed right to terminate a pregnancy is marked as special. The opinion does not refer to any constitutional history supporting such a right. The opinion does not use doctrinal support, or structural argument, or prudential (policy) support (other than the arguable benefit to individuals claiming

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[84] *Id.* at 1165.
[85] *Id.*at 1165-66.
[86] *Id.*at 1173.
[87] Wall St. J., May 20, 2023, at A11.
[88] *See Id.*
[89] *See* Mariah Timms, *Youths Sue States to Compel Action on Climate Change,* Wall St. J., June 12, 2023, at A3.
[90] *Id.*
[91] *Id.*
[92] Phillip Bobbott, Constitutional Interpretation 12-13 (1991).

the right), or ethical support.[93] The reasoning in *Roe* is simply not attached to the Constitution.

Dean Ely may have said it best:[94]

> *[Roe v. Wade]* is . . . a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be. . . .
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> . . . The point that often gets lost in the commentary, and obviously got lost in *Roe,* is that . . . before the Court can get to the "balancing" stage, before it can worry about the next case and the case after that . . . it is under an obligation to trace its premises to the charter from which it derives its authority. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it. . . .

(5) Did Justice Blackmun "Write a Statute" in *Roe?* Beyond its judicial alchemy and encroachment into the legislative process, *Roe* has been questioned on the ground that Justice Blackmun wrote a statute.[95] The decision set up a precise trimester structure.[96] This apparatus was intended to solve the problem that the state had at least some interest in regulating abortion. Therefore, Justice Blackmun said that the right to abortion "is not absolute."[97] The trimester system dealt with this problem by declaring that the right of a woman to terminate a pregnancy was generally paramount in the first trimester, but the state had greater interest during the second trimester, and the state had its strongest interest in regulating to preserve potential life in the third trimester.[98]

The precision of this structure resembled that of a statute passed by a legislature. The statute thus passed by the Court, in effect, created an agency within the lower federal courts to enforce the abortion right. Usually, Supreme Court opinions deal with issues in more general ways. Even when providing a particular duration of time within which a state could act in a certain way, such as

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[93] These are Professor Bobbitt's "six modalities." *See Id.* at 12-13.
[94] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L. J. 920, 947-49 (1973).
[95] *See* David Crump et al., Cases and Materials on Constitutional Law (2019).
[96] Roe, 410 U.S. at 162-64.
[97] *Id.*
[98] *Id.*

by denying a right to a jury in petty offense,[99] the Court has avoided such detailed treatment of its holdings.

And the structure thus created by *Roe* soon began to create difficulties. In *Akron v. Akron Center for Reproductive Health, Inc.,*[100] Justice O'Connor wrote, "The *Roe* framework, then, is on a collision course with itself." The *Roe* trimester system had been based on viability of the unborn child/fetus, and viability was changing because medical science was constantly saving babies earlier than the trimester system had recognized. "[D]ifferent technological improvements will move *backward* the point of viability,"[101] and "fetal viability in the first trimester may be possible in the not too distant future."[102] Hence the collision course built within *Roe.* Medical science challenged the trimester structure.

A few years later, the Court overruled the trimester system but kept the central holding of *Roe.* In *Planned Parenthood v. Casey,*[103] the Court preserved the principle that a woman retained a right to decide whether to terminate a pregnancy but substituted a prohibition on governments' placing an "undue burden" on the decision of a woman seeking an abortion.[104]

This holding looked more like judicial reasoning than had the trimester concept in *Roe.* That is, it looked that way—until one read the eye-opening sentence that the plurality had used to elaborate: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[105] Well, yes, because the First Amendment protects mental processes—but how this off-point passage about internal thought supported a fundamental constitutional right to take action, including action to terminate a pregnancy, remained unclear.

And, of course, the vagueness of the *Planned Parenthood* holding meant that the lower courts would have to grapple with various issues left unresolved. When and how a judicial bypass of parental rights could be conducted,[106] what kinds of

[99] *See* Duncan v. Louisiana, 391 U.S. 145, 153 (1968)(defining petty offenses as those authorizing only six months' confinement, for which a jury trial is not constitutionally required).
[100] 462 U.S. 416, 458 (1983).
[101] *Id.* at 456.
[102] *Id.* at 457.
[103] 505 U.S. 833 (1992).
[104] *Id.* at 874.
[105] *Id.* at 851.
[106] *See* Hodgson v. Minnesota, 497 U.S. 417 (1990)(holding state's bypass constitutional).

abortions could be prohibited,[107] and whether male parents-to-be had any rights,[108] needed adjudication. But such, probably, is always the case when the Supreme Court recognizes new rights.

(6) Justice Blackmun's Reaction to These Abortion Decisions. Justice Blackmun concurred in part in the *Planned Parenthood* decision. And he sounded as though he saw the dissenters as enemies rather than colleagues, and the abortion right as a nearly religious objective. ". . . I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light," he wrote.[109] And the three justices who had written to preserve the abortion right were engaged in "an act of personal courage and constitutional principle."[110] In actuality, it was an act of constitutional principle only because Justice Blackmun so described it, while he attributed no such motive to the dissenters, who were entitled to the belief that they were acting with constitutional principle. And alleging that the decision was an act of courage was dubious because a majority of the nation's citizens supported some kind of abortion right,[111] and so did a majority of Supreme Court justices.[112]

In *Planned Parenthood*, in fact, Justice Blackmun acted as though the abortion right rested on his sole shoulders:[113]

> In one sense, the Court's approach is worlds apart from that of [justices opposing the *Roe* holding]. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.
>
> I am 83 years old. I cannot remain on this Court forever . . . .

Justice Blackmun also made remarks insulting his colleagues in *Webster v. Reproductive Health Services*.[114] The Court there held that certain kinds of restrictions on abortion were constitutional. Justice Blackmun wrote, "Never in my memory has a plurality announced a judgment of this Court that so foments

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[107] *See* Gonzales v. Carhart, 550 U.S. 124 (2007)(upholding prohibition on so-called partial-birth abortions).
[108] *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976)(consenting father has right to parentage of child surviving abortion).
[109] Planned Parenthood, 505 U.S. at 923.
[110] *Id.*
[111] *See* https://news.gallup.com/poll/1576/abortion.aspx (last visited June12, 2023)(showing public attitudes 1970's-2022).
[112] In *Planned Parenthood,* the majority supported the basic right to abortion.
[113] *Id.* at 943.
[114] 492 U.S. 490 (1989).

disregard for the law."[115] Moreover, he said, "Nor in my memory has a plurality gone about its business in such a deceptive fashion.[116] He even suggested that the plurality had invited charges of "cowardice."[117] His conclusion was dramatic: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[118]

(7) Justice Blackmun's Personal Reasons for the holding in *Roe.* Justice Blackmun's background gave him personal reasons for the holding in *Roe*. He had spent his "happiest decade" in practice while representing a major hospital and its physicians. One commentator puts it this way:[119]

> Motivated by his initial passion for medicine, Blackmun accepted a position as resident counsel for Mayo Clinic. His time at the clinic, which he described as the happiest decade of his life, earned him the attention of President Dwight D. Eisenhower to replace Sanborn's seat on the U.S. Court of Appeals for the Eighth Circuit in 1959. Blackmun established himself as a conservative on the court. The majority of his opinions centered on taxation; however, he also wrote on the treatment of prisoners and discrimination. Many of his opinions were on the edge of evolving constitutional law. On April 14, 1970, Blackmun was nominated to the Supreme Court by President Nixon. His nomination was approved unanimously.

But Justice Blackmun changed sharply during his time on the Court. One can imagine how his representation of the Mayo Clinic must have influenced his inclination toward a woman's right to a terminate a pregnancy:[120]

> As Blackmun gravitated towards the left, he focused on the pragmatic aspects of the case more than the theoretical. . . . Blackmun was most concerned with the person affected by the decision, urging the Court to stay grounded. Blackmun's growing determinant nature is illustrated in his opinion in *Roe v. Wade*. Blackmun devoted a great deal of time in developing his opinion, drawing from his experience at the Mayo Clinic. Blackmun led the Court in the decision to rule in favor of abortion,

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[115] *Id.* at 538.
[116] *Id.*
[117] *Id.* at 559-60.
[118] *Id.* at 560.
[119] https://www.oyez.org/justices/harry_a_blackmun.
[120] *Id.*

> authoring an opinion that was both controversial and unexpected from the former conservative. . . .

One can readily see that in *Roe,* Justice Blackmun's viewpoint centered upon "the person[s] affected by the decision": physicians and their women patients. And it is not a much further step to conclude that his decade as a lawyer for the Mayo Clinic readied him for "le[ading] the Court" toward a right to abortion. One can only imagine, however, how the *Roe* opinion would be different if it had been written instead by a former attorney for a major Christian church organization and if that hypothetical justice had allowed himself to focus on "the pragmatic rather than the theoretical."

(8) The Overruling of *Roe.* The Supreme Court ultimately overruled *Roe* in 2022 with its decision in *Dobbs v. Jackson Women's Health Organization.*[121] Mississippi's Gestational Age Act prohibited abortions after 15 weeks' gestation except in medical emergencies or in cases of severe fetal abnormality.[122] The Court noted that *Planned Parenthood* had upheld *Roe* as a matter of *stare decisis.*[123] A proper application of *stare decisis*, however, required an assessment of the strength of the grounds on which *Roe* was based. The Court therefore turned to the question that the *Casey* plurality did not consider: whether a right to abortion was a fundamental liberty.[124]

In this inquiry, the Court began with the standards used in the Court's cases to determine whether the Fourteenth Amendment's reference to liberty protected a particular right. *Planned Parenthood* had followed *Roe* in grounding the right in the Due Process clause. But no part of the Constitution expressly marked the alleged right as special, it was not subject to heightened scrutiny under the Court's precedents, and therefore, it was subject to the same standard of review as other health and safety regulations.[125] The Court then turned to another indicator of a fundamental right: the degree to which it was "deeply rooted" in the nation's history and tradition. Here, there was a problem in *Roe.* As the Court put it, *"Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight."[126] The

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[121] 142 S. Ct. 2228 (2022).
[122] *Id.* at 2244-46.
[123] *Id.*
[124] *Id.* at 2245-46.
[125] *Id.*
[126] *Id.* at 2249.

Court traced this history and found that until shortly before *Roe,* there had been no protection of the claimed right, and in fact abortion had generally been a crime.[127]

Instead of seriously urging that the claimed right was deeply rooted, proponents argued that it was part of a broad right to privacy. This privacy right, they said, included the freedom to make "intimate and personal choices" that were central to an individual's "dignity and autonomy."[128] But the Court responded that the concept of "ordered liberty" set boundaries on competing interests, and the people of different states, through their elected representatives, might decide to set the balance differently.[129]

Finally, the Court considered whether the claimed abortion right was part of a broader entrenched right supported by other precedent. Attempts to support abortion by reference to a right to define one's "concept of existence" proved too much.[130] It could create fundamental rights to illicit drug use, prostitution, or the like. Besides, *Roe* and *Planned Parenthood* had recognized a countervailing interest that distinguished other cases that might support the right: the state's interest in protecting potential life.[131]

Then, the Court revisited whether *stare decisis* required continued adherence to *Roe.* This principle protected several important interests: reliance interests, restraint upon judicial hubris, and "the actual and perceived integrity of the judicial process."[132] But *stare decisis* "is not an inexorable command," and it was weakest in constitutional cases[133] (because of the difficulty of amending the Constitution). The Court therefore turned to recognized factors that supported the overruling of a series of precedents.

Five factors stood out for such an overruling. First, the nature of the Court's error. *Roe* was egregiously wrong and on a collision course with the Constitution from the beginning.[134] Second, the quality of the reasoning. *Roe* did not rest upon any constitutional text or deep roots in history and tradition.[135] Third, workability, or whether the decision could be applied in a consistent and predictable manner.

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[127] *Id.* at 2249-56.
[128] *Id.* at 2258.
[129] *Id.* at 2256-58.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 2264, *citing* Payne v. Tennessee, 501 U.S. 808, 807 (1991).
[133] Dobbs, 142 S. Ct. at 2264.
[134] *Id.* at 2264-66.
[135] *Id.* at 2265-72.

Planned Parenthood had scored poorly on this scale; it had created a long list of Circuit conflicts.[136] Fourth, effect on other areas of the law. *Roe* and *Planned Parenthood* had led to the distortion of many unrelated legal doctrines.[137] Fifth and finally, reliance interests, such as those involved in contract or property decisions. Overruling *Roe* and *Planned Parenthood* would not have a harmful effect on interests of those kinds.[138]

This reasoning led to the conclusion that the proper standard for resolving a constitutional challenge to a regulation of abortion was rational basis review.[139] The Mississippi legislature had articulated its goal: "protecting the life of the unborn."[140] This legitimate interest formed a rational basis for the Act in question. It followed that the constitutional challenge to Mississippi's Gestational Age Act must fail.[141]

(9) An Evaluation of Justice Blackmun's Performance in the Abortion Decisions. The *Roe* opinion itself has been the subject of pointed criticism for the weakness of its reasoning, even from commentators who favored its conclusion. The conversion of the interests of those seeking the right was simply judicial alchemy. There was, as *Dobbs* pointed out, no showing that the right was marked by any content in the Constitution; it was not deeply rooted in our nation's history or tradition; and the broad right to define one's existence that the proponents argued was potentially unlimited. The swing paragraph that carried the weight of the decision could have been completely changed in meaning by the plausible substitution of a few words by an opponent.

Moreover, Justice Blackmun's commentary on his colleagues' different conclusions was inappropriate. He treated the abortion right, his creation, as if it were a quasi-religious object, essential to preserve, exactly as he had described it in *Roe.* And he was led to criticize disagreeing justices in derogatory personal terms, going so far as to accuse them of "cowardice," when they were ostensibly as sincere as he. His had become a jurisprudence not of reason but of personal pique.

The *Dobbs* decision, regardless of one's perception of its outcome, was much more principled in its overruling of *Roe v. Wade.* It showed how Justice Blackmun

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[136] *Id.* at 2275.
[137] *Id.* at 2275-76.
[138] *Id.* 2276-78.
[139] *Id.* at 2283-84.
[140] *Id.*
[141] *Id.*

had failed to ground his reasoning in bases recognized by longstanding precedent. It considered recognized grounds for overruling an earlier decision and applied them to the facts. The decision in *Dobbs* demonstrated the weakness of Justice Blackmun's reasoning in *Roe* as well as such an opinion can.

C. Justice Blackmun's Child Neglect Opinion: Santosky v. Kramer

Santosky v. Kramer[142] concerned New York laws that provided for the termination of parental rights upon proof of "permanent neglect" by a "fair preponderance of the evidence."[143] This standard would have been a frightening prospect for a seriously neglected child. It meant that the child might eventually be returned to parents accused of permanent neglect even if there was proof by roughly fifty (50 %) percent of the evidence that the permanent neglect was real. The child at best would be left in limbo, incapable of being adopted. In other words, the child could face a 0.50 probability that his or her future caregivers would be the same ones who had neglected him or her or left without parents, in lengthy foster care. But as is well known, this burden of proof was traditional for most issues in civil trials, and it was therefore adopted in New York.

Justice Blackmun's opinion for the Court, however, held that the preponderance standard did not tilt the outcome heavily enough away from the child's interests and toward the parents' interests. His reasoning, in fact, did not consider the child's interest at all. "[D]ue process," he wrote, "requires that the State support its allegations by at least clear and convincing evidence."[144] This standard, clear and convincing evidence, does not allow itself easily to be translated into percentages or probabilities. But it meant that the standard for removing the child needed to be significantly higher in protecting the allegedly abusing parents, and not the child, than the roughly fifty percent implicated by a preponderance of the evidence.

New York bifurcated its proceedings into a factfinding hearing, in which allegations of permanent neglect were to be determined, and a dispositional hearing, at which the state determined where and how to place the child. The process gave procedural advantages to the parents:[145]

> At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency "made

[142] 455 U.S. 745 (1982).
[143] *Id.*at 747-49.
[144] *Id.*
[145] *Id.* at 748-49 (citations omitted).

> diligent efforts to encourage and strengthen the parental relationship." The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." Should the State support its allegations by "a fair preponderance of the evidence," the child may be declared permanently neglected. That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child.

"Diligent efforts" to repair the apparently broken parent-child relationship would be difficult to provide, given the shockingly low funding for many child-protective agencies, which can lead to massive underreporting.[146] And proof that the parents "failed substantially and continuously or repeatedly" to "plan for the future of the child" requires an investigation into the parents' subjective minds, which usually can be done only through circumstantial evidence. To prove these propositions by clear and convincing evidence will be a high barrier, giving the welfare of the child an even lesser concern than the clear-and-convincing standard might imply. And, of course, parents and not the child have the ability to obtain lawyers to fight the county and, for that matter, to sue the county for alleged mistakes.

What source provided the standard of clear and convincing evidence, which Justice Blackmun's opinion now imposed on every state and territory? Just as in *Roe v. Wade,* this burden of proof arose from Justice Blackmun's internal balancing of interests:[147]

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

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[146] *See* National Library of Medicine, New Directions in Child Abuse and Neglect Research ch. 2, unnumbered section headed *Incidence rates and the Problem of Underreporting,* at https://www.ncbi.nlm.nih.gov/books/NBK195982 (last visited June 8, 2023).

[147] *Id.* at 753-54.

This balancing was done without any mention of the interest of the child, whose permanent neglect might have been shown by a preponderance of the evidence.

The Blackmun opinion turned next to the standards for Due Process protections contained in *Matthew v. Eldridge*.[148] That case set out three factors to be considered in cases in which government acts adversely to an individual: the private interest, the risk of error, and the state's opposing interest.
The *Eldridge* formula is appealing, but its application depends on the weights assigned to the three factors, which in turn depend on internal human processing of the judge's values.

And in Justice Blackmun's judgment, all three factors weighed against the preponderance standard and in favor of a clear and convincing evidence requirement. Justice Blackmun wrote that "[T]he first Eldridge factor—the private interest affected—weighs heavily against use of the preponderance standard."[149] He added, "We do not deny that the child and his foster parents are also deeply interested in the outcome of [the factfinding] contest. But . . . the focus is emphatically not on them."[150] Thus, it was by removing the interests of foster parents as well as the allegedly permanently neglected child that Justice Blackmun made his evaluation of the first *Eldridge* factor.

Next came the weighing of the second factor: the risk of error. The preponderance standard created an unacceptable risk:[151]

> Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.

But these factors apply in most court proceedings, and they would also be present in proceedings conducted with a clear-and-convincing standard. In fact, this description fit Justice Blackmun's weighing of the *Eldridge* Factors just as well.

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[148] 424 U.S. 319 (1976).
[149] 455 U.S. 745, 759 (1982).
[150] *Id.*
[151] *Id.* at 762-63.

Actually, the risk of error would necessarily vary with the facts of the case before the trial court. Imagine a case in which the parent is accused of neglecting an injured child. The parent's explanation is that the child fell. A spiral fracture would create relatively clear evidence that the accusation of abuse is true,[152] while an instance of blunt trauma would make such an inference more difficult.[153] Justice Blackmun, heedless of any distinction, simply combined cases of all types and pronounced that the risk of error in all cases was too high for a preponderance standard.

The third *Eldridge* factor, as analyzed by Justice Blackmun, also favored a greater burden of proof than a preponderance. "[A] stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State."[154] But it would not reduce factual error in protecting the interests of the child.

Justice Blackmun also stated flatly that the state's ability to supply proof would "dwarf"[155] the resources of parents. This is a facile argument, but also a lazy and frivolous one. Yes, the resources of any given county in New York are large in an absolute, combined sense. (The respondent in this case was the head of the Ulster County Department of Social Services.)[156] But what is the size of that county's budget for the ordinary child neglect case? Given the way that child abuse budgets are allocated among the many priorities of government,[157] one might infer that, instead of "dwarfing" the resources of an average private parent, the state's ability to supply proof might itself be dwarfed in individual cases.[158] What other funds from the state's budget should be cut to prevent this imbalance? Alcohol abuse prevention? Law enforcement? Prison administration? Or what else?[159]

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[152] "Spiral fractures in very young children are highly suspicious for abuse since they are the result of forceful twisting or jerking of an extremity." Google/spiral fracture child abuse.

[153] *Cf.* Mariah Timms, *Man Released after Overturned Conviction,* Wall St. J., May 24, 2023, at A3 (describing a case in which the defendant was convicted of hitting his child and killing her, but medical evidence twenty years into his life sentence showed that this had not happened).

[154] Santosky, 455 U.S. at 767.

[155] *Id.* at 763.

[156] *Id.* at 745 (containing the style of the case).

[157] *See supra* note 146 and accompanying text.

[158] The author heard this argument frequently while serving as an assistant district attorney. "The resources the state uses against my client are unlimited." It was true that, in absolute magnitude, the budget for the district attorney's office was large, but it was pitifully small for the average case. Just as an example, some of my cases would have benefitted by the testimony of witnesses from out of state. But the office could not afford to pay what would be needed to bring those witnesses to our courts, and unless an interested private party brought them, the remedy might be dismissal.

[159] One can predict a progressive response: raise taxes. But the people will resist that proposed solution.

In any event, after his *Matthews v. Eldridge* analysis, Justice Blackmun's conclusion was clear. After deciding that the states should have the ability to decide whether to adopt a higher standard such as "beyond a reasonable doubt,"[160] he announced the outcome. "We hold that [a standard requiring clear and convincing evidence] adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."[161]

(1) Evaluating Justice Blackmun's Performance in *Santosky v. Kramer.* Four justices dissented in an opinion by Justice Rehnquist. They emphasized the point that the New York statutes were complex and gave ample opportunities as various stages for accused parents to claim or reclaim parental rights:[162]

> . . . By parsing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal-court intrusion into every facet of state family law. If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.
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> Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with "fundamental fairness" . . . . By adoption of the procedures relevant to this case, New York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme "fundamentally fair."

In summary, Justice Blackmun's opinion ranks poorly on the four scales listed in the introduction to this article. His Due Process analysis is unconvincing and contains sophistical arguments. There is little to support his evaluation of the *Eldridge* factors other than his own judgments. And those treatments seem egocentrically based.

Justice Blackmun did nothing to analyze the opposing arguments put together by the dissenters, and the abilities of parents to avoid or reverse adverse judgments,

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[160] Santosky, 455 U.S. at 768-69.
[161] *Id.* at 769.
[162] *Id.* at 770-71.

as the dissenters showed, were extensive. The aftermath of Justice Blackmun's opinion does not seem to have created difficulties for lower courts, but it is impossible to know how it may have adversely affected either the states' family law procedures or the interests of neglected children.

II. Justice Scalia: Why He Is One of the Two Worst

Justice Scalia's opinions on Confrontational Clause[163] issues are emblematic of his style. His reasoning omits authorities that are on the opposing side, and indeed, his historical reviews are downright dishonest. He did not successfully avoid egocentrism, even though his pretense was to follow constitutional text and history wherever it led. He was dismissive of opposing views, and he treated his colleagues' ideas in insulting ways. The aftermath of his principal Confrontation Clause decision was a quagmire. This section addresses these issues.

A. Judge Scalia's Confrontation Clause Reasoning

(1) Some Background: The Reliability Test for Hearsay Exceptions. The issue in the Confrontation Clause cases concerned which kinds of hearsay exceptions qualified for admissibility.[164] It would be difficult to try any case without hearsay of some kind.[165] A long line of cases had held, in essence, that hearsay testimony was admissible upon a showing of "reliability," among other factors.[166] In *Mancusi v. Stubbs,*[167] the Court explained this standard:

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." It is clear from these statements, and from numerous prior decisions of this Court, that even though the

[163] This Clause of the Constitution guarantees a criminal defendant the right to "be confronted" by the witnesses against him. U.S. Const. Amend VI.
[164] *See, e.g.,* Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)(describing the issues for "prior statements").
[165] For example, one can infer that there frequently are contemporaneous statements that implicate the hearsay exception for excited utterances. There frequently are also business records or public records. *See* Fed R. Evid. 803 (1-2), (6-8)(hearsay exceptions).
[166] *See* Mancusi v. Stubbs, 408 U.S. 204 (1972)(requiring "indicia of reliability"); Barber v. Page, 390 U.S. 719 (1968)(similar). *See also* Motes v. United States, 178 U.S. 458 (1900)(similar).
[167] 408 U.S. 204, 213 (1972).

> witness be unavailable his prior testimony must bear some of these 'indicia of reliability."

Later, in *Ohio v. Roberts,*[168] the Supreme Court restated this reliability test:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

The defendant in *Roberts* had been convicted of forging a check, among other crimes. The Court upheld the admissibility of text from a preliminary hearing at which the witness was "constitutionally unavailable."[169]

The reliability test had been well established when Justice Scalia entered the contest and abruptly changed the test completely.

(2) *Crawford v. Washington:* Justice Scalia's Abrupt Rejection of the Court's Entire Confrontation Clause Jurisprudence. In *Crawford v. Washington,*[170] Justice Scalia introduced an entirely new test to replace reliability. His new creation depended, instead, upon whether the hearsay statement was "testimonial." The Confrontation Clause, he said, "is a procedural rather than a substantive guarantee."[171] The Clause "commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[172] This, in turn, meant that the Confrontation Clause applied if the original witness's statement had been "testimonial."[173] If the statement was not testimonial, it could be admitted, even without any indicia of reliability.[174] But if it was testimonial, meaning a "solemn declaration or affirmation made for the

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[168] 448 U.S. 56, 66 (1980).
[169] *Id.* at 59-60.
[170] 541 U.S. 36 (2004).
[171] *Id* at 61.
[172] *Id.*
[173] *Id.* at 68.
[174] *Id.*

purpose of establishing . . . some fact,"[175] the Confrontation Clause excluded it unless there had been cross-examination of the declarant.[176]

To reach this conclusion, Justice Scalia purported to examine the history of the treatment of hearsay before the adoption of the Constitution.[177] His effort was to demonstrate that cross examination, not reliability, was the concern of the Confrontation Clause.[178] His history, however, was selective and erroneous. He emphasized *Sir Walter Raleigh's Case,*[179] in which the famous Englishman was convicted of conspiracy against the king. The prosecution offered an ex parte examination before another body and a letter written by one Lord Cobham supporting the allegation.[180] Raleigh objected to this hearsay statement, because Cobham was in prison in the London Tower, close by, and could be called as a live witness. "Call my accuser before my face," said Raleigh.[181] The court overruled this objection and admitted Cobham's hearsay.[182] The reference to this story seemed to support Justice Scalia's cross-examination theory.

But the Justice omitted another part of *Raleigh's Case,* which did not support the cross-examination theory and instead supported the reliability test. The prosecution also offered testimony that repeated the statement of an unnamed "Portugal gentleman." This unidentified declarant had said that Raleigh had committed treason and that "Don Raleigh would cut [the king's] throat."[183] Sir Walter again objected. He pointed out that the hearsay statement was unreliable. The declarant, he said, was a "beggarly Priest" or "wild Jesuit," and he asked, {W]hat proof is it against me?"[184] In other words, Raleigh's objection was not about cross examination, but instead, it was about the unreliability of the statement: what alleged "proof" did it contain? The part of the *Raleigh Case,* which Justice Scalia did not see fit to include, did not support Justice Scalia's theory. It actually supported the test of *Ohio v. Roberts,* which depended upon whether a hearsay statement was reliable.

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[175] *Id.* at 51.
[176] *Id.* at 68.
[177] *Id.* at 43-50.
[178] *See Id.*
[179] *Id.* at 44 (describing the case as one of the "most notorious" involving the issue).
[180] *Id.*
[181] *Id.*
[182] *Id.*

[183] *See* 1 D. Jardine, Criminal Trials 434, 436 (1832).
[184] *See Id.*

This omission by Justice Blackmun was either deliberate dishonesty or outrageous sloppiness. And the Justice proceeded to ignore other relevant history of importance, namely, the history of the exceptions to the hearsay rule, which were also background to the Confrontation Clause. Hearsay exceptions such as those for dying declarations[185] and admissions[186] are supported by indicia of reliability or "circumstantial guarant[ies]" of "trustworthiness." But Justice Scalia did not discuss this part of the history, which supported the reliability theory of *Ohio v. Roberts.* It conflicted with his own theory.

The reliability test had been far less complex. It depended only upon whether the out-of-court statement carried "indicia of reliability."[187] In fact, it usually would have been even more straightforward than that, because if the statement had fallen within a "firmly rooted" hearsay exception,[188] as most admitted hearsay would have, it would have satisfied the Confrontation Clause. The new test introduced by Justice Scalia was much more complicated because it depended upon a finding about the purpose of the declarant, upon whether that purpose met the definition of making a testimonial statement, and whether the substitute for present cross examination had been sufficient.[189]

Furthermore, Justice Scalia, in overruling *Ohio v. Roberts,* did not consult the criteria for overruling a decision mentioned in prior decisions.[190] Those factors would have counseled caution about the justice's upending of the entire jurisprudence of the Confrontation Clause. *Roberts* and cases like it were not premised on weak reasoning. They did not involve spirited dissents or close votes. They had not proved to be unworkable, and certainly they were much less so than the confusion that followed *Crawford,* which began appearing almost immediately.

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[185] *See, e.g.,* State v. Chaplin, 286 A.2d 325, 329-31 (Me. 1972) (citing State v. Bordeleau, 108 A. 464, 465 (Me. 1920)) (stating that reliability flows from the "circumstantial guaranty" of trustworthiness in the knowledge that declarant is about to die and discussing necessity of evidence which is "sometimes the strongest and even the only" proof).

[186] *See* Griffin v. State, 496 S.E.2d 480, 483-84 (Ga. 1998)(reviewing history of voluntary confession admissibility, which was "transplanted to the American colonies"); Harris v. State, 342 A.2d 305, 309 (Md. Ct. Spec. App. 1975), *citing* Lambros v. Coolahan, 45 A.2d 96, 98 (1945)(observing that oral admissions of a party are "universally" admissible); Commonwealth v. Babbitt, 723 N.E.2d 17, 23 (Mass. 2000)(observing that even adoptive admissions being treated as an exception to the hearsay rule is a practice that is at least two centuries old); 4 John Henry Wigmore, Evidence in Trials at Common Law §§1048-49 (James J. Chadbourne ed., 1972).

[187] *Roberts,* 448 U.S. at 66.

[188] *Id.*

[189] *See infra* Pt. II(A)(3) of this article (discussing what factors make a statement testimonial).

[190] *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991).

(3) The Quagmire Begins to Appear: *Davis v. Washington* and *Hammon v. Indiana.* The question whether a statement was testimonial, then, depended upon the purpose of the speaker. Was it to supply evidence for a criminal case against a suspect? Or was the purpose something else? If this was the question, then a hearing to determine the declarant's purpose might be required in many situations—a case within a case. But that kind of effort would be intolerable, wouldn't it? Or maybe not. Perhaps that was Justice Scalia's purpose.

An inquiry of this kind would be made more difficult by the possibility that the declarant might have mixed motives. The typical mundane situation in which this dilemma came to be recognized was that of an abused spouse or partner in a domestic violence case. The survivor of the abuse might immediately call the police. And tell her story. Then, the survivor might want to end the present bout of abuse. She also may want to achieve this end by having the abuser removed by arrest. If the first objective was her motivation, her statement to the police would not be testimonial. If the second, the statement would be testimonial and subject to exclusion. But her motives may have included both of these possibilities. Then what?

The first post-*Crawford* case to come to the Court presented exactly this problem. In *Davis v. Washington*,[191]and in a companion case, *Hammon v. Indiana,* the declarants were domestic abuse survivors.[192] The Court, through Justice Scalia, held the survivor's statement in *Davis* to have been non-testimonial and admissible, while the closely similar statement in *Hammon* was testimonial and excludable.[193] The cases must have been exercises in mind-reading for nine justices who, unfortunately, were not psychologists.

In *Davis,* the declarant was Michelle McCottry, who called 911 and said that she had been assaulted by the former boyfriend, Davis, who had beaten her and then disappeared. "He's runnin' now," she said.[194] Her statement was admitted in the state courts, presumably as an excited utterance. Justice Scalia wrote that the question whether the statement was testimonial was to be judged by objective evidence, not by a finding that the declarant's real subjective motive was testimonial.[195] The latter kind of inquiry, presumably, would be too difficult to conduct during a trial. And the statement made by Michelle was non-testimonial,

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[191] 547 U.S. 813, 829-830 (2006).
[192] *See Id.*at 813-21 (describing evidence from both).
[193] *Id.* at 828-29.
[194] *Id.* at 813.
[195] *Id.* at 827.

because the objective facts showed a set of "ongoing" occurrences "as they were actually happening."[196] Of course, as to the occurrence that mattered, Davis's alleged assault upon Michelle, this statement by Justice Scalia was flatly untrue; the important part (the assault) had already happened and was in the past. The Court added that the environment was not "tranquil." Michelle could not be assured of her safety, and also, her statement was not the result of a formal inquiry.[197] Upon these thin reeds, Justice Scalia based the holding that the Confrontation Clause was not violated, and the Court upheld Davis's conviction for violation of a no-contact order.

Amy Hammon's statement arose in a similar situation. When the police arrived, she stood beside her husband and said that nothing was wrong. The officers separated the two, and while her husband was in the next room, Amy described the assault that her husband had inflicted upon her.[198] Amy executed a written affidavit, which should have been inadmissible under traditional rules. Her statement, and also her affidavit, were entered into evidence before the jury. The Indiana Supreme Court held that the statement was a proper excited utterance[199] and upheld Hammon's conviction. But the United States Supreme Court, through Justice Scalia, held that Amy's statement was testimonial and therefore violated the Confrontation Clause.[200] In so holding, the justice relied upon a "primary purpose test": The primary purpose of the statement was to have Hammon arrested and convicted. Under this approach, the Court concluded that Amy's statement was "backward looking" and not a reaction to an ongoing situation.[201]

The two holdings show that the difference between testimonial and non-testimonial is in the eye of the beholder. Either of the two cases could have gone the opposite way. First, Michelle McCottry's statement was also backward-looking, as much so as Amy Hammon's statement. It described an assault committed earlier by a defendant who was "runnin' now."[202] Second, the Court seemed to assume that the officers were likely to arrest Amy's husband and see him prosecuted,[203] while they may instead have intended to take Amy to a women's shelter or, as happened more often in olden days, to leave both husband and wife undisturbed after separating them into two rooms. Third, the Court's

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[196] *Id.* at 828.
[197] *Id.* at 827.
[198] *Id.* at 819.
[199] *Id.* at 821. The written statement was held improper but harmless error.
[200] *Id.* at 827-28.
[201] *Id.*
[202] *Id.* at 813.
[203] *See Id.* at 829-30.

holding that the events were "at some remove in time from the danger"[204] is dubious. After being assaulted, calling for police, having them come into her home, being questioned beside her husband, having him taken to another room, being questioned alone by the officers, she likely was terrified, or under stress. Her husband even tried to intervene.[205] The Indiana Supreme Court's holding that her statement was an excited utterance was more in conformity with the situation.

Justice Thomas concurred and dissented from this holding in *Hammon.* He described the officers' alternatives beside arresting Amy's husband. He also concluded that the Court's approach was "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause."[206] A more targeted approach, he said, reflecting the purposes of the Clause, would be to exclude formal declarations such as those contained in affidavits or written depositions.[207] Finding that a statement was testimonial was an effort to discern the "largely unverifiable motives" underlying a statement or to figure its "primary purpose" was to try to erect a "hierarchy of purpose that will rarely be present." And a holding based on purported "objective factors" was to engage in "an exercise in fiction."[208]

The fact that the *Davis* and *Hammon* holdings each could have been exchanged for the other shows that Justice Thomas is correct. Reading the minds of the two women involved in the cases is a treacherous business. Amy Hammon may have been more concerned with escaping her situation, since her husband was in the next room and tried to intervene while she was telling the officer about the husband's assault on her, and she may have been less interested in seeing him convicted of a crime. Michelle McCottry may have been more interested in seeing her ex-boyfriend prosecuted, and less concerned about immediate escape from violence, since he was running away. It is impossible to know. The nation's trial courts now had this impossible mission. And that was Justice Thomas's point.

(4) The Quagmire Deepens: *Michigan v. Bryant.* In *Michigan v. Bryant,*[209] the declarant was a mortally wounded man who gave a statement to police on the scene, identifying the man who had shot him.[210] The Michigan Supreme Court thus had before it a classic dying declaration, as well as an excited utterance, excepted

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[204] *Id.* at 832.
[205] *Id.* at 830.
[206] *Id.* at 834.
[207] *Id.* at 836-37.
[208] *Id.* at 839.
[209] 562 U.S. 344 (2011).
[210] *Id.* at 348.

from the hearsay rule. But that court held the statement inadmissible. Following *Hammon,* the court saw the statement as backward-looking, and like Amy Hammon's statement, it sought to establish facts. It therefore was testimonial and excludable under the Confrontation Clause.[211]

But the *Hammon* case had fooled the Michigan court, and it began to become clear that the *Crawford* approach was unworkable. The United States Supreme Court, instead of focusing upon the backward-looking feature of the statement, held that it was made during an "ongoing emergency" as police attempted to find and arrest the perpetrator.[212] *Hammon,* the Court explained, involved a domestic dispute, whereas the situation in *Bryant* did not.[213] In case this distinction seemed not to make a difference, he explained further.

The Court then added some additional objective factors that could fit its newly minted ongoing-emergency theory of admissibility. The type of weapon mattered, such as a gun versus a perpetrator's hands; and so did the victim's injuries, such as a serious wound rather than a superficial gunshot injury; whether the statement was a response to a question; and the formality of the inquiry.[214] In *Bryant,* the officers needed information about the potential dangers they might face in searching for the perpetrator. According to the Court, the statement would be less likely to be admissible if the assailant had used his fists, presumably because the officers would not need to know to watch out for that kind of assault.[215] It would also be less likely if the wound from a gun was superficial instead of one piercing the victim's vital organs,[216] or if the officers had asked the obvious question, "what happened," or if they had been able to take the victim to a place of safety and question him in formal detail.[217]

In any event, *Michigan v. Bryant* was a clear demonstration of the lack of wisdom in Justice Scalia's abrupt departure from existing standards in *Crawford,* as well as the appropriateness of the standard of reliability in *Ohio v. Roberts,* the case he overruled. The Michigan Supreme Court's application of the *Hammon* analysis made sense as a conformation to *Crawford* and *Davis,* even though it would have excluded every dying declaration, all of which are backward-looking

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[211] *Id.* at 348-49, 351.
[212] *Id.*at 351.
[213] *Id.* At 355.
[214] *Id.* at 357, 364-65.
[215] *Id.* at 364.
[216] As distinguished from a "superficial gunshot wound." Id. at 364-65.
[217] Which would be similar to Amy Hammon's telling what happened in response to "police questioning." *Id.* at 357.

almost by definition.[218] The United States Supreme Court's decision made sense in preserving a longstanding exception to the hearsay rule, but the reasoning it used to reach this result seems contrived.

Justice Scalia himself agreed with this criticism—and dissented in *Michigan v. Bryant.* His opinion not only would have created havoc in cases involving dying declarations but insulted his colleagues for not doing so:[219]

> [The Court's reasoning] is so transparently false that professing to believe it demeans this institution. . . . In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. . . . Because I continue to adhere to the Confrontation Clause that the People adopted, I dissent.

Justice Scalia thus represented himself as the one who understood what the People meant when they adopted the Constitution, as opposed to the majority, who did not understand at all.

(5) And the Quagmire Deepens Further, with Multiple Declarants: *Melendez-Diaz v. Massachusetts.* In *Melendez-Dias v. Massachusetts,*[220] the defendant had been convicted of cocaine possession.[221] At trial, conviction required proof that the substance was, in fact, cocaine, and the prosecution supplied this proof by offering certificates from chemical analysts.[222] Justice Scalia wrote the opinion for a plurality of the Court, reasoning that the certificates were testimonial and that their admittance into evidence therefore violated the Confrontation Clause.[223] He rejected the state's argument that the certificates were scientific evidence, unlike testimony from a conventional witness. There was no distinction between proof of facts by testimony from a written laboratory statement and a similar statement from an eyewitness.[224] The state argued that this outcome would result in exploding costs of prosecution, but Justice Scalia labeled this argument "irrelevant," and in any event, the experience of other states was that the requirements of the Court could be met.[225]

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[218] *See* Fed. R. Evid 804(b) (2)(statement about "cause or circumstances" of dying person's death.
[219] 562 U.S. 344, 379-380 (2011)(citations omitted).

[221] 557 U.S. 305 (2009).
[222] *Id.* at 308.
[223] *Id.* at 310-11.
[224] *Id.* at 314-15.
[225] *Id.* at 325.

Strangely, a majority of the justices refused to follow this reasoning, although it was the main holding that reversed the conviction. Justice Thomas concurred with the result on the different ground that the Confrontation Clause was properly concerned with excluding evidence such as affidavits, which the certificates in this case resembled.[226] And four justices dissented, joining an opinion by Justice Kennedy, which pointed out that the cocaine could have passed through the hands of at least four different people during the analysis, and each had the potential to "introduce error."[227] There might be a sampler, an interpreter, a calibrator (who might be from a contracting firm and do the task periodically), and a supervisor, who typically would be the one to certify the result. The plurality's opinion seemed to say that all four, then, must appear live and be cross-examined.[228] Otherwise, the testimony of any one of the four would rest on the hearsay of the others. If this conclusion was correct, the Court might well have "for all practical purposes, forbidden the use of scientific tests in criminal trials."[229]

And the difficulties did not end there. In its analysis of document authentication, the plurality had omitted to recognize chain-of-custody issues. This authentication had been done before by certificates from custodians of documents.[230] Justice Scalia had skipped over this step by saying that it was "up to the prosecution to determine which steps in the chain are so crucial as to require evidence,"[231] whereas the Court's holding would not allow a certificate from a clerk who happened to have custody of relevant documents any more than a certificate from a laboratory supervisor that a substance was cocaine.[232] Furthermore, Justice Scalia's remark that other states already complied with this decision was not exactly so. The states used a variety of techniques to avoid calling a horde of witnesses, such as using greater authentication only if the defendant objected.[233]

And the cost of additional procedures could be enormous. The FBI laboratory performed nearly a million analyses a year for courts both state and federal. The Court's decision meant that "before any of those million tests reaches a jury, at least one of the laboratory's analysts must board a plane, find his or her way to an

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[226] *Id.* at 329-30.
[227] *Id.* at 339.
[228] *Id.* at 332.
[229] *Id.* at 332-34.
[230] *Id.* at 311.
[231] *Id.*
[232] *Id.* at 348-49.
[233] *Id.* at 355.

unfamiliar courthouse, and sit there waiting to read aloud notes made months ago."[234]

The dissenters argued that the flaw in the plurality's reasoning was its acceptance of *Crawford* itself. The Confrontation Clause does not "refer to kinds of statements. Nor does the clause contain the word 'testimonial.'"[235] The Clause should be confined to the kind of witness to which it had applied historically, and that was "one who perceived an event that gave rise to a personal belief in some aspect of the defendant's guilt."[236] This suggestion resembled the test laid out by Justice Thomas, which prevented trial by formal statements such as affidavits. And the dissenters recalled *Sir Walter Raleigh's Case.* There, the hearsay affidavit was made by a person who allegedly perceived the alleged "offense" by Raleigh. A chemical analyst was different because that person "observes neither the crime nor any human action related to it."[237] In other words, the analyst does not accuse any particular person and may not even know the name of the defendant.

Thus, the votes for rejecting the *Crawford* approach were now a majority, with Justice Thomas, Justice Kennedy, and the three other dissenters opting for tests that depended upon issues other than whether the evidence was testimonial. This was a serious indication of the unworkability of the *Crawford* reasoning. And Justice Scalia, with his remark in *Melendez-Diaz* that the impracticality of making proof was irrelevant, seems to have rejected every kind of prudential, or policy, reasoning out of hand.

(6) The Testimonial-or-Not Issue Resurfaces, with Unworkable Results: *Bullcoming v. New Mexico.* The defendant in *Bullcoming v. New Mexico*[238] was convicted of aggravated driving while intoxicated. The technical analyst who had tested the defendant's blood had prepared a certificate summarizing the result of a gas chromatograph test of alcohol in the defendant's blood.[239] But that analyst had not testified. The certificate was received in evidence after being sponsored by a second analyst, who was present for cross examination. The record indicated only that the first analyst had been "placed on leave for an undisclosed reason."[240] The Supreme Court reversed the conviction.[241]

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[234] *Id.*at 342.
[235] *Id.* at 343.
[236] *Id.* at 343-44.
[237] *Id.* at 344-35.
[238] 564 U.S. 647 (2011).
[239] *Id.* at 652-53.
[240] *Id.* at 656.
[241] *Id.* at 658.

The Court added another testament to the unworkability of the *Crawford* approach by splitting four ways. Justice Ginsburg wrote the plurality opinion, rejecting the argument that the first analyst had only written the result and that the instrument had made the real statement.[242] Justice Thomas concurred in part but declined to join Part IV and footnote 6 of Justice Ginsburg's opinion, in which it was said that consequences of a decision were irrelevant.[243] Justice Sotomayor concurred in part and added that the sponsoring witness was not a "supervisor, reviewer, or someone else with a personal, albeit slight, connection to the scientific test at issue."[244] This remark presented the possibility that a substitute witness needed to be present, she added, and she left open the possibility that a machine-generated printout might be acceptable.[245]

And then, there were four dissenters. The technician who actually had performed the test, they said, had also performed hundreds or thousands of others, and he would not recall it, making it a "hollow formality" to insist on his presence.[246] Also, the plurality had seized on factors showing reliability, such as the technician's signature, as showing its testimonial nature, which seemed to set *Ohio v. Roberts* on its head.[247] For example, the dissenters said, even reliable reports of earlier abuse by women whose abusers had murdered them would not be admissible under new statutes allowing them as evidence, unless the state could prove that the murder was intended to prevent their testimony.[248]

The dissenters also wrote about the effects that had resulted from the Court's confrontation decisions on driving-while-intoxicated decisions in this state. Summonses requiring the presence of analysts rose 71 percent, to 1,600 annually, or "8 or 9 every workday."[249] The effect sent analysts traveling throughout this state, and one could imagine similar problems for every other state. "Scarce resources could be committed to other urgent needs in the criminal justice system" if it were not for this decision.[250] The dissenters concluded that the Court's confrontation decisions had created results that were "chaotic."[251]

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[242] *Id.* at 663-64.
[243] *Id.* at 650.
[244] *Id.* at 672.
[245] *Id.* at 673.
[246] *Id.* at 676-77.
[247] *Id.* at 678.
[248] *Id.* at 682.
[249] *Id.* at 683.
[250] *Id.* at 684.
[251] *Id.*

Justice Ginsberg, following Justice Scalia, said in Part IV of her opinion that these effects were not relevant.[252] Bad consequences did not count in the constitutional calculus. She also said that these claims of chaos were "dubious."[253] Justice Ginsburg's statements that effects could not be considered are at variance with authoritative Supreme Court decisions. As the Court wrote in *Kennedy v. Mendoza-Martinez,*[254] "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." Consequences matter, and Scalia's pronouncements in opposition are anomalous. In fact, the majority of the Court disagreed—including concurrences by Justices Thomas, Sotomayor joined by Kagan, and the dissenters—and refused to join part IV of Justice Ginsburg's opinion, the part that said that effects were not relevant.

But the real point is that the Court's fracturing showed that Justice Scalia's opinion in *Crawford* was not merely impractical, but also unworkable. The four-way split demonstrated that it was virtually impossible for this Court to follow *Crawford,* and it was predictable that the lower courts would flounder with the differing opinions in the Court. Justice Scalia's abrupt departure from existing law in *Crawford* was not made for precedential use.

(7) A Different Coalition Forms: *Williams v. Illinois.* Finally, in *Williams v. Illinois,*[255] the Court found at least the illusion of stability. The issue concerned the required protocol for receiving DNA results into evidence. At trial, the rape survivor identified Williams as the perpetrator of the rape against her.[256] Then, two expert witnesses testified about their roles in the development of DNA evidence against Williams. The first, Karen Abbinanti, explained how she had developed a DNA profile from a sample of Williams's blood before he was a suspect in the rape in question.[257] The second, Sandra Lambatos, testified that the DNA profile produced by an outside laboratory from a sample of semen taken from the rape survivor was a "computer match" with the profile of the DNA taken from Williams.[258] The state also showed the jury the chain of custody from the Williams sample to the laboratory and back.[259] Williams's lawyer objected to Lambatos's

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[252] *Id. at 665.*
[253] *Id.*
[254] 372 U.S. 144, 160 (1963).
[255] 567 U.S. 50 (2012).
[256] *Id.* at 60.
[257] *Id.*
[258] *Id.* at 60-61.
[259] *Id.* at 62-63.

testimony because there was no confrontation of personnel who had generated the semen profile at the laboratory.[260]

Justice Alito wrote the opinion for a four-justice plurality, upholding Williams's conviction. The plurality reasoned that the questioned testimony had been offered as an explanation for Lambatos's expert opinion, and not as substantive evidence.[261] Federal Rule of Evidence 702 allows an expert to testify on the basis of otherwise inadmissible evidence and allows the inadmissible basis to be received to explain the expert's underlying reasons for the opinions offered.[262] The plurality also concluded, however, that the expert's explanation of the laboratory results would have been admissible even if it had been received as substantive evidence.[263] The plurality reasoned that the evidence did not offend the concerns of the Confrontation Clause. This was so, Justice Alito wrote, because the laboratory evidence lacked two factors found in evidence that triggered Confrontation Clause concerns. First, the Clause was concerned with hearsay statements that accused a targeted individual of a crime.[264] Second, the Clause prohibited formal statements "such as affidavits, depositions, former testimony, and confessions" that evaded witness confrontation.[265]

This testimony by Lambatos, the plurality concluded, came from a source that was not aimed at a "targeted individual." Individuals working in a laboratory to produce a profile from a sample taken from a rape victim did not accuse a particular person of a crime; they did not know whom the profile might match.[266] Thus, evidence from an expert who did not participate in the laboratory process but explained its efforts did not fit the concept of formal documents offered to accuse a given individual of a crime.[267] And Justice Thomas, holding to his well-known pattern, concurred separately on the ground that the Confrontation Clause implicated only formal documents such as affidavits.[268] The evidence here did not have this kind of "formality and solemnity."[269] Thus, five justices agreed to interlocking opinions that featured exclusion of formal documents like affidavits as the principal concern of the Confrontation Clause.

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[260] *Id.* at 62-63.
[261] *Id.* at 69.
[262] Fed. R. Evid. 703.
[263] 567 U.S. 50, 81-82 (2012).
[264] *Id.* at 82-83.
[265] *Id.*
[266] *Id.* at 84.
[267] *Id.* at 85.
[268] *Id.* at 103-04.
[269] *Id.*

Justice Breyer concurred in the plurality opinion but wrote separately to emphasize the unreasonableness of insisting on testimony from everyone who participated in a DNA analysis. He drew a map or diagram of the DNA process to explain his concern. The diagram, by its complexity, supported Justice Breyer's separate concern,[270] although he joined the plurality opinion and thus apparently shared the judgment that non-accusatory statements did not offend the Confrontation Clause.

Four Justices dissented in an opinion by Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor. They were confident in their disagreement with the judgment of the Court:[271]

> Under our Confrontation Clause precedents, this is an open-and-shut case. The State of Illinois prosecuted Sandy Williams for rape based in part on a DNA profile created in Cellmark's laboratory. Yet the State did not give Williams a chance to question the analyst who produced that evidence. Instead, the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated. That approach—no less (perhaps more) than the confrontation-free methods of presenting forensic evidence we have formerly banned—deprived Williams of his Sixth Amendment right to "confron[t] ... the witnesses against him."

The dissenters added that the majority of the Court could not agree on their reasons.[272] Thus, although a coalition had formed around the "formal document" theory of exclusion, the *Crawford* reasoning still showed itself to be unworkable.

(8) The *Crawford* "Testimonial" Reasoning Continues to Haunt the Court. In 2016, in *Woods v. Etherton,*[273] the Court cited *Crawford* in holding that an anonymous tip received in evidence to explain later activity was not testimonial because a "fairminded jurist" could have concluded that it was not offered for its truth.[274] And most recently, in 2022 in *Hemphill v. New York*,[275] the Court held that a statement made during another defendant's allocution, not subject to cross-examination, was testimonial and therefore admitted in violation of the

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[270] *Id.* at 99.
[271] *Id.* at 119-20.
[272] *Id.* at 120.
[273] 578 U.S. 113 (2016).
[274] *Id.* at118-19.
[275] 142 S. Ct. 681 (2022).

Confrontation Clause.[276] It also was not admissible under the "open door" theory in response to the defendant's misleading argument.[277] Justices Alito and Kavanaugh concurred separately[278] and Justice Thomas dissented on unrelated grounds.[279] Thus, *Crawford* continues to bedevil the Court.

B. Assessing Crawford *and Its Progeny, together with Justice Scalia's Role.*

The overruling of *Ohio v. Roberts,* together with its focus on reliability in hearsay statements, was unjustified. An overruling of *Crawford,* on the other hand, and its replacement with a concern other than testimonial evidence, would be justified. These conclusions are warranted by the criteria that the Court has used to justify departures from *stare decisis.*

(1) Evaluating *Ohio v. Roberts* and *Crawford v. Washington* under Criteria for Departure from *Stare Decisis*. The Court has said that bad reasoning and workability were chief characteristics for disregarding *stare decisis.* [280] In *Roberts,* the opinion was not demonstrably badly reasoned. Reliability, which the Court emphasized as the criterion for confrontation exceptions, has been a supporting factor in hearsay exceptions for centuries.[281] Nor was the reliability factor unworkable. There was no indication of difficulty among the lower courts in following *Roberts.*

The *Roberts* decision was not of a character especially requiring *stare decisis,* which is at its "acme in cases involving contract or property interests where reliance interests are involved."[282] But *Roberts* was not decided by "the narrowest of margins," over "spirited dissents."[283] It had not been questioned by cases after the establishment of its standards.[284] And it had not been interpreted differently by different members of the Court.[285]

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[276] *Id.* at 692.
[277] *Id.* at 692-93.
[278] *Id.* at 694.
[279] *Id.* at 696.
[280] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991).
[281] *See* Janet D. Glick, *Coy v. Iowa: The Effect of a Face-to-Face Confrontation Requirement on Statute Shielding Child Witnesses,* 10 N. Ill. U. L. Rev. 109, 140 & n.233 (1989).
[282] Cf. Payne, 501 U.S. at 828 (identifying these factors as bases for overruling."
[283] *Cf. Id.* (similarly identifying this factor).
[284] *Cf. Id.* (similarly identifying this factor).
[285] *Cf. Id.* (similarly identifying this factor).

In summary, *Roberts* met the criteria that the Court had set up for retaining a decision by reason of *stare decisis.* Justice Scalia made no attempt to address these criteria when he wrote the decision overruling *Roberts.*

But the justice's opinion in *Crawford v. Washington,* overruling *Roberts,* should have been overruled itself, because the criteria for departing from *stare decisis* were met there. *Crawford* was badly reasoned, because Justice Scalia's review of history was flawed. His heavy reliance on *Sir Walter Raleigh's Case* omitted parts of the decision that supported reliance on reliability, the basis of *Roberts,* and it ignored the many hearsay exceptions also based on reliability.[286] *Crawford* was unworkable, as was shown by later cases in which judicial fudging and splintered opinions dominated.[287] Although it did not involve contract or property issues in which the need to protect reliance interests would have been at its acme, *Crawford* was decided over a spirited dissent.[288] It has been questioned in later cases by members of the Court.[289]

In short, *Crawford* itself meets the Court's criteria for departure from *stare decisis,* and it should be overruled. And in fact, a majority of the Court later discarded *Crawford* by decisions in which differing justices formed a coalition that modified the testimonial criterion into a standard that excluded only formal statements accusing the defendant, such as affidavits.[290] But it would be better if *Crawford* were flatly overruled and replaced by a standard of this kind.

(2) Justice Scalia and His Role in Producing This Confrontation Disaster. Justice Scalia criticized his colleagues in later cases in which they struggled to make sense of the strange new confrontation world that he had created. In doing so, he sounded as though he thought he was the smartest guy in the courtroom.[291] His opinion in *Crawford* overruled *Roberts* without considering the criteria for departure from *stare decisis.* And he did it with an opinion that omitted history that strongly opposed his sharp turn away from the reliability standard. Again, he sounded as though he was the smartest guy in the courtroom.

In terms of the factors for bad judging set up at the beginning of this article, Justice Scalia fits the category of worst justices. His *Crawford* opinion is badly

[286] *See supra* Pt. II(A)(2) of this article.
[287] *See supra* Pts. II(A)(3)-(8) of this article.
[288] *See supra* Pt. II(A)(2) of this article.
[289] *See supra* Pt II(a)(3)-(7) of this article.
[290] *See supra* Pt. II(a)(7) of this article.
[291] *See supra* Pt. II(A)(4) of this article.

reasoned and does not stand up well to criticism, in ways that do not depend on its outcome. His following opinions do not deal respectfully with opposing views. He hardly even attempted to avoid egotism. And the aftermath has been chaos.

C. Justice Scalia's Surprising Opinion on Free Exercise of Religion

Justice Scalia's opinion in *Employment Division v. Smith*[292] turned the Supreme Court's jurisprudence on religion upside down.[293] In *Fulton v. Philadelphia,*[294] the Supreme Court made a partial correction of the longtime mistake in *Smith*. Justice Alito, concurring in *Fulton,* explained the need fully to overrule that decision:

> In *[Smith,]* the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.[295]

Smith involved the religious use of peyote, which resulted in the users' disqualification from unemployment benefits on the ground that they had violated state drug laws.[296] Justice Scalia's holding was that the First Amendment's Free Exercise Clause did not prevent this result.[297]

Justice Scalia reasoned that the exercise of religion included such acts as "participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."[298] The state would violate the Free Exercise Clause if it "sought to ban such acts or abstentions *only* when they are *engaged in for religious reasons."*[299] So, targeting of religious observance was the only, narrow government action that was prohibited. But the right of free exercise, Justice Scalia concluded, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that

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[292] 494 U.S. 872 (1990).
[293] *See* Fulton v. Philadelphia, 141 U.S. 1868, 1883 (2021)(stating that *Smith* "pushed aside" 30 years of precedent).
[294] 141 S. Ct. 1868 (2021).
[295] *Id.* at 1883.
[296] 494 U.S. at 874.
[297] *Id.* at 877-78.
[298] *Id.*
[299] *Id.* (emphasis added).

the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[300]

In *Fulton,* Justice Alito skewered this reasoning. The *Smith* holding could easily allow laws prohibiting a broad variety of religious observances:

> **. . .** *Smith*'s interpretation can have startling consequences. . . . Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. . . . Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice.[301]

Fulton involved a Catholic adoption agency that, for religious reasons, refused to refer children to same-sex couples. Philadelphia refused to allow this practice.[302] Chief Justice Roberts's opinion held this Philadelphia practice unconstitutional and did so by applying strict scrutiny:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.[303]

Justice Roberts's opinion controlled the holding, but it was Justice Alito who showed how badly Justice Scalia had gone wrong in *Smith.*

Justice Scalia's practice in cases of this kind was to overrule multiple earlier decisions if a different interpretation of the Constitution, according to him, was more accurate. As Justice Alito observed, Justice Scalia "abruptly pushed aside" thirty years of jurisprudence on the Free Exercise Clause," and he did so with the Confrontation Clause, too, as is shown above. When he was assigned an opinion, others in the Court tended to go along (or to dissent). In following this practice,

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[300] *Id.* at 879.
[301] 141 U.S. at 1884.
[302] *Id.*
[303] *Id.* at 1881.

Justice Scalia frequently failed to undertake the analysis required for overruling a precedent (although Justice Alito did the analysis while overruling Scalia in *Fulton)*. Justice Scalia emerges, again, as one of the two worst Justices.

D. The Sentencing Commission Case: Mistretta v. United States

In *Mistretta v. United States,*[304] the Supreme Court upheld Congress's creation of the United States Sentencing Commission. This Commission included judges as well as other personnel,[305] and it promulgated sentencing range guidelines for the array of federal crimes.[306] These sentencing ranges originally had the force of law but allowed the judge "discretion" to depart from the guidelines to fit the case.[307] The Commission's product seemed to fit the promise of determinate sentencing; to make sentences more uniform and proportional to blameworthiness.[308]

As might be expected, the Commission's early efforts were not error-free. For example, in the wake of a securities scandal, a judge sentenced a midlevel participant named Jamie Olis to 24 years' imprisonment. The judge explained that he was bound to do so by sentencing guidelines.[309] The Supreme Court later held that the guidelines were unconstitutional insofar as they were mandatory.[310] After that, the same judge sentenced Olis to a much lesser six years' imprisonment,[311] which arguably fit the case better.

Justice Scalia dissented in *Mistretta,* the basic Sentencing Commission case, on the ground that the commission was given power that was an unconstitutional delegation of the legislative function.[312] This was an arguable position, but the justice larded it with facts reflecting omission of important background, just as he had done in *Crawford* in his confrontation opinion.[313] For example, he wrote that a judge who disregarded the guidelines would be reversed,[314] and he left out the fact

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[304] 488 U.S. 361 (1989).
[305] *Id.* at 369.
[306] *Id.* at 366.
[307] *Id.*
[308] *See Id.* at 365 (reporting on existing situation of "common" sentencing disparity; *see generally* David Crump, *Determinate Sentencing: The Promise and Perils of Sentence Guidelines,* 68 Ky. L. J. 1 (1979)(discussing advantages and disadvantages of determinate sentencing).
[309] *See* David Crump et al., Criminal Law: Cases, Statutes, and Lawyering Strategies 504-05 (Carolina Academic Press 4th ed. 2020)(memorializing the case).
[310] United States v. Booker, 543 U.S. 220 (2005).
[311] *See* David Crump et al., Criminal Law: Cases, Statutes, and Lawyering Strategies 504-05 (Carolina Academic Press 4th ed. 2020)(memorializing the case).
[312] Mistretta, 488 U.S. at 419-20.
[313] *See supra* Pt. II(A)(2) of this article.
[314] 488 U.S. 361, 413 (1989).

that a sentencing judge had discretion to depart from the guidelines. He also failed to note the flexibility of the Commission to change or broaden guidelines, and he did not recognize the possibility that the guidelines might not be mandatory in the future. He also ridiculed the idea of a sentencing commission. The Act, he said, created a "junior varsity Congress."[315]

III. CONCLUSION: THE TWO WORST JUSTICES

This article has set up four criteria for evaluating the worst Supreme Court Justices: how well their reasoning stands up to criticism, how well they have been able to recognize and deal respectfully with opposing views, whether they have avoided egotism and idiosyncratic preferences, and how the decisions that are the aftermath of their opinions have worked out.

And the article has nominated Justices Blackmun and Scalia as the two worst modern justices.

A. Justice Blackmun.

This article has considered three lines of cases involving Justice Blackmun: the baseball antitrust cases, the abortion cases, and the child neglect case. In each case, Justice Blackmun's opinions are badly reasoned and do not stand up to criticism. His baseball antitrust opinion in *Flood v. Kuhn* failed to correct what the members of the Court agreed was a regrettable mistake, and it did not consider the factors governing departure from *stare decisis.* Its reasoning was accomplished by a major diversion. The justice showed egotism, remarking that the opinion was his "sentimental journey." Although the opinion acknowledges opposing views, it is hardly reconcilable with cases involving other similar situations.

Justice Blackmun's opinion in *Roe v. Wade* is badly reasoned, unconvincing, and unable to stand up to criticism. Its swing paragraph, in which the right to terminate a pregnancy is mysteriously conjured up in a way that one scholar who agrees with the outcome has flatly labeled a "very bad decision" because "it is not constitutional law and gives almost no sense of an obligation to try to be." In the decisions that follow, Justice Blackmun shows the worst kind of egotism. The aftermath has included both clashes among the American people and a recent decision overruling the *Roe* holding that Justice Blackmun wrote.

[315] *Id.* at 427.

Finally, the justice's opinion in the child neglect case, *Santosky v. Kramer,* declines to consider the interest of the child in its balancing of Due Process claims. Justice Blackmun reduces the state's interest to a financial one, so that even the state's interest, which opposes those of the allegedly neglectful parents, does not include child welfare. At worst, the child must risk being returned to parents whose permanent neglect is the triable issue and at best risks a continuing stretch of foster care without the possibility of adoption. The opinion in this respect is badly reasoned regardless of whether the merits of its outcome are deemed positive or negative.

And that is why Justice Blackmun is one of the two worst justices.

B. Justice Scalia.

Justice Scalia's opinion in *Crawford v. Washington* is badly reasoned. It relies on pre-constitutional history, but it omits the history that opposes his judgment. Justice Scalia's authority of principal reliance, *Sir Walter Raleigh's Case,* contains an important point of emphasis that supports the opposite result, focusing on reliance rather than a testimonial criterion. Justice Blackmun conveniently leaves this part of *Raleigh's Case* out of his reasoning. He also omits the long line of hearsay exception development, which has depended heavily on "indicia of reliability," and which therefore opposes his conclusion. The opinion is either unusually sloppy or deliberately dishonest.

Therefore, Justice Scalia's opinion in *Crawford* fares poorly when considered against the four criteria set up at the beginning of this article. The reasoning does not stand up well to criticism. The justice himself shows his egocentric thinking both in *Crawford,* which abruptly rejects the wisdom of the past, and in later dissents, which criticize the Court for not steering more closely to his own vision. He refuses to consider the legitimate arguments of other justices, and he pointedly rejects consideration of the consequences of his *Crawford* opinion. The aftermath of his *Crawford* opinion has been confusion and chaos.

The Confrontation Clause jurisprudence is of the highest kind of importance. It is virtually impossible to try any kind of criminal case without some hearsay, and therefore Justice Scalia's opinion affects nearly every criminal case in America. And it does so by replacing the workable test of *Ohio v. Roberts* with a regime in which there are few clear answers. A present sense impression, an excited utterance, a business record, and even a dying declaration all require an ersatz psychological investigation of the declarant to determine whether the statements in them are testimonial or not testimonial. And the answer often will be that they are

both. One can readily conclude that trial courts will have many cases in which arguments about confrontation issues concerning hearsay exceptions are dominant.

Employment Division v. Smith, Justice Scalia's Free Exercise Clause case, would have upheld laws prohibiting a wide range of of religious ceremonies. As Justice Alito later observed, Justice Scalia simply "pushed aside" thirty years of precedent. This Scalia opinion also scores poorly when compared to the four criteria on which this article is centered. The reasoning does not hold up well against criticism, such as Justice Alito's. The opinion does not deal effectively with the views of the four dissenting justices. One can infer that the aftermath was full of confusion as courts struggled to decide which laws were general, according to *Smith,* and thus exempted from Free Exercise Clause analysis.

And that is why Justice Scalia is one of the two worst justices.

C. So, What Makes a Bad Supreme Court Justice?

This article ends where it began. There are four criteria that this article has used to evaluate bad Supreme Court justices. First, the quality of their reasoning in key cases: how well their opinions stand up to criticism. Second, their ability and willingness to treat opposing arguments effectively. Third, their avoidance of egocentrism. Fourth and finally, the aftermath of the decisions they reached: whether it has consisted of clear results or of chaos. These are criteria that can be applied irrespective of the results the justices have reached, and this article has attempted to do so.