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Gonzalez-Lopez and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles?

I. INTRODUCTION

In *United States v. Gonzalez-Lopez*, a five member majority, per Justice Scalia, held that when a court wrongfully denies a defendant's counsel of choice, the remedy is automatic reversal, not some form of harmless error review.[1] The Supreme Court's decision, by refusing to balance a defendant's rights against a trial's overall fairness, epitomizes rule-based jurisprudence. The decision, however, raises the question of whether the bright-line rule it adopted arose from a broad judicial philosophy that favors limited judicial discretion or from the application of context-specific factors. This Note acknowledges that a methodological preference for limited judicial discretion likely influenced the majority opinion, but argues that considerations arising out of the constitutional rights of those accused of crimes also justified the bright-line rule in this case. These context-specific principles are found in literature, including the work of Jeffrey L. Fisher,[2] the advocate who argued *Gonzalez-Lopez*. With this case, Fisher completed a triumvirate of successful Supreme Court arguments that started with *Crawford v. Washington*[3] and *Blakely v. Washington*.[4]

Crawford, *Blakely*, and *Gonzalez-Lopez* share a common characteristic: each relies on a bright-line rule that eschews a balancing of the interests of the government and the defendant. The former two cases support Fisher's "constitutional choice" analysis, which suggests that the Court has a textual justification for applying bright-line rules where the text of the Constitution reflects a choice

1. United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006).

2. Jeffrey L. Fisher is a partner at Davis Wright Tremaine LLP in Seattle, Washington, and a professor at Stanford Law School.

3. Crawford v. Washington, 541 U.S. 36 (2004).

4. Blakely v. Washington, 542 U.S. 296 (2004).

rather than a value.[5] The use of a bright-line rule in *Gonzalez-Lopez*, however, is not clearly justified by this constitutional choice analysis, but by context-specific factors that encourage more mechanical protection of criminal rights. Even though Fisher's constitutional choice analysis does not explain the use of a bright-line rule in *Gonzalez-Lopez*, the presence of context-specific factors, independent of a general preference for limiting judicial discretion, justified the majority's use of a bright-line rule in this case.

Rule-based jurisprudence operates by identifying constitutional principles and then positing rigid safeguards against their infringement. The safeguard, or bright-line rule, that emerges from this process encourages predictability in the law[6] and represents a synthesis of values and principles.[7] Constitutional interpretation based on such absolute rules limits judicial discretion[8] and ensures that judges enforce individual rights—particularly in criminal cases, "when it may be unpopular to do so."[9] When universal rules govern each litigant's case, the system fosters a sense of true equality before the law.[10] Although modern commentators disagree on the

5. Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1522–28 (2006).

6. Even those who generally oppose bright-line rules agree that some situations require them, such as where there is a need for predictability. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 212–13 (1999) ("When there is a strong interest in predictability, or when the Court has reason for confidence in a wide ruling, narrowness is a mistake.").

7. *Id.* at 213.

8. *Crawford*, 541 U.S. at 67–68.

9. Fisher, *supra* note 5, at 1512; *see also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–75 (1960). Justice Black thought it necessary to establish absolute rules in order to protect against the power of the government:

> To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights, which I have discussed with you, make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas—whatever the scope of those areas may be. If I am right in this then there is, at least in those areas, no justification whatever for "balancing" a particular right against some expressly granted power of Congress.

Id.

10. Justice Scalia has spoken of the importance of binding each individual by universal rules:

> When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. . . . [I]t does not greatly appeal to one's sense of justice to say: "Well, that earlier case had nine factors, this one has nine plus one." Much better,

merits of bright-line rules, it was the norm in early constitutional law.[11]

Confidence in the bright-line approach eroded as it often produced a poor fit between doctrine and the real world.[12] A balancing test can address this problem by facilitating an equitable result while still respecting constitutional values.[13] Like a bright-line rule, a balancing test identifies the constitutional principle, but then proceeds to balance that principle against a competing interest.[14] Justice Holmes, for example, favored such balancing so that the absolutes of the past would yield to the practicalities of the day.[15] Although his view eventually carried the day, it was still a dissenting view in the 1928 case of *Panhandle Oil Co. v. Mississippi* ex rel. *Knox*.[16] In that case, the majority determined that the states could

> even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989). For an argument that liberty is furthered by a rule-of-law system that generates predictability, see FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72–73 (1944).

11. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949 (1987) (discussing cases); *see also* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 432 (1995).

12. Aleinikoff, *supra* note 11, at 953. For indications of the modern Court's inclination (at least during the 1990s) to use balancing tests, see David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 642 (1994); *see also* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 301 (1995) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) and Matthews v. Eldridge, 424 U.S. 319, 335 (1976), but also recognizing counterexamples in Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–19 (1992) and Employment Div. v. Smith, 494 U.S. 872, 882–90 (1990)).

13. Justice O'Connor has been the flag bearer of the flexible approach. *See* Blakely v. Washington, 542 U.S. 296, 321 (2004) (O'Connor, J., dissenting) ("If indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former."); JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 278 (2005); Fisher, *supra* note 5, at 1506 (describing Justice O'Connor as a "consummate incrementalist").

14. Aleinikoff, *supra* note 11, at 987 ("[B]alancing appears as an extra step in constitutional interpretation. Once a court has done the hard work of explicating a constitutional provision through the usual methods of textual, precedential, and consequentialist reasoning, the result is subjected to another test—the weight of competing interests.").

15. *Id.* at 954.

16. *See* Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

not tax gasoline sales to the Federal Government because a state could not "retard, impede, and burden" the operations of the United States.[17] Justice Holmes dissented to such a rigid rule against burdening federal functions, arguing that that the Court had the ability to strike a balance between permissible and burdensome regulation.[18] With confidence in the ability of the Court to balance competing interests, Justice Holmes declared that "[t]he power to tax is not the power to destroy while this Court sits."[19] As in the taxation of federal functions, application of a balancing approach in other areas opens up a middle ground of constitutionality, allowing constitutional doctrine to conform to the exigencies of reality.

A decision to adopt a balancing approach has several additional advantages. Balancing epitomizes concepts of justice,[20] fairness, and reasonableness.[21] In areas of doctrinal uncertainty, balancing based on judicially determined factors allows for a gradual development of the law, giving "flexibility without sacrificing legitimacy."[22] Indeed, at a time when opposing values and rights vary in weight relative to one another and from year to year, balancing leads to effective case-by-case administration of justice. Changes can occur in one direction or another, providing for expansion or restriction of rights based on the present societal circumstances.[23]

17. *Id.* at 222 (majority opinion).

18. *Id.* at 223 (Holmes, J., dissenting) ("[T]his Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax.").

19. *Id.*

20. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908). Pound argued that although the "scientific" nature of law tended toward public confidence, the ultimate goal was justice, which sometimes required more flexibility:

> Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law. But this scientific character of law is a means,—a means toward the end of law, which is the administration of justice. Law is forced to take on this character in order to accomplish its end fully, equally, and exactly; and in so far as it fails to perform its function fully, equally and exactly, it fails in the end for which it exists.

Id.

21. Aleinikoff, *supra* note 11, at 962.

22. *Id.* at 961.

23. *Id.* at 960.

The balancing approach, however, can distract courts from the importance of constitutional values.[24] When a constitutional principle reflects only an invitation to balance competing interests, constitutional theory has less value.[25] With such relativity, the individual rights protected by the Constitution occasionally give way to other interests. Although reasonable people disagree about the merits of sacrificing individual rights in certain contexts, our Constitution prescribes certain procedures that must not give way to balancing. Both *Crawford* and *Blakely* accord greater recognition to some of these constitutional procedures.

In *Crawford*, the Court held that the Sixth Amendment right "to be confronted with witnesses"[26] required that a court subject testimonial evidence to cross-examination. That is, if a witness made a statement against the defendant and later became unavailable to testify in trial, that statement may be admitted only if the defendant had a prior opportunity to cross-examine the witness.[27] In establishing this mechanical protection, the Court set aside the prior test, which protected a defendant's right to confrontation by requiring that an out of court statement offered against the defendant either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[28] The prior test abstracted the Confrontation Clause to its underlying purpose—protection against unreliable evidence—and then allowed a judge to admit evidence under circumstances in which that purpose would not be furthered by cross-examination.[29] The *Crawford* Court,

24. *Id.* at 992 ("The balancing drum beats the rhythm of reasonableness, and we march to it because the cadence seems so familiar, so sensible. But our eyes are no longer focused on the Constitution.").

25. *Id.* ("Ultimately, the notion of constitutional supremacy hangs in the balance. For under a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit.").

26. The Sixth Amendment provides thus:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ***to be confronted with the witnesses against him***; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added).

27. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

28. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

29. *See* Fisher, *supra* note 5, at 1507.

however, said that the Constitution required more, holding that only an absolute rule would satisfy the defendant's right to confront the witnesses against him.[30]

Similarly, when the Court in *Blakely* confronted the issue of whether a judge could increase a defendant's sentence based on factual findings not made by a jury nor admitted by the defendant, it held that the Sixth Amendment right to a jury trial required that each fact affecting the sentence must be admitted by the defendant or derive from a jury verdict.[31] Under Washington law, after a defendant pled guilty to, or was convicted by jury for, an offense corresponding to a statutory maximum sentence, the judge could increase that sentence based on specified aggravating factors.[32] The Court held that in the matter of sentencing, the Constitution foreclosed a "judicial estimation of the proper role of the judge."[33] Judges cannot use their discretion to balance away the defendant's right to a jury trial because the Constitution already outlines a procedure—jury trial—that protects the rights of the defendant.

Both *Crawford* and *Blakely* recognized the importance of using a bright-line rule—a mechanical safeguard—to protect the interests recognized by the Sixth Amendment. Fisher seems to accurately hypothesize that the bright-line rule in those cases stemmed from the Court's decision to read the Constitution as having chosen to protect constitutional rights through an absolute rule.[34] In *Crawford*, the Court recognized a constitutional choice in the right

30. *See Crawford*, 541 U.S. at 61. The Court stated as follows:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Id. For an account of the argument Fisher made before the Supreme Court in *Crawford*, and how one concurring Justice opposed the categorical nature of his proposed rule, see Fisher, *supra* note 5, at 1507–08 (recounting his advocacy for a bright-line rule, and how he faced the argument that the "Sixth Amendment right must yield on occasion" to a higher "truth-seeking" goal (citation omitted)).

31. Blakely v. Washington, 542 U.S. 296, 301–04 (2004).

32. *Id.* at 299–300.

33. *Id.* at 307. "[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id.* at 308.

34. *See* Fisher, *supra* note 5, at 1522.

"to be confronted" by witnesses. Similarly, the Court in *Blakely* decided that the Constitution had already chosen the basis upon which convicted criminals could be sentenced—the jury trial. The Court in *Gonzalez-Lopez* also adopted an absolute rule, ensuring automatic reversal for a defendant wrongly denied counsel of choice. Thus, *Gonzalez-Lopez* provides additional opportunity to analyze the merits of a bright-line rule and the considerations supporting the Court's use of such rules. This analysis will show that even where Fisher's constitutional choice analysis does not explain the Court's use of a bright-line rule, the Court has other reasons to apply these rules in the area of criminal constitutional law, including the Court's competence over criminal trials, a greater need for formalism in criminal constitutional law, and the relative constancy of the criminal process over time. Absent such factors, it could appear that the only commonality between the three cases lies in the identity of the author of each of the opinions: an ardent supporter of the bright-line rule and limiting judicial discretion,[35] Justice Scalia.[36]

This Note first gives context and background to the Sixth Amendment right to counsel of choice, including both the constitutional history and some of the judicial developments that led up to *Gonzalez-Lopez*. This context and background highlights the uncertain history of the right. Part III follows this uncertain history into *Gonzalez-Lopez* and discusses the Justices' divergent views on the nature and scope of the right to counsel of choice and the appropriate remedy for violations of that right. Finally, Part IV analyzes the merits of rule-based jurisprudence in this context and examines whether Fisher's hypothesis adequately explains the Court's use of a bright-line rule in *Gonzalez-Lopez*. In the end, although the Court may not have responded to a constitutionally chosen bright-line rule—as, according to Fisher, the Court did in

35. For purposes of this Note, bright-line rules are treated as limiting judicial discretion. For commentary that more fully develops this point, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 158–62, 222–28 (1991); Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 843 (1994).

36. *See* SUNSTEIN, *supra* note 6, at 210 ("[A]bove all, [Justice Scalia] seeks to develop rules of interpretation that will limit the policy-making authority and decisional discretion of the judiciary . . . ."); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1320–23 (1990); Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 452–53 (2006). *See generally* Scalia, *supra* note 10.

Crawford and *Blakely*—the bright-line rule is supported by factors that encourage the use of mechanical rules to administer criminal constitutional rights. Although a preference for limiting judicial discretion may have also influenced the Court's decision, the outcome is correct, and is supported by principles specific to criminal constitutional law.

II. CONTEXT AND BACKGROUND

Although the full meaning and scope of the Sixth Amendment right to counsel has not been fully developed,[37] the right to counsel recognizes the importance of fairness and arguably grants the defendant a degree of control over the conduct of the defense.[38] That defense, if effective, will help to protect the integrity of the judicial system.[39] This Part first briefly traces the right to counsel from the English common law to the Bill of Rights, and then focuses on how the courts have developed the doctrine under the Sixth Amendment.[40] This brief outline establishes the context and background necessary to understand the discussion of *Gonzalez-Lopez* by showing that history and precedent did not compel the Court to apply a bright-line rule to protect a defendant's right to counsel of choice.

A. History of the Sixth Amendment Right to Counsel

The American understanding of the role of counsel in criminal proceedings has evolved according to changing legal conditions. A

37. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 52 (2002) ("[The] meaning and scope of the 'right to [counsel of choice]' have not been fully developed or explained by the Supreme Court." (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 618 (1989))).

38. *Id.* at 51–52 (identifying several reasons behind allowing defendants to select their own counsel, including "to grant the criminal defendant effective control over the conduct of his defense," to promote trust and confidence in the legal system, to enhance the feeling of fairness, and to increase the probability that the accused will feel reconciled with the outcome of the trial (quoting Wheat v. United States, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting))).

39. A credible judicial system must make some provision for an adequate criminal defense. On the importance of constitutional safeguards to such a defense, see Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 643 (1996) ("Counsel, confrontation, and compulsory process are designed as great engines by which an innocent man can make the truth of his innocence visible to the jury and the public.").

40. For an exhaustive list of bibliographical sources relating to the history of the right to counsel, see TOMKOVICZ, *supra* note 37, at 216–19.

gradual evolution has occurred from the English common law, which often denied the right to counsel, to our present system, which recognizes a right to counsel of choice for those with means to hire counsel and the right to effective assistance of counsel for all defendants. Underlying this historical process was the idea that fairness depends upon an adversarial system in which a defendant has a meaningful opportunity to prove innocence.

1. English common law

In light of the English common law right to counsel, the American system has come a long way in improving the fairness of criminal trials. A criminal trial in late seventeenth- and early eighteenth-century England looked much different from a criminal proceeding of today. Private parties brought criminal charges against the defendant, with the judge acting as a neutral referee between the two litigants.[41] A defendant did not have a right to access the evidence against him or to compel witnesses in his behalf.[42] For the most serious crimes, defendants could not have the assistance of counsel,[43] while a defendant charged with a misdemeanor or trespass could hire a lawyer.[44] Without evidentiary safeguards and the advocacy of counsel, fairness depended in large part upon how the judge chose to conduct the trial.

Under the English common law, fairness took a back seat to the need to maintain the supremacy of the government in the eyes of the people.[45] Without a police force and strong government to enforce

41. *Id.* at 2–3 (describing the conditions of trial, including the chaos created by the defendant's ability to question witnesses at will).

42. *See id.* at 3 ("Ordinarily, an individual charged with a felony was confined until the time of trial. He did not receive a copy of the indictment, was not informed of the evidence against him, and had no process for compelling witnesses to testify on his behalf." (citations omitted)).

43. *Id.* (stating that a defendant could not have assistance of counsel if charged with serious crimes, "such as murder, manslaughter, larceny, robbery, or rape, or treason or misprision of treason").

44. *Id.* (citing WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8 (1955) and John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 308 (1978)).

45. *See* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 2–3 (1992) ("This antipathy that the British common law displayed toward the assistance of counsel derived from the weakness of the government vis-à-vis its enemies." (citing FRANCIS H. HELLER, THE SIXTH AMENDMENT TO

the laws, the criminal justice system could not afford to be generous to criminal defendants.[46] Since felonies presented the greatest risk to the stability of the society, the government had greater incentive to deny defendants the assistance of counsel. Such a concession would impede the efficiency of the system and undermine the power of the government.[47] Although some commentators justify the English denial of counsel by the fact that defendants faced simple charges brought by private parties with relatively equal power,[48] this would not explain why those charged with misdemeanors would receive assistance of counsel, while defendants in felony cases had to go it alone.

At any rate, with few exceptions, defendants accused of serious crimes in England had no right to hire counsel until the early nineteenth-century. Although the Treason Act of 1695 and gradual judicial concessions increased the availability of counsel to the accused,[49] the right was not substantial and its existence and scope depended on the discretion of the judge.[50] With time, the government increased in stability and criminal trials eventually took on a more prosecutorial nature.[51] In view of these changed circumstances, in 1836, Parliament passed a law that allowed every defendant to hire counsel, and in 1903, it extended that right to indigent defendants in cases where "justice required such an appointment."[52]

In summary, at the nascence of the United States Constitution, the right to counsel in England depended upon the discretion of the judge in all cases except misdemeanors and charges of treason. Even those who could afford to hire counsel had no certainty as to whether a court would grant that privilege. The English system

THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 10 (1951))).

46. *See* TOMKOVICZ, *supra* note 37, at 3–4.

47. *Id.* at 4.

48. *Id.* at 4–5.

49. *Id.* at 6–7.

50. BEANEY, *supra* note 44, at 10 ("Because there was no statutory basis for this practice [of permitting defense counsel to perform various trial functions on behalf of the defendant], variations were frequent."); TOMKOVICZ, *supra* note 37, at 7 (citing J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 359 (1985) and Langbein, *supra* note 44, at 313).

51. TOMKOVICZ, *supra* note 37, at 7.

52. BEANEY, *supra* note 44, at 12; *see also* TOMKOVICZ, *supra* note 37, at 8–9.

relied on the discretion of the judge to ensure the fairness of the proceedings.

2. The Sixth Amendment and the Constitutional Convention

The American criminal justice system originally patterned itself after the English system,[53] but it gradually changed. In the early eighteenth-century, many colonies addressed crime through the public prosecutor, displacing the prior system of private criminal litigation.[54] This difference in procedure may have prompted the colonies to create allowances for counsel to ensure the fairness of trials.[55] In addition, the number of trained legal professionals increased in the colonies, and respect for the legal profession grew.[56] With a greater need for representation and an increased number of respected legal professionals, the colonies recognized that counsel should play a greater role in criminal defense. This change would give the defendant a chance to prove innocence while facing a powerful state.[57]

The changed colonial attitude toward the assistance of counsel is most apparent in the constitutional and statutory provisions that protected the right. By 1791, only one of the colonies still adhered to the English common law approach of denying the accused the assistance of counsel.[58] The remainder recognized the important role

53. BEANEY, *supra* note 44, at 15 ("Colonial records are produced to demonstrate that a deliberate and conscious effort was made in colonial America to copy English substantive and procedural rules."); TOMKOVICZ, *supra* note 37, at 9.

54. TOMKOVICZ, *supra* note 37, at 9 (citing Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 101 n.112 (1995)).

55. *Id.* at 10; *see also* GARCIA, *supra* note 45, at 4 ("The prosecutor wielded great power due to his familiarity with procedural niceties, the 'idiosyncrasies' of juries, and the personnel of the court. As a consequence, the assistance of counsel and the allied rights ultimately enumerated in the Sixth Amendment became essential to counter the prosecutor's advantage." (footnotes omitted)).

56. TOMKOVICZ, *supra* note 37, at 9–10. Initially, the colonists had fostered hostile sentiment toward lawyers. William F. McDonald, *In Defense of Inequality: The Legal Profession and Criminal Defense*, *in* THE DEFENSE COUNSEL 13, 20–22 (William F. McDonald ed., 1983).

57. *See* Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring) (stating that the rights conferred on defendants are "designed to redress the advantage that inheres in a government prosecution").

58. *See* Powell v. Alabama, 287 U.S. 45, 61 (1932); BEANEY, *supra* note 44, at 16–22 (summarizing constitutional and statutory provisions in each colony); GARCIA, *supra* note 45, at 4 (stating that most state constitutions contained a right to counsel after the colonies

counsel played in ensuring the fairness of the trial process. Given that most colonies had already recognized the right to counsel, it is hardly surprising that the Bill of Rights would contain such a provision.

The right to counsel in the Bill of Rights did not generate much discussion, although two states included a right to counsel provision in their suggested lists of rights.[59] The Convention adopted the provision without any reported discussion.[60] This silence could indicate that the states generally considered their practices to be in accord with the Sixth Amendment's right to counsel but could also indicate relative indifference or consensus. In any event, the lack of reported discussion concerning the right to counsel certainly does not aid the courts in interpreting the clause.[61]

In summary, the historical record does not definitively resolve the question of whether the right to counsel of choice deserves the protection a bright-line rule provides. Those who oppose the bright-line rule can emphasize the fairness considerations underlying historical developments. For example, with the development of the adversarial system, defendants needed counsel in order to obtain a fair trial result. If fairness is the core reason for providing the right to counsel, then, as some would argue, the right to counsel of choice should not be absolute, but should be enforced only when unfairness would result without its enforcement. On the other hand, those who would favor an absolute rule can look to the history of the right to counsel and argue that the American rejection of the English system—which placed the right to counsel within the discretion of judges—indicates a preference for enforcing constitutional rights through mechanical safeguards. Thus, the historical record leads to potentially conflicting conclusions as to the nature and scope of the right and the extent to which it should be protected. History does not unequivocally guide courts in making these decisions.

declared independence (citing Faretta v. California, 422 U.S. 806, 828–29 (1975))); TOMKOVICZ, *supra* note 37, at 10–13.

59. BEANEY, *supra* note 44, at 22.

60. *Id.* at 24 (noting a "dearth of discussion" concerning the right to counsel provision).

61. *Id.*

B. Fairness: A Main Focus of Sixth Amendment Jurisprudence

In the years immediately following the Constitutional Convention, the Supreme Court provided little interpretation of the right to counsel because the Bill of Rights originally only applied against the actions of the Federal Government.[62] Although the Fourteenth Amendment placed limitations on the activities of the states, it did not incorporate all the amendments in the Bill of Rights against the states. Indeed, when the Court finally began enforcing the right to counsel against the states, it acted under the Due Process Clause of the Fourteenth Amendment.[63] Although the Court initially interpreted the right to counsel based on the fairness considerations of due process, the Court now acts under the Sixth Amendment.[64] Thus, the meaning of the right to counsel is not necessarily limited to the fairness aspects of the Due Process Clause.

Notwithstanding the separation of the right to counsel analysis from the due process analysis, the Court's demonstrated willingness to place limitations on the right to counsel of choice shows that fairness still plays an important role in determining the scope of the right. For example, the Supreme Court in *Wheat v. United States*[65] held that the defendant's right to counsel of choice must sometimes give way to the need to avoid conflicts of interest between chosen counsel and other witnesses. When the Court chose to maintain overall trial integrity at the expense of a defendant's right to choose counsel, some commentators lamented that the Court had relegated the right to counsel to a fairness-based due process determination.[66]

62. *See* Barron v. Baltimore, 32 U.S. 243, 250 (1833) ("These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

63. *See, e.g.*, *Powell*, 287 U.S. at 60 ("The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution."); Stuntz, *supra* note 11, at 435–36.

64. *See* Blakely v. Washington, 542 U.S. 296, 301, 308 (2004) (discussing the requirements of the Sixth Amendment after granting certiorari on case from Washington Court of Appeals); Morris v. Slappy, 461 U.S. 1, 11 (1983) (applying Sixth Amendment to habeas petition from state court conviction in which defendant claimed denial of the right to counsel).

65. Wheat v. United States, 486 U.S. 153 (1988).

66. GARCIA, *supra* note 45, at 3 ("In essence, the Court has adopted the tenet that defendants possess a revocable privilege to counsel rather than a fundamental constitutional right.").

In *Wheat*, representation by Mr. Wheat's choice of counsel could have impaired the integrity of the decision through conflicts of interest. Mr. Wheat and several co-defendants were charged with conspiracy to distribute marijuana.[67] Prior to Mr. Wheat's trial, two co-defendants represented by Eugene Iredale received favorable results, which caused Mr. Wheat, apparently encouraged by these results, to request Iredale as his counsel.[68] In a hearing held to discuss a possible conflict of interest, Mr. Wheat argued that little potential for conflict existed because (1) he was willing to waive his right to conflict-free counsel, (2) the possibility for a conflict of interest was too tenuous, and (3) all three defendants waived any future claims of conflict of interest and agreed to let Iredale represent Mr. Wheat.[69]

In response, however, the trial court held that "an irreconcilable conflict of interest exist[ed]" and denied petitioner's request to be represented by Iredale.[70] At Mr. Wheat's trial, the government planned to call the second co-defendant to testify against Mr. Wheat.[71] In that situation, ethical prescriptions could have prevented Iredale from effectively cross-examining the second co-defendant. The prior representation created a serious conflict of interest such that the court would have risked error on appeal if it had allowed representation by Iredale. The court denied the substitution, Mr. Wheat proceeded to trial, and the jury returned a guilty verdict.[72] Subsequently, the Ninth Circuit affirmed, holding that the trial court struck the proper balance between a defendant's qualified right to counsel of choice and the court's need to avoid conflicts of interest.[73]

The Supreme Court also affirmed, emphasizing the fairness interest underlying the Sixth Amendment right to counsel.[74] Although the right to attorney of choice "is comprehended by the Sixth Amendment," the Court cited fairness as the core purpose of

67. *Wheat*, 486 U.S. at 154.

68. *See id.* at 154–55.

69. *See id.* at 156–57.

70. *See id.* at 157 ("I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is denied." (quoting the district court judge's ruling regarding the conflict of interest)).

71. *Id.* at 156.

72. *Id.* at 157.

73. *Id.*

74. *See id.* at 164.

the Amendment.[75] If the importance of one's counsel of choice were overemphasized, a court would have to grant every defendant's preference, regardless of resulting trial conflicts. The Court recognized a presumption in favor of counsel of choice but not an absolute right.[76] An absolute right to determine the identity of counsel went against the Court's understanding of the Sixth Amendment, under which "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such."[77]

In contrast to the majority opinion, the dissenting opinions gave greater weight to the importance of a defendant's autonomy interest in conducting the mode of defense. The dissenters reasoned that a defendant should have a "fair opportunity to secure counsel of his own choice,"[78] although they agreed that this right is not absolute.[79] The dissent, however, would accord greater weight to a defendant's interest in controlling the aspects of the defense, because "it is [a defendant] who suffers the consequences if the defense fails."[80] With respect to the conflicts of interest, the dissent argued that respecting a defendant's autonomy interest would best promote the fairness of the trial, at least in the important sense of how a defendant perceives the fairness of the trial.[81]

Wheat illustrates that a defendant does not have an absolute right to counsel of choice and that restrictions on that right often stem from considerations of trial integrity.[82] Given the impact of *Wheat*,

75. *Id.* at 159.

76. *See id.* at 160.

77. *Id.* at 159 (citing United States v. Cronic, 466 U.S. 648, 657 n.21 (1984)).

78. *Id.* at 165 (Marshall, J., dissenting) (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)).

79. *See id.* at 166.

80. *Id.* (quoting Faretta v. California, 422 U.S. 806, 819–20 (1975)).

81. *See id.*

82. *See id.* at 166 ("[A] trial court may in certain situations reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process."). In addition, a defendant does not have the right to choose a lawyer who is not a member of the bar, "may not insist on representation by an attorney he cannot afford" or who refuses to stand as counsel, and may not select an attorney who has a previous relationship with an opposing party. *Id.* at 159 (majority opinion). Finally, under proper circumstances, a court may effectively disqualify a defendant's choice of counsel if a trial is scheduled to begin on a certain date, and defendant's counsel has other commitments until after that date. *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2567 (2006) (Alito, J., dissenting).

further concessions might also occur in the name of fairness. Fairness considerations could lead the Court to treat the right (1) as a due process-based right to a fair trial; (2) as a right that promotes the integrity of the trial process, or, applying a more absolute view; (3) as a procedural requirement that grants the defendant control over the defense.[83] Of the three options, the language in the Court's opinion could lead to the conclusion that the right to counsel means little more than a due process-based determination of fairness.[84] Yet the other interests, especially the defendant's interest in controlling the conduct of the defense, arguably deserved recognition.[85] A future Court would have to give more direction.

The Court in *Wheat* circumscribed the right to counsel of choice by the need to maintain the integrity of the trial process. Its discussion focused on the issue of whether the trial court wrongfully denied the defendant's counsel of choice. The facts in *Wheat* differ from *Gonzalez-Lopez*, where the Court had to decide the remedy for the wrongful denial of counsel of choice. Nonetheless, *Wheat* still provides a good backdrop to the discussion of *Gonzalez-Lopez* because it shows how the Court has evaluated the right based on fairness considerations, not on an absolute conception of the right.

III. *UNITED STATES V. GONZALEZ-LOPEZ*

A. Facts

In *United States v. Gonzalez-Lopez*, the Court faced the issue of whether wrongful denial of a defendant's counsel of choice required

83. *See* Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. REV. 345, 381 (1992) (stating that the Court could go in one of three directions from *Wheat*: (1) it could retain the right only so far as it furthers the Sixth Amendment purpose of obtaining a fair trial, (2) it could focus on the institutional goals promoted by the right, or (3) it could view the right as part of the Sixth Amendment's interest in granting criminal defendants control over their trials).

84. *See id.* at 351 (stating that although *Wheat* could be seen to isolate the Sixth Amendment's goal of assuring a fair trial as the sole purpose of the right to counsel, the Court likely did not intend such a shift in its position).

85. *See, e.g.*, Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 188 (1998) ("In addition to the systemic interest in promoting the adversarial system of criminal justice, recognition of the right to counsel of choice also implicates the accused's personal interest in autonomy.").

the remedy of automatic reversal.[86] The facts involve several characters: Cuauhtemoc Gonzalez-Lopez, charged with conspiracy to distribute more than 100 kilograms of marijuana, and three defense attorneys.[87] Mr. Gonzalez-Lopez's family hired the first attorney, who later withdrew after Mr. Gonzalez-Lopez selected different counsel.[88] The federal district court, however, denied this choice of counsel, because the district court believed the attorney Mr. Gonzalez-Lopez selected had violated a court rule in a previous representation.[89] Mr. Gonzalez-Lopez proceeded to trial with a third attorney and was found guilty by the jury.[90] On appeal, the Eighth Circuit held that the district court had misinterpreted the court rule, making the denial of the defendant's chosen counsel erroneous.[91]

More importantly, the Eighth Circuit determined that the erroneous deprivation of counsel of choice was not subject to harmless error review and thus required automatic reversal, although it acknowledged that the Supreme Court had not addressed the issue.[92] The court recognized two types of constitutional errors: trial errors, which occur during the presentation of evidence to the jury, and structural errors, which affect the "framework within which the trial proceeds."[93] The court determined that harmless error review provides a sufficient remedy for trial errors, because the effect of the error "may . . . be quantitatively assessed in the context of other evidence presented . . . ."[94] Structural errors, on the other hand, require retrial because they negatively affect "the framework within which the trial proceeds."[95] The Eighth Circuit characterized the

86. *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564–66 (2006).

87. *Id.* at 2560.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2561.

92. United States v. Gonzalez-Lopez, 399 F.3d 924, 932–33 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006). The Supreme Court previously hinted that the wrongful denial of counsel may require automatic reversal, but it had not decided the issue. *See* Flanagan v. United States, 465 U.S. 259, 268 (1984) (cited in *Gonzalez-Lopez*, 399 F.3d at 933).

93. *Gonzalez-Lopez*, 399 F.3d at 932 (citing Neder v. United States, 527 U.S. 1, 8 (1999)).

94. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)).

95. *Id.* (citing *Neder*, 527 U.S. at 8); *see also* Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

erroneous deprivation of counsel as a structural error, aligning itself with the majority of circuit courts that had addressed the issue.[96]

Having determined that the denial of counsel of choice constituted a structural error, the Eighth Circuit vacated the conviction and remanded for a new trial.[97] In doing so, it recognized that the Sixth Amendment ensures not only fairness, but also that a defendant will have a certain degree of control over the conduct of the defense.[98] The government appealed, and the Supreme Court granted certiorari.[99]

B. Holding

The majority affirmed the Eighth Circuit, holding that the erroneous denial of counsel of choice required automatic reversal of the conviction, with no showing of prejudice.[100] In coming to that conclusion, the majority first showed that the Sixth Amendment "right to have Assistance of Counsel" was not merely the right to effective assistance of counsel but the right to assistance of one's *chosen* counsel. Additionally, the majority defined the remedy for the denial of the right as automatic reversal.[101] Justice Scalia wrote for the majority, joined by Justices Stevens, Souter, Ginsburg, and Breyer. The dissent, written by Justice Alito and joined by Chief Justice Roberts, Justice Kennedy, and Justice Thomas, disagreed on both points.[102]

96. *Gonzalez-Lopez*, 399 F.3d at 933 (citing United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1996); United States v. Childress, 58 F.3d 693, 736 (D.C. Cir. 1995) (per curiam); Bland v. California, 20 F.3d 1469, 1478 (9th Cir. 1994), *overruled on other grounds by* Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000); United States v. Mendoza-Salgado, 964 F.2d 993, 1015–16 (10th Cir. 1992); United States v. Panzardi Alvarez, 816 F.2d 813, 818 (1st Cir. 1987); Wilson v. Mintzes, 761 F.2d 275, 285–86 (6th Cir. 1985)). The Eighth Circuit recognized that *Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir. 2004), had taken a middle-ground approach by adopting an adverse effect standard, but joined the majority of circuit courts in holding that the wrongful denial of attorney of choice warrants automatic reversal of the conviction. *Gonzalez-Lopez*, 399 F.3d at 933.

97. *Id.* at 935.

98. *Id.*

99. United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2560 (2006).

100. *See id.* at 2564–66.

101. *See id.* at 2561, 2564–66.

102. For an interesting discussion of the ideological division between conservative Justices in criminal cases, see Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043 (2006).

1. Majority's evaluation of the Sixth Amendment right: Counsel of choice

After reciting the pertinent text of the Sixth Amendment, Justice Scalia cited cases for the position that the Sixth Amendment allows defendants with sufficient resources to choose who will represent them.[103] Although several factors limit the scope of this right, the government conceded that the district court had erroneously denied Mr. Gonzalez-Lopez's choice of counsel.[104] The analysis of the Court, therefore, proceeded on the assumption that Mr. Gonzalez-Lopez should have been able to hire the chosen attorney. The only questions were whether that denial violated the Sixth Amendment and, if so, what remedy a court should supply.

Justice Scalia began by rejecting the government's proposed rule defining when the right to counsel had been violated. The government argued that the Assistance of Counsel Clause would not be violated unless a defendant who had been erroneously denied counsel of choice could show that the denial prejudiced the defense.[105] This evaluation would essentially parallel the analysis applied when a defendant claims that counsel provided ineffective assistance of counsel.[106] This focus on the fairness aspect of the Sixth Amendment would arguably collapse the right to counsel into the right to effective assistance of counsel.[107] The majority rejected the government's proposed prejudice requirement, asserting that the Sixth Amendment guarantees more than effective assistance of counsel.[108]

In effect, the government would have the Court recognize that the Sixth Amendment assures a fair trial and then disregard the right

103. *See Gonzalez-Lopez*, 126 S. Ct. at 2561 (citing Wheat v. United States, 486 U.S. 153, 159 (1988) and Powell v. Alabama, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.")).

104. *Id.*

105. *Id.*

106. *See* Strickland v. Washington, 466 U.S. 668, 691–96 (1984). Justice Scalia quoted a portion of *Strickland* that states that prejudice requires a showing of a "reasonable probability that . . . the result of the proceedings would have been different." *Gonzalez-Lopez*, 126 S. Ct. at 2561 (quoting *Strickland*, 466 U.S. at 694).

107. *Gonzalez-Lopez*, 126 S. Ct. at 2562 ("[T]he Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details.").

108. *Id.* at 2563.

to counsel of choice "so long as the trial is, on the whole, fair."[109] Justice Scalia condemned this approach because it "abstracts from the right to its purposes, and then eliminates the right."[110] He identified the parallel process formerly applied to Confrontation Clause jurisprudence, in which the Court had said that "the purpose of the Confrontation Clause was to ensure the reliability of evidence,"[111] and then did away with formal confrontation of witnesses when the evidence "bore [sufficient] 'indicia of reliability.'"[112] The Court later recognized that the right to confrontation existed independent of any judicial estimation of the reliability of evidence, holding that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[113]

Likewise, the Court stated that it would not reduce the Sixth Amendment right to counsel of choice to the identified purpose of ensuring the fairness of trials, thereby allowing a court to deny that right when it would not further the purpose of fairness. Instead, the Court held that the Sixth Amendment requires "not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[114] The Sixth Amendment protects the defendant's right to counsel of choice, not the right to a fair trial.[115] If the Sixth Amendment really only ensured fairness, then the defendant would need to show prejudice (lack of fairness); but because the defendant has a right to counsel of choice, its erroneous deprivation requires nothing more "to make the violation 'complete.'"[116]

An analogy to the right to effective assistance of counsel misconstrues the Sixth Amendment, because the right to counsel and the right to effective assistance of counsel originated differently. The right to effective assistance of counsel, even for those without resources to hire an attorney, originated from the fairness

109. *Id.* at 2562.

110. *Id.* (quoting Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)).

111. *Id.*

112. *Id.* (quoting Ohio v. Roberts, 448 U.S. 56, 65–66 (1980)).

113. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)).

114. *Id.*

115. *Id.*

116. *Id.*

requirement inherent in due process.[117] With its origins in fairness, it makes sense to require a defendant to show prejudice in order to complete a violation of the right.[118] The Sixth Amendment right to counsel of choice, however, exists apart from due process protections, and the Court refused to merge the two rights.[119] Having refused to merge the right to effective assistance with the right to counsel of choice, the Court held that the erroneous denial alone violated the constitutional rights of a defendant.

2. Majority's remedy for erroneous denial: Automatic reversal

Denial of constitutional rights rarely warrants automatic reversal of a conviction; in most cases, the government has the opportunity to show that the error was "harmless beyond a reasonable doubt."[120] An identifiable error that clearly does not influence the outcome of the trial does not justify the expenditure of additional public resources that would be required to retry a case. As the Eighth Circuit has previously acknowledged, however, some errors affect the framework of the trial—and not merely the manner in which it proceeds[121]—and thus do not fit nicely into harmless error analysis.

The Court held that denial of counsel of choice cannot be remedied through harmless error analysis.[122] According to the Court, the principle that separates errors subject to harmless error review from errors that require automatic reversal is the "difficulty of assessing the effect of the error."[123] Based on this standard, the Court had "little trouble" concluding that the erroneous denial of

117. *Id.* at 2563 (citing McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970)).

118. *Id.* ("Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose.").

119. *See id.* Some argue that even indigent defendants should have a right to more than effective assistance of counsel. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1043–45 (2006) (summarizing research that reveals the inadequacy of indigent defense); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 435 (1992). This Note does not discuss this topic, although *Gonzalez-Lopez*, in strengthening the right to counsel of choice, could have the effect of encouraging reforms that provide more meaningful representation for indigent defendants.

120. *Id.* at 2564 (citing Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991)).

121. *See* discussion *supra* Part III.A.

122. *Gonzalez-Lopez*, 126 S. Ct. at 2566.

123. *Id.* at 2564 n.4.

counsel of choice warrants automatic reversal.[124] The Court identified several factors that complicate harmless error analysis, including the ambiguous effect of attorney differences in trial strategy, defense theory, jury selection, and witness examination.[125] The impact of these differences would be difficult to determine; indeed, such a determination would be tantamount to an "inquiry into what might have occurred in an alternate universe."[126] Due to the difficulty of assessing the impact of the error, the Court held that erroneous deprivation of counsel of choice requires automatic reversal.[127]

Thus, the majority twice refused to subject the denial of counsel of choice to some form of prejudice analysis grounded in concepts of fairness. First, it identified the right to counsel of choice as an absolute right with merit in itself, regardless of its purpose in ensuring fairness. Second, the Court refused to subject the violation of that right to harmless error analysis because of the difficulty of assessing the impact of the error on the trial. In both instances, it used categorical rules to protect the rights of the defendant.

3. Dissent's characterization of the Sixth Amendment right: Assistance

The dissent emphasized the purpose of the Sixth Amendment—fairness—and would have used fairness to assess a violation of the defendant's right to counsel of choice and the remedy for that violation.[128] In coming to its conclusion, the dissent focused on the text of the Constitution and the purpose attributed to the text in precedent. According to the dissent, the key word in the Assistance of Counsel Clause is *assistance*—meaning that the quality of assistance should be the touchstone of constitutionality.[129] The actual text provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[130] Given this language, the dissent found it more legitimate to focus on the assistance the accused should receive, not on the identity of counsel.[131] Under this

124. *Id.* at 2564.
125. *Id.*
126. *Id.* at 2565.
127. *Id.* at 2564–65.
128. *Id.* at 2567 (Alito, J., dissenting).
129. *Id.* at 2566.
130. U.S. CONST. amend. VI.
131. *Gonzalez-Lopez*, 126 S. Ct. at 2566 (Alito, J., dissenting).

reading, the Sixth Amendment would grant the "right to have *the assistance* that the defendant's counsel of choice is able to provide,"[132] not the absolute right to choose who will represent the defendant.

The dissent also argued that the historical and legal development of the Sixth Amendment supports this focus on assistance. The purpose of the Amendment was to counter the English common law rule that limited the ability of a felony defendant to be represented by counsel.[133] To achieve this purpose, a defendant need not have counsel of choice, but only such assistance as will ensure fairness. Although at the time of the adoption of the Bill of Rights, defendants chose their own counsel, this was necessarily the case because "the availability of appointed counsel was generally limited . . . ."[134] Accordingly, the dissent concluded that the history of the Sixth Amendment does not require that a defendant receive assistance from counsel of choice.

In addition, case law outlines limitations on the right to counsel of choice, and these limitations indicate an emphasis on assistance as opposed to choice.[135] The right to choose has never been absolute; many considerations can overcome the defendant's choice of counsel, including court eligibility rules, conflict-of-interest rules, and court scheduling considerations.[136] These extraneous limitations "are tolerable because the focus of the right is the quality of the representation . . . not the identity of the attorney . . . ."[137] The limitations on counsel of choice indicate that the Amendment cannot inexorably guarantee a defendant's choice of counsel.[138]

Even apart from the limits to the right to counsel, case law extols the Sixth Amendment as a protection of fairness, not of the defendant's choice. The Amendment "assure[s] fairness in the adversary criminal process"[139] and was not intended "to ensure that a

132. *Id.*

133. *Id.* at 2566–67 (citing United States v. Ash, 413 U.S. 300, 306 (1973)).

134. *Id.* at 2567.

135. *Id.* at 2567–68.

136. *Id.* (citations omitted).

137. *Id.* at 2567–68.

138. *Id.* ("These limitations on the right to counsel of choice are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation.").

139. *Id.* at 2567 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).

defendant will inexorably be represented by the lawyer whom he prefers."[140] Given this emphasis, the dissent thought it unreasonable to accord too much deference to a defendant's first choice when deciding whether the defendant must show prejudice to make the violation complete.[141] On the contrary, the emphasis on fairness implies that a defendant should show some defect in the assistance received in order to prove a Sixth Amendment violation. Thus, the dissent reasoned that no violation of the Sixth Amendment *occurs* unless a court error "diminishes the quality of assistance that the defendant would have otherwise received."[142] The defendant could receive a new trial by identifying a difference between the representation received and that of disqualified counsel.[143]

4. Dissent's remedy: A defendant must show prejudice

Given that the dissent would require an "identifiable difference"[144] in the quality of representation before finding a constitutional violation, it would have no need to evaluate whether that violation would be subject to harmless error review or automatic reversal, because the test for violation already incorporates the principles of harmless error review. Yet, assuming (as the majority decided) that erroneous deprivation of counsel alone violates the Constitution, the dissent still would subject that violation to harmless error review before granting the defendant a new trial.[145] This result follows from the rareness of automatic reversal as a

140. *Id.* ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." (quoting Wheat v. United States, 486 U.S. 153, 159 (1983) and citing Morris v. Slappy, 461 U.S. 1, 14 (1983))). One scholar recognized a problem with unchecked counsel of choice: that an attorney may develop such a close relationship with a client that she or he may yield ethical considerations to the needs of the client. *See* Pamela S. Karlan, *Discrete and Relational Criminal Representation*, 105 HARV. L. REV. 670, 686–87 (1992). The Court's hesitancy to recognize a relational right in the Sixth Amendment may stem from this concern.

141. *Gonzalez-Lopez*, 126 S. Ct. at 2568.

142. *Id.*

143. *Id.* Notably, the standard proposed by Justice Alito would apparently require less showing of prejudice than an ineffective assistance of counsel claim within the meaning of *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which requires a defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

144. *Gonzalez-Lopez*, 126 S. Ct. at 2568 (Alito, J., dissenting) (quoting Rodriquez v. Chandler, 382 F.3d 670, 675 (7th Cir. 2004)).

145. *Id.* at 2570.

remedy and the absurd results that would follow from subjecting the denial of counsel of choice to automatic reversal.[146]

According to the dissent, automatic reversal is reserved for errors that involve fundamental unfairness, and the denial of counsel of choice does not rise to that level.[147] Although the majority characterized automatic reversal as being appropriate whenever the effect of the error is difficult to determine,[148] the dissent focused on the nature of the error.[149] Only where the error was one that would "render a trial fundamentally unfair" should a court grant automatic reversal.[150] Denial of counsel of choice does not involve this high level of fundamental unfairness because the defendant often chooses counsel unwittingly; furthermore, quality of representation often does not differ between first- and second-choice counsel.[151] The dissent admitted that equivalent representation would not justify the *denial* of the right to choice of counsel, but the high likelihood of fair representation should "inform the remedy."[152]

The dissent also thought that absurd results follow from the automatic reversal of erroneous denials of counsel of choice.[153] To require retrial in cases where no prejudice resulted creates a significant burden on the resources of the courts.[154] The dissent estimated that there would be many situations in which a second-choice attorney would actually provide better assistance than the counsel of first choice; or at any rate, the trial judge would know that any difference in trial strategy did not affect the trial outcome.[155] The dissent thought this judicial determination was well within the competence of the courts.[156] Significantly, when a court cannot

146. *See id.* at 2569–71.

147. *See id.*

148. *See supra* Part III.

149. *Gonzalez-Lopez*, 126 S. Ct. at 2569 (Alito, J., dissenting).

150. *Id.* (quoting Neder v. United States, 527 U.S. 1, 7 (1999)); *see also id.* at 2570 ("The touchstone of structural error is fundamental unfairness and unreliability.").

151. *Id.* at 2569.

152. *Id.*

153. *Id.* at 2570.

154. *See id.* at 2571 ("The consequences of the majority's holding are particularly severe in the federal system and in other court systems that do not allow a defendant to take an interlocutory appeal when counsel is disqualified . . . . [I]f an appellate court concludes that the trial judge made a marginally incorrect ruling in applying its own *pro hac vice* rules, the appellate court has no alternative but to order a new trial . . . .").

155. *Id.* at 2570.

156. *Id.*

clearly discern the effect of the denial, the prosecution would have a hard time proving that the error was harmless beyond a reasonable doubt.[157] Thus, even if erroneous deprivation of counsel of choice violated the Sixth Amendment—without any showing of prejudice—automatic reversal required such a showing because the right in question did not involve the categorical unfairness requisite to granting automatic reversal.

The difference between the majority and dissent reveals divergent understandings of the right to counsel of choice, and these views found voice in the respective opinions on how courts should administer the right. The majority favored clear rules that would indicate when the right was violated and what the remedy should be.[158] The dissent, on the other hand, would allow judges to use discretion to determine whether a Sixth Amendment violation occurred and whether that violation warranted a new trial.[159] Although both opinions rooted their analysis in the text of the Sixth Amendment,[160] each came to a different conclusion. This stark difference in result, with both views framing analysis around the text of the Constitution, indicates a methodological difference at play,[161] and warrants further discussion and exploration.

IV. ANALYSIS

The fact that history, precedent, and constitutional text did not clearly lead to the outcome in *Gonzalez-Lopez* suggests that deeper methodological approaches of the Justices led to the divergent outcomes of the majority and dissenting opinions. In particular, Justice Scalia favors bright-line rules and limiting judicial

157. *Id.*

158. *See id.* at 2564–65.

159. *See id.* at 2569–71.

160. *See id.* at 2561, 2566. Indeed, the textual foundation for analysis is of great importance to textualists like Justice Scalia. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean."); *see also* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1132 (1996) (noting the importance of beginning with the text and sticking close to it).

161. One author has pointed out that methodology increasingly matters in the disposition of criminal cases. *See* Barkow, *supra* note 102, at 1077. The analysis that follows seems to vindicate that hypothesis.

discretion,[162] and that overarching methodology likely played a key role in the outcome of this case. Although this methodological preference influenced the majority opinion, other factors provide independent justification for the bright-line rule. This Part analyzes the approach of Jeffrey L. Fisher, as well as the academic literature that addresses the merits and shortcomings of bright-line rules in the criminal procedure context, in a search for other principles that justify the use of a bright-line rule in this case. Fisher's constitutional choice analysis attempts to provide a textual justification for bright-line rules. This neutral analysis, however, does not fully explain the use of a bright-line rule in *Gonzalez-Lopez*. Other factors specific to the criminal procedure context provide independent justification for the Court's treatment of the right to counsel of choice. The Court's experience with criminal procedure makes a bright-line rule more reliable than in other contexts; the important rights at stake implicate a greater need for formalism; and the static nature of the criminal trial means that a rule laid down today will not need modification tomorrow. Given the strength of these factors, this Part concludes that the bright-line rule in *Gonzalez-Lopez* does not rely solely on a methodological preference for bright-line rules and limited judicial discretion.

A. Procedural Rule Not Mandated by Precedent

Both opinions proffered several factors in favor of their respective approaches, yet neither opinion could definitively state that the Constitution mandated the decision. Two pragmatic factors—interpretive consistency and generous construction of rights—support the majority approach; the dissent's approach, on the other hand, relies on history, recent judicial trends, judicial efficiency, and considerations of fairness.[163] The analysis below concludes that substantive constitutional doctrine did not mandate a procedural safeguard in this case.

Interestingly, had the Court adopted the analysis of the Eighth Circuit, it could have found greater substantive backing for its procedural rule. The Eighth Circuit said that the Sixth Amendment entailed not only fairness, but also a defendant's right to free choice

162. *See supra* note 36.

163. *See infra* notes 169–79 and accompanying text.

in shaping the method of defense.[164] By recognizing such an autonomy interest, the Supreme Court could have bolstered its conclusion that the Sixth Amendment protects the defendant's choice of counsel, not merely effective assistance of counsel.[165] The Court, however, declined to do so.[166] Instead, it accepted the government's argument that the Sixth Amendment's purpose is to ensure a fair trial.[167] The majority only differed from the dissent in its method of ensuring fairness: it held that the Sixth Amendment requires a "particular guarantee of fairness"—the right to choice of counsel.[168]

Perhaps the strongest factor in favor of the majority approach is that it distinguishes between the Sixth Amendment and due process;[169] yet, even conceding the need to draw such a distinction, the majority approach does not necessarily follow. The majority

164. United States v. Gonzalez-Lopez, 399 F.3d 924, 934–35 (2005) ("The criminal defendant's right to select the attorney of his choice to represent him, like the right to self-representation, derives from the Sixth Amendment principle wherein the defendant has the right to decide the type of defense he will mount." (citing United States v. Laura, 607 F.2d 52, 56 (1979))); *see also* Faretta v. California, 422 U.S. 806, 819 (1975) (recognizing an autonomy interest behind the Sixth Amendment right to self-representation).

165. The Court had the autonomy argument before it, not only as raised by the lower court, but also in the respondent's brief. *See* Brief for the Respondent at 23–24, 39–40, United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) (No. 05-352). In addition, the Court addressed the autonomy interest at oral argument, where "autonomy" was mentioned over twenty times, mainly in response to questions by Justices Souter and Stevens. Transcript of Oral Argument, United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) (No. 05-352), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-352.pdf [hereinafter Gonzalez-Lopez Transcript]. It is interesting to note that Justice Scalia, who wrote for the majority, made no reference to an autonomy interest in the opinion, and did not use the word "autonomy" during oral argument. *See id.*

166. The Court did state that the defendant has a right "to choose who will represent him," but did not discuss the interests that supported that right. *Gonzalez-Lopez*, 126 S. Ct. at 2561 (citing Wheat v. United States, 486 U.S. 153, 159 (1988)).

167. *Id.* at 2562. ("It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial . . . ."). The Court could have recognized an autonomy interest behind the right to assistance of counsel. It had done so in interpreting other aspects of the Sixth Amendment. *See* Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 410 (2000) ("While the Court has alluded to three values—trial fairness, substantive privacy interests, and respecting the autonomy of the accused—as reflected in the Sixth Amendment right to counsel, close consideration of the Court's work makes clear that the fairness and autonomy interests are the primary, and perhaps the only, values presently bottoming the right to counsel.").

168. *Gonzalez-Lopez*, 126 S. Ct. at 2562.

169. *See id.*

forcefully argued that the Sixth Amendment should not collapse into an effective assistance of counsel analysis.[170] It argued that the right to counsel and the right to effective assistance of counsel arose separately and from different sources, and should therefore not converge.[171] This would suggest that erroneous denial of chosen counsel completes the violation.

It does not follow, however, that the violation requires automatic reversal, for in requiring harmless error analysis before granting a new trial, the Court would not collapse the right to counsel into the right to effective assistance of counsel. The two rights would differ in the ease with which the prosecution could prove harmlessness:[172] if, as the majority asserted, a court would have difficulty assessing the prejudicial effect of deprivation of counsel,[173] this ambiguity would make the prosecution's argument for harmlessness very difficult. Unlike the harmless error analysis associated with an ineffective assistance of counsel claim—where the prosecution can point to the harmlessness of the specific errors upon which the defendant brought the ineffective assistance claim[174]—the uncertain effect of the denial of counsel of choice would make it difficult for the prosecution to meet the burden of proving harmlessness beyond a reasonable doubt.

A second factor favoring the majority approach is that it creates a windfall for the criminal defendant. Many argue that the Court should liberally construe the criminal rights protected by the Constitution because political processes will not fill that role.[175] In light of this anti-majoritarian role, perhaps a mechanical rule better protects a defendant's rights. Although this argument has merit, it does not show that the remedy for the violation of the right to counsel must be automatic reversal. The Court could protect a defendant's right from the heat of passion that can accompany public

170. *Id.*

171. *Id.* at 2563.

172. *See id.* at 2569–70 (Alito, J., dissenting) ("To be sure, when the effect of an erroneous disqualification is hard to gauge, the prosecution will be unable to meet its burden of showing that the error was harmless beyond a reasonable doubt.").

173. *See id.* at 2565 (majority opinion).

174. *See id.* at 2570 (Alito, J., dissenting).

175. *See, e.g.*, Scalia, *supra* note 10, at 1180 ("[Courts'] most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of [the] popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.").

trials by finding a violation of the right upon erroneous deprivation. Then, on appeal, the defendant would have his or her rights vindicated in a more dispassionate forum, with the government carrying a heavy burden to show harmlessness beyond a reasonable doubt. Only then would a defendant be denied a new trial.

Thus, it is not clear that precedent or constitutional considerations mandated the Court's bright-line rule.[176] Indeed, the dissent's balancing approach had significant merit in this case. The dissent's approach would reconcile the history of the Sixth Amendment with *Wheat's* recent focus on fairness. In another, but unrelated, aspect of fairness, the balancing approach would recognize the inequity of allowing wealthy defendants a new trial upon erroneous denial of first choice of counsel, while indigent defendants have no right to choose their counsel *and* must show prejudice to their defense in order to gain any redress for the mistakes of appointed counsel.[177] Most significantly, the dissent's approach would recognize the importance of criminal rights, but also give greater recognition to judicial efficiency as a competing interest. A balancing approach could save the expense of a new trial when choice of counsel had no effect on the outcome of the proceedings.[178] The majority's categorical approach refused to recognize these interests, instead requiring automatic reversal—"strong medicine" that should only be used sparingly.[179]

176. On the inadequacy of grounding Sixth Amendment jurisprudence on analyses of history and precedent, see Amar, *supra* note 160, at 1127 ("[P]recedent alone cannot guide the way—even for those Justices who steer by precedent as their polestar—because precedent in this field is so regularly contradictory or perverse.").

177. Michael R. Dreeben, *The Right To Present a Twinkie Defense*, 9 GREEN BAG 347, 352 (2006). *Gonzalez-Lopez* does not bid well for the indigent criminal defendant's perception of fairness:

> [E]ven if the Court cannot, through its decisions, equalize justice for the rich and poor, it also need not . . . poke a finger in the eye of indigent criminal defendants. Imagine this statement to the typical indigent defendant: "If you have incompetent, or conflicted, or lethargic, or grossly inexperienced counsel, you have no ground for complaint unless you can show that competent counsel would have created a reasonable probability of a different outcome. But if only you were rich! Then, a denial of your first-choice counsel would be the golden road to a new trial."

Id.

178. Indeed, granting automatic reversal in all cases, without consideration of the public expense associated with a new trial, arguably creates "[a] poor fit between doctrine and the real world." *See* Aleinikoff, *supra* note 11, at 953.

179. *Gonzalez-Lopez*, 126 S. Ct. at 2570 (Alito, J., dissenting).

Given that a bright-line rule can impair judicial efficiency and that precedent did not mandate the rule, some other factor must have influenced the Court's decision to apply the bright-line rule. In searching for such a factor, relevant legal scholarship should be considered, including that of Jeffrey L. Fisher, the successful advocate in *Crawford*, *Blakely*, and *Gonzalez-Lopez*. The following discussion evaluates whether Fisher's constitutional choice analysis adequately explains the use of a bright-line rule in *Gonzalez-Lopez* and examines other factors that might explain the Court's holding.

B. Searching for the Basis of the Bright-Line Rule

Fisher outlines several factors that could lean toward the application of a bright-line rule, including originalism, considerations of administrability, and the enforcement of constitutional choices.[180] Under Fisher's analysis, the difference between constitutional choices and constitutional values best explains the Court's recent use of categorical rules and he analyzes *Crawford* and *Blakely* to vindicate this hypothesis.[181] He does this by first showing that originalism and administrability do not account for the rules adopted in those cases. He then applies his constitutional choice analysis to determine when the Court should apply a procedural rule, and concludes that his analysis explains the results reached in *Crawford* and *Blakely*.[182] This analysis does not, however, explain the Court's use of a bright-line rule in *Gonzalez-Lopez*.

1. Originalism: An unlikely support for bright-line rules

Fisher suggests that although originalism informs the Court as to the nature of the right in question, originalism will not determine whether that right should be enforced through a bright-line rule or a balancing test.[183] An originalist defense of categorical rules would suggest that the Framers placed criminal procedure guarantees in the Bill of Rights in order to prevent judges from balancing away those rights.[184] Although Fisher acknowledges that the Bill of Rights protects against the erosion of common law rights, he believes that

180. *See* Fisher, *supra* note 5, at 1516–28.
181. *See id.* at 1523–28.
182. *See id.* at 1516–28.
183. *Id.* at 1518.
184. *Id.* at 1516–17; *see also* Black, *supra* note 9, at 874–75.

bright-line rules are not absolutely necessary for the protection of rights.[185] "The leap from the Framers' general intentions to the means of implementing them is simply too great."[186]

The majority in *Gonzalez-Lopez* did not attempt to make the leap from the general intentions of the Framers to a requirement for a bright-line rule. The Court instead harkened to principle; it was unwilling to abstract the purpose of fairness from the right to counsel and then eliminate the right.[187] The Court also supported its holding by distinguishing the right to counsel of choice from the right to effective assistance of counsel, rooting the right to counsel of choice in the longstanding practice of allowing defendants to choose their counsel.[188] The right to effective assistance, on the other hand, originated from an understanding that fairness required a baseline standard of attorney performance.[189] The Court, however, did not argue that the historical understanding mandated the bright-line rule adopted,[190] but that harmless error review would confuse the right to counsel with the right to effective assistance of counsel.[191]

185. Fisher, *supra* note 5, at 1517 ("[I]t is one thing to say that the Framers intended to install bulwarks against erosion and another to say that they intended bulwarks to segregate only by kind and never by degree. A dam can still be effective while letting some water pass through.").

186. *Id.* at 1517. *But see* Barkow, *supra* note 102, at 1072–73 (arguing that originalism sometimes dictates the categorical enforcement of rights); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 201–03 (2005) (recognizing originalism and formalism as driving the bright-line rule in *Crawford*, but only formalism compelling a bright-line rule in *Blakely*).

187. United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2562 (2006) (quoting Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)).

188. *See id.* at 2563 (citing Wheat v. United States, 486 U.S. 153, 159 (1988); Andersen v. Treat, 172 U.S. 24 (1898); and BEANEY, *supra* note 44, at 18–24, 27–33).

189. *Id.*

190. Indeed, Justice Scalia may not have garnered the necessary votes for a majority if he had based his analysis on original understanding, given that at least one Justice that joined his opinion does not favor that basis of decision. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 249 (2002) ("The more literal judges may hope to find, in language, history, tradition, and precedent, objective interpretive standards; they may seek to avoid an interpretive subjectivity that could confuse a judge's personal idea of what is good for that which the Constitution demands; and they may believe that these 'original' sources more readily will yield rules that can guide other institutions, including lower courts. These objectives are desirable, but I do not think the literal approach will achieve them, and, in any event, the constitutional price is too high.").

191. *Gonzalez-Lopez*, 126 S. Ct. at 2563 ("To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative

Historical records often lead to conflicting conclusions as to whether a bright-line rule should apply. Indeed, in the *Gonzalez-Lopez* dissent, Justice Alito looked at the purpose of the right to counsel and argued that "Assistance of Counsel" focuses on assistance, not on the "identity of the provider."[192] The Amendment ensured fairness by limiting the English common law rule that denied a felony defendant the right to assistance of counsel.[193] As further evidence that the historical record can lead to different conclusions, the dissent—in arguing that the Clause ensured fairness, not that a defendant would "inexorably be represented by the lawyer whom he prefers"—quoted one of the same interpretive cases that the majority cited in support of its decision.[194] Thus, *Gonzalez-Lopez* seems to vindicate Fisher's hesitancy to use originalism to explain the use of bright-line rules. The majority opinion did not attempt to base its holding on originalism, and the analysis of the dissenting opinion revealed the inadequacy of an attempt to do so. Originalism does not explain the Court's use of a bright-line rule here.

2. Administrability: Not a factor in Gonzalez-Lopez

On then to administrability, wherein Fisher argues that although a need for predictability encourages the use of bright-line rules, it does not fully justify their use.[195] Where rights are at stake, one might argue that constitutional provisions should provide "clear ex ante guidance and prove administrable in the courts."[196] In this regard, there are many situations in which defendants, police officers, prosecutors, and courts need to know how to structure their conduct

effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.").

192. *Id.* at 2566 (Alito, J., dissenting).

193. *See id.* at 2566–67.

194. *Id.* at 2567 (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)). As to the conflicting conclusions that can be drawn from the historical record, see *supra* Part II, which shows that on the one hand, the record indicates that the right to counsel was intended to ensure a fair trial; on the other hand, the provision was intended to take away the ability of judges to limit that right. Both sides can rely on such evidence to inform their respective opinions.

195. *See* Fisher, *supra* note 5, at 1518–21.

196. *Id.* at 1519; *see also* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–63 (1992) (recognizing the importance of certainty and predictability, but warning that such certainty can allow the "bad man" to engage in reprehensible behavior right up to the well-defined line).

in carrying out the processes surrounding criminal prosecution.[197] Administrability has particular importance for Sixth Amendment rights because courts deal with these rights on a daily basis.[198]

Although the frequent surfacing of Sixth Amendment rights usually creates a need for predictability, such a need did not support the use of a bright-line rule in *Gonzalez-Lopez* because courts rarely have occasion to deny a defendant's counsel of choice. At oral argument, the Court discussed the rarity of these cases, and Fisher suggested that less than one such case reaches the federal courts of appeal each year.[199] In short, wrongful denial of counsel of choice does not occur frequently enough to warrant a bright-line rule for administrability purposes.

Thus, administrability cannot explain the Court's use of a bright-line rule in *Gonzalez-Lopez*. Indeed, according to Fisher, the need for administrability, even where applicable, only frames the question of what type of rule to apply.[200] Given that originalism and administrability fail to explain the Court's use of a bright-line rule, the discussion below considers the guidepost identified by Fisher: the difference between constitutional values and constitutional choices.

3. Categorical enforcement of constitutional choices

Fisher's guidepost separates constitutional choices from constitutional values, and if applicable, may serve as a decisive factor in a court's decision between bright-line rules and balancing tests. His rule says that "[w]hen the Constitution makes a choice instead of identifying a value, that choice must be categorically enforced."[201] In other words, the Constitution makes a "choice" when its text prescribes the procedure by which a court should protect the right. Although many procedures are apparent on first reading, Fisher identifies a textual tool for situations of less clarity: determine

197. Fisher, *supra* note 5, at 1519.

198. *See, e.g.*, *id.* at 1520 (citing Crawford v. Washington, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., concurring)).

199. Gonzalez-Lopez Transcript, *supra* note 165, at 45.

200. *See* Fisher, *supra* note 5, at 1521 ("In fact, [administrability] really only frames [our inquiry], because a need for easily administrable constitutional doctrine does not always lead to categorical rules."). Fisher goes on to note situations in which constitutional rights are at issue, but the Court has refused to adjudicate the rights by means of bright-line rules. *Id.* at 1521–22.

201. *Id.* at 1522.

whether the right is phrased as a noun or as an adjective.[202] Nouns indicate choices, while adjectives imply values.[203]

The recent example in *Crawford* provides an illustration of the categorical enforcement of a constitutional value. In *Crawford*, the Court faced a constitutional text that granted a defendant the right "to be confronted with the witnesses against him."[204] The Court decided that only a procedural right to formally confront testimonial evidence could satisfy the demands of the Constitution, because "[t]he Constitution prescribes a procedure for determining the reliability of testimony in criminal trials . . . ."[205] That is, since the text of the Constitution describes a procedure (confrontation) by which the defendant can challenge the evidence that witnesses bring forward, courts must honor that "choice" by refusing to balance the criminal defendant's interest in confrontation against society's interest in justice or efficiency.[206]

The question then, in relation to the right to counsel of choice, is whether the text "Assistance of Counsel" represents a constitutional "choice" that a defendant is entitled to a certain attorney or, in the alternative, a guarantee that the defendant will have the assistance necessary to carry out an effective defense. The text, by enumerating "Assistance" and "of Counsel," lends some credibility to the idea that the Constitution prefigures a role for counsel of choice. Indeed, if the Clause really only focuses on "Assistance," there would be little need for the modifier "of Counsel." To avoid attributing redundancy to the text, one must acknowledge some importance of the role of counsel.

202. *Id.* at 1523.

203. Fisher analyzes several nouns and adjectives and their constitutional treatment:

> A process either constitutes "confrontation," or it doesn't. A decision maker is either a "jury," or it isn't. A person is either put into "jeopardy," or she isn't. On the other hand, deciding whether a search or seizure is "unreasonable" is a matter of gradation and requires a balancing of interests. The same goes for deciding whether a trial is "speedy"; whether punishment is "cruel"; whether bail or fines are "excessive"; and whether process is "due."

Id.

204. U.S. CONST. amend. VI.

205. Crawford v. Washington, 541 U.S. 36, 67 (2004).

206. *See* Fisher, *supra* note 5, at 1524 ("The Sixth Amendment chooses 'confrontation' as the means of testing witness testimony; it provides no qualifier inviting, or allowing, courts to balance the utility of that procedure against competing interests.").

Even considering that counsel should play some role, it is not clear that the text mandates that a defendant choose the identity of counsel. In the text, "Assistance" comes first and arguably bears the greatest weight in the phrase. "Counsel" merely specifies the form in which the assistance comes. It requires an inference not present in the text to find that "of Counsel" not only invites the use of counsel, but also prescribes counsel of choice as the necessary vehicle for attaining "Assistance of Counsel."[207] The text does not clearly indicate a constitutional choice that must be enforced through a bright-line rule. Thus, Fisher's constitutional choice analysis does not provide an unquestionable explanation of the Court's decision in *Gonzalez-Lopez*. Although the text prescribes a method (assistance of counsel) for ensuring fairness, it does not prescribe counsel of choice as the necessary means.

As a result, Fisher's rule does not affirmatively bridge the interpretive divide between the majority and dissent. In addition, neither originalism nor a need for administrability justifies the Court's imposition of a bright-line rule. The majority applied a bright-line rule after considering the traditional practice of allowing defendants to choose counsel and the perceived problem of merging the right to counsel and the right to effective assistance of counsel.[208] The dissent considered the purpose of the Clause and also made pragmatic arguments for harmless error review.[209] The analysis to this point has not provided convincing evidence that the majority's bright-line rule arose out of considerations independent of a preference for bright-line rules and limiting judicial discretion.

C. Naked Preference for Procedural Rules?

If considerations independent of broad judicial philosophies cannot justify the application of a procedural rule, then the discussion returns to the bright-line rule/balancing test battle-grounds, with each side lauding the merits of its approach.[210] Further probing indicates that where ambiguity exists as to what the text

207. Indeed, the Constitution would best protect the right to counsel of choice by using the words "Assistance of Counsel of Choice." On the other hand, little discussion attended the incorporation, adoption, or ratification of the Counsel Clause. *See supra* Part II.A.2.

208. *See supra* notes 169–75 and accompanying text.

209. *See supra* notes 176–79 and accompanying text.

210. *See* discussion *supra* Part I.

demands, the Court should apply the bright-line rule in criminal procedure. Indeed, Fisher persuasively suggests this approach in criminal procedure cases,[211] and he supports that position by pointing out the Court's ability to create reliable rules of criminal procedure,[212] the greater need for formalism,[213] and the relative constancy of the criminal trial process.[214] Thus, even if originalism, administrability, or constitutional choice analysis do not explain the Court's use of a bright-line rule in *Gonzalez-Lopez*, the unique characteristics of criminal procedure weigh in favor of bright-line rules. A brief discussion of this additional analysis follows, as applied to the Court's choice to protect the right to counsel of choice with a categorical rule.

First, the Court's experience with criminal trial procedure weighs in favor of using bright-line rules to protect criminal rights.[215] The members of the Court have direct and often extensive experience with trial proceedings and know the contours of criminal trials. Thus, one of the principal objections to bright-line rules—that the Court lacks adequate experience to lay down a law that will bind future courts—drops out of the analysis.[216] With the right to counsel of choice, judges see daily manifestations of the important role of counsel in the presentation of a defense[217] and understand the intangible but pivotal role of counsel in the trial.[218] During oral

211. Fisher, *supra* note 5, at 1531 ("[A] general appreciation for the different natures of constitutional criminal procedure and substantive rights suggests three normative reasons why balancing is more likely to be dangerous to the essence of criminal procedure rights than to other rights."); *see also* Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 BYU L. REV. 351, 356–58 (discussing the rule-based nature of criminal law).

212. Fisher, *supra* note 5, at 1534–35.

213. *Id.* at 1531.

214. *Id.* at 1535.

215. *Id.* at 1534–35.

216. *Id.* at 1534 (citing SUNSTEIN, *supra* note 6, at 209, 255 and Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 424–25 (1985)). The risk associated with laying down a rule binding future courts is that it may not adequately address future situations, and therefore the rule will lead to individuals "being sacrificed on the altar of rules." Sullivan, *supra* note 196, at 66.

217. For a detailed enumeration of the tactical differences attorneys may legitimately pursue, see Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Respondent at 5–7, United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) (No. 05-352).

218. *See* Fuller v. Diesslin, 868 F.2d 604, 610 (3d Cir. 1989) ("Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within

argument, Justice Scalia acknowledged the unique role of counsel when he suggested that mere competence is often not enough; a defendant wants to hire the lawyer who will present the "Twinkie defense": the defense tactic, though seemingly absurd, that will win the case.[219] The Justices on the Court have enough experience with criminal trials to know that choice of counsel matters and that a court has no way of knowing how counsel, chosen by a defendant but denied by a court, could have influenced the jury.

Some may argue that even when the Court's experience creates confidence in a bright-line rule, the Court should avoid a bright-line rule because the mandatory nature of the rule deemphasizes the values underlying the rule.[220] Such an argument suggests that the Court's bright-line rule in *Gonzalez-Lopez* would limit a lower court's analysis of the fairness values underlying the right to counsel of choice, and this under-analysis would diminish the quality of justice administered. Although the argument in general has merit, in this case the very analysis that the argument advocates—that of whether a violation of the right to counsel of choice triggers fundamental unfairness[221]—involves sufficient uncertainty as to betray confidence in the outcome of the analysis[222] and thus undermine concepts of fairness. In this situation, harmless error review involves a level of uncertainty that would itself be fundamentally unfair to a defendant's constitutional rights.

the range of effective and competent advocacy, may be important in the development of a defense." (quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979))).

219. Gonzalez-Lopez Transcript, *supra* note 165, at 17 ("I want a lawyer who will invent the Twinkie defense. . . . I want a lawyer who's going to win for me . . . and the criterion for winning is not how competent is the lawyer necessarily.").

220. *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 115 (2005) ("I think it is fair to say that the Court's emphasis on formalism in its interpretation of the Bill of Rights distracted it from specifying normative constitutional values in the criminal procedure arena . . . ."); *see also* Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 159 (2005) ("[J]ustices who turn away from [an open-ended analysis of fairness] because they fear subjectivity are not likely to take a normative approach to the provisions in the Bill of Rights.").

221. *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2569 (2006) (Alito, J., dissenting) (arguing that automatic reversal is reserved for errors that involve fundamental unfairness).

222. *See id.* at 2564–65 (2006) (majority opinion).

Second, formalism[223] is arguably more essential to criminal procedure than other areas of law.[224] As a practical matter, a court approaches a very different task when depriving a person of life or liberty than in many cases that deal with property. In the former situation, the government exercises its "most awesome powers"[225] and affects the individual in ways that have no parallel among society's other institutions.[226] A fair government, in exercising these powers, would establish clear ground rules by which it acts, "lest the siren song of administrative convenience" overcome the government's obligation to seriously consider the impact of impairing individual liberty.[227] One disturbing feature of that siren song is that the most egregious crimes cause the greatest cry for convenience, making the need to protect criminal rights even stronger.[228] Bright-line rules help to preserve the criminal rights

223. Formalism involves the "concept of decisionmaking according to *rule*." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (emphasis added). For a compilation of other definitions of formalism, see *id.* at 510 n.1. Admittedly, formalism shares certain similarities with administrability. Considerations of formalism and administrability can both vie for bright-line or procedural rules. For purposes of this Note, however, different interests underlie each. Administrability weighs in favor of a bright-line rule because that rule serves the efficiency interests of the courts. Formalism, on the other hand, supports a bright-line rule because that rule protects the individual liberty of the defendant. The interest in administrability can be satisfied by any clear rule, regardless of its content; with formalism, however, the content of the rule matters.

224. SCHAUER, *supra* note 35, at 149–55; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1037–40 (2006); Fisher, *supra* note 5, at 1531. For an analysis of *Crawford* and *Blakely* in light of the need for formalism in criminal procedure, see Bibas, *supra* note 186.

225. Fisher, *supra* note 5, at 1531.

226. Government control over property, on the other hand, does have institutional analogues: parents control property interests of children, an employer may deprive a worker of the opportunity to work, and a church may deprive a member of the benefits of membership, to name a few. None of these institutions, however, has the authority to deprive an individual of life or personal liberty.

227. Fisher, *supra* note 5, at 1531; *see also* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear."); David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 242 (2001).

228. Fisher, *supra* note 5, at 1531–32 ("Discovering who killed a police officer—not to mention, as the Framers might have posited, discovering who conspired violently to overthrow the government—is more important than discovering who stole a slice of pizza. Therefore, a flexible approach to criminal procedure rights is likely to make them vanish precisely when passions are at their highest, and when those procedures are most important.").

guaranteed by the Constitution by ensuring a fair process that does not give way to the exigencies of majoritarian interest.[229]

This reasoning also applies to the right to counsel of choice: a defendant facing the force of majoritarian will can best enjoy the "Assistance of Counsel" when that right is protected by a bright-line rule. Given that judges know the importance of the interaction between counsel and the jury, a judge could be tempted to find a reason to deny a defendant's chosen counsel in order to stack the cards against a defendant or level the playing field vis-à-vis a prosecutor who connects less effectively with a jury.[230] In addition, given that most cases do not go to trial, uncertainty with regard to a defendant's right to retain superb counsel could impair the defendant's ability to bargain for a reduced charge.

Of course, a formal rule must represent the assimilation of reasoned principles to have any legitimacy,[231] but in *Gonzalez-Lopez*, the Court outlined the principles upon which it decided to apply a formal rule protecting the defendant's right to counsel of choice.[232] Although a formal rule can obscure the process by which a Court reaches a conclusion,[233] *Gonzalez-Lopez* confirms that such

229. Although the political process can also undermine any procedural protection the Court grants while acting in its anti-majoritarian role, *see* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54–55 (1997), this does not give cause to abandon the anti-majoritarian role; indeed, it only makes the role more vital.

230. The formal rule of *Gonzalez-Lopez* means that automatic reversal occurs upon denial of counsel. Of course, that does not necessarily translate into more generous protection of the right to counsel of choice, because lower courts may simply find that counsel was not wrongfully denied (as in *Wheat*, as discussed *supra* in text accompanying notes 70–82). Although it is true that the bright-line rule of *Gonzalez-Lopez* does not remove all judicial discretion from the administration of the right, it adds formality to that right. Most importantly, it formally declares the meaning of the Constitution. Formalism need not cover the entire ground in order to exert a positive influence in protecting rights.

231. *See* Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 157–58 (2003) ("Bright line rules that are not principled provide neither guidance for law enforcement in dealing with the next case nor protection for citizens.").

232. *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2562 (2006).

233. *See* Schauer, *supra* note 223, at 514 (stating that formalism "obscures that choice and thus obstructs questions of how [a rule] was made and whether it could have been made differently"); *see also* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962) ("Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them—more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history.").

obfuscation need not occur if the Court acknowledges the basis upon which it holds.[234]

Finally, the relative constancy of the trial process also weighs in favor of using bright-line rules to protect criminal rights. In many contexts, the Court should hesitate to commit itself to bright-line rules because doing so could discourage solutions to new problems, especially where new problems have no analog in recent history.[235] In the area of criminal procedure, however, the concern of societal change largely falls away because the reasons for granting criminal rights remain the same.[236]

Consider the constancy surrounding the right to counsel: as long as justice is administered through the adversarial system, a defendant must have resources necessary to face the power of the state. Given that the adversarial system is deeply rooted in the American tradition and conception of justice, the Court can lay down a bright-line rule protecting the right to counsel without concern that societal change will alter the role of counsel in the near future.[237] Although society's interest in combating crime influences the scope of the right to counsel of choice,[238] once a violation of that right is discovered (by a court finding of wrongful denial of counsel of choice), the only remaining countervailing interest is that of judicial efficiency in avoiding a new trial. The Court appropriately imposed a bright-line

234. *See Gonzalez-Lopez*, 126 S. Ct. at 2562–65 (identifying a need to distinguish between the right to counsel of choice and the right to effective assistance of counsel and the need to avoid the uncertainty of harmless error review).

235. *See* Chen, *supra* note 12, at 266; Fisher, *supra* note 5, at 1535; Sullivan, *supra* note 196, at 66.

236. Fisher, *supra* note 5, at 1535.

237. With the Court's knowledge of trial procedure and the constancy of that procedure, there should be less concern over the use of bright-line rules to protect criminal rights. Even those who criticize bright-line rules could recognize an exception that allows for their use under such conditions. *See* SUNSTEIN, *supra* note 6, at 212–13 ("[W]hen the Court has reason for confidence in a wide ruling, narrowness is a mistake.").

238. The scope of the right to counsel of choice is limited in significant aspects, as discussed *supra* note 82 and accompanying text. In addition, the public can influence the scope of that right, as seen in the use of forfeiture statutes. These statutes effectively deprive a defendant of the opportunity to be represented by counsel of choice by preventing the defendant from paying for an attorney out of the proceeds of the alleged crime. *See* Karlan, *supra* note 140, at 705. The forfeiture statutes survived constitutional challenge in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989).

rule because the nature of the efficiency interest and the right to counsel of choice remain largely the same over time.[239]

These three considerations justify the Court's application of a bright-line rule in *Gonzalez-Lopez*, apart from a preference for limited judicial discretion or bright-line rules. The Court's familiarity with trial practice, a greater need for formalism, and the unchanging nature of criminal defense all weigh in favor of applying a bright-line rule protecting a defendant's right to counsel of choice. Of these three considerations, the Court's knowledge of the importance of counsel to an accused's defense seems to have carried the greatest weight in this case, given that the Court devoted much of its discussion to that point.[240] The Court's rule ensures that future courts will resolve any uncertainty in the effect of wrongful denial of counsel in favor of the defendant.

Absent such factors, an inference may arise that a preference for limited judicial discretion[241] led to the bright-line rule in *Gonzalez-Lopez*, meaning that only stare decisis principles would hinder a future Court in applying its own preference for a balancing test. Although Fisher's constitutional choice analysis does not fully explain the bright-line rule in *Gonzalez-Lopez*, it provides a helpful framework and will prove useful in future cases. Even where constitutional choice analysis does not resolve the issue of whether to apply a bright-line rule, other considerations show why the Court should favor bright-line rules in the criminal procedure context.

V. CONCLUSION

Recent developments in constitutional criminal law, beginning with *Crawford* and *Blakely*, and continuing with the recent decision in *Gonzalez-Lopez*, may indicate that the current Court is more inclined than previous Courts to adopt bright-line rules to protect the constitutional rights of defendants. If this indicates a trend for future jurisprudence, the question arises as to what drives the trend—a methodological preference for limited judicial discretion or

239. Although a given court's degree of interest in efficiency may increase due to crowded dockets, the nature of the interest remains the same. Similarly, the defendant's interest in counsel of choice may be greater when faced with a more onerous sentence, but the nature of the interest remains the same regardless of the sentence faced.

240. United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564–65 (2006).

241. *See supra* note 36.

context-specific factors. Jeffrey L. Fisher argued *Crawford*, *Blakely*, and most recently *Gonzalez-Lopez*, in which the Court held that a defendant who is erroneously denied counsel of choice must receive a new trial—without the judicial balancing of harmless error review. Although the history of the right to counsel may not have mandated this bright-line rule, Fisher's analysis helps show why the Court held as it did. His "constitutional choice" analysis provides a neutral criterion for determining the applicability of bright-line rules. That analysis involves deciding whether the Constitution has chosen to administer rights through a bright-line procedure. Although constitutional choice analysis did not clearly dictate a bright-line rule protecting counsel of choice in *Gonzalez-Lopez*, the criminal procedure context justifies the use of such a rule. In the criminal context, the Court has the experience necessary to formulate valid rules, and the important rights at stake implicate a greater need for formalism. Additionally, the static nature of the criminal trial means that a rule laid down today will not need modification tomorrow. These considerations support the use of a bright-line rule in *Gonzalez-Lopez*, and proffer an explanation independent of a putative preference for limited judicial discretion. This case may confirm the beginning of a trend toward bright-line rules in criminal law, a trend that could also influence other areas of constitutional interpretation.

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