

**ELEVATING CHOICE OVER QUALITY OF
REPRESENTATION: *United States v. Gonzalez-
Lopez*, 126 S. Ct. 2557 (2006)**

The Supreme Court's Counsel Clause jurisprudence generally has been preoccupied with the effect of alleged violations on the fairness and reliability of the trial process.¹ This approach seemed ripe for reexamination after *Crawford v. Washington*, which held that the Sixth Amendment does not provide a substantive guarantee of a fair trial, but rather specifies the procedural safeguards that must be present for a trial to comport with the Constitution.² Last Term, in *United States v. Gonzalez-Lopez*,³ the Court eliminated the need to revisit these problematic precedents by redefining the criminal defendant's right "to have the Assistance of Counsel for his defence."⁴ In holding by a 5-4 vote that a defendant's right to counsel is necessarily violated whenever he is erroneously deprived of his first-choice attorney, the Court declared that "counsel of choice" — the liberty to choose one's lawyer — was the central meaning of the Counsel Clause.⁵ It thereby imported customary practice into the Constitution without a sound basis either in precedent or in the text, structure, or historical purpose of the Sixth Amendment.

Shortly after Cuauhtemoc Gonzalez-Lopez was charged with conspiring to distribute marijuana in the Eastern District of Missouri, he retained California lawyer Joseph Low to represent him.⁶ Low applied to the district court for admission pro

1. For example, in a 2002 decision, Justice Scalia explained that prejudice is an element of *every* Sixth Amendment violation—even those involving total deprivation of counsel, although in such cases prejudice may be presumed. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). This reliability-centered approach is reflected in numerous right-to-counsel precedents, notably *Strickland v. Washington*, under which even a defendant who proves that his lawyer made such serious errors that the lawyer was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" cannot win reversal of his conviction without also demonstrating a reasonable probability of prejudice to the trial's outcome. 466 U.S. 668, 687 (1984).

2. 541 U.S. 36, 61–62, 67–68 (2004).

3. 126 S. Ct. 2557 (2006).

4. U.S. CONST. amend. VI.

5. *Gonzalez-Lopez*, 126 S. Ct. at 2563.

6. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 926–27 (8th Cir. 2005).

hac vice, but was twice rebuffed without explanation.⁷ Finally, the court explained that it had denied Low's application because he had violated the Missouri Rules of Professional Conduct by communicating with Gonzalez-Lopez and with the defendants in another case without their respective attorneys' permission.⁸ Gonzalez-Lopez proceeded to trial with a local attorney, Karl Dickhaus, and was convicted.⁹

The Eighth Circuit vacated the conviction and remanded the case for a new trial.¹⁰ The panel first held that the Missouri Rules of Professional Conduct do not prevent a lawyer from communicating with a represented party unless the lawyer is representing another party in the same case.¹¹ Not only had the district court denied Low's application based on its erroneous interpretation of a local rule, but it had also failed to consider the effect of its decision on Gonzalez-Lopez's Sixth Amendment right, as a "non-indigent criminal defendant[]," to be represented by his preferred counsel.¹² The panel concluded that Gonzalez-Lopez had been denied his Sixth Amendment right to counsel of choice and that this denial could not constitute harmless error.¹³

The Supreme Court affirmed. Writing for the Court, Justice Scalia¹⁴ rejected the government's argument that the Sixth Amendment is not violated unless a defendant's lawyer is ineffective within the meaning of *Strickland v. Washington*.¹⁵ Instead, he concluded that denial of counsel of choice mandates reversal even if substitute counsel's performance was neither deficient nor prejudicial to the defendant. Justice Scalia explained that the right to effective counsel derives chiefly from the Due Process Clause and the Sixth Amendment's "purpose of ensuring a fair

7. *Id.* at 927.

8. *Id.* at 927–28, 930.

9. *Id.* at 927–28.

10. *Id.* at 926.

11. *Gonzalez-Lopez*, 399 F.3d at 927.

12. *Id.* at 928 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Powell v. Alabama*, 287 U.S. 45, 53 (1932)), 929 ("[A]n accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so." (quoting *United States v. Vallery*, 108 F.3d 155, 157 (8th Cir. 1997))), 932.

13. *Id.* at 932, 934–35. The panel noted that requiring the defendant to show prejudice from the deprivation would effectively "collaps[e] the right to counsel of choice into the right to receive effective assistance of counsel at trial." *Id.* at 935.

14. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Scalia.

15. 466 U.S. 668 (1984); see Brief for the United States at 14–15, *Gonzalez-Lopez*, 126 S. Ct. 2557 (No. 05-352), 2006 WL 403665.

trial,”¹⁶ whereas the right to choose one’s attorney is the “root meaning” of the Counsel Clause.¹⁷ The Court would not require proof of prejudice, therefore, because doing so would substitute a general “fairness” standard for the specific procedural protection guaranteed by the Counsel Clause.¹⁸

Justice Alito dissented,¹⁹ maintaining that a defendant who is convicted after being wrongfully denied his first-choice attorney is not entitled to reversal unless he can make “at least *some* showing” of an adverse effect on the “quality of assistance” he received at trial.²⁰ Though agreeing with the majority that the Counsel Clause guarantees “a limited right to be represented by counsel of choice,” Justice Alito argued that “the focus of the right is the quality of representation that the defendant receives, not the identity of the attorney who provides the representation.”²¹ Therefore, he said, a defendant’s Sixth Amendment rights are violated only when he is wrongfully deprived of the level or quality of legal assistance that his first-choice attorney would have provided.²²

By declaring counsel of choice to be the core meaning of the Counsel Clause and relegating the entitlement to effective counsel to the Sixth Amendment’s penumbra, the Court eliminated the contradiction between *Crawford*’s insistence on firm procedural guarantees and the ubiquitous prejudice requirement in its right-to-counsel jurisprudence. The majority’s decision to recognize the traditional means of implementing the right to counsel—that is, private selection and retention—as an aspect of the right itself went well beyond what the Court’s precedent required. The Court could better vindicate the text, structure, and historical purpose of the Sixth Amendment with an interpretation of the Counsel Clause that guarantees a baseline of effective legal assistance to every defendant who can afford it.

16. *Gonzalez-Lopez*, 126 S. Ct. at 2563.

17. *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Andersen v. Treat*, 172 U.S. 24 (1898)).

18. *Id.* at 2562. Justice Scalia also agreed with the lower court that the deprivation could not be subjected to harmless-error analysis. *Id.* at 2563–65.

19. Chief Justice Roberts and Justices Kennedy and Thomas joined Justice Alito.

20. *Gonzalez-Lopez*, 126 S. Ct. at 2566 (Alito, J., dissenting).

21. *Id.* at 2567–68.

22. *Id.* at 2568 (noting also that Counsel Clause guarantees defendant “the best assistance that [his] circumstances permit”).

Although the right to counsel of choice has been widely acknowledged and enforced in the courts of appeals,²³ its career in the Supreme Court provides little support for the *Gonzalez-Lopez* majority's conclusion that it is the central meaning of the Counsel Clause. The right appeared for the first time in 1932 in *Powell v. Alabama*,²⁴ which reversed the convictions of the so-called "Scottsboro Boys" on two independent grounds: that the defendants had not been given a "fair opportunity to secure counsel of [their] own choice," and that the court's appointment of counsel to represent them "pro forma" on the morning of trial was not constitutionally sufficient.²⁵ *Powell* thus involved complete deprivation of counsel.²⁶ Similarly, in *Chandler v. Fretag*, the Court held that a petitioner who was denied "any opportunity whatever to obtain [private] counsel," and for whom no counsel was appointed, was convicted without due process.²⁷ *Chandler*, like the Scottsboro Boys, had suffered a total deprivation of counsel.²⁸

It thus appears that the supposed right to counsel of choice was born out of the reality that private retention of counsel was the only way for many defendants to obtain meaningful legal assistance. The Court acknowledged as much when it said, in *Wheat v. United States*:

[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.²⁹

23. See Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 799 n.172 (1989) (collecting cases).

24. 287 U.S. 45, 53 (1932).

25. *Id.* at 53, 58.

26. *Id.* at 58 ("[W]e hold that defendants were not accorded the right of counsel in any substantial sense.").

27. 348 U.S. 3, 10 (1954).

28. *Id.* at 4–5. *Glasser v. United States*, another case often cited as supporting a right to counsel of choice, held only that a trial court committed reversible error by requiring the petitioner's lawyer to simultaneously represent a codefendant with divergent interests, causing the petitioner to receive assistance that "was not as effective as it might have been." 315 U.S. 60, 76 (1942).

29. 486 U.S. 153, 159 (1988). The Court went on to hold that a trial court has discretionary authority to deny a defendant his chosen attorney if it finds that attorney to have a potential conflict of interest. *Id.* at 163.

One commentator on *Wheat* noted that the Court had failed to identify a source for the right to select one's own counsel in the text, structure, or underlying values of the Sixth Amendment, and hoped that "the Court will soon find the opportunity to clarify just what it is about the Sixth Amendment that compels the recognition of a right to counsel of choice."³⁰ In *Gonzalez-Lopez*, the Court let such an opportunity pass.

The right to counsel of choice is also difficult to reconcile with the interpretation of the Sixth Amendment advanced in the Court's twentieth-century jurisprudence. When the Court first announced the right to appointed counsel in 1938, it held that federal courts are powerless to sentence a defendant "unless he has or waives the assistance of counsel."³¹ The plain meaning of this statement is that an indigent defendant who does not waive his right to counsel and is assigned a public defender "has . . . the assistance of counsel."³² If so, it is difficult to see, at least as a textual matter, why a wealthy defendant in the same position does not also have the assistance of counsel.³³

This logical inconsistency is not, of course, fatal to an originalist defense of the right to counsel of choice. There is little argument that the *per se* entitlement to appointed counsel, which was not identified by the Court until some 150 years after the signing of the Constitution, was not part of the original meaning of the Sixth Amendment.³⁴ It does not follow, how-

30. 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, 350, 386 (1992). Even Justice Marshall, an ardent defender of counsel of choice, did not claim that it was the core meaning of the constitutional guarantee of counsel; rather, he argued that it was necessary in order to effectuate the Sixth Amendment's underlying purpose of allowing a criminal defendant "effective control over the conduct of his defense." *Wheat*, 486 U.S. at 165–66 (Marshall, J., dissenting). Justice Marshall did not address whether an indigent defendant for whom counsel is appointed is thereby deprived of "effective control" over his defense.

31. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

32. A defendant has no right to a "meaningful relationship" with his counsel, so the appointment of any qualified attorney satisfies an indigent defendant's Sixth Amendment right. *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

33. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) ("The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money . . . entitles him to something more. We reject this contention . . .") (quoting *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 649 (4th Cir. 1988)) (first omission in original) (internal quotation marks omitted); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

34. See WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27–33 (1955). The Congress that adopted the Sixth Amendment provided by law for

ever, that *free choice* of counsel is central to the meaning of the Counsel Clause. The original understanding of the clause does not give rise to an entitlement, but neither does it unambiguously support the *Gonzalez-Lopez* majority's interpretation. Instead, the text, structure, and history of the Amendment suggest a right to obtain a certain fixed quantum of legal representation by private retention.

The only legal assistance available to most defendants at the time of the Founding was that of retained counsel,³⁵ and the right to counsel was generally conceived as a liberty to be joined in court by one's hired attorney.³⁶ As the right to counsel was traditionally vindicated by private retention, it is not surprising that the petitioner in the 1898 case of *Andersen v. Treat* thought that a court had violated his rights when it appointed a lawyer to represent him in place of the one he had hired.³⁷ Yet his claim received a decidedly lukewarm reception in the Supreme Court, which noted the absence of precedent on "the question under what circumstances a court may . . . decline to assign particular counsel on the request of the accused."³⁸ It thus appears that as late as 1898 there was no settled constitutional doctrine of the right to counsel of choice.

The question that the *Andersen* Court found unnecessary to answer, and that the *Gonzalez-Lopez* Court might have confronted more directly, is whether the Counsel Clause incorporates the traditional means of securing legal assistance—that is,

appointed counsel in capital cases, but not in other felony cases, supporting an inference that "the Sixth Amendment was irrelevant, in its view, to the subject of appointment of counsel[.]" *Id.* at 28; see also JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 20–21 (2002); *Scott v. Illinois*, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused . . . to employ a lawyer to assist in his defense."); *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) ("There is . . . no general obligation on the part of the government . . . [to] retain counsel for defendants or prisoners.").

35. BEANEY, *supra* note 34, at 21.

36. Thus, several states recognized a criminal defendant's right "to be *allowed* counsel" or to be heard by "*his* Counsel." See *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 402–13 (Neil H. Cogan ed., 1997) (emphasis added).

37. 172 U.S. 24, 26 (1898).

38. *Id.* at 31. The Court took note of a case in which a Massachusetts court had refused—evidently without provoking a constitutional challenge—to assign a defendant charged with capital murder his chosen attorney on the ground that "a person of more legal experience should be assigned, who might render aid to the Court as well as to the prisoner." *Commonwealth v. Knapp*, 26 Mass. (9 Pick.) 496, 498 (1830).

private choice and retention—as part of the constitutional right it embodies. Thus framed, it is but one instance of a broader challenge for originalism. While traditional practice provides an important guidepost in the search for original meaning, judges must be careful not to confuse the historical means of implementing rights with the rights themselves. Incautiously executed, the originalist enterprise carries with it the danger of lending constitutional force to mere historical mannerisms.³⁹

The necessity of distinguishing core constitutional meaning from practices growing out of period-specific conditions is not unfamiliar; just last Term, it was at the center of a debate between Justices Stevens and Scalia. Justice Stevens criticized the originalist mode of constitutional interpretation by claiming that an originalist interpretation of the Fourth Amendment would permit a husband, but not his wife, to consent to a search of their home.⁴⁰ Justice Scalia replied that it is appropriate for the dictates of the Fourth Amendment to evolve in response to changes in the extra-constitutional property rights regime, because originalism acknowledges the distinction between “the original import” of a constitutional provision and “the background sources of law to which [that provision], on its original meaning, referred.”⁴¹

Some of the problems involved in applying this principle to the right to counsel were evident in 2000, when the Court, per Justice Stevens, speculated that the Sixth Amendment right to represent oneself at trial—a right first recognized twenty-five years earlier, but alleged to have existed at the founding⁴²—might have been weakened or obliterated by the advent of universal appointment of counsel. Justice Stevens noted that the

39. Taking a cue from Justice Scalia, one might call this the *Young Frankenstein* problem in constitutional interpretation. Just as Gene Wilder took too much from Marty Feldman’s instruction to “walk this way” when he copied the latter’s manner of walking rather than merely proceeding in the indicated direction, so too the originalist who relies on traditional practice to understand the meaning of constitutional provisions may ascribe too much significance thereto. Cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION 143 (1997) (likening the interpretation of incoherent statutes to “the Feldman-Wilder ‘Walk this way’ routine”).

40. *Georgia v. Randolph*, 126 S. Ct. 1515, 1528–29 (2006) (Stevens, J., concurring).

41. *Id.* at 1540 (Scalia, J., dissenting). Thus, said Justice Scalia, originalism concedes that Fourth and Fifth Amendment outcomes should vary depending on the extra-constitutional property rights regime. *Id.*

42. *Faretta v. California*, 422 U.S. 806, 827–28 (1975) (noting that self-representation was “the general practice” in eighteenth-century America and was recognized as a right by several colonial charters, and concluding that “the ‘right to counsel’ meant to the colonists a right to choose between pleading through a lawyer and representing oneself”).

historical evidence for a right to self-representation was rendered unreliable by the fact that when the Constitution was written, “self-representation was *the only feasible alternative* to asserting no defense at all” for the many defendants who could not afford lawyers.⁴³ This argument demonstrates why privileging the original meaning of constitutional provisions requires distinguishing between *prerogatives* traditionally enjoyed by defendants, and *rights* actually enshrined in the Constitution. It is worth pondering which label describes the selection and retention of counsel—a practice that was likewise “the only feasible alternative” for most defendants desiring legal assistance at the time of the founding.

The true meaning of the phrase “Assistance of Counsel” in the Sixth Amendment may be ambiguous, but giving it content does not require subsuming historical practice wholesale into the Bill of Rights. Rather, one can look to the evils against which the constitutional provision was meant to defend, as the Court has done numerous times in other contexts.⁴⁴ Principal-evil analysis suggests an interpretation of the Counsel Clause that prevents the government from denying a criminal defendant *all* legal assistance. The Founders’ recognition of the right to counsel was primarily a rejection of pre-nineteenth-century English common law, which forbade defendants charged with felonies other than treason from appearing with counsel.⁴⁵ This practice was decried by commentators, including Blackstone, who declared it to be “not at all of a piece with the rest of the humane treatment of prisoners by the English law.”⁴⁶ The oppressive nature of the prohibition was underscored by Parliament’s decision in 1695 to create an exception to the general

43. *Martinez v. Court of Appeal*, 528 U.S. 152, 156–58 (2000) (emphasis added) (citation omitted). Justice Scalia concurred in the judgment.

44. In *Crawford v. Washington*, for example, the Court stressed that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused The Sixth Amendment must be interpreted with this focus in mind.” 541 U.S. 36, 50 (2004); cf. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (noting that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”); *Tennessee v. Lane*, 541 U.S. 509, 562–63 (2004) (Scalia, J., dissenting) (arguing that Equal Protection Clause should be interpreted in light of the fact that the “principal evil” against which it was directed was racial discrimination).

45. BEANEY, *supra* note 34, at 8–9; see also *Faretta*, 422 U.S. at 823.

46. WILLIAM BLACKSTONE, 4 COMMENTARIES *349; cf. Winick, *supra* note 23, at 787 (describing the 1586 treason trial of Mary Queen of Scots, who was tried without counsel and executed despite her protestations that she was unfamiliar with the laws of England).

rule and permit assistance of counsel in cases of treason, a crime of which its members were particularly likely to stand accused.⁴⁷ It was this harsh practice against which the guarantee that defendants would enjoy the “assistance of counsel” was principally directed.⁴⁸

It is undoubtedly true that “retained counsel was the model the framers had in mind” when they drafted the Counsel Clause.⁴⁹ But the case for reading this model as constitutionally required is surprisingly weak. In the absence of clear evidence or textual guidance, courts ought not assume that the mere fact that something was done implies that it was done *as of right*. Unlike in the eighteenth century, the prevailing model for obtaining counsel in the modern criminal trial is through appointment.⁵⁰ There is no compelling reason why designating a competent attorney to assist a defendant at trial—or, *a fortiori*, allowing him to hire his second-most-preferred attorney, as apparently happened to Gonzalez-Lopez—does not fully satisfy the Sixth Amendment. The purpose of its procedural guarantee, “to protec[t] the unaided layman at critical confrontations with his expert adversary, the government,”⁵¹ is fully served by either practice.

47. BEANEY, *supra* note 34, at 9.

48. See, e.g., Winick, *supra* note 23, at 786 (“In essence, the sixth amendment was a reaction against the prior English practice of prohibiting counsel in serious criminal cases and requiring the defendant to ‘appear before the court in his own person and conduct his own cause in his own words.’”) (quoting 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH COMMON LAW* 211 (2d ed. 1898)); Shapiro, *supra* note 30, at 380–81. Proponents of the right to counsel of choice point to the case of John Zenger, a colonial printer who was charged with libel for printing articles critical of the corrupt British governor of New York and whose private attorneys were summarily disbarred in an apparent attempt to force him to proceed to trial with appointed counsel loyal to the governor. See Winick, *supra* note 23, at 790–98. Although the Zenger trial doubtless symbolized the inequity and corruption of the English legal system in the minds of the colonists, it does not follow that they believed Zenger’s fundamental rights were violated simply by depriving him of his chosen counsel. The overwhelming evidence of judicial bias in the Zenger case stands in stark contrast to the erroneous but apparently good-faith denial of first-choice counsel in *Gonzalez-Lopez*. Furthermore, the availability of such a prominent example of a defendant who was denied his first-choice counsel makes it all the more telling that the Founders chose not to include in the Constitution specific language addressing that situation.

49. Winick, *supra* note 23, at 798.

50. Two-thirds of federal felony defendants in 1998 were represented by court-appointed lawyers. Bureau of Justice Statistics, *Indigent Defense Statistics*, <http://www.ojp.usdoj.gov/bjs/id.htm> (last visited Sept. 19, 2006).

51. *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (Scalia, J.) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)) (alteration in original) (internal quotation marks omitted).

One practical reason to prefer an interpretation of the Sixth Amendment which guarantees choice of counsel is that it saves the trouble of defining the baseline of competent legal representation that is necessary to satisfy the Constitution. The state's responsibility is merely passive—it must not interfere with the defendant's ability to obtain the legal assistance he desires. Interpreting the Counsel Clause as conferring an absolute liberty shrinks the interpretive burden on the Court, and thus reduces the likelihood that the Justices' own predilections will color their rulings.⁵²

Two considerations, however, militate in favor of the more challenging construction whereby the "assistance" that the state must allow defendants to procure need only rise to a certain fixed level of competence and effectiveness regardless of their resources. The first goes to the consistency and integrity of the Court's jurisprudence. Whether rightly or wrongly, the Court has maintained for nearly seventy years that the right to counsel includes an entitlement of indigent defendants to have counsel appointed for them,⁵³ and for more than forty years that this entitlement is so fundamental that its abridgment constitutes a denial of due process.⁵⁴ Even if *Strickland's* right to "effective" assistance arises from the Due Process Clause or the penumbras of the Sixth Amendment, the recognition of an entitlement to the assistance of counsel necessitates a constitutional definition of who qualifies as *counsel* and what counts as *assistance*.⁵⁵

A second consideration supporting the baseline interpretation is the text and structure of the Sixth Amendment. In order

52. Cf. Richard Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1282–84 (2006) (arguing that the Court is willing to accept "mild substantive distortion" of constitutional meaning in order to achieve a clear rule) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989)).

53. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

54. *Gideon v. Wainwright*, 372 U.S. 335, 339–42 (1963).

55. See, e.g., Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 442, 444, 453 (1993) (noting that the Supreme Court has ceded the definitional enterprise to the lower courts, which have generally agreed that any licensed attorney qualifies as "counsel"). In *Strickland v. Washington*, Justice O'Connor declared that an attorney who fails the first (performance) prong of the effectiveness inquiry is "not functioning as the 'counsel' guaranteed by the Sixth Amendment," 466 U.S. 668, 687 (1984); any attempt to take this statement seriously as a definition of "counsel," however, is frustrated by the existence of the second (prejudice) prong, which would be unnecessary if the first prong truly established that the defendant had been deprived of counsel within the meaning of the Constitution.

to accomplish its “fundamental purpose” of ensuring that the trial is a reliable mechanism for uncovering the truth,⁵⁶ the Amendment imposes several affirmative requirements on the state which must be fulfilled in the same way with respect to every defendant. The state must convene an impartial jury to try the defendant, must provide him with notice of the charges, must bring forth the witnesses against him, and must enforce subpoenas on his behalf.⁵⁷ Professor Akhil Reed Amar argues that this structural pattern is so compelling that the Counsel Clause must be read as an entitlement, notwithstanding the strong historical evidence to the contrary.⁵⁸ One need not go that far to conclude that reading the clause as providing a right to the most reliable trial the defendant can afford is inconsistent with the Amendment’s basic structure. An interpretation that guarantees all defendants with financial resources a uniform level of legal assistance is a rational compromise between the Amendment’s text, which suggests an egalitarian approach, and its history, which conclusively shows that it did not afford an entitlement to indigent defendants.

One contemplating *Gonzalez-Lopez*’s pronouncement cannot escape the impression that Justice Scalia’s interpretation of the “Assistance of Counsel” was informed, not by the foregoing considerations of text, purpose, and structure, but by an emphasis on traditional practice and a general sense that the Framers were “suspicious enough of governmental power” that they “would not have found acceptable” interference by the government with an individual defendant’s decision concerning legal representation.⁵⁹ Of course, what the Framers would have found unacceptable and what they actually prohibited are two different things. An inquiry into the nebulous values and preferences of the founding generation may be a lens on the original understanding of constitutional provisions, but, especially when unanchored by the constitutional text, it is just as likely to be a mirror reflecting the contemporary judge’s own predilections.

56. *Brewer v. Williams*, 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting); see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 90 (1997).

57. See U.S. CONST. amend. VI.

58. AMAR, *supra* note 56, at 140.

59. See *Martinez v. Court of Appeal*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment) (arguing that a constitutional right of self-representation can be derived from the Due Process Clause).

After *Gonzalez-Lopez*, it appears that the liberty to hire one's first-choice counsel has become solidly embedded in the Sixth Amendment. Whether the implicit relegation of related rights, such as the entitlements to appointed counsel and to the effective assistance of counsel, to the periphery of the Counsel Clause will have any effect on the rigor with which they are enforced remains to be seen. However, if constitutional criminal procedure is to be increasingly influenced by originalist methodology, the non-rigorous application of that methodology in *Gonzalez-Lopez* ought to be examined carefully. Tradition—particularly tradition informed by a judge's own quasi-intuitive sense of the Framers' values—should not be allowed to overwhelm the text and structure of the Constitution.

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