

Much Ado About Virtually Nothing: Why History and Tradition Say Nothing About Two-Way Video Testimony

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[C]onstitutional lawyers, unlike ordinary historians, should attempt *to make the best constructive sense out of historical events associated with the Constitution*. They do owe a duty of “fit” to the materials; they cannot disregard the actual events, which therefore discipline their accounts. But they also try to conceive of the materials in a way that makes political or moral sense, rather than nonsense, out of them to current generations.¹

I. INTRODUCTION: WHAT HATH ZOOM TO DO WITH PHILADELPHIA?

History is a funny thing. We cannot divorce ourselves from it, as much as we might hope to bracket out the horrors of chattel slavery or the atrocities of Jim Crow. Yet, it also prepared the way for the goods

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1. Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995).

we experience in the present, such as they are. The artifacts and ideas of the past also inscrutably crop up here and there to reshape the past and the present in unimagined ways.

For instance, the inkstand Chief Justice Roger Taney used to pen the infamous *Dred Scott* opinion² found its way into the hands of Justice John Marshall Harlan. As the story goes, Harlan thought he had given it away, but Harlan's wife, Malvina, shrewdly stowed the inkstand away for an opportune moment. As Justice Harlan's melancholy grew over the Court's erosion of the Reconstruction Amendments, Malvina one day put the inkstand on his desk. As Harlan biographer Peter Canellos put it, "she would insist it was almost an act of magic: the ink from Taney's well began flowing in Harlan's script."³ After Harlan penned his dissent in *Plessy v. Ferguson*,⁴ Malvina would describe the effect as "a bit of 'poetic justice.'"⁵ As Peter Canellos paraphrases one of Malvina's letters, "'the small inkstand in which Taney's pen had dipped' when he stripped away Black rights would be the same pool of ink from which John Marshall Harlan issued the stoutest defense of Black civil rights in the nation's history up to that time."⁶

Harlan's dissent would not only provide ballast to sustain African Americans through Jim Crow in the hope that one day the Constitution really would be theirs;⁷ it also became a blueprint that ultimately

2. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party) (opining in extensive dicta that people of African descent could not be citizens of the United States and that Congress lacked constitutional authority to regulate slavery in the territories), *superseded by constitutional amendments*, U.S. CONST. amends. XIII & XIV; *see also* Abraham Lincoln, Address at Cooper Inst. (Feb. 27, 1860) (criticizing the *Dred Scott* decision by pointing out that the reasoning was divided and the actual holding of the case was narrow—slave owners could retain legal possession of enslaved persons when traveling into areas where slavery was illegal—and, thus, Taney's dicta on the larger constitutional issues was not legally controlling).

3. PETER S. CANELLOS, *THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO* 28 (2021).

4. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

5. CANELLOS, *supra* note 3, at 29.

6. *Id.*

7. *See id.* at 267–69, 350–51, 441–43 (describing the impact of Harlan's dissents in the Black community following the Supreme Court's narrowing of the Reconstruction Amendments and the Civil Rights Acts during the Gilded Age and early Jim Crow).

won the day.⁸ When Thurgood Marshall convinced the Court nearly sixty years later to overturn *Plessy* in *Brown v. Board of Education*,⁹ his reasoning was largely based on Harlan's dissent.¹⁰

While poetic justice may provide some basis for sentimentality—or even hope—these cases reveal a more serious issue: how should history inform the meaning of the Constitution? For example, at least two perspectives account for the Supreme Court's interpretive movement from *Dred Scott* to *Brown*: either the Court said what the Constitution should mean in more enlightened, progressive times, or the Court finally said what the Constitution really “meant” all along.¹¹ Most would concede the real decision offered only a frosted pane into the Court's actual reasoning, which likely involved a hodgepodge of each in order to reach *Brown*'s unanimous result.

8. *Id.* at 464–67 (“At crucial moments, Marshall turned to what he called his ‘Bible,’ the dissenting opinion of Justice Harlan in *Plessy v. Ferguson*.”); see also Constance Baker Motley, *In Memory of Thurgood Marshall*, 68 N.Y.U. L. REV. 208, 210 (1993) (describing Harlan's dissent in *Plessy* as Marshall's “bible”); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 102 (1998) (“Justice Harlan's dissent in *Plessy* formed the basis of our legal arguments to end segregation in education.”).

9. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

10. As Canellos explains, *Brown* does not explicitly cite Harlan's *Plessy* dissent, but it was a core part of the NAACP's argument. CANELLOS, *supra* note 3, at 467–69. Harlan's dissent also served as the backdrop for the Court's ultimate holding that “in the field of public education[,] the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Brown*, 347 U.S. at 495.

11. See, e.g., Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 65, 68 (1997) (“[T]he Supreme Court's 1954 decision . . . correctly interprets what the Fourteenth Amendment says (and *always* said)—even though it may well defy what the amendment's authors and ratifiers expected the amendment to do”); Ronald Dworkin, *Comment*, in *id.* at 115, 119 (distinguishing between a “semantic-originalist” view, which would embrace the *Brown* holding and “concur in the Court's decision” and an “expectation-originalist” view, which would interpret the Fourteenth Amendment to permit segregation).

Of course, history is always relevant to interpreting texts, not least *legal* texts.¹² But increasingly, the Court looks to history to adjudicate the Constitution's meaning.¹³ Enter text, history, and tradition.¹⁴

12. See, e.g., JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 3–26 (2024) (explaining “how people use history when they make constitutional arguments,” describing various modalities of historical argument, and rejecting the notion of a “single modality of ‘historical argument’”); Sunstein, *supra* note 1, at 604–05 (1995) (distinguishing the goal of the ordinary historian, who “is trying to reimagine the past,” from the goal of a constitutional lawyer who is “trying to contribute to the legal culture’s repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future”); Reva B. Siegel, *The Politics of Constitutional Memory*, 20 *GEO. J.L. & PUB. POL’Y* 19, 21 n.5 (2022) (describing the phenomenon of “constitutional memory as a form of collective memory forged through constitutional interpretation”); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *NOTRE DAME L. REV.* 1753, 1757–58 (2015) (evaluating different approaches to history in legal interpretation and asserting that “historical analysis is empirically and appropriately pervasive in constitutional adjudication”); E.D. Hirsch, Jr., *Transhistorical Intentions and the Persistence of Allegory*, 25 *NEW LITERARY HIST.* 549, 552 (1994) (explaining how legal texts are “typically intend[ed] to convey meaning beyond [their] immediate occasion[s] into a future context which is very different from that of [their] production” and, accordingly, intended to be applicable—or “allegorizable”—to “unforeseen situations”). But see Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 *HASTINGS L.J.* 901, 901–906 (1990) (critiquing historical analysis of constitutional rights and characterizing reliance on history for constitutional interpretation as “deeply flawed,” “perverse,” and “undesirable”).

13. See Chemerinsky, *supra* note 12, at 901 (arguing against relying on historical understandings of the Constitution’s meaning and noting that by the early 1990s in “virtually every area of constitutional law, the Supreme Court increasingly is relying on tradition as its guide in decisionmaking [sic]”). For a more recent perspective, see generally BALKIN, *supra* note 12.

14. See generally Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 *YALE L.J.* 852 (2013) (arguing for an older version of the text, history, and tradition test from Seventh Amendment case law to replace interest balancing in Second Amendment cases); Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 *NW. U. L. REV.* 433 (2023) (exploring different uses of history and tradition and suggesting a framework for using history and tradition within the context of originalist jurisprudence). But see Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 *DUKE L.J.* 67 (2023) (critiquing the Court’s use of history and tradition in *Bruen* and discussing the difficulties of employing history in judicial decision-making). Charles’ article also points out the inconsistency between *Bruen* and *Dobbs v. Jackson*

The United States Supreme Court has gradually developed a history-oriented approach to constitutional questions—especially when it comes to the Bill of Rights.¹⁵ In adjudicating questions of constitutionality, the Court has articulated what has come to be known as the text, history, and tradition (“THT”) test.¹⁶ When determining the scope of a right, the Court first looks to the text of the Constitution in its historical context.¹⁷ Then, the Court considers historical traditions qualifying that constitutional right.¹⁸

Women’s Health Organization, noting that “[t]he Supreme Court did not consistently apply an approach to the absence of historical evidence in these two cases issued one day apart.” *Id.* at 119–20.

15. See generally R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1 (2022) (discussing the Court’s use of history and tradition in the First, Second, and Fifth Amendments); Barnett & Solum, *supra* note 14 (examining the Supreme Court’s use of history and tradition applying the First, Second, and Fourteenth Amendments in *Dobbs*, *Bruen*, and *Kennedy*).

16. See *N.Y. Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) (“[T]he standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”).

Most discussions of text, history, and tradition have concerned the Second Amendment, as in *Bruen*, but it also shows up in other Bill of Rights contexts. See, e.g., *Vidal v. Elster*, 602 U.S. 286, 290–311 (2024) (opinion of Thomas, J.) (applying history and tradition in the First Amendment context); *cf. id.* at 312, 323 (Barrett, J., concurring in part) (agreeing with the ultimate judgment but disagreeing with Justice Thomas’ approach of relying *solely* on history and tradition as the determinative test to applying history and tradition); see also Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL’Y 59, 59 (2023) (discussing text, history, and tradition in First Amendment freedom of speech cases); William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL’Y 419, 419–24 (2023) (discussing text, history, and tradition in Free Exercise Clause cases).

17. See *Bruen*, 597 U.S. at 17.

18. *Id.*

The test draws vigorous critiques.¹⁹ Yet, some enthusiastically endorse its expansion to other areas of constitutional law,²⁰ and—in one form or another—text, history, and tradition seems to be here to stay.²¹ One particular difficulty the test presents, though, is how to apply it to modern issues centered on experiences, technological advancement, and events that the writers of the Constitution could never have imagined or anticipated.²²

19. See generally Charles, *supra* note 14 (critiquing the test in *Bruen*); Leo Bernabei, *Bruen as Heller: Text, History, and Tradition in the Lower Courts*, 92 FORDHAM L. REV. ONLINE 1 (2024) (describing lower courts' difficulties in applying text, history, and tradition); Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of Traditionalism in Constitutional Interpretation*, 47 HARV. J.L. & PUB. POL'Y 745 (2024) (discussing the problems inherent in the "historic tradition" prong of the *Bruen* test).

20. See, e.g., Nat'l Republican Senatorial Comm. v. FEC, 117 F.4th 389, 398–407 (6th Cir. 2024) (en banc) (Thapar, J., concurring) (urging the Supreme Court to apply text, history, and tradition with First Amendment as with other campaign finance cases), *cert. granted*, 145 S.Ct. 2843 (2025); see also *id.* at 407–18 (Bush, J., concurring dubitante) (addressing the historical record not addressed by the majority).

21. See *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 490–92 (2025) (applying intermediate scrutiny for First Amendment analysis of laws requiring age gating of pornography websites). It is unclear whether this signals a shift in direction, deeply rooted use of tiers of scrutiny in analogous cases, or simple judicial politics; nevertheless, Thomas discusses "[h]istory, tradition, and precedent" as the basis for states' ability to regulate obscenity. *Id.* at 472–74 (reviewing the "earliest obscenity decisions," state statutes from the 1830s and 1840s, and cases before and after the Fourteenth Amendment).

22. See, e.g., *Bruen*, 597 U.S. at 27 ("While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." (referring to *United States v. Jones*, 565 U.S. 400, 404 (2012), in which the Court determined that the installation of a tracking device constituted a "search" for Fourth Amendment purposes)); see also *United States v. Morgan*, 150 F.4th 1339, 1350–51 (10th Cir. 2025) (finding that history does not support the proposition that the Second Amendment protects machine guns—or Glock triggers). After all, as Chief Justice Roberts wrote, the Court does not use history and tradition "to suggest a law trapped in amber." *United States v. Rahimi*, 602 U.S. 680, 691 (2024). In Justice Sotomayor's concurrence, she wrote, "[u]nder the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary." *Id.* at 705–06 (Sotomayor, J., concurring). See also *id.* at 739–40 (Barrett, J., concurring) ("[I]mposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-

For example, during the COVID-19 pandemic, courts across the country struggled to balance defendants' rights with public health measures.²³ This included leveraging newer two-way video conferencing technology to allow for social distancing.²⁴ Many questioned the constitutionality of these procedures, especially in view of criminal defendants' Sixth Amendment right to confrontation.²⁵

The Court's Confrontation Clause jurisprudence has shifted over time from allowing policy balancing for exceptions to more text and history oriented analyses.²⁶ Having not addressed the issue before,

century policy choices, . . . [a]nd it assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority. Such assumptions are flawed, and originalism does not require them."). Technological advancement has been especially salient in the Fourth Amendment search and seizure context. *See* *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (holding use of a thermal imaging device constituted a Fourth Amendment search); *Carpenter v. United States*, 585 U.S. 296, 316–17 (2018) (same for obtaining cell-site location data). Nevertheless, the Justices still prioritize historical analogies as relevant or even controlling. *See, e.g., Carpenter*, 585 U.S. at 368 (Alito, J., dissenting) ("Talk of kings and common-law writs may seem out of place in a case about cell-site records and the protections afforded by the Fourth Amendment in the modern age. But this history matters, not least because it tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope.").

23. *See generally* Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205 (2021) (reviewing how various state practices and recommendations during the pandemic have percolated up through state and federal courts); Elizabeth Bays, Note, *Mr. Crawford Gets COVID: Courts' Struggle to Preserve the Confrontation Clause During COVID and What It Teaches Us About the Underlying Rights*, 98 N.Y.U. L. REV. 239 (2023) (examining conflicts between courts' COVID-19 practices and Sixth Amendment confrontation rights).

24. Bays, *supra* note 23, at 242.

25. *See generally* Laura Anne Rose, *Protecting a Cornerstone Constitutional Right in the Age of Zoom: The History and Case Law Surrounding the Confrontation Clause*, 69 S.D. L. REV. 162 (2024) (analyzing the historical background of the right to confrontation and current circuit splits over the application of *Maryland v. Craig* and *Crawford v. Washington* to two-way video testimony). For a pre-*Bruen* and pre-pandemic discussion of two-way video testimony, see generally Will Resnik, Comment, *Get with the Times: Why the Use of Live Two-Way Video Testimony Does Not Violate the Confrontation Clause*, 45 AM. J. CRIM. L. 461 (2019) (arguing in favor of the constitutionality of two-way video testimony).

26. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 1020–22 (1988) (analyzing historical texts and uses of the term "confrontation" to hold that a screen interposed between a teenage victim-witness of sexual assault and the defendant violated the defendant's

and hearing the clamor to expand its text, history, and tradition jurisprudence, the Court could take up the constitutionality of two-way video testimony and consider replacing the balancing tests being applied in lower courts with a version of the text, history, and tradition test.²⁷ But—is such a test workable, useful, or desirable?

This Note uses two-way video testimony and the Sixth Amendment as a way to ascertain the utility and limits of using text, history, and tradition in constitutional jurisprudence. Following this introduction, Part II walks through the background of video technology in relation to the Court's Confrontation Clause case law before explaining the contours of the Court's recent text, history, and tradition test and how it applies in the Sixth Amendment context. Part III sets out a text, history, and tradition framework—mirroring that used in *Bruen* and *Rahimi*—and then examines relevant historical sources in analyzing the Confrontation Clause. Part IV of this Note will evaluate the usefulness

Sixth Amendment's right to confrontation). Notably, Scalia offers an almost proto-THT analysis: "[o]ur cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* at 1021 (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)). Compare *Maryland v. Craig*, 497 U.S. 836, 849–50 (1990) (adopting a policy-balancing test for admitting one-way video testimony from vulnerable witnesses), with *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004) (using a text and history test to establish the meaning of the confrontation right to override prior precedent allowing a wife's statement to police despite not being subject to cross-examination). See also *Rahimi*, 602 U.S. at 710 (Gorsuch, J., concurring) (arguing the Court applies a THT approach to the Confrontation Clause in *Crawford* and *Giles v. California*, 554 U.S. 353, 358–61 (2008)).

27. See *Rose*, *supra* note 25, at 181–87 (analyzing current circuit splits over the application of *Craig* and *Crawford* to two-way video testimony); Resnik, *supra* note 25, at 468–76 (noting the Supreme Court has thus far turned away at least two chances to address this issue) (rejecting on unclear grounds an amendment to Fed. R. Crim. P. 26(b) to allow two-way video testimony in lieu of depositions in certain circumstances, but rewording the rule to omit "orally" from "In every trial the testimony of witnesses must be taken in open court" (citing Court Rules, 207 F.R.D. 89 (2002))); *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009) (allowing two-way video testimony for eighty-year-old witness who would have had to travel from California to New York to testify), *cert denied*, *Wrotten v. New York*, 560 U.S. 959, 959 (2010) (Sotomayor, J., respecting denial of cert.) ("The question [of two-way video testimony] is an important one, and it is not obviously answered by [*Craig*]. . . . Because the use of [two-way] video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling.").

of the text, history, and tradition framework when dealing with a relatively recent technological advancement like high-definition, two-way video conferencing—something that would have been unfathomable to the likes of James Madison, George Washington, and John Adams. Part V briefly concludes.

In the end, history and tradition offer a mixed picture: the history of the right to confrontation cannot sufficiently resolve the unforeseeable technological development of two-way video unless viewed at a very high level of abstraction. At the level of principles, though, the underlying rationale supports the use of two-way video testimony.

II. BACKGROUND: VIDEO TECHNOLOGY AND JURISPRUDENCE CONVERGE

To provide some background, this Section first overviews the United States Supreme Court's approach to the Confrontation Clause before surveying the status of two-way video testimony in constitutional conversation. It then turns to explaining the contours of the Court's recent text, history, and tradition test and how it applies in the Sixth Amendment context.

A. A Brief History of Confrontation Clause Jurisprudence and Video Testimony

The Sixth Amendment to the United States Constitution provides criminal defendants the right to “be confronted with the witnesses against [them].”²⁸ Typically, the Supreme Court has interpreted the right to confrontation to include four key elements as to witnesses at trial: (1) the witness is sworn under oath; (2) the defense has the opportunity to cross-examine the witness; (3) the jury is able to observe the witness' demeanor; and (4) the witness is present at the proceeding.²⁹

28. U.S. CONST. amend. VI.

29. For an alternate enumeration of these elements and more thorough treatment of their origins, see *Craig*, 497 U.S. at 845–46.

[T]he right guaranteed by the Confrontation Clause includes not only a “personal examination,” but also “(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-

Using modern, two-way video conferencing platforms, a court can swear in witnesses, the defense can cross-examine witnesses, and the jury can observe witnesses in high-resolution, in real-time.³⁰ This approach allows testimony from witnesses who would otherwise be unavailable due to distance, health, or trauma—allowing the prosecution to put on more, and better, testimony which is open to scrutiny by the defense and the jury.³¹ The only Confrontation Clause concern is whether live, two-way video is sufficiently “present.”

The historic right to confrontation meant to assure a preference for “live,” challengeable testimony over unsworn *ex parte* statements.³² So, one might be excused for thinking that modern two-way video technology would surpass the framers’ wildest dreams for ensuring this right. Nevertheless, federal and state courts have struggled to square video-mediated testimony with the Confrontation Clause, remaining skeptical of its application.³³

examination, the ‘greatest legal engine ever invented for the discovery of truth’; [and] (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”

Id. (first quoting *Mattox v. United States*, 156 U.S. 237, 242 (1895); and then quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

30. Resnik, *supra* note 25, at 481–82 (explaining why current two-way video technology is of sufficient quality to meet the demands of the confrontation right).

31. *See id.*

32. *See Mattox v. United States*, 156 U.S. 237, 239–40 (1895) (the Court’s earliest opinion interpreting the Confrontation Clause); *see also* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 108–14 (2005) (disputing Scalia’s use of history in *Crawford* and examining background to testimonial statements vis-à-vis ratification of Sixth Amendment); Thomas D. Lyon & Raymond LaMagna, *The History of Children’s Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1032 (2007) (explaining the history of unavailable children’s hearsay); Rose, *supra* note 25, at 163–70 (analyzing historical background of right to confrontation in medieval, English, and early American law, though with some historiographical issues).

33. *See* Rose, *supra* note 25, at 181–94 (surveying recent circuit and state supreme court precedents applying the right to confrontation to two-way video testimony); Daniel Tran, *Is Witness Credibility on Virtual Courtroom Procedures Impaired or Enhanced for Adults or Children?*, 32 S. CAL. INTERDISC. L.J. 491, 502–04, 510–11 (2023) (surveying federal and state court approaches to the constitutionality of virtual testimony).

Earlier case law did not establish any kind of “physically in-person” requirement for testimony because physical presence was inherent to the nature of trial before efficient two-way video conferencing technology.³⁴ A witness was either at trial, or she was not.

For a time, the Supreme Court endorsed a flexible view that the Sixth Amendment only supported a “preference for face-to-face accusation.”³⁵ The prosecution could overcome this preference so long as it demonstrated a hearsay declarant was unavailable, and the statement “[bore] adequate ‘indicia of reliability.’”³⁶ The Court essentially conflated “indicia of reliability” with firmly rooted hearsay exceptions.³⁷ The Court gradually modified this standard, however, as it was faced with the challenges of modern technology and concerns about sensitive witnesses. Nevertheless, it left the critical analysis of two-way video testimony up in the air, leading to a long-standing circuit split and many unanswered questions.

1. Initial Adoption of Mediated Testimony in Court

Once closed-circuit television (“CCTV”) technology became available, states began to enact laws that allowed witnesses to testify via CCTV under certain conditions.³⁸ Additional methods, such as using a screen or one-way mirror, were also employed to shield witnesses from the gaze of their abusers while allowing them to give their

34. Compare Davies, *supra* note 32, at 200 (“[T]he meaning that the language of a text carries can change if the premises under which it is read have changed. Indeed, the practical import of a text can be inverted if the premises and context have changed enough. Thus, the original meaning of a text has always been shaped by the historical context in which it was written.” (citation omitted)), and *id.* at 200 n.305 (discussing the example of the Fourth Amendment’s warrant requirement), with Lyon & LaMagna, *supra* note 32, at 1039–46 (explaining how eighteenth-century English courts addressed hearsay evidence and competence in child sexual abuse cases), and Rose, *supra* note 25, at 170–77 (describing major Supreme Court precedents before the advent of video or remote testimony).

35. Ohio v. Roberts, 448 U.S. 56, 65 (1980), *abrogated by*, Crawford v. Washington, 541 U.S. 36 (2004).

36. Roberts, 448 U.S. at 66.

37. *Id.*

38. See Maryland v. Craig, 497 U.S. 836, 853–55 (1990) (describing and listing state laws allowing child victim testimony via CCTV).

testimony live in court.³⁹ This latter practice prompted the Court to begin defining what mode of “confrontation” the Sixth Amendment required. Thus, in *Coy v. Iowa*, the majority argued that a one-way screen procedure violated the Confrontation Clause.⁴⁰ The one-way screen had allowed the jury and defendant to observe the victim-witness but prevented the victim-witness from seeing the defendant.⁴¹

2. One-Way Video as Accommodation: *Maryland v. Craig* and the *Craig* Test

The Court first truly addressed video technology in *Maryland v. Craig*.⁴² There, it allowed one-way, CCTV testimony by a six-year-old victim of sexual assault—but only as a narrow policy exception to a general rule of physical presence in the courtroom based on a limited historical analysis of the confrontation right adopted in *Coy v. Iowa* two years before.⁴³ The Court in *Craig* did not address two-way video testimony, and has not yet addressed it.⁴⁴ Some later Supreme Court

39. See *Coy v. Iowa*, 487 U.S. 1012, 1014–15 (1988) (addressing a discretionary one-way screen statute). For a more recent example describing the implementation of a screening procedure, see *Pitts v. State*, 405 So. 3d 1238, 1242–45 (Miss. 2025) (describing application of non-discretionary one-way screen statute), *rev’d and remanded*, *Pitts v. Mississippi*, 607 U.S. 1 (2025) (per curiam).

40. 487 U.S. at 1022.

41. *Id.* at 1014–15.

42. 497 U.S. at 840–42.

43. *Id.* at 849–50. *But see id.* at 861 (Scalia, J., dissenting) (joined by Brennan, Marshall, and Stevens, JJ.) (“The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court.”). Compare *Crawford v. Washington*, 541 U.S. 36, 65–68 (2004) (Scalia, J.) (overturning *Ohio v. Roberts* and introducing a distinction between “testimonial” statements, requiring cross-examination, and “non-testimonial” statements, not requiring cross-examination, based on an extensive historical analysis of the history and purpose of the Confrontation Clause), with *id.* at 70 (Rehnquist, C.J., concurring) (arguing the case should have been disposed of without overruling *Roberts*) (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.”).

44. See sources cited *supra* note 26.

decisions called even this limited exception into question,⁴⁵ and lower courts have treated two-way video testimony with caution.⁴⁶

Even so, the COVID-19 pandemic induced accelerated adoption of video conference call technology in courtrooms across the country, renewing questions about the constitutionality of two-way video testimony.⁴⁷ As the Court develops its jurisprudence to focus more on “text, history, and tradition,”⁴⁸ it is paramount to consider the role history and

45. For example, in *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) (Scalia, J.), the Supreme Court overruled *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980), the case which provided the underlying “indicia of reliability” rationale for the exception in *Craig*. See *Crawford*, 541 U.S. at 74–75 (Rehnquist, J., concurring in the judgment) (pointing out the conflict between overruling *Roberts* and the reasoning relied on in cases like *Craig*); see also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145–46 (2006) (Scalia, J.) (in dicta, citing *Craig*, 497 U.S. at 862 (Scalia, J., dissenting) and claiming “[w]e rejected [*Roberts*’ ‘indicia of reliability’] argument (*and our prior cases that had accepted it*) in *Crawford*. . . .” (emphasis added)).

Recently, though, the Court upheld the *Craig* test in a five-page per curiam order. *Pitts v. Mississippi*, 607 U.S. 1 (2025) (per curiam). There the Court reversed the Mississippi Supreme Court’s determination that a state statute mandating the use of a screen for child witnesses that blocked the child from the view of the defendant and vice versa violated the Confrontation Clause as applied because the trial court failed to make a “case-specific finding of necessity.” *Id.* at 5. Despite finding constitutional error, however, the Court noted such a violation might only rise to the level of harmless error and remanded the case on that question. *Id.* at 6 (citing *Coy*, 487 U.S. at 1021) (“This Court has held that the denial of the right to face-to-face confrontation is among those errors ‘subject to that harmless-error analysis.’”).

46. See *Rose*, *supra* note 25, at 181–94 (discussing circuit court approaches to two-way video conferencing and how state court decisions illuminate the development of the right to two-way video confrontation). For example, most circuits have sided with the Eleventh Circuit in applying *Craig*’s two-part test to two-way video testimony, even though *Craig* technically only addressed one-way video testimony. See *id.* at 181–87 (finding the First, Eighth, Ninth, Tenth, and Eleventh Circuit Courts apply *Craig*’s test to two-way video testimony); *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006). But the Second Circuit held early on that *Craig* did not apply to two-way video testimony because it was essentially equivalent to physical, in-person testimony as long as certain parameters were met. See *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (“[T]he Supreme Court crafted [the *Craig*] standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant.”).

47. See *Draper*, *supra* note 23, at 236–45.

48. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24 (overturning a tiers-of-scrutiny analysis and establishing the so-called “text, history, and tradition” test in the Second Amendment context) (“We reiterate that the standard for applying

tradition play in the right to confrontation should the issue of two-way video testimony reach the Supreme Court.⁴⁹

B. Replacing Policy Balancing with Text, History, and Tradition

The Supreme Court has employed text, history, and tradition in various forms throughout its history, but in the past few decades, it has crystalized a specific text, history, and tradition test. While most of this development has occurred in the Second Amendment context, it extended to the Court's jurisprudence on other constitutional rights as well, including the Sixth Amendment.

1. Enter Text, History, and Tradition: *Bruen* and *Rahimi*

The Supreme Court set out perhaps its most infamous version of a text and history test in *District of Columbia v. Heller*, when it clarified the Second Amendment right for individuals to own firearms for self-defense.⁵⁰ But it was in *New York State Rifle & Pistol Association v.*

the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50, n.10 (1961)); see *United States v. Rahimi*, 602 U.S. 680, 700 (2024) (Roberts, J.) (developing *Bruen*'s THT test to allow a restriction on someone's right to possess a firearm based on a domestic violence restraining order because "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others") (see also the multiple concurrences on the issue of how to conduct the history and tradition test); cf. *id.* at 747 (Thomas, J., dissenting) (arguing the test should require a close historical analog rather than a broad historical standard). Compare *Vidal v. Elster*, 602 U.S. 286, 299–311 (2024) (Thomas, J.) (applying a similar analysis in the First Amendment context), with *id.* at 311 (Barrett, J., concurring) (arguing for a standards-oriented approach to history and tradition rather than Thomas' "hunting for historical forbears [sic] on a restriction-by-restriction basis").

49. It seems this would most likely occur as a post-pandemic challenge to the Second Circuit's precedent in *Gigante*, or a precedent in a state with a broad allowance for two-way video testimony.

50. 554 U.S. 570, 595 (2008). This issue resurfaced later, on remand. *Heller v. District of Columbia*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (on remand) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not

Bruen that the Court established its clearest, two-part text, history, and tradition test.⁵¹ Part of *Bruen*'s infamy likely lies in its precise articulation of the test where prior uses of text and history had been more ad hoc or less well-defined.

According to *Bruen*, a court must undertake a two-pronged analysis. First, it must determine whether the government's action restricted a right protected in the text of the Second Amendment.⁵² If the text of the amendment does not encompass the government's action, it is constitutional.⁵³ But if the amendment does protect against the kind of restriction the government made, the restriction is presumptively unconstitutional and requires a second step to determine whether the nation has a "historical tradition" allowing this kind of exception to the protected right.⁵⁴

The first prong requires an analysis of whether the government's action restricted a right protected in the text of the amendment as understood in its historical context.⁵⁵ This step involves two components: (1) "a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language" (2) "confirmed by the historical background of the Second Amendment."⁵⁶ Essentially, this is a test for the original public meaning of the amendment.⁵⁷

by a balancing test such as strict or intermediate scrutiny."). For a more comprehensive discussion of the application of the THT test, specifically in the context of the Second Amendment, see generally Miller, *supra* note 14.

51. 597 U.S. 1, 26–27 (2022). This is not to say the test is easy to apply. *See, e.g., Rahimi*, 602 U.S. at 742–43 (Jackson, J., concurring) ("The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness.").

52. *Bruen*, 597 U.S. at 17.

53. *See id.* ("[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.").

54. *Id.*; *see also Rahimi*, 602 U.S. at 691.

55. *Rahimi*, 602 U.S. at 691; *see Bruen*, 597 U.S. at 19 ("Step one . . . demands a test rooted in the Second Amendment's text, as informed by history.").

56. *Bruen*, 597 U.S. at 20 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–78, 592 (2008)).

57. *See District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (stating that methodology should uncover the "public understanding" of the Second Amendment at its ratification); *see also Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting), *overruled in part, Bruen*, 597 U.S. at 19 (2022) (noting that history can be employed to understand the text of an amendment or to understand traditional

The second prong picks up where the first leaves off. It requires an assessment of whether “the challenged regulation is consistent with the principles that underpin our regulatory tradition.”⁵⁸ To survive constitutional scrutiny, an exception must be “‘relevantly similar’ to laws that our tradition is understood to permit.”⁵⁹ Yet, not all historical analogs are up to the task. The rationale and extent of the historical restrictions must be sufficiently similar to the law at issue.⁶⁰ Further, not “every modern law that remotely resembles a historical analogue” should count because this “risk[s] endorsing outliers that our ancestors would never have accepted.”⁶¹ The regulation does not, however, need to match precisely: it may be “analogous enough to pass constitutional muster” without being a “dead ringer” or a “historical twin.”⁶²

Both prongs require the use of historical sources. For each, the historical context comprises the background to the amendment’s ratification and the amendment’s interpretation through around 1900.⁶³ According to the *Heller* Court, this consideration includes pre-founding English and Colonial history (ca. 1600–1776), founding-era history

exceptions to it); Barnett & Solum, *supra* note 14, at 446–49 (discussing the use of history and tradition as evidence of original public meaning or original purposes).

58. *Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 26–31).

59. *Id.* (quoting *Bruen*, 597 U.S. at 29).

60. *See id.* (“[I]f laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.”).

61. *Bruen*, 597 U.S. at 30 (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021) (interpreting *Heller* to require focus on “type” of regulation)). In his dissent in *Rahimi*, Justice Thomas argues the dangers of analogizing at too high a level of abstraction or in contravention of the Constitution’s guarantee of Equal Protection.

It argued that since early legislatures disarmed groups [i.e., slaves, African Americans, and Native Americans] considered to be “threats,” a modern Congress has the same authority. The problem with such a view should be obvious. Far from an exemplar of Congress’s authority, the discriminatory regimes the Government relied upon are cautionary tales. They warn that when majoritarian interests alone dictate who is “dangerous,” and thus can be disarmed, disfavored groups become easy prey.

602 U.S. at 776 (Thomas, J., dissenting) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010)).

62. *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30).

63. *Bruen*, 597 U.S. at 20 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592, 605 (2008)).

(ca. 1776–1800), and post-ratification era history (ca. 1800–1900).⁶⁴ In *Bruen*, the Court further organizes post-ratification history into a number of categories: (a) Founding-Era Legal Scholars, (b) Nineteenth-Century Cases, (c) Post-Civil War Congressional Discussions of Second Amendment, (d) Post-Civil War Public Discussion of Second Amendment, and (e) Post-Civil War Commentators.⁶⁵ There remains, however, debate over *how* Reconstruction-era discussions of the Bill of Rights and the Fourteenth Amendment should play into the analysis.⁶⁶

2. Text, History, and Tradition and Sixth Amendment Jurisprudence

Some version of text, history, and tradition has been applied to various areas of First Amendment jurisprudence for years.⁶⁷ Recent cases, however, have indicated a more totalizing use of the doctrine,⁶⁸ sparking debate about its utility and parameters.⁶⁹ And both scholars

64. *Heller*, 554 U.S. at 595 (English and Colonial history), 600–01 (state constitutions and interpretations immediately following ratification), 605 (ratification and post-ratification history), 614 (post-Civil War congressional and public discussions of the amendment), 616–19 (post-Civil War commentaries).

65. *Bruen*, 597 U.S. at 20–21.

66. The remaining debate revolves around this question: to what extent do Reconstruction and the Fourteenth Amendment substantially transform earlier interpretations so that they control, rather than supplement, the meaning of prior constitutional enactments? *See, e.g., id.* at 82–83 (Barrett, J., concurring) (pointing out the Court has not settled whether the controlling meaning of the Bill of Rights amendments resides ultimately in their ratification in 1791 or their meaning as recast in 1868); *cf.* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 281–94 (2000) (articulating a theory of how the Reconstruction Amendments substantively transformed the meaning of the original Bill of Rights) (cited favorably in a number of Supreme Court opinions such as *McDonald*, 561 U.S. at 762 nn.9–10, 775, 832) (discussing the role of the Fourteenth Amendment and the Civil Rights Act of 1866 in interpreting the Second Amendment vis-à-vis incorporation).

67. *See generally* Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901 (1993) (discussing the use of history and tradition in First Amendment rights cases).

68. *See* *Vidal v. Elster*, 602 U.S. 286, 301 (2024) (applying history and tradition in the First Amendment context); *see also* Calvert & Papandrea, *supra* note 16, at 67–76 (applying THT in First Amendment cases).

69. *See Elster*, 602 U.S. at 312 (Barrett, J., concurring) (disputing Thomas’ application of history).

and lower court judges have argued to expand its use further.⁷⁰ Similarly, text, history, and tradition have been used in the Seventh Amendment context,⁷¹ and the Court has begun using it more to bound the recognition of unspecified rights under substantive due process.⁷²

Confrontation Clause jurisprudence finds itself in a similar position to that of the Second Amendment leading up to *Bruen*. As was the case following *Heller*, the Supreme Court seems to have eschewed policy balancing in Confrontation Clause cases, while it lingers in state law and lower federal courts.⁷³ But while *Craig* theoretically remains good law and *Roberts* continues as a zombie precedent, the Court has already indicated its direction.

In the *Bruen* decision, Justice Thomas bases his opinion in part on the claim that the text, history, and tradition test is already well established in the Sixth Amendment.⁷⁴ Thomas explains, “beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims. If a litigant asserts the right in court to ‘be confronted with the witnesses against him,’ we require courts to consult history to determine the scope of that right.”⁷⁵ Specifically, Thomas cites *Giles v. California* to support the prong-two scope-of-right analysis.⁷⁶ Therefore, with the current state of the law and the

70. See, e.g., *Republican Nat’l Senatorial Comm. v. FEC*, 117 F.4th 389, 398 (6th Cir. 2024) (en banc) (Thapar, J., concurring); *id.* at 407 (Bush, J., concurring) (arguing for extending THT into campaign finance); Haun, *supra* note 16, at 421 (arguing for expansion of THT into Free Exercise jurisprudence).

71. Miller, *supra* note 14, at 872–87 (addressing THT in Seventh Amendment cases).

72. See Barnett & Solum, *supra* note 14, at 455–76 (analyzing use of versions of THT in First, Second, and Fourteenth Amendment and suggesting uses of history and tradition for future jurisprudence); Wright, *supra* note 15, at 2–9 (arguing the opposite).

73. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (“We hold, however, that, under the circumstances of this case[,] the prosecutor’s need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants’ rights, to confront their accusers face-to-face.”).

74. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 25 (2022).

75. *Id.* (quoting U.S. CONST. amend. VI).

76. *Bruen*, 597 U.S. at 25 (quoting *Giles v. California*, 554 U.S. 353, 358 (2008)); see *id.* (“[T]he Confrontation Clause is ‘most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established

current approach of the Court, it seems only a matter of time before it applies text, history, and tradition to the use of two-way video testimony.

III. METHODS & SOURCES FOR THE CONFRONTATION CLAUSE'S TEXT, HISTORY, AND TRADITION

In order to assess the use of text, history, and tradition in this context, this Note first sets out a text, history, and tradition framework for analysis. Then, it walks through the relevant historical sources before applying that framework to a hypothetical challenge to the use of two-way video testimony.

A. Framing a Text, History, and Tradition Test for the Sixth Amendment

In keeping with the model of text, history, and tradition the Supreme Court framed in *Bruen* and recast in *Rahimi*, this Note follows a two-part framework. At step one, it looks to the text of the Sixth Amendment in its historical context to define what right the Confrontation Clause protects. This analysis focuses on the time leading up to and following the ratification of the Bill of Rights. At step two, it considers analogous historical traditions limiting the right of confrontation. This encompasses a broader period, from the early influences of English common law on the Colonies through Reconstruction.

To preview: at step one, the text and history of the Sixth Amendment do not clearly preclude the use of two-way video testimony because live witness testimony, subject to cross-examination, likely falls within the meaning of “confront” and “witnesses.” Because the technology did not exist at the time of enactment, only a negative inference from this historical situation could provide a basis for excluding two-way video testimony from the confrontation right.

At step two, no direct historical analogs for two-way video exist during the relevant period. Thus, no relevant historical tradition can address whether two-way video would be allowed as an exception to in-person confrontation on that basis. But the underlying historical principle of allowing testimony subject to cross-examination supports

at the time of the founding.” (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004))).

allowing two-way video testimony. The following sections walk through the historical sources relevant to steps one and two.

*B. The Historical Record: Texts, Background, and Cases*⁷⁷

The relevant portion of the Sixth Amendment reads: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁷⁸ The key terms in question are “confronted” and “witnesses.”⁷⁹

Historical sources will often serve to both enlighten the meaning of the text at prong one as well as the scope or limits of the right in

77. At this stage, it is important to point out the limitations of this analysis. This Note only addresses virtual or mediated testimony in criminal trials, not broader “virtual court” issues. More importantly, it only addresses what the Constitution allows, not any more defendant-friendly rules state law might establish. *See generally* JEFFREY SUTTON, 51 IMPERFECT SOLS. 23–35 (2018) (explaining how state supreme courts can interpret analogous provisions in state constitutions to be more protective than similar provisions in the federal Constitution); *cf.* Nathan Kinard, *The Music of Confrontation: Taking Back Independence in Interpreting Tennessee’s Constitution*, TENN. BAR. J., Mar.–Apr. 2021, at 40, 40–41 (arguing the Tennessee Constitution requires witnesses to be physically present at trial even if the U.S. Constitution does not). Further, it does not fully address issues related to distance (e.g., jurisdiction, subpoena power, carceral control) or technical implementation.

78. U.S. CONST. amend. VI.

79. The clause’s grammar is also significant. The passive voice indicates it is about the prosecution confronting the defendant *with* the witnesses, not about the defendant confronting the witnesses. This calls the core implication of *Coy v. Iowa*, 487 U.S. 1012, 1017–20 (1988), into question, insofar as Justice Scalia infers the Amendment guarantees the *accused* the right to *confront the witnesses* based essentially on several points of dicta in prior cases describing the right in active terms. Here, the passive is justified because the subject of the Amendment is those accused followed by a list of rights belonging to them. Many of these are passive, but this is presumably intentional to keep the attention on the main subject of the Amendment. *Cf.* BRYAN A. GARNER, GARNER’S MODERN ENGLISH USAGE 807 (5th ed. 2022) (pointing out the passive is often used to focus on the person acted upon). While defendants benefit from the *results* of the rights inscribed in the Sixth Amendment, it is not, for instance, defendants who inform themselves of the “nature and cause[s] of the accusation[s],” who ascertain by law the district court in which the crime was committed, or who create the sanctions supporting the compulsory process of witnesses for their defense. U.S. CONST. amend. VI.

prong two.⁸⁰ This Section first considers the ancient precursors of the right to confrontation, before walking through historical sources enlightening both the text and history of the Sixth Amendment. Thus, it encompasses dictionaries and legal dictionaries from around the time of ratification, walks through early English and colonial sources, discusses ratification-era debates, and concludes with analysis of post-ratification treatises, laws, and cases.⁸¹

As Justice Harlan astutely observed in *California v. Green*, “the Confrontation Clause comes to us on faded parchment.”⁸² Nevertheless, while “[h]istory seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause,”⁸³ there are yet historical sources to consider.

1. Ancient Precursors of Confrontation

The idea of a right to confrontation did not arrive on the scene in 1787. It goes back thousands of years from Ancient Near Eastern cultures to Roman Civil Law. This Section considers texts discussing the ancient precursors of the confrontation right that may have been influential on the American founding generation.

One of the most ancient sources for the confrontation rule is from the Jewish Torah, Deuteronomy 19:15–21.⁸⁴ The passage

80. See, e.g., *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting), *overruled in part*, *Bruen*, 597 U.S. at 19 (2022) (“These approaches will typically yield the same result; one uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature’s power to take it away.”).

81. While intended to be thorough, this Note does not purport to be an exhaustive treatment on the historical context in which the Constitution or early American legal system was developed. For more information on appropriately researching American Legal History as a practitioner in the legal field, see generally Morris L. Cohen, *Researching Legal History in the Digital Age*, 99 L. LIBR. J. 377 (2007) (providing helpful information on source materials to consult when researching legal history); JOHN B. NANN & MORRIS L. COHEN, *THE YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY* (2018) (providing a six-step interdisciplinary process for accurately and appropriately conducting research on American legal history).

82. 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring).

83. *Id.* at 174.

84. Deuteronomy is the fifth book of the Jewish Torah and Christian Pentateuch, forming part of the Anglican and Protestant canons of scripture. For a

mandates that “[i]f a false witness testifies against [or rises up to accuse] another person and accuses him of a crime, then both parties to the controversy must stand before . . . the priests and judges.”⁸⁵ The primary purpose of appearing before this tribunal was to avoid perjury, and the judges were tasked with assessing the witness to prevent and punish false testimony.⁸⁶ Notably, it is the parties to the suit who are explicitly commanded to appear before the tribunal, not the witnesses themselves (unless, of course, the witness is one of the parties).⁸⁷ Yet,

translation from the Jewish tradition, see *Deuteronomy* 19:15–21 (Jewish Publication Society (JPS Tanakh, 1917)), and for a translation from the Christian tradition, see *Deuteronomy* 19:15–21 (New English Translation, 2d ed., 2019). As part of the Anglican and Protestant canons of scripture, Deuteronomy was formative for English and early American law. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984) (presenting findings of comprehensive review of citations in early American political writings) (“If we ask what book was most frequently cited by Americans during the founding era, the answer somewhat surprisingly is: the Book of Deuteronomy. . . . [T]he biblical tradition is most prominent among the citations.”).

85. *Deuteronomy* 19:16–17 (New English Translation, 2d ed., 2019). It also instructs the judges to “thoroughly investigate the matter” including whether “the witness should prove to be false and to have given false testimony against the accused.” *Id.* at 19:18. This apparently expanded on the rule for capital offenses by applying it as a general rule in all crimes that more than one witness was required to convict. Compare *Deuteronomy* 19:15a (applying to “any trespass or sin [a person] commits”), with *Deuteronomy* 17:6 (evidence from two or more witnesses required in capital cases), and *Numbers* 35:30 (describing similar requirements).

86. John Calvin, the sixteenth-century continental reformer followed by the New England Puritans, Presbyterians, and many other English and American protestants, interprets this passage in *Deuteronomy* 19:16–17 to refer to procedures judges employ to prevent perjury at trial.

Because the fear of God does not so prevail in all men, as that they should voluntarily abstain from the love of slander, God here appoints the punishment to be inflicted for perjury: for political laws are enacted against the ungodly and disobedient, in order that those who despise God’s judgment should be brought before the tribunal of men.

3 JOHN CALVIN, COMMENTARIES ON THE LAST FOUR BOOKS OF MOSES ARRANGED IN THE FORM OF A HARMONY 185 (Charles W. Bingham trans., Edinburgh, 1854) (Geneva, 1564).

87. JEFFREY H. TIGAY, *Deuteronomy*, in THE JPS TORAH COMMENTARY 183–84 (1996); cf. *Deuteronomy* 25:1 (two parties in conflict to appear before tribunal for adjudication).

the context implies that this occurs during proceedings in which witnesses are testifying before the tribunal.⁸⁸

Roman law had similar maxims. Writing in the mid-second century CE, Appian described the Roman Senator Piso exhorting the Roman Senate that “[o]ur law . . . requires that the accused shall himself hear the charge preferred against him and shall be judged after he has made his own defence.”⁸⁹ This referred to the accused’s right to be present to respond to the accusations.⁹⁰

Similarly, in the first century CE, the Roman Procurator, Porcius Festus, remarked that “it was not the custom of the Romans to hand over anyone before the accused had met his accusers face-to-face and had been given an opportunity to make a defense against the accusation.”⁹¹ Here again, the idea seems to be limited to the opportunity of the accused to be present to mount a defense to the charges.⁹²

The takeaway is that in all these ancient precursors, those the accused meets “face-to-face” are those making the accusation, i.e., the

88. See TIGAY, *supra* note 87, at 184. The accusatory witness is very likely also the plaintiff but may be someone giving testimony on the plaintiff’s behalf. See *Deuteronomy* 19:16 (witness who accuses a person); *Exodus* 23:1–2 (prohibiting testifying falsely on behalf of another); *Leviticus* 5:1 (describing a witness as someone who observed or has knowledge about a matter). But see PETER C. CRAIGIE, *THE BOOK OF DEUTERONOMY* 269–70 (1976), and DUANE L. CHRISTENSEN, *DEUTERONOMY* 1:1–21:9, at 430 (Bruce M. Metzger et al. eds., rev. ed. 2001), who both take the “false witness” in verse 16 (which uses a different adjective than that for “false testimony” in verse 18) to be a single witness bringing the charges and take the remedy for this exception (only having one witness) to be appealing the case to the priests at the sanctuary in Jerusalem.

89. 3 APPIAN, *BELLUM CIVILE* [“THE CIVIL WARS”] § 54 (Horace White trans., London, MacMillan & Co. 1899).

90. *Id.* (“[F]or the truth of this I appeal to Cicero, our greatest orator. Since he hesitates to accuse Antony when present, but brings against him in his absence certain charges which he considers of the greatest gravity, and not open to doubt, I have come forward to show, in the fewest words, that these charges are false.”).

91. *Acts* 25:16 (New English Translation, 2d ed., 2019).

92. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481, 485 (1994). This right was likely on a sliding scale with most procedural rights limited to males of a certain class or birth. See 3 BRIAN RAPSKE, *THE BOOK OF ACTS IN ITS FIRST CENTURY SETTING: THE BOOK OF ACTS AND PAUL IN ROMAN CUSTODY* 46–47, 56–62, 120–21, 128–29 (Bruce W. Winter ed., 1994) (discussing the effect of honor and status on Roman tribunals).

opposing party, not the witnesses per se.⁹³ Moreover, the ancients tied this procedural rule to the goal of avoiding faceless, nameless accusations rather than to providing an opportunity for cross-examination or its attendant benefits.⁹⁴ Thus, the burgeoning rule focused on the opportunity to (a) know the specific charges in order to (b) give a defense before a magistrate.⁹⁵ Later Roman and Civil Law promulgated these ideas through the Middle Ages, and they continued to be influential on the development of law in Enlightenment-era Europe.⁹⁶

2. Ratification Era Dictionaries and Other Definitional Sources

While based on ancient antecedents, the Confrontation Clause must be considered in the context in which it was drafted. Thus, the text, history, and tradition analysis, at step one, begins with the text and, thus, relies on word-oriented authorities. These include

93. Herrmann & Speer, *supra* note 92, at 486. In many cases, this may simply be the representative of the state. *See, e.g.,* PLINY THE YOUNGER, LETTERS 10.96–97 (T.E. Page et al. eds., William Melmoth trans., 1931) (discussing administration of criminal punishment by a territorial governor). Around 110 CE, the Roman Emperor Trajan replied to Pliny, a territorial governor, that “[i]nformations [sic] without the accuser’s name subscribed must not be admitted in evidence against anyone, as it is introducing a very dangerous precedent, and by no means agreeable to the spirit of the age.” *Id.* But the emperor endorses Pliny’s practice of “interrogat[ing] them” on referral or reputation as “extremely proper,” only critiquing his use of “a placard [] put up, without any signature, accusing a large number of persons by name.” *Id.*

94. PLINY, *supra* note 93. Thus, Justice Scalia was “entirely correct” in *Coy* that the confrontation right is ancient, based on the *Acts* passage cited above. Herrmann & Speer, *supra* note 92, at 483; *see Coy v. Iowa*, 487 U.S. 1012, 1015 (1988) (tracing Roman origins of the confrontation right). But the sources do not support his reasoning that the kind of confrontation in view protects any right of the defendant *to be seen by* the witnesses or even the broader, older view that it protected the right to test witnesses before the trier of fact through cross-examination. Similarly, Herrmann and Speer mistakenly posit that the purpose of witnesses’ personal presence shifted from providing for cross-examination to examination by the trier of fact during Hadrian’s reign. Herrmann & Speer, *supra* note 92, at 489. While orators practiced cross-examination in Roman trials, the rule of the accuser’s presence seems to have been primarily for the benefit of the trier of fact throughout most of history.

95. *See* Herrmann & Speer, *supra* note 92 (noting defendants’ “opportunity to be present at the proceedings against them”).

96. *See id.* at 484–85 (discussing influential third-century Roman sources). Early Islamic law also includes similar confrontation concepts. *See, e.g., Quran, Surah An-Nur [The Light] 24:4, 6* (requiring accusers to present witnesses).

dictionaries of the English language and legal dictionaries from around the time of ratification of the Sixth Amendment. A number of general dictionaries from the time around ratification serve as a starting point to understanding the text's meaning (though, not the end point).⁹⁷ Afterward, a look at relevant law dictionaries will shed additional light of the use of the relevant terms around the time of the founding.⁹⁸ These sources demonstrate that the terms "confront" and "witnesses," as used in the Sixth Amendment, are broad, malleable terms that can encompass mediated live testimony like two-way video conferencing.

a. Dictionaries of English

Generally, dictionaries from around the time of a law's enactment are most probative of historical meaning, but sometimes dictionaries from after the time of enactment are helpful, since definitions tend to lag.⁹⁹ This Note examines the dictionaries of Samuel Johnson,¹⁰⁰

97. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 418 (2012) ("A dictionary definition states the core meanings of a term. It cannot delineate the periphery. Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense.").

98. The burgeoning practice of applying corpus linguistics to the interpretation of legal documents ought to be considered here, but the restraints of time prevent an in-depth analysis in this Note. On the superiority of corpus linguistics to relying on dictionaries, see generally Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915 (2010). For the relevance and utility of corpus linguistics for judicial analysis of cases, compare Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828–29 (2018) (arguing for judges' adoption of corpus linguistics tools), with Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 95 S. CAL. L. REV. POSTSCRIPT 13, 14–15 (2020–2021) (critiquing Lee & Mouritsen's proposal and suggesting corpus linguistics is not conducive to use as a regular interpretive tool).

99. See SCALIA & GARNER, *supra* note 97, at 419 ("Dictionaries tend to lag behind linguistic realities . . .").

100. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773), <https://johnsonsdictionaryonline.com>.

Nathan Bailey,¹⁰¹ and Noah Webster.¹⁰² Johnson's and Webster's dictionaries are particularly helpful because they are unabridged dictionaries offering detailed definitions with examples of usage.

Johnson's definitions of "confront" range, in order, from most physical to most metaphorical.¹⁰³ The court-related definition speaks of confronting evidence rather than witnesses,¹⁰⁴ and even where Johnson includes the phrase "in opposition," his examples evince a non-physical form of confrontation.¹⁰⁵ Johnson has a single, separate entry for "confrontation"—"bringing two evidences face to face," but again, this focuses on ideas and evidence—quite capacious concepts.¹⁰⁶

Bailey's dictionary mirrors Johnson's in defining the term as "to bring Face to Face, to oppose, to compare."¹⁰⁷ Webster's American dictionary, for the most part, copies Johnson's—even to the extent of using the same examples.¹⁰⁸ What Webster most obviously adds, though,

101. NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (20th ed. 1763). Archival photographs of this source (like many others now in the public domain) can be found on the Internet Archive website at <https://archive.org/details/universaletymolo00bail/> (last visited Apr. 8, 2026).

102. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), <https://webstersdictionary1828.com/>.

103. *Confront*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/confront_va (defining "confront" as to "stand against another in full view; to face," "stand face to face, in opposition to another," "oppose one evidence to another in open court," or "compare one thing with another").

104. *Id.* at def. 3 ("To oppose one evidence to another in open court."). Johnson's example for this particular definition reads: "We began to lay his unkindness unto him: he seeing himself *confronted* by so many, went not to denial, but to justify his cruel falsehood [sic]." *Id.* (citing SIR PHILIP SIDNEY, THE COUNTESS OF PEMBROKE'S ARCADIA 170, ll. 15–18 (William Du-Gard et al., 10th ed. 1655), *reprinted by* EARLY ENGLISH BOOKS ONLINE: EARLY MODERN COLLECTION (PROQUEST 2248532159), <https://www.proquest.com/eebo/books/countess-pembrokes-arcadia-written-sir-philip/docview/2248532159/sem-2?accountid=14582> (last visited Apr. 8, 2026)).

105. *See Confront*, def. 2, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/confront_va ("The East and West churches did both confront the Jews and concur with them.").

106. *Confrontation*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/confrontation_ns (last visited Apr. 8, 2026).

107. *Confront*, BAILEY, *supra* note 101, at 196.

108. *Confront*, WEBSTER, *supra* note 102, <https://webstersdictionary1828.com/Dictionary/confront> (last visited Apr. 8, 2026) (defining "confront" as to "stand face to face in full view; to face; to stand in front [of]," "stand in direct

is a more descriptive third definition, behind which the Sixth Amendment likely stands.¹⁰⁹ Under that definition, confrontation means an “accused person and a witness” are “set face to face” or brought “into [each other’s] presence.”¹¹⁰ Similar to Johnson, Webster only provides one definition of “confrontation.”¹¹¹

While Webster’s definitions of “confront” indicate some kind of presence is in view, according to Webster, “presence” is, itself, an elastic term.¹¹² For Webster, the idea of being face-to-face or “present” includes not only physical closeness but also “being in view” or “sight.”¹¹³ Presence can also more generally refer to demeanor or metaphorical presence in one’s mind.¹¹⁴ Thus, “confrontation” is an elastic term requiring further specification from its use in a given context.

Turning to early definitions of witnesses, Bailey’s pithy definition of “a witness” is “one who testifies a Thing.”¹¹⁵ Johnson defines the term similarly.¹¹⁶ Most of Johnson’s examples are metaphorical or do not involve literal testimony in-person at a trial. The sole exception references a scene in Shakespeare’s *Henry VIII* when a prosecutor uses

opposition,” “oppose,” “set face to face; bring into the presence of; as a[n] accused person and a witness, in court, for examination and discovery of the truth,” and “set together for comparison” or “compare one thing with another”).

109. *Id.* at def. 3. See US. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .”).

110. *Confront*, def. 3, WEBSTER, *supra* note 102, <https://webstersdictionary1828.com/Dictionary/confront>.

111. *Confrontation*, WEBSTER, *supra* note 102, <https://webstersdictionary1828.com/Dictionary/confrontation> (last visited Apr. 8, 2026) (“The act of bringing two persons into the presence of each other for examination and discovery of truth.”).

112. *Presence*, def. 3, WEBSTER, *supra* note 102, <https://webstersdictionary1828.com/Dictionary/Presence> (last visited Apr. 8, 2026).

113. *Id.*

114. *Id.* at def. 6, def. 8.

115. *Witness*, BAILEY, *supra* note 101, at 939. Unfortunately, Bailey defines “to testify” circularly as “to witness or certify; to make appear or known.” *Testify*, *in id.* at 853. Bailey similarly defines “testimony” as “Witnessing, Evidence, Proof, [or] Token.” *Testimony*, *in id.*

116. *Witness*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/witness_ns (last visited Apr. 6, 2026) (defining witness as “[t]estimony; attestation” or “one who gives testimony”).

“examinations, proofs, [and] confessions [of] divers witnesses.”¹¹⁷ But this merely illustrates the use of witness testimony in producing evidence for trial generally. Johnson’s treatment of the verb “to witness” also illustrates the word’s usage in general, metaphorical, or mediated terms.¹¹⁸

Webster emphasizes the “personal presence” of a witness to events they observed.¹¹⁹ Yet, they lack any emphasis on the manner in which witnesses relate those events to others.¹²⁰

Webster offers one definition of a “witness” as “[o]ne who gives testimony; as [in], the witnesses in court agreed in all essential facts,” but this is part of an example, not the definition itself.¹²¹ Though offering fewer examples than Johnson, most of Webster’s examples involve

117. *Id.* (quoting WILLIAM SHAKESPEARE, HENRY VIII act 2, sc. 1, l. 835).

118. *Witness*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/witness_va (last visited Apr. 6, 2026) (defining witness as “[t]o attest; tell with asseveration”); *To Witness*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/witness_vn (last visited Apr. 6, 2026) (defining to witness as “to bear testimony”). His examples include someone’s conscience or perception informing the person of some fact, spiritual or natural forces “witnessing” events; a person being enjoined from “witness[ing],” i.e., being a tattletale; or testimony via a letter, article, or book. *Id.*

Like Bailey, Johnson’s definitions of “testify” and “testimony” include words like “witness” and “witnessing.” *To Testify*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/testify_va (last visited Apr. 6, 2026) (defining it as “[t]o witness; to give evidence of any point”); *To Testify*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/testify_vn (last visited Apr. 6, 2026) (defining it as “[t]o witness; to prove; to give evidence”); *Testimony*, JOHNSON, *supra* note 100, https://johnsonsdictionaryonline.com/1773/testimony_ns (last visited Apr. 6, 2026) (defining testimony as “[e]vidence given; proof by witness”).

119. *Witness*, WEBSTER, *supra* note 102, at verb transitive, def. 1 & noun, def. 3, <https://webstersdictionary1828.com/Dictionary/witness> (last visited Apr. 6, 2026). Webster offers his own experience “witness[ing] the ceremonies in New York, with which the ratification of the constitution was celebrated, in 1788.” *Id.* Webster also offers a definition specific to “witnessing” a legal instrument—i.e., seeing it signed and subscribing to its authenticity. *Id.* at verb transitive, def. 1 & noun, def. 4.

120. *Id.* (defining the noun as “[t]estimony,” “attestation of a fact or event,” “[t]hat which furnishes evidence or proof” and defining the verb as “[t]o attest,” “to give testimony,” “[t]o bear testimony,” “to testify to something,” or “[t]o give evidence”).

121. *Id.* at noun, def. 5.

someone observing events or statements communicating some fact.¹²² None of the latter would require the literal presence of the witness other than to convey, in some form, a message or rumor.

When defining the verb “testify,” Webster does refer to the solemnity of giving testimony under oath in judicial proceedings as helping establish a fact.¹²³ In only one definition, however, does Webster speak of “affirm[ing] or declar[ing] . . . *before* [a] tribunal.”¹²⁴

Thus, per these leading dictionaries, witnesses are generally those who can attest to a fact they observed, but they may convey their observations in a number of ways. To the extent witnesses give that information before a court *in person*, this is for the benefit of the tribunal or trier of fact. None of these dictionaries defines witnesses or testimony in relation to a defendant’s presence or requires witnesses to be literally, physically present to convey information.

b. Legal Dictionaries

Legal dictionaries, on the other hand, flesh out the use of these and related terms in the legal context. They also provide a bridge between word study and historical analysis, as many of the relevant legal dictionaries serve more as encyclopedia-type sources that heavily abstract contemporary legal treatises.¹²⁵

122. *Id.* One example, however, is particularly relevant to the discussion at hand. Under “[t]o give evidence,” Webster quotes *Isaiah* 3:9, which says, “[t]he shew [i.e., appearance] of their countenance doth witness against them.” *Id.* (verb, intransitive, def. 2). Under “show,” as a noun, Webster’s first definition is “[s]uperficial appearance; not reality” and includes such other definitions as “something offered to view,” “[p]ublic appearance, in distinction of concealment,” “[s]emblance; likeness,” “[e]xhibition in view,” “[e]xternal appearance,” and even “[a] phantom; as a fairy show.” *Show*, WEBSTER, *supra* note 102 (noun, defs. 1, 2, 5, 6, 8, 9, and 11), <https://webstersdictionary1828.com/Dictionary/show> (last visited Nov. 14, 2025).

123. *Testify*, WEBSTER, *supra* note 102 (verb intransitive, def. 2), <https://webstersdictionary1828.com/Dictionary/testify> (last visited Nov. 14, 2025) (“In judicial proceedings, to make a solemn declaration under oath, for the purpose of establishing or making proof of some act to a court; to give testimony in a cause depending before a tribunal.”).

124. *Id.* (verb transitive, def. 1) (emphasis added). This could merely refer to making a deposition before a tribunal and does not reference actual trial proceedings, and none address whether a defendant would be present or absent.

125. Though numerous legal dictionaries were in circulation at the time of the founding, those selected here cover the span of pre-ratification English legal

Such dictionaries from around the time of ratification did not contain entries for the terms “confront” or “witness,” but their entries on “evidence,” “depositions,” and the term “viva voce” helped to define these terms. For example, “viva voce” was a term often used to describe witness testimony in a jury trial.¹²⁶ While later, mid-nineteenth-century dictionaries like Bouvier’s defined this term essentially as the opposite of a deposition,¹²⁷ the earlier, more relevant dictionaries define “viva voce” more succinctly: “where a witness is examined personally in open court.”¹²⁸ One must look to entries on evidence or depositions, however, to understand what was meant by “examined personally.”

In describing depositions, Giles explained the normal rule was that a living witness “must appear in person in the court to be examined,” but this rule admitted a number of exceptions.¹²⁹ These included exceptions for a witness who had died, was going to sea, was unable to travel, or was “kept away by the procurement of the prisoner.”¹³⁰ Notably, in both places where entries described testimony “in person,” this was in contrast to having the written deposition of an unavailable

dictionaries to nineteenth-century American legal dictionaries in order to provide breadth to this study. Like dictionaries of the English language of the time, legal dictionaries often freely copied from one another. So, another purpose in the selection is to avoid reduplication. For a list of the most relevant legal dictionaries from different periods, see SCALIA & GARNER, *supra* note 97, at 420–24.

126. JACOB GILES, *Viva Voce*, A NEW LAW-DICTIONARY: CONTAINING THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW (J. Morgan ed., 9th ed. 1772) (redirecting to the entry on depositions); WILLIAM MARRIOT, *Viva Voce*, 4 A NEW LAW DICTIONARY 162 (1798) (“[Viva voce is] where a witness is examined personally in open court.”) (redirecting to an entry on evidence); *see also* JOHN BOUVIER, *Viva Voca*, 2 A LAW DICTIONARY: ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 613 (2d ed. 1858) (“[A] witness delivers his evidence . . . in open court.”).

127. *Viva Voca*, BOUVIER, *supra* note 126, at 613 (“It is said a witness delivers his evidence viva voce, when he does so in open court: the term is opposed to deposition.”).

128. *Viva Voce*, GILES, *supra* note 126; *Viva Voce*, in MARRIOT, *supra* note 126.

129. *Deposition*, GILES, *supra* note 126. Significantly, Giles notes that this rule only applied to cases at law, not cases in Chancery, because Chancery—being a civil-law court—primarily relied on depositions. *Id.*

130. *Id.*

witness read into evidence.¹³¹ Thus, “in person” certainly could have meant—and practically did mean—that an available witness would be required to appear physically in court.

Marriot offers an extensive entry on evidence, but where *viva voce* testimony occurs, Marriot primarily discusses it in relation to the best evidence rule.¹³² In addition to the typical hearsay exceptions for dying declarations and former testimony, Marriot emphasizes the role of making testimony under oath and explains, in passing, the importance of cross-examination.¹³³ While capital cases required evidence to be given “in [the prisoner’s] presence,” this only refers to evidence generally, and one is left parsing what counts as “presence” once technology is introduced, allowing for a witness to provide testimony live, in real time in court.¹³⁴

In other contexts, some forms of mediated testimony were allowed in extenuating circumstances—those at great distances (e.g., traveling at sea or in another country) or those who were blind—might offer written testimony if their handwriting was proven “*viva voce*” in court.¹³⁵ Similarly, “[a] witness though deaf and dumb, [could] be sworn and give evidence on an indictment for felony, if intelligence [could] be conveyed to, and received from him by means of signs and tokens.”¹³⁶ This last example was a truly mediated form of testimony via the live translation of a third person, in which the jury could not directly hear or even understand the testimony of the witness, but could observe the transaction between the witness and translator. Thus, “in

131. *Id.* (“[W]here witnesses could not be produced, by reason of sickness, etc., their *depositions* might be read, for or against the prisoner on a trial of High Treason; but not where they could be produced in person.”).

132. WILLIAM MARRIOT, *Evidence*, WILLIAM MARRIOT, 2 A NEW LAW DICTIONARY, at CCXLII to CCLXXII (1798).

133. When a grand jury was concerned about a witness being tampered with, it requested an earlier investigative deposition, which was refused by the court because “the court were of opinion, that as the best evidence was the *viva voce* testimony of *Denby* himself, they could not abandon that and resort to the secondary kind of evidence, resulting from his written deposition.” *Id.* at CCXLIV.

134. *Id.* at CCLXIV (“It is a settled rule that, in cases of life, no evidence is to be given against the prisoner but in his presence.” (citation omitted)). Giles’ entry on evidence substantially concurs. See *Evidence*, GILES, *supra* note 126.

135. *Evidence*, MARRIOT, *supra* note 132. This was the case for civil cases, but informs what was considered “*viva voce*” or in-person testimony.

136. *Id.* at CCXLVIII.

person” testimony admits flexibility. The legal treatises from which these dictionaries draw provide additional insight.

3. Pre-Ratification Sources: English and Colonial Law

Few pre-ratification legal treatises truly address the mode of presenting witnesses in court or of providing mediated testimony that might be analogous to two-way video conferencing. Most barely touch on witness testimony at all. Entries on hearsay and juries, however, provide some evidence of what kind of confrontation the framers may have had in mind.¹³⁷ This Section will address the treatises of Mathew Bacon¹³⁸ and William Hawkins,¹³⁹ as well as William Blackstone’s *Commentaries on the Laws of England*.¹⁴⁰

Matthew Bacon’s abridgement discusses several enlightening details of the English laws regulating juries. For example, when empaneled and brought to the court, they were to “look on the prisoners.”¹⁴¹ Later, if a jury wanted to hear a witness again, the witness was to “deliver his Testimony in [] open Court.”¹⁴² In context, “in open court” was by contrast to the prohibition on talking with witnesses or parties out of court.¹⁴³ These requirements illustrate concerns about the openness of the proceeding and the judge’s control over the presentation of evidence but also the importance of the jury’s observation of the

137. This insight can be gleaned from the wealth of primary sources available from this era, particularly those compiled in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS* (Neil H. Cogan, 2d ed. 2015) [hereinafter *COMPLETE BILL OF RIGHTS*].

138. 3 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* (E. Nutt, R. Nutt & R. Gosling eds., Savoy 1740), *reprinted in* *COMPLETE BILL OF RIGHTS*, *supra* note 137, at 685–732 (reprinted from copy in John Adams’ library).

139. 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* (E. Richardson & C. Lintot eds., London 1762), *reprinted in* *COMPLETE BILL OF RIGHTS*, *supra* note 137, at 735–57.

140. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Oxford Univ. Press 1765), *reprinted in* *COMPLETE BILL OF RIGHTS*, *supra* note 137, at 780–88.

141. BACON, *supra* note 138, at 715. Bacon does not explain the purpose of this activity, which could be challenged.

142. *Id.* at 716. The jury may also have the judge ask the witness specific questions, “so be it in open Court.” *Id.*

143. See *infra* note 144 for context.

accused and the witnesses.¹⁴⁴ It was the jurors' unique prerogative to assess the "Credit of the Witnesses" or the parties.¹⁴⁵

William Hawkins' *Treatise of the Pleas of the Crown* offers several discussions of witness testimony, but, as elsewhere, rules about the mode of its presentation must be inferred. Along the lines of the legal dictionaries, Hawkins contrasts deposition testimony with testimony "viva voce" or "in person."¹⁴⁶ He also indicates that English law preferred such viva voce testimony.¹⁴⁷ Thus, if a witness was available to testify "viva voce" or "in person," the testimony should generally be viva voce.¹⁴⁸ Moreover, for Hawkins, a person's demeanor is critical in evaluating their character.¹⁴⁹

In capital or felony cases, "it [was] a settled Rule, That . . . no Evidence [was] to be given against a Prisoner, but in his Presence."¹⁵⁰ With some hedging, he suggests this rule may extend to all criminal cases.¹⁵¹ By itself, however, this statement does not say anything about

144. Cf. *id.* at 731 (under heading "(M)(3) 'How Abuses by Others in Relation to Them Are Punishable; and Therein of the Offence of Embracery'"). "Embracery is defined in general to be any Attempt of either Party; or a Stranger, to corrupt or influence a Jury [by] . . . any other way, except by opening and enforcing the Evidence by Council [sic] at the Trial." *Id.*

Another illustrative point is how courts handled a view because this involves how English courts considered the necessity of physically seeing or being in the presence of key evidence. Originally, views were not usually granted unless the judge determined it necessary for the jurors to see the land involved in the dispute. *Id.* at 717 ("(H) In What Cases and In What Manner to Have a View"). Later, though, Parliament enacted a law requiring a view whenever it appeared "proper and necessary that the Jurors . . . should have the View . . . in order to their better understanding of the Evidence that will be given on the Trial of such issues." *Id.* at 719. Only six of the twelve jurors had to attend, but a party could challenge the case if the jurors heard evidence about the view when the jury had not actually gone to the location. *Id.* at 717–18. Nevertheless, the necessity of a view was up to the court's discretion, and substitutes like maps, testimony, and the juror's own knowledge of the land were often adequate substitutes. *Id.* at 717–19.

145. *Id.* at 730.

146. HAWKINS, *supra* note 139, at 744, Ch. XLVI (Of Evidence), §§ 9–10.

147. *Id.*

148. *Id.*

149. See *id.* at 735, Ch. XXXIX, § 2 (defending the earlier English practice of having the judge serve as defendant's "counsel").

150. See *id.* at 741, Chapter XLVI (Of Evidence), § 1.

151. *Id.* at 741, § 1, note b.

whether witnesses must be physically present, as it pertains to “evidence,” which could include depositions.

For instance, in his discussion of hearsay, Hawkins explains that depositions were allowed in evidence for a felony indictment when made before a coroner or justice of the peace for an investigation of the same underlying crime.¹⁵² The reasons to allow such depositions include when a witness was unable to travel or was kept away by the “Means or Procurement” of the defendant.¹⁵³ In the one case where Hawkins found such depositions were not allowed, this was because “the Defendant was not present . . . and therefore had not the Benefit of a Cross Examination.”¹⁵⁴

English courts allowed depositions more freely in cases of treason. Depositions were usable in lieu of testimony whenever the deponent was unavailable to testify “viva voce,” including, for instance, when the deponent was sick.¹⁵⁵

When discussing the qualification and manner of witness testimony, Hawkins, like others of the time focuses mainly on the qualification of witnesses (e.g., the age of children, privileges) and the requirement of testifying under oath.¹⁵⁶ The purpose of the oath was, essentially, required for any testimony and intended primarily to enjoin perjury.¹⁵⁷ And many restrictions on witnesses’ qualifications were linked to the concern that they could not take the oath in good faith or testify honestly.¹⁵⁸

152. *Id.* at 742, § 6.

153. *Id.* at 743. Such testimony had to be read into evidence under oath, and the prosecution had to assure the court that the deposition was “the very same” as the deposition taken before the Coroner or Justice of the Peace “without any Alteration whatsoever.” *Id.*

154. *Id.* § 10.

155. *Id.* § 9 (discussing Lord Stafford’s Trial). Hawkins also explains that deposition evidence was free game if used to impeach a witness with a prior inconsistent statement. *Id.* Similarly, hearsay rules were not dissimilar to the modern rules in that hearsay was generally disallowed due to not being under oath or subject to cross-examination. *Id.* at 744, § 14.

156. *See, e.g., id.* at 745–49, §§ 16–30 (discussing privileges and qualifications of witnesses along with the oath requirement).

157. *Id.* at 748–49, § 29.

158. *Id.* at 748, §§ 25–27 (witnesses with maintenance from the King not an exception), § 26 (witness who is an atheist suspect because unable to swear on the Old or New Testament), § 27 (children of concern due to lack of discretion).

Finally, in discussing a defendant's right in treason trials to serve process for compelling witnesses in their defense, Hawkins describes this as the right to compel witnesses "to appear for them *at any such Trial or Trials*."¹⁵⁹ At the time Hawkins was writing, this likely required a witness' physical presence at the court. But it seems unlikely that a shield law or other mediated testimony would violate this or other rules because in those cases a witness would still be "at" the trial and able to testify *viva voce* before the jury, the primary audience for witnesses.

Unlike the prior treatises, Blackstone's *Commentaries on the Laws of England* have a short section discussing the manner of witness testimony.¹⁶⁰ However, this section reflects some general practices and Blackstone's own advocacy for a certain procedure more than elucidating the actual law or practice in detail.

According to Blackstone, "[t]his open examination of witnesses *viva voce* [orally], in the presence of all mankind, is much more conducive to the clearing up of truth" than the civil law inquisitorial practice.¹⁶¹ Blackstone recognizes that taking testimony "privately" by deposition has the benefit of facilitating disclosure of information the witness would be embarrassed to share openly.¹⁶² He argues, nevertheless, that this pressure on witnesses "on a sudden" by the judge, jury, and counsel will better "sift out the truth . . . than a formal set of interrogatories."¹⁶³

In Blackstone's reckoning, a paper witness also flattens out the wrinkles in a witness' testimony that the jury can assess during oral testimony.¹⁶⁴ And "the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial."¹⁶⁵ Here, though, the "confronting" is

159. *Id.* at 749, § 30.

160. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PRIVATE WRONGS 370–74 (1st ed., Oxford 1765–1769), available at https://archive.org/details/bim_eighteenth-century_commentaries-on-the-laws_blackstone-william_1768_3/page/370/mode/1up?q=own+infamy.

161. *Id.* at 373.

162. *Id.*

163. *Id.*

164. *Id.* at 374 ("[A]s much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.").

165. *Id.* at 373.

clearly the questioning of witnesses by defense counsel.¹⁶⁶ Moreover, Blackstone suggests that examining and cross-examining witnesses serve as the principal benefits of this form of testimony—in that these draw out the witnesses’ demeanor for the jury’s observation.¹⁶⁷

Elsewhere, Blackstone regularly interacts with English case law and statutes. On these points, however, Blackstone relies principally on his own logic and the first-century Roman orator, Quintilian.¹⁶⁸ Notably, Blackstone keys in on two technical phrases, *viva voce* and *ore tenus*, both meaning oral testimony.¹⁶⁹ This reveals his main focus is on the orality and liveness of the presentation—the goal being jurors’ ability to hear and observe the examination of witnesses in real time.

To sum up these eighteenth-century English sources: confronting witnesses was part of English law, but was not without exception. The primary concerns in these sources seem to be that juries should be able to make an open inquiry into the best evidence, and that assessing witness demeanor in the context of live testimony and cross-examination provides the best means of accomplishing this task. Nevertheless, when witnesses were unavailable for a variety of reasons (e.g., extensive travel, distance, sickness, death), deposition testimony was allowed in varied contexts depending on the kind of crime being tried. These sources set the stage for the drafting of the Confrontation Clause in the first Congress.

4. Ratification Era Sources: State Constitutions, Constitutional Conventions, and Congressional Debate over the Bill of Rights

Little record of debate exists on the Confrontation Clause’s drafting. Several framers opined on the importance of jury trials¹⁷⁰ and

166. *Id.*

167. *Id.* at 374.

168. *Id.* (citing QUINTILIAN, INSTITUTIO ORATORIA bk. V, ch. 7); see QUINTILIAN, INSTITUTIO ORATORIA 171–91 (Harold Edgeworth Butler ed. and trans., Loeb Classical Library vol. II 1920) (proving that if the deponent’s character cannot be called into question, then “we may attack the witnesses to his signature”).

169. BLACKSTONE, *supra* note 160, at 374.

170. See, e.g., *Letter from Thomas Jefferson to James Madison* (Dec. 20, 1787), reprinted in COMPLETE BILL OF RIGHTS, *supra* note 137, at 682 (arguing that “[i]t would have been much more just and wise [to have included a Bill of Rights including protections for trial by jury], and to have established general right instead of general wrong”); *Letter from James Madison to George Eve* (Jan. 2, 1789), reprinted in

debated how and from where juries should be selected.¹⁷¹ Both George Washington and Thomas Jefferson mentioned that excluding or including a constitutional provision on jury trials was challenging due to how mixed state practices were at the time.¹⁷² Debate flew over whether the Constitution would allow the new federal government to abolish jury trials.¹⁷³ This suggests the practice was inconsistent and that much of what ended up in the Sixth Amendment did not map well to any general state consensus.

Many states promulgated constitutional amendments with substantially the same wording as the clause following their state conventions approving the United States Constitution.¹⁷⁴ Many states also had

COMPLETE BILL OF RIGHTS, *supra* note 137, at 683 (supporting revisions to the Constitution to include provisions “for all essential rights,” including trials by jury).

171. See, e.g., *Letter from Benjamin Goodhue to Samuel Phillips* (Sep. 13, 1789), *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 684 (expressing suspicion that the Senate “striking out the term *vicinage* as applied to Jurors . . . may mar the whole business [the proposed Amendments]”); *Letter from James Madison to Edmund Pendleton* (Sep. 23, 1789), *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 685 (discussing the Senate debate over how to define the scope of locality for jury selection).

172. *Letter from George Washington to Marquis de Lafayette* (Apr. 28, 1788), *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 682–83 (“[I]t was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.”); *Letter from Thomas Jefferson to James Madison*, *supra* note 170 (“[T]here has been no uniformity among the states as to the cases triable by jury, because some have been so incautious as to abandon this mode of trial.”).

173. *Compare* FABIUS, No. 4 (Apr. 19, 1788), *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 678 (decrying the new Constitution as failing to protect *trial by jury*, which he characterized as a “Heaven-taught institution,” “corner stone[] of liberty,” and “our birth-right”—also noting the importance of juries “hearing the evidence”), *with* A NEW HAMPSHIRE FARMER, No. 3 (June 6, 1788), *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 680–81 (quoting Blackstone on the benefits of trial by jury), *and* THE FEDERALIST NOS. 81 & 83 (defending the Constitution as protecting trial by jury).

174. Proposals from several state conventions are reprinted in COMPLETE BILL OF RIGHTS, *supra* note 137, at 612–14. This includes: New York (July 26, 1788) (“to be confronted with his accusers and the Witnesses against him”), North Carolina (Aug. 1, 1788) (“to be confronted with the accusers and witnesses”), Pennsylvania Minority (Dec. 12, 1787) (“to be confronted with the accusers and witnesses”), Rhode Island (May 29, 1790) (“to be confronted with the accusers and witnesses”), and Virginia (“to be confronted with the accusers and witnesses”). *Id.* But the proposal from the

a similar confrontation provision in their state constitutions.¹⁷⁵ None of this, however, sheds much light on the clause other than the fact that the framers thought it significant enough to include.

Only seven states had such provisions.¹⁷⁶ Only three—Massachusetts, New Hampshire, and Pennsylvania—included the phrase “face to face,” and of those Pennsylvania’s did not include the “face to face” language until 1790, after the Sixth Amendment was drafted and sent to the states for ratification in 1789.¹⁷⁷ North Carolina, intriguingly, provides a means of confrontation by presenting “other Testimony.”¹⁷⁸

Three points arise from the drafting process. First, the original draft of the amendment included both confrontation of accusers and witnesses.¹⁷⁹ But the House dropped “accusers, and” early in the drafting stage.¹⁸⁰ Second, Madison placed the Confrontation Clause between the right to be informed of the “cause and nature” of the

Maryland Minority (Apr. 26, 1788) omits any reference to confrontation by accusers, witnesses, or anyone else, for that matter. *Id.*

175. The COMPLETE BILL OF RIGHTS, *supra* note 137, collects these provisions in one place where they can be compared easily side-by-side. Delaware’s Declaration of Rights (1776) (“to be confronted with the accusers or witnesses”); Maryland’s Declaration of Rights (1776) (“to be confronted with the witnesses against him”); Massachusetts Constitution (1780) (“to meet the witnesses against him face to face”); New Hampshire Constitution (1783) (“[t]o meet the witnesses against him face to face”); North Carolina Declaration of Rights (1776) (“to confront the Accusers and Witnesses with other Testimony”); Pennsylvania Constitution (1776) (“to be confronted with the witnesses”) (changed in 1790 to “to meet the witnesses face to face”); Vermont Constitution (1777) (“to be confronted with the Witnesses”); Virginia’s Declaration of Rights (1776) (“to be confronted with the accusers and witnesses”). See COMPLETE BILL OF RIGHTS, *supra* note 137, at 614–23.

176. *Id.*

177. MASS. CONST. of 1780, pt. I, art. XII, in COMPLETE BILL OF RIGHTS, *supra* note 137, at 616; N.H. CONST., pt. 1, art. XV, in COMPLETE BILL OF RIGHTS, *supra* note 137, at 616; PA. CONST. of 1790, art. IX, in COMPLETE BILL OF RIGHTS, *supra* note 137, at 622.

178. N.C. DECLARATION OF RIGHTS of 1776, § VII, in COMPLETE BILL OF RIGHTS, *supra* note 137, at 621.

179. Proposal by Madison in House, June 8, 1789, *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 597 (“to be confronted with his accusers, and the witnesses against him”).

180. Compare *id.* at 597–98, with House Committee of Eleven Report, July 28, 1789, *reprinted in* COMPLETE BILL OF RIGHTS, *supra* note 137, at 599 (“to be confronted with the witnesses against him”).

accusation and the right to compulsory process and assistance of counsel.¹⁸¹ Third, the text omits the phrase “face to face,” used in three state constitutions around the time of drafting.¹⁸²

Accordingly, the clause must mean something more specific than the historical right to confront one’s accusers. Namely, it applies specifically to witnesses, not just accusers or any kind of evidence. Yet, it does not emphasize the face-to-face aspect of confrontation.

5. Post-Ratification Sources: Treatises, Statutes, and Cases

Post-ratification sources are similarly sparse, but they essentially conform to earlier conceptions of the confrontation right. In George Tucker’s American edition of *Blackstone’s Commentaries*, Tucker adds that in Virginia—and in the Americas generally—frequent travel leads to issues getting witnesses and evidence for trial.¹⁸³ So, Virginia law allowed parties to take depositions of people who would be traveling out of the state.¹⁸⁴ Tucker also mentions the familiar rule that depositions before a justice of the peace could be given in evidence if the witness died before trial, but only for felonies and not misdemeanors.¹⁸⁵

Joseph Story only briefly discusses the Confrontation Clause in his *Commentaries on the Constitution*.¹⁸⁶ Story opines that the clause

181. Compare *supra* note 179 and accompanying text (original draft of the Sixth Amendment), with U.S. CONST. amend. VI (final amendment).

182. See sources cited *supra* note 177.

183. 3 GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA*, app. at 5 (“Note A. Summary View of the Judicial Courts of the Commonwealth and of the United States, Virginia”).

184. It appears this applied to both civil and criminal trials. *Id.*

185. *Id.* at 368–69. Specifically, a note discussing evidence states that, by the statutes of Philip and Mary, depositions taken before a justice of the peace in cases of felony may be read in evidence if the witness dies before the trial. However, this note immediately observes that “as the statute confines this to felony, and as it is an innovation upon the common law, it cannot be extended to any misdemeanors [sic].”

186. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION* bk. 3, § 1791, at 548 (Thomas M. Cooley ed., Little, Brown, and Co. 4th ed. 1873) (1833).

simply “follow[s] out the established course of the common law for all trials for crimes.”¹⁸⁷ From this, he points out the public aspect of criminal trials and the fact that in capital cases witnesses “give [] their testimony . . . in the presence of the accused.”¹⁸⁸

The Supreme Court waited over one hundred years after the passage of the Bill of Rights to opine extensively on the Confrontation Clause. It finally did so in *Mattox v. United States*.¹⁸⁹ While the Court described the purpose and function of the Confrontation Clause in *Mattox*, its relevant holding only addressed hearsay evidence, not the mode of a person giving testimony at trial.¹⁹⁰ Its relevance for video commentary is, thus, dicta. It served, however, as the foundation of the Court’s later jurisprudence.

According to the *Mattox* Court, “the primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness.”¹⁹¹ This provided the defendant an

187. *Id.* Story later mentions that by the time he wrote these commentaries in 1833, confrontation was a “fundamental and indispensable” right in all states alongside other criminal trial rights. *Id.* § 1949, at 667–68, 668 n.1.

188. *Id.* at 548.

189. *Mattox v. United States*, 156 U.S. 237 (1895). In 1879, the Court briefly discussed whether admitting prior testimony based on forfeiture by wrongdoing violated the Confrontation Clause, but there the Court focused on the common law rule of forfeiture by wrongdoing and discussed the Confrontation Clause itself only in passing. *Reynolds v. United States*, 98 U.S. 145, 158–61 (1879). Even earlier, Justice Bushrod Washington, sitting as a circuit justice, briefly opined on the admissibility of prior testimony from a witness who had died before a second related trial, but he did not mention the Constitution or the right to confrontation. *United States v. Wood*, 28 F. Cas. 754, 3 Wash.C.C. 440 (C.C.E.D. Pa. 1818) (No. 16,756).

190. *Mattox*, 156 U.S. at 238 (limiting the issue of the case to the admissibility of recorded testimony from a prior trial when key witnesses passed away).

191. *Id.* at 242. Notably, even at this early stage, the court looks to a historical test for interpreting the right.

We are bound to interpret the Constitution in the light of *the law as it existed at the time it was adopted*, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta [sic].

Id. at 243 (emphasis added). Moreover, this is where the Court purportedly derived its exceptions to the “general rule” based in “public policy and the necessities of the

opportunity to (1) cross-examine witnesses, (2) “test[] the recollection and sift[] the conscience of the witness,” and (3) “compel[] [the witness] to stand face to face *with the jury* in order that *they* may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”¹⁹²

Notably, the face-to-face requirement has to do with the jury’s ability to assess the witness’ demeanor, not the defendant’s ability to perceive the witness or vice versa. As the Court elaborates, allowing testimony to be read into evidence deprives the defendant of “that *personal presence* of the witness *before the jury* which the law has designed for his protection.”¹⁹³

The Court relies favorably on *Commonwealth v. Richards*, an 1836 opinion of Massachusetts’ Supreme Judicial Court, describing a similar provision in the Massachusetts Declaration of Rights, which included the phrase “face to face.”¹⁹⁴ The Court explains “that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused.”¹⁹⁵ But it goes on to say that the right “was not intended to affect . . . what was or was not competent evidence to be given face to face according to the settled rules of the common law.”¹⁹⁶ This suggests that where the law included “face to face” explicitly, it referred primarily to the mode of presentation and did not require the literal presence of the testimony’s author. As the *Richards* court explained, though, such statements read into evidence are “very defective” because one “cannot have a true representation of *the countenance, manner and expression* of the deceased witness, which either confirmed or denied the truth of the testimony.”¹⁹⁷ Thus, such deposition admission must be more carefully circumscribed.

case.” *Id.* This closely resembles the “pre-existing right” language used in *Heller* and *Bruen*.

192. *Id.* at 242–43 (emphasis added).

193. *Id.* at 243 (emphasis added).

194. *Id.* at 241 (citing *Commonwealth v. Richards*, 35 Mass. (18 Pick.) 434, 437 (1836)); see MASS. CONST. pt. 1, art. XII (“[E]very subject shall have a right . . . to meet the witnesses against him face to face . . .”).

195. *Mattox*, 156 U.S. at 241 (quoting *Richards*, 35 Mass. at 437).

196. *Id.* at 241–42 (quoting *Richards*, 35 Mass. at 437).

197. *Richards*, 35 Mass. at 439 (emphasis added).

In the twentieth century, the Court affirmed *Mattox*'s standard in *California v. Green*.¹⁹⁸ The Court clarified that confrontation concerns not hearsay rules, as such, but the ability to test an available witness at trial.¹⁹⁹ *Green* thus fairly summarizes the American approach to the right as the defendant's opportunity to conduct cross-examination of available witnesses at trial and the jury's ability to observe and assess those witnesses' demeanor.²⁰⁰

IV. APPLYING TEXT, HISTORY, AND TRADITION TO THE CONFRONTATION CLAUSE

The historical material above, while limited, provides useful matter for analysis. In applying that material to the text, history, and tradition test, the sources closest in time to ratification are most relevant to the step one analysis, and all the material factors into step two.

At step one, we consider whether the text of the Sixth Amendment would allow or preclude testimony via two-way video. Dictionaries from the founding era show the terms "witness" and "testify" could encompass depositions testimony and other forms of evidence.²⁰¹ But the confluence of "witnesses" with "confront" indicates the Confrontation Clause requires some kind of "presence"—or ability to be heard and observed—at trial.²⁰² Reading the dictionary definitions along with law dictionaries and English treatises from around the time of enactment reveals two purposes of such presence: (1) availability for the trier of fact to observe and scrutinize the witness' demeanor, and (2) to serve the underlying purpose of presenting the evidence for the accused to rebut.²⁰³

The congressional material and ratification conventions provide little insight into the text of the Sixth Amendment's Confrontation Clause because they do not comment on that part of the amendment and focus instead on other aspects of the criminal process.²⁰⁴ That

198. *California v. Green*, 399 U.S. 149, 158, 164 (1970).

199. *Id.* at 160–61.

200. *Id.*

201. *See supra* Section III.B.2.

202. *See supra* Section III.B.2.

203. *See supra* Sections III.B.2, 3.

204. *See supra* Section III.B.4.

suggests that this right was presumed to be either straightforward or well understood at the time.

The clause's history and textual context indicate that "confrontation" does mean *more* than simply a defendant's right to be made aware of the charges against them and challenge those charges in court.²⁰⁵ The fact that the Sixth Amendment's text includes the right for the accused to be made aware of the indictment against them, as well as the rights to counsel and compulsory process to bring witnesses in their defense, seems to cover those aspects of the traditional right.²⁰⁶ At the same time, the fact that the first Congress originally considered including "accusers and witnesses" suggests that the term "witnesses" does double duty in the statute.²⁰⁷ More significantly, though, Congress did not include either the phrase "in person" or "face-to-face," which were sometimes associated with testimony and confrontation in other sources.²⁰⁸

Several sources imply or perhaps require physical presence *de facto* based on the technology of the day in which the clause and these sources were written. The telegraph and telephone had yet to be invented, not to mention high-speed internet and high-definition video. Yet, at least in some sense, testimony could be mediated via human translation.²⁰⁹ In the end, nothing in these sources prescribes literal, physical presence so long as an attorney can cross-examine available witnesses, and the jury is able to observe their demeanor.

At step two, we consider the traditional limitations of the confrontation right in practice. At one level, this step is more straightforward. Witnesses available to give oral testimony at trial were required to give oral testimony at trial.²¹⁰ Nevertheless, several exceptions meant deposition testimony was allowed for witnesses unable to appear

205. See *supra* Section III.B.4.

206. Compare *supra* Section III.B.4 (discussing the intent of the drafters in including both "accusers" and "witnesses"), with *supra* Sections III.B.1, 3 (discussing, respectively, ancient precursors of confrontation and pre-ratification sources).

207. See *supra* Section III.B.4.

208. See *supra* Section III.B.4.

209. See *supra* text accompanying note 136 (describing interpretation for deaf and mute witness); cf. *supra* text accompanying notes 129–34 (providing a "viva voce" reading of absent witnesses' letters).

210. See, e.g., *supra* text accompanying notes 146–49.

at trial.²¹¹ This included witnesses who were sick, traveling long distances, or simply outside the bounds of the jurisdiction and, thus, sufficiently unavailable to allow written testimony or prearranged depositions.²¹²

High-quality two-way video testimony meets or surpasses these historical requirements. It meets the requirements of orality and liveness because it allows the jury to hear the witness' testimony in real time.²¹³ It also allows the jury to observe the witness' demeanor.²¹⁴ So, while a witness on a video feed may not be in precisely the same position as a witness in person, nevertheless, the jury can visibly observe the witness' demeanor, and jurors may even have a better vantage where they have individual monitors.²¹⁵

Moreover, given the choice between a witness "reduced to writing" and one able to testify *viva voce* over a video feed, the latter is clearly superior under the terms of Blackstone—perhaps the most ardent advocate of live testimony who influenced the founders.²¹⁶ So, at a minimum, historical tradition would be open to live video testimony for those who are ill, at a significant distance from the court, or outside

211. See *supra* text accompanying notes 129–31, 152–55.

212. See *supra* text accompanying notes 130–31.

213. See Resnik, *supra* note 25, at 478, 482 (discussing technological advantages of using two-way video); Tran, *supra* note 33, at 494 (describing more advantages). But see *id.* at 511–12 (noting scenarios when the use of video technology would create confrontation problems).

214. See Resnik, *supra* note 25, at 482 (explaining how two-way video testimony allows a jury to assess a witness' credibility); *United States v. Yates*, 438 F.3d 1307, 1332 (11th Cir. 2006) (Marcus, J., dissenting) (using a two-way video allowed the witness to have "view of the defendants and the jury as they testified"); see also *Judges Discuss Pros and Cons of Virtual Litigation*, TENN. STATE CTS. (Jan. 19, 2021), <https://www.tncourts.gov/news/2021/01/19/judges-discuss-pros-and-cons-virtual-litigation> ("One unforeseen advantage of the Zoom format for Judge Hurd has to do with witnesses. When she is on the bench, she is used to observing witnesses from the side as they sit at the witness stand. Zoom has allowed her to see witnesses face to face, giving her a better perspective of their demeanor. In that way, Zoom 'has been a benefit it seems to me,' Judge Hurd said.")

215. See Resnik, *supra* note 25, at 482 (arguing that jury ability to assess witness demeanor is not impaired when the screen is "situated where the witness would be sitting if they were in the courtroom" weakens the argument that two-way video testimony fails the *Craig* test).

216. See *supra* text accompanying notes 160–69.

the jurisdiction, because deposition testimony was allowed in such cases.²¹⁷

Moreover, video testimony hews much closer to the real-time, oral presentation that the confrontation right seems to require. Based on the definitional sources, live video testimony could easily be considered “in person” to the extent that it is live and occurring “in” court.²¹⁸ Of course, it would require the testimony be made under oath, subject to the judge’s control, and open to full cross-examination.²¹⁹ But the technology does not prevent this. The only limitation is human skill and ingenuity.

V. CONCLUSION: THE LIMITS OF TEXT, HISTORY, AND TRADITION

In sum, neither text nor history and tradition affirmatively preclude the use of two-way video testimony in criminal trials. In fact, it is difficult to find any historical analog to the kind of mediation involved in two-way video testimony which otherwise meets all the requirements of orality, observability, liveness, and availability for cross-examination. The only way to conclude that the text, historically understood, cannot encompass live video testimony is to base that conclusion in the de facto reality of a pre-internet age and assume the framers would have rejected such a technological innovation. There is no evidence for that conclusion.

After letting that unsettled dust again lie on the floorboards of history, we are left with the text of the Confrontation Clause, the need for constitutional and effective criminal process, and the availability of technological flexibility. Liberally sifting the historical record will reward the industrious explorer. Those with better evidence may win their day in court. And the better the quality and uses of history attorneys employ, the more likely judges can lay clear-eyed foundations for the future as they work to maintain the wisdom of the past while learning from its foibles and follies. In the end though, both lawyer and judge must rely on that inextricable human skill which both the

217. See *supra* text accompanying notes 129–34 (discussing historic exceptions for witnesses who are sick, unable to travel, or in another country).

218. See *supra* Section III.B.2 (analyzing the text of the Confrontation Clause as defined in English dictionaries and legal dictionaries).

219. See *supra* notes 28–29 and accompanying text (listing the required elements to satisfying the Sixth Amendment as interpreted by the Supreme Court).

founders of yesteryear and the Justices of today recognized as the *sine qua non* of legal interpretation: judgment.²²⁰

220. See THE FEDERALIST NO. 78 (Alexander Hamilton) (defending judicial review); see also David French, Opinion, *Neil Gorsuch Has a Few Thoughts About America Today*, N.Y. TIMES (Aug. 4, 2024), <https://www.nytimes.com/2024/08/04/opinion/neil-gorsuch-supreme-court.html>. In this interview, French asks Justice Gorsuch about his concerns that text, history, and tradition tests rely on suspect sources like state legislatures and Congress, which sometimes flagrantly violated both the text and principles of the Bill of Rights. *Id.* (Case in point: the Alien and Sedition Acts of 1798.) Gorsuch's response proves enlightening: "[w]henever you're looking for the original meaning of . . . the Constitution, there's going to be better and worse evidence of original meaning So, like anything else, it calls for, as Madison called [it], judgment." *Id.* Thus, judges "have to exercise judgment. And you bring to us evidence, whether it's facts or law, we're going to weigh that evidence and try to find what's reliable and good and trustworthy evidence separated from that which is not." *Id.*