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Thomas Y. Davies

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What Did the Framers Know, and When Did They Know It? Fictional Originalism in *Crawford v. Washington*

Thomas Y. Davies[†]

I. INTRODUCTION

Originalism is not without appeal in the abstract: why not interpret constitutional provisions according to the original meaning they carried when the text was framed? After all, that is what the Framers agreed to. However, originalism as practiced is another matter.

Original meaning – the public meaning that a constitutional provision carried at the time the provision was framed – is a historical phenomenon. As such, it can be established only by valid historical evidence.¹ However, the

[†] Elvin E. Overton Distinguished Professor and National Alumni Association Distinguished Service Professor, University of Tennessee College of Law. The author thanks Professor Clifford S. Fishman, Professor Otis H. Stephens Jr., and Professor George C. Thomas III for helpful comments on a draft of this article. Of course, the author is solely responsible for any errors and for the views expressed. The quotations of historical sources in this article are presented with the spelling, capitalization, and punctuation of the originals, but use modern typefaces.

¹ Supreme Court justices generally seem to accept this definition of “original meaning,” although they often use the term to refer to what a provision meant at the time of *ratification*, which is not necessarily the same thing. *See infra* notes 166-75 and accompanying text. I do not think it is worthwhile to distinguish between the public meaning and the meaning the Framers “intended”; rather, because the criminal procedure provisions drew upon settled understandings of legal rights, I believe those two concepts are equivalent.

However, recovering the original meaning of a constitutional provision is distinct from two other enterprises with which it is sometimes confused. First, original meaning is distinct from a variety of textualism in which modern readers, using framing-era dictionaries, attempt to parse the specific wording of the text for a precise or “plain” meaning. Because the criminal procedure provisions in the Bill of Rights employed phrases that were understood to invoke settled legal understandings of rights, “reading” the constitutional text word-by-word today will not produce the historical original meaning; rather, as a historical phenomenon – how the text was actually understood – original meaning can be recovered only by reconstructing the larger doctrinal and institutional context which the language of the text was meant to invoke. *See, e.g., infra* notes 287-92 and accompanying text (discussing the meaning of “witnesses” in the Confrontation Clause).

history that one finds in Supreme Court criminal procedure opinions tends to drastically understate the degree to which doctrine and institutions have changed since the framing of the Bill of Rights.² Indeed, much of what the justices have announced as original meaning is merely historical fiction.³ The historical claims regarding the original meaning of the Confrontation Clause in the 2004 decision *Crawford v.*

In addition, it is important to distinguish the recovery of the original meaning from the study of the “origins” of the rights set out in the Bill of Rights. The original meaning is the meaning that would have been attached to the text *during the framing-era itself*. What actually came before is not directly relevant to the original meaning, although the understanding that framing-era Americans had of history is relevant (even if it was inaccurate) insofar as it informed the public understanding of the texts. Unfortunately, far more historical research has been done on the “origins” of constitutional rights than on the actual content of those rights in framing-era law. See, e.g., LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999) (discussing the historical origins of several of the rights in the Bill of Rights but saying relatively little about the legal content of those rights at the time of the framing itself).

I address only the original understanding of the Confrontation Clause itself in this article. However, I should note that Professor Jason Mazzone posed an interesting question at the Brooklyn symposium: given that the Sixth Amendment was not originally intended to apply to state proceedings, but became applied only through the Due Process Clause of the Fourteenth Amendment, should the relevant “original meaning” be that of the original Sixth Amendment itself, or of the understanding of the Sixth Amendment’s protections when the Fourteenth Amendment was framed after the Civil War? The latter might seem more appropriate – if one assumes that the “due process of law” clause of the Fourteenth was actually intended to incorporate the rights protected in the federal Bill. I do not attempt to deal with these questions in this article; however, they reflect how much criminal procedure protections have changed over time.

² One reason that erroneous claims regarding historical criminal procedure are commonplace in judicial opinions is that there has been far more discontinuity in that area than is generally recognized. The criminal procedure provisions of the Bill of Rights were framed to preserve the accusatory procedure that had come to full development during the eighteenth century. However, during the nineteenth century American courts abandoned accusatory procedure and replaced it with investigatory procedure that allowed more aggressive attempts to suppress crime, especially the development of modern policing. Then, during the early twentieth century, the federal Supreme Court reformulated constitutional criminal procedure doctrines to accommodate new criminal investigative institutions, especially modern policing. The result is that modern doctrine, and the historical claims in modern criminal procedure opinions, often bear little resemblance to framing-era procedure. For an overview of the transformation from accusatory to investigatory criminal procedure, see Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 418-35 (2002) [hereinafter Davies, Atwater]; see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 724-34 (1999) [hereinafter Davies, *Original Fourth*] (describing the discontinuity of search and seizure law). See also *infra* notes 328-43 and accompanying text.

³ For some examples of erroneous originalist claims in criminal procedure opinions, see *infra* notes 34, 319, 326, 343; see also Davies, Atwater, *supra* note 2, at 262-66.

*Washington*⁴ provide the latest installment of fictional originalism.

In *Crawford*, Justice Scalia's opinion for the Court purported to find that the original meaning of the Confrontation Clause limited the scope of the confrontation right to "testimonial" statements comparable to framing-era depositions of witnesses to crimes. Additionally, Justice Scalia asserted that framing-era doctrine subjected the admission of an out-of-court statement of an unavailable witness in a criminal trial to a strict cross-examination rule: the statement was admissible if, but only if, the defendant had had a prior opportunity to cross-examine the unavailable witness. I argue in this article that neither of those claims was validly derived from history.

The former claim limiting the scope of the right to testimonial statements amounts to a political choice posing as a historical mandate. The more accurate historical statement is that the Framers did not address whether the Confrontation Clause should apply to nontestimonial hearsay evidence because they never anticipated that informal hearsay statements could come to be viewed as valid evidence in criminal trials – as they have.

The latter claim regarding a rigid cross-examination rule is simply erroneous history. Framing-era authorities did not articulate a general rule regarding the admissibility of depositions of unavailable witnesses. Rather, those authorities differentiated between misdemeanor and felony prosecutions. The authorities did not indicate that there was any legal authority for taking witness depositions at all in misdemeanor cases; hence, it is doubtful that depositions would have been admissible in misdemeanor trials even in the unlikely event that there had been a prior opportunity for cross-examination.

The situation was quite different in felony cases, in which more importance was accorded to obtaining a conviction. Two statutes enacted during the reign of Mary Tudor, the so-called Marian statutes, *required* that justices of the peace make written records of the sworn depositions of witnesses of a felony at the time an arrest was made and send those depositions on

⁴ 541 U.S. 36 (2004). For another commentary critical of the history in *Crawford*, see 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 6371.2, at 29-30 (Supp. 2005).

to the felony trial court.⁵ Moreover, these sworn Marian depositions, which were a standard aspect of felony prosecutions, were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial. Indeed, depositions were inadmissible in felony cases only in the odd instance when they were improperly taken outside of the statutory procedure. Thus, because Marian procedure was standard for felony prosecutions in framing-era America as well as in England, the use of Marian witness depositions as evidence in framing-era felony trials disproves Scalia's claim that the original meaning of the Confrontation Clause included a rigid cross-examination rule. In contrast to Justice Scalia's claim, it does not appear that a prior opportunity for cross-examination had any effect on the admissibility or inadmissibility of the deposition of an unavailable witness in a framing-era criminal trial.

By way of background, let me briefly review the confrontation issue in *Crawford*, and describe the originalist claims Justice Scalia made in his opinion for the Court. Then I will sketch out my criticisms of Justice Scalia's historical claims in more detail before moving on to the historical evidence.

A. *The Confrontation Issue in Crawford*

The Confrontation Clause of the Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"⁶ The specific issue in *Crawford* was whether the admission in a murder trial of a tape recording of a statement the defendant's wife had made during a police interrogation had violated the defendant's right under that Clause. The wife's hearsay statement tended to undercut the defendant's claim of self-defense, and the defendant was convicted of murder.⁷ However, the wife could not be called as a witness or cross-examined during the trial because of the Washington

⁵ See *infra* notes 73-83 and accompanying text (discussing and citing these statutes).

⁶ U.S. CONST. amend. VI.

⁷ *Crawford*, 541 U.S. at 40-41.

state marital privilege.⁸ Hence, the defendant asserted that admission of his wife's hearsay statement had violated his constitutional right to confront an adverse witness.⁹

When the defendant's appeal was heard in the Washington Supreme Court, the controlling authority regarding the application of the Confrontation Clause to hearsay statements was the United States Supreme Court's 1980 decision *Ohio v. Roberts*.¹⁰ Under the flexible approach set out in *Roberts*, all hearsay statements were subject to confrontation analysis, but a hearsay statement was nevertheless admissible if the statement bore "adequate indicia of reliability" either by falling within a "firmly rooted" hearsay exception or because of other "particularized guarantees of trustworthiness."¹¹ Applying that standard, the Washington Supreme Court concluded that admission of the wife's hearsay statement to police did not contravene the Confrontation Clause.¹²

The United States Supreme Court reversed. All of the justices agreed that the wife's statement should have been inadmissible even under *Roberts*,¹³ but they split as to validity of the *Roberts* standard itself. In a concurring opinion, Chief Justice Rehnquist and Justice O'Connor were of the view that the *Roberts* standard was sufficient. However, Justice Scalia, writing for the Court, condemned *Roberts* as a "fundamental failure" as a constitutional standard.¹⁴

⁸ See *id.* at 40 (noting that the Washington state marital privilege "bars a spouse from testifying without the other spouse's consent," but "does not extend to a spouse's out-of-court statements admissible under a hearsay exception"). The Washington formulation of the privilege contrasts with the broader formulation of the privilege in framing-era law which appears to have barred any use of a spouse's statement. Thus, it does not appear that the specific confrontation issue that arose in *Crawford* could have arisen during the framing era. See *infra* note 18.

⁹ The Washington Supreme Court accepted the defendant's claim that the admission of his wife's statement conflicted with his right to confrontation, and reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." *Crawford*, 541 U.S. at 42 n.2 (quoting *State v. Crawford*, 54 P.3d 656, 660 (Wash. 2002)). Justice Scalia's opinion for the Court "express[ed] no opinion on these matters." *Id.*

¹⁰ 448 U.S. 56 (1980).

¹¹ *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

¹² *Crawford*, 54 P.3d at 663; see also *Crawford*, 541 U.S. at 41-42.

¹³ *Crawford*, 541 U.S. at 67 ("We readily concede that we could resolve this case by simply reweighing the 'reliability factors' under *Roberts* and finding that Sylvia Crawford's statement falls short.")

¹⁴ *Id.* at 67 ("[W]e view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion [regarding the application of the confrontation right].")

To replace *Roberts*, Justice Scalia announced “the cross-examination rule”:¹⁵ a hearsay statement that is testimonial in nature may not be admitted in a criminal trial unless the person who made the statement is actually unavailable to testify and the defendant had had at least a prior opportunity to cross-examine the unavailable witness regarding the statement.¹⁶ Moreover, Scalia described the cross-examination rule announced in *Crawford* as though it were derived from the original meaning of the Sixth Amendment.¹⁷

B. *Justice Scalia’s Originalist Claims*

Although Justice Scalia apparently did not specifically inquire whether the Framers could have anticipated that a statement by a wife could ever be admitted against her husband,¹⁸ he did assert a more general claim that two aspects

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 68 (“Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

¹⁷ *See, e.g., id.* at 59 (referring to the “Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine”); *id.* at 68 (comparing cross-examination rule to the “Framers’ design”).

Although six other justices joined Justice Scalia’s opinion for the Court, I think it is nevertheless appropriate to treat the originalist analysis as Scalia’s own work. It seems unlikely that other justices played a significant role in formulating the historical claims. For example, it seems unlikely that the historical aspects were discussed in any detail at the justices’ conference. *See, e.g.,* WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 289-91 (1987) (suggesting that conference discussions tend to be brief). Moreover, available information suggests that justices who are not authoring an opinion make relatively few suggestions about the drafts of opinions that are circulated among the justices. (Some years ago, I examined the files of a number of salient criminal procedure Supreme Court cases when Justice Thurgood Marshall’s papers were first made public at the Library of Congress. Although the practice in the Court is for justices to circulate suggested changes in opinions by a letter which goes to all of the justices, and such letters were included in Marshall’s papers, I was struck by how few changes were actually suggested, even in cases that were widely regarded as being quite significant.) Hence, although it is not impossible that one or more other justices had significant input, I think it is appropriate to view the claims about original meaning in *Crawford* as Justice Scalia’s own work.

¹⁸ It seems doubtful that the Framers could have anticipated the specific issue that arose in *Crawford* because framing-era evidence doctrine seems to have strictly prohibited *any* use of a statement made by one spouse as evidence against the other. For example, a leading eighteenth-century treatise on criminal procedure stated the following:

Sect. 16. As to the first of these particulars, *viz.* Whether a husband or Wife may be witnesses for or against one another: It seems agreed, That the Husband and Wife being as one and same Person in Affection and Interest, can no more give Evidence for one another, in any Case whatsoever than for themselves; and that regularly the one shall not be admitted to give Evidence

of the original understanding of the Confrontation Clause mandated the cross-examination rule.¹⁹ First, Scalia asserted that *Roberts* had deviated from the original meaning of the Confrontation Clause insofar as it applied confrontation analysis to all hearsay evidence. According to Scalia, the Framers were concerned with more formal types of “testimonial” hearsay, such as depositions,²⁰ but not with informal or spontaneous hearsay statements.²¹ Although he left a precise definition of “testimonial hearsay” for another day,²² his opinion conveyed a strong impression that the Confrontation Clause should regulate only the admissibility of those more formal out-of-court statements that amount to “testimonial” hearsay.²³ Nevertheless, Scalia also asserted that contemporary police interrogation bears “a striking resemblance” to the taking of a witness’s deposition by a framing-era justice of the peace,²⁴ and therefore concluded that the wife’s hearsay statement in *Crawford* was sufficiently “testimonial” to be subject to confrontation analysis.²⁵

against the other, nor the Examination of the one be made Use of against the other, by Reason of the implacable Dissension which might be caused by it, and the great Danger of Perjury from taking the Oaths of Persons under so great a Bias, and the extreme Hardship of the Case. . . .

2 WILLIAM HAWKINS, PLEAS OF THE CROWN 431, 432 (1771) [hereinafter HAWKINS, PLEAS (1771)] (emphasis added, citations omitted); 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 607-08 (Thomas Leach ed. 1787) [hereinafter HAWKINS, PLEAS (1787)] (emphasis added, notes omitted). The only exceptions Hawkins noted were situations in which a crime or threat was committed by one spouse against the other. *Id.* Several of the justice of the peace manuals used in colonial and framing-era America reprinted this statement. See, e.g., RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 145 (entry for “Husband & Wife”) (Williamsburg, 1774); JAMES PARKER, CONDUCTOR GENERALIS 171 (entry for “Evidence”) (New York City, 1788).

¹⁹ *Crawford*, 541 U.S. at 50 (“[H]istory supports two inferences about the meaning of the Sixth Amendment”).

²⁰ See, e.g., *id.* at 50 (asserting that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused”).

²¹ *Id.* at 51 (asserting that “not all hearsay implicates the Sixth Amendment’s core concerns”).

²² *Id.* at 68.

²³ See the statements quoted *infra* notes 276-81 and accompanying text. *But see Crawford*, 541 U.S. at 61 (noting that the Court’s decision in *Crawford* “casts doubt” on the Court’s previous refusal to limit the Confrontation Clause to “testimonial” hearsay, although noting that *Crawford* did not directly raise or “definitively resolve” the issue).

²⁴ *Crawford*, 541 U.S. at 52. I argue below that this comparison is flawed. See *infra* notes 312-20 and accompanying text.

²⁵ *Id.* at 52 (“Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”). Justice Scalia’s opinion did not differentiate between custodial and noncustodial interrogations. See *id.* at 53 n.4 (“We use the term “interrogation” in its colloquial, rather than any technical

Second, Justice Scalia asserted that *Roberts* was inconsistent with the original meaning insofar as it assessed the admissibility of testimonial hearsay according to a relativistic standard. According to Scalia, both historical English cases and post-framing American state-court cases revealed a rigid framing-era cross-examination rule under which “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”²⁶ Thus, because the defendant in *Crawford* had not had a prior opportunity to cross-examine the person who made the adverse statement, Scalia concluded that the admission of the unavailable witness’s statement in the defendant’s trial had violated the defendant’s confrontation right.²⁷

Notably, the two sets of historical claims that Justice Scalia made in *Crawford* carry opposing implications. The rigidity of the cross-examination rule adopted in *Crawford* appears to imbue the confrontation right with considerably more protection for criminal defendants than had been the case under the relativistic formulation of the confrontation right in *Roberts* (although *Crawford* did not define precisely what would constitute a prior opportunity for cross-examination or indicate whether assistance of counsel would be a necessary aspect of such an opportunity). However, the explicit limitation of the confrontation right to “testimonial hearsay,” coupled with the incomplete definition of that concept in *Crawford*, may leave room for a future Court to define “testimonial hearsay” fairly narrowly and thereby limit the significance of the confrontation right.

I leave it to others to prognosticate as to which aspect of *Crawford* will ultimately turn out to be the more important. Likewise, although I am inclined to think that *Crawford* may

legal, sense.”). However, the opinion also did not define “police interrogation” except to include a “cf.” citation to a case discussing the nature of “custodial interrogation” for purposes of applying Miranda warnings. *See id.* (citing *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)). That citation is notable insofar as *Innis* held that the police conduct in that case did *not* amount to “interrogation” even though the defendant responded to the police conduct by making an incriminating statement.

Lower courts have adopted a wide variety of broader or narrower definitions of “police interrogation” for purposes of applying *Crawford*. *See, e.g.*, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 28:20b (Clifford S. Fishman ed., 7th ed. 2003 & Supp. forthcoming Nov. 2005).

²⁶ *Crawford*, 541 U.S. at 53-54.

²⁷ *Id.* at 68-69.

well be an improvement over the extreme flexibility of *Roberts* – at least insofar as it imposes a cross-examination opportunity standard – I leave it to others to explore the policy ramifications of the majority’s choice. My concern in this article is with Justice Scalia’s history.²⁸

I argue that the historical claims that Justice Scalia made in *Crawford* were invalid, and that Chief Justice Rehnquist’s concurring opinion gave a more accurate picture of the actual history (although Rehnquist’s analysis also reflected serious historical errors). History does not mandate the rigid cross-examination rule that Scalia articulated in *Crawford*. Indeed, it is highly doubtful that an opportunity for cross-examination affected the admissibility of depositions in criminal trials under framing-era law. Rather, the historical errors and distortions in Scalia’s originalist rationale simply

²⁸ Although there does not appear to have been any consideration of the original meaning of the Confrontation Clause in the Washington state court proceedings in *Crawford*, several of the briefs filed in the Supreme Court did make historical arguments. Petitioner Crawford’s brief made historical claims to the effect that framing-era law made an opportunity for cross-examination a categorical requirement for the admission of an out-of-court statement. See Brief of Petitioner at 12-20, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410) [hereinafter Petitioner’s Brief]. For a discussion of several of the more significant historical errors in petitioner’s brief, see *infra* notes 84, 121, 298. Similar historical claims were also made in an amicus brief filed by nine law professors. See Motion for Leave to File and Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park in Support of Petitioner, at 8-11, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410) [hereinafter Professors’ Brief]. For a discussion of several of the more significant errors in the historical claims that the professors’ brief made regarding the supposed cross-examination rule, see *infra* notes 84, 88, 103, 298. Although Justice Scalia’s assertions overlapped with the claims made in those briefs to some degree, his opinion introduced several crucial but erroneous claims that did not appear in any brief. See *infra* notes 121, 153.

In addition, both the professors’ brief and the brief filed by the Solicitor General made historical arguments to the effect that the original scope of the Confrontation Clause was limited to only “testimonial” statements. See Professors’ Brief, *supra*, at 11; Brief for the United States as Amicus Curiae at 9-13, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410) [hereinafter Amicus Brief of the United States]. Those claims were roughly comparable to those made by Scalia on the same topic. See *infra* note 322.

Respondent State of Washington’s brief did not make any historical arguments. See *generally* Brief of Respondent, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410). That was also the case with Brief of Amici Curiae The National Association of Criminal Defense Lawyers, The American Civil Liberties Union and The ACLU of Washington in Support of Petitioner. See *generally* Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union and the ACLU of Washington in Support of Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410).

underscore the inappropriateness of originalism as a mode of justifying constitutional criminal procedure rulings.

C. *The Organization of This Article*

In part II, which comprises most of this article, I address the specific historical claim that Justice Scalia made in *Crawford* – that a rigid cross-examination rule was part of the American understanding of the “common-law” confrontation right at the time the federal Bill of Rights was adopted. With regard to the historical English evidence, Scalia asserted that the Court of King’s Bench created a broad cross-examination rule in the 1696 ruling *King v. Paine*,²⁹ in which the judges ruled that a deposition of a deceased witness could not be introduced as evidence in a *misdemeanor* case. He also asserted that any doubts regarding the broad cross-examination rule created in *Paine* were removed by a set of three later English cases decided in 1787, 1789, and 1791.³⁰ Thus, he asserted that a rigid cross-examination was part of the understanding of the confrontation right when the Confrontation Clause was ratified in 1791. I argue that Scalia misinterpreted *Paine* and that the later 1787, 1789, and 1791 cases were actually irrelevant to the original understanding of the Confrontation Clause.

Justice Scalia’s interpretation of *Paine* was flawed because he failed to give adequate consideration to important differences between misdemeanor procedure, which was at issue in *Paine*, and felony procedure, which was not. Framing-era law assigned substantially different standards and procedures to felony and misdemeanor prosecutions. In particular, the so-called Marian statutes that applied to felonies required that a justice of the peace take and record the sworn information of witnesses of a felony at the time an arrest was made. The written record of a witness’s statement during Marian procedure was commonly referred to as a “deposition” or, sometimes, as an “examination.” The Marian statutes also

²⁹ *Crawford*, 541 U.S. at 45 (citing 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696)). However, the evidentiary ruling in that case was actually also reported in four other case reports. See *infra* note 104. The dates given in the various reports of *Paine* vary from 1695 to 1697; however, I have opted to follow *Crawford* and use 1696. See *id.*

³⁰ *Crawford*, 541 U.S. at 46-47 (citing *King v. Radbourne*, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (Old Bailey 1787); *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (Old Bailey 1789); *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (Old Bailey 1791)).

required that the justice of the peace send the written record of a witness deposition to the felony trial court. Because a Marian deposition was viewed as a judicial record of sworn testimony, a Marian deposition could be admitted into evidence in a felony trial if the witness had become unavailable. In contrast, there was no similar statutory authority for taking or recording pretrial statements of witnesses in misdemeanor cases.³¹

In *Crawford*, Justice Scalia glossed over the important differences between felony and misdemeanor procedure and misinterpreted *Paine* in two significant respects. First, Scalia misstated the implication that *Paine* carried for misdemeanor prosecutions. *Paine* ruled that the deposition of a deceased witness could not be admitted in a misdemeanor trial. Scalia focused narrowly on one statement in one of the five reports of the deposition issue in that case in which the judges of the Court of King's Bench were reported to have noted that the deposition could not be admitted because the defendant had not had a prior opportunity to cross-examine the deceased witness. On that basis, Scalia interpreted *Paine* to mean that the deposition would have been admissible if there had been a prior opportunity for cross-examination. However, that interpretation ignored other reports of the case in which the judges concluded that there was no legal authority for anyone to even take a deposition in a misdemeanor case. Hence, it seems likely that *Paine* was actually understood to mean that depositions could not be taken or admitted in misdemeanor cases at all, and there does not seem to be any indication that depositions were taken or offered as evidence in misdemeanor cases after the *Paine* decision. Thus, Scalia erred when he interpreted *Paine* as though it meant that a prior opportunity for cross-examination would make a deposition admissible in a misdemeanor case. It appears more likely that *Paine* actually ended the taking of depositions in misdemeanor cases altogether.³²

Second, Justice Scalia misinterpreted *Paine* insofar as he treated it as a decision that restricted the admissibility of a Marian deposition of an unavailable witness in a felony case. The judges in *Paine* explicitly recognized that the misdemeanor

³¹ For a discussion of the points summarized in this paragraph, see *infra* notes 65-97 and accompanying text.

³² For a discussion of the points summarized in this paragraph, see *infra* notes 105-23 and accompanying text.

case before them did not implicate the rule that Marian depositions of unavailable witnesses were admissible in felony cases, and they explicitly reaffirmed the admissibility of Marian depositions in felony cases. That same understanding of *Paine* is also evident in important historical sources that Scalia downplayed or omitted: the leading eighteenth-century treatises on criminal procedure and evidence explicitly affirmed the rule that a Marian deposition of an unavailable witness was admissible in a felony trial and also explicitly noted that *Paine* did not alter that rule. Moreover, although the treatises did state certain conditions for admitting a Marian deposition (for example, that the justice or his clerk had to swear to its authenticity), none suggested that the admissibility of a Marian deposition depended upon an opportunity for cross-examination. Thus, *Paine* did not create any cross-examination rule applicable to felony trials, either.³³

The bottom line is that *Paine* did not create any cross-examination rule at all. There simply was no valid historical basis for Justice Scalia's claim that *Paine* made an opportunity for cross-examination a general condition for admitting a deposition of an unavailable witness in a criminal trial.

Justice Scalia's reliance on the 1787, 1789, and 1791 English cases was also misplaced. For one thing, he made a prochronistic error³⁴ when he treated the English cases decided

³³ For a discussion of the points summarized in this paragraph, see *infra* notes 124-52 and accompanying text.

³⁴ A "prochronism" is the form of anachronism that occurs when more recent concepts or events are erroneously projected backward into an earlier period. Because interest in constitutional history often seems to be prompted by a desire to see what implications the historical meaning of a text might have for modern issues, there is often a temptation to impose modern concepts on the Framers' understandings, and to cite sources that the Framers did not have access to at the time of the framing as evidence of the Framers' understanding.

Prochronistic errors arising from a failure to apprise when a statement actually became accessible are scattered throughout the U.S. Reports. For example, Justice Bradley put the interpretation of both the Fourth and Fifth Amendments off to a false start in *Boyd v. United States* when he assumed that the American Framers had been familiar with a passage attributed to Lord Camden in a 1765 English case. 116 U.S. 616, 626-30 (1886). The Framers probably were aware of the case; however, the statement that Bradley quoted had not appeared in the report of the case that had been published in 1770, when the controversy over general warrants was still hot. See Davies, *Original Fourth*, *supra* note 2, at 726-27. Instead, that passage was added to a later report of the case that was not published until more than a decade later, by which time the controversy over the legality of general warrants had been settled, and state declarations of rights had already prohibited use of general warrants. *Id.* Hence, it seems quite doubtful that the Framers of the Fourth Amendment would have been familiar with the passage upon which Bradley based *Boyd*, and the idea involved – that a search of papers amounts to a compelled confession – did not appear in other sources. *Id.*

in 1787, 1789, and 1791, as though they constituted evidence of the original understanding of the Confrontation Clause. That claim involved two errors. First, the relevant outside date for assessing original meaning is the date when the text was framed by the First Congress, not the date of ratification. The state legislatures had authority to decide whether to accept or reject the Bill of Rights proposed by the First Congress, not to alter the meaning of the proposed provisions.³⁵ Second, Americans had no access to the content of an English decision until a published report of the decision became available in America, but none of the reports of the three cases Scalia cited were published in London early enough for them to have come to the attention of the American Framers prior to the framing of the Confrontation Clause in 1789. Indeed, the 1791 case was not published until 1792, which was even after the ratification. It is a virtual certainty that the Framers were unaware of any of those cases when the Confrontation Clause was framed.³⁶

In addition, contrary to the impression created in Justice Scalia's opinion, none of the three cases rejected the admissibility of a Marian deposition of an unavailable witness. The 1787 case *admitted* a deposition. The 1789 and 1791 cases merely ruled that a deposition that had not been taken at the time of arrest in accordance with Marian procedure was

Failure to attend to appropriate editions of treatises can also lead to prochronistic errors. For example, the Supreme Court misinterpreted the original understanding of the "breach of the peace" arrest standard in the Speech and Debate Clause of Article I in *Williamson v. United States*, as a result of mistakenly treating a statement from Blackstone on the subject as though it were what Blackstone had written in the first edition of his *Commentaries*. 207 U.S. 425, 435-46 (1908). Actually, Blackstone had originally taken the opposite view, but flip-flopped on the issue in later editions to accommodate a statute passed by the English Tory Parliament. See Davies, Atwater, *supra* note 2, at 292-300. A more recent example of this sort of prochronistic error occurred in Justice Souter's opinion for the Court in *Atwater v. Lago Vista*. 532 U.S. 318 (2001). Souter treated statements regarding a pre-framing authority that appeared in nineteenth-century editions of treatises as though they showed that the same statement had appeared in the earlier editions of the treatises. *Id.* at 330-32. However, that was not the case; the significant statements had actually only been added to the nineteenth-century editions. See Davies, Atwater, *supra* note 2 at 310-14.

A "parachronism" is the opposite form of anachronism, and occurs when concepts or events from an earlier period are projected forward into a more recent period. Parachronistic errors seem to pose less of a threat to constitutional history, but they sometimes do appear in Supreme Court opinions. For example, Justice Souter also relied on early colonial statutes that likely had become obsolete by the eighteenth century in describing framing-era arrest standards in *Atwater*. See *id.* at 341-44.

³⁵ I also argue that English cases and doctrines first published after 1775 generally cannot constitute valid evidence of original meaning. See *infra* notes 155-59 and accompanying text.

³⁶ For a discussion of the points summarized in this paragraph, see *infra* notes 160-82 and accompanying text.

extrajudicial and thus could not constitute valid, sworn evidence. The most that can be said of these cases is that the 1789 and 1791 cases hinted at the possibility that cross-examination might be allowed during a Marian deposition itself. However, I can find no similar suggestion that cross-examination was part of Marian procedure in any published source that Americans could have had access to prior to the framing of the Confrontation Clause. Thus, regardless of how one interprets those cases, they cannot constitute valid evidence of the original understanding of the Confrontation Clause.³⁷

Turning to the historical American evidence, Justice Scalia also asserted that “numerous early state decisions” showed that the Framers had rejected the admissibility of Marian depositions unless there had been an opportunity for cross-examination.³⁸ However, the evidence for that claim collapses on inspection. Although one post-framing 1794 North Carolina case does lend support to Scalia’s cross-examination rule, that is the only case among those cited by Scalia that was both germane and “early” in any meaningful sense. In addition, the significance of that lone post-framing case is more than offset by highly relevant pre-framing evidence that Scalia overlooked: justice of the peace manuals that were printed and used in framing-era America usually included quotations from the English treatises that endorsed the admissibility of Marian depositions of unavailable witnesses in felony trials – without mentioning cross-examination. Thus, the available evidence indicates that the admissibility of Marian depositions of unavailable witnesses was still accepted as settled law when the Confrontation Clause was framed.³⁹

Justice Scalia’s history was correct insofar as he noted that English commentators did advocate a cross-examination rule for Marian depositions shortly after the framing of the American Bill of Rights, that the English Parliament did enact a cross-examination standard for the admission of depositions in 1848, and that some American state courts imported that rule. However, those *post-framing* developments hardly constitute valid evidence of the original meaning of the

³⁷ For a discussion of the points summarized in this paragraph, see *infra* notes 183-216 and accompanying text.

³⁸ *Crawford v. Washington*, 541 U.S. 36, 54, 54 n.5 (2004).

³⁹ For a discussion of the points summarized in this paragraph, see *infra* notes 231-69.

Confrontation Clause. Rather, the historical record indicates that Scalia prochronistically imposed a post-framing development on the original understanding of the Confrontation Clause. Hence, the cross-examination rule announced in *Crawford* was only fictional originalism.⁴⁰

In part III, I turn to Justice Scalia's broader claim regarding the scope of the original Confrontation Clause. As noted above, Justice Scalia asserted that the confrontation right should apply only to "testimonial" hearsay because the Framers were concerned only with formal types of hearsay such as depositions. However, as Chief Justice Rehnquist correctly noted in his concurring opinion, framing-era sources did not distinguish between "testimonial" and "nontestimonial" hearsay. Indeed, during the framing era it was still black-letter law that hearsay was "no evidence." The modern conception of hearsay and the variety of exceptions under which hearsay is now often admitted as evidence in criminal trials were at most only embryonic at the time of the framing.⁴¹ The more accurate historical statement is that the Framers never had occasion to contemplate whether or how the confrontation right should apply to what today might be viewed as informal or nontestimonial hearsay because they never imagined that informal hearsay could become admissible evidence. Thus, Scalia's assertion that the Confrontation Clause was not intended to address informal hearsay expressed a political choice, not a mandate from history.⁴²

I conclude in part IV by arguing that the historical errors and distortions in *Crawford* provide significant additional evidence that originalism is a defective and undisciplined mode of justification for criminal procedure decisions. I argue that there is now so much distance between modern doctrine and the framing-era law that shaped the authentic original meaning of the criminal procedure provisions of the Bill of Rights that the authentic history rarely connects in any meaningful way with modern criminal procedure issues. I also argue that claims regarding original meaning in Supreme Court opinions tend to mask the genuine differences between historical and contemporary doctrine,

⁴⁰ For a discussion of the points summarized in this paragraph, see *infra* notes 217-230.

⁴¹ *Crawford*, 541 U.S. at 69 n.1 (Rehnquist, C.J., concurring).

⁴² For a discussion of the points summarized in this paragraph, see *infra* notes 273-322.

rather than illuminate the authentic history. Hence, the whole originalist project of justifying modern constitutional criminal procedure rulings by invoking historical doctrine results in distorted history and false justifications for criminal procedure decisions.⁴³

II. THE FICTIONAL CHARACTER OF THE “CROSS-EXAMINATION RULE”

As noted above, Justice Scalia condemned the *Roberts* approach to the confrontation right as being too relativistic. He based that condemnation partly on a general assertion that constitutional rights should take the form of rules,⁴⁴ and partly on a historical claim that the framing-era confrontation right preserved in the Confrontation Clause included an absolute cross-examination rule that admitted no exceptions. In contrast, Chief Justice Rehnquist argued that the confrontation right was not inflexible, but rather was always subject to exceptions.⁴⁵ I think Rehnquist’s view was closer to the authentic history on this point – although the evidence he presented was also underdeveloped and flawed in a variety of ways.⁴⁶

⁴³ I discuss original meaning as a mode of justifying decisions rather than deciding cases because there are reasons to doubt whether the rationales presented in Supreme Court opinions are accurate indicators of the reasons why the justices voted as they did; rather, the rationales stated in opinions serve as a sort of test of whether the decision can be justified. Indeed, if one considers the actual decision-making process in the Court, it seems unlikely that an originalist justification that appears in an opinion would have been formulated in any detail until after the case had been decided in conference, and the opinion had been assigned to an individual justice. *See supra* note 17.

Constitutional law is not about the motivations justices have for voting as they do. Rather, constitutional law consists of the justifications they offer for having done so. One may hope that the need to provide a justification introduces some degree of discipline. However, that hope is defeated if the justices simply invent fictional history and blame the decision on the Framers.

⁴⁴ *Crawford*, 541 U.S. at 67-68 (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable . . .”).

⁴⁵ *See, e.g., id.* at 73 (“Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones.” (citation omitted)).

⁴⁶ Chief Justice Rehnquist’s response was underdeveloped insofar as he overlooked important evidence and was also defective insofar as he was as prone to using prochronistic sources that were not actually available to the Framers as Scalia. *See infra* notes 162, 163, 181, 272.

A. *Justice Scalia's Claims Regarding English Authorities*

Justice Scalia initially set the stage for asserting a rigid understanding of the confrontation right by discussing “the historical background of the Clause.”⁴⁷ In particular, he recounted that the common-law confrontation right had emerged in the wake of several prominent historical treason trials in which that right had been denied, and specifically invoked the famous trials of Sir Walter Raleigh, Sir Nicholas Throckmorton, John Lilburn, and Sir John Fenwick in seventeenth-century England.⁴⁸ He also invoked the 1768-69 civil-law smuggling prosecution of John Hancock in the Boston vice-admiralty court.⁴⁹

Justice Scalia's rendition of this general history was flawed in several ways,⁵⁰ and he oversimplified history insofar

⁴⁷ *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

⁴⁸ *Id.* at 43 (citing Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 15-16, 24 (1603) [hereinafter *Raleigh's Case*]; The Trial of Sir Nicholas Throckmorton, 1 How. St. Tr. 869, 875-76 (1554); The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315, 1318-22, 1329 (Star Chamber 1637)). *See also id.* at 45 (citing Proceedings Against John Fenwick, 13 How. St. Tr. 537, 591-92 (Attainder in House of Commons 1696) [hereinafter *Fenwick's Case*]).

⁴⁹ *Crawford*, 541 U.S. at 48 (citing Sewall v. Hancock (Oct. 1768-Mar. 1769), in 2 LEGAL PAPERS OF JOHN ADAMS 194, 207 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965) (reprinting Adams's notes on the prosecution of Hancock; there is no formal case report)). *See also infra* note 52.

⁵⁰ Although Justice Scalia purported to describe the Framers' understanding of confrontation, he erroneously based his description upon a number of sources that the Framers plainly had no access to. For example, Scalia based some of his assertions about Raleigh's trial on a nineteenth-century English work. *See, e.g., Crawford*, 541 U.S. at 44 (citing 1 DAVID JARDINE, CRIMINAL TRIALS 435 (London 1832) [hereinafter CRIMINAL TRIALS (1832)] (reprinted Philadelphia 1835 [hereinafter CRIMINAL TRIALS (1835)]) (quoting a statement by Raleigh)); *id.* (citing CRIMINAL TRIALS (1832), *supra*, at 520 (quoting a statement by one of Raleigh's judges)); *id.* at 52 (citing CRIMINAL TRIALS (1832), *supra*, at 430) (stating that Cobham's statement in Raleigh's trial was unsworn). However, Jardine indicated both in the preface to his book and in an introductory note to the section on Raleigh's trial itself that he had used materials not previously published as well as prior published reports. *See* CRIMINAL TRIALS (1835), *supra*, at 38-39, 400 n.*. Thus, in citing points from Jardine's account, Scalia employed a work that was unknown to the Framers as evidence of the Framers' understanding. *See also* other instances in which Scalia erroneously relied upon sources unavailable to the Framers set out *infra* notes 162-64, 176-77 and accompanying text.

Scalia also repeated some claims about the impact of these cases that are likely exaggerated. For example, he cited Dean John Henry Wigmore's claim that the 1696 attainder proceeding in the House of Commons against Sir John Fenwick “must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination.” *Crawford*, 541 U.S. at 46 (citing “3 J. WIGMORE, EVIDENCE § 1364 at 22-23 n.54” (1923) [hereinafter 3 WIGMORE] (discussing *Fenwick's Case*, 13 How. St. Tr. 537 (Attainder in the House of Commons 1696))). However, “the general consciousness” is not a substitute, in claims about original meaning, for evidence that the Framers were actually knowledgeable about a case. One can safely assume that the Framers were familiar with the fact that the right of confrontation

as he conveyed the impression that the right to confrontation in the famous cases was understood solely or primarily in terms of cross-examination.⁵¹ Likewise, he oversimplified when he described American opposition to civil-law inquisitorial procedure as though it had been narrowly focused on the use of depositions as evidence.⁵² Nevertheless, there is no doubt that

had been abused in seventeenth century political trials in England, but I know of no evidence they were conversant with Fenwick's trial itself, and I doubt Wigmore knew of any, either.

⁵¹ We may now think of confrontation primarily in terms of cross-examination, but commentators have questioned whether that is historically accurate. See, e.g., Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 572-77 (1992) (discussing the procedural functions of the right to confront adverse witnesses).

Cross-examination was not necessarily the issue in some of the famous cases. Justice Scalia asserted that "the problem" in the trial of Sir Walter Raleigh was that "the judges refused to allow Raleigh to confront Cobham [who had given a damning out-of-court statement against Raleigh] in court, where he could cross-examine him and try to expose his accusation as a lie." *Crawford*, 541 U.S. at 62. However, the report of the case does *not* show that Raleigh sought to cross-examine Cobham. Rather, Raleigh said that if Cobham would accuse him to his face, he would accept that as proof of his guilt. At one point he said "let Cobham be sent for; let him be charged upon his soul, upon his allegiance to the King, and if he will then maintain his accusation to my face, I will confess myself guilty." *Raleigh's Case*, 2 How. St. Tr. 1, 420 (1603). Likewise, he said "[Cobham] is in the house hard by and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this Confession of his, it shall convict me and ease you of further proof." *Id.* at 427. In fact, he responded to a question as to how he would respond if Cobham was produced and persisted in his accusation by saying, "[m]y Lord, I put myself upon it." *Id.* at 436. Thus, Raleigh apparently hoped either that his protests would raise a doubt as to whether the alleged statement by Cobham had been manufactured by prosecutors, that Cobham's physical appearance would reveal he had been tortured, or that Cobham would be too embarrassed or too guilt-stricken to repeat the statement to Raleigh's face. However, Raleigh did not indicate that he sought to cross-examine Cobham in the usual sense of that term.

⁵² Americans also objected to other features of civil-law inquisitorial procedure. For example, the absence of a threshold requirement of an accusation of crime in fact allowed the government to use a civil prosecution to "fish" for evidence upon which a charge could be based. Likewise, civil-law inquisitorial procedure was associated with drawn-out trials and repetitious considerations of evidence. These abuses and others figured prominently in American complaints about the civil-law smuggling prosecution of John Hancock in the Boston vice-admiralty court from October 1768 to March 1769.

Although Justice Scalia mentioned this trial, he cited only John Adams's (Hancock's counsel) complaint about the use of "Examinations of witness upon Interrogatories" during that prosecution. See *Crawford*, 541 U.S. at 48 (citing Draft of Argument in *Sewall v. Hancock*, in 2 LEGAL PAPERS OF JOHN ADAMS 194, 207 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965)). However, that is too narrow a view of the vices of that prosecution.

The best evidence we have of how Americans perceived Hancock's prosecution is found in contemporary newspaper accounts of the trial that were smuggled out of the city and reprinted in other colonial papers. See *BOSTON UNDER MILITARY RULE* (Oliver M. Dickerson ed. 1936) (reprinting the contemporary accounts). What one finds there are repeated complaints that the prosecution, which was initiated by the filing of libel, was not based on an accusation of actual crime, but only on a

the Framers did attach great importance to the confrontation right and did intend for the Confrontation Clause to at least prevent the sorts of extreme denials of confrontation evident in the famous cases by requiring, as a general principle, that evidence in criminal trials be presented in face-to-face oral testimony rather than through depositions or affidavits.⁵³

However, the general history of the confrontation right simply does not reach the specific issue of the admissibility of a

suspicion of smuggling. For example, one of the earliest entries notes that “none of the interrogatories on behalf of the informers have been as yet lodged in the registers-office” (that is, the supposed evidence was not being made public), and that Bostonians “heartily wish that the Co[m]missioners of the customs, the prosecutors] may still toil in their infamous fishery, without catching any evidence that may operate to [Hancock’s] prejudice.” *Id.* at 28 (entry for Nov. 28, 1768).

A later entry notes that “a number of witnesses were examined by the court, in a most extraordinary and curious manner; Mr. Hancock’s nearest relations, and even his tradesmen were summoned as evidences; but nothing turning up, that could support the [prosecution], the court was again adjourned . . .” *Id.* at 43 (entry for January 2, 1769). A later entry complained that the prosecution was “re-examining witnesses” by a method “so extraordinary” that the proceedings were “more alarming than any that had appeared to the world, since the abolition of the *Court of Star Chamber*” and that “[a]lmost every person already, who has the least *connection* with the parties accused, or who can be supposed to have the knowledge of the *secrets of their business*, has been pressed in the service, but to no purpose hitherto.” *Id.* at 46 (entry for January 7, 1769).

Still another entry complained that the commissioners had required Hancock to post bail “without their having any proof of the matter of charge *in their hands*, but that the [prosecution was initiated], with design further to harass and distress [Hancock], and in hopes that some evidences would be *fished up* in the course of a lengthy trial, which might support [the prosecution].” *Id.* at 57 (entry for January 30, 1769). Likewise, a later entry states that the Commissioners had sought a further adjournment “for them and their emissaries to hunt up other evidence. – When this trial will end, we cannot say . . .” *Id.* at 67 (entry for February 21, 1769).

It was at this late point in the proceedings that Adams apparently objected to the use of interrogatories as evidence (the argument that Scalia cited); but in the newspaper account the interrogatories are only one of several complaints Adams made. For example, the newspaper account complained that the judge was being arbitrary as to “which rules of the civil law *shall*, and which *shall not* be adopted by the court”; and that the prosecutors were being permitted to use methods that the defense was not permitted. *Id.* at 72 (entry for March 2, 1769).

Viewed in its entirety, the prosecution of John Hancock exhibited a litany of abuses that extended far beyond the use of interrogatories (prosecution without accusation of crime in fact, lack of speedy trial, excessive bail, civil-law modes of evidence such as interrogatories, no jury, a judge who served at the pleasure of the king and was paid from the fines he collected, etc.). *See generally id.*

⁵³ The requirement that confrontation be physically face-to-face is clearly stated in historical sources. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1st ed. 1768) [hereinafter 3 BLACKSTONE]. Although citations to the later editions of this work with “star” pagination are commonplace in judicial opinions and legal commentaries, inattention to the changes that Blackstone made in various editions can lead to serious errors. *See, e.g.*, Davies, Atwater, *supra* note 2, at 292-300 (explaining the role of a miscitation of a passage Blackstone had altered in a later edition in the Supreme Court’s misinterpretation of the original understanding of the arrest provision of the Speech and Debate Clause in *Williamson v. United States*, 207 U.S. 425, 439 (1908)).

statement of a genuinely *unavailable* witness. The famous abuses involved the use of a deposition where testimony of a live witness could have been offered; however, use of a deposition of a genuinely unavailable witness presented a different situation (as Raleigh noted during his own trial⁵⁴). Indeed, it seems likely that the problem of unavailable witnesses may have been especially acute during the seventeenth and eighteenth centuries when there were no police agencies to protect witnesses from threats from defendants. Hence, Scalia necessarily sought other English authority that specifically addressed the admissibility of a deposition of an unavailable witness in a criminal trial.

As a general matter, Justice Scalia was correct to turn to English legal materials. Although it is possible that some differences had developed between framing-era American understandings of criminal procedure rights and those set out in English sources (as well as among the American colonies and states), framing-era Americans still looked primarily to English materials for the content of legal rights.⁵⁵ Thus, although considerable caution must be exercised with regard to any doctrine first announced in an English publication after 1775, statements appearing in English materials published prior to

⁵⁴ See *Raleigh's Case*, 2 How. St. Tr. at 19 (quoting Raleigh as saying, "Indeed, where the Accuser is not to be had conveniently, I agree with you [that reading an examination would suffice as evidence]; but here my Accuser may [testify in person]; he is alive, and in the house"). The post-framing account by Jardine, which Scalia cited for several points, has Raleigh say: "If my accuser were dead or abroad, it were something; but he liveth, and is in this very house." CRIMINAL TRIALS (1835), *supra* note 50, at 418-19.

⁵⁵ Some commentators have suggested that the original meaning of the Sixth Amendment should be sought in American sources rather than English sources. See, e.g., Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 619-21 (1991) (pointing to some differences between American and English trial rights; for example, that some American colonies allowed defense counsel in nontreason felony trials when counsel was not permitted in England).

However, the notion of a distinct American legal culture should not be overstated. The published legal materials that were available in framing-era America were almost entirely English. As of 1789, there still were virtually no published reports of American court decisions. For all practical purposes, American state case reports began with Kirby's Connecticut Reports, which were first published in 1789. Likewise no American legal treatises on evidence or criminal procedure had been published by 1789. See ELDON REVARE JAMES, A LIST OF LEGAL TREATISES PRINTED IN THE BRITISH COLONIES AND THE AMERICAN STATES BEFORE 1801 (1934). Justice of the peace manuals had been published in the American colonies and states and they do provide important evidence of the American understanding of legal rights (see *infra* notes 241-68 and accompanying text), but those manuals were derived quite directly from English treatises and manuals.

1775 do constitute relevant sources for probing the original understanding of the Confrontation Clause.⁵⁶

In *Crawford*, Justice Scalia based his claim regarding an absolute cross-examination rule primarily on two specific historical claims about English cases. First, he asserted that the 1696 decision by the Court of King's Bench in the misdemeanor libel case *King v. Paine*⁵⁷ announced an across-the-board cross-examination rule.⁵⁸ Although he suggested that "some doubts remained" after *Paine* as to whether the "common-law" cross-examination rule applied even to the admissibility of a deposition of an unavailable witness of a felony taken under the authority of the Marian statutes,⁵⁹ he dismissed Marian procedure as a mere statutory "derogation" of common law.⁶⁰

Second, Justice Scalia also asserted that any lingering "doubts" as to whether the Marian depositions were subject to his cross-examination rule were removed, in any event, by three subsequent English cases decided in 1787, 1789, and 1791 that "rejected" the "statutory derogation view."⁶¹ He identified these three cases as being pertinent to the original meaning of the Confrontation Clause because they constituted English common law "by 1791," the year the Bill of Rights was ratified.⁶²

However, neither *Paine* nor the later three cases actually stood for the propositions that Scalia implied they did,

⁵⁶ As I explain below, it is unlikely that statements or doctrines first appearing in English publications after 1775 informed the Framers' understanding of legal rights. See *infra* notes 155-59 and accompanying text.

⁵⁷ 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696). There are also several other, different reports of the case. See *infra* note 104.

⁵⁸ In Scalia's description of *Paine*, "[t]he court ruled that, even though a witness was dead, his examination was not admissible where 'the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination.'" *Crawford v. Washington*, 541 U.S. 36, 45 (2004) (quoting *King v. Paine*, 5 Mod. at 165, 87 Eng. Rep. at 585 (K.B. 1696)). A mayor possessed the judicial authority of a justice of the peace as well as that of an executive. See *Davies, Atwater*, *supra* note 2, at 340-41 n.317, 361 n.411.

⁵⁹ *Crawford*, 541 U.S. at 46.

⁶⁰ *Id.* ("the [Marian] statutes were in derogation of the common law"); *id.* at 54 n.5 ("to the extent Marian examinations were admissible, it was only because the statutes *derogated* from common law.").

⁶¹ See *Crawford*, 541 U.S. at 54 n.5 (citing *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (Old Bailey 1791); *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (Old Bailey 1789)). Cf. *King v. Radbourne*, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (Old Bailey 1787)). See also *id.* at 46-47 (citing same).

⁶² *Id.* at 46 ("by 1791 (the year the Sixth Amendment was ratified)"); *id.* at 54 ("the common law in 1791"); *id.* at 54 n.5 ("by 1791").

and the 1787, 1789, and 1791 cases also were all published in London too late to have come to the attention of the American Framers prior to the framing of the Confrontation Clause. Instead, the framing-era authorities show that Marian depositions of unavailable witnesses were routinely admissible in felony trials. Moreover, Marian depositions were not a minor procedural departure from “common law.” Rather, they were a standard feature of felony prosecutions in both framing-era England and framing-era America. Thus, the framing-era confrontation right was not as rigid as Justice Scalia claimed.

B. Marian Procedure in Felony Prosecutions

Justice Scalia actually said little about Marian procedure in *Crawford*.⁶³ In particular, he omitted the important fact that the Marian statutes were generally understood to be part of the law of the American colonies and early states as well as of England.⁶⁴ Hence, some additional background is required to appreciate how significant Marian procedure actually was in framing-era law.

1. Felony Procedure Under the Marian Statutes

Contrary to Justice Scalia’s account, “common-law” criminal procedure during the framing-era did not necessarily take the form of across-the-board rules. Rather, because English law assigned more importance to convicting and punishing traitors and felons than misdemeanants, distinct procedures and standards often applied separately to treason, felony, or misdemeanor prosecutions, and even to subsets of

⁶³ Justices and commentators who assume an originalist posture often advance isolated claims about specific historical doctrines or events without providing the reader with much information about the larger doctrinal and institutional context. See, e.g., Davies, Atwater, *supra* note 2, at 317-26 (noting that Justice Souter made a variety of isolated erroneous assertions about historical arrest doctrine but never described the larger structure of common-law procedure and thus evaded the reasons why warrantless arrest authority had been limited to felonies and breaches of the peace). This expert posturing leaves the reader little choice but to accept the historical claim at face value. Indeed, this style of presentation exerts something of a bullying effect – as if the writer had said to the reader “I have this arcane knowledge because I’m an expert; unless you already know what I am talking about, you are unqualified to question my assertions; so just take my word for it.” Justice Scalia adopted an expert posture of this sort in *Crawford* when he tossed about references to Marian procedure without actually describing that procedure in any comprehensible way and without locating it in the larger context of framing-era procedure. See *Crawford*, 541 U.S. at 43-44, 46-47, 50, 52-55.

⁶⁴ See *infra* notes 92-94 and accompanying text.

misdemeanor prosecutions, such as those that did or did not involve a breach of the peace.⁶⁵ The important point for present purposes is that Marian procedure was a *standard feature* of felony prosecutions.⁶⁶

During the eighteenth century, English criminal procedure was still accusatory; that is, a criminal prosecution was initiated when a private person (usually the victim, with the obvious exception of homicides) made a sworn accusation that a crime had been committed “in fact” (that is, that a felony or misdemeanor had actually – not just probably – been committed).⁶⁷ This requirement of an accusation of crime “in fact” was one of the more fundamental differences between common-law procedure and continental “inquisitorial” procedure.⁶⁸ Likewise, the requirement of an accusation of crime “in fact” is one of the most important differences between framing-era procedure and modern investigatory procedure, in which government officers can initiate arrests and prosecutions on the basis of fairly minimal notions of “probable” crime.⁶⁹

The first step in a prosecution in accusatory procedure usually was the complainant’s arrest of the accused person, either with or without a warrant.⁷⁰ Once the complainant had

⁶⁵ For example, there were different arrest standards depending on whether the crime involved was a felony, or a breach of the peace, and warrantless arrest authority did not extend to non-breach minor offenses. See generally Davies, Atwater, *supra* note 2, at 321-26. There were also distinct trial standards. For example, defendants were permitted to have counsel in misdemeanor prosecutions and in treason prosecutions (by statute), but not in felony prosecutions. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 348-50 (1st ed. 1769) [hereinafter 4 BLACKSTONE]. Similarly, the evidence of at least two witnesses was required for treason prosecutions, but not for felony or misdemeanor prosecutions. See, e.g., *id.* at 350-51.

⁶⁶ It should be noted that felonies were a more narrowly defined class of crimes during the framing-era criminal law than they are today; at that time, many serious crimes were only misdemeanors. See Davies, Atwater, *supra* note 2, at 283.

⁶⁷ An allegation that a crime had been committed “in fact” was required to justify either an arrest warrant or a warrantless arrest. See, e.g., Davies, *Original Fourth*, *supra* note 2, at 631-33, 651-52.

⁶⁸ See *supra* note 52.

⁶⁹ Contrary to claims in other Supreme Court opinions, “probable cause” was *not* a recognized justification for a criminal arrest or search in framing-era law. See Davies, Atwater, *supra* note 2, at 368-79; Davies, *Original Fourth*, *supra* note 2, at 624-40, 640 n.252, 703-06. In addition, the concept of probable cause was drastically relaxed in *Illinois v. Gates*, 462 U.S. 213, 238-39, 246 (1983) (defining “probable cause” as a “fair probability” or “substantial chance” of criminal activity). See Davies, Atwater, *supra* note 2, at 379-82.

⁷⁰ Unlike modern Sixth Amendment doctrine, framing-era law treated the arrest as the beginning of the “prosecution.” See Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right*

made the arrest,⁷¹ he was required promptly to take the arrestee to a justice of the peace so that the justice could either release, bail, or commit the arrestee to jail to await trial.⁷² The complainant was also required to justify the arrest at that time by also bringing any supporting witnesses he had to the justice of the peace. The justice would then question the complainant and witnesses under oath to determine whether there were grounds for a prosecution.

In cases involving felonies, the Marian statutes – 1 & 2 Philip & Mary, chapter 13 (1554) and 2 & 3 Philip & Mary, chapter 10 (1555) – were understood to require the justice of the peace to make a written record of the unsworn statement made by the arrestee and of the sworn statements made by the complainant and his witnesses.⁷³ The 1554 Marian statute also imposed similar requirements for the recording of information given under oath in a coroner's inquest into a homicide.⁷⁴ Specifically, the Marian statutes required a justice of the peace to "examine" the unsworn arrestee when the arrestee was brought before him and to make a written record of that statement.⁷⁵ In addition, the statutes also required that the justice make a written record of the "information," given under oath, by the complainant and any witnesses whom the complainant had brought along to support his accusation, and

Against Self-Incrimination as a "Trial Right" in Chavez v. Martinez, 70 TENN. L. REV. 987, 1013 n.126 (2003) [hereinafter Davies, Chavez].

⁷¹ A warrantless arrest was attributed to the complainant, although he usually would procure the assistance of other persons, or a constable, as well. In a warrant arrest, the accuser obtained the issuance of a warrant that was then executed by a constable, who could command others to assist.

⁷² See, e.g., 4 BLACKSTONE, *supra* note 65, at 293 ("When a delinquent is arrested . . . he ought regularly to be carried before a justice of the peace.").

⁷³ British statutes are styled according to the year of the reign of the monarch. The Marian statutes are called such because they were enacted during the reign of Queen Mary Tudor, who was married to Philip of Spain. The names Philip and Mary are usually abbreviated in citation of the statutes as "Phil. & Mar.," "Phil. & M.," or "P. & M."

By its terms, the 1554 Marian statute applied if an arrestee was to be bailed to await trial for "Manslaughter or Felony." See 1 & 2 Phil. & Mar., c. 13, § IV. The 1555 statute extended the same procedures to an arrestee who was to be committed to "Ward" (i.e., jail) to await trial for "Manslaughter or Felony." See 2 & 3 Phil. & Mar., c. 10, § II. However, Marian procedure generally did not apply to accusations of treason, which were subject to other statutory provisions (*see infra* note 189), or to lesser offenses, which generally were not subject to specific statutory procedures.

⁷⁴ 1 & 2 Phil. & Mar., 1554, c. 13, § V.

⁷⁵ 1 & 2 Phil. & Mar., 1554, c. 13; 2 & 3 Phil. & Mar., 1555, c. 10. See also Davies, Chavez, *supra* note 70, at 1002-06 (discussing the implications of the Marian examination for the right against self-accusation).

also required that the justice place the complainant and any witnesses he produced at the time of the arrest under a recognizance to compel them to appear and testify at trial.⁷⁶

In addition, the Marian statutes required the justice to “certify” the written records of the arrestee’s “examination” and of the complainant’s and witnesses’ information to the felony trial court,⁷⁷ and it appears that these were made available to the judges and prosecuting counsel – though perhaps not to the defendant or his counsel – during the subsequent felony trial.⁷⁸ In eighteenth-century sources, the record of the statement made by a complainant (who was sometimes called an “informer” or “accuser”) or witness (who was sometimes called an “evidence”) was sometimes called an “examination” but was most commonly referred to as a “deposition,” even though the statutes did not use either of those terms to describe the statements of witnesses.

The purpose of the Marian provisions, evident in the prologue of the statutes themselves, was to increase the likelihood that felons could be convicted at trial.⁷⁹ The expectation probably was that the record of the deposition could be used by the felony trial court to detect whether a witness had changed his story because of a bribe or threat. However, by the seventeenth century Marian depositions of unavailable witnesses had also become admissible as evidence in felony trials.

2. The Admissibility of Marian Depositions of Unavailable Witnesses During the Seventeenth Century

Sir Matthew Hale was a leading English judge of the seventeenth century. He wrote two works on criminal law and procedure prior to his death in 1675, but both were published only posthumously. His shorter outline of criminal law and

⁷⁶ 1 & 2 Phil. & Mar., 1554, c. 13, § IV.; 2 & 3 Phil. & Mar., 1555, c. 10, § II.

⁷⁷ 1 & 2 Phil. & Mar., 1554, c. 13, § IV.; 2 & 3 Phil. & Mar., 1555, c. 10, § II.

⁷⁸ See *infra* note 207.

⁷⁹ See 1 & 2 Phil. & Mar., 1554, c. 13, § I (complaining that prior procedure allowed justices of the peace to permit “the greatest and notablest Offenders” to escape justice and go unpunished).

For an account of Marian procedure in seventeenth-century England, see John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317-35 (1973). For an account of Marian procedure in eighteenth-century England, see JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 40-47 (2003) [hereinafter LANGBEIN, *ADVERSARY TRIAL*].

procedure, titled variously as a “Summary” or “Methodical Summary” of the pleas of crown, was published in 1678, and subsequent editions were published up to 1773.⁸⁰ In that work, he noted that the Marian statutes empowered justices of the peace to “Examine the Offender and Informer” and that “[t]hese Examinations, if the party be dead or absent, may be given in Evidence” in a felony trial.⁸¹

Hale’s larger treatise, *History of the Pleas of the Crown*, was first published in 1736, and subsequent editions were published into the nineteenth century.⁸² In that work, Hale also stated in four passages that Marian depositions of unavailable witnesses were admissible in felony trials, and one of those passages explicitly described such depositions as a form of judicial record:

By the [Marian statutes, justices of the peace] ought to take the examinations of felons (without oath,) and the informations of accusers or witness (upon oath,) and return them to the justices of gaol-delivery.

And these examinations may be read as evidence against the prisoner, and so may the informations of witnesses taken upon oath, if they are dead or not able to travel, for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or

⁸⁰ SIR MATTHEW HALE, PLEAS OF THE CROWN OR A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT (commonly cited as “H.P.C.” in eighteenth-century sources). This work was published under various titles in seven editions from 1678 to 1773. See 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 362 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter MAXWELL] (entry 35, “Summary of the Pleas of the Crown”). Three editions for 1707 [hereinafter HALE, SUMMARY (1707)], 1716 [hereinafter HALE, SUMMARY (1716)], and 1773 [hereinafter HALE, SUMMARY (1773)] are available in The Eighteenth Century Collections Online. Thomson Gale, www.gale.com [hereinafter Eighteenth Century Collections].

⁸¹ HALE, SUMMARY (1707), *supra* note 80, at 262-63 (discussing “Evidence to the Petit Jury” in “Case of Felony”); HALE, SUMMARY (1716), *supra* note 80, at 262-63 (same); HALE, SUMMARY (1773), *supra* note 80, at 262-63 (same).

⁸² MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN (Sollom Emlyn ed., 1736) (two volumes) (commonly cited as “H.H.P.C.” in eighteenth-century materials) (*reprinted in* Eighteenth Century Collections, *supra* note 80) [hereinafter HALE, HISTORY (1736)]. According to the preface, the editor attempted to publish Hale’s handwritten manuscript without changes. Subsequent editions were published in 1778 (in London [hereinafter HALE, HISTORY (London 1778)]) and Dublin [hereinafter HALE, HISTORY (Dublin 1778)]) and in 1800 [hereinafter HALE, HISTORY (1800)]. See MAXWELL, *supra* note 80, at 362 (entry 36). Both of these later editions are available in Eighteenth Century Collections, *supra* note 80.

his clerk, that these examinations and informations were truly taken.⁸³

⁸³ 2 HALE, HISTORY (1736), *supra* note 82, at 52. This passage, which appears in the chapter on the powers of a justice of the peace, was unchanged in later editions. See 2 HALE, HISTORY (London 1778), *supra* note 82, at 52; 2 HALE, HISTORY (Dublin 1778), *supra* note 82, at 52. The same passage also appears with minor stylistic alterations in 2 HALE, HISTORY (1800), *supra* note 82, at 51.

Three other passages in this treatise endorse the admissibility of Marian depositions of unavailable witnesses. The first of two passages in the first volume dealt with the admissibility of Marian depositions in treason trials as follows:

By the statute of 1 & 2 P. & M. cap. 14. justices of the peace ought to examine the party and take informations touching offenses brought before them, and certify them at the next gaol-delivery.

The justices of peace cannot hear and determine treason by virtue of the commission of the peace, nor take an indictment of it, yet they may take examinations and informations touching such offense of the party brought before them, and certify them according to that statute; and those informations taken upon oath, as they ought to be, and sworn to by the justice or his clerk, that took them; to be truly taken, may be read in evidence against the prisoner, if the informant be dead, or not able to travel, and sworn so to be; yea by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable.

1 HALE, HISTORY (1736), *supra* note 82, at 305. This passage appears unchanged in the 1778 and 1800 editions. See 1 HALE, HISTORY (London 1778), *supra* note 82, at 305; 1 HALE, HISTORY (Dublin 1778), *supra* note 82, at 305; 1 HALE, HISTORY (1800), *supra* note 82, at 304-05.

The second, briefer passage in the first volume appears in a discussion regarding the steps to be taken in connection with the execution of an arrest warrant. Although it does not explicitly refer to the Marian statutes, this passage appears in a chapter titled “Concerning felonies by the common law . . . and first touching arrests”:

2. [The justice of the peace] must take information of the prosecutor or witnesses in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, &c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

1 HALE, HISTORY (1736), *supra* note 82, at 586. This passage appears unchanged in the 1778 and 1800 editions. See 1 HALE, HISTORY (London 1778), *supra* note 82, at 586; 1 HALE, HISTORY (Dublin 1778), *supra* note 82, at 586; 1 HALE, HISTORY (1800), *supra* note 82, at 585.

In addition to the passage quoted in the text, there is also a second passage in the chapter on evidence in the second volume:

By the statute of 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10. Justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses, (the examination to be without oath, the informations to be upon oath,) and are to put the same in writing, and are to certify the same to the next gaol-delivery.

These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.

But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination

These statements by Hale provide strong evidence that Marian depositions of unavailable witnesses – witnesses who had died or had become unable to travel – were understood to be admissible in felony trials during the seventeenth century.

3. Justice Scalia's Disparagement of Marian Procedure

Although Justice Scalia briefly acknowledged one of Hale's statements regarding the admissibility of Marian depositions (though not the one treating such depositions as judicial records),⁸⁴ he disparaged Marian procedure by asserting that the Framers would have disdained Marian depositions as an import from despised continental civil-law "inquisitorial" procedure.⁸⁵ However, that treatment ignored an important difference between Marian procedure and civil-

2 HALE, HISTORY (1736), *supra* note 82, at 284. This passage appears unchanged in the 1778 edition. See 2 HALE, HISTORY (London 1778), *supra* note 82, at 284; 2 HALE, HISTORY (Dublin 1778), *supra* note 82, at 284. The passage also appears with minor stylistic alterations in 2 HALE, HISTORY (1800), *supra* note 82, at 284.

⁸⁴ *Crawford*, 541 U.S. at 44 (citing 2 HALE, HISTORY (1736), *supra* note 82, at 284). The passage that Justice Scalia cited is the final of the three passages quoted *supra* note 83.

Although Scalia did not acknowledge Hale's treatment of a Marian deposition as a judicial record, his treatment of Hale was an improvement over the claims made regarding Hale's views in the briefs filed in *Crawford*. Petitioner's brief quoted a very general statement by Hale endorsing cross-examination as being superior to *ex parte* examinations based on written interrogatories but never mentioned Hale's specific endorsements of the admissibility of Marian depositions of unavailable witnesses in criminal trials. Petitioner's Brief, *supra* note 28, at 15 (citing MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 164 (Charles M. Grey ed., 1713)). The passage from Hale that Petitioner quoted simply contrasted common-law procedure for the trial of civil lawsuits to the civil-law procedure for trials in the English ecclesiastical or equity courts. See LANGBEIN, ADVERSARY TRIAL, *supra* note 79, at 233-34 n.241.

The amicus brief of the law professors, apparently referring to the same passage by Hale, simply noted that "Hale . . . praised the open and confrontational style of the criminal trial" –without citing any particular work. This brief also did not mention Hale's specific statements regarding the admissibility of Marian depositions. See Professors' Brief, *supra* note 28, at 9, 11.

⁸⁵ See, e.g., *Crawford*, 541 U.S. at 43 (describing examinations of witnesses conducted by justices of the peace as having been "adopted" from "civil-law practice"); *id.* at 44 (describing examinations of witnesses conducted by justices of the peace as "an adoption of continental procedure"); *id.* at 50 (describing Marian statutes as inviting "the civil-law mode of criminal procedure").

Justice Scalia has not always recognized American hostility to "inquisitorial" procedure. Indeed, in a slightly different context he has claimed that American pretrial criminal procedure has always been "inquisitorial." See *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (Scalia, J.) ("Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body) . . ."). Although the framing-era grand jury is often described as though it were inquisitorial, I think that is likely yet another modern myth. See Davies, Atwater, *supra* note 2, at 427-28.

law inquisitorial procedure: a Marian examination of the arrestee and deposition of a witness was taken only *after* a named and potentially accountable accuser had made an arrest on the basis of a sworn accusation that a crime had been committed “in fact”; in contrast, because inquisitorial procedure did not require an accusation of crime in fact, it was perceived to allow officials to use detentions and interrogations abusively to “fish” for evidence that could be used to charge a crime.⁸⁶

Hence, although it is fair to say that Marian procedure was in tension with common-law rights that English courts were developing during the late-seventeenth and eighteenth centuries – both the rights against self-accusation⁸⁷ and of confrontation – it is hardly the case that the American Framers simply would have dismissed Marian depositions of witnesses as part and parcel of civil-law inquisitorial procedure. Indeed, although Scalia implied that the American Framers viewed Marian depositions as an abuse,⁸⁸ he failed to actually cite any historical complaint about Marian procedure itself.⁸⁹

Justice Scalia also disparaged the admissibility of Marian depositions by writing as though that rule of admissibility was merely a statutory “derogation” from common-law procedure.⁹⁰ However, there is no basis for

⁸⁶ See *supra* note 52.

⁸⁷ See Davies, Chavez, *supra* note 70, at 1003.

⁸⁸ For example, Justice Scalia wrote:

[t]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Crawford, 541 U.S. at 50. The amicus brief filed by law professors in *Crawford* also claimed that the admission of Marian depositions of unavailable witnesses “almost certainly was one of the chief abuses at which the Confrontation Clause was aimed” – but provided no evidence for that claim. See *infra* note 103.

⁸⁹ The earliest American complaint about admitting a Marian deposition of a witness I have located dates to 1794. See *infra* notes 263-68 and accompanying text.

⁹⁰ See, e.g., *Crawford*, 541 U.S. at 46 (asserting that “the [Marian] statutes were in derogation of the common law”). Justice Scalia’s rhetorical strategy of treating Marian depositions as an exception to a general common-law rule appears to parallel Wigmore’s earlier treatment. Wigmore, writing about hearsay rather than the Confrontation Clause as such, claimed that after *Paine* “the applicability of the hearsay rule to sworn statements *in general*, as well as to unsworn statements, is not questioned,” but conceded that sworn statements to justices of the peace or to coroners “being already expressly authorized by statute, though not expressly made admissible, might be thought to call for *special exemption*” 3 WIGMORE, *supra* note 50, § 1364 (emphasis added); see *supra* notes 60 & 63 and accompanying text. This passage also

assuming that the American Framers would have discounted Marian procedure simply because it was based on statutory authority. Although framing-era criminal procedure was still predominantly a matter of common law, a number of older English statutes had been absorbed into common-law procedure.⁹¹ Moreover, because statutes trumped common law in the hierarchy of legal authority (as they still do), English judges had no authority to formulate a “common-law” doctrine that contravened a statute. Marian procedure could be altered only by Parliament. For that reason, the Marian statutes were grandfathered in when English courts refined the common-law confrontation right as they reformed criminal procedure during the late seventeenth and early eighteenth centuries.

Moreover, because the Marian statutes were enacted during the mid-sixteenth century – earlier than the date of the initial settlement of any of the American colonies – the Marian statutes were generally understood to be part of the law of the American colonies.⁹² Several colonies or early states even explicitly reenacted Marian procedure by local statute,⁹³ and the framing-era American justice of the peace manuals routinely included discussions of Marian felony procedure.⁹⁴ Hence, these historical sources refute Scalia’s suggestion that

understated the significance of the rule of admissibility as to Marian statutes insofar as it failed to acknowledge that the “special exemption” created by the Marian statutes included all felony prosecutions.

⁹¹ See, e.g., Davies, Atwater, *supra* note 2, at 327-33. Justice Scalia had previously cited older English statutes – “the so-called night-walker statutes, and their common-law antecedents” – as though they provided broad authority for investigative detentions in framing-era criminal procedure. *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring). In fact, however, Scalia’s claim in *Dickerson* overstated the implications of the historical statutes he cited, which stopped far short of providing the broad authority for detaining suspicious persons that is allowed by contemporary doctrine. See Davies, Atwater, *supra* note 2, at 263-64 n.65 and accompanying text.

⁹² The general rule was that an English statute that had been enacted by Parliament prior to the date of settlement of an American colony applied in the colony; however, a statute enacted by Parliament after the date of settlement of a colony applied in the colony only if the statute explicitly stated that it applied to the colony. See, e.g., Davies, Atwater, *supra* note 2, at 331 n.280.

⁹³ Some colonies or states reenacted English statutes to clarify local law. See, e.g., “An Act to put in force in this Province the several Statutes of the Kingdom of England or South-Britain, therein particularly mentioned,” Pub. L. No. 331, 1712 Pub. L. S.C. 25 (1712), particularly subparts “An Act touching Bailment of Persons,” *id.* at 58, and “An Act to take Examination of Prisoners suspected of any Manslaughter or Felony,” *id.* at 59-60 (South Carolina’s reenactment of both Marian statutes); *infra* note 239 (1715 North Carolina statute enacting examination procedure for felony prosecutions); *infra* note 254 (1787 New York statute reenacting Marian procedure). I have not attempted to make a thorough inventory of these statutes.

⁹⁴ See *infra* notes 241-69 and accompanying text.

framing-era Americans dismissed Marian deposition procedure as merely a statutory aberration.

However, Justice Scalia did not merely disparage the stature of the Marian statutes. He also wrote as though English courts had actually rejected the rule of admissibility regarding Marian depositions that Hale had set out in the late seventeenth century. Specifically, he stated that a “recurring question was whether the admissibility of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him,”⁹⁵ and he asserted that the admissibility of Marian depositions had been brought under a general “common law” cross-examination rule by the 1696 ruling in *King v. Paine*.⁹⁶ Additionally, he also asserted that any lingering doubts that might have remained on that point were removed by three much later cases decided in 1787, 1789, and 1791.⁹⁷ However, these claims do not withstand examination.

C. *The 1696 Ruling in Paine*

Justice Scalia traced the “cross-examination rule” to the 1696 ruling in the misdemeanor seditious libel prosecution⁹⁸ in *Paine*.⁹⁹ According to the Modern Reports version – the only report of the case that Justice Scalia cited¹⁰⁰ – the judges of King’s Bench and Common Pleas¹⁰¹ were of the opinion that the

⁹⁵ *Crawford*, 541 U.S. at 45.

⁹⁶ *Id.* at 45-46 (citing and discussing *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696)).

⁹⁷ *Id.* at 46-47 (citing *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (Old Bailey 1791); *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (Old Bailey 1789); *King v. Radbourne*, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (Old Bailey 1787)).

⁹⁸ *Id.* at 45. Seditious libel was a *misdemeanor* in English law, not a felony. *See, e.g., Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696) (headnote in English Reports states regarding a seditious libel prosecution that deposition cannot be read in a trial for a “misdemeanor”); *Rex v. Pain*, Comb. 358, 359, 90 Eng. Rep. 527 (same case) (basing the ruling regarding the nonadmissibility of a deposition in a libel prosecution on “the difference between felony and misdemeanor”). Justice Scalia recognized that *Paine* involved a “misdemeanor libel.” *Crawford*, 541 U.S. at 45.

⁹⁹ *Crawford*, 541 U.S. at 46 (citing *Paine*, 5 Mod. 163, 87 Eng. Rep. 584).

¹⁰⁰ Justice Scalia noted that *Paine* was “widely reported.” *Id.* at 45. However, he did not cite any of the other reports.

¹⁰¹ The ruling in *Paine* was by the Court of King’s Bench at Westminster, the most authoritative English court in matters of criminal procedure. *See* 4 BLACKSTONE, *supra* note 65, at 262 (discussing the jurisdiction of the King’s Bench over criminal cases). However, in *Paine*, the judges of King’s Bench conferred with the judges of Common Pleas, who sat in another part of the same hall, before issuing their ruling. *See Paine*, 5 Mod. at 165, 87 Eng. Rep. at 585.

deposition of a deceased witness “was not admissible where ‘the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination.’”¹⁰² Scalia read that statement as expressing a rigid rule – his “cross-examination rule” – that a deposition of an unavailable witness could be admitted as evidence in a criminal trial if, but only if, the defendant had had a prior opportunity to cross-examine that witness.¹⁰³

However, four other case reporters provided three additional versions of the evidentiary issue in *Paine* (one of the reports reprinted a previous version),¹⁰⁴ and they presented a

¹⁰² *Crawford*, 541 U.S. at 45 (citing *Paine*, 5 Mod. at 165, 87 Eng. Rep. at 585). A mayor possessed the judicial authority of a justice of the peace. *See supra* note 58.

¹⁰³ *Crawford*, 541 U.S. at 46. Two of the briefs filed in *Crawford* had also addressed *Paine*. Petitioner Crawford’s brief described the ruling in the same sweeping terms that Scalia did. *See* Petitioner’s Brief, *supra* note 28, at 14 (citing *Paine*, 90 Eng. Rep. 1062, 1062 (K.B. 1696), as authority that “[t]his right to confrontation was a bright-line rule. Even if a witness died, his prior ex parte statement to a government officer could not be admitted against the accused because the defendant ‘could not cross-examine’ the declarant.”). This treatment overstated the significance of the *Paine* ruling in the same way that Justice Scalia did.

The professors’ amicus brief gave a more accurate rendition of *Paine* than that given by Justice Scalia and by the Petitioner’s brief insofar as it correctly noted that the case pertained only to “misdemeanor cases”:

[J]ustices of the peace were required by statute to examine felony witnesses, and these examinations were admissible at trial, even though the witness had not been cross-examined, if the examination was taken under oath and the witness was then unavailable. This treatment – which almost certainly was one of the chief abuses at which the Confrontation Clause was aimed – was a continuing source of controversy, and in 1696, in the celebrated case of *Rex v. Paine*, the court refused to extend it to *misdemeanor cases*; eventually, the practice was abolished by statutes for felony cases as well.

Professors’ Brief, *supra* note 28, at 10 (emphasis added). However, this statement was misleading in other respects. First, the final statement in the quoted passage was misleading insofar as it evaded a rather material fact – no English statute made cross-examination a requirement for admitting a Marian deposition of witness in a criminal trial until 1848 – more than a half century after the framing of the Sixth Amendment Confrontation Clause. Second, it is notable that the brief cited no evidence for the claim that the Confrontation Clause was aimed at the “abuse” of Marian depositions of witnesses. There does not appear to be any substance to that claim; rather, framing-era American sources routinely endorsed the admissibility of Marian depositions of unavailable witnesses in felony trials. *See infra* notes 241-69 and accompanying text.

¹⁰⁴ There are five reports of the evidentiary ruling by the Court of King’s Bench in *Paine*: (1) *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (Modern Reports edited by William Nelson and published in 5 editions beginning in 1711; *see* MAXWELL, *supra* note 80, at 304-05 (entry 88)); (2) *Rex v. Paine*, 1 Salk. 281, 91 Eng. Rep. 246 (the reports of William Salkeld, published in six editions from 1717 to 1795; *see* MAXWELL, *supra* note 80, at 308 (entry 111)); (3) *Rex v. Pain*, Comb. 358, 90 Eng. Rep. 527 (the reports of Roger Comberbach, published in a single edition in 1724; *see* MAXWELL, *supra* note 80, at 298 (entry 33)); (4) *Rex v. Pain*, Holt 294, 90 Eng. Rep. 1062 (the reports of Cases Determined by Sir John Holt, published in one edition in 1738; *see* MAXWELL, *supra* note 80, at 301 (entry 64)) (this report appears to be a reprint of Comberbach’s); and (5) *Rex v. Payne*, 1 Ld. Ray. 729, 91 Eng. Rep. 1387 (the reports of

different picture of the case. First, they indicate that it is quite unlikely that *Paine* actually adopted the positive aspect of *Crawford's* cross-examination rule – the notion that the deposition could have been admissible in the misdemeanor trial if the arrestee had been permitted a prior opportunity for cross-examination. Instead, they indicate that the judges actually ruled that valid depositions could not be taken in misdemeanor cases at all. Second, the other reports – along with the arguments of counsel in the Modern Reports version – make it clear that *Paine* did not hold any adverse implications for the admissibility of Marian depositions in felony cases. Let me explain these two points.

1. The Absence of Any “Cross-Examination Rule” for Misdemeanor Cases

Perhaps because Justice Scalia focused on only the Modern Reports version of *Paine* – in which the judges were reported as having referred only to the defendant’s having “lost the benefit of a cross-examination”¹⁰⁵ – he treated the case as having ruled that a deposition of an unavailable witness *could* be admitted if, but only if, there had been a prior opportunity for cross-examination. However, that treatment overlooked the possibility that the case simply meant that there was no authority for a justice of the peace to ever take a deposition in a *misdemeanor* case, and thus a deposition could never be

Robert, Lord Raymond, published in five editions from 1743 to 1832; see MAXWELL, *supra* note 80, at 307-08 (entry 105)). There was also a sixth report of the case that did not address the evidentiary issue: King v. Paine, Carth. 405, 90 Eng. Rep. 834 (Carthew’s Reports) (discussing the elements of the offense of seditious libel, but not discussing the evidentiary issue).

In addition to the varied spellings of the defendant’s name, these reports also give varied dates for the decision. The reports in Modern Reports and in Salkeld’s Reports indicate the case was decided in Hillary Term (that is, January), of the seventh year of the reign of William III, which would be 1695. However, Comberbach’s Reports and Holt’s Reports give the date as Hillary Term of the eighth year of William III, which would be 1696, and Carthew’s Reports gives the year as the ninth year of William III, which would be 1697. Lord Raymond’s Reports do not give any year. Because the exact year is of no consequence for present purposes, I follow Justice Scalia’s lead and use 1696.

These multiple reports of a single case are a product of the unsystematic nature of case reporting during the seventeenth and eighteenth centuries. Individual judges or barristers collected and published their own notes of cases in which they had been involved or during which they had been present, usually toward the end of their careers. Happily, the English Reports often identify cases that are the subject of more than one report by one or more “s.c.” (same case) citations that appear immediately after the style of a case.

¹⁰⁵ See *supra* text accompanying note 102.

properly sworn or admitted as evidence in a misdemeanor trial.¹⁰⁶

In the Modern Reports version of *Paine*, most of the arguments of counsel did not relate to the cross-examination point; rather, they had to do with whether a justice of the peace possessed any legal authority to administer a sworn deposition in a misdemeanor case.¹⁰⁷ Additionally, the other reports of *Paine* indicated that the judges concluded that a justice of the peace simply had no authority to take a deposition in a misdemeanor prosecution. The report of *Paine* in Comberbach's Reports (reprinted in Holt's Reports), indicates that the judges gave alternative grounds for rejecting the deposition. That version of *Paine* mentioned the lack of an opportunity for cross-examination as one reason to exclude the deposition, but it also stated, as a second reason for excluding the deposition, that there was a "difference" between misdemeanor and felony cases because the Marian statutes created authority "to take" depositions in felony cases – the implication being that there was no comparable authority in misdemeanor cases.¹⁰⁸ In addition, the two other versions of

¹⁰⁶ None of the cryptic reports of *Paine* spell out this logic, but it flows from the structure of legal authority for the taking of depositions. The office of the justice of the peace was rooted in statutory authority. The Marian statutes explicitly directed a justice to take depositions in a felony case, so there was positive statutory authority for taking a deposition in a felony prosecution. However, there was no comparable grant of authority for a justice to take a deposition in a misdemeanor case. Hence, because a justice had no grant of authority to take such a deposition, he had no authority to administer an oath in that situation. Moreover, because an unsworn deposition could not be evidence, this meant that a deposition taken in a misdemeanor case could not be evidence. This logic was spelled out in one of the later cases cited by Scalia, which rejected a non-Marian deposition in a felony case because the deposition was "extrajudicial" and the justice of the peace therefore had no authority to administer an oath for a deposition outside of Marian statutory authority. See *infra* notes 192-94 and accompanying text. Thomas Starkie also spelled out this logic in his commentary on evidence law. See *infra* note 225 and accompanying text.

¹⁰⁷ After noting that the Marian statutes gave justices "power" to take depositions of witnesses in felony cases, defendant's counsel in *Paine* asserted that "[b]efore the making [of the Marian statutes] no single justice had power to take the information of witnesses against criminals, neither could the conservators at common law take such depositions . . ." 5 Mod. at 164, 87 Eng. Rep. at 585. As used in this context, "conservators" were the common-law antecedents of justices of the peace.

¹⁰⁸ The reports of *Paine* by Comberbach and Holt stated that:
the Court would not allow [the deposition of the deceased person] to be given in evidence, for two reasons.

1. It appears, that the defendant was not present when the examination was taken, so that he could not cross-examine him.

Paine in Salkeld's Reports and in Lord Raymond's Reports indicated that the deposition was rejected only because of the lack of authority for the taking of depositions in misdemeanors. Significantly, those two reports of *Paine* did not even mention the defendant's loss of the opportunity for cross-examination; instead, they simply contrasted the Marian statutory authority for taking and admitting depositions in felony trials to the misdemeanor prosecution at hand.¹⁰⁹

Thus, if one considers all of the *Paine* reports, it appears that the judges rejected the deposition first because there was no authority for a justice of the peace to even take a deposition in a misdemeanor case, and second because the deposition was invalid insofar as it did not meet the usual cross-examination standard derived from deposition practice in civil litigation and chancery proceedings.¹¹⁰ However, if there was no authority for a justice of the peace to take a deposition in a misdemeanor case, then it is unclear how such a deposition could have constituted admissible evidence even if cross-examination had been allowed.¹¹¹

Hence, although the notion that a testimonial statement of an unavailable witness should be admissible if there had

2. There is a difference between capital offenses and cases of misdemeanour, for in the case of felony the justices are by [the Marian statutes] to take the examinations in writing, and certify them to the [felony trial court] Comb. at 359, 90 Eng. Rep. at 527. See also Holt at 295, 90 Eng. Rep. at 1062.

In context, the second reason given in these reports seems to be a rejection of the "strongly urged" argument of the Attorney-General, as prosecutor, that "before the [Marian] statutes as well as since, justices of the peace . . . might take examination as well for misdemeanors as felony . . ." Comb. at 359, 90 Eng. Rep. at 527. See also Holt at 296, 90 Eng. Rep. at 1062.

¹⁰⁹ The only reason given by the judges as to why the deposition in *Paine* could not be admitted in Salkeld's Reports was that the Marian statutory authority for admitting depositions in felony trials "cannot be extended farther than the particular case of felony, and therefore not to this [misdemeanor] case." *Paine*, 1 Salk. at 281, 91 Eng. Rep. at 246 (citation omitted). Similarly, Lord Raymond's Reports indicated that, in contrast to the Marian authority for admitting "informations" of deceased witnesses in felony trials, "no such information can be given in evidence" in "misdemeanors, or in civil actions, or appeals of murder." *Payne*, 1 Ld. Raym. at 730, 91 Eng. Rep. at 1387. (An appeal of murder was a private prosecution initiated by relatives of a deceased, in contrast to a prosecution brought in the name of the crown. See 4 BLACKSTONE, *supra* note 65, at 308-12.)

¹¹⁰ Cross-examination was required for depositions in civil actions or chancery proceedings. See *infra* note 127.

¹¹¹ See *supra* note 106 (explaining the logic of deposition authority). There is evidence that the absence of statutory authority for the taking of depositions in misdemeanors was viewed as the more fundamental aspect of the *Paine* ruling. Specifically, when a leading eighteenth-century commentator provided a short synopsis of the ruling, he referred only to the lack of statutory authority but deleted a reference to the absence of an opportunity for cross-examination. See *infra* note 141 and accompanying text.

been a prior opportunity to cross-examine may seem to make sense in the context of the types of pretrial adversary hearings that occur in modern practice, it is quite doubtful that *Paine* actually adopted that view of depositions. Instead, *Paine* appears to have meant that depositions could be taken only if there was statutory authority to do so. Indeed, although the treatises and manuals published after *Paine* mentioned the exclusion of the deposition in that case, they did not mention any instances of depositions being admitted in later misdemeanor cases.¹¹² Hence, it is doubtful that depositions actually were even taken in misdemeanor cases after *Paine*.

2. *Paine* Actually Affirmed the Admissibility of Marian Depositions in Felony Trials

Justice Scalia also misinterpreted *Paine* insofar as he suggested that the case adopted an across-the-board cross-examination standard that applied even to the admission of Marian depositions in felony cases. Likewise, he misdescribed the post-*Paine* situation when he suggested there were any “doubts” on that score. There is no historical evidence of any “doubts”; rather, the reports of *Paine* explicitly stated that the ruling in that case did *not* apply to Marian depositions in felony cases.

In the Modern Reports version that Scalia cited, the cryptic statement of the judges’ ruling made no reference to Marian depositions in *felony* cases. However, that version of the ruling must be read in light of defense counsel’s previous assertion that Marian procedure was not involved in the misdemeanor case before the court:

this [misdemeanor libel] case was not like an information before a coroner, or an examination by justices of the peace of persons accused and afterwards committed for *felony*, because they have power by [the Marian statutes] to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol delivery.¹¹³

¹¹² See *infra* text accompanying note 129 (GILBERT (1754)); text accompanying notes 139-41 (HAWKINS, PLEAS).

¹¹³ King v. Paine, 5 Mod. 163, 164, 87 Eng. Rep. 584, 585 (K.B. 1696) (citation omitted). “Fact” referred to the crime that had been committed. See *supra* note 66. The “general gaol delivery” was a felony trial court. See 4 BLACKSTONE, *supra* note 65, at 266-68.

Thus, in the Modern Reports version Paine's counsel explicitly acknowledged that a Marian deposition would have been admissible in a felony trial.

In addition, each of the other three versions of *Paine* reported that the judges themselves reiterated the rule that Marian depositions of deceased witnesses were admissible in felony cases, without any mention of cross-examination. Comberbach's and Holt's version cited Hale's statement in his *Methodical Summary* regarding the admissibility of Marian depositions¹¹⁴ and quoted the judges as stating:

[t]here is a difference between capital offenses and cases of misdemeanours, for in the case of felony the justices are by the [Marian statutes] to take the examinations in writing, and certify them to the [felony trial court], &c. and if the party be dead or absent, they may be given in evidence.¹¹⁵

Similarly, Salkeld's report stated:

[*et per Cur.* Upon advice with the Justices of the Common Pleas, in cases of felony such depositions before a justice, if the deponent die, may be used in evidence by the [Marian statute]. But this cannot be extended farther than the particular case of *felony*, and therefore not to this [misdemeanor] case.¹¹⁶

Likewise, Lord Raymond reported:

per Curiam, in indictments for felony, by [the Marian statutes], such informations may be read, the deponent being dead. But in indictments or informations for misdemeanors, or in civil actions, or appeals of murder, no such information can be given in evidence . . .¹¹⁷

Thus, the crucial point – a point that one does not learn from Justice Scalia's opinion – is that every one of the four versions of the evidentiary ruling in *Paine* indicated that the

¹¹⁴ See *Rex v. Pain*, Comb. 358, 359, 90 Eng. Rep. 527, 527 (K.B. 1724) (citing HALE, SUMMARY, *supra* note 80, at 263); *Pain*, Holt at 295, 90 Eng. Rep. at 1062 (citing HALE, SUMMARY, *supra* note 80, at 263) (the passage cited is that quoted *supra* text accompanying note 81).

¹¹⁵ *Pain*, Comb. at 358, 90 Eng. Rep. at 527; *Pain*, Holt at 295, 90 Eng. Rep. at 1062.

¹¹⁶ *Rex v. Paine*, 1 Salk. 281, 281, 91 Eng. Rep. 246, 246 (citation omitted). (“*Et per Cur.*” indicates that this statement was “by the court,” that is, the judges’ ruling.)

¹¹⁷ *Rex v. Payne*, 1 Ld. Raym. 729, 729-30, 91 Eng. Rep. 1387, 1387. (An appeal of murder was a private prosecution initiated by relatives of a deceased, in contrast to a prosecution brought in the name of the crown. See 4 BLACKSTONE, *supra* note 65, at 308-12.) (The term “per Curiam” indicates the statement was the ruling of the court.)

prohibition against the admission of a deposition as evidence in that misdemeanor trial had *no effect* on the rule that Marian depositions of unavailable witnesses were admissible in felony trials. Moreover, although later treatise writers seem to have read *Paine* to also prohibit the use of a deposition of an unavailable witness in a felony trial if the deposition were improperly taken outside of Marian procedure,¹¹⁸ they also reiterated that *Paine* did not limit the admissibility of Marian depositions of unavailable witnesses in felony trials.¹¹⁹

Thus, the reports of *Paine* show that it definitely did not create a rigid “cross-examination rule” applicable to felony trials. Indeed, because depositions were routinely taken under the Marian statutes in felony prosecutions, but were unlikely to have been taken outside of that statutory authority,¹²⁰ the rule reiterated in *Paine* had the practical effect of making depositions of unavailable witnesses *routinely* admissible in felony trials.

Thus, the basis for Justice Scalia’s suggestion that there were “some doubts” about the admissibility of Marian depositions of unavailable witnesses after *Paine* is unclear.¹²¹ Indeed, the most significant feature of Scalia’s suggestion is that he did not actually identify any expression of these “doubts” in a historical source. Instead, he merely asserted that the admissibility of depositions in felony trials was “only” by the authority of the Marian statutes, which is hardly the same thing.¹²² In that context, he offered a cryptic citation to

¹¹⁸ The treatises interpreted *Paine* to prohibit the admission of depositions unless they were taken within the authority of the Marian statutes. *See infra* text accompanying note 129 (GILBERT (1754)); text accompanying note 141 (HAWKINS, PLEAS).

¹¹⁹ *See infra* text accompanying note 129 (GILBERT (1754)); text accompanying note 141 (HAWKINS, PLEAS); text accompanying note 147 (BULLER).

¹²⁰ It does not appear that there would have been any legal authority for a justice of the peace to take a deposition in a felony case outside of Marian procedure. *See supra* note 106; *see also infra* notes 192-94, 225 and accompanying text.

¹²¹ *Crawford v. Washington*, 541 U.S. 36, 46 (2004). There was no mention of any doubts regarding *Paine*’s meaning in the briefs filed in *Crawford*. Petitioner’s brief simply misstated *Paine* as though it applied to felonies as well as misdemeanors, while the professors’ amicus brief recognized that *Paine* addressed only misdemeanor prosecutions. *See supra* note 103.

¹²² Although Justice Scalia was correct when he asserted that Marian depositions were admissible because they were authorized by statute, the authority he cited was not available when the Confrontation Clause was framed. Scalia cited dicta to that effect from a 1790 English case. *See Crawford*, 541 U.S. at 46 (citing *King v. Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K.B. 1790) (Grose, J.) (dicta regarding Marian statutes); *id.* at 722-23, 100 Eng. Rep. at 823-24 (Kenyon, C. J.) (same)). Note, however, the Framers would not have been aware of that 1790 case

Baron Geoffrey Gilbert's leading treatise on the law of evidence.¹²³ However, that source deserved more attention than Scalia gave it.

D. *The Descriptions of Paine in the Leading Treatises*

During the framing era, treatises were an especially important source of legal information in America. Because law libraries were private and sets of case reports were expensive, few American lawyers or judges had access to anything like a comprehensive collection of English cases. The English treatises were more widely available,¹²⁴ and the treatises were

when the Confrontation Clause was framed in the summer of 1789. *See infra* notes 172-75 and accompanying text.

In addition, *Eriswell* was of doubtful relevance. In fact, when Chief Justice Rehnquist cited *Eriswell* in his concurring opinion as a case that admitted a deposition, Justice Scalia discounted the significance of that case because "*Eriswell* was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper." *Crawford*, 541 U.S. at 54-55 n.5.

¹²³ *Crawford*, 541 U.S. at 46 (citing LORD CHIEF BARON GEOFFREY GILBERT, LAW OF EVIDENCE 65, 215 (Capel Lofft ed. 1791 [hereinafter GILBERT (1791)]). *See also* SIR GEOFFREY GILBERT, LAW OF EVIDENCE BY A LATE LEARNED JUDGE (Dublin 1754) (reprinted in facsimile by Garland Publishing, Inc., 1979) [hereinafter GILBERT (1754)]. This treatise was published posthumously and republished in several later editions from 1756 to 1801 [hereinafter GILBERT (1756); GILBERT (1760); GILBERT (1769); GILBERT (1777)]. *See* MAXWELL, *supra* note 80, at 379 (entry 5). The 1756, 1760, 1777, 1791 editions are available in Eighteenth Century Collections, *supra* note 80. Another edition of this treatise was reprinted in Philadelphia in 1788 [hereinafter GILBERT (Philadelphia 1788)], *microformed on* Early American Imprints, Series I: Evans, no. 21113 (Readex) [hereinafter Imprints].

¹²⁴ A guesstimate of the relative availability of preframing copies of English sources in framing-era America can be made on the basis of the number of copies now shown as available in American public libraries in the Worldcat listing of the Online Computer Libraries Center. *See* Online Computer Libraries Center, <http://www.oclc.com> (showing that there are the following numbers of pre-framing copies of the five case reporters that reported *Paine*: 21 copies of Modern Reports, 1 copy of Salkeld's Reports, 61 copies of Comberbach's Reports, 50 copies of Holt's Reports (which reprinted Comberbach's), and 11 copies of Lord Raymond's Reports).

The same source shows that there are the following numbers of pre-framing copies of the leading treatises: 89 copies of Hawkins's *Pleas of the Crown* (*see infra* note 132) [there are also 59 copies of the 1787 edition of that treatise, most of a 1788 Dublin printing, that probably began to be imported about the time the Bill of Rights was framed]; 7 copies of Hawkins's *Summary of Crown Law* (*see infra* note 133); 59 copies of Hale's *Summary* (*see supra* note 80); 123 copies of Hale's *History of the Pleas of the Crown* (*see supra* note 82); 45 copies of Gilbert's *Evidence* (*see supra* note 123) [there are also 25 copies of the 1788 American edition of Gilbert's evidence treatise that was printed on the eve of the framing of the Bill of Rights (*see infra* note 131)]; and 77 copies of Buller's *nisi prius* treatise (*see infra* note 147) [there are also 37 copies of a 1788 New York printing of this treatise].

Although this data gives only a crude indication of the relative availability of these volumes during the framing-era, it seems apparent that framing-era Americans would have been more likely to have formed their view of the admissibility of Marian depositions from the treatises, rather than directly from case reports.

also important because the justice of the peace manuals printed and widely used in colonial and framing-era America excerpted the more important passages from the treatises.¹²⁵

What did the leading eighteenth-century treatises on evidence and criminal procedure have to say about *Paine* and the admissibility of depositions in criminal cases? Scalia did cite Gilbert's evidence treatise, but wrote only "compare 1 Gilbert, Evidence, at 215 ([Marian depositions] admissible only 'by Force 'of the Statute'), with *id.* at 65."¹²⁶ However, the cited passages in Gilbert's treatise did not suggest that *Paine* had given rise as to any "doubts" about the admissibility of Marian depositions of unavailable witnesses in felony cases.¹²⁷

After stating that a coroner's Marian examination of a deceased or unavailable witness would be admissible in a

I am indebted to Professor Sybil Marshall and the library staff at the University of Tennessee College of Law Library for this data.

¹²⁵ See *infra* notes 241-69 and accompanying text.

¹²⁶ *Crawford*, 541 U.S. at 46 (citing GILBERT (1791), *supra* note 123, at 65, 215 (the odd internal quotation marks reflect editor Lofft's replacement of an earlier citation to the Marian statutes themselves)).

¹²⁷ *Id.* Justice Scalia's suggestion that the passage at page 65 of Gilbert's treatise was relevant was inapt; it merely stated that a deposition in a civil suit or chancery proceeding was inadmissible against a person who was not a party in the case in which the deposition was taken:

"For on the same principles of Natural Justice, on which the Rule at the Common Law, respecting Verdicts in Evidence is founded:" a Deposition cannot be given in Evidence against any person that was not party to the suit; and the Reason is, that he had not Liberty to cross examine the Witnesses, and it is against natural Justice that a Man should be concluded in a Cause to which he was never a Party.

"And consequently, on the other Side," a Man shall *never take Advantage* of a Deposition that was *not party* to the suit: for if he cannot be prejudiced by the Deposition, he shall never receive any Advantage from it: for this would create the greatest Mischief that could be: for then a Man that never was party to the Chancery Proceedings, might use against his Adversary all the Depositions that made against him, and he, in his own Advantage, could not use the Depositions that made for him; because the other party not being concerned in the suit, had not the Liberty to cross examine, and therefore cannot be encountered with any Depositions out of the Cause.

GILBERT (1791), *supra* note 123, at 65 (emphasis in original). Although this passage shows that cross-examination was expected in civil depositions—which no doubt is the source of the reference to the lack of cross-examination in *Paine*—there is nothing in Gilbert's treatise to suggest that that aspect of civil procedure cast any doubt on the contrary rule regarding Marian depositions in felony cases.

felony trial,¹²⁸ Gilbert's treatise discussed *Paine* and the admissibility of Marian depositions of witnesses taken by a justice of the peace. Specifically it stated that

the Court would not allow the Examinations of [the deceased witness] to be given in Evidence, because *Paine* was not present to cross-examine, and *tho' tis Evidence in Indictments for Felony in such case by Force 2, 3 Phil. and Mary, Capt. 10*, yet 'tis not so in Informations for Misdemeanors in Civil Actions or Appeals of Murder.¹²⁹

Significantly, this discussion of *Paine* and the admissibility of Marian depositions in felony cases was not altered as late as the 1791 London edition, even though considerable additions and alterations were made to other

¹²⁸ A coroner's deposition of a witness would have been taken in the context of a possible homicide, so a subsequent trial in which such a deposition might have been admitted would have been for felony. Moreover, a coroner's deposition of a witness was provided for in the Marian statutes. See *supra* note 74 and accompanying text. Gilbert's treatise stated the following regarding the admissibility of coroner's depositions (which he termed "examinations"):

A Witness examined before the Coroner but upon the Trial is either dead or so ill that he is not able to travel, if Oath be made of the Truth of this Fact, the Examination of such Witness so dead or unable to travel, may be read; but the Coroner must first make Oath that such Examinations are the same which were taken before him upon Oath, without any Addition or Alteration; because the Examinations are in these Cases the utmost Evidence that can be procured, the Examinant himself being prevented in coming by the Act of God.

And much more so are such Examinations Evidence and to be read on the Trial when it can be proved on Oath, that the Witness is detained and kept back from appearing by the means and procurement of the Prisoner, for he shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong.

So if Oath be made that a Witness examined before the Coroner has been sought for against the Trial, and though all Endeavours have been used, yet he cannot be found, in such case his Examinations *may be read*; because I suppose it is to be presumed that the Witness is dead when he cannot be found after the strictest Enquiry.

GILBERT (1754), *supra* note 123, at 99-100. This passage was unchanged through the 1777 London edition. See GILBERT (1756), *supra* note 123, at 140-41; GILBERT (1760), *supra* note 123, at 140-41; GILBERT (1769), *supra* note 123, at 140-41; GILBERT (1777), *supra* note 123, at 138. However, the final paragraph was deleted in the substantially revised four-volume 1791 edition edited by Capel Lofft. GILBERT (1791), *supra* note 123, at 214-15.

¹²⁹ GILBERT (1754), *supra* note 123, at 100 (emphasis added). Statutory citations are to the Marian statutes. See *supra* note 73 and accompanying text. (An appeal of murder was a private prosecution initiated by relatives of a deceased, in contrast to a prosecution brought in the name of the crown. See 4 BLACKSTONE, *supra* note 65, at 308-12).

Justice Scalia cited but did not quote the Gilbert passage I have quoted in *Crawford*, 541 U.S. at 46; see *supra* note 126 and accompanying text.

passages in that edition.¹³⁰ This passage was also unchanged in the 1788 American edition.¹³¹ Hence, the editors of those later editions apparently did not think there had been any change in the rule regarding the admissibility of Marian depositions in felony trials.

Thus, Justice Scalia understated the degree to which Gilbert's treatise endorsed the admissibility of Marian depositions. Moreover, he apparently overlooked a passage of at least as much significance from the leading treatise on criminal law and procedure.

1. What Hawkins's Treatise said about Marian Depositions and *Paine*

The leading eighteenth-century treatise on criminal procedure was Sergeant William Hawkins's two-volume *Pleas of the Crown*, first published in 1716-1721, and republished in several later editions into the nineteenth century.¹³² An abbreviated version of the treatise was also published as *A Summary of Crown Law* in 1728.¹³³ Like the earlier statement in Sir Matthew Hale's *Methodical Summary*¹³⁴ (note that Hawkins's treatise and *Summary* were written and published after Hale's *Methodical Summary* was published but before

¹³⁰ See GILBERT (1756), *supra* note 123, at 141-42; GILBERT (1760), *supra* note 123, at 141-42; GILBERT (1769), *supra* note 123, at 141-42; GILBERT (1777), *supra* note 123, at 139; GILBERT (1791), *supra* note 123, at 215.

¹³¹ See GILBERT (Philadelphia 1788), *supra* note 123, at 139.

¹³² Hawkins's two-volume treatise was initially published in 1716 (volume 1) [hereinafter 1 HAWKINS, PLEAS] and 1721 (volume 2) [hereinafter 2 HAWKINS, PLEAS] (photo reprint 1978) (commonly cited as "Hawk P.C." in eighteenth-century materials). Subsequent editions were published in 1724, 1739 [hereinafter 2 HAWKINS, PLEAS (1739)], 1762 [hereinafter 2 HAWKINS, PLEAS (1762)], 1771 [*supra* note 18], 1787 [*supra* note 18], 1788 (a Dublin reprinting of the 1787 edition) [hereinafter 2 HAWKINS, PLEAS (1788)], 1795 [hereinafter 2 HAWKINS, PLEAS (1795)], and 1824. The 1787 and 1795 editions were edited by Thomas Leach, who updated the 1787 edition with additional textual notes and substantially expanded the 1795 edition to four volumes. See, e.g., MAXWELL, *supra* note 80, at 362-63 (entry 37). The 1739, 1771, 1787, 1788 and 1795 editions are available in Eighteenth Century Collections, *supra* note 80.

The title "Sergeant" indicated that Hawkins was an experienced, high status barrister in the superior English courts at Westminster. See 3 BLACKSTONE, *supra* note 53, at 26-27.

¹³³ WILLIAM HAWKINS, A SUMMARY OF THE CROWN LAW (1728) (two volumes) [hereinafter, HAWKINS, SUMMARY]. See MAXWELL, *supra* note 80, at 363 (entry 38). The original 1728 edition is available in Eighteenth Century Collections, *supra* note 80. One bibliographic work indicates this work was republished in 1770. See BRIDGMAN'S LEGAL BIBLIOGRAPHY 155 (Richard W. Bridgman ed., London, 1807).

¹³⁴ See *supra* text accompanying note 80.

Hale's full treatise was published¹³⁵), Hawkins's treatise stated that "It seems settled" that a Marian deposition of an unavailable witness (he used the term "informer") "may be given in evidence at a felony trial":

Sect. 6. It seems settled, That the Examination of an Informer taken upon oath, and subscribed by him either before a coroner upon an Inquisition of Death in pursuance of 1 & 2 Ph. & M. 13. or before Justices of Peace in pursuance of 1 & 2 Ph. & M. 13. and 2 & 3 P. & M. 10. upon a Bailment or Commitment for any Felony, may be given in evidence at the Trial of such inquisition, or of an Indictment for the same felony, if it be made out by Oath to the Satisfaction of the Court, that such Informer is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner, and that the Examination offered in Evidence is the very same that was sworn before the Coroner or Justice, without any Alteration whatsoever.¹³⁶

Hawkins also made a nearly identical statement regarding the admissibility of Marian depositions in his *Summary*.¹³⁷

Hawkins's passage on the admissibility of Marian depositions in his treatise is especially noteworthy for present purposes because he stated two conditions for the admission of such a deposition: first, sworn testimony as to the unavailability of the witness (which was not satisfied simply by an Oath that the witness could not be found¹³⁸); and, second, sworn testimony as to the accuracy of the record of the deposition. However, he said nothing about a requirement of an opportunity for cross-examination. Hawkins's reference to situations in which a witness was "kept away" by the defendant may also reveal a pragmatic basis for the rule of admissibility –

¹³⁵ HALE, SUMMARY, *supra* note 80 (published in 1678); 1 HAWKINS, PLEAS, *supra* note 132 and 2 HAWKINS, PLEAS, *supra* note 132 (published in 1716-21); HAWKINS, SUMMARY, *supra* note 133 (published in 1728); and HALE, HISTORY (1736), *supra* note 82 (published in 1736).

¹³⁶ 2 HAWKINS, PLEAS, *supra* note 132, at 429 (citations omitted).

¹³⁷ See 2 HAWKINS, SUMMARY, *supra* note 133, at 420-21:

Sect. 5. The Examination of an Informer taken on Oath, and subscribed by him, either before a Coroner on an Inquisition of Death, in Pursuance of 1 & 2 Ph. & Ma. 13, or before Justices of the Peace in Pursuance of 1 & 2 Ph. & M. 13. and 2 & 3 Ph. & Ma. 10. on a Bailment or Commitment for any Felony, may be given in Evidence at the Trial of such Inquisition, or of an Indictment for the same Felony, if it be made out by Oath, to the Satisfaction of the Court, that such Informer is dead, or unable to travel, or kept away by the Procurement of the Prisoner, and that the Examination offered in Evidence is the very same that was sworn before the Coroner &c

¹³⁸ Hawkins also wrote:

Sect. 7. But it hath been adjudged, That it is not sufficient to authorize the Reading such an Examination, to make Oath that the Prosecutors have used all their Endeavours to find the Witness, but cannot find him.

2 HAWKINS, PLEAS, *supra* note 132, at 430.

there were no police agencies that could provide protection for witnesses.

In his treatise, Hawkins also discussed *Paine* as a rule for an “indictment for libel” – that is, for a misdemeanor trial.¹³⁹ Although he noted that the Modern Reports report of *Paine* had referred to the lack of an opportunity for cross-examination, he neither said nor implied that *Paine* imposed that standard on Marian depositions; rather, he again noted the admissibility of Marian statutes depositions in felony procedure:

Sect. 10. But it is said to have been adjudged in the seventh Year of Will. 3. by the Court of King’s Bench upon Advice with the Justices of the Common Pleas, upon an indictment for a Libel, that Depositions taken before a justice of Peace relating to the fact could not be given in evidence, though the Deponent were dead; and that the Reason why *such Depositions may be given in evidence in felony* depends upon the Statutes of P. and M.; And that this cannot be extended farther than the particular Case of Felony. But in the report of this Case in 5 *Mod.* it is said that the Reason why such Depositions could not be read was because the Defendant was not present when they were taken, and therefore had not the Benefit of a cross Examination.¹⁴⁰

Thus, Hawkins’s treatise explained that the deposition had been inadmissible in *Paine* both because Marian procedure did not authorize the taking of depositions in misdemeanor prosecutions and also because the defendant did not have the opportunity to cross-examine the witness. Interestingly, however, when Hawkins discussed *Paine* in a shorter passage in his *Summary*, he mentioned only the lack of authority for the taking of depositions in misdemeanor cases, but did not mention the lack of an opportunity to cross-examine, suggesting that Hawkins regarded the lack of authority for the taking of depositions in misdemeanor cases as the more fundamental reason for the exclusion of the deposition in *Paine*.¹⁴¹ Thus, the contrast that Hawkins drew in both works

¹³⁹ 2 HAWKINS, PLEAS, *supra* note 132, at 430. It is curious that Hawkins referred to an “indictment,” because all of the reports of *Paine* described the case as proceeding upon an “information.” However, indictments were not necessarily limited to felonies during the eighteenth century; rather, serious misdemeanors were also subject to “indictment” by grand jury.

¹⁴⁰ *Id.* (citations omitted) (emphasis added). Note that Hawkins referred to both of the grounds offered by the judges for rejecting the deposition. See *supra* note 108 and accompanying text.

¹⁴¹ A comparable but shortened passage on *Paine* also appeared in Hawkins’s shorter 1728 “*Summary*,” *supra* note 133, although Hawkins cited only Salkeld’s report of *Paine* in this version, but omitted any reference to the Modern Reports version in which the loss of cross-examination had been mentioned:

between misdemeanor and felony procedure makes it clear that he did not question the admissibility of a deposition of a witness in a felony trial. Notably, although Thomas Leach did insert some notes into Hawkins's text when he edited the 1787 edition of this treatise, and even added entirely new sections when he substantially expanded the 1795 edition, he did not alter the passages on Marian depositions or *Paine* (although he did add related material in the 1795 edition, as discussed below).¹⁴²

Moreover, as I discuss below, Hawkins's statements on these points are especially significant because they were also widely reproduced in the justice of the peace manuals printed and used in colonial and framing-era America,¹⁴³ as well as in eighteenth-century and early nineteenth-century editions of other widely used works such as Jacob's *Law-Dictionary*.¹⁴⁴

Sect. 7. But it is said to have been solemnly adjudged that Depositions taken before a Justice of Peace concerning a Libel, cannot be given in Evidence on the Trial of an Indictment for such Libel, tho' the Witness be Dead, and that the Reason why such Depositions are Evidence in Felony depends on the Statutes of Ph . & Ma.

2 HAWKINS, SUMMARY, *supra* note 133, at 421 (emphasis omitted).

¹⁴² See 2 HAWKINS, PLEAS (1739), *supra* note 132, at 429-30; 2 HAWKINS, PLEAS (1762), *supra* note 132, at 429-30; 2 HAWKINS, PLEAS (1771), *supra* note 18, at 429-30; 2 HAWKINS, PLEAS (1787), *supra* note 18, at 605-06; 2 HAWKINS, PLEAS (1788), *supra* note 132, at 605-06; 4 HAWKINS, PLEAS (1795), *supra* note 132, at 421-22, 423).

Not surprisingly, when Leach edited the 1795 edition, he added additional sections relating to the 1787, 1789, and 1791 cases that he had published in 1789 in the first edition of his *Crown Cases*, discussed *infra* notes 176-82 and accompanying text. He did not suggest that those cases altered the rules Hawkins had previously set out, but his added material suggested that an arrestee should have an opportunity of contradicting or cross-examining the witness during a Marian deposition. See *infra* notes 221-22 and accompanying text.

¹⁴³ See *infra* notes 241-69 and accompanying text.

¹⁴⁴ GILES JACOB, A NEW LAW-DICTIONARY (1729) [hereinafter JACOB'S LAW DICTIONARY] [some later editions omit the word "New"]. This dictionary was first published in 1729, and republished to the tenth edition in 1782. T.E. Tomlins then published expanded editions in 1797 (2 volumes) and several nineteenth century editions. See MAXWELL, *supra* note 80, at 9 (entry 33). All of the eighteenth-century editions are available in Eighteenth Century Collections, *supra* note 80; none of the London editions have page numbers. In addition, a six volume American edition was published in Philadelphia in 1811 (*reprinted in facsimile by The LawBook Exchange 2000*).

The entry for "Deposition" in the 1729 first edition also states:

Depositions of Informers &c. taken upon Oath before a Coroner, upon an Inquisition of Death, or before Justices of Peace on a Commitment or Bailment of Felony, may be given in Evidence at a Trial for the same Felony, if it be proved on Oath that the Informer is dead, or unable to travel, or kept away by the Procurement of the Prisoner; and Oath must be made that the *Depositions* are the same that were sworn before the Coroner or Justice, without any Alteration. 2 Hawk. P.C. 429.

However, Justice Scalia apparently never considered the two most significant passages from Hawkins's treatise, although he did cite Hawkins's treatise for another, less significant point that appeared one page prior to the passages I have quoted.¹⁴⁵

2. What Buller Wrote About Marian Depositions

A mid eighteenth-century commentator also essentially echoed Hawkins's views on the admissibility of Marian depositions. Francis Buller gained prominence when he published a one-volume treatise on trial practice in 1767, and later became a judge of the Court of King's Bench.¹⁴⁶ His treatise, *An Introduction to the Law Relative to Trials at Nisi*

JACOB'S LAW DICTIONARY, *supra* (pages not numbered). The citation to "2 Hawk. P.C. 429" is to the passage from Hawkins's treatise set out *supra* text accompanying note 136.

The entry for "Evidence" in the 1729 first edition states:

Depositions before a Coroner, are admitted as *Evidence*, the Witnesses being dead. 1 Lev. 180. Likewise they have been admitted where a Witness hath gone beyond Sea. 2 Nels. Abr. 760. The Confession of a Prisoner before a Magistrate, &c. may be given in *Evidence* against him: And the Examination of an Offender need not be on Oath, but must be subscribed by him, if he confesses the Fact; and then be given in Evidence upon Oath by the Justices of the Peace who took the same. The Examination of Others must be on Oath, and proved by the Justice or his Clerk, &c. as to their *Evidence*, if they are dead, unable to travel, or kept away by the Prisoner. H.P.C. 19, 262. Kel. 18. 55. Wood's Inst. 647. The Examination of an Informer before a Justice, taken on Oath and subscribed, may be given in *Evidence* on a Trial, if he be dead, or not able to travel, &c. which is to be made out on Oath. 2 Hawk. P.C. 429.

Id. (pages not numbered). The citation to "H.P.C. 262" is to the passage from Hale's *Summary* set out *supra* note 81 and accompanying text (note that Hale's larger treatise had not yet been published when Jacob first published his dictionary); "2 Hawk. P.C. 429" is again a citation to the passage from Hawkins's treatise set out *supra* text accompanying note 136.

The subsequent 1773 and 1782 editions (which are most germane to assessing the original understanding of the Confrontation Clause) repeat these passages. They also appear in the 1797 edition, which also added a paragraph, as set out *infra* note 150.

The 1811 first American edition of Jacob's *Law-Dictionary* reprinted the passages from the 1797 London edition. See 2 JACOB' LAW-DICTIONARY, *supra*, at 248-49 (entry for "Deposition"); *id.* at 444, 454-55 (entry for "Evidence").

So far as I can determine, Jacob said nothing regarding *Paine* or the taking or admitting of depositions in misdemeanor cases, which suggests that it was not done. See *supra* text accompanying note 112. Likewise, he said nothing about an opportunity for cross-examination in any passage about the deposition or examination of a witness in a criminal case.

¹⁴⁵ Crawford v. Washington, 541 U.S. 36, 45 (2004) (citing 2 HAWKINS, PLEAS (1787), *supra* note 132, ch. 46, § 3, at 603-04). The section cited by Justice Scalia is one page ahead of Hawkins's passage on the admissibility of Marian depositions in § 6 of the same chapter, as quoted in the text accompanying note 136.

¹⁴⁶ See 8 EDWARD FOSS, JUDGES OF ENGLAND 252-53 (1864; reprinted 1966).

Prius, was republished in six London editions to 1793, and was reprinted in New York in 1788.¹⁴⁷

After noting several situations in which depositions could not be admitted in civil cases, and specifically noting that depositions were inadmissible “where there cannot be Cross-Examination, as Depositions taken before Commissioners of Bankrupts,” Buller stated that Marian depositions “shall be read against the Offender upon an Indictment, if the Witnesses be dead.”¹⁴⁸ This passage was unaltered in later editions,¹⁴⁹ and was also added to the post-framing 1797 London and 1811 Philadelphia editions of Jacob’s *Law-Dictionary*.¹⁵⁰ Notably, Buller also expressed no “doubts” about the admissibility of Marian depositions, and he said nothing about conditioning their admissibility on cross-examination, even though he had noted just before this passage that lack of an opportunity for cross-examination did bar use of depositions in civil cases.

¹⁴⁷ FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (first published 1767; republished in several editions to 1793). See MAXWELL, *supra* note 80, at 335 (entry 3). Virtually all of the editions are available in Eighteenth Century Collections, *supra* note 80 [hereinafter BULLER (Dublin 1768); BULLER (London 1772); BULLER (Dublin 1785); BULLER (London 1789); BULLER (London 1790); BULLER (London 1793)]. The first American printing of this treatise was in New York in 1788. See JAMES, *supra* note 55, at 184 (entry 64).

“Nisi Prius” was the term for the trial jurisdiction exercised by the judges of the superior courts at Westminster when they traveled to other parts of England to hold jury trials. See 3 BLACKSTONE, *supra* note 53, at 57, 59.

¹⁴⁸ BULLER (Dublin 1768), *supra* note 147, at 341:

[I]f the Witnesses examined on a Coroner’s Inquest be dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on Behalf of the Public, to make Enquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions before him to be fairly and impartially taken.—And by [the Marian statutes] Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Gaol-Delivery; but the Examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.

¹⁴⁹ See BULLER (London 1772), *supra* note 147, at 238; BULLER (London 1789), *supra* note 147, at 230-31; BULLER (Dublin 1785), *supra* note 147, at 242; BULLER (London 1793), *supra* note 147, at 242.

¹⁵⁰ The following paragraph was added to the 1797 expanded edition of Jacob’s *Law-Dictionary* immediately after the passage from the entry on “Evidence” quoted *supra* note 144:

By Stats. 1 & 2 P. & M. c. 13. 2 & 3 P. & M. c. 10. Justices of peace shall examine persons brought before them for felony, and those who brought them, and certify such examination to the next gaol-delivery: but the examination of the prisoner shall be without oath, and the others upon oath; and these examinations shall be read against an offender upon an indictment, if the witnesses be dead. Bull. N.P. 242.

GILES JACOB, THE LAW-DICTIONARY (1797) (pages not numbered) (entry for “Evidence”). This passage also appeared in the 1811 Philadelphia edition.

Thus, the post-*Paine* statements in the leading treatises by Hawkins, Gilbert, and Buller (like Hale's pre-*Paine* writings) did not express or leave room for any "doubts" at all about the admissibility of Marian depositions of unavailable witnesses in felony trials.¹⁵¹ Although eighteenth-century Americans would likely have understood from English sources that a Marian deposition would have been admissible in a felony trial only if a witness was deceased, gravely ill, or prevented from attending by the defendant,¹⁵² there is no evidence that they would have thought that *Paine* undercut or limited the rule that Marian examinations of such unavailable witnesses were admissible in felony cases, without regard to whether there had been any prior opportunity for cross-examination. Moreover, contrary to Justice Scalia's telling, the relevant evidence does not indicate any change in that settled rule prior to the framing of the Confrontation Clause.

E. The 1787, 1789, and 1791 English Cases

Justice Scalia compounded his error regarding post-*Paine* "doubts" about the admissibility of Marian depositions of unavailable witnesses when he asserted that later English cases decided in 1787, 1789, and 1791 had eliminated any such doubts by "reject[ing]" the "statutory derogation" of Marian procedure.¹⁵³ Indeed, he wrote as though these three English cases had firmly established a rigid cross-examination rule,

¹⁵¹ The reader might wonder what Blackstone had to say. He did not address the subject of the admissibility of Marian depositions of witnesses in his *Commentaries*. The fact that he did not is not of any significance; Blackstone gave only a rudimentary treatment of criminal procedure and of evidence in criminal trials because his *Commentaries* were actually intended as an introductory overview for students of the law. Indeed, Blackstone also wrote little about criminal trial procedure itself; the statement by Blackstone that Justice Scalia cited in *Crawford* regarding the importance of oral testimony was actually taken from Blackstone's discussion of the presentation of evidence in trials in *civil* actions. See *Crawford*, 541 U.S. at 43, citing 3 Blackstone, *supra* note 53, at 373-74.

¹⁵² See, e.g., *supra* text accompanying note 136 (quoting Hawkins's passage).

¹⁵³ See *Crawford*, 541 U.S. at 54 n.5:

As we have explained, to the extent that the Marian examinations were admissible, it was only because the statutes *derogated* from the common law Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations – explicitly in *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (1789), and *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (1791), and by implication in *King v. Radbourne*, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (1787).

Justice Scalia appears to have located these cases through his own research; there was no reference to any of these cases in any of the briefs filed in *Crawford*.

applicable even to the admissibility of Marian depositions, prior to the ratification of the Sixth Amendment in 1791:

by 1791 (the year the Sixth Amendment was ratified), [English] courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. *See* King v. Dingler, 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791); King v. Woodcock, 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789); *cf.* King v. Radbourne, 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787) . . .¹⁵⁴

However, this set of claims also collapses on inspection. For one thing, all of these three English cases were published too late to have informed the Framers' thinking. For another, it would not have mattered if the Framers could have become aware of them because none of the cases challenged the admissibility of a Marian deposition or imposed a cross-examination standard on a Marian deposition.

1. The 1787, 1789, and 1791 English Cases Could Not Have Informed the Original Meaning of the Confrontation Clause

When Justice Scalia cited English cases decided in 1787, 1789, and 1791 in *Crawford*, he implicitly adopted what might be termed a last-minute conception of original meaning. That is, he assumed that even an English case decided on the very eve of ratification of the Bill of Rights constitutes evidence of the original meaning of a provision of the Bill. Although this last-minute conception of original meaning was far from novel, it exposed serious historical misunderstandings.

a. General Historical Objections to Last-Minute Originalism

Although Americans had good reason to pay close attention to statements regarding criminal procedure rights in English legal sources during the grievances and controversies that led up to the American Revolution,¹⁵⁵ that changed when

¹⁵⁴ *Crawford*, 541 U.S. at 46-47. In yet another passage, Justice Scalia also asserted that these three cases revealed that "the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Id.* at 54. *See also infra* note 184.

¹⁵⁵ *See generally* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

the American states declared their independence in 1776: English decisions after that date were no longer authoritative.¹⁵⁶ In addition, the criminal procedure provisions in the federal Bill of Rights were decidedly not novel. The newly independent states had articulated criminal procedure protections in the state declarations of rights adopted between 1776 and 1784, and it seems unlikely that many English sources were imported during the Revolutionary War years 1775-1783, when the state declarations were adopted. Hence, the state declarations essentially constitutionalized the rights that had been articulated in English sources published prior to 1775.¹⁵⁷ Moreover, the criminal procedure clauses included in the federal Bill of Rights simply reiterated the protections that

¹⁵⁶ American independence meant, among other things, that a ruling in an English case decided after July 2, 1776 did not constitute law in an American state unless and until a court in that state actually adopted that ruling. Indeed, some state constitutions were quite explicit as to the cut-off date at which English common law and statute law were absorbed as the law of the new state. For example, New York set it at April 19, 1775 – the date of the battle of Lexington. N.Y. CONST. of 1777, art. XXXV, reprinted in 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 168, 177-78 (William F. Swindler ed., 1978).

Moreover, available evidence suggests that American state courts were sometimes reluctant to adopt English innovations during the decades immediately following the Revolution. For example, although an important innovation in English arrest law was announced in the 1780 case *Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1782) (holding that a constable who made an unlawful warrantless arrest was not subject to trespass liability if he acted on the basis of a charge of felony made by another person), that case was not even mentioned, let alone followed in an 1814 Pennsylvania decision on the same subject, *Wakely v. Hart*, 6 Binn. 316 (Penn. 1814) (holding a constable liable for trespass damages for an unlawful warrantless felony arrest). See Davies, *Original Fourth*, supra note 2, at 634-36. Indeed, Jesse Root, Chief Justice of Connecticut, asserted a complete break with English common law in the Preface to his 1798 Connecticut Reports. 1 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT ERRORS 1789-1793, at iii-ix (1899). Hence, unless there is specific evidence that Americans knew of or relied upon an English source published after 1775, that source should not be assumed to constitute evidence of framing-era American law.

¹⁵⁷ Between 1776 and 1784, eight of the twelve American states (counting Vermont) that adopted state constitutions also responded to the pre-revolutionary grievances by adopting declarations of rights as part of their constitutions. These included Virginia, Pennsylvania, Delaware, Maryland, North Carolina (all in 1776), Vermont (1777), Massachusetts (1780), and New Hampshire (1784). See Davies, *Original Fourth*, supra note 2, at 668 n.326. The state declarations included settled understandings of criminal procedure protections. See *id.* at 670. All eight included the confrontation right, sometimes stated as a right to “meet” face-to-face the witnesses against the defendant. See THE COMPLETE BILL OF RIGHTS 402-13 (Neil H. Cogan ed. 1997) [hereinafter COMPLETE BILL] (setting out criminal trial provisions of the initial state declarations of rights). However, it is likely that the disruptions of the Revolutionary War (1775 to 1783) limited the importation of English legal sources during the period in which the state declarations were written. Moreover, the later of these declarations were largely modeled on the earlier declarations. See Davies, *Original Fourth*, supra note 2, at 668-74.

the states had previously adopted. Madison made only a few innovations in the criminal procedure provisions he proposed for the federal Bill, and no additional innovations were introduced during the deliberations of the First Congress.¹⁵⁸ Thus, the original understanding of the federal criminal procedure amendments essentially reflected criminal procedure rights described in English sources as of 1775. Hence, when these historical aspects are taken into account, it is highly unlikely that any English doctrine first announced after 1775 informed the original American public understanding of a criminal procedure provision of the federal Bill.¹⁵⁹

However, even putting these general objections to last-minute originalism aside, it is also evident that the 1787, 1789, and 1791 English cases that Justice Scalia cited were invalid evidence of original meaning if one considers when the reports

¹⁵⁸ The complaints that were made about the absence of a federal Bill during the ratification debates of 1787-1788 also drew upon the omission of the rights already articulated in the state declarations. See, e.g., Patrick Henry, Remarks at the Virginia Ratifying Convention (June 14, 1788) (referring to protections provided by Virginia constitution regarding jury trial and related rights and complaining of absence of such protections in proposed federal constitution), reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445-48 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1836) [hereinafter Henry]; Abraham Holmes, Remarks at the Massachusetts Ratifying Convention (referring to protection against general warrants in Massachusetts constitution and complaining of absence of such protection in proposed federal constitution), reprinted in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111-12 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1836) [hereinafter Holmes]. Additionally, when James Madison drafted the initial proposals for a federal Bill, he sought to facilitate adoption of a federal Bill by eschewing controversial topics and limiting his proposals for a federal bill of rights largely to those already proclaimed in the state declarations and proposals. See EDWARD DUMBAULD, THE BILL OF RIGHT AND WHAT IT MEANS TODAY 34, 36 (1957). Likewise, the First Congress did not add any novel criminal procedure provisions beyond those proposed by Madison.

Madison's innovations can be readily identified by comparing his proposals with the earlier state provisions. Madison did innovate in using the custom-search warrant standard of "probable cause" in the Fourth Amendment. See Davies, *Original Fourth*, supra note 2, at 703-06. He innovated in using the phrase "due process of law" in place of the traditional phrase "law of the land." See Davies, Atwater, supra note 2, at 408-15. And he innovated in using the novel "be a witness against himself" phrasing of the right against self-incrimination. See Davies, Chavez, supra note 70, at 1008-09. Otherwise, his proposals were not innovative.

¹⁵⁹ Using 1775 as the date for assessing the relevance of English materials can sometimes make a significant difference in the common-law content associated with the Bill of Rights. English court rulings during the 1780s – including some of those reported in Leach's *Crown Cases* – made a variety of innovations that relaxed standards pertaining to the initiation of criminal prosecutions but elaborated aspects of the jury trial itself. See, e.g., supra note 156 (discussing the 1780 ruling in *Samuel*); infra notes 180-82 (discussing the 1783 ruling in *Warickshall*). Thus, the "common law" that can be extracted from Leach's reports may seem a little less foreign to modern investigatory criminal procedure than the more rigorously accusatory procedure of the pre-Revolutionary era.

of those cases were *first published*, rather than simply when the cases were decided in London.¹⁶⁰

b. The Too-Late Publication of Leach's Crown Cases

Americans had no way to learn of an English ruling until a published report of the case was printed, the volume containing the report was shipped to America, distributed throughout the states, and Americans purchased and read the volume.¹⁶¹ Moreover, during the eighteenth century there was always some delay between the decision of a case and the publication of a report of the case – a half-century delay in the instance of one case cited in *Crawford*.¹⁶² Thus, even if one

¹⁶⁰ I initially recognized the importance of the date when an English case was published when I examined claims that Professor Amar had made about the original Fourth Amendment. Amar had cited a 1785 English case as authority that writs of assistance were not equivalent to general warrants. See Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 77-80 (1996) (citing *Cooper v. Boot*, 4 Dougl. 339, 99 Eng. Rep. 911 (K.B. 1785)). Likewise, he cited the same case for a statement Lord Mansfield had made regarding the supposed immunizing effect a warrant had on an officer's trespass liability. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 778 (1994) (citing *Cooper*, 4 Dougl. 339, 99 Eng. Rep. 911 (K.B. 1785)). However, upon researching *Cooper*, I discovered that the earliest report of the case had not been published prior to 1801, so it was plain that the statements in it could not have informed the Framers' understanding in 1789. See Davies, *Original Fourth*, *supra* note 2, at 561 n.19.

¹⁶¹ It does not appear there could have been alternative sources of information. For example, although English court decisions of broad public import were sometimes reported in American newspapers, those reports tended to be very cryptic, and they did not convey the sort of detail that a practicing lawyer would require. See, e.g., Davies, *Original Fourth*, *supra* note 2, at 563-65 n.22 (discussing newspaper accounts of the *Wilksite* general warrant cases). Moreover, the cases Scalia cited were hardly of broad public import. See *Crawford v. Washington*, 541 U.S. 36, 43-47 (2004). In addition, although an American who was in London when a decision was rendered might have learned of a decision first-hand, it seems unlikely that that he could have shared that information with many other Americans.

¹⁶² Chief Justice Rehnquist cited the 1739 ruling in *King v. Westbeer*, 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (Old Bailey 1739), as historical evidence that a sworn affidavit of a deceased accomplice could be admitted as evidence in a framing-era criminal trial. *Crawford*, 541 U.S. at 72. In response, Justice Scalia asserted that *Westbeer* was irrelevant because it "was decided a half-century [before the adoption of the Sixth Amendment] and cannot be taken as an accurate statement of the law in 1791." *Id.* at 54 n.5.

However, this exchange was pointless. *Westbeer* is irrelevant to the original meaning of the Sixth Amendment because it was never published until Thomas Leach included it in his *Crown Cases*, which was not published until May 1789 at the earliest (see *infra* note 177 and accompanying text) – fifty years after the decision, but too late to have informed the framing of the Confrontation Clause. As I argue in the text that follows, *all* of the cases in Leach's *Crown Cases* were published too late to have informed American thinking prior to the framing of the Confrontation Clause in the summer of 1789. See *infra* notes 163, 177, 182 and accompanying text.

ignores the general defects of last-minute originalism, it should be obvious that the date when a report of the case was initially *published* in London, plus at least a few months, marks the earliest date by which Americans could have learned of the content of the case. However, Justice Scalia and Chief Justice Rehnquist both repeatedly ignored this basic consideration in *Crawford*.¹⁶³

Even if one were to accept Scalia's use of 1791, the year the Bill of Rights was ratified, as the appropriate cutoff for relevant evidence of original meaning, the fact is that the 1791 case that Scalia cited was not published in London until some time in 1792.¹⁶⁴ Thus, the 1791 case (the only one among the three that Scalia cited that actually mentioned "cross-examination"¹⁶⁵) had no conceivable bearing on the original meaning of the Confrontation Clause.

Additionally, although numerous previous Supreme Court opinions and commentaries have mechanistically treated the date of ratification of the Bill of Rights in 1791 as though it

¹⁶³ For example, Justice Scalia and Chief Justice Rehnquist sparred over the 1787, 1789, and 1791 cases, *see infra*, and sparred over *Westbeer*, as discussed *supra* note 162, even though all of those cases were never reported until Thomas Leach's *Crown Cases* was published in London in May 1789 at the earliest, *see infra* note 177, and thus could not have informed American thinking when the Confrontation Clause was framed in the summer of 1789. Likewise, Rehnquist also misrelied upon another case first published in the same volume of reports. *Crawford*, 541 U.S. at 70 (Rehnquist, C.J., concurring) (citing *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779)).

Scalia and Rehnquist also duelled over statements appearing in *King v. Eriswell*, 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790). Compare *Crawford*, 541 U.S. 46, 54 n.5 (opinion of the Court, written by Scalia), *with id.* at 72 (Rehnquist, C.J., concurring). However, *Eriswell* was never published – or even decided – until after the Confrontation Clause was framed in 1789. Scalia and Rehnquist showed similar disregard for whether the American Framers had access to a source when they cited the 1791 edition of Gilbert's evidence treatise, rather than earlier editions that were available in framing-era America. *See, e.g., id.* at 45 (opinion of the Court); *id.* at 70 n.3 (Rehnquist, C.J., concurring). As previously noted, Scalia even used an account of Raleigh's trial that was not published until four decades after the framing. *See supra* note 50.

¹⁶⁴ Justice Scalia cited the report of the 1791 ruling in *King v. Dingle* that now appears in the English Reports. *See Crawford*, 541 U.S. at 46 (citing *King v. Dingle*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (1791)). However, the English Reports reprint the 1815 fourth edition of *Crown Cases*. *Dingle* could not have appeared in the first edition, which was published in 1789. *See infra* note 177. It seems highly likely that *Dingle* would have been first published in the one-volume second edition (I have not been able to examine the second edition; no copy of that edition is included in Eighteenth Century Collections, *supra* note 80). Bibliographic sources show the second edition was published in 1792. *See, e.g.,* MAXWELL, *supra* note 80, at 303 (entry 78) (showing second edition of *Crown Cases* published 1792); BRIDGMAN, *supra* note 133, at 190 (same).

¹⁶⁵ *See infra* notes 200-02 and accompanying text.

were the appropriate date for assessing the doctrinal content of the original meaning of a provision in the Bill of Rights¹⁶⁶ – as Scalia and Rehnquist both did in *Crawford*¹⁶⁷ – ratification is not the germane date.

It makes no sense to refer to an *original meaning* that did not emerge until after the members of the First Congress and the members of nine state legislatures had already approved the Bill. When the Virginia legislature provided the tenth approval necessary for the Bill to become operational in December 1791,¹⁶⁸ it possessed authority only to accept or reject the amendments already proposed – not to revise their content.¹⁶⁹ Hence, the original meaning has to refer to the public meaning of the text at the time the First Congress approved the language of the amendments – the date when the text was *framed*. Indeed, Justice Scalia seems to have

¹⁶⁶ A variety of opinions have construed a provision of the Bill of Rights according to the law as of the date of ratification of the Bill, as of 1791, or as of the date of the “adoption” of the Bill (which appears to refer to ratification). *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 331, 339, 345-46 n.14 (2001) (Fourth Amendment); *Mitchell v. United States*, 526 U.S. 314, 332, 335 (1999) (Scalia, J., dissenting) (Fifth Amendment right against self-incrimination); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 370 (1995) (Thomas, J., concurring) (First Amendment freedom of speech); *id.* at 372-73 (Scalia, J., dissenting); *Minnesota v. Dickerson*, 508 U.S. 366, 379, 382 (1993) (Fourth Amendment); *Harmelin v. Michigan*, 501 U.S. 957, 966, 987 (1991) (Eighth Amendment); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (Seventh Amendment); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 669-70 (1989) (First Amendment Establishment Clause); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989) (Opinion of the Court) (Seventh Amendment); *id.* at 77, 84, 86 (White, J., dissenting); *Payton v. New York*, 445 U.S. 573, 598 (1980) (Opinion of the Court) (Fourth Amendment); *id.* at 606 (White, J., dissenting); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335, 336, 337 (1979) (Opinion of the Court) (Seventh Amendment); *id.* at 345-46, 347, 349 (Rehnquist, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 284 n.29, 380, 382 (1972) (Burger, C.J., dissenting) (Eighth Amendment); *id.* at 428.

¹⁶⁷ Justice Scalia referred to “1791” or the date of “ratification” several times. *See, e.g.*, *Crawford*, 541 U.S. at 46 (referring to English cases decided “by 1791 (the year the Sixth Amendment was ratified)”; *id.* at 54 n.5 (“in 1791”). Similarly, although Chief Justice Rehnquist referred to the “framing” of the Sixth Amendment at one point in his concurring opinion, *id.* at 72 (referring to “English law at the time of the framing”), at others he referred to the “ratification of the Sixth Amendment,” *id.* at 71, or “1791,” *id.* at 72. At still another point he referred to the state of the law at the “time of the founding.” *Id.* at 69 n.1.

¹⁶⁸ *See* DUMBAULD, *supra* note 158, at 50 (noting that Virginia did not provide the final approval necessary for the ratification of the Bill of Rights until December 1791).

¹⁶⁹ “Ratification” means – and meant – a principal’s retroactive approval of an agent’s prior act. *See, e.g.*, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., 1st ed. 1828) (defining “ratification” as: “1. the act of ratifying, confirmation. 2. the act of giving sanction and validity to something done by another; as the *ratification* of a treaty by the senate of the United States.”).

acknowledged as much in prior opinions¹⁷⁰ (and Chief Justice Rehnquist acknowledged as much in *Crawford* itself¹⁷¹).

The text of the Bill of Rights, including the Confrontation Clause, was formally approved by the First Congress for submission to the states on September 25, 1789.¹⁷² Realistically, however, the original meaning of the Confrontation Clause became fixed even earlier. The legislative record shows that there was no alteration of the text following the report of the committee of eleven on July 11, 1789, and the only change that committee made from the proposals Madison had offered on June 8 – the deletion of the redundant words “accusers and” – appears to have been stylistic rather than substantive.¹⁷³ Moreover, Madison appears to have taken his language for the proto confrontation clause from New York’s 1788 proposals for amendments.¹⁷⁴ Additionally, there is no indication of any debate regarding the confrontation right when the House of Representatives took up the proposed amendments during August, or when the Senate later approved them (although the record for the Senate is almost nonexistent).¹⁷⁵ Hence, as a historical matter, the text

¹⁷⁰ For example, Justice Scalia joined Justice Thomas’s concurring opinion in a previous Confrontation Clause case in which Thomas discussed the original meaning of the Confrontation Clause in terms of the understanding of the “drafters” of that Clause. See *White v. Illinois*, 502 U.S. 346, 363 (1992) (Thomas, J., joined by Scalia, J., concurring) (discussing what “the drafters of the Sixth Amendment intended”). In addition, Scalia referred to the “framing” of the Fourth Amendment in the 1999 decision *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (stating that the first consideration in assessing the constitutionality of a search under the Fourth Amendment should be “whether a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed”).

¹⁷¹ *Crawford*, 541 U.S. at 72 (Rehnquist, C.J., concurring) (referring to “English law at the time of the framing”).

¹⁷² See Agreed Resolution of September 25, 1789, reprinted in COMPLETE BILL, *supra* note 157, at 385, entry 12.1.1.28.a.

¹⁷³ The proto confrontation clause James Madison proposed on June 8, 1789 referred to an accused’s right “to be confronted with his accusers, and the witnesses against him.” See COMPLETE BILL, *supra* note 157, at 285, entry 12.1.1.1.a. The Committee of Eleven’s report on July 28, 1789, simply deleted the words “accusers and” from Madison’s “accusers and witnesses against him.” See *id.* at 387, entry 12.1.1.3 (“to be confronted with the witnesses against him”). There was no subsequent change in the text of the Clause; the same language appeared in the Agreed Resolution of September 25, 1789. See *id.* at 400, entry 12.1.1.28.a (“to be confronted with the witnesses against him”). It seems likely that “accusers and” was simply thought to be redundant with “witnesses against him” because a complainant could be a “witness” in a criminal prosecution.

¹⁷⁴ See *infra* note 255 and accompanying text.

¹⁷⁵ There is no record of any discussion of the Confrontation Clause in the records of the debates in the House regarding the proposed amendments to the Constitution. See COMPLETE BILL, *supra* note 157, at 387-91, entries 12.1.1.4 through

of the Confrontation Clause was framed no later than the summer of 1789.

The date of the framing matters because the 1787 and 1789 English cases Scalia cited were published in Thomas Leach's *Crown Cases*,¹⁷⁶ and the one-volume first edition of that work became available in London no earlier than – though possibly later than – *May of 1789*¹⁷⁷ – no more than roughly a month before Madison proposed what became the Confrontation Clause, and two months before the Committee of Eleven proposed the final language.

Hence, taking into account the time required to ship (literally) that volume to America and distribute it to customers, it is questionable whether copies of Leach's *Crown Cases* were available to Americans at all when the Confrontation Clause was framed during the summer of 1789. Moreover, it is a virtual certainty that the members of the First Congress who framed the federal Bill would not have put aside

12.1.1.12 (report of debates in the House of Representatives on August 17, 18, and 21, 1789). There is no comparable record of the debates in the Senate, but the Senate did not propose any alteration of the Confrontation Clause to the House. See Senate Resolution of September 9, 1789 in COMPLETE BILL, *supra* note 157, at 395, entry 12.1.1.19 (“to be confronted with the witnesses against him”).

¹⁷⁶ See *supra* text accompanying note 154 (indicating that the reports of the 1787 ruling in *Radbourne* and of the 1789 ruling in *Woodcock* were published in “1 Leach” and that that volume is reprinted in 168 English Reports). However, the *English Reports* reprint the 1815 fourth edition of Leach's *Crown Cases*. (As a general rule, the English Reports reprints only the final edition of the earlier nominate reports.) The single-volume 1789 first edition of Leach's *Crown Cases* (available in Eighteenth Century Collections, *supra* note 80) was slightly smaller than the first volume of the fourth edition. Specifically, the first edition contains 190 cases and runs to cases decided in 1789; in contrast, the first volume of the 1815 fourth edition reprinted in the English Reports contains 244 cases and runs to cases decided in 1791. I have confirmed that the reports of *Radbourne* and *Woodcock* did appear in the first edition.

¹⁷⁷ Bibliographic works show that the first edition of Leach's *Crown Cases* was published in 1789, but give only the year of publication. See, e.g., MAXWELL, *supra* note 80, at 303 (entry 78). However, the earliest possible date for the printing of the first edition of *Crown Cases* is evident from the fact that one of the last cases in that volume reported a proceeding during the “April session 1789” of the Old Bailey. See John Wilkins's Case, CROWN CASES 444 (1st ed. 1789) (“At the Old Bailey April Session 1789”). In addition, the Old Bailey Session Papers indicate that the April 1789 session was held “[o]n Wednesday, the 22d of April, 1789, and the following days.” See www.oldbaileyonline.org/facsimiles/1780s/178904220001.html (presenting cases from the April 1789 session; last day of session not given). Hence, assuming that the actual printing would have taken a few weeks, it is a virtual certainty that the volume could not have been available for sale in London prior to sometime in May 1789, although it might have been published some time later than that.

the crucial work of forming a new government¹⁷⁸ simply to read the latest reports of ordinary criminal trials from England.¹⁷⁹

Thus, although Justice Scalia's opinion in *Crawford* was not the first Supreme Court opinion to cite a case from Leach's *Crown Cases* as though it constituted evidence of the original meaning of a provision of the Bill of Rights,¹⁸⁰ and although Chief Justice Rehnquist did likewise in *Crawford*,¹⁸¹ all of those citations amount to prochronistic errors. A case that was first published in Leach's *Crown Cases* cannot constitute valid evidence of how the American Framers understood the Bill of

¹⁷⁸ Several members of the First Congress even objected to taking up the proposal for the Bill of Rights during the summer of 1789 on the ground that there was more pressing business to attend to regarding the formation of the new federal government and the provision of revenue for it. See, e.g., 5 THE ROOTS OF THE BILL OF RIGHTS 1034-42 (Bernard Schwartz ed., 1980) (reprinting the legislative record of responses to Madison's proposal that the House take up a Bill of Rights in June 1789 and showing that several members objected to taking up the subject because of other pending legislation relating to matters such as the revenue and the establishment of a federal judiciary); see also ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 206-07 (1955) (noting that "there were continual outcries" by members of the House "that more important business was pressing").

¹⁷⁹ Leach's *Crown Cases* was novel insofar as it presented reports of run-of-the-mill criminal trial rulings. Previous case reporters had concentrated on the appellate rulings or quasi-appellate rulings on reserved issues in the superior courts at Westminster. See T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 555, 560 n.363 (1999) (noting that the English Reports contain largely reports from the "central royal courts" and that Leach's *Crown Cases* is the earlier of only two reporters of "nominate reports" of ordinary criminal trials included in the English Reports).

¹⁸⁰ See, e.g., *Bram v. United States*, 168 U.S. 532, 551-52 (1897) (citing "Rex v. Thompson, (1783) 1 Leach, (4th ed.) 291" and "Cass' case, (1784) 1 Leach, 293" as pertinent authority for construing the Fifth Amendment right against self-incrimination). See also *infra* note 181.

Commentators have also misrelied on cases from 1 Leach's *Crown Cases* in making arguments about original meaning. See, e.g., Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 916-17 (1995) (describing *King v. Warickshall*, 1 Leach 263, 168 Eng. Rep. 234 (Old Bailey 1783), as "the leading English case [regarding the admissibility of physical evidence discovered by means of an improperly obtained confession] when the U.S. Bill of Rights was adopted in 1791").

¹⁸¹ Chief Justice Rehnquist's concurring opinion in *Crawford* also treated 1791 as the relevant date for assessing the relevance of English cases and cited a number of cases that were first published in Leach's *Crown Cases*. See *Crawford v. Washington*, 541 U.S. 36, 72 (2004) (Rehnquist, C.J., concurring) (citing *King v. Westbeer*, 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (Old Bailey, 1739)); *id.* at 69-70 (citing *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202 (K.B. 1779)); *id.* at 73 (citing *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353-54 (Old Bailey 1789)).

Chief Justice Rehnquist also implied that decisions in 1 Leach were relevant to the original content of the Fifth Amendment right against self-incrimination in his opinion for the Court in *United States v. Dickerson*, 530 U.S. 428 (2000). See *id.* at 433 (citing *King v. Rudd*, 1 Leach 115, 117-18, 122-23, 168 Eng. Rep. 160, 161, 164 (K.B. 1775) [incorrectly cited as "1783"]; *King v. Warickshall*, 1 Leach 262, 263-64, 168 Eng. Rep. 234, 235 (Old Bailey 1783) [incorrectly cited as "K.B."]).

Rights (a point I made in an article that was submitted to the Court in another case during the same term in which *Crawford* was decided).¹⁸²

The 1787, 1789, and 1791 English cases that Justice Scalia presented as though they comprised decisive authority for his cross-examination rule were actually irrelevant for assessing the Framers' understanding of the confrontation right. However, that was not the only problem with his reliance on those cases – they also did not show what his opinion implied.

2. What the 1787, 1789, and 1791 Cases Actually Stood For

As noted above, Justice Scalia claimed that the 1787, 1789, and 1791 English cases had “rejected” what he termed the “statutory derogation view” under which Marian depositions were admitted into evidence without regard to cross-examination.¹⁸³ Unfortunately, he stated that claim rather cryptically, and he did not say anything further that clarified its meaning.¹⁸⁴ I think that the claim can be construed

¹⁸² Because some justices and commentators had suggested or implied that the 1783 decision *King v. Warickshall*, 1 Leach 263, 168 Eng Rep. 234 (Old Bailey 1783), constituted evidence of the original understanding of the Fifth Amendment right against self-incrimination, *see supra* notes 180-81, I explained, in an article on the original understanding of that right, that Leach's *Crown Cases* had been published too late to provide credible evidence of the original meaning of the Fifth Amendment right. *See Davies, Chavez, supra* note 70, at 1023-28.

During the same term as *Crawford*, the Court addressed the issue of the admissibility of the physical “fruits” of an unwarned confession in *United States v. Patane*, 524 U.S. 630 (2004). In *Patane*, counsel for the defendant submitted a prepublication copy of my article and counsel explicitly called the Court's attention to my discussion of the invalidity of treating the *Warickshall* case as evidence of the original meaning of the Fifth Amendment. Happily, none of the justices invoked original meaning of the Fifth Amendment right or history in the decision in *Patane* – although there is no reason to assume that my article accounts for that silence. Unfortunately, the information regarding the inappropriateness of treating a case reported in Leach's *Crown Cases* as evidence of the original meaning of a provision in the Bill of Rights does not seem to have come to the attention of Justice Scalia, Chief Justice Rehnquist, or the clerks who were involved in writing the opinions in *Crawford* during the same term.

¹⁸³ *See supra* text accompanying note 153.

¹⁸⁴ Justice Scalia's statements regarding these three cases sometimes implied more than was literally said. Indeed, considering that these three cases were crucial to his historical claim, it is noteworthy that he actually said very little about them. For example, when he first cited the three cases in his opinion, he said only that they showed that English “courts were applying the cross-examination rule even to examinations taken by justices of the peace in felony cases[.]” *Crawford*, 541 U.S. at 46; *see supra* text accompanying note 154. However, this claim regarding “felony cases” could be read to refer only to the point that depositions which were improperly

in two slightly different ways, and that it is useful to disentangle these two possible interpretations as far as possible.

One way to understand Scalia's "reject[ion]" claim – which I think is the most natural way to read what he wrote in the context of his other statements, and which I suspect is how many readers of *Crawford* understand it – is that these three cases had ruled that Marian depositions were inadmissible unless there had been an opportunity for cross-examination in that particular case. In this section, I show that the cited cases did not say that the admissibility of a deposition depended upon a prior opportunity for cross-examination and thus they do not support this strong version of Scalia's "reject[ion]" claim.

The other possible interpretation of Scalia's "reject[ion]" claim, which is somewhat more nuanced, is that cross-examination simply always was, or at some point in time had become, a standard feature of Marian deposition practice itself, and thus Marian procedure actually satisfied the common-law cross-examination rule that Scalia attributed to *Paine*. I think this version of the "reject[ion]" claim is evident in early *nineteenth-century* English commentaries and in a discussion by Wigmore that Scalia cited and apparently drew inspiration from.¹⁸⁵ Thus, in the next section, I inquire whether there is

taken *outside of* Marian procedure (as was the case with *Woodcock* and *Dingler*) would have been inadmissible. Thus, that sentence could mean merely that *some* depositions in felony cases were *occasionally* ruled inadmissible. However, if that was the meaning, the assertion would have been of little consequence for the argument.

Likewise, Justice Scalia wrote in a later passage that the three cases "reveal[ed] [that] the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 54. However, in this statement he did not explicitly say anything about depositions admissible under the Marian statutes. The statement would be of virtually no consequence, however, unless it had been meant to include Marian depositions. Looking at these two statements alone, one might suspect that they were artfully written to lead the reader to imagine that they had claimed more than was actually said.

However, Justice Scalia also made a third statement in which he wrote that the three cases "rejected" the "statutory derogation view." *See id.* at 54 n.5. Because Scalia had used "statutory derogation" to describe the rule of admissibility under the Marian statutes, *see supra* text accompanying note 153, this statement would appear to indicate that Scalia must have meant for all three passages to assert that the 1787, 1789, and 1791 cases somehow altered the rule of admissibility under the Marian statutes themselves, even if he was not very explicit as to precisely how they altered it.

¹⁸⁵ Immediately after Scalia's first citation to the 1787, 1789, and 1791 cases in *Crawford* (*Radbourne*, *Woodcock*, and *Dingler*), Scalia also cited "3 Wigmore § 1364, at 23" and wrote:

Early 19th-century treatises confirm that [cross-examination] requirement.
See 1 T. STARKIE, EVIDENCE 95 (1826); 2 *id.*, at 484-92; T. PEAKE, EVIDENCE

evidence that cross-examination may have become a feature of English Marian practice by the end of the *eighteenth* century. I conclude, regarding this other version of the claim, that although evidence suggests some English judges may have begun to treat cross-examination as an aspect of Marian procedure roughly with, or shortly after, the time of the framing, no statements to that effect had been published in time to have informed the American understanding of the confrontation right when the Confrontation Clause was framed in 1789.

a. The 1787, 1789, and 1791 Cases Did Not Restrict the Admissibility of Marian Depositions of Unavailable Witnesses

The 1787, 1789, and 1791 English cases did not “reject” the previously stated rule that Marian depositions of unavailable witnesses were admissible in felony trials. Likewise, they did not limit the admissibility of such depositions according to whether there actually had been an opportunity for cross-examination of the witness. None of those cases actually ruled that a Marian deposition of an unavailable witness was inadmissible in a felony trial, or even questioned the admissibility of a genuine Marian deposition of an unavailable witness. Instead, one case discussed an *admissible* deposition of an unavailable witness and the other two cases discussed depositions that were inadmissible for the sole reason that they were taken *outside* of Marian procedure. None of these three cases stood for the proposition implied in Justice Scalia’s opinion – that a Marian deposition of an unavailable witness would be inadmissible unless there had been a prior opportunity for cross-examination.

i. The 1787 Case

In *King v. Radbourne*, the earliest of the three cases cited by Scalia (albeit with a “*cf.*” signal), a trial judge ruled

63-64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, *see* 11 & 12 Vict., c. 42, § 17, the change merely “introduced in terms” what was already afforded the defendant “by the equitable construction of the law.” *Queen v. Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C.J.).

Crawford, 541 U.S. at 47 (footnote omitted). I discuss these commentaries and statements *infra* notes 223-28 and accompanying text.

that a deposition of a deceased victim was *admissible* in a trial for petty treason and murder. The judge described the deposition at issue as having been taken “in the presence of the prisoner” and “heard by the prisoner,” presumably at the time of arrest.¹⁸⁶ However, the case report said nothing about the prisoner (that is, the arrestee) having any opportunity to take part in the deposition or to pose any questions to the deponent.¹⁸⁷ Further, there is a ready explanation for the explicit reference to the “presence of the prisoner.” *Radbourne* was not a simple murder case; because the defendant was a servant and had killed her mistress she was also charged with petty treason, a form of treason.¹⁸⁸ Thus, evidence in the trial was subject to the explicit requirement in the treason statutes – but not in the Marian felony statutes – that all evidence of treason be taken “in the presence of” the accused.¹⁸⁹ However, there is no reason to conclude that the “in the presence of” language in *Radbourne* imposed any condition on the admissibility of a Marian deposition of an unavailable witness in a trial that involved only a felony charge.¹⁹⁰

¹⁸⁶ King v. Radbourne, 1 Leach 457, 459, 461, 168 Eng. Rep. 330, 331-32 (Old Bailey 1787).

¹⁸⁷ *Id.* at 459-61, 168 Eng. Rep. at 331-32.

¹⁸⁸ See *id.* at 457, 168 Eng. Rep. at 330 (indictment for “feloniously and traitorously” killing her mistress); *id.* at 462, 168 Eng. Rep. at 333 (court refers to indictment for “petty treason”). A conviction for petty treason, a capital crime, could result in an extremely harsh form of execution. See the discussion of “petit treason” at 4 BLACKSTONE, *supra* note 65, at 75, 203-04.

¹⁸⁹ *Radbourne*, 1 Leach at 461-62, 168 Eng. Rep. at 333 (“[S]tatutes 5 & 6 Edw. 6, c. 11 s. 12 [which pertained to treason] . . . require[] . . . that the said accusers shall, if then living, be *brought in person before the party so accused*, and avow what they have to say against him; and these statutes not being repealed by the 1 & 2 Phil. and Mary, c. 10, which orders that all trials of treason shall be according to the course of the common law.” (emphasis added)). Note, however, that the treason statute said nothing regarding an opportunity for the accused person to cross-examine the witness, and that the treason statute contained an exception for a statement of a deceased witness (“if then living”).

The defendant in *Radbourne* was acquitted of petty treason because “the statute 1 Edw. 6, c. 12, s. 22,” required the evidence of two witnesses for petty treason, and that requirement was not met. However, she was nevertheless convicted of murder and executed for that crime. *Radbourne*, 1 Leach at 461-63, 168 Eng. Rep. at 332-33.

¹⁹⁰ However, Thomas Peake later cited *Radbourne* as though it did carry an implication for Marian depositions in an 1802 English commentary on evidence. See *infra* note 223 and accompanying text.

ii. The 1789 Case

Unlike *Radbourne*, the 1789 and 1791 cases Justice Scalia cited did rule that depositions taken from dying victims were inadmissible in murder trials (although the 1789 case allowed the statement to be admitted as a dying declaration¹⁹¹). However, neither case excluded a Marian deposition; rather, the depositions in those felony cases were excluded precisely because they *did not conform* to Marian procedure.

In the 1789 case *King v. Woodcock*, a justice of the peace had taken the deposition of a victim of a beating who died prior to the defendant's trial for murder.¹⁹² During the trial, the judge, Chief Baron Eyre, noted that the deposition could not be admitted under the Marian statutes because it had not been taken in connection with the defendant's arrest, as provided for in the Marian statutes.¹⁹³ Specifically, because the justice of the peace had taken the deposition separately at the poorhouse to which the victim had been taken prior to the arrest, rather than in connection with the arrest, Eyre concluded that the magistrate had acted "extrajudicial[ly]" beyond his authority. As a result, the deposition was legally unsworn and inadmissible for that reason.¹⁹⁴ Eyre also commented that because of the circumstances in which the deposition was

¹⁹¹ See *King v. Woodcock*, 1 Leach 500, 502-03, 168 Eng. Rep. 352, 353-54 (K.B. 1789) (leaving jury to determine whether the victim deponent knew she was dying, and thus whether her statement was admissible as a dying declaration; jury convicted defendant of murder, and defendant was executed). The usual framing-era rule was that only sworn statements could constitute evidence. See *infra* notes 297-98. However, it appears that a speaker's anticipation of imminent death was thought to assure truthfulness to the same degree as an oath. Thus, the dying declaration exception to the usual requirement of an oath applied only if there was proof that the speaker was aware that he or she was about to die. As explained in the text following, the judge in *Woodcock* ruled that the deposition was not properly authorized and thus not properly sworn, so it could not be admitted into evidence as a valid deposition; however, because it was taken when the speaker was aware of imminent death, it could be admitted, even though not sworn, as a dying declaration. In contrast, if there was no evidence that the speaker was aware of imminent death, then the statement would be inadmissible. See *infra* note 198.

¹⁹² *Woodcock*, 1 Leach at 500-01, 168 Eng. Rep. at 352.

¹⁹³ *Id.* at 502, 168 Eng. Rep. at 353.

¹⁹⁴ *Id.* at 502, 168 Eng. Rep. at 353 (reporting that the judge stated that because the deposition ("examination") of the victim was taken outside of Marian procedure, the deposition was not "upon oath, judicially taken" and, hence, the court "must strip this examination of the sanction to which it would have been entitled, if it had been taken pursuant to the directions of the Legislature"). Note that this reflects the logic of deposition authority set out *supra* note 106. The judge's description of the deposition as "extrajudicial" appears to mean that the deposition would have been invalid as evidence and inadmissible even if the arrestee had been present when it was taken and even if the arrestee had been allowed to cross-examine the witness.

taken, “the prisoner therefore had no opportunity of contradicting the facts [the deposition] contains.”¹⁹⁵ However, the case report did not indicate that Eyre referred to the lack of an opportunity for cross-examination as such, and that silence is noteworthy because he did refer to cross-examination in the context of a trial.¹⁹⁶

Moreover, contrary to the implication a reader might draw from the citation to *Woodcock* in *Crawford*, Eyre did *not* question – let alone “reject[]”¹⁹⁷ – the admissibility of a Marian deposition. To the contrary, he explicitly stated that “[a Marian] deposition, if the deponent should die between the time of the examination and the trial of the prisoner, may be substituted in the room of that given *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact.”¹⁹⁸

¹⁹⁵ *Woodcock*, 1 Leach at 502, 168 Eng. Rep. at 353.

¹⁹⁶ *Id.*, 168 Eng. Rep. at 353. Baron Eyre referred only to the “opportunity of contradicting,” not of cross-examining, when discussing the inadmissibility of the out-of-court deposition. The omission of cross-examination is noteworthy because he had previously referred to testimony during a trial as being “in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give.” *Id.* at 501, 168 Eng. Rep. at 352. Eyre’s comment that the prisoner could not “contradict” the witness’s statement seems to refer to what the arrestee could say; he may have meant that the prisoner would be unfamiliar with what the witness had said when the prisoner attempted to exculpate himself. See *infra* text accompanying notes 218-19.

However, Professor Langbein has treated the reference to “contradict” in *Woodcock* as “the first judicial mention of [the want of cross-examination] rationale for excluding what we would call hearsay” LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 238. Langbein’s assessment that this was the first mention of cross-examination is especially significant because he based that assessment on his examination of the Old Bailey Session Papers as well as the published case reports. *Id.* In particular, he noted that when judges excluded a statement of an allegedly murdered boy in an earlier 1785 case in the Old Bailey, they referred solely to the fact that it was unsworn, but did not mention any concern with the lack of cross-examination. See *id.* at 238 n.267. Thus, although I am not convinced that Langbein was correct in viewing Eyre’s comments in *Woodcock* as a reference to cross-examination, Langbein’s analysis of the 1785 case does make it fairly certain that the concern with cross-examination did not appear any earlier than the 1789 ruling in *Woodcock*.

¹⁹⁷ See quotation from *Crawford* *supra* note 153 (describing *Woodcock* as having “rejected” the “statutory derogation view” that Marian depositions were admissible without regard to cross-examination).

¹⁹⁸ *Woodcock*, 1 Leach at 501-02, 168 Eng. Rep. at 353.

But beyond this kind of evidence [taken during trials,] there are also two other species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of a particular Act of Parliament [i.e., the Marian statutes], which authorizes Magistrates to take such examinations, and directs that they shall be returned to the Court of Gaol Delivery. This last species of deposition, if the deponent should die between the time of the examination and the trial of the prisoner, may be

iii. The 1791 Case

Like *Woodcock*, the report of the 1791 case *King v. Dingler* dealt with a deceased victim's deposition that had been taken outside of Marian procedure. A magistrate had taken the deposition of the dying victim the day after the arrest, rather than in connection with the arrest.¹⁹⁹ The defendant's counsel argued that when Marian procedure is followed, "the prisoner may have, as he is entitled to have, the benefit of cross-examination" but that "as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination."²⁰⁰ (As I discuss below, this case, the report of which was not published until 1792,²⁰¹ seems to be the first in which there was an explicit assertion, albeit only by counsel, that a prisoner would have had a right to cross-examine during a Marian deposition of a witness.²⁰²) However, the report of *Dingler* does not indicate that the judge referred to a loss of cross-examination in his ruling. Rather, it states only that "[t]he Court, on the authority of the case cited [that is, *Woodcock*] admitted the objection, and refused to receive the examination into evidence."²⁰³

Thus, this case also did not "reject[]" the rule that statements taken from absent witnesses pursuant to the Marian statutes were admissible in felony trials.²⁰⁴ Except for counsel's novel hypothetical claim, the case did not address

substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact.

Id. at 501-02, 168 Eng. Rep. At 352-53 (citation omitted); *see also* the statement quoted regarding the "legislative sanction" for admitting properly taken Marian depositions in the parenthetical *supra* note 194.

¹⁹⁹ *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey 1791). The defendant had already been "committed" to await trial when the deposition was taken "[o]n the ensuing day." *Id.* The introductory case note also states that the deposition was taken "in the absence of the prisoner," *id.*, but that probably was added when the English Reports were published in the mid-nineteenth century.

²⁰⁰ *Id.* at 562, 384. The prosecuting counsel conceded that the deposition was "not taken strictly in pursuance of [the Marian statutes]," but there is no record of any comment on the cross-examination argument. *Id.*

²⁰¹ *See supra* note 164 and accompanying text.

²⁰² *See infra* note 220 and accompanying text.

²⁰³ *Dingler*, 2 Leach at 562, 168 Eng. Rep. at 384. Unlike *Woodcock*, the deposition in *Dingler* did not constitute a dying declaration. *See id.*, 168 Eng. Rep. at 384 (counsel for the crown conceded that the deposition was not a dying declaration).

²⁰⁴ *See* quotation from *Crawford* set out *supra* note 153 (describing *Dingler* as having "rejected" the "statutory derogation view" that Marian depositions were admissible without regard to cross-examination).

Marian depositions. The bottom line is that none of the three cases Scalia cited actually dealt with the admissibility of Marian depositions.

b. The Possibility That Marian Procedure Itself Provided an Opportunity for Cross-Examination

The more nuanced interpretation of Justice Scalia's claim that the 1787, 1789, and 1791 cases "rejected" what he termed the "statutory derogation view"²⁰⁵ is that those cases demonstrated that Marian procedure itself provided an opportunity for cross-examination. Was that the case?

Did Marian procedure itself usually include an opportunity for a defendant to cross-examine an adverse witness during the taking of the witness's deposition? Unfortunately, it does not appear that any direct evidence of how Marian depositions were taken has survived. For example, I have not located any reports of surviving copies of Marian depositions. In addition, the short descriptions of Marian procedure in the treatises and justice of the peace manuals stop short of prescribing actual practice beyond requiring that an accuser or witness be deposed under oath. The published cases and commentaries do seem to indicate that English practice was moving in the direction of providing an opportunity for cross-examination as an aspect of Marian procedure itself toward the end of the eighteenth century. However, the salient point for the present inquiry is that no published statement to that effect had appeared in any source that the American Framers could have had access to in 1789 (or even in 1791).

The Marian statutes themselves did not say anything about cross-examination. Although they provided that the examination of the arrestee and the depositions of witnesses were to be taken in connection with bailment or commitment of an arrestee, and although those processes would have promptly followed an arrest, the statutes did not even say that the arrestee had to be present during the depositions of witnesses.²⁰⁶ The only statement I have located as to whether

²⁰⁵ See *supra* note 153.

²⁰⁶ In fact, the Marian statutes set out the requirement of the "examination" of the arrestee first, and then refer to the requirement of taking the "information" of the witnesses who brought the arrestee. See *supra* notes 75-76 and accompanying text.

arrestees were present for a Marian witness deposition is a statement by an English historian in an 1883 work to the effect that Marian depositions were *not* taken in the prisoner's presence – although that writer presented no evidence for that conclusion.²⁰⁷ (Justice Scalia cited that historical work for another proposition, but did not mention that specific statement in *Crawford*,²⁰⁸ although Justice Thomas had quoted that statement in a prior opinion that Justice Scalia had joined, and that statement was also invoked in two briefs filed in *Crawford*.²⁰⁹) Of course, it also goes without saying that, even if the arrestee had been present for the taking of a witness's Marian deposition, he would not have been represented by counsel at that time.

The important point is that none of the published statements about Marian depositions that were available in America prior to the framing of the Confrontation Clause make any reference to the arrestee being present during the taking of a witness's deposition. For example, the statement by the judges in the Modern Reports version of *Paine* – that the deposition should be inadmissible because “the defendant was not present when they were taken, and therefore had not the benefit of a cross examination” – plainly did not refer to Marian

²⁰⁷ 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (1883) [hereinafter 1 J. STEPHEN] (contrasting the taking of depositions of witnesses under the Marian statutes and under “the statute of Victoria,” (the 1848 legislation discussed *infra* note 227 and accompanying text)). Stephen asserted that in Marian procedure “[t]he prisoner had no right to be, and probably never was, present” during depositions of witnesses. *Id.* He also asserted that “there is evidence to show that the prisoner was not allowed even to see [such depositions].” *Id.*

Stephen did not set out evidence for either claim, however, it appears that the defendant was not given access to a witness's Marian deposition during the early nineteenth century. *See* Harrison's Case, 1 Lewin 67-68, 168 Eng. Rep. 962 (Lancaster Sp. Assizes 1829) (refusing defense counsel's request to see “the depositions taken before the magistrate” because “[i]t is against the rule”). If one assumes that the general trend in English law was to increase the protections afforded the defendant, this suggests that defendants also would not have been permitted to see Marian depositions during the eighteenth century.

²⁰⁸ *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (citing 1 J. STEPHEN, *supra* note 207, at 326) (quoting Stephen's book on the emergence of a demand for cross-examination after the famous treason trials of the late sixteenth and early seventeenth centuries).

²⁰⁹ Justice Thomas had previously quoted Stephen's statement in his concurring opinion, joined by Scalia, in *White v. Illinois*, 502 U.S. 346, 361 (1992) (“These interrogations [by magistrates] were ‘intended only for the information of the court. The prisoner had no right to be, and probably never was, present.’ 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (1883).”). The quoted statement by Stephen was also quoted or cited in two briefs filed in *Crawford*. *See* Petitioner's Brief, *supra* note 28, at 13 (quotation); Amicus Brief of the United States, *supra* note 28, at 11 (citation and paraphrase).

deposition procedure because the judges had clearly stated that Marian felony procedure did not apply to the misdemeanor case at hand.²¹⁰ Hence, it appears that the judges in *Paine* were simply saying that the deposition offered did not comport with the usual procedure for non-Marian depositions, derived from chancery and civil procedure.²¹¹

Similarly, none of the pre-framing editions of the treatises by Hale, Hawkins, Gilbert, or Buller suggested that Marian depositions called for the arrestee to be present or allowed for the arrestee to cross-examine the witness.²¹² It is especially noteworthy that both Hale and Hawkins identified several conditions that had to be met for a Marian deposition to be admitted, but did not include cross-examination, or even the taking of the deposition in the presence of the arrestee, among them.²¹³ Similarly, it is noteworthy that Hawkins and Gilbert described the reference to cross-examination in the Modern Reports version of *Paine* as being distinct from Marian depositions. It seems unlikely they would have drawn that distinction if they had understood that Marian depositions provided an opportunity for cross-examination.²¹⁴ The silence in the treatises as to the presence of the arrestee is significant because it strongly suggests that the arrestee played no role in Marian deposition practice. Surely, if cross-examination had been understood to be a usual feature of Marian procedure, someone would have written as much.

Likewise, the apparently unquestioned rule that a Marian deposition of an unavailable witness taken by a coroner was admissible in a subsequent felony homicide trial seems to refute any assumption of an implicit cross-examination standard.²¹⁵ Because no one would necessarily have been

²¹⁰ King v. Paine, 5 Mod. 163, 165 (K.B. 1696); see also *supra* notes 107-09 and accompanying text.

²¹¹ An opportunity for cross-examination was a requisite for a valid deposition in civil litigation. See *supra* note 127 (setting out Gilbert's discussion of cross-examination in depositions taken in civil cases).

²¹² See *supra* notes 81, 83 (HALE), 128 (GILBERT), 136 (HAWKINS, PLEAS), 137 (HAWKINS, SUMMARY), 148 (BULLER), and accompanying text.

²¹³ See *supra* notes 83 (HALE), 136 (HAWKINS, PLEAS), 137 (HAWKINS, SUMMARY), and accompanying text.

²¹⁴ See *supra* note 140 and accompanying text (discussing Hawkins's juxtaposition of the reference to the loss of cross-examination in *Paine* with the admissibility of Marian depositions in felony trials).

²¹⁵ The Marian statutes provided for depositions before a coroner. See *supra* note 74 and accompanying text. Moreover, a deposition taken by a coroner of a witness who had died, was unable to travel, or was detained by means or procurement of the accused was admissible in a subsequent homicide – that is, felony – trial. See, e.g.,

accused or arrested for homicide prior to the conclusion of a coroner's inquest into a suspicious death, depositions taken by a coroner would not necessarily even have been taken in the presence of the person later accused, let alone have provided an opportunity for that person to cross-examine witnesses. Thus, although Justice Scalia passed quickly over the subject of coroner's depositions,²¹⁶ it seems quite unlikely that cross-examination could have been a condition for admitting into evidence Marian depositions taken by coroners.

It is true that *post-framing* English authorities suggested that Marian procedure might involve cross-examination – but the important point is that the published statements to that effect became available in America only after the Confrontation Clause already had been drafted. The first published suggestion – hint might be more accurate – that Marian depositions provided an opportunity for cross-examination appeared in the 1789 *Woodcock* case (which, again, the Framers could not have been aware of when the Confrontation Clause was framed²¹⁷). Even there, Baron Eyre commented only that because the non-Marian deposition at issue had been taken in the defendant's absence, “the prisoner therefore had no opportunity of contradicting the facts [the deposition] contains,” but did not refer to the defendant's lost opportunity to cross-examine as such.²¹⁸ Of course, one cannot be sure that Eyre did not simply conflate “contradict” and “cross-examine,” but he may well have intended to distinguish between the two. In particular, being present and hearing a deposition might have been advantageous to a defendant even if he was not permitted to pose questions to the witness. If a defendant was not present when a deposition was taken, and also was not provided with a copy of a witness's deposition (which seems to have been the rule²¹⁹), the defendant would

supra notes 136 (HAWKINS, PLEAS), 137 (HAWKINS, SUMMARY), 128 (GILBERT), 148 (BULLER), and accompanying text. Note that Peake still recognized the admissibility of depositions taken by coroners in his 1802 commentary. *See infra* note 223.

²¹⁶ Crawford v. Washington, 541 U.S. 36, 47 n.2 (2004) (stating that “[t]here is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes,” but basing that “question” primarily on nineteenth-century American state cases, while omitting any mention of the statements from the treatises, set out *supra* note 215, endorsing the admissibility of such depositions).

²¹⁷ *See supra* notes 176-77 and accompanying text.

²¹⁸ King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep.352, 353 (Old Bailey 1789); *see supra* notes 195-96 and accompanying text.

²¹⁹ *See supra* note 207 and accompanying text.

have been at a disadvantage in preparing his own statement for his own Marian examination as well as his defense for trial. Thus, not being present for a witness's deposition would have been a disadvantage even if the defendant would not have been permitted to cross-examine the witness during the deposition. In any event, however, it was not until the 1791 *Dingler* case (which was not published until 1792, after even the ratification of the Bill of Rights) that there was an explicit suggestion made by defense counsel that the defendant would have had an opportunity to cross-examine the witness if Marian procedure had been adhered to when the deposition was taken.²²⁰

Admittedly, there is evidence that English commentators soon expansively construed *Woodcock* and *Dingler* as though they meant that Marian procedure should provide for cross-examination. Thomas Leach, who published those cases in 1789 in his *Crown Cases*, commented on those two cases when he published a substantially revised and expanded edition of Hawkins's *Pleas of the Crown* in 1795 (six years after the framing of the Bill of Rights). Although he did not alter the passages from the earlier editions of Hawkins's treatise regarding both the admissibility of Marian depositions of unavailable witnesses and *Paine*,²²¹ he added an entirely new section, with marginal citations only to the 1789 *Woodcock* and 1791 *Dingler* cases, to the effect that an arrestee would have an opportunity to contradict or cross-examine witnesses during the post-arrest Marian procedure.²²²

Seven years later (thirteen years after the framing of the American Bill of Rights), Thomas Peake's 1802 commentary cited the 1787 *Radbourne* case as though it had

²²⁰ See *supra* note 200 and accompanying text.

²²¹ See *supra* notes 136, 140 and accompanying text.

²²² Leach added the following section to Hawkins's treatise:

Sect. 25. And it has been held, that an examination of a person murderously wounded, taken by a justice of the peace, at the poor-house of the parish, on oath, and regularly signed, but in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of Phillip and Mary direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alledged.

4 HAWKINS, PLEAS (1795), *supra* note 132, at 423 (emphasis omitted). Note that this discussion of *Woodcock* treats the reference to the "extrajudicial" character of the deposition as though it referred to the lack of cross-examination. However, the case report actually used the term "extrajudicial" in connection with the lack of any authority for a justice of the peace to take a deposition outside of Marian post-arrest procedure. Baron Eyre's comment about the lack of an opportunity for contradicting the accusations was stated as a separate point. See *supra* note 195 and accompanying text.

imposed a requirement that Marian depositions be taken “in the presence” of the arrestee, but did not mention an opportunity to cross-examine as such.²²³ In 1818 (twenty-nine years after the framing), a case report was published in London in which an English judge expressly treated an opportunity for cross-examination as a condition for admitting a Marian deposition.²²⁴ Then in 1824 (thirty-five years after the

²²³ THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 40-41 (Philadelphia 1802) [hereinafter PEAKE, EVIDENCE]; (reprinted London 1808) [hereinafter PEAKE, EVIDENCE (1808)]; see also *Crawford v. Washington*, 541 U.S. 36, 47 (2004) (citing PEAKE, EVIDENCE (1808), at 63-64). The relevant passage is as follows (I have indicated in brackets where the case citations in the margins appear to relate to the text):

While on the subject of depositions, it may not be improper to mention those taken by Magistrates under the [Marian statutes] On these statutes it has been holden; that if in a case of felony one magistrate takes the deposition on oath of any person in the presence of the prisoner, whether the party wounded, or even an accomplice; and the deponent dies before the trial, the depositions may be read in evidence; but if the prisoner be not present at the time of the examination, it cannot be read as a deposition taken on oath [marginal citation to *Radbourne*], though in cases where a party wounded was apprehensive of, or in imminent danger of death, it may be received as his dying declaration [a marginal citation indicates this refers to *Dingler*]. This act of parliament only extends to cases of felony, and therefore such examination cannot be read on an information for a libel [a marginal citation indicates this refers to *Paine*].

In like manner depositions taken before a coroner, may, in case of the death or absence beyond sea, of the witness, be used on a trial for murder.

PEAKE, EVIDENCE at 40-41. Scalia cited the comparable passage from the third 1808 edition. *Crawford*, 541 U.S. at 47 (citing PEAKE, EVIDENCE (1808), at 63-64).

Note that Peake ignored the petty treason aspect of the 1787 *Radbourne* case and incorrectly asserted that it meant that Marian depositions were inadmissible unless they were taken “in the presence of” the arrestee. Note, too, that Peake did not refer to a cross-examination requirement as such.

²²⁴ See *King v. Smith*, Holt 614, 171 Eng. Rep. 357 (Newcastle Summer Assizes 1817) (case report published 1818). The issue was whether a Marian deposition of a deceased victim was properly admitted in a murder trial. Justices of the peace had begun taking the deposition of the victim of an assault before the accused was brought into the room, but the deposition taken up to that point was then read to the accused, and he was given an opportunity to cross-examine the victim, but declined to do so. According to Holt’s report, Chief Baron Richards, who presided over the trial, observed that although the Marian statutes did not mention that a witness’s deposition had to be taken in the presence of the prisoner, “the decisions established the point, that the prisoner ought to be present, that he might cross-examine.” Nevertheless, because the accused was given an opportunity to cross-examine but declined to do so, Richards ruled that the deposition was admissible, and the accused was convicted of murder. *Id.* at 616-17, 171 Eng. Rep. at 360. Significantly, the only prior decision cited in the case report was the 1787 decision in *Radbourne* (discussed *supra* text accompanying notes 186-90); hence, it appears that that case was the authority that Richards referred to.

Prior to the execution of sentence, Richards referred the issue of the admissibility of the deposition to the Twelve Judges of England (of which he was one), and that body affirmed the conviction; the defendant was then executed. *Id.* at 616, 171 Eng. Rep. at 360.

framing), Thomas Starkie's commentary on the law of evidence cited the 1789 *Woodcock* and 1791 *Dingler* cases – without actually discussing them – in the course of advocating that Marian depositions *should* provide for cross-examination.²²⁵

There are two other reports of the case. A report by Starkie gave a similar description of the issue and ruling at trial. See *King v. Smith*, 2 Stark. 208, 171 Eng. Rep. 622, 623 (1820). Another report by Russell and Ryan indicates that there were actually two issues regarding the admission of the deposition – whether the deposition had been taken in conformity with the Marian statutes and whether an examination taken when the charge was assault and robbery could be admitted, after the victim died, in a trial for the different charge of murder. See *King v. Smith*, Russ. & Ry. 339, 340-41, 168 Eng. Rep. 834, 835 (1825).

Although this case went to the Twelve Judges, none of the three reports does more than report that that body affirmed the admissibility of the deposition. Hence, it is unclear precisely what issue the Twelve Judges addressed.

²²⁵ THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE (1824); see also *Crawford*, 541 U.S. at 47 (citing 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 95 (1826) [hereinafter 1 STARKIE (1826)]; 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 484-92 (1826) [hereinafter 2 STARKIE (1826)]). I have located only an 1826 Boston reprinting of the first edition of this work.

The first passage cited by Scalia is a general statement: “Thus the depositions of witnesses before magistrates, under the statutes of Philip and Mary, are not evidence, unless the prisoner had an opportunity to cross-examine those witnesses (q)” 1 STARKIE (1826), *supra*, at 96, cited in *Crawford*, 541 U.S. at 47.

Footnote (q) cites a later discussion of depositions in the second volume. That latter discussion first describes the Marian statutes and then states that Marian “depositions in case of felony, being warranted by [the Marian] statutes, become evidence in particular cases, upon general principles of evidence, that objection having been removed by the statutes which would otherwise have operated to their exclusion, namely, that they were extra-judicial. 2 STARKIE (1826), *supra*, at 486. (Note that this restates the logic of authority regarding depositions set out *supra* note 106.)

A subsequent passage asserts that “the prisoner has had the power to cross-examine the witness [when the Marian deposition was taken], but this was at a time and under circumstances very disadvantageous to the prisoner.” 2 STARKIE (1826), *supra*, at 487. This work then states the following:

It must be proved, that the depositions were taken conformably with the statutes, since any other would be extra-judicial; that they were taken on oath; that they were taken in the presence of the prisoner; for where the informations are taken by a magistrate, the words of the statute strongly imply that the prisoner is supposed to be *present*, for the Justice is to take the examination of the prisoner, and the information of those who bring the prisoner; and if they were to be taken in the prisoner's absence he would lose the benefit of cross-examination, and consequently the evidence, in principle, would not be admissible; the effect of the statutes, seems to be not to alter any rule of evidence, but only to make a particular proceeding regular, which otherwise would have been irregular, and so leave it subject to the ordinary rules of evidence (c).

2 STARKIE (1826), *supra*, at 487-88 (emphasis in original) (notes (a) and (b) omitted). However, it is significant that Starkie cited no authority regarding the need for cross-examination or for the presence of the prisoner except that footnote (c) at the end of the passage cited a statement, in dicta, by of one of the judges in the 1790 *Eriswell* case, *King v. Eriswell*, 3 T.R. 707, 710, 100 Eng. Rep. 815, 817 (K.B. 1790) (discussed *supra* note 122), who had referred to the 1696 ruling in *Paine* (discussed *supra* notes 98-123 and accompanying text). He also referred to the 1789 ruling in *Woodcock* (discussed *supra* notes 192-97 and accompanying text) and the 1791 ruling in *Dingler* (discussed *supra* notes 199-204 and accompanying text). See 2 STARKIE (1826), *supra*, at 488-89.

Although Parliament did not address the cross-examination issue when it revised Marian procedure in 1826,²²⁶ Parliament did make cross-examination a condition for admitting depositions of witnesses in felony trials in 1848 (fifty-nine years after the framing of the Confrontation Clause).²²⁷ Then in 1854, Chief Judge Jervis of the English Court of Criminal Appeals (who had been a principal author of the 1848 statute) suggested that even before the 1848 legislation, the “equitable construction” of the Marian statutes had implied that there should be an opportunity for cross-examination during Marian depositions of witnesses.²²⁸ And, later still, Wigmore followed Starkie and cited the 1789 *Woodcock* case in a discussion of the emergence of cross-examination as a test for admitting hearsay (although he did not refer to the Confrontation Clause itself in that discussion).²²⁹

However, the noteworthy point for present purposes is that Starkie cited no authorities between the 1696 ruling in *Paine* and the 1789 ruling in *Woodcock*. It is also significant that Starkie asserted only that the statute “strongly impl[ies]” that the prisoner need be present, and that a deposition would be inadmissible “in principle” if there had not been cross-examination. All in all, although the passage clearly endorses a cross-examination requirement for Marian depositions, it stops short of showing that any such rule had already become settled.

²²⁶ See generally 7 Geo. IV, c. 64 (1826) (Eng.).

²²⁷ 11 & 12 Vict., c. 42, § 17 (1848) (Eng.). The statute provided that a deposition of a witness could be admitted as evidence in a criminal trial if the witness was dead or unable to travel and the prisoner had had a full opportunity of cross-examination.

²²⁸ See *Crawford*, 541 U.S. at 47 (quoting *Regina v. Beeston*, 29 Eng. Rep. L. & Eq. 527 (Ct. Crim. App. 1854) (Jervis, C.J.)). In *Beeston*, the English judges ruled that a deposition of an unavailable witness could be admitted in a trial for murder even though the charge at the time the deposition had been taken had been for grievous wounding. Chief Judge Jervis stated that the admission of the deposition was proper because the defendant “had a full opportunity of cross-examination” when the deposition of the deceased victim had been taken. *Beeston*, 29 Eng. Rep. at 529. Jervis also commented that the 1848 statute, which explicitly required an opportunity for cross-examination as a condition for admission of a deposition as evidence, had “introduced in terms the principle that the prisoner should have the full opportunity of cross-examination, which he formerly had only by the equitable construction of the law.” *Id.* Although Jervis’s statement may suggest that “equitable” English magistrates might have permitted defendants to cross-examine witnesses during Marian depositions sometime prior to the 1848 legislation, it hardly amounts to direct evidence that cross-examination had become part of Marian depositions in England by 1789, let alone that the Framers of the Confrontation Clause would have been aware of any such development.

²²⁹ See 3 WIGMORE, *supra* note 50, § 1364, at 23 n.58 and accompanying text; see also *Crawford*, 541 U.S. at 47 (citing 3 WIGMORE, *supra*). However, a close examination of this discussion reveals that Wigmore is not a trustworthy historian. For example, Wigmore asserted that the “general rule, from the early 1700s, was clearly understood to exclude alike sworn and unsworn statements made without opportunity . . . for cross-examination.” 3 WIGMORE, *supra* (text preceding note 51).

Woodcock, *Dingler*, and the subsequent expansive characterizations of those cases by Leach, Peake, and Starkie indicate that a cross-examination standard for Marian depositions probably emerged in England sometime prior to the 1848 legislation, most likely in the course of a more general elaboration of the law of evidence by judges and commentators. However, those sources do not indicate that cross-examination had become a regular part of English Marian procedure prior to the last decade or so of the eighteenth century. Moreover, the absence of earlier evidence of a cross-examination rule seems to be consistent with what is known regarding the more general shift in the law of evidence from concern with oaths to concern with cross-examination toward the end of the eighteenth century.²³⁰ The important point for assessing the original

However, the only evidence given for that “general rule” was a statement by a New York judge “writing just two centuries later” in an 1889 case! *Id.* & n. 60.

Additionally, Wigmore downplayed the significance of the rule of admissibility regarding Marian depositions by omitting any mention that such depositions were standard in felony cases. For example, he referred to statutory authorization for the admission of “the sworn examination of witnesses before justices of the peace in *certain cases*” without identifying felony cases as the “*certain cases*.” *Id.* (text preceding note 58). Likewise, when discussing *Paine*, Wigmore stated that “the use of examinations before coroners and justices rested on the special statutory authority given them to take such depositions” – but again did not state that that “special” authority applied generally to felonies. *Id.* at n.52.

Similarly, Wigmore cited *Woodcock* as a case in which “[the record of a] justice of the peace’s examination of the victim of an assault [was] excluded.” *Id.* at n.58. However, that was not very accurate: the court actually ruled in *Woodcock* that because the deposition was not taken within Marian procedure, the statement was “extrajudicial” and thus, as a legal matter, did *not* actually constitute a sworn statement taken by a justice of the peace. *See supra* text accompanying note 194.

It should also be noted that Wigmore did not discuss the original meaning of the Confrontation Clause itself, but merely concluded that a prior opportunity for cross-examination had become a condition for admitting hearsay statements by “the end of the 1700s.” *See* 3 WIGMORE, *supra* note 50, § 1364, at 23. Of course, “the end of the 1700s” is a decade too late for assessing the original meaning of the Sixth Amendment.

²³⁰ The appearance of the statements in the nineteenth-century commentaries is consistent with the pattern that Professor Gallanis noted in his study of the emergence of hearsay doctrine. Specifically, Gallanis found that concern with hearsay was focused on lack of an oath until virtually the end of eighteenth century, when the lack of an opportunity for cross-examination emerged as the primary concern. 2 M. POTHIER, TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS (William David Evans, Esq., trans., Philadelphia, 1826). He noted that in the English treatises, “[t]he more modern concern – the absence of cross-examination – appeared first in Lofft’s 1791 revision of Gilbert,” and that the lack of cross-examination did not emerge as a stronger concern than the concern with the lack of an oath until an 1826 treatise. *See* Gallanis, *supra* note 179, at 533 (discussing 2 GILBERT (1791), *supra* note 123 at 890, and SIR WILLIAM EVANS’S APPENDIX ON EVIDENCE, contained in 2 M. POTHIER, TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS (William David Evans, Esq., trans., Philadelphia, 1826)). *See also* Gallanis, *supra* note 179, at 537 (reporting that discussions of the purpose of the hearsay rule generally centered on the need for an

meaning of the Confrontation Clause is that all of these English statements regarding cross-examination in Marian depositions were published too late to have informed the framing of the Confrontation Clause in 1789.

The bottom line for the present inquiry is that the statements in the English authorities that were available in America early enough to have informed the original meaning of the Confrontation Clause did not indicate that cross-examination had become an aspect of Marian deposition procedure or that an opportunity for cross-examination had become a condition for admitting a Marian deposition of an unavailable witness. Rather, the English authorities available in America prior to the framing simply indicated that Marian depositions of unavailable witnesses were admissible as evidence in felony trials.

Thus, regardless of which way one construes Justice Scalia's claim that the 1787, 1789, and 1791 cases "rejected" the "statutory derogation view," it is clear that the English authorities that were available in framing-era America did not indicate that the admissibility of a Marian witness deposition depended upon an opportunity for cross-examination. Indeed, the weight of the evidence from American framing-era sources indicates that Americans simply understood that Marian depositions of unavailable witnesses were admissible evidence in felony trials.

F. What Framing-Era American Sources Show

Of course, the absence of a cross-examination rule for Marian depositions in English sources does not necessarily rule out the possibility that Americans might have developed a stronger conception of the confrontation right on their own. Justice Scalia asserted that post-framing American state cases indicate that framing-era Americans had embraced his cross-examination rule. Specifically, he made several assertions to the effect that "numerous early state-court decisions make

oath during the eighteenth century and on the desirability of cross-examination during the nineteenth century).

Professor Langbein seems to concur with Gallanis' analysis. For example, Langbein notes that concern with cross-examination was "muted" during the eighteenth century. LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 238, 245. Likewise, Langbein has indicated that a concern with cross-examination was not apparent as late as a 1785 Old Bailey case, but appeared for the first time in the 1789 *Woodcock* case. *See supra* note 196.

abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it.”²³¹

However, here too, Justice Scalia’s evidence falls short of supporting his claim. Specifically, only one of the American cases that Scalia cited was both relevant and genuinely “early.” Moreover, he ignored other framing-era American sources that indicated continued acceptance of the admissibility of Marian depositions of unavailable witnesses.

1. Justice Scalia’s “Numerous Early State-Court Decisions”

In all, Justice Scalia cited eleven cases from seven American states decided between 1794 and 1858 as evidence that his cross-examination rule was part of the original understanding of the Confrontation Clause.²³² However, cases decided more than a few decades after the framing do not constitute valid evidence of original meaning. Rather, because conditions changed rapidly during the early decades of the Republic – and because criminal justice institutions began to change as well – the value that *post-framing* statements hold for making backward-looking inferences about what the Framers “must have” thought at the time of the framing falls off rather sharply as the distance from the framing-era increases.²³³

²³¹ *Crawford*, 541 U.S. at 55 n.5. See also *id.* at 54 (referring to “[t]he numerous early state decisions applying the [cross-examination rule]”); *id.* at 50 (referring to “[m]any” such decisions).

²³² *Crawford*, 541 U.S. at 49-50 (citing (starting with the earliest): (1) *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794); (2) *State v. Atkins*, 1 Tenn. (1 Overt.) 229 (Super L. & Eq. 1807); (3) *Johnston v. State*, 10 Tenn. 58, 59 (Err. & App. 1821); (4) *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); (5) *State v. Hill*, 20 S.C.L. 607, 608-10 (App. 1835); (6) *Commonwealth v. Richards*, 35 Mass. 434, 437 (1837); (7) *Bostick v. State*, 22 Tenn. 344, 345-46 (1842); (8) *State v. Campbell*, 30 S.C.L. 124 (App. L. 1844); (9) *Kendrick v. State*, 29 Tenn. 479, 485-88 (1850); (10) *United States v. Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (C.C. Ill. 1851); (11) *State v. Houser*, 26 Mo. 431, 435-36 (1858)).

²³³ Post-framing statements can be important evidence of *discontinuity*. For example, if one traces a modern conception back in time, and it disappears from doctrinal statements before one gets to the framing, that is a strong indication that the modern conception arose only after the framing. See, e.g., Davies, *Original Fourth*, *supra* note 2, at 611-18 (noting that the absence of any references to a “reasonableness” standard in post-framing discussions of search and seizure principles indicates that there was no such concept in the original understanding of the Fourth Amendment).

However, post-framing statements, standing alone, are less potent as evidence of what was included in the original meaning, because there usually is no way

The significant point is that only two of the “numerous early” state cases that Scalia cited were decided prior to 1820 – that is within three decades of the framing. The others were simply too distant from the framing to constitute plausible evidence of original meaning.²³⁴ Moreover, one of those two cases, the 1807 Tennessee ruling in *State v. Atkins*, actually was not germane.²³⁵ Thus, Scalia’s American evidence boils down to a single source, the 1794 North Carolina case *State v. Webb*.²³⁶

to discern whether they actually reflect a continuing understanding or merely the appearance of a novel understanding.

²³⁴ By 1820, published endorsements of cross-examination had appeared in the *post-framing* English commentaries by Leach, *see supra* note 222, and Peake, *see supra* note 223, and also in a published report of *Smith*, *see supra* note 224. Hence, American state court decisions that adopted a cross-examination rule after that date may simply reflect *post-framing* developments, rather than the original American understanding of the confrontation right.

Of course, later American commentaries are of no more relevance. In addition to citing the nineteenth-century state cases, Justice Scalia also stated that “[n]ineteenth-century treatises confirm the [cross-examination] rule,” and cited 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE; OR, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES § 1093, at 689 (2d ed. 1872); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *318 (1868). *Crawford*, 541 U.S. at 50. However, this amounts to mere rhetorical padding. No one could seriously propose that sources from the latter half of the nineteenth century constitute evidence of the original meaning of a provision of the Bill of Rights.

²³⁵ *Crawford*, 541 U.S. at 50 (citing *Atkins*, 1 Tenn. at 229). As Chief Justice Rehnquist noted, *Atkins* did not adopt Scalia’s cross-examination rule regarding depositions because it excluded a statement that had been subjected to cross-examination during a previous trial. *Id.* at 72 (Rehnquist, C.J., concurring). Rehnquist was correct on that point, but an additional clarification is in order. The *Atkins* court ruled that testimony of a deceased witness given in a previous misdemeanor trial for petty larceny in a lower court could not be admitted during a trial *de novo* in a higher court despite the opportunity for cross-examination in the first trial. That ruling likely reflected the lack of any written record of prior testimony from the earlier lower court misdemeanor trial (there were no court reporters or transcripts in such courts). Unlike a Marian deposition, for which there was a written record, the prior testimony could be established only by the oral testimony of someone who had heard the prior trial – and that rendition would obviously be inexact or subject to abuse. Thus, there was a general rule that oral evidence regarding the testimony given in a prior trial was inadmissible. *See, e.g.*, 2 HAWKINS, PLEAS (1771), *supra* note 18, at 430 § 12; CONDUCTOR GENERALIS 172-73 (James Parker ed., printed by John Patterson for Robert Hodge, New York City, 1788) (*microformed on Imprints, supra* note 123, at no. 21359) [hereinafter CONDUCTOR GENERALIS]. However, prior to 1807 authorities on the law of evidence also recognized that the written record of a deposition was more trustworthy than an oral account of testimony from a previous trial. *See, e.g.*, 1 GILBERT, (1791) *supra* note 123, at 62 (written depositions are superior evidence to live testimony regarding evidence given at a prior trial). Thus, *Atkins* does not shed any light on the admissibility of a written record of a deposition.

²³⁶ *Webb*, 2 N.C. 103; *see also Crawford*, 541 U.S. at 49 (citing and discussing *Webb*).

Webb does offer support for Scalia's position. The prosecutor in *Webb* sought to admit a deposition from a witness in South Carolina in a felony horse stealing trial in North Carolina. As the locations indicate, the deposition could not have been taken in proximity to Webb's arrest. The prosecutor asserted that the deposition was admissible under several English authorities, although the authorities actually were not on point.²³⁷ The North Carolina judges responded as follows:

These [English] authorities do not say that depositions taken in the absence of the prisoner shall be read, and our act of Assembly, 1715, ch. 16, clearly implies the depositions to be read, must be taken in his presence; it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine; and though it be insisted that the act intended to make an exception in this instance, to the rule of the common law, yet the act has not expressly said so, and we will not, by implication, derogate from the salutary rule established by the common law.²³⁸

The North Carolina statute referred to was a shortened paraphrase of the Marian statutes.²³⁹ As the judges recognized, the statute did not explicitly require that the depositions of witnesses be taken in the arrestee's presence. Nevertheless,

²³⁷ *Webb*, 2 N.C. at 139 (noting that the prosecutor cited, among other authorities, 2 HALE, HISTORY (1736), *supra* note 82, at 284 (see third passage set out *supra* note 83); 2 HAWKINS, PLEAS, *supra* note 132, at 429 (see passage set out *supra* text accompanying note 136); and *King v. Eriswell*, 3 T.R. 707, 713, 100 Eng. Rep. 815, 819 (K.B. 1790) (discussed *supra* note 122)).

The cited English authorities did not really address the situation in *Webb* – the deposition in South Carolina was not taken in connection with the arrest that presumably had occurred in North Carolina. *Webb*, 2 N.C. at 103. Rather, the facts in *Webb* were essentially the same as that in the English *Woodcock* and *Dingler* cases, in which the depositions were not taken in connection with the arrest of the defendant, as contemplated by the Marian statute. See *supra* notes 192-204 and accompanying text.

²³⁸ *Webb*, 2 N.C. at 103.

²³⁹ In pertinent part, the North Carolina statute provided that:
no person within this province shall be committed to prison for any criminal matter, until examination thereof be first had before some magistrate; which magistrate shall admit the party to bail, if bailable, and shall record the examination of the party, and also the full matter given in evidence, both against him and for him, with all concurring circumstances; and shall take recognizance, with good and sufficient securities, to our Sovereign Lord the King, for the informer to appear and prosecute, as the laws of the kingdom of *Great Britain* and this province do direct; and likewise all evidences for the King to appear, and give evidence against the criminal, at the next court, where the matter is cognizable, ensuing such examination; which examination and recognizance so taken, shall be returned to the office of the court wherein the matter is to be tried

An Act to direct the method to be observed in the examination and commitment of criminals, 1 Public Acts of the General Assembly, ch. 16 (North Carolina, 1715).

they found it appropriate to infer that requirement, and then linked the “in the presence” requirement to the importance of “the liberty to cross-examine.”²⁴⁰

Webb does indicate that within five years after the framing of the Confrontation Clause, North Carolina judges were resisting the use of depositions as evidence unless there had been some opportunity to cross-examine. However, it is noteworthy that the judges rested their decision on “natural justice” rather than on any precedent or other published authority. It is also noteworthy that other American evidence – sources that Scalia overlooked – indicate that the admissibility of Marian depositions of absent witnesses was still widely accepted in framing-era America.

2. The Evidence in Framing-Era American Justice of the Peace Manuals

Justice of the peace manuals were a type of legal encyclopedia covering matters likely to be relevant to a justice of the peace or similar judicial officer. Because the manuals published in America were relatively inexpensive and widely used, and were edited with an eye toward the law applicable in the American colonies and states, those published prior to the framing of the federal Bill of Rights provide one of the most direct sources of evidence we have regarding how Americans understood criminal procedure during the framing era.²⁴¹ Notably, these manuals typically included both descriptions of Marian procedure and quotations of Hawkins’s statement endorsing the “settled” admissibility of Marian depositions of unavailable witnesses.²⁴²

For example, when Joseph Greenleaf published an “abridgment” of a leading English manual in Boston in 1773,²⁴³

²⁴⁰ See quotation *supra* note 239 and accompanying text.

²⁴¹ For a listing of framing-era English and American justice of the peace manuals, see Davies, Atwater, *supra* note 2, at 278-81 nn.121-22. The prefaces to the American manuals often recite that the English material has been edited with a view to presenting what is relevant in America generally, or in the particular colony or state for which the manual was intended.

²⁴² See *supra* text accompanying note 136 (Hawkins’s statement that the admissibility of Marian depositions of unavailable witnesses “seems settled”).

²⁴³ AN ABRIDGMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER (Joseph Greenleaf ed., Boston 1773) (*reprinted in* Imprints, *supra* note 123, at no. 12702) [hereinafter ABRIDGMENT OF BURN’S]. This American manual was based on the English manual, RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER (first published in London in 1755, and reissued in numerous later editions until 1869; see MAXWELL, *supra* note 80, at 225-26, (entry 15)).

he included a summary of Marian procedure in the entry for “Examination.”²⁴⁴ In the entry for “Evidence,” he repeated Hawkins’s statement that “[i]t seems settled,” that a Marian deposition of an unavailable witness could be admitted in a felony trial,²⁴⁵ and also quoted Hawkins’s description of *Paine*.²⁴⁶ A similar treatment appeared in a 1774 manual that Richard Starke edited for Virginia.²⁴⁷ Although Starke described the somewhat “peculiar” procedure for examining arrestees and witnesses in felony cases in Virginia,²⁴⁸ he cited Hale as authority that the sworn deposition of an unavailable witness could be admitted as evidence in a criminal trial,²⁴⁹ and also quoted Hawkins on the “settled” rule that a Marian

²⁴⁴ ABRIDGMENT OF BURN’S, *supra* note 243, at 131.

²⁴⁵ *Id.* at 118 (repeating the paragraph quoted *supra* text accompanying note 136).

²⁴⁶ *Id.* (repeating the paragraph quoted *supra* text accompanying note 140).

²⁴⁷ THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE (Richard Starke ed., Williamsburg, Va. 1774) (*reprinted in* Imprints, *supra* note 123, at no. 13637) [hereinafter STARKE]. *See also* THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE (George Webb ed., Williamsburg, Va., 1736), *reprinted in* Imprints, *supra* note 123, at no. 4101 (an earlier manual published in Virginia) [hereinafter WEBB]. That earlier work had endorsed the admissibility of Marian depositions taken by a coroner. *Id.* at 140 (entry for Examination) (stating that “[i]f Witnesses examined before the Coroner, are dead, or unable to travel, and Oath made thereof; such Examinations may be read at the Trial, the Coroner making Oath, that they are the same, and not altered. *Lord Morley’s Case*”). Notably, however, there are no citations to the treatises by Hawkins or Hale in that manual; rather, the citations are only to older English works. *See generally id.* Hence, Webb’s manual was quite obsolete by the framing era.

²⁴⁸ STARKE, *supra* note 247, at 114-15. In his entry for “Criminal,” Starke did not cite the Marian statutes but instead noted that Virginia, by a colonial statute, had created a multi-justice of the peace “Court of Examination,” which he described as a procedure “peculiar to this Colony.” *Id.* at 115. In Virginia procedure, following an arrest for a criminal offense, a justice of the peace was “thoroughly to examine as well the Prisoner as Witnesses; and if the Fact [i.e., the crime] appears to him, on mature Deliberation, to amount to a Felony, or to be of such Nature as to affect the Life or Member of the Person charged,” the justice was to commit the arrestee to the county jail, summon other justices to convene a court of examination, and take recognizances of the witnesses to appear and testify. *Id.* at 114. Thus, it appears that the “court of examination” was added to the usual post-arrest procedures, including Marian depositions, rather than that it replaced them.

²⁴⁹ *Id.* at 116 (providing a form for “Information of A Witness” to be used by a single justice, and stating that this deposition “being sworn to be truly taken by the Justice, may be given in Evidence on the Trial against the Prisoner, if the Witnesses be dead or not able to travel” (citing 1 HALE, HISTORY (1736), *supra* note 82, at 586 [passage quoted *supra* note 83])). Starke also made other statements that indicate that the Marian statutes were understood to be in effect in Virginia. *See id.* at 31, 35-37 (discussing the provisions of the Marian statutes regarding bail under the entry for “Bail”).

deposition of an unavailable witness could be admitted, as well as Hawkins's discussion of *Paine*.²⁵⁰

A 1788 edition of *Conductor Generalis*, a widely used manual published in New York City, gave the same treatment.²⁵¹ This manual also included a paraphrase of the Marian statutes,²⁵² and also repeated Hawkins's passage on the "settled" admissibility of Marian depositions of unavailable witnesses, as well as his description of *Paine*.²⁵³

The treatment of Marian depositions in the 1788 edition of *Conductor Generalis* corresponds to other evidence of the continued importance of Marian procedure in framing-era New York. In 1787, when the state legislature was in the process of sorting through which English statutes to retain and which to jettison, the legislature chose to reenact the Marian statutes.²⁵⁴ In addition, the understanding of the confrontation right in New York is of particular interest because the first Congress was meeting in New York City in June, 1789, when James Madison proposed the amendments that became the federal Bill of Rights. Moreover, Madison appears to have borrowed much of the language for what became the Sixth Amendment verbatim from the amendments proposed by the New York ratifying convention in 1788. Those proposals included a

²⁵⁰ *Id.* at 143 (entry for "Evidence," subtitle "Of Written Evidence") ((citing 2 HAWKINS, PLEAS, *supra* note 132, at 429-30) (restating the paragraphs by Hawkins set out *supra* text accompanying notes 136, 140)).

²⁵¹ CONDUCTOR GENERALIS, *supra* note 235. There is also a slightly different 1788 edition, printed by Hugh Gaine in New York City (*reprinted in* Imprints, *supra* note 123, at no. 21358). There were earlier manuals that also used this title, though their contents were quite different. See Davies, Atwater, *supra* note 2, at 280 n.122.

²⁵² CONDUCTOR GENERALIS, *supra* note 235, at 176-77 (entry on "Examination") (reciting the requirement that a justice of the peace "take . . . the information of them that bring [the arrestee]").

²⁵³ *Id.* at 168 (entry on "Evidence") (citing 2 HAWKINS, PLEAS, *supra* note 132, at 429, 430 (restating the paragraphs by Hawkins set out *supra* text accompanying notes 136, 140)).

²⁵⁴ New York began the process of deciding which English statutes to reenact and which to dispose of in 1786. See "An Act for revising and digesting the laws of this State," passed April 15, 1786. Marian procedure was reenacted in 1787. See "An Act concerning justices of the peace," passed January 30, 1787 (requiring the justice to whom a person arrested for "any treason, misprison of treason, murder, manslaughter or felony" was brought to "take the examination of such prisoner and information of those that bring him or her of the fact and circumstances thereof" and to put the information in writing and certify that record to the trial court); An Act touching the bailment of persons, passed February 16, 1787 (same substance); An Act concerning coroners, passed Feb. 14, 1787 (requiring coroners to make a written record of evidence given by witnesses if an inquest led to an indictment for murder or manslaughter).

confrontation clause that tracked that which Madison proposed.²⁵⁵

Additionally, a 1788 manual authored by a prominent South Carolina judge for that state²⁵⁶ also described Marian procedure.²⁵⁷ This manual reiterated Hawkins's statement regarding the "settled" admissibility of Marian depositions of unavailable witnesses and also cited a statement by Hale to the same effect.²⁵⁸ In addition, a somewhat cursory 1791 North Carolina manual reiterated Marian procedure, though it did not address the admissibility of Marian depositions.²⁵⁹

²⁵⁵ The 1788 New York proposals for amendments included the following language: "And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense." See, e.g., COMPLETE BILL, *supra* note 157, at 401 (entry 12.1.2.2) (proposal from the New York state ratifying convention, July 26, 1788).

Madison added the right to a speedy trial and clarified the "means" for obtaining favorable witnesses, but otherwise tracked this language and used exactly the same language for the confrontation right as the New York proposal:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Id. at 385 (entry 12.1.1.1.a) (speech by James Madison in the House of Representatives, June 8, 1789).

²⁵⁶ THE SOUTH CAROLINA JUSTICE OF THE PEACE (Philadelphia, W. Aiken & Son 1788), *reprinted in* Imprints, *supra* note 123, at no. 21472 (the identifying page in Imprints misstates the date as "1778" while the copy itself shows 1788) [hereinafter SOUTH CAROLINA JUSTICE]. The name of the author does not appear in the manual itself; however, it has been attributed to Judge John Fauchaud Grimké. See MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 6-7 (1980).

²⁵⁷ SOUTH CAROLINA JUSTICE, *supra* note 256, at 199-201 (entry for "Examination"). There are also references to Marian procedure in other entries. See, e.g., *id.* at 50 (bail); *id.* at 190 (admissibility of examination of arrestee).

²⁵⁸ *Id.* at 184 (entry titled "Evidence") (repeating the two paragraphs from Hawkins's treatise set out *supra* text accompanying notes 136, 140). See also *id.* at 200 (entry titled "Examination") (stating with regard to "information" taken under oath from witnesses under Marian procedure "13. And the said information, being upon the trial, sworn to be truly taken, by the justice, or his clerk, may be given in evidence against the prisoner, if the witnesses be dead, or not able to travel" (citing "1 H.H. 586" (quoting the second passage set out *supra* note 83)).

²⁵⁹ THE OFFICE AND AUTHORITY OF JUSTICE OF THE PEACE AND OF SHERIFFS, CORONERS, &C. 124 (Francois-Xavier Martin ed., New Bern, N.C. 1791) (*reprinted in* Imprints, *supra* note 123, at no. 23535) (discussing the 1776 North Carolina statute enacting Marian procedure set out *supra* note 239).

An earlier 1774 manual published in North Carolina had noted the admissibility of depositions of a deceased witness that had been taken by a coroner. THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 159 (James Davis ed., New Bern, N.C. 1774) ("Depositions taken before the Coroner may be admitted for Evidence, if the Witness be dead. 1 Lev. 180.") (*reprinted in* Imprints, *supra* note 123, at no. 13236).

However, another somewhat less detailed manual published by Eliphalet Ladd in 1792 in New Hampshire contained both a shortened description of Marian procedure that included Hale's statement that the deposition of an unavailable witness is admissible at trial²⁶⁰ and a quotation of Hawkins's passage regarding the "settled" admissibility of a Marian deposition of an unavailable witness, although it omitted Hawkins's discussion of *Paine*.²⁶¹ Indeed, the 1811 first American edition of Jacob's *Law Dictionary* also cited Hale's and Hawkins's statements regarding the admissibility of Marian depositions.²⁶²

Moreover, I cannot find any American source that questioned the admissibility of Marian depositions of unavailable witnesses prior to a 1794 Virginia manual authored by William Waller Hening.²⁶³ In contrast to Starke's 1774 Virginia manual,²⁶⁴ Hening asserted that the Marian statutes were not in force in Virginia, apparently on the ground that they had not been reenacted by the state legislature after independence.²⁶⁵ In addition, Hening criticized the Marian examination of an arrestee as a derogation of the common-law

²⁶⁰ BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE 156-58 (Eliphalet Ladd ed., Dover, N.H. 1792) (entry for "Examination") (*reprinted in* Imprints, *supra* note 123, at no. 24161) (describing Marian procedure); *id.* at 158 (stating that "the said information [of a witness] being upon the trial sworn to be truly taken by the justice or his clerk, may be given in evidence against the prisoner if the witnesses be dead or not able to travel," citing 1 HALE, HISTORY, *supra* note 82, at 586 [the second passage quoted *supra* note 83]).

²⁶¹ *Id.* at 132 (entry for "Evidence") (quoting only the paragraph from Hawkins's discussion set out *supra* text accompanying note 136, but omitting Hawkins's description of the ruling in *Paine*, set out *supra* text accompanying note 140).

²⁶² See *supra* note 144.

²⁶³ NEW VIRGINIA JUSTICE (William Waller Hening ed., "entered for publication" 1794, printed in Richmond, Va., 1795) [hereinafter NEW VIRGINIA JUSTICE] (*reprinted in* Imprints, *supra* note 123, at no. 28823). Hening also compiled Virginia statutes.

²⁶⁴ See *supra* notes 247-48.

²⁶⁵ NEW VIRGINIA JUSTICE, *supra* note 263, at 147 (entry for "Criminals") (stating that the "statute of England of *Ph. & M.* which not having been adopted by our legislature, is consequently not in force," and that "[t]he practice of taking the information of the witness in writing, by the justice, depends upon the same statute of *Ph. & M.* above mentioned, . . . and for the reasons just mentioned, I conceive, is not in force in this country.").

At the time Hening wrote, Virginia was still unique among the states in having created a "Court of Examination" which may have been the predecessor of the modern preliminary hearing. See *supra* note 248. Hening described the court of examination as being "peculiar to the laws of this commonwealth." NEW VIRGINIA JUSTICE, *supra* note 263, at 147. However, the court of examination was created prior to independence at a time when the Marian statutes were perceived to be in effect. See the statements in Starke's earlier Virginia manual, discussed *supra* note 248.

right against self-accusation,²⁶⁶ and also questioned the propriety of admitting depositions of unavailable witnesses at trial:

The doctrine laid down in the books, that the *examination of a witness* taken before a magistrate in pursuance of [the Marian statutes], may be read against a criminal in case of the death of a witness, or his inability to attend, is liable to these objections: – that the prisoner may be concluded by evidence however objectionable the witness may be in point of interest, guilt, &c. and that the accused party has not the same advantage of cross examination, which he would possess before a court, with the assistance of counsel.²⁶⁷

For present purposes, it is noteworthy that Hening candidly recognized that the admissibility of Marian depositions was still “the doctrine laid down in the books.” Thus, it appears that he was not asserting that there already was a rule against admitting such depositions, but only that there *should* be such a rule. It is also noteworthy that he did not cite any of the three 1787, 1789, or 1791 cases Scalia relied upon in *Crawford*, even though they had been published in London several years before Hening published his manual.²⁶⁸ Apparently Hening either was unfamiliar with those cases, or did not find them to be pertinent to the topic.

Hening’s Virginia commentary, coupled with the *Webb* decision in neighboring North Carolina, might indicate movement toward placing greater emphasis on a criminal defendant’s right to cross-examination within a decade of the framing of the federal Bill. However, they are hardly sufficient to support the claim Justice Scalia made in *Crawford* – that a rigid cross-examination rule was *already* part of framing-era American law. That is especially so given the consistent statements to the opposite effect that appeared in the earlier, framing-era American manuals that addressed the issue. Taken collectively, the framing-era manuals constitute strong evidence that Marian depositions of unavailable witnesses

²⁶⁶ NEW VIRGINIA JUSTICE, *supra* note 263, at 147 (stating that “the power of examining the prisoner himself and committing his examination to writing” under Marian procedure was “repugnant to the common law, as will appear not only from Lambard (Eiremarch, b. 2. c. 7) where he observes that, [the Marian statutes were] *the first warrant given for the examination of a felon in English law: but from judge Blackstone, who says that at the common law, no man was bound to betray himself [nemo tenebatur prodere seipsum]: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.*” See 4 BLACKSTONE, *supra* note 65, at 296).

²⁶⁷ NEW VIRGINIA JUSTICE, *supra* note 263, at 148 (entry for “Criminals”).

²⁶⁸ See *supra* notes 164, 176-77 and accompanying text.

were regarded as admissible evidence in felony trials in framing-era America, without regard to an opportunity for cross-examination.²⁶⁹

G. *Summary Regarding the “Cross-Examination Rule”*

The validity of historical claims depends solely upon the available evidence, not on institutional authority or the office of the person who asserts the claim. Although Justice Scalia wrote as though the Framers of the Sixth Amendment Confrontation Clause would have understood that there was already a rigid cross-examination rule regarding the admission of any deposition in a criminal case, the salient points are that he did not identify valid evidence for that claim and he omitted significant evidence that showed the opposite. The available historical evidence actually refutes both aspects of the “cross-examination rule” that Justice Scalia asserted. First, the fact that framing-era legal authorities quite consistently endorsed a “settled” rule that Marian depositions of unavailable witnesses were admissible evidence in felony trials shows that Scalia was incorrect when he asserted that a prior opportunity for cross-examination was a rigid requirement for admitting an out-of-court statement.²⁷⁰ Second, the framing-era rule that only a statement made under a validly administered judicial oath could constitute valid evidence shows that Scalia was also incorrect in asserting that a prior opportunity for cross-examination would have been sufficient to permit the admission of an out-of-court statement in a criminal trial.²⁷¹ Thus, both aspects of Justice Scalia’s assertion of a framing-era

²⁶⁹ Unfortunately, it does not appear to be possible to reconstruct actual practice regarding the admission of Marian depositions in the American colonies or early states because there do not seem to be any records of the evidence admitted in colonial or framing-era trials. See, e.g., JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776), 134 n.328 (1970 reprint) (noting that less than abundant records of activities of justices of the peace in New York provide some evidence of the taking of depositions of witnesses during the mid-eighteenth century); *id.* at 635 (concluding that “[t]he royal officials in New York do not seem to have admitted any right to cross-examination at a preliminary hearing [i.e., a Marian examination]”); *id.* at 636 (lamenting that “[t]he casual way in which any remembrance of evidence was noted in court [records] makes it difficult to determine how far the sworn examination was employed in New York”).

Professor George Thomas has informed me that, in an on-going study of New Jersey colonial court records, he has come across one instance of a reference to a witness’s “examination” included among the list of witnesses who testified in a criminal trial.

²⁷⁰ See *supra* notes 124-52, 241-69 and accompanying text.

²⁷¹ See *supra* notes 106-12, 193-94 and accompanying text.

“cross-examination rule” were only historical fiction. (And Chief Justice Rehnquist’s response on these points also suffered from errors.²⁷²)

However, does the historical admissibility of Marian depositions actually hold any implications for contemporary confrontation doctrine? At one level, the admissibility of Marian depositions plainly disproves Justice Scalia’s claim of a rigid framing-era cross-examination rule. However, are there any specific implications for current procedure that can or should be drawn from an aspect of Marian procedure when Marian procedure itself disappeared well over a century ago? Similarly, does the historical requirement that all evidence be taken under oath hold any implications for the way that we should now understand the confrontation right, given that modern evidence law no longer makes a valid oath a requirement for admissible evidence? How does one apply these facets of framing-era accusatory procedure in the context of the very different investigatory criminal procedure that we use today? Can they be applied? If so, should they be applied? Puzzles of this kind are not confined to the specific issue of a cross-examination requirement. They also arise with regard to Justice Scalia’s broader claim regarding the original scope of the Confrontation Clause.

III. THE ORIGINAL SCOPE OF THE CONFRONTATION CLAUSE

Justice Scalia also claimed in *Crawford* that “[t]he constitutional text, like the history underlying the common-law right of confrontation . . . reflects an especially acute concern

²⁷² Like Justice Scalia, Chief Justice Rehnquist also ignored the important passages in Hawkins’s treatise – even though he cited another less significant passage that appeared only one page earlier. See *Crawford*, 541 U.S. 36, 70 n.3 (2004) (citing “2 WILLIAM HAWKINS, PLEAS OF THE CROWN, ch. 46, § 4, p. 604, n.3 (T. Leach 6th ed. 1787).”) The more significant passages, from the same chapter were sections 6 and 10, at 2 HAWKINS, PLEAS (1787) *supra* note 18, at 605-06, (quoted *supra* text accompanying notes 136, 140). Similarly, Chief Justice Rehnquist also overlooked the discussions of Hawkins’s and Hale’s statements in the American justice of the peace manuals, discussed *supra* notes 241-69 and accompanying text. Instead, he also offered cases that were published too late to have informed the Framers’ original understanding of the Confrontation Clause as evidence of original meaning. See *supra* notes 162 (discussing *Westbeer*), 163 (discussing *Brasier* and *Eriswell*), 191 (discussing *Woodcock*). Likewise, although he cited the 1769 edition of Gilbert’s evidence treatise, which was available prior to the framing, for one point, he inexplicably relied on the 1791 expanded edition of that treatise for another point, although the latter was published too late to have informed the original meaning. See *Crawford*, 541 U.S. at 70 n.2 (citing GILBERT (1769), *supra* note 123, at 152); *id.* at 70 n.3 (citing GILBERT (1791), *supra* note 123, at 216).

with a specific type of out-of-court statement.”²⁷³ Specifically, he asserted that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”²⁷⁴ He also asserted that statements made today during a police interrogation should fall within the set of “testimonial” statements to which the Clause applies, because such statements bear a “striking resemblance” to depositions taken by framing-era justices of the peace.²⁷⁵

However, Justice Scalia also asserted that the text and history of the Clause carry a negative implication; namely, that the Framers’ “focus” on depositions²⁷⁶ “suggests that not all hearsay implicates the Sixth Amendment’s core concerns.”²⁷⁷ Instead, the Clause was meant to reach only a “core class of ‘testimonial’ statements”²⁷⁸ that include “formal statement[s] to government officers” but not “off-hand, overheard remark[s]” or “casual remark[s].”²⁷⁹ Thus, notwithstanding that *Crawford* stopped short of “definitively” limiting the confrontation right to testimonial hearsay,²⁸⁰ Justice Scalia announced toward the end of his opinion that “[w]here nontestimonial hearsay is at

²⁷³ *Crawford*, 541 U.S. at 51.

²⁷⁴ *Id.* at 50.

²⁷⁵ *Id.* at 52.

²⁷⁶ *Id.* at 50 (“focus”), 51 (same). See also *id.* at 53 (“even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object”), 60 (“core concerns of the [Confrontation] Clause”).

²⁷⁷ *Id.* at 51.

²⁷⁸ *Id.*

²⁷⁹ *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (stating that “[a]n off-hand, overheard remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted”); *id.* (distinguishing “casual remark to an acquaintance” from “formal statement”).

²⁸⁰ Justice Scalia wrote:

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law In *White*, we considered the first proposal and rejected it. 502 U.S. at 352-53. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because [the statement at issue] is testimonial under any definition.

Id. at 60-61 (2004) (citing *Lilly v. Virginia*, 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring); *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas J., joined by Scalia, J., concurring in part and concurring in the judgment); AKHIL R. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-31 (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998)).

issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law."²⁸¹

Judging from the presentations made during the *Crawford* symposium, the precise boundary assigned to this testimonial/nontestimonial distinction will be of huge practical significance.²⁸² But do the "text" and "history" really mandate that the reach of the confrontation right should be limited to "testimonial" hearsay?

A. *The Nonhistorical Character of the Testimonial/
Nontestimonial Distinction*

In *Crawford*, Chief Justice Rehnquist took issue with Justice Scalia's claim regarding the scope of the Confrontation Clause. Specifically, he asserted that "[t]he Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine [in *Roberts*]."²⁸³ Rehnquist was clearly correct on this point. Although Scalia prochronistically wrote as though the Framers used or were familiar with his testimonial/nontestimonial distinction,²⁸⁴ he did not identify any framing-era source that distinguished between testimonial and nontestimonial hearsay. So far as I can tell, none did. That distinction simply had not appeared by the time of the framing.

Hence, Justice Scalia was not applying a historical definition of the scope of the Confrontation Clause when he employed the testimonial/nontestimonial distinction. Indeed, Justice Scalia effectively conceded as much when he shoe-horned a statement made during a contemporary police interrogation into the class of testimonial statements that the Framers were supposedly focused on.²⁸⁵ However, it is patent

²⁸¹ *Crawford*, 541 U.S. at 68.

²⁸² See generally Symposium, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 Brook. L. Rev. 1 (2005).

²⁸³ *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

²⁸⁴ For example, Justice Scalia wrote, "[t]he historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54 (emphasis added). The sentence prochronistically implied that the "Framers" were conversant with the "testimonial" category; but they were not.

²⁸⁵ *Id.* at 66-67. The addition of police interrogation to the class of "testimonial" statements was a departure from the description of testimonial statements that Justice Scalia had previously endorsed by joining Justice Thomas's concurring opinion in *White v. Illinois*, 502 U.S. 346, 365 (1992). In *White*, Thomas, wrote that "the Court has assumed that all hearsay declarants are 'witnesses against' a

that the Framers were also unfamiliar with police interrogation, because that practice, like police departments themselves, did not arise until well into the nineteenth century.²⁸⁶

Thus, Justice Scalia's claims about the scope of the Clause did not merely involve a direct application of a historical boundary; rather, they amounted to his own translation of historical doctrine to the modern setting. Was his translation valid?

I think Justice Scalia overreached what legitimately can be derived from the authentic original meaning. The problem does not lie in his statements regarding what the Framers opposed; they clearly did seek to prohibit trial by deposition when live testimony was possible. Rather the problem arises in the negative inference Justice Scalia drew to the effect that the Framers would not have been concerned with less formal sorts of hearsay evidence – and, hence, that the Confrontation Clause need not reach “nontestimonial” hearsay at all. This claim amounts to a historical false dichotomy, and it reflects a political judgment more than a historical analysis.

defendant within the meaning of the Clause” but that assumption “is neither warranted nor supported by the history or text of the Confrontation Clause.” *Id.* at 359 (emphasis in original) (citations omitted). Likewise, Thomas asserted that “[t]here appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation.” *Id.* at 362. Additionally, Thomas asserted that, in light of the reference to “witnesses against him,” *id.* at 364, in the text of the Confrontation Clause, “[a]s a matter of plain language, however, it is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition.” *Id.* at 362-63. Instead, Thomas endorsed a “narrower reading” of the Confrontation Clause, under which the Clause would apply only to “the ‘discrete category of testimonial materials that was historically abused’ which was composed of ‘formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’” *Id.* at 365. Thomas did consider the possibility of viewing a “victim’s statements to [an] investigating police officer” as “the functional equivalent of in court testimony because the statements arguably were made in contemplation of legal proceedings,” but he implied that attempting to include such statements might make the scope of the Clause unclear and unworkable. *Id.* at 364. He did not suggest that statements to police were historically comparable to those to which the historical confrontation right had applied. *See generally id.*

²⁸⁶ As I have previously explained, peace officers such as constables had no authority to interrogate anyone at the time of the framing. *See Davies, Original Fourth, supra* note 2, at 749 n.574. Indeed, because peace officers were required to promptly take any arrestee to a justice of the peace, there was no opportunity for them to interrogate an arrestee. *See Davies, Chavez, supra* note 70, at 1030. The practice of police interrogation emerged informally during the nineteenth century when relaxed standards for arrest allowed police to arrest earlier in the development of a case, and when a temporal gap developed between arrest and the issuing of formal charges by a prosecuting agency and the testing of probable cause for the arrest by a magistrate. *Id.* at 1030-33.

B. *What Do “Text” and “History” Actually Reveal About the Scope of the Confrontation Right?*

What does the text of the Confrontation Clause actually tell us? The critical phrase for assessing the scope of the Clause is “witnesses against” the “accused.”²⁸⁷ Prior to *Crawford*, some justices and commentators had suggested that this phrase was ambiguous enough to be open to a variety of meanings.²⁸⁸ However, in *Crawford*, Justice Scalia asserted that “the constitutional text . . . reflects an especially acute concern” with a “core class of ‘testimonial’ statements.”²⁸⁹

There is no doubt that the Framers understood “witnesses against him” in the Confrontation Clause to include persons who gave formal testimony – *sworn* testimony – during the course of a criminal prosecution. Moreover, if one understands accusatory procedure, “witnesses against him” also would have included persons who gave sworn depositions to a justice of the peace at the time an arrest was made as well as in later proceedings.²⁹⁰ In fact, the “witnesses against [the accused]” who testified at trial typically would have been the same persons who had given depositions at the time of arrest, so the same persons typically would have been “witnesses” throughout the prosecution.

However, although the Framers plainly would have included persons who gave formal testimony as “witnesses against him,” it is unclear that they meant for the confrontation right to stop there. For one thing, although Scalia offered definitions of “witness” in a historical dictionary, those definitions are less definitive than Scalia suggested; “witness” also carried the colloquial meaning of a person who had observed an event.²⁹¹ Hence, if person A testified about a

²⁸⁷ See *supra* text accompanying note 6.

²⁸⁸ Justice Scalia alluded to this when he wrote: “The Constitution’s text does not alone resolve this case. One could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in between.” *Crawford*, 541 U.S. at 42-43 (citations omitted). See also *White*, 502 U.S. at 358-60 (Thomas, J., joined by Scalia, J., concurring) (discussed *supra* note 285). Scalia had previously suggested that the phrase “witnesses against him” need not cover hearsay evidence at all but merely referred “to those who give testimony against the defendant at trial.” *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting).

²⁸⁹ *Crawford*, 541 U.S. at 51.

²⁹⁰ See *supra* notes 70-77 and accompanying text.

²⁹¹ Justice Scalia cited Noah Webster’s 1828 American dictionary as evidence that “witnesses” meant those who “bear testimony” and “testimony” meant “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”

statement person B had made about a crime, A would be a “witness” because he testified formally, but B’s hearsay statement could also be that of a “witness” in the colloquial sense.²⁹²

In addition, because “hearsay” was defined during the eighteenth century as one person repeating an unsworn statement made by another, it is not clear that a Marian deposition would have been commonly regarded as a form of hearsay at the time of the framing. Instead, because Marian depositions were validly sworn and recorded by a judicial officer, they seem to have been regarded simply as a form of written evidence.²⁹³ Nevertheless, there were some references

Crawford, 541 U.S. at 51 (citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (pages unnumbered)) [the citation was in error insofar as the definitions referred to appeared in volume 2; however, both volumes are sometimes bound as one in modern reprints]. However, “bear testimony” appears only in the definition of the intransitive verb “to witness.” Although that definition shows that “witnesses” could have referred to formal testimony, other definitions in that dictionary show that “witnesses” could also have carried a much broader and looser meaning. For example, Webster’s definition of the noun “witness” included “testimony” but also included the alternate meaning “[a] person who knows or sees any thing; one who was personally present; as, he was an eye-witness.” See 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (pages unnumbered) (definitions of “WITNESS, n.,” nos. 1 and 3). Indeed, Scalia had previously quoted this broader definition of “witness” in his dissenting opinion in *Craig*. 497 U.S. at 864-65 (Scalia, J., dissenting). See also *White*, 502 U.S. at 360 (Thomas, J., joined by Scalia, J., concurring) (quoting the same definition of “witness” as in *Craig*).

²⁹² See Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 228-29 (2005).

²⁹³ For example, Hale discussed Marian depositions as a form of judicial record comprising written evidence. See 2 HALE, HISTORY (1736), *supra* note 82 at 52, quoted *supra* text accompanying note 83. Likewise, Hawkins distinguished the discussion of depositions from hearsay in his chapter on evidence. The first section discussed “Where the Confession of the Defendant or the Depositions of others out of Court may be allowed as Evidence” and included sections 3 through 13 of that chapter. See HAWKINS, PLEAS (1771), *supra* note 132, at 429-31. The second section then discussed “How far Hearsay is Evidence,” *id.* at 429, and set that out in a single section as follows:

Sect. 14 As to the second Particular, *viz.* How far Hearsay is Evidence: It seems agreed, That what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross-Examination; and therefore it seems a settled Rule, that it shall never be made use of but only by way of Inducement or Illustration of what is properly Evidence; yet it seems that what the Prisoner had been heard to say at another Time, may be given in Evidence for him, as well as against him, and also what a Witness hath been heard to say at another Time, may be given in Evidence in order either to invalidate or confirm the Testimony which he gives in Court.

Id. at 431. Thus, it does not appear that Hawkins regarded depositions as hearsay.

Similarly, Gilbert’s treatise discussed Marian depositions and *Paine* in connection with confessions and Marian examinations of arrestees. See *supra* note 129

to “hearsay” as an abuse in the famous cases that prompted the articulation of the confrontation right. For example, Raleigh, during his trial, complained of “hear-say” evidence.²⁹⁴ Likewise, Chief Justice John Marshall referred to the constitutional right to confrontation when discussing the admissibility of a hearsay statement in one of the Burr conspiracy trials in 1807 – although that occurred nearly two decades after the framing of Bill of Rights.²⁹⁵

The main reason why the Framers’ attitude toward informal hearsay is unclear, however, is that they did not have the same understanding of the law of hearsay evidence or of the liberal exceptions to the ban against hearsay that we now do. Rather, as Chief Justice Rehnquist also noted in *Crawford*, modern scholarship indicates that “at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions.”²⁹⁶

and accompanying text. However, he made no mention of depositions in his discussion of “hearsay.” See *infra* note 297.

The 1789 *Woodcock* and 1791 *Dingler* English cases cited by Scalia are also noteworthy in this regard because, even though they ruled that a deposition taken outside of Marian procedure was “extrajudicial” and not properly sworn, neither of those reports characterized the invalid and inadmissible depositions as “hearsay.” See *Crawford*, 541 U.S. at 46-47 (citing *King v. Woodcock*, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (Old Bailey 1789); *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (Old Bailey 1791)). Although these cases were published too late to have informed the original understanding of the Sixth Amendment, they do provide evidence that invalid depositions still had not come to be described as “hearsay” in legal materials that were produced roughly contemporaneously with the framing of the Bill of Rights.

²⁹⁴ Raleigh seems to have complained of “hear-say” only once in the account of his trial in State Trials. See *Raleigh’s Case*, 2 How. St. Tr. at 20 (quoting Raleigh as saying “there is a law of two Accusers; one of his own knowledge, another by hear-say”).

There is also an instance in Throckmorton’s trial of hearsay in the sense of one witness stating what another had said. A Deposition given by the Duke of Suffolk related what Lord Thomas Grey had said regarding Throckmorton’s conduct. Throckmorton objected “But what doth the principal author of this matter say against me, I mean the lord Thomas Grey, who is yet living? Why is not his Deposition brought against me, for so it ought to be, if he can say any thing?” The Trial of Sir Nicholas Throckmorton, 1 How. St. Tr. 869, 883-84 (1554); see also *id.* at 886 (“There is also for proof . . . the duke of Suffolk’s Confession, with whom I never had conference; and therefore he avouched the take of his brother’s mouth.”).

²⁹⁵ *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694).

²⁹⁶ *Crawford*, 541 U.S. at 69 n.1 (citing Gallanis, *supra* note 179, at 534-35; Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, U. ILL. L. REV. 691, 738-46 (1993)). Note that Chief Justice Rehnquist’s formulation, based on recent scholarship, differs from Justice Thomas’s previous historical claim, apparently referring to the original understanding of the Confrontation Clause, that “[t]here appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the *simultaneously evolving* common-law right of confrontation.” *White*, 502 U.S. at 362 (Thomas J., joined by Scalia J., concurring)

C. *The Embryonic Understanding of Hearsay During the Framing-Era*

Because the oath was the critical requisite for valid, admissible evidence in framing-era doctrine, and because “hearsay” was understood to refer to any statement by a witness that repeated an unsworn statement by another person, the doctrinal rule was that “[h]earsay is no evidence.”²⁹⁷ (This appears, for example, to be the basis for the rule that one person’s confession could not be used as evidence against another; because confessions were unsworn, they could not constitute evidence in the usual sense. Thus, although there was an exception that permitted using a confession against the speaker himself, the requirement that evidence be sworn prohibited admitting the confession as evidence against someone else.²⁹⁸) Moreover, it appears that few “exceptions”

(emphasis added). Thomas’s statement appears to have prochronistically projected the nineteenth-century development of exceptions to the ban against hearsay evidence back to the earlier period when the right of confrontation emerged. However, the historical record indicates that the right of confrontation preserved in the Sixth Amendment predated the articulation of exceptions to the ban against hearsay evidence during the nineteenth century.

²⁹⁷ In Gilbert’s words:

Hearsay is no Evidence . . . though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath

Crawford, 541 U.S. at 70 n.2 (quoting GILBERT (1769), *supra* note 123, at 152). See also LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 237 (noting that a hearsay statement was regarded as “no evidence” because it was unsworn).

²⁹⁸ The initial authority for this rule was *Case of Thomas Tong*, Kelyng, J. 17, 84 Eng. Rep. 1061 (K.B. 1662) [hereinafter *Tong’s Case*]. The issue in this case was whether a coconspirator in treason could be a witness at trial against other conspirators. The judges ruled he could, and stated that “persons who are equally culpable” of treason with those who are on trial could be called as witnesses at trial and were not incompetent to testify because of their involvement. *Id.* at 17-18, 84 Eng. Rep. 1062. However, the judges also recognized that a “confession” is “only evidence against the party himself who made the confession, but cannot be made use of as evidence against any others whom *on his examination* he confessed to be in the treason.” *Id.* at 18-19, 84 Eng. Rep. at 1062 (emphasis added).

The crucial premise of this second statement in *Tong’s Case* was that the “confession” of a confederate referred to was one that had been obtained prior to trial during the *unsworn* Marian post-arrest “examination” of the co-conspirator by a justice of the peace. See the italicized phrase in the preceding paragraph; see *also id.*, 84 Eng. Rep. at 1062 (noting that the confession that had been made during an examination by a “privy councillor” was equivalent to a confession made during an examination by a justice of the peace). Hence, *Tong’s Case* simply stood for the rule that an *unsworn*

regarding hearsay were recognized by the framing era.²⁹⁹ In

pretrial confession given during an examination could not constitute “evidence” against another person. In contrast, any testimony given by a coconspirator in court during a trial would have been *sworn*, and thus could constitute evidence.

Unfortunately, the meaning of this rule is easily misunderstood if one does not understand the implicit historical distinction between sworn and unsworn statements. In *Crawford*, although Crawford’s wife had not been charged with a crime in the case (Petitioner’s Brief, *supra* note 28, at 4), Crawford claimed she was an “accomplice” or at least a “potential accomplice” and thus that his wife’s statement should be excluded under the common-law rule that an “accomplice’s” confession was inadmissible against anyone but the accomplice himself or herself. *See id.* at 9 (citing *Tong’s Case*, Kelyng J. at 17, 18, 84 Eng. Rep. at 1061-62). However, as explained above, *Tong’s Case* did not base the framing-era rule on the mere status of a witness being an accomplice, let alone merely a “potential accomplice.” Petitioner’s invocation of the supposed “accomplice confession” rule was merely an example of ripping the common-law rule from the now lost common-law context.

Unfortunately, the justices have also failed to grasp that the rule in *Tong’s Case* regarding the inadmissibility of a confession by another person simply reflected the unsworn nature of a confession taken during a Marian examination of an arrestee, as contrasted to the admissibility of a sworn Marian deposition of a witness. Thus, in *Crawford*, Justice Scalia cited the framing-era rule against the use of a confession as evidence against another person as though it constituted part of the more general development of a right of confrontation. *See Crawford*, 541 U.S. at 45 (stating that historical “authorities also stated that a suspect’s confession could be admitted only against himself, and not against others he implicated”). Justice Breyer previously made the same error. *See Lilly v. Virginia*, 527 U.S. 116, 141 (1999) (Breyer, J., concurring) (citing *Tong’s Case* as though it stated a general principle of face-to-face confrontation). The professors’ brief in *Crawford* also cited the confession rule as though it reflected a more general concern with confrontation. *See Professors’ Brief*, *supra* note 28, at 11 n.7. However, the inadmissibility of a confession against anyone except the confessor simply reflected the basic evidentiary requirement that only *sworn* statements could constitute valid evidence. An unsworn confession was inadmissible against others *regardless* of any consideration of the right to confrontation.

²⁹⁹ Commentators have generally concluded that the hearsay exceptions that are a salient aspect of modern evidence law developed only after the framing of the Bill of Rights. For example, Professor Mosteller has written that:

The historical record is clear . . . that hearsay exceptions were not considered a substitute for cross-examination at the time of the promulgation of the Confrontation Clause. Courts recognized only a handful of exceptions, each with a specialized history that could not be easily generalized. If we were to take our cue from the exceptions in effect at the time of the framing, the result would be a very restrictive one regarding the admission of hearsay in criminal cases. In general, if a statement was considered hearsay, it was inadmissible except in a very limited number of exceptions and where the declarant was unavailable, with death generally the only form of unavailability recognized.

Thus, at the time Congress ratified the Sixth Amendment, the hearsay/Confrontation Clause analysis was quite protective of the criminal defendant. Not insignificantly, if hearsay and the Confrontation Clause applied, the statement was excluded except under very narrow circumstances.

Mosteller, *supra* note 296, at 745-46. *See also* the views of Professor Gallanis set out *infra* note 304.

The amicus brief of the United States in *Crawford* drew a more expansive picture of hearsay exceptions by claiming that “late 18th century” law recognized the following exceptions to hearsay regarding “dying declarations, regularly kept records,

Crawford, Justice Scalia identified only two hearsay exceptions that might date from that period: an exception for a “dying declaration” (where the declarant’s anticipation of imminent death was viewed as prompting truthfulness to a comparable degree as an oath),³⁰⁰ and a possible exception for a “spontaneous declaration.”³⁰¹

One reason that the law of hearsay was still undeveloped in the framing era is that the less formal trial procedure of that period did not permit the exclusion of hearsay testimony to the degree that modern trial procedure does. The judge could prevent a witness from testifying if the witness were deemed incompetent, or the judge could prevent the reading of a deposition if it had been taken improperly. However, there does not seem to have been any effective procedure for preventing a witness from repeating an out-of-court statement made by another person in the hearing of the jury. For one thing, the jury was not sent out of the courtroom during the discussion of evidentiary matters in eighteenth-century criminal trials. For another, witness testimony was not as structured by a question and answer format as is now the case, and there apparently was often no opportunity for counsel to object before a witness repeated a hearsay statement in the course of his or her testimony. Instead, if a witness did repeat a hearsay statement, the judge instructed the jury that hearsay was “no evidence” and that the jury should not give any credit to the hearsay statement.³⁰² The more rigorous

co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence.” Amicus Brief of the United States, *supra* note 28, at 13 n.5. However, the salient point is that most of those exceptions applied only to civil matters; only the dying declaration and co-conspirator declarations exceptions were likely to arise in criminal trials. Moreover, the historical basis for the “co-conspirator declaration” exception referred to is dubious. *See supra* note 298.

Commentators also have sometimes overstated the historical exceptions to the ban against hearsay that were pertinent to criminal trials and the confrontation right. *See, e.g.*, AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 94 (1997) (asserting that “surely all hearsay cannot be unconstitutional. At common law, the traditional hearsay ‘rule’ was notoriously unruly, recognizing countless exceptions to its basic preference for live testimony,” but offering no evidence to support that historical assertion).

³⁰⁰ *See Crawford*, 541 U.S. at 56, 56 n.6 (describing dying declarations as the only exception to the ban against hearsay that would have permitted the admission of testimonial statements in criminal trials by 1791).

³⁰¹ *Crawford*, 541 U.S. at 22 n.8 (noting that “in 1791” such an exception would have been narrowly construed “to the extent the hearsay exception for spontaneous declarations existed at all”).

³⁰² Langbein reports that in framing-era practice in England, issues of the admissibility of evidence were discussed in front of the jury. *See* LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 249. He also reports that, although hearsay was

modern notion that hearsay should be excluded from the jury's hearing appears to have developed only as the criminal trial became more complex and testimony became more formally structured during the nineteenth century.³⁰³ As a result, the "exceptions" to the rule against hearsay evidence also developed largely only during the nineteenth century – after the oath became a less important factor in assessing the validity of evidence.

The important point is that the Framers simply did not consider the application of the confrontation right to the types of informal hearsay evidence that are now commonly admitted as evidence in criminal trials, because they did not anticipate the possibility that informal hearsay could or would become widely recognized as valid "evidence" in its own right.³⁰⁴ Rather, both the modern understanding of hearsay and of hearsay exceptions are post-framing developments.

Thus, the critical question is whether inferences can be drawn from the original meaning of a constitutional provision regarding a subject the Framers had no occasion to consider, or even anticipate. Justice Scalia implicitly asserted a narrow understanding – the original meaning should be understood to prohibit only the specific abuses the Framers were familiar with. Unsurprisingly, that approach to original meaning seems to appeal to those who generally prefer to read constitutional

"no evidence" as a matter of doctrine, *see id.* at 235-37, it often arose during criminal trials, *see id.* at 234-35. Because judges could not prevent witnesses from referring to hearsay statements, they could only direct the jury that hearsay was "no evidence" and thus should not be credited. *See id.* at 235, 236, 247-51.

³⁰³ As is widely understood, the criminal trial before the petit jury has become a much more complex and rigorous procedure than it was during the late eighteenth century, and the subsequent increased frequency of counsel in criminal trials almost certainly is part of the explanation for that increase in complexity. *See, e.g.*, Gallanis, *supra* note 179, at 537-38. *See also* LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 242-44. Langbein suggests that the hearsay rule itself – that hearsay was "no evidence" – was "firmly in place" in English practice at the Old Bailey "by the end of the eighteenth century." *Id.* at 242. However, he does not identify exceptions to that rule other than the dying declaration exception, which he dates as having arisen prior to the hearsay rule itself. *See id.* at 249 n.305.

³⁰⁴ Professor Gallanis noted in his study of the emergence of hearsay doctrine that "hearsay controversies in [reported English] criminal cases were almost nonexistent before [the 1780s]." Gallanis, *supra* note 179, at 536. However, he concluded that the contours of the modern rule against hearsay, and its exceptions, were evident in cases decided during the 1780s because of a "sharp rise" in litigated issues regarding hearsay during that period. *Id.* at 535-36. (Note, however, that because Gallanis was interested in English developments, he referred only to the dates when cases were decided, not to the dates when published reports of those cases would have become available in America.) Gallanis attributed the increase in hearsay litigation to the increased frequency with which lawyers appeared in routine criminal trials during that period. *Id.* at 537-38.

restrictions on government criminal justice authority narrowly. However, that approach ignores the basic fact that all texts are incomplete on their face.

D. What the Framers Did and Did Not Expect

All texts are incomplete in the sense that they do not explicitly spell out all of the premises and expectations that shaped the meaning that the authors intended to convey to their audience. Widely shared premises are often left unstated, simply because there does not seem to be a need to state them. In addition, the 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.³⁰⁵ Thus, the original meaning of a text has always been shaped by the historical context in which it was written. But what if the context has changed? Is it really appropriate to limit the “meaning” of the text to only the “original” specific abuses the Framers actually had in mind when they wrote it, without inquiring as to whether or how the underlying premises and expectations that caused the Framers to focus as they supposedly did may have changed over time?

Consider the extent to which contemporary criminal procedure context has diverged from the premises and expectations that shaped the Framers’ understanding of the confrontation right. The Framers still had confidence that oaths provided an assurance of truthfulness; in contrast, we

³⁰⁵ For example, Professor Telford Taylor once argued that the absence of any explicit warrant requirement in the Fourth Amendment’s text indicated that the Framers were “[not] at all concerned” with warrantless government intrusions. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS* 39 (1969). In one sense that was correct; the original Fourth Amendment was focused only on the standards for a valid warrant. See Davies, *Original Fourth*, *supra* note 2, at 724. However, the reason that the Framers were content to simply control warrants was that they never anticipated the emergence of the modern police officer, and thus never conceived that ordinary officers would be accorded much authority unless they were executing warrants. Thus, when the Fourth Amendment was written, controlling the warrant sufficed to serve the Framers’ larger purpose of preventing ordinary officers from exercising discretionary arrest or search authority. *Id.* at 650. However, if one were to read the Fourth Amendment today as only addressing standards for valid warrants, the whole purpose of that Amendment would be defeated because modern police have acquired warrantless authority that the Framers never imagined they would be permitted to exercise. Thus, the sound response to Professor Taylor’s position is that there is reason to think that Framers would have been very concerned about warrantless intrusions had they been able to anticipate how policing would develop.

are less sure the oath assures the likelihood of truth-telling – which is why we now value cross-examination so much. In addition, although the Framers still expected that criminal procedure would be accusatory – indeed, they probably thought that the provisions in the state declarations of rights and the federal Bill of Rights would preserve accusatory procedure – accusatory procedure was replaced by modern investigatory procedure. More specifically, the Framers expected that the full case against the arrestee would usually be set out at the time of the arrest that commenced a prosecution; in contrast, contemporary prosecutors now withhold as much of their case as possible during preliminary hearings (which had not been invented in 1789³⁰⁶) in order to gain advantage in plea-bargaining (a process that does not appear in framing-era sources³⁰⁷) or to have the advantage of surprise in the event of trial.³⁰⁸

Even more importantly, the Framers did not expect that government officers would search out potential witnesses of crime; that was the complainant's burden.³⁰⁹ In contrast, modern police officers do search out potential witnesses in the process of investigating charged crimes and even develop informant networks for discovering uncharged crimes. In the course of conducting this modern form of investigation, police generate and collect rumors and hearsay information to a degree that was unknown during the framing era.

³⁰⁶ Professor Langbein suggests that Marian procedure may have taken on features of a preliminary hearing in London in the 1750s. See LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 274-77. However, that seems likely to have been an aberration. Preliminary hearings probably came into widespread use only after Marian procedure was abandoned during the nineteenth century; Marian examinations were replaced by the combination of a probable cause hearing for warrantless arrests, and a subsequent preliminary hearing. This evolution may have been well underway in Virginia's use of a "court of examination" even before the framing-era, but that development seems to have been limited to Virginia. See *supra* notes 248, 265.

Justice Scalia's opinion in *Crawford* refers to "ex parte testimony at a preliminary hearing" as an example of a form of a statement that would clearly be "testimonial" under any definition of that term. *Crawford v. Washington*, 541 U.S. 36, 52 (2004). The reference is puzzling because, so far as I can determine, preliminary hearings are not held *ex parte*. If Scalia meant to refer to a Marian deposition, he departed from historical usage in referring to such as a "preliminary hearing."

³⁰⁷ See, e.g., John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 278 (1978) (noting that there were few guilty pleas in eighteenth-century English trials and that judges typically advised defendants against pleading guilty).

³⁰⁸ See, e.g., NEIL P. COHEN & DONALD J. HALL, *CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS: CASES AND MATERIALS* 141 (2d ed. 2000).

³⁰⁹ See, e.g., LANGBEIN, *ADVERSARY TRIAL*, *supra* note 79, at 11-12; cf. Davies, Chavez, *supra* note 70, at 1028-29.

Additionally, hearsay information collected by police and prosecutors is of considerable importance because modern evidence law authorizes the use of hearsay evidence to a far greater degree than was the case in 1789.³¹⁰ Indeed, it is at least a plausible hypothesis that courts have liberalized the exceptions to the supposed ban against hearsay in order to allow the government to exploit the array of hearsay-like information now generated by modern police investigation.

It is pointless to ask what the Framers would make of all these changes – they cannot tell us, and we cannot know. The more appropriate question is whether there is any method by which we now can decide how the original understanding of a provision in a 200-plus-year-old text should apply to a very different context than that for which it was written.

In *Crawford*, Justice Scalia purported to translate the original meaning to the modern context by assessing “resemblance” to a historical feature. Thus, he asserted that statements made during police interrogations should be understood to fall within the scope mandated by “text and history” because “[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England.”³¹¹ But do they?

Framing-era depositions were under oath and conducted by magistrates; in contrast, contemporary police interrogations are not sworn. Scalia asserted that these differences were immaterial, but he offered no valid historical evidence for his suggestion that oaths were not assigned importance in framing-era law.³¹² Instead, he asserted that it “does not

³¹⁰ In contrast to the historical rule that “hearsay is no evidence,” *see supra* note 297 and accompanying text, contemporary evidence law recognizes a variety of exceptions to the rule against hearsay. For an explication of the variety and scope of the contemporary exceptions, *see*, for example, 4-5 JONES ON EVIDENCE: CIVIL AND CRIMINAL, *supra* note 25, chs.26-38 (discussing hearsay exceptions relating to: prior inconsistent statements by witnesses; admissions; spontaneous statements (“*res gestae*”); state of mind; statements made for medical diagnosis or treatment; special exceptions for sexual assault or child abuse cases; recorded recollections; business records; public records; miscellaneous “declarant availability immaterial” exceptions; market reports and commercial publications; “declarant unavailable” exceptions (including former testimony, dying declarations, statements against interest, and statements admitted on account of wrongdoing by a litigant); and “residual” exceptions).

³¹¹ *Crawford*, 541 U.S. at 52.

³¹² *Id.* at 52 (stating that the fact that “statements [to police officers are unsworn] is not dispositive”). As evidence on this supposedly historical point, Scalia cited only Jardine’s 1832 account of Raleigh’s trial, *see supra* note 50, and an 1844 South Carolina opinion. *See Crawford*, 541 U.S. at 52 (citing CRIMINAL TRIALS (1832), *supra* note 50, at 430; *State v. Campbell*, 30 S.C.L. 124 (App. L. 1844)). Obviously,

change the picture” that depositions were conducted by magistrates rather than peace officers because “[j]ustices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function.”³¹³ However, that assessment is too superficial. Justices of the peace were understood to be *judicial* officers in 1789,³¹⁴ and it mattered that justices conducted interrogation of witnesses in 1789 because only sworn statements could constitute valid evidence. A justice of the peace could administer an oath precisely because he held a *judicial* commission – but a constable could not.³¹⁵ In 1789, it was still unthinkable that a constable would take an examination of a witness.

In addition, Scalia’s claim of a “striking resemblance” blurs two very different levels of “investigation.” The “investigation” conducted by a justice of the peace during the framing era was limited largely to questioning those who were already arrested on the basis of an accusation of crime “in fact” and those who brought the arrestee to him; the justice did not investigate in the sense that he undertook to discover uncharged crimes or even sought out potential witnesses when an accusation had been made. Marshalling witnesses was the obligation of the private complainant.³¹⁶ In contrast, modern

neither of those sources sheds any light on the Framers’ understanding of the importance of an oath for determining the validity of evidence. In addition Scalia noted that unsworn confessions were admitted against the person who made them. *Id.* However, confessions were understood to be entirely distinct from evidence from witnesses. *See supra* note 298. Except for a defendant’s own confession, an oath was a requisite for valid evidence. *See supra* note 297 and accompanying text.

³¹³ *Crawford*, 541 U.S. at 53.

³¹⁴ *See, e.g.*, JACOB’S LAW DICTIONARY (1782), *supra* note 144 (pages unnumbered) (stating in a discussion of “Justices of the Peace” that “[t]he power of justices is *ministerial* when they are commanded to do any thing by a superior authority, as by the court of B.R. [i.e., King’s Bench] &c. In all other cases they act as *judges*; but they must proceed according to their commission, &c.”). *See also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF England 342-43 (1st ed. 1765) [hereinafter 1 BLACKSTONE] (stating that the commission of a justice of the peace “empowers any two or more of them to hear and determine all felonies and other offenses; which is the ground of their jurisdiction at [the court of] sessions.”).

³¹⁵ *See Davies, Original Fourth, supra* note 2, at 623 n.199.

³¹⁶ *See supra* text accompanying notes 70-76. *See also* LANGBEIN, ADVERSARY TRIAL, *supra* note 79, at 41 (noting that, although some English justices of the peace may have sought out additional witnesses, the Marian statutes did not require them to do so). *See also id.* at 42-43 (concluding that Marian procedure mainly helped perpetuate private prosecutions and channeled English pretrial procedure away from public prosecution); *id.* at 338 (concluding that the privatization of criminal investigation was the central failing of English criminal procedure).

police attempt to “ferret out” uncharged crimes,³¹⁷ and they detain or arrest and question suspects on the basis of minimal standards of possible crime such as “reasonable suspicion” or “probable cause.”³¹⁸ Hence, there are striking differences between the two types of “investigation”; justices of the peace did not “investigate” as intensively or intrusively as modern police investigate – no government officer investigated in that sense in 1789.³¹⁹

Thus, Justice Scalia’s assertion that contemporary police interrogation is somehow equivalent to a framing-era judicial deposition (a claim that also holds significant implications for the Fifth Amendment right against self-accusation³²⁰) has little basis in history. The asserted “resemblance” ignores at least as many features as it considers, and falsely implies more continuity in criminal procedure than has been the case.

My point is not that the Confrontation Clause today should not extend to a hearsay statement made during police interrogation. In light of the fact that depositions taken by justices of the peace are no longer used, the confrontation right would be virtually meaningless if were understood to prohibit

³¹⁷ For the origin of this phrase, see *United States v. Johnson*, 319 U.S. 503, 512 (1943).

³¹⁸ See *supra* note 69.

³¹⁹ Justice Scalia committed a classic prochronism when he wrote that “it is not surprising that other government officers [that is, justices of the peace during the framing era] performed the investigative functions now associated primarily with police.” *Crawford v. Washington*, 541 U.S. 36, 53 (2004). That statement simply *assumes* that there has always been government investigation of ordinary crime. However, that assumption is false. Neither the justice nor his constable had authority to ferret out crime in the way that modern police officers are expected to. See *Davies, Atwater*, *supra* note 2, at 422-25. Modern policing is a post-framing invention that is a salient feature of the larger transformation from accusatory to investigatory procedure. Specifically, modern policing dates from the mid-nineteenth-century substitution of “probable cause” for the crime-in-fact standard for warrantless arrests. See *Davies, Original Fourth*, *supra* note 2, at 627-40. That relaxation of the arrest standard for officers vastly expanded the discretionary authority of the police officer. Indeed, it made the modern police officer possible. It also opened the way for the development of police investigation and interrogation of suspects. See *Davies, Chavez*, *supra* note 70, at 1030-32. The concept of a peace officer taking a statement to be used as evidence would not have made any sense to the Framers. See *Davies, Original Fourth*, *supra* note 2, at 749 n.574.

³²⁰ It should be noted – as I am confident that Justice Scalia would recognize – that the claim that modern police interrogation is equivalent to a framing-era examination by a justice of the peace is also a necessary component of any claim that police interrogation is consistent with the original understanding of the Fifth Amendment right against self-incrimination. The examination of an arrestee by a justice of the peace was the only form of pretrial interrogation authorized by framing-era law. See *Davies, Chavez*, *supra* note 70, at 1001-06.

only the admission of depositions and affidavits. Rather, it makes sense to apply the confrontation right at least as far as statements made during police interrogation if for no other reason than that police investigation and interrogation generates much of the potential evidence in contemporary criminal prosecutions. The crucial shortcoming of an originalist approach that would define a protection in the Bill of Rights according to only the specific abuses that the Framers actually anticipated is that such an approach underestimates the tendency for government power to expand in ways that end-run the Framers' experience. Hence, reading the Bill of Rights to prohibit only the exact abuses that the Framers imagined would tend to drain the Bill of practical meaning.

However, given that it is necessary to construe the confrontation right to extend beyond the specific abuses known to the Framers, why stop at statements made during police interrogation – particularly given that police interrogations are quite distinct from framing-era justice of the peace depositions? How does history compel that choice? Indeed, even assuming that there are valid policy justifications to restrict the confrontation right to something less than every hearsay statement identified by modern evidence law, why should the confrontation right today be defined according to specific settings or forms in which the hearsay statement was obtained? Why not extend the right more broadly to any statement that is the product of police investigation?³²¹ Or to any statement that materially goes to the assessment of guilt? No doubt a variety of policy considerations are pertinent to assessing these possibilities; my point is simply that none of these questions are actually answered by original meaning precisely because they all involve matters that fall outside of the Framers' experience and expectations.

For present purposes, the important point is that the “testimonial/nontestimonial” distinction that is salient in *Crawford* was not part of the original meaning, and Justice Scalia misdescribed history when he suggested that the original meaning limited the reach of the Confrontation Clause to “testimonial hearsay.” That was a political judgment posing

³²¹ See, e.g., Berger, *supra* note 51, at 561 (commenting, with regard to the confrontation right, that “[h]earsay statements procured by agents of the prosecution or police should . . . stand on a different footing than hearsay created without governmental intrusion”).

as history, not history itself.³²² History can inform us of the importance the Framers attached to the confrontation right and to cross-examination, but it cannot tell us what that right should now mean, in a very different context. The answer to that question can be addressed only by assessing the contemporary conditions and consequences of the relationship between the right of confrontation and hearsay.

IV. CONCLUSION: THE FALSE ALLURE OF ORIGINALISM

I have not engaged in the preceding assessment of the originalist claims in *Crawford* in the hopes of prompting a reconsideration of the outcome of that case. As noted above, my sense is that *Crawford* probably is an improvement over the extreme flexibility of *Roberts*. Instead, my hope is that exposing the errors and distortions in *Crawford*'s claims about original meaning will encourage the justices and commentators to forego the pretense of originalism for more candid and constructive modes of justifying constitutional rulings.³²³

³²² It should be noted that all of the briefs filed in *Crawford* seem to have anticipated or endorsed the restriction of the scope of the Confrontation Clause to only "testimonial hearsay." In particular, the professors' amicus brief endorsed this limitation in much the same way Justice Scalia did. The brief asserted that "the law against hearsay has not played a role in this account [of the emergence of the confrontation right]. Hearsay law, like evidence law more generally, was not well developed at the time the [Confrontation] Clause was adopted, much less during the previous centuries." Professors' Brief, *supra* note 28, at 11 (repeating a virtually identical statement in Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1208 (2002)). However, after stating, in effect, that the Framers were unfamiliar with modern hearsay doctrine, the Professors' brief nevertheless draws a negative conclusion: that "[i]n expressing a fundamental procedural principle governing how testimony must be given, the [Confrontation] Clause was not meant to constitutionalize the law of hearsay." *Id.* at 11. I think this conclusion is simply arbitrary. Indeed, this brief was a bit too imprecise in saying that hearsay law was not well developed when the Confrontation Clause "was adopted"; in framing-era doctrine, hearsay was "no evidence." See *supra* note 293 and accompanying text. Hence, I do not see how the Framers were ever given any reason to consider whether or how confrontation should apply to hearsay "evidence." It may be that the combination of a cross-examination rule for "testimonial hearsay" and a free pass for "nontestimonial hearsay" constitutes a neat compromise for construing the Confrontation Clause today, but that does not mean that the compromise has any historical roots or character.

The amicus brief of the United States in *Crawford* once again restated the Justice Department's view that the confrontation right should be restricted to "testimony or its equivalent." Compare Amicus Brief of the United States, *supra* note 28, at 8-10 with *White*, 502 U.S. at 352-53 (indicating that the United States as amicus had contended "that the Confrontation Clause generally does not apply to the introduction of out-of-court statements admitted under an accepted hearsay exception"). However, although this brief addressed history, it also failed to articulate any substantial historical basis for the construction it sought.

³²³ See *supra* note 43.

Originalism in criminal procedure suffers two serious defects. First, the justices too often get the history wrong. Getting the history right requires considerable immersion in the historical sources, but the justices do not have the time to delve into history that deeply. Second, in the event the justices were to get the history right, they would find that authentic framing-era doctrine is usually so distant from the modern context and from modern conceptions that it simply does not connect up with contemporary issues.

A. *The Recent Emphasis on Originalist Justifications*

The appeal of originalism lies in the notion that it injects a degree of discipline into constitutional law. However, the recent turn to originalism is largely the product of constitutional politics. Specifically, the turn to originalism reflects the search by conservative politicians, judges, and lawyers for a rhetoric to justify retrenching the expansive constructions of constitutional rights that had been articulated in the decisions of the Warren Court and early Burger Court.

During the Nixon period, this response was characterized as a return to “strict construction.” However, when applied to the cryptic language of the Bill of Rights, this textual-sounding approach did not always suggest precisely what the strict construction should be. Thus, during the Reagan administration, the response was shifted slightly to place greater emphasis on the supposedly historical “original meaning” of the constitutional text.³²⁴

Although much of the impetus for the turn to originalism probably arose from the Court’s decisions regarding the right of privacy (abortion) and, perhaps, the religion clauses (school prayer, vouchers, etc.), originalist claims also appeared in constitutional criminal procedure opinions. Conservatives were particularly hostile toward the Warren Court’s interpretations of the implications of the Fourth and Fifth Amendments for police conduct, and especially the exclusionary rules that enforced Fourth and Fifth Amendment protections. They responded by formulating a search-for-truth agenda for criminal procedure.

³²⁴ See Davies, Atwater, *supra* note 2, at 252-60.

B. *Contemporary Search-for-Truth Investigatory Procedure*

Of course, the notion that criminal procedure should be only a “search for truth” in criminal trials provides a perfect slogan for legitimizing unfettered government investigative power. That agenda treats the jury trial at the end of a criminal proceeding as the only important safeguard, but dismisses pretrial standards and protections as unnecessary obstacles to the search for truth at trial. Thus, although the search-for-truth agenda accords importance to the trial rights in the Sixth Amendment – or at least to some aspects of those rights³²⁵ – it justifies the evisceration of the contents of the Fourth and Fifth amendments. Moreover, because jury trials actually occur in only a very small percentage of criminal prosecutions, this agenda effectively frees police and prosecutors from constitutional restraints in most criminal matters.

Unsurprisingly, the theme that criminal procedure should assure that the criminal trial is an unfettered “search for truth” has also shaped the originalist claims regarding constitutional criminal procedure in Rehnquist Court opinions. The self-described originalist justices have justified the removal of constitutional restraints on police by asserting that the Framers intended for the Fourth Amendment to apply only a flexible “generalized reasonableness” standard for assessing police detentions, arrests, and searches – an approach that maximizes the potential for after-the-fact rationalizations of police intrusions.³²⁶ Likewise, they have also asserted that the

³²⁵ The Court has not been particularly insistent on providing *effective* assistance of counsel in criminal trials. *See, e.g.*, George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 543-44 (2004). Of course, other aspects of contemporary procedure, such as the extremely limited pretrial discovery permitted defendants, are also difficult to square with search-for-truth rhetoric. In practice, the search-for-truth model may operate largely as a search for incriminating evidence.

³²⁶ The notion that the Fourth Amendment was intended to create a broad reasonableness-in-the-circumstances standard for assessing the constitutionality of government intrusions is the product of a series of false historical claims. The idea that the Fourth Amendment created a reasonableness standard distinct from the warrant standards it explicitly set out had its start in Justice Bradley's opinion in *Boyd v. United States*, 116 U.S. 616 (1886). That opinion is notable for Bradley's heavy reliance on a long quotation of a statement Lord Camden made in a 1765 English general warrant case. *Id.* at 627-29. However, the quoted language had not appeared in the report of the case that the Framers likely were familiar with, but had been added in a report that was not published until the 1780s, after all of the components of the Fourth Amendment, including the reference to a right against “unreasonable” searches and seizures, had already appeared in the language of the state declarations

Framers intended for the right against self-incrimination to operate only at trial itself, but not to limit pretrial investigation of crimes – a construction that maximizes the opportunity for police interrogation.³²⁷

I think the search-for-truth agenda is also evident in *Crawford* itself – albeit with a twist. Because the right of confrontation does relate to the criminal trial, and because cross-examination is widely regarded as essential to accurate truth-finding, the search-for-truth model identifies the Confrontation Clause as a trial right that must be accorded some importance. I think that explains why the two justices who seem most committed to originalist justifications, Justices Scalia and Thomas, joined more moderate members of the Court in asserting a strong cross-examination rule in *Crawford*. Their insistence that the confrontation right take the form of an enforceable rule was consistent with taking seriously the search for truth in the jury trial.

Conversely, the fact that the confrontation right can operate as an exclusionary rule that excludes potentially incriminating evidence from trial, as was the case in *Crawford* itself, undoubtedly explains why the articulation of the cross-

of rights. Hence, it seems highly unlikely that the Framers would have paid any attention to the language on which Bradley relied. *See supra* note 34. However, although *Boyd* invented the idea of a free-standing reasonableness standard, the content that case assigned to Fourth Amendment reasonableness has not exerted a significant influence on modern Fourth Amendment doctrine.

The more important decision, which also rests on a historical error, is Chief Justice Taft's opinion in *Carroll v. United States*, 267 U.S. 132 (1925). In that case, Taft justified permitting police to make warrantless searches of cars on the ground that such a search would be "reasonable" if there was probable cause that the car contained contraband because the First Congress had enacted statutes that permitted warrantless searches of ships roughly contemporaneously with the framing of the Fourth Amendment. *Id.* at 150-53. However, Taft erred by assuming that the Fourth Amendment would have applied to ships; the historical evidence indicates that a ship would have fallen outside of the "houses, papers, and effects" protected by the Fourth Amendment. *See* Davies, *Original Fourth*, *supra* note 2, at 604-08. Indeed, the Fourth Amendment had never been mentioned in any of the numerous ship seizure cases decided by the Court prior to *Carroll*. *Id.*; Davies, Atwater, *supra* note 2, at 262.

More recently, Justice Scalia endorsed a generalized reasonableness approach and asserted that it was the "first principle" mandated by the original meaning of the Fourth Amendment in *California v. Acevedo*. 500 U.S. 565, 583 (Scalia, J., concurring). Specifically, he asserted that "colonial juries" used only a "reasonable[ness]" standard to assess the lawfulness of a search. *Id.* at 581. However, the only historical source he cited did not mention any "reasonable[ness]" standard; the only other authority he cited, a commentary by Professor Amar, actually only cited, in turn, an article by Scalia himself in which Scalia had asserted that search and seizure law should be based on a reasonableness assessment rather than upon a set of rules. *See* Davies, Atwater, *supra* note 2, at 263 n.64.

³²⁷ *See* *Chavez v. Martinez*, 538 U.S. 760 (2003) (discussed in Davies, Chavez, *supra* note 70, at 990-95).

examination requirement in *Crawford* was coupled with the limitation of the confrontation right to “testimonial” statements. As a practical matter, that limitation may well turn out to leave police and prosecutors with considerable room to obtain and use “nontestimonial” hearsay statements as evidence for establishing the guilt of criminal defendants.

However, the defect in all of this – at least in terms of the historical focus of this article – is simply that the larger search-for-truth ideological agenda does not mesh with the authentic original understanding of constitutional criminal procedure.

C. *The Contrast Between the “Search-for-Truth” Agenda and Historical Accusatory Procedure*

As noted above, framing-era criminal procedure – the procedure that the Framers actually sought to preserve in the Bill of Rights – was accusatory.³²⁸ Moreover, accusatory procedure differed in fundamental ways from current investigatory procedure. Indeed, the search-for-truth model of investigatory procedure now locates safeguards against abuse of criminal justice power quite differently than accusatory procedure did.

The essence of framing-era accusatory procedure was that government criminal justice power did not arise unless and until a complainant actually made a strong accusation that a crime had been committed “in fact.”³²⁹ Government provided the forum to resolve accusations, provided coercive power to arrest the accused to assure his appearance in that forum, and inflicted punishment on the guilty. However, at least in ordinary crimes, government did not initiate the use of the criminal power, and did not investigate to discover uncharged crimes.³³⁰

Of course, the Framers conceived of the jury trial as the ultimate protection against abuse of criminal justice power, and there is no doubt that they assigned it great importance. However, as the Framers were undoubtedly aware, the abuses

³²⁸ See *supra* notes 67-69, 306-10 and accompanying text. See also Davies, Atwater, *supra* note 2, at 422-29.

³²⁹ See *supra* note 67. This standard was more rigorous than mere “probable cause.” See *supra* note 69.

³³⁰ There were exceptions in which government itself was the victim of the crime, for example, counterfeiting, smuggling, treason.

that had prompted the reformulation of common-law criminal procedure during the late seventeenth and eighteenth centuries had mostly involved the initiation of criminal proceedings without a prior accusation of a specific crime.³³¹

Thus, accusatory procedure located important protections at the initiation of a criminal proceeding. It set a high threshold for initiating a prosecution by requiring a sworn accusation of a crime in fact – and by making the complainant at least potentially responsible for having made the accusation. These aspects were meant to prevent the wrongful initiation of prosecutions.³³² Indeed, the importance accorded the sworn accusation probably explains the acceptance of the admissibility at trial of Marian depositions of witnesses who had become unavailable after the arrest. Because Marian procedure recorded the sworn information that constituted the basis for the accusation, and because the oath was accorded considerable weight, the judicial record of that information was too substantial to be cast aside if the witness later became genuinely unavailable.

Accusatory procedure also imposed a series of post-arrest tests of the validity of the accusation prior to the ultimate trial before the petit jury. The Marian examinations of the arrestee, the complainant, and the complainant's witnesses was the first test of the substantiality of the accusation. The grand jury then tested the prima facie truth of the accusation a second time.³³³ Only after passing those two filters was a defendant subjected to trial before the petit jury. Thus, the final petit jury trial was not understood as a wide-ranging search for truth; rather, it was one last opportunity for the defendant to challenge and rebut a strong, already twice-

³³¹ See, e.g., Davies, Atwater, *supra* note 2, at 430-31 (discussing the importance of the 1628 Petition of Right, which was a response to arrests made without accusation of a specific crime; the 1642 abolition of the Court of Star Chamber, which was a response to the abuse of interrogation prior to any criminal charge; and the 1769 Habeas Corpus Act, which was a response to evasions of the standards for legally valid arrest and pretrial imprisonment).

³³² Of course, there is no way to know whether the historical accusatory standards were efficacious in preventing unfounded prosecutions. However, the fact that English courts relaxed these standards to facilitate the development of modern policing, see *supra* note 159, suggests that the accusatory standards did restrict the initiation of criminal proceedings.

³³³ During the framing-era, the standard for grand jury indictment was the apparent truth of the accusation, not the lower probable cause standard used today. See Davies, Atwater, *supra* note 2, at 427-28.

tested accusation of guilt.³³⁴ The underlying idea was that a defendant should not have to undergo trial at all unless it had already been concluded that there was a high probability that he was guilty. That is the accusatory procedure the Framers thought that they had preserved in the state declarations of rights and in the federal Bill of Rights. However, it did not work out that way.

The most salient feature of the post-framing history of American criminal procedure is the displacement of accusatory procedure by investigatory procedure. Contrary to the Framers' perception that the legislature posed the greatest danger to the preservation of accusatory procedure,³³⁵ it was actually the courts themselves that relaxed arrest and interrogation standards during the nineteenth century. The obvious reason they did so was to facilitate the development of more aggressive forms of crime suppression, especially modern policing.³³⁶ At roughly the same time, and perhaps partly in response to that relaxation, but also as a result of increased appearance by defense counsel, the criminal trial became more complex, and the law of evidence became more elaborate.³³⁷

By the late nineteenth century, the protections against abuse that had restricted the initiation of a prosecution had virtually disappeared; instead, what safeguards there were became concentrated in the jury trial itself. In a very real sense, pretrial constitutional criminal procedure was essentially nonexistent in this period. Thus, the accusatory procedure that had informed the original understanding of the criminal procedure protections was displaced and lost more

³³⁴ For example, the final trial before the petit jury was sometimes described as a trial before the "traverse" jury – meaning that it was the opportunity for the defendant to "traverse" (respond to, rebut) the evidence against him. See Davies, Atwater, *supra* note 2, at 428 n.630.

³³⁵ See, e.g., Davies, Atwater, *supra* note 2, at 407-08 (noting that Madison initially proposed inserting the criminal procedure provisions in the Bill of Rights into the limits on the powers of Congress set out in Article I, section 9, of the Constitution). See also, e.g., Henry, *supra* note 158, at 447-78 (warning during the Virginia ratifying convention that without a federal bill of rights, "Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments [and that] Congress may introduce the practice of the civil law, in preference to that of the common law [and] may introduce the practice of France, Spain, and Germany – of torturing, to extort a confession of the crime."); Holmes, *supra* note 158, at 111 (warning during the Massachusetts ratifying convention that without a federal bill of rights "[w]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal of Spain . . . the *Inquisition*.").

³³⁶ See, e.g., Davies, Chavez, *supra* note 70, at 1030-32.

³³⁷ See *supra* note 303.

than a century ago, and the original meaning of the criminal procedure provisions of the Bill of Rights were lost at the same time.

Constitutional criminal procedure was revived in the Supreme Court toward the end of the nineteenth and beginning of the twentieth centuries, and the justices invented the modern doctrinal structure at that time.³³⁸ However, the early twentieth-century justices shaped the new doctrine to facilitate government investigation of crime,³³⁹ not to return to accusatory procedure. Of course, the Supreme Court did not call attention to the fact that it had fundamentally revised the content of constitutional standards. Rather, the justices finessed it.

Unsurprisingly, the justices who reinvented criminal procedure also invented an official history of criminal procedure to legitimate their reformulation. “We have always done it that way” is the most common source of legal legitimacy, and an originalist pedigree was particularly necessary in the formalist jurisprudence of the early twentieth century. Of course, because investigatory procedure had

³³⁸ The reformulation of constitutional criminal procedure appears to have been prompted by a fundamental change in the understanding of the legal character of misconduct committed by officials and officers. Strange as it now may sound, during the framing era, there had been no conception that misconduct by an officer could constitute government wrong-doing or an unconstitutional government action; rather, because misconduct by an officer was, by definition, outside of the valid authority of his office, such misconduct was conceived to be only a form of personal wrongdoing and trespass. Thus, there was no basis for applying constitutional standards directly to the officer. For that reason, the Bill of Rights was aimed at limiting the power of Congress to relax settled conceptions of legal rights by legislation. See Davies, *Original Fourth*, *supra* note 2, at 660-67.

However, the modern notion that misconduct by officers constitutes a form of government illegality began to emerge around the end of the nineteenth century when the Supreme Court expanded the concept of “state action” to allow it to employ the Due Process Clause of the Fourteenth Amendment to oversee the regulation of businesses by state regulators. In particular, the justices made the novel ruling that even actions by state regulators that violated state law could constitute “state action” for purposes of applying the Due Process Clause. That new conception that officers could violate constitutional standards was then transferred to unlawful conduct by law enforcement officers in the early twentieth century. See Davies, *Original Fourth*, *supra* note 2, at 729-30.

³³⁹ There is a twist; the initial rulings in the reconstruction of constitutional criminal procedure often imposed limitations on law enforcement authority in order to protect business records. See, e.g., Davies, *Original Fourth*, *supra* note 2, at 729 n.516 (noting that the initial application of the Fourth Amendment to a warrantless police search appears to have been a response to government seizures of business records). However, the justices reversed direction and undertook to facilitate law enforcement during Prohibition when the focus of law enforcement was no longer on business interests. See *supra* note 326 (discussing the adoption of a generalized reasonableness approach to police searches in *Carroll*).

become firmly established by that time, the justices shaped the official history to support investigatory procedure. This official history then took on the aura of *stare decisis*. Fictional assertions in one opinion became the starting point for justifying the next.³⁴⁰ Historical aspects that fit, or could be made to fit, or at least seem to fit, were cited as evidence of the official version of original meaning; those that did not were either distorted or ignored. Thus, the justices shaped the supposed original meaning to mesh with and support the already decided-upon doctrine, not the other way around.³⁴¹

Happily, originalist claims were somewhat less evident in the opinions announced during the mid-twentieth century, though nothing was done to correct the official history that had already been created. However, fictional originalist claims again became salient during the Burger and Rehnquist Court periods, as the new law-and-order majority set about dismantling the constructions of the Warren Court.

The recent (re)turn to originalism is distinguishable by the specificity of the supposedly historical claims that are made. Perhaps in response to current academic styles, the originalists on the Court now tend to assert specific historical precedents for the specific rule that they announce. Ironically, the specificity of the claims has made it easier to detect just how fictional official history has become. If one examines the evidence offered for the specific claims that are made, the evidence usually collapses. That is what the preceding pages

³⁴⁰ Unfortunately, the legal academy has often given the official history invented by the justices a free pass. Unlike other disciplines, law is essentially normative. Hence, there are no objective standards of validity in law. Rather, law reflects status, and the Supreme Court is at the apex of the legal status structure. That was especially so earlier in the twentieth century. Thus, early twentieth-century commentators often parroted what justices wrote about history as though that were the history. The result was that official history became the accepted wisdom.

Even today, despite the more critical tenor of legal scholarship, the originalist claims in Supreme Court opinions are likely to get a free pass from many commentators and most casebook editors. Most legal academics have little background (or interest) in the relevant history, so they simply treat what the justice wrote as though it were valid. Others may even sycophantically curry favor by praising the justices' historical claims as scholarship. See, e.g., Davies, *Atwater*, *supra* note 2, at 245-46 n.16 (discussing academic comments that uncritically accepted or even praised Justice Souter's purportedly historical but actually inaccurate analysis of framing-era arrest doctrine in *Atwater*).

³⁴¹ Of course, the justices sometimes encountered the complexity of the authentic history, but they easily evaded that complexity by simplifying the original meaning to abstractions of "core concerns," "first principles," and the like. That simplification was achieved by editing away the complexity of authentic history. However, selective original meaning does not constitute original meaning in any meaningful sense.

demonstrate about Justice Scalia's claims in *Crawford*. That is what I have previously demonstrated regarding Justice Souter's claims about supposedly historical arrest law in *Atwater*.³⁴² Other examples are not hard to find.³⁴³

Thus, *Crawford* offers a paradigmatic illustration of the defects of an originalist approach to criminal procedure. Justice Scalia got the history wrong because he insisted on treating Marian procedure as though it were merely an aberration from the contemporary paradigm of the trial as the search for truth. But his claims were prochronistically defective because Marian procedure comprised a significant aspect of the accusatory structure of framing-era procedure.

D. Conclusion

Originalism cannot provide valid justifications for contemporary criminal procedure rulings because the authentic history involves far more discontinuity than is commonly

³⁴² See generally Davies, *Atwater*, *supra* note 2.

³⁴³ Fictional historical claims have taken a variety of forms. In some instances, justices have correctly stated but then misapplied framing-era doctrine. For example, in *Wilson v. Arkansas*, 514 U.S. 927, 932-34 (1995), Justice Thomas correctly noted that framing-era law required that an officer knock and announce when executing a warrant for a house search; however, he ignored the fact that the common-law authorities consistently stated a rigid, not flexible, knock and announce requirement, and instead endorsed a flexible standard as though it were the historical standard. See Davies, *Atwater*, *supra* note 2, at 259, 264.

Additionally, justices have sometimes drawn on historical authorities that simply were not on point. For example, in *Minnesota v. Carter*, 525 U.S. 83, 91-94 (1998), Justice Scalia cited English cases that pertained to hot pursuit as evidence that an invited guest did not enjoy any protection against a warrantless police intrusion of a house. However, the situation in *Carter* did not involve hot pursuit, and framing-era law did recognize circumstances in which a guest enjoyed the same protections as a resident of a house. See Davies, *Atwater*, *supra* note 2, at 264 n.66.

Indeed, justices sometimes even make historical claims without offering any evidence at all. For example, in *Wyoming v. Houghton*, 526 U.S. 295, 300-02 (1999), Justice Scalia asserted that framing-era search authority would not have recognized any distinction between authority to make a warrantless search of a parcel of freight on a ship and of a personal handbag, but offered no historical evidence for that rather strained claim.

More recently, in *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting), Justice Thomas opined that the historical evidence is too ambiguous to provide guidance as to whether the Framers intended for a warrant to be required for a search of a house, but cited no historical materials at all to justify the claim of ambiguity. The historical evidence actually quite consistently indicates that the Framers did value *specific* warrants as a means of controlling the officer and that, except in emergencies, an entry of a house was unlawful unless it was made pursuant to a valid warrant. See Davies, *Original Fourth*, *supra* note 2, at 642-50; see also *supra* note 326.

expected. The real past is foreign.³⁴⁴ As a result, there is little likelihood that authentic framing-era law will speak coherently to the types of issues that arise from contemporary doctrine. It often is possible to recover the authentic original meaning of a constitutional provision – provided one looks only to the historical sources themselves rather than to U.S. Reports – but what one finds in the historical sources will seldom connect up with modern doctrine. Far too much has changed. Indeed, so much has changed that the original meanings would not serve contemporary society all that well even if they could be reimplemented.³⁴⁵

The bottom line is that, at least in criminal procedure, originalism is not a sound mode of constitutional discourse. If the claimed original meaning is derived from the official history and the sources are made to fit, or made to seem to fit – as they were in *Crawford* – originalism is merely fiction posing as history. However, false history is entitled to no more respect than junk science.³⁴⁶ Conversely, if the authentic history is

³⁴⁴ Let me mention one other salient, but overlooked, way in which framing-era doctrine was drastically different from modern doctrine. At the time of the framing, “due process of law” still referred quite precisely to the requisite legal “process” (that is, the documentary authority) for initiating a *criminal* prosecution: arrest warrants (including both a written warrant “in deed” and comparable authority to make warrantless arrests, referred to as a “warrant in law”), indictments, or informations. Thus, the common-law standards for warrantless arrests were constitutionalized in the Fifth Amendment; the Fourth Amendment was addressed solely to banning unparticularized general warrants. Moreover, “due process of law” was strictly a standard for initiating criminal or penal proceedings (including nonmaritime forfeitures); the term was not applied to civil matters.

Subsequently, of course, the Supreme Court appropriated “due process” for a variety of other purposes during the late nineteenth century. Hence, when the Supreme Court constructed modern criminal procedure doctrine in the early twentieth century, it necessarily reassigned warrantless arrests to the Fourth Amendment, and thus made them subject to the purported “reasonableness” standard of that Amendment. Thus, modern doctrine has transferred the original content of “due process of law” – including arrest standards – to the Fourth Amendment and relaxed the standards that formed the historical content of “due process of law” to a “reasonableness” standard, while it has also accorded a host of novel meanings to “due process of law” that have no basis in the framing-era understanding of that term. That is no small adjustment. *See* Davies, Atwater, *supra* note 2, at 391-96.

³⁴⁵ Accusatory procedure may have been adequate for a nation of relatively small, stable, homogeneous communities; it would be far from ideal in an urbanized nation where persons often interact as strangers.

³⁴⁶ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court held that a trial judge should act as a gatekeeper to assure that expert testimony on scientific matters is permitted only when the proffered expert’s testimony is based on “good science” and comports with the scientific method. 509 U.S. 579 (1993). *See also* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (extending the *Daubert* approach to non-scientific experts). Unfortunately, there is no comparable gatekeeping regarding the historical claims cited to or made by the Supreme Court.

recovered, it usually doesn't mesh with modern doctrine and doesn't answer the questions that arise from contemporary procedure.

One thing that history indisputably teaches us about constitutional criminal procedure is that the Framers of the Bill of Rights thought the subject was important. That is why so many clauses in the Bill of Rights address criminal procedure. That being so, the justices owe us more than a fictional justification when criminal procedure is at stake.