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## Reconceiving the Right to Present Witnesses

Richard A. Nagareda

*University of Georgia School of Law*

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# RECONCEIVING THE RIGHT TO PRESENT WITNESSES

*Richard A. Nagareda\**

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\* Assistant Professor, University of Georgia School of Law. A.B. 1985, Stanford; J.D. 1988, University of Chicago. — Ed. Ronald Carlson, Dan Coenen, Anne Dupre, Ruth Nagareda, and Michael Wells provided helpful comments on earlier drafts.

## INTRODUCTION

Modern American law is, in a sense, a system of compartments. For understandable curricular reasons, legal education sharply distinguishes the law of evidence from both constitutional law and criminal procedure. In fact, the lines of demarcation between these three subjects extend well beyond law school to the organization of the leading treatises and case headnotes to which practicing lawyers routinely refer in their trade. Many of the most interesting questions in the law, however, do not rest squarely within a single compartment; instead, they concern the content and legitimacy of the lines of demarcation themselves. This article explores a significant, but relatively neglected, area that lies at the intersection of evidence, the Constitution, and crime.

For more than three decades, the Supreme Court has recognized a constitutional right on the part of criminal defendants to present witnesses.<sup>1</sup> Although this right is not set forth explicitly in the text of the Constitution itself, the Court correctly has regarded it as a necessary implication of the Compulsory Process Clause of the Sixth Amendment.<sup>2</sup> As such, the right is an integral part of the constitutional guarantees that a criminal defendant may invoke to override the ordinary rules of evidence, whether in the form of statutes or common law decisions — in essence, to turn a dispute within the law of evidence into a constitutional case.<sup>3</sup>

The right to present witnesses, however, tends to slip through the cracks of the conventional curriculum. Given its limitation to criminal trials, the right does not come up in standard constitutional

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1. The first explicit articulation of the right in these terms appears in *Washington v. Texas*, 388 U.S. 14, 19 (1967).

2. In pertinent part, the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. On the derivation of the right to present witnesses from the right to compulsory process, see *infra* section I.A. At various times, the Court also has pointed to other sources for the right to present witnesses, including implications from the Fifth Amendment right against self-incrimination (at least when the witness in question consists of the defendant herself) and notions of adversarial fairness implicit in the Due Process Clause. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987).

On the possible distinction between the defendant-as-witness and third-party defense witnesses, see *infra* section I.C.1.b (rejecting such a distinction). On due process, see *infra* section II.C.1.b (arguing that due process adds nothing to the content of the right to present witnesses but, instead, serves simply as the vehicle for incorporation of that right against the states).

3. The other significant constitutional override is the Confrontation Clause of the Sixth Amendment. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). On the lessons to be drawn from the Confrontation Clause for the proper parameters of the right to present witnesses, see *infra* section II.B.

law courses; nor, given its evidentiary overlay, does it arise in standard criminal procedure courses. Even within the realm of evidence pedagogy, the right barely achieves mention. With rare exception, the editors of the leading evidence casebooks do not discuss the major Supreme Court decisions on the right as a distinct line of analysis.<sup>4</sup> They typically content themselves, instead, to include a single decision in the line and, even then, to focus largely upon the particular kind of testimony in dispute.<sup>5</sup> This omission is one of many that results from the curricular compartmentalization of the Constitution and that, in turn, carries over into the world of legal scholarship.<sup>6</sup> This article seeks, if nothing else, to build the case to rectify this omission.

It comes as no surprise that the Court has invoked the right in order to strike down the application of evidence rules that peculiarly disadvantage criminal defendants with regard to the presentation of witness testimony.<sup>7</sup> More surprisingly, the Court also has invoked the right to invalidate, as applied to criminal defendants, at least some rules of evidence that are generally applicable — that is, rules that restrict the admission of a particular type of witness testimony, whether offered by the prosecution or the defense.<sup>8</sup> Under the Court's current approach, evidence rules that operate to pre-

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4. One notable exception is RONALD L. CARLSON ET AL., *EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES* 849-71 (4th ed. 1997).

5. Several recent casebooks include *Rock*, but the editors do so simply as part of a discussion of witness competency. See, e.g., ERIC D. GREEN & CHARLES R. NESSON, *PROBLEMS, CASES, AND MATERIALS ON EVIDENCE* 388 (2d ed. 1994); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 541 (3d ed. 1996); JOHN F. SUTTON, JR. & OLIN GUY WELBORN III, *CASES AND MATERIALS ON EVIDENCE* 404 (8th ed. 1996); JACK B. WEINSTEIN ET AL., *EVIDENCE* 256 (9th ed. 1997). One casebook goes a small step further by also including *Chambers v. Mississippi*, 410 U.S. 284 (1973), concerning statements contrary to penal interest, but the editors do so as part of a separate section on the constitutional grounds for the admission of hearsay. See MUELLER & KIRKPATRICK, *supra*, at 451. Another recent casebook mentions only *Chambers* in a similar light. See RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, CASES, AND PROBLEMS* 322 (2d ed. 1997).

6. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131 (1991); J.M. Balkin & Sanford Levinson, *Commentary — The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1012 (1998); Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 327-31 (1981).

7. See *Washington v. Texas*, 388 U.S. 14, 16 (1967) (striking down state evidence rule that disqualified accomplices as witnesses for defense, but not as witnesses for prosecution).

8. See *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (striking down per se prohibition upon hypnotically-enhanced testimony, as applied to bar defendant herself from testifying); *Chambers*, 410 U.S. at 299 (striking down hearsay exception for statements against interest that permitted statements against pecuniary interest but not those against penal interest, as applied to bar third-party defense witnesses). But see *United States v. Scheffer*, 118 S. Ct. 1261 (1998) (upholding per se prohibition upon expert scientific testimony concerning polygraph examination).

vent the presentation of defense witnesses “may not be arbitrary or disproportionate to the purposes they are designed to serve.”<sup>9</sup>

This constitutional override to the ordinary rules of evidence has assumed even greater significance in recent years, as rulemakers have grappled increasingly with new forms of witness testimony that stem from developments in modern science. The Court’s two most recent decisions on the right, for example, focused upon rules that categorically excluded, respectively, hypnotically-enhanced testimony<sup>10</sup> and expert scientific testimony concerning the results of polygraph examinations.<sup>11</sup> In these cases, the Court reached starkly divergent results, striking down the former rule as applied to a criminal defendant, but upholding the latter. Whatever its content, the right to present witnesses undoubtedly will play a key role in the disputes that are bound to arise from the science and technology of witness testimony in the twenty-first century.

The prospect of confronting the evidence disputes of the future within the parameters of the Court’s current case law is not auspicious. As I explain, the Court’s decisions in the area — especially when read in light of the Court’s most recent decision, from last Term, in *United States v. Scheffer*<sup>12</sup> — form an incoherent, contradictory body of law. That, in itself, would be reason enough for commentators to concern themselves with the subject, which surprisingly has garnered little fresh attention in recent years. The mid-1970s saw substantial articles by two leading commentators — Peter Westen and Robert Clinton — on the then-developing right to present witnesses.<sup>13</sup> Indeed, the authors of a subsequent treatise on exculpatory evidence describe their work as “essentially an extended footnote to” the Westen and Clinton articles.<sup>14</sup> No commentator in the past two decades, however, has sought to question the conventional understanding of the right as a matter of first principles. Nor has anyone sought to integrate the Court’s recent think-

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9. *Rock*, 483 U.S. at 56; see also *Scheffer*, 118 S. Ct. at 1264.

10. See *Rock*, 483 U.S. at 61.

11. See *Scheffer*, 118 S. Ct. at 1265-66.

12. 118 S. Ct. 1261 (1998).

13. See Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974) [hereinafter Westen, *Compulsory Process I*]; Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975) [hereinafter Westen, *Compulsory Process II*]; Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976); see also Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978) [hereinafter Westen, *Unified Theory*].

14. See EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, *EXCULPATORY EVIDENCE* xiii (2d ed. 1996).

ing on the subject with contemporary scholarship on other, conceptually similar questions of constitutional law that lie outside the compartments of evidence and criminal procedure.<sup>15</sup> These are the objectives of this article.

To that end, I contend that the Court's "arbitrary or disproportionate" standard is not simply flawed in application but that the standard fundamentally misconceives the nature of the right to present witnesses. Under the Court's current approach — indeed, in the view of all modern commentators — the right consists of an entitlement to exceptions from generally applicable rules of evidence, though the actual availability of an exception in a given instance has tended to turn recently upon ad hoc judgments by the Court itself.

One should not dismiss the ad hoc nature of the Court's recent jurisprudence simply as a sign of sloppy judging or ideological sleight-of-hand; rather, one should see it as a symptom of a much deeper and well-founded discomfort on the part of the Court with the implications that an "arbitrary or disproportionate" standard would have for the law of evidence, if taken seriously. The conception of a constitutional right as an entitlement to exceptions from generally applicable rules raises what one commentator aptly describes, in other constitutional contexts, as "the floodgates problem":<sup>16</sup> namely, the challenge of articulating some principled stopping point for the recognition of exceptions in order to avoid tearing apart the system of rules itself. It is this problem, I submit, that best accounts for — though it does not justify — the Court's ad hoc reasoning on the right to present witnesses. An exception-based view of the right to present witnesses, in particular, would throw into doubt such familiar features of evidence law as the rule against hearsay, limitations upon the use of extrinsic evidence for purposes of witness impeachment, and rules of privilege.

In describing the Court's recent output in these terms, I seek to highlight still another kind of compartmentalization — one *within*

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15. Akhil Amar takes on such an enterprise with respect to most of the constitutional rights that deal with matters of criminal procedure. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997). Even his otherwise sweeping treatment, however, devotes precious little attention to the right to present witnesses specifically, *see id.* at 136, though he does make several important points with regard to the meaning of the Compulsory Process Clause. The portions of Amar's book that discuss the Clause repeat, essentially verbatim, the analysis presented in an earlier article. See Akhil Reed Amar, *Foreword — Sixth Amendment First Principles*, 84 GEO. L.J. 641, 698 (1996). For ease of reference, I shall cite hereafter only to the book.

16. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1180 (1996).

the realm of constitutional law. Many of the rights protected by the Constitution consist of either entitlements to exceptions or demands for equal treatment. To take a well-settled example, the holding of *Washington v. Davis*<sup>17</sup> is that a generally applicable law does not violate the Equal Protection Clause merely because it has a disproportionate impact upon the members of a racial minority — there, African Americans. This is so because the content of the constitutional right — as its name suggests — is itself equality-based, not exception-based. What compartment one is in thus has tremendous significance for the application of the Constitution. It is not surprising, then, that one of the most controversial constitutional decisions in recent years — the Court's 1990 decision in *Employment Division v. Smith*<sup>18</sup> on the Free Exercise Clause — consists, at bottom, of a determination to switch a constitutional right from one compartment to the other. The upshot of *Smith* is to reject the preexisting understanding of the Free Exercise Clause as an entitlement to exceptions for religious practice<sup>19</sup> in favor of a view that makes religious practitioners subject to generally applicable laws — there, a criminal prohibition upon possession of the drug peyote.<sup>20</sup>

The switch effected by *Smith* understandably has elicited a wealth of academic commentary<sup>21</sup> — not to mention an unsuccessful congressional effort to switch back, by statute, to an exception-based view.<sup>22</sup> But scholars have devoted comparatively little attention to the even more provocative project of identifying areas in

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17. 426 U.S. 229 (1976).

18. 494 U.S. 872 (1990).

19. I refer here to the Court's rhetoric in framing the constitutional standard for free exercise cases prior to *Smith* in terms of a demand for a compelling state interest. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). As noted by commentators on both sides of the free exercise debate, in terms of actual application, even the pre-*Smith* Court rarely gave this exacting standard real bite. See Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CR. REV. 79, 99-102; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990).

20. See *Smith*, 494 U.S. at 874.

21. This vast literature is beyond the scope of the present article. For thoughtful defenses of *Smith*, see, for example, Eisgruber & Sager, *supra* note 19; Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991). For thoughtful criticism of *Smith*, see, for example, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); McConnell, *supra* note 19.

22. See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act—which would have restored the compelling interest test for government-imposed burdens upon religious exercise—as in excess of the remedial power granted to Congress by section 5 of the Fourteenth Amendment).

which the Court has erroneously *declined* to switch a constitutional right from the exception to the equality compartment. The right to present witnesses, I submit, is a striking example of such an error. Specifically, I argue that a wide array of sources — the historical context of the Compulsory Process Clause, recent learning on the closely related Confrontation Clause, considerations of institutional structure, the Court's approach to conceptually similar problems of constitutional law, and sheer practical concern for the protection of criminal defendants as a whole — together form a compelling case to reconceive the right as one of equal treatment. Under the approach set forth here, the Court should apply strict scrutiny — in the familiar sense of a demand for a compelling governmental interest — with respect to evidence rules that peculiarly disadvantage criminal defendants. By contrast, when the rule in question is an evenhanded one — when the government, as rulemaker, has determined to restrict the presentation of witness testimony by the government itself as prosecutor in the same manner as it limits the defense at trial — the Court generally should apply the far more deferential standard of ordinary rationality review.

The analysis in support of this view proceeds in three parts. Part I presents an overview of the current landscape, explaining initially how a right to compulsory process under the terms of the Sixth Amendment necessarily implies a right to present witnesses. Drawing upon the leading Supreme Court cases in the area, this Part then details how the Court has come to understand the right to present witnesses as an entitlement to exceptions from generally applicable evidence rules. Part I finally focuses upon the Court's latest decision, in *United States v. Scheffer*. I contend that, although the Court is correct to regard a per se ban on polygraph evidence as constitutionally permissible — if not necessarily wise evidence policy — the Court's reasoning amounts to an ad hoc judgment that is not only contrary to precedent but also unsupportable by reference to any of the three substantive propositions relied upon in the opinion. This ad hoc quality, as suggested earlier, is explicable as part of a justified fear that an "arbitrary or disproportionate" standard, if applied seriously, would require a radical rethinking of many settled principles of evidence law. The disappointment of *Scheffer* lies in the Court's apparent willingness to act upon this genuine concern without questioning explicitly the underlying conception of the right that has given it life.

Part II sets forth the affirmative case for reconceiving the right to present witnesses as a right to equal treatment. Focusing upon



the historical context of the Compulsory Process Clause, this Part initially concurs with the view of modern commentators that the forerunners of the Clause in state constitutions and in the proposals advanced for the Bill of Rights — though somewhat illuminating — do not point squarely in favor of either an exception-based or an equality-based view. Both modern commentators and the Supreme Court, however, have overlooked a crucial feature of the historical context: In the late eighteenth century, it was uniformly the law, both in the various states and in English criminal trials, that criminal defendants were disqualified from testifying under oath as witnesses in their own defense.

This feature of then-contemporary evidence law — shocking to the modern eye — sheds considerable light upon the proper conception of the right to present witnesses. Specifically, it indicates that the most egregious sort of violation, under an exception-based view of the right, actually was the prevailing practice at the time that the Bill of Rights was ratified and for several decades afterward. The disqualification of criminal defendants, however, did not arise as a way peculiarly to disadvantage such persons. Instead, this limitation was part of a generally applicable disqualification of all interested persons to appear as witnesses, whether for the prosecution or the defense. The only way to explain the uniformity of this practice at the time of the Bill of Rights — indeed, the only way to account for the conspicuous lack of the slightest indication that the Bill was thought by its contemporaries to require a change in prevailing evidence practice — is to understand the right to present witnesses as a right to equal treatment.

This is, most definitely, not to say that the Constitution freezes into place the eighteenth century law of evidence. Quite to the contrary, the historical record strongly supports the view that the Founding generation<sup>23</sup> left considerable room for an evolving law of evidence, receptive to change and adaptation in light of modern thinking and conditions. What makes the disqualification of criminal defendants violative of the right to present witnesses is that the common law of evidence subsequently, in the nineteenth century, removed virtually all disqualifications of witnesses. At that point, the Supreme Court rightly found a constitutional violation with respect to the one state that persisted in barring defendants as witnesses, notwithstanding its lifting of virtually all other limitations

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23. I use the term "Founding generation" rather than the more common "Founders," for I speak here not just of those who drafted the Constitution itself but, more generally, of the generation contemporaneous to the establishment of the Constitution.

upon witness qualification.<sup>24</sup> But the source of the violation lies in the structure of the state rule, not in judicial application of a free-standing notion of arbitrariness.

Part II further explains that, apart from historical context, an equality-based conception of the right to present witnesses dovetails with recent learning on the Confrontation Clause and is consistent with the Court's decisions on the Due Process Clause as a guarantee of adversarial fairness in criminal trials. This Part then presents two additional justifications for an equality-based view, one institutional and the other practical. An important institutional consequence of such a view is to enable the makers of evidence rules — today, typically legislatures — to deploy their comparative advantage in culling through information for the making of complex empirical judgments, especially with respect to controversial new forms of witness testimony on the cutting edge of science. Courts, by contrast, can deploy their comparative advantage in ensuring that the decisionmaking process by which judgments of evidence policy are made gives criminal defendants a fair shake — specifically, by insisting that, whatever the rule selected, it must be evenhanded, absent a compelling justification otherwise. There is good reason to believe that the government is acting out of a genuine policy concern — not simply to advantage its own prosecutors vis-à-vis criminal defendants — when the government itself is prepared to disavow completely the use of a particular type of witness testimony.

This insight, in turn, distinguishes the switch advocated here — from an exception-based to an equality-based conception of the right to present witnesses — from the more controversial switch of the same sort effected by *Smith* for the Free Exercise Clause. There, a demand for generally applicable rules is far more susceptible to criticism, for such rules — like the criminal prohibition upon peyote in *Smith* itself — typically will have little practical bite for the vast majority of the public. Generally applicable evidence rules, virtually by definition, restrict the prosecution in the same manner as they do the defense.

One need not take a rosy view of evidence policymaking, however, to embrace an equality-based view. Simply as a practical matter, wholly apart from the niceties of constitutional doctrine, the more one distrusts the ability of policymakers to accord appropriate weight to the interests of criminal defendants, the less attractive the

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24. See *infra* section I.B.1 (discussing *Ferguson v. Georgia*, 365 U.S. 570 (1961)).

current, exception-based view becomes. If anything, as I explain, the practical consequences of current law may be to make it all the more difficult to detect the tilting of the playing field against defendants, insofar as the Court's stance encourages the making of admissibility determinations on a case-by-case basis. Such a view leaves policymakers free — indeed, it encourages them — to decline to enact per se exclusionary rules that, in many of their applications, would be highly protective of criminal defendants. Simply as a matter of whose ox is gored, it is impossible to defend the status quo on the ground that it makes defendants as a whole better off.

Part III applies the right to present witnesses, understood as a demand for equal treatment, to the Court's existing case law. I then discuss the constitutionality of some familiar features of the Federal Rules of Evidence that are conspicuously not evenhanded.

## I. THE CURRENT LANDSCAPE

For nearly two centuries after its enactment, the Compulsory Process Clause elicited little attention. “Until 1967 the Supreme Court addressed it only five times, twice in dictum and three times while declining to construe it.”<sup>25</sup> Since then, the Court has taken two significant analytical steps. The first consists of reading the Clause not only to bear upon “compulsory process” in the literal sense of bringing witnesses to court under the compulsion of law, but also to concern the admissibility of witness testimony — including the testimony of persons who need no legal compulsion to appear. This first step is correct. The second step, however, consists of reading the Clause to confer upon criminal defendants an entitlement to the admission of witness testimony, even in the face of generally applicable evidence rules. This second step, I argue, is in error; and the consequences of that error become glaringly apparent when one considers the Court's most recent effort to understand the right to present witnesses.

### A. *From Compulsion to Admissibility*

The Compulsory Process Clause, at the very least, requires the government to permit criminal defendants to avail themselves of the same rules of process — in the literal sense of service of process to compel the attendance of witnesses in court — as are available to the prosecution. Oddly enough, notions of compulsory process in

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25. Westen, *Compulsory Process I*, *supra* note 13, at 108 (citing cases).

this most obvious sense initially developed in England not as a means by which to secure the testimony of recalcitrant witnesses but, instead, to protect persons who were entirely willing to testify. Absent legal compulsion to testify, persons other than parties or counsel were vulnerable to lawsuits for “maintenance” by the party against whom they testified<sup>26</sup> — in colloquial terms, a cause of action for being a busybody.

Under the reign of Elizabeth I in the sixteenth century, Parliament sought to rectify the problem by providing that witnesses do not simply have a duty to respond to compulsory process in civil actions but, more importantly, that they have a “*right* to come and to testify, unmolested by the apprehension of maintenance-proceedings.”<sup>27</sup> When English law subsequently extended notions of compulsory process for the benefit of criminal defendants, that move came simply as a way to apply the same set of ground rules as between the prosecution and the defense. As John Henry Wigmore explained in his famous treatise on the common law of evidence:

In criminal causes, the date when process began to be issued for the Crown’s witnesses does not appear; though presumably it preceded the time of Elizabeth’s statute. But the accused in a criminal cause was not allowed to have witnesses at all, — much less to have compulsory process for them. By the early 1600s this disqualification began to disappear, and the accused was occasionally allowed to put on witnesses, who spoke without oath. After two generations, and by 1679, under the Restoration, the judges began to grant him, by special order, compulsory process to bring them; and finally, at slow intervals, in 1695 and in 1701, he was guaranteed this right by general statutes. This guarantee was afterwards embodied in most of the constitutions of the [various states within] the United States.<sup>28</sup>

Wigmore found the reference to “compulsory process” in the Sixth Amendment to “provide[ ] nothing new or exceptional”; it merely “gave solid sanction, in the special case of accused persons, to the

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26. See 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2190, at 2960 (1st ed. 1904) (“[A]nybody who was not somehow concerned as a party or a counsel in the cause ran the risk, if he came forward to testify to the jury, of being afterwards sued for maintenance by the party against whom he had spoken.”). I cite throughout to the first edition of Wigmore’s treatise, rather than to its more recent descendants, because the first edition contains the most detailed exposition of the common law of evidence — particularly as it stood at the time of the ratification of the Bill of Rights.

27. *Id.* § 2190, at 2962 (emphasis in original).

28. *Id.* § 2190, at 2963 (footnotes omitted); see also *id.* § 2191, at 2964 (“[T]he purpose of the [English] statutes was merely to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed both by parties in civil cases and by the prosecution in criminal cases.”). For a similar account of the history behind the Compulsory Process Clause, see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1786, at 662-66 (New York, Da Capo Press 1970) (1833).

procedure ordinarily practised and recognized for witnesses in general.”<sup>29</sup> Apparently speaking only to the process for obtaining witnesses, Wigmore added that the Compulsory Process Clause “does not override and abolish such *exemptions and privileges* as may be otherwise recognized by common law or statute”<sup>30</sup> — that is, “*exemptions and privileges*” that would prevent even the prosecution from compelling a given witness to appear in court.

On its face, the Compulsory Process Clause does not speak specifically to the admissibility of witness testimony. But both the Supreme Court and modern commentators have correctly understood the Clause to bear upon questions of admissibility as well as the bringing of witnesses into court under compulsion of law. The Court logically observes that it would be odd “to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.”<sup>31</sup> To label such an act as completely “futile” is something of an overstatement, for the defense might use compulsory process simply to make contact with a recalcitrant individual and then to use the information gleaned therefrom to identify admissible testimony from other witnesses. The Court is correct, however, that such a limited notion of compulsory process would make little sense. The Compulsory Process Clause itself refers to the obtaining of “witnesses” — a term that, in ordinary parlance, refers to persons who testify in court, not to those whom a party might contact simply for the purpose of pre-trial investigation. Moreover, the Sixth Amendment as a whole speaks to the procedures for criminal trials, not to pre-trial investigation.

Along similar lines, Akhil Amar reasons that:

[i]f the accused, in order to show his innocence, is generally empowered to drag a human being, against her will, into the courtroom to tell the truth, surely he must also enjoy the lesser-included rights to present other truthful evidence that in no way *infringes* on another human being’s autonomy. These lesser-included rights are plainly presupposed by the compulsory process clause.<sup>32</sup>

The primary repository of these rights “presupposed” by the Clause is the law of evidence.

Based upon history and the implications from the constitutional text, two propositions thus emerge as starting points: First, the

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29. 3 WIGMORE, *supra* note 26, § 2191, at 2965.

30. *Id.* (emphasis in original).

31. *Washington v. Texas*, 388 U.S. 14, 23 (1967).

32. AMAR, *supra* note 15, at 132.

Compulsory Process Clause necessarily assumes that criminal defendants have some set of rights with respect to the admissibility of witness testimony; and, second, given the development of compulsory process as a means to protect willing witnesses as well as to coerce unwilling ones, it is not appropriate to distinguish between the two sorts of witnesses for purposes of admissibility. A crucial question remains: Given the recognition that the Clause bears not only upon the process of witness compulsion but also upon issues of admissibility, should the Supreme Court apply to the latter category of questions the same principle of equality that governs with respect to the former? As I now explain, the Court has consciously declined to do so.

### B. *From Equality to Exception*

The Court's current framework for the right to present witnesses focuses not upon the evenhandedness of the evidence rule in dispute but, instead, upon whether application of the rule — whatever its structure — would be “arbitrary or disproportionate” in light of its justification.<sup>33</sup> The Court arrived at this approach through a circuitous route, however.

#### 1. *Discriminatory Rules*

The cases in which the Court first began to intimate the existence of a constitutional right to present witnesses — *Ferguson v. Georgia*<sup>34</sup> and *Washington v. Texas*<sup>35</sup> — dealt with evidence rules that were flagrantly discriminatory as to criminal defendants. The Court nonetheless did not ground its analysis upon this feature of the rules, and the consequences of the Court's refusal have become increasingly apparent in more recent decisions.

*Ferguson* concerned, albeit indirectly, a Georgia statute that disqualified criminal defendants from testifying under oath in their defense.<sup>36</sup> Although Georgia had “in 1866 abolished by statute the common-law rules of incompetency for most other persons,” the state had the curious distinction of being “the only jurisdiction in the common-law world,” as of 1961, to retain a disqualification for defendants.<sup>37</sup> In an effort to mitigate the harshness of this remain-

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33. See *supra* note 9.

34. 365 U.S. 570 (1961).

35. 388 U.S. 14 (1967).

36. *Ferguson*, 365 U.S. at 573.

37. *Ferguson*, 365 U.S. at 570. In a narrow, technical respect, this disqualification might seem evenhanded, in the sense that the defendant is disqualified from testifying under oath

ing disqualification, the state permitted the defendant to make an unsworn statement to the jury, although defense counsel could not help to elicit such a statement through prompting or examination.<sup>38</sup> Even this meager concession was not given evenhandedly. If the unsworn statement referred to facts that tended to suggest guilt, "the prosecution [would be] relieved of the necessity of proving [those facts] by evidence of its own"; but if the statement was helpful to the defense, the trial judge could "*sua sponte* instruct the jury to treat the accused's explanation as not presenting a defense in law."<sup>39</sup>

*Ferguson* would be a very straightforward case today. Indeed, it is hard to imagine a more egregious violation of the right to present witnesses, irrespective of whether one takes an exception-based or an equality-based view. The Court, however, reversed the defendant's conviction as a violation not of the right to present witnesses but, rather, of the right to counsel. Writing for the Court, Justice Brennan said simply that the state "could not . . . deny [the defendant] the right to have his counsel question him to elicit his [unsworn] statement."<sup>40</sup>

Considered in retrospect, this seemingly odd choice of paths stems from the state of constitutional law at the time that the Court decided *Ferguson*. In the early 1960s, the Court was in the midst of its now-famous enterprise of incorporation, which ultimately would apply virtually all of the protections in the Bill of Rights to the states via the Due Process Clause of the Fourteenth Amendment.<sup>41</sup> At the time that *Ferguson* arose, however, the Court had yet to deem the Compulsory Process Clause applicable to the states.<sup>42</sup> It thus is not surprising that defense counsel in *Ferguson* litigated the

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for either side. Such a view would, however, elevate form over substance. In any criminal trial — that is, any time that the defendant does not admit to the crime but, instead, is contesting some aspect thereof — it is the defense alone that would want to call the defendant as a witness. The prosecution, of course, could not compel the defendant to testify against herself. See U.S. CONST. amend. V. And the prosecution hardly would want to call the defendant to testify for herself. The crux of the Georgia disqualification rule, then, is to disadvantage peculiarly the defense.

38. See 365 U.S. at 571.

39. 365 U.S. at 590. Georgia law provided that the defendant's unsworn statement "'shall have such force only as the jury may think right to give it.'" 365 U.S. at 571 (quoting disqualification statute).

40. 365 U.S. at 596.

41. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 441 (13th ed. 1997).

42. A holding squarely on this point did not come until six years later. See *Washington v. Texas*, 388 U.S. 14, 18-19 (1967). The Court did not deploy the incorporation doctrine to make applicable to the states the related Sixth Amendment right of confrontation until 1965. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

case simply as a violation of the right to counsel,<sup>43</sup> that right having been incorporated by the Court in capital cases nearly three decades earlier.<sup>44</sup>

The recognition that *Ferguson* would signal the welcome demise of the Georgia disqualification statute as a practical matter was not lost upon the Justices. In their concurring opinions in *Ferguson*, Justices Frankfurter and Clark, respectively, deemed it “meaningless” and “not even intelligible” to address the lack of assistance from counsel with respect to the defendant’s unsworn statement without also explicitly invalidating the underlying disqualification statute.<sup>45</sup> Modern commentators have concurred in that assessment,<sup>46</sup> as has the Court itself when referring to the result in *Ferguson* in the post-incorporation era.<sup>47</sup>

Though not cast in terms of a constitutional right to present witnesses, *Ferguson* nonetheless contains important intimations of things to come. The Court devoted no less than ten pages of its opinion to an extended account of the rise and fall of witness disqualification rules,<sup>48</sup> including an explicit observation that a general “[d]isqualification for interest was . . . extensive in the common law when this Nation was formed.”<sup>49</sup> The Court’s opinion, however, contains no recognition that this history might have any significance for the meaning of the Constitution. The upshot of the historical record for the Court was simply that “decades ago the considered consensus of the English-speaking world came to be that there was *no rational justification* for prohibiting the sworn testimony of the accused.”<sup>50</sup> The transition from a law of evidence with widespread, generally applicable witness disqualification rules to one with few such limitations thus was noteworthy only insofar as it undercut the weightiness of the governmental interest behind the rule in ques-

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43. In fact, the defendant “did not offer himself to be sworn as a witness,” 365 U.S. at 572 n.1, such as would be necessary to raise the constitutionality of the Georgia disqualification statute itself.

44. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932); cf. *Ferguson*, 365 U.S. at 571 (noting that *Ferguson* “was under sentence of death”).

45. 365 U.S. at 599 (Frankfurter, J., concurring); 365 U.S. at 602 (Clark, J., concurring).

46. See Westen, *Compulsory Process I*, *supra* note 13, at 110-11 (“*Ferguson* was ‘not a right-to-counsel case.’ The defendant was fully assisted by counsel in preparing his unsworn statement. . . . The essential defect from the defendant’s viewpoint, rather, was that the statement was unsworn, not that it was unassisted.” (quoting 365 U.S. at 599 (Frankfurter, J., concurring))); see also Clinton, *supra* note 13, at 760.

47. See *Rock v. Arkansas*, 483 U.S. 44, 50 & n.7 (1987).

48. See 365 U.S. at 572-82.

49. 365 U.S. at 574.

50. 365 U.S. at 582 (emphasis added).



tion. Although the Court noted the lack of evenhandedness in the Georgia disqualification statute,<sup>51</sup> that structural observation had significance only as it served to accentuate the arbitrariness of the state's position.

Six years later, in *Washington v. Texas*,<sup>52</sup> the Court further conflated notions of evenhandedness (focused upon the structure of the rule in question) and notions of arbitrariness (focused upon the weightiness of the interests behind the application of the rule in a given case). With *Washington*, the right to present witnesses began to take its present form. In an opinion by Chief Justice Warren, the Court initially dispelled any doubts on the incorporation question by holding explicitly that the Compulsory Process Clause of the Sixth Amendment applies to the states as a "fundamental element of due process of law."<sup>53</sup> In addition, the Court correctly reasoned that the right to compulsory process for the obtaining of witnesses necessarily implies a right to admit witness testimony.<sup>54</sup>

Turning to the merits, the Court again confronted a state evidence rule that discriminated between prosecution and defense. As summarized by the Court, Texas statutes provided that "persons charged or convicted as coparticipants in the same crime could not testify for one another, although there was no bar to their testifying for the State"<sup>55</sup> — in essence, a one-way rule for criminal accomplices. Like the Georgia disqualification rule in *Ferguson*, the Texas rule for accomplices in *Washington* was unique in the world of then-existing state evidence law.<sup>56</sup> The Court struck down the Texas rule as applied at trial to exclude the testimony of a witness offered by the defense in a murder prosecution — a witness previously convicted, apparently on an accomplice theory, in connection with the same shooting.<sup>57</sup> Defense counsel had sought to use the witness to enhance the credibility of the defendant's own testimony — admitted at trial — to the effect that it was the witness himself, not the defendant, who actually fired the shots that killed the victim.<sup>58</sup>

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51. See 365 U.S. at 570.

52. 388 U.S. 14 (1967).

53. See 388 U.S. at 19.

54. See 388 U.S. at 19, 23; see also *supra* section I.A (defending this inference).

55. 388 U.S. at 16-17 (footnotes omitted).

56. See 388 U.S. at 17 n.4 ("Counsel have cited no statutes from other jurisdictions, and we have found none, that flatly disqualify coparticipants in a crime from testifying for each other regardless of whether they are tried jointly or separately.").

57. See 388 U.S. at 16.

58. The prosecution's theory was that the defendant, joined by several other boys including Charles Fuller, initially threw bricks at the house where the victim lived. Most of the boys then ran back to a nearby car, leaving only the defendant and Fuller in front of the

Under the circumstances of the disputed shooting, the proffered witness "was the only person other than [the defendant] who knew exactly who had fired the shotgun and whether [the defendant] had at the last minute attempted to prevent the shooting."<sup>59</sup>

The Court, however, did not strike down the application of the Texas accomplice rule due to its lack of evenhandedness. Nor does that refusal appear inadvertent; in fact, Justice Harlan wrote separately, concurring for himself alone, to say that it was the "discrimination between the prosecution and the defense" that doomed the rule.<sup>60</sup> The Court instead reasoned that the defendant "was denied his right to . . . compulsory process . . . because the State *arbitrarily* denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."<sup>61</sup> Again, the touchstone was arbitrariness, not the lack of evenhandedness in itself — although the Court did regard the latter as an indication of the former.

The results in *Ferguson* and *Washington* make eminent sense, and the approach that I sketch out later would not change them.<sup>62</sup> Simply as a matter of enlightened evidence policy, the rules struck down in the two cases are among the most bizarre to survive to relatively recent times. In giving those rules a justly-deserved bur-

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house. To support a charge of murder, the prosecution contended that the defendant shot and killed the victim when she rushed outside to investigate the commotion. See 388 U.S. at 15.

The trial judge permitted the defendant to testify that it was Fuller who fired the fatal shot — indeed, that the defendant had sought to dissuade Fuller from shooting at all. The defense then sought to call Fuller as a witness to support the credibility of the defendant's testimony on these two factual points. Fuller, however, had previously been convicted in connection with the same shooting — apparently as an accomplice. (Thus, under the prosecution's theory of events, there was nothing inconsistent about seeking to convict the defendant for murder, based upon the premise that he had done the actual shooting.) Pointing to the Texas prohibition upon the admission of accomplice testimony for the defense, the trial judge excluded Fuller's testimony, and the defendant was convicted. See 388 U.S. at 16.

59. 388 U.S. at 16; see also 388 U.S. at 16 (characterizing accomplice's testimony as "vital" to the defense).

60. See 388 U.S. at 24 (Harlan, J., concurring). Justice Harlan based his view not upon the Compulsory Process Clause — which he did not consider to be incorporated against the states — but, instead, upon the Due Process Clause. See 388 U.S. at 24-25. I agree with Justice Harlan's focus upon the lack of evenhandedness in the Texas rule, though I would ground that focus specifically upon the Compulsory Process Clause, as incorporated against the states per the Court in *Washington*.

61. 388 U.S. at 23 (emphasis added). To this sentence, the Court appended a footnote to indicate that "[n]othing in th[e] opinion should be construed as disapproving testimonial privileges . . . which are based on entirely different considerations from those underlying the common-law disqualifications for interest" or "nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them." 388 U.S. at 23 n.21.

62. See *infra* section III.A.

ial, however, the Court left implications that would prove problematic. Peter Westen, a leading commentator on the right to present witnesses, reads *Washington* with understandable breadth. According to Westen:

by the use of the term "arbitrary" the Court was referring to the fact that the Texas rule imposed an *unnecessary* burden on the defendant's right to present witnesses because the rule wholly excluded evidence *that might have been reliable* instead of permitting it to be heard, weighed, and judged by the fact-finder.<sup>63</sup>

In effect, as Westen accurately observes, the *Washington* Court's reasoning amounts to the application of a constitutional standard of review much like the compelling interest test used for intrusions upon other constitutional rights.<sup>64</sup> Whatever the doctrinal label, however, the Court put forward this approach not as one triggered by the discriminatory structure of the Texas rule but, rather, as a free-standing constitutional inquiry capable of extension to generally applicable rules. As I now explain, the Court made precisely this extension after *Washington*.

## 2. Generally Applicable Rules

Six years later, in *Chambers v. Mississippi*,<sup>65</sup> the Court addressed a Mississippi evidence rule different in structure from those struck down as applied in *Ferguson* and *Washington*. Pursuant to their common law powers, the Mississippi courts had permitted the admission of out-of-court statements against interest as an exception to the rule against hearsay, but the same courts had extended this hearsay exception only to statements against the declarant's pecuniary interest. Statements against penal interest — that is, statements that tend to implicate the declarant in a crime — were deemed outside the exception and, hence, inadmissible under the rule against hearsay.<sup>66</sup> Unlike the discriminatory rules in *Ferguson*

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63. Westen, *Compulsory Process II*, *supra* note 13, at 200 (emphasis in original).

64. See Westen, *Compulsory Process I*, *supra* note 13, at 115 ("Without so stating, the Court implied that the state had no 'compelling interest' in using disqualification as a means for avoiding perjury.").

65. 410 U.S. 284 (1973). In the years between *Washington* and *Chambers*, the Court decided one case on the right to present witnesses that did not implicate rules of evidence *per se*. In *Webb v. Texas*, 409 U.S. 95 (1972), the Court reversed a criminal conviction on the ground that the remarks of the trial judge had effectively denied the defendant the right to present a witness. The witness in *Webb* — the only one offered by the defense at trial — had declined to testify "only after the [trial] judge's lengthy and intimidating warning" for the witness to avoid perjury. See 409 U.S. at 97. The Court noted, in passing, that the judge had "gratuitously singled out this one [defense] witness"; "none of the witnesses for the State had been so admonished." 409 U.S. at 97, 96.

66. See *Chambers*, 410 U.S. at 299. I use the word "declarant" in the sense recognized in evidence law: namely, to refer to the person who actually made the out-of-court statement in

and *Washington*, the Mississippi hearsay exception in *Chambers* was evenhanded on its face in the sense that it did not exempt out-of-court statements against penal interest, irrespective of whether the offering party was the prosecution or the defense.<sup>67</sup> In this respect, the position of the Mississippi courts was hardly anomalous. To the contrary, the Court acknowledged that “[t]his materialistic limitation on the declaration-against-interest hearsay exception appears to be accepted by most States in their criminal trial processes.”<sup>68</sup> The Court nonetheless struck down the Mississippi rule, as applied at trial to exclude the testimony of defense witnesses. The defense had offered the witnesses to recount three out-of-court statements in which another man, Gable McDonald, had confessed to the shooting of a police officer of which the defendant Chambers stood accused.

*Chambers*, in some respects, stands as the Court’s broadest recognition of a constitutional override to state restrictions on the presentation of witnesses. The excluded witnesses were far from the only avenue open to the defense to raise the possibility that the prosecution had misidentified the defendant as the shooter.<sup>69</sup> Rather, the defense wished to use the excluded witnesses to reinforce the credibility of other evidence already admitted. In particular, the trial court had permitted the defense not only to call McDonald himself as a witness, but also to read to the jury the transcript of yet another out-of-court confession that McDonald had

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question, as distinct from the witness who recounts that statement in the form of hearsay at trial. See FED. R. EVID. 801(b).

67. As discussed at greater length in section III.A, *infra*, I contend that the Mississippi hearsay exception is not evenhanded where the declarant of the statement against penal interest also could be considered a coconspirator of the defendant. In that situation — one different from the circumstances of *Chambers* itself — the prosecution would not need to rely upon the hearsay exception for statements against interest in order to admit an out-of-court statement that would incriminate both the declarant and the defendant. The prosecution, instead, may admit such evidence as a statement of a coconspirator of a party opponent.

68. 410 U.S. at 299.

69. *Chambers* arose from a confrontation between police officers and a hostile crowd at a bar. The officers arrived at the scene with a warrant for the arrest of one man whom they, in fact, located at the bar. When the officers attempted to make the arrest, however, members of the crowd intervened. Several gunshots were fired at the officers from an alley; one struck and ultimately killed Officer Sonny Liberty. Before he died, however, Officer Liberty managed to fire back into the alley. His first shot was wild and simply scattered the crowd standing nearby. According to various witnesses, Officer Liberty “appeared . . . to take more deliberate aim” before firing a second shot that struck but did not kill the defendant, Chambers. The prosecution charged the defendant with murder on the theory that Officer Liberty had chosen to shoot back at the person who initially had fired upon him. As reinforcement of this theory, the prosecution relied upon a surviving officer at the scene, who testified specifically that he saw Chambers shoot Officer Liberty. See 410 U.S. at 285-86.

made in the offices of defense counsel.<sup>70</sup> Upon cross-examination by the prosecution, however, McDonald repudiated that particular confession. At that point, the trial court barred the defense from using the disputed witnesses to inform the jury of the three additional confessions by McDonald on the ground that those statements were not within the Mississippi hearsay exception for statements against interest.<sup>71</sup>

Unable to point to any discrimination on the face of the Mississippi hearsay exception itself, the Court still struck down its application. The problem, said Justice Powell for the Court, was that:

The testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.<sup>72</sup>

As one commentator tellingly observes, the Court's core holding that "the defendant had a constitutional right to introduce evidence deemed inadmissible under [generally applicable] state hearsay rules was unprecedented."<sup>73</sup> Indeed, this holding comes as even more of a surprise, given that the Court itself, several decades earlier in *United States v. Donnelly*,<sup>74</sup> had upheld the exclusion in *federal* criminal trials of statements against penal interest. In fact, the Court had done so under circumstances wherein the disputed state-

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70. See 410 U.S. at 291. The trial court also had permitted the defense to put on testimony from two persons at the scene of the shooting: one testified that he actually "saw McDonald shoot [the officer]," and the other "testified that he saw McDonald immediately after the shooting with a pistol in his hand." 410 U.S. at 289.

71. See 410 U.S. at 291-92. Apart from its ruling on the admissibility of the three additional confessions, the trial court also barred the defense from recalling McDonald to the stand on the ground that Mississippi law prohibited a party from impeaching its own witness — a limitation known as the "voucher" rule. In a separate discussion, the Supreme Court held that this too was constitutional error, though not under the right to present witnesses. Noting that the state "ha[d] not sought to defend the [voucher] rule or explain its underlying rationale," the Court struck down its application as a violation of the defendant's right "to confront and to cross-examine those who give damaging testimony" against him — a right that the Court considered applicable regardless of "whether the witness was initially put on the stand by the [defense] or by the State." 410 U.S. at 297-98. On the relationship between the right of confrontation and the right to present witnesses, see *infra* section II.B.

72. 410 U.S. at 302. According to the Court, these "persuasive assurances of trustworthiness" were three: McDonald made each of the additional confessions "spontaneously to a close acquaintance shortly after the murder had occurred." Each "was corroborated by some other evidence" — namely, the evidence that the trial court had permitted the defense to admit. And, finally, the additional confessions were "in a very real sense self-incriminatory and unquestionably against interest." See 410 U.S. at 301.

73. Westen, *Compulsory Process I*, *supra* note 13, at 152.

74. 228 U.S. 243 (1913).

ments appeared at least as reliable and as crucial to the defense as those in *Chambers*.<sup>75</sup> To avoid overruling *Donnelly*, the Court offered nothing more than a feeble distinction based upon the availability of the declarant in *Chambers* to be examined by the defense at trial.<sup>76</sup> If anything, longstanding principles of evidence law hold that the availability of the declarant is a fact that cuts *against* the admission of out-of-court statements against interest, not one that supports a constitutional imperative to admit them.<sup>77</sup>

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75. In *Donnelly*, the Court upheld a conviction for murder on an Indian reservation, notwithstanding the district court's refusal to admit the testimony of a defense witness prepared to recount an out-of-court confession to the crime by another man, Joe Dick, who died prior to trial. The Court recognized that the prosecution's own evidence "strongly tended to exclude the theory that more than one person participated in the shooting" — the implication being that "the Dick confession, if admitt[ed], would have directly tended to exculpate [the defendant]." 228 U.S. at 272. In fact, in its unsuccessful effort to build a foundation for admission of the confession, the defense had pointed to a set of "human tracks upon a sand bar at the scene of the crime [that] led in the direction of an acorn camp where Dick was stopping at the time, rather than in the direction of the home of [the defendant]." 228 U.S. at 272. The defense also noted that "beside the track there was at one point an impression as of a person sitting down" — a detail that defense counsel took to indicate "a stop caused by shortness of breath, which would have been natural to Dick, who was shown to be a sufferer from consumption." 228 U.S. at 272.

Unlike the situation in *Chambers*, the defense in *Donnelly* was unable to bring to the attention of the jury in any other way the existence of an outright confession by a third person. The net loss of exculpatory information thus was far greater in *Donnelly* than in *Chambers*. The *Donnelly* Court nonetheless upheld the exclusion of hearsay testimony to recount Dick's confession, relying exclusively upon the "practically unanimous weight of authority" at the time that regarded statements against penal interest as simply too unreliable to be admitted. 228 U.S. at 273.

76. The Court stated that "[t]he availability of McDonald significantly distinguish[ed]" the situation in *Chambers* "from the *Donnelly*-type situation," where "the declarant [Dick] was unavailable at the time of trial" due to death. 410 U.S. at 301 (footnote omitted).

77. It is a fundamental tenet of evidence law that the applicability of the hearsay exception for statements against interest — whether or not understood to encompass statements against penal interest — turns upon an initial determination that the declarant is unavailable to testify at trial. See TAYLOR H. McELROY, MISSISSIPPI EVIDENCE § 46 (1955) (discussing Mississippi hearsay exception for declarations of deceased against interest); see also 2 WIGMORE, *supra* note 26, § 1476, at 1834 (discussing common law basis for unavailability requirement). The exception for statements against interest, in other words, is a rule that prefers to admit hearsay when the alternative is to leave the jury unaware of the declarant's statement, but not when the declarant is available to be called as a witness and thereby confronted with his earlier remarks. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 8.53, at 1327 (1995). As a result, the unavailability of the declarant in *Donnelly*, if anything, is a fact that tends to help rather than hinder an argument for admission of the Dick confession. To put the point the opposite way: the availability of the declarant at the time of trial should be an additional reason — indeed, a conclusive reason as far as the evidence rules are concerned — to keep out hearsay testimony from other persons about the declarant's remarks, not a source of support for a constitutional command to let it in.

The one factual detail that might salvage the outcome in *Chambers* specifically is that the trial court there not only had deemed the disputed witness testimony to be inadmissible hearsay, but also had prevented the defense from recalling McDonald to the stand in order to impeach him with the three additional confessions. Cf. *supra* note 71 (explaining that the *Chambers* Court struck down this "voucher" rule in a separate portion of its opinion, based not upon the right to present witnesses, but upon the right of confrontation). But that is an anomaly attributable to the peculiar confluence of the Mississippi hearsay exception and the

In an extensive scholarly treatment of the *Chambers* litigation, defense counsel understood the Court to recognize that "the accused in a criminal proceeding has a constitutional right to introduce *any* exculpatory evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth."<sup>78</sup> The Court's analysis certainly marks the decoupling of a free-standing judicial standard of arbitrariness from any structural notions of evenhandedness.

Even the *Chambers* Court itself, however, was not entirely at ease with this move; rather, the Court sprinkled its opinion with hedges and caveats to suggest that its arbitrariness standard might not be all that it seemed. Upon noting emphatically that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," the Court immediately added that, "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of . . . evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."<sup>79</sup> Later, in a passage bordering upon the disingenuous, the Court announced its conclusion on the merits but quickly added that, "[i]n reaching this judgment, we establish no new principles of constitutional law" nor otherwise "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."<sup>80</sup>

The Court's apparent concern to cabin the reach of its reasoning in *Chambers* extends, most obviously, to future cases. Specifically, the hedging in *Chambers* stands as an attempt to avoid "the flood-gates problem," on which I elaborate later in this Part.<sup>81</sup> As one commentator has observed, some lower courts in the years after *Chambers* drew upon the Supreme Court's equivocal dicta to slow the application of the right to present witnesses.<sup>82</sup>

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state's separate prohibition upon the impeachment of witnesses by the party who calls them at trial. It is not a point of distinction that one may generalize, much less constitutionalize, as the *Chambers* Court attempted to do in order to avoid the overruling of *Donnelly*.

78. Westen, *Compulsory Process I*, *supra* note 13, at 151-52 (emphasis in original). See *Chambers*, 410 U.S. at 285 (identifying Westen as counsel for the defendant before the Supreme Court).

79. 410 U.S. at 302.

80. 410 U.S. at 302-03.

81. See *infra* section I.C.2.

82. See Steven G. Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 CRIM. L. BULL. 131, 137-38 (1983) (describing reaction of lower courts as "ambivalent" and "clearly mixed").

After *Chambers*, the Court itself left the right essentially untouched for two decades,<sup>83</sup> until 1987, when it began to apply it in the context of generally applicable restrictions upon newly emerging forms of witness testimony. In *Rock v. Arkansas*,<sup>84</sup> the Court struck down a per se prohibition upon the admission of hypnotically-enhanced testimony, as applied at trial to prevent a criminal defendant herself from testifying about the circumstances of a homicide. The dispute in *Rock* centered upon the events that led to the shooting death of the defendant's husband. Interviewed by the police at the scene, the defendant stated that the shooting occurred in the course of a scuffle, after her husband had severely battered her; but the defendant "could not remember the precise details of the shooting."<sup>85</sup> After undergoing two hypnosis sessions at the suggestion of her attorney, the defendant recalled that she had not held her finger on the trigger of the gun; instead, she said, "the gun had discharged [accidentally] when her husband grabbed her arm during the scuffle."<sup>86</sup> In a trial for manslaughter, the prosecution objected to the admission of this testimony from the defendant as the product of hypnotic enhancement.

As in *Chambers*, the disputed testimony in *Rock* was not the only means open to the defense to present its version of the facts — here, to raise the possibility that the defendant did not cause the gun to discharge. Prompted by the details newly recalled by the defendant, her attorney arranged for a handgun expert to examine the particular weapon in the case, and the trial court ultimately permitted the expert to testify "that the gun was defective and prone to fire, when hit or dropped, without the trigger's being pulled."<sup>87</sup> The trial court ruled, however, that the defendant herself could not testify about her post-hypnotic recollections of the shooting, and the jury returned a conviction for manslaughter.

On appeal, the Arkansas Supreme Court affirmed, using its common law authority to deem hypnotically-enhanced testimony

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83. During this period, the Court applied its analysis in *Chambers* to vacate a death sentence where the trial court, in the sentencing phase, had excluded as inadmissible hearsay under state evidence law a statement against penal interest offered by the defense. See *Green v. Georgia*, 442 U.S. 95, 96-97 (1979). The Court also overturned a conviction where the trial court had excluded testimony bearing upon the voluntariness of a confession by the defendant. The trial court's ruling violated earlier Court precedents allocating to the jury the ultimate determination of whether a given confession is voluntary. See *Crane v. Kentucky*, 476 U.S. 683, 688-89 (1986).

84. 483 U.S. 44 (1987).

85. 483 U.S. at 46.

86. 483 U.S. at 47.

87. 483 U.S. at 47.



inadmissible per se.<sup>88</sup> *Rock* thus was not a case in which the state sought to apply a per se ban formulated long ago, in factually dissimilar circumstances. Arkansas's stance was far from anomalous amongst the states to have considered hypnotically-enhanced testimony. A few states had deemed such evidence generally admissible, and a few others were willing to admit it upon the use of certain safeguards; but a plurality of jurisdictions had found hypnotically-enhanced testimony to be "so unreliable" as to be categorically inadmissible in criminal trials,<sup>89</sup> though the cases did not specifically involve testimony from the defendant.<sup>90</sup> Sifting through these different perspectives, the Arkansas court credited the view of the leading law review article on the subject at the time, written by a prominent clinical psychiatrist, who pointedly stated that "[a]fter hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail" and that even experts in hypnosis could not discern the difference upon observation of the subject.<sup>91</sup> The court went on to note that the safeguards identified by some other states did "not even address[ ]" the prospect that the subject might "confus[e] actual recall with confabulation" or might gain "unwarranted confidence in the validity of his ensuing recollection."<sup>92</sup>

The Supreme Court of the United States reversed. Writing for the Court, Justice Blackmun started with the unassailable observation that the right to present witnesses is "incomplete if [the defendant] may not present himself as a witness."<sup>93</sup> The Court professed no desire to opine about "the admissibility of testimony of previously hypnotized witnesses other than criminal defendants."<sup>94</sup> But the Court nonetheless invoked its earlier decisions on the presentation of third-party witnesses to say that, "[j]ust as a

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88. See *Rock v. State*, 708 S.W.2d 78 (Ark. 1986).

89. See 708 S.W.2d at 79 (citing earlier decisions from Arizona, California, Massachusetts, Maryland, and New York flatly barring hypnotically-enhanced testimony).

90. See 483 U.S. at 57 ("States that have adopted an exclusionary rule . . . have done so for the testimony of *witnesses*, not for the testimony of a *defendant*." (emphasis in original)). Cf. *infra* section I.C.1.b (contending that there is no principled distinction, for constitutional purposes, between a criminal defendant's right to testify herself and her right to present third-party witnesses).

91. See 708 S.W.2d at 80 (quoting Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 314 (1980)).

92. 708 S.W.2d at 82-83 n.2.

93. 483 U.S. at 52. In addition to treating the testimony of the defendant herself in *Rock* as an aspect of the right to present witnesses, the Court also noted that a defendant's prerogative to testify is "a necessary corollary" to the defendant's Fifth Amendment right to refuse to testify. 483 U.S. at 52.

94. See 483 U.S. at 58 n.15.

State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony.”<sup>95</sup> Here again, per *Chambers*, is the inquiry for arbitrariness divorced from the examination of structure.

The Court readily characterized hypnotic enhancement as “controversial,” adding that experts had developed “no generally accepted theory to explain the phenomenon” of hypnosis itself and that “the current medical and legal view of its appropriate role is unsettled.”<sup>96</sup> Indeed, the Court added that “scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy.”<sup>97</sup> *Rock* thus does not turn so much upon specific findings about the state of scientific knowledge about hypnosis — a slippery ground upon which to base constitutional analysis, in any event — but, more deeply, upon the apparent rigor of the Court’s legal standard that limitations upon the right to present witnesses “may not be arbitrary or disproportionate to the purposes they are designed to serve.”<sup>98</sup>

The *Rock* opinion contains rhetoric that would lead one to think that this “arbitrary or disproportionate” standard is especially tough stuff, approximating the strict scrutiny that the Court regularly deploys in other areas involving intrusions upon constitutional rights. The Court stated emphatically that “[w]holesale inadmissibility of a defendant’s testimony is an arbitrary restriction on the right to testify in the absence of *clear* evidence by the State repudiating the validity of *all* post-hypnotic recollections.”<sup>99</sup> In explaining why the Arkansas per se rule did not satisfy this test, the Court stated that at least some of the risks associated with hypnotically-enhanced testimony “can be reduced, although perhaps not eliminated, by the use of procedural safeguards” in the hypnosis process itself<sup>100</sup> — an observation akin to a statement that the state had available less restrictive means by which to advance at least some of its objectives.

As an institutional matter, the application of such a demanding standard of review — even to a rule barring both prosecution and

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95. 483 U.S. at 55.

96. 483 U.S. at 59.

97. 483 U.S. at 61.

98. See 483 U.S. at 56.

99. 483 U.S. at 61 (emphasis added).

100. 483 U.S. at 60.

defense alike from using a hotly-disputed type of witness testimony — reveals a profound level of distrust for the rulemaker. In fact, the four dissenting Justices in *Rock* focused primarily upon notions of institutional competency, arguing that deference to common law policymaking by state courts in the field of evidence should be “at its highest . . . where, as the Court concedes, ‘scientific understanding . . . is still in its infancy.’”<sup>101</sup> Even the dissenters in *Rock*, however, did not confront head-on the majority’s fundamental conception of the right to present witnesses as an entitlement to exceptions.

Given the case law from *Ferguson* to *Rock*, one might have thought that the Court, in its most recent Term, would have had very little trouble striking down a per se prohibition upon the admission of expert scientific testimony concerning the results of polygraph examinations<sup>102</sup> — particularly as applied to an examination of the defendant himself in a proceeding that turned upon the credibility of his testimony. This, however, did not happen. That a lopsided majority of not less than eight Justices would uphold precisely such a rule in *United States v. Scheffer*<sup>103</sup> is strong evidence that something important is afoot for the right to present witnesses. As such, it is worthwhile to parse closely the Court’s most recent exposition of the right.

### C. *The Arbitrariness of an “Arbitrary or Disproportionate” Standard*

In Part III, I ultimately conclude that the result in *Scheffer* is right as a matter of first principles. For present purposes, however, I take the Court on its own terms in order to ask whether it is possible to maintain the existing “arbitrary or disproportionate” standard, perhaps with a few caveats, exceptions, or minor repairs. I conclude that it is not.

As I explain here, the Court’s constitutional reasoning in *Scheffer* is indefensible, either as a matter of precedent or in terms of the

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101. 483 U.S. at 65 (Rehnquist, C.J., dissenting) (quoting 483 U.S. at 61).

102. The common form of polygraph test measures a variety of physiological responses to a set of questions asked by the examiner, who then interprets these physiological correlates of anxiety and offers an opinion to the jury about whether the witness — often, as in this case, the accused — was deceptive in answering the questions about the very matters at issue in the trial.

*United States v. Scheffer*, 118 S. Ct. 1261, 1267 (1998).

103. 118 S. Ct. 1261 (1998). For an early and largely critical assessment of *Scheffer*, directed to its likely effect upon the admissibility of polygraph evidence in particular, see Lloyd C. Peeples, III et al., *Exculpatory Polygraphs in the Courtroom: How the Truth May Not Set You Free*, 28 CUMB. L. REV. 77 (1998).

three substantive propositions that the Court sought to draw therefrom. It would be one thing if an observer could dismiss the analytical flaws of *Scheffer* as anomalous. Justice Thomas's opinion for the Court, however, raises more fundamental doubts about the viability of the "arbitrary or disproportionate" standard. One may best understand *Scheffer* as the product of a deep and well-founded concern on the part of the Court over the potential of such a standard — if applied in the manner of earlier cases — to necessitate a radical rethinking of many settled principles of evidence law. The *Scheffer* Court, however, did the law a disservice by attempting to give wing to those legitimate concerns within its current analytical framework rather than by taking a fresh look at that framework itself. In fairness to the Court, one should note that counsel did not litigate the case as a vehicle for such a rethinking of the right to present witnesses.<sup>104</sup> My goal is to initiate that debate.

### 1. *The Court on Its Own Terms*

The circumstances in *Scheffer* would seem virtually to invite a replay for polygraph evidence of the debate in *Rock* over hypnosis. Although the dispute in *Scheffer* arose in the context of a military court martial, the Court effectively treated the case as if it had involved the presentation of witnesses in an ordinary criminal trial.<sup>105</sup> As such, the practical consequence of the Court's decision has been to uphold the constitutional permissibility of per se prohibitions upon polygraph evidence in some twenty-seven states.<sup>106</sup>

There are other parallels as well: the defense in *Scheffer* sought to use the disputed expert testimony concerning the defendant's polygraph examination to lend credibility to the defendant's own

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104. The Solicitor General, for example, did not call upon the Court to overrule *Rock*, much less to understand the right to present witnesses generally as a right of equal treatment. See Brief for United States, *Scheffer*, 118 S. Ct. 1261 (1998) (No. 96-1133), available at LEXIS, 1996 U.S. Briefs 1133. By contrast, the absence of briefing on whether to make a fundamental switch from an exception-based to an equality-based understanding of the Free Exercise Clause did not stop the Court from doing just that in *Employment Division v. Smith*, 494 U.S. 872 (1990). See McConnell, *supra* note 19, at 1113-14 (criticizing the Court for not requesting additional briefing on this question before rendering decision).

105. The Court, for instance, did not decide the case based upon some notion of special presidential authority with regard to the making of evidence rules for the military context. For the sake of clarity, I shall use the terminology of criminal trials — prosecution, defendant, etc. — when describing the circumstances in *Scheffer*.

106. See Peeples et al., *supra* note 103, at 96 n.135 (citing state decisions). Although there is no prohibition in the Federal Rules of Evidence specifically directed to polygraph evidence, some federal circuits have excluded such evidence per se upon application of the general framework for expert scientific testimony. See, e.g., *United States v. Sanchez*, 118 F.3d 192, 197 (4th Cir. 1997) (reaffirming its preexisting ban after reconsideration in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

testimony at his court-martial. Based upon the results of a urinalysis that the defendant Scheffer voluntarily had undergone while working for the Air Force as an informant in drug investigations, the Air Force had charged him with use of methamphetamines.<sup>107</sup> At his court martial, Scheffer denied that he knowingly had ingested the drug and testified in such a manner as to suggest that a suspected dealer may have surreptitiously drugged him in the course of an undercover operation.<sup>108</sup>

To lend credibility to this account, defense counsel sought to inform the jury that — before the results of the urinalysis were known and as part of routine Air Force procedure for its drug informants — Scheffer voluntarily had taken a government-administered polygraph examination. “In the opinion of the examiner, the test ‘indicated no deception’ when [Scheffer] denied using drugs since joining the [military].”<sup>109</sup> The court martial excluded the expert’s testimony pursuant to Military Rule of Evidence 707, which flatly bars the admission of polygraph evidence.<sup>110</sup> As in *Rock*, then, the testimony at issue in *Scheffer* lay at the heart of an ongoing scientific controversy.<sup>111</sup> Military Rule 707 itself is not an archaic holdover from the earliest stages of that debate; rather, the President issued it in 1991, in response to a military court decision that purported to open the door to polygraph evidence for both

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107. Periodic urinalysis, not surprisingly, is part of the standard procedures for informants in drug investigations under the auspices of the Air Force Office of Special Investigations. See 118 S. Ct. at 1263.

108. See 118 S. Ct. at 1261. Scheffer recalled that he had visited the house of a suspected drug dealer and, thereafter, had begun driving back to the Air Force base. “The next thing he remembered was waking up the next morning in his car in a remote area, not knowing how he got there.” *United States v. Scheffer*, 44 M.J. 442, 444 (C.M.A. 1996). This is not to say that *Scheffer* necessarily is a case of factual innocence. Had Scheffer, in fact, blacked out shortly after his contact with the suspected drug dealer, his flat denial of drug usage just three days later during his polygraph examination would seem quite odd. One would think that he would have had every reason at least to mention his blackout at that juncture. In addition, the other charges of which Scheffer was convicted — passing 17 bad checks and being absent without leave from his military post for 13 days, see 118 S. Ct. at 1263 — are at least consistent with the behavior of a person with a drug problem. In short, the notion that some subjects may be able to “fool” a polygraph is not merely a theoretical concern on the facts of *Scheffer*, though the Court treated it as such. See 118 S. Ct. at 1265 n.6.

109. 118 S. Ct. at 1263.

110. In pertinent part, this rule provides that:

Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

MIL. R. EVID. 707(a).

111. See *infra* section I.C.1a (discussing the Court’s reliance upon the lack of scientific consensus as the central justification for the upholding of Military Rule 707).

sides in courts martial, at least under some circumstances.<sup>112</sup> One easily can imagine the same sort of response from a state legislature, or indeed from Congress, with regard to controversial new types of witness testimony that may arise in the years ahead.

In light of what came before, the reasoning used by the Court to uphold the *per se* prohibition upon polygraph evidence in *Scheffer* is full of surprises. Specifically, the Court rested its holding upon three central propositions that warrant close attention,<sup>113</sup> not only to ascertain the correctness of *Scheffer* itself, but also, more significantly, as possible constitutional principles by which to cabin an exception-based view of the right to present witnesses. Wholesale reconception of the right would not be necessary if it were possible to take an exception-based view without thereby calling into doubt a vast array of familiar evidence principles.

The first proposition appears in the Court's account of the justifications behind the *per se* rule. Here, the Court identifies what it considers the crucial rationale for the permissibility of a *per se* rule: "There is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."<sup>114</sup> In the face of this

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112. See Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991) (responding to *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987)).

113. I focus here upon those propositions with which the eight-member majority of the Court agreed: namely, those stated in Parts II-A and II-D of Justice Thomas's opinion for the Court. In Parts II-B and II-C, Justice Thomas set forth two additional reasons for the upholding of the *per se* ban on polygraph evidence — concern over interference with jury functions and over collateral litigation — but only a plurality of Justices agreed. See 118 S. Ct. at 1269-70 (Kennedy, J., concurring, joined by O'Connor, Ginsburg, and Breyer, JJ.) (considering it unnecessary to reach these two additional grounds for the rule and, in any event, disagreeing with Justice Thomas's analysis of jury functions).

114. 118 S. Ct. at 1265 (citing treatises on scientific evidence); see also 118 S. Ct. at 1269 (Kennedy, J., concurring) ("The continuing, good-faith disagreement among experts and courts on the subject of polygraph reliability counsels against our invalidating a *per se* exclusion of polygraph results.").

Given the ongoing rancor about the polygraph, it is worthwhile to take special care to identify the precise source of uncertainty here. The Court readily acknowledged the defendant's observation that "current research shows polygraph testing is reliable more than 90 percent of the time." 118 S. Ct. at 1265 n.6. Similarly, Justice Stevens pointed out, in dissent, that "[t]here are a host of studies that place the reliability of polygraph tests at 85% to 90%." 118 S. Ct. at 1276 (Stevens, J., dissenting).

Although the point is not articulated clearly in the Court's opinion, the lingering sense of uncertainty troubling the Court appears to center not upon *aggregate* estimates of reliability based upon experimental research but, instead, upon the more difficult question of whether one can ascertain the reliability of polygraph evidence *in a particular instance*. This seems to be what the Court is getting at when it states that, "[a]lthough the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know *in a particular case* whether a polygraph examiner's conclusion is accurate . . ." 118 S. Ct. at 1266 (emphasis added). Likewise, immediately after acknowledging the defendant's aggregate estimate of reliability, the Court hastened to add that, "[e]ven if the basic debate about the reliability of polygraph technology itself were resolved, . . . there would still be

uncertainty, the Court could not say that a per se prohibition was "arbitrary."

The second and third propositions come later in the opinion, where the Court seeks to distinguish its holding from those in earlier cases — all of which held in favor of the defendant asserting the right to present witnesses. The Court sought to distinguish *Rock* on the ground that the trial court there had applied a per se rule against hypnotically-enhanced testimony so as "to infringe[ ] upon the accused's interest in testifying in her own defense."<sup>115</sup> In addition to this proffered distinction between testimony by the defendant herself and testimony of other defense witnesses, the Court went on to suggest that the expert testimony excluded in *Scheffer* did not present the jury with additional firsthand information concerning the events in question.<sup>116</sup> Rather, the court martial "heard all the relevant details of the charged offense from the perspective of the accused" — namely, through Scheffer's own testimony.<sup>117</sup> The ban on polygraph evidence "merely" prevented Scheffer from introducing the polygraph examiner, in essence, as a form of cumulative evidence — merely to "bolster" the credibility of the testimony that Scheffer himself already had given.<sup>118</sup> The Court then declared that the per se prohibition upon polygraph evidence did "not implicate any significant interest of the accused"<sup>119</sup> — a state-

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controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus 'fool' the polygraph machine and the examiner." 118 S. Ct. at 1265 n.6; cf. *supra* note 108 (noting reasons to suspect that Scheffer might have "fool[ed]" the polygraph in this instance). It does one little good to know that polygraphs are reliable "90 percent of the time," in other words, if one cannot reliably ascertain whether the particular polygraph evidence in the case at hand falls in the 90 percent that are reliable or the 10 percent that are not. The Court thus does not seem to be insisting that polygraphs must be 100 percent accurate. Instead, the Court's concern seems to focus upon a perceived lack of extrinsic means — i.e., aside from the polygraph itself — by which to distinguish accurate from inaccurate polygraph results in particular instances.

The *Scheffer* Court might have added a related point that data generated from experimental settings in which the underlying truth is known (and the experimenter simply wishes to determine how often the examiner, aided by the polygraph, can detect that the subject is lying) plainly is not the same enterprise as the selection of appropriate rules for a trial setting where, by definition, the truth is not known (and the process of witness testimony is itself the major vehicle for reconstructing the truth).

115. See 118 S. Ct. at 1268.

116. In the course of distinguishing *Rock*, for example, the Court emphasized that the exclusion of the disputed witness in that case "deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts." 118 S. Ct. at 1268.

117. See 118 S. Ct. at 1268.

118. See 118 S. Ct. at 1268-69.

119. See 118 S. Ct. at 1268.

ment that comes as a shock after the Court's earlier description of the right to present witnesses as a "fundamental" right.<sup>120</sup>

As explained in the subsections that follow, all three of the propositions underlying *Scheffer* are seriously flawed and, in particular, do not form plausible constitutional limits upon an exception-based view of the right to present witnesses.<sup>121</sup>

a. *Uncertainty as Justification.* The claim that uncertainty is sufficient to support the application of a categorical, per se rule is profoundly at odds with the "arbitrary or disproportionate" standard set forth earlier by the Court and reiterated by the *Scheffer* majority.<sup>122</sup> In *Rock*, the Court struck down the application of the Arkansas per se ban on hypnotically-enhanced testimony, notwithstanding the Court's own explicit acknowledgment that the reliability of that testimony was uncertain.<sup>123</sup> In *Chambers*, too, there was divergence amongst the states over the appropriate treatment of statements against penal interest.<sup>124</sup>

Apart from precedent, the question of whether uncertainty should justify application of general evidence rules to restrict defense testimony ultimately is a debate over the underlying standard of constitutional review. If the "arbitrary or disproportionate" standard really does amount to some form of heightened constitutional scrutiny, then *Rock* surely is correct that uncertainty alone should not be sufficient to support a per se rule of inadmissibility. If, however, the standard actually is something more closely approximating ordinary rationality review, then uncertainty would be a sufficient justification. One conceivable reading of *Scheffer*, then, would see the case as an effort by the Court to water down, *sub silentio*, the underlying standard of constitutional review. The problem is that *Scheffer*, so understood, does its watering indiscrimi-

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120. See *supra* note 53 and accompanying text; see also 118 S. Ct. at 1272 (Stevens, J., dissenting) ("The Court's opinion barely acknowledges that a person accused of a crime has a constitutional right to present a defense.").

121. The *Scheffer* Court alluded to the correct constitutional principle virtually by accident, mentioning in a fleeting footnote that the rule struck down in *Washington v. Texas* "burdened only the defense and not the prosecution." 118 S. Ct. at 1268 n.12.

122. See 118 S. Ct. at 1264.

123. See *supra* notes 96-97 and accompanying text; see also IMWINKELRIED & GARLAND, *supra* note 14, § 2-4, at 51 (noting that the reliability of hypnotically-enhanced testimony like that in *Rock* "was and still is highly debatable"); cf. Westen, *Compulsory Process II*, *supra* note 13, at 203 (reading the pre-*Rock* case law as establishing that "the defendant has a constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ" (emphasis omitted)); *id.* at 207 (stating similar standard).

124. See *supra* note 68 and accompanying text.



nately, shedding doubt upon the rigor of constitutional review even for rules that are not evenhanded.

For its part, the *Scheffer* Court itself did not say explicitly that it was seeking to make any change in the underlying standard of review. The Court, instead, sought to limit its earlier cases by way of distinction. But, as I now explain, neither of the Court's distinctions are plausible as a matter of precedent or sound constitutional principle.

b. *The Defendant as Witness.* In an effort to distinguish *Rock*, the *Scheffer* Court suggested that the right to present witnesses carries greater constitutional weight when the proffered witness consists of the defendant herself, as distinct from a third-party witness. This proposition is decidedly out of step with the Court's previous opinions in the area, which strongly suggest that there is no distinction, from a constitutional standpoint, between situations in which exculpatory evidence comes from the defendant's own recollection or from the memory of a third party.

As a textual matter, "the compulsory process clause draws no distinction between the defendant and other 'witnesses in his favor.'"<sup>125</sup> Moreover, as a doctrinal matter, there is no basis to draw such a distinction when the Court already has deemed the right to present third-party witnesses to be among the "fundamental" aspects of a criminal trial.<sup>126</sup> In the Court's current constitutional lexicon, there is no category of "super-fundamental" rights.

In *Rock*, the Court did note that it was faced with a situation in which the defendant herself wished to testify; and, in a footnote, the *Rock* Court eschewed any desire to speak specifically to "the admissibility of testimony of previously hypnotized witnesses other than criminal defendants."<sup>127</sup> Rhetoric aside, however, the logic of *Rock* is not so confined. To the contrary, the *Rock* Court intermingled its discussion of the defendant's right to testify with an exposition of the general right to present witnesses;<sup>128</sup> and commentators

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125. Westen, *Compulsory Process I*, *supra* note 13, at 119.

126. By declaring, in *Chambers*, that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," the Court clearly spoke of third-party witnesses. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (pre-*Scheffer* case, reiterating the "fundamental" nature of the right to present witnesses and adding that it is "an essential attribute of the adversary system itself" in the course of holding that trial courts nonetheless may sanction defendants for violations of discovery rules concerning the pretrial disclosure of witnesses).

127. *Rock v. Arkansas*, 483 U.S. 44, 58 n.15 (1987).

128. See 483 U.S. at 51-52. Moreover, to acknowledge, as *Rock* does, that the right of the defendant herself to testify finds additional support as "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony" is not to draw any distinction as to

prior to *Scheffer* properly had understood the reasoning in *Rock* to extend to witnesses other than the defendant herself.<sup>129</sup>

Precedent aside, the pre-*Scheffer* case law is right as a matter of first principles in its refusal to distinguish between the defendant's own testimony and that of a third-party witness. If the right to present witnesses really does consist of an entitlement to exceptions from generally applicable evidence rules as necessary to bring to the jury's attention exculpatory testimony, then it makes no sense to draw such a distinction. Whether exculpatory testimony comes from the defendant herself or from a third party is likely to depend upon little more than pure chance: for example, whether a third party happened to be at the scene of the crime at the relevant time.

Indeed, a distinction between testimony by defendants and testimony by third parties would tend, as a practical matter, to make the right to present witnesses depend upon the particular criminal element in dispute in a given case. The major issue in *Rock* turned upon causation: whether the defendant's actions had caused the gun to discharge.<sup>130</sup> A defendant will be in a position to testify in a case focused upon causation (if she can remember what happened), and the same is likely to be true in a case that centers upon the defendant's mental state at the time of the criminal act. By contrast, a defendant may not be in a position to provide the crucial testimony when her defense centers upon misidentification. Here, the whole point of the defense is that the defendant did not commit the crime. In such a scenario, the viability of a misidentification defense is likely to turn not simply upon the defendant's own disavowal of the crime but, more crucially, upon the testimony of some third person: someone thought by the defense to be the actual perpetrator or, one step removed, someone who heard inculpatory remarks made by such a person, as in *Chambers*. Whatever one's conception of the right to present witnesses, its content surely should not turn upon fortuities or upon the particular criminal elements in dispute in a given case.

One might well expect the jury, as a general matter, to discount more readily the testimony of a defendant on grounds of self-interest than the jury might discount the account of a third party

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constitutional weight. See 483 U.S. at 52. Support in two places in the text, rather than just one, does not somehow double the protection to which the Constitution entitles the defendant.

129. See IMWINKELRIED & GARLAND, *supra* note 14, § 6-4, at 163 ("Although the *Rock* opinion does not explicitly resolve the issue, most commentators have concluded that *Rock* will ultimately be extended to defense witnesses other than the accused.").

130. See *supra* note 86 and accompanying text.

with no stake in the case. That observation, however, would be an odd justification for placing greater constitutional weight upon the right of the defendant herself to testify. If anything, the greater willingness of the jury to find credible the testimony given by a disinterested third party — in particular, the prospect that such testimony may be more likely to raise a reasonable doubt in the mind of the jury — should, if anything, make it more compelling for the defense to admit the testimony of such a person under an exception-based view, as compared to the potentially self-serving testimony of the defendant. But that is not the law, at least after *Scheffer*.<sup>131</sup>

*c. Firsthand Knowledge.* The third proposition relied upon by the *Scheffer* Court fares no better. By definition, a polygraph examination that indicates a lack of deception serves merely to suggest that the testimony of the test subject at trial is worthy of belief. In this sense, the Court is literally correct to say that expert testimony concerning a polygraph examination does not itself add to the “firsthand knowledge” conveyed to the jury about the disputed events in the case but, instead, serves simply to “bolster” the credibility of what the test subject already has recounted directly in court.<sup>132</sup>

This observation, however, is an implausible reed upon which to rest the application of a “fundamental” constitutional right. The Court’s distinction draws far too fine a line between “firsthand knowledge” that merely makes more believable what a previous witness has said and information gleaned in other ways that may have even greater force, precisely because it makes more coherent

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131. One of the ironies of *Scheffer* is that the excluded defense expert witness was not merely a disinterested third party but actually an agent of the prosecuting government itself. Cf. *United States v. Scheffer*, 118 S. Ct. 1261, 1278 (1998) (Stevens, J., dissenting) (“It is incongruous for the party that selected the examiner, the equipment, the testing procedures, and the questions asked of the defendant to complain about the examinee’s burden of proving that the test was properly conducted.”).

132. See 118 S. Ct. at 1268-69 (emphasis added). The strategic value of polygraph evidence for the defense in a criminal case consists of its implications for the veracity of a test subject who serves as a witness, not in the ability of the examiner simply to testify — wholly apart from the polygraph — that the subject made a prior statement concerning the facts of the case. Thus, in *Scheffer*, the whole point of admitting the polygraph evidence was to support Scheffer’s veracity, not to convey simply that Scheffer had made some prior statement to the government denying that he had used drugs. The terms of Military Rule 707 would seem to leave a defendant like Scheffer entirely free to testify himself about his making of such a prior statement in an effort to persuade the jury that he has been telling the same story all along. The defendant simply could not add that the statement was made in the course of a polygraph examination or that the examination indicated a lack of deception in the statement.

and credible what the jury already has heard.<sup>133</sup> If anything, *Chambers* is precisely such a case. There, the disputed witnesses had no “firsthand knowledge” in the sense of personal observations made at the scene of the shooting in dispute. Insofar as they had any knowledge at all that bore upon disputed matters, it consisted of knowledge in a form that the law of evidence, at least presumptively, disfavors: namely, hearsay — albeit, hearsay purporting to consist of confessions by another man to the shooting.<sup>134</sup> Indeed, as emphasized earlier, the trial court in *Chambers* already had permitted the jury to hear other testimony — including from the purported shooter himself — that raised, with some plausibility, the prospect of misidentification.<sup>135</sup> *Chambers*, in short, is a case of witnesses with only secondhand knowledge, offered simply to bolster the credibility of other misidentification evidence admitted at trial. The *Chambers* Court nonetheless deemed the admission of those witnesses to be constitutionally required. It thus comes as no surprise that modern commentators plausibly have read *Chambers* as recognizing a constitutional right to present additional exculpatory witnesses, “even when other witnesses have testified to the same facts, if the jury could reasonably conclude that [the additional witnesses’] testimony is more credible, or that the mere accumulation of testimony adds to its weight.”<sup>136</sup>

The *Scheffer* Court offered no principled answer to *Chambers*, stating merely that it had sought to “confine[ ] its [earlier] holding to the ‘facts and circumstances’ presented” and asserting flatly that *Chambers* “does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or fed-

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133. Writing outside the context of constitutional rights just one Term prior to *Scheffer*, the Supreme Court underscored the importance of permitting the prosecution to admit evidence of a criminal defendant’s prior bad acts — within the parameters of Rule 404 — as a way to enhance the narrative coherence of other evidence already introduced to prove the specific criminal conduct alleged of the defendant in the case at hand. See *Old Chief v. United States*, 117 S. Ct. 644, 653 (1997) (“Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the [further] inferences, whatever they may be, necessary to reach an honest verdict.”). For a more extensive exposition of my views on *Old Chief* and its relationship to the cognitive psychological literature on jury decisionmaking, see Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1168-71 (1998).

134. See *supra* notes 66-67 and accompanying text.

135. See *supra* note 70 and accompanying text.

136. Westen, *Compulsory Process II*, *supra* note 13, at 225-26 (emphasis added; footnotes omitted); see also Clinton, *supra* note 13, at 791-92 (observing that *Chambers* “clearly did break new constitutional ground” as “the first case in which the right to defend has been applied to arguably cumulative, albeit critical, defense testimony”); IMWINKELRIED & GARLAND, *supra* note 14, § 2-4, at 45 (“In *Chambers*, the hearsay evidence was technically cumulative.” (footnote omitted)).

eral rule excludes favorable evidence.”<sup>137</sup> These are exceedingly weak grounds of distinction. Again, if the point of the Constitution really is to entitle defendants to exceptions from generally applicable rules in order to admit exculpatory evidence — at least when that evidence appears “vital”<sup>138</sup> or “critical”<sup>139</sup> to the case at hand — then the expression of a constitutional preference for firsthand knowledge, or for testimony that will do something more than just bolster other evidence, is itself arbitrary.

What could possibly be going on here? At the most superficial level, one might seek to attribute the Court’s troublesome reasoning in *Scheffer* to nothing more than the changes in Court personnel in the decade since *Rock*.<sup>140</sup> Simple judicial head-counting does not form a satisfying explanation, however, when one considers that the eight-member majority in *Scheffer* bridged the usual fissures of judicial philosophy and interpretive methodology amongst the Justices. Nor can one casually dismiss *Scheffer* as an inartful application of the “arbitrary or disproportionate” standard, brought on by some anomalous visceral reaction against polygraphs specifically. Rather, there is language in *Scheffer* that is strikingly *not* new but that brings to the fore the hedges and caveats lurking in earlier decisions, like *Chambers* itself. As I next discuss, it is this feature of *Scheffer*, more than its specific holding, that makes the case a provocative harbinger for the future.

## 2. *Exceptions and Floodgates*

In contrast to *Scheffer*’s forebears, the Court’s description of the right to present witnesses in *Scheffer* starts not with the venerable constitutional roots of that right but, instead, with its limits and qualifications. The Court states cryptically that the right “is not unlimited, but rather is subject to reasonable restrictions.”<sup>141</sup> This language is in keeping with the Court’s prior statements, in otherwise expansive opinions, to the effect that “[t]he accused does not have an unfettered right to offer testimony that is incompetent, privi-

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137. 118 S. Ct. at 1268 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 303 (1973)).

138. *Washington v. Texas*, 388 U.S. 14, 16 (1967).

139. *Chambers*, 410 U.S. at 302; see also *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (reiterating that the witness testimony offered by *Chambers* was “critical to his defense”).

140. Of the five Justices who voted to strike down the per se ban on hypnotically-enhanced testimony in *Rock*, only one — Justice Stevens — remains on the current Court, and he was the lone dissenter in *Scheffer*. By contrast, three of the four dissenters in *Rock* — Chief Justice Rehnquist and Justices O’Connor and Scalia — subsequently voted to uphold the per se rule in *Scheffer*. Compare *Rock*, 483 U.S. at 45 with *Scheffer*, 118 S. Ct. at 1263.

141. 118 S. Ct. at 1264.

leged, or otherwise inadmissible under standard rules of evidence.”<sup>142</sup> Insofar as one may discern from the Court’s cases as a whole, however, the process of distinguishing permissible from impermissible applications of evidence rules is largely an ad hoc enterprise.<sup>143</sup>

The Court’s repeated expressions of hesitancy are not a feature unique to the cases on the right to present witnesses; rather, they relate to a pervasive problem for constitutional rights understood to consist of entitlements to exceptions from generally applicable rules. Michael Dorf describes this concern as “the floodgates problem”:<sup>144</sup> in essence, the struggle to define some principled limits upon the entitlement in order to avoid the need to compel widespread exceptions that would tear apart the system of legal rules itself. This fear, I submit, not only is well-founded with respect to the right to present witness, but also provides the best explanation for the willingness of the Court in *Scheffer* to dust off the hedges and caveats from its earlier dicta in order to uphold a categorical rule of exclusion.

The floodgates problem is not a farfetched, abstract, or remote concern in this context. Some constitutional slopes are considerably more slippery than others. If anything, the leading academic treatments of the right to present witnesses revel in the bursting of floodgates. Without any apparent acknowledgment of this general phenomenon in constitutional decisionmaking, commentators in the area have argued vigorously for the Court to extend the right to its seemingly logical limits as an entitlement to exceptions from generally applicable evidence rules. Peter Westen, for instance, states that “the defendant has a constitutional right to produce any witnesses whose ability to give reliable evidence is something about

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142. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Given that *all* of the Court’s decisions on the right to present witnesses prior to *Scheffer* struck down the application of rules that purported to limit the admission of evidence, one might try to explain the quoted language from *Taylor* as an inadvertent overstatement. *Taylor* itself involved an issue tangentially related to the right to present witnesses. The Court there held that a trial judge may refuse to admit testimony as a sanction against defense counsel who “willful[ly]” fails to identify a witness, as part of the ordinary process of pre-trial preparation, for the purpose of “seeking a tactical advantage” vis-à-vis the prosecution. 484 U.S. at 417. The same rhetoric of limitation also appears, however, in cases that deal squarely with the right to present witnesses and that otherwise rule in favor of the defendant advancing the right. See *supra* notes 79-80 (discussing similar language in *Chambers*); *Rock*, 483 U.S. at 55 n.11 (“Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant’s right to testify.”).

143. See generally *IMWINKELRIED & GARLAND*, *supra* note 14, § 2-3, at 42 (observing that “[t]he ‘fact-bound’ character of [the Court’s] as-applied holdings” in cases on the right to present witnesses tends to leave in doubt “the precedential value of th[ose] holdings”).

144. See *supra* note 16.

which reasonable people can differ.”<sup>145</sup> The implication is that even nondiscriminatory rules generated through the ordinary process for evidence policymaking — a process that *routinely* involves the selection of one from among many competing views of appropriate policy — would be constitutionally vulnerable. Defendants would merely need to identify some contrary viewpoint that a “reasonable” person might hold — something that inevitably would be present with regard to controversial new forms of witness testimony. In fact, the right to present witnesses, so conceived, would consist not merely of an entitlement to exceptions from the ordinary system of evidence rules but, at bottom, an argument against the possibility of rules at all.

Robert Clinton is only somewhat less sweeping in his contention that “the key to developing a coherent constitutional approach to the right to defend is the *balancing* of the constitutional values of fairness protected by the right to defend against the governmental interests expressed in the [pertinent] procedural or evidentiary rulings.”<sup>146</sup> The Court, if anything, has taken this suggestion too much to heart in cases like *Chambers*, *Rock*, and *Scheffer*, striking balances on an ad hoc basis that cannot be reconciled by reference to any consistent constitutional principle.

If one were to take seriously the Court’s admonition against “arbitrary” rules that operate to exclude testimony from defense witnesses — as modern commentators do, to their credit — the right to present witnesses would cut a wide swath through the law of evidence as we know it.<sup>147</sup> Specifically, there are several longstanding,

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145. Westen, *Compulsory Process II*, *supra* note 13, at 203 (emphasis omitted).

146. Clinton, *supra* note 13, at 797 (emphasis in original). Clinton himself describes this as a “‘totality of the circumstances’ approach.” *Id.* at 800. Drawing upon this view, Edward Imwinkelried and Norman Garland describe the circumstances that may bear upon the constitutional inquiry in a given case. See IMWINKELRIED & GARLAND, *supra* note 14, §§ 2-4 to 2-6, at 43-65. The bulk of their treatise is a virtual celebration of the floodgates problem, pointing out how a balancing approach to the right to present witnesses would call into question the gamut of familiar evidence rules. See *generally id.*, chs. 4-14. If anything, in other writing, Imwinkelried goes even further than Clinton to suggest that the right to present witnesses should extend to civil parties. See Edward J. Imwinkelried, *The Case for Recognizing a New Constitutional Entitlement: The Right to Present Favorable Evidence in Civil Cases*, 1990 UTAH L. REV. 1. Such a move would cut loose completely the right from its moorings in the guarantees of the Sixth Amendment for criminal trials specifically. Cf. *infra* section II.C.1.b (arguing that an exception-based view of the right cannot be justified by reference to general notions of due process independent from the specific guarantee of compulsory process).

147. See IMWINKELRIED & GARLAND, *supra* note 14, § 1-2, at 8 (noting that the Court’s decisions on the right have “the potential to revolutionize criminal evidence law”). I confine the ensuing discussion of the floodgates problem to generally applicable evidence rules. I am in accord with the position of Westen and Clinton, insofar as they posit that evidence rules that peculiarly disadvantage defendants should be subject to strict scrutiny.

bedrock rules of evidence that, in a given instance, might have the effect of preventing defense witnesses from testifying "on the basis of *a priori* categories."<sup>148</sup>

a. *Ordinary Hearsay*. One of the longest standing — though, admittedly, not necessarily the most coherent or logical — rules of evidence is the rule upon hearsay.<sup>149</sup> The rule, of course, is rife with exceptions — both those that identify specific kinds of out-of-court statements thought sufficiently reliable to be admissible<sup>150</sup> and, in its contemporary form, a residual exception designed to reach "rare[]" and "exceptional circumstances" where a particular statement has "guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions."<sup>151</sup> But it remains true today, as it has for centuries, that ordinary hearsay — that is, hearsay not within any exception — is flatly inadmissible, at least as far as the rules of evidence are concerned.<sup>152</sup> This is one of the most venerable "*a priori* categories" in all of evidence law.

A constitutional right to present witnesses — if taken seriously as an entitlement to exceptions from generally applicable rules — would shed doubt upon the categorical exclusion of ordinary hearsay. In mandating the admission of the particular hearsay testimony in *Chambers*, the Court repeatedly underscored that the circumstances surrounding the out-of-court statements in that case "provided considerable assurance of their reliability."<sup>153</sup> Commentators properly have questioned, however, whether there are any principled grounds upon which so to restrict the reach of *Chambers*. Clinton, for example, boldly states that "the admission of hearsay evidence *with no extrinsic indicia of reliability* might be constitutionally compelled if the evidence is of critical importance to the accused."<sup>154</sup> Westen qualifies this notion only modestly, conceding merely that the defense should have to show that the declarant is

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148. *Washington v. Texas*, 388 U.S. 14, 22 (1967). For similar rhetoric, see *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Rock v. Arkansas*, 483 U.S. 44, 61-62 (1987).

149. As a general matter, a witness may not testify to an out-of-court statement made by some other person, at least when the proponent of the witness is seeking thereby "to prove the truth of the matter asserted" in the statement itself. See FED. R. EVID. 801(c) (defining "hearsay").

150. See FED. R. EVID. 803 & 804(b).

151. S. REP. NO. 93-1277, at 20 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7065 (commentary on identically phrased predecessor provision to the current Rule 807).

152. See FED. R. EVID. 802. On the lengthy history of the rule against hearsay, see 2 WIGMORE, *supra* note 26, § 1364, at 1680-95.

153. 410 U.S. at 300; see also 410 U.S. at 302 ("The [hearsay] testimony rejected by the trial court here bore persuasive assurances of trustworthiness . . .").

154. Clinton, *supra* note 13, at 808-09 (emphasis added).



unavailable and that her out-of-court statement, at least, "is [not] so inherently unreliable that reasonable people . . . could not rationally rely on it."<sup>155</sup>

Given the lineage of the rule against hearsay, one can understand why the Court might deploy hedges and caveats of the sort in *Chambers* and later cases in an attempt to avoid casting itself upon such a path.<sup>156</sup> The floodgates problem does not stop here, however.

*b. Extrinsic Evidence and Impeachment.* All of the Supreme Court cases discussed in this Part concerned witnesses called in an effort to set forth affirmatively the defense account of the facts. The defense is not obligated to pursue such a strategy exclusively, however, but may instead — or in addition — attempt to use witness testimony to shed doubt upon the credibility of the crucial prosecution witnesses. There are, of course, many ways to attack the credibility of a witness, but one important way is to question the general character of the witness for truthfulness — in essence, to suggest that the witness is lying in her trial testimony, because she is the sort of person who lies generally.<sup>157</sup>

For this kind of attack, there is a relatively well-established set of rules, designed to avoid turning the case at hand into a trial focused upon the unrelated prior behavior of a particular third-party witness.<sup>158</sup> The attacking party may seek to call into doubt the witness's general character for truthfulness by presenting opinion or reputation testimony from other persons and may, in the discretion of the trial court, inquire on cross-examination into specific instances of the witness's conduct short of a criminal conviction<sup>159</sup> —

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155. Westen, *Compulsory Process II*, *supra* note 13, at 304.

156. See *supra* notes 79-80, 142 and accompanying text. Some commentators further suggest that defendants might deploy similar reasoning to call into question the best evidence rule, which expresses a preference for original writings over other evidence attesting to the contents thereof in much the same way that the rule against hearsay expresses a preference for live testimony over out-of-court statements. See IMWINKELRIED & GARLAND, *supra* note 14, § 13-3, at 413-15.

157. See GREEN & NESSON, *supra* note 5, at 267-69 (distinguishing attacks upon the general character of the witness for truthfulness from other, familiar kinds of attacks upon witness credibility).

158. See 4 WEINSTEIN'S FEDERAL EVIDENCE § 608.02[2], at 608-08 to 608-09 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) [hereinafter WEINSTEIN'S EVIDENCE] ("Real dangers of confusing the issues and protracting the trial may arise from side-excursions into the witness's past unrelated to the substantive issues being tried."); see also *id.* § 608.12[2], at 608-27.

159. See FED. R. EVID. 608(a) - (b). But cf. IMWINKELRIED & GARLAND, *supra* note 14, § 8-5, at 212 & n.56 (noting that a few states do not permit even inquiry on cross-examination concerning prior untruthful acts of a witness, unless there was an actual criminal conviction).

Apart from the rules of evidence, the Court has relied upon the Confrontation Clause to afford defense counsel broad flexibility with regard to the scope of cross-examination. See,

for example, a particular occasion on which the party believes that the witness lied. But the attacking party may not seek to prove the occurrence of those specific instances of conduct by putting on “extrinsic evidence,” such as the testimony of yet another witness who observed the conduct in question.<sup>160</sup>

As the author of one leading treatise remarks: “Courts often summarize the no-extrinsic-evidence rule by stating that ‘the examiner must take his or her answer,’” in the sense that “the cross-examiner may not call other witnesses to prove the misconduct after the witness’s denial.”<sup>161</sup> From the defendant’s standpoint, however, it may be quite important in a given instance to use extrinsic evidence in this prohibited manner — especially if the defense has strong reason to believe that a crucial prosecution witness has lied by denying outright, on cross-examination, that the disputed instance of conduct ever occurred. The defense nonetheless is, and has long been, stuck with the witness’s answer, just as the prosecutor would be in any effort to impeach a witness for the defense.

Indeed, the bar upon extrinsic evidence also would apply where the prosecution has attacked the general character of a defense witness for truthfulness, through cross-examination about a specific instance of conduct. To rehabilitate its witness, the defense would be restricted to opinion or reputation testimony and, once again, could not put on extrinsic evidence — for example, another witness with knowledge that the disputed instance of conduct did not actually occur.<sup>162</sup> The law of evidence thus limits witness rehabilitation in the same manner as witness impeachment.

This is not to say that the prohibition upon extrinsic evidence as a technique of impeachment is a trap only for unwary defendants; again, it applies with equal force to the prosecution. A constitu-

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*e.g.*, *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (holding that defendant’s right of confrontation overrides state’s interest in maintaining confidentiality of prosecution witness’s status as juvenile offender on parole, where defense sought on cross-examination to suggest possible bias of witness to testify favorably for the prosecution due to fear of parole revocation).

160. *See* FED. R. EVID. 608(b). Although Rule 608 was an innovation insofar as it permits the use of opinion testimony as a vehicle of attack in addition to reputation testimony, *see* 4 WEINSTEIN’S EVIDENCE, *supra* note 158, § 608.11[1], at 608-19, the flat bar upon extrinsic evidence of specific instances of conduct — the pertinent limitation here — has a lengthy pedigree at common law. *See infra* note 198; *cf.* 4 WEINSTEIN’S EVIDENCE, *supra* note 158, § 608.12[3][a], at 608-28 (“Evidence is *extrinsic* if offered through other documents or witnesses rather than through cross-examination of the witness himself or herself.” (emphasis in original; footnote omitted)).

161. WEINSTEIN’S EVIDENCE, *supra* note 158, § 608.12[3][b], at 608-28 to 608-29 (footnotes omitted).

162. *See* FED. R. EVID. 608(b) (applying same limitation upon use of extrinsic evidence “for the purpose of attacking or supporting the witness’ credibility” (emphasis added)).

tional right on the part of defendants to present witnesses — if conceived as an entitlement to exceptions from generally applicable rules — nonetheless would shed considerable doubt upon this familiar limitation.<sup>163</sup>

Indeed, at least one commentator takes the point a substantial step further, by calling into doubt a related rule that does not exclude any witnesses by its terms but that nonetheless might have the effect, at the margin, of discouraging the defense from calling a witness. It has long been the case that a party may impeach a witness with extrinsic evidence, if in the form of a prior criminal conviction;<sup>164</sup> and the prospect of such impeachment is a strategic consideration long familiar to defense counsel in the determination of whether to put a given witness — the defendant herself, perhaps — on the stand. Westen argues that courts should bar the prosecution from impeaching a defense witness in this manner, if the witness's prior conviction does not relate "significant[ly]" to her anticipated testimony and otherwise would discourage the defense from calling that witness.<sup>165</sup> This step would take the right to present witnesses from an entitlement in favor of the defense to a limitation upon the prosecution's presentation of its own case.

c. *Rules of Privilege.* Both Westen and Clinton further contend that an exception-based view, applied seriously, should lead the Court to question the application of general rules of privilege that otherwise would prevent a criminal defendant from obtaining the testimony of a third-party witness.<sup>166</sup> Westen puts the point most emphatically when he states that "[n]o interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpa-

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163. See Westen, *Compulsory Process II*, *supra* note 13, at 224 (observing that a right to present all witnesses that the jury might find exculpatory would call into doubt limitations upon evidence "to impeach a witness for the prosecution" (footnote omitted)).

164. See FED. R. EVID. 609. This rule treats differently extrinsic evidence in the form of an actual conviction, for the attacking party easily may prove the occurrence of the specific instance of conduct with little sidetracking of the trial. See 4 WEINSTEIN'S EVIDENCE, *supra* note 158, § 608.12[2], at 608-27.

165. See Westen, *Compulsory Process I*, *supra* note 13, at 149 (contending that the Compulsory Process Clause "would not permit a defense witness to be impeached with evidence of prior crimes unless the state could demonstrate a significant link between the prior criminal conduct of a witness and his propensity to falsify testimony in an unrelated trial").

166. The Fifth Amendment, by its terms, provides a privilege against self-incrimination. See U.S. CONST. amend. V. Exercising common law authority with regard to matters of privilege in the federal courts, the Supreme Court has recognized a wide variety of additional, non-constitutional privileges. For an overview thereof, see MUELLER & KIRKPATRICK, *supra* note 77, §§ 5.8-5.37, at 357-496.

tory evidence.”<sup>167</sup> Under an “arbitrary or disproportionate” standard — understood as something akin to strict scrutiny in the manner of the pre-*Scheffer* case law — these “*a priori* categories” too would be open to doubt. Yet matters of privilege are one corner of evidence law that the Court has sought specifically and repeatedly to leave undisturbed by the right to present witnesses, even as the Court has ruled in favor of particular defendants asserting that right.<sup>168</sup>

One of the most difficult areas in this regard centers upon the Fifth Amendment privilege against self-incrimination. In the criminal context — particularly when multiple persons may have been involved in the underlying criminal activity — it is not uncommon for a witness desired by the defense to refuse to testify based upon the Fifth Amendment. Although the Supreme Court has not spoken directly to the question, “[t]he clear majority view [of the lower courts] is that the accused’s constitutional right [to present witnesses] cannot override a witness’ Fifth Amendment privilege . . . .”<sup>169</sup> In the face of this prevailing view, both Westen and Clinton argue that the prosecution may be constitutionally obligated to grant immunity to such a witness in order to enable the defense to

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167. Westen, *Compulsory Process I*, *supra* note 13, at 161. *But see* IMWINKELRIED & GARLAND, *supra* note 14, § 10-5, at 301 (contending that Westen “is dogmatic to assume that the accused’s interest must always prevail” in the face of a claim of privilege, and counseling instead in favor of case-by-case balancing).

168. *See, e.g., supra* note 61 (discussing caveat on privilege in *Washington*); *Rock v. Arkansas*, 483 U.S. 44, 56 n.11 (1987) (repeating caveat from *Washington*). Various commentators have sought to develop frameworks to identify, either categorically or on a case-by-case basis, the situations in which the right to present witnesses should override witness claims of privilege. *See, e.g.,* Alfred Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173, 1190, 1196 (1980) (distinguishing between privileges held by private persons and those held by the government); Welsh S. White, *Evidentiary Privileges and the Defendant’s Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377, 397 (1989) (setting forth “three guiding principles” focused upon whether the privilege in question is “designed to assist the government in performing one of its essential functions,” whether the privilege applies evenhandedly against the government as well as defendants, and whether the privilege is asserted as an obstacle to cross-examination of the witness or to compulsion of the witness to testify at all); Robert Weisberg, Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 991 (1978) (calling for “in camera hearing[s] in which the court may make a carefully structured sequence of inquiries into the relative weights of the witness and defense interests”). Notwithstanding the Supreme Court’s caveats, a handful of lower courts have suggested that a witness’s assertion of at least some privileges must give way in the face of a demand from a criminal defendant to present testimony from the witness. *See* White, *supra*, at 382 n.31 (discussing cases).

169. *See* IMWINKELRIED & GARLAND, *supra* note 14, § 11-4, at 345. The few contrary cases generally have involved misconduct by the prosecution, use by the prosecution of immunized testimony, or use of a prior statement by the particular witness whom the prosecution has refused to immunize for the benefit of the defense. *See id.* § 11-4, at 354-67.

obtain her testimony.<sup>170</sup> Although it is beyond the scope of this Article to explore the subject of witness immunity in depth,<sup>171</sup> there are some telling points that one may make with regard to the flood-gates problem and the appropriate content of the right to present witnesses.

The lower courts have not been kind to Westen and Clinton's view with regard to witness immunity. In fact, the leading treatise on exculpatory evidence observes that "there is unanimity among the courts that the accused is not even entitled to a 'missing witness' instruction when the prosecution fails to exercise its immunity power to make a witness's testimony available."<sup>172</sup> Westen and Clinton nonetheless are on to something important when they highlight the lack of parity in the ability of the prosecution and the defense, under current law, to obtain testimony from a witness who resists based upon the privilege against self-incrimination. The prosecution has every incentive to exercise its immunity-granting power in order systematically to advantage itself in criminal trials. In light of this concern and notwithstanding notions of judicial deference for prosecutorial discretion,<sup>173</sup> Akhil Amar recently has suggested that this lack of parity is quite troublesome given the core guarantee provided by the Compulsory Process Clause: namely, a right on the part of the defense to avail itself of the same compulsion techniques as are available to the prosecution for the "obtaining of witnesses."<sup>174</sup> Even an equality-based conception of the Compulsory Process Clause thus, at the very least, would regard

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170. See Westen, *Compulsory Process I*, *supra* note 13, at 167 ("The government's peculiar control over potentially exculpatory witnesses imposes a constitutional obligation on it to immunize them to obtain evidence in the defendant's favor."); see also Clinton, *supra* note 13, at 825-26 ("Since a grant of immunity provides an alternative which impedes the right to defend less drastically than an unqualified recognition of the witness' right to claim privilege at the expense of the accused, the grant of immunity would seem constitutionally compelled under the balancing test suggested herein." (footnote omitted)).

171. See IMWINKELRIED & GARLAND, *supra* note 14, § 11-4, at 342 & n.110 (citing examples of the "large volume of scholarly commentary" on witness immunity).

172. *Id.* § 11-4, at 345.

173. A prosecutor's decision on whether to grant immunity to a given witness is an aspect of the ultimate decision on whether to prosecute that individual. Even "use immunity" — the assurance simply that the immunized testimony will not be used against the witness, not that the witness will be free entirely from any possibility of criminal charges — can cripple a subsequent criminal prosecution. See, e.g., *United States v. North*, 920 F.2d 940, 942 (D.C. Cir. 1990) (overturning the conviction of Oliver North in connection with the Iran-Contra scandal on the ground that the prosecution was unable to show that the testimony it offered at trial was not "shaped, directly or indirectly, by [North's earlier] compelled testimony [to a congressional committee], regardless of how or by whom [a given witness] was exposed to that compelled testimony" (emphasis omitted)).

174. See AMAR, *supra* note 15, at 134-36; see also *supra* section I.A (discussing the core meaning of the Clause).

with skepticism the Court's studied reluctance to grapple seriously with witnesses foreclosed to the defense due to assertions of the privilege against self-incrimination.

The proposition that defendants generally should get the same tools of witness compulsion as prosecutors nonetheless is a far cry from the kind of free-standing entitlement that Westen and Clinton seek to derive from the Court's precedents. It would be one thing for the Court to embark upon the difficult job of articulating a set of constitutional principles to ensure a level playing field with regard to witness immunity.<sup>175</sup> It would be quite another thing — and a far more sweeping change in the law — to abandon entirely norms of prosecutorial discretion by mandating the exercise thereof to immunize witnesses whenever a defendant might consider their testimony helpful, even when the prosecution would regard immunity in any form as too high a price to bear to obtain helpful testimony for itself.

I underscore the foregoing examples — the rule against hearsay, rules on witness impeachment, and rules of privilege — not to say that the upsetting of existing law is necessarily a reason, in itself, to interpret the Constitution so as to avoid that result. There are quite famous instances in which the Court has uprooted longstanding practices based upon a constitutional imperative.<sup>176</sup> Even the view advanced here of the right to present witnesses as a right of equal treatment would necessitate a rethinking of existing case law.<sup>177</sup> But the observation that the Court's current "arbitrary or disproportionate" standard, if applied in a principled manner, would call for a radical reorientation of preexisting evidence law — including rules that the Court itself has transmitted to Congress in the rulemaking process<sup>178</sup> — certainly should stand as both a substantial reason for caution and a powerful impetus for the seeking of some alternative approach that would not carry such sweeping consequences. When viewed in this light, the Court's effort to engage in a constitutional high-wire act — seeking to give genuine content

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175. This enterprise might well lead to an increase in the formalization of criteria used by prosecutors with respect to the granting of immunity, if only to provide a baseline against which to evaluate refusals to exercise that power for the benefit of defendants.

176. See, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954), for the leading illustration in the area of individual rights.

177. Apart from the specific question of witness immunity to which I alluded earlier, see *infra* section III.A (revisiting the Court's case law under an equality-based view of the right to present witnesses).

178. Virtually all of the current Federal Rules of Evidence are the product of a rulemaking process that passes through the Court itself. See MUELLER & KIRKPATRICK, *supra* note 5, at 4.

to the right to present witnesses while, at the same time, trying to avoid the floodgates problem — is not surprising. What is disappointing is the Court's unwillingness to deal directly with the features of its own jurisprudence that have positioned it on a high-wire in the first place.

It is possible to imagine a system of evidence law that would recognize a pervasive exception for the presentation of witnesses by the defense in criminal trials. Such a move would mark a fundamental shift from the current law of evidence. In the parlance of jurisprudence, the current law of evidence consists of a mixture of "rules" and "standards."<sup>179</sup> Some features of current law are "rules" in that they dictate the exclusion of particular types of evidence — hearsay, extrinsic evidence for the purpose of witness impeachment, and so forth — on a categorical basis. Once one is within the category described, the evidence is excluded. Other features of current law are "standards" in that they merely inform, but do not dictate, the trial court's determination of admissibility in a given instance. Rule 403 — counseling the balancing of probative value against prejudicial effect — is the classic example of such a "standard."<sup>180</sup> If taken seriously, an exception-based view of the right to present witnesses would mandate a shift from the current mixture of "rules" and "standards" to a system composed entirely of "standards" but no "rules" — at least with regard to witness testimony offered by the defense in a criminal trial. Although such a system has *never* existed in this country or anywhere else insofar as I can discern, Congress and the makers of evidence policy at the state level are free to construct one. Contrary to the suggestion of all modern commentators, however, such a system is not mandated by the Constitution. Rather, as I show in the next Part, the right to present witnesses consists of the simple but profoundly powerful mandate that the government must do unto itself what it would do unto defendants, absent a compelling justification otherwise.

## II. FROM EXCEPTION TO EQUALITY

In setting out the affirmative case for a conception of the right to present witnesses as a right of equal treatment, this Part draws

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179. On the distinction between "rules" and "standards" in the context of the Supreme Court's constitutional jurisprudence, see Kathleen M. Sullivan, *The Supreme Court 1991 Term — Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-59 (1992). For a more detailed exposition of the distinction — cast as between "mandatory rules" and "rules of thumb" — see FREDERICK SCHAUER, *PLAYING BY THE RULES* 5-6 (1991).

180. See FED. R. EVID. 403.

upon several modes of constitutional argumentation. Although there remains considerable debate over the binding force of history, in itself, as a basis for constitutional interpretation, it is common ground that history is at least relevant to the inquiry, if not determinative.<sup>181</sup> As Laurence Tribe aptly observes:

The cases are legion in which constitutional text is not completely free of ambiguity. Yet it is often the case that, although there may be more than one linguistically *possible* interpretation of a constitutional provision, one of those possible interpretations may be the *most plausible* by a wide margin in light of structural considerations viewed against the backdrop of the history of the provision's adoption.<sup>182</sup>

That is especially so here, given that — unlike many areas that today are the subject of constitutional debate — the basic setting of the criminal trial was something quite familiar to those who drafted and ratified the Bill of Rights. In fact, the Sixth Amendment as a whole stands as strong evidence that the Founding generation had many specific thoughts on the subject. Unlike previous treatments of the historical context of the Compulsory Process Clause, I focus not simply upon the forerunners of that provision but, more tellingly, upon the contemporaneous law of evidence into which the Constitution cast that Clause. The only way to account for the then-widespread disqualification of all interested persons as witnesses — let alone the complete absence of any contemporaneous recognition that the Bill of Rights would alter that practice — is to understand the right to present witness in equality-based terms.

As part of my overall enterprise to question the compartmentalization of the Constitution by the legal academy, I go on to discuss several structural considerations that lend further support to an equality-based conception of the right. Specifically, I look not only to the right of confrontation recognized by the constitutional text most closely proximate to the Compulsory Process Clause, but also to two other matters not discussed by commentators in the area to date: namely, principles concerning the appropriate structure of rulemaking institutions and recent debate over exception- and equality-based views of other constitutional rights. Finally, I argue that, completely apart from doctrine, criminal defendants as a

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181. See Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) (“[T]here is no need to presuppose agreement about an ‘originalist’ (or any other) theory of constitutional interpretation. Even opponents of originalism generally agree that the historical understanding [of the Constitution] is relevant, if not dispositive.”).

182. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1278-79 (1995) (emphasis in original).



whole may well be better off in practical terms under an equality-based view — especially so, the more skeptical one is about the willingness of evidence policymakers to weigh seriously the interests of criminal defendants.

### A. *Historical Context*

Previous commentators on the right to present witnesses certainly have not ignored the historical antecedents of the Compulsory Process Clause,<sup>183</sup> though they generally regard them as not pointing absolutely in favor of an exception- or an equality-based view. One feature of the historical record is common ground, however: There was essentially no discussion of the Clause or its implications for then-existing law at the time of the Bill of Rights. Previous commentators have missed the significance of this datum in the historical record, largely because they overlook the context in which it occurred. The silence of observers at the time is a crucial piece of the puzzle, but only when one first recognizes the features of the contemporaneous law of evidence.<sup>184</sup>

#### 1. *Textual Forerunners*

Prior to the Bill of Rights, only New Jersey referred explicitly in its constitution to notions of equality between prosecutors and defendants with regard to witnesses.<sup>185</sup> Most of the contemporary state constitutions that spoke to the subject, instead, conferred upon criminal defendants a right to “produce,” “call for,” or “examine” favorable “proofs” or “evidence,” without explicit reference to principles of equality vis-à-vis the prosecution or, for that matter,

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183. See Clinton, *supra* note 13, at 728-39; Westen, *Compulsory Process I*, *supra* note 13, at 90-108.

184. This would not be the first time that silence served as a crucial piece of evidence in the reconstruction of past events. The key datum that enables Sherlock Holmes to unlock the mystery at the heart of Sir Arthur Conan Doyle's *Silver Blaze* consists of the silence of an otherwise fierce dog stationed in a stable. Holmes infers from the dog's silence that the unknown person who made his way into the barn on the night in question must have been someone very familiar to the animal, such that it did not respond by barking. See ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE CLASSIC MYSTERIES OF SHERLOCK HOLMES* 332, 336 (Longmeadow Press 1992) (1892). The absence of any contemporaneous recognition that the Bill of Rights would dramatically reorient then-existing evidence law is, in the present context, the equivalent of the dog that did not bark.

185. See N.J. CONST. of 1776 art. XVI, reprinted in *THE COMPLETE BILL OF RIGHTS* 408 (Neil H. Cogan ed., 1997) [hereinafter Cogan] (“[A]ll criminals shall be admitted to the same Privileges of Witnesses and Council, as their Prosecutors are or shall be entitled to.” (emphasis added)); cf. N.Y. BILL OF RIGHTS of 1787 para. 6, reprinted in Cogan, *supra*, at 410 (“Writs and Process shall be granted freely and without Delay, to all Persons requiring the same.”).

to any concept of "compulsory process" per se.<sup>186</sup> In keeping with this language in their own constitutions, various state ratifying conventions called for the addition to the original federal Constitution of a bill of rights to recognize, among other things, a right of criminal defendants to "produc[e]" or to "call for" "evidence" in their favor.<sup>187</sup> Indeed, if read without regard to their historical context,<sup>188</sup> these forerunners of the Compulsory Process Clause might tend to suggest precisely the kind of free-standing right to present witnesses — that is, a right beyond parity or equality with the prosecution — recognized by the Supreme Court today.

186. See MASS. CONST. of 1780 pt. I, art. XVII, *reprinted in* Cogan, *supra* note 185, at 404 ("[E]very subject shall have a right to produce all proofs, that may be favourable to him. . . ."); N.H. CONST. of 1783 pt. I, art. XV, *reprinted in* Cogan, *supra* note 185, at 405 ("[E]very subject shall have a right to produce all proofs that may be favourable to himself."); PA. CONST. of 1776 ch. I, art. IX, *reprinted in* Cogan, *supra* note 185, at 411 (right "to call for evidence in his favour"); VT. CONST. of 1777 ch. I, art. 10, *reprinted in* Cogan, *supra* note 185 at 413 (right "to call for Evidence in his Favor"); DEL. DECL. OF RIGHTS of 1776 § 14, *reprinted in* Cogan, *supra* note 185, at 402 (right "to examine evidence on oath in his favour"); VA. DECL. OF RIGHTS of 1776 art. VIII, *reprinted in* Cogan, *supra* note 185, at 413 (right "to call for evidence in his favour"). It is unclear from the face of the state constitutions whether the references to "proofs" carried with them generally applicable limitations upon the process of proof or, similarly, whether the references to "evidence" carried with them generally applicable limitations upon the types of evidence considered admissible at trial. *But cf. infra* section II.A.2 (arguing that the state constitutional provisions remained subject to generally applicable limitations of evidence law, given the nature and extent of such limitations in contemporaneous common law).

At least one state — Maryland — explicitly treated the process for the production of witnesses in a manner distinct from their examination at trial, conferring separate rights with respect to each. MD. DECL. OF RIGHTS of 1776 art. 19, *reprinted in* Cogan, *supra* note 185, at 403 (right "to have process for his witnesses [and] to examine the witnesses for and against him on oath"). Another state — North Carolina — provided simply that the accused shall have the right "to confront the Accusers and Witnesses with other Testimony." N.C. DECL. OF RIGHTS of 1776 art. VII, *reprinted in* Cogan, *supra* note 185, at 410-11. No pertinent references appear in the constitutions of Georgia, Rhode Island, or South Carolina.

187. The New York proposal stated specifically that "in all Criminal Prosecutions, the Accused ought . . . to have the means of producing his Witnesses." N.Y. Proposal, July 26, 1788, *reprinted in* Cogan, *supra* note 185, at 401. Other states proposed the addition of a right to "call for" favorable "evidence." See N.C. Proposal, Aug. 1, 1788, *reprinted in* Cogan, *supra* note 185, at 401 (right "to call for evidence"); Pa. Minority Proposal, Dec. 12, 1787, *reprinted in* Cogan, *supra* note 185, at 402 (right "to call for evidence in his favor"); R.I. Proposal, May 29, 1790, *reprinted in* Cogan, *supra* note 185, at 402 (right "to call for evidence . . . in his favour"); Va. Proposal, June 27, 1788, *reprinted in* Cogan, *supra* note 185, at 402 (right "to call for evidence . . . in his favor"); *cf.* Statement of Gov. Randolph at Va. Ratifying Convention, June 15, 1788, *reprinted in* Cogan, *supra* note 185, at 435 ("Calling of evidence in [the prisoner's] favor is coincident to his trial."); The Impartial Examiner, No. 1, VA. INDEP. CHRON., Feb. 27 & Mar. 5, 1788, *reprinted in* Cogan, *supra* note 185, at 468 (criticizing the absence of a provision in the original federal Constitution that would prevent Congress from putting into force "a law that persons charged with capital crimes . . . shall not . . . call for evidence in their favor" (emphasis in original)).

188. See *infra* section II.A.2 (arguing that the pervasive disqualification of interested witnesses at the time of these state constitutional provisions undercuts the inference that the quoted language recognized a free-standing right to present witnesses, as distinct from a right to equal treatment vis-à-vis the prosecution).

In drafting the Sixth Amendment, however, James Madison curiously used none of these examples. In particular, he did not select language from the various states to refer explicitly to the calling of witnesses or the producing of evidence generally, opting instead for a right on the part of the accused simply "to have compulsory process for obtaining witnesses in his favor."<sup>189</sup> If Madison's handiwork and its forerunners were the extent of the historical record, then one would be hard pressed to come down distinctly in favor of either an exception- or an equality-based reading. There is more, however.

Given the apparent uniqueness of Madison's wording in the Compulsory Process Clause, especially in light of the state constitutions and proposals, one might have thought that there would have been considerable discussion of the Clause at the time. But, as previous commentators accurately observe, that was not so. In fact, during the consideration of the Bill of Rights in Congress and by the various states, there was essentially no discussion of the presentation of witnesses.<sup>190</sup> At the very least, if contemporary observers had understood the Bill of Rights to mandate sweeping change in the then-existing law of evidence, one would have expected them to say something. They did not. Writing of this puzzling silence, one commentator states that "[t]he sixth amendment was noncontroversial (aside from the requirement that the jury be drawn from the district where the crime occurred) because its principles were already accepted at common law."<sup>191</sup> But what *was* the contempora-

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189. U.S. CONST. amend. VI. See Westen, *Compulsory Process I*, *supra* note 13, at 97 (referring to "Madison's unique phrasing"). As Westen observes, Madison did not select wording to refer explicitly to notions of equality, notwithstanding the existence of New Jersey's formulation to that effect. See Westen, *Compulsory Process II*, *supra* note 13, at 256 n.230; *cf. supra* note 185 (discussing New Jersey's formulation). It is a mistake, however, to draw from this observation the inference that "the framers of the compulsory process clause certainly knew how to formulate the clause on a principle of equality and, presumably, would have done so if they so desired." Westen, *Compulsory Process II*, *supra* note 13, at 256 n.230. That would prove far too much, for the same reasoning would shed doubt upon the fundamental notion that the Compulsory Process Clause extends not just literally to the "compulsory process" used to haul recalcitrant witnesses into court, but also to the admissibility of witness testimony. *Cf. supra* section I.A. Madison just as strikingly did not select a formulation that would refer to the latter issue — again, notwithstanding the many state examples, see *supra* note 186, that pointed in that direction.

Clinton reads Madison's word choice more evenhandedly, observing simply that: "No one suggested that the Massachusetts protection of the 'right to produce all proofs, that may be favorable to [the accused]' ought to be added. No one urged either the New Jersey language, which guaranteed equality between prosecution and defense in regards to witnesses and counsel . . ." Clinton, *supra* note 13, at 736.

190. See Clinton, *supra* note 13, at 735; Westen, *Compulsory Process I*, *supra* note 13, at 98.

191. Westen, *Compulsory Process I*, *supra* note 13, at 77.

neous common law of evidence? It is to that central question that I now turn.

## 2. *Contemporaneous Evidence Law*

At the time of the ratification of the Bill of Rights, the common law of evidence uniformly and categorically disqualified criminal defendants from testifying under oath in their own defense. This disqualification was not directed against criminal defendants specifically but, instead, arose from a generally applicable disqualification of all interested persons as witnesses.<sup>192</sup> Ironically enough, the Supreme Court's first case touching upon the relationship between the Constitution and the presentation of witnesses by criminal defendants — *Ferguson v. Georgia* — contains its most detailed historical treatment of witness disqualification at common law.<sup>193</sup> That a general rule disqualifying interested persons as witnesses was firmly and uniformly established at the time of the Bill of Rights is not, and cannot be, seriously disputed. Nor, as recounted above, is there disagreement among scholars as to the lack of any contemporaneous recognition that the Sixth Amendment, or the Bill of Rights generally, would necessitate drastic change in the common law of evidence concerning the presentation of witnesses in criminal trials. The problem, to put it bluntly, is that both the Court and academic commentators heretofore have failed to put two and two together.

The *only* way to reconcile the notion of a constitutional right to present witnesses with the contemporaneous common law is to understand the right as one of equal treatment. If the Compulsory Process Clause, or the Bill of Rights more generally, really did afford a free-standing right to admit exculpatory evidence notwithstanding generally applicable evidence rules, then one surely would have expected someone at least to mention this tumultuous change

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192. See *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961) ("Disqualification for interest was . . . extensive in the common law when this Nation was formed. . . . Here, as in England, criminal defendants were deemed incompetent as witnesses.").

193. See 365 U.S. at 573-82. As the Court explained, "the principal rationale of the rule" in the sixteenth century consisted of "the possible untrustworthiness of the party's testimony; for the same reason disqualification was applied in the seventeenth century to interested nonparty witnesses." 365 U.S. at 573; see also 365 U.S. at 574 (tracing the extension of this reasoning to the criminal context); *Benson v. United States*, 146 U.S. 325, 335-36 (1892) ("It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule."). For more extensive discussion of witness disqualification for interest at common law, see 1 WIGMORE, *supra* note 26, § 575, at 688-98.

in then-existing practice. No such recognition appears in the historical record.

If anything, the absence of any such reference is especially noteworthy given the presence of language in contemporary state constitutions that provided criminal defendants with the right to "produce" or to "call for" favorable evidence.<sup>194</sup> The absence of outcry strongly suggests that even that language — more explicitly directed to the admissibility of witness testimony at trial than the reference to "compulsory process" that Madison ultimately included in the Sixth Amendment — was not understood at the time to entitle defendants to exceptions from generally applicable evidence rules. The states otherwise would have been unable to maintain for decades<sup>195</sup> their categorical disqualification of all interested witnesses simply as a matter of state constitutional law, wholly apart from the federal Constitution.

In fact, to the present day, some states among the original thirteen colonies have retained language in their respective state constitutions that recognizes a right to "produce" or to "call for" favorable evidence.<sup>196</sup> Surprisingly few courts within these states have had occasion to parse these provisions in recent years. But even those courts do not regard their respective state constitutions as affording a free-standing right to present witnesses in violation of generally applicable rules of evidence.<sup>197</sup>

The restrictions that governed the qualification of witnesses in the eighteenth century are now archaic relics, but many other long-standing, generally applicable restrictions remain. In recounting the history of the prohibition upon extrinsic evidence as a means of witness impeachment, for instance, Wigmore observes that

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194. See *supra* note 186.

195. See *Ferguson*, 365 U.S. at 575 (observing that efforts to reform witness qualification rules did not begin until the nineteenth century).

196. See MD. DECL. OF RIGHTS art. 21; MASS. CONST. pt. I, art. XII; N.H. CONST. pt. I, art. XV; VT. CONST. ch. I, art. 10; VA. DECL. OF RIGHTS art. I, § VIII.

197. See *State v. Newcomb*, 663 A.2d 613, 618 (N.H. 1995) ("A defendant has the right, under . . . the [New Hampshire] State Constitution, to produce all proofs favorable to his defense. This, however, does not entitle him to introduce evidence in violation of rules of evidence."); *State v. Johnson*, 465 A.2d 1366, 1368 (Vt. 1983) ("Defendant's argument that . . . the Vermont Constitution gives him an independent right, totally divorced from any rules of evidence, . . . is unfounded. . . . [T]he 'evidence in his favor' must be otherwise admissible under the law of evidence . . ."). See generally *Oliva v. Commonwealth*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995) (construing right "to call for evidence in [one's] favor" to mean that, "[i]f the evidence [that the defendant] presented and proffered clearly and directly pointed to . . . another person as the guilty party, the trial judge was required to admit that evidence which was relevant and material, provided that it was otherwise admissible").

[t]owards the end of the 1600s appears a tendency to exclude it; and though the rule of exclusion did not become completely settled until the end of the next century, and though there are instances enough of its being ignored down to that time, nevertheless, it was always treated, from the beginning of the 1700s, as a rule that might be invoked.<sup>198</sup>

The rule against hearsay, if anything, has even deeper roots in the common law of evidence.<sup>199</sup> Again, had the Constitution mandated change to these generally applicable rules for witness testimony, one would have expected at least some intimation to that effect. Again, silence.

This is most emphatically *not* to say that the law is stuck forever with the evidence rules prevalent in the late eighteenth century. Quite to the contrary, the generation that drafted and ratified the Constitution left open a wide vista for change and refinement — for an evolving law of evidence, so to speak — through the instrument of common law courts and, later, by way of evidence rules enacted by legislatures. It is no longer the case that interested persons are disqualified as witnesses, and that is a very good thing. But, given the historical record, it is folly to say that such a change was constitutionally mandated, as distinct from being the product of what we today consider a more enlightened conception of evidence policy. The significance of the witness qualification rules of the eighteenth century lies not in any binding authority that they might have upon the present with regard to competency questions but, instead, in the way that those rules shed light upon the broader *principle* enshrined in the Constitution to constrain those who would revise evidence law in the centuries thereafter.

Modern commentators err by treating arguments from history as straw men — in essence, by positing a false choice between blind adherence to the evidence rules of the eighteenth century and a dynamic, responsive law of evidence adapted to the conditions and thinking of the twentieth.<sup>200</sup> My contention is that one can have the latter — indeed, plenty of it — while still looking to historical context to discern the content of the constitutional constraints upon evidence reform.

As of the late eighteenth century, it was thought perfectly acceptable for the law to prevent a criminal defendant from testifying

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198. 2 WIGMORE, *supra* note 26, § 979, at 1102.

199. See *supra* note 152.

200. See, e.g., Westen, *Compulsory Process I*, *supra* note 13, at 114 (applauding the Court for rejecting a “strictly historical test” based upon the “dead hand of the common-law rule of 1789”).

under oath, at least as part of a generally applicable prohibition upon testimony by all interested persons. Several decades after the ratification of the Constitution, that view came under attack on policy grounds. As an illustration of the ordinary process of evidence reform at work, the Court itself has recounted that "[b]roadside assaults upon the entire structure of disqualifications, particularly the disqualification for interest, were launched early in the nineteenth century in both England and America."<sup>201</sup> By the later part of the nineteenth century, "most of the States now comprising the Union" had dropped the disqualification of criminal defendants to testify under oath.<sup>202</sup> From a constitutional standpoint, the problem comes only when particular jurisdictions drop the general disqualification of witnesses for interest but still retain the disqualification for criminal defendants in particular. That is precisely the situation that the Court faced in *Ferguson*, and the Court was eminently correct to invalidate, in practical effect, the Georgia disqualification of defendants implicated in that case.<sup>203</sup>

One sees the same process of evidence reform at work with regard to the disqualification of accomplices as witnesses. As the Court recognized in *Washington v. Texas*, that rule also originated in the broader disqualification of interested persons and, as such, existed at the time of the ratification of the Bill of Rights.<sup>204</sup> The constitutional problem arose in the nineteenth century, when the states dropped the general disqualification for interested persons — indeed, when all but Georgia dropped the disqualification of criminal defendants as such — but Texas persisted in retaining a disqualification specifically directed against the presentation of an accomplice as a witness for the defense.<sup>205</sup> Again, the problem

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201. *Ferguson v. Georgia*, 365 U.S. 570, 575 (1961).

202. See 365 U.S. at 577.

203. See *supra* section I.B.1.

204. See *Washington v. Texas*, 388 U.S. 14, 20-21 (1967).

205. See 388 U.S. at 17 n.4 (noting that, apart from the law of Texas at the time of *Washington*, "no statutes from other jurisdictions . . . flatly disqualif[ied] coparticipants in a crime from testifying for each other regardless of whether they are tried jointly or separately"); cf. 1 WIGMORE, *supra* note 26, § 580 at 714-16 (contending that, upon elimination by statute of the disqualification of defendants as witnesses, "[t]here ought to-day to be no further question . . . that there is no limitation whatever on the qualification of a co-indictee or co-defendant to testify either for or against the accused").

Westen thus errs when he claims that, "[b]y invalidating a rule of competency that was well-established in 1791, the Court in *Washington* rejected the historical view of the compulsory process clause." Westen, *Compulsory Process II*, *supra* note 13, at 254. In 1791, it certainly was true that accomplices were incompetent to testify. That disqualification came not in the form of a rule that peculiarly disadvantaged criminal defendants but, rather, as part of a broader, evenhanded disqualification of interested persons. What the Court struck down in *Washington* was most assuredly *not* the "well-established" law as it existed in 1791 but, in-

stems from the lack of evenhandedness, not from any binding constitutional force that the eighteenth-century law of evidence may have upon modern times.

### 3. *The First Congress*

Apart from the contemporaneous law of evidence, the actions of the First Congress are consistent with an equality-based view of the right to present witnesses.<sup>206</sup> The First Congress provided by statute that a person accused of treason — a federal crime —

shall be allowed and admitted in his said defence to make any proof that he or they can produce, by *lawful* witness or witnesses, and shall have like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.<sup>207</sup>

The statute thus not only recognizes a right to “admit[ ]” witness testimony distinct from a right to compulsory process,<sup>208</sup> it also explicitly limits the right to present witnesses by the word “lawful.” That word choice suggests that the right is not a free-standing entitlement to present all witnesses that the defense might consider helpful but, rather, an entitlement that remains subject to the constraints upon the presentation of witnesses enacted through the ordinary “law[ ]” making process.<sup>209</sup>

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stead, a variation that was anything but evenhanded — namely, a body of law that had arisen in Texas much later, in the nineteenth century, after the elimination of the general disqualification for interested witnesses.

206. As in other areas of constitutional debate, commentators on the right to present witnesses point to the actions of the First Congress as evidence of contemporaneous understanding. *See, e.g.,* Westen, *Compulsory Process I*, *supra* note 13, at 100-01.

207. Act of April 30, 1790, ch. 9, § 29, 1 Stat. 112, 119 (emphasis added). With only cosmetic modifications in pertinent part, this provision remains in force to the present day, though it now applies more broadly to all federal capital cases. *See* 18 U.S.C. § 3005 (1994).

208. That the First Congress saw fit to enact into statute an assurance with regard to the “admi[ssion]” of “witness” testimony might suggest that such a guarantee did not already exist as part of the Constitution. It would not be unheard of, however, for Congress to reinforce or to clarify by statute the content of preexisting law. In fact, with regard to the portion of the statute that concerns compulsory process for the obtaining of witnesses, Chief Justice John Marshall — riding circuit — remarked in passing that the statute “ought to be considered as declaratory of the common law in cases where th[e] constitutional right [to compulsory process under the Sixth Amendment] exists.” *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (granting subpoena to enable treason defendant Aaron Burr to obtain certain disputed letters and orders in the hands of the President). *Cf.* 25 F. Cas. at 33 (adding “that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground” (emphasis added)). Chief Justice Marshall had no occasion, however, to construe specifically the portion of the statute entitling persons accused of treason to “make any proof that he or they can produce by lawful witness or witnesses.”

209. Westen draws attention to the portion of the statute concerning “process of the court” but does not make anything of the portion that deals most directly with the presenta-



This reading of the historical record draws additional support from further actions of the First Congress. In the Judiciary Act of 1789, the First Congress provided that the federal courts shall use the common law of evidence.<sup>210</sup> In so doing, Congress presumably did not regard the prominent features of the common law at the time to be contrary — at least, not in any stark or fundamental way — to the guarantees in the then-pending Bill of Rights. For the reasons set forth earlier, the common law of evidence in the eighteenth century strongly supports a view of the right to present witnesses as a right to equal treatment.

### B. *The Confrontation Clause*

In a sense, the choice between an equality-based and an exception-based view turns upon the plausibility of a further claim: namely, that the Constitution permits the making of categorical determinations of admissibility that, as applied in a given instance, might restrict the presentation of defense witnesses in criminal trials. Writing of the Court's constitutional jurisprudence as a whole, one commentator astutely observes that "[t]he recurring distinction in constitutional law between 'categorization' and 'balancing' is a version of the rules/standards distinction. Categorization corresponds to rules, balancing to standards. Categorization is taxonomic. Balancing weighs competing rights or interests."<sup>211</sup> Rhetoric railing against the use of "*a priori* categories" certainly is a common feature of the Court's most expansive treatments of the right to present witnesses.<sup>212</sup>

Whatever one might think of the Court's rhetoric as a matter of evidence policy, the foregoing historical account indicates that the early common law of evidence made categorical determinations with far greater frequency — and far, far more draconian effect — than current law but that those determinations nonetheless were

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tion of "witness" testimony. See Westen, *Compulsory Process I*, *supra* note 13, at 100-01. As a result, Westen attributes no significance to the word "lawful," notwithstanding that it, at the very least, sheds doubt upon his conception of the constitutional right to present witnesses as an entitlement to exceptions from generally applicable rules of evidence. Indeed, wholly apart from the guarantees of the Constitution, the pertinent portion of the statute itself would appear to leave treason defendants entirely at the mercy of the applicable "law" concerning "admi[ssibility]" — that is, insofar as the statute is concerned, to permit "law[s]" that are not evenhanded as between prosecution and defense.

210. Act of Sept. 24, 1789, ch. XX, § 30, 1 Stat. 73, 88 (providing that "the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States . . . as of actions at common law").

211. Sullivan, *supra* note 179, at 59.

212. See *supra* note 148.

not considered forbidden by the newly-enacted Bill of Rights. One need not rest exclusively upon history, however, for this inference. Rather, the Court's own analysis of the related guarantee of the Confrontation Clause<sup>213</sup> — and, for that matter, the major competing view of the Clause found amongst the Justices themselves and recent academic commentary — strongly support the permissibility of categorical determinations with regard to the admission of witness testimony in criminal trials.

It is fitting that the Compulsory Process Clause and the Confrontation Clause should be "textually adjoining" within the Sixth Amendment, each being the "fraternal twin" of the other.<sup>214</sup> The Compulsory Process Clause "guarantees the accused a basis for introducing evidence 'in his favor,'" and the Confrontation Clause "guarantees the accused a basis for challenging the evidence 'against him'" through the confrontation of prosecution witnesses.<sup>215</sup> Both the Supreme Court itself<sup>216</sup> and academic commentators<sup>217</sup> have remarked, in general terms, upon the connection between the two Clauses. To date, however, surprisingly few sources have attempted to draw upon the Confrontation Clause to inform our understanding of the right to present witnesses implicit in the Compulsory Process Clause.<sup>218</sup> And none have done so in

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213. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

214. See Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1047 (1998).

215. Westen, *Compulsory Process I*, *supra* note 13, at 154-55; see also Westen, *Compulsory Process II*, *supra* note 13, at 280 (describing the Confrontation and Compulsory Process Clauses as "parallel provisions for securing the attendance of witnesses in criminal cases").

216. See *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.").

217. See *supra* notes 214-15.

218. Westen is noteworthy in his recognition of this connection. In his view, the significance of the two Clauses, understood together, is simply to

allocate[ ] between the prosecution and the defense the burden of taking the initiative in identifying the witnesses to be produced — placing on the prosecution the burden of confronting the defendant with witnesses "against" him, and placing on the defendant the burden of identifying and requesting the production of witnesses "in his favor."

Westen, *Unified Theory*, *supra* note 13, at 602. In this observation, Westen is correct. He justifies his exception-based reading of the right to present witnesses, however, with an implausibly broad interpretation of the prosecution's obligations under the Confrontation Clause.

Drawing largely upon a position embraced at one time by Justice Harlan, Westen reads the Confrontation Clause to forbid the prosecution from using hearsay statements from any witness who remains available to testify. See Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1188-89 (1979) [hereinafter Westen, *Future of Confrontation*]; see also Westen, *Unified Theory*, *supra* note 13, at 582. The Court as a whole, and Justice Harlan in particular, specifically have repudiated such a position for it would, among other things, deem unconstitutional the many longstanding hearsay exceptions that do not depend upon a

light of the significant developments in the Court's confrontation jurisprudence in recent years. As I now explain, a view of the right to present witnesses as a right of equal treatment would bring that right more closely into line with the Court's current approach to confrontation.

The major challenge facing the Court in the confrontation area is not unlike the one that arises under the right to present witnesses: namely, how to reconcile a constitutional guarantee with longstanding features of the common law of evidence. In the confrontation context, the challenge has centered upon the exceptions to the rule against hearsay, the whole point of which is to make admissible certain kinds of hearsay in lieu of in-court testimony by the declarant — that is, testimony that would be subject to confrontation by way of cross-examination at trial.

Here, the Court has shown itself fully prepared to embrace evidence rules that identify, on a categorical basis, situations in which out-of-court statements are generally reliable — where the circumstances under which the statements are made, in themselves, provide a rough substitute for actual “confront[ation]” by the defendant at trial. In fact, the Court has gone even further, stating that some forms of hearsay are actually better than in-court testimony in that the “same factors that contribute to the statements’ reliability cannot be recaptured even by later in-court testimony.”<sup>219</sup> Thus, for example, the Court has upheld under the Confrontation Clause the admission as prosecution evidence of coconspirators’ statements,<sup>220</sup> present sense impressions,<sup>221</sup> and statements made in the course of receiving medical treatment,<sup>222</sup> without regard to the availability of the declarant to testify. For other out-of-court statements that are not reliable in their own right

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showing of unavailability. See *White v. Illinois*, 502 U.S. 346 (1992) (upholding admission of hearsay under Illinois exceptions for spontaneous declarations and statements in the course of medical examinations, without a showing of unavailability); *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring) (repudiating his earlier position in *California v. Green*, 399 U.S. 149, 172 (1970) (Harlan, J., concurring)); cf. *FED. R. EVID.* 803 (listing no less than twenty-three hearsay exceptions that do not turn upon a showing of unavailability).

219. See *White*, 502 U.S. at 355-56; see also *United States v. Inadi*, 475 U.S. 387, 395 (1986) (similarly noting, with respect to coconspirators’ statements, that “[e]ven when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy”).

220. See *Inadi*, 475 U.S. at 399-400 (upholding application of *FED. R. EVID.* 801(d)(2)(E)).

221. See *White*, 502 U.S. at 355 (upholding application of Illinois counterpart to *FED. R. EVID.* 803(2)).

222. See *White*, 502 U.S. at 355 (upholding application of Illinois counterpart to *FED. R. EVID.* 803(4)).

but simply stand as a second-best substitute for in-court testimony, the Court has upheld the admission of hearsay, upon a showing by the prosecution that the declarant is unavailable.<sup>223</sup> The upshot of these moves in the Court's recent confrontation jurisprudence has been to endorse the constitutional permissibility of the hearsay exceptions set forth in the current Federal Rules of Evidence — some of the most categorical features of both the common law of evidence and current law.

This development has met with criticism, as one of the very few instances in which the Court has tied closely the substance of a constitutional guarantee to the content of ordinary legislation — albeit in the form of evidence rules with deep roots in hearsay doctrine developed over the centuries at common law. But even under the leading alternative view of the Confrontation Clause embraced, in various forms, by at least two members of the current Court<sup>224</sup> and a variety of recent commentary,<sup>225</sup> a categorical approach would be used. Merely its focus would change.

This alternative view takes issue with the implicit premise of the Court's current approach that the admission of hearsay statements as evidence for the prosecution necessarily amounts to the presentation of "witnesses against" the defendant within the meaning of the Confrontation Clause. The word "witnesses," in ordinary parlance, does not include people who make statements outside of the courthouse.<sup>226</sup> Under the alternative position, the question simply is: What subset of out-of-court statements should be treated as the equivalent of actual testimony from "witnesses" in court and, as such, must be subject to confrontation by the defense? Although the Justices and commentators who embrace this alternative view have answered this question with various shadings and subtleties, the common and crucial insight is that hearsay should be understood to implicate the Confrontation Clause only when it consists of statements that the government itself might generate through coercion or fabrication (such as statements made while the declarant is in police custody) or that are otherwise made in a formal, legal context (such as testimony at a grand jury proceeding, which the jury

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223. See *Inadi*, 475 U.S. at 394-95 (explaining rationale for admission of prior testimony from an unavailable declarant, upheld earlier in *Ohio v. Roberts*, 448 U.S. 56 (1980)).

224. See *White*, 502 U.S. at 358-66 (Thomas, J., concurring, joined by Scalia, J.).

225. See, e.g., AMAR, *supra* note 15, at 125-31; Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998). For a similar view, see also Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992).

226. See AMAR, *supra* note 15, at 127.

might see as the equivalent of actual "witness[ ]" testimony at trial).<sup>227</sup>

In short, under either the Court's approach or its major competitor, the meaning of the Confrontation Clause centers upon categorical determinations capable, for the most part, of being made in advance of any particular dispute over the admissibility of witness testimony. Under either approach, categorization — informed by text, experience, and the objectives of the Confrontation Clause — holds sway. The striking thing is that *no one* on the Court claims that it should apply the Confrontation Clause by focusing upon the testimony to be provided by the particular prosecution "witnesses" at issue in a given instance and, from there, ascertaining their inculpatory significance in the specific case at hand. For the Court, the question is not, and has *never* been, whether the incriminatory force of the disputed prosecution testimony, in the circumstances of a particular case, is such that a right of confrontation might be especially useful to the defense — even though confrontation might raise a reasonable doubt in the mind of the jury. Indeed, in a thoughtful recent essay advocating a version of the alternative approach summarized here, Richard Friedman specifically rejects the notion that the Confrontation Clause "should be applied on a case-by-case basis with an eye to what will assist accurate factfinding in the particular case."<sup>228</sup>

Having taken a categorical approach for the right of the defendant to be confronted with the "witnesses against" him, the Court should not shy from the same approach for the related right of the

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227. See *White*, 502 U.S. at 365 (Thomas, J., concurring) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process . . ."); accord AMAR, *supra* note 15, at 129 ("[W]e must properly read the word *witness* to encompass videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony." (italics in original)); *id.* at 131 (distinguishing between "general out-of-court declarations — one friend talking to another, often even before the government is involved — and governmentally prepared depositions"); Berger, *supra* note 225, at 561 ("Hearsay statements procured by agents of the prosecution or police should . . . stand on a different footing [for purposes of the Confrontation Clause] than hearsay created without governmental intrusion."); Friedman, *supra* note 225, at 1026 ("[T]he confrontation right applies only to a subset of hearsay declarants, those who are deemed to have made testimonial statements and so have acted as witnesses."); *id.* at 1042-43 (providing examples).

228. Friedman, *supra* note 225, at 1028. Two recent commentators do embrace a view that would appear to entail case-by-case consideration. Charles Nesson and Yochai Benkler would have the right of confrontation depend largely upon whether the prosecution is able to come up with corroboration for a given out-of-court statement offered against the defendant. See Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 173 (1995).

defendant to present “witnesses in his favor.” In particular, if the Confrontation Clause does not bar the use of a categorical approach with regard to out-of-court statements — even those that may be devastatingly incriminating to the defendant — it is hard to see why the Court should decry the use of “*a priori* categories” under the Compulsory Process Clause. As one commentator accurately notes, “[t]he danger of mistaken convictions arising from unreliable out-of-court evidence is the same whether caused by deficiencies in the state’s evidence or by deficiencies in the defendant’s evidence.”<sup>229</sup>

For out-of-court statements by persons not called as actual “witnesses” for the prosecution at trial, it remains true that defense counsel may note their absence as a way to shed doubt upon the prosecution’s case. By contrast, defense counsel certainly could not summarize for the jury the substance of the expected testimony from a defense witness deemed inadmissible under a generally applicable evidence rule. But that plainly would not preclude the defense from seeking to use information gleaned from that witness as a means by which to identify other, admissible evidence.<sup>230</sup> The defense, in short, has a second-best alternative to the excluded defense testimony in the same way that defense commentary about the prosecution’s reliance upon hearsay stands as a second-best alternative to actual, in-court confrontation of the declarant. That is not to say that the second-best alternative to the desired defense testimony necessarily will be as good, or even nearly as good, as the testimony itself. But the same is true of comments by defense counsel to note the absence of a declarant whose out-of-court statements form the crucial incriminatory evidence for the prosecution. Such comments are likely to be especially unavailing when the justification for admitting hearsay as prosecution evidence in the first place is that the surrounding circumstances make it *more* reliable than testimony that the declarant might give at trial.<sup>231</sup> The Court nonetheless has not regarded the prospect of such an imperfect — perhaps, in a given case, totally ineffective — second-best alternative to preclude the admission of hearsay as prosecution evidence under the Confrontation Clause. The same should hold true for the

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229. Westen, *Unified Theory*, *supra* note 13, at 597.

230. For instance, it apparently had not occurred to defense counsel in *Rock* to have an expert examine the gun used in the disputed shooting until the defendant intimated, after undergoing hypnosis, that the gun may have discharged accidentally. See *Rock v. Arkansas*, 483 U.S. 44, 47 (1987).

231. See *supra* note 219 and accompanying text.

second-best alternative available in lieu of desired defense testimony.

### C. *Institutional Structure and Related Constitutional "Compartments"*

The justifications for an equality-based view of the right to present witnesses are not confined simply to the history of common law evidence rules or related guarantees of the Sixth Amendment concerning witnesses in criminal trials. Rather, as I contend here, structural insights from the core institutional features of the criminal system strongly support the greater degree of deference that an equality-based view would accord to the makers of evidence rules, as compared to current law. I explain how these structural insights help to distinguish the demand for equal treatment in the present context from instances in which the Due Process Clause mandates aspects of criminal procedure that tilt the playing field for the protection of defendants — most prominently, the reasonable doubt standard recognized in *In re Winship*<sup>232</sup> and the obligation of the prosecution under *Brady v. Maryland*<sup>233</sup> and its progeny to turn over exculpatory evidence to the defense. Finally, in keeping with my effort to question the growing compartmentalization of the Constitution in academic circles, I turn to a conceptually similar problem of constitutional law that initially might seem unrelated to the rights of criminal defendants. Specifically, I use structural insights to explain how the switch advocated here from an exception-based to an equality-based view of the right to present witnesses avoids a major pitfall attributed to the similar switch in *Employment Division v. Smith*<sup>234</sup> for the Free Exercise Clause.

#### 1. *Structuring the Making of Rules*

Frederick Schauer has observed that legal rules are significant not simply for their substantive content but also for the manner in which they reflect upon institutional arrangements.<sup>235</sup> This general point has garnered far too little attention in connection with the making of evidence rules and the right to present witnesses. One may explain much about the relationship between rules and rights in this area by reference to the core institutional features of the

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232. 397 U.S. 358 (1970).

233. 373 U.S. 83 (1963).

234. 494 U.S. 872 (1990).

235. See SCHAUER, *supra* note 179, at 158-62.

criminal system. As to the admissibility of witness testimony at trial, whether for the prosecution or for the defense, the government acts in two distinct roles. Arms of the government serve not only as the makers of evidence rules (increasingly, legislatures) but also as one of the parties that stands to benefit from application of those rules (in the government's capacity as prosecutor). There are fairly obvious reasons for a democracy to empower government institutions to delineate not only the ground rules for criminal trials but also what constitutes crime itself. In addition, it has long been true that prosecutorial power in the criminal sphere resides with government officials rather than private persons. When it comes to the prosecution of crime, the government essentially has a monopoly.

Although individual agents of the government may be criminal defendants in particular instances, the interests of the government as a whole — the United States, the State, the People — are systematically aligned with the prosecution. When combined with rulemaking authority in the evidence field, this systematic alignment of interest raises a considerable potential for abuse. The concern, in short, is that the government will skew the rules of evidence in such a way as to favor itself, as prosecutor. Indeed, this concern is all the stronger given that the interests of criminal defendants have never — certainly not today — been a cause with great political popularity.<sup>236</sup>

The beauty of a conception of the right to present witnesses rooted in notions of equality is that it may serve as a powerful antidote to the problem of self-dealing while, at the same time, avoiding the prospect of tearing apart the core institutional arrangements of the modern criminal system. An equality-based view would hold that courts should regard with great suspicion those instances in which the government denies certain kinds of testimony to the defense but permits itself to use the same when the testimony happens to help the government's own case as prosecutor. By contrast,

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236. Similar concern arises even when the maker of evidence rules is not a politically accountable legislature but, instead, a common law court. As one commentator observes: Judges and prosecutors are often viewed as team players in the criminal justice arena. Many judges are former prosecutors, and their evidentiary rulings are sometimes perceived to favor the government over the defense. Defendants and defense attorneys object that, despite the Bill of Rights, the presumption of innocence, and other legal protections afforded criminal defendants, the deck is too often stacked against the defense. The fact that state court judges, who handle the bulk of criminal cases, are elected by a population increasingly vocal about the need to fight crime contributes to the perception that judges are closer to prosecutors than defendants.

Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 200 (1997).



when the government denies a particular type of evidence not only to the defense but also to itself, that stance is an exceedingly powerful indication that the government genuinely regards the particular categorical rule of exclusion as serving a compelling interest — one beyond that of simply advantaging itself as prosecutor.<sup>237</sup> For even-handed rules, then, ordinary rationality review should suffice.

a. *Institutional Capabilities and the Legitimacy of the Trial Process.* An equality-based view would enable the law to make use of the institutional advantages of the legislative process as a source of evidence reform, without the concomitant risk that the government's self-interest will trample upon criminal defendants. As Richard Posner has emphasized with respect to constitutional adjudication generally, many disputes presently cast in terms of constitutional doctrine turn, in significant part, upon complicated empirical judgments about non-legal matters — judgments that courts are not well-equipped institutionally to make.<sup>238</sup> In the area of evidence disputes, the comparative advantage of legislatures in the making of empirical judgments is especially pronounced with regard to the cutting-edge varieties of witness testimony likely to arise in the twenty-first century. The key is to harness the ability of legislative bodies to identify and cull through information from the pertinent body of expertise — frequently, science. The role of the right to present witnesses should be to structure those proceedings to ensure that whatever rule the government selects for itself also will apply to defendants, absent a compelling justification other-

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237. As I explain momentarily, *see infra* section II.C.1.b, I take this insight from remarks of Akhil Amar — albeit directed to a different aspect of the Compulsory Process Clause. Outside the realm of evidence law, Dan Kahan and Tracey Meares have advanced a similar argument to support the constitutionality of community policing measures, such as gang-loitering laws designed to reduce crime in predominantly African-American inner-city communities. As they explain:

The uniformly relentless scrutiny [toward criminal law enforcement] associated with the modern [constitutional doctrine] rests on a presumption that communities never share in the burdens of law-enforcement techniques that restrict the liberty of African-Americans. That assumption made sense before the 1960's civil rights revolution, but makes much less sense today, given the political strength of African-Americans and their own concern to free themselves from the ravages of inner-city crime. So instead of subjecting all law-enforcement techniques to searching scrutiny, courts should now ask *whether the community itself is sharing in the burden* that a particular law imposes on individual freedom. If it is, the court should presume that that law does not violate individual rights.

Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1173 (1998) (emphasis added).

238. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 21-22 (1998).

wise. In this manner, institutional arrangements may reinforce, rather than threaten, constitutional rights.<sup>239</sup>

This institutional point is not just a pragmatic one. It is intimately related, as well, to the role of evidence law and the Constitution as part of the larger panoply of legal rules that legitimize the results of criminal trials in the eyes of the public.<sup>240</sup> When a criminal defendant is unable to use evidence that might call into question her guilt, the legitimacy of the trial is undoubtedly reduced. The problem of legitimacy, however, is not so simple or one-dimensional. Longstanding evidence rules of the sort canvassed earlier<sup>241</sup> routinely keep out witness testimony offered by the defense that might well be outcome determinative in a given criminal trial. To say that the social legitimacy of the trial process depends upon the defendant being able to put on whatever evidence she thinks might raise a reasonable doubt about her guilt is, again, to run headlong into the floodgates problem.

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239. This institutional point relates, as well, to the connection between the right to present witnesses — as applied to witness testimony that draws upon scientific innovations — and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). There, construing Rule 702, the Court famously rejected the proposition that the admissibility of expert scientific testimony turns exclusively upon the general acceptance of the scientific technique used by the expert. See *Daubert*, 509 U.S. at 588.

Concurring in *Scheffer*, Justice Kennedy observed that the per se rule against polygraph evidence upheld in that case is in tension with the general thrust of *Daubert*. See *United States v. Scheffer*, 118 S. Ct. 1261, 1269 (1998) (Kennedy, J., concurring). That is true, insofar as *Daubert* posits an exacting case-by-case evaluation of the support for expert scientific testimony — albeit based upon an interpretation of the Federal Rules of Evidence, not upon any constitutional imperative. See *Scheffer*, 118 S. Ct. at 1269 (Kennedy, J., concurring) (acknowledging *Daubert's* lack of constitutional status). At a deeper level, however, the Court's current analytical framework for the right to present witnesses actually replicates the institutional weaknesses of *Daubert*. As numerous observers have noted, *Daubert* places the federal courts in the awkward position of sitting in judgment over heated disputes concerning matters on the cutting edge of science. See, e.g., *Daubert*, 509 U.S. at 600-01 (Rehnquist, C.J., concurring in part and dissenting in part); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (panel op. by Kozinski, J., on remand); Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 B.Y.U. L. REV. 803, 815. As applied to expert scientific testimony such as that involved in *Scheffer*, the Court's "arbitrary or disproportionate" standard for the right to present witnesses has the distinct potential to entail the same sort of second-guessing of other institutions' determinations of reliability. That is, perhaps, not quite so troubling when the rulemaking institution consists of some other court, acting pursuant to common law powers. It is much more awkward, as an institutional matter, when the rulemaking entity is — at least by comparison — better positioned to cull through the scientific debate.

240. The leading exposition of the role of evidence law in the legitimation of outcomes at trial remains Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985). For a provocative earlier comparison of the trial process and the performing of a play for an audience, see Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

241. See *supra* section I.C.2.

The legitimacy of the trial process in the eyes of the body politic surely goes beyond the question of whose ox is gored by a particular evidence rule in a given instance. Legitimacy depends at least as much upon a social consensus, *in advance of any particular evidence dispute*, concerning the appropriate institutional framework for the formulation of evidence rules and the appropriate substantive restrictions upon the rulemaking institutions. That is among the most significant lessons of the Legal Process movement, which takes as its major enterprise the legitimation of legal outcomes in the face of social diversity and disagreement.<sup>242</sup> To say that the rules of evidence generally must treat defendants as they treat prosecutors — as an equality-based reading would hold — is to tie the legitimacy of the criminal trial to deeply-ingrained notions of fairness.

The point is even stronger in modern times, when evidence rules increasingly are the products of the democratic process and not merely the output of common law courts acting subject to a legislative override. When a rule treats equally prosecutors and defendants, there is little reason to believe that the political process somehow is picking on defendants as part of a get-tough-with-crime bandwagon. Rather, legitimacy is a consideration that cuts in a number of different directions, particularly when controversial new forms of testimony on the cutting edge of science are concerned. In that context particularly, there is a considerable downside to the *admission* of witness testimony that has been, say, hypnotically-enhanced or that discusses the results of a polygraph examination: namely, a lingering suspicion by external observers that the outcome at trial — whether a conviction, an acquittal, or simply a hung jury — rests upon evidence that is akin to a Ouija board. The existence of an evenhanded rule to exclude such evidence stands as a powerful indication that society really does believe that the legitimacy of trials would be damaged more by the admission of the disputed type of witness testimony — whether by a prosecutor or a defendant — than it would be by its exclusion. It is eminently the role of public institutions to make precisely these sorts of decisions. Indeed, there is no reason to think — much less to compel constitutionally — that the various jurisdictions within this country necessarily will address the same problem in the same way. A diversity of policy views is entirely appropriate when the type of testimony in question is itself hotly disputed.

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242. A classic statement of this enterprise appears in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 3-4 (William N. Eskridge, Jr. & Philip P. Frickey eds., rev. ed. 1994).

*b. Structure and Due Process.* Recognition of the relationship between the right to present witnesses and institutional structure also serves to clarify a lingering point of doctrinal uncertainty concerning the source of the right itself. Neither the Supreme Court nor modern commentators draw upon the Compulsory Process Clause alone to support their view of the right as an entitlement to exceptions. In its most detailed effort to pinpoint the source of the right, the Court in *Rock* also referred to the Due Process Clause.<sup>243</sup> Likewise, in speaking to the right in passing within a broader discussion of the Sixth Amendment, Akhil Amar contends that courts should understand the Compulsory Process Clause to provide equality of process with regard to witness compulsion but that courts nonetheless are correct to recognize a free-standing constitutional entitlement for the defense to admit witness testimony based upon “a more general Sixth Amendment and due process test of innocence protection and truth-seeking.”<sup>244</sup> Robert Clinton similarly invokes the Due Process Clause in support of his balancing test.<sup>245</sup>

There is much confusion here, as a matter both of precedent and of first principles:

*i. Precedent.* As noted in Part I, the Supreme Court needed to invoke notions of fundamental fairness implicit in the guarantee of due process in order to apply the provisions of the Bill of Rights to the states.<sup>246</sup> In this way, the Due Process Clause served simply — and quite properly — as a vehicle of incorporation in the Court’s earliest cases on the right to present witnesses. Insofar as the Court relied upon due process exclusively in *Chambers*, the Court did so simply because of the peculiar manner in which the constitutional claim in the case was litigated below.<sup>247</sup> That does not demonstrate,

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243. See *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

244. AMAR, *supra* note 15, at 136 & n.213 (citing Westen, *Compulsory Process I*, *supra* note 13, at 133-36, 156-57, 159, for the proposition that, “unless the evidence is so unreliable, in the context of other evidence in the case, that it cannot properly be assessed by the jury and the public, a defendant should be able to get it in”). Westen himself, to his credit, argues for a more focused inquiry based upon the Compulsory Process Clause specifically. See Westen, *Compulsory Process I*, *supra* note 13, at 181.

245. See Clinton, *supra* note 13, at 803-05.

246. See *supra* notes 41-44 and accompanying text.

247. As Westen explains:

[Chambers] made no constitutional objections until he moved, after the jury returned the verdict, for a new trial on the ground that the exclusion of his evidence denied him a fair trial under the due process clause. . . . [T]he [Supreme] Court seems to have assumed that the only constitutional question properly before it rested on due process, rather than on Chambers’ newly advanced confrontation and compulsory process arguments, and that this due process claim was based on the cumulative effect of the trial

however, that the Compulsory Process Clause somehow means something different when combined with the Due Process Clause, and the Court's implicit suggestion to that effect in *Rock* is a misreading of precedent. Notions of fundamental fairness are relevant to impose upon the states the right to present witnesses implicit in the Compulsory Process Clause, not somehow to alter the content of that guarantee. That, of course, is what incorporation means in the criminal context: defendants get rights vis-à-vis the states that the Bill of Rights provides against the federal government — nothing less, but also nothing more.

Apart from precedent, efforts to draw an exception-based view from the Due Process Clause are mistaken in principle, and the explanation of that mistake itself relates to the structural insights set out above. I first consider the point by reference to academic commentary and then turn to an illustrative sampling of due process case law.

*ii. The Academic Debate.* Among commentators, Akhil Amar's effort to invoke the Due Process Clause is the most telling, as he seeks to distinguish between a decidedly equality-based view of witness compulsion and an exception-based view of witness admissibility. Amar starts from the right premise when he speaks of the literal compulsion of witnesses. In rhetoric closely akin to that deployed here, he states that "when a government chooses to deny itself a certain [witness] coercion technique . . . or even all coercion against certain highly valued social relationships of intimacy and trust . . . this self-denial proves that the government really does see a 'compelling interest' against compulsion."<sup>248</sup> Indeed, with regard to witness compulsion, Amar appears entirely willing to embrace a categorical approach. There does not seem room, in his view, for the courts to engage in a case-specific examination to ascertain whether the Constitution requires the use of a given compulsion technique — one that the government has "chos[en] to deny itself" — even when the particular witness sought by the defense might well be highly exculpatory. When he comes to the admissibility of witness testimony, however, Amar nonetheless invokes due process to support an exception-based view.<sup>249</sup>

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court's rulings [excluding exculpatory hearsay statements and preventing the defense from recalling the declarant to the stand] taken together rather than separately.

Westen, *Unified Theory*, *supra* note 13, at 607 n.108.

248. AMAR, *supra* note 15, at 133.

249. See *supra* note 244 and accompanying text.

There are two related problems here. Amar's telling reference to "compelling interest[s]" implies that strict scrutiny, when applied by a reviewing court, operates as a way to reconstruct the ordinary rulemaking process with special weight attached to the protection of constitutional rights — weight that the process otherwise might be thought disinclined to give to criminal defendants, among other persons afforded special constitutional protection. The same reasoning would suggest, however, that a rulemaking process *supplemented by a constitutional demand for equal treatment* would not be in need of judicial reconstruction. Rather, by Amar's own reasoning, a rulemaking process so constrained would determine what interests are compelling enough to warrant the exclusion of evidence per se and, with the government bound no less than defendants, there would be no structural reason to regard that determination as constitutionally suspect.

More broadly, Amar's suggestion that at least some (unspecified) evidence rules might be unconstitutional under his general "due process test of innocence protection and truth-seeking" is a contention curiously at odds with his overall approach to constitutional interpretation — an approach that is much in keeping with my effort here to connect structure and rights. Speaking outside of the criminal context to the interpretation of the Bill of Rights as a whole, Amar has presented a powerful argument that constitutional scholars have long neglected the structural dimensions of the Bill. He provocatively contends that one ought to understand the Bill of Rights not so much as a series of measures to protect political minorities but, instead, as provisions that actually reinforce the structural, and decidedly majoritarian, themes of the original Constitution — in essence, as a way to deploy popular sovereignty as a constraint upon the new national government.<sup>250</sup> All of this, if anything, reinforces the attractiveness of an equality-based view of the right to present witnesses, as it would place in the hands of rulemaking institutions the flexibility to adapt to changing conditions with regard to evidence issues, but would insist that they do unto the government itself, as prosecutor, what they would do unto criminal defendants. Amar's invocation of the Due Process Clause thus, I submit, is an error even on his own terms.

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250. See Amar, *supra* note 6, at 1132 ("[I]ndividual and minority rights did constitute a motif of the Bill of Rights — but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights . . . . The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.").

iii. *When Due Process Mandates Inequality.* Apart from academic commentary, the structural insights outlined earlier also distinguish an equality-based view of the right to present witnesses from other aspects of criminal procedure that advantage defendants specifically vis-à-vis the prosecution pursuant to a due process mandate.<sup>251</sup> As I explain by way of two leading examples, the cases in this line seek to address what are, at bottom, structural problems arising from the multiple roles that the government plays in the criminal process and the concomitant potential for self-dealing. For purposes of due process, the point is not to mandate equal treatment or unequal treatment favoring the defense but, rather, to address the structural problems inherent in a government monopoly upon law making and criminal enforcement. That unequal treatment is required by due process in some areas is not a command for it to be mandated blindly with respect to the admissibility of witness testimony as well. For the reasons outlined earlier, an equality-based view of the right to present witnesses addresses the same structural concerns, precisely by imposing a constitutional demand for equal treatment.

Two examples illustrate the point: The Supreme Court, in *In re Winship*, held that the Due Process Clause requires the prosecution in a proceeding properly characterized as criminal in nature to prove all elements of the crime beyond a reasonable doubt.<sup>252</sup> This standard of proof plainly tilts the playing field substantially in favor of criminal defendants, as compared to the usual preponderance standard in civil litigation. In *Winship*, however, the question was not so much which standard of proof should govern in criminal cases. The Court easily showed that a demand for proof beyond a reasonable doubt in criminal matters “dates at least from our early years as a Nation” — indeed, that “[t]he ‘demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times.’”<sup>253</sup>

The real concern, instead, turned upon the systematic incentive of the government, in its capacity as law maker, to define narrowly what constitutes a “criminal” proceeding, in an effort to exclude matters like the juvenile delinquency proceeding at issue in *Winship*

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251. See generally *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (noting in dictum that “the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules”).

252. *In re Winship*, 397 U.S. 358, 364 (1970).

253. 397 U.S. at 361 (quoting CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 321, at 681 (1954)).

itself.<sup>254</sup> A narrow construction of the “criminal” category by the government as law maker would enable the government, as prosecutor, to avoid not just the elevated standard of proof associated for centuries therewith but also the panoply of other constitutional protections — the rights to counsel, to confrontation and, for that matter, to present witnesses — afforded by the Sixth Amendment specifically for criminal trials.<sup>255</sup> The due process imperative in *Winship* thus serves to constrain the government from self-dealing by positing an independent judicial role to ascertain whether the proceeding at issue is properly classified as “criminal.” There is considerably less need for a similar stance with regard to the admission of witness testimony, at least when the rulemaking process itself would operate under a demand for equal treatment.

Another conspicuously unequal aspect of criminal procedure mandated by the Due Process Clause consists of the obligation of prosecutors, under *Brady v. Maryland*, to disclose to defendants “favorable” evidence, even though defendants are under no analogous obligation to bring to the attention of prosecutors unfavorable evidence.<sup>256</sup> As such, *Brady* is a classic example in which even-handedness does not pass constitutional muster in the criminal context. Here again, however, the explanation for a constitutional mandate systematically to favor the defense stems from the structural features of the criminal system: specifically, the government’s role as the administrator of both the courts and the prosecutor’s office. As a result, unlike attorneys for civil litigants or for criminal defendants, prosecutors have an obligation beyond that of zealous advocacy. As Barbara Babcock has explained, the central insight behind *Brady* consists of the notion that prosecutors, as agents of the same government that administers the court system itself, should not be able to assert the defendant’s guilt while aware of information, unknown to the defense, that tends to suggest inno-

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254. Under New York law at the time, the determination of juvenile “delinquency” turned upon a finding that the particular juvenile in question had engaged in “an act which would constitute a crime if committed by an adult.” 397 U.S. at 359.

255. The civil-criminal distinction is the subject of considerable academic interest and ongoing debate. For my synopsis of the recent literature, see Nagareda, *supra* note 133, at 1128.

256. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Court itself has recognized that the Compulsory Process Clause is at least tangentially related to *Brady* in that the prosecution is obligated to issue compulsory process only to those witnesses whose testimony is “material” to the defense — the same standard that governs the government’s obligation to disclose favorable evidence. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867-68 (1982).



cence.<sup>257</sup> Here, too, inequality — if one can call it that — is necessary to constrain self-dealing by the government in pre-trial information gathering in a way that is not needed for rules governing the admission of witness testimony, at least not when supplemented by a demand that those rules themselves accord equal treatment.

In short, due process lends no support to an exception-based view of the right to present witnesses; if anything, it reinforces the plausibility of an equality-based view.

## 2. *Exceptions and Equality Elsewhere*

In the context of constitutional law as a whole, the proposition that courts should understand the right to present witnesses as a right to equal treatment is neither novel nor momentous. Such a view, instead, starts to look quite familiar when one considers developments in two other constitutional contexts that, if anything, are even more sensitive and socially contentious than the rights of criminal defendants: specifically, race and religion.<sup>258</sup>

Race is the more straightforward illustration, as the constitutional provision in question — the Equal Protection Clause<sup>259</sup> — speaks explicitly in terms of equal treatment. Thus, in *Washington v. Davis*,<sup>260</sup> the Court rejected an equal protection challenge to a law that had a disparate impact upon African Americans. If anything, disparate impact — a claim that necessarily goes to the disadvantageous effects of the law upon many persons of a particular race — is, in some ways, considerably more troubling than an isolated application that disadvantages a single individual. The line drawn by the Court between laws of general applicability (which do not trigger strict scrutiny, even upon a showing of disparate impact)

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257. See Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1131, 1134-35 (1982) (emphasizing the Court's reference in *Berger v. United States*, 295 U.S. 78, 88 (1935), to the distinctive role of the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

258. Outside the realm of individual rights, there are other contexts in which the Court has understood constitutional provisions to focus upon equal treatment. Thus, under the so-called Dormant Commerce Clause, the Court "treats laws that facially discriminate against interstate commerce and laws that are 'protectionist' in purpose or practical effect as 'virtually per se invalid.'" GUNTHER & SULLIVAN, *supra* note 41, at 297.

259. U.S. CONST. amend. XIV, cl. 1.

260. 426 U.S. 229 (1976) (upholding constitutionality of test to measure the reading comprehension, vocabulary, and verbal skills among applicants to police force). In this respect, the Equal Protection Clause differs fundamentally from federal statutes, such as Title VII of the Civil Rights Act of 1964, understood to permit actions for disparate impact. See 426 U.S. at 238-39.

and laws that classify by race (which generally will be upheld only upon the showing of a compelling governmental interest)<sup>261</sup> is analogous to the line suggested here. In fact, the justification offered by the Court — the fear that the Equal Protection Clause otherwise would run rampant through many familiar government programs that might have a disparate impact<sup>262</sup> — is simply the analogue, in the race context, of the floodgates problem lurking behind the *Scheffer* Court's effort to cabin the right to present witnesses.

The religion context is more controversial, though even more illuminating for present purposes. The controversy stems, in large part, from the lack of any explicit reference to notions of equality on the face of the Free Exercise Clause. One might take the declaration that "Congress shall make no law . . . prohibiting the free exercise" of religion as embodying a constitutional *requirement* for exceptions from generally applicable laws.<sup>263</sup> The historical context of the Clause, too, remains hotly debated.<sup>264</sup>

In *Employment Division v. Smith*,<sup>265</sup> the Court nonetheless departed dramatically from its previous exception-based view of the Clause, regarding the general applicability of an Oregon criminal prohibition upon the drug peyote to be essentially conclusive in favor of its constitutionality. The comparison with *Smith* is illuminating, given that several other states actually had recognized an exception for religious exercise in their comparable criminal statutes concerning peyote.<sup>266</sup> The religious practitioners in *Smith* — much like the criminal defendants in both *Rock* and *Scheffer* — happened to have the very considerable misfortune to live in a jurisdiction that did not recognize exceptions but, instead, took a categorical view. In effect, Oregon had adopted a per se rule criminalizing peyote, much as Arkansas had excluded hypnotically-

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261. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

262. See *Washington v. Davis*, 426 U.S. 229, 248 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

263. See McConnell, *supra* note 19, at 1115 (contending that this reading "is the more obvious and literal meaning" of the constitutional language (*italics omitted*)).

264. Compare, e.g., McConnell, *supra* note 181 (discussing historical support for an exception-based view of the Clause) with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (disputing McConnell's account).

265. 494 U.S. 872 (1990).

266. See 494 U.S. at 912 n.5 (Blackmun, J., dissenting).

enhanced testimony and the President had barred in courts martial expert testimony based upon polygraph examinations. In *Smith*, too, the Court referred at some length to the floodgates problem<sup>267</sup> as well as to the institutional inappropriateness of placing the judiciary in the position of "determin[ing] the place of a particular belief in a religion or the plausibility of a religious claim."<sup>268</sup> The latter concern stands as the rough analogue to the institutional considerations raised earlier with respect to the second-guessing of evidence rules that govern complex, cutting-edge forms of witness testimony.<sup>269</sup>

Not surprisingly, *Smith* unleashed a torrent of academic commentary,<sup>270</sup> and a grand synthesis of that debate is well beyond my enterprise here. Regardless of whether one is a *Smith*-lover, a *Smith*-hater, or neither, it should be common ground that a crucial feature of the present context makes an equality-based view of the right to present witnesses markedly more palatable than the equivalent view of the Free Exercise Clause. In the free exercise context, a generally applicable law is one that typically will have little bite upon most of the body politic. Simply as a political matter, the major reason why there are criminal prohibitions upon peyote is that the vast majority of people do not regard that substance as part of religious exercise or, for that matter, of any legitimate activity. As Michael McConnell starkly observes:

In a world in which some [religious] beliefs are more prominent than others, the political branches will inevitably be more selectively sensitive toward religious injuries. Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice.<sup>271</sup>

For the right to present witnesses, by contrast, insistence upon general applicability really does have bite in the sense that it genu-

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267. See 494 U.S. at 888-89; see also 494 U.S. at 885 ("To make an individual's obligation to obey [a generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' — permitting him, by virtue of his beliefs, 'to become a law unto himself,' . . . — contradicts both constitutional tradition and common sense." (footnote and citation omitted)).

268. 494 U.S. at 887.

269. See *supra* section II.C.1.

270. For a mere smattering of the rancor over *Smith*, see *supra* note 21. On the unsuccessful effort by Congress to switch back to an exception-based view, see *supra* note 22.

271. See McConnell, *supra* note 19, at 1136. Even the Court in *Smith* acknowledged that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890.

inely constrains the prosecution. It means that the prosecution cannot admit the specified form of testimony, even though in some cases — perhaps many — hypnotically-enhanced testimony, polygraph results, or an out-of-court statement contrary to the declarant's penal interest may be exceedingly helpful to the prosecution's case. Under such conditions, there is considerably less reason to think that the rulemaker somehow is hostile to, or simply unaware of, the interests of criminal defendants and all the more reason to think that the rule actually amounts to a thoughtful resolution — not necessarily the only one that might be made — of a contested question of admissibility.

The comparison with the Court's free exercise cases since *Smith* sheds further light upon the constitutional demand for evenhandedness. After *Smith*, the Court has not focused blindly upon general applicability, without regard to the real-world effects of a given law. Thus, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>272</sup> the Court struck down a prohibition upon animal sacrifice that, though ostensibly of general applicability, was "drafted with care to forbid few killings but those occasioned by religious sacrifice."<sup>273</sup> The upshot is that one should not focus simply upon general applicability on the face of the law itself, without regard to whether that feature of the law makes for evenhandedness in practical terms or is merely the product of artful draftsmanship. As I note by way of example in Part III,<sup>274</sup> this is a lesson that should carry over to a demand for evenhandedness under the auspices of the right to present witnesses.

#### D. *Protecting Defendants in Practical Terms*

It is not necessary to take an idyllic view of the rulemaking process in order to regard the right to present witnesses as a right to equal treatment. To the contrary, as I discuss here, the more skeptical one is that rulemakers — whether legislators or common law judges — will consider seriously the interests of criminal defendants, the more attractive an equality-based view becomes. Wholly apart from constitutional doctrine, it surely is worthwhile to consider the practical effects of a given constitutional standard over

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272. 508 U.S. 520 (1993).

273. 508 U.S. at 543. See also 508 U.S. at 536 ("The [prohibition] excludes almost all killings of animals except for religious sacrifice.").

274. See *infra* section III.B.2 (analyzing Rule 412 as a rule that is, at least arguably, generally applicable on its face but that restricts evidence the admission of which only defendants are likely to seek).

another. I contend here that concern for the protection of criminal defendants in practical terms tends to point in favor of the switch that I advocate to an equality-based view. At the very least, it is not possible to argue for the current exception-based view on the ground that it is the more protective of criminal defendants as a whole.

There are four options that a maker of evidence rules realistically might wish to pursue with regard to a controversial type of witness testimony, the admission of which — all readily would agree — should not be absolutely mandated:

Option 1: A discriminatory rule that categorically bars the admission of the specified type of testimony when offered by the defense but that leaves open the prospect for its admission, on a case-by-case basis, when offered by the prosecution.

Option 2: An evenhanded, categorical rule that bars the admission of the specified type of testimony when offered by either side.

Option 3: A rule that leaves open the prospect for admission of the specified type of testimony for either side, on a case-by-case basis.

Option 4: A rule that categorically bars the admission of the specified type of testimony when offered by the prosecution but that leaves open the prospect for its admission, on a case-by-case basis, when offered by the defense. (One might call this a reverse discrimination rule, insofar as it systematically would favor the defense over the prosecution, rather than vice versa as in Option 1.)

It is undoubtedly true that, if defendants could write the evidence rules, they would opt uniformly for Option 4 — the reverse discrimination rule — for it, in practical terms, would categorically restrict the prosecution from admitting the disputed type of witness testimony if it incriminated a particular defendant but would leave the defense free to argue for admission if the testimony turned out to be exculpatory in a given instance. But defendants do not write, and have never written, the evidence rules; legislatures and common law courts do. The upshot of the Supreme Court's decisions on the right to present witnesses is to forbid rulemakers from choosing either Option 1 or Option 2, at least absent a compelling justification. Indeed, Option 1 is completely off the table, as even an equality-based view would strike it down. Moreover, under either my view or that of the current Court, Options 3 and 4 are equally permissible as a constitutional matter, as either would leave open the prospect that the disputed type of witness testimony may be admitted for the defense on a case-by-case basis.

The practical question is: Are defendants as a whole better off under the current constitutional regime that leaves open their desired Option 4, also permits Option 3, and essentially forbids Option 2? Might defendants as a whole actually be better off under an equality-based view that would leave open Options 2, 3, and 4? There is reason to think so — at the very least, reason to doubt that one credibly can defend the current constitutional regime on the ground of its practical effect upon defendants generally.

A world in which rulemakers could not bind *both* prosecutors and defendants to categorical rules for the exclusion of controversial forms of witness testimony might well devolve into a world in which categorical rules are never enacted in the first place. In particular, if every categorical rule were to remain subject to constitutionally-mandated exceptions for defendants in particular cases, a rulemaker may well be disinclined to enact categorical rules that are, in many — for some rules, most — of their applications, highly protective of criminal defendants.<sup>275</sup> The rulemaker may opt, instead, for an evenhanded, case-by-case approach.

To translate the point to the framework used here: If the enactment of Option 2 will necessarily amount in practice to Option 4 — as it would under current law — the rulemaker might not pursue Option 2 at all. Instead, it might choose Option 3. If anything, current law pushes rulemakers in that direction. In contrast to its ad hoc invalidations of categorical rules, the Supreme Court has not imposed any substantial constitutional limitations upon the prerogative of rulemakers to select a case-by-case approach to the admission of witness testimony in lieu of a categorical approach.<sup>276</sup>

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275. For defendants, the protective applications of a categorical rule are hardly trivial. To take one telling illustration, drawn from the circumstances in *Rock*: The refusal of a rulemaker to prohibit categorically all hypnotically-enhanced testimony would be profoundly harmful to many defendants, and not just because they would be put to the burden of litigating the admissibility of such evidence when offered by the prosecution. The most troublesome cases of prosecution efforts to admit hypnotically-enhanced testimony center upon allegations of sexual abuse — an area that commentators have long regarded as especially susceptible to erroneous convictions and, even more importantly, one in which judges in charge of making case-by-case admissibility determinations might be most tempted to afford prosecutors more leeway than defendants.

For an overview of the recent literature on testimony in sexual abuse trials, see Richard A. Leo, *The Social and Legal Construction of Repressed Memory*, 22 L. & SOC. INQUIRY 653 (1997). See also *id.* at 663 (identifying hypnosis as among the “specific techniques through which recovered memory therapists first create and then validate pseudomemories of abuse”).

276. In the context of cases involving incriminating identification testimony, the Court has held that the Due Process Clause places an outer limit upon the ability of prosecutors to offer evidence that is extremely unreliable in the sense of creating “a very substantial likelihood of irreparable misidentification.” See *Simmons v. United States*, 390 U.S. 377, 384 (1968). This residual due process limitation “is a minimal one: only the most tendentious

The balancing of Option 2 versus Option 3, in terms of their practical impact upon defendants as a whole, is likely to turn upon the particular type of testimony in question. When the testimony is such that it tends to be offered more frequently as incriminatory evidence by the prosecution, defendants as a whole would be better off under an evenhanded, categorical bar (Option 2) than they would be if they retained the opportunity to argue on a case-by-case basis for admission of the same type of testimony in those few instances in which it helps the defense (Option 3). For other types of witness testimony, the balance may tip the other way, again, when one considers the effects upon all defendants. I do not purport to discern an answer to the balancing question that would apply uniformly to all types of disputed witness testimony. Indeed, no answer appears possible. Even empirical research confined to the impact of a given evidence rule would be fraught with peril, for the reported cases would not include those instances where the rule — especially, an evenhanded, case-by-case rule — leads defendants or prosecutors to plea bargain rather than to take their chances with the admissibility issue at trial. For present purposes, nonetheless, there are two crucial observations that one can make with confidence, both of which concern the practical consequences of the competing constitutional regimes at issue here.

First, it is not possible to defend the current exception-based view of the right to present witnesses on the ground that it makes defendants as a whole better off. If anything, there is strong reason to doubt that the current regime does so — at the very least, that it does so generally — insofar as it gives rulemakers a disincentive to enact categorical exclusionary rules that, in many instances, will be highly protective of defendants.

Second, there is a significant respect in which an evenhanded, case-by-case approach is *always* less desirable than a categorical approach from the standpoint of defendants. In fact, it is a feature that should be of special concern to those who would take the most skeptical view of the seriousness with which the criminal system regards defendants. A system in which both rulemakers and rule-

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and inherently dubious items of [identification] evidence are deemed to run afoul of the due process clause." Westen, *Future of Confrontation*, *supra* note 218, at 1190; *see also id.* ("The due process clause permits the prosecution to introduce any item of incriminating evidence it wishes, unless the evidence is too unreliable for a jury to evaluate rationally.").

Even if extended beyond the context of identification testimony, such a limitation plainly would not prevent an evidence rulemaker from taking the position that a particular controversial form of evidence — that is, one that at least some observers regard as reliable, as is true for polygraph evidence and hypnotically-enhanced testimony — may be admissible for the prosecution on a case-by-case basis.

applying judges — so a skeptic would posit — are neglectful of defendants' interests would be one that would find highly attractive a regime of case-by-case admissibility rulings. That way, it would be all the easier to tilt the playing field for prosecutors and against defendants through a series of particularized rulings, without having to say so in any overt or general manner, such as would more quickly — and properly — garner the attention of the public. A system of case-by-case rulings, moreover, would enhance the ability of prosecutors to exercise their discretion to bring to the fore the strongest cases in order to establish favorable precedents on the admissibility issue. It is very hard to imagine that defendants as a whole would consider themselves better off in such a world. Yet, that is the world that an exception-based view creates in practical terms.

### III. IMPLICATIONS

Having set forward the case to reconceive the right to present witnesses as a right of equal treatment, I briefly discuss here the implications of that view for the Court's existing case law and for features of the Federal Rules of Evidence.

#### A. *The Case Law Reconsidered*

An equality-based view would hold that the early cases concerning discriminatory evidence rules — *Ferguson* and *Washington* — were decided correctly, but for the wrong reasons. As Justice Harlan counseled in his *Washington* concurrence,<sup>277</sup> the Court should have focused upon the discriminatory structure of the rules, not upon a free-standing inquiry into arbitrariness. One easily may dispose of the Court's two most recent cases as well: The outcome in *Rock* was wrong. Specifically, the per se rule against hypnotically-enhanced testimony struck down in that case was evenhanded, and that stance — in the face of ongoing controversy over the effects of hypnosis — does not run afoul of constitutional review for rationality. By contrast, *Scheffer* was right in its result, because the per se rule against polygraph evidence is, in relevant respects, identical to the rule in *Rock*. The Court's reasoning in *Scheffer*, however, is a serious disappointment, for it makes none of the right analytical points.

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277. See *supra* note 60. Justice Harlan based his view on the Due Process Clause, whereas I rely upon the Compulsory Process Clause and use the Due Process Clause solely as a vehicle of incorporation.



The most subtly intriguing case is *Chambers*, which concerned Mississippi's refusal to admit statements against penal interest as an exception to the rule against hearsay. The question there was whether the defense could admit the testimony of third-party witnesses, prepared to recount three out-of-court confessions of a man other than the defendant to the shooting of a police officer.<sup>278</sup> As I explain, the Court erred in striking down Mississippi's hearsay rule, at least on the facts presented in *Chambers* itself.<sup>279</sup> There is, however, reason to doubt the constitutionality of such a rule in other situations.

On its face, at least, the rule in *Chambers* was as evenhanded as one could imagine: Statements against penal interest constituted inadmissible hearsay, whether offered by the prosecution or the defense. Upon a determination that the rule is evenhanded, the only question under an equality-based view would be whether there exists a rational basis for treating statements against penal interest differently from statements against pecuniary interest, which Mississippi was prepared to admit — again, for both sides — as an exception to the rule against hearsay. Although the question is not an easy one — and I would not distinguish between the two sorts of statements as a policy matter — the Court ultimately would have been hard pressed to deem the state irrational for considering statements against penal interest to carry somewhat greater risks of fabrication.

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278. See *supra* note 68 and accompanying text.

279. Westen contends that *Chambers* is rightly decided, because it would have been constitutionally permissible to admit an out-of-court statement against penal interest as evidence for the prosecution — specifically, that the statement would have been sufficiently reliable to satisfy the Confrontation Clause, even if the prosecution had not called the declarant as a witness at trial. See Westen, *Compulsory Process I*, *supra* note 13, at 155 (noting that *Dutton v. Evans*, 400 U.S. 74 (1970), holds “that a spontaneous declaration against penal interest, corroborated by independent evidence and made without any apparent motive to mislead, could be used against the accused, because its inherent reliability made cross-examination unnecessary”). This premise is accurate as a description of the Court's confrontation case law. Westen uses it, however, to read *Chambers* as “stand[ing] for the proposition that evidence that is sufficiently reliable by constitutional standards to be introduced ‘against’ the accused is sufficiently reliable to be introduced ‘in his favor.’” *Id.* at 155.

The question, however, is not whether it would be constitutionally permissible for the prosecution to admit the type of testimony in question, had it been inculpatory rather than exculpatory. The right question, instead, is whether *the system of evidence rules at issue* — in *Chambers*, Mississippi evidence law — would have permitted the prosecution to admit the disputed type of testimony, had it been inculpatory. It is plain that Mississippi law, at the time, considered all statements against penal interest — even statements offered by the prosecution to incriminate the defendant (and the declarant, too) — to be inadmissible hearsay. In other words, whatever the outer boundaries of the Constitution might be with regard to statements against interest, Mississippi had chosen *not* to permit the prosecution to go to the constitutional limit. Instead, the state had acted evenhandedly to bar statements against penal interest, regardless of which side wished to admit them.

People generally do not say things contrary to their interests unless they are true.<sup>280</sup> When the disputed out-of-court statements implicate the declarant in crime, however, the picture becomes murkier. The concern is that those sorts of statements may be, in a sense, *too* contrary to the declarant's interest: They not only are unlikely to be made but, given the seriousness of implicating one's self in crime, may — if made — be advanced for some ulterior motive.

First, consider when the defense would want to admit statements against penal interest: when out-of-court statements inculpate the declarant in crime but nonetheless exculpate the defendant, there is a non-trivial concern that the defense may have induced the declarant to fabricate the statement in an effort to sow doubt about the defendant's guilt in the mind of the jury.<sup>281</sup> Now, consider when the prosecution would want to admit a statement against penal interest: if such a statement is inculpatory to both the declarant and the defendant, the concern is that the declarant simply was seeking to curry favor for herself with the prosecution by implicating the defendant as well in criminal activity.<sup>282</sup> In fact, one does not have to rest upon broad generalizations to support the rationality of the Mississippi rule: in *Chambers*, the declarant himself took the position at trial, with some plausibility, that his earlier statements identifying himself as the shooter were fabrications.<sup>283</sup> There was, in short, at least a rational basis to treat differently statements against penal interest — one that resonates with the facts of *Chambers* itself.

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280. See FED. R. EVID. 804(b)(3) advisory committee's note ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

281. See 5 WEINSTEIN'S EVIDENCE, *supra* note 158, § 804.06[5], at 804-56 (discussing need for corroboration of this sort of statement); cf. *infra* section III.B.1 (questioning whether it is constitutionally permissible for the federal rules to insist upon special indicia of corroboration where the statement exculpates but not when it inculpates the defendant).

282. See 5 WEINSTEIN'S EVIDENCE, *supra* note 158, § 804.06[6][a], at 804-60 ("Since the statements are made by someone subject to criminal prosecution, the possibility exists, especially when the statement is made while the declarant is in police custody, that the declarant sought immunity or hoped to be allowed to plead to a lesser crime in return for providing help to the prosecution in obtaining a conviction.").

283. The declarant McDonald claimed that he had confessed to the shooting at the instigation of a local minister, who "had promised that he would not go to jail and that he would share in the proceeds of a lawsuit that Chambers would bring against the [police]." *Chambers v. Mississippi*, 410 U.S. 284, 288 (1973). This is not to say that McDonald's account necessarily was true. Rather, it is simply to note that the particular statements against penal interest in *Chambers* hardly were outside the basic policy argument for the exclusion of such evidence.

In addition, apart from factual details, it would have been bizarre for the Supreme Court to deem irrational Mississippi's refusal to admit statements against penal interest when the Court itself, in the decades prior to the Federal Rules of Evidence, had embraced precisely the same view for purposes of federal criminal trials.<sup>284</sup> Even among the various states, Mississippi's refusal to admit statements against penal interest was not anomalous; rather, it represented the majority view at the time.<sup>285</sup>

It would be a mistake, however, to think that an equality-based view of the right to present witnesses should look only to the face of the particular rule in question. Rather, a variation on the situation in *Chambers* illustrates the probity with which courts should apply an equality-based view. The exclusion of statements against penal interest would *not* be an evenhanded rule in some situations, and the key to their recognition turns not upon speculation about the rulemaker's subjective intent but, instead, upon examination of related evidence rules. As I now explain, a court would not properly characterize as evenhanded a rule of the sort in *Chambers* in circumstances where it is possible to characterize the declarant of the statement against penal interest as a coconspirator of the defendant.

When offered by the prosecution, out-of-court statements contrary to the declarant's penal interest typically will implicate the declarant in the same crime for which the defendant herself is on trial. As such, the declarant frequently will consist of someone the prosecutor readily may label a coconspirator of the defendant.<sup>286</sup> The prosecution need not prove the existence of a conspiracy beyond a reasonable doubt; indeed, the defense may have plausible grounds to deny the existence of a conspiracy. For purposes of admissibility, it is enough simply for the prosecutor to present the court with facts

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284. See *supra* notes 75-77 (discussing the incongruity of the result in *Chambers* and the Court's earlier decision in *Donnelly v. United States*, 228 U.S. 243 (1913), upholding the exclusion of exculpatory statements against penal interest in federal trials). *Donnelly* held sway within the federal system until the current Rule 804(b)(3) supplanted it by permitting the admission of all statements against interest. See *Chambers*, 410 U.S. at 299.

285. See *supra* note 68 and accompanying text.

286. See Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 357 (1984) ("Almost all coconspirator statements . . . assert or at least imply an insider's knowledge on the part of the declarant concerning the [criminal] venture, and in other contexts this factor alone has brought [the exception for statements against interest provided by] rule 804(b)(3) into play." (citation omitted)); see also James Joseph Duane, *The Trouble with United States v. Teller: The Dangers of Hunting for Bootstrappers and Other Mythical Monsters*, 24 AM. J. CRIM. L. 215, 259 n.149 (1997) ("The overlap between the operation of these two hearsay exceptions is obviously considerable.").

from which a reasonable jury might infer, by a mere preponderance of the evidence, that a conspiracy existed.<sup>287</sup>

The significance of this point is that the prosecutor then will not need to rely upon the hearsay exception for statements against interest. Rather, the law of evidence has long considered statements by coconspirators of a party to be outside the rule against hearsay, when offered against that party — at least where the statement is made “during the course and in furtherance of the conspiracy.”<sup>288</sup> This is the position taken not only by the current Federal Rules of Evidence,<sup>289</sup> but also, more importantly, by Mississippi law at the time of *Chambers*.<sup>290</sup> The basic policy rationale is that an out-of-court statement made by a coconspirator of a party is tantamount to a statement from that party herself, essentially on agency principles.<sup>291</sup> This rationale, in turn, explains why the exception is limited to the admission of coconspirators’ statements *against* that party. The upshot is that the bar upon statements against penal interest in *Chambers* would not be evenhanded where the declarant also is a coconspirator, for the prosecution could use another hearsay exception to admit the statements (when incriminatory), whereas the defense could not (if the testimony were exculpatory).<sup>292</sup>

The feature of *Chambers* itself that makes the application of the Mississippi hearsay rules constitutionally permissible is that there was no reason whatsoever to think that the declarant in that case was a coconspirator of the defendant. By all appearances from the Court’s opinion, the two men were completely unconnected to one another, save for their fateful presence in the same location at the time of the disputed shooting. In those circumstances, Mississippi’s bar upon statements against penal interest is genuinely evenhanded — and the Court’s holding in *Chambers* is in error — as the prosecution could not have used the coconspirator exception to admit the

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287. See *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

288. FED. R. EVID. 801(d)(2)(E).

289. FED. R. EVID. 801(d)(2)(E).

290. See McELROY, *supra* note 77, § 43, at 202.

291. See FED. R. EVID. 801(d)(2) (removing coconspirators’ statements from definition of hearsay, along with a “party’s own statement,” statements by persons “authorized by the party to make a statement concerning the subject,” and statements by a “party’s agent or servant”).

292. The federal rules avoid this problem by making an incriminatory statement admissible for the prosecution under the coconspirator exception and an exculpatory statement admissible for the defense as a statement against interest. The federal hearsay exception for statements against interest encompasses all statements against penal interest. See FED. R. EVID. 804(b)(3). But cf. *infra* section III.B.1 (contending that it is unconstitutional for the federal rules to prescribe a heightened standard of corroboration for exculpatory statements against interest offered by criminal defendants).

declarant's out-of-court statements, had they inculpated rather than exculpated the defendant.

The major point is that a commitment to an equality-based view does not counsel blind acceptance of evenhandedness on the face of the disputed evidence rule. Rather, the inquiry is a probing and subtle one. The significant attraction of such an approach, as compared to current law, lies in its institutional appropriateness. It puts the reviewing court in the position not of second-guessing the grounds upon which one might regard the disputed form of evidence as problematic but, instead, in the position of analyzing the structure and relationship of the evidence rules at issue — a distinctly lawyerly task, rather than one of an evidence policymaker.

### B. *Equal Treatment and the Federal Rules of Evidence*

It should come as no surprise that the Supreme Court heretofore has never invoked the right to present witnesses to strike down the application of a federal evidence rule, as distinct from state evidence law. Given the Court's own involvement in the rulemaking process at the federal level,<sup>293</sup> it is unlikely that the Court would give its imprimatur to any rule about which it had serious constitutional reservations. Wholly apart from the Court's involvement, moreover, the federal rules typically afford criminal defendants greater flexibility with regard to the admission of evidence, insofar as they distinguish at all between defendants and prosecutors. That, of course, is constitutionally permissible under either an exception-based or an equality-based view. Thus, for example, criminal defendants retain the option to place their own character at issue, whereas the prosecution may use evidence of bad character only in response to such a defense.<sup>294</sup>

There nonetheless are some significant features of the current federal rules that systematically disadvantage defendants vis-à-vis prosecutors and that are the product of legislative draftsmanship independent from the Court itself. Comparison of these features sheds light upon the application, advocated here, of a compelling interest test to discriminatory evidence rules.

#### 1. *Rule 804(b)(3)*

The first example returns us to the hearsay exception for statements against interest. Unlike the Mississippi rule in *Chambers*,

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293. See *supra* note 178.

294. See FED. R. EVID. 404(a).

federal Rule 804(b)(3) exempts from the rule against hearsay a statement that "so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." In order to avail themselves of this exception, litigants generally would need to show only that it is possible for the fact finder to consider the statement contrary to the declarant's interests<sup>295</sup> — hardly a difficult showing to make.

The last sentence of Rule 804(b)(3), however, places a substantial additional limitation upon the invocation of this exception by criminal defendants: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."<sup>296</sup> Whether this heightened standard of corroboration directed specifically at exculpatory evidence can survive strict scrutiny is open to considerable doubt. There certainly is legitimate concern when the defense offers the out-of-court statement of an unavailable declarant in an effort not only to inculcate the declarant but also to exculpate the defendant. As noted above with respect to *Chambers*, it would not be irrational for a rulemaker to exclude statements against penal interest when offered either by the prosecution or the defense.<sup>297</sup> But Rule 804(b)(3) does not apply evenhandedly its demand for "corroborating circumstances clearly indicat[ing] . . . trustworthiness."<sup>298</sup>

This language in Rule 804(b)(3) was not part of the package upon which the Court itself passed in transmitting the original set of federal rules to Congress. Rather, the language represents the product of the legislative process, wherein the fear was that the defendant herself might seek to corroborate an out-of-court confes-

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295. See generally FED. R. EVID. 104(b).

296. The precise degree of corroboration required by the rule remains unclear. See Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851, 958-59 (1981); cf. *United States v. MacDonald*, 688 F.2d 224, 232 (4th Cir. 1982) (reading requirement of "clear[ ]" corroboration as codifying the holding in *Chambers*).

297. See *supra* notes 280-83 and accompanying text.

298. Notwithstanding that the text of the rule applies this heightened standard only to exculpatory statements offered by the defense, some lower courts have extended it to inculpatory statements against interest offered by the prosecution in order to avoid unspecified "constitutional difficulties." See *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); see also *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990) (following *Alvarez*). The seemingly more straightforward alternative would be simply to strike down the heightened standard of corroboration applicable to exculpatory statements offered by the defense. For an argument that the heightened standard of Rule 804(b)(3) is unconstitutional under the Supreme Court's cases on the right to present witnesses, see Tague, *supra* note 296, at 1000-11.

sion from someone else in an effort to shed doubt upon her own guilt.<sup>299</sup> In the face of a constitutional demand for a compelling governmental interest, however, that policy justification should not pass muster.<sup>300</sup> Such an out-of-court statement would be transparently dubious in the sense that the prosecution readily could highlight its potential for unreliability — especially, if the defendant herself happens to be the witness attesting to an out-of-court confession by another, now-unavailable person. In other words, the adversarial process itself would serve to guard against the ill-considered acceptance of such a statement by the jury.

There is, however, at least one discriminatory feature of the current federal rules that likely would survive strict scrutiny.

## 2. Rule 412

By its terms, Rule 412 generally prohibits the admission of evidence concerning the prior sexual “behavior” or “predisposition” of “any alleged victim” in “any . . . criminal proceeding involving alleged sexual misconduct.”<sup>301</sup> Rule 412 thus protects not only the victim in a prosecution for rape, among other sexual offenses, but also pattern witnesses whom the prosecution might call to testify about similar instances of sexual misconduct by the defendant in

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299. The House Report explains the rationale for this change:

[The House Committee] believed . . . that statements . . . tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The [Advisory Committee] proposal in the [version of the rule transmitted to Congress by the Supreme Court] to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language ‘unless corroborating circumstances clearly indicate the trustworthiness of the statement’ as affording a proper standard and degree of discretion.

H.R. REP. NO. 93-650, at 16 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7089-90.

300. If anything, the current preoccupation with “mechanistic[ ]” applications of evidence rules, see *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), may afford defendants too little protection against discriminatory rules. For instance, in *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), the Ninth Circuit upheld the constitutionality of Arizona's counterpart to Rule 804(b)(3) on the ground that the trial judge's finding of insufficient corroboration was not “mechanistic” but, instead, stemmed from “the [defendant's] proffer and the corroborating and contradicting circumstances” presented in the particular case. 133 F.3d at 1267. This analysis completely misses the central point that the rule systematically disfavors defendants by subjecting them to a heightened standard of corroboration in the first place.

301. FED. R. EVID. 412(a). The term “sexual behavior” includes “all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact,” such as use of contraceptives, birth of an illegitimate child, or diagnosis of venereal disease. The reference to “sexual predisposition” is “designed to exclude evidence that . . . the proponent believes may have a sexual connotation for the factfinder,” such as “the alleged victim's mode of dress, speech, or lifestyle.” FED. R. EVID. 412 advisory committee's note.

the past.<sup>302</sup> Like the heightened standard of corroboration in Rule 804(b)(3), Rule 412 had its genesis in Congress rather than the usual rulemaking process involving the Court.<sup>303</sup>

One might try to characterize Rule 412 as evenhanded on its face, in that it bars a particular type of evidence without explicit reference to the side seeking its admission. The relatively few sources to address the issue consider Rule 412 to exclude evidence of a victim's *lack* of sexual "behavior" when offered by the prosecution.<sup>304</sup> That premise is open to doubt, as the words "behavior" and "predisposition," when used in ordinary parlance, both imply positive action or inclination — something that only the defendant would wish to raise in an effort to support a defense of consent. Even if one were to assume the applicability of Rule 412 to the prosecution in extraordinary situations, one cannot plausibly deem the rule evenhanded in any realistic sense. It virtually always will be the defense that would wish to raise the victim's sexual "behavior" or "predisposition." Not surprisingly, the legislative history of Rule 412 reveals no awareness, much less any affirmative desire, that the rule should limit the prosecution. Indeed, insofar as a lack of evenhandedness in the structure of the rule itself serves as a surrogate for distrust of the rulemaking process, there is reason for concern here. If criminal defendants are not an especially palatable cause in political terms, defendants in sex cases are an exceedingly unpalatable one. Rule 412, in short, is the analogue in the law of evidence to the prohibition in *Lukumi* upon animal sacrifice as part of religious exercise.<sup>305</sup> Rule 412 focuses upon a particular type of evidence, the admission of which will be sought by defendants virtually exclusively.

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302. See FED. R. EVID. 412 advisory committee's note ("Rule 412 extends to 'pattern' witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible."); cf. FED. R. EVID. 413 & 414 (deeming admissible evidence of the defendant's "commission" of other offenses of "sexual assault" or "child molestation," respectively).

303. The major features of Rule 412 originally were enacted by Congress in 1978, outside the ordinary rulemaking process in which the Court plays a part. See FED. R. EVID. 412 note. The current text of the rule is, however, the product of the Advisory Committee's effort in the early 1990s to "diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct." See FED. R. EVID. 412 advisory committee's note.

304. At least one federal district court has stated that Rule 412 bars evidence of the victim's lack of sexual "behavior." See *Virgin Islands v. Jacobs*, 634 F. Supp. 933, 936-37 (D.V.I. 1986) (construing original version of Rule 412, which referred only to sexual "behavior"); see also 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5387, at 577 (1980) (asserting, in passing, that Rule 412 excludes evidence of the victim's virginity "when offered by the prosecution").

305. See *supra* notes 272-73 and accompanying text.



In his analysis of the right to present witnesses, Peter Westen casts significant doubt upon rape shield rules such as Rule 412, contending that evidence of the victim's consent to sex in the past must be admitted for the defense as long as "reasonable people could differ about [its] probative value."<sup>306</sup> In its current form, Rule 412 seeks to address possible constitutional problems by including an explicit exception for instances in which the exclusion of evidence concerning the victim's sexual behavior or predisposition "would violate the constitutional rights of the defendant."<sup>307</sup> A reading that would admit such evidence whenever "reasonable people could differ" about its probative value would, in all likelihood, require the courts to construe the constitutional exception so broadly as to enfeeble the general prohibition. In particular, such a view would appear to elevate the right to present witnesses to such a level as to be beyond even a compelling justification to the contrary.

In contrast to the constitutional analysis of Rule 804(b)(3), there is good reason to think that Rule 412 should pass strict scrutiny, notwithstanding its lack of evenhandedness. The core rationale behind Rule 412 — the government's interest in encouraging the reporting of crimes involving sexual misconduct by protecting victims in the trial process itself<sup>308</sup> — is quite powerful indeed. And the federal circuits are on solid ground in turning away constitutional challenges to state law equivalents of Rule 412 based upon the right to present witnesses.<sup>309</sup> At the very least, one can say confidently

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306. Westen, *Compulsory Process II*, *supra* note 13, at 209. For other accounts of the constitutional issues surrounding Rule 412 — albeit that take as given the conception of the right to present witnesses as an entitlement to exceptions — see, e.g., Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 802-08 (1986); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 556-60 (1980).

307. FED. R. EVID. 412(b)(1)(C). The one example cited by the Advisory Committee to illustrate this constitutional exception is *Olden v. Kentucky*, 488 U.S. 227 (1988). See FED. R. EVID. 412 advisory committee's note. *Olden* did not concern the admission of a third-party defense witness but, instead, held that a rape defendant must be permitted to inquire on cross-examination into the victim's cohabitation with another man at the time of the incident in an effort to show bias. The defense in *Olden* sought thereby to suggest that the victim had fabricated the rape charge in order to account for her consensual sexual intercourse with the defendant. See 488 U.S. at 230. As such, *Olden* sounds in the constitutional right to confrontation rather than the right to present witnesses. See 488 U.S. at 232 (describing the trial court's denial of the opportunity to impeach for bias through cross-examination as a "Confrontation Clause error[ ]").

308. See FED. R. EVID. 412 advisory committee's note.

309. See, e.g., *Richmond v. Embry*, 122 F.3d 866, 874 (10th Cir. 1997); *Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994); *United States v. Saunders*, 943 F.2d 388, 391 (4th Cir. 1991). For its part, the Supreme Court has upheld against a facial attack a state law equivalent to the requirement of Rule 412(c) that the defense must give notice of its plans to introduce evidence of the victim's prior sexual behavior and that, absent such notice, such evidence shall be excluded. See *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991).

that the adversarial process — far from allaying concern over the admission of the disputed evidence, as it would for out-of-court confessions under Rule 804(b)(3) — actually is the major source of the problem. The fundamental insight behind Rule 412 rests upon the recognition that subjecting the victim to the adversarial process, in itself, will deter the reporting of sex crimes, and the rule focuses its exclusionary force only upon the particular class of crimes for which that deterrent effect is most pronounced. Here, “reasonable people” might very well differ about the probative value of a victim’s sexual “behavior” or “predisposition,” but that should not be sufficient to justify widespread exceptions to Rule 412 based upon the constitutional right to present witnesses.<sup>310</sup> Rule 412, in short, passes strict scrutiny.

### CONCLUSION

The Supreme Court should reconceive the right to present witnesses as a right to equal treatment rather than an entitlement to exceptions from generally applicable evidence rules. Historical context, the closely related right to confrontation, structural considerations, analogous constitutional decisions, and sheer practical concern for the protection of the defendants as a whole, together, form a powerful case for such a shift. An equality-based view of the right would provide the Court with ample authority to police situations in which the rulemaking process has not taken seriously the interests of criminal defendants while, at the same time, avoiding the endangerment of core, evenhanded principles of evidence law that have existed for centuries. In this manner, the Court may bridge more amicably the law of evidence and the Constitution.

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310. The analysis presented here would leave undisturbed the application of the constitutional exception in Rule 412(b)(1)(C) based upon the separate guarantee of the Confrontation Clause. See *supra* note 307 (discussing advisory committee’s reference to *Olden*).