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# Constitutional Evidence Law

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*This Article identifies the causes and consequences of a puzzling asymmetry in constitutional law. Of the three facets of adjudicative fact-finding—evidence, procedure, and rules of decision—only two are constitutionalized. Constitutional law regulates procedural and decisional rules—not whether the evidence that fact-finders use is adequate. Allocation of the risk of error by procedures and decisional rules—formulated as burdens of proof—is subject to constitutional scrutiny. Allocation of the risk of error by the rules of evidential adequacy, however, is free from that scrutiny. This constitutional asymmetry is puzzling because all risk-allocation impacts court decisions and, consequently, whether a person is deprived erroneously of her liberty or property. This Article explains this asymmetry in the informal constitutionalization of evidence—a phenomenon that implicates three dynamics of power and culture. First, state evidence rules generally align with the Supreme Court’s agenda for risk-allocation. Second, when those rules do deviate from the Court’s agenda to promote local interests, they do not do so overtly. Finally, a state rule’s alignment with a federal rule of evidence guarantees its constitutionality. This informal order reflects a series of implicit, but credible understandings between state courts and the Supreme Court. This Article identifies and illustrates these understandings.*

# Constitutional Evidence Law

Alex Stein\*

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## INTRODUCTION

This Article identifies the causes and consequences of a puzzling asymmetry in constitutional law. Of the three facets of adjudicative factfinding—evidence, procedure, and rules of decision—only two are constitutionalized. Constitutional law regulates procedural and decisional rules, but not whether the evidence that factfinders use is adequate.

Constitutional law regulates procedure through a set of rules that determine a person's power to control the trial by adducing evidence in support of her case and by examining the evidence of her adversary. Constitutional law regulates decisionmaking by setting probability requirements for findings of fact—standards of proof—and by allocating the burdens of proof among the prosecution, plaintiffs, and defendants. Constitutional law, however, does not control adequacy of the evidence upon which factfinders determine the probability of contested allegations and apply the burdens of proof. This is so because the Supreme Court interprets the Due Process Clause, as related to evidence, very narrowly. Under this interpretation, any evidence is constitutionally adequate when its use is not “fundamentally unfair.”<sup>1</sup> Moreover, “fundamental unfairness” occurs only in extreme cases such as those which exhibit a serious prosecutorial misuse of the trial process. Examples include when the government knowingly procures the defendant's conviction by false evidence or by evidence from which factfinders can draw no rational inferences.<sup>2</sup> Anything less is not “fundamentally unfair.” As a result, virtually any rule that controls evidential admissibility and identifies evidence that does or does not require corroboration is constitutional. The “fundamental unfairness” criterion practically exempts evidential adequacy from constitutional scrutiny.

Under this regime, as long as factfinders apply the “beyond a reasonable doubt” standard, they can convict a defendant upon any inculcating evidence. This evidence may include the defendant's uncorroborated confession,<sup>3</sup> uncorroborated testimony of the defendant's accomplice, a DNA statistic, or even the defendant's prior crimes. Evidential insecurity would not make the verdict unconstitutional,<sup>4</sup> as constitutional scrutiny only applies to evidence

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1. See *infra* Part I.C.

2. See *infra* Part I.C.

3. The confession, of course, must not be a product of coercive police interrogation. If it is, the court would have to suppress it under the prophylactic exclusionary rule. See *infra* note 11.

4. An appellate court can only overturn such a verdict if no rational juror could deliver it. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“[T]he relevant question is whether, after

implicating the defendant's participatory powers under the Sixth Amendment. A rule that blocks the admission of defense evidence might detract from the defendant's right to compulsory process. A rule that allows factfinders to rely on hearsay statements as evidence against the defendant might detract from the defendant's right to confrontation. While such detractions are of constitutional concern,<sup>5</sup> this concern is about the quality of the trial process rather than the adequacy of the evidence.<sup>6</sup> And for rules that determine evidential adequacy—admissibility, corroboration, and “one witness”<sup>7</sup> rules—there is no constitutional review.

This constitutional asymmetry is puzzling. Adjudicative factfinding takes place under uncertainty and thus involves risk of error.<sup>8</sup> Adjudicators<sup>9</sup> allocate this risk in every single case, civil and

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viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”).

5. See *infra* text accompanying notes 17-30.

6. The focal point of the Sixth Amendment's participatory requirements is the defendant's opportunity “to fight back” by adducing evidence and by cross-examining adverse witnesses. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“[The Sixth Amendment] commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”). The confrontation doctrine, as interpreted until recently, made only one reference to evidential adequacy by requiring “indicia of reliability” for any statement made against the defendant by a person who does not testify in court and classifies as “unavailable.” *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), *overruled in part by Crawford v. Washington*, 541 U.S. 36 (2004) (holding that *Ohio v. Roberts* only applies to non-testimonial hearsay statements). To limit the admissibility of such statements, the Supreme Court held that “adequate indicia of reliability” must be present in the statement itself. Corroborative evidence—no matter how trustworthy it is—will not do. *Idaho v. Wright*, 497 U.S. 805, 814-23 (1990). The Court made it clear that what matters here is not the statement's probability of being true, but rather the defendant's opportunity to uncover its flaws and falsities by cross-examining the person who made it. Evidence corroborating the statement is no substitute for such cross-examination. *Id.* at 822-23; see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 125-31 (1997) (observing that the confrontation doctrine promotes truth-finding via cross-examination, rather than through sorting hearsay statements by credibility). According to the most recent understanding of the doctrine, the confrontation requirement applies to inculpatory testimonial statements alone, but its application is rigid. There are no “indicia of reliability” that could substitute the defendant's right to cross-examine the maker of a testimonial hearsay statement relied upon by the prosecution. The court can admit such a statement over the defendant's objection only when the defendant is given an opportunity to cross-examine its maker at or before trial, or when he forfeits this right by committing a wrongdoing. See *infra* notes 23 and 30.

7. The “one witness” rule, generally adopted across the United States, authorizes factfinders to determine facts on a testimony of a single witness. 7 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2034(2), at 343 (James H. Chadbourn rev. ed. 1978) (stating as a general principle that a jury may decide a case on the uncorroborated testimony of a single witness); see *United States v. Ingram*, 600 F.2d 260, 263 (10th Cir. 1979) (stating courts' general adherence to the “one witness” rule); *United States v. Levi*, 405 F.2d 380, 383 (4th Cir. 1968) (same).

8. See ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 34-36 (2005) (identifying causes and pervasiveness of the risk of error in adjudicative factfinding).

criminal. The risk's allocation depends on evidence, procedure, and the rule of decision applied. The rule of decision allocates the risk of error by setting the standards of proof for factual allegations and by placing the burden of proof on a given party. I identify this risk as "decisional." The rules of procedure allocate control over management of the trial by giving litigants participatory powers that enable each litigant to promote her case by evidence and argumentation. The participatory power thus allows a litigant to protect herself against impositions of the risk of error. But it also allows a litigant to expose her adversary to that risk: a litigant may use her participatory power to distort the factfinders' information or obfuscate the applicable rule of decision.<sup>10</sup> I identify this risk as "participatory." Finally, the rules of evidential adequacy determine the information—qualitatively and quantitatively—on which factfinders can rely in their decisions. These rules allocate risks I identify as "informational."

Constitutional law protects people against decisional and participatory risks, but not against informational risks. This policy is inconsistent. If constitutional protections against decisional and participatory risks shield people from wrongful deprivation of their liberties and properties, why allow lawmakers and judges to chip away at these protections by distributing informational risks as they deem fit?

This Article proceeds in three parts. Part I compares the constitutional regulation of procedure and decisions with the minimalist "fundamental unfairness" criterion for evidence rules. This discussion evaluates the constitutionally unprotected domain of evidence alongside the protected domains of procedure and decision. Allocation of the risk of error by the rules of procedure and decision must satisfy the broad constitutional requirement of minimizing harm—the "least harm principle," for short—under which a decisional or procedural rule must work to reduce the net amount of harm from an erroneous disposition of the case. The greater the harm, the stricter

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9. The term "adjudicators" refers to judges and juries in their respective roles as trial managers and factfinders. "Factfinders" also refers to both judges and juries, but only in their factfinding capacity.

10. A prosecutor, for example, may use the defendant's criminal record to impeach his true testimony about duress. Alternatively, she may frame duress as an "affirmative defense," which the defendant must prove by a preponderance of the evidence, even though in reality the defense negates "malice"—an element of the crime that the prosecution must prove beyond a reasonable doubt. *Cf. Davis v. United States*, 160 U.S. 469, 474 (1895) (holding that when defendant's insanity negates "malice aforethought," the prosecution has the burden of disproving it beyond a reasonable doubt); *cf. also Dixon v. United States*, 126 S. Ct. 2437, 2441 n.4 (2006) (observing that when duress negates malice or another form of mens rea, the prosecution carries the burden of disproving it beyond a reasonable doubt).

the procedural and decisional requirements for authorizing its infliction. Substantial deviation from this principle renders the rule in question unconstitutional. There is, however, no similar requirement for evidence rules and, consequently, no constitutional protection against informational risks. Constitutional law only addresses the apportionment of decisional and participatory risks, which is puzzling.

Part II develops a theory that supports the installation of constitutional control over evidence rules. Decisional, participatory, and informational risks have different causes, but the same effect: an erroneous decision that deprives a person of her liberty or property. Therefore, the allocation of informational risks by the rules of evidence must answer the same constitutional criteria that control the allocation of decisional and participatory risks. The Supreme Court devised these constitutional criteria in accordance with its vision as to how to allocate the risks of error. The Court's decision not to extend these criteria to evidence rules therefore appears to be an oversight.

In developing this argument, I examine the widespread perception of evidence rules as rare and sporadic exceptions to unregulated factfinding. This perception permeates a number of constitutional doctrines and evidence law itself. As such, it provides a partial explanation to the "fundamental unfairness" standard. I demonstrate, however, that this perception is flawed. Evidence rules are not marginal: their effect on the outcomes of court decisions is profound. More importantly, a regime that provides factfinders with unregulated discretion poses a serious constitutional problem. Allowing factfinders to apportion informational risks as they deem fit undercuts the Supreme Court's agenda for risk-allocation by procedural and decisionmaking rules. Factfinders can foil this agenda by manipulating informational risks. This anti-constitutional prospect calls for the constitutionalization of evidence law.

This call is purely normative in nature. As such, it does not consider the effects of federalism and constitutional culture. These effects are introduced in Part III, which develops a positive account of the informal constitutionalization of evidence. This account identifies three dynamics: constitutional *détente*, constitutional culture, and federal safe harbors. These dynamics involve implicit, but entirely credible, understandings between the Supreme Court and state courts about the permissible scope of state evidence rules. According to these understandings, state courts must never openly defy the Court's agenda for risk-allocation. While they can deviate from this agenda to protect local interests, they must use evidence rules that have low visibility so as not to undermine the Court's constitutional authority.

Finally, a state rule's alignment with a federal rule of evidence guarantees its constitutionality.

### I. THE LANDSCAPE OF CONSTITUTIONAL TRIAL RULES

Constitutional trial rules<sup>11</sup> control two domains: procedure and decisionmaking. This Part of the Article examines these rules and their underlying motivation. The constitutional validity of court procedures and decisional rules, formulated as burdens of proof, depends on the risk of error and the consequent harm. Constitutional rules of procedure and decision aim to minimize net harm from an erroneous case disposition. The greater the potential harm, the stricter the procedural and decisional requirements authorizing the denial of a person's liberty or property. This "least harm principle" animates the Supreme Court's constitutional requirements for procedures and decisions in both criminal and civil trials. In the domain of procedure, these requirements control the allocation of participatory risks by the rules of trial management. In the domain of

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11. Trial rules are provisions that regulate processes of proof and argumentation in trials. Rules that control pre-trial matters such as arrest, bail, interrogation, and a grand jury review of criminal charges are not trial rules. The Sixth Amendment's guarantee of a speedy and public criminal trial before an impartial jury and the Seventh Amendment right to a jury trial in civil actions at common law also do not count as trial rules. Rather, these constitutional provisions are about the trial's format. They set no requirements with respect to proof and argumentation. Furthermore, trial rules do not include the Fourth Amendment's protections against searches and seizures or the exclusionary rule that remedies violations of these protections. *See* *Mapp v. Ohio*, 367 U.S. 643, 655-60 (1961) (articulating the scope and purpose of the Fourth Amendment's exclusionary rule as applicable to the states). The Supreme Court's constitutional jurisprudence explicitly separates these prophylactic protections from defendants' trial rights. *See* *Withrow v. Williams*, 507 U.S. 680, 688 (1993) (explaining that the Fourth Amendment's exclusionary rule is not a trial right); *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (same). The constitutional rules that suppress coerced confessions, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Bram v. United States*, 168 U.S. 532, 542-45 (1897), and confessions elicited during custodial interrogations in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), are different. Based on the Fifth Amendment's privilege against self-incrimination and, in the case of coerced confessions, also on the general due process requirement, *Withrow*, 507 U.S. at 693; *Colorado v. Connelly*, 479 U.S. 157, 163 (1986), these rules serve a dual purpose. Primarily, they deter police misconduct in interrogations. *See* *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (explaining that suppression of coerced confessions is driven primarily by the need to prevent improper inquisitorial methods of interrogation, as opposed to a concern that "such confessions are unlikely to be true"). But they also guard against the use of unreliable confessions at trial and for that reason can be categorized as trial rules. *See* *Withrow*, 507 U.S. at 691-92 ("*Miranda* safeguards a 'fundamental trial right.' "). This categorization would be untidy, though. The primary focus of the Fifth Amendment's exclusionary rule and its "due process" addition for coerced confessions is not confession evidence as such, but rather confessions obtained by police misconduct. This rule regulates a highly limited segment of the informational risk. I therefore do not include it in my account of constitutional trial rules. Adding it to the list would not change anything in my analysis anyway.



decisionmaking, they regulate the imposition of decisional risks by the rules allocating the burden of proof. These requirements reflect the Court's choices between false positives (errors favoring the prosecution and plaintiffs) and false negatives (errors favoring defendants). The constitutional status of these choices protects people from decisions of lawmakers and judges that favor a different allocation of the risk of error.

This Part of the Article also identifies a domain that receives no such protection—rules of evidential adequacy that determine which evidence is admissible and which evidence requires corroboration. By setting requirements for evidential adequacy, evidence rules allocate informational risks to one party or the other. Constitutional law steps in to invalidate such a rule only in extreme cases that exhibit “fundamental unfairness.”

As with participatory and decisional risks, informational risks result in erroneous verdicts that deprive people of their liberties and properties. Evidence rules, therefore, are operationally identical to the risk-allocating procedures and decisions that need to align with the Constitution. However, because evidence rules only need to avoid “fundamental unfairness,” by devising rules of evidence, legislators and judges can skew the informational risks in a way that subverts the Supreme Court's constitutional agenda for participatory and decisional risks. The Constitution's checkerboard protection against risks of error therefore presents a puzzle for legal theory and a legitimacy problem for the practice of the law. What can possibly explain and justify the constitutional indifference towards informational risks alongside the expansive constitutional regulation of participatory and decisional risks? Why not treat the three risks similarly?

### *A. The Protected Domains: Procedure and Decision*

#### 1. Procedure

Constitutional rules of procedure determine a person's power to participate in her trial. This power enables a person to adduce evidence that supports her allegations and that challenges the allegations of her adversary.<sup>12</sup> The participatory power protects a person from being abused by a bad judge, an overzealous prosecutor,

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12. See, e.g., WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4, at 28 (4th ed. 2004) (explaining that in an adversary system each party “is expected to present the facts . . . in a light most favorable to its side, and . . . challenge the . . . presentations made by the other side”).

and an unscrupulous adversary.<sup>13</sup> However, it also enables a person to abuse her adversary and the trial process by distorting the truth.<sup>14</sup> The power therefore requires a counterbalance: the participatory rights must be apportioned equitably between the parties. This apportionment still does not neutralize the parties' potentials for truth-distortion. Rather, it enables each party to impose the same amount of risk of error on her opponent. This mutual imposition of risks may be good for some cases, but not for others.

As a normative matter, apportionment of participatory risks depends on morality. Under the prevalent moral vision, equal apportionment of participatory risks is suitable for ordinary civil adjudication. There, adjudicators have no special reason for erring in favor of the plaintiff instead of the defendant, or vice versa: false positives are as harmful as false negatives.<sup>15</sup> In criminal trials, however, things are markedly different. Under the prevalent moral vision, it is better to acquit a guilty defendant than to convict and punish an innocent person.<sup>16</sup> This preference requires an asymmetrical allocation of participatory risks—one that gives defendants more participatory power than the prosecution.

The Supreme Court's willingness to protect the accused from the risk of erroneous conviction<sup>17</sup> defines the constitutional design of the participatory power for criminal defendants. A defendant's right to confrontation gives her the power to cross-examine any person testifying against her interest.<sup>18</sup> Testimonial evidence is admissible only when the defendant has an opportunity to cross-examine its provider, a witness or an out-of-court declarant.<sup>19</sup> The concept of

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13. *Id.*; see also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 1.1, at 2-3 (4th ed. 2005) (indicating that in civil trials litigants "control and shape the litigation," while the court maintains a "passive role").

14. See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

15. See *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (applying the "preponderance-of-the-evidence standard" because it "results in a roughly equal allocation of the risk of error between litigants"); see also STEIN, *supra* note 8, at 219-44 (describing the equality principle for allocating risk of error and its effect on civil litigation).

16. 2 MCCORMICK ON EVIDENCE § 341, at 491 (Kenneth S. Broun ed., 6th ed. 2006); see also STEIN, *supra* note 8, at 172-83 (offering an account of the criminal burden of proof as securing the legal system's alignment with the "equal best" standard).

17. See, e.g., *In re Winship*, 397 U.S. 358, 364, 369-72 (1970) (holding in a foundational ruling that proof beyond a reasonable doubt is constitutionally required in all criminal trials); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (stating that avoidance of erroneous convictions has "transcending value").

18. U.S. CONST. amend. VI; see also 2 MCCORMICK, *supra* note 16, § 252, at 155-65 (describing confrontation rights).

19. *Crawford v. Washington*, 541 U.S. 36, 61 (2004); see also *California v. Green*, 399 U.S. 149, 164 (1970) (holding that admission of a witness's prior statement inconsistent with his trial

“testimonial” is crucial to a defendant’s entitlement to confrontation.<sup>20</sup> To qualify as testimonial, a person’s factual account must be delivered in court or in another formal proceeding, such as a police interrogation.<sup>21</sup> The defendant’s entitlement to confrontation does not attach to statements unaffiliated with a formal proceeding,<sup>22</sup> a victim’s cry for help, for example.<sup>23</sup> Informal “event statements,”<sup>24</sup> however, may still constitute admissible hearsay.<sup>25</sup> If so, admission of such statement must rely on a recognized exception to the rule against hearsay.<sup>26</sup> Until very recently, the exception also had to satisfy the Constitution’s demand for confrontation. To satisfy that demand, the exception had to be “firmly rooted” in the common law of evidence.<sup>27</sup> Alternatively, a statement cleared as evidence against the defendant ought to have exhibited “adequate indicia of reliability,”<sup>28</sup> and the

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testimony does not violate the Confrontation Clause when the defendant can cross-examine the witness).

20. The differentiation between “testimonial” and “event” statements originates from the disparity of power between the defendant and the government. Testimonial statements are controllable by government agents who may put pressure on a witness to induce him to testify in accordance with their wishes. Event statements have no such potential for generating injustice and therefore do not require heightened constitutional scrutiny. STEIN, *supra* note 8, at 189-96. For foundational analysis, see Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014-22 (1998).

21. *Crawford*, 541 U.S. at 68.

22. *Id.*; see also *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) (reaffirming that *Crawford* does not apply to statements made outside formal proceedings).

23. See *Davis*, 126 S. Ct. at 2273-74 (holding that the Confrontation Clause protects defendants against statements made in interrogations aiming to collect evidence for criminal prosecutions, but not against statements to an agency attending an ongoing emergency). The defendant also may forfeit his right to confrontation by committing a wrongdoing that prevents the maker of an inculpatory testimonial statement from testifying as a witness at his trial. *Id.* at 2280 (stating that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation,” and explaining that “forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds” (quoting *Crawford*, 541 U.S. at 62, and citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879))).

24. See STEIN, *supra* note 8, at 190 (defining “event statements” as “any statement that the declarant makes . . . during any event outside of legal proceedings”).

25. See FED. R. EVID. 801(c) (defining as presumptively inadmissible hearsay any out-of-court statement aiming to “prove the truth of the matter asserted”); 2 MCCORMICK, *supra* note 16, § 246, at 128-31 (explaining the definition of hearsay).

26. See FED. R. EVID. 802 (prescribing that a hearsay statement is admissible only under a recognized exception to the rule against hearsay); 2 MCCORMICK, *supra* note 16, § 245, at 127-28 (explaining this principle).

27. See *Idaho v. Wright*, 497 U.S. 805, 817 (1990) (“Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability . . .”); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (same); 2 MCCORMICK, *supra* note 16, § 252, at 160 (describing the case law that led the Court to conclude that statements admissible under “firmly rooted” hearsay exceptions have sufficient “indicia of reliability”).

28. *Wright*, 497 U.S. at 814-15; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled in part by Crawford v. Washington*, 541 U.S. 36 (2004).

person who made it had to be unavailable as a witness at the defendant's trial.<sup>29</sup> However, two recent Supreme Court dicta seem to remove completely the defendants' constitutional protection against non-testimonial inculpatory statements.<sup>30</sup>

Additionally, criminal defendants are entitled to compulsory process—a right that gives a defendant the power to call witnesses<sup>31</sup> and demand the production of documents and physical evidence for trial.<sup>32</sup> To this end, the defendant can mobilize the formal subpoena mechanism.<sup>33</sup> The compulsory process requirement imposes on the government an affirmative duty to facilitate the defendant's effort to obtain evidence that may exonerate her. Discovery rules that exist under the Due Process Clause<sup>34</sup> protect the defendant's right to obtain such evidence. Under the basic discovery rule laid down in *Brady v. Maryland*, the defendant is entitled to receive from the prosecution not only the evidence that may be used against her at trial, but also any evidence that may have exculpatory potential.<sup>35</sup> The suppression of exculpatory evidence, both willful and inadvertent, violates due process<sup>36</sup> and voids the defendant's conviction.<sup>37</sup> A rule that works in

29. See *Roberts*, 448 U.S. at 74 (defining “unavailable” for purposes of the confrontation requirement); *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (holding that to establish a declarant's “unavailability,” prosecution must show substantial effort to secure his attendance as a witness).

30. In *Davis*, 126 S. Ct. at 2274, Justice Scalia, writing for the Court, explained that testimonial hearsay defines not only the core of the Confrontation Clause protection, but also the protection's parameters. In a more recent decision, *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007), Justice Alito, writing for the Court, opined:

[W]hatever improvement in reliability *Crawford* produced must be considered together with *Crawford*'s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. . . . Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

For analysis of these pronouncements and their implications, see Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis and Bockting*, 19 REGENT U. L. REV. 367 (2007).

31. See *Washington v. Texas*, 388 U.S. 14, 22-23 (1967) (holding that a statute disqualifying accomplice testimony as evidence for defendant violates the Compulsory Process Clause). The defendant's right to call witnesses and produce evidence is also guaranteed under the Due Process Clause. See *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (noting that the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense” (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984), and citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986))).

32. See LAFAYE ET AL., *supra* note 12, § 24.3, at 1127-28 (describing uses of a court's subpoena power to compel the production of evidence or witness testimony).

33. *Id.*

34. See *id.* at 1128-30 (outlining the constitutional rights of defendants to assistance in obtaining evidence).

35. 373 U.S. 83, 87 (1963).

36. *Id.*

tandem with *Brady* provides that even a faultless destruction or suppression of material exculpatory evidence by police or prosecution mandates acquittal.<sup>38</sup> There is also a special rule that applies in cases in which police or the prosecution maliciously suppresses or destroys evidence potentially useful to the defendant. The normal consequence of such misconduct is acquittal; the court need not even examine the potential probative value of the evidence maliciously suppressed or destroyed.<sup>39</sup>

Finally, the right to counsel strongly enhances the defendant's participatory power. This right allows a criminal defendant to appoint an attorney to represent her throughout the legal process.<sup>40</sup> A defendant who is unable to pay attorneys' fees normally is entitled to a counsel at the government's expense.<sup>41</sup> The right to counsel is understood as incorporating the attorney-client privilege,<sup>42</sup> which protects the confidentiality of the defendant's communications with her attorney and any additional information generated by the attorney's work.<sup>43</sup> The right to counsel also protects the defendant from ineffective assistance of counsel.<sup>44</sup> This right attaches not only to criminal trials and preliminary hearings,<sup>45</sup> but also to police lineups<sup>46</sup> after the defendant has been charged.<sup>47</sup> Failure to honor the right

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37. *Id.* at 88-89; *see also* *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (summarizing essential components of a *Brady* violation).

38. *See Illinois v. Fisher*, 540 U.S. 544, 547 (2004) (per curiam) (finding that the defendant could not be acquitted automatically because the destroyed evidence was only "potentially useful," as opposed to "materially exculpatory").

39. *See Arizona v. Youngblood*, 488 U.S. 51 (1988).

40. *Wheat v. United States*, 486 U.S. 153 (1988) (holding that the Sixth Amendment right to counsel encompasses the right to choose one's attorney); *see also United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564-66 (2006) (holding that denial of defendant's right to choose an attorney warrants reversal of conviction).

41. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

42. *See, e.g., Black v. United States*, 385 U.S. 26, 28-29 (1966) (per curiam) (remanding the case for a new trial as a result of a finding that government agents monitored confidential communications between defendant and his attorney); *Williams v. Woodford*, 306 F.3d 665, 683 (9th Cir. 2002) (holding that government interference in a defendant's confidential relationship with his attorney violates the Sixth Amendment); *United States v. Castor*, 937 F.2d 293, 297 (7th Cir. 1991) (same); *Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985) (same); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) (holding that privacy in a defendant's communications with his attorney is "the essence of the Sixth Amendment right").

43. 1 MCCORMICK, *supra* note 16, § 89, at 401, § 96, at 434-40.

44. *See Strickland v. Washington*, 466 U.S. 668, 691-92 (1984) (explaining the rule that ineffective assistance of counsel voids a defendant's conviction).

45. *Coleman v. Alabama*, 399 U.S. 1, 6 (1970).

46. *United States v. Wade*, 388 U.S. 218, 236-37 (1967).

47. *See Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (holding that the right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment").

generally leads to a reversal of the defendant's conviction.<sup>48</sup> Furthermore, the exclusionary rule suppresses any evidence that the government obtains pursuant to the right's violation.<sup>49</sup>

Constitutional criminal procedure does not give the prosecution similar participatory powers. The prosecution, for example, cannot invoke the right to cross-examination in order to block the admission of defense evidence.<sup>50</sup> The Constitution might mandate the admission of exculpatory evidence even when it constitutes inadmissible hearsay.<sup>51</sup> The prosecution can only block the admission of patently unreliable and prejudicial defense evidence.<sup>52</sup> For example, the Supreme Court upheld the constitutionality of a rule preventing the admission of a polygraph examination of the defendant's self-exonerating account.<sup>53</sup> As a general matter, exclusion of defense evidence is constitutional only if it serves a "legitimate interest"<sup>54</sup> and is not "disproportionate to the ends that [it is] asserted to promote."<sup>55</sup>

The prosecution also cannot force the defendant to testify and be cross-examined at trial. The Fifth Amendment's privilege against self-incrimination permits defendants not to testify. The Supreme Court also has interpreted this privilege as prohibiting the prosecution from commenting to the factfinders on the defendant's silence.<sup>56</sup> This

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48. See *Wade*, 388 U.S. at 239-42 (discussing the rationale for reversal based on pretrial lineup evidence having been obtained without counsel present, but also noting exceptions).

49. See *Brewer v. Williams*, 430 U.S. 387, 398-406 (1977) (affirming application of the exclusionary rule as a remedy for violation of the right to counsel).

50. The rights to present evidence and confront witnesses under U.S. CONST. amend. VI are given to the accused, not to the prosecution.

51. See *Holmes v. South Carolina*, 547 U.S. 319, 324, 331 (2006) (holding that state rule blocking admission of exculpatory hearsay violates defendant's rights to due process, compulsory process, and confrontation).

52. *Id.* at 326 ("While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.").

53. See *United States v. Scheffer*, 523 U.S. 303, 305, 309 (1998) (upholding the constitutionality of a military rule blocking the admission of polygraph evidence, and justifying this decision in part by the questionable reliability of polygraphs).

54. *Id.* at 308.

55. *Holmes*, 547 U.S. at 326; see also *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (pronouncing unconstitutional Arkansas's rule that excluded hypnotically refreshed testimony because "wholesale 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 posthypnosis recollections").

56. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) (interpreting the Fifth Amendment as prohibiting adverse inferences from and prosecutorial comments on defendant's silence at custodial interrogation); *Griffin v. California*, 380 U.S. 609, 615 (1965) (interpreting the Fifth

restriction of the prosecution's participatory power is both substantial and one-sided.<sup>57</sup> Asymmetrical application of the attorney-client privilege intensifies this nonreciprocal allocation of participatory risks. As previously noted, this privilege protects the defendant's self-incriminating communications to her attorney. It does not, however, protect exculpatory information possessed by police or the prosecution. The police cannot make such information privileged, for example, by communicating it to a government attorney.<sup>58</sup> Nor can the government withhold exculpatory information on state secrecy grounds.<sup>59</sup> The defendant is entitled to receive from the prosecution all exculpatory information, so long as the prosecution presses the charges.<sup>60</sup>

All this skews participatory risks in the criminal defendant's favor. The defendant's ability to distort the truth at her trial by pretending to be innocent is consequently greater than the prosecution's ability to frame him.<sup>61</sup> This allocation of participatory risks is socially beneficial, as it reduces the potential for erroneous conviction. But it also works to society's detriment by giving defendants more opportunity to obtain an erroneous acquittal.

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Amendment as prohibiting adverse inferences from and prosecutorial comments on defendant's silence at trial).

57. This privilege affords special protection to innocent defendants who find themselves unable to corroborate their self-exonerating accounts by objective evidence. Without it, guilty criminals would be incentivized to pool with innocents by making false exculpatory statements (to the extent they believe that their lies are unlikely to be exposed). Aware of these criminals' incentives, factfinders would rationally discount the probative value of all uncorroborated exculpatory statements, to the detriment of the unfortunate innocents who cannot corroborate their true statements. The Fifth Amendment privilege minimizes this pooling effect and correspondingly reduces the rate of wrongful convictions. Under this regime, rational innocents still tell the truth, whereas criminals—fearful of being implicated by their lies—separate from the pool by exercising the right to silence. See Daniel Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000); see also STEIN, *supra* note 8, at 164 n.82 (responding to critics of this anti-pooling rationalization).

58. See LAFAVE ET AL., *supra* note 12, § 20.3, at 938-40 (stating that prosecution generally is not entitled to the "work product" protection except for statements of opinion documenting mental impressions of its legal staff).

59. *Jencks v. United States*, 353 U.S. 657, 671-72 (1957).

60. See *United States v. Reynolds*, 345 U.S. 1, 12 (1953) ("[In criminal cases] the Government can invoke its evidentiary privileges only at the price of letting the defendant go free."); *United States v. Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944) ("The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."). But a private person's communication to his attorney stays privileged despite its exonerating potential for a criminal defendant even after the person's death. See *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) ("It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this.").

61. Before trial, however, the excessive investigative and prosecutorial powers make a person particularly exposed to governmental abuse.

In civil litigation, the constitutional baseline for apportioning participatory risks is equality. The baseline functions as a default rule. Reasoned deviations from this rule withstand constitutional scrutiny. Under this system, a litigant's right to participate in her trial is constitutionally protected. Based on the Due Process Clause of the Fourteenth Amendment,<sup>62</sup> the Supreme Court interprets this protection to include a litigant's right to present evidence, to examine the evidence of her opponent, and to be represented by an attorney.<sup>63</sup> Dissimilarly to criminal cases, there is no constitutional demand for discovery of information. The government also has no constitutional obligation to provide free legal representation to the poor.<sup>64</sup>

The scope of participatory rights in civil litigation is determined by the balancing formula of *Mathews v. Eldridge*, which focuses on the risk of factfinding error.<sup>65</sup> Under this formula, the scope of participatory rights depends on three factors: harm resulting from an erroneous disposition of the case under the procedures actually used, the utility of the additional or substitute participatory safeguards, and the social cost of those safeguards.<sup>66</sup> According to *Mathews*, due process demands that adjudicative procedures minimize not only the cost of errors in decisions, but also the cost of avoiding errors.<sup>67</sup> The total sum of those costs must be minimized. Any enhancement of a person's participatory rights consequently must be more productive than costly. The enhancement's productivity is measured by the amount by which it reduces the aggregate social cost of false positives and false negatives. The enhancement's cost equals

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62. U.S. CONST. amend. XIV, § 1.

63. See *Tennessee v. Lane*, 541 U.S. 509, 523, 532 (2004) (interpreting the Due Process Clause as requiring States, "within the limits of practicability," to "afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings" (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))); *Connecticut v. Doehr*, 501 U.S. 1, 18 (1991) (holding that due process may require an adjudicative hearing to justify deprivation of property rights). The rights enumerated in the text are included in the constitutional entitlements to hearing (under *Doehr*) and participation (under *Boddie* and *Lane*). These decisions make constitutional civil procedure more meaningful than it was two and a half decades ago. Cf. John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 582 (1984) (analyzing the then-existing constitutional jurisprudence and observing that it "does not influence civil procedure even when constitutional principles are plainly relevant").

64. See *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999) ("A plaintiff in a civil case has no constitutional right to counsel."); see also *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) ("[A] State need not equalize economic conditions.").

65. 424 U.S. 319 (1976). Devised originally for administrative hearings, the *Mathews* doctrine also applies in civil litigation. See *Doehr*, 501 U.S. at 10-11 (applying the *Mathews* analysis to the burden created by a prejudgment remedy statute that "ordinarily appl[ies] to disputes between private parties rather than between an individual and the government").

66. *Mathews*, 424 U.S. at 335.

67. *Id.* at 344.



the difference between the costs of adjudication with and without it. This balancing applies to categories of cases rather than to any individual case.<sup>68</sup>

Under this framework, violation of due process can occur only when the social saving from curtailing a person's participatory power is far below the expected harm to that person. When the saving is substantial enough, the curtailment withstands constitutional scrutiny. As a general matter, curtailment of participatory power passes constitutional muster when it restricts both parties equally.<sup>69</sup>

## 2. Decision

Constitutional trial rules regulate decisional risks by allocating burdens of proof. This allocation sets the standards of proof for factual findings and determines the consequences of a party's failure to satisfy the controlling proof standard.

For criminal convictions, constitutional due process generally requires proof beyond a reasonable doubt.<sup>70</sup> Under this requirement, the jury's finding of a reasonable doubt as to whether the defendant committed the crime must lead to an acquittal.<sup>71</sup> The judge must instruct jurors to decide the case by this standard,<sup>72</sup> and in the explanation, she must explain the meaning of "beyond a reasonable doubt" in simple words that an average juror can understand.<sup>73</sup> The same standard controls post-conviction decisions of trial judges and appellate courts. The success of a post-conviction challenge of a guilty verdict depends on whether a rational juror could find beyond a reasonable doubt that the defendant committed the crime of which he is accused. When the answer to this question is "yes," both the trial

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68. *Id.*

69. *See, e.g.,* Coppedge v. United States, 369 U.S. 438, 446-47 (1962) (underscoring courts' "duty to assure to the greatest degree possible . . . equal treatment for every litigant before the bar"); *see also* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52 (1976) ("[I]nsofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated.").

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

71. *Id.*

72. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994).

73. *See id.* at 6 (stating that, when assessing the constitutionality of a judge's instructions regarding the reasonable doubt standard, the key question is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the . . . standard").

judge and the appellate court must affirm the conviction.<sup>74</sup> Criminal convictions thus require a very high, although numerically unstated, probability of guilt.<sup>75</sup> This requirement allows many guilty defendants to go free in the interest of not convicting the innocent.<sup>76</sup> And the requirement's constitutional entrenchment prevents legislative and judicial attempts to whittle it down.

This protection from the risk of erroneous conviction does not extend to affirmative defenses, such as duress, necessity, or insanity, which exonerate, or reduce the culpability of, an otherwise guilty defendant.<sup>77</sup> Defendants can benefit from these defenses even when all the elements of the crime are proven beyond all reasonable doubt. This feature makes affirmative defenses both special and constitutionally unnecessary. Because states and Congress may choose not to recognize these defenses, they are allowed to condition the availability of any such defense on its proof by the defendant. Consequently, lawmakers can require defendants to establish any affirmative defense by preponderance of the evidence,<sup>78</sup> by clear and convincing proof,<sup>79</sup> or even beyond a reasonable doubt.<sup>80</sup> The defense, however, needs to be genuinely affirmative: it must not overlap any element of the crime.<sup>81</sup>

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74. *E.g.*, *Herrera v. Collins*, 506 U.S. 390, 401 (1993) (stating that, in a habeas corpus petition, the appellate court must not reverse the conviction unless it finds that the evidence at petitioner's trial was not sufficient to convince any rational trier of fact of guilt beyond a reasonable doubt).

75. *See* STEIN, *supra* note 8, at 172-73 (describing a formula capturing the utility-based criminal proof standard and observing that the "conventional doctrine . . . vigorously resists the explicit introduction of numbers into the . . . formula").

76. *See* 2 MCCORMICK, *supra* note 16, § 341, at 490-91 ("[In applying the stringent 'beyond a reasonable doubt' standard,] courts may have increased the total number of mistaken decisions in criminal cases, but with the worthy goal of decreasing the number of one kind of mistake—conviction of the innocent.").

77. *See* *Patterson v. New York*, 432 U.S. 197, 208 (1977) (upholding the constitutionality of a statute requiring defendants to prove an affirmative defense by a preponderance of the evidence).

78. *As in* *Patterson. Id.*; *see also* *Dixon v. United States*, 126 S. Ct. 2437, 2447-48 (2006) (requiring defendants relying on duress as an affirmative defense to prove it by a preponderance of the evidence).

79. *See* *Clark v. Arizona*, 126 S. Ct. 2709, 2717, 2732 (2006) (recognizing that a state may require defendants to prove insanity by clear and convincing evidence).

80. *As in* *Leland v. Oregon*, 343 U.S. 790, 798 (1952), in which the court upheld the constitutionality of an Oregon statute requiring defendants to prove the insanity defense beyond a reasonable doubt.

81. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 137 (3d ed. 2003) ("If the factor . . . is an element in the offense, the prosecutor must bear the burden of persuasion beyond a reasonable doubt. If it is a 'new matter' affirmative defense that can coexist with all the elements of the offense . . . then the burden of persuasion can be put on the defendant."). For analysis of the nature and objectives of the special proof requirements that attach to affirmative

For civil trials, the default proof standard is a preponderance of the evidence.<sup>82</sup> Under this standard, adjudicators must deem a factual allegation proven when it is more probable than not. The Supreme Court treats this standard as a constitutional benchmark because it makes parties to a civil action “share the risk of error in roughly equal fashion.”<sup>83</sup> The Court also recognizes an array of social interests that justify deviations from the default standard of equal apportionment of the risk of error.<sup>84</sup> Any plausible rationale for departing from the preponderance standard must pass constitutional muster.<sup>85</sup> This rationale may be an anti-euthanasia policy,<sup>86</sup> a welfare program,<sup>87</sup> or virtually any other plausible goal. The Court has emphasized that “[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion normally is not an issue of federal constitutional moment.”<sup>88</sup>

For civil cases in which a citizen faces the prospect of being deprived of a fundamental liberty, the traditional constitutional proof standard is “clear and convincing” evidence.<sup>89</sup> This standard is higher than a preponderance of the evidence, but not as onerous as “beyond a reasonable doubt.”<sup>90</sup> The Supreme Court has attached this standard to deportation<sup>91</sup> and denaturalization<sup>92</sup> proceedings, as well as to decisions that commit a person to a mental institution.<sup>93</sup> This standard also controls actions for terminating parental rights.<sup>94</sup> The cause for terminating those rights—typically, parental neglect of the

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defenses, see Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1241-52 (2007).

82. *Grogan v. Gartner*, 498 U.S. 279, 286 (1991).

83. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

84. See MUELLER & KIRKPATRICK, *supra* note 81, at 109 (stating that the preponderance standard applies across the board in civil cases, but listing a wide variety of situations in which a higher “clear and convincing evidence” standard may be used).

85. See *Lavine v. Milne*, 424 U.S. 577, 587 (1976).

86. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990) (holding that due process does not forbid states from requiring clear and convincing evidence as a proof of patient’s wish for the withdrawal of life-sustaining treatment).

87. As in *Lavine*, 424 U.S. at 578-79.

88. *Id.* at 587; see also *Nguyen v. INS*, 533 U.S. 53, 63-64 (2001) (holding that “[t]he Constitution . . . does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity” for citizenship purposes).

89. *Addington v. Texas*, 441 U.S. 418, 431-33 (1979).

90. See *Cruzan*, 497 U.S. at 282-83 (recognizing the need for an intermediate standard of proof); *Addington*, 441 U.S. at 424-25 (discussing the relationship between “clear and convincing” and other standards of proof).

91. *Woodby v. INS*, 385 U.S. 276 (1966).

92. *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943).

93. *Addington*, 441 U.S. at 425-27.

94. *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982).

child—needs to be established by clear and convincing evidence.<sup>95</sup> Finally, in a libel action brought by a public figure, the publisher's malice—a prerequisite to the plaintiff's recovery of tort damages—also must be established by clear and convincing evidence.<sup>96</sup>

These rulings fit into the *Mathews* formulation of constitutional due process.<sup>97</sup> Under this formulation, the proof standard must track the net harm from the erroneous denial of a person's substantive right.<sup>98</sup> The greater the harm, the higher the proof requirement authorizing its infliction. Constitutional law thus tells the plaintiff: "If the defendant and you had a quarrel over money or property—so that the risks of an erroneous disposition of the case were equally bad for both sides—the controlling proof standard would have been preponderance. But you want to take away the defendant's fundamental right without risking an equivalent right of your own. The risks of error, therefore, are not the same for you and for the defendant, and your evidence consequently must be considerably—rather than just slightly—more compelling than hers."<sup>99</sup>

### *B. The "Least Harm Principle": Constitutional Protections Against Risks of Error*

Constitutional rules of procedure and decision have a unifying rationale. Allocation of the risk of error has far-reaching consequences. Adjudicators allocate this risk in every case. How the risk is allocated affects whether a person is deprived of liberty and property—whether criminal defendants go to prison despite being innocent, and whether parties to civil lawsuits are deprived of money

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95. *Id.* at 747-48.

96. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (holding that a publisher's right to due process, which attaches to its constitutional entitlement to free speech, means that maliciousness of its libelous publication must be proven by clear and convincing evidence); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986) (same).

97. *See supra* notes 65-69 and accompanying text.

98. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). For critical analysis of this doctrine, see Mashaw, *supra* note 69, at 46-52, in which the court criticized the *Mathews* formula for dwarfing "soft variables" that include a person's dignity and autonomy).

99. This rationalization carries the "clear and convincing" standard into many new domains. For example, an action for revoking a doctor's license to practice medicine might necessitate the imposition of the "clear and convincing" requirement on due process grounds. *See Nguyen v. Wash. Dept. of Health Med. Quality Assurance Comm.*, 29 P.3d 689, 697 (Wash. 2001) (imposing on due process grounds the "clear and convincing" requirement on a proceeding for removal of a doctor's license); *see also* Roy G. Spece, Jr. & John J. Marchalonis, *Sound Constitutional Analysis, Moral Principle, and Wise Policy Judgment Require a Clear and Convincing Evidence Standard of Proof in Physician Disciplinary Proceedings*, 3 IND. HEALTH L. REV. 107 (2006) (arguing that the "clear and convincing" standard is constitutionally required in disciplinary actions against doctors).

or property that belong to them. Because people do not fully trust legislators and judges, they seek constitutional protection for their liberties and properties. They receive this protection from the constitutional rules regulating court procedures and burdens of proof. These rules determine the constitutionally favored allocation of participatory and decisional risks. This allocation reduces the total harm from erroneous denials of substantive rights—subject to costs: the cost of adjudicative procedures and decisions must not exceed the harm that they prevent. The totality of constitutional rules regulating procedures and burdens of proof thus can be conceptualized as the “least harm principle.”

Under this principle, the constitutional validity of adjudicative procedures and decisional rules depends on the risk of error and the resulting harm. A procedure or a rule of decision that exposes a person to an excessive risk of error fails the test for constitutionality. The key question, of course, is what risks of error—participatory and decisional—count as excessive.

The answer depends on social morality. Under the prevalent moral vision, the conviction and punishment of an innocent person is considered particularly harmful.<sup>100</sup> A wrongly convicted person suffers from punishment and stigmatization. Her physical harm, however, does not by itself warrant special protection of the innocent. Because this harm is comparable to that of crime victims, its infliction can be justified as a measure necessary for intensifying deterrence: the prevention of crime victims’ suffering often offsets the suffering of a wrongly convicted defendant. But wrongful conviction and punishment also degrade the convicted person by making her a means for attaining society’s goals. This instrumentalization inflicts on the convicted person a substantial moral harm: it devalues her life, relative to that of other citizens.<sup>101</sup> To minimize this moral harm, constitutional doctrine provides that a person only can be convicted when her guilt is proven beyond a reasonable doubt.

“Beyond a reasonable doubt” does not mean beyond *any* doubt. The prevalent moral vision distinguishes between erroneous convictions that are accidental and wrongful convictions that are deliberate.<sup>102</sup> By drawing this distinction, it underscores that it is one thing to convict an innocent person accidentally, when there are no evidence-based reasons for doubting her guilt, but quite another to convict an innocent person by knowingly disregarding such a reason.

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100. See RONALD DWORKIN, A MATTER OF PRINCIPLE 79-89 (1986) (explicating this vision).

101. *Id.* at 81-84.

102. *Id.* at 84-88.

The first case is just a misfortune; the second constitutes an injustice. The first case involves bad luck that may befall any person. The second involves a deliberate, and therefore unjust, sacrifice of an individual for the good of society, a sacrifice that violates equality and fairness.<sup>103</sup> Under this vision, the state may convict a person of a crime and make her eligible for punishment when it satisfies two conditions. The state must do its best to protect the person from the risk of erroneous conviction, and it must not provide better protection to other individuals.<sup>104</sup>

This “equal best” standard branches into a set of constitutional requirements that minimize the net amount of harm from erroneous dispositions of criminal cases. Under one such requirement, the prosecution must eliminate every possibility of the defendant’s innocence that arises from the evidence. This is what “proof beyond a reasonable doubt” means.<sup>105</sup> The “equal best” standard also requires that defendants have an adequate opportunity to obtain and present exculpatory evidence.<sup>106</sup>

Any rule that increases the factual accuracy of an adjudicative determination of guilt correspondingly decreases the factual accuracy of an adjudicative determination of innocence.<sup>107</sup> The “equal best” standard does exactly that. It greatly increases the chances that a convicted defendant will have committed the crime in question and greatly decreases the chances that innocent people will be found guilty. By the same token, this standard greatly increases the chances that factually guilty defendants will be exonerated. By decreasing the incidence of false positives, the “equal best” standard increases the incidence of false negatives.

In the civil litigation area, society’s valuation of the harms is different. The harm that a plaintiff sustains when her claim is denied erroneously is generally perceived as equal to the harm that a

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103. *Id.*

104. *See* STEIN, *supra* note 8, at 172-78 (articulating the “equal best” standard as an organizing principle for existing protections against erroneous conviction).

105. *Id.* at 173-74; *see also* PAUL ROBERTS & ADRIAN A.S. ZUCKERMAN, *CRIMINAL EVIDENCE* 360-66 (2004) (articulating the meaning of “beyond a reasonable doubt”).

106. *See supra* notes 31-39 and accompanying text.

107. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 618 n.2 (6th ed. 2003) (observing that “trading off Type I and Type II errors is a pervasive feature of evidence law”); STEIN, *supra* note 8, at 172-78 (“The legal system can . . . reduce the incidence of wrongful acquittals (‘false negatives’) by increasing the number of wrongful convictions (‘false positives’), and vice versa.”).

defendant suffers when the plaintiff's claim is granted erroneously.<sup>108</sup> This equality of the harms dictates that the rules of procedure and decision do not favor either party. In other words, these rules must be unbiased. They ought to ensure that the plaintiff and the defendant are both equally protected from, and equally exposed to, the risk of error.<sup>109</sup> This risk-equalizing standard explains the existing rules of discovery, subpoena, witness examination, and other trial and pre-trial mechanisms. This standard also justifies the preponderance requirement, under which a party whose evidence is more convincing than that of her adversary prevails at trial.<sup>110</sup> Courts and legislators may deviate from the equality standard only on special policy grounds.<sup>111</sup>

The Supreme Court's constitutional jurisprudence also has established the "heightened protection" standard.<sup>112</sup> Its primary manifestation is the "clear and convincing evidence" requirement.<sup>113</sup> As previously explained, this requirement attaches to actions that deny a person's civil liberty or other fundamental right. For such actions, constitutional doctrine also prescribes a number of procedural enhancements that solidify a person's protection from the risk of error. Courts achieve this protection by expanding the person's participatory power.<sup>114</sup>

In sum, the "least harm principle" explains three sets of constitutional requirements for adjudicative procedures and decisions. The first set includes the requirements for procedures and decisions in criminal adjudication. These requirements generally align with the "equal best" standard. The second set accommodates the requirements for procedures and decisions in regular civil litigation. These requirements generally align with the equality standard. The third set consists of requirements for procedures and decisions in actions for

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108. See STEIN, *supra* note 8, at 219-25 ("The equality principle demands that risk of error be allocated equally between the claimant and the defendant . . . [as the] losses that the claimant and the defendant might undeservedly suffer are equally regrettable.").

109. *Id.*

110. See *Grogan v. Gartner*, 498 U.S. 279, 286 (1991) ("[T]he preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants . . .").

111. See *supra* text accompanying notes 84-96.

112. See *Addington v. Texas*, 441 U.S. 418, 423-24 (1979) (recognizing the need to interpose heightened proof requirements to "protect particularly important individual interests in various civil cases").

113. *Id.* at 431-33.

114. See, e.g., *Johnson v. Solomon*, 484 F. Supp. 278, 292 (D. Md. 1979) ("Today there can be little doubt that a person detained on grounds of mental illness has a right to counsel, and to appointed counsel if the individual is indigent." (quoting *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974))).

denying fundamental rights. These requirements generally align with the “heightened protection” standard. By applying these standards, courts allocate decisional and participatory risks in a way that minimizes the net harm from the erroneous disposition of cases.

### C. *The Unprotected Domain of Evidence*

Constitutional regulation of the rules that determine evidential adequacy has an altogether different format—a format best described as a floating threat. The Due Process Clause of the Fifth and the Fourteenth Amendments provides the framework for testing evidence rules for constitutionality. The Clause accommodates the demand for “due evidential standards,” as the Amendments’ history and underlying rationale support this reading.<sup>115</sup> Early on, the Supreme Court stated that the meaning of due process must be determined by a “gradual process of inclusion or exclusion.”<sup>116</sup> The Court interpreted the scope of due process broadly. Specifically, it held that this scope is “dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.”<sup>117</sup> According to this understanding, the Due Process Clause guaranteed “not particular forms of procedure, but the very substance of individual rights to life, liberty and property.”<sup>118</sup> The standard for examining the constitutionality of an evidential or procedural rule under this Clause was whether the rule violated “the very essence of a scheme of ordered liberty”<sup>119</sup> or “offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>120</sup>

Originalists interpreted this standard as encompassing “immemorial usage,”<sup>121</sup> that is,

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115. See generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 385-91 (2005); RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND”* 241-55 (1926); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957).

116. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

117. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

118. *Hurtado v. California*, 110 U.S. 516, 532 (1884).

119. *Palko*, 302 U.S. at 325.

120. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see also *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (confirming the *Snyder* formulation).

121. As explained in one of the Supreme Court’s foundational decisions, *Hurtado*, 110 U.S. at 521:

[T]he phrase “due process of law” is equivalent to “law of the land,” as found in the twenty-ninth chapter of *Magna Charta*; . . . that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have



those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>122</sup>

The originalist approach, of course, required courts to adapt the old rules to the new social conditions. Consequently, courts often transformed those rules into general standards not anticipated by the Constitution's framers.<sup>123</sup>

Contemporary constitutional jurisprudence reaffirms this understanding of due process. In *Mooney v. Holohan*, the Supreme Court held that a prosecutor's contrivance to procure the defendant's conviction by perjured testimony violated due process.<sup>124</sup> To sustain the conviction, the government relied on the trial process that allowed the defendant to exercise his participatory power.<sup>125</sup> The defendant was able to cross-examine prosecution witnesses and to adduce exculpatory evidence.<sup>126</sup> No inhibitions were imposed on his

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been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves . . . .

*Jones v. Robbins*, 74 Mass. (8 Gray) 329, 342-43 (1857) (Shaw, C.J.) (interpreting "the law of the land" and "process of law" standards as referring to England's Magna Carta); *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (interpreting "due process" as referring to the principles of Magna Carta, "private rights," and "distributive justice"); see also *Twining v. New Jersey*, 211 U.S. 78, 100-02, 105-06 (1908) (confirming all of the above).

122. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855); see also *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (explaining that "historical practice" is the primary guide as to whether a principle is "fundamental" under the Due Process Clause).

123. Consider, for example, Justice Scalia's interpretive modernization of the old confrontation right, articulated in *Crawford v. Washington*, 541 U.S. 36 (2004). His holding that the right entitles the defendant to cross-examine providers of inculcating testimonial evidence is not an application that the Constitution's framers originally envisioned. Today's "testimonial evidence" is a concept that captures many previously unknown forms of testimony. Justice Scalia's interpretation, however, is still faithful to the broad principle underlying the Sixth Amendment's text. See Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1518 (2006) (explaining *Crawford's* "originalism" as a blend of new trial practices and the framers' understandings that resulted in a "contemporary judgment concerning how a common law right can best be implemented in the modern criminal justice system"); see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming 2007), available at <http://papers.ssrn.com/abstract=925558> (advancing the idea that constitutional interpretation requires fidelity to the principles underlying the Constitution's text, but not to the text's original expected application).

124. 294 U.S. 103 (1935) (per curiam) (finding conviction sought through deliberate use of perjured testimony to be "as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation").

125. *Id.* at 111-12.

126. *Id.* at 112.

participation in the court proceedings. The defendant also made no complaints about the rule of decision: in all likelihood, he was convicted under the “beyond a reasonable doubt” standard.<sup>127</sup> The government claimed, therefore, that the defendant failed to raise before the Court an issue of federal constitutional concern.<sup>128</sup> The Court rejected this claim, describing it as a “narrow view of the requirement of due process.”<sup>129</sup> The Court ruled that perjured testimony violates due process when the prosecution knowingly uses it to secure the defendant’s conviction.<sup>130</sup> This ruling suggests that the prosecution might also violate due process when it knows that its evidence *might* be false.<sup>131</sup>

The impact of this decision on what evidence is constitutionally permissible at trial is significant. *Mooney* breaks the procedure-decision dichotomy and interprets due process broadly enough to encompass the constitutional review of evidential adequacy. The Supreme Court has confirmed this understanding of *Mooney* on a number of occasions.<sup>132</sup> Today’s constitutional doctrine holds that bad evidence may invalidate the defendant’s conviction on due process grounds.<sup>133</sup> This is the case when, during a suggestive lineup

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127. *Id.* at 110-11.

128. *Id.* at 111-12.

129. *Id.* at 112. Because the defendant had not exhausted his recourse to courts below, his habeas corpus petition was denied without prejudice. *Id.* at 115.

130. *Id.* at 112-13; *see also* *Napue v. Illinois*, 360 U.S. 264, 269, 272 (1959) (holding that the prosecution’s failure to correct testimony known to be false violates due process); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942) (same).

131. *See* *United States v. Agurs*, 427 U.S. 97, 103-04 (1976) (stating that “fundamental unfairness” could attach to cases in which the prosecution should have known about the perjury, but underscoring that, under the prevalent understanding of *Mooney*, a merely constructive awareness is not enough).

132. *See* *Albright v. Oliver*, 510 U.S. 266, 298-99 (1994) (Stevens J., dissenting) (noting that *Mooney* rejected as unduly “formalistic” the interpretation of Due Process as requiring proof beyond a reasonable doubt, probable cause, and process rights); *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-48 (1974) (reaffirming *Mooney*); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (same); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (same); *Napue*, 360 U.S. at 269 (same); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (same); *Pyle*, 317 U.S. at 215-16 (same).

133. *See* *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”); *see also* *Dutton v. Evans*, 400 U.S. 74, 96-97 & n.4 (1970) (Harlan J., concurring) (“The task [of examining the constitutionality of evidence rules] is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments’ commands that federal and state trials, respectively, must be conducted in accordance with due process of law. It is by this standard that I would test federal and state rules of evidence. . . . Reliance on the Due Process Clauses would also have the virtue of subjecting rules of evidence to constitutional scrutiny in civil and criminal trials alike.”).

proceeding, the police implicitly point to the accused and tell the identifying witness: “this is the man.” Any such proceeding is fundamentally unfair; consequently, it violates due process.<sup>134</sup> As the Court underscored in *Dowling v. United States*, any evidence should be ruled inadmissible when its admission “violates ‘fundamental conceptions of justice.’”<sup>135</sup>

The Court, however, limited this notion to a very narrow category of infractions.<sup>136</sup> Thus far, it has included in this category only two cases: government-induced perjury<sup>137</sup> and identification testimony from a suggestive lineup.<sup>138</sup> Admission of such evidence, in the Court’s view, is fundamentally unfair and violates due process.<sup>139</sup> Another “fundamentally unfair” scenario recognized by the Ninth Circuit would prohibit prosecutorial use of evidence from which factfinders can draw no rational inferences against the defendant.<sup>140</sup> The Court has the power to expand the “fundamental unfairness” category, but for now, this line of precedent remains dormant. The Court also has committed itself to exercise this power in highly exceptional circumstances<sup>141</sup>—again, without specifying what these circumstances might be.<sup>142</sup> The emerging doctrine therefore poses a

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134. See, e.g., *Manson v. Brathwaite*, 432 U.S. 98, 105-06 (1977) (using the “substantial likelihood of misidentification” criterion for suppressing suggestive identification procedures on due process grounds); *Neil v. Biggers*, 409 U.S. 188, 196-99 (1972) (same); *Foster v. California*, 394 U.S. 440, 442-43 (1969) (holding that an unnecessarily suggestive lineup violates due process if admitted into evidence); *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (same).

135. 493 U.S. 342, 352 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

136. *Id.*

137. *Mooney v. Holohan*, 294 U.S. 103, 110, 112-13 (1935).

138. *Foster*, 394 U.S. at 442-43.

139. *Id.*

140. See *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (calling proof of drug-dealing by evidence that defendant drove a car with \$135,000 in the trunk “a problem,” but holding that this problem did not make defendant’s trial fundamentally unfair because “there is a rational inference the jury could draw from the challenged evidence,” while fundamental unfairness can only occur “if there are no permissible inferences the jury may draw from the evidence”).

141. See *Dowling*, 493 U.S. at 352 (holding that an evidence rule should only be voided if it violates our “fundamental conceptions of justice which lie at the base of our civil and political institutions”); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (upholding the constitutionality of Texas law rendering prior-crime evidence admissible to prove recidivism in a single criminal proceeding, after establishing that the law is not fundamentally unfair, and explaining that the “fundamental unfairness” doctrine does not allow the Supreme Court to tell states how to define their evidence rules).

142. In *Dowling*, 493 U.S. at 352-53, the Supreme Court held that admission of criminal disposition evidence was not “fundamentally unfair” because trial judges’ limiting instruction adequately guarded against prejudice. On analogous grounds, the Eighth, Ninth, and Tenth Circuits upheld the constitutionality of Federal Rules of Evidence 413 and 414, under which a defendant’s prior sexual misconduct is admissible to prove the crime at issue in the instant trial.

floating constitutional threat for courts and lawmakers, both state and federal.

This floating constitutional control over the domain of evidence contrasts starkly with the elaborated set of constitutional rules that the Supreme Court has imposed on procedures and decisions. Why is the Court's application of constitutional standards to evidence rules so exceptional, when the constitutional control over procedures and decisions is so pervasive?

Constitutional doctrine that extends to procedure and decisions unmistakably identifies the Supreme Court's agenda in civil and criminal adjudication. The Court has exercised its constitutional power in both areas to entrench its preferred conceptions of justice and fairness in risk-allocation. The Court's agenda, however, can be subverted by lawmakers and judges acting in the constitutionally unprotected domain of evidence. Lawmakers and judges disagreeing with the Court's agenda may produce evidential rules and rulings that effect a different allocation of the risk of error. Because evidence rules escape constitutional scrutiny, such dissenters have enough room to maneuver.

Consider criminal adjudication. There, the Supreme Court's agenda is to protect defendants against erroneous conviction. The "equal best" standard (or its conceptual equivalent) determines the level of required protection. Now consider a lawmaker willing to subvert this standard. To this end, the lawmaker could abolish the corroboration requirement for confessions<sup>143</sup> and for accomplice

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*See* United States v. LeMay, 260 F.3d 1018, 1031 (9th Cir. 2001) (holding that Rule 414 does not violate Due Process, Equal Protection, or the Eighth Amendment's ban on cruel and unusual punishment); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) (holding that Rule 413 does not violate Due Process and that neither Rule 413 nor 414 violates Equal Protection because trial judges' discretion under FED. R. EVID. 403 to exclude excessively prejudicial evidence adequately protects defendants against prejudice); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (holding on similar grounds that Rule 413 does not violate Due Process); *see also* Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1517 (2005) (supporting the proposition that Federal Rules of Evidence 413 and 414 and their state equivalents violate due process, but observing that "it would be foolish for those who are concerned about the reach of these rules . . . to count on a successful due process challenge").

143. *Cf.* State v. Polly, 657 N.W.2d 462, 466 (Iowa 2003) (holding that "a confession standing alone will not warrant a criminal conviction unless other proof shows the defendant committed the crime"); *Opper v. United States*, 348 U.S. 84, 89 (1954) (noting that confession made by the accused needs corroborating evidence to serve as the basis for a conviction); N.Y. CRIM. PROC. LAW § 60.50 (McKinney 2006) ("A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.").

testimony,<sup>144</sup> permit the admission of evidence of defendants' prior crimes,<sup>145</sup> and allow adjudicators to find the defendant guilty of a crime based on a DNA statistic alone.<sup>146</sup> None of these hypothetical rules unmakes the requirement that the prosecution prove the defendant's guilt beyond a reasonable doubt. Under these rules, adjudicators still have to acquit the defendant in the face of a reasonable doubt as to whether "he did it." Nor do any of these rules erode the defendant's right to participate in her trial. The defendant is able to cross-examine prosecution witnesses, challenge the credibility of any evidence, call her own witnesses, and adduce other evidence that may exonerate her. Therefore, the new rules do not increase the decisional and participatory risks for criminal defendants. Their effect is different, yet still detrimental, to innocent defendants. The rules weaken the evidential base on which a person may be found guilty "beyond a reasonable doubt" and, in doing so, increase the defendant's informational risk.

These deviations from the "equal best" standard impact evidence, as opposed to procedure and decision. They increase the defendant's informational risk without increasing the participatory and decisional risks. In the domain of evidence, however, the "equal best" standard has no formal footing. The floating constitutional threat is the only protection that the defendant can invoke, although it does not help him. While the new rules are problematic, they do not fall into the "fundamental unfairness" category. They hurt defendants badly in several ways, but still do not allow the prosecution to obtain convictions by relying on evidence known to be false. The defendant, therefore, would not be able to demonstrate that these rules offend "fundamental conceptions of justice." Of course, he may argue that the rules subvert the Supreme Court's risk-allocating agenda, but this argument can only demonstrate that the prevalent constitutional doctrine is underinclusive. The new evidence rules pass constitutional muster.

## II. THE CASE FOR CONSTITUTIONALIZING EVIDENCE

This Part of the Article develops a theory calling for the imposition of tight constitutional control on evidence rules. Because

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144. *Cf.* 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 38, at 239 & n.12 (15th ed. 1993 & Supp. 2007) (attesting that "it is now commonly required that the accomplice's testimony be corroborated," and citing statutes and case law from two dozen states).

145. *Cf.* FED. R. EVID. 404(a) (providing that prior misconduct is generally inadmissible to prove an action in conformity).

146. Compare with the opposite holdings in cases cited *infra* note 284.

evidence rules apportion informational risks, they must align with the constitutional doctrines allocating the risk of error in the procedural and decisional domains. The apportionment of informational risks must satisfy the same constitutional criteria that control the allocation of decisional and participatory risks. The current “fundamental unfairness” criterion is too narrow to secure this alignment.

This theory also examines and criticizes the conventional understanding of evidence rules as marginal and operationally insignificant. This conventional understanding provides a partial explanation of the “fundamental unfairness” criterion. Arguably, this criterion is residual and exceptional because evidence rules are residual and exceptional, too. These rules constitute exceptions to free proof—a regime that allows judges and juries to determine facts by exercising their ordinary reasoning skills without regulation from the law. Again, the need to constrain adjudicators arguably arises only in connection with procedures and decisions, as these may systematically skew the risk of error in a constitutionally wrong direction. The Supreme Court therefore imposes tight constitutional control on procedures and decisions, while it is content to possess only an exceptional and residual power to regulate evidentiary rules.

These arguments challenge my theory. Their conventional wisdom status makes them eligible for a detailed discussion in Section A below. There, I demonstrate that these arguments are unsustainable. Evidence rules allocate the risk of error as much as procedural and decisional rules do. Evidence rules, therefore, are similarly infused with political morality and require the same measure of constitutionalization. If people deserve constitutional protection against risks of error that attach to procedures and decisions, they ought to be protected against informational risks as well. There is no principled argument by which to separate the allocation of informational risks from the apportionment of decisional and participatory risks.

My theory combines positive and normative arguments. I postulate, rather than prove, that the Supreme Court’s vision of how to allocate the risk of error in civil and criminal cases is correct. Based on this postulation, I examine the desirability of the constitutional requirement that evidence rules align with that vision. My arguments in favor of this alignment are normative, perhaps even exceedingly so. For the time being, I ignore federalism and other forces operating against the alignment. As Part III explains, these forces turn what could be a formal constitutional law of evidence into an informal practice.

*A. Marginalization of Evidence Rules*

The marginalization of evidence rules is both a widespread and conspicuous phenomenon. This phenomenon hallmarks four distinct areas of the law, each of which is a manifestation of the rules' perceived marginality. Under this perception, a rule that controls evidential admissibility or interposes a corroboration requirement has only a minor significance for the legal system. Occasionally, such a rule may determine the outcome of a particular trial, but it rarely affects the workings of the system as a whole.

The first area is evidence law itself. Evidence rules, as conventionally understood, are rare and unsystematic exceptions to judges' and juries' free evaluation of evidence.<sup>147</sup> The second area is the quasi-constitutional<sup>148</sup> doctrine of *Erie*,<sup>149</sup> which categorizes evidence rules as predominantly not outcome determinative.<sup>150</sup> This characterization treats evidence rules as a trial technology that generally does not determine the outcomes of diversity cases adjudicated by federal courts. Based on this characterization, the *Erie* doctrine designates federal rules to govern evidentiary matters, as opposed to the state laws that *actually* decide the case. The third area is the Ex Post Facto Clause.<sup>151</sup> The Supreme Court interprets this clause as extending solely to *substantive* matters—including rules of decision, such as standards and burdens of proof—but not to rules that regulate evidential adequacy.<sup>152</sup> The fourth area is the Commerce Clause.<sup>153</sup> This clause is construed by the Court as authorizing

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147. See, e.g., MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 149 (1997) (describing and predicting dissipation of evidence rules); Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437 (2000) (describing, explaining, and criticizing the marginalization of evidence rules); see also WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 211-12 (2d ed. 2006) ("In one of our classics of literature, *Alice in Wonderland*, one of the characters is the Cheshire Cat who keeps appearing and disappearing and fading away, so that sometimes one could see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all. In practice, our rules of evidence appear to be rather like that." (footnote omitted)).

148. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 605 (1992) (articulating "quasi-constitutionalism" as explaining federal courts' diversity jurisdiction); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 206 (2006) (categorizing the *Erie* doctrine as quasi-constitutional); see also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 700-06 (1974) (discussing the constitutional foundations of *Erie*).

149. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

150. See *infra* notes 174-182 and accompanying text.

151. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

152. See *Carmell v. Texas*, 529 U.S. 513 (2000).

153. U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to regulate interstate commerce).

Congress to enact special evidence rules that advance *substantive* federal goals in state courts<sup>154</sup>—recently exemplified by a rule that protects the confidentiality of specified information<sup>155</sup>—as opposed to garden-variety rules that regulate the course of proof in state courts.

These understandings belittle the significance of evidence rules by treating them as mere aids to factfinding. Further, the assumption is that factfinding is a predominantly epistemic activity driven by the factfinders' common-sense reasoning, experience, and logic. Accordingly, evidence rules affect this activity only on the margins, by introducing the proper adjudicative adjustments into the accepted epistemic methodology. Evidence rules consequently affect court decisions only in exceptional cases, typically by suppressing crucial evidence on substantive policy grounds.<sup>156</sup> When evidence rules have this exceptional effect, however, the law categorizes them as substantive rather than evidential.<sup>157</sup> Burdens and standards of proof also fall into the substantive category, as they go directly into the adjudicators' final decision.<sup>158</sup> Most evidence rules do not have these effects and thus are categorized as marginal or even technical. My present goal is to show that these understandings are incorrect.

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154. See *Pierce County v. Guillen*, 537 U.S. 129, 146-47 (2003) (upholding constitutionality of federal statute, 23 U.S.C. § 409, making privileged, and protecting from disclosure and admission into evidence in state courts, any "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites . . . [pursuant to the above statute] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds"); see also *Felder v. Casey*, 487 U.S. 131, 138-42 (1988) (holding that state courts entertaining a federal cause of action ought to adjust their procedures so that the underlying federal goal is achieved and the federal right is protected); *Brown v. Western Ry. Co. of Ala.*, 338 U.S. 294, 296 (1949) (holding in relation to state procedures that a "federal right cannot be defeated by the forms of local practice").

155. See *Guillen*, 537 U.S. at 146-47.

156. As in *Guillen*, this is what evidentiary privileges typically do. See 1 MCCORMICK, *supra* note 16, § 72 (explaining that while rules of privilege inhibit the factfinding process, they are warranted because they "protect the interests and relationships which . . . are regarded as of sufficient social importance to justify some sacrifice of availability of evidence").

157. See Ely, *supra* note 148, at 724-27 (attesting that privileges are substantive rules); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 133 (2002) (same); Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 373 (1969) (same).

158. See *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 20-21 (2000) ("Given its importance to the outcome of cases, we have long held the burden of proof to be a "substantive" aspect of a claim." (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 271 (1994); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942))). For a general theoretical account of proof burdens' substantive nature, see Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980).



### 1. Marginalization of Evidence Rules by the Law of Evidence

Evidence law has a structure of rules, on the one hand, and unregulated factfinding or “free proof,” on the other. Under the conventional view, free proof is prevalent, while evidence rules are marginal exceptions.<sup>159</sup> Adjudicative factfinding, therefore, is perceived as a predominantly epistemic endeavor.<sup>160</sup> Factfinders determine facts by common sense, logic, and experience. Their decisions are affected by a few evidentiary rules that facilitate factfinding and by even more exceptional rules that promote goals unrelated to factfinding. Factfinders exercise their judgment under the controlling burdens of proof. Because law has “no mandamus to the logical faculty”<sup>161</sup>—and presumably to the epistemological faculty as well—it cannot control this endeavor. As such, the conventional view further marginalizes evidence rules by consolidating their exceptions. According to this view, these exceptions reinstate free proof.

This coordinated silencing of the legal establishes the dominance of the epistemological. Evidence rules aligned with the prevalent epistemology do not disturb its proclaimed dominance in factfinding, while evidence rules that remain unaligned are categorized as outliers. The conventional understanding of evidence rules is thus founded on assimilation and exile.

This understanding is flawed.<sup>162</sup> Any rule of evidence that shapes the content of factfinders’ evidential base allocates informational risks. When factfinders are free to use any evidence, they are also free to apportion informational risks as they deem appropriate. Consider the following hypothetical case:<sup>163</sup> A corrections facility accommodating 1,000 inmates experiences a riot conducted by 999 inmates who kill a number of corrections officers. One inmate

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159. See sources cited *supra* note 147.

160. For recent statements of this view, see Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 LAW & PHIL. 321, 321 (2005) (calling the trial a “fundamentally epistemological event”); Mike Redmayne, *The Structure of Evidence Law*, 26 OXFORD J. LEGAL STUD. 805, 805-07 (2006) (reviewing STEIN, *supra* note 8) (describing adjudicative factfinding as determination of probabilities on factual grounds).

161. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 314 n.1 (1898).

162. See STEIN, *supra* note 8, at 64-140 (demonstrating that allocation of the risk of error by evidence rules is pervasive); see also Ronald J. Allen, *Laudan, Stein, and the Limits of Theorizing About Juridical Proof*, 27 LAW & PHIL. (forthcoming 2008) (on file with Vanderbilt Law Review) (critiquing the present author’s evidence theory and its “top-down” methodology while accepting its key point about the pervasiveness of risk-allocation).

163. This example is adapted from Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192-93 (1979).

stood against the wall and did not participate in the riot. This inmate is unidentifiable, and so every inmate accused of participating in the riot will claim to be him. Subsequently, each of the 1,000 inmates is accused of murdering the officers.

The probability of guilt in each criminal case equals 0.999, which surpasses the conviction threshold set by the “beyond a reasonable doubt” rule.<sup>164</sup> Factfinders, however, have no evidence on which to distinguish between the inmates who participated in the riot and the inmate who did not. This lacuna creates an informational risk, altogether separate from the decisional risk allocated by the probability rule. The two risks are different because one relates to the rule setting the probability on which factfinders must find the defendant guilty, while the other attaches to the information on which factfinders determine this probability. The former risk is decisional, while the latter is informational.

The quality of the evidence that factfinders use in their decisionmaking determines the informational risk imposed on the losing party.<sup>165</sup> Because factfinders never have complete information, informational risks are present in every case. Burdens of proof—rules of decision that employ quantitative probabilistic criteria (“preponderance,” “beyond a reasonable doubt,” and “clear and convincing”)—cannot control those risks. These quantitative criteria cannot account for the informational risk—a risk of erroneous decision originating from the incompleteness and limited dependability of the information on which the probability of the case is calculated. An informational risk accompanying the factfinder’s probability assessment determines the assessment’s epistemic quality. The risk’s extent indicates the strength of the probability assessment, which, once again, depends on the deficiencies of the evidence.<sup>166</sup>

This qualitative criterion has no quantitative effect on the probability assessment.<sup>167</sup> Because informational risks are ubiquitous, if any such risk could unmake the factfinders’ determination of a preponderance or beyond a reasonable doubt, factfinding would become impossible. Moreover, the presence of an informational risk is not a good reason for decreasing the probability that factfinders otherwise could find on the existing evidence. Missing evidence could

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164. See, e.g., Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 173 (1997) (examining probability requirements for convictions under which a 0.999 probability of guilt is sufficient).

165. See STEIN, *supra* note 8, at 40-49, 80-91 (demonstrating how the quality of the evidence that factfinders use affects allocation of the risk of error).

166. *Id.* at 80-91 (conceptualizing informational risk as probabilities’ “weight”).

167. *Id.*

increase that probability as well, and there is no way to know it.<sup>168</sup> This, indeed, is the essence of the uncertainty problem.

The allocation of informational risks affects court decisions that define people's liberties and properties. This allocation, therefore, needs to have a moral and political warrant. However, the conventional view suppresses this moral and political aspect of adjudicative factfinding based on a theory that denies the existence of informational risks. According to this artificial theory, factfinders properly can account for any evidential deficiency in applying the burdens of proof.<sup>169</sup> By branding factfinding an epistemic endeavor, this theory produces two effects. Evidence rules that respond to the chosen epistemological criteria appear "normal," while other evidence rules are classified as "extraneous" to factfinding. Moreover, these "extraneous" rules appear exceptional because most evidence rules can be rationalized in epistemological terms.

As I have explained, these appearances are false. Understanding that adjudicative factfinding is pervasively moral and political has a profound normative consequence. This understanding calls for a re-rationalization of evidence rules. Rules that control evidential adequacy allocate the risk of error.<sup>170</sup> They have this effect when they classify evidence as admissible, when they keep evidence from factfinders by categorizing it as inadmissible, and when they prescribe which evidence requires corroboration.<sup>171</sup> Free proof is an evidence rule, too: one that allows factfinders to apportion the risk of error as they deem fit.<sup>172</sup> Failure to acknowledge it will not make the risk of error disappear.

Allocation of the risk of error by evidence rules is pervasive.<sup>173</sup> And this pervasiveness calls for the installation of tight constitutional control over evidence rules. Constitutional doctrine guards against

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168. For such cases, probability theory offers the "indifference principle"—a technical assumption that the information unavailable to factfinders is not slanted in either direction. See L. JONATHAN COHEN, AN INTRODUCTION TO THE PHILOSOPHY OF INDUCTION AND PROBABILITY 43-47 (1989); JOHN MAYNARD KEYNES, A TREATISE ON PROBABILITY 41-64 (1921). This principle relies on the mutually offsetting effect of unknown possibilities that unfold in a long sequence of identical trials. For a single case, in which the event in question either occurred or did not, this randomizing strategy is inappropriate. See STEIN, *supra* note 8, at 40-49.

169. For a recent, but still unsustainable, layout of this theory, see Redmayne, *supra* note 160, at 807-15.

170. See STEIN, *supra* note 8, at 107-40 (arguing that "[l]egal regulation of adjudicative factfinding needs to be tightened" in order to control the apportionment of the risk of error).

171. *Id.* at 118-22.

172. *Id.*

173. *Id.* at 133-40; see also Allen, *supra* note 162 (manuscript at 44) (accepting the view that "rules of evidence do not just do what they purport to do; they also allocate error, like it or not").

impositions of the risk of error by adjudicative procedures and decisions. To achieve its goals, it also should guard against similar impositions of risk by the rules of evidence.

## 2. Marginalization of Evidence Rules Under *Erie*

Under the *Erie* doctrine,<sup>174</sup> federal courts adjudicating diversity disputes must apply the state law that controls the case.<sup>175</sup> The controlling status attaches both to substantive laws and to any procedural arrangement with a substantive<sup>176</sup> or “significant” effect on the litigation’s outcome.<sup>177</sup> This outcome-determinative category<sup>178</sup> includes all decisional rules that fix the standards and allocate the burdens of proof.<sup>179</sup> Evidentiary privileges that suppress probative evidence on confidentiality and privacy grounds fall into the same substantive category.<sup>180</sup> All other evidentiary rules—specifically those that govern the admissibility of evidence—are expelled from the outcome-determinative category.<sup>181</sup> This expulsion is based on the

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174. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

175. Ascertainment of that law relies on the choice-of-law principles. See FRIEDENTHAL ET AL., *supra* note 13, § 4.5.

176. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (rejecting the substantive-procedural divide as a criterion for identifying the applicable law under *Erie*).

177. *Id.* As explained by FRIEDENTHAL ET AL., *supra* note 13, § 4.3, at 212, *Guaranty Trust Co.* viewed *Erie* as “an attempt to achieve vertical uniformity, that is, the consistent application of local substantive law in both state and federal courts within the same state,” as well as to “eliminate a major incentive for litigants of diverse citizenship to forum shop.”

178. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (applying the “outcome-determination” test, but not “without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws”); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427-28 (1996) (stating and applying the “outcome-determination” test in relation to the “twin aims” of *Erie* articulated in *Hanna*); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) (same).

179. This rule is well-settled. See *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446-47 (1959) (holding that, under *Erie*, state law controls the allocation of the burden of proof); *Palmer v. Hoffman*, 318 U.S. 109, 116-17 (1943) (same); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939) (same); *Monger v. Cessna Aircraft Co.*, 812 F.2d 402, 404-05 (8th Cir. 1987) (same); see also FED. R. EVID. 302 (providing that state law controls presumptions whenever it supplies a rule of decision for the case).

180. See FED. R. EVID. 501 (providing that state law controls all privileges whenever it supplies the rule of decision for the case); see also GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE § 10.2, at 324-25 (4th ed. 2006) (explaining that, in diversity cases, evidentiary privileges track the substantive law of the state).

181. See *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 470-72 (7th Cir. 1984) (classifying FED. R. EVID. 407, which excludes evidence of subsequent remedial measures, as procedural, and consequently applicable in diversity cases, despite having “substantive consequences by virtue of affecting incentives to take safety measures after an accident occurs”); *In re Air Crash Disaster near Chicago*, 701 F.2d 1189, 1193 (7th Cir. 1982) (“[T]he Federal Rules of Evidence govern the admissibility of evidence in diversity cases.”); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 n.14 (5th Cir. 1982) (“[F]ederal law governs procedural matters . . . including the

theory that the rules' effect on the outcome of the case is not significant enough.<sup>182</sup>

This doctrine marginalizes evidence rules that allocate informational, as opposed to decisional, risks. However, as demonstrated above, informational and decisional risks have similar effects. There are many good reasons—including predictability, uniformity, and economy of scale—for applying federal admissibility rules in diversity cases. An unprincipled differentiation between informational and decisional risks, however, is not among those reasons.<sup>183</sup>

### 3. Marginalization of Evidence Rules Under the Ex Post Facto Clause

The Supreme Court interprets the Ex Post Facto Clause<sup>184</sup>—the constitutional prohibition of retroactive legislation—as extending solely to substantive rules and to the rules of decision formulated as burdens of proof.<sup>185</sup> In *Carmell v. Texas*, the Court applied this interpretation to an evidence rule.<sup>186</sup> The Court held that a corroboration requirement for a prosecution witness—a rape complainant<sup>187</sup>—is part and parcel of the prosecution's burden of

admissibility of evidence.” (internal citations omitted)); *cf.* *Morton v. Brockman*, 184 F.R.D. 211, 215 (D. Me. 1999) (holding that a Maine statute suppressing evidence of nonuse of seatbelts in product liability actions against car manufacturers derives from a substantive policy and consequently trumps federal evidence rules).

182. *See, e.g.*, Ronan E. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 293-95 (1962) (categorizing hearsay, opinion, and other admissibility rules as not outcome determinative, and as consequently belonging to the domain of federal law, under *Erie*); Mason Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692, 709 (1963) (identifying exceptions to the hearsay rule as not outcome determinative because there is “no assurance that the trier of fact . . . will believe the evidence” admitted under those exceptions).

183. *Cf.* *Swift*, *supra* note 147, at 2471-76 (arguing that many admissibility rules are outcome determinative).

184. U.S. CONST. art. I, § 9.

185. *See Calder v. Bull*, 3 U.S. 386, 391 (1798) (“[I] do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease [sic] the punishment, or change the rules of evidence, for the purpose of conviction.”); *see also Carmell v. Texas*, 529 U.S. 513, 530 (2000) (citing *Calder v. Bull* to support the proposition that the Ex Post Facto Clause prohibits retroactive changes of evidential sufficiency requirements).

186. 529 U.S. at 530.

187. The Supreme Court examined the constitutionality of a Texas statute modifying a corroboration arrangement for cases of rape and sexual assault. Under the old arrangement, a defendant could not be convicted on his complainant's testimony if it were not corroborated by the complainant's prompt outcry or by evidence extraneous to her testimony. The old statute exempted from this arrangement complainants below fourteen years of age. The new statute, TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2000), as it was then, raised the exempted complainants' age to under eighteen. The statute effectively provided that, from then on, a jury could convict the defendant on the uncorroborated testimony of a fourteen- to seventeen-year-old

proving the defendant's guilt beyond all reasonable doubt.<sup>188</sup> Consequently, this requirement cannot be removed from prosecutions for crimes allegedly committed prior to its abolition or alteration.<sup>189</sup>

In justifying this conclusion, the Court distinguished between the unprotected and the protected categories of evidence rules. The Ex Post Facto Clause does not extend to the unprotected category of rules: rules that determine what evidence is admissible. By contrast, the protected category consists of rules that fix the level of proof that incriminating evidence must reach in order to allow adjudicators to convict the defendant. The Court held that modifying these rules retroactively violates the clause.<sup>190</sup>

The dissenting Justices accepted this distinction, but reached the opposite conclusion.<sup>191</sup> According to them, the corroboration requirement sets a formal credibility condition for basing a defendant's conviction on the testimony of a single witness.<sup>192</sup> This requirement is identical to conditional admissibility. The dissent thus found that the corroboration requirement is not part of the criminal burden of proof constitutionally protected by the Ex Post Facto Clause.<sup>193</sup>

The dissent and the Court's opinion are both flawed. A rule that allows the prosecution to use evidence that previously was deemed inadequate—say, uncorroborated testimony of a rape complainant<sup>194</sup>—in order to satisfy a demanding proof standard for convictions is functionally equivalent to a rule that lessens the standard of proof to achieve the same effect. The first measure reallocates the informational risk, while the second reallocates the decisional risk. Both measures, however, achieve the same substantive result.

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complainant if it found the testimony credible beyond all reasonable doubt. *Carmell*, 529 U.S. at 518-19.

188. *Carmell*, 529 U.S. at 530 ("Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony *and* corroborative evidence.").

189. *Id.* at 539-47.

190. *Id.*

191. *Id.* at 553 (Ginsburg J., dissenting).

192. *Id.*

193. *Id.* at 560-61 ("Under both the old and new versions of the statute, the applicable standard is proof beyond a reasonable doubt.").

194. I do not discuss here the merits of this rule. See generally Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 977-86 (2004) (explaining persuasively the corroboration requirement for rape accusations as driven by societal bias against complainants).

The Court and the dissent track one of the fundamentals of *Erie*: the distinction between evidentiary rules that are and are not outcome determinative.<sup>195</sup> While a rule of evidence classified as outcome determinative under *Erie* is substantive enough to be protected by the Ex Post Facto Clause, an evidentiary rule outside this category is not, and therefore is eligible for retroactive removal or modification. The Court classified the corroboration requirement as outcome determinative because it defined it as an addition to the prosecution's burden of proof. The dissenting Justices, however, classified it as not outcome determinative because it operates similarly to a garden-variety rule that controls the adequacy of evidence. For reasons already given, evidential adequacy rules have the same outcome-determinative effect as burdens and standards of proof.<sup>196</sup> Yet based on both the Court's and the dissent's perspective, the outcome-determinative category includes only those rules of evidence that allocate decisional risks. This perspective marginalizes informational risk and all evidentiary rules that allocate it.

#### 4. Marginalization of Evidence Rules Under the Commerce Clause

The Constitution's fundamental premise holds that, subject to due process and a few other safeguards,<sup>197</sup> states are free to design evidence rules for their own courts.<sup>198</sup> Federal actions adjudicated in state courts are the only area in which exceptions to this general principle are allowed.<sup>199</sup> But what happens in the case of federal interests, as opposed to actions?

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195. See *supra* notes 178 and accompanying text.

196. Classifying evidentiary rules, along with the standards and burdens of proof, as outcome determinative is still a far cry from protecting them against retroactive changes. Evidential entitlements attach to a person only at a trial in which they can be activated. Before that time, a person holds no evidential entitlements whatsoever. At his trial, moreover, he captures only those evidential entitlements that exist at that time. Changes in the law of evidence that preceded a person's trial therefore ought not to be invalidated on retroactivity grounds. They simply are not retroactive to begin with. For full explanation of this point, see STEIN, *supra* note 8, at 17-25.

197. These are enumerated above in Part I.

198. See *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."); *Patterson v. New York*, 432 U.S. 197, 201 (1977) (stating the principle that "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958))); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (stating that the Supreme Court has no constitutional warrant to dictate evidence rules to states).

199. See *supra* note 154.

Although application of an evidence rule in a state proceeding is an intrastate activity, it may also affect interstate commerce. For example, a state may adopt an evidentiary rule that effectively eases the proof of a product defect in a car by shifting the risk of error as to whether the car was defective to its manufacturer. Yet by doing so, this rule may increase car prices across the United States. Accordingly, Congress might exercise its authority under the Commerce Clause<sup>200</sup> to interpose a uniform proof requirement that it considers well balanced. As another example, consider a rule, pertinent to a state tort action, which allows the disclosure and admission into evidence of any official report documenting the accident history of a particular state road.<sup>201</sup> This rule may discourage the preparation of official accident reports, as states face liability for accidents that occur at hazardous locations.<sup>202</sup> But because safe state roads are instrumental to interstate commerce,<sup>203</sup> Congress may be willing to encourage the compilation of road-improving data by creating a special evidentiary privilege for official accident reports.

The evidentiary privilege under 23 U.S.C. § 409 does exactly that.<sup>204</sup> In *Guillen*, the Supreme Court extended this privilege to road safety reports and data collections conducted in furtherance of federal programs aimed at enhancing safety on state roadways.<sup>205</sup> The Court acknowledged that the privilege assisted “state and local governments in reducing hazardous conditions in the Nation’s channels of commerce.”<sup>206</sup> To avoid excessive incursion into state court procedures<sup>207</sup> and inhibiting the ascertainment of the truth in tort actions,<sup>208</sup> the Court confined the privilege to this narrow federal

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200. U.S. CONST. art. I, § 8.

201. *See, e.g.*, *Getchell v. Lodge*, 65 P.3d 50, 55-58 (Alaska 2003) (holding that police officers’ accident reports are generally admissible under Alaska evidence rules).

202. *See Pierce County v. Guillen*, 537 U.S. 129, 133-34 (2003) (taking notice of the report to Congress by the Secretary of Transportation, according to which “the States feared that diligent efforts to identify [hazardous] roads . . . would increase the risk of liability for accidents that took place at hazardous locations before improvements could be made”).

203. *See id.* at 147 (finding that legislation that would result in “greater safety on our Nation’s roads” could be interpreted as “[aiming] at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce,” and therefore “[falling] within Congress’ Commerce Clause power”).

204. 23 U.S.C. § 409 (2000) (amended 2004).

205. *Guillen*, 537 U.S. at 146-48.

206. *Id.* at 147.

207. *Id.* at 146-47.

208. *Id.* at 144-45.



objective.<sup>209</sup> This confinement shields the Court from a federalist accusation of writing evidence rules for state courts.<sup>210</sup>

*Guillen* represents further, albeit incorrect, support of the spurious notion of “substantive effect” that separates different evidentiary rules. *Guillen*’s interpretation of the Commerce Clause singles out state rules of evidence that run expressly against federal interests in interstate commerce. Under *Guillen*, it is only those rules that Congress can override constitutionally; other state evidence rules are outside the reach of Congress, presumably for lack of substantive effect.

To understand the inaccuracy of this view, hypothesize that after *Guillen*, Washington courts develop a rule instructing juries in tort actions against the State to draw adverse inferences from the State’s failure to adduce all safety and accident reports pertaining to the roadway in question. This rule would likely be categorized as evidential rather than substantive. It is unlikely that the *Guillen* doctrine would identify it as directly frustrating the federal interest in the production of road safety reports. The new rule surely undercuts that interest by creating a chilling effect almost identical to that of full documentary disclosure. But it achieves this effect indirectly, by shifting the risk of error in tort actions to the State. Should that make a difference?

Maybe it should, as the Commerce Clause jurisprudence inquires whether congressional enactment trespasses into an area traditionally designated for state sovereignty as opposed to regulating a traditional federal domain.<sup>211</sup> There is nothing wrong with the Supreme Court supporting tradition. Adherence to tradition, however, is not a good reason for maintaining fictional distinctions in the law and passing them off as real. Evidence rules that allocate the risk of error in state courts can affect federal interests regardless of whether they are classified as federally significant. Whether Congress should exercise control over such rules is a separate issue.

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209. *Id.* at 146-48.

210. This accusation is still not without merit. See Lynn A. Baker, *Lochner’s Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727, 734-35 (2005) (“Because the statute at issue regulated apparently non-commercial activity—the discovery and introduction of evidence in civil litigation—and interfered with a traditional area of state sovereignty—state judicial processes, one might reasonably have expected the States’ Rights Five [the late Chief Justice Rehnquist and Justices Kennedy, O’Connor, Scalia, and Thomas] to hold the statute unconstitutional . . .” (footnotes omitted)).

211. As explained in *United States v. Lopez*, 514 U.S. 549, 564 (1995). See also Baker, *supra* note 210, at 762 (underscoring the pervasive role of tradition in the Supreme Court’s interpretation of the Commerce Clause).

*B. Constitutionalizing Evidence*

The effect of evidentiary rules on the outcomes of both civil and criminal trials is significant. Every trial, as well as every plea bargain and settlement “in the shadow of the law,”<sup>212</sup> is profoundly affected by those rules and how they allocate the risk of error. Because the allocation of informational risk is as constitutionally significant as the apportionment of the risk of error by the constitutional rules of procedure and decision, complete alignment of the three domains appears to be a constitutional necessity. At a minimum, rules that determine evidential adequacy for criminal cases must not increase the defendant’s informational risk above the level set by the rules that the Supreme Court develops for federal trials.<sup>213</sup> In civil cases, evidence rules should not increase the plaintiff’s informational risk to benefit the defendant, or vice versa. They may do so only in cases in which a compelling—and constitutionally reviewable—governmental interest calls for a different allocation of the risk.

The alternative to this constitutional alignment is for lawmakers to develop any evidentiary rules that their politics might require. Section I.C. has identified the implications of this lawmaking power on criminal trials.<sup>214</sup> As an example from civil litigation, consider a hypothetical rule that reverses the burden of proof in product liability actions. Specifically, this rule requires that out-of-state manufacturers prove by a preponderance of the evidence that their products are not defective “in any tort action filed by a resident of the State.” This discriminatory rule violates due process. However, what about a rule prescribing that “any testimony of a product’s consumer stating her dissatisfaction with the product is admissible against the manufacturer”? This rule eliminates the expert witness requirement for plaintiffs. But unlike the previous rule, it does not reverse the burden of proof to the detriment of an out-of-state defendant. Because the rule in question apportions an informational risk, as opposed to the decisional risk allocated by the burden of proof, it cannot be categorized as fundamentally unfair and, consequently, does not violate due process.<sup>215</sup> But it does confer an unfair evidential

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212. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (coining the “shadow of the law” metaphor).

213. See *infra* Part III.C.

214. See *supra* text accompanying notes 143-146.

215. The manufacturers’ constitutional complaint would also face a threshold objection: the “fundamental unfairness” criterion, as presently defined, applies in criminal cases alone. See *supra* notes 121-142 and accompanying text.

advantage upon plaintiffs, who happen to be residents of the state.<sup>216</sup> Constitutional alignment, therefore, seems to be necessary in this area as well.

### III. THE INFORMAL CONSTITUTIONAL LAW OF EVIDENCE

Constitutional law pays little attention to informational risks. The Supreme Court's decisions have installed tight constitutional control over the apportionment of participatory and decisional risks alone. These decisions implement the Court's moral vision of how to allocate the risk of error in criminal and civil trials. The Court's failure to impose this vision on the rules of evidence that allocate informational risks—and that bring about the same consequences as participatory and decisional risks—therefore gives the impression of a constitutional oversight. What else could it be, given the marginalization of evidentiary rules that transpires from the *Erie* doctrine, from the Court's interpretation of the Ex Post Facto and Commerce clauses, and, indeed, from evidence law itself?

This Part of the Article demonstrates that the “constitutional oversight” hypothesis is too simplistic. As an initial observation, it is simply hard to believe that Supreme Court Justices do not see the relationship between evidence rules and the risk of error. More crucially, the oversight hypothesis ignores a number of factors that explain the absence of formal constitutionalization in the area of evidence. First, the Supreme Court maintains a floating constitutional threat to void any rule of evidence that brings about fundamental unfairness. The Court pledged to carry out this threat only in extreme cases, but has made no interpretive commitments as to what “fundamental” means. The “fundamental unfairness” category, therefore, has the potential for expansion. Second, state evidence rules generally conform to the Supreme Court's criteria for risk allocation. They deviate from these criteria only in special cases in which the

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216. This discussion is inspired by a real-life example: *Blankenship v. General Motors Corporation*, 406 S.E.2d 781 (W. Va. 1991), a case in which the West Virginia Supreme Court adopted the “crashworthiness” doctrine for product liability actions against car manufacturers. In formulating the proof requirements, the court ruled that the plaintiff's evidence only needed to show “a defect that was a factor in causing some aspect of the plaintiff's harm.” *Id.* at 786. Based on this evidence, a jury now can award the plaintiff full compensation. The court reasoned that it adopts this rule on the basis of “the same actuarial considerations that have prompted us finally to adopt the doctrine of crashworthiness—namely, that we [West Virginians] are *already* paying for full coverage.” *Id.* The Court supplemented this reasoning by a candid remark that “[i]n any adversarial system where residents are pitted against non-residents, there will inevitably be a temptation to redistribute wealth in the direction of residents,” and that “[by] far the best tax is one imposed on a stranger who can't vote or otherwise retaliate.” *Id.* at 787 n.11. For further discussion of this decision, see *infra* notes 268-278 and accompanying text.

local interest for a different allocation of the risk of error is particularly strong. Most importantly, such deviations have low visibility. They affect the fate of individual litigants without attempting to rewrite constitutional law. Third, state evidence rules tend to align with the Federal Rules of Evidence, promulgated by the Supreme Court.

This constitutional equilibrium is not accidental. It arises from implicit understandings between the Supreme Court and state courts,<sup>217</sup> which are the result of power and culture. These understandings are produced by three different dynamics, analyzed in the sections below. I call these dynamics constitutional *détente*, constitutional culture, and federal safe harbors. These dynamics create understandings that produce a *de facto* constitutional law of evidence.

These dynamics also highlight the divergence of state and state judges' interests. Residents' well-being is of paramount interest to the state and its elected politicians. The state, therefore, has a strong incentive to formulate a system of factfinding that helps prosecutors to convict criminal defendants<sup>218</sup> and enhances the residents' protection against fraud, bad products, and other hazards. This system's compliance with the Supreme Court's constitutional standards would depend solely on the Court's ability to enforce its standards against the state. This ability, as I explain below, is limited. No state, however, has taken advantage of this limited ability to develop a one-sided system of factfinding. While some state rules of evidence do single-mindedly promote residents' interests,<sup>219</sup> most of those rules are unbiased and largely align with the Court's criteria for risk allocation. My explanation of this phenomenon underscores the crucial involvement of state judges in the formation of the law of evidence. The meaning, the implications, and the constitutional validity of state rules of evidence are determined by state judges, whose values and incentives are different from those of state politicians.

For state judges, residents' well-being is significant, but not all-important. A judge's decisions determine her professional ethos and reputation. Making decisions perceived as correct and being reversed rarely is integral to garnering the respect of the legal community. For

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217. These understandings may also involve state legislators. Courts, however, are always the dominant players because no evidence rule can bypass them. Courts do not merely interpret and apply evidence rules; they also can void those rules on constitutional grounds.

218. *Cf.* CAL. CONST. art. I, § 28(d) (establishing people's "right to truth-in-evidence" by a constitutional demand that, generally, "relevant evidence shall not be excluded in any criminal proceeding" except under statute enacted by a super-majority in each house of the Legislature).

219. *See infra* Section III.A.

senior judges, judgeship is also an opportunity to participate in nationwide constitutional governance and dialogue.<sup>220</sup> Apart from enhancing a judge's reputation, this participation adds to her legacy as a judge.<sup>221</sup> For these reasons, doing the right thing has intrinsic value for state judges. This constitutional culture explains the congruence between many state evidence rules and the Supreme Court's agenda in risk-allocation. The power relationships with which my exposition begins do not tell the whole story.

### A. *Constitutional Détente*

The Supreme Court's preferences in allocating the risk of error determine the moral limits that the Court imposes on legislators and other courts. By imposing its criteria for risk-allocation, the Court protects those important interests that other political actors, including lower courts, tend to ignore.<sup>222</sup> This protection reflects the Court's independent vision of the good.<sup>223</sup>

The Supreme Court has the power to impose this vision on federal actors. The Court's Justices have lifetime tenures, and their decisions face no judicial review. The prospect of legislative overruling by Congress may impact the Court's decisions,<sup>224</sup> but in the area of constitutional decisionmaking, as opposed to statutory interpretation and common law, this prospect is unlikely.<sup>225</sup> Congress may threaten the Court with budgetary repercussions.<sup>226</sup> This threat, however, is

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220. See, e.g., J. Anthony Kline, Comment, *The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1093 (1995) (a senior California judge describing the "right to truth-in-evidence" provision of CAL. CONST. art. I, § 28(d) as threatening "the quality of American justice").

221. Cf. Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 165, 204 (1998) (observing that judges generally care about their reputation, esteem, and legacy).

222. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006), describes this account of the Supreme Court's constitutional jurisprudence as a view according to which "politics is to constitutional law as a disease is to the medicine that cures it."

223. I focus here on the Supreme Court's revealed preferences as exhibited by its decisions.

224. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390-97 (1991) (predicting this impact).

225. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 442-43 (2000) (declaring unconstitutional 18 U.S.C. § 3501, an attempt by Congress to repeal the exclusionary rule set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

226. Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1277 (2005); see also Eugenia Froedge Toma, *Congressional Influence and the Supreme Court: The Budget as a Signaling Device*, 20 J. LEGAL STUD. 131, 134-35 (1991) (arguing that congressional budgetary generosity toward the Supreme Court correlates with whether Congress likes the Court's decisions).

largely theoretical, and it hardly influences the Court's decisions.<sup>227</sup> The President's ability to dilute the Justices' power by appointing new Justices with rival agendas,<sup>228</sup> while more significant, is often ineffectual because vacancies rarely occur.<sup>229</sup>

State courts, in contrast, *can* undermine the Supreme Court's agenda.<sup>230</sup> Their judges have a strong political incentive to promote local interests, such as crime reduction, because failure to promote those interests may put the judge at risk of losing the next election.<sup>231</sup> Failure to expand residents' rights in product liability actions against out-of-state manufacturers also exposes judges to voter retaliation.<sup>232</sup> When protecting local interests, state courts can take advantage of the fact that the Court only reviews a very small number of cases. Accordingly, they can be massively noncompliant. Unable to review most non-complying decisions, the Court would then have to relax its constitutional criteria for state laws.<sup>233</sup>

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227. The political attitudes towards the Supreme Court are not uniform and change from Congress to Congress. This factor dilutes the threat of budgetary retaliation. John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 451 n.40 (1996). See also Nancy C. Staudt et al., *Judicial Decisions as Tax Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340, 1352-55 (2007) (carrying out a comprehensive empirical study establishing that, although Congress occasionally responds in a negative way to the Court's decisions, the number of positive Congressional responses, including codification of the Court's jurisprudence, is at least as high). With the federal judiciary as a whole, things are different. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1011-12 (2000) (observing that the federal judiciary is heavily dependent on Congress for resources).

228. Posner, *supra* note 226.

229. Any new appointment also goes through a partisan confirmation proceeding in the Senate. See generally Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988). The sitting Justices can strengthen the opposition to a rival nominee by issuing decisions that portray her agenda as a radical departure from the constitutional mainline.

230. Federal judges have no systemic incentives to do so and are also controllable by the Supreme Court's appellate power.

231. See, e.g., John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 87-89 (1986) (describing how conservative opponents waged a multimillion-dollar campaign that unseated three California Supreme Court Justices for being soft on crime).

232. See ERIC A. HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 67-94 (2006) (demonstrating empirically that partisan-elected judges tend to increase in-state plaintiffs' awards in tort actions against out-of-state corporate defendants).

233. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1649-51 (1995) (analyzing this dynamic). Collective action does not seem to be a big problem for state courts. See, e.g., Victoria A. Saker, *Federalism, The Great Writ, and Extrajudicial Politics: The Conference of Chief Justices, 1949-1966*, in FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS 131, 131 (Harry N. Scheiber ed., 1992) (discussing an organization of state chief judges formed in 1949 to wage "a 15-year crusade to trim the *habeas* jurisdiction of the federal courts").

Failure to comply with a Supreme Court precedent can prove costly, though. The disobedient judge faces the prospect of reversal, which is detrimental to her career.<sup>234</sup> Systematic deviation from what is perceived as the “law of the land” would also mark the judge as radical or idiosyncratic. These are not desirable images for most judges.<sup>235</sup> These prospects motivate state judges to keep the noncompliance weapon for unavoidable and politically critical conflicts with the Court. State judges are well aware that the Court is not interested in initiating constitutional wars that it is not certain to win. They also know how far the Court will go to avoid such a war.<sup>236</sup> The Court is willing to allow state judges space to promote local interests at the expense of its agenda. And this space has a constitutional name: federalism.<sup>237</sup>

This space is not unlimited. The Supreme Court must define its limits in order to protect its agenda and constitutional authority against open and systematic noncompliance. Such noncompliance not only could thwart the Court’s agenda but also could erode its authority by motivating further noncompliance. The Court therefore designates the federalist space for deviations that are silent, occasional, and relatively invisible. For a number of reasons, the Court cannot expressly negotiate this space with state courts. First, the Court needs to appear apolitical.<sup>238</sup> Second, it often is not possible to determine the boundaries of the federalist space before a real controversy arises.<sup>239</sup> Finally, the Court expects state courts to protect its agenda against divergent initiatives by state legislators. An express commitment to this effect would make a state court unpopular and politically

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234. See POSNER, *supra* note 107, at 543 (noting that judges are prestige maximizers and are sensitive to being reversed by a higher court); Posner, *supra* note 226, at 1271 (mentioning reversal rate among indicators of judicial promotion, which affects performance); see also Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767, 771 (2004) (“Lower federal court judges may fear reversal by a higher court and may harbor ambitions for higher office . . .”).

235. See Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 800 (2003) (“The common law method, which encourages a simultaneously respectful but open-minded attitude toward precedent, tends to rein in the most radically arrogant.”).

236. Cf. *Elkins v. United States*, 364 U.S. 206, 221 (1960) (“[A] healthy federalism depends upon the avoidance of needless conflict between state and federal courts.”).

237. See generally Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635 (2006).

238. See, e.g., Frederick Schauer, *Foreword: The Court’s Agenda—And the Nation’s*, 120 HARV. L. REV. 4, 57 (2006) (observing that the Supreme Court fosters appearance of “neutrality and political disinterest”).

239. See Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 198 (2000) (“All genuine federal systems are highly complex, contingent products of unique historical, social, and political forces.”).

vulnerable. The Court and state courts thus establish a workable balance through an implicit communication of mutual threats, promises, and commitments.<sup>240</sup> This balance and its benefits form a constitutional *détente* between the Court and state courts.

This *détente* explains the “fundamental unfairness” doctrine that otherwise appears underinclusive. By this doctrine, the Supreme Court signals to state courts that it will invalidate an evidence rule only when the rule openly defies its risk-allocating agenda. This signal is transmitted by the doctrine’s conventional understanding. According to this understanding, the doctrine bans only false testimony that the government suborns or induces<sup>241</sup> and evidence from which factfinders can draw no rational inferences against the defendant.<sup>242</sup> Such abuses of the process are too fundamental and too salient to condone. The Court thus signals that it will tolerate only invisible violations that promote state interests. For transparent violations, the Court retains the option to retaliate by expanding the “fundamental unfairness” category.<sup>243</sup> These signals define the federalist space for state courts. The Court makes those signals credible by incorporating them in the constitutional doctrine. State courts seize the federalist space but reciprocate by staying within the defined boundaries. They deviate from the Court’s agenda only in special cases, and they do so invisibly.<sup>244</sup>

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240. This account is inspired by Schelling’s theory of strategic communications. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 119-39 (1960) (identifying equilibrium-attaining dynamics between adversaries communicating implicitly by threats and commitments).

241. See *supra* notes 130-139 and accompanying text.

242. See *supra* note 140 and accompanying text.

243. The Court also maintains a threat to lay down “watershed rules” of constitutional criminal procedure. A single watershed rule can invalidate a large number of criminal convictions retroactively—a consequence that undermines the power and authority of state courts. But the Court has held that it will use its power to announce a watershed rule only in extreme circumstances that “implicate the fundamental fairness of the trial.” See *Teague v. Lane*, 489 U.S. 288, 312 (1989). Specifically, a watershed rule will apply retroactively on collateral review of convictions when it “alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction” and is necessary to prevent an “impermissibly large risk” of erroneous conviction. *Id.* at 311-13 (quoting *Mackey v. United States*, 401 U.S. 667, 693-94 (1971), and *Desist v. United States*, 394 U.S. 244, 262 (1969)); see also *Whorton v. Bockting*, 127 S. Ct. 1173, 1182-84 (2007) (applying *Teague*’s two-prong standard and denying the watershed status to *Crawford v. Washington*, 541 U.S. 36 (2004)); *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (reaffirming *Teague*’s two-prong standard for watershed rules). The watershed weapon thus can be perceived as a residual component of the strategic balance between the Supreme Court and state courts.

244. This understanding of the “fundamental unfairness” doctrine complements the theory of constitutional interpretation set forth in JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 13-15, 114-24 (2005), and articulated in Jed Rubenfeld, *The Paradigm-Case Method*, 115 *YALE L.J.* 1977 (2006). Rubenfeld’s theory distinguishes between “application understandings”—the framers’ and the Supreme Court’s



State courts deviate with the help of rules that control evidential adequacy. These rules allow judges to block evidence on unreliability grounds.<sup>245</sup> They also authorize judges to admit questionable evidence<sup>246</sup> and to suppress evidence that is generally trustworthy.<sup>247</sup> In doing so, the rules allocate informational risks without explicitly acknowledging this effect. Their application is fact-intensive: state judges always must consider the specifics of the evidence that they admit or block. These situation-specific decisions have low visibility. Adjudicators combine these decisions with orderly applications of the conventional burdens of proof and rules of procedure. These applications display constitutionally adequate allocations of decisional and participatory risks and downplay the divergent apportionment of informational risks. The hidden apportionment of informational risks gives state courts a needed flexibility. State courts are able to promote local interests by skewing the risk of error in any chosen direction within understood limits. Their allocations of risk stay out of sight and thereby may deviate quietly from the Supreme Court's agenda.<sup>248</sup>

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commitments to particular meanings of what constitutional rights prohibit—and “no-application understandings” that are merely intentions not to expand the scope of existing constitutional rights. Because intentions, unlike commitments, are not binding, the Supreme Court is free to reexamine the no-application understandings and develop new rights and new meanings of unconstitutionality. The Court, however, is not free to deviate from the application understandings by making constitutional what, in fact, is not. The “fundamental unfairness” doctrine and its floating constitutional threat fall into a separate in-between category of “strategic understandings” that features no commitments or intentions in either direction.

245. A good example of such a rule is the *Frye* doctrine, which conditions the admissibility of expert evidence on the “standing and scientific recognition” of its methodology. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); see also David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 355 n.25 (2004) (reporting that a substantial number of states still follow *Frye* in one form or another). Another example is a Virginia statute prescribing that an interested party's testimony against a person incapable of testifying requires corroboration. See VA. CODE ANN. § 8.01-397 (2006), construed in *Williams v. Condit*, 574 S.E.2d 241, 244 (Va. 2003).

246. See *infra* text accompanying notes 259-276.

247. See, e.g., TENN. CODE ANN. § 29-26-115(b) (2000) (providing that, subject to a necessity-based exception, only Tennessee physicians or those from a “contiguous bordering state” can testify as experts in medical malpractice actions before Tennessee courts); see also *Legg v. Chopra*, 286 F.3d 286, 291 (6th Cir. 2002) (categorizing Tennessee's restriction for medical experts' testimony as a “substantive” rule applicable in diversity cases); *Hartsell ex rel. Upton v. Fort Sanders Reg'l Med. Ctr.*, 905 S.W.2d 944, 950 (Tenn. Ct. App. 1995) (upholding exclusion of the American Medical Association rules pertaining to disputed treatment because under Tennessee law, doctors' standard of care must be proven by local experts). This rule protects Tennessee doctors against malpractice lawsuits and possibly reduces the cost of medical care for the people of Tennessee.

248. State courts cannot deviate from this agenda invisibly by redesigning their procedures. Any such change in the law would be general and, consequently, conspicuous. Modification of the

This equilibrium can be exemplified by both criminal and civil evidence doctrines. I begin with a criminal evidence example. The Supreme Court disfavors the idea of using a defendant's propensity to commit crimes as evidence of her guilt. The Court expressly committed itself to the principle, "Judge the act, not the actor," by holding that propensity evidence is excessively prejudicial to the defendant.<sup>249</sup> Admission of such evidence increases the defendant's informational risk, thus exposing her to the risk of erroneous conviction.<sup>250</sup> This exposure to the risk of error does not align with the "equal best" standard.<sup>251</sup>

But Congress differed from the Supreme Court in enacting Federal Rules of Evidence 413 and 414. These rules allow the prosecution to adduce evidence of prior sexual misconduct against a defendant charged with rape, sexual assault, or child molestation.<sup>252</sup> The defendant's past as a sexual predator can evidence his commission of the act on trial and his guilty mind. Past misconduct only needs to be sufficiently similar to the present accusation.<sup>253</sup> Unlike most federal rules of evidence, Rules 413 and 414 were enacted by Congress. Their enactment bypassed the regular Rules Enabling Act procedure.<sup>254</sup> The Court did not promulgate these rules and likely was against them.<sup>255</sup> The Court, however, is unlikely to pronounce

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proof burdens would be conspicuous, as well, because these rules expressly identify the bearers of the risk of error. See 2 MCCORMICK, *supra* note 16, §§ 336-37 (explaining burdens of proof).

249. *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

250. See STEIN, *supra* note 8, at 183-85 (explaining that propensity evidence cannot integrate with case-specific information and thus only can increase the statistical chances of guilt); see also John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1073-77 (1968) (observing that evidence of a defendant's bad character dilutes the regret associated with the jurors' prospect of convicting him erroneously and motivates jurors to be lax in applying the "beyond a reasonable doubt" standard).

251. STEIN, *supra* note 8, at 183-85.

252. The trial judge may still exclude this evidence as unduly prejudicial to the defendant, using her general discretion under FED. R. EVID. 403. *But see* Orenstein, *supra* note 142, at 1518-40 (expressing well-founded skepticism about the performance of this gatekeeping role by trial judges in rape and child molestation cases).

253. The similarity condition is implied in the "relevancy" requirement expressly imposed by Federal Rules of Evidence 413 and 414. See Orenstein, *supra* note 142, at 1527-30 (discussing the effect that similarity has on admissibility and probative value of sexual misconduct evidence).

254. Congress enacted those rules as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135-37. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5411, at 360-61 (Supp. 2007).

255. The Judicial Conference of the United States urged Congress not to adopt these rules. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 56 Crim. L. Rep. (BNA) 2139, 2140 (Feb. 15, 1995); see also Eileen A. Scallen, *Analyzing "The*

them unconstitutional because they have a very limited scope of application.<sup>256</sup> At federal trials, the Court also can use its supervisory power<sup>257</sup> to diminish the rules' applicability.<sup>258</sup> These impact-limiting factors make it politically imprudent for the Court to clash with Congress over the rules' constitutionality.

As far as state trials are concerned, propensity rules fall into the federalist space within which courts are permitted to promote local interests. Admission of propensity evidence by state courts runs against the Supreme Court's agenda for risk-allocation, but not openly so. State judges always do more than just allow the jury to count propensity evidence as increasing the probability of the defendant's guilt. They apply the Court's procedural safeguards against erroneous conviction and instruct the jury to acquit the defendant if the accusations are not proven beyond all reasonable doubt. Their deviations from the Court's agenda consequently have low visibility.

The most striking example of this dynamic is the "lustful disposition" rule that numerous states have adopted.<sup>259</sup> This rule allows the prosecution to prove sexual offense accusations by evidence that points to the defendant's lustful disposition. Georgia courts have developed the broadest admissibility rules for lustful dispositions. They let in evidence of past sexual misconduct irrespective of the period separating the misconduct from the act on trial.<sup>260</sup> They also impose no similarity requirements for misconduct; a defendant's past sexual misconduct need not be similar to the act on trial in order to evidence it.<sup>261</sup> This broad admissibility rule extends to all sexual

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*Politics of [Evidence] Rulemaking*," 53 HASTINGS L.J. 843, 856 (2002) (recounting the opposition of the Judicial Conference to FED. R. EVID. 413-415).

256. Because rape and other sexual offenses are predominantly state crimes, Rules 413-414 apply almost exclusively in military federal cases and in Indian Country. Orenstein, *supra* note 142, at 1490.

257. *See infra* note 301 and accompanying text.

258. The Court can do so by imposing strict interpretation on the admissibility conditions set by those rules, as well as by encouraging federal courts to exclude prior misconduct evidence under FED. R. EVID. 403.

259. *See* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 188 (1993) (attesting that many states admit "lustful disposition" evidence).

260. *See, e.g.*, Mikell v. State, 637 S.E.2d 142, 146-47 (Ga. Ct. App. 2006) (affirming admission of evidence of defendant's uncharged sexual activities with a minor during 1994-97 to prove child molestation in 2003).

261. *See, e.g.*, Cook v. State, 625 S.E.2d 83, 89 (Ga. Ct. App. 2005) (affirming admission of evidence of defendant's unwelcome fondling of a sixteen-year old girl to prove molestation of a six-year-old girl); Brown v. State, 620 S.E.2d 394, 398 (Ga. Ct. App. 2005) (affirming admission of evidence of defendant's uninvited homosexual fondling of a twenty-nine-year-old man to prove his lustful disposition towards young boys); Beck v. State, 587 S.E.2d 316, 319-20 (Ga. Ct. App. 2003) (affirming admission of evidence of defendant's "deviant" sexual act with his wife to prove

activities apart from possession of sexual paraphernalia.<sup>262</sup> As such, it helps the prosecution to convict dangerous sex offenders. But the rule also exposes defendants accused of sexual crimes to a serious informational risk. From time to time, this risk may result in a wrongful conviction.

Despite this prospect, the risk is not unconstitutional. For that reason, its numerous impositions on defendants never have been challenged before the Supreme Court.<sup>263</sup> A defendant's lustful disposition always can be remotely probative of the accusations. For example, it can prove that the defendant had a guilty mind. Admission of such evidence therefore would not qualify as fundamentally unfair. The availability of a rational inference makes the unfairness to the defendant not fundamental enough to warrant an incursion into state law.<sup>264</sup> This factor also makes the unfairness invisible: one virtually never can find indications that factfinders put the evidence to an improper use. Most importantly, Georgia courts execute this "tough on sex crimes" policy in combination with their faithful observance of the constitutional rules that allocate decisional and participatory risks. The Supreme Court of Georgia committed itself to the application of the "beyond a reasonable doubt" standard.<sup>265</sup> Based on the Confrontation Clause, it voided Georgia's necessity exception to the hearsay rule as applying to testimonial evidence.<sup>266</sup> This decision impedes the prosecution of sex and domestic violence offenses.<sup>267</sup> The resulting allocation of informational, decisional, and participatory risks protects Georgia's local interests, and it does so without defying the Court's agenda.

In the civil domain, I take my example from products liability law. State courts have an incentive to favor in-state plaintiffs by

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his lustful disposition towards performance of similar acts with his young stepdaughters); *Hall v. State*, 419 S.E.2d 503, 504-05 (Ga. Ct. App. 1992) (affirming admission of evidence of defendant's intercourse with his younger sister to prove his lustful disposition towards sexually fondling and rubbing his daughter fifteen years later).

262. *See Simpson v. State*, 523 S.E.2d 320, 321-22 (Ga. 1999) (holding that sexual paraphernalia are admissible to establish "lustful disposition" only in exceptional cases).

263. For an unsuccessful attempt by a Missouri defendant, see *State v. Lachterman*, 812 S.W.2d 759, 768-69 (Mo. Ct. App. 1991), *cert. denied*, 503 U.S. 983 (1992), in which the court upheld the admission of prior sodomies with young boys and possession of child pornography as evidencing defendant's "depraved sexual instinct" in a new sodomy trial.

264. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

265. *See Garland v. State*, 325 S.E.2d 131, 133 (Ga. 1985) (reaffirming the requirement that guilt be established beyond a reasonable doubt).

266. *Richard v. State*, 637 S.E.2d 406, 409 (Ga. 2006).

267. *See Tom Lininger, Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 771-73 (2005) (demonstrating that expansion of the confrontation right makes prosecutors more likely to drop charges when a vulnerable victim of the crime recants or refuses to cooperate).

forcing out-of-state manufacturers to pay those plaintiffs excessive compensation.<sup>268</sup> To achieve this result, state courts may impose punitive damages on out-of-state manufacturers.<sup>269</sup> This incentive is particularly strong in jurisdictions with split-recovery statutes that direct a fixed percentage of punitive damage awards to state-administered funds.<sup>270</sup> For these reasons, the Due Process Clause—as interpreted by the Supreme Court—restricts courts’ ability to impose punitive damages.<sup>271</sup> This interpretation of due process protects defendants against impositions of decisional and participatory risks. If the courts’ assessment of punitive damages were to remain indeterminate, defendants would be exposed to a serious decisional risk. The absence of criteria for imposing such damages also would curtail the defendants’ ability to defend against their imposition. This curtailment would expose the defendants to a serious participatory risk. The Court’s guideposts for assessing punitive damages reduce those risks.<sup>272</sup> These guideposts condition the availability of a punitive damage award on the reprehensibility of the defendant’s conduct and on whether criminal and administrative sanctions sufficiently deter it.<sup>273</sup> The guideposts also require that the award be proportionate to the actual damage suffered by the plaintiff.<sup>274</sup>

But what about informational risks? Can a state court devise an evidence rule that would make it easier for an in-state plaintiff to prove a case against the manufacturer? The West Virginia Supreme Court has devised such a rule.<sup>275</sup> Under this rule, a plaintiff in a crashworthiness case can establish that her entire injury was caused by the car defect merely by showing that the defect was “a factor in causing some aspect of the plaintiff’s harm.”<sup>276</sup> Based on this partial

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268. See, e.g., *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781, 787 n.11 (W. Va. 1991) (acknowledging the presence of this incentive).

269. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563-65 (1996) (documenting an Alabama court’s award of punitive damages in the amount of \$4,000,000 to a doctor from Birmingham who purchased a new BMW sports sedan without being told that it was repainted following acid rain).

270. For analysis of these statutes and their implications, see Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375-80, 414-22 (2003).

271. See *Gore*, 517 U.S. at 574-86 (voiding a punitive damage award for being excessive and determining guideposts for assessing punitive damages under the Due Process Clause).

272. See *id.*; see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003).

273. *Gore*, 517 U.S. at 575-86.

274. *Id.* at 581 (holding that few awards exceeding a single-digit ratio between punitive and compensatory damages satisfy due process).

275. *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781, 786-87 (W. Va. 1991).

276. *Id.* at 786.

causation evidence, the jury has discretion to award the plaintiff the full amount of compensation.

This rule forces defendants to compensate plaintiffs for unproven damages. Nonetheless, it passes constitutional muster for three doctrinal reasons. First, the “fundamental unfairness” rule has yet to be extended to civil trials.<sup>277</sup> Second, the factfinder still may decide the case either way under the preponderance standard. Finally, relying on injury-enhancement evidence as a proof of full causation is not altogether irrational.<sup>278</sup> The “one rational inference” criterion<sup>279</sup> shields the rule from the Supreme Court’s constitutional intervention. The prime reason for upholding the rule’s constitutionality is not doctrinal, though. The rule’s applications do not align with the Court’s risk-allocating preferences. These applications, however, are situation specific and therefore largely invisible. Their low visibility separates them from court decisions that impose punitive damages or reverse the proof burden for no good reason. This factor keeps the West Virginia rule within the federalist space.<sup>280</sup>

### *B. Constitutional Culture*

The informal constitutional law of evidence is not only about power. It is also about the culture of doing the right thing.<sup>281</sup> Within this framework, the Supreme Court and state courts do not simply divide rule-making power. Rather, they share constitutional governance through coordination and dialogue in the atmosphere of mutual respect.<sup>282</sup> The Court does not demarcate a free-hand territory within which state judges can protect their voters from crime by exposing defendants to an increased risk of erroneous conviction. Rather, it trusts those judges’ institutional commitment to justice and

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277. Presently, this rule only applies in criminal cases. *See supra* notes 121-142 and accompanying text.

278. *See* ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 81-83 (2001) (observing that such inferences may be justified, but preferring the partial-compensation approach).

279. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

280. The West Virginia Supreme Court signaled that it would make a different rule if “responsible leadership in a federal structure” could secure an “explicit and binding coordination” between states. *Blankenship*, 406 S.E.2d at 786 n.10. This signaling is far from accidental.

281. I thank Bruce Ackerman for drawing my attention to this phenomenon.

282. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1805 (2007) (rationalizing courts’ applications of constitutional principles as organizing a dialogue between generations and setting a system of sustained deliberation that protects society’s achievements from transient desires for change and populist temptations); *see also* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-58 (1993) (developing a constitutional dialogue model for multiple political actors).

does not interfere. The Court also realizes that its risk-allocating agenda is not uniquely correct and that it need not apply universally.

Allocation of participatory and decisional risks by the rules of procedure and burdens of proof is general by definition. As such, it warrants an imposition of uniform constitutional standards. But from the state courts' perspective, these standards may require fine-tuning. Skewing the informational risk in a chosen direction is the best way to make local adjustments. Because informational risks are situation specific, their allocation does not alter the general constitutional standards. State courts consequently introduce the required adjustments by formulating their own rules of evidence.<sup>283</sup> These rules do not necessarily align with the Supreme Court's view, nor do they uniformly promote local interests. Instead, they often advance the state court's broader conception of justice.

The constitutional détente theory therefore does not fully explain state courts' evidential practices. Contrary to populist expectations, these courts are not uniformly tough on crime. They may, in fact, increase the rate of wrongful acquittals in order to heighten the defendant's protection against the risk of erroneous conviction beyond the Supreme Court's constitutional minimum. If, by doing so, state courts sacrifice local interest, it is to promote higher justice and to participate meaningfully in the constitutional governance and dialogue. What follows are three salient examples of this important phenomenon.

The first example is DNA evidence. This evidence does not fall into any constitutionally suspect category; a jury's finding that DNA identifies the defendant as a perpetrator of the crime beyond a reasonable doubt is constitutionally sufficient. But a number of state courts rule out the possibility of convicting a defendant upon DNA evidence alone<sup>284</sup> because DNA only identifies the frequency of a random match between people's genetic patterns. Hence, even when the match is extremely rare, it can only identify the defendant as belonging to a small group of people sharing the pattern.<sup>285</sup> The prosecution's case remains deficient because of the absence of case-

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283. Such rules also may be enacted, but courts ultimately would interpret them and determine their constitutionality.

284. *See, e.g.*, *State v. Skipper*, 637 A.2d 1101, 1108 (Conn. 1994) (holding that an inculcating genetic pattern that only one out of 3,497 people could have cannot establish alone the defendant's guilt beyond all reasonable doubt); *Commonwealth v. Rocha*, 784 N.E.2d 651, 658 n.13 (Mass. Ct. App. 2003) (holding DNA evidence sufficient for defendant's conviction because case-specific evidence unequivocally identified him as one of two possible perpetrators of the crime); *Griffith v. State*, 976 S.W.2d 241, 249 (Tex. App. 1998) (holding DNA evidence sufficient for defendant's conviction because case-specific evidence singled him out as a prime suspect).

285. *See, e.g.*, *Skipper*, 637 A.2d at 1103-04 & n.9.

specific evidence singling out the defendant as a likely perpetrator. These holdings align with the “equal best” standard,<sup>286</sup> but not with the citizens’ interest in convicting as many criminals as possible.

The second example involves the corroboration requirement for confessions.<sup>287</sup> The Supreme Court of New Jersey ruled that a jury cannot determine the defendant’s eligibility for capital punishment on the basis of her uncorroborated confession.<sup>288</sup> This ruling requires the judge in a trial for aggravated murder to determine whether there is independent evidence corroborating the defendant’s voluntary confession. Absence of corroborative evidence makes the defendant ineligible for capital punishment.<sup>289</sup> The court justified this ruling on constitutional grounds,<sup>290</sup> stating that “[o]ur State policy seems always to have favored that something more than his or her words would send a defendant to death.”<sup>291</sup>

Other state courts have developed similar requirements.<sup>292</sup> The Supreme Court of Tennessee, for example, has imposed the corroboration requirement for all confessions as a constitutional standard.<sup>293</sup> Such decisions go beyond the constitutional due process minimum. Federal law that evolves from the Supreme Court’s jurisprudence also requires corroboration for defendants’

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286. See STEIN, *supra* note 8, at 86-88, 204 (arguing that statistical evidence alone is insufficient to convict a defendant, no matter how statistically probable the accusations may be). A DNA match becomes case specific only when it practically eliminates all suspects other than the defendant. See David H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413, 438 (calling for a population-wide amassment of DNA samples as a means for easy apprehension of repeat offenders and minimization of the risk of erroneous conviction).

287. Cf. Boaz Sangero, *Miranda is Not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession*, 28 CARDOZO L. REV. 2791 (2007) (advocating heightening of corroboration requirements for confessions).

288. *State v. Di Frisco*, 571 A.2d 914, 928 (N.J. 1990). For a recent application of this requirement, see *State v. Reddish*, 859 A.2d 1173, 1211-15 (N.J. 2004).

289. *Di Frisco*, 571 A.2d at 924.

290. *Id.* at 926-27 (invoking the principles of due process); see also *id.* at 936 (Handler, J., concurring in part and dissenting in part) (stating that finding a defendant eligible for capital punishment on his uncorroborated confession “insults the values inherent in fundamental fairness and the constitutional protections that assure due process”).

291. *Id.* at 928 (majority opinion).

292. See, e.g., *Littlejohn v. State*, 989 P.2d 901, 911 (Okla. Crim. App. 1998) (holding in a murder case that a defendant’s confession had no corroboration and that its admission therefore violated due process).

293. See *State v. Housler*, 193 S.W.3d 476, 490 (Tenn. 2006) (“Due Process is violated when the jury convicts on the basis of the defendant’s confession absent corroborating evidence of the corpus delicti.” (citing *State v. Smith*, 24 S.W.3d 274, 281 (Tenn. 2000))).



confessions.<sup>294</sup> However, this requirement has yet to acquire constitutional status.<sup>295</sup>

The third example is the corroboration requirement for accomplice testimony, adopted by numerous states.<sup>296</sup> As explained by the California Supreme Court, this requirement is court created, rather than constitutionally based.<sup>297</sup> Federal law does not require corroboration as a condition for basing a defendant's conviction on the testimony of her accomplice,<sup>298</sup> nor does the Supreme Court's due process jurisprudence.<sup>299</sup> State courts again go beyond the constitutional minimum to protect defendants from the risk of erroneous conviction.<sup>300</sup>

### C. Federal Safe Harbors

In 1943, the Supreme Court announced its authority under Article III of the Constitution to devise rules of evidence for federal courts.<sup>301</sup> Previously, the Rules Enabling Act of 1934<sup>302</sup> gave the Court "the power to prescribe general rules of . . . evidence for cases in the

294. *Wong Sun v. United States*, 371 U.S. 471, 488-90 (1963); *Smith v. United States*, 348 U.S. 147, 152-53 (1954); *Opper v. United States*, 348 U.S. 84, 89-90 (1954); *United States v. Deville*, 278 F.3d 500, 506-07 (5th Cir. 2002).

295. *See United States v. Bukowski*, 435 F.2d 1094, 1106 n.7 (7th Cir. 1970) ("[I]t is not clear whether [the corroboration requirement for confessions] need be treated as a feature of 'Due Process.'").

296. *See TORCIA*, *supra* note 144.

297. *In re Mitchell P.*, 587 P.2d 1144, 1146 (Cal. 1978); *see also People v. Felton*, 18 Cal. Rptr. 3d 626, 637 (Cal. Ct. App. 2004) ("[T]he corroboration requirement [for accomplice testimony] is a matter of state law, not due process.").

298. *See Watson v. Howard*, 123 F. App'x 910, 917 (10th Cir. 2005) ("Federal law does not require independent corroboration of accomplice testimony . . ."); *DuBois v. Lockhart*, 859 F.2d 1314, 1317 (8th Cir. 1988) (holding that a rational factfinder can find a defendant guilty beyond a reasonable doubt without additional evidence to corroborate an accomplice's testimony).

299. *See United States v. Augenblick*, 393 U.S. 348, 352 (1969) (holding that corroboration requirements for accomplice testimony "do not customarily involve constitutional questions").

300. *E.g.*, *State v. Pecor*, 972 P.2d 737, 745 (Idaho Ct. App. 1998).

301. *See McNabb v. United States*, 318 U.S. 332, 340-47 (1943) (holding that a prolonged detention constitutes pressure rendering the defendant's confession involuntary and, consequently, inadmissible, and asserting that the Supreme Court's supervisory power under U.S. CONST. art. III, § 1 makes it mandatory for federal courts to follow this holding); *Johnson v. United States*, 318 U.S. 189, 198-99 (1943) (holding that, independent of the Fifth Amendment, a prosecutor cannot comment on the defendant's failure to testify, and asserting that the Supreme Court's supervisory power under U.S. CONST. art. III, § 1 makes it mandatory for federal courts to follow this holding). *But see Amy Coney Barrett, The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006) (carrying out a comprehensive study of the constitutional history of U.S. CONST. art. III, § 1, demonstrating that the Supreme Court over-interpreted its "supremacy" functions).

302. 28 U.S.C. §§ 2071-77 (2000).

United States district courts . . . and courts of appeals.”<sup>303</sup> The Court acted under the latter authority in 1972 by promulgating the Federal Rules of Evidence.<sup>304</sup> After exercising its power to amend those rules,<sup>305</sup> Congress enacted them into law that became effective in 1975,<sup>306</sup> and it made a few amendments thereafter.<sup>307</sup> This obviated the Court’s need to install constitutional control over federal evidence rules. Federal trials, both civil and criminal, are conducted primarily under the Court’s rules that implement its vision of how to allocate the risk of error.

Federal rules of evidence also serve as a model for state courts and legislators—an important constitutional role outside federal law. Alignment with a federal rule that the Supreme Court promulgated and approved in advance practically guarantees that a state rule will withstand constitutional scrutiny. Federal rules of evidence thus set a safe-harbor incentive for state rules, on which state courts and legislators generally act.

In a recent case, *Clark v. Arizona*, the Supreme Court upheld the constitutionality of Arizona’s “Mott Rule.”<sup>308</sup> The Mott Rule holds inadmissible testimony of a psychological or psychiatric expert as to whether the defendant had the requisite mens rea for the crime on trial.<sup>309</sup> Under this rule, such an expert can only testify on the issue of insanity, identify the defendant’s mental disease, or give observational testimony about the defendant’s behavioral traits.<sup>310</sup> For reasons stated by the dissenting Justices, this limitation clashes with due process.<sup>311</sup> A mental health expert often is able to provide useful information about the defendant’s capacity to form the mens rea for the crime.<sup>312</sup> Although far from indisputably accurate, this information can help the defendant raise a reasonable doubt as to

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303. *Id.* § 2072(a).

304. See Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 913 (1978) (outlining the promulgation of the Federal Rules of Evidence by the Supreme Court as delegate of the congressional rulemaking authority). Professor Cleary served as Reporter to the Advisory Committee for the Federal Rules of Evidence.

305. 28 U.S.C. § 2074. Before the enactment of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642, Congress’s power to modify federal rules of evidence existed in a different format in 28 U.S.C. § 2072.

306. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

307. The most significant of those amendments is the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135-37, that enacted FED. R. EVID. 413-15.

308. 126 S. Ct. 2709, 2729-37 (2006).

309. *State v. Mott*, 931 P.2d 1046, 1051, 1054 (Ariz. 1997) (en banc).

310. *Clark*, 126 S. Ct. at 2724-26.

311. *Id.* at 2743-49 (Kennedy J., dissenting)

312. *Id.* at 2746.

whether he had a guilty mind. The Mott Rule therefore exposes criminal defendants to a serious informational risk. The countervailing factors favored by the Court may attract some utilitarians, but they hardly can legitimize the imposition of the risk of erroneous conviction on individual defendants.<sup>313</sup>

To understand *Clark* fully, however, one needs to consider Federal Rule of Evidence 704(b), which the Supreme Court cites in a footnote.<sup>314</sup> This rule holds:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>315</sup>

Rule 704(b) and Arizona's Mott Rule are essentially the same, which is why the Mott Rule was held constitutional. While this rule exposes defendants to the risk of erroneous conviction, it does so in a way that the Supreme Court approves in advance.

Federal Rule of Evidence 704(b) is an informal safe harbor for state rules, as is any other federal rule of evidence. The Federal Rules of Evidence thus do not function only as a model that advises state courts and legislators;<sup>316</sup> they are also a constitutional guarantor. The Judicial Conference Advisory Committee on Evidence Rules works to secure the constitutionality of the rules and their state equivalents.<sup>317</sup> This Committee removes constitutional "traps for the unwary,"<sup>318</sup> as courts and legislators opting for the adoption of a federal rule of evidence should be able to rely on its constitutionality. This creation of federal safe harbors allows the Supreme Court to control state rules of evidence.

Indeed, state courts resort to federal rules as safe harbors in order to shield their decisions from possible invalidation on constitutional grounds. I illustrate this resort by two decisions of California and New York courts. These decisions are particularly

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313. See STEIN, *supra* note 8, at 197 (arguing on moral grounds in favor of broad admissibility of defense expert evidence).

314. *Clark*, 126 S. Ct. at 2725 n.30.

315. FED. R. EVID. 704(b).

316. Federal Rules of Evidence have had a tremendous success in that role. They have been adopted by all states except California, Georgia, Illinois, Massachusetts, Missouri, New York, Kansas, and Virginia. In addition to the District of Columbia, forty-two jurisdictions follow these rules. See 21 WRIGHT & GRAHAM, *supra* note 254, § 5009.

317. See Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2431-34 (2005) (attestation by the Committee's Reporter).

318. *Id.* at 2433.

illustrative because neither California nor New York has adopted the Federal Rules of Evidence.

In a landmark decision, *People v. Falsetta*, the Supreme Court of California held that California's statutory removal of the bar against propensity evidence from sex crime prosecutions<sup>319</sup> does not violate due process.<sup>320</sup> The court's reasons for this decision included the similarity between the California statute and Federal Rules of Evidence 413 and 414, along with the fact that federal courts have upheld the constitutionality of those rules.<sup>321</sup>

The *Falsetta* decision suppressed the differences between the California statute and the federal rules. Federal Rules of Evidence 413 and 414 require type similarity between the defendant's past sexual misconduct and the crime on trial. A sexual assault of an adult victim, for example, is not admissible as evidence in a federal trial for child molestation.<sup>322</sup> There is no such requirement in the California statute. Under the federal rules, the defendant's past sexual misconduct also must be relevant to an issue on trial.<sup>323</sup> The California statute, as interpreted in *Falsetta*, presupposes this relevancy<sup>324</sup>—a presupposition that hinders the defendant's objection to the evidence. The *Falsetta* court chose to ignore these differences in order to accentuate the sameness of the California statute and the federal rules. This reasoning strategy could serve only one purpose: establishment of a safe harbor.

*People v. Brandon*, a recent New York case, presented a puzzling evidentiary issue. Shortly after his conviction by a jury, the defendant moved for an order setting aside the verdict.<sup>325</sup> His affidavit revealed that he had a conversation in the courthouse's hallway with one of the jurors after the verdict was announced. According to the affidavit, the juror—whose eyes were glassy and whose breath smelled of alcohol—had expressed concern for the defendant and regret about the verdict. The defendant also proffered this juror's testimony as

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319. CAL. EVID. CODE § 1108(a) (West 2003) (providing that, subject to a court's general discretion to exclude preponderantly prejudicial evidence, "in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible" by the general rule against propensity evidence).

320. 986 P.2d 182, 187-93 (Cal. 1999).

321. *Id.*

322. See FED. R. EVID. 414(a) (requiring similarity between categories of victims).

323. FED. R. EVID. 413(a) and 414(a) allow past sexual misconduct to be "considered for its bearing on any matter to which it is relevant."

324. The court reasoned that past sexual misconduct is "at least circumstantially relevant" in every trial involving a sex crime. *Falsetta*, 986 P.2d at 188-89.

325. See *People v. Brandon*, 785 N.Y.S.2d 286, 287-88 (N.Y. Crim. Ct. 2004).

independent evidence and called four additional jurors to testify about the jury's deliberation. The judge ruled the jurors' testimony inadmissible.<sup>326</sup> Ultimately, she decided that the defendant failed to prove by a preponderance of the evidence that the juror's misconduct had affected the verdict.<sup>327</sup>

The judge based her exclusion of the jurors' testimony on the common law of New York.<sup>328</sup> This decision was constitutionally problematic, as the defendant's testimony *was* admitted and merited proper evaluation. Finding that testimony unpersuasive while preventing witnesses from corroborating it hardly aligns with due process. Presumably for that reason, the judge also cited Federal Rule of Evidence 606(b), which imposes a complete bar on a juror's post-verdict testimony concerning "any matter or statement occurring during the course of the jury's deliberations." Under this rule, a juror only can testify about an "outside influence" on the jury or its exposure to "extraneous prejudicial information."<sup>329</sup> The judge also cited the Supreme Court's decision in *Tanner v. United States*.<sup>330</sup> *Tanner* approved a trial court's suppression of a juror's testimony about his fellow jurors' alcohol and drug consumption.<sup>331</sup>

These citations do not align with New York's "improper influence" standard for vacating jury verdicts in criminal trials. Under this standard, any improper influence on the jury capable of working out an injustice is sufficient cause to vacate the verdict.<sup>332</sup> The influence need not come from an outside source.<sup>333</sup> By deciding the case as it did, the court exposed its decision to a due process challenge. And to shield itself from that challenge, the court underscored the alignment between its decision and a federal rule—not applicable in New York—and quoted the Supreme Court's rationalization of that rule.<sup>334</sup>

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326. *Id.* at 289.

327. *Id.* at 291.

328. *Id.* at 288-89.

329. FED. R. EVID. 606(b).

330. *Brandon*, 785 N.Y.S.2d at 288.

331. *Tanner v. United States*, 483 U.S. 107, 125 (1987).

332. *See* *People v. Brown*, 399 N.E.2d 51, 53 (N.Y. 1979) (reaffirming a broad "improper influence" standard for vacating the jury verdict in a criminal case).

333. *See id.* at 52-54 (holding that a juror's contrived experimentation in front of other jurors in a robbery trial to affirm that a police witness could see the face of the driver of the getaway car qualified as "improper influence").

334. *See Tanner*, 483 U.S. at 117-26 (affirming the fairness and practicality of the rule that recognizes only an external, as opposed to an internal, influence on the jury as a reason for vacating verdicts); *see also id.* at 127 (justifying this differentiation by "long-recognized and very substantial concerns" that "support the protection of jury deliberations from intrusive inquiry").

## CONCLUSION

This Article began by asking how constitutional law impacts evidence, yet it ended by asking the reverse: What is the impact of evidence rules on constitutional law? Asking this question is necessary because evidence rules are constitutionally unique. The Supreme Court's interpretation of the Due Process Clause broadly exempts them from constitutional scrutiny. This exemption separates evidential adequacy rules from burdens of proof and court procedures, such as the cross-examination of witnesses, which must satisfy the Court's demanding constitutional requirements. Burdens of proof and court procedures allocate the risk of error among the prosecution, plaintiffs, and defendants. Allocation of this risk is of constitutional concern because adjudicative errors produce wrongful denials of a person's liberty or property. Rules that determine what evidence is admissible and what evidence requires corroboration allocate the same risk. Constitutional law, nonetheless, does not address this area.

This constitutional asymmetry calls for an explanation. The most compelling explanation takes into account the broad sweep of the constitutional standards regulating the burdens of proof and court procedures. State courts must have the ability to modify this regulation locally without undermining the Supreme Court's constitutional authority. Evidence rules are ideally suited for that purpose because their applications by state courts have low visibility. These applications are also situation specific. As such, they can deviate from the Court's vision as to how to allocate risk of error without engendering conceptual clashes with the general constitutional standards. The Court must accept these quiet deviations to respect state courts' independent vision of justice and secure their cooperation in its broad constitutional scheme. The Court therefore avoids telling state courts and legislators how to design and apply their evidence rules. Yet for extreme deviations from its vision of due process, the Court retains a residual power to interfere. The Court also induces states to align their evidence rules with the Federal Rules of Evidence, which it promulgates and interprets: this alignment virtually guarantees the state rule's constitutionality. The relationship between constitutional law and evidence rules is bi-directional, rather than hierarchical.