Grab Bag of Principles Or Principled Grab Bag: The Constitutionalization of Common Law

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American government operates through three branches: The legislative
branch makes the law; the executive branch enforces the law; and the judicial branch interprets the law. As first-year law students read their first cases, they quickly learn the descriptive inadequacy of this model of American government popularized by seventh-grade history classes. Judges throughout American history have made law. Even in this "age of statutes," judges, in their development of the common law, continue to prescribe rules to fill gaps left by legislatures.

When judges act as common-law decision makers, their declarations are always subject to the dissatisfaction of the legislature. Only when judges make constitutional pronouncements are their decisions insulated from legislative review. Consequently, judges attract far less criticism when they make common law than when they make constitutional law. Judges often lack an applicable statute to interpret, yet still must adjudicate disputes. One can hardly condemn judges for formulating rules when no other extant source of law (other than the past words of other judges) is available to guide them.

Constitutional decision makers have a source to interpret; however, a text does not always make their job any easier, and indeed, probably makes it harder. The Constitution is couched in general terms, which leaves judges with the responsibility of filling interpretative gaps. Throughout American history, the Supreme Court has used various methods to fill these gaps. This article explores one method that has attracted little attention: the constitutionalization of common law.

Perhaps because development of the common law and constitutional interpretation seem like distinct enterprises, the link between the two has gone largely unexplored. As a descriptive matter, however, the dichotomy fails to account for the influence that the common law has had on constitutional interpretation as an interpretative gap filler. Indeed, the Supreme Court in recent years has used the results of the deliberations of state judges to establish federal constitutional standards.

The constitutionalization of the common law has a checkered history. In the series of nineteenth- and early twentieth-century decisions known as the Lochner era, the Court used a brand of common-law constitutionalization to strike down legislative enactments. This era now is no more than an epithet to most and the very symbol of judicial arrogation of legislative power. This article takes no further whacks at this very dead

2. In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court struck down a New York law limiting the work hours of bakery employees as an unreasonable interference with the common-law liberty of contract. "It was the defining character of the Lochner era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as
horse.3

Instead, this article examines, through the lens of three recent cases (each construing a separate constitutional provision), the use that the modern Supreme Court has made of the common law as a vehicle for establishing constitutional standards. In Honda Motor Co. v. Oberg,4 the Court utilized state common-law procedures to establish the minimum level of due process required for reviewing the size of punitive damage awards. In Ohio v. Roberts5 the Court introduced the concept of “firmly rooted” common-law hearsay exceptions to the Sixth Amendment’s Confrontation Clause. Finally, in Lucas v. South Carolina Coastal Council6 the Court established the so-called “nuisance exception” to the requirement of just

constitutionally suspect.” Seminole Tribe v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting); see also PruneYard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (“If accepted, [the claim that the State of California was constitutionally prohibited from revising its own law of trespass] would represent a return to the era of Lochner v. New York [citation omitted] when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development.”). Nonetheless, some of the cases that constitutionalized non-economic common-law rights are still cited favorably by modern courts. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that liberty under the Fourteenth Amendment includes “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”)).

3. The phenomenon described in this paper is distinct from Henry Monaghan’s discussion of the Supreme Court’s power to fashion “constitutional common law,” which he describes as “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.” Henry P. Monaghan, Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2-3 (1975) (describing the exclusionary rule and the rules regarding police questioning of suspects articulated in Miranda v. Arizona, 384 U.S. 436 (1966), as a reflection of this common-law authority).

The topic of this paper is also distinct from the broader notion of federal common law which, at least in its modern form, arises mainly in connection with defining and enforcing the rights and obligations of the federal government left unaddressed by federal statutes. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1945). For a survey of this area of law, see chapter VII of Richard Fallon et al., Hart and Wechsler’s The Federal Courts and the Federal System (4th ed. 1996) [hereinafter Hart & Wechsler].

Finally, the subject of this paper is unrelated to the concept of a general federal common law that federal courts would have the power to promulgate in diversity cases in lieu of state law, but which would not bind state courts in future litigation. This power, established in Swift v. Tyson, 41 U.S. 1 (1842), was put to rest in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

5. 448 U.S. 56 (1980).
compensation for total takings.

Each of these cases used the common law for distinct purposes and with different impulses driving the Court's reliance upon it. Each use of the common law presents different problems. Yet at least at its most general level, the Court's constitutionalization project uses the common law to discipline itself and other courts in the face of uncertainty. The need for this discipline is a function of the Court's tendency to articulate broad constitutional principles rather than narrow rules when interpreting unclear constitutional provisions. The common law serves as a check on the aggregation of judicial power, one that is self-imposed and driven by the Court's concern for its own legitimacy and its consequent desire to create limits for itself and other courts that seem divorced from the Court's own personal preferences.

This article attempts to explain how the Court has utilized this particular method of constitutional adjudication while examining the problems raised by the practice. It also explores the windows that this practice opens to expose the larger imperfections that are often endemic to constitutional interpretation. Finally, this article will attempt to determine whether the Court's constitutionalization project bolsters or undermines the legitimacy of the Court's role as the final and authoritative voice on constitutional law.

I. THE QUESTIONS, PROBLEMS, AND USES OF CONSTITUTIONALIZATION

At its core, the constitutionalization dilemma is about what role, if any, the past and present judges of fifty separate states, as well as federal judges developing the common law, should have in establishing federal constitutional standards when addressing non-federal questions. One could argue that common-law constitutionalization is simply another term for upholding state court interpretations of the United States Constitution. After all, state courts must interpret the federal Constitution whenever cases before them present constitutional issues. The Supreme Court then may overrule state court interpretations, uphold the state court decision and thereby transform a state judge's interpretation into a federal constitutional standard, or simply not review the state court's decision because either the parties did not petition the Court for certiorari or the Court declined to issue the writ. This process of constitutional review is an inevitable and unproblematic aspect of our system of constitutional federalism.

However, this suggestion fails to explain adequately the nature of constitutionalization. First, the constitutionalization of the common law is seldom, if ever, about state court "interpretations" of the federal Constitution. Indeed, the cases that develop state common law that is later constitutionalized by the Supreme Court almost never involve federal constitutional claims. In most of these cases, the state court developing the
common-law standard was not interpreting the Constitution, or even federal law.

Further, the Supreme Court does not constitutionalize the common law based upon the quality and persuasiveness of the state court's interpretation. Instead, the Court infuses with significance the mere fact that the court said what it said at all. Thus, whatever the Supreme Court is doing when it constitutionalizes state common law, it is not upholding an interpretation of the Constitution in the sense of a considered attempt to assess the meaning of the document's text, history, and structure. Instead, the Supreme Court is constitutionalizing something that has not been constitutionally derived.

In this method of constitutional analysis, the Supreme Court uses the common law for different purposes. In *Honda* the Court resorted to the common law to establish a federal constitutional right. In contrast, the Court used the common law in *Ohio v. Roberts* and subsequent cases to cabin an individual constitutional right. Finally, the Court in *Lucas* used the common law to limit legislative encroachment on a constitutionally protected right, simultaneously deferring to state law and avoiding the creation of an even more uncertain heightened scrutiny standard.\(^7\)

When the Court constitutionalizes judicial decisions that did not even purport to address federal constitutional questions, it could be doing one of several things. The first rationale for constitutionalization of common law is that the Court could be according constitutional significance to a shared common-law consensus among state courts simply because most, if not all, state courts have come to the same conclusion about the wisdom and fairness of a certain practice. One could attempt to justify this first mode of constitutionalization in three different ways. State court consensus could reflect the Framers' intent, serve as a gap-filling mechanism, or provide the occasion for an extra-textual constitutional amendment.

First, one could argue that the appearance of such a consensus is the best historical evidence the Court has of the understood meaning of a constitutional provision and what was considered to be an acceptable practice. Under this view, the closer to the time of the relevant provision's ratification that this historical understanding reveals itself, the better. The difficulty with this justification is that the Constitution expressly incorporates the common law in one instance.\(^8\) Thus, we can apply a popular mode of statutory interpretation: Given that the Congress that voted on the

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7. Furthermore, in the *Roberts* and *Lucas* cases, the Court accorded constitutional significance to the continuing and future pronouncements of today's state courts as opposed to confining the search for such transcendent pronouncements to, for example, pre-Fourteenth Amendment courts.

8. See U.S. CONST. amend. VII ("In Suits at common law, . . . the right of trial by jury shall be preserved . . . according to the rules of the common law.").
Bill of Rights "knew how" to constitutionalize common law, we should not be so quick to assume that other constitutional provisions that lack similar language were also meant to incorporate the common law.9

The second justification for constitutionalization of common-law consensus among state courts is that the consensus provides material to fill in gaps in the Constitution when it is otherwise impossible to ascertain the effect of the provision on the relevant issue. The Framers might have deliberately created such gaps by leaving the wording of a provision vague to give it evolving content. Alternatively, the inability to divine the meaning of a provision itself might have created the gap.10 Third and most radically in justifying constitutionalization of common-law consensus is that the consensus of state courts, coupled with the feedback mechanism of society's silent and longstanding approval, amends the Constitution in an extended and severely toned down Ackermanesque "constitutional moment."11

Second in the list of rationales for constitutionalization of common-law decisions is that the Court could be using the gloss and legitimacy of the common law to create post hoc justifications for policy moves that the Court wants to make, but for which it needs to find a historical hook to cover its machinations. On the other hand, the Court might be using the common law to avoid injecting the policy views of the judiciary into future constitutional interpretation under the theory that the certainty of state court precedent (wise or not) is superior to the uncertainty of case-by-case

9. See, e.g., Bailey v. United States, 516 U.S. 137, 150 (1995) (concluding that because Congress "knew how" to draft a statute that penalized people for intending to use a firearm, its use of different language in defining a separate offense meant that Congress had not intended that offense to include the intent to use a firearm).

10. Under this explanation, the Court would not necessarily need to immunize such a consensus from legislative review. Instead, like "constitutional common law" and Judge Calabresi's call for judge-made common law that overrules anachronistic statutes, infra note 43, the Court could use such a consensus to revise a legislative enactment with the understanding that if the current legislature disapproved of the decision, it could then revise the Court.

11. See Bruce Ackerman, Higher Lawmaking, in RESPONDING TO IMPERFECTION 63 (Sanford Levinson ed., 1995). Professor Ackerman argues that Article V of the Constitution does not constitute the sole method for amending the Constitution. In addition, the Constitution can be and has been amended several times by the process of a severe alteration of constitutional doctrine in response to a "challenge to institutions" derived from an "electoral mandate" that is a kind of comment upon a "constitution impasse." Id. at 79. The kinds of constitutional issues dealt with in this paper are scarcely the kinds of revolutionary changes that Ackerman's theory is meant to characterize. Nevertheless, it is worth at least noting the similarity. For a critical response to Ackerman's more unconstrained approach to constitutional interpretation, see Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221 (1995).
adjudication. Along this same line, the Court could be responding to other limitations inherent in constitutional interpretation. A third rationale for the Court's use of the common law might simply be an attempt to protect the expectations that have developed in reliance upon the common law.

II. THE CONSTITUTIONALIZATION OF COMMON-LAW PUNITIVE DAMAGES EXCESSIVENESS REVIEW

A. Generally

The Supreme Court resorts to common-law constitutionalization most frequently when attempting to identify Anglo-American traditions to divine the meaning of vague constitutional provisions.\(^\text{12}\) Under the Court's framework, tradition can affect the shape and scope of constitutional rights in two basic ways. First, the widespread adoption of a practice with historical support can insulate it from constitutional attack.\(^\text{13}\) Second, a

\(^{12}\) While this article focuses on the common law end of the analysis, the Supreme Court obviously does not solely look to the common law to establish the existence of a tradition. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (pointing to both a statutory and common law pedigree in determining the extent of protection that the Constitution offers to a student faced with corporal punishment); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (identifying a general American tradition of extended families living together using secondary historical material and not common-law decisions); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (finding support for its decision that property tax exemptions for churches do not violate the First Amendment's Establishment Clause in "an unbroken practice" of according such exemptions).

The Court's analysis of tradition frequently begins by describing British statutory and common law traditions. In Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855), for example, the Court said that to determine the content of the Fifth Amendment's Due Process Clause, it had to look to those settled usages and modes of proceeding existing in the common and statute [sic] 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. Id. at 277. British protection of a right, however, is not the sine qua non of due process analysis as evidenced by the Court's decision in In re Winship, 397 U.S. 358 (1970). In Winship the Court held that proof beyond a reasonable doubt of criminal charges was a requirement of due process. Id. at 364. The Court wrote that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." Id. at 361. While the requirement of a "higher degree of persuasion in criminal cases" was much older, said the Court, the "crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798." Id. at 361 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 681-82 (1954)). It was thus the widespread and early acceptance of the requirement in America that made the difference.

\(^{13}\) The core case of this section, Honda Motor Co., is an example of establishing a
constitutional right through tradition. Consequently, this will be the major focus of this part of the paper. Nonetheless, the question of the use of tradition to defeat constitutional rights has garnered far more criticism than the use of tradition to establish constitutional rights, and this section will refer to several cases that address the practice of using tradition to justify the refusal to recognize constitutional rights. The core case of Part III, Ohl v. Roberts, also is an example of limiting constitutional rights through the common law. Essentially, the issues presented by the use of the common law to defeat constitutional rights involve (1) the extent to which a right must have been recognized, or not prohibited, by other jurisdictions, present and past, to qualify as fundamental under the Constitution; (2) to what extent the absence of such protection suggests that the Constitution does not protect the right, see, for example, Michael H. v. Gerald D., 491 U.S. 110, 140-41 (1989) (Brennan, J., dissenting) (denying that "the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States"); and (3) the level of specificity at which one should define a right to determine if it has traditionally been accorded protection, id. at 127 n.6. See generally Steven R. Greenberger, Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment, 33 B.C. L. REV. 981 (1992) (arguing that Justice Scalia's use of tradition as a value-free method to cabin due process rights is unworkable and not free from values external to the tradition); Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057 (1990) (arguing inter alia that Justice Scalia's method of determining whether a right is fundamental by examining the most specific level at which the tradition protects or denies the asserted right is not valueless); L. Benjamin Young, Jr., Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet, 78 VA. L. REV. 581 (1992) (using Michael H. v. Gerald D., 491 U.S. 110 (1989), as a vehicle to argue that Justice Scalia's due process analysis is no less subjective than the analysis by Justice Brennan).

The Court in Hurtado v. California, 110 U.S. 516, 528 (1884), established the rule that "a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country . . . ." The Court modified the Hurtado principle in Twining v. New Jersey, 211 U.S. 78 (1908), concluding that a departure from traditional procedures may violate due process if it contravenes "fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." Id. at 101. Justice Scalia has contended that "a process approved by the legal traditions of our people is 'due' process" without further inquiry. Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1, 27-28 (1991) (Scalia, J., concurring in the judgment). But see Pacific Mut. Life Ins., 499 U.S. at 40 (Kennedy, J., concurring in the judgment) (arguing that "widespread adherence to a historical practice" should not always necessarily "foreclose[] further inquiry when a party challenges an ancient institution or procedure as violative of due process); Burnham v. Superior Court of Cal., 495 U.S. 604, 621-22 (1990) (Scalia, J.) (conceding that a historical practice no longer widely accepted could conceivably be constitutionally vulnerable).

The Court has only occasionally struck down practices with a long and venerable tradition. See, e.g., Shaffer v. Heitner, 433 U.S. 186 (1977) (invalidating quasi-in rem jurisdiction where the property that is asserted as the basis for jurisdiction is unrelated to the plaintiff's cause of action); Brown v. Board of Educ., 347 U.S. 483 (1954) (striking down the tradition of racial segregation in public schooling). Justice Scalia argued in Rutan v. Republican Party, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting), that the elimination of tradition was only justified in Brown because the unambiguous text of the Thirteenth and Fourteenth Amendments "leaves no room for doubt that laws treating people differently
widespread historical practice can itself become a constitutional right.\textsuperscript{14}

In \textit{Honda} the Court held that Oregon’s system for determining punitive damages liability violated Honda’s right to procedural due process because it did not provide for post-verdict judicial review of the amount of the award.\textsuperscript{15} The traditional common-law practice of providing excessiveness review was the determinative factor in the Court’s analysis.\textsuperscript{16} The Court first pointed to six British cases all of which, it claimed, provided for some excessiveness review at common law.\textsuperscript{17} Next, the Court demonstrated the use of some form of excessiveness review in the nineteenth century through a variety of sources of law, namely two early federal circuit decisions, four state decisions, and several treatises.\textsuperscript{18} Finally, the Court referred to more recent cases from forty-nine states that provided for some judicial review because of their race are invalid.” Regardless of what one thinks about this argument, it certainly fails to explain the Court’s decision in \textit{Williams v. Illinois}, 399 U.S. 235, 239 (1970), which struck down the then widespread and historical practice of imprisoning those who could not pay their fines for longer than the statutory maximum. The \textit{Williams} case had little to do with the supposedly unambiguous language of the Equal Protection Clause’s proscription against race-based distinctions.


\textsuperscript{15} \textit{Id.} at 432. There was significant controversy in the case over what exactly Oregon’s system allowed in terms of post-verdict excessiveness review and the adequacy of its other methods for constraining jury discretion. Indeed, the precise nature of Oregon’s procedures was the focal point of respondent Oberg’s oral argument. See Oral Argument of Laurence H. Tribe on Behalf of the Respondent, \textit{Honda Motor Co. v. Oberg}, 512 U.S. 415 (1994) (No. 93-644), in 230 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 541 (Philip B. Kurland & Gerhard Casper eds., 1995).

\textsuperscript{16} The Court stated “Oregon’s abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis.” \textit{Honda}, 512 U.S. at 430.

\textsuperscript{17} \textit{Id.} at 422-23. The Court discounted the case of \textit{Beardmore v. Carrington}, 95 Eng. Rep. 790 (C.P. 1764), which asserted that there were no English cases that awarded a new trial based upon the excessiveness of a damages award. \textit{Id.} at 793. The Court pointed to the fact that the cases that it cites post-dated \textit{Beardmore} and thereby overruled \textit{Beardmore}’s suggestion that appellate review of excessive damage awards was not required at common law. \textit{Honda}, 512 U.S. at 423-24.

\textsuperscript{18} \textit{Honda}, 512 U.S. at 424-26. The Court, however, conceded that “[j]udicial deference to jury verdicts may have been stronger in eighteenth-century America than in England, and judges’ power to order new trials for excessive damages more contested.” \textit{Id.} at 434 n.12. The Court pointed to practices during nineteenth-century America leading up to the Fourteenth Amendment as the “crucial time” for assessing whether the Fourteenth Amendment’s Due Process Clause protected the right to excessiveness review. \textit{Id.} (citing Burnham v. Superior Court, 495 U.S. 604, 611 (1990)). According to the Court, such review was “well established in American courts” by the time of the ratification of the Fourteenth Amendment. \textit{Id.}
of punitive damages awards.19 While the Court acknowledged that a state could constitutionally depart from traditionally required procedures, the Court determined that the state could only do so if it provided a "similar substitute"—something the Court found Oregon failed to do.20

B. The Common Law as Tradition

The incorporation of common-law tradition to protect constitutional rights is the least controversial mode of constitutionalization. After all, what one feels one is "due" often will depend at a minimum upon what others similarly situated have been entitled to in the past. Just as the younger sibling feels that she should have the same curfew that the older sibling had, "due process" has long been thought to incorporate a baseline minimum of protected rights that privilege past entitlements. While the Court recognized that strict adherence to the past, even when protecting individual rights, "den[i]es every quality of the law but its age and [renders] it incapable of progress or improvement,"21 the Honda case indicates that the Court will not hesitate to set a common-law floor limiting how low the state may go in the protection of life, liberty, or property. In this way, the Court uses the common-law tradition to police the few states that have chosen their own path.

The use of tradition is bolstered by the argument that the ratifiers of the Fifth and Fourteenth Amendments meant "due process" to refer to those procedures in effect prior to the time that the relevant constitutional provision was ratified.22 Under this explanation, constitutionalization becomes difficult to distinguish from "originalist" attempts to construe the meaning of the Constitution.23 Thus, the Honda Court pointed to the

19. Id. at 426.
20. Id. at 430-32. The Court also found no changes occurred in society over time that justified a departure from the traditional practice. Id. at 431.
22. Note that this theory would mean that due process would have a different content for the states than for the federal government given that the "law of the Land" was different in 1868 than in 1790. "As a matter of common law, the assessment of uncertain damages during the Framing generation was a protected jury function." Alan Howard Scheiner, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142, 156 (1991); see also Brief of Legal Historians Daniel R. Coquillette et al., as Amici Curiae in Support of Respondent, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (No. 93-644), in LANDMARK BRIEFS, supra note 15, at 367-70 [hereinafter Brief of Legal Historians]. As one commentator notes, however, the discrepancy may have been justified inasmuch as "it is entirely possible that [the Fourteenth Amendment's] state ratifiers did not object to limitations on the federal government that they were unwilling to place upon themselves." Greenberger, supra note 13, at 993 n.52. Honda, however, is an example of placing a limit upon the states that would not necessarily limit the federal government.
23. Justice Black tried to resolve this interpretative dilemma in In re Winship, 397 U.S.
widespread use of excessiveness review in the period prior to ratification of the Fourteenth Amendment. 24

The Court also seems to find relevant at times the post-ratification follow-through of the common-law tradition. 25 For example, in Honda and many other cases, although the Court relies on the historical consensus, it also accords significance to the post-ratification continuation of the tradition. 26 Furthermore, sometimes the Court does not even distinguish

358 (1970) (Black, J., dissenting). Justice Black, while agreeing with the Court in Murray’s Lessee that “due process of law” was synonymous with the Magna Carta’s use of the words “law of the land,” disagreed with that Court about the meaning of the phrase. Winship, 397 U.S. at 385. To Justice Black, due process meant only that the government must act “according to the ‘law of the land’—that is, according to written constitutional and statutory provisions as interpreted by court decisions.” Id. at 382. Due process contained no independent content beyond the requirement that the government act according to law. Id. As he recognized, however, this interpretation had been rejected a long time earlier by, among others, the Court in Murray’s Lessee. Id. The Murray’s Lessee Court declared it “manifest that it was not left to the legislative power to enact any process which might be devised.” Murray’s Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).

24. Honda, 512 U.S. at 425. Moreover, the Court in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), wrote that “the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted” and that “[n]othing in that Amendment’s text or history indicates an intent on the part of its drafters to overturn the prevailing method.” Id. at 17-18. The Court in Haslip also referred to past Court opinions that said the Fourteenth Amendment cannot trump practices which were two hundred years old absent some compelling explanation. Id. at 17. Haslip, however, used the ratification date of the Fourteenth Amendment to insulate practices from constitutional scrutiny, whereas Honda used pre-ratification history to strike down a practice that departed from tradition.

25. Likewise, using pre-Fourteenth Amendment cases would make little sense in a situation where post-Fourteenth Amendment developments have altered the legal landscape as to a particular issue. See Note, Excessiveness Review for Capital Defendants After Honda Motor Co. v. Oberg, 108 HARV. L. REV. 1305, 1317-20 (1995) (arguing that since cases like Furman v. Georgia, 408 U.S. 238 (1972), radically altered the death penalty legal landscape in the 1970s, the Court should only utilize post-Furman history to determine whether courts must afford capital defendants excessiveness review).

26. The Court pointed in Honda to the fact that 49 states currently had adopted some form of the procedure. Honda, 512 U.S. at 426; see, e.g., Burnham v. Superior Court, 495 U.S. 604 (1990) (upholding the constitutionality of state assumption of jurisdiction over non-residents based solely upon the non-resident’s physical presence in the state). “This American jurisdictional practice is, moreover, not merely old; it is continuing.” Id. at 615. The opinion later said that the retention of old procedures inconsistent with certain fundamental values might be unconstitutional where the procedure “is engaged in by only a very small minority of the States. Where, however, . . . a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is ‘no longer justified.’” Id. at 622 (quoting Shaffer v. Heitner, 433 U.S. 186, 212 (1977)); see also Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261, 295 (1990) (Scalia, J., concurring) (“[M]ost states that did not explicitly prohibit
between the pre-ratification and post-ratification tradition in attempting to establish a historical consensus. Nonetheless, the Court has minimized the importance of a consensus in modern practice when the consensus is not historically rooted.

This mode of constitutionalization’s appeal to the Court is obvious. Tradition at least appears to provide a value free reference point to which judges may resort without injecting their own views into the decision-making process. Under this view, the decisions of the past are not necessarily philosophically superior but only more divorced from the judge’s own perceptions. Thus perhaps the most influential originalist jurist of this era, Justice Antonin Scalia, also relies heavily upon tradition when interpreting what he deems to be vaguely worded constitutional language where there is no direct evidence of original intent. The two approaches derive from the same desire to purge judicial decision making of the personal values of the individual judges that preside over the

assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment’s ratification, that assisted and (in some cases) attempted suicide were unlawful.”

27. See, e.g., Cruzan, 497 U.S. at 261 (1990). In finding a constitutionally protected liberty interest in the right to refuse medical treatment, the Court held that right to be “[t]he logical corollary of the doctrine of informed consent” which, the Court observed, had “become firmly entrenched in American tort law.” Id. at 269-70. The Court, however, made no mention of whether the right to informed consent became entrenched before or after the ratification of the Fourteenth Amendment.


29. See, e.g., Honda, 512 U.S. at 421-26. The Court initially looked to tradition to determine if appellate review of excessive punitive damage awards was constitutionally required rather than looking, for example, to the more indeterminate balancing test of Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

30. See Greenberger, supra note 13, at 989 (noting that “Justice Scalia’s implicit solution to the problem of interpreting open-textured constitutional provisions . . . in the face of an ambiguous or nonexistent historical record is to substitute ‘tradition’ for original intent”). A particularly striking example of Justice Scalia’s reliance upon tradition is his dissenting opinion in Rutan v. Republican Party, 497 U.S. 62, 92-115 (1990) (Scalia, J., dissenting), where he argued that the hiring of state employees based upon party affiliation was not in violation of the First Amendment. Id. at 97. As he put it, “[s]uch a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court’s principles are to be formed.” Id. at 95-96.
process. Moreover, requiring adherence to tradition is less intrusive upon the legislature than a modern judicially created standard such as the Mats
Mathews balancing test.

The central objection to the constitutionalization of common-law tradition in this case is not that it privileged the opinions of judges over the legislature. Instead, the main objection is to a particular kind of federalism that one might call lateral federalism, which involves privileging the traditions of a great number of states over those of the few. This kind of constitutionalization essentially says that a minority of states must follow what the significant majority of states have done in the past and continue to do in the present. They must do so not because the practices of the minority are inconsistent with some fundamental theory of liberty, functional theory of efficiency, or balancing test, but the minority of states must fall into line simply because the majority of states have a longstanding tradition of doing things a different way. The Court's efforts to make its own jurisprudence value free force the non-conforming minority of states to follow the practices of the majority of states. The Court enunciated no compelling analytical basis to support the constitutionalization of common-law tradition in Honda beyond the widespread and longstanding silent acceptance of state judges' views on proper punitive


Originalism's attractiveness, for the most part, lies in the possibility it seems to offer the judicial interpreter of an escape from personal responsibility. Believing or at least fearing that constitutional decisions necessarily must reflect the subjective value-preferences of someone, the originalist insists that judges must refrain from imposing their personal preferences in a democratic society.

Id. at 659-60 (footnote omitted); see also Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989). Scalia observed:

[T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law...

Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.

Id. at 863-64.

32. Matews, 424 U.S. at 334-35. The Matews test requires courts evaluating the constitutionality of state procedures to weigh "the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest; . . . and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335. The Court in Medina, 505 U.S. at 445-46 (quoting Patterson, 432 U.S. at 202), refused to apply the Matews test in evaluating state criminal procedures, preferring instead to ask only if a particular procedure violated some fundamental value "'rooted in the traditions and conscience of our people.'"
damages review procedure. As a practical matter, the Court constitutionalization of tradition may improperly focus on a state's trees to the exclusion of its forest and thus foster an insensitivity to the inner workings of the state's procedural system. In Honda, for example, while the state of Oregon failed to provide post-verdict excessiveness review, it accorded more effective pre-verdict procedures than the state of Alabama employed under the procedures approved in Haslip. The Honda Court nonetheless found that Oregon had "provided no similar substitute for the protection provided by judicial review of the amount awarded by the jury in punitive damages." Thus, the Court defined the relevant due process baseline as sufficient post-verdict protection in the form of excessiveness review and did not allow the added security of other pre- and post-verdict procedures to suffice in the absence of excessiveness review. While Oregon's procedures probably did a better job of constraining the jury before the fact, the other states' procedures probably did a better job of rooting out those few situations where it was obvious the jury had gone astray—even though the jury's deviation might have been occasioned largely by the absence of sufficient pre-verdict safeguards. The Court's opinion, however, refused to examine whether or not the procedural differences were, in the end, a wash. Instead of emphasizing the total quantum of defendant protection that the entire proceeding offered, the Court compartmentalized the protections and

33. Honda, 512 U.S. at 438 (Ginsburg, J., dissenting) ("Several preverdict mechanisms channeled the jury's discretion more tightly in this case than in . . . Haslip . . . ."). The dissent also pointed to certain post-verdict procedures afforded by Oregon and concluded that "[Oregon's] procedures are perhaps more likely to prompt rational and fair punitive damage decisions than are the post hoc checks employed in jurisdictions following Alabama's pattern." Id. at 444; see also Brief for Respondent, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (No. 93-644), in LANDMARK BRIEFS, supra note 15, at 18-19 (recognizing the same pre- and post-verdict procedures as Justice Ginsburg and noting the fact that "the size of the mean punitive damages award in Oregon is less than half that of the national mean"); Matthew J. Macario, Punitive Damage Awards and Procedural Due Process in Products Liability Cases, 68 TEMP. L. REV. 409, 431 (1995) ("The unwillingness of the Court to conduct an inquiry [into all of a state's procedures for setting punitive damage awards] illustrates its larger failure to appreciate the effectiveness of Oregon's procedural scheme."). Even the Honda Court noted that one of two reasons for the importance of post-verdict excessiveness review is the fact that jury instructions "typically leave the jury with wide discretion in choosing amounts." Honda, 512 U.S. at 432. Pre-verdict constraints limiting broad jury discretion were the strength of Oregon's system. Id. at 480.

34. Honda, 512 U.S. at 431.

35. Had the Court analyzed the total reliability of the damages safeguards in Oregon, the opinion would not have been as value driven as an application of the Mathews test which balances state and defendant's interests. See Mathews, 424 U.S. at 334-35. Instead, the Court could have just compared the reliability levels of the two procedural systems.
faulted Oregon for not having a specific compartment—excessiveness review. The constitutionalization of tradition thus resulted in an insensitivity to the nuances of coordinate state systems.

One can sympathize with the Court's predicament. On the one hand, it seems somewhat artificial to privilege a certain type of procedure if the total quantum of protection is the same. On the other hand, figuring out whether two different procedural systems offer an equivalent amount of protection presents the Court with a task it is probably ill-equipped to handle. Any attempt to show the Court which system was most reliable would be fraught with great uncertainties. For example, how much weight should one accord to punitive damages generally being lower in Oregon than in other states given that the contrast might be the result of other factors? At least theoretically, the Court would not need to inject its own subjective beliefs into the question of whether or not the two sets of procedures are equivalent in terms of risk of error. As a practical matter, however, and given the Court's inability to measure the total reliability of each system, the Court probably would have to guess. Yet the difficulty could just as easily suggest the need for deference as the need for uniformity.\(^{36}\)

Moreover, the mere fact that something is a widespread common-law tradition does not mean it should be considered "fundamental." Indeed, simply because something is traditional does not necessarily mean that those who began and continued the tradition felt strongly about it.\(^{37}\) Even if the initiators of and those who perpetuated the common-law tradition had felt strongly about it, a large segment of society at the time may have opposed it.\(^{38}\) Nor does the great number of states that determined the

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36. The Court's presumption of a state system's unreliability on behalf of defendants facing huge punitive damage awards when it lacks a specific protection contrasts with the presumption of reliability of hearsay exceptions that work to disadvantage criminal defendants. See infra note 125.

37. See Brief of the Association of Trial Lawyers of America as Amicus Curiae in Support of Respondent, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (No. 93-644), in LANDMARK BRIEFS, supra note 15, at 271 (arguing that "excessiveness review, even where permitted, is not regarded as a fundamental right") [hereinafter Brief of the Trial Lawyers].

38. See Scheiner, supra note 22, at 152 (noting the strong Antifederalist support for a civil jury was based partly upon the fear "that judges would naturally favor private citizens or organizations that were part of the ruling elite"). Thus, another uncertainty is how much significance to accord the persistence of a tradition when a consistent dissenting tradition exists. For example, Justice Scalia, in dissent, justified the selection of government employees based upon their political affiliation, with reference to the tradition of the spoils system. Rutan v. Republican Party, 497 U.S. 62, 94-97 (1990); see supra note 30. As at least one commentator has pointed out, however, the spoils system was not exactly an unchallenged American tradition. See Young, supra note 13, at 607 ("Civil service reforms pursued by the Mugwumps and Progressives in the late nineteenth and early twentieth centuries surely converted the spoils system into a challenged political practice . . . .").
practice was sensible mean that the practice was so fundamental to society that the public would have wanted to see it inscribed into constitutional stone.\textsuperscript{39} As one brief argued in \textit{Honda}, even where judges practiced excessiveness review prior to ratification of the Fourteenth Amendment, “personal injury tort awards and punitive damage verdicts were reviewed extremely deferentially, if at all.”\textsuperscript{40} Societal toleration of common-law procedure applied sparingly would not seem to qualify the procedure as a fundamental tradition. Society’s tolerance of the practice might have depended in fact upon the rarity of the application of the practice.\textsuperscript{41}

Nonetheless, the Supreme Court treated the common-law tradition of excessiveness review as a sufficient reflection of fundamental values to justify constitutionalization. Ultimately, two attributes of this method of constitutionalization partially justify the move. First, in addition to being old, a constitutionally privileged tradition seemingly must also be accompanied by a consensus of state courts exceeding the total number of states necessary for passage of a constitutional amendment. Thus a single state judge’s view could not be constitutionalized.\textsuperscript{42} The second justification for

\begin{quote}
Justice Scalia himself pointed out in his \textit{Rutan} dissent that segregation merited less deference as a tradition in part because it had been vigorously challenged on constitutional grounds in the nineteenth century. \textit{Rutan}, 497 U.S. at 95-96 n.1. Thus, while Justice Scalia argued in his \textit{Rutan} dissent for the preservation of a tradition against constitutional interference, in \textit{Honda} it was tradition inviting such interference. The criticism of the \textit{Rutan} dissent and \textit{Honda} points out that the persistence of a tradition does not necessarily connote widespread societal acceptance.

\textsuperscript{39} This is, of course, even assuming that the practice of post-verdict review of damages was as widespread as Justice Stevens in \textit{Honda} suggested it was prior to ratification of the Fourteenth Amendment. \textit{Honda}, 512 U.S. at 425. After all, the Court only cited four pre-Fourteenth Amendment state cases in support of its claim. \textit{Id.} Furthermore, three of these cases were decided early in the nineteenth century, prior to the popular election of state judges. For example, the Court cited an 1815 New York case; however, New York did not popularly elect judges until 1846. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 111 (2d ed. 1985). One could thus argue from the record Justice Stevens presents that judicial review of punitive damage awards—what little of it there was—was primarily an elitist phenomenon.

\textsuperscript{40} Brief of Legal Historians, \textit{supra} note 22, at 12; see also Brief of the Trial Lawyers, \textit{supra} note 37, at 11 (noting that Justice Story, in adopting excessiveness review, saw himself as going to the limits of the Seventh Amendment). Thus, if people at the time saw anything as fundamental, it was the right to a civil trial by jury.

\textsuperscript{41} Thus, while the use of tradition may seem to reflect judicial restraint, there is still room for play in the joints. One’s willingness to view a tradition as fundamental may largely depend upon one’s view of the practice itself.

\textsuperscript{42} It does not follow, however, that one should view the state court consensus as the equivalent of a constitutional amendment. Constitutional amendments do not simply require that a given number of people feel a certain way about an issue. Rather, the passage of a constitutional amendment demands a fervor and commitment totally dissimilar to what is required for society to accept silently the decisions of state judges on matters of tangential

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this method of constitutionalization is that the persistence of a common-law tradition requires at least the silent approval of two branches of government. After all, two governmental bodies, the courts and the legislature, can revise a common-law decision if that decision is inconsistent with contemporary policy. The courts, however, cannot strike legislative enactments absent some constitutional error.\textsuperscript{43} Thus, one might assume that an unrevised historical practice has met with at least some degree of popular approval and remains a rational response to contemporary problems.

In essence, the Court assumes that wisdom at least accompanies inertia. Justice Kennedy suggested viewing inertia as presumptive wisdom, in slight contrast to Justice Scalia's resort to history as value-free referent. Justice Kennedy wrote that "[h]istorical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair."\textsuperscript{44} The question becomes more complicated when the Court is confronted with rival traditions that derive from different lawmaking sources. For example, in \textit{Cruzan v. Director, Missouri Department of Health}\textsuperscript{45} the Court found a liberty interest in the right to refuse unwanted medical treatment based largely upon the general common law

\textsuperscript{43} \textit{But see} \textit{Calabresi, supra} note 1, at 163-66 (presenting the proposal that courts should be able to overrule outdated statutes, deriving such power from their common-law function of keeping the law up to date); \textit{see also} Quill \textit{v. Vacco}, 80 F.3d 716, 732-35 (2d Cir. 1996) (Calabresi, J., concurring in the judgment) (proposing that an old New York statute of uncertain constitutionality prohibiting assisted suicide be set aside while allowing for the possibility of future legislative reenactment), \textit{rev'd}, 117 S. Ct. 2293 (1997). Furthermore, an older statute may not attract enough attention to be overruled even if it has become increasingly anachronistic. Courts may have greater occasion to reevaluate the wisdom of a certain principle than legislatures, the latter requiring a majority of its members to change anything. The question, then, is whether this legislative inertia is a larger force for legal ossification than stare decisis.


However, the Court in \textit{In re Winship}, 397 U.S. 358 (1970), also recognized that while "virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" \textit{Id.} at 361-62 (quoting \textit{Duncan v. Louisiana}}, 391 U.S. 145, 155 (1968)). Nonetheless, the Court in \textit{Winship} went beyond consensus to articulate reasons for the standard. For example, the Court wrote "[I]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." \textit{Winship}, 397 U.S. at 364.

\textsuperscript{45} 497 U.S. 261 (1990).
of battery and the more specific tradition requiring informed consent prior to operating on a patient. The Court reasoned that the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." The Court did not squarely rule upon the question of whether the Constitution absolutely protects the right of a competent person to refuse medical treatment. Justice Scalia's concurrence, however, pointed to longstanding and widespread statutory proscriptions of suicide and attempted suicide in arguing against the existence of a constitutional right to die.

While the constitutionalization of common-law consensus probably strikes most observers as the most legitimate of the three methods described in this paper, this method of constitutionalization is still a problematic choice on its own terms. The Constitution does not explicitly provide a mechanism for the constitutionalization of common-law consensus. Nor can one point to any intent of the ratifiers of the Fifth or Fourteenth Amendment indicating that such consensus should be the touchstone for due process analysis. Once again, this lack of evidence contrasts markedly with the Seventh Amendment's express incorporation of common-law tradition.

Moreover, the Court's method in Honda avoids looking arbitrary only because so many states have adopted and continue to use excessiveness

46. Id. at 270.

47. Id. at 294-95 (Scalia, J., concurring). One might argue that Justice Scalia's approach in Cruzan is inconsistent with the method of adjudication he recommends in Michael H. v. Gerald D., 491 U.S. 110 (1989). In Michael H., Justice Scalia argued that, in determining whether a given right has been traditionally protected, one should define the right at its most specific level. Id. at 127 n.6. Yet in Cruzan, Justice Scalia defined the right quite generally (in essence, the right to kill oneself) and found a long tradition of proscribing the general practice. Cruzan, 497 U.S. at 294-95. One might respond that there is a significant difference between using tradition to protect a constitutional right (a move which forecloses future legislative or judicial action) and using tradition to defeat a constitutional right. This distinction might make functional sense, but Justice Scalia himself does not make it. Rather, when arguing in Michael H. that his approach was not novel, he pointed to cases where the Court examined traditions at their most specific level where the tradition only would have served to defeat the constitutional right. Michael H., 491 U.S. at 127 n.6 (referring to Roe v. Wade, 410 U.S. 113 (1973)). Cruzan thus presented the question of when a statutory and a common-law tradition collide, which should yield.

48. "[T]he topic of due process apparently received little more attention in the debates over ratification of the Fourteenth Amendment than it received in the debates concerning the Fifth Amendment . . .," Greenberger, supra note 13, at 993 n.52. Moreover, the assumption that due process also meant "The Law of the Land" does not help, given that prior to the ratification of the Fourteenth Amendment, the "Law of the Land" encompassed the laws of the states. How many states constituted the "Law of the Land?" In contrast, the interpretation of the Fifth Amendment's Due Process Clause would have necessitated the examination only of those British practices that were carried over to America.
review. If, however, a larger number of states failed to adopt the procedures, the Court would need more than the majority of states that adopted the procedure to justify imposing it upon the minority.\textsuperscript{49} Generally in our federal system, the popularity of a practice, especially when that practice reflects nothing more than the views of state judges, is not enough to impose it upon a lone holdout.\textsuperscript{50} What is ultimately troubling, however, about the constitutionalization of common-law tradition is that it tells a state to adopt a particular practice without any theory of why that practice is so fundamental or any historical evidence that society viewed the practice as fundamental. However, the assumption that the persistence of a common-law tradition without more reflects a fundamental constitutional or social value is not the obvious point that the Court seems to think it is.

III. THE CONSTITUTIONALIZATION OF COMMON-LAW HEARSAY EXCEPTIONS AND THE COMMON LAW AS JUDICIAL COMPROMISE

Prior to the codification of the rules of evidence in the mid-1900’s, the law governing the admission of hearsay was essentially the province of the common law.\textsuperscript{51} This division of labor made a great deal of sense. Given that the everyday job of trial courts is to ascertain the factual truth so that they can properly apply the substantive law, one would expect that the institutional experience of the judiciary would be the best guide for structuring the fact-finding process.

Until the mid- to late-1960s, the Constitution seemingly placed few strictures upon the admissibility of evidence in criminal trials. However, at that point the Sixth Amendment’s Confrontation Clause re-emerged to threaten the hegemony of the common law and, increasingly, evidence codes in this area.\textsuperscript{52} As defined by the Federal Rules of Evidence, hearsay

\textsuperscript{49} The Court has not really had to face the line-drawing problem of how many states must adopt a practice before it can be considered a constitutional principle. Nonetheless, the theoretical possibility of such a problem arising gives a slightly artificial feel to this mode of constitutionalization, albeit one that might not be avoidable. \textit{See Note, supra} note 25, at 1318-19 (seemingly arguing that the adoption by the “vast majority of states” of some form of excessiveness review in capital cases should suffice to make such review constitutionally required).

\textsuperscript{50} At the very least, the imposition of the views of some states upon another traditionally has required the expense of political effort necessary to pass a constitutional amendment or preemptive federal legislation.

\textsuperscript{51} \textit{See} JoAnne A. Epps, \textit{Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?}, 77 KY. L.J. 7, 14 (1988-89) (“Though there were consistent themes, the several states and the federal government relied on their own perceptions of their respective common law to formulate rules of evidence.”).

\textsuperscript{52} The Court also developed exclusionary rules which prevent the introduction of evidence resulting from violations of the Fourth and Fifth amendments. \textit{See, e.g.}, Miranda
is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The Sixth Amendment’s Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . .."

The historical record provides little direct evidence of the drafters’ intent for the Confrontation Clause. The Supreme Court has pointed out that the hearsay rule and the Confrontation Clause protect similar values and are derived from similar roots. Most lawyers assume that the core

v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961). Note that while the focus of this article is on the constitutionalization of judicial pronouncements, the Court’s Confrontation Clause jurisprudence also utilizes evidence codes and legislatively enacted evidentiary rules that expand common-law evidentiary rules to limit the right of confrontation. See, e.g., infra notes 71, 73. While this practice may raise somewhat different concerns from the constitutionalization of common law, both of these practices use nonconstitutionally derived norms to define the contours of a constitutional right.

53. FED. R. EVID. 801(e).
54. U.S. CONST. amend. VI.
55. “Courts and commentators agree that history teaches little about the Framers’ intentions for the clause.” Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 569 n.46 (1988). One commentator notes that “[t]he Clause was barely debated while the Sixth Amendment was under consideration, and American documents predating the Sixth Amendment rarely discussed the purpose of confrontation.” Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 MINN. L. REV. 557, 568 (1992) (footnote omitted). Nonetheless, Berger writes that the Clause can be understood if viewed as part of the larger whole of the Bill of Rights rather than studied in isolation. See id. at 568-69; see also Graham C. Lilly, Notes on the Confrontation Clause and Ohio v. Roberts, 36 U. FLA. L. REV. 207, 208-217 (1984) (discussing conflicting historical interpretations of the Confrontation Clause); S. Douglas Borisky, Note, Reconciling the Conflict Between the CoConspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment, 85 COLUM. L. REV. 1294, 1301 (1985) (“One of the most significant problems for a court facing a confrontation clause challenge to the admission of evidence is the uncertainty surrounding the intent and purposes of the clause.”).
56. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (citing California v. Green, 399 U.S. 149, 155 (1970); Dutton v. Evans, 400 U.S. 74, 86 (1970)); see also Stanley A. Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause, 66 N.C. L. REV. 1, 3 (1987); Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause, 81 VA. L. REV. 149, 150 (1995) (pointing to Sir Walter Raleigh’s trial and conviction by rank hearsay as “ha[v]ing] driven [more than any other story] AngloAmerican lawyers to limit the use of hearsay and to ensure a right of confrontation”); Frank T. Read, The New Confrontation-Hearsay Dilemma, 45 S. CAL. L. REV. 1, 6 (1972). Lilly, however, argued that the more likely source of the impulse behind the Clause was the colonists’ hatred of the British use of vice-admiralty courts "to punish violators of acts that restricted the colonists’ rights of international trade." Lilly, supra note 55, at 211. These proceedings were conducted under the proceedings of the civil law and not under traditional adversarial proceedings. Id. Witnesses subject to such proceedings were examined in closed chambers, and the accused was also denied the right

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value of confrontation involves the right to cross examine adverse witnesses to test the reliability of their testimony.\(^57\)

The interpretation of the Confrontation Clause in the hearsay context, however, turns upon one’s definition of the phrase "witnesses against him."\(^58\) Read most naturally, the Clause would bar only the unconfronted testimony of in-court witnesses. While one could read the Clause as a literal prohibition upon the introduction of any hearsay, the Supreme Court unequivocally rejected this reading.\(^59\) Nor has the Court limited itself to constitutionalizing only those hearsay exceptions which were recognized at common law prior to the adoption of the Bill of Rights.\(^60\)

Yet the Court also has not limited the Clause’s ambit to the right to cross examine in-court witnesses.\(^61\) Nor has the Court adopted the slightly broader view that the Confrontation Clause prohibits the introduction of certain formalized testimonial materials such as depositions, affidavits, and confessions while having nothing to say about all other hearsay.\(^62\) Further-

to a jury. Id. at 211-12.

57. "[T]he fundamental value to be preserved by the right of confrontation is cross-examination, the same value that, according to Wigmore, is the test for determining whether an item of evidence is hearsay." Read, supra note 56, at 6.


59. Roberts, 448 U.S. at 63. ("If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." (citation omitted)).

60. "[The Court] has rejected any interpretation of the Clause that would treat confrontation as an absolute right subject only to the exceptions recognized at common law prior to the adoption of the Bill of Rights." Berger, supra note 55, at 593 (citing Bourjaily v. United States, 483 U.S. 171, 182 (1987)); see also Georgia J. Hinde, Note, Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 Fordham L. Rev. 1291, 1308 n.108 (1985) (commenting that such a test is inadequate "because it is unclear how many exceptions were recognized when the sixth amendment was ratified").

61. See White, 502 U.S. at 359-60 (describing the authority espousing this interpretation); see also 5 John Henry Wigmore, Evidence in Trials at Common Law § 1397, at 158 (Chadbourn rev. 1974) ("The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein."). Justice Harlan challenged Professor Wigmore’s reading by pointing out that it "would have the practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring [constitutional] guarantee." California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring). To Justice Harlan, it made no sense that the Framers would constitutionalize the hearsay rule and then allow judges to gradually eviscerate it with exceptions. Id. In the end, however, Harlan adopted a very narrow interpretation of the Confrontation Clause. See infra note 62.

62. While agreeing with Professor Wigmore and Justice Harlan’s concurrence in the result in Dutton v. Evans, 400 U.S. 74, 94-95 (1970), that the text of the Confrontation Clause would seem to limit its scope to mandating the cross-examination of in-court
more, the Court has refused to hold that the Clause demands the production of available witnesses, and consequently, the Court has rejected a reading of the Confrontation Clause that requires only the production of available witnesses. 63

Instead of the above interpretations, under the Court’s hybrid approach first announced in Ohio v. Roberts, 64 the Confrontation Clause authorizes the admission of hearsay only “if it bears adequate ‘indicia of reliability.’” 65 Yet, the Court did not call for an individualized assessment of each common-law hearsay exception to determine if it exceeded some constitutionally mandated reliability threshold. 66 The Court allowed reliability to be “inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In all other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” 67

witnesses, Justice Thomas argued that this limitation was inconsistent with Supreme Court precedent and the history surrounding the clause. White, 502 U.S. at 364-65 (Thomas, J., concurring in part and concurring in the judgment). In his concurrence, Justice Thomas chose history over text and argued that the Confrontation Clause prohibits the introduction of “extrajudicial statements” but “only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” Id. at 365. The Court’s opinion in White rejected the approach as coming “too late in the day.” Id. at 352-53; see also Berger, supra note 55, at 563-64. Professor Berger argues that statements elicited from witnesses by prosecutors or agents of the government merit special scrutiny under the Confrontation Clause, but he criticizes Justice Thomas for taking a “formalistic rather than a functional approach to the kind of prosecutorially obtained statements that would be covered.” Id. Furthermore, Berger believes that the Clause should not be limited only to government-obtained statements, arguing that “other objectives of the Bill of Rights and the Sixth Amendment support restrictions on hearsay even though the government played no role in [a statement’s] creation.” Id. at 563.

63. White, 502 U.S. at 346. Had the Court established the preference for availability, it would have in effect struck down the part of Rule 803 that states that the availability of the declarant is immaterial to the admissibility of the twenty-four hearsay exceptions that come within its ambit. See Fed. R. Evid. 803.

64. 448 U.S. 56 (1980).

65. Id. at 66 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).


67. Roberts, 448 U.S. at 66 (emphasis added). The Court in Roberts also required prosecutors attempting to admit hearsay to “either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.” Id. at 65. Justice Harlan suggested the same approach ten years earlier in a concurrence in California v. Green, 399 U.S. 149, 182 (1970) (Harlan, J., concurring); he later retracted this suggestion in Dutton v. Evans, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring in the judgment). The Court in White v. Illinois, 502 U.S. 346, 353-57 (1992) rejected an unavailability
A. What is a Firmly Rooted Exception?

1. The Role of History

Neither the Court’s opinion in *Roberts* nor subsequent opinions precisely define the characteristics of a “firmly rooted” hearsay exception. So far, the Court has explicitly identified seven such exceptions. An examination of those exceptions, along with other cases declaring certain exceptions to be firmly rooted, reveals three criteria in search of a theory.

First, the words “firmly rooted” connote historical acceptance. Indeed, history seemingly plays a significant role in the determination of whether or not an exception is firmly rooted. For example, in *Bourjaily v. United States* the Court, determining that the co-conspirator hearsay exception was firmly rooted, relied upon the fact that “[t]he admissibility of co-conspirators’ statements was first established in this Court over a century and a half ago . . . , and the Court has repeatedly reaffirmed the exception as accepted practice.”

In addition, in *Mattox v. United States* the Court recognized of dying declarations that “there could be nothing more directly contrary to the letter of the [Confrontation Clause]. . . . [Y]et from time immemorial they have been treated as competent testimony.” Further, in *White v. Illinois* the Court noted that the “exception for spontaneous declarations is at least two centuries old . . . and may date to the late 17th century.”

Yet history cannot fully explain either the Court’s decisions or those of lower federal courts on this issue. First, the modern version of the

requirement, limiting that aspect of the *Roberts* holding to its facts. See *supra* note 63.

68. *White*, 502 U.S. at 355-56 n.8 (spontaneous declarations and statements made for the purpose of medical diagnosis or treatment); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (a declaration of co-conspirators made in furtherance of the conspiracy); *Roberts*, 448 U.S. at 66 n.8 (dying declarations, cross-examined prior-trial testimony, business records, and public records).


70. *Id.* at 183 (citing United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827)). *But see* Hinde, *supra* note 60, at 1297 n.37 (noting that certain facts in *Gooding* distinguish it from the modern form of the co-conspirator exception).

71. 156 U.S. 237 (1895).

72. *Id.* at 243. “The dying declaration is believed to be the only extant exception to the hearsay rule at the time the sixth amendment was ratified.” Epps, *supra* note 51, at 14 n.26 (citing FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 105 (Greenwood Press 1969) (1951)). *But see* California v. Green, 399 U.S. 149, 178 n.12 (1970) (Harlan, J., concurring) (recognizing that Heller’s contention “is open to question” and pointing to the fact that “Wigmore . . . takes the position that several exceptions to the hearsay rule existed as of the time the Sixth Amendment was adopted”).


74. *Id.* at 355 n.8 (citation omitted).
so-called business records exception, recognized by the Court in *Roberts*, has its origins in the mid-twentieth century and was not recognized at common law.\(^{75}\) Moreover, the *White* Court, even as it noted the age of the spontaneous declaration exception, relied only on the wide acceptance of the exception for statements made for purposes of medical diagnosis and did not rely on the age of the exception.\(^{76}\)

Additionally, the historical formulation of hearsay exceptions has not always survived. The Court in *Bourjaily* eliminated a component of the common-law exception for co-conspirators’ statements that had served to ensure its reliability.\(^{77}\) Nevertheless, the Court still deemed the exception firmly rooted.\(^{78}\)

Two other exceptions that the Supreme Court has not considered illustrate that a hearsay exception need not be grounded in history to be firmly rooted for purposes of the Confrontation Clause. First, the Federal Rules establish an exception to the hearsay rule for present sense impressions, which are defined as statements “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”\(^{79}\) At least two federal courts and one state court have declared this exception to be firmly rooted for purposes of the Confrontation Clause.\(^{80}\) Nonetheless, the historical roots

\(^{75}\) See FED. R. EVID. 803(6) advisory committee’s note (tracing the exception back to the Commonwealth Fund Act adopted in 1936 as a rule for the federal courts and the subsequent adoption by many states of the similar Uniform Business Records as Evidence Act); see also Hinde, *supra* note 60, at 1307 n.101 (citing Johnson v. Lutz, 170 N.E. 517, 519 (N.Y. 1930), for the proposition that the common law excluded business records). In *Hearsay: Business Records and Public Records*, 51 U. Cin. L. Rev. 42, 43 (1982), Glen Weissenberger stated that the exception “can be traced to the common-law doctrine known as the ‘shop-book’ rule.” Weissenberger also noted, however, that the rule allowed for the admissibility of such evidence as the account books of merchants only in “certain limited situations.” *Id.* The rule developed in a way that required whoever prepared the records to be available or their absence justified, *id.*, a requirement that one cannot find in the Commonwealth Fund Act or the Uniform Business Records as Evidence Act. See FED. R. EVID. 803(6) advisory committee’s note.


\(^{78}\) *Id.* at 183-84.

\(^{79}\) FED. R. EVID. 803(1).

of the exception are questionable. New York, for example, did not adopt the exception until 1993.\textsuperscript{81} Explicit judicial recognition of the exception did not begin until the 1940's.\textsuperscript{82} Although the exception has its roots in the older common-law doctrine of \textit{res gestae}—a "murky" category encompassing contemporaneous statements in general—courts tended to emphasize (largely due to the influence of Dean Wigmore) that the statement had to be made in an excited state to ensure sufficient reliability.\textsuperscript{83} Moreover, even today the courts differ on whether a statement of present sense impression requires corroboration as a prerequisite of its admissibility.\textsuperscript{84}

Finally, history cannot explain the willingness of several federal courts to declare the exception for statements against penal interest to be firmly rooted.\textsuperscript{85} While statements against pecuniary or proprietary interest have long been admissible at common law,\textsuperscript{86} the opposite is true for statements

\textsuperscript{629, 634} (La. Ct. App. 1993).
\textsuperscript{83} 2 \textit{McCormick}, \textit{supra} note 82, § 271, at 211.
\textsuperscript{84} \textit{Brown}, 610 N.E.2d at 374 (requiring "some additional indicia of reliability" prior to admitting a present sense impression). The court's opinion also briefly surveys the corroboration requirements of other jurisdictions, some of which require there be an "equally percipient witness, a witness at the scene who had an equal opportunity to perceive the event and who will be subject to cross-examination as to the accuracy of the declarant's statement." \textit{Id.} at 373 (quoting James B. Thayer, \textit{Bedingfield's Case}, 15 Am. L Rev. 1, 71 (1881)). Other courts only require "some corroboration." \textit{Id.; see also United States v. Obayagbona, 627 F. Supp. 329, 339 (E.D.N.Y. 1985) ("Under the Federal Rules a present sense impression need not be corroborated . . . ."); State v. Flesher, 286 N.W.2d 218, 220 (Iowa Ct. App. 1979) (requiring no corroboration). But see United States v. Blakey, 607 F.2d 779 (7th Cir. 1979) (seemingly reading in a corroboration requirement into the federal rule).}
\textsuperscript{85} A statement against interest, admissible under Federal Rule 804(b)(3) if the declarant is unavailable as a witness, is
\textit{[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.}
\textit{Fed. R. Evid. 804(b)(3).}
\textsuperscript{86} "[S]tatements against pecuniary or proprietary interest have long been recognized . . . [at common law]." Andrew R. Keller, \textit{Inculpatory Statements Against Penal Interest and the Confrontation Clause}, 83 Colum. L. Rev. 159, 162 (1983) (footnote omitted); see
against penal interest. Nonetheless, some argue that the distinction, while historically based, did not make a great deal of functional sense because one is just as unlikely to tell a falsehood that is against one's penal interest, as one is to tell a falsehood that is against one's pecuniary interest. The perceived functional equivalence of the penal interest exception with the more historically accepted pecuniary or proprietary interest exception has led several federal courts to declare the former to be "firmly rooted" for purposes of Confrontation Clause analysis, serving as an example of the courts constitutionalizing the analogue of a common-law hearsay exception.

2. Wide Acceptance

The Court seems to find the number of states that have adopted a particular hearsay exception a relevant factor in determining whether or not a hearsay exception is firmly rooted. For example, in concluding that the exceptions for spontaneous declarations and statements made for purposes of medical diagnosis are firmly rooted, the Court noted that the former was recognized by the Federal Rules "in nearly four-fifths of the States" and the latter by an equal number of states. Thirty-nine states have adopted the Federal Rules of Evidence in some form. Thus, if the test for firmly

also 2 McCormick, supra note 82, § 317, at 337-39.

87. "[S]tatements against penal interest—whether exculpatory or inculpatory in nature—were not well-received at common law in either English or American courts." Keller, supra note 86, at 162. See also Fed. R. Evid. 804(b)(3) advisory committee's note (recognizing that the federal rule was eliminating the "common law limitation"); Goldman, supra note 56, at 35 ("Only in the past two decades have a significant number of jurisdiction broadened the exception to include declarations against penal interest . . . .").

88. "[T]here is no rational distinction between statements against pecuniary and penal interests in their probabilities of trustworthiness . . . ." Jennings, supra note 66, at 753. While this statement is probably accurate, it ignores the fact that statements against penal interest are much more likely to come into play in a criminal proceeding, an arena where our constitutional system is far less willing to brook error.

89. See United States v. Innamorati, 996 F.2d 456, 474 n.4 (1st Cir. 1993); United States v. York, 933 F.2d 1343, 1364 n.5 (7th Cir. 1991); Jennings v. Maynard, 946 F.2d 1502, 1505-06 (10th Cir. 1991). The Court refused in Lee v. Illinois to allow an accomplice's confession which implicates a defendant to be categorized as simply a declaration against penal interest, because this category, said the Court, "defines too large a class for meaningful Confrontation Clause analysis." 476 U.S. 530, 544 n.5 (1986).


rooted requires no more than majority acceptance, the inevitable result will be the constitutionalization of all the hearsay exceptions in the federal rules.92

3. Reliability

Even as courts resort to history and the extent of acceptance to determine whether an exception is firmly rooted, the driving force behind the deference to those factors purportedly is the concern with the reliability of statements falling under the exception.93 As the Court stated in Ohio v. Roberts,94 "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"95 The Court's test effectively treats the inherent reliability of the statement as a proxy for cross examination of the declarant.96

In at least the case of the business records exception, the Court's willingness to declare the exception to be firmly rooted seemed to derive principally from the inherent reliability of material admitted under the exception.97 However, the Court generally derives firmly rooted exceptions from some combination of their history and the statement's reliability that the Court assumes from the history of the exception. "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."98

Wyoming).

92. See generally Myrna S. Raeder, White's Effect on the Right to Confront One's Accuser, 7 CRIM. JUST. 2, 2 (1993) (arguing that the Supreme Court's "whittling away the need to demonstrate unavailability and expansively defined hearsay exceptions as firmly rooted" may be "the final blow to Confrontation Clause analysis in cases of firmly rooted hearsay exceptions"). Note, however, that the Court has already declared that Idaho's equivalent exception to Federal Rule of Evidence 803(24) for statements not covered by any other exceptions, but which the Court determines possess "equivalent circumstantial guarantees of trustworthiness" and which are "more probative on the point for which [they are] offered than any other evidence which the proponent can procure through reasonable efforts," is not firmly rooted. Idaho v. Wright, 497 U.S. 805, 812 (1990).

93. See Lee, 476 U.S. at 543 (terming "the conviction of a defendant based, at least in part, on presumptively unreliable evidence" to be the "danger against which the Confrontation Clause was erected").

94. 448 U.S. 56 (1980).
95. Id. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).
96. Id. at 65.
97. See supra Part III.A.1 (discussing the business record exception's lack of historical roots).
98. Wright, 497 U.S. at 817; see also Jonakait, supra note 55, at 578 (suggesting that
Thus, history and acceptance provide the bases for the conclusion that certain exceptions are sufficiently reliable so that adversarial testing of the declarant is unnecessary. The Court does not engage in further analysis of the reliability of those exceptions once it has deemed the exceptions to be firmly rooted; nor has the Court ever overtly said that the presumption of reliability is rebuttable in any individual case.99

Courts have been rightly criticized for relying too heavily on the historical judicial acceptance of an exception and for not relying enough on the central concern of the Confrontation Clause.100 The most egregious example of this tunnel vision is the Court's declaration that statements of co-conspirators constitute a firmly rooted exception to the hearsay rule.101 As noted above in Part III.A.1, the Bourjaily Court focused exclusively upon the "long tradition" of the exception in declaring it firmly rooted.102 The majority did not even mention that the historical use of this exception did not arise from a perception of its inherent trustworthiness.103 As the dissent pointed out, "[b]y all accounts, the exemption was based upon agency principles, the underlying concept being that a conspiracy is a

if the Court is correct in believing that the promotion of accuracy is the overriding goal of the Confrontation Clause, "a court should naturally defer to accumulated evidentiary wisdom when asked if evidence furthers confrontation's mission"). Jonakait's contention is not necessarily correct, though. A firmly rooted exception that has been accepted because of its tendency to promote accurate verdicts does not necessarily strike the balance that the Confrontation Clause requires.

99. But see Goldman, supra note 56, at 8 (arguing that the presumption that firmly rooted hearsay exceptions are reliable should be rebuttable, yet noting many lower court cases which seem implicitly to assume that the presumption is irrebuttable). Given the Court's theory that the purpose of the Confrontation Clause is to ensure the reliability of the process, it would make sense for the Court to allow a defendant the opportunity to show that a particular piece of evidence was an exception to the general reliability of the applicable hearsay exception. Nevertheless, the Court in Bourjaily v. United States stated that "no independent inquiry into reliability is required" if a statement qualifies as a firmly rooted hearsay exception. 483 U.S. 171, 183 (1987). While the issue is perhaps not completely clear, this article assumes that the presumption of reliability would be very difficult, if not impossible, to overcome.

100. "Unfortunately, some lower courts have seemed to equate 'firmly rooted' with 'long used.' This equation offends common sense because the vintage of an exception has little to do with the 'indicia of reliability' of the exception." Hinde, supra note 60, at 1307 (footnote omitted); see also Goldman, supra note 56, at 12 ("However, the concept of firmly rooted should not be synonymous with longevity. An out-of-court assertion may satisfy the requirements of a long-observed hearsay exception, yet not necessarily possess sufficient reliability to meet the requirements of the confrontation clause.").

101. Bourjaily, 483 U.S. at 171. Technically, co-conspirator statements are not hearsay exceptions under the Rules, but instead are defined as "not hearsay." Fed. R. Evid. 801-(d)(2)(E).

102. Bourjaily, 483 U.S. at 183; see also Goldman, supra note 56.

103. Bourjaily, 483 U.S. at 188.
common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all.\(^{104}\)

Courts should defer to the historical pronouncements of judges only when those judges asked the relevant questions. Because the judges who developed the co-conspirator hearsay exception focused on questions that were unconnected with the basic concern of trustworthiness, which the modern Court has determined is the fundamental impulse behind the Confrontation Clause, the long history of the exception should not have been the sole factor relied on in declaring the exception firmly rooted.

Even where the courts developed exceptions by focusing on relevant concerns of reliability, many scholars have argued that deference to history still departs too greatly from the underlying concerns of the Confrontation Clause.\(^{105}\) First, the circumstantial guarantees of trustworthiness which courts frequently cite to justify the use of various hearsay exceptions are often aimed only at the risk that a statement might be a lie.\(^{106}\) However, adversarial testing reveals more than just fabrication. Cross-examination helps the jury assess the significance of any of the "four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory."\(^{107}\)

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104. Id. Others, as well, have pointed out that the co-conspirator hearsay exception has never rested on an inherent trust of such statements. The advisory committee note on the exception does not attempt to justify the admissibility of such evidence on the basis of its reliability. Fed. R. Evid. 801(d)(2)(E) advisory committee's note. Rather, it recognizes the "agency theory of conspiracy is at best a fiction" even as it fails to articulate any other justification for the exception other than it is "the accepted pattern." Id. This is in contrast to the advisory committee's notes on various other hearsay exceptions which point to the circumstantial guarantees of trustworthiness that underlie each exception. See, e.g., Fed. R. Evid. 803(1) advisory committee's note ("The underlying theory of [the exception for present sense impressions] is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."); see also Hinde, supra note 60, at 1296-98; Borisky, supra note 55, at 1300, 1304.

105. See, e.g., Goldman, supra note 56, at 15 (arguing an exception should be firmly rooted if "the circumstances prerequisite to admission under that exception realistically assure a substantial likelihood that virtually any statement offered under it is based on personal knowledge and is not the product of either faulty recollection, or intentional or unintentional misrepresentation"); Nesson & Benkler, supra note 56 (arguing for a two-tier test for firmly rooted hearsay exceptions which would require a judge to analyze hearsay for a sound, competent foundation and require corroborating evidence that could be tested); Jennings, supra note 66, at 746-49 (arguing that hearsay exceptions should not be limited to those recognized "on an arbitrary date [i.e. ratification of the Sixth Amendment] when the law was quite unclear," because those original exceptions, even if one assumes that the Framers considered those exceptions, are not necessarily still constitutional today).

106. For example, the advisory committee note justifies the excited utterance exception by contending that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Fed. R. Evid. 803(2) advisory committee's note.

107. Laurence H. Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 958 (1974); see
Second, too much deference to history allows inertia to prevent a reevaluation of the traditional exceptions based on psychological discoveries or changes in societal attitudes.\textsuperscript{108} Third and finally, one might simply state, as Green and Nesson have, that the contention that the guarantee of trustworthiness surrounding the hearsay exceptions renders cross-examination superfluous is “nonsense.”\textsuperscript{109}

4. Summary

While certain obvious themes characterize the Court’s jurisprudence regarding firmly rooted hearsay exceptions, no entirely coherent theory emerges. For example, reliability seems to be the Court’s primary impulse behind constitutionalizing the business records exception, but the Court utterly departs from reliability concerns in the context of the co-conspirator exception. Lower federal courts ignore history and, arguably, reliability when they constitutionalize both the statement against penal interest and the present sense impression exceptions.\textsuperscript{110} Finally, the Supreme Court’s deference to history without a serious reevaluation of the reliability of the

\textit{also} Goldman, \textit{supra} note 56, at 28-29 (criticizing the rationales underlying the admissibility of present sense impressions and spontaneous exclamations); Jennings, \textit{supra} note 66, at 751 (noting that “[p]sychological studies indicate that excitement may severely impair the declarant’s ability accurately to perceive and communicate”); Note, \textit{The Theoretical Foundation of the Hearsay Rules}, 93 HARV. L. REV. 1786 (1980) (pointing out that traditional hearsay analysis does not take into account the risk that the jury will overestimate the reliability of a given statement).

\textsuperscript{108} See Goldman, \textit{supra} note 56, at 28-29 (arguing that the rationales for admitting present sense impressions and spontaneous exclamations “are based on questionable psychological assumptions”). Goldman points out the reasoning behind those exceptions depends on the dubious assumption that “descriptive accuracy is a natural consequence of observation.” \textit{Id.} at 29; see \textit{also} Jennings, \textit{supra} note 66, at 748 (“[Judges] should particularly not rely inflexibly upon categories based upon assumptions which may be reasonably challenged by objective or psychological tests or upon values which are no longer dominant in our society.”) (footnote omitted); Stanley A. Goldman, \textit{Distorted Vision: Spontaneous Exclamations as a “Firmly Rooted” Exception to the Hearsay Rule}, 23 LOY. L.A. L. REV. 453, 472 (1990) (“The inherent flaws in the rationale underlying the spontaneous exclamation exception and the unreliability of spontaneous statements dictate that the exception should not be classified as firmly rooted.”).

For example, Nesson and Benkler note that the rationale behind the dying declarations exception no longer reassures our “culture that only grows more cynical about the authenticity of religious experience” as it did when “‘facing one’s Maker’ as a moment of truth” was more deeply ingrained in the national consciousness. Nesson & Benkler, \textit{supra} note 56, at 156.


\textsuperscript{110} See, \textit{e.g.}, Keller, \textit{supra} note 86, at 163-64 (discussing reasons why statements against penal interest traditionally have been deemed unreliable).
hearsay statements may itself give rise to reliability concerns which justified the Court's resort to history in the first place.

B. The Common Law as Judicial Compromise

The Court found additional use for the common law in the Confrontation Clause cases. As one commentator wrote in 1971: "Typically, hearsay exceptions are the product of legislative or judicial action. Neither is capable of restricting a constitutional right."\(^{111}\) One might respond that this assertion simply assumes that the admission of all hearsay violates the Confrontation Clause. As in Honda Motor Co. v. Oberg,\(^ {112}\) one might argue the Court is simply using history to flesh out the meaning of an ambiguous constitutional provision. Nonetheless, the historical consensus on which the Court relied in Honda is significantly different from the Supreme Court's use of historical consensus in Confrontation Clause cases.

In cases like Honda, the Supreme Court relies upon history simply because it is tradition. Indeed, the phrase "due process" easily lends itself to a principled historical analysis because what one is "due" in the present may largely depend upon what one was "due" in the past. The Court's primary failing in Honda was that its opinion did not identify any norm it was protecting beyond history's shield against arbitrariness.

On the other hand, in Confrontation Clause cases, the Court identified a norm. Its approach entails a two-step functional analysis in contrast to the one-step historical analysis of the Honda Court. The Court first notes that the value to be protected is the reliability of a result, which adversarial testing helps ensure. Second, the Court defers to the experience of past judges and legislators on whether certain hearsay exceptions provide the needed reliability. In the second analysis, the Court looks to the common law as a source of expertise, not just tradition.

The Supreme Court could have elected to follow another more formalistic path. Had it adopted either Justice Thomas's view that the Confrontation Clause prohibits the use of certain formalized testimonial materials or Wigmore's view that the Clause forbids only unconfronted, in-court witness testimony, then the Court could have completely avoided the temptation to constitutionalize the common law. Then, the lack of a constitutional proscription on admitting hearsay would no more deserve the description "common-law constitutionalization" than any other practice that the Constitution does not prohibit. It is the Court's determination that the admission of hearsay implicates the Constitution that makes its exemption


\(^{112}\) 512 U.S. 415 (1994).
of common-law hearsay exceptions from constitutional scrutiny so striking. Instead of choosing the narrow path of historical formalism, the Court instead articulated a broad constitutional principle infusing the Clause with a meaning that made the admissibility of hearsay constitutionally suspect. The Court then abdicated to the common law its role in elaborating that meaning. By doing so, the Supreme Court also removed the lower courts from weighing and considering the individual merits of any particular hearsay exceptions, especially in the case of firmly rooted hearsay exceptions. Essentially, the Court compromised.

Indeed, the Court even used the language of compromise to justify its approach. Sounding like a politician, the Roberts Court pointed to its “demonstrated success in steering a middle course” as a justification for its continuing to do so. The Court further justified its middling approach by pointing to the lack of scholarly suggestion that the Court’s prior Confrontation Clause jurisprudence had “misidentified the basic interests to be accommodated” or been contrary to the intent of the Framers. The Court noted the lack of a scholarly consensus on the proper course to take as well as the already rejected prior alternatives such as the Wigmore-Harlan approach. Finally, convinced that no magic rule would solve all problems, the Court “reject[ed] the invitation to overrule a near-century of jurisprudence.”

The Court’s use of the common law thus countenanced compromise in the face of uncertainty. Mainly out of an aversion to alternatives, the Court allowed the past experience of judges to form the contours of an explicitly granted constitutional right. Such a move would prompt less concern if the Confrontation Clause read, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him to the extent consistent with the administration of justice.” Where the text seems only concerned with the rights of the defendant, deference to the pronouncements of past judges, whose top priority may not have been the protection of defendants, may be inappropriate. By compromising, the Court contracted its articulated constitutional norm. After all, the common heritage of the rule against hearsay and of the Confrontation Clause does

113. Ohio v. Roberts, 448 U.S. 56, 68 n.9 (1980). Interestingly, the Court offers no indication of what it means by success. Perhaps it regards success as the lack of complaints about the Court’s approach. However, the fact that the Court in White v. Illinois, 502 U.S. 346 (1992), eviscerated Roberts’s requirement that prosecutors demonstrate the unavailability of declarants prior to admitting the declarant’s hearsay testimony indicates all was not completely well with the Court’s approach in Roberts.

114. Roberts, 448 U.S. at 68 n.9. Of course, the Court could not definitively show its holdings were consistent with the Framers intent, either.

115. See id. (referring to the “mutually critical character of the commentary”).

116. Id.
not mean that all hearsay exceptions are rooted in the same concerns.\(^{117}\) Courts have always demanded a large degree of trustworthiness from hearsay exceptions, with the possible exception of co-conspirator hearsay. However, competing institutional considerations have surely made common-law courts and later legislatures more willing to brook a greater degree of error than the constitutional protection allows. Judges face competing pressures such as the need to streamline their dockets and the concern over excluding possibly probative evidence.\(^{118}\) Thus, the Court cannot justify its approach by claiming that it is simply deferring to experts on an essentially factual question, for the question of what hearsay is reliable enough to pass constitutional muster is inescapably a normative judgment.

Two administrative law doctrines provide alternative ways to view the Court’s Confrontation Clause jurisprudence. In a sense, just as Congress must delegate authority in the complex administrative state to solve many complex problems, the Supreme Court has agreed to defer to the administrative expertise of past courts and legislatures on the question of what constitutes a reliable hearsay exception. The Constitution limits Congress’s delegation of its congressional authority, although the limitation is almost never breached.\(^{119}\) The Court arguably ducks responsibility for the fundamental choice of setting the constitutional threshold of reliability necessary for a hearsay statement to be admitted, which the Constitution exclusively commits to the Court.

117. The hearsay rule and its exceptions have been generated through common law development and legislative enactment, evolving into a mind-numbing hodgepodge, a "rule" with more than twenty-five exclusions and exceptions (including a catchall exception) and no clear underlying standard. As such, the doctrine cannot express a coherent constitutional principle. Why should this process of development be accorded absolute constitutional respect in the context of hearsay but in no other context? The trap of equating the right of confrontation with hearsay law gives us a constitutional rule that epitomizes legal technicality, subordinates the Constitution to common-law rules of evidence, and lacks any clear bounds or coherent rationalization.

Nesson & Benkler, supra note 56, at 159.

118. In addition, at least until the 1960s, courts developing hearsay exceptions had no reason to think that this project implicated the Constitution. Thus, one cannot even say that the Supreme Court, in declaring firmly rooted hearsay exceptions constitutional, approves constitutional interpretation. Instead, the Court is merely approving the work of courts that had no reason to be thinking in constitutional terms.

119. See, e.g., Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in the judgment) (arguing that Congress unconstitutionally delegated to the Secretary of Labor the fundamental choice of “whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths”).
A second analogy from administrative law helps illustrate the interactive problems caused by an unclear constitutional mandate. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* the Court deferred to an administrative agency’s construction of a statute where congressional intent was unclear and where the agency’s construction was within a permissible range. Similarly, the Court in *Roberts* deferred to common-law courts in response to the Confrontation Clause’s vague mandate. The Court, however, did not examine specific firmly rooted hearsay exceptions to determine if they are permissible constructions of the Constitution. Moreover, because the lower courts were not interpreting the mandate when they developed the hearsay exceptions, the Court is not even upholding an interpretation at all. Accordingly, the former analogy seems more appropriate although the analogical inadequacy of the second helps illuminate the problems with the Court’s Confrontation Clause jurisprudence.

Part of the Court’s willingness to sanction a transparent compromise derived from its yearning for bright-line rules and the resulting consistency and certitude of application that such rules provide. The beauty of common-law hearsay exceptions is that they remove the need for courts to justify their decisions, except to the extent that courts must explain why a certain statement falls within the letter of the exception. Rules also limit the power of courts to accomplish their desired results. Indeed, even as the Court expanded the power of the judiciary by rejecting Justice Thomas’s formalistic approach to the Confrontation Clause, the Supreme Court limited the extent of its acquisition of power for itself and other judges by mandating deferral to the opinions of their historical counterparts on the admissibility of certain types of hearsay.

It is axiomatic that bright-line rules have their costs. Their

121. Id. at 843.
123. The promulgation of firmly rooted hearsay exceptions “responds to the need for certainty in the workaday world of conducting criminal trials.” Id. at 66.
124. A similar advantage is that distinct rules make it easier to determine what the law is. This reasoning intersects one of the arguments for codification of evidentiary rules. See Barbara C. Salken, *To Codify or Not to Codify—That is the Question: A Study of New York’s Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 664-81 (1992).
125. Suppose, for example, that the application of a hearsay exception admits probative pro-prosecution evidence 90% of the time and unprobative pro-prosecution evidence 10% of the time. Suppose further that a rule requiring a case-by-case determination of probity admits the probative evidence only 70% of the time, never admits unprobative evidence, and significantly increases transaction costs. Finally, suppose that both the failure to admit probative evidence and the admission of unprobative evidence, as well as the exclusion of probative evidence, results 50% of the time. The rule would result in a 5% false conviction
creation often helps save time and resources but at the expense of accuracy; however, acceptance of such rules means a willingness to accept the latter costs. Part of the Court's willingness to sacrifice accuracy in the case of rights to confrontation may be the result of its own historical role in establishing evidentiary rules as well as its own role in the eventual codification of the Federal Rules of Evidence. In that sense, the Court has an institutional stake in trusting and perpetuating its own past pronouncements.

When examining the terms of the Court's compromise, one may cynically observe that the Court is willing to compromise on the additional value that it has recognized as undergirding the confrontation right because history is unclear that the Confrontation Clause is about anything more than "ex-parte affidavits" or the right to cross-examine in-court witnesses. The Court's jurisprudence in this arena is tentative; the Court rocked the boat, but only in areas where it felt the waters clearly allowed it to do so. Yet, when the Court reached the rockier waters of the common law, the Court abandoned the ship rather than attempting to tame the waters in a shaky boat.

The imprecise definition of the confrontation right also allowed for this common-law compromise without the appearance that the Constitution was actually being judicially amended by a previously understood constitutional meaning. The constitutionalization of the common law seemed less

126. The appearance of compromise is reinforced when one considers that the only reason that firmly rooted hearsay exceptions have had the time to become firmly rooted is because the Supreme Court has only recently begun interpreting the Confrontation Clause in the way it presently does.

rate (over a 0% false conviction rate under the standard) coupled with a 10% decrease in the false acquittal rate as well as a significant decrease in transaction costs.

The Constitution necessarily allows for a risk of false convictions. After all, the prosecution must establish guilt beyond a reasonable doubt, not no doubt at all. However, there is something distinct and troubling about the way that error is accepted in the confrontation area. The risk that one will be convicted despite innocence because there was only unreasonable, albeit accurate, doubt is the risk that every defendant must face under the Constitution. The Constitution guarantees every defendant no more than the right to a certain burden of proof. Every defendant theoretically faces the same risk ex-ante. The Confrontation Clause, however, is supposed to accord the right to confront each person, thus ensuring the reliability of evidence. The Court allows for exceptions where the right to confront would be essentially superfluous. Yet these exceptions are not 100% reliable. The approach, therefore, ensures ex-ante that some defendants will have to bear the full brunt of the rule. The Court is willing to accept this fact to avoid the costs of constitutionalizing every evidentiary decision. It would obviously not be acceptable for a court to deny the right to cross-examine to every tenth defendant who comes before it. Yet, this is essentially what the Court does when it says that the court may automatically admit evidence that will only be reliable in 90% of cases 100% of the time. It is an aggregate approach to what is supposed to be an individualized process.
radical because the right was being defined at the same time as the exceptions. One might also say that the Court was making practical a right that reality could not have supported if it entailed the elimination of all common-law hearsay exceptions. In other words, the acceptance of firmly rooted hearsay exceptions was the political price that members of the Court paid to abandon the constricted interpretation of Wigmore and Harlan.

Moreover, the Court's alternatives were not especially attractive. Had the Supreme Court eliminated all hearsay exceptions and articulated a general standard of reliability for courts to follow each time hearsay was introduced as evidence, the Court would have removed state courts from very familiar moorings and overruled the way states had been putting people in jail for over a century—without compelling evidence that the old methods had been unjust or unconstitutional. Furthermore, both the increased litigation costs and the inconsistency of application would have been inevitable.\footnote{127} Even this application inconsistency could not have been resolved by the Supreme Court because of its fact-specific nature.\footnote{128}

As an alternative the Court conceivably could review each hearsay category to determine if it possessed sufficient indicia of reliability to satisfy the Confrontation Clause.\footnote{129} Such an approach would necessitate either the articulation of an arbitrary and unmeasurable threshold of general reliability beyond which the Constitution sanctions the occasional

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\footnote{127} One need only look to the experience of the courts with the residual hearsay exception to see the problems of such an approach. Among the prerequisites to admissibility under this exception is that the statement must possess "equivalent circumstantial guarantees of trustworthiness" to the other hearsay exceptions. \textit{Fed. R. Evid.} 803(24). One commentator pointed out that the requirement of the residual hearsay exception is similar to the "particularized guarantees of trustworthiness" required by the Constitution when a hearsay statement does not fall within a firmly rooted hearsay exception. \textit{See} Major Timothy W. Murphy, \textit{Corroboration Resurrected: The Military Response to Idaho v. Wright}, 145 \textit{Mil. L. Rev.} 166, 171 (1994) (quoting United States \textit{v.} Hines, 23 M.J. 125, 135 (C.M.A. 1986)). A major problem with the application of the residual hearsay exception is "its lack of any certainty, uniformity, or predictability. This has created a great deal of doubt about the rule against hearsay. As a result preparation for trial has become more difficult because attorneys can no longer be certain whether an out-of-court declaration is inadmissible." James E. Beaver, \textit{The Residual Hearsay Exception Reconsidered}, 20 \textit{Fla. St. U. L. Rev.} 787, 800 (1993).

\footnote{128} \textit{See} Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 \textit{U. Chi. L. Rev.} 1175, 1179 (1989) (noting that the establishment of standards diminishes the Supreme Court's role in deciding what the law is and subsumes uniformity to other priorities).

\footnote{129} \textit{See} Goldman, \textit{supra} note 56, at 15 (suggesting that, if there is no opportunity to question the declarant, an exception "can be constitutionally classified as firmly rooted only if... the circumstances prerequisite to admission under that exception realistically assure a substantial likelihood that virtually any statement offered under it is based on personal knowledge and is not the product of either faulty recollection, or intentional or unintentional misrepresentation"). Goldman further argues that the presumption of constitutionality should be rebuttable for statements that fall within a firmly rooted exception. \textit{Id.} at 47.
admission of unreliable evidence or, as Professor Goldman proposed, a high standard of admissibility that few exceptions could meet.\textsuperscript{130} Moreover, applying reliability analysis to an entire category of exceptions would not eliminate the aggregative approach to what is supposed to be an individual right.

Even as the Court lost legitimacy points because of the evident interpretative difficulties of its approach, the political costs would have been greater if it overruled centuries of evidence jurisprudence in the face of an uncertain historical record. Had the historical record been more clear about the meaning of the Confrontation Clause, then this approach would have been a clear abdication of the Court’s constitutional responsibility. But because the record lacked clarity, one cannot be certain that the Court’s approach was the wrong one. In effect, the Court selected an almost certainly inadequate approach, over a possibly erroneous one that has greater interpretative coherence but potentially more drastic consequences for the law of evidence.

The Court has not always taken the more timid and restrained road. Indeed, in the past the Court demonstrated that the resort to common-law consensus for the interpretation of a vague constitutional norm is far from inevitable. In the landmark case of \textit{New York Times v. Sullivan},\textsuperscript{131} the Supreme Court declined to allow aspects of common-law libel and defamation define the scope of the press’s freedom to criticize public officials.\textsuperscript{132} Instead, the Court created a whole new series of tests designed to ensure that the common law not confound what it viewed as the fundamental values of the First Amendment.

\begin{footnotesize}
\begin{enumerate}
  \item One could fault the Court for not explicitly making the presumption of reliability for a firmly rooted hearsay exception rebuttable, although that would have resulted in case-by-case adjudication. \textit{Id.} at 47.
  \item \textit{Id.} at 1397, supra note 61, § 1397, at 158.
  \item \textit{Id.} at 254 (1964).
  \item \textit{Id.} at 47.
\end{enumerate}
\end{footnotesize}

Having just argued that the right to confrontation was essentially the right to cross-examination and thus the right “to have the hearsay rule enforced,” he wrote:

\begin{quote}
Now the hearsay rule is not a rule without exceptions \ldots There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not attempt to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended \ldots just as the brief prohibition against ‘abridging the freedom of speech’ was not intended to ignore the exception for defamatory statements.\textit{Id.}
\end{quote}
The Court's language and approach in *New York Times* contrasts markedly with its deference to the common law in the Confrontation Clause cases. The Court declared that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." Thus, the Court required plaintiffs who were public officials seeking to recover damages for defamatory statements to prove that an allegedly defamatory statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The rule altered the common-law framework which allowed for presumptions both of malice and falsity. While eleven state courts had, at the time of the decision, previously adopted the Supreme Court's requirement, the approach was nonetheless the minority view. Subsequent cases also eliminated certain components of common-law private libel as well, including the common-law rule imposing strict liability for false statements about private individuals.

134. Id. at 279-80.

The proposition [that requires a public official bringing a defamation claim to prove actual malice] stands in very sharp opposition to the majority common law position on the same question, which drew a line between statements of fact, for which liability was strict if the statements were false, and statements of opinion, which were generally privileged absolutely because they are incapable of being either true or false.

*Id.* at 795-96.
137. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding states could not impose liability without fault for false statements about private individuals). "The old common law of libel, which was still the law in most states when Gertz was decided in 1974, included no such requirement." LEWIS, supra note 135, at 195. Furthermore, in *Philadelphia Newspapers, Inc.* v. Hepps, 475 U.S. 767, 776-77 (1986), the Court eliminated the presumption of falsity in cases involving private plaintiffs, at least where the speech at
However, the Court in *New York Times* did not find an absolute right to criticize public officials as advocated by the petitioners and Justices Black and Goldberg. The Court compromised by according some measure of constitutional respect to the value of reputation—even for public officials. The difference is that the *New York Times* Court largely moved away from the common law for its compromise, whereas the Confrontation Clause cases embraced the common law. The *New York Times* Court viewed the constitutional norm to be protected as separate from the common law. The Confrontation Clause cases, however, used the common law to limit the norm and assumed that the common law had struck the correct balance. Moreover, in *New York Times* the Supreme Court chose not to defer to the states’ efforts to strike a balance despite that the common law had historically balanced the concern for freedom of expression with that of reputation. The Court deferred, however, to the results of the common law’s balancing test in the Confrontation Clause cases, presuming that the concerns which motivated the common-law courts were the same that drove the Confrontation Clause. The result of these

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issue concerns public matters, and the private plaintiff is suing a media defendant. “The decision reversed the common-law rule, which made a libel defendant prove a challenged statement true.” LEWIS, supra note 135, at 195. 138. *New York Times*, 376 U.S. at 293-305. 139. See LEWIS, supra note 135, at 119 (“Reputation was a value deserving of respect, too, and over many years the law had respected it despite the First Amendment’s strong commitment to free speech.”). 140. One potential difference in the positions of the *New York Times* Court and, for example, the Roberts Court, is that the former was able to rely upon the historical reaction to the Sedition Act to help define the contours of the right. See *New York Times*, 376 U.S. at 273-77. The Court wrote in *New York Times* that the controversy over the Sedition Act “first crystallized a national awareness of the central meaning of the First Amendment.” *Id.* at 273. No such historical event in the early Republic was available to help define the meaning of the Confrontation Clause (although many argue that the Confrontation Clause drafters drew their inspiration from the injustice of the trial of Sir Walter Raleigh). See supra note 56. On the other hand, the meaning of freedom of the press at the time of founding the Constitution is hardly obvious. See, e.g., Epstein, supra note 136, at 788 nn.14 & 17 (suggesting the First Amendment incorporated Blackstone’s view that freedom of the press was limited to freedom from prior restraint). Moreover, the Sedition Act was not officially declared unconstitutional until *New York Times*, although many have assumed the Act’s unconstitutionality from the time of its passage until the *New York Times* decision. *New York Times*, 376 U.S. at 273-77. The Court, however, had no similar history illuminating the spirit of the Confrontation Clause. Thus, there would have been little to bolster the legitimacy of an attempt by the Court fully to overturn traditional hearsay doctrine.

141. “[T]he common law operates from a deep conviction in the importance of freedom of speech . . . .” Epstein, supra note 136, at 791. Epstein also points to areas where the common law protected speech, including the “absolute protection” for critical opinion of public figures. *Id.* at 791 n.21.
differing approaches has been an ongoing role for the Court in elaborating judicially created First Amendment standards for libel, defamation, and privacy, while escaping the role of monitoring a significant area of evidence law. Indeed, the Court’s retreat from the common law in First Amendment issues ironically necessitated the Court’s subsequent slow elaboration of common-law standards. The Court in Roberts turned to the common law to avoid case-by-case decision making.

In the end, the New York Times decision provides the more satisfying result, at least from an interpretative perspective, because the courts using that approach actually wrestle with a constitutional principle. The Confrontation Clause jurisprudence is troubling because the Court faltered at the threshold of enunciating its own principle and called on the common law to prop itself up. The problem with Roberts was not that it invoked the common law to define the constitutional norm, but that it constitutionalized the common law despite the apparent tension with the norm the Court previously articulated. Further, the Court did not satisfactorily explain why it trusted the common law to strike the proper balance. One might argue that the Court is simply reluctant to overrule what is firmly rooted. But the Court did not simply give the common law the benefit of the doubt on whether it passed the constitutional test. Instead, without providing any good reason why, the Court did not require the common law to take the test at all. While the legitimacy of the common law helped hide the interpretative difficulties with the Court’s approach, a look behind the shine does not by itself inspire confidence in the Court’s ability to resolve interpretative uncertainty in a principled manner.

IV. THE CONSTITUTIONALIZATION OF STATE NUISANCE LAW AND THE COMMON LAW AS METHODOLOGICAL CONSTRAINT

In Honda Motor Co. v. Oberg142 and the Confrontation Clause cases, the constitutionalization of common law resulted in federal constitutional standards applying to all citizens.143 Indeed, the common conception of a constitutional right is one that protects all citizens equally no matter where they reside. An act that constitutes cruel and unusual punishment in one state should constitute cruel and unusual punishment in another—just

143. Note that a few courts and at least one commentator have found it relevant to comment on whether or not a hearsay exception is firmly rooted in a particular jurisdiction. See Casey, supra note 82, at 293 ("It is submitted that the present sense impression exception is not firmly rooted in New York."); see, e.g., State v. Dorcey, 307 N.W.2d 612, 617 (Wis. 1981) ("The exception which allows the admission of hearsay statements made by a co-conspirator is well-rooted in Wisconsin law."). Nonetheless, the Supreme Court has given no indication that one’s confrontation rights may vary from jurisdiction to jurisdiction.
as Due Process or Confrontation Clause violations are judged by the same standard in all states.

However, under the Supreme Court's longstanding deference to state conceptions of property and the framework established in Lucas v. South Carolina Coastal Council, one's right to compensation under the Takings Clause of the Fifth Amendment, at least theoretically, is a function of one's address. In 1986 David Lucas purchased two residential coastal lots in South Carolina for just under one million dollars. Two years later the South Carolina General Assembly passed legislation that prevented him "from erecting any permanent habitable structures on his two parcels," and Lucas sued the state. The trial court found that these restrictions rendered Lucas's parcels valueless and ordered the state to pay just compensation. The South Carolina Supreme Court reversed, ruling that the state owed no compensation when its regulation was designed to prevent serious harm to the public.

After the United States Supreme Court granted a writ of certiorari, the Court reversed the South Carolina Supreme Court. If a regulation deprives an owner's property of all "economically beneficial use," the Court ruled that the State must compensate the owner unless the restriction

inhire[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

145. Id. at 1006.
146. Id. at 1007.
147. Id. at 1009.
148. Id. at 1009-10 (citing Lucas v. South Carolina Coastal Council, 309 S.C. 424, 424 S.E.2d 484 (1992)).
149. Lucas, 505 U.S. at 1029. The requirement that a regulation must deprive property of all economically beneficial use before the Court will consider it a categorical taking has arguably engendered even more scholarly debate and criticism than this section's subject, the nuisance exception. See, e.g., William W. Fisher III, The Trouble with Lucas, 45 STAN. L. REV. 1393, 1402-05 (1993) (arguing that the problem of defining the relevant parcel that a regulation has deprived of all value will only add to the arbitrariness of the law of takings); Richard A. Epstein, Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations, 45 STAN. L. REV. 1369, 1376-77 (1993) (arguing that the "line between total and partial takings is relevant only to the question of how much compensation is required, not to whether there is a basic obligation to compensate"). One aspect of this discussion is
While the Court considered it “unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land,” the Court remanded the case to the South Carolina Supreme Court to give the state the opportunity to “identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.” On remand, the South Carolina Supreme Court ruled that the South Carolina Coastal Council failed to “persuade[] us that any common law basis exists by which it could restrain Lucas’s desired use of his land; nor has our research uncovered any such common law principle.” The court then ordered compensation for the temporary taking.

One difference between Lucas and the other cases discussed in this article is that in Lucas, the Court constitutionalized each state’s individual common law rather than some common-law consensus. Consequently and unlike the cases discussed in Parts II and III, the Lucas decision allows current state courts to establish constitutional parameters in their role as gradual expositors of background state common law.

These differences will be discussed in the next section and are not especially remarkable. The Court has historically utilized state definitions of property when construing the Takings Clause. What is most noteworthy about the Court’s use of the common law in Lucas is that the court privileged common-law restrictions over statutory ones and used the common law to avoid articulating a novel constitutional standard.

A. Common Law as Background Expectations

As the majority points out, the result in Lucas is largely unremark-

relevant to the subject of this article, and it relates to the so-called parceling or “denominator” problem. The problem is illustrated by the following example: If a state enacts a regulation which only allows building on one half of a person’s 100-acre parcel but forbids it on the other half, has one’s 50-acre property been deprived of all value, or has one’s 100-acre property been deprived of one half of its value? In dictum, Justice Scalia suggested that “the answer” to the parceling problem might also lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Lucas, 505 U.S. at 1017 n.7. Thus, the Court might in the future resort to constitutionalizing state common law in the area of defining the scope and size of property interests.

150. Lucas, 505 U.S. at 1031.


152. Id.
able. In essence, the opinion by Justice Scalia holds that the state cannot owe compensation for taking something that the property owner never actually owned. Because the Constitution provides for no baseline definition of property, the Court generally must look to "existing rules or understandings that stem from an independent source such as state law" to ascertain the scope of property rights.

If a state's background rules of property forbid certain uses, then those restrictions, such as common-law nuisance restrictions, "inhere in the title itself," and the property owner purchases the property subject to those conditions. Nonetheless, the body of state-created expectations and restrictions that inhere in the title to property has seldom set the limits of the state's ability to regulate. Indeed, as Justice Holmes suggested in 1922, the question of whether a certain restriction inhere in the title is distinct from the question of whether the restriction falls within the ambit of the legislative police power.

Even ignoring this precedent, a theory of expectations ultimately does not fully explain or justify Justice Scalia's resort to common-law const-

153. Lucas, 505 U.S. at 1027.
154. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). See Henry Paul Monaghan, Of "Liberty" and "Property", 62 CORNELL L. REV. 405, 435 (1977) (noting that the Due Process clause itself does not create property interests, and instead those interests are found principally in state law). Although Roth involved a procedural due process claim against a state entity, it is clear that state definitions of property combined with the Fifth Amendment's prohibition against uncompensated takings, limit the federal government's power as well as the power of the states. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984) (failing to find a taking, yet holding that the Fifth Amendment protects trade secrets recognized under state law as property from uncompensated appropriation by the federal government).
155. Lucas, 505 U.S. at 1029.
156. Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords . . . with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.
157. "If, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and that embodies that understanding does not need to invoke the police power." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). This quote, from Justice Holmes, the father of regulatory takings doctrine, see Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), suggests that the legislative power to regulate land use has historically been analyzed separately from the expectations of property owners.
stitutionalization. As Professor Tribe argues, the "[expectations] path is a circular one inasmuch as expectations are themselves subject to government manipulation. . . . Without appeal to such concerns [as regularity, autonomy, and equality], we are defenseless against the alluring but fatal argument that, since it is the government that gives, government is free to take away as well." In other words, unless one is willing to give the state nearly limitless power to manipulate property rights and eviscerate the Takings Clause at least as applied to the states, one must resort to norms other than expectations to define property rights for purposes of the Takings Clause.

However, an earlier opinion by Justice Scalia in Nollan v. California Coastal Commission demonstrated the Court's clear unwillingness to adopt such a stripped-down view of the Takings Clause. In Nollan Scalia indicated that statutory constraints, even those applied only to owners who purchased property after the enactment of the statute, are not restrictions that inhere in the title. The plaintiffs in Nollan purchased their property after the Commission began to implement its policy of conditioning building permits for certain beach front property on the grant of an

159. See William A. Fischel, Regulatory Takings: Law, Economics, and Politics 183 (1995) ("Rational expectations theory holds that landowners should have seen the taking coming and so should not expect compensation. This is shown by logic and history to be an unsatisfactory application of a good positive theory to thoroughly normative territory."); see also Jeremy Paul, The Hidden Structure of Takings Law, 64 S. Cal. L. Rev. 1393, 1521 (1991).

Expectations analysis represents takings law's effort to assure the citizenry that plans based on existing law will not be disrupted unless compensation is paid. This project cannot be completed if only because government must retain the flexibility to change laws without incurring the massive transaction costs of compensating for every change. But neither can it be abandoned, unless property is to lose its place as the constitutional right that protects minority holdings against changing majority views.

The challenge for the Court then is to find a substantive, normative way to differentiate between expectations based on existing law that will receive constitutional protection and expectations based on existing law that will not.

Id. (footnotes omitted).
161. Id. at 834 n.2. In Nollan the California Coastal Commission began to implement a policy that conditioned building permits for certain beach front property upon a grant of an easement across the property. Id. at 828-29. The Court ultimately found that if the government wanted the easement it had to compensate the owners, and the government could not constitutionally avoid payment by imposing such a condition upon the owners of the property. Id. at 841-42.

https://scholarcommons.sc.edu/sclr/vol49/iss3/6
easement to the public.\textsuperscript{162} However, the \textit{Nollan} Court found the chronology irrelevant to the question of the state's obligation to compensate and wrote: "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."\textsuperscript{163} A broad reading of this quote from \textit{Nollan} would suggest that prospective statutory or administrative use restrictions do not inhere in the title of property as do common-law restrictions, a distinction that is inexplicable if the only goal is to protect the expectations of the purchaser.\textsuperscript{164} In addition, Justice Blackmun's dissent in \textit{Lucas} determined that "[t]he Court's references [in \textit{Lucas}] to 'common-law' background principles . . . indicate that legislative determinations do not constitute 'state nuisance and property law' for the Court."\textsuperscript{165}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 834 n.2.
\item \textit{Id.} Thus, the Court prevents the state from invoking a "moving to the taking" defense for use whenever property is purchased after a regulation has gone into effect. For commentary offering a similar justification for the rejection of the defense, see Fischel, \textit{supra} note 159, at 193-95. The defense is based upon the notion that property owners who purchase property after a regulation has gone into effect have already been compensated for their loss by the lower price of the property. Fischel argues, however, that this is simply "[t]he
taking at the wrong moment in time" because it ignores the prior owner's right to compensation and makes that right essentially inalienable if a subsequent purchaser cannot take advantage of it. \textit{Id.} at 194.
\item Suffice it to say, however, that if the only question is expectations, the attempt at distinction at the very least ignores the historical role that the legislature has played in identifying and proscribing nuisances. \textit{See infra} note 177.
\item Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1052 n.15 (1992). An Iowa court in \textit{Hunziker v. State}, 519 N.W.2d 367 (Iowa 1994), questionably interpreted the \textit{Lucas} Court's reference to "background principles" of property to encompass statutory restrictions in effect when the plaintiff purchased the property. In \textit{Hunziker} the plaintiffs had purchased their property twelve years after passage of a statute authorizing the state archaeologist to deny permission to exhume important archaeological remains. \textit{Id.} at 371. When the archaeologist later discovered the presence of important remains on the plaintiff's property, the plaintiffs were effectively denied permission to build upon their property. The court, however, found that "at the time the plaintiffs acquired title, the State, under existing state law, could have prevented disinterment. This limitation or restriction on the use of the land inhere in the plaintiffs' title." \textit{Id.}

One commentator writes that the "most significant question that remains unanswered by \textit{Lucas} is whether land-use regulations . . . already in place prior to the purchase of the land, create such an implied limitation." Andrew R. Mylott, \textit{Is There a Doctrine in the House?: The Nuisance Exception to the Takings Clause Has Been Mortally Wounded by \textit{Lucas}}, 1992 \textit{Wis. L. Rev.} 1299, 1323 (1992); \textit{see also} William Funk, \textit{Revolution or Restatement?: Awaiting Answers to Lucas' Unanswered Questions}, 23 \textit{ENVTL. L.} 891, 896 (1993) (discussing the issue of \textit{Lucas}'s application to prospective statutory restrictions). Neither the \textit{Hunziker} court nor Mylott, however, address footnote 2 of the Court's opinion, discussed \textit{supra} notes 162-64 and accompanying text, nor do they deal with the tone of the Court's opinion in \textit{Lucas} or the dissent's view of the majority opinion.
\end{enumerate}
\end{footnotesize}
Courts could also distinguish between two types of statutes. The \textit{Nollan}-type statute imposes a use restriction directly upon certain property. The \textit{Hunziker}-type statute imposes a generalized risk that the legislature will impose a use restriction on a landowner's property if a certain event occurs that is beyond that landowner's control, for example, the discovery of archaeological remains. If the former type of regulation went uncompensated for subsequent purchasers, then the impact would be felt immediately. Given that the owner could now only sell the property for less value because of the restriction, the current owners would feel the incentive to claim compensation for the use at the time of the enactment of the regulation—even if they had no intention previously of taking advantage of that particular use. A more sensible system would allow subsequent purchasers to seek compensation so that the current owners would not feel the rush to do so before the use restriction truly affected them.

The latter type of statute, however, only adjusts property value for the risk of regulation. No similar incentives would be present because no particular property would be targeted. The only thing taken would be the loss of value deriving from the risk of future appropriation. Assuming this risk was spread evenly among property owners, property owners would rationally forego compensation for the minimal impact because they would otherwise be taxed for the compensation system and would have to pay for legal counsel to seek compensation. Moreover, the minimal impact of such a regulation on everyone's property is not the type of loss with which the Takings Clause traditionally has been concerned.

All purchasers would then acquire their property at a slightly lower price as ex ante compensation for the statutory risk (and then could insure against the risk). Still, while this is a distinction between the statutes in \textit{Hunziker} and \textit{Nollan}, this distinction would allow legislatures to pass general statutes stating that all property shall be subject to the risk of random appropriation. While such statutes impose only a general risk of regulation on everyone's property, this is clearly not what the Court had in mind. If the only question is expectations, then the attempt at distinction at the very least ignores the historical role that the legislature has played in identifying and proscribing nuisances.

Justice Kennedy suggested an expectations-based approach to the problem, but did not confine expectations simply to the common law; he wrote, "Property is bought and sold, investments are made, subject to the State's power to regulate." Recognition of the circularity of the analysis, he nonetheless argued that the "expectations protected by the Constitution are based on objective rules and customs that can be understood as

\footnote{166. \textit{Lucas}, 505 U.S. at 1034 (concurring).}
reasonable by all partes involved.”167 However, “[t]he common law of nuisance is too narrow a confines for the exercise of regulatory power in a complex and interdependent society.”168

One cannot reconcile Justice Scalia’s opinions in Nollan and Lucas with a pure expectations-based conception of property. Yet Justice Scalia explicitly refused in Lucas to articulate a general unified theory of nuisance principles as Professor Epstein urged the Court to do in an amicus brief submitted in the Lucas case.169 Instead, Scalia opened the door to the possibility that other common-law doctrines inhere in the title by referring to “background principles of nuisance and property law.”170 Furthermore,

167. Id. at 1035.
170. Lucas, 505 U.S. at 1030. For example, the state court in Stevens v. City of Cannon Beach, 854 P.2d 449, 456-57 (Or. 1993), determined that the common-law doctrine of custom qualified as a background principle, and thus the plaintiffs never had the right that they claimed was taken. Furthermore, commentators argue that Lucas will have little impact on certain types of state regulation because of background principles of state property law beyond the law of nuisance. See, e.g., Hope M. Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, 19 HARV. ENVTL. L. REV. 1 (1995) (arguing that uses prohibited by the doctrine of custom or the public trust doctrine should be uncompensable under Lucas); Jamee Jordan Patterson, California Land Use Regulation Post Lucas: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California, 11 UCLA J. ENVTL. L. & POL’y 175, 185 (1993) (arguing that where uses of property interfere with “public property rights acquired through actual or implied dedication, public trust rights, or state waters including ground water and navigable waters” and possibly the State’s interest in fish, game, and wildlife, deprivation of such uses should not constitute a taking). But see James S. Burling, Of Nuisances and Public Trusts—Can Lucas Be Evaded?, C97 ALI-ABA 259, 274, 276 (1995) (arguing that the “Public Trust Doctrine should logically have no ability to negate the existence of a regulatory taking” because to do so would be to retroactively redefine existing interests
the opinion explicitly made the existence of a taking dependent upon each state’s law of property and nuisance, potentially allowing a taking in one state that would not have been a taking in another. 171 Thus, the Court in Lucas privileged the definitional over the expectational and the normative. 172 One must look to fronts other than the latter two to fully explain Justice Scalia’s resort to common-law constitutionalization in Lucas.

B. Common Law as Institutional Empowerment

The resolution of the Lucas case was the product of two distinct features of American constitutional law: (1) the lack of an articulated constitutional definition of property and the resultant dependence upon state-created expectations 173 and (2) the incorporation of the Takings Clause by the Fourteenth Amendment to apply to state and municipal governments. 174 As a means of constraining federal power, the former feature theoretically made a great deal of sense. Allowing the states to define property rights that the Fifth Amendment prohibits the federal government from taking without just compensation certainly created a more potent institutional check on federal power than if the power of definition lay in federal hands alone.

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based upon newfound societal needs when at the time that the property right was created, no such “modern notions of an expanded public trust” existed.

171. There is, however, a tension in the Court’s opinion between normative and definitional conceptions of property. The Court made clear (with reference to the Restatement (Second) of Torts) its view that no common-law principle would have been able to prevent the use at issue in Lucas. The Court wrote “[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the ‘essential use’ of land.” Lucas, 505 U.S. at 1031. The Court went on to say the question was “one of state law to be dealt with on remand.” Id.; see also Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism, 35 WM. & MARY L. REV. 301, 319 (1993) (noting that Justice Scalia “writes in places as if there is just one American background law of property and nuisance . . . that is common to the national jurisdiction and all the state jurisdictions”).

172. “The Lucas Court seems to have forsaken familiar notions of reasonable expectations as a measure of property rights in favor of what Justice Scalia calls a ‘categorical’ rule; in this instance a rule drawn from a historical definition that is quite different from a rule of expectation.” Joseph L. Sax, Rights that “Inhere in the Title Itself”: The Impact of the Lucas Case on Western Water Law, 26 LOY. L.A. L. REV. 943, 944-45 (1993). There is an obvious overlap, as Sax notes, between definition and expectation in the sense that people make their decisions according to the background law. Id. at 945. Nonetheless, as Justice Kennedy noted, statutes can create expectations as well, but the Court leaves those expectations out of the definition. See Lucas, 505 U.S. at 1035 (Kennedy, J., concurring).

173. See supra note 154 and accompanying text.

The combination of the historic deference to state definitions of property with the application of the Takings Clause to localities, however, ensured that the power of definition would now be in the hands of the same entity that incorporation of the Takings Clause was supposed to constrain. The Court had to determine which institution would have the power to check encroachments upon constitutionally protected property rights. After 

Lucas, the Court determined that, in the area of total takings at least, the various state judiciaries have primary authority.}

Yet the importance of institutional empowerment in the Court's particular resort to common-law constitutionalization is easily overemphasized. To guard against this tendency, one must define more precisely the nature of the power shift that 

Lucas engendered. One must first recognize that post-Lucas state courts contribute now in two ways to the takings determination—as constitutional decision makers and as common-law decision makers.

State judges who preside over takings claims undoubtedly have more power than they did with respect to the state legislature prior to 

Lucas. The Court effectively disregards the legislature's traditional role in defining public nuisances by ruling that any legislative enactment that deprives

175. One commentator described the main issue in 

Lucas as one of "allocative authority." 

Leading Cases, supra note 168, at 274; see also John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 COLUM. J. ENVTL. L. 1, 27 (1993) (stating that the regulatory takings debate is "an institutional debate as to which branch of government should have the final say on the substantive issues of land-use regulation"). Humbach and the comment, however, differ on which allocation the Court should have preferred. The comment favored the courts, at least where a statute has deprived owners of all economic use of their land, arguing that courts can more fairly balance competing interests and provide a more predictable result through the evolution of precedent. See 

Leading Cases, supra note 168, at 274-75. Pointing out, however, that "it is, after all, still a comparatively rare event for legislatures to ban previously lawful uses of land[,]" Humbach contends that the legislature is superior because it can address complex issues in a more systematic way than the courts. Humbach, supra, at 16. Legislatures, subject to frequent elections and constituent contact, are exposed to a greater diversity of views and are thus in a better position to determine what the interests of the public require. Id. at 25-26. For a unique twist on the debate, see Fischel, supra note 159, at 355, for an argument that there be judicial supervision of the actions of local governments but not state legislatures.

176. Ironically, this is happening at a time when state legislatures are seriously considering and enacting regulatory takings legislation to aid property owners. See John A. Humbach, Should Taxpayers Pay People to Obey Environmental Laws?, 6 FORDHAM ENVTL. L.J. 423, 423 n.2 (1995) (citing National Audubon Society's "Takings" Fifty State Review, A CLEAR VIEW (Clearinghouse on Envtl. Advocacy/Envtl. Working Group, Wash., D.C.), Dec. 1994, at 3) (pointing out that as of the end of 1994, 83 takings bills had been introduced in 33 states, six of which had been enacted into law). This fact is not an argument against empowering the courts. An activist court is little danger to a legislature that wants to overprotect property rights, whereas an activist legislature could easily shift back to overregulation if the courts lacked the power to stop it.
property of all value must be compensated unless it coheres with "background principles of the State's law of property and nuisance." As a result, the governmental body defending a regulation faces a heightened burden of justifying regulations which deprive property of all economically viable use. Indeed, a desire to limit legislative power at least in this narrow area of takings law seems to fuel most of the Lucas opinion.

The recourse to the common law per se is not what empowers the judiciary. Rather, Lucas empowers state jurisdictions presiding over takings cases in the same way that any heightened scrutiny standard would empower them. Thus, objections to Lucas on institutional empowerment grounds are at their root concerned about the extent to which the Fifth and

177. Lucas, 505 U.S. at 1029. As discussed above, legislative enactments almost certainly do not qualify as background principles of property law under the Court's takings jurisprudence. "[B]y the 1800's in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted." Id. at 1052 n.15 (Blackmun, J., dissenting). Moreover, "[f]or hundreds of years, state legislatures and their parliamentary predecessors exercised the power to declare new kinds of public nuisance and add to the list of socially intolerable uses of land as new needs became evident." John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. U. L. REV. 771, 772 (1993); see also Babcock, supra note 170, at 22 ("[B]oth the legislatures and the courts have played major roles in expanding the reach of common law nuisance, particularly with respect to protection of the environment and natural resources."); Michael C. Blumm, Property Myths, Judicial Activism, and the Lucas Case, 23 ENVTL. L. 907, 908 (1993) ("[N]uisance law includes, there is no question, the background of statutes."). The Second Restatement of Torts characterizes "whether the conduct is proscribed by a statute, ordinance or administrative regulation" as a "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable" and thus a public nuisance. RESTATEMENT (SECOND) OF TORTS § 821B (1979). Note also "the [19th century] defense of 'statutory justification,' which exempted mills, railroads, and other enterprises operating under franchise from the government from the reach of ordinary nuisance law." Jeff L. Lewin, Boomer and the American Law of Nuisance: Past, Present, and Future, 54 ALB. L. REV. 189, 197 (1990). It is also unclear what the Court would make of the Louisiana law of nuisance which is entirely derived from its civil code. See LA. CIV. CODE ANN. arts. 667-69 (West 1972 & Supp. 1997); see also John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 HARV. L. REV. 1252 (1996) (arguing that contrary to a widely accepted historical premise, colonial land use regulation went far beyond nuisance law and had purposes other than harm prevention).

178. See Lucas, 505 U.S. at 1026 (noting that an approach to regulatory takings that only required the legislature to point out some noxious use that it was attempting to prevent "would essentially nullify . . . limits to the noncompensable exercise of the police power"). For an example of the Supreme Court doing the opposite and disempowering state courts in favor of state legislatures in the area of constitutional interpretation, see Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), which reversed the Minnesota Supreme Court's decision that a state law banning the sale of milk products in plastic nonreturnable containers but permitting sales in other nonreturnable containers such as paperboard cartons was a violation of the Equal Protection Clause.
Fourteenth Amendments require the Court to be suspicious when a regulation deprives property of all of its value. To the extent that total regulatory takings implicate the Constitution, Justice Scalia is hardly unreasonable in ensuring the effectiveness of that protection by insulating those rights from the whims of a legislative majority. The Bill of Rights is not a top ten list with some rights deserving greater protection than others. On the other hand, to the extent the Constitution cannot be fairly read to protect against such total regulatory takings beyond the minimal scrutiny applied to all economic regulations, commentators correctly point out the contradiction with Justice Scalia’s constant criticism of judicial activism.179

The result is no different from what it would have been if the Supreme Court had determined that some other test should guide the determination of the acceptability of a regulation that deprives property of all economic value. State courts would have the same responsibility for fleshing out and applying that test. Moreover, the use of state common law as a standard does not increase the power of state courts actually presiding over takings claims relative to the federal courts. Under doctrines of ripeness and res

179. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting in part) (arguing that a woman’s right to have an abortion, similar to bigamy, should not be constitutionally protected because “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed” and further, the democratic process should determine the wisdom of restrictions on abortion). Justice Scalia notes that “[t]he Court’s temptation is . . . towards systematically eliminating checks upon its own power . . . .” Id. at 981; see Hambach, supra note 177, at 771-72 (arguing that the reasoning behind Justice Scalia’s Planned Parenthood dissent dictated upholding in the Takings area the “traditional authority of legislatures to set public policy on problematic uses of land” and a rejection of “judicial preemption of laws duly made under our nation’s democratically-driven processes”); see also Lucas, 505 U.S. at 1060 (Blackmun, J., dissenting) (arguing that the Court’s opinion “seems to treat history as a grab bag of principles, to be adopted where they support the Court’s theory, and ignored where they do not”). Blackmun points to a number of cases where the Court upheld regulations invoking police power. Id. at 1047-48. Justice Scalia’s response was essentially that none of those cases deprived the regulated property of all of its value. Moreover, according to Justice Scalia, a regulation that eliminates all a property’s economic value is prohibited by a “historical compact recorded in the Takings Clause that has become part of our constitutional culture.” Id. at 1028 (majority opinion). But Justice Blackmun points out the fallacy of such a compact by observing that if one looks to early common law for background principles, then regulations would not have been compensable at all given the early understanding of the Takings Clause. See id. at 1060 (Blackmun, J., dissenting). If one looks to later understandings, however, then one has to confront the fact that “legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased.” Id. at 1060; see also Michelman, supra note 171, at 323 (calling Justice Scalia’s assertion of a constitutional compact a “naked assertion . . . because the Lucas opinion refers to no source external to its subscribers for its crucial claim of judicial knowledge”).
judicata, state courts almost always have the first and last word on state takings issues, barring a successful appeal to the Supreme Court.\footnote{180}{One should not mistake the use of state common law as a grant of more power to state courts in presiding over state or local inverse condemnation actions than such courts had previously with respect to the federal courts. \textit{Leading Cases,} supra note 168, at 274, seems to make this error when it states that the majority’s opinion allocated authority to the “state judiciary rather than to the state legislature or the federal courts.” (emphasis added) The comment later says that the \textit{Lucas} opinion “clearly leaves room for federal court review of state court interpretation of common law nuisance doctrine.” \textit{Id.} at 276 n.61. In practice, this will not be the case under the Court’s prior precedent. The reason is that state courts, as a practical matter, have near exclusive authority (allowing of course for Supreme Court review) over such disputes as a result of the Supreme Court’s 1985 decision in \textit{Williamson County Reg’l Planning Comm’n v. Hamilton Bank,} 473 U.S. 172 (1985).

The case required property owners complaining of a state or local taking to exhaust both state administrative and judicial remedies. The result of the state court’s decision is generally dispositive in the dispute, for res judicata generally will bar any further attempt to bring the suit in federal court. If her claim was denied in the state, the property owner’s only recourse as a general rule is an appeal to the Supreme Court. \textit{See generally} Thomas E. Roberts, \textit{Ripeness and Forum Selection in Fifth Amendment Takings Litigation,} 11 J. \textit{LAND USE & ENVTL.} L. 37, 56-68 (1995) (explaining the \textit{Williamson} case in detail).

Thus, the only way that a state court presiding over a takings claim has more power after \textit{Lucas} than it did relative to federal courts prior to \textit{Lucas} is that the Supreme Court will doubtless be less eager to review the reasonableness of a state court’s interpretation of its own nuisance law than it would a federal standard, because a review of such a case will have far less precedential value since each state has its own nuisance standard and because of the federalism implications of telling a state that it has erroneously interpreted its own law.}

In contrast, the state judge, when presiding over a public or private nuisance case, is empowered specifically by the Court’s resort to the common law. The state judge’s decision is now invested with significance that exceeds its impact upon the rights of the parties involved and the impact of the case on state property law because the state court decision determines the scope of a right protected under the federal Constitution. Moreover, federal courts adjudicating takings claims also are presumably bound by this state court precedent assuming they find, as required by the \textit{Lucas} Court, that it is “an objectively reasonable application of relevant precedents.”\footnote{181}{\textit{Lucas,}} 505 U.S. at 1032 n.18.

The significance of this empowerment, however, will depend largely upon the ability of plaintiffs to successfully bring cutting-edge nuisance actions in state courts and to shape the law of nuisance in a way that might eventually affect the resolution of a takings claim.\footnote{182}{\textit{See}} Steven R. Levine, Comment, \textit{Environmental Interest Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council,} 48 U. MIAMI L. REV. 1179, 1213 (1994) (“[E]nvironmental interest groups] may achieve success litigating claims in court or lobbying for legislation that broadens a state’s conception of nuisance.”).
takings,” is clearly the motivating force behind the *Lucas* opinion. Although this impulse does not fully explain the *Lucas* Court’s resort to the constitutionalization of state common law, this desire to empower state courts explains the preference for judicially created expectations and definitions over legislative ones. Supreme Court ripeness doctrine and the presumption against regulations depriving property of all economic value ensure that the state courts would have the last word on takings by state regulations. The Court’s preference for the common law itself over some other standard of heightened scrutiny, however, still requires some explanation.

C. Common Law as Methodological Constraint

A concern for background expectations does not fully justify the Court’s approach in *Lucas*, because it cannot explain the Court’s preference for expectations rooted in the common law over those rooted in statutes and the past role of the legislature in regulating property rights. A concern with oppression by legislative majorities largely animated the Court’s decision, but nonetheless does not fully explain its “choice of law.”

183. The Court could, in the alternative, have mandated that lower courts apply a uniform heightened scrutiny standard, a uniform standard of nuisance, or even state takings doctrine to determine if a regulation constituted a total taking. Professor Sax, for example, wrote that he would have had much less trouble with the *Lucas* decision if it had “suggested that heightened judicial scrutiny should be triggered when regulation deprives an owner of all economic value.” Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* *Lucas* v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1455 (1993). Furthermore, nothing stopped the Court from adopting a heightened scrutiny test in addition to the deference to state nuisance law. Doing so would have recognized the difference between the police power and the expectations that compose a state’s property rights—a distinction recognized in *Jackman v. Rosenbaum*, 260 U.S. 22 (1922). See supra note 157 and accompanying text. Another scholar has argued for a novel but extremely compelling approach to takings law. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993). Professor Rubenfeld suggested that the key to a coherent theory of the Takings Clause is the word “use” rather than the word “taken.” *Id.* at 1080-81. The Takings Clause, Rubenfeld argues, prohibits the government’s use of the productive capacities of another’s property without just compensation. *Id.* The adoption of this approach in *Lucas* would have obviated the need for a total taking category, the constitutionalization of common law, or any sort of alternative heightened scrutiny standard because the only issue would have been: Did the government’s regulation take over property for society’s use? Indeed, Rubenfeld suggests that the adoption of a nuisance test is somewhat perverse. See *id.* at 1095. “The ‘balancing’ of public interest against private loss, which assumes that compensation is *less* warranted the *more* the state profits from using some of its citizens’ property, misses the entire point of the compensation guarantee.” *Id.* (emphasis in original). Rubenfeld also sees little difference between nuisance analysis and the noxious use analysis the Court ostensibly jettisoned in its *Lucas* opinion. *Id.* at 1093. Although Rubenfeld can explain virtually every Supreme Court result with reference to the usings principle, his approach nevertheless is still
Though the judiciary gained power relative to the legislature as a result of *Lucas*, the reliance on the common law also constrains the judiciary in a particular way.

One senses from the *Lucas* opinion that the Court was not fully content with its own decision to constitutionalize fifty different bodies of common law. For example, while the Court states that all of a state’s background property law figures into the total takings analysis, the Court focuses on nuisance.  

Although the opinion explicitly disaggregates takings law by linking it directly to the nuisance law of each state, the Court hints strongly at what it expects that law to look like. Moreover, the Court makes clear that new principles of common law will be treated just like statutes, stating that “[a]ny limitation so severe [as to deprive property of all of its value] cannot be newly legislated or decreed (without compensation).” The resort to the common law may be attributed partially to the Court’s deference to a state’s traditional role of defining its own property rights as well as a consequent reluctance to attempt an articulation of a federal standard. Professor Michelman, however, reads *Lucas*’s requirement that a state’s validation of a legislative enactment which deprives property of all economic value must be an “objectively reasonable” interpretation of past precedent as a potentially massive intrusion upon the state’s right to interpret its own law. Michelman correctly points out that the opinion, at least theoretically, gives the Supreme Court the power to admonish a state court for incorrectly interpreting its own precedent. The Court might even constitutionalize a particular common-law method of interpretation, selecting, for example, a jurisprudence of rules rather than one of flexible principles. Consequently, Michelman—

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a road on which the Court has not yet consciously traveled, although it seems to be one worth exploring in the future.

185. *Id.* at 1030-31.
186. *Id.* at 1029 (emphasis added).
187. *But see* Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). The Webb’s Court, in invalidating a Florida statute allowing the state to claim the interest earned on an interpleader fund deposited with the court, made no reference to Florida law, instead referring to the “usual and general rule” that interest follows the principal. *Id.* at 162. The Webb’s case suggests that there is some constitutional minimum of property rights below which a state may not go even if the right was not previously recognized by state law. For a more extended discussion of Webb’s, see TRIBE, supra note 158, at 609-10. In imposing the definitions of other jurisdictions upon Florida, the Webb’s Court’s actions bear more than just a passing resemblance to those of the *Honda* Court.
190. Michelman, *supra* note 171, at 325-26. Richard Lazarus has noted a gradual
notes a potentially stark contrast between the Court's conservative desire to protect property rights and its conservative leanings favoring federalism.191

However, another model simultaneously quells federalism concerns and provides a functional explanation for the Court's reliance upon the common law. This model focuses on a court that has wearied somewhat of the takings morass and is seeking, at least for the narrow category of so-called total takings, a way to operationalize constitutional law without requiring the constant monitoring by the Supreme Court. The Court's frustration with the regulatory takings issue has led it to establish categorical standards for takings analysis such as the total deprivation of value in Lucas.192 If the Court envisioned itself in the role of monitor, it would not have created fifty different state standards for total takings because the different standards certainly do not support Supreme Court opinions with broad precedential value. Sax notes that "[p]resumably, states will have substantial latitude in determining the extent to which their existing legal principles limit property rights."193

 elimination in nuisance law of an interpretative approach emphasizing rigid, formalistic, property-based rules "in favor of balancing the competing considerations, including both individual equities and broad societal interests, of each party's legal position." Richard J. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 IOWA L. REV. 631, 663 (1986). Some fear the Court's resort to a more definitional approach to property law will require a return to a less flexible approach to nuisance law. Yet given the Court's emphasis on the essentially indeterminate factors of the Restatement, one might question whether the Court really expects state courts to apply nuisance law in a rule-like fashion. See Lucas, 505 U.S. at 1031. Indeed, it is ironic that Justice Scalia described nuisance more in terms of the modern-standards approach than the older rules-based approach, given that his emphasis on rights that inhere in the title would seem to favor the older approach.

191. See Michelman, supra note 171, at 318. Fisher also criticized the framework which authorizes the Court to overrule state interpretations of state law. Fisher, supra note 149, at 1407. Fisher notes that

[a] state judge whose interpretation is overturned by the Supreme Court thus could not help but see in such a ruling an adverse evaluation of either his competence or his honesty. In sum, if it is taken seriously, the nuisance exception to the Lucas test may lead to considerable awkwardness and resentment.

Id.

192. Sax, supra note 183, at 1437.

193. Id. at 1438. Moreover, the Court sent the federal courts packing a long time ago in the area of state takings through the combination of ripeness doctrine and res judicata generally barring federal court takings review. See Richard J. Lazarus, Putting the Correct "Spin" on Lucas, 45 STAN. L. REV. 1411, 1430-31 (1993). Lazarus notes:

State court judges are not likely to conclude that their own application of precedent is not 'objectively reasonable.' And, while federal judges might be more willing to second-guess their state judicial counterparts,
Potentially, the Court could have adopted a third model. It could have wholly eliminated the relevance of past understandings by creating a new standard for those situations where a regulation deprives a parcel of property of all of its value. This model is the flip side of constitution-aliizing the common law and would have resembled the Court’s action in New York Times v. Sullivan.

The Lucas and Sullivan Courts approached the federalism question in markedly different ways. Both reached out to protect a right they viewed as constitutionally protected by refusing to defer to the organ of state government that they saw as threatening those rights. Yet Lucas tells states that the Court will monitor their application of their own law, and Sullivan tells the states that they will have to abandon certain aspects of their own substantive law.

Assuming that the Court had to find a check on the power of state legislatures to redefine property rights through regulation, then which is the greater intrusion upon state power: establishing a federal constitutional standard that trumps the traditional common law or deferring to state substantive law and instructing lower (mainly state) courts to monitor for its misapplication? The latter is potentially more insulting, but Justice Scalia may have recognized that approach is also less disruptive and certainly not unprecedented as a matter of judicial federalism. More-

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they are not likely to have much opportunity to do so. The Supreme Court’s ripeness rules effectively require that ‘as-applied’ takings challenges be initiated in state administrative and judicial fora.

Id. at 1430.

194. On the other hand, the Court could have attempted to adopt a broader expectations-based view of property that incorporates background understandings that are not necessarily rooted in the common law. See, e.g., Lucas, 505 U.S. at 1034-35 (Kennedy, J., concurring) (describing such an expectation-based view). Once again, by rejecting this view, the Court’s opinion demonstrates that it is concerned with more than just expectations.


196. Professor David Shapiro pointed out that just because something is a lesser intrusion does not necessarily mean that it is more acceptable as a matter of federalism if there is no power justifying the federal action. Discussion with David Shapiro, Professor of law at Harvard Law School, Cambridge, Massachusetts (April, 1996). In this case, however, either option would have been within Justice Scalia’s power—assuming that regulations depriving property of all value merit some kind of special scrutiny.

197. Fisher’s criticism ignores the precedent allowing for federal review of state court determinations of state law in non-diversity contexts. See Fisher, supra note 149. Ever since Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816), the federal courts have reviewed state questions of law that are antecedent to the determination of a federal right. “[W]here a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court’s determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination . . . .” HART & WECHSLER, supra note 3, at 521; see also Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (stating “[e]ven though the constitutional protection
over, the second approach has the added federalism advantage of forcing federal courts adjudicating takings claims to defer to a state-created body of law. 198 Finally, the Court may have recognized that the occasion will be rare for the kind of insult Professor Michelman fears because the Court will not likely review state court interpretations of state nuisance law.

Not only is constitutionalizing the common law less disruptive to state property law, but it also operationalizes takings law in a way that is both substantively appealing to the Court and methodologically familiar to the states. As mentioned above, the Lucas opinion is written as though the Court has something in mind but does not quite want to say it. The Court does not articulate any unified theory of what state property law must look

invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded” (quoting Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U.S. 537, 540 (1930)); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 108-09 (1938) (overruling a state court’s interpretation of state contract law in assessing whether legislative action had resulted in an unconstitutional impairment of contract); Michelman, supra note 171, at 324 (noting that “Lucas might just be a case of federal judicial oversight in the historically approved mode of ensuring against circumvention of federally guaranteed rights by opportunistic manipulation of state law by state judges”). Moreover, the fear of Supreme Court arrogation of state court interpretative authority is almost certainly unwarranted because it is unlikely that the Court will be anxious to review cases that turn solely on state court interpretations of their own law. Fisher, therefore, almost certainly exaggerates when he writes that “[w]e can thus expect to see the Supreme Court reexamining and sometimes overturning state courts’ interpretations of their own states’ common law.” Fisher, supra note 149, at 1407. Nonetheless, the potential for judicial arrogation exists, and Professor Michelman argues that “charges of circumvention” of a state court’s own precedent should be “firmly documentable” to avoid a massive insult to state courts. Michelman, supra note 171, at 324. The Court in Demorest, for example, addressed the question of whether the state had previously created a certain defined type of property interest. Demorest, 321 U.S. at 47-48. The law of nuisance is so indeterminate, however, that it would be difficult to review such decisions without imposing a fairly structured style of interpretation upon the state courts. Michelman, supra note 171, at 324-25. The difficulty might just as easily suggest that the Court will not bother, and that if members of the Court should attempt it, they would lose other members of the Lucas majority.

198. The extent of the federalism insult also depends upon which state court decisions regarding background property law are scrutinized. For example, could the Supreme Court under Lucas rule that a prior state decision on nuisance law was a misinterpretation of past precedent when that decision did not involve a takings claim but was relied upon by the state defendant in a later takings action? Or could it only rule upon interpretations of state law made by state courts in takings claims? The latter would be much more in keeping with past Supreme Court precedent allowing review of antecedent state questions so as not to allow questionable interpretations of state law to defeat federal rights. The former would be much more unprecedented and a far greater intrusion upon state sovereignty. The Court’s opinion suggests that it will review the interpretation of past precedents by the court adjudicating the takings claim; however, there is no indication that the Court will review the validity of the state court precedents upon which the state relied.
like, but the Court certainly states its perception as to what state property law will look like. Most significantly, the Court, citing specific portions of the commentary to the Restatement (Second) of Torts, states:

The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so [sic], see id., § 827, Comment g). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.\(^{199}\)

Other factors relevant in the “total taking” inquiry include

the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, ... the social value of the claimant's activities and their suitability to the locality in question, ... and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike ...\(^{200}\)

Thus, the Court seems to expect that nuisance law shares the Takings Clause's concern with limiting the "singling out" of property owners to bear burdens that others similarly situated do not currently have to bear nor have had to bear in the past.\(^{201}\) Moreover, taking into account longstand-

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199. Lucas, 505 U.S. at 1031.

200. Id. at 1030-31. Not all of the factors that Justice Scalia references are uniform from state to state. See, e.g., Lewin, supra note 177, at 234-35 (pointing out that courts in the various states accord varying significance to the utility of the defendant's conduct in the nuisance balancing test). Moreover, one question that is unaddressed in Lucas is the relevance of the particular redress that a state court provides for nuisance-like conduct. After all, a state regulation is the functional equivalent of an injunction. If a state's nuisance law generally allows only damages for nuisances, is a state thereby prevented from forbidding the use? See, e.g., Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970) (granting "an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall ... be determined by the court").

201. The extent of singling out in Lucas was palpable. Justice Kennedy noted in concurrence that, "[h]ere, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots." Lucas, 505 U.S. at 1035-36. For evidence of the Court's concern with "singling out," see Armstrong v. United States, 364 U.S. 40, 49 (1960), which held that the purpose of the Takings clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should
ing use brings reasonable expectations back into takings analysis through a common-law back door. Nuisance law asks many of the questions that the Court thinks should be asked, which largely explains the Court’s preference for that body of law.

While at least one commentator termed nuisance the “analytical equivalent” of the noxious-use test rejected by the Court, the Court clearly expects that justifying legislative action under the nuisance test will be more difficult than under a requirement that the legislature simply articulate some harm its actions mitigate—at least where regulations require property to remain essentially in its natural state. However, while the Court’s inattention to the legislature’s historic role in regulating property may indicate a certain agenda, the Court’s use of the common law is not solely a proxy for its own policy concerns. Indeed, just as significant is the combination of constraint and evolutionary development engendered by the resort to a common-law method that involves many of the policy concerns underlying the Takings Clause. With the common law comes a ready made body of precedent, principles, and understandings which judges utilize in justifying their decisions. Moreover, the common law has

be borne by the public as a whole."

The Court’s concern with “singling out” also motivates the first part of its test. While the Court mentions other concerns in addition to singling out, it also notes that at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life” in a manner that secures an “average reciprocity of advantage” to everyone concerned.

Lucas, 505 U.S. at 1017-18 (citation omitted); see also FISCHEL, supra note 159, at 351-55 (advocating a “normal behavior” standard that would not require compensation when government acts to prevent deviation from some community norm). While Fischel notes that the normal behavior standard allows for more regulatory deprivations to go uncompensated than nuisance law; nonetheless, the sentiment expressed by Justice Scalia above seems to resemble Fischel’s proposed standard. Id. Professor Fischel differs from Justice Scalia, however, in that he would allow deference to state legislatures in their declarations of what is normal behavior. Id. at 355.

202. Moreover, asking whether the government or claimant could have mitigated the harm through less disruptive means seems to resemble a narrow tailoring standard.

203. Lazarus, supra note 193, at 1426.

204. Indeed, all of the restrictions in the “background principles of the State’s law of property and nuisance,” not simply those of nuisance alone, can justify the failure to compensate a property owner for a regulation that deprives a piece of property of all of its value. Lucas, 505 U.S. at 1029.

205. As one commentator noted, “Because courts are bound by precedent, which is subject to the gradual evolution of the common law, a judicial definition of ‘nuisance’ is more likely to remain predictable while retaining sufficient flexibility both to meet new conceptions of ‘social value’ and to adapt to new measures for alleviating harms.” Leading Cases, supra note 168, at 275.

206. Note that in the Confrontation Clause arena, the Supreme Court resorted to the
developed separate from the need to justify constitutionally legislative action (although, of course, all common-law courts will in the future decide nuisance cases with the knowledge that their decisions theoretically could have constitutional significance). In addition to this disciplining measure, constitutionalization provides a way of thinking about the problem of the nature of property that is familiar to state judges and to the lawyers who must advise their clients. The adoption of the common-law method increases predictability for landowners and, thus, at least helps to further the goals of reasonable expectations analysis even if it is not based upon reasonable expectations theory.

Justice Kennedy, in his concurrence, suggests that one should resort to a state’s entire legal tradition, in an effort to determine reasonable expectations, rather than simply the common law. While this approach is a more realistic approximation of the history of state regulation of property than the Court’s, it is also a much more unfamiliar and thus uncertain standard. Additionally, the system that the Court created is essentially self-operating and virtually ensures that the Court will play a minor role in this narrow area of takings law in the future.

Moreover, with constraint comes the opportunity for slow, guided evolution. The constitutionalization of the common law in *Lucas* allows state courts to develop slowly the law of property under principles common law so that courts could avoid having to consistently justify their decisions. The opposite is true in *Lucas*.

207. Just how much evolution is a matter of debate. Some commentators are optimistic about the adaptive potential of the common law under the *Lucas* total takings regime. See Babcock, *supra* note 170, at 20-21 (“The nuisance doctrine’s malleability results from the multifactored balancing process judges employ to determine which harms to prohibit and which to permit. The balance of utilities shifts over time to reflect changing mores and expectations about personal conduct, thereby forcing the doctrine to change and evolve.”) (footnotes omitted); Funk, *supra* note 165, at 898-99 (arguing that background principles of property are sufficiently flexible to adapt to new discoveries such as the value of wetlands); Lazarus, *supra* note 193, at 1426 (noting the Court’s explicit recognition in *Lucas* that the application of nuisance and property law “requires a balancing of harms and social values and may evolve over time with ‘new knowledge’ or ‘changed circumstances.’... [This] is a hopeful harbinger of what the Court might do in a case with facts more sympathetic to the government”). But see *Lucas*, 505 U.S. at 1068-69 (Stevens, J., dissenting) (“The Court’s holding today effectively freezes the State’s common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.”); Humbach, *supra* note 176, at 13-15 (pointing to language in the Court’s opinion indicating that the Court was more interested in seeing a petrified nuisance law than an evolving one); Sax, *supra* note 172, at 945 (“The tone and rhetoric of *Lucas* seems deliberately calculated to cut off arguments that changing times create changing needs, and with them changing (diminished) expectations that property owners must internalize.”); Sax, *supra* note 183, at 1455 (suggesting the *Lucas* majority, by accepting outdated conceptions of property, failed to allow flexibility in dealing with government regulations).
that are unique to each state’s situation. At the very least, the Court’s opinion makes clear that common-law principles will be able to accommodate changing “experiential propositions” which would include, for example, new scientific understandings about the danger of a certain practice. Less clear is what effect Lucas will have on regulation which combines new understandings about the interconnectedness of property with new normative conceptions of the role of property in our society. Sax believes that the Lucas majority has in mind the preservation of a conception of property as something waiting to be transformed into another economically beneficial use, a vision which frowns upon regulations which require property to be preserved in its natural state.

Commentators have correctly pointed to Justice Scalia’s preference for rules-based jurisprudence as an important motivation for the Court’s decision in Lucas. Justice Scalia’s desire for categorization quite evidently led to the “total deprivation” rule, but it also contributed to the “nuisance rule” as well. Nonetheless, Justice Scalia could not have had illusions that he was creating certainty as he constitutionalized the “impenetrable jungle.” Thus, one student commentator set up a “straw Scalia” when he wrote that “Justice Scalia’s categorical nuisance exception sets forth a deceptively simple test for noncompensable land use regulation: The restriction must fit into the common-law definition of nuisance, or

208. Lucas, 505 U.S. at 1031 (“[C]hanged circumstances or new knowledge may make what was previously permissible no longer so.”); see also MELVIN ARON EBENBERG, THE NATURE OF THE COMMON LAW 37-42 (1988).

209. Sax, supra note 183, at 1442-46. Sax contrasts this “transformative” vision with a notion of “the economy of nature” which views property as inherently interconnected and as serving ecological functions for which the owner or custodian of the property may be prevented from disturbing. Id. at 1442. The Court’s model is too inflexible to accommodate the “economy of nature” model, according to Sax. Id. at 1446. Simple heightened scrutiny would have more effectively and flexibly balanced the competing interests of landowner with ecology. Id. at 1455. But see Babcock, supra note 170, at 25-26 (arguing that the societal interests implicated by wetlands destruction can be accommodated under a nuisance framework and that a nuisance framework “provides a growing, not shrinking, opportunity for regulatory authorities to protect the nation’s coastlines and wetland resources”).

210. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1177-82 (1989) (according to Scalia, rules foster predictability, both constrain and “embolden” the decision maker, better provide for the appearance of evenhanded treatment, and move judges closer to the role of “determiner of law” and farther away from the realm of “finder of fact”). To Justice Scalia, the last factor is a problem because it essentially acknowledges earlier than necessary that a point exists where the application of law stops. Id. at 1182; see also Michelman, supra note 171, at 324-26 (arguing that Justice Scalia’s preference for rules helps explain the Lucas decision); Scott R. Ferguson, Note, The Evolution of the “Nuisance Exception” to the Just Compensation Clause: From Myth to Reality, 45 HASTINGS L.J. 1539, 1560 (1994) (Justice Scalia’s “desire to categorize takings jurisprudence explains the apparent 180-degree shift in the status of the nuisance exception manifested in Lucas.”).
another restriction inherent in the title."\textsuperscript{211} Justice Scalia never could have intended to declare that nuisance was a simple test because he asserted in his own opinion that nuisance was a balancing test. Once the Court required the application of some form of heightened scrutiny, the standard was inevitably going to be somewhat vague and require some discretion on the part of the judge applying it. The nuisance balancing test is no less clear than requiring that a regulation be narrowly tailored to fulfill an important governmental interest. The difference is that the Supreme Court's test defers more to state law and state approximations of state interests and more resembles the policies that the Court has said drive the Takings Clause. Thus, when Professor Michelman wrote that "[p]erhaps it is by insisting that state judiciaries read their bodies of property law as 'laws of rules,' as composed of narrow rules only and not spacious principles, that Justice Scalia means to protect the regulatory-taking project from frustration by unsympathetic state judiciaries,"\textsuperscript{212} he too ignores Justice Scalia's use of the Restatement balancing test to illustrate the principles of nuisance.

Instead, one should view the Court's opinion as having required the application of a categorical method with an underlying theory that resembles the Court's past pronouncements on the policies that underlie the Takings Clause. The case of \textit{Prah v. Maretti}\textsuperscript{213} illustrates the distinction between a methodology that allows for evolution and a categorical rule. In \textit{Prah} the Supreme Court of Wisconsin held private nuisance law (and thus the Restatement balancing test) applicable to the blockage of sunlight in contravention of precedent where judges were extremely reluctant to grant easements for sunlight.\textsuperscript{214} The court found that the earlier unwillingness to provide such protection was prompted by three concerns: (1) the rule that landowners could do whatever they wanted with their property as long as it did not physically harm another's land, (2) the fact that sunlight was only valuable for aesthetic reasons or illumination at the time, and (3) society's interest in promoting land development.\textsuperscript{215} But the Wisconsin court said times had changed in the sense that property was now more heavily regulated for the general welfare. Sunlight had become useful as a power source, and unhindered development was no longer considered fully consonant with the "realities of our society."\textsuperscript{216} Thus, the court continued to apply a certain method, but because of new understandings drawn from society's evolving concerns, the court reached a result different

\textsuperscript{211} Ferguson, \textit{supra} note 210, at 1561.
\textsuperscript{212} Michelman, \textit{supra} note 171, at 325.
\textsuperscript{213} 321 N.W.2d 182 (Wis. 1982).
\textsuperscript{214} \textit{Id.} at 191.
\textsuperscript{215} \textit{Id.} at 189.
\textsuperscript{216} \textit{Id.} at 190.
from the one it would have reached in the early twentieth century.

Admittedly, how Justice Scalia would feel about this example is unclear. The Lucas opinion, however, gives no indication that courts are bound by anything more than their own historical method for adjudicating nuisance disputes. Indeed, Justice Scalia relies upon the Restatement balancing test, which indicates a willingness to accept the evolution of state property law. Nonetheless, the categorical method will generally bar regulations that force property owners to keep property in its natural state. If so, this will not be due to the rigidity of a rule but rather to the results of a categorical balancing test. In essence, the Court attempts to mandate a familiar way of approaching the problem and not a specific result.

V. CONCLUSION

Constitutional interpretation is about coping with uncertainty and the power that derives from it. The Supreme Court did not need the common law to interpret the Confrontation Clause. The Court could have limited the confrontation right to cross examining witnesses who testify in court and to preventing the use of ex parte affidavits. Instead, the Court chose to identify a norm that the Clause protects: the reliability provided by the adversarial testing of evidence. If taken to the extreme, every hearsay statement that a prosecutor sought to admit would have become a constitutional issue. The use of the common law prevented this situation from coming to pass.

The Supreme Court uses the common law to solve interpretative problems, and it does so in a manner that generally creates greater certainty and stability in the law and adds at least the shine of legitimacy to its work. The Court's use of the common law in the Confrontation Clause context surely demonstrates that constitutional interpretation is not always an entirely principle-driven enterprise. Yet while constitutional interpretation may be political, it is seldom about raw power grabs in our society and more often about compromise and self-restraint.

Those with a political scorecard might note that in the three central cases addressed by this paper, ideological conservatives arguably won each time. Big business won a mechanism, albeit a limited one, for limiting punitive damages awards. The use of the common law protected traditional hearsay exceptions at the expense of defendants (although defendants would have lost more had Justice Thomas's approach gained the Court's favor). Finally, property owners won a limitation on state regulatory power.

217. Background principles such as the public trust doctrine are more definitional and thus rules-based in nature.
In the first two cases, however, the decision to constitutionalize the common law met with approval from the various wings of the Court. In the Confrontation Clause area, the resort to the common law made the move to a more expansive interpretation of the Confrontation Clause more politically acceptable. Moreover, in the *Cruzan* case the Court, while not explicitly ruling on the issue, used the common law as support for at least a liberty interest in refusing lifesaving medical treatment. In *In re Winship*, the Court used the common law to expand the rights of the accused. These examples suggest that the common law is not simply an ideological tool, although the Court’s sympathies certainly must enter into it.218

In *Lucas* Justice Scalia abandoned the attention to text, history, and original intent that he advocates in other contexts. Even in that case, however, the turn to the common law was a way to solve problems spawned by nearly a century of a confusing body of law in the area of regulatory takings. The Court’s belief that the Takings Clause protected against regulatory takings and the determination that the legislature could not be trusted when enacting certain regulations created the need, in the Court’s mind, for a heightened scrutiny standard. The decision that the common law would serve as that standard can be explained as much by deference to state property law and its familiarity and stability as by a simple desire to protect property rights.219 Nonetheless, the establishment of state common law as the exclusive way of justifying a total taking was seemingly out of keeping with such precedents as *Jackman v. Rosenbaum* and general historical understandings about the police power.

One would expect that states’ rights would generally be advanced when the Supreme Court constitutionalizes state common law. Certainly, state law won a significant victory in *Ohio v. Roberts*. *Lucas* and *Honda*, however, are more of a mixed bag. In *Lucas*, the Supreme Court limited state legislatures but continued to defer to state common law. Yet at the same time, the decision raised the prospect of a future declaration by the Court that a state had adopted the wrong mode of interpreting its own common law. In *Honda*, the Court used tradition to limit the diversity of state procedures. But states on balance win by a turn to tradition. For example, had the *Medina* Court moved away from tradition and adopted a multifactored balancing test in lieu of tradition to evaluate state criminal procedures, the number of challenges to state procedures would surely have

218. For example, some basic intuitive sense of fairness probably motivated the Court to give big business in Oregon the consensus protections that it supposedly lacked. Moreover, in at least the *Bourjaily* case, a desire for a certain result seemed clearly to trump any consistent interpretative theory.

219. As noted above, however, the common law also acts as a certain kind of constraint on the state judiciary. Justice Scalia does not sufficiently explain why the common law is the only proxy for a heightened scrutiny standard that the Court allows.
increased.

No interpretative method can make interpretation judgment-free. Yet acceptance of this fact is of course not synonymous with judicial imperialism. The constitutionalization of common law paradoxically helped make judging less dependent upon the personal views and guesses of judges. While determining whether a practice is historically rooted or not can involve a great deal of manipulation, the resort to tradition seems to require less judgment from judges than, for example, a multifactored balancing test. While the resort to common-law constitutionalization may have achieved the goals of several justices by reducing the potential scope of the constitutional rights of defendants, it also precluded the confusion and disruption that would have been caused by turning every hearsay question into a constitutional one. Finally, while the application of nuisance law surely requires judgment by the presiding judge, a heightened scrutiny standard would certainly not have resulted in value-free application and would have lacked the constraint, legitimacy, and substantive appeal that the use of nuisance law provides.

The constitutionalization of the common law is at its roots a conservative phenomenon. What began centuries ago as judges slowly developing rules to address problems left unresolved by legislatures, became a tool for the Supreme Court to use in filling gaps left by the Framers in a way that preserves continuity and stability. It is as if the judges of the past, whose words have been approved by the silence of the people, are speaking to today’s judges. What began centuries ago as an exercise of discretion on the part of judges became a means of constraining discretion in constitutional interpretation.

But at what cost certitude? Plainly the Supreme Court’s method in Honda has drawn little controversy even if its interpretation of history and Oregon’s own procedures was erroneous. But the lack of controversy belies serious problems with the Court’s failure to articulate a proper theory of why the constitutionalization of that particular common-law tradition was appropriate. The case of the Supreme Court’s largest abdication was also the case that avoided overruling the common-law hearsay exceptions that state courts have used for decades to convict criminals. The Court’s willingness to compromise probably reflected its lack of confidence in its overall interpretation of the values the Confrontation Clause protected and its inability to articulate a standard that would result in the consistent application of the values the Clause protects. Moreover, the Confrontation cases provide the only example where the Court resolved a constitutional controversy without fully focusing on the objective content of the constitutional norm. It is only with the Lucas case that one has a sense that the common law belonged both doctrinally and functionally in the Court’s
effort to operationalize a vague and unconstrained area of the law.\textsuperscript{220}

The comedian Steven Wright once said, "You can't have everything. Where would you put it?"\textsuperscript{221} The constitutionalization of common law reflects the perceptiveness of this axiom. The cost of certitude in the Confrontation Clause area, and of avoiding a drastic result of which the Court was unsure, was the partial abdication of the Court's interpretative responsibility. Further, deferring to state common law expanded the possibility of Supreme Court review of state court interpretations of state law. The protection of an individual right resulted in the imposition of the views of a majority of states upon a minority for no reason other than that it was the majority. Deference to state-created definitions of property frees the Court from the need to articulate its own standard for assessing the validity of state regulation.

The politically acceptable results that may accompany common-law constitutionalization thus can also bring along with them a certain interpretative unsightliness. This combination partially reflects the fact that constitutional interpretation cannot always be pretty. But it also reflects the fact that the Supreme Court generally turns to the common law out of weakness and not strength. The common law should not be used as a means of escaping the articulation of constitutional values. Rather, it should be used as a means to that end. For ironically, even as common-law constitutionalization is an effort to avoid the injection of judicial values into constitutional interpretation, at least two of the cases discussed in this paper have the feel of political compromise.

In the end, the constitutionalization of common law is more than anything about the Court's attempt to read itself out of the interpretative debate. The results of its work, however, show that the divorce of judges' personalities from their work does not make the appearance of arbitrariness

\textsuperscript{220} This is not necessarily to approve of the Court's regulatory takings jurisprudence to that point. It is merely to respect the Court's use of the common law once it had determined that at least part of the regulatory takings doctrine needed to be operationalized. One commentator proposes a similar approach for dealing with interpretative uncertainty in a substantively appealing way that constrains judicial discretion and ensures "methodological evenhandedness." See Ira C. Lupu, \textit{Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion}, 102 \textit{Harv. L. Rev.} 933, 971 (1989) (arguing that the Court should use the common law to identify burdens on the free exercise of religion).

\textsuperscript{221} Or as Justice Scalia once wrote, the value of perfection in judicial decisions should not be overrated. To achieve what is, from the standpoint of the substantive policies involved, the "perfect" answer is nice—but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment.

Scalia, \textit{supra} note 210, at 1178.

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go away. A way to avoid this unsightliness might be the articulation of a theory that explains this example of the interconnectedness of American law.