THE SUPREME COURT AND COERCED CONFESSIONS: *ARIZONA V. FULMINANTE* IN PERSPECTIVE

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> *No man shall be forced by Torture to confesse any Crime against himselfe or any other unlesse it be done in some Capitall case, where he is first fullie convicted by cleare and sufficient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.*[1]

This article is about the abuse of judicial power—how the justices of the Supreme Court continue to convert common and statutory law issues into constitutional ones. My contention is simple: judges today play a far more important role in making public policy than the Framers of our Constitution had anticipated. I will illustrate this contention through a historical analysis of confession admissibility standards and the Supreme Court's most recent pronouncement on the subject in *Arizona v. Fulminante*.[2]

In contrast to the views expressed herein, in contemporary legal circles a judicial power well beyond that contemplated by the Framers is championed and defended forcefully and eloquently.[3] My goal is not to convince readers of my preferences regarding confession admissibility standards; rather, it is to persuade readers that the courts have gone beyond their competence, usurping the authority and responsibility of all citizens and thus denying them their right to self-government. Resistance to judicial policy-making will grow only if the people real-

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1. *A Coppie of the Liberties of the Massachusets Collonie in New England* § 45, *in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 46 (William F. Swindler ed., 1979).

2. 111 S. Ct. 1246 (1991). The analysis pursued in this article is equally applicable to other bodies of case law in which the judiciary has practiced reductionism (that is, converting common and statutory law into constitutional issues), or has played fast-and-loose either with the Framers' understanding of constitutional provisions or with historical facts. Almost any doctrine will do.

3. A thorough discussion of such issues of course rests beyond the scope of this article. *See generally* William Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U. L. REV. 1, 18-155 (1981)(explaining nine arguments that contemporary proponents of modern judicial power use to defend that position).

ize—as they did during the New Deal—that many of the Supreme Court's pronouncements rest on no greater authority than what five justices think is good public policy. Questioning the legitimacy of Supreme Court decisions cannot be confined to the halls of academia. It must be a central issue of this nation's political life.

This article is divided into four parts. Part I details some of the premises that traditionally have governed American constitutional law. Part II examines our heritage with respect to confession admissibility. Part III contrasts that heritage with the Supreme Court's 1991 decision in *Arizona v. Fulminante*. Part IV provides my conclusions.

PART I: SOME PREMISES

Several matters related to the topic at hand are complex and cannot be explored within the confines of this article. Yet the reader is entitled to at least a basic explication of the author's premises, particularly since they admittedly deviate from those premises that presently dominate legal literature. I take refuge in my belief that these premises are sound ones, well-rooted in traditional constitutional law.

A. *The People Are Sovereign*

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.[4]

Constitution-making is at the core of American self-government, and self-government often requires self-restraint. Americans freely created the Constitution, and through the formal amendment process reserved the right for themselves to reevaluate and modify the choices they made should the future need arise. As evidenced by their system of government, Americans realize that total power, like total freedom, is illusory. Both are more likely than not to lead to self-abuse and abusing

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

others, and either could culminate in the loss of the right to self-government.

B. *A Fixed and Flexible Constitution*

Written constitutions prohibit specific types of governmental abuses, some that are common to all governments and others that are more specific to a nation's history. Accordingly, even without a Bill of Rights (which was not part of the original Constitution), the Framers sought to incorporate in the Constitution various restrictions on governmental power. Thus, the document provides that "No Bill of Attainder or *ex post facto* law shall be passed."[5] Yet, when the Framers anticipated that extraordinary circumstances might dictate extraordinary measures, they did not hesitate: "The privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in cases of rebellion or invasion the public safety may require it.*"[6] Surely, such provisions must have had specific meaning for those who authored and ratified them.

Those who proposed and ratified our Constitution understood it to prohibit certain governmental conduct. Neither the Framers nor the ratifiers understood the Constitution as authorizing judges to redefine the restrictions on the state and federal governments contained therein.[7] Only the people by amendment may add, substract or modify restrictions on themselves. By either statute or amendment, however, the people may add restrictions on governmental conduct. One example of this principle is the constitutional right to counsel as provided in the Sixth Amendment.[8] For the Framers, the right only guaranteed that in "all criminal prosecutions" a defendant could not be denied "Assistance of Counsel" *if he could afford it.*[9]

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5. U.S. CONST. art. I, § 9, cl. 3.

6. *Id.* § 9, cl. 2 (emphasis added).

7. While it is impossible within the confines of this article to defend my position that power-granting clauses may be treated differently from power-limiting ones, the principle for doing so may be stated: in both instances it is the people's elected representatives who are entrusted with the choices to be made and who may be held accountable. These views were tentatively put forth in William Gangi, *On Raoul Berger's Federalism: The Founders' Design*, 13 LAW & SOC. INQUIRY 801 (1988). They are defended more completely in my forthcoming book, SAVING THE CONSTITUTION FROM THE COURTS, from which this article is extracted.

8. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

9. *See* William Gangi, *The Sixth Amendment, Judicial Power, and the People's Right to Govern Themselves*, *in* THE BILL OF RIGHTS 365, 367 (Eugene W. Hickok, Jr. ed., 1991).

Yet during the period between the proposal and ratification of the Sixth Amendment, Congress went further, enacting legislation that provided that *in capital cases* judges must appoint counsel should a defendant be *unable* to afford one,[10] thus creating a *statutory* right, supplemental to the right soon ratified in the Sixth Amendment. Any subsequent Congress could have repealed or expanded the supplemental right by ordinary legislation.

If the people at any time thereafter decided that the statutory status of that supplementary right was too tenuous, by amendment they could raise it to constitutional status. If such an amendment were ratified, judges would then be obliged to ensure that the right to counsel so defined would thereafter be enjoyed by all persons. Additionally, once that amendment was ratified, Congress could no longer *diminish* the right by statute; Congress remained free to *expand* it by statute. There is no support, however, for the contention that *judges* were ever authorized to expand the meaning that constitutional rights had for their ratifiers.[11] This is equally true for the general enterprise of lawmaking.

C. *The Power of Self-government is lodged in the Legislature*

According to *The Federalist Papers*, "the essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society."[12] Hence, the Framers expected federal and state legislatures to adapt their respective societies to changing circumstances within the guidelines provided by the Constitution. They would find incredulous contemporary arguments sanctioning the substitution of judicial for legislative public policy making.[13] As Publius put it: "The courts must declare the sense of the law; and if they should be

10. *Id.* (describing Act of Apr. 30, 1790, § 29, 1 Stat. 112 (1790)). The discussion in the text omits the actual development in federal courts of the right to counsel, most notably the Supreme Court decisions in Johnson v. Zerbst, 304 U.S. 458 (1938) and Powell v. Alabama, 287 U.S. 45 (1932), the legitimacy of which may be subject to question. Gangi, *supra* note 9, at 367-68.

11. *But see* ARTHUR GOLDBERG, EQUAL JUSTICE 81-97 (1971); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 27 (1980); Note, *Counsel at Interrogation*, 73 YALE L.J. 1000, 1048-51 (1964). For a critical analysis of claims that judges act to compensate for legislative inertia or political pressure, *see generally* Gangi, *supra* note 3, at 22-26, 37-39.

12. THE FEDERALIST No. 75, at 449, 450 (Alexander Hamilton)(Clinton Rossiter ed., 1961). For the Framers, the legislature was the primary public policy maker.

13. *See* Gangi, *supra* note 3, at 22-33 (analyzing the "vacuum" and "best-suited" arguments).

disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[14]

D. *Judicial Review*

"The interpretation of the law is the proper and peculiar province of the courts."[15] The Framers believed that judges serving during "good behavior" could better keep legislators in bounds, helping to assure that legislators would not exceed the constitutional powers granted them. In order to preserve the will of those who proposed and ratified the Constitution, judges were authorized to set aside contrary acts only when the legislature and executive attempted either to exercise powers never granted them or when an admittedly granted power was exercised beyond its intended scope.[16] The Framers thus understood judicial review as an extraordinary extension of the ordinary power of interpretation, to be exercised only when the government sought to act in ways manifestly contrary to the Constitution.[17] Publius described the Constitution as fundamental law that ought to be preferred to statutes, just as the intention of the people who ratified the Constitution ought to be preferred over the intention of their elected "agents."[18] In effect, Publius defended the notion of "constitutional supremacy rather than judicial supremacy."[19] The Framers accordingly viewed the federal judiciary as having a limited but important *constitutional* function: to guard the Constitution's meaning, assuring that the ratified meaning was preserved unless and until the people chose by amendment to change it.[20]

This view of the judiciary is defended in *The Federalist Papers*,

14. THE FEDERALIST No. 78, at 464, 469 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

15. *Id.* at 467.

16. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178-80 (1803).

17. THE FEDERALIST No. 78, *supra* note 14, at 467-68.

18. *Id.* at 467; *see also* John S. Baker, Jr., *Constitutional Architecture*, 16 HARV. J.L. & PUB. POL'Y 59, 62-65 (1993)(defending judicial review on these grounds).

19. Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 88 (1988).

20. Publius was very explicit on the point:

> Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.

THE FEDERALIST No. 78, *supra* note 14, at 470.

where Publius characterizes the power of judicial review as a mere extension of the ordinary judicial interpretive task: akin to resolving a conflict between "two contradictory laws."[21] This understanding of judicial review came to life in *Marbury v. Madison*, where Chief Justice John Marshall described the province of the Court as

> solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[22]

The Constitution was thus viewed as "a superior paramount law, unchangeable by ordinary means," unlike "ordinary legislative acts" that are "alterable when the legislature shall please to alter [them]."[23] The function of the Court was to "expound the law, not to make it,"[24] and to interpret the Constitution "with the best lights we can obtain on the subject . . . according to its true intent and meaning when it was adopted."[25] This brings us to the sticky wicket of "intent."

E. *The Matter of Intent*[26]

It is indisputable that inquiries into and use of the Framers' intentions raise serious interpretive problems,[27] and yet such problems were not considered insurmountable by Publius or the judiciary during the early days of the republic.[28] Publius

21. *Id.* at 468.
22. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
23. *Id.* at 177.
24. Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849).
25. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405 (1856).
26. The term "original understanding," as some suggest, may also be accurate. *See, e.g.*, Lofgren, *supra* note 19, at 78-79; Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 966-67 & nn.5-11 (1992). I purposefully employ the term "intent," even though in some quarters a certain hostility to the concept has become intellectually fashionable. It seems to me that if lawyers are trained to preserve the "intent" of a client wishing to will her entire estate to a cat, then one might legitimately raise the issue of how much fidelity is owed to those who won independence, and later proposed and secured ratification of the Constitution.
27. See Gangi, *supra* notes 3 and 7, for sources on this problem. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1986); Brennan, *supra* note 26.
28. Professor Lofgren points out that "the Federalists never explicitly and unambiguously stated that future interpreters should always resort to ratifier intent." Lofgren, *supra* note 19, at 92. He also explains why they did not. *Id.* at 92-93. Publius, for example, seems fully aware of the difficulties of interpretation that judges face:

> All new laws . . . are considered as more or less obscure and equivocal, until

spoke comfortably of the "intention of the people" and left little doubt that he considered the expression of that intent—the Constitution—to be binding upon both judges and future generations.[29] Chief Justice John Marshall, among others, made repeated references to intent, sometimes referring to the intent of "the framers of the instrument,"[30] and other times referring to "the intention of the person['s]" use of particular words.[31] He also concluded that "[i]t must have been the intention of those who gave these powers, to insure . . . their beneficial execution . . . [since t]his . . . constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[32]

Although Marshall and Publius assumed that the Constitution was superior to ordinary statutes, both believed that its interpretation would parallel statutory construction.[33] Hence, the Framers understood that all interpretive attempts might require the discernment of *intent* by scrutinizing either the lan-

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> their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. . . . But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminate in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.

THE FEDERALIST No. 37, at 224, 229 (James Madison)(Clinton Rossiter ed., 1961).

29. THE FEDERALIST No. 78, *supra* note 14, at 467. Professor McDowell comments: "Original intention and original meaning were held to be the primary means by which the written Constitution could be kept a *limited* constitution. In this belief, men as politically opposed as Thomas Jefferson and John Marshall could stand united." GARY L. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 11 (1985).

30. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819).

31. *Id.* at 415.

32. *Id.* Gerald Gunther rejects as insupportable contemporary interpretations of this and other passages in *McCulloch* that deduce an alleged judicial power to adapt the Constitution to changing circumstances. On the contrary, he contends that Marshall viewed this passage as admonishing *judges* to permit as wide a *legislative* discretion as is consistent with the explicit limitations contained in the Constitution. *See* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 18-20 (Gerald Gunther ed., 1969).

33. H. Jefferson Powell explains that by 1787, the English legal system had "produced a wealth of reflection on the process of construing normative documents. Moreover, the common law considered these canons of interpretation to be themselves a part of the law, and to be equally binding on the maker and the interpreter of a document." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894 (1985)(citations omitted).

guage of the text or some extrinsic evidence.[34] Accordingly, Chief Justice Marshall observed:

> As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influences in the construction . . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purpose for which they conferred.[35]

It is of course true that inquiries into the Framers' intentions are not always fruitful. Yet, as Judge Bork put it:

> We must not expect too much of the search for original understanding in any legal context. *The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review* . . . . The precise congruence of individual decisions with what the ratifiers intended can never be known, but it can be estimated whether, across a body of decisions, judges have in general vindicated the principle given into their hands. If they accomplish that, they accomplish something of great value.[36]

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34. *See also* Gangi, *supra* note 7. *Compare* Powell, *supra* note 33 *and* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) *with* Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986) *and* Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1985).

35. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 188-89. Elsewhere Justice Johnson concluded:

> The simple, classical, precise, yet comprehensive language, in which [the Constitution] is couched, leaves, at most, but very little latitude for construction; and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188-89 (1824)(Johnson, J., dissenting).

As Raoul Berger observes, "The intention of the lawmaker is the law. . . . [A] thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers." Smythe v. Fiske, 90 U.S. (23 Wall.) 374, 380 (1874), *quoted in* Hawaii v. Mankichi, 190 U.S. 197, 212 (1903), *quoted in* Raoul Berger, *Lawyering vs. Philosophizing: Facts or Fancies*, 9 U. DAYTON L. REV. 171, 197 (1984).

36. ROBERT H. BORK, THE TEMPTING OF AMERICA 163 (1990)(emphasis added).

The essential question, therefore, is whether "the basic postulates of the constitutional order require that the court undertake the task of ascertaining original intent *as best it can*?"[37] From my perspective, an affirmative response is unquestionably more sustainable than a negative one. Put another way, "while historical intent might not be easily reconstructed . . . [w]here it could be determined . . . it was dispositive in the resolution of textual ambiguities."[38] Therefore, any theory of constitutional interpretation that renders unimportant or irrelevant questions as to original intent, "*so far as that intent can be fairly discerned*, is not, given our traditions, politically or intellectually defensible."[39]

It is from these five premises that I analyze the standards governing confession admissibility and their relationship to the Constitution.

PART II: CONFESSION ADMISSIBILITY AND THE AMERICAN HERITAGE[40]

A. *The English Common-Law Confession Rule*

In England, confessions eventually were defined as "acknowledgements in express words . . . of the truth of the guilty fact charged or some essential part of it."[41] The English common-law rule governing the admissibility of confessions developed over four centuries, and during that time the confession itself, as "a proved fact," sometimes became confused with the process of proving its reliability.[42] In 1783, an English

37. Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 377 (1981).

38. Lofgren, *supra* note 19, at 97. As Robert Clinton observes, "[t]he Framers' focus on language, however naive it may appear today, apparently assumed that words have a relatively fixed and unchanging meaning." Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1193 (1987). Herman Belz sums up the situation: "The authors of the Constitution were [originally] presumed to have said what they meant to say in the document itself." Herman Belz, *Equality and the Fourteenth Amendment: The Original Understanding*, 4 BENCHMARK 32 (1990).

39. Henry Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 124 (1978).

40. Much of the material in this section is derived from William Gangi, *The English Common Law of Confessions and Early Cases Decided by the United States Supreme Court*, JUDICATURE, INFORMATION REPORT SERIES No. 205 (1973). This pamphlet is out of print, but copies can be obtained from the American Judicature Society.

41. 3 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 821, at 238 (3d ed. 1940).

42. 3 *id.* § 866, at 356-58.

court clearly enunciated the principle of trustworthiness that stood at the heart of confession admissibility:

> Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers; but a confession forced from their mind of the accused by a flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.[43]

Such articulation notwithstanding, confession admissibility standards soon became obscured. Dean Wigmore observed the general development that "[c]onfessions apparently untrustworthy as affirmations of guilt [were] excluded[, but] . . . there was no general sentiment against . . . [confessions as such], no 'prima facie' doubt of their propriety."[44]

By 1835, the principle of trustworthiness again was stated with clarity: "The object of the rule . . . is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself guilty of an offense which he never really committed."[45] Dean Wigmore provided this analysis: In order to evaluate the reliability of particular confessions, judges must hear the circumstances under which they were obtained. In principle some confessions would be reliable while others were not, and while disagreements might occur over the effect of an inducement in particular circumstances, reliability would be judged on a case-by-case basis.[46]

According to Dean Wigmore's treatise on evidence, three different modes of expressing this concern with reliability were used by various English courts to acknowledge the fact that under some "inducements" even an innocent man might confess falsely:

1. "Was the inducement sufficient . . . to elicit an untrue Confession of Guilt?" According to Dean Wigmore, this "ortho-

43. King v. Jane Warwickshall, 1 Leach 263-64, 168 Eng. Rep. 234-35 (1783).

44. 3 WIGMORE, *supra* note 41, § 819, at 238.

45. Rex v. Court, 7 C. & P. 487, 173 Eng. Rep. 216 (1835).

46. 3 WIGMORE, *supra* note 41, § 866, at 357-58; *see also* Gangi, *supra* note 40, at 3-4; *cf.* 3 WIGMORE, *supra* note 41, § 861.

dox" mode of expression was "correct on principle, though not in the sense adopted by a majority of courts."[47]

2. "Was the Confession induced by a Threat or a Promise, by Fear or Hope?"[48] This formulation of the rule of reliability did not explicitly contain the standard of measurement; implied in it, however, was the idea that the threat or promise, fear or hope, would still have to be of a sufficient magnitude to induce the confessor to confess falsely. In that sense, it was analytically not much different from the first choice.

3. "Was the Confession Voluntary?" Dean Wigmore considered this formulation of the rule to be the least accurate, and suggested that the threat or promise mode should be included in the reliability test: "No confession of guilt shall be heard in evidence unless made voluntarily; for if made under influence of either hope or fear, there is *no test of its truthfulness*."[49] Standing alone, the pure voluntariness test could easily lose sight of the basis of exclusion—trustworthiness—and, instead, mistakenly substitute a different exclusionary principle—the likelihood of a denial of free choice.

The ultimate incompatibility between the two judicial views of confession admissibility—the "trustworthiness" and "voluntariness" principles—led over time to confusion in the English courts. From this ad hoc legacy of attempts by trial courts to determine the reliability, or "trustworthiness," of confessions the American rule of law evolved.

B. *Confession Admissibility in the United States*

In the American colonies, confession admissibility standards presumably paralleled English practice.[50] The Massachusetts Body of Liberties,[51] for example, showed that the people of

47. 3 *id.* § 824, at 250.

48. 3 *id.* § 825, at 253.

49. 3 *id.* § 826, at 256 (quoting State v. Whitfield, 70 N.C. 356 (1874))(emphasis added).

50. The exact contents of confession rules in each colony remain largely uninvestigated. In England at this time confessions often were treated as equivalent to a guilty plea; they were accepted without question until the late 1700s. *See* 3 WIGMORE, *supra* note 41, § 818, at 235 n.7. While the term "confession" also appeared during early stages of development it referred not to a *standard of admissibility*, but to either a plea of guilty or a dispensation from the requirement of "two overt-act witnesses" in treason cases. Hence, such "confessions" went to *conclusiveness*, rather than serving as evidentiary standards of admissibility. *See* 3 *id.* § 818, at 232-35. In such cases, "no resort to evidence (no 'trial')" was needed. 3 *id.* § 818, at 233.

51. *See supra* text accompanying note 1.

each colony remained perfectly free to treat confession admissibility as they saw fit.[52] When the colonies became the United States, this lack of a clearly expressed doctrine of confession admissibility in English law became the foundation for similar confusion in American law. In many state court decisions, judges used the language of voluntariness to describe the reason for exclusion, even though they could have used either the reliability or the free choice principle.[53]

At the federal level, early decisions contained the same sort of confusion that haunted earlier English cases.[54] For example, in *Hopt v. Utah*,[55] the first confession admissibility case decided by the U.S. Supreme Court, the Court offered an analysis that suggested a focus on trustworthiness. Justice Harlan stated that despite some English precedents requiring nonjudicial confessions to be excluded, there was common agreement that a confession, if freely and voluntarily made, was "evidence of the most satisfactory character."[56] The Court also invoked the presumption that "one who is innocent will not imperil his safety or prejudice his interest by an untrue statement."[57] Echoing the language of the English cases, Justice Harlan also noted that the presumption that an innocent man would not confess falsely could be overridden by the presence of inducements that deprived the accused of the "self-control essential to make his confession voluntary within the meaning of the law."[58] The Court, however, did not state that the mere presence of inducements rendered a confession per se inadmissible. In fact, it held the confession admissible despite the defendant's claim

52. The states were not bound by provisions of the Bill of Rights, *see* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), although similar rights presumably existed in most state statutes and constitutions. Yet even had the Bill of Rights' provisions applied to the states, none of those provisions were considered pertinent or dispositive in confession cases, including the Fifth Amendment's prohibition against compulsory self-incrimination. "State criminal proceedings came under the surveillance of the Supreme Court very gradually after the adoption of the Fourteenth Amendment and did not begin to receive its careful attention until well into the twentieth century." OTIS H. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 23 (1973). This increasing "surveillance" paralleled increases in judicial abuses.

53. *See generally* Bradford P. Wilson, *The Fourth Amendment as More than a Form of Words: The View from the Founding*, *in* THE BILL OF RIGHTS, *supra* note 9, at 151.

54. *See* 3 WIGMORE, *supra* note 41, § 819, at 238.

55. 110 U.S. 574 (1883).

56. *Id.*

57. *Id.* at 585. This presumption is at the core of the trustworthiness rationale. *See infra* note 70.

58. *Hopt*, 110 U.S. at 585.

that it had been obtained in circumstances where a police officer might have offered a prohibited inducement.

The Court seemed equally supportive of the trustworthiness rationale in *Sparf v. United States*.[59] A sailor suspected of murder confessed while being held in irons in the ship's hold, after his captain told him that he should tell the truth. The Court upheld the confession's admissibility, stating that "confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."[60] The captain's advice was not ruled an "inducement," as it was unlikely to have evoked a false confession.[61] Had the Court interpreted the "voluntary" language to assure complete free choice, then advice to tell the truth could have been considered coercive.[62] *Sparf* thus stands for the trustworthiness principle, with the invocation of voluntarism serving only as an element of reliability.

Finally, in *Wilson v. United States*,[63] the Supreme Court upheld the admission of statements made by an accused murderer who was "in custody and manacled,"[64] and had been interrogated in the presence of a lynch mob without having been advised of a right to counsel.[65] The Court held that the statements were voluntary, since they were made "in the absence of any threat, compulsion, or inducement."[66] "Voluntary" in this instance, therefore, apparently meant that the circumstances surrounding the statement did not lead to a "fair risk of falsity."[67] That the circumstances surrounding Wilson's statement did not militate against its admissibility shows that the Court could not possibly have interpreted its use of the word "voluntary" to convey a free-choice rationale. Only a rationale based on trustworthiness explains the Court's conclusion. This conclusion is bolstered by the fact that the Court scrutinized the credibility of Wilson's statements as well, through comparisons with ex-

59. 156 U.S. 51 (1884).
60. *Id.* at 55.
61. *See* Gangi, *supra* note 40, at 12 n.96.
62. *See infra* notes 124, 128 and accompanying text; *see also infra* note 141 (discussing Bram v. United States, 168 U.S. 532 (1897)).
63. 162 U.S. 613 (1896).
64. *Id.* at 621.
65. *See id.* at 615.
66. *Id.* at 624.
67. Gangi, *supra* note 40, at 14.

trinsic evidence.[68]

It seemed clear quite early that in the United States getting at the *truth* was the main concern of the citizenry. Bradford Wilson quoted Justice Story:

> In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode by which it is obtained. If it is competent or pertinent evidence, and not in its own nature objectionable, as having been created by constraint, or oppression, such as confessions extorted by threats or fraud, the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. The law deliberates not on the mode by which it has come to the possession of the [charging] party, but on its value in establishing itself as satisfactory proof.[69]

Thus, the early American view of confession admissibility was rooted in trustworthiness, rather than in free choice.

In the Eighteenth Century, confession admissibility in federal and state courts of the United States apparently depended upon which mode of expression (reliability or voluntariness) a judge used and whether he interpreted the precedents as seeking reliability or freedom from coercion. These two concerns are *not* mutually exclusive. The presence of duress, for example, is important under both rationales; it might encourage an innocent defendant to confess falsely, as well as a guilty defendant to confess truthfully.[70] Depending upon the circum-

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68. *See Wilson*, 162 U.S. at 617, 619-21.

69. Wilson, *supra* note 53, at 168.

70. Judge William Schaefer wrote of the trustworthiness rule, "while it may be improbable that an innocent person would confess a crime, this improbability rests on the assumption that he was not coerced." William Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 12 (1956). The assumptions of the trustworthiness rule, however, are ultimately very different from those associated with free choice:

> Since men seek self-preservation, the trustworthiness rationale assumed that where harm would result, men ordinarily would not confess falsely. Furthermore, the rationale assumed that if guilty men—burdened by guilt and the necessity of lying consistently to cover up the truth—would confess before men fortified by innocence. The rationale consequently created an image of the accused, and the actions at the time of confession were evaluated in the context of how he would have reacted if he had been innocent. The truth of the confession became the key in assessing the confessor's testimony. If the confession proved false, courts excluded it on the grounds that the confessor evidently had been coerced into making it. If corroborated, the confession was admitted and the courts attributed its making to a guilty conscience rather than the coercion experience. In principle, the common law confession rule

stances surrounding the confession and how clearly a judge explained its admission or exclusion, it might be difficult to discern on what rationale—reliability or free choice—a judge based admissibility. Such a determination was made even more difficult when the judge used the ambiguous "voluntary" terminology, without linking that mode of expression to other terms which would clarify the exclusionary principle used: reliability or free choice.

One important consideration in early federal and state confession cases seems to be the amount of corroborating evidence available and the conclusiveness of that evidence.[71] When a judge focused on the probable reliability of a confession, he may have admitted it into evidence, either partially or totally, if other evidence confirmed its *probable truth*. By contrast, when a judge focused on the coercive atmosphere in which a defendant confessed, a determination of complete admissibility or complete rejection then turned on how much pressure this particular defendant should have been expected to endure. If no corroborating evidence existed, or that which existed seemed insubstantial, a judge's use of the "voluntary" mode of expression obscured whether the dispositive factor had been reliability or free choice. Only in relatively rare instances would a judge be compelled to articulate clearly the basis for admission or exclusion: when the probable truth of a confession had been unequivocally confirmed, but the confession also had been obtained in a circumstances that might have led an innocent man to confess falsely. If reliability were the ultimate concern, the confession would be admitted; if free

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protected only innocent men from being convicted on false or probably false evidence. *The rule did not bar, however, the admissibility of confessions which were established as true though coerced.*

Gangi, *supra* note 40, at 1-2 (citations omitted)(emphasis added).

71. The goal of the trustworthiness rule was to admit reliable evidence; that objective permitted the formulation of the doctrine of confirmation by subsequently discovered facts. This doctrine provided that even confessions acquired under circumstances that would ordinarily jeopardize their reliability, and thus admissibility, could nevertheless be admitted if facts were discovered that confirmed the confession in material points. In such circumstances, "the influence of the improper inducement is seen to have been nil." 3 WIGMORE, *supra* note 41, § 856, at 338. Though this doctrine flowed logically from the premises of the trustworthiness rationale, its application in fact varied among different courts and time periods. Some jurisdictions permitted admission of only the *facts* corroborated; others admitted those *parts of the confession* that had been confirmed; and some jurisdictions admitted the whole confession if material parts of it had been confirmed by subsequently discovered facts. *See* 3 *id.* §§ 856-59; *see also supra* note 68 and accompanying text.

choice were the foundation, the confession would be excluded despite its truthfulness.[72] As Albert R. Beisel observed:

> It is perhaps all too easy to view the [confession] rule as directly protecting an accused from compulsion or inducements as such, when they are used to obtain confessions. Should a court adopt this . . . outlook it would be necessary to find some other source of law than the common law to support it. Protection of an accused from compulsion or inducements, directly and as such, would be completely incongruous and insupportable within the common law system of evidence. Confessions at common law are not invalidated just because compulsion was applied or inducements held out to an accused, but because compulsion or inducement render or are likely to render an accused's confession untrustworthy as criminal evidence.[73]

Hence, long after ratification of the Constitution, the Bill of Rights, and the Fourteenth Amendment, state legislatures continued to craft varied approaches to confession admissibility. In so doing they undoubtedly attempted to establish consistency between earlier statutes and case precedents, while simultaneously trying to incorporate the latest social consensus on what the people considered as sufficient to exclude confessions. It is also probable that American judges, like their English counterparts, tempered the logical application of confession admissibility standards with other considerations, including their understanding of how the citizenry ranked the various evils present, and what "justice" and "fair play" demanded.[74] No state *as a matter of law* barred the admission of a confession otherwise known to be reliable, solely upon the ground that illegal or immoral means were used to obtain it.[75]

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72. For a general discussion of early cases decided by the U.S. Supreme Court, see KAMISAR, *supra* note 11; STEPHENS, *supra* note 52; Gangi, *supra* note 40; William Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 1, 37-42 (1974). *See also supra* notes 55-68 and accompanying text.

73. ALBERT R. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW 47 (1955).

74. *See* 3 WIGMORE, *supra* note 41, §§ 831-33, at 262 n.2, 264-65 n.1, 265-67 n.3, 268-69 n.3, 269-70 nn.4 & 5.

75. As late as 1940, Dean Wigmore explicitly rejected as inapplicable to confession admissibility standards based on trustworthiness at least two exclusionary principles that are accepted today:

> First, courts did not reject confessions simply because promises were not kept, confidences betrayed, deceptions intentionally perpetrated, or the methods used to obtain them were illegal. Second, courts did not reject confessions on the basis of violating the privilege against self-incrimination. "The sum and substance of the difference is that the confession rule aims to exclude self-

Clearly, then, confession admissibility remained a rule of evidence. While judges unquestionably had substantial input in defining such standards, federal and state legislators by simple statute could and undoubtedly *did* repudiate or recast judicially-created admissibility standards that they found unacceptable. Legislators, not judges, had the final word on how to balance competing considerations, and there is no evidence to suggest that by adopting the Bill of Rights or the Fourteenth Amendment the respective framers or ratifiers intended that any of the provisions contained therein authorized the federal judiciary to supervise state confession admissibility standards.

C. *An Alternative View of United States Confession History*

The preceding discussion accepts as convincing Dean Wigmore's analysis of the history of coerced confessions. Contemporary judges and legal scholars, however, place much greater reliance on a competing analysis put forth by Professor Charles McCormick. Unlike Dean Wigmore, Professor McCormick suggested that although the purpose of the common-law confession rule originally may have been to safeguard the discovery of truth, judges in many instances employed "language which savors of privilege."[76] Additionally, even after the "voluntary" formulation of the rule was condemned as confusing and inap-

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incriminating statements which are *false* while the privilege rule gives the option of excluding those which are *true*."

Gangi, *supra* note 40, at 304; *see* 3 WIGMORE, *supra* note 41, §§ 823, 841a, at 248-50, 281-82.

Supreme Court decisions eventually repudiated Dean Wigmore's position, holding that confessions obtained in the manners mentioned above are inadmissible on *constitutional* grounds. New grounds included incorporation of the Fifth Amendment's privilege against self-incrimination into the Fourteenth Amendment. For a most articulate defense of these decisions, see KAMISAR, *supra* note 11. *But see* William Gangi, *The Inabu-Kamisar Debate: Time for Round Two?*, 12 W.ST.U. L. REV. 117 (1984). These matters are discussed *infra* at notes 98-116 and accompanying text.

76. CHARLES MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 155 (1954). In 1897, the Supreme Court held that the Fifth Amendment's privilege against compulsory self-incrimination and the common law confession rule had common histories. *See* Bram v. United States, 168 U.S. 532 (1897). For an analysis of *Bram*, see Gangi, *supra* note 72, at 4-14. By 1940 scholars, notably Dean Wigmore, strongly criticized the *Bram* decision, claiming "[t]hat the two rules should be supposed to have something of a common principle or spirit is a not unnatural error. But that history should be rashly tampered with by asserting any common origin is inexcusable." 3 WIGMORE, *supra* note 41, § 823, at 250 n.5. The Court abandoned the privilege-confession identity in Brown v. Mississippi, 297 U.S. 278 (1936), but in Miranda v. Arizona, 384 U.S. 436 (1966), resurrected *Bram*, substituting storytelling for scholarship. *See infra* notes 108-116 and accompanying text.

propriate by such scholars as Dean Wigmore,[77] Professor McCormick noted that learned judges continued to employ it.[78] He concluded, therefore, that the continued use of the "voluntariness" language stemmed—perhaps—not only from a "liking for its convenient brevity, but also [from] a recognition that there is an interest here to be protected [that] is closely akin to the interest of a witness or of an accused person which is protected by the privilege against self-incrimination."[79]

Because both the confession admissibility rule and the privilege against self-incrimination emerged from the shadows of the rack and the thumbscrew, Professor McCormick contended that the circumstances of his day might justify broader application of the confession rule. He stated that

> the unlicensed barbarity of the . . . third degree, which is almost routine in some parts of this country, of torturing prisoners to extort confessions, is in some aspects more dangerous that the medieval judicial torture, which was carefully regulated by laws and administered only upon the order of a responsible authority.[80]

Professor McCormick accordingly challenged Dean Wigmore's conclusion that application of the confession rule and the self-incrimination privilege should remain distinct, claiming that such a distinction is a "delusion."[81] Professor McCormick and many of his reform-minded contemporaries believed that the protection afforded by the common-law "trustworthiness" rule was inadequate.[82] He concluded, therefore, that the self-incrimination privilege and the confession rule should no longer remain "widely separated,"[83] and by so doing he added schol-

77. Dean Wigmore characterized the use of the "voluntary" formulation as "so indefinite and loose that it does not itself supply a solution . . . ." 3 WIGMORE, *supra* note 41, § 826, at 255.

78. *See* MCCORMICK, *supra* note 76, at 155.

79. *Id.*

80. *Id.* at 156. Professor McCormick referred to charges that "third degree" police tactics were widespread. *See* George Wickersham, *Report on Lawlessness in Law Enforcement*, 11 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931); Gangi, *supra* note 72, at 23-24.

81. MCCORMICK, *supra* note 76, at 157.

82. *See* Charles McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 250 (1946)("The judge or jury if there is a conflict in the evidence as to pressure will often be more interested in punishing the crime with which the prisoner is charged, than in protecting the civil rights of a probably guilty man by disregarding the extorted confession").

83. MCCORMICK, *supra* note 76, at 155.

arly weight to the shifting of confession admissibility standards from "trustworthiness" to "free choice."

When the views of Dean Wigmore and Professor McCormick are closely examined, however, it is clear that Professor McCormick seriously contested neither Dean Wigmore's conclusion that the self-incrimination privilege and confession rule differed in origin and function[84] nor Dean Wigmore's analysis that the original common-law confession rule was never intended to protect guilty defendants from illegal police conduct. Professor McCormick simply contended that those conclusions should have been considered irrelevant in his day, and that a *modern* confession rule should protect even guilty defendants from alleged police misconduct. In that respect he found a receptive audience among the reform-minded intelligentsia—especially judges.

Professor McCormick never rooted his policy preferences in the Constitution, nor could he have validly done so based on the principles defended in this article. His reform proposals were put forth during a period of progressivist enthusiasm, one steeped in evolutionary expectations not generally hospitable to the past, which considered inadequate the more particular and limited objectives reflected in early confession precedents. Instead, such reformers sought to redefine constitutional terms as they saw fit, possessing great confidence about the "progress of the law."[85] This progressivist attitude eventually pervaded legal scholarship and took on an evolutionary patina identified

84. The privilege against compulsory self-incrimination apparently developed in the context of the "moral compulsion that an oath to a revengeful God commands of a pious soul." R. Carter Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A. J. 509, 510 (1956). Generally speaking, the privilege against self-incrimination applied only in the courtroom, after a "criminal case" commenced. U.S. CONST. amend. V. The Framers evidently considered it inhumane to require a defendant to take an oath "to tell the truth, the whole truth, and nothing but the truth so help me God," thereby creating a dilemma: to tell the truth and perhaps lose one's life, or to lie and suffer eternal damnation. *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); JOHN M. MAGUIRE, EVIDENCE OF GUILT 120-21 (1958); LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 10 (1959); MCCORMICK, *supra* note 76, at 155; EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 146 (1962); 3 WIGMORE, *supra* note 41, §§ 840, 850; Yale Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59, 68 (1966); William T. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 382 n.226 (1938-39).

85. *See, e.g.*, Zechariah Chafee, Jr., *The Progress of the Law, 1919-1922, Evidence II*, 35 HARV. L. REV. 428 (1922); *see also* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978); GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

by the label—the "development" of a legal doctrine.[86]

Professor McCormick left undisturbed Dean Wigmore's conclusion that the original purpose of the "voluntary" confession doctrine was to exclude probably false evidence. Reformers embraced this doctrine, not because the trustworthiness rule had in fact failed to accomplish its purpose, but because allegations of widespread third-degree practices by the police in the 1930s caused reformers to believe that a confession rule should accomplish more: protect even the *guilty* from illegal police activity. In sum, Professor McCormick's challenges to Dean Wigmore were over *what* protection a confession admissibility rule *should* afford in the late 1930s, to *whom* it should be afforded, and *how* that protection could be enforced.

These questions certainly posed important public policy issues, but not constitutional ones. Unless the American people choose by amendment to make them such, the people hold the right to deal with such matters in whatever manner they wish. Yet the ideas of Professor McCormick and his like-minded colleagues ultimately deprived the people of this fundamental prerogative of self-government by facilitating the creation of constitutional confession standards by sheer judicial fiat.

D. *The Supreme Court Abandons Trustworthiness*[87]

Beginning in the 1920s, reform-minded federal judges used the "voluntary" mode of expression to assure that defendants made post-arrest statements freely.[88] In that context, *Lisenba v. California*[89] emerges as a pivotal case. There, Justice Roberts made a crucial distinction with respect to the Fourteenth Amendment's due process requirement: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."[90] The Court thereby ruled that

86. *See, e.g.*, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

87. A case-by-case recounting of the development of the modern coerced confession rule is outside the scope of this discussion.

88. *See, e.g.*, Ziang Sung Wan v. U.S., 266 U.S. 1 (1924)(blending reliability and free choice considerations). Justice Brandeis, writing for the majority, cited an article by Professor Chafee, and, although he did not explain them, he also included a number of unorthodox references. *See id.* at 15 n.4, 17 n.6. During this time in federal courts, the Fifth Amendment privilege against compulsory self-incrimination was *not* considered applicable to confession cases and of course did not apply to the states. *See supra* text accompanying notes 74-75.

89. 314 U.S. 219 (1941).

90. *Id.* at 236. Justice Roberts continued, stating that "the criteria for decision of

while state courts could continue to employ either free choice or trustworthiness tests as a *state* standard of evidence admissibility, in order to meet federal Fourteenth Amendment due process standards, state common law or statutory language had to be interpreted in *free choice* terms. It would take more than two decades for the Supreme Court to suppress continued state reliance on the trustworthiness standard, but after *Lisenba* the Supreme Court recognized only *one* test of confession admissibility as having *constitutional status*—that of *free choice*.[91]

This assumption of power by the *Lisenba* (or any other Supreme Court) majority to elevate a common law rule of evidence to constitutional status is illegitimate. Moreover, despite Justice Roberts's assertion to the contrary, the free choice rationale in fact did *not* govern federal or state common or statutory law confession admissibility standards during the adoption of the Fifth and Fourteenth Amendments.[92] Neither the free choice nor the trustworthy rationale enjoyed constitutional status.[93] If practice is given any weight, the trustworthiness standard probably enjoyed wider usage.

As Dean Wigmore explained fifty years ago, judges counseled caution regarding confessions out of concern for their reliability. This was a rebuttable concern:

> If the exclusion of the confession rests altogether upon the probability that the confession is untrue . . . then, if the prosecution produces evidence tending to show, and sufficient to warrant the jury in finding, that it is *true*, it ought to be received, for in such case the reason of the exclusion is done away. All courts recognize the propriety of this reasoning,

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that question may differ from those appertaining to the *State's* rule as to the admissibility of a confession." *Id.* at 235-36 (emphasis added).

It has been argued that the Court first elevated the exclusion of coerced confessions to constitutional status in Brown v. Mississippi, 297 U.S. 278 (1936). *See* Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 338 (1962). But see Stein v. New York, 346 U.S. 156, 189-91 (1952) and my own assessment: "It is more reasonable to give a narrower reading to the holding in *Brown*—[that] it was the *use* of coerced [unreliable] confessions to obtain a conviction rather than the police practices *per se* which violates due process." Gangi, *supra* note 72, at 26.

91. *See* Rogers v. Richmond, 365 U.S. 534 (1960).

92. *See id.*; *see also* Gangi, *supra* note 40, at 15. Even Professor McCormick never disputed the fact that confession admissibility standards were rules of common and statutory law and did not enjoy constitutional status. *See supra* notes 76-86 and accompanying text.

93. This conclusion is based on the fact that after the Constitution and the Bill of Rights were ratified, federal and state courts continued to use both rationales.

but illogically decline to pursue it to its legitimate results.[94]

Since 1941, the Supreme Court has failed to cite convincing authority to support its *Lisenba* contention that federal courts excluded confessions solely on the grounds that they inhibited free choice. The cases cited by Justice Roberts[95] are at least equally concerned with probable reliability.[96] Finally, Justice Roberts's distinction of "fundamental unfairness in the use of evidence" finds no basis in the Constitution or the Framers' intentions.[97] At the time the Constitution was ratified, these matters were considered rules of evidence and, as such, they did not enjoy constitutional status.

E. *Post-*Lisenba *Progress? A Matter of Perspective*

In 1971, I investigated whether between 1884 and 1966 the Supreme Court had "modified the original purpose and application of the English common law rule of 'involuntary' confessions."[98] Finding in the affirmative, I concluded that the Court had given little weight to the rule's original trustworthiness purpose and found that, instead, the justices had arbitrarily favored those precedents that emphasized free choice. Furthermore, with *Miranda*, the Court moved well beyond an effort to assure that confessions were made freely—under the guidelines

94. Beery v. United States, 2 Colo. 186, 221 (1873), *quoted in* 3 WIGMORE, *supra* note 41, § 858, at 341.

95. In *Lisenba*, Justice Roberts listed earlier cases where the Court had found denials of "fundamental fairness." *See* Lisenba v. United States, 314 U.S. 219, 236 n.16 (1941). Interestingly, Justice Roberts omitted any reference to Bram v. United States, 168 U.S. 532 (1897), probably because of the Court's rejection of the privilege's applicability to confession situations in Brown v. Mississippi, 297 U.S. 278 (1936). *See supra* note 76 and accompanying text.

96. *See Lisenba*, 314 U.S. at 236-37. Justice Roberts failed to support his contentions that in each of the federal cases he cited for authority, "voluntary" language had been employed to guarantee free choice, or that in using the "voluntary" mode of expression, state courts had abandoned their concern for reliability. *See also* Gangi, *supra* note 76, at 28-29.

97. *See supra* text accompanying notes 92-93. Justice Roberts stated in *Lisenba*:

> If by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used at trial.

314 U.S. at 237. It is likely, however, that such considerations also would impact on the *reliability* of the trial process. One might argue that unconfirmed confessions may be viewed similarly. Arguing that denial of free choice would do the same thing is not as convincing. *See* Gangi, *supra* note 72, at 29.

98. William Gangi, The Supreme Court and Confessions: Justice at the Expense of Truth? 79-87 (1971)(unpublished Ph.D. dissertation, University of Michigan (Ann Arbor)).

legislated there, even freely made confessions acquired in the absence of the warnings specified had to be excluded.[99]

The Supreme Court, thus, had changed the status of the protection afforded defendants from a common-law or statutory rule of evidence designed to protect the innocent into a constitutional right accorded to innocent and guilty defendants alike. This amounted to a privilege against conviction based on illegally obtained evidence. This development seemed contrary to the intent of the ratifiers of both the Constitution and its subsequent amendments, because the ratifiers had bound themselves and future generations only to the meaning those provisions had at ratification. As stated earlier, any judicial expansion of the restrictions placed on the government amounts to a proportionate reduction of the people's ability to govern themselves. Such expansions are tantamount to amendments to the Constitution made without the people's consent, and they are therefore illegitimate.[100] Consequently, I do not repudiate the duty of courts to interpret the law or to exercise that power through judicial review; I simply contend that the judiciary is as capable as the Congress or the President of abusing its power.[101]

The Framers expected the people in each state to decide for themselves how to pursue criminal prosecutions.[102] The Bill of Rights, of course, did not apply to the states, and even if it had applied, the Fifth Amendment's Due Process Clause guaranteed only long-accustomed *procedural* protections that certainly did not include a defendant's right to have a reliable (although coerced or illegally obtained) confession excluded.[103] Nor did

99. Miranda v. Arizona, 384 U.S. 436, 467-72 (1966)(requiring that suspects must be given a warning that they have a right to silence, that they may be represented by counsel, that if they cannot afford counsel it will be provided for them, and that any interrogation must cease if requested by the suspect).

100. *See supra* notes 4-25 and accompanying text.

101. *See, e.g.*, William Gangi, *O What a Tangled Web . . .*, THE PROSECUTOR 15, 36 (Spring 1986)(arguing that governmental powers must be specifically conferred and may only be exercised within the limits granted if they are to be legitimate).

102. *See, e.g.*, THE FEDERALIST No. 80, at 480-81 (Alexander Hamilton).

103. *See supra* notes 50-53 and accompanying text; *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY 193-200 (1977)(arguing that due process is strictly procedural); HOWARD N. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 126-27 (1977)(arguing that relevant due process procedures are entirely spelled out in the Fourth and Fifth Amendments). Professor Meyer notes:

> No one could dream that one day the United States Supreme Court would take a constitutional term, turn it into a nonsensical phrase—substantive due process—and misuse it as a cover-up for the absence of constitutional author-

the Fifth Amendment's prohibition against compulsory self-incrimination bear on coerced confession admissibility, having, as it did, a very different purpose.[104] In sum, for those who framed the Constitution and the Bill of Rights, confession admissibility standards did not enjoy constitutional stature.

It also cannot be seriously contended that the framers of the Fourteenth Amendment even considered state confession admissibility standards, let alone wished to interfere with them. Justice Roberts's due process distinction is unsupported by evidence.[105] In its historical context, "fundamental fairness" is but an early example of what would eventually become open-ended adjudicative principles, or "noninterpretive" review, which is illegitimate.[106]

Recent Supreme Court confession decisions stand on no higher ground than did Justice Roberts's "fundamental fairness" criterion. Upon careful examination of these cases, one often finds judicially created distinctions which conveniently mask personal predilections. If anything can be concluded from the study of these distinctions, it is that succeeding and shifting U.S. Supreme Court majorities have constructed and discarded numerous alleged constitutional distinctions that cannot be traced to the ratifiers' understanding of the constitutional provisions or amendments. Instead, they have served only to justify continued judicial interference with state criminal justice systems. Thus, the justices illegitimately have continued to limit the people's right to self-government.[107]

The most significant example of this abrogation of power by the Supreme Court with respect to state criminal justice systems occurred during Chief Justice Earl Warren's tenure. During that time, precedents fell to the "domino method" of constitutional adjudication, wherein "every explanatory statement in a previous opinion [was] made the basis for extension to a wholly different situation."[108] So it came to pass that *Mapp*

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ity to interfere with the constitutional functions of the legislatures of the states, and even with those of Congress.

Id. at 127.

104. *See supra* note 84.

105. *See supra* note 90 and accompanying text.

106. *See* William Gangi, *The Supreme Court: An Intentionist's Critique of Non-Interpretive Review*, 28 CATH. LAW. 253, 260-85 (1983).

107. *Cf.* Gangi, *supra* note 72, at 31-36.

108. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV.

v. Ohio,[109] an exercise of illegitimate judicial power[110] that ignored pertinent history, was used to justify the Court's decision in *Gideon v. Wainwright*.[111] These two cases were also cited as authority in *Malloy v. Hogan*.[112] Warren Court decisions then got really "tricky." *Escobedo v. Illinois*[113] cited *Gideon* and *Massiah v. United States*,[114] which itself cited *Gideon* for authority. These decisions were soon followed by the grand finale in *Miranda v. Arizona*, where for authority the Warren Court cited all of the precedents *it had created*![115]

This is not constitutional law. This is storytelling.[116]

PART III: THE CONTEMPORARY STATUS OF CONFESSION ADMISSIBILITY, *ARIZONA V. FULMINANTE*, AND THE JUDICIAL CREATION OF RIGHTS

On September 14, 1982, Oreste Fulminante reported his 11-year old stepdaughter Jeneane missing, and two days later she was found "shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck."[117] The

929, 950 (1965). *See generally* CRIMINAL LAW REPORTER, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-71 (1972).

109. 367 U.S. 643 (1961)(holding that a personal constitutional right to exclusion of illegally seized evidence is binding on the states).

110. *See* Calandra v. U.S., 414 U.S. 338 (1974)(holding that the exclusionary rule is not a personal constitutional right). For a defense of the proposition that the modern exclusionary rule lacks a constitutional basis, see William Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 DRAKE L. REV. 33 (1984).

111. 372 U.S. 335, 342 n.6 (1963)(holding that the Sixth and Fourteenth Amendments require states to furnish counsel to indigent defendants in felony cases).

112. 378 U.S. 1, 4 n.2, 6, 10 (1964)(holding that the Fifth Amendment prohibition of compulsory self-incrimination is applicable to the states)(citing *Gideon*); *id.* at 6, 8, 9 (citing *Mapp*).

113. 378 U.S. 478, 479, 487, 491 (1964)(citing *Gideon*); *id.* at 484, 486, 488 (citing *Massiah*).

114. 377 U.S. 201 (1964)(holding that evidence is inadmissible when obtained without counsel after an indictment but before trial).

115. 384 U.S. 436, 466 (1966)(citing *Mapp*); *id.* at 473 (citing *Gideon*); 460, 463-65, 468 n.37 (citing *Malloy*); 440, 442, 450, 465-66, 470, 475, 477, 479 n.48 (citing *Escobedo*).

116. Professor Wallace Mendelson describes such decisions as "fairy tales." Wallace Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 441 (1979). For a thorough examination of *Miranda*, see Kenneth W. Graham, Jr., *What is Custodial Interrogation?: California's Anticipatory Application of* Miranda v. Arizona, 14 UCLA L. REV. 59, 71-73 (1966)(noting that *Miranda* contains embarrassing inconsistencies).

117. Arizona v. Fulminante, 111 S. Ct. 1246, 1250 (1991). The "ligature" is mentioned because at the trial testimony indicated that Fulminante had knowledge of it. Arizona v. Fulminante (Dec. 11, 1985), Record of the Case at 19-20 [hereinafter Record]. Presumably only the murderer, a witness to the crime, or those who discovered the body would have known that the victim had been choked. *See also* 111 S. Ct. at 1259.

body was too decomposed to establish whether the victim had been sexually assaulted.[118] During the subsequent police investigation Fulminante, having made inconsistent statements, became a suspect. Since there was insufficient evidence to charge him, however, Fulminante was permitted to leave Arizona.[119] He was subsequently arrested and convicted in New Jersey on federal firearms charges and was sent to the Ray Brook federal prison in New York. There he became friends with Anthony Sarivola who, unbeknownst to Fulminante, also was an FBI informant.[120]

Rumors had circulated in prison that Fulminante had killed a child in Arizona.[121] Sarivola on several occasions had asked Fulminante about the truth of those rumors, but Fulminante had offered only exculpatory or apparently fabricated statements (for example, bikers probably killed his stepdaughter).[122] As an alleged child-killer, the defendant was apparently in some danger of being assaulted by other inmates, and Sarivola testified that Fulminante was "starting to get tough treatment and what not."[123] Sarivola then offered Fulminante his protection if the latter told him about what happened. "Fulminante then admitted to Sarivola that he had driven Jeneane to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head."[124] The record is silent about

118. 111 S. Ct. at 1250. There was trial testimony by Anthony Sarivola, see *infra* notes 121-25 and accompanying text, an FBI informant, that Fulminante had told him that before murdering his stepdaughter he had forced Jeneane to beg for her life and to perform oral sex on him. *See* Record at 19.

119. *See* Arizona v. Fulminante, 111 S. Ct. at 1250.

120. State v. Fulminante, 778 P.2d 602, 607-08 (Ariz. 1988). Sarivola testified that he and Fulminante has been housed in the same prison unit, seeing each other every day for between two and eight hours, and that they had become "friends." Record at 14. Sarivola was serving a sixty-day sentence at Ray Brook for extortion. Sarivola apparently was an important figure within the unofficial prison-inmate governing structure. He allegedly sat on a "five-person crime commission at Ray Brook . . .[that] was so powerful, that [it] could give permission for hits outside the prison." Record at 14.

121. *See* Arizona v. Fulminante, 111 S. Ct. at 1250; *see also* State v. Fulminante, 778 P.2d at 606, 608-09, 613.

122. *See* Arizona v. Fulminante, 111 S. Ct. at 1250. Sarivola passed on Fulminante's initial exculpatory comments to his FBI contact. *Id.* His agent asked him to "find out more," and the Supreme Court of Arizona considered this fact, along with a later "promise of protection," *see infra* note 128 and accompanying text, sufficient for the trial judge to have "instructed the jury on whether the jury understood Sarivola to be a 'law enforcement officer.' " State v. Fulminante, 778 P.2d at 609.

123. Arizona v. Fulminante, 111 S. Ct. at 1250.

124. *Id.* The Supreme Court of Arizona noted that "Sarivola testified that if the defendant would tell the truth, he could be protected." State v. Fulminante, 778 P.2d at 609 n.1. (In a pretrial interview, Sarivola had stated that Fulminante "would 'have went

what, if anything, happened to Fulminante in prison after Sarivola was released from Ray Brook in November 1983. On the day Fulminante finished serving his term in May 1984, he made a second confession admitting to the same information to Sarivola's girlfriend.[125]

The State of Arizona charged Fulminante with murder and the defendant filed a pretrial motion to suppress both confessions, arguing that the first confession made to Sarivola was coerced and that the second confession was the "tainted fruit" of the first.[126] The trial court denied Fulminante's motion,

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[sic] out of the prison horizontally.' " Arizona v. Fulminante, 111 S. Ct. at 1262 (Rehnquist, C.J., dissenting).) The Arizona Supreme Court also concluded that this promise of protection had rendered the confession involuntary because such promises, "however slight," were prohibited. State v. Fulminante, 778 P.2d at 609.

The fact that Fulminante was being threatened by other inmates might be relevant even under the trustworthiness rationale, but only if Sarivola himself had made or instigated such threats. The bottom line, however, would have remained whether the confession was probably true or false. Even under the free choice rationale, one might argue that because Sarivola apparently was in no way involved in making the threats there is no logical connection between those threats and Sarivola's alleged promise to protect Fulminante. After all, even if Sarivola were considered a law enforcement officer, he did not *make* the threats. If Sarivola were not considered a law enforcement officer, the confession may never have been subject to review. Even under modern exclusionary principles, "private" (versus "official") coercion may not render illegally acquired evidence inadmissible.

125. *See* Arizona v. Fulminante, 111 S. Ct. at 1258-59. Could Fulminante have had another motive to confess to Sarivola—knowing of Sarivola's status in the prison and the poor status of child murderers—a reason perhaps more consistent with Fulminante's contention that he never confessed? *See id.* at 1261 ("Fulminante knew of Sarivola's connections with organized crime"). I think so. It has already been noted that Sarivola apparently was loosely connected with a New York crime family and held some unofficial status in the prison, allegedly including the ability to order "hits" outside the prison. Perhaps Fulminante was not so much interested in Sarivola's protection as he was in the prospect of future employment! After all, regarding the content of what Fulminante told Sarivola, even the Supreme Court of Arizona concluded: "These were statements of a man who was bragging and relishing the crime he committed." State v. Fulminante, 778 P. 2d at 606, 621. Thus, Fulminante may have viewed Sarivola as a possible *contact* after leaving prison. (Sarivola and his wife Donna, in fact, picked Fulminante up on the day he was released from prison, some six months after Sarivola had left the prison. Arizona v. Fulminante, 111 S. Ct. at 1258-59.) Fulminante simply may have been "networking." Sarivola apparently belonged to an organization, and all organizations recruit new members. Sarivola allegedly could order "hits" *outside* the prison, and Sarivola himself was an enforcer and presumably might know of related "job openings" in his or other organizations. Perhaps in his conversations with Sarivola Fulminante was engaging in a little self-advertising, embellishing his "professional" resume, trying to impress a potential employer. However despicable Fulminante's brutal killing of his stepdaughter might appear to ordinary citizens, including judges, in some quarters it could be viewed as an ability to do *anything* asked. After all, Fulminante—if the confession is to be believed—raped and killed his wife's child in cold blood.

126. *Id.* at 1250-51. The United States Supreme Court never made a determination on the admissibility of the second confession. Thus, the rules regarding multiple confessions were never discussed. The Supreme Court of Arizona did discuss the second confession, however, and found it voluntary. *See* State v. Fulminante, 778 P.2d at 627.

"specifically finding that based on the stipulated facts, the confessions were voluntary."[127]

Fulminante was convicted and sentenced to death, but he appealed, contending that his conviction violated the due process clauses of the Fifth and Fourteenth Amendments because his confession to Sarivola "was the product of coercion." Although in its initial review the Arizona Supreme Court found Fulminante's first confession to Sarivola to be coerced, it ruled that its admission had been "harmless error . . . because of the overwhelming nature of the evidence against" Fulminante.[128]

The defendant then petitioned for a rehearing, contending in part that past decisions of the United States Supreme Court prohibited the Arizona Supreme Court from finding harmless error once it had labeled the first confession involuntary and thus inadmissible. Agreeing with this analysis, the Supreme Court of Arizona reversed Fulminante's conviction and ordered a retrial without the first confession. Because of different views on harmless error in state and federal courts, the U.S. Supreme Court agreed to hear the case.[129]

The Supreme Court's holding in *Fulminante* was complicated, but can be summarized rather simply.[130] In the holding, a shifting coalition of justices[131] decided that: 1) Fulminante's first

127. Arizona v. Fulminante, 111 S. Ct. at 1251.

128. *Id.* at 1251. The Supreme Court of Arizona concluded that as "an alleged child murderer the defendant was in danger of physical harm at the hands of other inmates . . . [and that] in return for the confession with respect to the victim's murder, Sarivola would protect him." This "promise" of protection was adjudged "extremely coercive" because of the implication that Fulminante's life would be in danger if "he did not confess." State v. Fulminante, 778 P.2d at 608. In reaching that conclusion, the Supreme Court of Arizona contended that in order to be "free and voluntary within the meaning of the Fifth Amendment" the confession had to be procured without "any direct or implied promises, however slight, nor by the exertion of any improper influence." *Id.* at 609. The Supreme Court of Arizona also believed that Sarivola might have been considered a law enforcement agent, and so the "promise" made by him was sufficient to render the confession involuntary. *See id.*

129. *See* Arizona v. Fulminante, 111 S. Ct. at 1251.

130. There were two crucial issues in Arizona v. Fulminante:

a) Who, for purposes of extending an "inducement," should be considered a law enforcement agent?

b) Were the circumstances surrounding Fulminante's confession to Sarivola sufficient to constitute a prohibited "threat or promise?"

The answer to both questions ultimately depends on which principle of exclusion—reliability or free choice—is believed to govern confession admissibility.

131. Here is the court reporter's summary:

> White, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. Marshall, Blackmun, and Stevens, JJ., joined Parts I, II, III, and IV of that opinion; Scalia, J., joined Parts I and II; and Kennedy, J., joined Parts I and IV. Rehnquist, C.J., delivered an opinion,

confession to Sarivola was coerced;[132] 2) given the specific circumstances under which the first confession was obtained, its admission at trial could not be considered "harmless"; but 3) the Constitution does not automatically preclude the finding of "harmless error," even if a coerced confession has been introduced.

In Parts I and II of Justice White's opinion, a majority coalition[133] concluded that Fulminante's first confession had been coerced. This conclusion in turn rested upon several questionable factors, including the judicial re-creation of Fulminante's state of mind based on his previous prison experience. The opinion ignored the defendant's explicit denial that he had ever confessed or that he had been intimidated by other inmates. The majority also ignored uncontradicted testimony that the confession had occurred after dinner as Fulminante and Sarivola spoke in conversational tones while walking around the prison track. For the confession to be coerced, therefore, Sarivola had to be considered a law enforcement officer, despite the fact that he was merely an informant and did not interrogate Fulminante in any traditional, or pre-Warren Court, sense of that term. The Court also had to find that the

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Part II of which is for the Court, and filed a dissenting opinion in Parts I and III; O'Connor, J., joined Parts I, II, and III of that opinion; Kennedy and Souter, JJ., joined Parts I and II; and Scalia, J., joined Parts II and III. Kennedy, J., filed an opinion concurring in the judgment.

Arizona v. Fulminante, 111 S. Ct. at 1249. An elaboration of this breakdown is undertaken *infra* at notes 132-35 and accompanying text.

132. Justice White maintained that, "[u]sing his knowledge of [the] threats, Sarivola offered to protect Fulminante in exchange for a confession." *Id.* at 1252. This language conveys the impression that only a confession of guilt, *whether true or false*, would have been acceptable to Sarivola. Yet, there is no evidence to support such reasoning. That conclusion in turn seems to depend on one possible reading of the circumstances surrounding the confession and Fulminante's motive for confessing. Yet Sarivola simply asked for "the truth," *see id.*, which, under traditional trustworthiness standards, could never constitute sufficient inducement to render a confession "involuntary." *See* Gangi, *supra* note 40, at 2 (citing 3 WIGMORE, *supra* note 41, § 832). Nevertheless, on reasoning similar to Justice White's, the Arizona Supreme Court had found that Sarivola's promise was "extremely coercive." State v. Fulminante, 778 P.2d at 627.

Chief Justice Rehnquist disagreed with the Court, pointing to the fact that "at the suppression hearing, Fulminante stipulated to the fact that '[a]t no time did [he] indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's protection.'" Arizona v. Fulminante, 111 S. Ct. at 1262 (Rehnquist, C.J., dissenting). Is it pivotal that Sarivola was an FBI informant? If he had merely been another inmate who could offer protection, would the confession have been accepted as voluntary? The justices do not address this issue.

133. Justices White, Marshall, Blackmun, Stevens, Scalia, and Kennedy. Justice Kennedy did not actually believe the confession had been coerced, but acknowledged that five other justices believed it had been, so his judgment was irrelevant. Arizona v. Fulminante, 111 S. Ct. at 1266 (Kennedy, J., concurring).

inducement, which might simply have amounted to asking Fulminante to tell the truth, was both a promise and one that was prohibited, despite contrary precedent.

Beyond its unconvincing reasoning, Justice White's opinion in Part I also seems inconsistent with his dissent in *Escobedo v. Illinois*, in which he had declared that "[t]he decision is thus another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not."[134] Is the holding that Fulminante's confession was coerced based on any less "new and nebulous rule" than the one that Justice White condemned in *Escobedo*?[135]

In Part III, having lost Justices Scalia and Kennedy, Justice White expressed the dissenting view that the admission of a coerced confession could never be considered harmless, and that any conviction where such a confession had been introduced required automatic reversal.[136] In Part IV, however, Justice White regained Justice Kennedy's concurrence and wrote for the plurality that on the facts of this case, the introduction of Fulminante's confession could not be considered harmless. Therefore, the confession was properly excluded.

Part I of Chief Justice Rehnquist's dissenting opinion contended that Fulminante's first confession had not been coerced.[137] In Part II, Chief Justice Rehnquist wrote for a *majority*, and held that the introduction of a coerced confession might in some circumstances be found to constitute harmless error, and

134. 378 U.S. 478, 495 (1964)(White, J., dissenting).

135. *Id.* at 497.

136. A constitutional basis for an automatic reversal rule is doubtful, and a simple statute, federal or state, would be sufficient to declare the people's will on the issue, no matter what an examination of precedents revealed. The case for automatic reversal is much stronger when little or no corroborating evidence exists. The logic of automatic reversal appears much less compelling, however, when the basis for exclusion is no longer reliability, but rather to assure a defendant's free choice or to punish departures from *Miranda* warnings.

137. Chief Justice Rehnquist, writing for the dissenters, claimed to be "at a loss to see how the Supreme Court . . . reached the conclusion that it did," noting that "no evidence" had been introduced to support the supposed danger to Fulminante or that the first confession made to Sarivola had been made "to obtain the proffered protection." Chief Justice Rehnquist maintained that Fulminante had experience in prison and that the majority had embraced a broader understanding of a "promise or threat" than it had in the past. He concluded, "[t]he conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company. Sarivola at no time threatened him or demanded that he confess; he simply requested that [Fulminante] speak the truth about the matter." Arizona v. Fulminante, 111 S. Ct. at 1263 (Rehnquist, C.J., dissenting).

therefore automatic reversal may not be required. In Part III, the Chief Justice again dissented, supporting the Arizona Supreme Court's initial conclusion that even if coerced, the introduction of the first confession at trial should be considered harmless.[138]

The problems with these holdings go beyond the narrow issues addressed in the majority and dissenting opinions. *All* of the *Fulminante* opinions ultimately lack any constitutional stature and serve only to deny the people of Arizona the right to address criminal justice matters. The history of confession admissibility, both in England and the United States, has been full of peaks and valleys,[139] and it is not difficult to understand why. Confession admissibility touches a community's soul, encompassing its view of the police, the power they exercise, and how this power affects different social, economic, and racial groups. A community's desire for crime control may compete with its fear of a lawless and abusive police force. The need for public order may compete with a community's sense of justice toward defendants and with the grief and pain of crime victims whose rights, too, have been violated.

Americans should have the right to balance these considerations in formulating positions on such policy issues, and the right to reevaluate such policies whenever they wish. The polity may go about such balancing in any number of ways. Citizens may choose to leave such issues to the sensitivity of judges, or they may choose to limit judicial discretion by enacting statutes that balance competing factors in a different fashion. The people may have to rewrite these statutes occasionally, as circumstances and judicial interpretations warrant, but in no sense do these community judgments enjoy constitutional status. My contention that the Court's decision in *Fulminante* was similarly not about constitutional law may best be advanced by ignoring the specifics of the opinions in that case and concentrating instead on the following two issues.

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138. *Id.* at 1266. Justice Kennedy, in a separate concurring opinion, agreed with Chief Justice Rehnquist that Fulminante's confession to Sarivola was not coerced, and that a finding of harmless error generally is not precluded by the Constitution in coerced confession cases. Yet, because confessions played such a critical role in the instant case, Justice Kennedy concurred in Part IV of Justice White's opinion, holding that the introduction of Fulminante's first confession was not harmless. *Id.* at 1266 (Kennedy, J., concurring in the judgment).

139. *See supra* notes 40-116 and accompanying text.

1. *Why should coerced confessions be excluded?* Despite substantial disagreements among them, *all* of the justices writing in *Fulminante* concluded that the principle governing coerced (that is, involuntary)[140] confession admissibility was "free choice."[141] Yet this proposition, on its face, lacks any federal constitutional status.[142]

2. *What is the purpose of State and Federal criminal justice systems?* Although Justice White and Chief Justice Rehnquist locked

140. "Our prior cases have used the terms 'coerced confession' and 'involuntary confession' interchangeably 'by the way of convenient shorthand.' " Arizona v. Fulminante, 111 S. Ct. at 1252 n.3 (citing Blackburn v. Alabama, 361 U.S. 199 (1960)). In *Blackburn*, Chief Justice Warren had contended that there were considerations that transcended guilt or innocence. 361 U.S. at 206. That conclusion, however, is not constitutionally based: it is a preference. As already noted, the conclusion that coerced confession precedents support the free choice rationale is a doubtful one at best. *See supra* notes 50-96 and accompanying text. The earliest confession cases were rooted in trustworthiness. *See* Gangi, *supra* note 40, at 9-15. Furthermore, it is reasonable to conclude that state jurisdictions probably had a similar orientation—a conclusion bolstered by the Court's repeated need to suppress concerns for trustworthiness by state courts. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1960)(finding that a state continued to employ the trustworthiness standard alone).

141. Justice White stated: "[W]e agree with [the Arizona Supreme Court's] conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion." Arizona v. Fulminante, 111 S. Ct. at 1253. Chief Justice Rehnquist posed the question similarly: "Is the confession the product of an essentially free and unconstrained choice by its maker?" *Id.* at 1261 (Rehnquist, C.J., dissenting).

The Supreme Court coerced confession doctrine's weakest link is its ultimate dependence on Bram v. United States, 168 U.S. 532 (1897)(holding that the common-law confession rule and Fifth Amendment had a common history—confessions are excluded because of Fifth Amendment's prohibition against compulsory self-incrimination). The *Bram* holding was severely criticized and was abandoned in Brown v. Mississippi, 297 U.S. 278 (1936), but was resurrected in Miranda v. Arizona, 384 U.S. 436 (1966). *See supra* note 76.

In the *Fulminante* case, the Supreme Court of Arizona concluded that as "an alleged child murderer the defendant was in danger of physical harm at the hands of other inmates . . . [and that] in return for the confession with respect to the victim's murder, Sarivola would protect him." This "promise" of protection was judged to be " 'extremely coercive' " because of the implication that Fulminante's life would be in danger if "he did not confess." State v. Fulminante, 778 P. 2d at 608. In reaching this conclusion, the Supreme Court of Arizona contended that in order to be "free and voluntary within the meaning of the [F]ifth [A]mendment [the confession had to be procured without] 'any direct or implied promises, however slight, *nor by the exertion of any improper influence*.' " *Id.* at 609 (citing *Bram*, 168 U.S. at 542-543)(emphasis added).

Justice White, writing for the majority, found Fulminante's first confession to Sarivola coerced, but he specifically *rejected* the Arizona Court's use of *Bram* for authority. Instead, he declared that the *Bram* criterion did "not state the standard for determining the voluntariness of a confession" and turned to that portion of the Arizona Supreme Court opinion that referred to the "totality of circumstances" doctrine. 111 S. Ct. at 1251, 1252 (criticizing State v. Fulminante, 778 P. 2d at 315).

But the "totality" doctrine, itself, is a creation of Chief Justice Warren. *See* Fikes v. Alabama, 352 U.S. 191, 197-8 (1957). It is not rooted in the Constitution; this doctrine, like so many others, only provides a convenient and vague formula that masks the substitution of personal preferences for those of state court judges—which is to say that the role of legislators is diminished.

142. *See supra* notes 50-116 and accompanying text.

horns over the purpose of the criminal justice system,[143] neither explained how this question is a matter fit for *judicial resolution*. I contend that there is no constitutional basis for a free choice-oriented confession rule, and therefore, the people are free to select, modify, or reject confession admissibility standards and to decide *for themselves* what purpose their state criminal justice systems should serve.

In the *absence* of contrary congressional legislation, the Supreme Court may of course adopt free choice as the governing standard for admitting confessions *in federal courts*, but it cannot legitimately resist congressional repudiation or modification of that standard.[144] Some scholars argue that if the intentions of the ratifiers are unclear, judges may become active lawmakers. Such views, however, are inconsistent with a government of *limited powers*, especially in reference to a branch charged only with exercising the judicial power; there is far more historical support for the view that judges ought to defer to the legislative branch. Such deference permits the electoral process to seek solutions, while minimizing the potential for imposing illegitimate constitutional restrictions. Under this formulation, the Framers' paradigm is still before us: a compound republic, not a judicial oligarchy.

There is much to say on both sides of the debate over confes-

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143. Justice White stated:

> The search for truth is indeed central to our system of justice, but "certain constitutional rights are not, and should not be, subject to harmless error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial" . . . . The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair."

Arizona v. Fulminante, 111 S. Ct. at 1257 (citations omitted). Yet Justice White assumes what he must prove: that "certain constitutional rights" had been denied, and that the judgment regarding fundamental fairness is constitutionally based.

In contrast, Chief Justice Rehnquist stated:

> In applying harmless error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless error doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual questions of the defendant's guilt or innocence, and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Id. at 1264 (Rehnquist, C.J., dissenting)(citations omitted).

144. While federal prosecutors continue to ignore it, for all practical purposes in 1968 Congress modified the application of *Miranda*-type rules in federal courts. *See* William Gangi, *Confessions: Historical Perspective and a Proposal*, 10 HOUS. L. REV. 1087 (1973)(explaining that Title II of the Omnibus Crime Control and Safe Streets Act modifies confession admissibility standards in federal courts).

sion admissibility. As understood by the Framers of the Constitution, the Bill of Rights, and the Fourteenth Amendment, Congress and the state legislatures were to remain free to pass laws (if the people so wished) that were identical to the restrictions *illegitimately* imposed, for example, by *Miranda*. The people would later be free to eliminate these restrictions, or, if they so desired, *add* even more restrictions.[145]

In contrast, legislators and citizens today find themselves bound by a constitutional straitjacket composed of inconsistent precedents, many of which are rooted in long-discarded progressivist assumptions. Simultaneously, the current Supreme Court's justices attempt to find graceful exits from the dilemmas created by their predecessors in the face of uninformed criticism that they are discarding long-established rights. In the absence of some attachment to the Framers' intent, Congress and state legislators have the authority to ignore illegitimate judicial rules and doctrines and retain for the people their birthright—the ability to decide criminal justice public policy questions as they see fit.

My accusation, that contemporary courts *create* rights unknown to the Framers, is hardly an earth-shattering one. Judges began writing faddish rights into the Constitution during the last two decades of the Nineteenth Century—first creating economic rights, then adding due process, equal protection, and privacy rights of every color and hue. Fads, of course, are fleeting and many judicially-created rights have been no exception. The earliest economic ones have already been repudiated, while those of the Warren Court are not faring much better. Such rights cannot last because they will eventually clash with realities beyond the reach of the judiciary. Sooner or later, the people's ability to respond to changing circumstances becomes intolerably inhibited; when this occurs, the rights articulated by

145. The New York Court of Appeals, in People v. Scott, 593 N.E.2d 1328 (N.Y. 1992), recently decided that the New York state constitution offers greater search and seizure protection for its citizens than the federal Constitution offers United States citizens. Id. at 1330 (construing Oliver v. United States, 466 U.S. 170 (1984)(holding that the Fourth Amendment does not protect open fields)). *See* Gangi, *supra* note 101, at 23-26. The judges of the New York Court of Appeals are entitled to interpret the New York Constitution as best they can. If by so doing the judges fall short in the eyes of New York's citizenry, the people may pass appropriate legislation or amend their Constitution, or even have them impeached if need be. *Cf.* William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303 (1993).

the judiciary are increasingly ignored, or are contracted to more manageable propositions—until the next clash.

The fact that faddish rights increasingly attain and then rapidly lose constitutional stature is far from a harmless cycle, however. If this situation continues, citizens will come to view every portion of the Constitution as tenuous, threatening even the legitimate restrictions on government (those that were imposed by the Framers, who well understood this danger). A casual attitude toward content is the very antithesis of a written constitution.

Justice Cameron of the Supreme Court of Arizona observed in his dissent that reversal of Fulminante's conviction was too high a price to pay for the exclusionary rule.[146] I concur, but the price *the public pays* will escalate until the people reclaim the right to modify or reject this rule. Years ago, I concluded that the very foundation of our criminal justice system was undermined when the common-law orientation that had sustained it for centuries—the conviction of the guilty—was replaced by an "exclusionary" psychology.[147] With that change, the once-noble role of defense counsel—to put the government to its proof—also changed. Under the common law it was assumed that truth would emerge from the adversarial clash between prosecution and defense. Today, defense counsel's first function is to excise from the impending trial even the most reliable and relevant evidence.

The time may have come for the people's representatives to reconsider their hands-off attitude toward the ethical requirements of attorneys, who operate at the suffrance of the people. While defending those accused of crime is important and can become a noble profession once again, nothing in the Constitution prevents the people from attempting to assure themselves that in criminal matters, *the public interest must remain paramount.*[148] This is within our historical right of self-government,

146. *See* State v. Fulminante, 778 P.2d 602, 634 (1988)(Cameron, J., dissenting).

147. *See generally* Gangi, *supra* note 110, at 129-130 (arguing that the premises of the exclusionary rule are incompatible with those of the common law).

148. Let me offer one example. Recently in New York, one Anthony Crippen was convicted of a double murder. A newly acquired appellate counsel charged that the defense attorney who had initially handled the case, one William H. Booth, had "lost interest in the case because his fee wasn't paid, that he failed to call witnesses Crippen wanted, and that he didn't let Crippen testify in his own defense." NEWSDAY, May 5, 1992, at 3.

Booth, of course, denied these accusations. In defending himself, however, he re-

and we must exercise it with respect to criminal justice standards or lose it forever.

vealed that "[d]uring the initial stages of my representation of the Defendant, and in the presence of his father . . . Crippen admitted to me that he had, in fact, murdered" the victims. The newspaper article then quotes a professor of law—a specialist in ethics—to the effect that it "sounds clearly unprofessional and misconduct to me. . . . The law allows a lawyer to reveal certain confidences with the defendant . . . as part of his own defense but something like this sounds not at all relevant . . . it goes to guilt." *Id.* Conceding for the sake of argument that the attorney-client relationship had been breached, I would argue that the information, once revealed, still should be admissible in any subsequent proceeding. Any punishment for a breach of the attorney-client relationship should be distinct from the admissibility of the revealed information. That proposal may not be pleasing to the bar, but the public need not tolerate ethical codes wherein it gets the short end of the stick.