SECRETS OF *CHAMBERS*: THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AT MIDDLE AGE

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Many people have decried the rising partisanship on the U.S. Supreme Court. One particular lament concerns the Court's departure from precedent, a shift that has eroded longstanding doctrines such as the right to abortion and affirmative action in higher education. This turn of events has caused advocates, especially those on the political left, to long for the rights they once held and fear that others may be in jeopardy. Among the rights that seem vulnerable are those that protect criminal defendants.

But there need not only be doom and gloom for the defense community. Advocates should identify doctrines the Supreme Court is unlikely to relegate to the dustbin. The doctrines with the best chance of survival often fall into two categories. The first category involves doctrines that align with values often held by conservative theorists. The second group contains doctrines whose fact-specific nature makes it unnecessary for the Court to eradicate the case precedent when the majority could just interpret it in a way that advances a result consistent with its agenda. Given that most criminal cases are heard well beneath the rarefied quarters of the Supreme Court, those engaged in strategic litigation should perhaps zero in on preserving what rights remain at the Supreme Court level and relying on them to foster justice in the lower courts.

This Article takes a close look at one such right: the constitutional right to present a defense in a criminal trial. A half-century ago, the Supreme Court issued Chambers v. Mississippi, *holding that criminal defendants enjoy a right to present a defense that may permit the admission of information otherwise barred by the rules of evidence. The* Chambers *majority found that the exclusion of evidence at a criminal trial that has "persuasive assurances of trustworthiness" and is "critical" to the defense violates the Due Process Clause and comprises reversible error. Case law has occasionally tethered this doctrine to the Sixth Amendment's Compulsory*

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Process Clause, which guarantees criminal defendants the right to call witnesses in their favor.

In this Article, I argue that the fact-specific structure of the right to present a defense, coupled with its historical basis and its libertarian ethos as a bulwark against government overreaching, may provide the key to its longevity in the current legal climate. Specifically, the right to present a defense may appeal to Supreme Court justices who harbor originalist and/or libertarian inclinations as well as to "realists" comfortable with a doctrine that grants judges vast discretion in charting its boundaries. Part I of the Article explores the birth of the constitutional right to present a defense and takes a deep dive into Chambers. *Next, Part II analyzes the post-*Chambers *case law to detect trends in how judges have applied the doctrine over the past 50 years. Finally, Part III demonstrates how some features of this doctrine, while a source of periodic frustration to litigants, may help ensure that it perseveres in an era when the Supreme Court is more inclined to retract rights than to craft new ones. This presents an opportunity for progressives eager to develop favorable case law in the lower courts.*

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INTRODUCTION

Many people have decried the rising partisanship on the U.S. Supreme Court.[1] One particular lament concerns the Court's departure from precedent, a shift

1. *See, e.g.*, Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 50 (2020); James D. Zirin, *The Supreme Court's Partisanship Is*

that has eroded long-standing doctrines such as the right to abortion[2] and affirmative action in higher education.[3] Stare decisis no longer carries the clout it seemingly once did in our Court of Last Resort. This turn of events has caused advocates, especially those on the political left, to long for the rights they once held and fear that others may be in jeopardy.[4] Among the rights that seem vulnerable are those that protect criminal defendants.[5]

Just a few years ago, calls to reduce overcriminalization, mass incarceration, and police funding had moved from the periphery to the center of the policy conversation.[6] Those days feel long ago.[7] In the past two years, the Supreme Court has curbed the availability of the "Great Writ" of habeas corpus for prisoners. One case made it harder for defendants to advance ineffective assistance of counsel claims in post-conviction pleadings,[8] and another cut off a possible avenue for proving legal innocence in federal court.[9] Those cases correspond with broader

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Becoming Increasingly Difficult to Deny, THE HILL (Oct. 4, 2021, 10:30 AM), https://thehill.com/opinion/judiciary/575076-the-supreme-courts-partisanship-is-becoming-increasingly-difficult-to-deny [https://perma.cc/2V2D-HU7Y].

2. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

3. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

4. *See, e.g.*, Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low [https://perma.cc/BCY4-R3NB] (describing the decline in support for the Supreme Court from Democrats and Democrat-leaning independents).

5. Although the Supreme Court's decisions in the area of criminal justice have certainly not been as polarizing as in other areas, the Court remains rigid in its federal habeas corpus jurisprudence. *See* Daniel S. Medwed, *Ineffective Assistance of Case Law: The Supreme Court's Deficient Habeas Jurisprudence*, 17 HARV. L. & POL'Y REV. 345, 357 (2022) [hereinafter Medwed, *Ineffective Assistance of Case Law*]. Also, while criminal defendants have prevailed quite often in recent years, "[t]he court tends to side with defendants under narrow circumstances, when their decisions won't have a wide-ranging impact." Brandon Buskey, *As a New Term Begins, Where Does the Supreme Court Stand on Criminal Justice?*, ACLU (Sept. 28, 2023), https://www.aclu.org/news/criminal-law-reform/as-a-new-term-begins-where-does-the-supreme-court-stand-on-criminal-justice [https://perma.cc/YF6T-C56F].

6. *See, e.g.*, Matt Cohen, *How Decriminalizing Sex Work Became a 2020 Campaign Issue*, MOTHER JONES (July 5, 2019), https://www.motherjones.com/politics/2019/07/how-decriminalizing-sex-work-became-a-2020-campaign-issue [https://perma.cc/SAB3-DDNE].

7. To be sure, progressive movements are still thriving in some jurisdictions with respect to an array of criminal justice issues. *See, e.g.*, Isaiah Thompson, *The Push for Prison Moratorium: A Case Study in Massachusetts*, NONPROFIT Q. (July 18, 2023), https://nonprofitquarterly.org/the-push-for-prison-moratorium-a-case-study-in-massachusetts [https://perma.cc/GUP2-RKTX].

8. Shinn v. Ramirez, 596 U.S. 366 (2022); *see also* Medwed, *Ineffective Assistance of Case Law*, *supra* note 5, at 362.

9. Jones v. Hendrix, 599 U.S. 465 (2023); Daniel Medwed, *Justices' Habeas Ruling Further Saps Writ of Its Strength*, LAW360 (July 7, 2023, 3:10 PM), https://www.law360.com/articles/1696665/justices-habeas-ruling-further-saps-writ-of-its-strength [https://perma.cc/AQF5-487H].

political trends. Congress took aim at indigent criminal defense in 2023, pushing legislation that would shrink funding for federal counsel for the poor.[10] More notably, the much-vaunted rise of "progressive prosecutors" in the 2010s and early 2020s has suffered major blowback.[11] These county-level prosecutors rose to power on a platform committed to tackling mass incarceration and racial inequities.[12] Yet some were "one and done," ousted after a single term by opponents on their right flank,[13] or resigned under pressure from adversaries.[14] Others expended scarce political capital fending off high-profile challenges and pivoted away from some of their boldest campaign promises.[15] A few tried but ultimately failed to keep their political opponents at bay. In San Francisco, former public defender turned chief prosecutor Chesa Boudin lost a recall vote, and his spot is now occupied by an office veteran supported by the local police.[16] Florida Governor Ron DeSantis has taken an especially alarming tack; he removed two progressive county prosecutors for

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10. *See, e.g.*, Nate Raymond, *US Judiciary Warns Congress Against Cuts to Public Defender, Cyber Spending*, REUTERS (Aug. 1, 2023, 10:54 AM), https://www.reuters.com/legal/government/us-judiciary-warns-congress-against-cuts-public-defender-cyber-spending-2023-08-01 [https://perma.cc/YPL7-2LJK].

11. *See, e.g.*, Jamiles Lartey, *Battles over 'Progressive' Prosecutors' Decisions Heating Up*, THE MARSHALL PROJECT (Aug. 19, 2023, 12:00 PM), https://www.themarshallproject.org/2023/08/19/prosecutors-desantis-warren-worrell-krasner-pamela-price [https://perma.cc/DV9F-WXYV]; DANIEL S. MEDWED, BARRED: WHY THE INNOCENT CAN'T GET OUT OF PRISON 230–31 (2022) [hereinafter MEDWED, BARRED].

12. MEDWED, BARRED, *supra* note 11, at 227–30.

13. *See, e.g.*, Luis Fieldman, *Berkshire District Attorney Race: Timothy Shugrue Claims Win After Andrea Harrington Concedes*, MASSLIVE (Sept. 7, 2022, 8:40 AM), https://www.masslive.com/news/2022/09/berkshire-district-attorney-race-timothy-shugrue-claims-win-after-andrea-harrington-concedes.html [https://perma.cc/KMG2-MRFY].

14. *See, e.g.*, Katie Kull & Erin Heffernan, *Kim Gardner Abruptly Resigns, Parson Appoints Temporary Replacement in St. Louis*, ST. LOUIS POST-DISPATCH (May 17, 2023), https://www.stltoday.com/news/local/kim-gardner-abruptly-resigns-parson-appoints-temporary-replacement-in-st-louis/article_58b7a24e-f40c-11ed-b024-2b43959061ae.html [https://perma.cc/QWX5-D7X7].

15. Consider the situation with Los Angeles County District Attorney George Gascón. *See, e.g.*, James Queally, *Effort to Recall L.A. County D.A. George Gascón Fizzles Out, but a Retry Is Coming*, L.A. TIMES (Sept. 16, 2021, 3:22 PM), https://www.latimes.com/california/story/2021-09-15/first-effort-to-recall-los-angeles-district-attorney-george-gascon-fizzles-out-but-a-retry-is-coming [https://perma.cc/X3G4-X742]; James Queally, *Frustration and Criticism as L.A. County D.A. Struggles to Reform Sentencing*, L.A. TIMES, https://www.latimes.com/california/story/2023-08-15/los-angeles-district-attorney-gascon-sentencing-reforms-struggle [https://perma.cc/H9JF-ELDS] (Aug. 16, 2023, 1:31 PM); *see also* Lartey, *supra* note 11 (discussing the attempt by the Pennsylvania state legislature to impeach Philadelphia District Attorney Larry Krasner).

16. *See* Michael Barba & Jonah Owen Lamb, *SF's New DA: Brooke Jenkins, Ex-Prosecutor Who Led Chesa Boudin Recall, Named His Successor*, S.F. STANDARD (July 7, 2022, 1:22 PM), https://sfstandard.com/2022/07/07/sfs-new-da-brooke-jenkins-ex-prosecutor-who-led-chesa-boudin-recall-named-his-successor [https://perma.cc/ELB8-3FA4]; St. John Barned-Smith & Mallory Moench, *Has Brooke Jenkins Fulfilled Promises Yet? Here's What She Says About Her Year as S.F. D.A.*, S.F. CHRON., https://www.sfchronicle.com/bayarea/article/sf-da-brooke-jenkins-crime-drug-dealing-promises-18192698.php [https://perma.cc/8533-ECVJ] (July 13, 2023, 7:13 PM).

perceived dereliction of duty when they exercised their discretion in a way that did not promote a so-called tough-on-crime agenda.[17]

But there need not only be doom and gloom for proponents of criminal justice reform. Advocates should identify doctrines the Supreme Court is unlikely to relegate to the dustbin. The doctrines with the best chance of survival often fall into two categories. The first category involves doctrines that align with values often held by conservative theorists. The second group contains doctrines whose fact-specific nature makes it unnecessary for the Court to eradicate the case precedent when the majority could just interpret it in a way that advances a result consistent with its agenda. Given that most criminal cases are heard well beneath the rarefied quarters of the Supreme Court, those engaged in strategic litigation should perhaps zero in on preserving what rights remain at the Supreme Court level and rely on them to foster justice in the lower courts.

This Article takes a close look at one such right. A half-century ago, the Supreme Court decided *Chambers v. Mississippi*, holding that criminal defendants enjoy a constitutional right to present a defense that may permit the admission of information otherwise barred by the rules of evidence.[18] The *Chambers* majority found the exclusion of evidence at a criminal trial that had "persuasive assurances of trustworthiness" and was "critical" to the defense violated the Due Process Clause.[19] Case law has occasionally tethered this doctrine to the Sixth Amendment's Compulsory Process Clause, which guarantees criminal defendants the right to call witnesses in their favor.[20]

Whether grounded in the Due Process or Compulsory Process Clauses, the right to present a defense offers a shield for defendants when evidentiary rules thwart their attempts to protect themselves at trial.[21] On the one hand, this shield has proven effective at times. Courts have applied the constitutional right to present a defense to overturn evidentiary decisions that stymied defendants from, among other things, introducing hearsay,[22] alerting the jury to potential alternative suspects,[23] piercing the attorney–client and priest–penitent privileges,[24] and cross-examining hostile

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17. *See* Romy Ellebogen & Ana Ceballos, *DeSantis Suspends Orange-Osceola State Attorney Monique Worrell*, TAMPA BAY TIMES, https://www.tampabay.com/news/florida-politics/2023/08/09/desantis-suspends-monique-worrell-state-attorney-prosecutor [https://perma.cc/Q6WU-MMJZ] (Aug. 11, 2023); Dan Sullivan & Sue Carlton, *Booted by DeSantis, Suspended Tampa State Attorney Won't Run Again*, TAMPA BAY TIMES (Jan. 8, 2024), https://www.tampabay.com/news/florida-politics/2024/01/08/booted-by-desantis-tampa-state-attorney-warren-wont-run-again [https://perma.cc/NN7A-EFUT].

18. 410 U.S. 284, 302–03 (1973).

19. *Id.* at 302.

20. *See, e.g.*, Washington v. Texas, 388 U.S. 14, 18 (1967); *see also* Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses or the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (citations omitted)).

21. *See Crane*, 476 U.S. at 690.

22. *Chambers*, 410 U.S. at 302; *see also* Green v. Georgia, 442 U.S. 95, 97 (1979).

23. Holmes v. South Carolina, 547 U.S. 319, 319 (2006).

24. Morales v. Portuondo, 154 F. Supp. 2d 706, 732 (S.D.N.Y. 2001).

witnesses.[25] On the other hand, the litigation outcome of any single right-to-present-a-defense claim is tough to forecast. Its prognosis hinges on whether the judges construe the excluded evidence as "critical" to the case and possessing "persuasive assurances of trustworthiness."[26] That inquiry involves a heavy dose of judicial discretion—and, accordingly, an equal portion of speculation from court-watchers.[27]

In this Article, I argue that the fact-specific structure of the right to present a defense, coupled with its historical basis and its libertarian ethos as a bulwark against government overreaching, may provide the key to its longevity in the current legal climate. Specifically, the right to present a defense may appeal to Supreme Court justices who harbor originalist and/or libertarian inclinations, as well as to "realists" comfortable with a doctrine that grants judges vast leeway in charting its boundaries. Part I of the Article explores the origins of the constitutional right to present a defense and takes a deep dive into *Chambers*. Next, Part II analyzes the post-*Chambers* case law to detect trends in how judges have applied the doctrine over the past 50 years. Finally, Part III demonstrates how some features of this doctrine, while a source of periodic frustration to litigants, may help ensure it perseveres in an era when the Supreme Court is more inclined to retract rights than to craft new ones. This presents an opportunity for progressives eager to develop favorable case law in the lower courts.

I. THE BIRTH OF THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

A. The Case Against Leon Chambers

Woodville, Mississippi, is the birthplace of Jefferson Davis, the President of the Confederacy during the Civil War.[28] Well into the twentieth century, Woodville maintained the racial segregation so prevalent in hamlets throughout the Deep South.[29] Most of its residents were Black, yet whites occupied virtually every position of authority.[30] In many respects, racial inequities were even more pronounced in Woodville than elsewhere.[31] The Ku Klux Klan, the vicious white supremacist hate group, had a firm political and social footprint in the area.[32] One

25. *Chambers*, 410 U.S. at 291–92.

26. *Id.* at 302.

27. *See* John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1080 (2007) ("The Court has yet to provide a comprehensive discussion of what the right to present a defense really means.").

28. For an argument that Justice Powell's opinion contains a "sanitized" version of the facts that omits many of the festering issues related to race and civil rights in Woodville, see Emily Prifogle, *Law and Local Activism: Uncovering the Civil Rights History of* Chambers v. Mississippi, 101 CALIF. L. REV. 445, 446 (2013); *see id.* at 458–59 ("On the courthouse lawn across from the museum sits the Jefferson Davis Oak—a 'living monument' to the Confederate president. A quick drive from the town square down a country road sits Rosemont Plantation, Davis's childhood home." (footnote omitted)).

29. *Id.* at 458–69.

30. *See id.*; *see also id.* at 464 (noting a 1971 report finding that the Black residents comprised 70% of the town's population).

31. *Id.* at 453–54.

32. *Id.* at 455.

journalist described the region "as not only having missed the civil rights movement but the Industrial Revolution as well."[33]

One evening in June 1969, two police officers entered a Woodville pool hall to execute an arrest warrant for a Black man named C.C. Jackson.[34] Aided by twenty to twenty-five other patrons, Jackson resisted the attempt to handcuff him.[35] One of the officers, a white man named James Forman, radioed for backup while his partner, Aaron Liberty, retrieved his riot gun from their cruiser. [36] Liberty was one of the few Black members of the Woodville police force, an auxiliary officer hired explicitly for the purpose of interacting with the Black community.[37] Three deputy officers arrived shortly after Forman's call to provide support.[38] A melee ensued as the police again tried to arrest Jackson, and gunshots rang out.[39] Several bullets struck Liberty in the back.[40] Liberty turned and fired his gun twice in the direction of where the shots seemed to have originated.[41] The first "was wild and high."[42] The second hit a Black man named Leon Chambers in the head.[43]

Liberty died moments later.[44] Chambers survived, and three of his friends drove him to the hospital.[45] Upon realizing that Chambers was still alive, the county sheriff posted a guard outside his hospital room.[46] The authorities subsequently charged Chambers with murder. He pleaded not guilty and consistently maintained his innocence.[47]

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33. *Id.* at 453–54 (quoting Annelieke Dirks, *Between Threat and Reality: The National Association for the Advancement of Colored People and the Emergence of Armed Self-Defense in Clarksdale and Natchez, Mississippi, 1960–1965*, 1 J. FOR STUDY RADICALISM 71, 85 (2006)).

34. Jackson was a "black youth in his twenties" who earlier that day had annoyed the pool hall's owner with a scam related to claims that the jukebox was not working, which prompted the owner to file an affidavit with the Woodville Police Department seeking Jackson's arrest. *Id.* at 483; *see also* Chambers v. Mississippi, 410 U.S. 284, 285 (1973).

35. *Chambers*, 410 U.S. at 285–86.

36. *Id.* at 286. Forman was a full-time member of the police force and had earned the moniker "Fussie" within the local Black community. Prifogle, *supra* note 28, at 484–85.

37. Prifogle, *supra* note 28, at 484–85. Liberty was a tall, heavyset man in his fifties who worked in a grocery store during the week, assisted with police functions on the weekends, and had earned the respect of the white establishment in Woodville. *Id.*

38. *Chambers*, 410 U.S. at 286.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 286–87.

46. *Id.* at 287.

47. *Id.*

The government's case against Chambers was rather threadbare. It consisted of the following evidence:

> One of the deputy sheriffs claimed he was standing near Officer Liberty and observed Chambers shoot Liberty.[48]
>
> Another deputy sheriff noted that although he did not see a gun in Chambers's hand, he witnessed Chambers "break his arm down" just before the shots rang out.[49]
>
> The belief that Liberty had fired in the direction of the shooter created the inference that he may have been aiming at his assailant, i.e., the person he shot, Leon Chambers.[50]

That was essentially it. The officers on-site at the time of the incident made no effort to examine Chambers before his friends took him to receive medical attention.[51] Instead, they focused on trying to save Liberty.[52] An autopsy revealed that Liberty had died as a result of being hit by four bullets from a .22 caliber revolver.[53] No such weapon was recovered at the pool hall.[54] Nor did Chambers match the profile of a murder suspect.[55] The father of nine children, Chambers served as a church deacon and did not have a criminal record.[56] Some evidence suggests he had engaged in civil rights activism and assisted with the effort to boycott several white-owned stores in the community.[57]

B. An Alternative Suspect

Rumors soon surfaced about an alternative suspect named Gable McDonald, a Black man who was part of the crowd that evening and was one of the men who transported Chambers to the hospital after the shooting.[58] A lifelong resident of Woodville, he decamped for Louisiana in the aftermath of Officer Liberty's murder.[59]

In November 1969, McDonald's wife summoned her husband back to Woodville at the request of an acquaintance, Reverend Stokes, who owned a gas station in the area and wished to speak with him.[60] McDonald complied.[61] After his meeting with Stokes, McDonald agreed to give a statement to Chambers's defense

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48. *Id.* at 286.
49. *Id.*
50. *Id.* at 289 (noting that "three officers saw Liberty shoot Chambers and testified that they assumed he was shooting his attacker").
51. *Id.* at 286.
52. *Id.*
53. *Id.*
54. *Id.* at 289.
55. *See* GEORGE FISHER, EVIDENCE 738–42 (4th ed. 2023).
56. *Id.*
57. Prifogle, *supra* note 28, at 512.
58. *Chambers*, 410 U.S. at 287.
59. *Id.*
60. *Id.*
61. *Id.*

attorneys.[62] Two days later, at the offices of the defense team, he supplied a sworn confession that he had killed Officer Liberty.[63] He explained how he had confided in a friend, James Williams, about his conduct and that he had used his own .22 caliber revolver in the shooting, which he disposed of afterward.[64] He affirmed that he was making the statement voluntarily and without compulsion from anyone.[65] McDonald entered police custody at the local jail.[66]

McDonald then had a change of heart. A month after his confession, McDonald recanted his statement in court, testifying that Reverend Stokes had coerced him through assurances that he would not go to prison and that he would receive compensation from a lawsuit Chambers would file against Woodville.[67] McDonald further alleged he had not even been at the pool hall at the time of the shooting—that he had been having a beer with a friend, Berkley Turner, at a café down the street.[68] After hearing about the shooting, McDonald and Turner allegedly found Chambers lying in the alley and, together with Williams, took him to the hospital.[69] Although McDonald acknowledged he had once owned a .22 caliber pistol, he explained that he had lost it before the shooting.[70] A justice of the peace accepted McDonald's repudiation and freed him from custody.[71] That represented the end of any investigation into McDonald's culpability.

C. State Court Proceedings

The case against Leon Chambers went to trial in 1970 in nearby Amite County, after the judge granted the defense's request for a change of venue due to adverse pretrial publicity and the animosity of the Woodville law enforcement community.[72] The defense pursued two main lines of argument to counter the prosecution's narrative. The first involved simply contending that the defendant did

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62. *Id.*
63. *Id.*
64. *Id.* Incidentally, Williams, together with Chambers, was originally charged with the murder and faced trial as well. The trial judge granted a directed verdict in favor of Williams given that none of the evidence identified him as the shooter. The sole evidence against him consisted of testimony that he had yelled "kill 'em" and confronted the police. He later pleaded guilty to a charge of obstruction of justice. *See* Prifogle, *supra* note 28, at 502–04.
65. *Chambers*, 410 U.S. at 287.
66. *Id.* at 288.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 288 n.2. Many commentators have situated the *Chambers* case within the racially charged atmosphere of southwestern Mississippi in the late 1960s. Emily Prifogle, for instance, emphasizes how the murder of Officer Liberty occurred after three years of sustained boycotts in Woodville. *See* Prifogle, *supra* note 28, at 469–82; *see also* Andrew Elliot Carpenter, Chambers v. Mississippi*: The Hearsay Rule and Racial Evaluations of Credibility*, 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 15, 23–24 (2002).

not shoot Officer Liberty, a tactic known as a "reasonable doubt" defense.[73] Just one officer testified that he saw Chambers fire the fatal shots.[74] Also, even though three officers declared that they saw Liberty shoot Chambers, who they assumed was the assailant, none of them approached Chambers as he lay prone on the ground to determine whether he was alive or had a weapon.[75] The police never found the murder weapon on the scene, and the prosecution produced no evidence indicating Chambers had ever possessed a .22 caliber pistol.[76] The *pièce de résistance* to buttress this theory came from a witness who testified that he was standing near the spot where Liberty was slain as the shooting unfolded; that he had his eyes on Chambers throughout the encounter; and that he was certain Chambers had not fired a gun.[77]

The second defense theory hinged on presenting evidence that the alternative suspect, McDonald, had perpetrated the murder.[78] And the defense succeeded with that strategy to an extent.[79] One witness testified that he actually saw McDonald shoot Liberty; another witness insisted he had observed McDonald armed with a pistol right after the murder.[80] But in other very significant respects, the defense failed to put forth its alternative perpetrator theory because of the idiosyncrasies of the Mississippi Rules of Evidence at the time.[81]

Chambers sought to admit evidence that McDonald had confessed to the murder not once, not twice, not thrice, but *four* times: in his sworn statement to Chambers's attorneys as well as during three separate private conversations that he had with friends.[82] To do so, the defense initially sought an order for McDonald to appear in court and, if the state did not call him to the stand, for the defense to present him as an "adverse witness."[83] The court granted the motion to compel McDonald to appear but reserved judgment on the adverse-witness request.[84] At trial, the prosecution chose not to put McDonald on the stand, which forced the defense to call him as its own witness.[85] During direct examination of McDonald, the defense

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73. *Chambers*, 410 U.S. at 289. This is known in defense circles as a "reasonable doubt" defense where the goal is to highlight the gaps in the government's proof as opposed to submitting a competing theory of who committed the crime, and it is authorized by the rules of ethics. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2024) ("A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established.").

74. *Chambers*, 410 U.S. at 289.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 291.

84. *Id.*

85. *Id.*

team managed to lay a foundation for the sworn confession, had it entered into evidence, and even read it aloud to the jury.[86]

The defense then renewed its motion to brand McDonald an adverse witness. This was important to Chambers because Mississippi embraced the "party witness" or "voucher" evidence rule, which prohibits a party from impeaching its own witnesses.[87] Although this was the norm in many jurisdictions at the time, the party-voucher rule has fallen out of favor in recent decades.[88] The trial judge rejected the defense motion to treat McDonald as an adverse witness, noting that "[h]e may be hostile, but he is not adverse in the sense of the word."[89] Without McDonald being labeled adverse, his account on cross-examination could *not* be challenged by the defense—and the jury may have been left with the impression that Chambers's allies had coerced the confession.

Foiled in their effort to undermine McDonald's repudiation of his sworn confession, Chambers's lawyers shifted gears. The defense aimed to introduce testimony from three witnesses in whom McDonald confided that he had murdered Liberty.[90] They were ready to testify to the following facts:

> Sam Hardin hoped to explain that he spent the late evening hours with McDonald on the night of the shooting and that McDonald told him he had "shot him."[91]
>
> Berkley Turner, McDonald's alleged companion at a café at the time of the killing, insisted that he had not been drinking with McDonald at that location, and that while he, McDonald, and James Williams were driving Chambers to the hospital, McDonald confessed to killing Liberty. Turner also claimed that one week later, McDonald reminded him of their conversation and demanded Turner not "mess him up."[92]
>
> Albert Carter, McDonald's neighbor and long-time friend, maintained that on the day after the incident, McDonald confessed to the murder and said he had discarded his .22 caliber revolver after the shooting.[93]

The prosecution objected to the admission of all three confessions on hearsay grounds: that McDonald's confessions were out-of-court statements being offered for their truth (that he had committed the crime) and must be excluded.[94] The trial

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86. *Id.*

87. *Id.* at 295–96.

88. *See, e.g.*, FED. R. EVID. 607 ("Any party, including the party that called the witness, may attack the witness's credibility."); *see also id.* advisory committee's note to 1972 proposed rules (discussing how this rule abandons "[t]he traditional rule against impeaching one's own witnesses" because it was "based on false premises").

89. *Chambers*, 410 U.S. at 291.

90. *Id.* at 292.

91. *Id.*

92. *Id.*

93. *Id.* at 293.

94. To be fair, Turner was permitted to testify that he did not accompany McDonald to a café at the time of the shooting. *Id.* at 292–93.

judge sustained these objections and, in the process, rejected the defense's assertions that the statements fell under exceptions to the hearsay ban.[95] Mississippi, like other states, recognized a statement "against interest" exception in the 1970s.[96] This exception is grounded in the idea (a) that people are unlikely to say something that harms their self-interests unless that statement is true; and (b) therefore, when such a statement occurs, it is sufficiently credible to overcome the presumption that hearsay statements lack reliability.[97] But Mississippi law restricted the statement-against-interest exception to declarations against a person's *pecuniary* interests.[98] Only hearsay statements that hurt the declarant's financial situation were deemed trustworthy enough to withstand the hearsay concern.[99] A statement against a person's "penal" interest, such as one exposing the person to potential criminal liability, did not satisfy this exception.[100] In other words, a statement that could put you behind in making your mortgage payment counted; a statement that could put you behind bars did not.

In effect, the trial court's application of the Mississippi party-voucher rule and its limited statement-against-interest hearsay exception deprived Chambers of the chance to subject McDonald's testimony to impeachment on cross-examination or let three other witnesses offer testimony that would help establish McDonald's culpability for Liberty's death.[101] Those deprivations may have made a difference. After about a half-hour of deliberations,[102] the jury convicted Leon Chambers of murder and voted in favor of life imprisonment.[103] The Mississippi Supreme Court affirmed that decision on appeal.[104]

D. The Supreme Court Opinion

Having lost in the Mississippi state courts, Chambers's counsel filed a petition for a writ of certiorari from the U.S. Supreme Court.[105] Then a peculiar thing happened. Justice Lewis Powell, a Southerner appointed to the Court by President Nixon and sworn in on January 7, 1972, was the circuit justice responsible for the Fifth Circuit Court of Appeals, which encompassed Mississippi.[106] As a result, he evaluated a bail application that Chambers's counsel submitted in late January prior to any decision on the petition for a writ of certiorari.[107] Justice Powell granted the

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95. *Id.*
96. *Id.* at 299.
97. FED. R. EVID. 804(b)(3) advisory committee's note to 1972 proposed rules ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").
98. *Chambers*, 410 U.S. at 299 (citing Brown v. State, 55 So. 961 (Miss. 1911)).
99. *See id.*
100. *Id.*
101. *Id.* at 294.
102. *See* Prifogle, *supra* note 28, at 507.
103. *Chambers*, 410 U.S. at 285.
104. *Id.*
105. *Id.*
106. *See* FISHER, *supra* note 55, at 738.
107. *Id.*

bail request.[108] That's right. He permitted a man convicted of murdering a police officer to leave prison pending not just the disposition of his case in the Supreme Court, but the disposition of his *application* to even have his case heard.[109] That same day Chambers left the state prison in Parchman, one of the country's most notorious and violent correctional facilities, and hitch-hiked home in his prison garb.[110]

The Supreme Court later agreed to review Chambers's case.[111] The goal of that review was "to consider whether petitioner's trial was conducted in accord with principles of due process under the Fourteenth Amendment."[112] In a majority opinion authored by none other than Justice Powell, the Court "conclude[d] that it was not."[113] Eight justices joined Powell's opinion, with only Justice William Rehnquist dissenting.[114]

Justice Powell launched his analysis by characterizing the right to due process in a criminal trial as synonymous with "the right to a fair opportunity to defend against the State's accusations."[115] Specifically, "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."[116] Two crucial aspects of the Chambers trial "implicated" these "elements of a fair trial."[117]

1. The Party-Voucher Rule

The majority determined that the trial judge's reliance on Mississippi's party-voucher rule, a common law principle forbidding a party from impeaching its own witness, denied Chambers the opportunity to attack Gable McDonald's claimed alibi and renunciation of his confession.[118] This denial was no mere technicality in the eyes of the Court. Although the right to cross-examine witnesses "is not absolute," the Court cited the fundamental role of this technique in promoting fair trials and the quest for the truth.[119] The Court belittled the value of the party-voucher rule in "modern criminal trials" because "defendants are rarely able to select their witnesses: they must take them where they find them."[120] Also, "as applied in this case, the voucher rule's impact was doubly harmful to Chambers'[s] efforts to develop his defense" given that "[n]ot only was he precluded from cross-examining McDonald, but . . . he was also restricted in the scope of his direct examination by the rule's corollary requirement that the party calling the witness is bound by

108. *Id.*
109. *Id.*
110. *Id.* at 739.
111. Chambers v. Mississippi, 410 U.S. 284, 285 (1973).
112. *Id.* Only five justices voted to issue a writ of certiorari and entertain Chambers's case, just one more than the minimum required for a cert. grant. FISHER, *supra* note 55, at 739.
113. *Chambers*, 410 U.S. at 285.
114. *Id.* at 295, 303, 308–14.
115. *Id.* at 294.
116. *Id.*
117. *Id.* at 295.
118. *Id.*
119. *Id.*
120. *Id.* at 296.

anything he might say."[121] The Court concluded that the party-voucher rule "plainly interfered with Chambers'[s] right to defend against the State's charges."[122]

2. The Statement-Against-Interest Hearsay Exception

The Court indicated that it need not consider the error induced by the party-voucher rule in isolation.[123] Rather, that blunder must be "viewed in conjunction with the trial court's refusal to permit [Chambers] to call other witnesses" because the purported testimony of Hardin, Turner, and Carter—that McDonald confessed to the murder in conversations with each of them—comprised inadmissible hearsay.[124] The prohibition on hearsay evidence, the Court observed, is predicated on the idea that out-of-court statements normally:

> [L]ack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.[125]

Yet a number of exceptions exist to justify admitting "hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."[126]

The Court emphasized that one of these exceptions applies to declarations against a person's interest.[127] The rationale for this rule, according to the Court, is "that a person is unlikely to fabricate a statement against his own interest at the time it is made."[128] As noted above, Mississippi had adopted the declaration-against-interest exception but limited it to statements that run counter to a person's "pecuniary interest," rendering it inapplicable for "declarations, like McDonald's in this case, that are against the penal interest of the declarant."[129] That did not make Mississippi an outlier. Most states at that time, as well as the federal system, adopted a similar "materialistic limitation."[130]

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121. *Id.* at 296–97.

122. *Id.* at 298. The Court also found that the notion "that McDonald's testimony was not 'adverse' to, or 'against,' Chambers is not convincing." *Id.* at 297.

123. *Id.* at 298.

124. *Id.*

125. *Id.*

126. *Id.* at 298–99.

127. *Id.* at 299.

128. *Id.*

129. *Id.*

130. *Id.* This norm was about to change, as the recently proposed Federal Rules of Evidence aimed to abandon it and recognize the reliability of statements that subject a person to possible criminal liability. *Id.* Now, the federal statement-against-interest exception applies to statements that

> a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency

This is where Justice Powell's decision took a remarkable turn. Despite the fact that (a) Mississippi fell within the majority of states in its treatment of the statement-against-interest hearsay exception and (b) the trial judge's ruling technically fell within the ambit of his discretion, the Court held that the excluded hearsay statements in this case "provided considerable assurance[s] of their reliability."[131] In support of this claim, the Court cited four reasons:

(1) Each one of McDonald's confessions to Hardin, Turner, and Carter "was made spontaneously to a close acquaintance shortly after the murder had occurred";[132]

(2) Each, moreover, "was corroborated by some other evidence in the case," not to mention that "[t]he sheer number of independent confessions provided additional corroboration";[133]

(3) Irrespective of the merits for excluding penal interests from the declaration-against-interest hearsay exception, each confession here "was in a very real sense self-incriminatory and unquestionably against interest";[134] and

(4) Even "if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury."[135]

The Court concluded that this evidence "bore persuasive assurances of trustworthiness" and was "critical" to the defense.[136] As the Court declared, "the hearsay rule may not be applied mechanistically to defeat the ends of justice."[137] When coupled with the impact of the Mississippi party-voucher rule, the trial judge's refusal to admit the confession "denied [Chambers] a trial in accord with traditional and fundamental standards of due process."[138] The lone dissenter, Justice Rehnquist, insisted the due process claim was not adequately preserved for review in the state courts, and that principles of federalism weighed in favor of steering clear of it.[139]

What an astonishing opinion.

Justice Powell, a newcomer to the Court and a Virginian, fired a powerful shot across the bow of southern mores—and in a case in which he could have easily

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> to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

FED. R. EVID. 804(b)(3)(A).

131. *Chambers*, 410 U.S. at 299–300.
132. *Id.*
133. *Id.*
134. *Id.* at 300–01.
135. *Id.* at 301.
136. *Id.* at 302.
137. *Id.*
138. *Id.*
139. *See id.* at 308–14 (Rehnquist, J., dissenting).

kept his powder dry. After all, Leon Chambers had succeeded in admitting McDonald's sworn, written confession to Reverend Stokes into evidence, so the jury at least had that available for consideration.[140] Plus, Mississippi's evidence rules were far from aberrational; most states construed the statement-against-interest hearsay exception in a similarly narrow fashion.[141] The price, though, that Powell paid to convince seven of his colleagues to join the opinion was steep; it came at the expense of crafting a broader and more precise holding.[142] Let's look at some of those costs.

First, Powell took pains to limit the holding to "the facts and circumstances of this case."[143] This maneuver intimated, for colleagues and litigants concerned about establishing precedent with a potentially unbridled scope, that the opinion should have a small radius. Second, for those concerned about something else—the expansion of federal rights and encroachment on state sovereignty—Powell added the caveat that the holding does not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."[144] Third, he asserted that "[i]n reaching this judgment, we establish no new principles of constitutional law."[145] Instead of creating a "new" rule of constitutional law, Powell linked his analysis to rights that "have long been recognized as essential to due process."[146] He relied on a 1948 case, *In re Oliver*, in which the Court identified the rights to examine witnesses against a criminal defendant and to offer testimony as "'basic in our system of jurisprudence.'"[147] *In re Oliver*, in turn, cited the nineteenth-century lineage of this strain of due process jurisprudence.[148]

It is particularly notable that Justice Powell grounded *Chambers* in the Due Process Clause rather than the Compulsory Process Clause, which guarantees criminal defendants a right to call witnesses on their behalf at trial and had recently

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140. FISHER, *supra* note 55, at 737.

141. *Id.*

142. *Id.* at 739–40; *see also* Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 792 (1976) (decrying the "analytical vagueness" of the opinion and the Court's failure to draft a "blueprint" for the doctrine's application). Another casualty of the dynamics at play, whether attributable to the need for consensus building or the mores of the era, was that Powell passed up the opportunity to lay bare the undercurrent of racism and discrimination that ran throughout the entire case. *See* Carpenter, *supra* note 72, at 30 ("Throughout the opinion, the Court artfully dodges the race issues that pervade every aspect of this case.").

143. *Chambers*, 410 U.S. at 303.

144. *Id.* at 302–03.

145. *Id.* at 302.

146. *Id.* at 294.

147. *Id.* (quoting *In re* Oliver, 333 U.S. 257, 273 (1948)).

148. *See, e.g.*, Stacey Kime, Note, *Can A Right Be Less Than The Sum of Its Parts? How the Conflation of Compulsory Process and Due Process Guarantees Diminishes Criminal Defendants' Rights*, 48 AM. CRIM. L. REV. 1501, 1503–04 (2011); *cf.* Clinton, *supra* note 142, at 742 (observing that "most of the early cases challenging exclusion of defense evidence did not raise constitutional challenges but were argued and resolved pursuant to nonconstitutional rules of procedural or evidentiary law and were predicated on the Supreme Court's supervisory power over the inferior federal courts").

been interpreted in a way that would have provided strong precedent for a constitutional right to present a defense. In 1967, the Supreme Court held in *Washington v. Texas* that a state competency rule banning accomplices from testifying for each other at trial violated the Compulsory Process Clause, which covers "in plain terms the right to present a defense."[149] *Washington* found the Texas competency rule "arbitrarily" interfered with the defendant's right to present a defense under the Compulsory Process Clause.

There are assorted explanations for why Powell, who even cited *Washington* in *Chambers*,[150] refused to hang his hat on compulsory process. These include claims that the defendant had not mentioned compulsory process in the lower courts and thus failed to preserve it for Supreme Court review, and that the arbitrariness test announced in *Washington* was ill-suited to the *Chambers* case.[151] The evidence rule contested in *Washington*—a Texas state competency rule that forbid defendants from calling their accomplices to testify on their behalf—had fallen out of favor nationwide. The Lone Star State was in fact the lone state with such a rule.[152] In contrast, the chief rule at issue in *Chambers* (Mississippi's stance on the statement-against-interest hearsay exception) was widespread across the country. That detail made it hard for Powell to characterize the Mississippi approach as "arbitrary" and fit it within the *Washington* rubric.[153]

The *Chambers* case also did not readily lend itself to a thorough analysis under a different constitutional principle: the Confrontation Clause.[154] To be sure, that provision of the Sixth Amendment, which guarantees a criminal defendant the right to confront the witnesses "against" him, had utility in reviewing the claim that Mississippi's party-voucher rule prevented the defense from challenging McDonald on the stand.[155] Yet the Confrontation Clause did not apply to the hearsay evidence that Chambers wanted to admit. The goal was not to confront Hardin, Turner, and Carter but to present them as defense witnesses.[156]

My take is that a blend of practical variables (the need to lure other judges to join the opinion) and jurisprudential ones (the contours of the compulsory process precedents and the nature of the Confrontation Clause) moved Powell to design the *Chambers* holding as he did. In so doing, he laid the foundation for an important principle. *Chambers* stands for the proposition that the exclusion of evidence that has "persuasive assurances of trustworthiness" and that is "critical" to the defense deprives a criminal defendant of a "meaningful opportunity to present a complete

149. 388 U.S. 14, 19 (1967).
150. 410 U.S. at 302.
151. FISHER, *supra* note 55, at 741–42.
152. *Id.* at 742.
153. *Id.*
154. *See* U.S. CONST. amend. VI.
155. The other chief issue in the case, how the Mississippi party-voucher rule prevented Chambers from cross-examining McDonald, did implicate the Confrontation Clause. As the Court wrote, Chambers "was not allowed to test the witness' recollection, to probe into details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief. The right of cross-examination . . . is implicit in the constitutional right of confrontation." 410 U.S. at 295.
156. *Id.* at 298–302.

defense."[157] Advocates have built upon this foundation—narrow as it was originally forged—to construct a rather robust constitutional right to present a defense.

II. THE RIGHT TO PRESENT A DEFENSE GROWS UP: 1973–2023

For 50 years, defense lawyers have featured *Chambers* in their briefs in the hopes of spurring appellate courts to reverse convictions based on an array of purported errors by trial judges. These efforts have achieved mixed results based on my analysis of judicial decisions from the U.S. Supreme Court, lower federal courts, and state supreme courts that cite *Chambers*.[158] In the vast majority of cases, *Chambers* serves as dicta, a principle divorced from the ones that guided resolution of the case.[159] In decisions where the constitutional-right-to-present-a-defense issue is prominent in the opinion and seems essential to the outcome, the "win" rate for the defense is modest.[160] But numbers do not tell the whole story. A deep dive into successful *Chambers* claims reveals ample opportunities for defendants to draw on its doctrine to achieve justice.[161]

A. A Supreme Trifecta: Green, Crane, *and* Holmes

Over the past half-century, the Supreme Court has granted writs of certiorari in a handful of cases implicating the constitutional right to present a defense. Three of those cases resulted in significant victories for defendants—and solidified the doctrinal foundation of the right for future litigants.[162] Incidentally, each of those cases derived from criminal prosecutions in states below the Mason–Dixon line.[163]

Six years after *Chambers*, the Supreme Court decided *Green v. Georgia*, which involved the convictions of two men, Roosevelt Green and Carzell Moore, for rape and murder.[164] Moore went to trial first and received a death sentence; Green later received the same result through a separate proceeding.[165] During the death penalty phase of his trial, Green sought to introduce evidence that Moore had confessed to a third party that he had killed the victim on his own after ordering Green to go on an errand.[166] But the trial judge excluded the evidence—and for similar reasons to those backed by the trial court in *Chambers*.[167] Georgia, like Mississippi, did not include a statement exposing a person to possible criminal liability within its statement-against-interest exception to the ban on hearsay

157. FISHER, *supra* note 55, at 741.
158. *See infra* Sections II.A–B.
159. *See infra* notes 248–49, 256–58 and accompanying text.
160. *See infra* notes 250, 258 and accompanying text.
161. I should acknowledge the difficulty with this exercise. Given that the constitutional right to present a defense is intertwined with the Due Process, Compulsory Process, and the Confrontation Clauses, a citation to *Chambers* may not be the perfect vehicle for identifying the full universe of these cases.
162. Crane v. Kentucky, 476 U.S. 683 (1986); Green v. Georgia, 442 U.S. 95 (1979); Holmes v. South Carolina, 547 U.S. 319 (2006).
163. *See Crane*, 476 U.S. 683; *Green*, 442 U.S. 95; *Holmes*, 547 U.S. 319.
164. 442 U.S. 95.
165. *Id.*
166. *Id.* at 96.
167. *Id.*

evidence.[168] So, the jury did not learn that Moore had confessed to shooting the victim by himself—powerful evidence for Green that could have motivated the jury to vote for a life sentence in lieu of the death penalty.[169] Adding insult to injury, Georgia prosecutors then told the jury that it could, without any direct evidence as to how the victim died, infer that Green participated in the actual murder given the presence of multiple bullets inside the victim's body.[170]

In a brief per curiam opinion, the Supreme Court reversed Green's death sentence and remanded for further proceedings. As in *Chambers*, the Court concluded that the exclusion of the confession evidence violated the Due Process Clause because "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, . . . and substantial reasons existed to assume its reliability."[171] Unlike in *Chambers*, though, the defense did not put forth another alleged evidentiary misstep (there, the application of the Mississippi party-voucher rule) to buttress its claim that the defendant was deprived of a meaningful opportunity to present a defense. The hearsay issue alone sufficed to warrant the finding of a constitutional violation.

This was a significant move by the Court. The exclusion of a single item of evidence, so long as it was critical and reliable, could violate the Due Process Clause.[172] Even though the Court followed the *Chambers* template by seeking to blunt the full impact of the decision—by declaring that the due process violation occurred "under the facts of this case" and "these unique circumstances"[173]—it is hard to interpret *Green* as anything other than an expansion and fortification of the constitutional right to present a defense.

Seven years after *Green*, and thirteen years after *Chambers*, the Supreme Court launched another salvo in favor of the right to present a defense.[174] *Crane v. Kentucky* concerned the shooting death of a clerk during a botched robbery at a liquor store in Louisville.[175] The police lacked any leads until the arrest of a sixteen-year-old for an unrelated robbery.[176] During the course of his interrogation, the juvenile confessed to a raft of other crimes "out of the clear blue sky."[177] Intrigued, the police transferred him to a juvenile detention center for further interrogation.[178]

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168. *Id.*

169. *See id.*

170. *Id.*

171. *Id.* at 97 (first citing Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion); and then citing *id.* at 613–16 (Blackmun, J., concurring in part and concurring in the judgment)).

172. FISHER, *supra* note 55, at 740.

173. *Green*, 442 U.S. at 97.

174. During the intervening years, the Supreme Court issued a number of opinions that contained dicta paying tribute to the concept of a constitutional right to present a defense. *See infra* notes 224–30 (discussing California v. Trombetta, 467 U.S. 479 (1984)).

175. 476 U.S. 683, 684 (1986).

176. *Id.*

177. *Id.*

178. *Id.*

Once there, the teen initially denied any involvement in the liquor store murder but later confessed to that crime too.[179]

Prior to trial on murder charges, the defendant sought to suppress his confession on the basis that it had been coerced.[180] At the pretrial hearing on the motion, the defendant testified that he had been kept in a windowless room for a long time, surrounded by as many as six police officers who denied his pleas to call his mother and badgered him into what he characterized as a false confession.[181] The police officers who testified at the hearing painted a different picture of what had happened.[182] Finding "no sweating or coercion of the defendant," the judge apparently credited the police narrative and rejected the motion, permitting the prosecution to utilize the confession at trial.[183]

The confession was the crux of the government's case. Defense counsel's opening statement revolved around how she planned to undermine the confession by showing not only that it was replete with inconsistencies, but also that the circumstances of the interrogation, especially its duration and the way in which it was conducted, would cast aspersions on the credibility of the confession.[184] The prosecution then filed a motion to block the defense from pursuing this line of argument; it claimed the issue of "voluntariness" had already been addressed in the pretrial ruling, and any foray into the legitimacy of the confession was moot.[185] The court agreed, ruling that the defense could not "develop in front of the jury" any information about the length of the questioning or the police officers who were present.[186] Restricted in this way, the legal team struggled to mount an effective defense, and the jury found the defendant guilty of murder.[187]

On appeal in the Kentucky Supreme Court, the defense complained about the trial court's decision to bar the defense from introducing evidence about the circumstances of the confession.[188] Established Kentucky law permitted the admission of evidence that bore upon the credibility of a confession—yet with an important caveat.[189] Under Kentucky procedure, a pretrial "voluntariness" determination could not be relitigated at trial.[190] In the eyes of the state supreme court justices, the defendant's proposed testimony related solely to the voluntariness issue, a topic that could not be examined anew *at* trial because of the binding decision made *before* trial.[191] Conviction affirmed.

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179. *Id.*
180. *Id.* at 684–85.
181. *Id.* at 685.
182. It is not entirely clear what this picture looked like because the Supreme Court simply noted that "[s]everal police officers offered a different version of the relevant events." *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 685–86.
186. *Id.* at 686.
187. The defendant received a sentence of forty years in prison. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 686–87.
191. *Id.*

The U.S. Supreme Court agreed to review the case and, in a unanimous decision, reversed Kentucky's highest court.[192] Justice Sandra Day O'Connor's majority opinion emphasized that questioning the voluntariness of a confession is conceptually separate and distinct from inquiring into its credibility.[193] As the Court put it, "[E]ntirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility."[194] A defendant is entitled to explore this topic, the Court went on, because it "will often be germane to its probative weight, a matter that is exclusively for the jury to assess."[195] The Court acknowledged that even though Kentucky departed from the customary approach to this issue, that detail alone was not enough to justify overturning a ruling by one of its judges due to the "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts."[196] The Court observed, however, that sometimes it is necessary to overcome this reluctance. And "on the facts of this case," the Court had "little trouble concluding . . . that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial."[197]

Although *Crane* resembled *Chambers* and *Green* in how the Court limited its holding to the precise "facts" in play and claimed to "break no new ground,"[198] it otherwise moved the right-to-present-a-defense doctrine forward in several important respects. The Court applied the doctrine to a case that lacked the vital evidentiary issue that had cropped up in the previous two cases: instances where a third party had confessed to the crime and the defendant sought to introduce that confession in jurisdictions that did not recognize a statement-against-penal-interest hearsay exception.[199] In the process, *Crane* suggested the constitutional right to present a defense had a wide enough reach to grapple with a whole host of evidentiary errors that impact the defendant's ability to mount a defense. Also, the *Crane* decision was unanimous; it was neither an unsigned per curiam opinion (*Green*) nor one that featured a strident dissent (*Chambers*). The fact that the whole Court coalesced around the notion that certain evidentiary rulings that cut the defendant off at the pass could violate the Constitution *did* break new ground; it heralded widespread acceptance of a doctrine that purportedly had deep historical origins but had only recently gained traction as a recognized doctrine with a discernible test. Finally, the Court reiterated that this doctrine had roots that went beyond due process and also derived from the Compulsory Process and Confrontation Clauses.[200]

The broad vision of the right to present a defense articulated in *Crane*, one that conceived of a right that derived from a range of constitutional sources and

192. *Id.* at 684, 692.
193. *Id.* at 687–89.
194. *Id.* at 689.
195. *Id.* at 688.
196. *Id.* at 689.
197. *Id.* at 690.
198. *Id.*
199. *See supra* notes 126–30, 166–73 and accompanying text.
200. *Crane*, 476 U.S. at 690.

could apply to various evidentiary errors, found further support in the final case in this Supreme Court trilogy.[201] In *Holmes v. South Carolina*, a state jury convicted Bobby Lee Holmes of murder and other offenses stemming from the beating, sexual assault, and robbery of an elderly woman who later died of complications from her injuries.[202] He received the death penalty.[203] Upon state post-conviction review, the court ordered a new trial, and prosecutors chose to retry him.[204] During the second trial, the prosecution's case featured forensic evidence retrieved from the crime scene—a palm print, fibers consistent with those from clothing worn by Holmes, and biological evidence that linked him to the crime.[205] Prosecutors buttressed the forensic evidence with eyewitness testimony placing Holmes in the vicinity of the crime scene allegedly within one hour of the attack.[206]

Holmes's defense had two main prongs. The first contention was that the police had tainted the forensic evidence and tried to frame him, and the defense team offered up two expert witnesses who together testified about the lackluster procedures the police employed to collect evidence in the case.[207] Second, Holmes tried to introduce evidence showing that a man named Jimmy McCaw White had committed the crimes.[208] At a pretrial hearing, multiple witnesses placed White near the crime scene on the morning of the assault.[209] Four other witnesses insisted White had either referred to Holmes as "innocent" or had confessed to the crime himself.[210] One of them even reported that White had said, "[W]ell, you know I like older women," along with other inculpatory statements.[211] The trial judge found the evidence about White inadmissible based on South Carolina case law suggesting third-party guilt evidence can only enter a case when it goes beyond creating a "bare suspicion" about another person and establishes a "reasonable inference or presumption" about a defendant's "own innocence."[212] The South Carolina Supreme Court upheld this decision on appeal, noting that Holmes could not "overcome the

201. Another case from this era worth noting is *Rock v. Arkansas*, 483 U.S. 44 (1987), in which the Court concluded that a state rule excluding per se all hypnotically refreshed testimony violated a criminal defendant's right to testify. In *Rock*, the Supreme Court relied on a number of sources, including the Compulsory Process Clause line of cases under *Washington v. Texas*, 388 U.S. 14 (1967), in reaching its conclusion. 483 U.S. at 52–55. It also delved into *Chambers* in support of the proposition that "[j]ust as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a [defendant] to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55–56.

202. 547 U.S. 319, 321–22 (2006).

203. *Id.* at 322.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 322–23.

208. *Id.* at 323.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 323–24.

forensic evidence against him to raise a reasonable inference of his own innocence."[213]

In a unanimous 2006 opinion authored by Justice Samuel Alito, the Supreme Court reversed the South Carolina Supreme Court, vacated the conviction, and remanded for further state proceedings.[214] The opinion began with the oft-stated maxim that while states have discretion to craft rules that exclude evidence from criminal trials, "[that] latitude, however, has limits."[215] Justice Alito observed that those limits may derive from the Due Process, Compulsory Process, or Confrontation Clauses and surface when a state rule denies a defendant a "meaningful opportunity to present a complete defense."[216] The opinion then gave several examples of "'arbitrary' rules . . . that excluded important defense evidence but that did not serve any legitimate interests," among them, the situations in *Washington*, *Chambers*, and *Crane*.[217]

The Court held that the third-party guilt rule embraced by South Carolina fell into the category of arbitrary rules that do not serve any legitimate interests because other states take a very different approach. Virtually every jurisdiction balances the "probative value" of third-party guilt evidence against its potential to generate "unfair prejudice," confuse the issues, mislead the jury, or cause other pernicious effects.[218] Here, the South Carolina courts focused solely on "the strength of the prosecution's case" and neglected to consider the independent value of the defense's proposed evidence.[219] As the Court observed, "Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case."[220] The Court ruled that "by evaluating the strength of only one party's evidence . . . the rule is 'arbitrary'" and does not serve any "legitimate end."[221]

It's time to take stock. Every member of the Supreme Court joined an opinion announcing that a South Carolina evidence rule violated the defendant's constitutional right to enjoy "a meaningful opportunity to present a complete defense."[222] The basis for Justice Alito's opinion was that the rule failed to require judges to balance the strengths and weaknesses of evidence of third-party guilt offered by the defense in the manner that other jurisdictions had chosen to do.[223] It is fair to say that *Holmes* provides hearty and unified twenty-first-century support for the constitutional right to present a defense, albeit from nearly twenty years ago.

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213. *Id.* at 324.
214. *Id.* at 320, 331.
215. *Id.* at 324.
216. *Id.* (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).
217. *Id.* at 325–26.
218. *Id.* at 326–29.
219. *Id.* at 329.
220. *Id.* at 330.
221. *Id.* at 331.
222. *Id.* (internal quotation marks omitted) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).
223. *See id.*

It is also fair to say that not every Supreme Court opinion concerning the right to present a defense over the past five decades offers the same degree of support. At no point, though, has the Court overturned or even substantially diluted the power of this doctrine. In *California v. Trombetta*, for example, the Court rejected a claim that law enforcement agencies are constitutionally compelled to retain the breath samples of people suspected of driving while intoxicated in order for breathalyzer test results to be admissible into evidence.[224] Even so, Justice Thurgood Marshall's majority opinion observed that "[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."[225] One aspect of this right to offer a complete defense, the Court mentioned, is "what might loosely be called the area of constitutionally guaranteed access to evidence."[226] Although the preservation of breath samples by law enforcement did not fall within this area, the Court noted many situations that did: the constitutional duties for the government to alert the defense and the judge when a state witness lies on the stand;[227] to turn over evidence that is favorable to the defense and material to guilt or punishment;[228] to reveal plea deals with government witnesses;[229] and to disclose the identity of undercover informants in certain circumstances.[230]

Another case, *Michigan v. Lucas*, involved a challenge to the constitutionality of a state rape-shield law that required the defense in sexual assault cases to provide written notice to the victim, within ten days of arraignment, if it wished to introduce evidence of a prior sexual relationship between the victim and the defendant.[231] Prosecutors charged Nolan Lucas with criminal sexual conduct based on allegations that he had used a knife to force an ex-girlfriend to engage in non-consensual sexual activity.[232] Lucas missed the ten-day window in which to provide notice about his desire to present evidence about their prior relationship; his lawyer only raised the topic at the start of trial.[233] Even though Michigan law lacked any guidance about the consequences of noncompliance with the notice requirement,[234] the trial court banned Lucas from using this evidence at trial.[235] Lucas then claimed the trial court ruling impaired his constitutional rights.[236] Upon

224. 467 U.S. 479, 491 (1984).
225. *Id.* at 485.
226. *See id.* (internal quotation marks omitted) (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).
227. *See id.* (citing Napue v. Illinois, 360 U.S. 264, 269–72 (1959)).
228. *See id.* (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).
229. *See id.* (citing Giglio v. United States, 405 U.S. 150, 150–51, 154–55 (1972)).
230. *See id.* (citing Roviaro v. United States, 353 U.S. 53, 64–65 (1957)).
231. 500 U.S. 145, 147, 149 (1991).
232. *Id.* at 147.
233. *Id.*
234. *Id.* at 149 ("Michigan's rape-shield statute is silent as to the consequences of a defendant's failure to comply with the notice-and-hearing requirement.").
235. *Id.* at 148.
236. *Id.* at 148–49.

review, the Michigan Court of Appeals sided with the defense.[237] It found that barring a criminal defendant from introducing evidence of a rape victim's prior sexual relationship with the defendant comprised a per se violation of the Sixth Amendment.[238] State prosecutors took issue with this finding—especially the conclusion that any and all trial court decisions to exclude this type of evidence automatically violated the right to present a defense—and sought further review from the U.S. Supreme Court.[239]

In a 7–2 decision, the Supreme Court reversed the Michigan Court of Appeals.[240] The Court offered no opinion on whether the trial court's ruling violated Lucas's right to present a defense under the facts of the case.[241] Rather, the Court simply held that the Michigan appellate body erred by issuing such a sweeping ruling: that suppressing evidence of a prior sexual relationship between the victim and the accused for a failure to satisfy the notice rule in a sexual assault case *always* violates the Constitution.[242] The Court listed situations where the defendant flouts the notice requirement as part of "a deliberate ploy to delay the trial, surprise the prosecution, or harass the victim."[243] Accordingly, because "[t]he notice-and-hearing requirement serves legitimate state interests," not every failure to comply warrants the "severe sanction of preclusion."[244] The Court proceeded to remand the case to the Michigan courts to evaluate whether "on the facts of this case, preclusion violated [the defendant's] rights under the Sixth Amendment."[245]

Even if at first blush the *Lucas* case seems to undermine the stability and strength of the right-to-present-a-defense doctrine, that strikes me as a mirage. *Lucas* reinforced the overall legitimacy of this doctrine—just by acknowledging its existence—and mainly served to underscore its fact-specific nature, as Justice Powell did in *Chambers* itself.[246] A subsequent Supreme Court case, *Nevada v. Jackson*, achieved a similar result by rejecting a criminal defendant's assertion of a right-to-present-a-defense violation at trial, but without eroding the essence of the right itself.[247]

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237. *Id.*

238. *Id.* at 148.

239. *See id.* at 146.

240. Justices John Paul Stevens and Marshall dissented. *See id.* at 154 (Marshall, J., joined by Stevens, J., dissenting).

241. *Id.* at 153 (majority opinion) ("We leave it to the Michigan courts to address in the first instance whether Michigan's rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' rights under the Sixth Amendment.").

242. *Id.* at 151.

243. *Id.* at 149.

244. *Id.* at 152–53.

245. *Id.* at 153.

246. *See supra* note 134 and accompanying text.

247. *See* Nevada v. Jackson, 569 U.S. 505, 509, 511 (2013) (acknowledging the legitimacy of the right to present a defense but noting that claims under that right "rarely" succeed and finding no "clearly establishe[d]" precedent that the constitutional right to present a defense is violated when a court excludes "extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility" when it "may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial").

At bottom, *Trombetta*, *Lucas*, and *Jackson* helped mark the boundaries of *Chambers*. One could even say they hemmed in the right to present a defense to some degree. Yet those cases did not come close to erasing this principle from the constitutional map. In fact, by acknowledging the existence of a right to present a defense, they helped to reinforce its prominence in the legal landscape.

B. Chambers *in the Lower Courts*

Beyond the Supreme Court, *Chambers* arguments have made headway with various federal and state judges. In particular, federal courts have cited *Chambers* more than 1,500 times in the past 50 years,[248] although only a small number of those cases either discussed or analyzed the right-to-present-a-defense principle in any level of detail.[249] Examining the federal district and circuit court cases that delve into right-to-present-a-defense claims reveals that defendants have obtained relief at least 13 times.[250] Nevertheless, that small sample size belies the large impact of this doctrine and ignores the signal that *Chambers* remains healthy precedent.

In the past 12 years, federal circuit courts have issued a handful of strong opinions underscoring the value and vibrancy of the right to present a defense. For instance, in *Kubsch v. Neal*, the trial court excluded allegedly exculpatory evidence on hearsay grounds, and the defendant Wayne Kubsch ultimately received a death sentence for killing three people in Indiana.[251] The excluded evidence consisted of videotaped interviews with two witnesses that would have called into question whether the defendant had the opportunity to commit the crime within the time frame put forward by the government.[252] The defendant lost in the Indiana state courts, and both the federal district court and a panel for the Seventh Circuit Court of Appeals rejected his petition for a writ of habeas corpus.[253] After a rehearing, the Seventh Circuit reversed the conviction on the basis that "[t]he facts of Kubsch's case parallel so closely the facts of *Chambers*, *Green*, *Crane* and *Holmes*, that a failure to apply those cases here would amount to an unreasonable application of law clearly established by the Supreme Court."[254] In 2012, the Ninth Circuit employed similar reasoning to reverse a murder conviction after the trial court had excluded evidence from a witness to whom the defendant's brother had supposedly confessed to the crime.[255]

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248. *See* Memorandum from Gopika Mesrobian Das on Updated Analysis of *Chambers* to Author 1 (Dec. 14, 2023) (on file with author) (noting that a search on the Lexis+ database found citations to *Chambers* in 1569 federal district court, circuit court of appeals, and Supreme Court opinions).

249. *Id.* (describing how the use of the "Discussion" bar on Lexis+, which evaluates how in-depth a particular opinion discusses a cited case, determined that 68 federal cases "Analyzed" *Chambers*, while 132 "Discussed" it).

250. *See id.* at 5.

251. 838 F.3d 845, 846 (7th Cir. 2016).

252. *Id.* at 850.

253. *Id.* at 846–47.

254. *Id.* at 862.

255. *See* Cudjo v. Ayers, 698 F.3d 752, 755, 757, 767–68 (9th Cir. 2012) (mentioning that "any distinctions between this case and *Chambers* are distinctions without a difference").

An analysis of state court decisions also demonstrates the extensive use of *Chambers* arguments outside the federal arena. Citations to *Chambers* surface in hundreds of majority opinions from the highest courts in each state, with these references particularly frequent in Connecticut and Kentucky.[256] Like their federal counterparts, these state court opinions usually cite *Chambers* as dicta, but at least 166 opinions discuss, analyze, examine, and/or rely upon *Chambers* in reaching a decision.[257] Moreover, many of those opinions resulted in victories for criminal defendants.[258]

III. THE RIGHT TO PRESENT A DEFENSE AT MIDDLE AGE: WHY IT MIGHT SURVIVE

Despite the successes chronicled in Part II above, legal commentators on the political left have long railed against the limitations of *Chambers*. These criticisms have targeted the fact-specific nature of the holding;[259] the refusal to announce a new constitutional rule;[260] the imprecise articulation of the right to present a defense;[261] the conflation of the Due Process, Compulsory Process, and Confrontation Clauses in the analysis;[262] and the unwillingness of the Court to tackle the racialized context of the cases more explicitly.[263] I reject this negative portrayal—or at least I am pragmatic enough to tolerate these shortcomings. More to the point, the perceived weaknesses of *Chambers* might actually prove to be strengths. They could even help solidify the right to present a defense over the long term given the ideological and jurisprudential trends of the Court.

In today's hyperbolic political environment, it is tempting to paint "liberal" and "conservative" positions on criminal justice in broad, simplistic strokes. These tropes include that the left uniformly seeks to reduce mass incarceration,

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256. *See* Memorandum from Tiba Fatli on State Supreme Court Decisions Citing *Chambers* to Author 1 (Dec. 31, 2023) (on file with author) (conducting a Westlaw search and identifying all state supreme court cases that cite *Chambers*, then reviewing them to ascertain which ones rely, mention, and analyze the case, and which ones use it solely as dicta).

257. *See id.* at 3–13 (providing chart of cases).

258. *See, e.g.*, R.S. v. Thompson, 485 P.3d 1068, 1072 (Ariz. 2021); Rios-Vargas v. People, 532 P.3d 1206, 1219 (Colo. 2023); Kreisher v. State, 303 A.2d 651, 652 (Del. 1973); State v. Stegall, 477 P.3d 972, 977 (Idaho 2020); Thomas v. State, 580 N.E.2d 224, 227 (Ind. 1991); State v. Stewart, 313 S.W.3d 661, 666 (Mo. 2010) (en banc); State v. Jenkins, 466 S.E.2d 471, 479–80 (W. Va. 1995).

259. *See* Clinton, *supra* note 142, at 714 ("The United States Supreme Court . . . has rarely suggested that the criminal defendant has a right to present his defense or explained the appropriate test to be applied to such a guarantee. Instead, the Court has usually treated each case as sui generis and has often chosen to ground its decisions on one of the specific guarantees in the fifth and sixth amendments, thereby straining, often beyond recognition, the language of many of the substantive guarantees involved. Thus, little theoretical growth has taken place with respect to assuring a right to present a defense." (footnotes omitted)).

260. *See generally id.*

261. *See* Blume et al., *supra* note 27, at 1080 ("The Court has yet to provide a comprehensive discussion of what the right to present a defense really means.").

262. *See generally* Kime, *supra* note 148.

263. *See generally* Prifogle, *supra* note 28.

overcriminalization, and racial inequities, while the right wants to preserve public safety, vast prison networks, and the rights of victims. This is far too rudimentary.[264] Any realistic portrait of the criminal justice debate is neither monochromatic nor easy to understand. For example, the movement to "believe women" in the realm of sexual abuse allegations has gained momentum since 2017.[265] This campaign is often associated with progressive activists, yet it is a cousin of the victims' rights movement, a cause usually championed by conservative advocates.[266] Likewise, right-leaning scholars and judges often espouse theories about our criminal justice system that defy the popular wisdom about where people on their side of the aisle should line up.[267] Several philosophies embraced by conservative thinkers tend to support a strong right to present a defense, notably: (a) originalism, (b) libertarianism, and (c) certain stances in the longstanding jurisprudential debate over the benefits of "rules" versus "standards."

A. Originalism

Consider the criminal justice jurisprudence of the late Justice Antonin Scalia. In many respects, he is the prototype of a jurist whose policy preferences favored stout law enforcement and harsh punishments in the abstract but whose judicial philosophy in practice frequently operated to defend individual rights and liberties.[268] As both friend and foe acknowledged, he believed in the original understanding of the Constitution.[269] Many observers contend that his distinctive

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264. For example, progressives tend to disagree about the merits of prison abolition as opposed to reforming the carceral system. *See, e.g.*, Dylan Rodriguez, *Reformism Isn't Liberation, It's Counterinsurgency*, MEDIUM: LEVEL (Oct. 19, 2020), https://level.medium.com/reformism-isnt-liberation-it-s-counterinsurgency-7ea0a1ce11eb [https://perma.cc/E735-FU7Q]; *see also* Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018, 6:00 AM), [https://perma.cc/Q8EP-UJ3D] ("Conservativism is not a monolith. There is no one way to be a conservative, think like a conservative, or define the conservative outlook."); Simon Lazarus, *Alito Shrugged: Libertarianism Has Won over the Supreme Court Conservatives*, NEW REPUBLIC (July 28, 2013), https://newrepublic.com/article/114059/supreme-court-libertarianism-ron-pauls-bench [https://perma.cc/GTW8-3RYW] ("But the conservative movement is not a monolith. It comprises discrete factions: social and religious conservatives; business conservatives; big-government conservatives; and libertarian conservatives.").

265. *See, e.g.*, Anna North, *The Debate over What "Believe Women" Means, Explained*, VOX (May 6, 2020, 4:00 AM), https://www.vox.com/2020/5/6/21246667/believe-women-joe-biden-tara-reade-sexual-assault-allegation [https://perma.cc/YN6A-U7GE].

266. For an interesting discussion of the origins of the modern victims' rights movement, see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938–53 (1985).

267. *See generally id.*

268. *See* Stephanos Bibas, *Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules*, *in* THE LEGACY OF JUSTICE ANTONIN SCALIA: REMEMBERING A CONSERVATIVE LEGAL TITAN'S IMPACT ON THE LAW 5 (Heritage Foundation, Spec. Rep. No. 1865, 2016) ("[Justice Scalia] was known to confess that as a policy matter, he favored vigorous law enforcement and punishment, but as a jurist, he championed a principled understanding of the rule of law. His approach helped preserve individual liberty, make the law clearer and more consistent and transparent, give citizens better notice, promote democratic accountability, and check prosecutors' and judges' power.").

269. *Id.*

brand of "originalism" focused on the objective meaning of the words in the Constitution and largely ignored any subjective inquiry.[270] As a result, Scalia's originalism has been called "a species of textualism."[271] Other scholars dispute this view. They argue that Scalia occasionally veered from rigid adherence to the text and drew on "extratextual" tools to resolve certain ambiguities in the document itself.[272] Regardless of one's precise stance on Scalia's spin on originalism, what seems clear is that his philosophy produced a jurisprudence that advanced the interests of criminal defendants surprisingly often.

Justice Scalia's fingerprints are all over two of the most prominent defense-friendly cases of the early twenty-first century. The first case, his 2004 majority opinion in *Crawford v. Washington*, reimagined the Confrontation Clause in a fashion that rendered it more difficult for prosecutors to introduce hearsay evidence against criminal defendants at trial.[273] His opinion underscored that he sought to hew closely to the original meaning of a provision that emerged to protect defendants from the admission of out-of-court statements that were the functional equivalent of in-court "testimony" without being subject to cross-examination.[274] The upshot was an approach to the Confrontation Clause unlike any the Court had previously entertained, much less endorsed, in more than a century of case law on the topic.[275]

In the second case, *Blakeley v. Washington*,[276] Justice Scalia trained his originalist lens on the Sixth Amendment right to a jury trial. He convinced the bulk of his colleagues that the Constitution's assertion that an impartial jury must determine a criminal defendant's fate at trial leads inexorably to the conclusion that

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270. *Id.* ("Rather than plumbing the Framers' minds, Justice Scalia took an objective approach.").

271. *Id.*

272. In the words of one scholar,

> Scalia's opinions went substantially beyond the Constitution's words, sometimes in ways that may be surprising to originalist theorists and practitioners. . . . First, Scalia used structural reasoning and background assumptions to find specific rules in very general text. Second, he made extensive use of the Constitution's English-law background, which he thought formed a crucial key to the Constitution's meaning. Third, he used post-ratification practice—including practice surprisingly remote from the time of enactment—to give meaning to ambiguous clauses. Fourth, he appeared to accept that new constitutional rules could arise with new technologies. Scalia consistently reaffirmed that none of these sources could override unambiguous text, but he was forthright in admitting that constitutional text standing alone was very often ambiguous.

Michael D. Ramsay, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1946 (2017).

273. 541 U.S. 36, 68 (2004).

274. *Id.* at 61, 68.

275. The history of our Confrontation Clause jurisprudence starts with *Mattox v. United States*, 156 U.S. 237 (1895). For decades after the *Mattox* decision, the Supreme Court issued rather arbitrary decisions in this area. *See* FISHER, *supra* note 55, at 737–42. In some respects, *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980), sought to rein in the case law by formulating a test for confrontation that focused on the "necessity" and "reliability" of the hearsay evidence.

276. 542 U.S. 296, 297–98 (2004).

any upward departure from a statutory sentencing range must be made by a jury, not a judge.[277] In both *Crawford* and *Blakeley*, Justice Scalia stitched together a patchwork quilt of "conservative" and "liberal" justices to secure a majority, ranging from Justice Ruth Bader Ginsburg to Justice Clarence Thomas.[278]

The underpinnings of the constitutional right to present a defense might appeal to jurists ideologically inclined toward originalism. In 1868, the Fourteenth Amendment made the Due Process Clause of the Fifth Amendment applicable to the states, and the Supreme Court soon clarified that this new provision guaranteed "fundamental fairness" in criminal trials.[279] As early as 1897, the Court explained that these guarantees include an "inherent right of defense."[280] Subsequent opinions spelled out the contours of this inherent right. *In re Oliver*, the 1948 case relied on by Justice Powell in *Chambers* itself,[281] proclaimed:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[282]

Powell even highlighted in *Chambers* that the Court was not announcing any "new principles of constitutional law."[283] Instead, he structured the opinion as an application of age-old Due Process Clause jurisprudence to the facts of the case.[284]

Justice Powell's artful design of the *Chambers* holding, and its formulation of a standard deeply rooted in due process, may permit it to withstand the partisan winds blowing on the Supreme Court. Indeed, three jurists often associated with the Court's right flank—Justices Alito and Thomas, and Chief Justice John Roberts—joined in the Court's 2006 opinion in *Holmes* lionizing a criminal defendant's right to "a meaningful opportunity to present a complete defense."[285] Many current Supreme Court justices who tout the virtues of originalism might be predisposed toward keeping *Chambers* in place as good law, yet with wiggle room in its

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277. *Id.* at 313–14 ("The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours' rather than a lone employee of the State." (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343 (1769))).

278. *See* Bibas, *supra* note 268, at 7–8.

279. *See* Kime, *supra* note 148, at 1503.

280. Hovey v. Elliott, 167 U.S. 409, 443 (1897).

281. 410 U.S. 284, 294 (1973).

282. 333 U.S. 257, 273 (1948).

283. 410 U.S. at 302.

284. Pre-*Chambers* case law clarified that divining the scope of these rights under due process has always "turn[ed] on the particular circumstances of the case." Levine v. United States, 362 U.S. 610, 616–17 (1960); *see also* Betts v. Brady, 316 U.S. 455, 462 (1942); Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

285. Holmes v. South Carolina, 547 U.S. 319, 331 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

application to restrict its potential reach if deemed necessary.[286] Not all pro-defendant doctrines possess such a strong originalist foundation.[287]

B. Libertarianism

In addition to conservatives who hail originalism as a compelling judicial philosophy, the right to present a defense might find a friendly audience among libertarians. At the risk of oversimplification, libertarians traditionally believe in expansive individual freedoms and limited government oversight. Think low taxes, minimal regulation, and decriminalization of "victimless" crimes like drug possession and prostitution.[288] To some extent, the political alliance between libertarians and conservatives more generally makes sense given the shared affinity for free markets and the absence of governmental interference in fiscal affairs.[289] But the relationship is not entirely harmonious. Libertarianism has been called "the weird cousin of the conservative movement for 70 years."[290] The oddity of the coalition between libertarians and other conservatives often lies in their different orientations toward social issues. Classic libertarians have little trouble with, say, the constitutionality of same-sex marriage or the legalization of marijuana.[291] Many

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286. *See* Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (**"**I have said in my opinions that when interpreting the Constitution, judges should seek the original understanding of the provision's text, if that text's meaning is not readily apparent.").

287. The "Great Writ" of habeas corpus, for example, is a remedy that prisoners may use to force the government to justify why they have them in custody. Its force, however, is blunted by a series of historical impediments. Habeas traditionally only served to address constitutional or jurisdictional errors. What is more, the passage of the Anti-Terrorism and Effective Death Penalty Act in 1996 imposed a panoply of procedural bars that further eroded the writ's utility. *See generally* Medwed, *Ineffective Assistance of Case Law*, *supra* note 5.

288. For a window into the libertarian approach to criminal justice, see information produced by the Cato Institute, which describes itself as "a public policy research organization—or think tank—that creates a presence for and promotes libertarian ideas in policy debates." *About*, CATO INST., www.cato.org/about [https://perma.cc/55ZF-PF8P] (last visited Aug. 6, 2024).

289. *See generally id.*

290. Jane Coaston, *The Libertarian vs. Conservative Impulses in G.O.P. Policy on Crime*, N.Y. TIMES (Sept. 25, 2023), https://www.nytimes.com/2023/09/25/opinion/conservative-criminal-justice-lehman.html [https://perma.cc/5QJD-YA2Y] (statement of Charles Fain Lehman, a fellow at the Manhattan Institute).

291. *See Criminal Justice*, CATO INST., https://www.cato.org/criminal-justice [https://perma.cc/6K6N-RKG4] (last visited July 31, 2024) ("Cato's research focuses on unconstitutional criminalization, self-defeating policing, coercive plea bargaining, and challenging our policy of near-zero accountability for law enforcement."). It is worth noting that some libertarians see themselves as traditional champions for gay rights:

> In 1972, while homosexuality was still classified as a mental disorder, the first Libertarian party platform advocated the "repeal of all criminal laws in which there is no victim." This view, simultaneously radical and commonsensical, is a cornerstone of libertarian beliefs. Private sexual conduct between consenting adults should never be criminalized. But libertarians went even further, advocating for allowing homosexuals in the military and for repealing bans on gay marriage.

socially conservative thinkers reject these developments. A number of Supreme Court justices have flashed libertarian leanings, with Justice Neil Gorsuch often leading the charge by injecting libertarian views into his opinions, sometimes in ways that run counter to other conservative thinking on the matter.[292]

Take Gorsuch's 2021 majority opinion in *Niz-Chavez v. Garland*. In that case, he relied on libertarian rhetoric to chastise the government for failing to comply with a notice requirement that he deemed a prerequisite to deporting an unauthorized immigrant.[293] The case concerned a federal law that permitted executive officials to cancel certain removal proceedings if the subject of the action had resided in the country for ten years.[294] If the official sends "a notice to appear" at a removal proceeding before ten years of residency have elapsed, however, the deportation cannot be stopped even if the person ultimately exceeds the ten-year mark.[295]

The precise issue in *Niz-Chavez* revolved around what a notice to appear must contain to satisfy this rule. Agusto Niz-Chavez had lived in the United States for eight years when immigration authorities first sent him a notice to appear in a deportation hearing.[296] But the notice was incomplete, so two months later they sent an additional letter that included the date and location of the proceeding.[297] The government claimed that taken together, these two documents contained all of the pertinent information notifying Niz-Chavez of his requirement to appear within the ten-year rule; therefore, he could not challenge his deportation.[298] Niz-Chavez protested on the grounds that the law required "a" notice to appear, the plain language of which did not countenance multiple partial notices.[299]

In his majority opinion, Justice Gorsuch agreed with Niz-Chavez's interpretation. As he wrote, the law demands that the government "must serve 'a' notice containing all the information Congress has specified."[300] Yet he supplemented that textualist analysis with a libertarian flourish: "If the government finds filling out forms a chore, it has good company. The world is awash in forms, and rarely do agencies afford individuals the same latitude in completing them that

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Trevor Burrus, *Gay Marriage: A Victory for 'Radical' Libertarians*, CATO INST. (Apr. 29, 2015), https://www.cato.org/commentary/gay-marriage-victory-radical-libertarians [https://perma.cc/KL43-NZS2].

292. *See* Mark Joseph Stern, *Neil Gorsuch's Persnickety Libertarianism Gave Immigrants a Win at the Supreme Court*, SLATE (Apr. 29, 2021, 2:54 PM), https://slate.com/news-and-politics/2021/04/gorsuch-libertarian-textualist-immigrant-rights.html [https://perma.cc/PZM3-C6DN].

293. 593 U.S. 155, 157–58 (2021).

294. *See* 8 U.S.C. § 1229b(b)(1)(A).

295. *See id.* § 1229b(d)(1)(A). The notice must contain all of the statutorily required information to stop the ten-year rule. *See* Pereira v. Sessions, 585 U.S. 198, 202 (2018).

296. *Niz-Chavez*, 593 U.S. at 173–74 (Kavanaugh, J., dissenting).

297. *Id.* at 159 (majority opinion).

298. *Id.* at 160.

299. *Id.* at 161.

300. *Id.*

the government seeks for itself today."[301] And, to underscore this point, he went on to observe:

> [W]ords are how the law constrains power. In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.[302]

Justices Amy Coney Barrett and Thomas joined Gorsuch's opinion and may represent the Court's "libertarian wing."[303]

The right to present a defense falls "squarely" within libertarian philosophy. At its core, *Chambers* stands for protecting the individual from the overwhelming power of the state and promoting the ability of criminal defendants to act freely, or at least with as little intrusion as possible, in constructing their defenses. Just like the notice at issue in *Niz-Chavez*, the application of rules by government actors to deny people the chance to defend themselves is to apply state power to harm the individual. Put another way, *Chamber*s should please many libertarians.

Another aspect of *Chambers*'s libertarian appeal is the lack of any clearly identifiable, competing interests harmed by its existence. The constitutional right to present a defense helps the individual avoid oppression by the government, whether inflicted by executive-branch prosecutors or judicial officials, and does not jeopardize any countervailing liberty interests. Prosecutors represent the "people" of the jurisdiction, not crime victims—or for that matter—any single person.[304] For nearly two hundred years, legal scholars have called prosecutors "ministers of justice" who bear the dual obligations of zealous advocacy and neutral commitment to fairness for all.[305] Some commentators believe that prosecutors never lose a case,

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301. *Id.* at 169.

302. *Id.* at 172.

303. Josh Blackman, *The Supreme Court's Libertarian Wing Squares the Corner*, REASON: VOLOKH CONSPIRACY (Apr. 29, 2021, 2:07 PM), https://reason.com/volokh/2021/04/29/the-supreme-courts-libertarian-wing-squares-the-corner [https://perma.cc/GR7E-SLC6].

304. I have written extensively on this topic. *See* DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 2 (2012); *see also* Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915, 925 n.42 (2011); Daniel S. Medwed, *Coaxing, Coaching and Coercing: Witness Preparation by Prosecutors Revisited*, 16 OHIO ST. J. CRIM. L. 379, 379 (2019); Daniel S. Medwed, *Grand Finality: Post-Conviction Prosecutors and the Defense of Death*, *in* FINAL JUDGMENTS: THE DEATH PENALTY AND AMERICAN LAW 90–91 (Austin Sarat ed., 2017); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 152 (2004) [hereinafter Medwed, *The Zeal Deal*].

305. *See* Medwed, *The Zeal Deal*, *supra* note 304, at 132–33.

be it conviction, acquittal, or mistrial, provided the result is just.[306] To say that *Chambers* harms prosecutors is to say that prosecutors—the representatives of our government in the criminal litigation process—benefit from injustice. Such a proposition is illogical, not to mention antithetical to the underpinnings of our legal system. What this means is that no discrete liberty interests are impaired by the right-to-present-a-defense doctrine that warrant a counterattack via strategic litigation, much less elicit sympathy from the Supreme Court's conservative majority.

C. Rules and Standards

Anyone who has trudged through the slog of law school is familiar with the debate over "rules" versus "standards," a debate centered on how legal norms should be structured and how they should bind people.[307] Once again, forgive my oversimplification in distilling the debate into its essence. A rules-based approach favors norms that are relatively clear and easy to apply. Laws that place the legal age for drinking alcohol at 21 exemplify the use of a rule. The populace is on notice about when a person is old enough, or not old enough to drink; the rule can be applied mechanically to determine one's eligibility to drink. Rules provide the benefits of certainty, uniformity, and stability.[308]

A standards-based approach exalts flexibility over rigidity. Standards are elastic, not static. Suppose lawmakers set the drinking age as follows: "People may drink alcohol when they have reached an age at which they are mature enough to ingest intoxicants responsibly." The downside with this standard, as compared with the rule mentioned above, would be a lack of certainty; people would not necessarily know in advance whether they are "mature enough to ingest intoxicants responsibly." The upside is that it might better promote the policy underlying the rule, which is presumably to ensure that each individual drinks in a manner that is socially responsible and safe, both to themselves and to others. Conceivably, mature 18-year-olds could drink—and immature 24-year-olds could not. Some people might prefer that result to drawing an impermeable line in the sand at an arbitrary age. Others might despair that the costs wrought by an unpredictable standard are not worth the benefit; that a clear, unambiguous rule is the fairest and most just way to proceed. To reiterate, this is an oversimplification. There are "hard" and "soft" rules, "hard" and "soft" standards, and there are also "principles" that may be even more nimble (and unwieldy) than either rules or standards.[309] And many, if not most,

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306. *Id.*

307. The literature on this debate is very extensive. For some illustrations of academic discourse in this area, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 392 (1985); Lawrence Solum, *Legal Theory Lexicon: Rules, Standards, Principles, Catalogs and Discretion*, LEGAL THEORY BLOG (Aug. 8, 2021, 9:00 AM), https://lsolum.typepad.com/legaltheory/2021/08/legal-theory-lexicon-rules-standards-principles-catalogs-and-discretion.html [https://perma.cc/PH3Y-3DK3]; Tomer S. Stein, *Rules vs. Standards in Private Ordering*, 70 BUFF. L. REV. 1835, 1838 (2022); Kathleen M. Sullivan, *The Supreme Court, 1991 Term–Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992).

308. *See* Schlag, *supra* note 307, at 400.

309. *See, e.g.*, Solum, *supra* note 307.

"rules" also have "exceptions," which makes them seem more like "standards" in their malleability and, as a consequence, unpredictability.

At its core, the debate between rules versus standards reflects the tensions undergirding the objectives of legal norms. As Larry Solum observed, if one's objective is "ex ante predictability and certainty, then rules are usually the way to go."[310] If the objective is "ex post fairness," then standards might carry the day.[311] Should legal norms privilege predictability in *advance* of their application or fairness *after* the event that triggered their application?

Many conservative legal theorists would seem to support rule-based regimes. The values of certainty and predictability buttress the notion that legal answers can be found in the "text" of the document and its "original" meaning. These values also mesh with the libertarian view that there are specific rights inherently free from government interference and that we can determine which rights belong in that category. Justice Scalia, for instance, was a famous proponent of rules.[312]

But it would be wrong to map the rules versus standards argument along a conservative versus liberal axis.[313] Like Justice Scalia himself, the issue is far more complex and nuanced. And those complexities and nuances have salience when it comes to a key question raised in this Article: whether the constitutional right to present a defense might be on the Supreme Court's chopping block.

Chambers and its progeny embrace a "standard," or perhaps an "exception" to the "rule" that states should receive deference in regard to "the establishment and implementation of their own criminal trial rules and procedures."[314] If courtroom decisions about evidence deprive a criminal defendant of information that has "persuasive assurances of trustworthiness" and is "critical" to the defense, then those decisions violate the Constitution, either as a matter of due process or compulsory process. Whether classified as an exception to a rule or as a standard, there is no way of accurately forecasting beforehand whether any single evidentiary ruling will violate this doctrine, in part, because only hindsight might reveal whether a particular item proved "critical" to the defense. The right to present a defense elevates *ex post* fairness over *ex ante* certainty. So, in a sense, it could ruffle the feathers of conservatives on the Court who favor rules, at least in the abstract.

But hold on. *Chambers* does not seem like a prime target for the conservative snipers on the Supreme Court. Its fact-based ethos, requiring an assessment of the trustworthiness and importance of the excluded evidence, allows

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310. *Id.*

311. *Id.*

312. *See, e.g.*, Akhil Reed Amar et al., *Panel on Rules Versus Standards in Constitutional and Statutory Interpretation*, 53 TULSA L. REV. 539, 540–43 (2018) (remarking on Justice Scalia's appreciation for rules).

313. This is by no means a novel point. As Kathleen Sullivan has observed, "rules and standards simply do not map in any strong or necessary way onto competing political ideologies, or, in the setting of constitutional adjudication, onto the side of the rightholders or the state. Instead, the political valences of rules and standards shift in cycles over time." Sullivan, *supra* note 307, at 96–97 (footnote omitted).

314. Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973).

appellate judges a chance for post-trial fairness. And judges inclined to preserve the result of a criminal trial, perhaps those who embrace law-and-order values, can simply apply the *Chambers* standard in such a way that affirms a conviction through a stringent interpretation of what comprises evidence with "persuasive assurances of trustworthiness" that is "critical" to the defense.[315] There is no need to jettison the doctrine to further a conservative law enforcement agenda; the doctrine can just be interpreted strictly.

CONCLUSION

Former President Donald Trump's appointment of three conservative Supreme Court justices from 2017 to 2020 paved the way for the groundbreaking decisions that eliminated the right to reproductive freedom[316] and the ability of universities to deploy affirmative action in admissions.[317] These developments have caused many progressives to fret about which other rights might be imperiled.[318] One right that may not be in harm's way is the constitutional right to present a defense. Many of the doctrine's perceived weaknesses at the time *Chambers* was decided—its linkage to due process and its fact-based nature—morph into strengths in the current climate. For one thing, the Supreme Court need not eradicate the doctrine to reach a particular, perhaps pro-law-enforcement result; the justices could simply construe the facts so as to uphold the conviction. For another thing, the right to present a defense is infused with certain jurisprudential values—originalism and libertarianism—that resonate with the Court's conservative majority. And, finally, the right-to-present-a-defense doctrine does not encroach upon the liberty interests of any other group. The government wins when justice is served, and justice is served when a criminal defendant is afforded a robust opportunity to mount a defense. To the extent that some justices might be sympathetic to any disadvantage incurred by prosecutors through the right-to-present-a-defense doctrine, that disadvantage could be ameliorated by applying the facts of the case in a particular manner—and leaving in place a doctrine that fosters libertarian and originalist values without undermining the interests of another group.

If true, my claim that the Supreme Court is unlikely to overturn *Chambers* and its progeny suggests something else: the justices may not be eager to grant review of right-to-present-a-defense cases. Without review in the Court of Last Resort, advocates have the chance to build upon the foundation of beneficial case law in the Supreme Court, lower federal courts, and state courts. Litigators should lean into *Chambers* as much as possible and make the constitutional right to present a defense as vigorous and formidable as it ought to be.

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315. One advantage of situating *Chambers* within the context of due process, rather than compulsory process, is that it permits judges to engage in a fact-based inquiry. *See, e.g.*, Levine v. United States, 362 U.S. 610, 616–17 (1960) ("Inasmuch as the petitioner's claim thus derives from the Due Process Clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.'").

316. *See supra* note 2 and accompanying text.

317. *See supra* note 3 and accompanying text.

318. *See supra* notes 4–5 and accompanying text.