

1986

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Recommended Citation

Imwinkelried, Edward J., "Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions against the Prosecution" (1986). *Minnesota Law Review*. 1222.
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Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution

Edward J. Imwinkelried*

Scholars have continually faulted American evidence law for its inconsistencies.¹ The commentators have leveled especially harsh accusations against the inconsistencies in the hearsay doctrine.² In the words of a leading critic, Professor Kenneth Culp Davis, one of the most irrational features of contemporary hearsay doctrine is that "technically incompetent evidence is often more reliable than technically competent evidence."³

Federal Rule of Evidence 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁴ Under this definition, some out-of-court statements do not constitute hearsay. A statement falls within the hearsay definition only if the proponent offers the statement for a hearsay purpose, that is, to prove the truth of the assertion in the statement.⁵ The proponent of testimony about

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1. *E.g.*, Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581, 608 (1950) ("Whether or not evidence is 'reliable, probative, and substantial' depends largely on factors having nothing to do with the reasons behind the rules of competence.").

2. *E.g.*, Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271 (1952); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

3. Davis, *supra* note 1, at 608. *See also* Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239, 262-63 (1978) (quoting Davis, *supra* note 1, at 608).

4. FED. R. EVID. 801(c).

5. *See id.*

an out-of-court statement can defeat a hearsay objection by offering the statement for a nonhearsay purpose, that is, a purpose that does not require an inference of the truth of the assertion.⁶

Although evidence offered for a hearsay purpose is generally inadmissible,⁷ the hearsay rule has numerous exceptions.⁸ Courts, pursuant to the Federal Rules of Evidence, recognize exceptions to the rule when the proffered statement falls within the spirit as well as the letter of the rule, if there is both a circumstantial guarantee of the trustworthiness of the statement and some necessity for resorting to the hearsay.⁹

Courts also acknowledge exemptions from the hearsay rule when the statement falls within the letter but not the spirit of the hearsay definition. Perhaps the foremost exemption is the doctrine that an out-of-court admission of a party-opponent is nonhearsay.¹⁰ Some argue that this exemption is a by-product of the adversary system of litigation.¹¹ According to this argument, the hearsay rule's principal purpose is to afford the opponent an opportunity to cross-examine the declarant. It makes little sense, therefore, to include a party-opponent's own decla-

6. See R. CARLSON, E. IMWINKELRIED & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 427-32 (1983); Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

7. See FED. R. EVID. 802.

8. For a list of the statutorily recognized exceptions, see FED. R. EVID. 803, 804.

9. See, e.g., E. CLEARY, *MCCORMICK ON EVIDENCE* § 253, at 753-58 (3d ed. 1984) (discussing situations in which a witness is unavailable to testify and it becomes necessary to admit evidence in exception to the hearsay rule) [hereinafter *MCCORMICK*]. The Federal Rules of Evidence permit courts to recognize other exceptions by stating that a statement otherwise excluded by the rule against hearsay will not be excluded if it is

not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 803(24), 804(b)(5).

10. FED. R. EVID. 801(d)(2).

11. See R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 6, at 437 (quoting Dean McCormick, C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 629 (2d ed. 1972)); Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 333 (1984); but see Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393, 419 (1984).

rations within the hearsay definition because that person is free to take the stand to deny or explain away the declaration.¹²

At common law and under the Federal Rules of Evidence, the admissions doctrine applies to both the party-opponent's own statements and to statements made by third parties, such as the party-opponent's agents, who are closely connected with the party-opponent.¹³ Statements made by third parties but admitted against the opponent because of his close relationship with the third party are customarily termed vicarious admissions.¹⁴ Vicarious admissions are admitted against the party-opponent on the theory that, given the party's close relationship with the third party, it is fair to impute the statement to the party-opponent.¹⁵

In criminal cases, the vicarious admission doctrine has evolved in a peculiar, contradictory fashion. Courts have been liberal to the point of irresponsibility in treating statements by a defendant's alleged co-conspirators as vicarious admissions receivable against the defendant.¹⁶ Suppose, however, that a criminal defendant attempts to offer into evidence a statement made by a police officer or prosecutor. In most jurisdictions, the statement is almost automatically inadmissible. Courts rigidly adhere to the view that the statement cannot qualify as a vicarious admission by the prosecuting sovereign.¹⁷

12. Bein, *supra* note 11, at 419 (quoting E.M. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1963)).

13. See FED. R. EVID. 801(d)(2)(A)-(E); R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 6, at 437-49 (discussing personal admissions, adoptive admissions, and vicarious admissions and noting the academic distinction between the common law rule, under which such admissions are hearsay but admissible under a special exception, and the Federal Rules of Evidence, under which such admissions are not hearsay).

14. See R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 6, at 438, 444 (distinguishing an "adoptive" admission, in which the opponent manifests some agreement to the statement, and a "vicarious" admission, which is imputed to the party-opponent regardless of any manifestation of agreement because of the opponent's legal relationship to the declarant).

15. *Id.* at 445 (stating that, historically, agency theory was the basis for admissibility); Mueller, *supra* note 11, at 333 ("It is fair to receive in evidence against each alleged conspirator the furthering statements of others because in joining the venture each impliedly authorizes the others to speak, and so assumes the risk of the consequences.").

16. For a discussion of the misplaced confidence prosecutors and courts place on alleged co-conspirators' statements, see *infra* text accompanying notes 33-50.

17. *E.g.*, United States v. Santos, 372 F.2d 177 (2d Cir. 1977); see generally Younger, *Sovereign Admissions: A Comment on United States v. Santos*, 43 N.Y.U. L. REV. 108 (1968) (criticizing the Second Circuit's disparate application of the admissions doctrine in criminal cases).

This Article examines the validity of this inconsistency in the vicarious admissions doctrine under the equal protection clause. While analyzing this inconsistency, the Article also addresses the question whether the equal protection doctrine can be used effectively to regulate the consistency and coherence of evidence law. To date, litigants rarely have invoked the equal protection doctrine when challenging the validity of evidentiary rules. In the handful of cases addressing equal protection challenges, courts typically reject the argument without any extended analysis.¹⁸ A few commentators have raised the possibility of equal protection attacks on particular evidentiary rules,¹⁹ including aspects of the hearsay doctrine.²⁰ Although these commentators have concluded that the equal protection clause invalidates the particular rules they were attacking, their analyses of the clause's application are as summary as those in the cases brushing aside equal protection challenges.

The net result is a gap in the literature on the application of the equal protection doctrine to evidentiary rules. The gap is anomalous. In recent years, the Supreme Court has invalidated evidentiary rules on a number of constitutional rationales, including the express sixth amendment confrontation guarantee²¹ and an implied sixth amendment right to present defense evidence.²² The judiciary's failure to resort to the equal protec-

18. *E.g.*, *Skinner v. Cardwell*, 564 F.2d 1381, 1390-91 (9th Cir. 1977) (upholding Arizona's rule permitting the "calling party to impeach its own witness by introducing prior inconsistent statements as substantive proof" but denying the same right to the opposing party), *cert. denied*, 435 U.S. 1009 (1978); *Conway v. Chemical Leaman Tank Lines*, 525 F.2d 927, 931 (5th Cir. 1976) (upholding a Texas statute that permitted evidence of a ceremonial marriage in a wrongful death action, but did not permit evidence of a common-law marriage); *Kuhl v. Commonwealth*, 497 S.W.2d 710, 712-13 (Ky. 1973) (categorically stating that the defendant was not denied equal protection or due process by the trial court's refusal to admit opinion testimony offered solely to encourage the jury to mitigate the punishment).

19. *E.g.*, *Bray, Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions*, 28 U. MIAMI L. REV. 489, 503-04 (1974); Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Convictions Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CIN. L. REV. 168, 179 (1968).

20. *E.g.*, *Tague, Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851, 989, 996 (1981).

21. *E.g.*, *Davis v. Alaska*, 415 U.S. 308, 319-20 (1974) (finding that a state law which protected the anonymity of juvenile offenders and limited their testimony in court denied the defendant in a burglary case his sixth amendment right to confront witnesses).

22. *E.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (criminal defendant's implied sixth amendment right to present defense evidence was im-

tion clause is surprising. Before World War II the equal protection clause was "a dubious weapon in the armory of judicial review" and languished through "eighty years of relative desuetude."²³ After the close of World War II, however, the clause underwent a dramatic rejuvenation. Since that time, the Supreme Court has frequently and vigorously used the clause to strike down laws restricting human and civil rights.²⁴ The equal protection guarantee has become "the single most important concept in the Constitution for the protection of individual rights."²⁵ It is now "the ultimate haven of human rights."²⁶

Part I of this Article demonstrates the differential evidentiary treatment of co-conspirators' and government agents' statements. Parts II-IV then present a critical evaluation of the difference under the equal protection doctrine. Part II argues that the differential treatment amounts to a classification, triggering the equal protection guarantee. Part III further contends that the classification should be subject to an intermediate level of judicial scrutiny. Under this level of scrutiny, the classification should be upheld if it is substantially related to achieving an important government interest. Part IV considers whether such a relationship exists. The Article concludes that the classification is insufficiently related to any important government interest for the differential treatment to withstand equal protection scrutiny.

I. THE DIFFERENTIAL TREATMENT OF STATEMENTS BY CO-CONSPIRATORS AND GOVERNMENT AGENTS UNDER THE VICARIOUS ADMISSION DOCTRINE

A. THE LIBERAL ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS

Defendant A is on trial. The prosecution calls Witness B to

permissibly diminished by Mississippi's common law rule that a party may not impeach his own witness); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (holding that the defendant in a criminal case had been denied his sixth amendment compulsory process rights because the state arbitrarily denied him the right to place on the witness stand a competent witness with testimony relevant and material to the defendant).

23. Tussmen & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 341 (1949).

24. *Id.* at 373; J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 585 (2d ed. 1983).

25. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 585.

26. Tussman & tenBroek, *supra* note 23, at 364.

the stand. Witness B is prepared to testify that Declarant C made an assertive, out-of-court statement incriminating A. If the prosecution offers the statement as proof of the truth of the assertion in the statement, the statement falls within the hearsay definition.²⁷ If the prosecution can demonstrate that A and C were co-conspirators, however, and that the statement in question furthered the conspiracy, the statement may be admissible under the co-conspirator doctrine.

The Supreme Court first recognized the co-conspirator doctrine in 1827 in the *Gooding* opinion authored by Justice Story.²⁸ The Federal Rules of Evidence set out a contemporary version of the doctrine: "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."²⁹

The co-conspirator doctrine requires the prosecutor to establish several preliminary facts as foundation for admitting a co-conspirator's statement as a vicarious admission against a criminal defendant. In most jurisdictions, the prosecutor must present independent evidence of both the conspiracy's existence and the defendant's membership in the conspiracy.³⁰ In addition, the "pendency" requirement requires the prosecutor to show that the co-conspirator made the statement while the conspiracy was pending.³¹ Lastly, the doctrine imposes a purpose limitation; the prosecutor must demonstrate that the co-conspirator made the statement to further the conspiracy's objectives.³²

At first blush, these foundational requirements appear to be impressive insurance that any statement admitted under the co-conspirator doctrine will be reliable evidence. Closer analysis reveals, however, that the foundational requirements are illusory guarantees of reliability.³³ Even out-of-court statements

27. See FED. R. EVID. 801(c).

28. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827).

29. FED. R. EVID. 801(d)(2)(E). The co-conspirator doctrine is one of several hearsay exemptions which together are called vicarious admissions. See *supra* notes 13-14.

30. See, e.g., CAL. EVID. CODE § 1223 (West 1966); Oakley, *From Hearsay to Eternity: Pendency and the Co-Conspirator Exception in California—Fact, Fiction, and a Novel Approach*, 16 SANTA CLARA L. REV. 1, 7-9 (1975) (discussing two California cases interpreting CAL. EVID. CODE § 1223 which governs the admissibility of co-conspirators' statements).

31. Mueller, *supra* note 11, at 331.

32. *Id.*

33. See Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confronta-*

that satisfy the foundational requirements can be "quite" or "extremely" untrustworthy.³⁴ Students of hearsay law have asserted that despite the seemingly rigorous foundational requirements, co-conspirator statements are generally less reliable than statements falling within any of the hearsay exceptions,³⁵ including the often-criticized dying declaration exception.³⁶ Professor Christopher Mueller put the matter bluntly but aptly when he wrote that the co-conspirator doctrine is "an embarrassment."³⁷

The general unreliability of co-conspirator statements is understandable in light of the specific weaknesses of this type of evidence. The basic theoretical justification for admitting the statements is that in an adversary litigation system, a party cannot complain about the introduction of statements made by third parties closely associated with him.³⁸ That justification, however, is unrelated to any consideration of the inherent trustworthiness of the evidence.³⁹

Co-conspirator statements are riddled with the very weaknesses the hearsay rule is designed to guard against. Hearsay is distrusted principally because its use prevents cross-examination of the out-of-court declarant.⁴⁰ By safeguarding the opportunity to cross-examine, the rule helps ensure that the opposing attorney will be able to expose latent deficiencies in the declarant's perception, narration, sincerity and memory.⁴¹ Yet a grave risk of misperception arises whenever a judge admits a co-conspirator's statement.⁴² The communication among co-

tion Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 *FORDHAM L. REV.* 1291, 1332 (1985) ("Coconspirator statements, however, almost never provide sufficient guarantees of trustworthiness apart from producing the declarant and testing the veracity of his statement.").

34. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 *HARV. L. REV.* 1378, 1387 (1972) ("quite"); Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 *U. CHI. L. REV.* 530, 541 (1958) ("extremely").

35. Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 *COLUM. L. REV.* 1294, 1312 (1985).

36. Note, *supra* note 33, at 1313 & n.135.

37. Mueller, *supra* note 11, at 324.

38. *Id.* at 333.

39. Davenport, *supra* note 34, at 1384; Note, *supra* note 35, at 1304-05.

40. Wheaton, *What is Hearsay?*, 46 *IOWA L. REV.* 210, 222 (1961); see *McCORMICK*, *supra* note 9, § 245, at 728 (citing *California v. Green*, 399 U.S. 149, 158 (1970); *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

41. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 6, at 421.

42. See Note, *supra* note 33, at 1311-12 (describing the various ways co-conspirators might misperceive the others' role in the conspiracy).

conspirators is often limited,⁴³ especially when the conspiracy is national or international in scope. A given conspirator may have little⁴⁴ or incomplete knowledge about the defendant.⁴⁵ The co-conspirator need not be acquainted with the defendant.⁴⁶ The danger of misperception is particularly acute in the case of peripheral conspirators.⁴⁷ Similarly, narrative problems exist because conspirators frequently use code words to communicate.⁴⁸ Finally, the risks of insincerity are mammoth. The conspirator may be an inveterate liar accustomed to bending the truth.⁴⁹ It may well be in the conspirator's self-interest to misrepresent the membership or aims of the conspiracy.⁵⁰

Unfortunately, the foundational prerequisites to application of the co-conspirator doctrine are not a panacea for these weaknesses in co-conspirator statements.⁵¹ Independent proof of the conspiracy and the defendant's membership in it affords scant assurance of reliability. The prevailing view is that the independent proof may be "slight."⁵² Courts evaluate the sufficiency of the independent proof in such a relaxed fashion that one commentator has charged that "the independent evidence requirement is not so much a requirement as an excuse" to admit conspirators' statements with flimsy corroboration.⁵³

For its part, the pendency requirement does little to eliminate possible sources of error in conspirators' statements. Many state courts apply the pendency requirement laxly.⁵⁴ Moreover, the only testimonial quality on which the requirement has any appreciable, helpful impact is memory.⁵⁵

Similarly, some courts make short shrift of the furtherance

43. Davenport, *supra* note 34, at 1392.

44. Comment, *supra* note 34, at 539.

45. Note, *supra* note 35, at 1308.

46. Comment, *supra* note 34, at 539.

47. *Id.*

48. Note, *supra* note 33, at 1311.

49. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1166 (1954) ("It is no victory for common sense to make a belief that criminals are notorious for their veracity a basis for law.").

50. *Id.* at 1165-66.

51. Davenport, *supra* note 34, at 1388-89.

52. *Id.* at 1388.

53. *Id.*

54. See Levie, *supra* note 49, at 1175 & nn.80-83 (citing, as examples, cases from Georgia, Ohio, Oregon and Kentucky).

55. Note, *supra* note 33, at 1312 ("Only the memory factor of reliability is somewhat ensured by Rule 801(d)(2)(E), because the rule requires that the statement have been made during the course of the conspiracy.").

requirement and pay it only lip service.⁵⁶ Even if a court takes the requirement seriously, the requirement does not ensure that the statement is true or the speaker truthful. To induce an outsider to join the conspiracy, the conspirator may lie to make the conspiracy seem stronger than it is.⁵⁷ The conspirator may exaggerate the defendant's role in the conspiracy⁵⁸ or name the defendant as a conspirator although the defendant is not a participant at all.⁵⁹ Hence, a conspirator's statement may further the conspiracy even when the statement is untrue.⁶⁰ In sum, even considered together, the foundational requirements for conspirator statements fail to circumstantially guarantee the statement's trustworthiness.⁶¹

56. *E.g.*, *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981) (In accepting that a co-conspirator's statement was made in furtherance of the conspiracy, the court stated, "This Court has noted that the 'in furtherance of the conspiracy' standard must not be applied too strictly, lest we defeat the purpose of the exception."), *cert. denied*, 459 U.S. 854 (1982). For further discussion of the cursory application of the furtherance requirement, see generally *Levie*, *supra* note 49, at 1167-72; *Morgan*, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 464-66 (1929); *Mueller*, *supra* note 11, at 357; *Comment*, *supra* note 34, at 531 n.5.

57. *Davenport*, *supra* note 34, at 1396.

58. Note, *supra* note 35, at 1309-10.

59. *Davenport*, *supra* note 34, at 1396.

60. *Mueller*, *supra* note 11, at 357.

61. See generally *Davenport*, *supra* note 34, at 1384-91 (analyzing the reliability of the co-conspirator exception). To make matters worse for the defense, prosecutors are now attempting to circumvent even the minimal foundational requirements of the co-conspirator doctrine. In addition to codifying the co-conspirator doctrine in Rule 801(d)(2)(E), the Federal Rules of Evidence set out two other applications of the vicarious admission doctrine:

A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . .

FED. R. EVID. 801(d)(2)(C)-(D). Courts typically invoke these doctrines in civil cases. See FED. R. EVID. 801 advisory committee note. By their terms, however, (C) and (D) are not limited to civil actions. Seizing on the literal terms of the statutes, prosecutors have begun to argue that (C) and (D) apply in prosecutions as well and that they constitute alternative theories for admitting co-conspirator statements. See, e.g., *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983) (co-conspirators' statements admissible against defendant whether or not a conspiracy is charged), *cert. denied*, 465 U.S. 1027, *cert. denied*, 465 U.S. 1034 (1984) (cases consolidated below but certiorari petitions filed separately).

If this argument succeeds, prosecutors will not even have to satisfy all the prerequisites to application of the co-conspirator doctrine. Under (D), there would still be a timing requirement and the prosecutor would have to prove that the content of the statement "concern[ed] a matter within the scope of [the criminal agency]" FED. R. EVID. 801(d)(2)(D). Subsection (D), how-

B. THE INADMISSIBILITY OF GOVERNMENT AGENTS' STATEMENTS OFFERED AS VICARIOUS ADMISSIONS AGAINST THE PROSECUTING SOVEREIGN

In the words of Professor Irving Younger, a defendant might initially assume that when "he confronted the sovereign in court, the rules of the game would be the same for both."⁶² The case law, however, does not bear out this assumption. In civil actions, a growing body of authority holds that a party opposing the government may introduce a government employee's statements as vicarious admissions of the government.⁶³ Yet, when the party invoking the vicarious admission doctrine is a criminal defendant, the almost-uniform view is that the government employee's statement is inadmissible hearsay.⁶⁴ The prosecuting sovereign has "a blanket exemption" from the vicarious admission doctrine.⁶⁵

The seminal case granting the prosecution the exemption is *United States v. Santos*.⁶⁶ The United States charged Santos with assaulting a federal officer. According to the prosecution's theory of the case, Edward Dower, an agent of the Federal Bureau of Narcotics, was present at the assault. At trial, Santos attempted to introduce an exculpatory out-of-court affidavit by Dower as a vicarious admission against the government.⁶⁷ The trial judge, however, sustained the prosecution's hearsay objection. Santos challenged the exclusion of the affidavit on appeal.

ever, does not require any proof of the declarant's purpose in making the statement. In other words, if the courts applied (D), they would effectively abolish the furtherance requirement. *See also* *United States v. Martel*, 792 F.2d 630, 635 (7th Cir. 1986) (holding that a letter from an alleged co-conspirator's employee was properly admitted at trial even though no determination was made that the letter was a co-conspirator's statement as required by *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978)).

62. Younger, *supra* note 17, at 108. *Cf.* *Eastman v. United States*, 212 F.2d 320, 322-23 (9th Cir. 1954) (citing civil cases as if they controlled the admissibility of a government agent's statement against the prosecution but finding that the declarant's status as a government agent terminated before he made the statement) (overruled on an unrelated issue by *United States v. Demma*, 523 F.2d 981, 982 (9th Cir. 1975)).

63. *E.g.*, *United States v. AT&T Co.*, 524 F. Supp. 1331, 1333-34 (D.D.C. 1981); *Burkey v. Ellis*, 483 F. Supp. 897, 911 n.13 (N.D. Ala. 1979).

64. *McCORMICK*, *supra* note 9, § 267, at 794-95. McCormick suggests that the rule affords the government a measure of protection from errors and indiscretions by its agents. *Id.*

65. Note, *Vicarious Admissions by Agents of the Government: Defining the Scope of Admissibility in Criminal Cases*, 59 B.U.L. REV. 400, 400 (1979).

66. 372 F.2d 177 (2d Cir. 1967). Professor Irving Younger was the appointed defense counsel in *Santos*. *See* Younger, *supra* note 17, at 108.

67. *See Santos*, 372 F.2d at 179; Younger, *supra* note 17, at 111.

The opinion of the Court of Appeals for the Second Circuit in *Santos* became "the first appellate decision on the question whether the admissions exception to the hearsay rule is available against the sovereign."⁶⁸ Citing the *Gooding* decision, the court acknowledged that if the tables were turned, the prosecution could have resorted to the co-conspirator doctrine.⁶⁹ Judge Waterman, writing for the court, even conceded that there was "seeming unfairness" in barring the defense evidence.⁷⁰ The court nevertheless concluded that the evidence was inadmissible, reasoning that "[t]his apparent discrimination" is warranted "by the peculiar posture of the parties in a criminal prosecution."⁷¹ The court observed that because the sovereign represents all the people and seeks justice rather than simply convictions, the prosecution is not an adversary litigant in the normal sense. The sovereign's agents cannot "bind" the sovereign and, in criminal cases, the sovereign's law enforcement agents are "supposedly uninterested personally" in the outcome of the case.⁷²

Although the *Santos* decision predates the Federal Rules of Evidence, courts continue to adhere to its holding. In a line of authority stretching through 1986, courts have espoused the view that a government agent's statement cannot qualify as a vicarious admission against the government in a prosecution.⁷³ Even during the regime of the Federal Rules, courts affirm "the continuing viability of the rule in *Santos*."⁷⁴ According to these courts, neither the text nor the legislative history of the Federal Rules manifests a congressional intent to alter the *Santos* rule.⁷⁵ Nor will courts permit the defense to circumvent the rule by offering the government agent's statements under an alternative hearsay exception. In 1977, for example, a district court cited *Santos* to support its decision to reject an attempt by the defense to introduce a government agent's statement under

68. Younger, *supra* note 17, at 112.

69. *Santos*, 372 F.2d at 180.

70. *Id.*

71. *Id.*

72. *Id.*

73. *E.g.*, *United States v. Kapp*, 781 F.2d 1008, 1014 (3d Cir. 1986), *cert. denied*, 106 S. Ct. 1220 (1986) ("There is no authority for the proposition that the prosecution is a 'party' against whom such evidence can be offered.").

74. *See, e.g.*, *United States v. Kampiles*, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

75. *See, e.g., id.* at 1246 (text of the Federal Rules of Evidence); *United States v. Morgan*, 581 F.2d 933, 938 & nn.14-15 (D.C. Cir. 1978) (legislative history of the Federal Rules of Evidence).

the residual hearsay exception in Federal Rule of Evidence 803(24).⁷⁶

The *Santos* result seems perverse when the reliability of co-conspirators' and government agents' statements is compared. The defendant may have little or no control over what the co-conspirator says,⁷⁷ and the co-conspirator may be an incorrigible liar. In contrast, the prosecuting sovereign has both formal and practical control over its agents. The government presumably chooses its agents at least in part on the basis of their honesty and integrity. Yet, in the name of the hearsay doctrine, which is designed to enhance reliable fact-finding, co-conspirators' statements are routinely admitted while government agents' statements are almost automatically barred. Common sense compels the conclusion that this result is "a miscarriage of justice."⁷⁸ The question is whether this result runs afoul of the equal protection guarantee.⁷⁹

76. *United States v. American Cyanamid Co.*, 427 F. Supp. 859, 867 (S.D.N.Y. 1977). For the text of the residual hearsay exception, see *supra* note 9.

77. See Oakley, *supra* note 30, at 15; Comment, *supra* note 34, at 539.

78. Younger, *supra* note 17, at 114.

79. Of course, the equal protection question would become moot if the courts eliminated the differential treatment by another means such as statutory construction. In other sections of the Rules, however, when Congress wanted to confine a doctrine to a particular type of case, Congress expressly indicated that intent. *E.g.*, FED. R. EVID. 803(8)(C) (factual findings in official records admissible against the government in criminal cases); FED. R. EVID. 804(b)(2) (statement made under belief of impending death concerning the cause of death admissible in a prosecution for homicide or in a civil case).

As previously stated, however, subsections (C) and (D) of Rule 801(d)(2) are not limited to civil actions by their terms. The language of Federal Rule of Evidence 801(d)(2)(C)-(D) seems broad enough to allow a criminal defendant to introduce against the government statements made by a government agent within the scope of her employment. Several commentators have urged the courts to apply Rule 801(d)(2)(C)-(D) to the statements of government agents as they would to those of any other agent. *E.g.*, Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEX. L. REV. 917, 993-94 (1976); Note, *supra* note 65, at 401. At least one court seems sympathetic to the urging. *United States v. Morgan*, 581 F.2d 933, 937-38 (D.C. Cir. 1978) (Bazelon, J.) (Once the government asserts the trustworthiness of an informant's assertions, the government may not then object to their admission on hearsay grounds.).

Although the above commentators and court find the text of Rule 801(d)(2)(C)-(D) expansive enough to permit the treatment of government employees' statements as vicarious admissions in prosecutions, one court has raised a counterargument also based on statutory construction. In *United States v. Kampiles*, the Seventh Circuit noted that Rule 803(8) appears to contemplate the admission of government employees' reports against the government in criminal cases under the official records hearsay exception. 609 F.2d 1233, 1246 n.16 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980). The court rea-

II. THE EXISTENCE OF A CLASSIFICATION TRIGGERING THE APPLICATION OF THE EQUAL PROTECTION GUARANTEE

Whenever the question arises whether differential treatment violates the equal protection guarantee, the temptation is to proceed immediately to the merits of the justifications advanced for the discrimination. Two issues, however, must be

soned that "this exception to the hearsay rule would be unnecessary if Rule 801(d)(2)(D) were found to encompass admissions by government employees." *Id.*

The Seventh Circuit's counterargument, however, is unpersuasive. The passage in Rule 803(8)(C) sanctions the admission of "factual findings" in official records "against the Government in criminal cases." FED. R. EVID. 803(8). Even if construed to apply to government employees' statements, Rule 801(d)(2)(C)-(D) would not render the language in Rule 803(8) surplusage. Under the Federal Rules of Evidence, many courts continue to demand proof that the declarant of a vicarious admission had personal knowledge of the subject matter of the declaration. *E.g.*, *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 8-9 (1st Cir. 1986). A sizeable body of authority, however, holds that "factual findings" under Rule 803(8)(C) need not be based on personal knowledge. *See* R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 6, at 491. For example, the Sixth Circuit has admitted under Rule 803 a police report containing a finding on the color of a traffic light at the time of an accident which the officer who had authored the report had not witnessed. *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 556 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

Thus, Rule 803(8)'s language would still have independent force and effect because it would remain the only basis for admitting government employees' statements that are not founded on personal knowledge. Further, assuming that Rules 801(d)(2)(C)-(D) and 803(8) overlap, there would still be insufficient reason to interpret the former rule narrowly. The maxim of avoiding redundant constructions is merely a guide to legislative interpretation, not a positive rule of law. 2A C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 46.06 (4th ed. 1984). Congress was not overly concerned with redundancy in drafting the Federal Rules of Evidence and many sections are essentially repetitive. *See* FED. R. EVID. 104(b), 602 & 1008; 1 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 26, at 155-56 (1977); Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 611 (1984).

If courts eventually reject the Seventh Circuit's counterargument in *Kampiles* and accept the broader construction of Rule 801(d)(2)(C)-(D), the equal protection issue will be moot. Some jurisdictions, however, lack statutes as liberalizing as Rule 801(d)(2)(D). California is a case in point. Under California law, the statement must be made "by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement." CAL. EVID. CODE § 1222(a) (West 1966). This language seemingly codifies the traditional common law test that the declarant must be a direct spokesperson for the party. *See* Note, *supra* note 65, at 404-05. The existence of a statute incorporating the traditional restrictive test in the jurisdiction obviously would make it more difficult to remedy the differential treatment of co-conspirators' and government agents' statements through statutory construction.

resolved before reaching the merits. One issue is the level of judicial scrutiny to which the classification should be subject. Even before identifying the appropriate tier of scrutiny, however, the court must resolve the threshold issue, namely, whether a classification exists to trigger application of the equal protection doctrine. Although often overlooked, this question can be "the jugular vein" of an equal protection argument.⁸⁰

The starting point in determining the applicability of the fourteenth amendment's equal protection clause is its language: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸¹ The language of the clause presents four potential obstacles to applying the equal protection guarantee to the differential treatment of co-conspirators' and government agents' statements. First, the clause expressly applies only to a "State." Invocation of the clause to attack the constitutionality of a Federal Rule of Evidence enacted by the national Congress might therefore be precluded. The Supreme Court removed this potential obstacle, however, when it held that the fifth amendment's due process clause contains an equal protection component.⁸² As a general rule, any classification violative of the fourteenth amendment will also run afoul of the fifth amendment's equal protection component.⁸³

80. See M. FORKOSCH, CONSTITUTIONAL LAW § 444, at 519 (2d ed. 1969).

81. U.S. CONST. amend. XIV, § 1.

82. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The concepts of equal protection and due process . . . are not mutually exclusive."). The lower courts repeatedly state that the equal protection guarantees of the fifth and fourteenth amendments are the same or identical. *E.g.*, *United States v. Craven*, 478 F.2d 1329, 1338 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973). The Supreme Court itself has stated that the "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). See also *Marozsan v. United States*, 635 F. Supp. 578, 580 (N.D. Ind. 1986) (Although couched in due process terms, the fifth amendment includes the concept of equal protection.).

83. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (The "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *Young v. Pierce*, 544 F. Supp. 1010, 1019 (E.D. Tex. 1982). See generally Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 451 (1977).

This general rule does have certain exceptions. Once a classification triggers the equal protection doctrine, the question becomes whether the government making the classification has a satisfactory justification for its action. See *infra* text accompanying notes 119-62. In particular, when the classification affects foreign policy or a subject within the national government's peculiar province, such as immigration, the national government may be able to advance justifications that a state government cannot. See, *e.g.*, *De Malherbe v. International Union of Elevator Constructors*, 476 F. Supp. 649, 665 (N.D.

Second, the clause restricts its guarantee to one of equal treatment under "the laws." This restriction does not foreclose the clause's applicability to the Federal Rules of Evidence because "laws" within the meaning of the clause clearly extends to legislative enactments.⁸⁴ Yet, a state may adopt the *Santos* rule by judicial decision rather than by legislative enactment. The question therefore arises whether judicial classifications are amenable to equal protection challenge. Just as the due process clause has been interpreted to cover judicial action,⁸⁵ however, the equal protection doctrine applies to diverse forms of state action,⁸⁶ including actions by the courts.⁸⁷ Thus, the

Cal. 1979) ("Although the federal government may sometimes establish that overriding national interests justify a rule excluding aliens, even where a state could not have validly adopted such a rule, defendants have not made such a showing in this case."). When a uniquely national interest comes into play, the equal protection guaranteed by the fifth amendment may not be coextensive with the protection afforded under the fourteenth amendment. *See id.*; Note, *Constitutional Law: The Equal Protection Clause: The Effect of Plyler v. Doe on Intermediate Scrutiny*, 36 OKLA. L. REV. 321, 328 (1983). None of those peculiarly national interests, however, seems applicable to the evidentiary treatment of co-conspirators' and government agents' statements.

84. It is well settled that the equal protection clause applies to classifications made by the legislatures in statutes. *See* Tussman and tenBroek, *supra* note 23, at 356. The Federal Rules of Evidence are a statute enacted by Congress. Act of Jan. 2, 1975, Pub. L. 93-595, § 1, 88 Stat. 1926. Rule 801(d)(2)(E) codifies the co-conspirator doctrine, and some federal courts have read the *Santos* rule into Rules 801(d)(2)(C)-(D) as well. *See* *United States v. Kapp*, 781 F.2d 1008, 1014 (3d Cir.), *cert. denied*, 106 S. Ct. 1220 (1986). So construed, the Federal Rules themselves classify government agents' statements differently than co-conspirators' statements. In any jurisdiction adopting this interpretation of the Rules, there is a statutory classification amenable to equal protection analysis.

85. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 24, at 497. Some constitutional prohibitions apply only to statutes enacted by legislatures. For example, the bill of attainder and ex post facto prohibitions apply only to legislation. *See* *Korte v. Office of Personnel Mgmt.*, 797 F.2d 967, 972 (Fed. Cir. 1986) (bill of attainder); *United States v. Stone*, 546 F. Supp. 234, 238 (S.D. Tex. 1982) (ex post facto). Courts have applied the due process clause to myriad forms of state action, however, whether the action is taken by "a legislature, executive officer, or a court." J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 24, at 497.

86. Both the due process and equal protection clauses are part of the fourteenth amendment. Because the clauses are parts of the same amendment adopted at the same time, they are *in pari materia*. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 51.03 (4th ed. 1984). The due process clause, therefore, constitutes part of the context for interpreting the equal protection clause. *See id.* Like the due process clause, the equal protection clause functions as a restraint on the action of every governmental agency and instrumentality. *See* *Avery v. Midland County*, 390 U.S. 474, 479-80 (1968) (government agency); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (instrumentality). Even if legislation is fair as written, its application or exe-

differential evidentiary treatment should be subject to equal protection attack whether it is created by statute or by case law.

The final two restrictions contained in the clause's language are more difficult to overcome. The clause guarantees equal protection only to a "person." Rigorous analysis must therefore address the questions whether the clause applies only to classifications of persons rather than classifications of things and, if so, whether the differential treatment of two kinds of statements amounts to a classification of persons. Finally, the clause assures all persons "equal" protection. This raises the question whether the clause contemplates equality of treatment between a private citizen and the government itself, rather than simply equal governmental treatment of private citizens. A negative answer to any of these questions would preclude finding a classification and foreclose an equal protection attack on the differential treatment of co-conspirators' and government agents' statements.

A. THE APPLICABILITY OF THE EQUAL PROTECTION DOCTRINE TO CLASSIFICATIONS OF EVIDENCE

The equal protection clause guarantees evenhanded treatment of persons, not things. In *McGowan v. Maryland*,⁸⁸ the

cution may violate the doctrine. See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Snowden v. Hughes*, 321 U.S. 1 (1944); *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535 (1938); *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 519, 527; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-17 (1978).

87. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) (stating that "state action" may emanate from judicial action); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (stating that the constitutional right not to be discriminated against cannot be nullified by judicial officers); *State v. Plenty Horse*, 85 S.D. 401, 184 N.W.2d 654, 656 (1971) (stating it is immaterial whether discrimination is caused by the legislature or the courts); *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 285, 571 P.2d 1373, 1378 (1977) (stating that equal protection must apply to all courts, otherwise the judicial branch would be empowered to amend the Constitution), *vacated on other grounds*, 443 U.S. 658 (1979).

Judicial actions held subject to the equal protection doctrine have included the selection of jurors, the awarding of damages and the granting of a divorce decree. See *Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (juror selection); *Barrows v. Jackson*, 346 U.S. 249 (1953) (damages award); *Beazley v. David*, 92 Nev. 81, 545 P.2d 206 (1976) (divorce decree). These precedents compel the conclusion that differentiating between government agents' and co-conspirators' statements is subject to equal protection scrutiny.

88. 366 U.S. 420 (1961).

Supreme Court confronted a multifaceted attack on the Maryland Sunday Closing Law. The appellants attacked the law, in part, on the ground that it denied them equal protection. The law generally prohibited sales on Sunday in Maryland but excepted certain types of retailers in Anne Arundel County. The Court held that although the exception resulted in differential treatment of retailers in different counties, the difference did not create a classification triggering the equal protection clause.⁸⁹ Writing for the Court, Chief Justice Warren stated that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite."⁹⁰

If the doctrine relates only to equality between persons as such, the doctrine arguably cannot apply to evidentiary classifications. By their terms, most evidentiary classifications draw dividing lines between things rather than persons. For example, in most of the hearsay exceptions under Federal Rules of Evidence 803 and 804, the foundational requirements for each exception remain the same regardless of the identity of the proponent of the evidence. Whether the proponent is a civil plaintiff, civil defendant, prosecutor or criminal defendant, the foundational requirements for present sense impressions are constant.⁹¹

Nevertheless, the premise that the doctrine relates to equality between persons does not necessarily lead to the conclusion that all evidentiary classifications are invulnerable to equal protection attack. Suppose, for example, that an evidentiary rule bans a particular type of evidence and that a civil defendant can demonstrate that it is almost always the defense that proffers that type of evidence. The civil defendant can then analogize to the equal protection precedents holding that

89. *Id.* at 427.

90. *Id.* See also *Reeder v. Kansas City Bd. of Police Comm'rs*, 796 F.2d 1050, 1053-55 (8th Cir. 1986) (upholding as not violative of the equal protection doctrine a Missouri statute prohibiting Kansas City police officers from participating in or contributing to political causes and campaigns because it regulated all persons similarly situated within the regulated territory equally; although the territory was treated differently from other areas, the equal protection doctrine relates to persons not places) (citing *McGowan v. Maryland*, 366 U.S. 420, 427 (1961)); *Templeton v. Metropolitan Gov't of Nashville and Davidson County*, 650 S.W.2d 743, 753-54 (Tenn. Ct. App. 1983) (upholding a law restricting retail package liquor sales to "urban services districts" because the equal protection doctrine relates to equality between persons and not places) (citing *McGowan*, 366 U.S. at 427.).

91. See FED. R. EVID. 803(1).

the disproportionate impact of a facially neutral law on one class of persons effected a classification.⁹²

More important for purposes of this inquiry, courts ought to treat a rule governing the admissibility of evidence as a classification when the rule conditions the admissibility of the evidence, at least in part, on the proponent's identity. In this situation, a classification of persons is an integral part of the evidentiary classification. The *Santos*⁹³ case made precisely such a classification. First, the court conceded that the prosecution may avail itself of the vicarious admission doctrine against the defendant.⁹⁴ Then, in its next breath, the court announced that defendants may not invoke that doctrine against the prosecution.⁹⁵ Thus, under the *Santos* rule, the admissibility of evidence turns, in part, on the identity of the evidence's proponent. At least in this limited situation, an evidentiary rule is a classification of persons.

B. THE APPLICABILITY OF THE EQUAL PROTECTION DOCTRINE TO CLASSIFICATIONS DRAWN BETWEEN PRIVATE AND GOVERNMENT AGENTS

The initial three hurdles to finding a classification triggering the equal protection clause are relatively easy to overcome because of the wealth of precedent on each of those issues. The last hurdle, however, is the most difficult to surmount because relatively little case law analyzes the validity of classifications drawn between private citizens and government agents.

In the typical case involving equal protection analysis, the court analyzes a line drawn between two classes of private citizens.⁹⁶ In contrast, when a private party challenges state action

92. See Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 786 (1981) (pointing out that "in two landmark cases, the Supreme Court held that it would not apply strict scrutiny to government actions having a disparate impact on members of different races unless the actions were based on an overt or covert racial classification, or unless the government decisionmaker actually intended to disadvantage a racial group" (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) and *Washington v. Davis*, 426 U.S. 229, 239 (1976))). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 600-11 (discussing classifications that discriminate on their face, in their application or in their purpose and effect).

93. *United States v. Santos*, 372 F.2d 177 (2d Cir. 1967). See *supra* text accompanying notes 66-72.

94. *Santos*, 372 F.2d at 180.

95. *Id.*

96. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 423 (noting

on due process grounds, the antagonists usually are the private party on one side and the government agents on the other.⁹⁷ The Supreme Court itself has declared that:

"Due Process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.⁹⁸

This language suggests that the mission of the due process clause is to control the government's relations with private citizens, while the province of the equal protection clause is to regulate government classifications between and among private citizens.⁹⁹ Seizing on this language, a prosecutor defending the *Santos* rule might contend that the only proper challenge to the rule is a substantive due process attack. The prosecutor might argue that the equal protection clause does not regulate the validity of lines drawn between private citizens and the state.

Principle and precedent, however, mandate rejection of this argument; it reflects a simplistic conception of the relationship between the due process and equal protection clauses because it assumes that the clauses have mutually exclusive domains. Such an assumption flies in the face of well-settled law that the due process clause of the fifth amendment includes an equal protection component.¹⁰⁰ More important, the assumption is at odds with both the purpose of the equal protection clause and the overall philosophy of the Constitution. The purpose of the equal protection clause is to prevent government favoritism,¹⁰¹ whether that favoritism is based on race, creed, status or rank.¹⁰² The clause was inspired by the same

that courts will strictly scrutinize legislation that classifies or separates out certain individuals or groups for specific government benefits or punishments); L. TRIBE, *supra* note 86, § 16-1, at 993-94 (constitutional norm can be violated by either government classification of persons or government failure to classify).

97. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 416 (Due process involves a determination of "whether or not a government entity has taken an individual's life, liberty, or property . . ."); see *generally id.* at 423 (contrasting due process and equal protection analysis); L. TRIBE, *supra* note 86, § 10-7 (discussing due process limitations on governmental actions towards individuals).

98. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

99. See, e.g., *In re Valenti*, 178 Cal. App. 3d 470, 224 Cal. Rptr. 10, 12 (1986) (equal protection analysis applied to test sentence-reduction distinction between felons and misdemeanants).

100. See *supra* notes 82-83 and accompanying text.

101. Tussman & tenBroek, *supra* note 23, at 358, 365.

102. *Id.* at 342.

egalitarian instinct underlying the constitutional prohibition against granting titles of nobility.¹⁰³ It surely would effectuate the anti-favoritist purpose of the equal protection doctrine to apply the clause to classifications favoring government agents over private citizens.

If extending the equal protection clause to classifications between private citizens and government agents is consistent with the clause's purpose, the extension also seems required by the overall philosophy of the Constitution. The Founding Fathers fashioned a constitutional model designed to contain and restrain government power.¹⁰⁴ That model identifies liberty with the absence of government.¹⁰⁵ It would frustrate the philosophy underlying that model to exempt classifications favoring government agents from equal protection scrutiny. Given the nation's traditional anti-statist bias, the most suspect sort of classification—the one sort of classification that should not escape equal protection scrutiny—is one that prefers the government over private citizens.

Available precedent points toward the same conclusion. Courts have applied the equal protection doctrine to classifications among government officials,¹⁰⁶ government employees,¹⁰⁷ and applicants for government employment.¹⁰⁸ Other courts

103. U.S. CONST. art. I, § 9, cl. 8; see Tussman & tenBroek, *supra* note 23, at 342, 352 (discussing the incorporation of the doctrine of equality into the fourteenth amendment).

104. See L. TRIBE, *supra* note 86, § 1-2 (discussing early restrictions on government power).

105. See Tussman & tenBroek, *supra* note 23, at 380.

106. See, e.g., *Chandler v. Louisville*, 277 Ky. 79, 125 S.W.2d 1026 (1939).

107. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (state employees); *Johnson v. Mayor of Baltimore*, 731 F.2d 209 (4th Cir. 1984) (fire fighters), *rev'd on other grounds*, 105 S. Ct. 2717 (1985); *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337 (5th Cir. 1982) (teachers), *cert. denied*, 461 U.S. 943 (1983); *Martin v. Tamaki*, 607 F.2d 307 (9th Cir. 1979) (city water and power department employees); *Gault v. Garrison*, 569 F.2d 993 (7th Cir. 1977) (teachers), *cert. denied*, 440 U.S. 945 (1979); *Hutchinson v. Lake Oswego School Dist.*, 519 F.2d 961 (9th Cir. 1975) (teachers), *vacated on other grounds*, 429 U.S. 1033 (pursuant to Lake Oswego's petition), *cert. denied*, 429 U.S. 1037 (1977) (Hutchinson's petition); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973) (teachers); *Lynn v. Kootenai County Fire Protective Dist. #1*, 97 Idaho 623, 550 P.2d 126 (1976) (fire fighters); *Minneapolis Fed'n of Teachers Local 59 v. Obermeyer*, 275 Minn. 347, 147 N.W.2d 358 (1966) (teachers).

108. See, e.g., *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (state civil service applicants); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (transit authority applicants); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (state civil service applicants), *modified on other grounds*, *Williams v. Zobel*, 619 P.2d 422, 431 (Alaska 1980); *Ridaught v. Division of Florida Hwy. Patrol*, 314 So. 2d 140 (Fla. 1975) (state highway patrol applicants).

have applied the doctrine when government employees¹⁰⁹ and officials¹¹⁰ challenged statutes that imposed on them burdens that did not apply to private citizens. These two categories of cases supply analogical support for the application of the doctrine to classifications conferring unique benefits on the government and its agents.

At least one court, moreover, has provided direct support for the proposition that a government's grant of unique benefits to itself may be challenged on equal protection grounds. In *Nelson v. State Department of Natural Resources*,¹¹¹ the Minnesota Supreme Court assessed the constitutionality of a state statute that provided special protection to the state government as an employer. Under the statute, if a tort victim was a state employee and the tortfeasor wanted to settle with the employee, the tortfeasor was required to give the state notice of the settlement. The purpose of the statute was to protect the state's subrogation claim under the workers' compensation statute. The statute required notice of settlement only if the victim's employer was the state; private employers were not entitled to notice. The court pointed out that the statute "distinguishes the state as an employer from all other employers and accords its interests greater protection."¹¹² In invalidating the statute on equal protection grounds, the court noted that "no genuine or substantial distinctions between the state as an employer" and private employers warranted giving greater protection to the state's rights than that accorded to private employers.¹¹³

109. See, e.g., *Local 2106, Int'l Ass'n of Firefighters, AFL-CIO v. City of Rock Hill*, 660 F.2d 97 (4th Cir. 1981) (fire fighters prevented from discussing employment matters before city council); *AFSCME Councils 6, 14, 65 & 96 v. Sundquist*, 338 N.W.2d 560 (Minn. 1983) (public employees contested a pension contribution increase meant to offset a decrease in employers' tax), *appeal dismissed*, 466 U.S. 933 (1984).

110. See, e.g., *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295 (5th Cir. 1977) (challenging the Code of Judicial Ethics requirement that judges resign when filing candidacy for nonjudicial office), *cert. denied*, 435 U.S. 1013 (1978).

111. 305 N.W.2d 317 (Minn. 1981).

112. *Id.* at 319.

113. *Id.* at 319-20. A fair amount of litigation has involved special notice requirements for claims against government agencies. These requirements typically prescribe notice periods shorter than the normal statute of limitations applicable to claims against private persons. See, e.g., *James v. Southeastern Pa. Trans. Auth. (SEPTA)*, 505 Pa. 137, 140-42, 477 A.2d 1302, 1303-04 (1984) (six month statute of limitations for claims against transportation authority held not violative of equal protection); Case Note, *Application of Intermediate Scrutiny Standard Hinges on "Importance" of Rights Affected, Pennsylvania*

Recognizing that the Minnesota Supreme Court engaged in a two-part analysis is crucial to the present inquiry. Although not specifically enunciated, the court first correctly perceived that a classification conferring peculiar benefits on the government is subject to equal protection scrutiny. The validity of the justifications advanced for the differential treatment was an entirely distinct question. Similarly, the differential treatment of co-conspirators' and government agents' statements is a classification falling within the purview of the equal protection doctrine. Whether genuine distinctions between the government and private defendants justify the differential treatment is a separate inquiry.

III. IDENTIFYING THE APPROPRIATE TIER OF EQUAL PROTECTION SCRUTINY

Finding a classification is only the beginning of equal protection analysis. Most government classifications are valid. American citizens have a wide range of abilities and needs. The government must be able to draw some lines between and among its citizens.¹¹⁴ Courts generally acknowledge the government's power to classify¹¹⁵ and distinguish.¹¹⁶ Although the

Supreme Court Review, 1984, 58 TEMP. L.Q. 347, 352 n.45 (1985) (stating in this critique of the Pennsylvania Supreme Court's application of intermediate level scrutiny in *James v. SEPTA*, that Pennsylvania joined the majority of jurisdictions upholding similar notice requirements and listing cases from jurisdictions on both sides of the issue). Although the courts are split over the validity of these requirements under the equal protection clause, they uniformly treat the requirements as classifications for equal protection purposes and reach the merits of the justification for treating the government differently than private defendants. See also *McAllister v. South Coast Air Quality Mgmt. Dist.*, 183 Cal. App. 3d 653, 228 Cal. Rptr. 351, 355 (1986) (applying equal protection analysis to classification denying punitive damages in an action against a governmental tortfeasor).

114. See *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (citing *Glonn v. American Guar. & Liability Ins. Co.*, 391 U.S. 73, 75-6 (1968)) (stating that the equal protection doctrine only restricts line drawing; it does not forbid it); *Barcume v. City of Flint*, 638 F. Supp. 1230, 1235 n.17 (E.D. Mich. 1986) ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private and that account for limitations on the practical ability of the state to remedy every ill.").

115. *E.g.*, *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, . . . our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

116. See, *e.g.*, *Avery v. Midland County*, 390 U.S. 474, 484 (1968) (In rejecting the county's unequal districting for the purpose of electing commission-

government's power to draw lines has some limits,¹¹⁷ the Supreme Court has even refrained from holding that bases of classifications such as race are always forbidden and repugnant to equal protection.¹¹⁸ Having found a classification, the next question is what level of scrutiny the court will apply to it. This section surveys the state of the jurisprudence on tiers of scrutiny and attempts to identify the proper tier for analyzing the validity of the differential treatment of co-conspirators' and government agents' statements.

A. THE THREE TIERS OF EQUAL PROTECTION SCRUTINY

Judicial scrutiny of government actions challenged on equal protection grounds falls into three categories: minimal, strict and intermediate.

Minimal scrutiny is the most relaxed.¹¹⁹ It requires only that the governmental classification have some rational relationship to a legitimate state policy. It does not demand a perfect fit,¹²⁰ abstract symmetry¹²¹ or mathematical nicety.¹²² The test is satisfied as long as there is a rough accommodation between the classification as a means and a legitimate state end.¹²³ The test reflects an extraordinary degree of deference to the judgment of the government official making the classification.¹²⁴ In some cases, courts declare that they will uphold the classification so long as the government official could reasonably conceive¹²⁵ or hypothesize¹²⁶ facts creating a nexus or relationship. Courts normally apply the minimal scrutiny

ers with power to set tax rates, among other things, the Court stated that equal protection "does not, of course, require that the state never distinguish between citizens . . .").

117. See *Stanley*, 405 U.S. at 652 (citing *Glonn*, 391 U.S. at 75-76).

118. See *Tussman & tenBroek*, *supra* note 23, at 353-56.

119. *Crane v. Schneider*, 635 F. Supp. 1430, 1432 (E.D.N.Y. 1986); *L. TRIBE*, *supra* note 86, § 16-2.

120. *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 202 (N.D. Ill. 1986).

121. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540 (1942) (citing *Patson v. Pennsylvania*, 232 U.S. 138, 144 (1914)).

122. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

123. *L. TRIBE*, *supra* note 86, § 16-4, at 997.

124. *Dieffenbach v. Attorney Gen. of Vermont*, 604 F.2d 187, 195 (2d Cir. 1979).

125. *Dandridge*, 397 U.S. at 485 (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1959); *Jackson Water Works v. Public Utilities Comm'n*, 793 F.2d 1090, 1094 (9th Cir. 1986); *Riverside Steel Constr. Co. v. William H. Simpson Constr. Co.*, 181 Cal. App. 3d 411, 227 Cal. Rptr. 424, 429 (1985).

test,¹²⁷ especially when the classification appears in economic or social welfare legislation.¹²⁸ When courts apply this low level of scrutiny, they in effect presume the constitutionality of the classification.¹²⁹ If the classification has any arguable rational basis, courts will sustain the statute even if they are convinced that the classification is improvident or unwise.¹³⁰ Professor Gerald Gunther has written that minimal scrutiny is "toothless"—it has no bite.¹³¹

At the polar extreme is so-called strict scrutiny.¹³² When courts apply this test, they require the government to show that the classification is a necessary means related to a compelling or overriding state interest.¹³³ This test imposes a heavy

126. *Bunyan v. Camacho*, 770 F.2d 773, 774 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986).

127. *See, e.g., Diebler v. City of Rehoboth Beach*, 790 F.2d 328, 333-34 (3d Cir. 1986) (In considering a candidacy restriction, the court began with the minimum rational basis test and considered reasons to heighten their scrutiny.); *McLain v. Meier*, 496 F. Supp. 462, 465-66 (D.N.D. 1980) (Courts "generally adhere to the rule that a state does not act unlawfully if the classification is rationally related to a legitimate government objective."); *Branch v. DuBois*, 418 F. Supp. 1128, 1130 (N.D. Ill. 1976) (noting that veterans preference challenges are routinely subjected to the minimum rational basis standard).

128. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Gronne v. Abrams*, 793 F.2d 74, 77 (2d Cir. 1986); *Jackson Water Works*, 793 F.2d at 1093-94; *Harlan v. Frazier*, 635 F. Supp. 718, 724 (W.D. La. 1986); *Case v. United States Dep't of Agric.*, 642 F. Supp. 341, 347 (M.D. Pa. 1986).

129. *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see also Illinois Psychological Ass'n v. Falk*, 638 F. Supp. 876, 881 (N.D. Ill. 1986) (plaintiff forced to assume the "heavy burden" of establishing that the state action was not rationally related to a legitimate state purpose).

130. *Vance*, 440 U.S. at 97; *cf. Griswold v. Connecticut*, 381 U.S. 479, 527 (Stewart, J., dissenting) (In arguing that a state law should be upheld, Justice Stewart stated, "I think this is an uncommonly silly law. . . . But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.").

131. Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972).

132. *E.g., Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) (rejecting the "high hurdle of 'strict scrutiny'"). This level of scrutiny has also been termed "close" or "heightened," *see Graham*, 403 U.S. at 372, and "exacting," *see Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969). *See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra* note 24, at 591-92 (discussing strict scrutiny).

133. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1982) (stating in dicta that for a classification to permissibly impinge upon a fundamental freedom it must be "necessary to the achievement of a compelling state interest"). *See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra* note 24, at 591-92.

burden of justification on the government.¹³⁴ It is almost impossible for the government to meet this burden and, in the vast majority of cases, a court's decision to apply strict scrutiny is fatal to the classification.¹³⁵

Courts reserve strict scrutiny for exceptional fact situations that fall into two categories. In one category, the basis for the classification is suspect.¹³⁶ Such classifications operate against classes of persons who have been subjected to a long history of purposeful unequal treatment, or who have been relegated to such a politically powerless position that they need extraordinary protection from the majority.¹³⁷ Race is the premier example of a suspect basis of classification.¹³⁸

In the second category, the classification "trammels"¹³⁹ or "impinges upon"¹⁴⁰ a fundamental right.¹⁴¹ The line drawn in these cases has an "appreciable,"¹⁴² "adverse"¹⁴³ effect on a right explicitly or implicitly protected by the Constitution.¹⁴⁴

134. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

135. *See* L. TRIBE, *supra* note 86, § 16-6, at 1000 (citing *Gunther*, *supra* note 131, at 8).

136. *See* *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (Classifications based on alienage, nationality or race are suspect and are thus subject to close judicial scrutiny.). For discussions of the suspect classification doctrine, see generally Antieau, *The Jurisprudence of Interests and Adjudication of Equal Protection Controversies*, 57 U. DET. J. URB. L. 831, 836-37 (1980); Note, *Alternative Model of Equal Protection Analysis: Plyler v. Doe*, 24 B.C.L. REV. 1363, 1373 (1983).

137. *See* *Doe v. Plyler*, 628 F.2d 448, 558 (5th Cir. 1980) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)), *aff'd*, 457 U.S. 202 (1982).

138. *E.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care . . ."); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [C]ourts must subject them to the most rigid scrutiny.");

139. *E.g.*, *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) ("trammels") (citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

140. *E.g.*, *San Antonio Indep. School Dist.*, 411 U.S. at 17 ("impinges").

141. *E.g.*, *McLain v. Meier*, 496 F. Supp. 462, 466 (D.N.D.), *aff'd in part and rev'd in part on other grounds*, 637 F.2d 1159 (8th Cir. 1980). For discussion of the fundamental rights classification, see generally Antieau, *supra* note 136, at 839-41; Note, *supra* note 136, at 1371.

142. *McLain*, 496 F. Supp. at 462; *cf.* *Serrano v. Priest*, 180 Cal. App. 3d 1187, 226 Cal. Rptr. 584, 606 (1986) (requiring plaintiffs to show their right to education had been substantially impaired).

143. *Gilday v. Board of Elections*, 472 F.2d 214, 217 (6th Cir. 1972).

144. *See* *San Antonio Indep. School Dist.*, 411 U.S. at 33; *Kovach v. Middelendorf*, 424 F. Supp. 72, 78 (D. Del. 1976); *Cieliczka v. Johnson*, 363 F. Supp. 453, 457 (E.D. Mich. 1973). *See generally* Comment, *Equal Protection of the Laws: Education Is Not A Fundamental Right*, 26 U. FLA. L. REV. 155, 157-59

The question is not the social importance of the individual's interest¹⁴⁵ but, rather, whether the Constitution itself establishes the right.¹⁴⁶ Courts have treated the rights to vote,¹⁴⁷ to procreate,¹⁴⁸ to travel interstate¹⁴⁹ and to exercise first amendment liberties¹⁵⁰ as fundamental interests.

The principal remaining dispute over strict scrutiny is the extent to which a right must be "textually footed" in the Constitution to qualify as a fundamental interest.¹⁵¹ For example, in a recent equal protection decision, the Supreme Court struggled over the question whether the right of interstate migration is sufficiently textually footed.¹⁵² Justice Brennan's plurality opinion held the right to be fundamental, although Brennan conceded that he could find "no citable passage in the Constitution to assign as its source."¹⁵³ In dissent, Justice O'Connor agreed to the characterization of the right as fundamental but felt compelled to trace the right to a more explicit constitu-

(1973) (discussing *San Antonio Indep. School Dist.* requirement that the right to be protected be founded in the text of the Constitution).

145. See *San Antonio Indep. School Dist.*, 411 U.S. at 33 (The societal importance of education is not sufficient to establish education as a fundamental right.); *Chatham v. Jackson*, 613 F.2d 73, 80 (5th Cir. 1980) (Although important to society and individuals, access to water service, like housing and welfare benefits, is not a right requiring closest constitutional scrutiny.). The approach here contrasts with the Supreme Court's approach in deciding whether to apply the *middle* level of scrutiny. The Court in those cases does consider the social importance of the affected interest. See *infra* text accompanying notes 195-203.

146. *San Antonio Indep. School Dist.*, 411 U.S. at 33; *Frazier v. Manson*, 176 Conn. 638, 646, 410 A.2d 475, 480 (1979).

147. See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reeder v. Kansas City Bd. of Police Comm'rs*, 796 F.2d 1050, 1054 (8th Cir. 1986); *Vargas v. Calabrese*, 634 F. Supp. 910, 927-28 (D.N.J. 1986).

148. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

149. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969).

150. See, e.g., *Vargas*, 634 F. Supp. at 927-28 (political association and voting are fundamental rights); *Clark v. State*, 665 S.W.2d 476, 480 n.3 (Tex. Crim. App. 1984) (rights guaranteed by the first amendment are fundamental).

151. See, e.g., *Chrysler Corp. v. Texas Motor Vehicles Comm'n*, 755 F.2d 1192, 1202 (5th Cir. 1985) (refusing to make the right to certain judicial procedures fundamental because they are not supported "by relevant constitutional text, history, and structural inference").

152. *Attorney Gen. of New York v. Soto-Lopez*, 106 S. Ct. 2317, 2320-21, 2330 (1986) (Justices Brennan's and O'Connor's contrasting viewpoints over textual footing).

153. *Id.* at 2320 n.2 (quoting *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring)).

tional source, namely, the privileges and immunities clause.¹⁵⁴

Although the definition of a fundamental right still gives the Supreme Court some difficulty, the most noteworthy recent development in equal protection jurisprudence has been the emergence of a third level of scrutiny, the intermediate or middle tier.¹⁵⁵ Until recently, most of the Justices subscribed to a two-tiered model of equal protection analysis.¹⁵⁶ The third, or intermediate, tier initially arose in cases involving governmental sex discrimination,¹⁵⁷ and many of the cases applying the new tier have invalidated gender classifications.¹⁵⁸

The intermediate tier requires the government to demonstrate that the classification is substantially related to an important state interest.¹⁵⁹ The first prong of this intermediate test addresses the magnitude of the government interest. The end or government interest at stake must be exceedingly persuasive.¹⁶⁰ Ordinarily, neither administrative convenience nor economic savings is a sufficiently important interest.¹⁶¹ The second prong takes an intensified look at the asserted means-end relationship; there must be a close fit between the end (the

154. *Id.* at 2330 (O'Connor, J., dissenting).

155. *See* *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate level of scrutiny appropriate for gender discrimination case). *See also* *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982) (education); *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy). For a discussion of this newer level of scrutiny in equal protection analysis, see generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 592-93; Note, *supra* note 136, at 1384-85, 1389; Comment, *Plyler v. Doe: The Quasi Fundamental Right Emerges in Equal Protection Analysis*, 19 NEW ENG. L. REV. 151, 169 (1983).

156. *See* Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F. L. REV. 525-26, 569 (1980).

157. *See, e.g., Craig*, 429 U.S. 190; *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

158. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-52 (1980) (holding unconstitutional Missouri's workers' compensation law because it denied a widower benefits after his wife's work-related death, unless he was mentally or physically incapacitated or proved dependence, but did not impose similar requirements on a widow to qualify for death benefits); *Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (Alabama statute under which husbands, but not wives, could be required to pay alimony held unconstitutional); *Marshall v. Kirkland*, 602 F.2d 1282, 1298-1301 (8th Cir. 1979) (school district practice of hiring only men or women for specific administrative jobs established a prima facie case of gender discrimination).

159. *E.g., Craig*, 429 U.S. at 197; *Ridgeway v. Montana High School Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986); *Baker v. Vanderbilt Univ.*, 616 F. Supp. 330, 331 (M.D. Tenn. 1985).

160. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

161. *Wengler*, 446 U.S. at 152-54; *Frontiero*, 411 U.S. at 688-90; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 725.

asserted government interest) and the means (the classification).¹⁶² Courts reject post-hoc rationalization for the classification and require the government to demonstrate that it had the particular policy in mind when it made the classification, that it is not merely advancing the policy as an afterthought.¹⁶³ Courts demand a "current articulation . . . refusing to supply a challenged rule with a rationale . . . where the rationale is not advanced in the litigation" ¹⁶⁴ Finally, if the challenged rule rests on presumed congruence between the classification and the asserted government interest that is not universally true, courts sometimes afford the individual an opportunity to rebut the presumption.¹⁶⁵

It is uncertain which rights will prompt the Supreme Court to invoke intermediate tier scrutiny.¹⁶⁶ Although the intermediate tier originated in gender discrimination cases, the Court has extended its use to other factual settings. For example, the Supreme Court has applied intermediate tier scrutiny to classifications affecting the right to education,¹⁶⁷ although it previously held that the same right does not trigger strict scrutiny.¹⁶⁸ While it remains unclear which factors will prompt application of the intermediate level of review,¹⁶⁹ it is nevertheless evident that the frontiers of this middle tier seem to be expanding steadily.¹⁷⁰ As the frontiers expand, courts are

162. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 595, 722-23.

163. L. TRIBE, *supra* note 86, § 16-30, at 1083.

164. *Id.* § 16-30, at 1083.

165. *Id.* § 16-31, at 1088-89.

166. See Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 910, 917 (1980).

167. *Plyler v. Doe*, 457 U.S. 202, 217-24 (1982).

168. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973).

169. Professor Laurence Tribe has attempted to identify the characteristics of cases in which courts apply the intermediate level of equal protection scrutiny.

Some cases of intermediate review combine sensitive criteria of classification with important liberties or benefits. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (aliens deprived of federal civil service employment) [additional citations omitted]. In other intermediate review cases, an important liberty or benefit is at stake but no sensitive criterion is involved. See, e.g., *Unites States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (households containing dependents of ineligible persons deprived of food stamps) [additional citations omitted]. And in still other intermediate review cases, a sensitive criterion is involved but no independently important liberty or benefit is at stake. See, e.g., *Trimble v. Gordon*, [430 U.S. 762 (1977)] (illegitimates deprived of intestate inheritance).

L. TRIBE, *supra* note 86, § 16-31, at 1090-91 n.10.

170. For instance, in several recent cases courts have applied intermediate

applying the middle tier not only when the classification affects "sensitive" classes of persons, such as illegitimates, but also when the classification impacts socially important, albeit non-constitutional, interests.¹⁷¹

B. THE APPROPRIATE TIER FOR ANALYZING THE VALIDITY OF THE DIFFERENTIAL TREATMENT OF CO-CONSPIRATORS' AND GOVERNMENT AGENTS' STATEMENTS

As noted at the outset of this Article,¹⁷² some commentators have suggested the possibility of applying the equal protection doctrine to evidentiary classifications.¹⁷³ These commentators have assumed, however, that the applicable standard of judicial review is minimal scrutiny.¹⁷⁴ That assumption is neither unavoidable nor sound.

A proponent of imposing a heavier burden of justification on the government might argue that the group of criminal defendants currently on trial is a suspect class, warranting application of the highest tier of scrutiny. Case law, however, does not support that argument. To date, the only groups that have qualified as suspect classes have been unpopular minorities¹⁷⁵ who are the objects of such intense community prejudice¹⁷⁶ that they deserve special protection from the majoritarian political process.¹⁷⁷ Courts appreciate that invocation of strict scrutiny is a drastic step because few classifications can pass muster

tier scrutiny to medical malpractice legislation on the theory that the victim's right to recover damages for personal injuries has great social importance. See, e.g., *Coburn v. Agustin*, 627 F. Supp. 983, 994-95 (D. Kan. 1985); *Carson v. Maurer*, 120 N.H. 925, 939-40, 424 A.2d 825, 835-36 (1980); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978); Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 35 DEF. L.J. 359, 373-75 (1986). But see *Baker v. Vanderbilt Univ.*, 616 F. Supp. 330, 332 (M.D. Tenn. 1985); *Barme v. Wood*, 37 Cal. 3d 174, 181-82, 689 P.2d 446, 451, 207 Cal. Rptr. 816, 821 (1984).

171. See *supra* note 169.

172. See *supra* notes 19-20 and accompanying text.

173. E.g., *Bray*, *supra* note 19, at 503-04; Note, *supra* note 19, at 179-80.

174. E.g., *Bray*, *supra* note 19, at 503-04; Note, *supra* note 19, at 179.

175. See *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.40 (1979) (citing *inter alia* *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

176. E.g., *State v. Plenty Horse*, 85 S.D. 401, 405, 184 N.W.2d 654, 655-56 (1971) (Sioux Indian).

177. L. TRIBE, *supra* note 86, § 16-13, at 1012 ("The central concern has been to root out any action by government which, in Justice Stone's phrase, is tainted by 'prejudice against discrete and insular minorities,' the sort of prejudice 'which tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities' in our society.") (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (dictum)).

under that standard. For that reason, courts are reluctant to treat even definable groups as suspect classes under the equal protection doctrine.¹⁷⁸ Moreover, the cases are legion in which courts have held that neither convicts¹⁷⁹ nor ex-convicts¹⁸⁰ comprise a suspect class. Both of these groups wield less power and are subject to more overt public hostility than the class of presently charged defendants. If those groups do not fall within the definition of a suspect class, *a fortiori* the class of current defendants does not.

It is more tenable to contend alternatively that strict scrutiny is apropos because the classification impinges upon a fundamental right to fair, evenhanded treatment in the criminal justice system. In two equal protection cases, one in 1963 involving the right to counsel on appeal and the other in 1956 relating to the right to a transcript on appeal, the Warren Court used broad language to describe a commitment to the ideal of equality in the criminal justice system.¹⁸¹ Some leading constitutional law scholars also take the position that under the equal protection doctrine, there is "a 'fundamental right' to fair treatment in the criminal justice system."¹⁸² If such a general fundamental right exists, the differential treatment of co-conspirators' and government agents' statements seemingly trammels on the right.

The Burger Court, however, undermined the strength of this argument by retreating from the broad language in the earlier opinions. The Burger Court interpreted the earlier cases to

178. *Id.* § 16-29, at 1077 n.2.

179. *E.g.*, *Hrbek v. Farrier*, 787 F.2d 414, 417 (8th Cir. 1986); *McQuillion v. Rushen*, 639 F. Supp. 420, 424 (N.D. Cal. 1986); *Paoli v. Lally*, 636 F. Supp. 1252, 1266-67 (D. Md. 1986); *Meredith v. Workers' Compensation Appeals Bd. Dep't of Conservation*, 19 Cal. 3d 777, 780-81, 567 P.2d 746, 747, 140 Cal. Rptr. 314, 315 (1977), *cert. denied*, 434 U.S. 1064 (1978). *See also* *O'Brien v. Skinner*, 414 U.S. 524, 530-31 (1974) (minimal rationality test applied to prisoner classifications challenged under the equal protection doctrine); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973) (same).

180. *E.g.*, *Darks v. Cincinnati*, 745 F.2d 1040, 1042-44 (6th Cir. 1984); *Miller v. Carter*, 547 F.2d 1314, 1321 (7th Cir. 1977), *aff'd*, 434 U.S. 356 (1978); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970); *Furst v. New York City Transit Auth.*, 631 F. Supp. 1331, 1336-37 (E.D.N.Y. 1986); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1111 (N.D. Cal. 1980); *State v. Correll*, 626 S.W.2d 699, 701 (Tenn. 1982).

181. *Douglas v. California*, 372 U.S. 353, 357-58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment . . ."); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.").

182. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 24, at 818.

mean only that without the counsel's helping hand or a record of what transpired in the lower court, the formal opportunity to appeal has little practical value.¹⁸³ The Supreme Court thus has limited the earlier cases by recasting them as meaningful-access situations in which differential treatment relates to such a critical aspect of criminal procedure that the appellant was denied effective access to the courts.

Taking their cue from the Supreme Court, the lower courts have largely abandoned the rhetoric of equality in criminal procedure and speak rather in terms of a right to meaningful access to the courts.¹⁸⁴ Several recent cases have applied minimal scrutiny to differential treatment in criminal procedure.¹⁸⁵ If a difference must effectively deny a defendant access to the courts to trigger strict scrutiny, however, it seems strained to argue that the difference between co-conspirators' and government agents' statements has that effect. Denying the defense a particular item of potentially exculpatory testimony hampers the defense, but it hardly cripples defense advocacy to the same extent as denying a criminal appellant counsel or a trial transcript. The difference may be only one of degree, but the difference is large and discernible. Thus, like the suspect class argument, a strict scrutiny argument founded on a supposed general fundamental right to nondiscriminatory criminal procedure is flawed.

Nevertheless, the differential treatment of co-conspirators' and government agents' statements implicates another right that should be held fundamental: the criminal defendant's right to present trustworthy, critical, exculpatory evidence.¹⁸⁶

183. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 822-23 (1977); *United States v. MacCollum*, 426 U.S. 317, 323-24 (1976); *Ross v. Moffitt*, 417 U.S. 600, 611-14 (1974); see also 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 11.2(c), at 22-24 (1984) (noting cases holding that "alternative methods of reporting trial proceedings," other than transcripts, would be "permissible" if they provided an appellate court with "an equivalent report" of events at trial from which appellants contention arose; also noting the Supreme Court's statement in *MacCollum* that the basic question is one of "access to procedures for review"); L. TRIBE, *supra* note 86, § 16-36, at 1105 n.29, § 16-49, at 1118-19 (citing cases reaffirming the principles of *Griffin* and *Douglas*).

184. E.g., *Lane v. Correll*, 434 F.2d 598, 600 (5th Cir. 1970).

185. E.g., *United States v. Avendano-Camacho*, 786 F.2d 1392, 1394 (9th Cir. 1986); *Tarter v. James*, 667 F.2d 964, 969 (11th Cir. 1982); *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029, 1039-40 (D. Alaska 1986); *People v. Partner*, 180 Cal. App. 3d 178, 225 Cal. Rptr. 502, 505 (1986); *People v. Garcia*, 698 P.2d 801, 808 (Colo. 1985).

186. See Churchwell, *The Constitutional Right to Present Evidence: Progress of Chambers v. Mississippi*, 19 CRIM. L. BULL. 131, 139 (1983); Clinton, *The*

In 1948, the Supreme Court referred generally to the right to present a defense.¹⁸⁷ At the very least, that right guarantees the defendant an opportunity to present both his version of the facts and the testimony of witnesses.¹⁸⁸ Significantly, however, the Supreme Court has extended that right to encompass an opportunity to present critical, reliable evidence. In a 1967 opinion, the Court struck down state statutes rendering accomplices incompetent as defense witnesses.¹⁸⁹ The Supreme Court held that the fourteenth amendment due process clause incorporates the sixth amendment compulsory process guarantee.¹⁹⁰ The Court then reasoned that as a necessary implication from that explicit guarantee, the criminal defendant must have a right to present pivotal, exculpatory testimony. Arguing *reductio ad absurdum*, the Court stated that it would be absurd to guarantee defendants a right to subpoena witnesses while allowing the state to apply "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."¹⁹¹

In a later decision, the Court applied this rationale to reverse a state court's hearsay ruling that had denied a criminal defendant the opportunity to present critical, trustworthy evidence.¹⁹² At least when the government agent's statement is reliable and would provide vital support for the defense theory, this rationale seems apposite to the exclusion of the government agent's statements under the vicarious admission doctrine. The cases recognizing this defense right furnish a solid

Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 IND. L. REV. 713 (1976); Ponsoldt, *Balancing Government Efficiency and the Protection of Individual Liberties: An Analysis of the Conflict Between Executive Branch "Housekeeping" Regulations and Criminal Defendants' Rights to a Constitutionally Fair Trial*, 19 HARV. C.R.-C.L. L. REV. 349, 389 (1984).

187. *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to . . . an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence . . .").

188. *People v. McCowan*, 182 Cal. App. 3d 1, 227 Cal. Rptr. 23, 29 (1986).

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

190. *Id.* at 17-19. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI.

191. *Washington*, 338 U.S. at 22.

192. *Chambers v. Mississippi*, 410 U.S. 284 (1973) (exclusion of testimony concerning third party's confession to murder for which defendant is on trial constitutes denial of fair trial in violation of due process under the fourteenth amendment); see Imwinkelried, *Chambers v. Mississippi*, — U.S. — (1973): *The Constitutional Right to Present Defense Evidence*, 62 MIL. L. REV. 225 (1973).

basis for concluding that the differential treatment of co-conspirators' and government agents' statements adversely affects a fundamental right implicitly protected by the Constitution.

Doubt arises only because, as previously stated, the Justices are still troubled by the question of the extent to which a right must be textually guaranteed before it can be deemed "fundamental."¹⁹³ The Supreme Court could conceivably hold that purely implied rights—rights lacking any explicit recognition in the text of the Constitution—do not qualify as fundamental interests deserving strict scrutiny protection. Even if the Court were to do so, however, it would be hard pressed to avoid applying the intermediate tier of scrutiny to the differential treatment of co-conspirators' and government agents' statements.

On the one hand, the Court would undoubtedly balk at characterizing defendants as a sensitive class. The logical consequence of that characterization would be that virtually every classification in the criminal justice system would be subject to at least middle tier scrutiny. The cases applying minimal scrutiny to criminal procedure classifications *sub silentio* reject the characterization.¹⁹⁴

On the other hand, it is patent that the defendant's right to present reliable, pivotal evidence is an important one. In deciding whether to apply the middle tier, the Supreme Court considers the social importance of the affected interest.¹⁹⁵ The Court itself has found that the interest in federal civil service employment is of sufficient magnitude to warrant invoking the intermediate tier.¹⁹⁶ A number of federal¹⁹⁷ and state¹⁹⁸ cases have held that the right to recover damages in a civil action for

193. See *supra* text accompanying notes 151-54.

194. *E.g.*, *United States v. Avendano-Camacho*, 786 F.2d 1392 (9th Cir. 1986); *Tarter v. James*, 667 F.2d 964 (11th Cir. 1982); *People v. Partner*, 180 Cal. App. 3d 178, 225 Cal. Rptr. 502 (1986).

195. See *L. TRIBE*, *supra* note 86, § 16-30, at 1082.

196. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 (1976); *L. TRIBE*, *supra* note 86, § 16-29, at 1082 n.18.

197. *E.g.*, *Coburn v. Agustin*, 627 F. Supp. 983, 994-95 (D. Kan. 1985); *Doran v. Priddy*, 534 F. Supp. 30, 37 (D. Kan. 1981).

198. *E.g.*, *Jones v. State Bd. of Medicine*, 97 Idaho 859, 871-72, 555 P.2d 399, 411-12 (1976), *cert. denied*, 431 U.S. 914 (1977); *Johnson v. Saint Vincent Hosp., Inc.*, 273 Ind. 374, 391-92, 404 N.E.2d 585, 596-97 (1980); *Carson v. Maurer*, 120 N.H. 925, 939-40, 424 A.2d 825, 835-36 (1980); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978); *Smith v. City of Philadelphia*, No. J-14-86 (Pa. Super. Ct. Oct. 3, 1986) (as summarized in 55 U.S.L.W. 2206-70, Oct. 21, 1986). See *Smith*, *supra* note 170, at 373-75; Comment, *Limitation on Recovery of Damages in Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CIN. L. REV. 1329, 1338-43 (1986).

personal injuries is of sufficient social importance to warrant middle tier scrutiny.

Finally, the Supreme Court's 1974 decision in *Davis v. Alaska*¹⁹⁹ provides powerful authority for treating the defense right to present critical evidence as a trigger for middle tier scrutiny. In *Davis*, the defendant was charged with burglary. The star prosecution witness was a person named Green. At the time of the trial, Green was still on probation as a juvenile delinquent for burglary. The state juvenile court statutes were construed to preclude the defense from questioning Green concerning his probationary status so as to impeach Green for bias. The Court held that, as applied, the state statutes unconstitutionally denied the defendant his right of confrontation of witnesses under the sixth and fourteenth amendments.²⁰⁰

Admittedly, the Court in *Davis* analyzed the statutes under the confrontation clause and did not invoke the implied defense right to present evidence.²⁰¹ The decision nevertheless indicates the great weight the Court attaches to the defense interest in presenting crucial testimony to the jury. Although Chief Justice Burger's majority opinion conceded that the state had an "important"²⁰² interest in preserving the anonymity of juvenile offenders, the Court held that the defense's interest in developing all relevant facts at trial was "paramount."²⁰³ Using these decisions as benchmarks, a criminal defendant's right to present reliable, exculpatory evidence should at minimum deserve the protection of the intermediate level of scrutiny.

IV. THE VALIDITY OF THE CLASSIFICATION OF CO-CONSPIRATORS' AND GOVERNMENT AGENTS' STATEMENTS UNDER THE MIDDLE LEVEL OF EQUAL PROTECTION SCRUTINY

To be constitutionally valid under the intermediate level of equal protection scrutiny, the differential treatment of co-conspirators' and government agents' statements must be substantially related to achieving an important government interest.²⁰⁴ To determine whether this test is satisfied, this final section de-

199. 415 U.S. 308 (1974).

200. *Id.* at 315-21.

201. *Id.* at 315.

202. *Id.* at 319.

203. *Id.*

204. See *supra* text accompanying notes 159-64.

scribes and critiques the justifications that have been advanced to rationalize the classification.

A. THE JUSTIFICATION FOR THE CLASSIFICATION

It is somewhat difficult to reconstruct the case for the differential treatment of co-conspirators' and government agents' statements. Most of the cases after *Santos* merely cite *Santos* without elaborating on the reasons for that case's holding.²⁰⁵ Occasionally a court following *Santos* embellishes by asserting that *Santos* distinguished between the two types of statements for unspecified "[r]easons of policy."²⁰⁶ Rather than developing their own rationales for the rule, courts rely on *Santos*'s precedential value. Unfortunately, the *Santos* opinion itself is hardly a model of lucid judicial reasoning.²⁰⁷

Nevertheless, on rereading *Santos*, it is reasonably clear that the Second Circuit relied on several lines of argument to rationalize treating government agents' statements differently than those of nongovernment agents'. The Second Circuit implicitly recognized that the rationale for the vicarious admission doctrine is that in an adversary system, it is fair to impute an agent's out-of-court statements to the party-opponent, although the statements technically may be hearsay.²⁰⁸ The court then articulated the factors that, in its view, made it improper or unfair to attribute a government agent's statements to the prosecuting sovereign.

One factor is that the government agent is "supposedly uninterested personally" in the outcome of the prosecution.²⁰⁹ Although the court did not explain why this factor justifies excluding the agent's statement, it implicitly invoked the following line of reasoning. If the agent were disinterested, he might not share the motivation of the prosecuting sovereign. The common interest or motivation of principal and agent works in

205. *E.g.*, *United States v. Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980); *United States v. Pandilidis*, 524 F.2d 644, 650 (6th Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); *United States v. American Cyanamid Co.*, 427 F. Supp. 859, 867 (S.D.N.Y. 1977).

206. *E.g.*, *United States v. Powers*, 467 F.2d 1089, 1095 (7th Cir. 1972) (citing *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967)), *cert. denied*, 410 U.S. 983 (1973).

207. The court's lack of clarity may be due in part to the parties' failure to brief and argue fully the question of the justifications for the differential treatment. See Brief for Appellee at 6-8, and Brief for Appellant at 4-8, *United States v. Santos*, 372 F.2d 177 (2d Cir. 1967).

208. *Santos*, 372 F.2d at 180.

209. *Id.*

favor of the sincerity of most statements admitted under the vicarious admission doctrine.²¹⁰ Lacking that insurance of sincerity, a government agent's statement, therefore, should not fall within the doctrine.

Another factor is that government agents have "historically [been] unable to bind the sovereign."²¹¹ When a court admits a government agent's statement as evidence against the government, to a degree the court is binding the government by the agent's action. Applying the vicarious admission doctrine to the statement would violate the historical tradition of the agent's inability to bind the sovereign.

Later apologists have listed other factors in support of the *Santos* rule. For example, one factor is the size and diversity of the government. The sovereign entity encompasses "a variety of diverse and often conflicting interests."²¹² Many government agents have little or no law enforcement responsibility. These agents may not understand the implications of their statements for their employer *qua* prosecuting sovereign.²¹³ The agents' lack of understanding makes it unfair to saddle the prosecution with their statements.

Furthermore, a contrary rule would interfere with the government's ability to investigate crimes.²¹⁴ Unlike the defense, the government has a duty to the public to investigate crimes. If government agents' statements constituted vicarious admissions by the government, law enforcement agents conducting investigations might become too chary in what that say and do. Investigators might cautiously pause to consider every word. A contrary rule would thus endanger the public interest in aggressive, vigorous crime investigation.

Professor McCormick urged one last theory to support the *Santos* rule: "the desirability of affording the Government a measure of protection against errors and indiscretions on the part of at least some of its many agents."²¹⁵ By granting the government a measure of protection against its agents' errors, the *Santos* rule helps ensure the reliability of the evidence admitted at trial.

210. Note, *supra* note 65, at 406.

211. *Santos*, 372 F.2d at 180.

212. *United States v. AT&T Co.*, 498 F. Supp. 353, 357 (D.D.C. 1980).

213. Note, *supra* note 65, at 406.

214. *Id.* at 413-14.

215. MCCORMICK, *supra* note 9, § 267, at 795.

B. AN APPRAISAL OF THE SOUNDNESS OF THE JUSTIFICATIONS

A governmental classification must pass a two-pronged test to withstand intermediate tier equal protection scrutiny. The first prong requires the asserted government interest underlying the classification to be "important."²¹⁶ Concededly, at least one of the rationales advanced in support of the *Santos* rule—that its abolition would interfere with crime investigation²¹⁷—rests on an indisputably important interest. The tenor of the Supreme Court's fourth amendment decisions since the early 1970s indicates that the Court attaches great and growing importance to the government's interest in vigorous crime investigation.²¹⁸ It is assumed, therefore, that the importance of this asserted interest will enable the classification to survive the first part of an equal protection inquiry.

The pivotal focus thus becomes the second prong: the suitability of the classification as a means to achieving the governmental end.²¹⁹ One might make a tenable argument that abolishing the *Santos* rule would impede the conduct of government crime investigations. Government investigators obviously have to make statements during investigations. If overturning *Santos* would make government agents unduly cautious in conducting investigations, the public interest in diligent crime investigation might be harmfully affected. The question resolves itself into whether overruling *Santos* would have a substantial impact on that interest.

The *Santos* rule, however, is irrelevant to much of what government agents do during crime investigations. The purpose of an investigation is to collect evidence from outside sources. Abandoning *Santos* certainly would not restrict government agents' ability to listen. Of course, in many instances the private sources consulted during crime investigations do not volunteer information to the authorities; the authorities must question them. Again, however, *Santos* is irrelevant. Questions

216. See *supra* text accompanying notes 159-61.

217. See Note, *supra* note 65, at 413-14.

218. See generally Gilligan, "Continuing Evisceration of [the] Fourth Amendment," 14 SAN DIEGO L. REV. 823, 824 (1977). This article analyzes the trend suggested by the Supreme Court in its 1975 fourth amendment cases. In all nine of its 1975 fourth amendment cases, the Court reversed state or lower federal court decisions suppressing evidence. In the ninth case, Justice Marshall dissented stating, "Today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures." *Id.*

219. See Tussman & tenBroek, *supra* note 23, at 346-50.

asked by government investigators—interrogatory sentences—generally do not fall within the hearsay definition anyway.²²⁰ *Santos* is pertinent only when the investigators make assertive statements that would otherwise constitute hearsay.

The most troublesome situation occurs when the investigator makes a false assertive statement, as when the investigator lies to one being interrogated to dupe her into divulging information. Assertive statements can fall within the hearsay definition.²²¹ It is doubtful, however, that even in this situation, jettisoning *Santos* will have any noticeable effect. Suppose that the defense offers the investigator's statement for the truth of the assertion. If the investigator had a compelling reason to lie as an interrogation tactic, the investigator should be able to articulate that reason and explain why the statement is false. Denied the immunity conferred by *Santos*, the investigator is still likely to make the statement in the field—and then at trial to testify to the reason for resorting to that interrogation ploy. The entrapment²²² and fifth amendment voluntariness²²³ doctrines also attach a species of penalty to misleading statements made by government agents to suspects. Yet, no empirical evidence indicates that those doctrines have created significant disincentives to crime investigators. In short, although this argument satisfies the important interest prong of middle tier scrutiny, the argument fails the substantial relationship prong.

Of course, the classification might be constitutionally valid if it is substantially related to achieving another important government interest. In their landmark article on the equal protection doctrine, Professors Joseph Tussman and Jacobus tenBroek use the terminology of Trait and Mischief.²²⁴ The Mischief is the social evil that the government action is calculated to eliminate. The Trait is the characteristic that the government chose as the dividing line in its classification. In this

220. See FED. R. EVID. 801(a)-(c); R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 6, at 422-27 (hearsay rule applies only to assertive statements that are formally or functionally declarative sentences; the rule is inapplicable to interrogatory sentences).

221. Note that even here, however, the defendant may sometimes have a nonhearsay theory for admitting the evidence when the defense wants to show the falsity of the statement rather than the truth of the assertion. See, e.g., *Anderson v. United States*, 417 U.S. 211 (1974).

222. E.g., *United States v. Pena*, 527 F.2d 1356, 1361 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976).

223. See E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, *CRIMINAL EVIDENCE* 314-18 (1979).

224. Tussman & tenBroek, *supra* note 23, at 346.

context, the Mischief is the exclusion of valuable, probative hearsay when it would be fair to impute the hearsay statement to the party-opponent. The Trait chosen as the dividing line in *Santos* is the status of party-opponent; the hearsay may be admitted against a private party-opponent, but not against the prosecution, a government entity. Viewed in these terms, the classification is classically underinclusive.²²⁵ The government has at least as much, and arguably more, control over its agents as the defendant has over his co-conspirators.²²⁶ Because the government probably has greater control over its agents, the government should have at least the same evidentiary responsibility as the defendant. It is just as "fair to receive"²²⁷ the statements against the government as it is to admit them against the defendant. The classification is consequently underinclusive because it stops short of eliminating all the Mischief; it still permits the exclusion of some hearsay when it would be fair to attribute the hearsay to the party-opponent.

It is true that courts frequently uphold underinclusive classifications.²²⁸ Such classifications, however, are not automatically valid under equal protection doctrine. Rather, courts often sustain such classifications because sound reasons frequently justify the underinclusivity.²²⁹ For example, eliminating the entire Mischief might necessitate government action on a large scale. If so, administrative convenience favors proceeding step-by-step to eradicate the problem piecemeal.²³⁰ Furthermore, it may be unclear whether the means selected are at all effective to eliminate the problem. Before prescribing a solution that may inadvertently compound the Mischief, the government may experiment with part of the Mischief. Finally, the Mischief might affect a particular industry or class of persons most adversely, and the government may properly conclude that the best use of finite government resources is to hit the Mischief "where it is most felt."²³¹ All of these considerations, however, are absent here. Rewording Federal Rule of Evidence 801(d)(2) will not require a mammoth government ef-

225. *Id.* at 348 ("All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include.").

226. See Oakley, *supra* note 30, at 14-15.

227. Mueller, *supra* note 11, at 333.

228. L. TRIBE, *supra* note 86, § 16-4.

229. Tussman & tenBroek, *supra* note 23, at 349, 372.

230. *Id.* at 349.

231. *Id.* at 372.

fort. There is nothing experimental about the vicarious admission doctrine. The defense is hit just as hard as the prosecution by the loss of probative evidence.

Nor can other asserted justifications for the differential treatment save the classification from unconstitutionality. Judge Bazelon has remarked that the government's argument based on its agents' disinterestedness is "difficult to grasp."²³² His remark may be a euphemism for observing that the assumption of disinterestedness is formally and practically false. If the government agent carelessly makes a statement that ultimately leads to an acquittal, he risks losing his job.²³³ Even when performing law enforcement duties, a government agent has some exposure to statutory and constitutional tort liability.²³⁴ Moreover, the assertion that government agents are disinterested is pointedly undermined by such problems as prosecutorial misconduct²³⁵ and vindictive prosecution.²³⁶ Congress itself has perceived the reality. The legislative history of Federal Evidence Rule 803(8) indicates that Congress forbade the prosecution from offering certain police reports under the official record hearsay exception because Congress was skeptical of the impartiality of the officers preparing the reports.²³⁷

In other contexts, courts routinely treat government agents as the defendant's adversaries. The American Bar Association's

232. *United States v. Morgan*, 581 F.2d 933, 937 n.11 (D.C. Cir. 1978).

233. See Note, *supra* note 65, at 411.

234. *Malley v. Briggs*, 106 S. Ct. 1092 (1986) (holding that a police officer will be held to a "reasonably well-trained officer" standard in determining whether probable cause existed and that if the officer presented a magistrate with a complaint and affidavit which failed to establish probable cause, the officer may be liable for causing an unconstitutional arrest under 42 U.S.C. § 1983); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that narcotics agents were liable for acting in violation of the fourth amendment).

235. See generally B. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1986) (Using "misconduct" to describe a prosecutor's attempt to take unfair advantage over the accused and otherwise prejudice his rights, this treatise discusses the problem as it occurs in every stage of the criminal justice process.).

236. See *United States v. Goodwin*, 457 U.S. 368 (1982) (suggesting that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish the defendant for doing something that the law plainly allowed him to do, thus violating due process and ultimately discouraging would-be vindictive prosecutors); *Blackledge v. Perry*, 417 U.S. 21 (1974) (holding that due process precluded North Carolina from substituting a more serious charge for the original one in response to defendant's invocation of his statutory right to appeal).

237. See generally Alexander, *The Hearsay Exception for Public Records in Federal Criminal Trials*, 47 ALB. L. REV. 699 (1983) (analyzing both the conceptual background and legislative history of Rule 803(8)'s exclusions).

Disciplinary Rules, for example, prohibit certain types of contact between one's client and the adversary's attorneys.²³⁸ Courts have applied that prohibition to prosecutors.²³⁹ Furthermore, there is now respectable authority that the vicarious admission doctrine applies against the government in civil litigation.²⁴⁰ The *Santos* court itself stated in dictum that the result would have been different if the case had been a civil trial rather than a prosecution.²⁴¹ No one can argue seriously that government agents are interested in the outcome of a case when the prospect is a money judgment against their employer but not when the possibility is an acquittal of someone who has flagrantly violated laws promulgated by the employer. On balance, the only realistic conclusion is that government agents are interested in the outcome of prosecutions on which they have worked. For that reason, there is at least as strong a guarantee of the agents' sincerity as there is of the sincerity of co-conspirators.

The argument based on government agents' historical inability to bind the sovereign is as flawed as the theory that government agents are disinterested. Posing the general question whether an agent can "bind" the government is not useful. No one is proposing that the government agents' statements serve as a basis for imposing civil liability or criminal responsibility on the agent or the government. Any reliance on the sovereign immunity doctrine is therefore misplaced.²⁴² Nor is anyone

238. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1981) (prohibiting a lawyer from communicating directly with a party he knows to be represented by a lawyer about the subject of the representation without prior consent of the other lawyer). *See also id.* DR 5-101(B) (prohibiting a lawyer from acting as both an attorney and a witness in the same matter).

239. *E.g.*, *United States v. Batchelor*, 484 F. Supp. 812, 813-14 (E.D. Pa. 1980) (prohibiting assistant United States attorney from interviewing defendant without having obtained prior consent of defendant's previously retained counsel); *United States v. Gold*, 470 F. Supp. 1336, 1351 (N.D. Ill. 1979) (prohibiting prosecutor from acting as both prosecutor and witness in grand jury proceedings); *United States v. Treadway*, 445 F. Supp. 959, 960 (N.D. Tex. 1978) (same).

240. *See, e.g.*, *United States v. AT&T Co.*, 524 F. Supp. 1331, 1333-34 (D.D.C. 1981) (Department of Defense study concluding that divestiture of the Bell system would be harmful to national security held admissible); *Burkey v. Ellis*, 483 F. Supp. 897, 911 n.13 (N.D. Ala. 1979) (government agent's inconsistent out-of-court statements made in the course of exercising his authority and within scope of that authority held admissible and binding upon agent's principal in civil cases).

241. *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967).

242. *See Note, supra* note 65, at 409-10.

proposing an estoppel against the government.²⁴³ The modest proposal is that the statement be usable as an evidential admission.²⁴⁴ In other factual settings, courts routinely permit statements by government agents to have even greater impacts on prosecutions. A government agent's statement may render a defendant's confession involuntary,²⁴⁵ create an entrapment defense²⁴⁶ or consummate a legally enforceable plea bargain.²⁴⁷ If those legal consequences can flow from a government agent's statement—when the government can be "bound" in those respects—by parity of reasoning the statement should qualify as admissible evidence against the prosecuting sovereign.

Similarly, any rationale based on the size of the government is fallacious. The thrust of this argument is that it would be unfair for courts to apply the vicarious admission doctrine to statements by every type of government agent, including those without law enforcement responsibilities, because many of these agents will not understand the impact that their statements can have on a prosecution. The argument mistakenly assumes that courts will apply the vicarious admission doctrine indiscriminately to all government agents. The doctrine can be limited to law enforcement agents such as police and prosecutors.²⁴⁸ These agents have an identity of interest and motivation with the prosecuting sovereign.²⁴⁹ Another weakness in the argument is that it proves too much. In the words of Judge Harold Greene, the argument "would apply with equal force to any large organization with many individuals speaking and acting on its behalf. Were the Court to accept the government's reasoning, all such organizations would effectively have to be exempted from the purview of the rule on party-opponent admissions."²⁵⁰ Indeed, in the case in which Judge Greene penned those words and in which the government made that

243. Younger, *supra* note 17, at 108.

244. For a discussion of the distinction between judicial admissions (admissions in pleadings and which are not evidence at all) and evidential admissions (e.g., statements of a party offered in evidence), see MCCORMICK, *supra* note 9, § 262.

245. See E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, *supra* note 223, at 315-17 (discussing government agents' coercive techniques, including threats, promises and inducements).

246. *E.g.*, United States v. Pena, 527 F.2d 1356, 1361 (5th Cir.), *cert. denied*, 426 U.S. 949 (1976).

247. *E.g.*, Santobello v. New York, 404 U.S. 257 (1971).

248. Note, *supra* note 65, at 401, 407.

249. *Id.* at 414.

250. United States v. AT&T Co., 498 F. Supp. 353, 358 (D.D.C. 1980).

argument, the litigant opposing the government was the American Telephone and Telegraph Company.²⁵¹

The final argument in favor of the existing classification is McCormick's contention that the *Santos* rule gives the government a measure of protection against errors by its agents.²⁵² Indisputably, the *Santos* rule has that effect; the argument accurately describes the operation of the *Santos* rule. As a justification for the differential treatment of co-conspirators' and government agents' statements, however, the argument misses the point. The issue is not whether the rule gives the government additional protection against errors. Rather, the issue is whether the government needs or deserves more protection from errors than the defendant.

It is implausible that the government needs more protection than the defendant. Co-conspirators may be pathological liars and they frequently have self-serving reasons to misstate the conspiracy's membership and aims.²⁵³ The government has presumably exercised some care in hiring its agents. Additionally, after hiring its agents, the government can exercise more formal and practical control over their conduct than one conspirator has over the conduct of co-conspirators.

The crux of the debate should be whether, as government, the prosecution deserves more protection from errors than the defense. It would be absurd to deny that the prosecution deserves some protection from such errors. Admission of erroneous statements at trial results in a risk that the ensuing fact-finding will be in error, and government has an important stake in accurate fact-finding. Nevertheless, that is the same stake that every litigant has by virtue of his status as a litigant in the adversary system. Like the prosecution, the defense has a vital stake in accurate fact-finding. The Supreme Court has recognized the defense's interest in accurate fact-finding by fashioning a confrontation clause requirement that prosecution hearsay be reliable.²⁵⁴ In the final analysis, asserting the government's right to protection from error is merely another way

251. *Id.*

252. MCCORMICK, *supra* note 9, § 267, at 795.

253. *See supra* text accompanying notes 49-50.

254. *See Lee v. Illinois*, 106 S. Ct. 2056, 2063 (1986) (citing *Dutton v. Evans*, 400 U.S. 74 (1970) (evaluating the trustworthiness of hearsay admitted under Georgia's expanded co-conspirator hearsay exception)); Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HASTINGS L.J. 621, 629-35 (1979) ("the constitutional requirement of reliability").

of saying that the government has a legitimate stake in trustworthy fact-finding. That stake, however, cannot serve as a justification for the classification because as litigants in an adversary system, both the defendant and the prosecution have the identical stake.

The conclusion that follows from this analysis is that the differential treatment of co-conspirators' and government agents' statements is violative of equal protection. The classification might survive scrutiny for minimum rationality because some of the arguments favoring the classification, particularly the supposed impact on crime investigations, are neither ridiculous nor self-contradictory. The classification, however, must be tested by a more demanding level of scrutiny because of the importance of the right on which it impinges. If courts apply strict scrutiny, the classification will suffer the same fate as most classifications tested under that tier and will be quickly invalidated. Even if courts apply middle tier scrutiny, the classification should fall. All the arguments advanced to justify the classification relate to legitimate state interests and some would probably qualify as important interests under the middle tier standard. Nevertheless, in each argument, the relationship between the classification and the asserted interest is either non-existent or extremely dubious. In each case, the ends-means relationship is too tenuous to withstand even middle tier scrutiny.

At the very least, courts should use the middle tier technique of affording the defendant an opportunity for rebuttal.²⁵⁵ The defendant should be permitted to rebut the supposed unfairness of imputing a government agent's statement to the government by showing that the statement is trustworthy and critical. The agent's substantial identity of interest with the government is a guarantee of sincerity; and when the surrounding circumstances otherwise show the statement's reliability, an imputation is eminently fair in terms of hearsay policy.

CONCLUSION

Although equal protection doctrine may invalidate the classification of co-conspirators' and government agents' statements, it would be a mistake to leap to the conclusion that the doctrine will revolutionize evidence law. As Part II of the Article emphasized, the critical step in equal protection analysis is

255. See *L. TRIBE*, *supra* note 86, § 16-30, at 1088, § 16-32, at 1092.

often the resolution of the question whether a classification exists.²⁵⁶ The equal protection guarantee strikes out at classifications of persons, not of things. As a consequence, the guarantee is likely to have limited impact on American evidence law.

The *Santos* rule is one of the few contemporary evidentiary doctrines under which the admissibility of evidence turns on the identity of the proponent of the evidence.²⁵⁷ Such evidentiary doctrines are the rare exception rather than the general rule. In most cases, whatever the identity of the proponent of the evidence, the foundational requirements for admitting the evidence and the possible objections to admission remain the same. It is true that under the equal protection clause, courts sometimes invalidate facially neutral laws that have a disparate impact on a particular class of persons.²⁵⁸ Courts ordinarily do so, however, only when the disparate impact compels a finding of discriminatory intent²⁵⁹ and it would be difficult for a defendant to prove that an evidentiary rule was inspired by such an intent. Courts will probably hold that the run-of-the-mill evidentiary doctrine is invulnerable to equal protection analysis because no classification of persons exists to trigger the equal protection guarantee.

In a sense, it is only fitting that the application of the equal protection guarantee to evidentiary doctrine be so limited. Even

256. See *supra* text accompanying notes 81-113.

257. Privilege law may be another area vulnerable to equal protection attack. By cloaking some relationships with protection while withholding it from others, privilege law arguably makes classifications of persons. See *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985) (failing to recognize privilege of parents while recognizing marital privilege does not deny equal protection); *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (failing to recognize absolute psychotherapist-patient privilege while recognizing absolute clergyman-penitent privilege does not deny equal protection).

258. See *Blattner*, *supra* note 92, at 786 (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976)).

259. *Id.* See also *United States v. Lulac*, 793 F.2d 636, 646 (5th Cir. 1986) (fourteenth amendment violated only if state purposefully discriminates against minorities by requiring college students to pass skills test before scheduling more than six hours of professional education courses at any state college or university); *Berry v. Phelps*, 639 F. Supp. 1515, 1517 (E.D. La. 1986) (petitioner, a convicted murderer scheduled for execution, unable to get habeas corpus relief unless able to "show strong evidence of discriminatory intent;" proof of disparate impact not sufficient); *Government of Virgin Islands v. Kramer*, 636 F. Supp. 458 (D.V.I. 1986) (fourteenth amendment not violated absent proof that selective enforcement of law that monitors admission to pretrial intervention program was deliberately based on an unjustifiable standard, such as race or religion).

if so limited, the guarantee still can be used to strike down the evidentiary classifications that are the most antithetical to the adversary system. A leading apologia for the adversary litigation system is the 1958 *Report of the Joint Conference* of the American Bar Association and Association of Law Schools.²⁶⁰ That report underscores that a key tenet of the adversary system is that both litigants must stand on equal footing before the judge. If the adversaries realize that they stand on equal footing, all sides have the same incentive to collect evidence before trial and to attempt to introduce the evidence at trial.²⁶¹ Equalizing the incentive level for all the litigants ideally results in the fullest factual record at trial and the most thorough airing of the issues in the case. Professor Younger captured an essential characteristic of the adversary system when he stated that at trial, "the rules of the game [should] be the same for both."²⁶² The equal protection doctrine can be a powerful weapon against evidentiary doctrines that, like the *Santos* rule, introduce asymmetries into the adversary system.

At this point, some might question the description of the equal protection doctrine as a "powerful" tool. In principle, the doctrine is not necessarily a potent theory for winning the admission of evidence such as statements by government agents. Once the court finds a violation of equal protection, the government can remedy the violation by either granting the benefit to all similarly situated persons or by denying it to all.²⁶³ Translated into this setting, the government may remedy the equal protection violation by admitting the government agents' statements or by banning both those statements and those by co-conspirators. Thus, it is theoretically possible that the ultimate effect of overturning *Santos* will be the exclusion of both types of evidence—arguably to the detriment of reliable fact-finding in criminal trials.

This scenario overlooks the realities of the criminal justice

260. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). The late Lon Fuller was one of the report's principal drafters.

261. See generally Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972) (presenting findings of an experiment designed to compare the different modes of presenting evidence between the adversary and inquisitorial systems).

262. Younger, *supra* note 17, at 108.

263. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) ("Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.") (Jackson, J., concurring); M. FORKOSCH, *supra* note 80, § 464, at 550.

system. In general, the government has much greater investigative resources than the defense.²⁶⁴ The prosecution is much more likely to possess evidence of an inculpatory statement by a co-conspirator than the defense is to have proof of an exculpatory statement by a government agent. Furthermore, prosecutors have long regarded the co-conspirator hearsay exception as a sheer necessity.²⁶⁵ As long as the government enjoys a marked superiority in investigative resources and views the co-conspirator exception as an essential prosecution weapon, the only feasible cure for the unconstitutionality of the classification will be admitting the relevant evidence on both sides. In practice and in theory, the equal protection doctrine thus can be a valuable tool for those who strive for greater coherence and consistency in American evidence law.²⁶⁶

264. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

265. See Levie, *supra* note 49, at 1164, 1166; Oakley, *supra* note 30, at 45; Note, *supra* note 35, at 1309; Note, *supra* note 33, at 1310.

266. One last question about the impact of the equal protection doctrine may be nagging the reader: What impact can the doctrine have on evidentiary rules beyond the effect of the implied sixth amendment right to present evidence? At first, it might seem that it will never be necessary to resort to the doctrine because any rule violative of equal protection would necessarily run afoul of the implied sixth amendment right. The equal protection analysis will differ from the sixth amendment analysis in one respect, however, and may differ from it in a second respect.

First, the equal protection guarantee may be applicable even when the defense evidence in question is not critical to the defense theory. The language in *Chambers* suggests that the sixth amendment right is operative only when the defense evidence is pivotal or crucial to the defense case. *Chambers v. Mississippi*, 410 U.S. 284 (1973); Churchwell, *supra* note 186, at 139-41; Imwinkelried, *Constitutional and Statutory Theories for the Admissibility of Defense Evidence*, in SEVENTEENTH ANNUAL DEFENDING CRIMINAL CASES: A PRACTICAL LOOK AT CURRENT DEVELOPMENTS IN CRIMINAL LAW 419, 435-36 (1979). The Court may indeed limit strict equal protection scrutiny to cases in which the defense evidence is critical. Yet the Court can apply intermediate tier scrutiny if it finds the classification impinges on an "important" defense right. Criticality is a step beyond mere importance; if the Court is using both terms in the normal sense, evidence is critical when it is "specially important." WEBSTER'S NEW COLLEGIATE DICTIONARY 267 (1979). As equal protection analysis evolves, the Court may find that the defense has a sufficiently important interest in presenting any reliable, exculpatory evidence. The equal protection guarantee would thus have a broader scope than the sixth amendment protection.

Second, in the cases in which both guarantees come into play, the equal protection test is stricter and more predictable. Under the implied sixth amendment right, when defense evidence is demonstrably reliable and critical to the defense theory, the defense is *prima facie* entitled to introduce the evidence. Imwinkelried, *supra*, at 419, 435-36. Under the case law, however, the sixth amendment analysis contains an additional step.

[T]he judge must apply a balancing test, weighing the defendant's interest in a fair trial against the specific policy served by the competence rule. Although *Davis* indicates that the judge should attach great weight to the defendant's interest, it is by no means a foregone conclusion that every competence rule . . . must yield to the right to present defense evidence.

Id. at 437. The degree of uncertainty is substantial because the judge is balancing intangibles.

The judge may have less latitude under an equal protection analysis. If the judge applies middle tier scrutiny, the judge inquires only whether the end served by the classification is important and whether the classification is substantially related to the end. If the judge concludes that the classification fails either prong of the test, the judge must strike down the classification. Thus, if the judge concludes that the end-means relationship is tenuous, the classification falls; the judge may not uphold the classification on the theory that, on balance, the end is so important that it outweighs the defense interest in presenting the evidence.