SILENCE AND NONTESTIMONIAL EVIDENCE

Caleb Lin*

ABSTRACT

The Fifth Amendment's Self-Incrimination Clause prohibits the government from compelling any person to be a "witness" against herself. Historically, the scope of that prohibition encompassed the compelled production of any evidence—including documents—from suspects. The Supreme Court, however, has winnowed the prohibition to oral communications only. This Article argues that the current doctrine is neither logically nor historically credible and calls for the reinstatement of silence as a core right in criminal procedure.

> In the corrupted currents of this world
> Offence's gilded hand may shove by justice,
> And oft 'tis seen the wicked prize itself
> Buys out the law: but 'tis not so above;
> There is no shuffling, there the action lies
> In his true nature; and we ourselves compell'd
> Even to the teeth and forehead of our faults,
> To give in evidence.
>
> –Claudius, King of Denmark[1]

* J.D. 2015, New York University School of Law; member, New York, Colorado, and California bars. The Author practices indigent criminal defense in California. He is grateful to Tiffany Lin, J.D. 2016, New York University School of Law; and the Honorable Ronald L. Gilman of the U.S. Court of Appeals for the Sixth Circuit for their thoughts and comments.

1. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 3, l. 57–64.

INTRODUCTION

No person, the Fifth Amendment promises, "shall be compelled in any criminal case to be a witness against himself."[2] What it means "to be a witness" against oneself has been largely settled in American law since at least 1910, when Justice Oliver Wendell Holmes wrote in *United States v. Holt* that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him. . . ."[3] From *Holt*, the general principle has been derived that the compulsion of physical, noncommunicative evidence from a defendant—such as a demonstration of the fitting of an article of clothing,[4] a handwriting exemplar,[5] a blood sample,[6] or even documents[7]—does not trigger the protections of the Self-Incrimination Clause because compelling a defendant to produce such evidence does not compel the defendant to be a "witness."

This principle, however, is neither historically nor logically sound. In fact, when Justice Thurgood Marshall complained in 1973 that he could not "accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect,"[8] he was simply reiterating a position with a historical pedigree stretching back to the Framers' earliest discussion of the language of the Fifth Amendment[9] and to even older caselaw from England concerning the production of documents.[10] The Self-Incrimination Clause bars the admission of compelled *evidence*, testimonial or otherwise. At the time the Fifth Amendment was ratified, there was no semantic difference between "being a witness" and "giving evidence,"[11] and no such difference existed before that time either.

---

2. U.S. CONST. amend. V, cl. 3.

3. Holt v. United States, 218 U.S. 245, 252–53 (1910) (emphasis added). In that case, a question arose at trial "as to whether a blouse belonged to" the defendant, and a "witness testified that the prisoner put it on and it fitted him." *Id.* at 252. The defendant claimed that he had been forced to put the blouse on, and that the fact that the blouse fit him should be suppressed. *Id.*

4. *Id.* (describing the defendant's Fifth Amendment argument as an "extravagant extension").

5. *E.g.*, United States v. Euge, 444 U.S. 707, 716–18 (1960).

6. Schmerber v. California, 384 U.S. 757, 765 (1966).

7. Fisher v. United States, 425 U.S. 391, 414 (1976).

8. United States v. Mara, 410 U.S. 19, 33 (1973) (Marshall, J., dissenting).

9. James Madison's language was discussed only in terms of prohibiting the compulsion of only "evidence against himself" in the Committee of the Whole. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 424 (1968) (quoting 1 ANNALS OF CONG. 753 (1789) (Gales & Seaton ed. 1834)); *infra* Section II.C.

10. *See, e.g.*, R v. Purnell (1748) 96 Eng. Rep. 20 (KB) [45] (denying a motion that would require document production because "[g]ranting such a rule would be to make a man produce evidence against himself, in a criminal prosecution").

11. *See* Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 47 N.Y.U. L. REV. 1575, 1608–09 (1999) (discussing language sources contemporaneous with the adoption of the Constitution that strongly suggest that being a "witness" and "giving evidence" were fundamentally indistinguishable). The Author owes a debt of gratitude to the late Professor Nagareda for his work in *Compulsion*, but this Article departs from his work in its proposal to expand Fifth Amendment protections to *all* forms of physical evidence and in its analysis of additional historical sources.

The epigraph to the instant Article illustrates the point. King Claudius, *Hamlet*'s selfish and tortured antagonist, killed his brother and married his sister-in-law, much to the chagrin of Shakespeare's eponymous hero. Claudius has the good sense, though, to recognize that his "offense is rank, it smells to heaven."[12] Contemplating his eventual punishment in the afterlife, he hypothesizes that the rules of evidence in heaven are probably different than those on earth: there, unlike here, a defendant may be compelled, "even to the teeth and forehead" of his faults, "[t]o give in *evidence*."[13]

Shakespeare composed *Hamlet* around 1600.[14] By then, the notion that earthly courts (at least in England) could compel defendants to "give in evidence" was largely rejected, and it would not be long before the right against self-incrimination would become a cornerstone of English law.[15] And indeed, until the Supreme Court took a wrong turn in the early twentieth century, the law was also quite clear in the courts of the United States—namely that that rule against self-incrimination prohibited the compelled production of all evidence, not just witness testimony.[16]

Under current law, however, the Self-Incrimination Clause is understood in a far more limited manner. It applies almost exclusively to oral communications compelled in court or by law enforcement while an accused is in custody.[17] This limited understanding has created what appears to be a nearly impenetrable membrane around the Self-Incrimination Clause, permitting a very limited range of evidence—nearly all of which is testimonial—into its protections.[18]

Only one category of evidence that appears at first glance to be nontestimonial has been able to permeate this membrane. For although the current misconstruction of the Fifth Amendment does not prevent documents from being subpoenaed from a criminal defendant, inferences can be drawn from the defendant's compliance with the subpoena—facts attendant to the "act of producing" a document.[19] A

---

12. SHAKESPEARE, *supra* note 1, at l. 36.

13. *Id*. at l. 63–64 (emphasis added).

14. Stephen Greenblatt, *Hamlet*, *in* THE NORTON SHAKESPEARE 1659 (Stephen Greenblatt et al. eds., 1997).

15. LEVY, *supra* note 9, at 325–30. *But see* John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION 82–100 (R.H. Helmholz et al. eds., 1997) (presenting an alternate timeline for the rise of the right against self-incrimination that begins in the late 1700s).

16. *See infra* Part II.

17. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that if procedural safeguards are not in place when police interrogate custodial suspects, the prosecution may not use statements by those suspects); Griffin v. California, 380 U.S. 609, 613–14 (1965) (holding that adverse inferences cannot be drawn from a defendant's refusal to speak at trial); *see also* Caleb J. Fountain, *Silence and Remorselessness*, 81 ALB. L. REV. 267, 282–83 (2017) (discussing the historical basis for the conclusion that, because the Self-Incrimination Clause prohibits compelled testimony in court, it also prohibits prosecutorial comment on a defendant's refusal to testify voluntarily).

18. Even the types of evidence that are allowed Fifth Amendment protections (viz. "testimonial" evidence) have eroded since the high-water mark of the Warren Court. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 382 (2015) (requiring an accused to explicitly invoke the right against self-incrimination before being granted the protection of *Miranda*).

19. Fisher v. United States, 425 U.S. 391, 410–11 (1976) (describing the act-of-production doctrine); United States v. Hubbell, 530 U.S. 27, 36 (2000) (reaffirming the act-of-production doctrine).

thorough exploration of this rule exposes its logical flaws and leads to the inexorable conclusion that all evidence compelled from the defendant must necessarily fall within the ambit of the Self-Incrimination Clause. By focusing on documents and the act-of-production doctrine, this Article seeks to draw broader conclusions, with implications for all forms of evidence that a criminal defendant may be compelled to produce.

The Article proceeds in three Parts. Part I recounts the history of the act-of-production doctrine in Supreme Court jurisprudence, which begins with *Boyd*, takes a wrong turn with *Fisher*, and concludes with *Hubbell*.[20] That Part will seek to point out the logical flaws of the current doctrine.

Part II addresses the pre-history of the act-of-production doctrine. It focuses on the rules at common law, their interrelationship with rules at equity, and the shift that occurred in the U.S. and English law books around the turn of the nineteenth century, which moved criminal discovery from courts of equity to the common law.[21] Before the enactment of these legal changes, a prosecuting attorney could not subpoena documents from a defendant without resorting to the courts of chancery, which would have protected the defendant's right against self-incrimination even as to physical evidence.[22] Upon the introduction of new rules in 1789 in the United States and 1851 in England, production of such evidence became available at common law, but with the proviso that such production must be limited to production authorized at equity.[23] The Article's historical conclusions will be buttressed by contemporary caselaw on the issue, including historical material that has yet to be cited in the existing literature on the subject.

Part III proposes a simpler, more workable framework than that promulgated by *Fisher* and the cases that followed it. Instead of drawing a distinction between the contents of physical evidence and the act of producing it, the law ought categorically to prohibit the compelled production of such evidence. The Part concludes with a brief discussion of the implications that such a rule would have for modern criminal investigations and for the admissibility of certain categories of physical evidence other than documents.

I. HISTORY & DEVELOPMENT OF THE ACT-OF-PRODUCTION DOCTRINE

A defendant's production of documents pursuant to a government subpoena is an ideal place to begin analyzing the Self-Incrimination Clause's fraught

20. *See* Boyd v. United States, 116 U.S. 616 (1886); *Fisher*, 425 U.S. 391; *Hubbell*, 530 U.S. 27.

21. Part II refers to the Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, in the United States and the Evidence Act of 1851, 14 & 15 Vict. c. 99, § 3 (Eng.), in England. These are the two laws to which Justice Bradley refers in *Boyd* and both serve as the critical historical turning points in the law of self-incrimination. The Author has had occasion to reflect on the changes ushered into the law of self-incriminatory evidence by these and other acts in Fountain, *supra* note 17, at 275.

22. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *382 (1765) (describing the requirement that only a "court of equity" could deal with such discovery issues). See *infra* notes 120–26 and accompanying text for a discussion on why equity courts would have protected a defendant's self-incrimination right.

23. *See Boyd*, 116 U.S. at 631 (quoting the Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, at length and noting that a similar English law existed at the time).

relationship with the production of physical evidence. Production of that form of evidence uniquely tests the boundaries of what is considered "communication"—one could surely argue that documents the defendant has written are as communicative as the words she might say under oath in court. Such production also invokes rich constitutional debates stretching back to the controversial decision in *United States v. Boyd*.

A. Boyd v. United States

As background, the Bill of Rights contains a range of rules that erect a barrier between the state and the individual, one of the purposes of which is to ensure that the prosecution and punishment of criminal conduct is respectful of individual autonomy.[24] Two of these rules are of particular interest to the present inquiry: the Warrant Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth. The Warrant Clause provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."[25] The Self-Incrimination Clause provides, of course, that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself. . . ."[26]

Put simply, the Warrant Clause sets a limit on what the state can affirmatively do *on its own* while investigating a crime.[27] In order to conduct a search or seizure against the will, or without the knowledge, of one of its subjects, the state, as a general rule, must first secure a warrant.[28] And to secure a warrant, the state must get sufficiently reliable evidence on its own,[29] present that evidence to a judicial magistrate,[30] and then execute the warrant on an unsuspecting suspect—a dangerous business, during which police authority to search is limited to what the warrant authorizes.[31] Law enforcement officials must, in short, build a case *before* investigating. This is no small task, particularly where, as is sometimes the case, the criminal conduct at issue is preserved in a "paper trail" rather than through eyewitnesses, forensic evidence, or video surveillance.

---

24. This is, of course, one of several reasons why these rules exist. *See, e.g.*, Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 316–33 (1991) (discussing the many differing rationales for the Self-Incrimination Clause); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 57–60 (1957) (arguing that "the real significance of the Bill of Rights is to be found . . . in the treatment that an unpopular victim can count on receiving in court").

25. U.S. CONST. amend. IV, cl. 2.

26. U.S. CONST. amend. V, cl. 3.

27. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–400 (1995) (describing the historical antecedents to the Fourth Amendment as being derived from cases concerning a state-claimed discretionary power to search its subjects against their consent).

28. *E.g.*, United States v. Karo, 468 U.S. 705, 717 (1984) ("Warrantless searches are presumptively unreasonable. . . .").

29. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983) (requiring a "totality-of-the-circumstances approach" to determine whether the probable cause necessary for a warrant to issue has been met).

30. *See* Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).

31. *See, e.g.*, Maryland v. Garrison, 480 U.S. 79, 84–85 (1987) (noting that the Fourth Amendment limits "the authorization to search to the specific areas and things for which there is probable cause to search").

Rather than go through all that work, it might be easier simply to serve subpoenas on criminal suspects,[32] thereby compelling them to produce incriminatory physical evidence on their own accord[33] or, even better, to produce self-incriminatory statements establishing their culpability.[34] Serving a subpoena need not involve presentation of evidence before a magistrate, nor does it require the police to conduct a costly and risky search of an unpleasantly surprised suspect's property.[35] In fact, the compulsion of verbal evidence from suspects, even by torture, has a lurid and extensive history in Western jurisprudence, including in England.[36]

However, the Self-Incrimination Clause sets a limit on what suspects can be compelled to do affirmatively for the state during its investigation.[37] A person cannot be made to "be a witness" against himself in a "criminal case."[38] The most obvious implication of these words is that a person cannot be compelled literally to

32. Criminal investigation by subpoena, of course, carries the obvious and overwhelming disadvantage for prosecutors of giving criminal suspects the opportunity to destroy the evidence that is the subject of the subpoena, thus subverting the investigation altogether. *See, e.g.*, United States v. McKnight, 799 F.2d 443 (8th Cir. 1986) (upholding conviction for obstruction of justice where white-collar defendant destroyed documents subject to a subpoena). Even the execution of search warrants cannot neutralize the threat of evidence destruction, and exceptions to the "knock-and-announce rule" have been developed to attempt to solve that issue. *See* Hudson v. Michigan, 547 U.S. 586, 589 (2006) (noting that police officers executing a warrant need not knock and announce their presence where there is "reason to believe that evidence would likely be destroyed if advance notice were given" (citation omitted)).

33. Nagareda, *supra* note 11, at 1584 ("Criminal investigations would be a great deal easier if the government simply could make persons suspected of crime turn over documents that indicate their guilt.").

34. In fact, the Court of High Commission in sixteenth-century England followed this process. *See* RICHARD COSIN, AN APOLOGIE FOR SUNDRIE PROCEEDINGS BY JURISDICTION ECCLESIASTICALL 49–51 (1593) (describing how parties were required to take an oath and answer "Articles or Interrogatories truly").

35. Courts as early as 1819 recognized the danger of unannounced searches authorized by warrant. Launock v. Brown (1819) 106 Eng. Rep. 482 (KB) [483] ("[I]f no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."). *See also* Mark Josephson, *Supreme Court Review: Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a House?,* Wilson v. Arkansas*, 115 S. Ct. 1914 (1995)*, 86 J. CRIM. L. & CRIMINOLOGY 1229, 1233–39 (1996) (discussing the knock-and-announce rule and its background).

36. *See* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 80–128 (2d ed. 2006) (compiling extensive primary sources establishing the use of "torture warrants" between 1540 and 1640 in England).

37. Much of the caselaw and literature on the Self-Incrimination Clause revolves around the question of what it means to be "compelled." For example, the seminal cases on the subject, *Miranda* and *Griffin*, explore whether or not out-of-court interactions with the police can be considered "compulsion," or whether a prosecutor's comment on silence during closing argument can constitute a compulsion to testify in court. *See* Miranda v. Arizona, 384 U.S. 436, 462 (1966) ("But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." (quoting Wan v. United States, 266 U.S. 1, 14–15 (1924)); Fountain, *supra* note 17, at 272–83 (discussing *Griffin v. California*, 380 U.S. 609 (1965), and the compulsion caused by prosecutorial comment on silence). The instant Article does not focus on compulsion itself—the question, rather, is what types of evidence can and cannot be compelled to begin with.

38. U.S. CONST. amend. V, cl. 3; United States v. White, 322 U.S. 694, 701 (1944) (noting that the Self-Incrimination Clause has the "historic function of protecting . . . the natural individual from compulsory incrimination through his own testimony or personal records").

testify by subpoena *ad testificandum*[39]—that is, a person cannot be forced to verbally testify on the witness stand—about her own criminal conduct, and this remains true today.[40] But if a person is compelled to produce *non*-testimonial evidence by a subpoena *duces tecum*,[41] is the proper objection under the Fifth Amendment, because she has been compelled to be a witness against herself? Or is the proper objection under the Fourth Amendment, because she has been compelled to search herself without a warrant?

Here, the Supreme Court wrote in 1886, the "Fourth and Fifth Amendments run almost into each other."[42] And like constitutional tectonic plates creating a convergent boundary in the law, a mountain of doctrine has built up, replete with narrow paths, switchbacks, and dead ends. To address fully the question posed by this Article, we must begin, as Dante did,[43] at the base of this mountain: the peculiar decision of *Boyd v. United States*.[44]

In 1884, the U.S. Attorney for the Southern District of New York charged E.A. Boyd & Sons with importing thirty-five cases of plate glass from Liverpool, England, into the ports of New York and evading requisite duties by producing a fraudulent invoice.[45] The statute criminalizing such fraud sought to avoid the costs and risks of relying on Fourth Amendment procedure by authorizing the court—in proceedings requiring the forfeiture of goods following successful criminal prosecutions[46]—to "issue a notice to the defendant or claimant to produce such book, invoice, or paper in court" as the government deemed incriminating.[47] After a jury convicted E.A. Boyd & Sons of violating the statute, the government obtained an order compelling the company to produce an invoice that the government believed was fraudulent.[48] The company complied but preserved its objection on the grounds that such compulsion violated the Fourth and Fifth Amendments.[49]

---

39. *Subpoena*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a subpoena *ad testificandum* as a "subpoena ordering a witness to appear and give testimony").

40. U.S. CONST. amend. V, cl. 3.

41. *Subpoena*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a subpoena *duces tecum* as a "subpoena ordering the witness to appear in court and to bring specified documents, records, or things").

42. Boyd v. United States, 116 U.S. 616, 630 (1886).

43. *See* DANTE ALIGHIERI, INFERNO, Canto I, l. 13.

44. *Boyd* has been written about extensively. For a survey of *Boyd* and some of the scholarly literature that has sprung up around it, see Stanton D. Krauss, *The Life and Times of* Boyd v. United States *(1886–1976)*, 76 MICH. L. REV. 184 (1977). The late Professor Nagareda, in his seminal work on this subject, notes that *United States v. Reyburn* suggests an even earlier iteration of the conflation of the Fourth Amendment with the Fifth in Supreme Court jurisprudence. *See* Nagareda, *supra* note 11, at 1584–85. The Court's discussion in *Reyburn* concerning the production of incriminatory documents was hypothetical, so the focus of this Article will remain on the more impactful decision in *Boyd*. *See* United States v. Reyburn, 31 U.S. 352, 367 (1832) (noting that the defendant was outside "the reach of a subpoena").

45. *Boyd*, 116 U.S. at 617–18.

46. The Court deemed such a forfeiture proceeding to consist of a "criminal case" within the meaning of the Fifth Amendment. *Id.* at 634 ("[S]uits for penalties and forfeitures . . . are within the reason of criminal proceedings for . . . that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.").

47. *Id.* at 620 (citing Act of June 22, 1874, § 5, 18 Stat. 187).

The Supreme Court reversed the judgment.[50] In doing so, the Court expressly held, in sweeping language, that production of papers should not be treated differently than production of verbal testimony. The opinion stated:

> And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.[51]

Compulsory production of documentary evidence, by the Court's estimation, was fundamentally the same as compulsory testimony.[52] And it is here that *Boyd* committed the error that led the doctrine astray for generations to come: "a compulsory production of the private books and papers of the owner of goods" in a criminal case, wrote the Court, "is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."[53]

Since 1886, these analytical gymnastics have never been reproduced. Justice Samuel Miller, concurring in *Boyd*, made the first critical pass at the majority's reasoning, noting that, because the statute in question "require[d] a party to produce certain papers as evidence on the trial," it did not authorize a *search*[54]:

> If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made.[55]

Clearly, serving someone with a subpoena is not a search. Even so, Justice Miller agreed with the Court's ruling: the compelled production of documentary evidence runs afoul of the Self-Incrimination Clause, and any statute authorizing such compulsion is unconstitutional.[56]

Justice Miller, along with the majority, failed almost completely to substantiate their Fifth Amendment reasoning.[57] This failure to articulate their rationale is what has led the modern doctrine far from the Self-Incrimination Clause's historical

48. *Id.* at 618–20.
49. *Id.* at 618.
50. *Id.* at 638.
51. *Id.* at 631–32.
52. *Id.* at 633 ("[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.").
53. *Id.* at 634–35.
54. *Id.* at 639 (Miller, J., concurring).
55. *Id.* at 641.
56. *Id.* at 639.

basis, has created the illogical "act-of-production doctrine," and has permitted the unconstitutional admission of other physical evidence.

B. Fisher v. United States *and* United States v. Hubbell

As this Article has observed, by the early twentieth century the Supreme Court already robbed *Boyd* of some of its possible significance, finding in 1910 that the Self-Incrimination Clause's protections applied solely to "communications" and did not extend to physical evidence.[58] But as recently as 1974, the Supreme Court reaffirmed that, at least as applied to documents, *Boyd*'s basic Fifth Amendment rationale remained intact: "the . . . privilege against compulsory self-incrimination," the Court wrote, "protects an individual from compelled production of his personal papers and effects. . . ."[59] But in 1976, in *Fisher v. United States*, the Supreme Court would revisit the application of the Self-Incrimination Clause to documents and finally put *Boyd* to rest by overruling it altogether.[60]

The Fifth Amendment question posed in *Fisher* appeared rather narrow. The Internal Revenue Service ("IRS") commenced an investigation into, among other individuals, Dr. E.J. Mason for alleged violations of federal income-tax laws.[61] Dr. Mason retained Solomon Fisher to represent him in connection with the investigation, and Mason gave Fisher accounting records.[62] The IRS served Mr. Fisher with a subpoena to produce those records, and Mr. Fisher objected on the grounds that doing so would violate, among other things, the attorney-client privilege and the Self-Incrimination Clause of the Fifth Amendment.[63]

The Court first addressed whether the compulsion of a suspect's attorney implicated the suspect's self-incrimination rights.[64] The answer, already supplied by the recently decided case *Couch v. United States*,[65] was clearly no: "enforcement

57. *See id*. (stating only that the Act in question "compel[s] the party on whom the order of the court is served to be a witness against himself"). The closest the majority came is to refer to the Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, and its reference to "the ordinary rules of proceeding in chancery." *Id*. at 631 (quotations omitted). The Court appeared to take for granted that existing rules would have readily brought documentary evidence within the ambit of the Fifth Amendment, without elaborating much further.

58. Holt v. United States, 218 U.S. 245, 252–53 (1910). Other cases between *Boyd* and *Fisher* departed from *Boyd* with respect to other forms of physical evidence. *See* Gilbert v. California, 388 U.S. 263, 265–66 (1967) (handwriting exemplars); United States v. Wade, 388 U.S. 218, 222–23 (1967) (voice exemplars); Schmerber v. California, 384 U.S. 757, 763–66 (1966) (blood samples).

59. Bellis v. United States, 417 U.S. 85, 87 (1974); *see also* United States v. White, 322 U.S. 694, 698 (1944) ("[T]he constitutional privilege of self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.").

60. 425 U.S. 391, 408–09 (1976). Parts of *Fisher* eulogize *Boyd*, recognizing that intervening caselaw had "washed away" its foundations. *Id*. at 409.

61. *Id*. at 393–94.

62. *Id*. at 394.

63. *Id*. at 394–95.

64. *Id*. at 397.

65. 409 U.S. 322, 329 (1973) (holding that no Fifth Amendment violation occurred where the government subpoenaed records from a suspect's accountant).

against a taxpayer's lawyer would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself."[66]

Resolving this narrow issue could not end the matter, however, because the documents in question—although not protected by the Fifth Amendment when in the hands of the suspect's attorney—were nonetheless protected by the attorney-client privilege.[67] This consequence invited the Court to consider whether the documents "could have been obtained by summons addressed to the taxpayer while the documents were in his possession."[68] Undoing a century of caselaw beginning with *Boyd* and hundreds of years of legal tradition preceding that, the Court held that the government *could* obtain such documents from the taxpayer, and by extension, from his attorney, with a mere subpoena.[69]

The Court explained that *Boyd* had lost its justification over time, having been eroded by *Holt* and a range of other cases that affirmed that the Self-Incrimination Clause was purportedly limited to "*testimonial* communication[s] that [are] incriminating."[70] Rather than refer to any historical material authorizing this departure from *Boyd*, the Court referred only to its own caselaw from the preceding ten years and the presence of the word "witness" in the Fifth Amendment.[71] The Court also consigned the many cases affirming *Boyd*'s basic Fifth Amendment rationale to the dustbin of dicta.[72]

After completely renouncing *Boyd* and removing all documents from the protections of the Fifth Amendment, the Court performed its strangest trick yet. Having limited the Self-Incrimination Clause's protections to "testimonial communications," the Court noted:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.[73]

These communicative statements—that the papers in question exist, are authentic, and are in the suspect's possession—are automatically made in response to a

66. *Fisher*, 425 U.S. at 397.
67. *Id.* at 405.
68. *Id.*
69. *Id.* at 409.
70. *Id.* at 408.
71. *Id.* at 406–11.
72. *Id.* at 408–09. Strangest of all, the Court falls back on *Bellis*, a decision that had, a mere two years before, strongly affirmed the Self-Incrimination Clause's application to documents. The Court cited *Bellis* to show that "under that case the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Id.* at 408 (citing Bellis v. United States, 417 U.S. 85 (1974)).
73. *Id.* at 410.

subpoena, and could, the Court conceded, theoretically fall within the ambit of the Self-Incrimination Clause's protections.[74] But, "[a]t this juncture, we are quite unprepared to hold," the Court concluded, "that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer."[75] The Court reached this conclusion despite the fact that existing caselaw, through the derivative-use doctrine, made abundantly clear that evidence is incriminating as long as it can "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[76] What link in a chain could be more significant than the very first link: that the documents do, in fact, belong to the suspect?

Professor Nagareda appropriately described the Court's decision in *Fisher* as "decoupling document content from the act of document production,"[77] and future-Justice Samuel Alito observed that the theory *Fisher* generated "is woefully out of touch with the realities of subpoena practice."[78] The result is a doctrine with no historical basis—*Fisher* cites no authority for its creation and waves away heaps of contrary caselaw. Moreover, the Court's holding rests on a thin logical foundation—for how one can meaningfully distinguish, for constitutional purposes, between the *act* of producing the document and the document itself when both are clearly the fruit of government compulsion?[79]

Years later, in *United States v. Hubbell*, the Court had the opportunity to revisit, and even dispose of, *Fisher* but declined to do so.[80] Webster Hubbell pleaded guilty in 1994 to charges of mail fraud and tax evasion in connection with the Independent Counsel's investigation of the Whitewater Development Corporation.[81] As part of his plea agreement, Mr. Hubbell agreed to cooperate with the Whitewater investigation,[82] and two years after his plea, the Independent Counsel served him with a subpoena *duces tecum* demanding the production of a range of documents to a federal

74. *See id*. at 410–11.

75. *Id*. at 412.

76. Hoffman v. United States, 341 U.S. 479, 486 (1951).

77. Nagareda, *supra* note 11, at 1592–94.

78. Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 46 (1986).

79. Professor Nagareda suggests that the Court's bizarre decision in *Fisher* is the result of the Court being "[m]isled by Justice Bradley's conflation of the Fourth and Fifth Amendments in *Boyd* . . . ." In *Fisher*, the Court "conceived of those provisions in terms of a false choice between two competing views—each of which, in its own way, would treat similarly government efforts obtain incriminatory documents by seizure and by subpoena." Nagareda, *supra* note 11, at 1602–03.

80. *See* United States v. Hubbell, 530 U.S. 27, 44 (2000).

81. *Id*. at 30. In 1995, the United States Senate voted to establish the Special Committee to Investigate Whitewater Development Corporation and Related Matters and appointed Kenneth Starr to serve as Independent Counsel; the purpose was to investigate President William Clinton and First Lady Hillary Clinton's investment in Whitewater, but ultimately spiraled into a wide-ranging investigation of a number of controversial events and characters in the Clinton administration and the Clintons' circle, including Mr. Hubbell. *See* S. REP. NO. 104-280, at 112, 138 (1996).

82. *Hubbell*, 530 U.S. at 30.

grand jury.[83] Mr. Hubbell refused to comply, relying on *Fisher* to refrain from stating "whether there are documents within [his] possession, custody, or control responsive to the Subpoena."[84] The Independent Counsel nonetheless obtained a court order for the documents and granted Mr. Hubbell immunity "to the extent allowed by law."[85] Mr. Hubbell thereafter turned over 13,120 pages of documents.[86]

As it turned out, the content of those documents provided the Independent Counsel with enough information to secure a new indictment against Mr. Hubbell alleging new charges of mail and wire fraud.[87] Hubbell moved to dismiss, claiming that the indictment relied, at least in part, upon information derived—either directly or otherwise—from the testimonial aspects of his immunized act of production.[88] After a trip up and down the Court of Appeals, the Supreme Court ultimately weighed in, concluding that the indictment must be dismissed.[89]

The Court did not, however, dismiss the indictment for the reason that would have been historically and logically obvious: that the Fifth Amendment bars the compelled production of physical evidence, including documents, from a suspect, and that the appropriate method for obtaining such information would be through a duly warranted search of the suspect's person or property under the Fourth Amendment. Instead, the Court affirmed its approach in *Fisher*, but concluded that, because the Independent Counsel had clearly made use of the testimonial aspect of Hubbell's production of the documents, the use of these documents violated the Self-Incrimination Clause.[90] "The documents did not magically appear in the prosecutor's office like 'manna from heaven,'"[91] the Court explained, noting that "[i]t was unquestionably necessary for [Hubbell] to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena."[92] In effect, the Fifth Amendment's protection of Mr. Hubbell's assertion—through the act of production—that the documents existed, were authentic, and were his was sufficient to prohibit the use of the documents' *contents*.[93]

---

83. *Id.* at 31.

84. *Id.* (quotations omitted).

85. *Id.* (quotations omitted). The Independent Counsel based its grant of immunity on 18 U.S.C. § 6002, the constitutionality of which was upheld in *Kastigar v. United States* on the ground that its use and derivative-use immunity was "coextensive with the scope of the constitutional privilege against self-incrimination." *Id.* at 38 (citing Kastigar v. United States, 406 U.S. 441 (1972)).

86. *Id.* at 31.

87. *Id.*

88. *Id.* at 31–32.

89. *Id.* at 32, 46.

90. *See id.* at 42–43.

91. *Id.* at 42 (citation omitted).

92. *Id.* at 43 (citing Curcio v. United States, 354 U.S. 118, 128 (1957)).

93. *See id.* To be more precise, what protected Mr. Hubbell was his grant of use and derivative-use immunity under 18 U.S.C. § 6002, which is, per *Kastigar*, coterminous with the protections of the Fifth Amendment. *See* Kastigar v. United States, 406 U.S. 441, 458 (1972).

The shallowness of the Court's reasoning is readily apparent. Suppose, as here, that a document incriminates someone, and that the incriminated person also possesses the document. For that document to have any relevance in a criminal case against that person, and for it to therefore be admissible, the prosecution must first establish that the document exists, that it is what it purports to be, and that the person possesses it.[94] By compelling the possessor of the document to produce it, the prosecution has cleared some of the evidentiary hurdles it would otherwise face in establishing the document's admissibility in court.[95] Of course, then, the "testimonial" aspect of subpoena compliance consists of a "link in the chain of evidence needed to prosecute" the defendant.[96] And the derivative-use doctrine precludes the admission of such evidence.[97] By applying the concept of derivative use to *Fisher*, which by 2000 was well established in Fifth Amendment doctrine,[98] the Court effectively created an exception that ought to swallow the rule if applied consistently.[99]

What we are left with is a Self-Incrimination Clause of unclear boundaries, supported by a doctrine that suffers from fundamental logical infirmities.[100] If the rule is as logically untenable as the preceding analysis suggests, one would expect it to at least rest upon firm historical foundations (as logically untenable rules sometimes do). Unfortunately, this was no more the case with *Hubbell* than it was with *Fisher*. In *Hubbell*, the Court availed itself of no more authority than the

94. *E.g.*, FED. R. EVID. 104(b) (establishing the standard by which a proponent of certain evidence can prove the facts that are necessary to make it relevant).

95. *E.g.*, *id.*; FED. R. EVID. 901 (describing authentication requirements in order for evidence to be admissible).

96. Hoffman v. United States, 341 U.S. 479, 486 (1951).

97. *See id.* at 488.

98. The law on this point was well established even at the time *Fisher* was decided. The *Hoffman* Court established the derivative-use doctrine in 1951, twenty-five years before *Fisher*. *Hoffman*, 341 U.S. at 486; *see also* Fisher v. United States, 425 U.S. 391, 391 (1976).

99. Some scholars have tried to understand *Hubbell* and *Fisher* by seizing on the observation that, in *Hubbell*, the prosecutors had no way of knowing that the documents existed, and therefore could not show that the "existence, possession, and authenticity [of the documents] are a foregone conclusion." Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After* United States v. Hubbell – *New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 166 (2002). There is no reason to suppose, however, that prosecutors in *Fisher* knew much more about the records in question than they did in *Hubbell*. *See Fisher*, 425 U.S. at 394. Indeed, if the prosecutors knew more than the "foregone conclusion" that the records existed, were authentic, and in the possession of the suspect, why would they not simply obtain a warrant and execute a search under the Fourth Amendment? *See* Mark A. Cowen, *The Act-of-Production Doctrine Privilege Post*-Hubbell*:* United States v. Ponds *and the Relevance of the "Reasonable Particularity" and "Foregone Conclusion" Doctrines*, 17 GEO. MASON L. REV. 863, 878 (2010) ("If the government is 100 percent certain that the documents they seek exist and are in the possession of the target of an investigation, or even within striking distance, then this will mostly likely rise to the level of probable cause necessary to obtain a search warrant.").

100. For selected cases trying to apply *Hubbell* in a manner consistent with *Fisher*, but reaching broader results than *Fisher* likely intended, see In re *Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1347 (11th Cir. 2012), where the court cited *Hubbell* in reversing a contempt finding by the district court where a defendant refused to produce a decrypted hard drive, and *United States v. Greenfield*, 831 F.3d 106, 115–17 (2d Cir. 2016), which relied on *Hubbell* to quash a subpoena for the production of self-incriminatory papers from a defendant.

derivative-use doctrine and *Fisher*, which, as Professor Nagareda aptly noted, itself was barely the result of "any analysis" whatsoever.[101]

Perhaps recognizing the unsustainability of the Court's continued adherence to the act-of-production doctrine, Justice Clarence Thomas penned a concurrence, in which Justice Antonin Scalia joined, offering a characteristically originalist third way.[102] "A substantial body of evidence," he wrote, "suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of *any* incriminating evidence."[103] Relying on several sources, principally consisting of dictionaries roughly contemporaneous with the adoption of the Constitution,[104] a handful of eighteenth century common-law cases,[105] and the state constitutions preceding the adoption of the federal Bill of Rights,[106] Justice Thomas invited "reconsideration" of *Fisher* and its progeny.[107] The time has come to accept that invitation.

II. COMPELLED PRODUCTION BEFORE THE FIFTH AMENDMENT

Surprisingly little scholarly work has been produced on what it means to be a "witness" for purposes of the Fifth Amendment,[108] and no work has been done on this front in the majority opinions of the Supreme Court since its ill-fated attempt in 1886.[109] The preceding Part demonstrated the significance of this hermeneutical question, for it is on the word "witness" that the Court has consistently hung its insistence, since roughly 1910, that the Fifth Amendment protects only "communications,"[110] and since 1976, that it protects only *oral* communications.[111] But this hook is weak and cannot support the weight of these conclusions. Being a witness, according to the law at the time of the adoption of the Bill of Rights, means *to produce evidence of any kind.*[112]

This Part focuses on the historical backdrop of the Fifth Amendment's "witness" language. It first addresses "background sources": dictionaries and treatises produced around the turn of the eighteenth century. It then reviews key eighteenth- and nineteenth-century cases that address the scope of the right against self-incrimination. Finally, it addresses the linguistic evolution that can be traced from

101. Nagareda, *supra* note 11, at 1602.
102. United States v. Hubbell, 530 U.S. 27, 49 (2000) (Thomas, J., concurring).
103. *Id.* (emphasis added).
104. *Id.* at 50.
105. *Id.* at 51.
106. *Id.* at 52.
107. *Id.* at 56.
108. The Author is aware of only one principal exception: Professor Nagareda's commendable work. *See* Nagareda, *supra* note 11 *passim*.
109. *See* Boyd v. United States, 116 U.S. 616, 630–35 (1886) (explaining under what circumstances an individual is compelled to act as a witness against himself).
110. Holt v. United States, 218 U.S. 245, 252–53 (1910).
111. Fisher v. United States, 425 U.S. 391, 409 (1976).
112. *See* Nagareda, *supra* note 11, at 1603.

pre-1792 state constitutions to the federal Bill of Rights and the Judiciary Act of 1792. This final step of the analysis brings us back to *Boyd*, precisely where our analysis began.[113]

A. Background Sources

When inquiring into the Framer's "intent" in drafting the Constitution in a particular way, the Supreme Court has long accepted that William Blackstone's *Commentaries*, first published in 1765, served as "the Framers' accepted authority on English law and the English Constitution."[114] This Article therefore begins a review of background sources by looking at the *Commentaries*. Although one will not find a clear definition of "witness" there, Blackstone does refer to witnesses as simply "parol evidence," or spoken evidence,[115] and considers the act of testifying as "giv[ing] evidence."[116] This apparent equation of "evidence" and "witness" is completely consistent with the legal consensus at the time of the Founding which was, as Justice Thomas wrote in his *Hubbell* concurrence, that "the term 'witness' meant a person who gives or furnishes evidence."[117] Legal dictionaries of the late eighteenth century defined "witness" as one who "gives evidence,"[118] and general-use dictionaries from as early as 1702 and as late as 1828 defined "witness" similarly.[119]

With this definition as a backdrop, Blackstone laments the absence of compulsory process at common law of papers from parties in cases where the jury fails to return a verdict "to the crown"—in criminal cases.[120] In general, the only way to obtain evidence from another party, Blackstone explains, is through courts of equity, and he evidently found this circuitous route, involving duplicative litigation

113. This Article varies from Professor Nagareda's exposition of this question for two reasons. First, although he provides excellent guidance on the early caselaw, this Article ultimately relies on more eighteenth- and nineteenth-century literary sources than he does. Second, this Article proceeds first from the legal zeitgeist of the adoption of the Bill of Rights, and then to the phraseology of the Bill of Rights, while Professor Nagareda proceeds in the opposite order. *See id.* at 1603–23.

114. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part); *see also* Collins v. Youngblood, 497 U.S. 37, 44 (1990) (noting that the Framers discussed Blackstone's *Commentaries* during the constitutional convention); Sessions v. Dimaya, 138 S. Ct. 1204, 1249 (2018) (Thomas, J., dissenting) (describing Blackstone as "one of the political philosophers whose writings on executive power were 'most familiar to the framers'" (quoting Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001))).

115. BLACKSTONE, *supra* note 22, at *369.

116. *Id.*

117. United States v. Hubbell, 530 U.S. 27, 50 (2000) (Thomas, J., concurring).

118. *E.g.*, 1 GILES JACOB, A NEW LAW-DICTIONARY (9th ed. 1772); 2 TIMOTHY CUNNINGHAM, NEW AND COMPLETE LAW-DICTIONARY (2d ed. 1771).

119. *See, e.g.*, JOHN KERSEY, A NEW ENGLISH DICTIONARY (1702); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

120. BLACKSTONE, *supra* note 22, at *382 ("If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals. The principal defects seem to be, . . . the want of a compulsive power for the production of books and papers belonging to the parties.").

in different jurisdictions, to be outrageously inefficient.[121] Witness testimony and evidence, Blackstone suggests, fall into the same category, and obtaining physical evidence in a criminal case poses challenges due to the absence of compulsory process at common law. But of what would those challenges consist in the court of equity? What does Blackstone have to complain about, if the Crown could simply get the defendant's papers from litigation at equity, even if doing so was inconvenient?

It is here that legal treatises are particularly useful. Key resources make clear that courts sitting in equity would historically *never* compel a litigant to produce evidence under subpoena that had a "tendency to render the defendant liable to punishment, penalty, or forfeiture."[122] If a bill in equity charged anything, "which if confessed by the answer, would subject the defendant to prosecution, or any penalty or punishment which may be enforced by judicial or competent authority . . . equity will not compel him to make the discovery."[123]

Other treatises produced in the early- to mid-nineteenth century agree with this assessment. "The situation of a defendant may render it improper for a court of equity to compel a discovery . . . because the discovery may subject the defendant to pains or penalties, or to some forfeiture, or something in the nature of a forfeiture."[124] Thus, in a criminal case at common law, if the Crown sought physical evidence from the counterparty, it would have to resort to courts of equity,[125] but once there, the Crown would find no recourse. The law of discovery in courts of equity flatly prohibited the compulsion by subpoena of evidence tending to incriminate the subject of the subpoena.[126]

B. Early Caselaw

The above-described dictionaries and treatises were, of course, based on actual court decisions resolving questions concerning the rights and obligations of actual litigants. It should not surprise the reader, then, that all the relevant caselaw strongly favors the conclusion that the right against self-incrimination prohibited the compelled production of all *evidence*, not just compelled oral testimony. Indeed, "[a]ll sources to address the point concur that the common law at the time of the Fifth Amendment barred the compelled production of self-incriminatory

121. *See id.*

122. CHARLES EDWARD POLLOCK, A TREATISE ON INSPECTION AND DISCOVERY 29 (1854).

123. *Id.* at 31–32. *Accord* JAMES WIGRAM, POINTS IN THE LAW OF DISCOVERY 81–82 (1841) (noting that if a request for discovery in a civil case "involves a criminal charge" the plaintiff is not entitled to an answer).

124. JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURTS OF CHANCERY BY ENGLISH BILL *253 (4th ed. 1833); *see also* WIGRAM, *supra* note 123, at 82.

125. BLACKSTONE, *supra* note 22, at *382.

126. *Id.*; POLLOCK, *supra* note 122, at 29; WIGRAM, *supra* note 123, at 82; MITFORD, *supra* note 124, at *253. Although the cited works do not use "subpoena," they all describe compulsory discovery.

documents."[127] One wonders how the Court could have strayed so far from this historically self-evident proposition.

As Justice Thomas and Professor Nagareda both observe, one of the significant common-law cases on the issue was a decision of the King's Bench in 1748.[128] Dr. John Purnell was Vice-Chancellor of the University of Oxford when two young students were caught speaking "treasonable words on the streets" of the city by a certain Mr. Blacow.[129] Dr. Purnell declined to depose Mr. Blacow concerning the offense and refused to punish the two students.[130] The Attorney General commenced a criminal action against Dr. Purnell, charging him with neglect of duty, and moved "for a rule directed to the proper officers of the university to permit their books, records and archives to be inspected, in order to furnish evidence against the vice chancellor."[131] The prosecution, quite sensibly, emphasized that the particular records they sought, were not private letters, but "public records"—the "statutes of the university."[132] The prosecution explained that its intent was solely to determine whether Dr. Purnell violated the University's regulations, and the regulations themselves were public record.[133]

Lord Chief Justice William Lee, ruling for the full King's Bench, found for Dr. Purnell. He held tersely that "such a rule would be to make a man produce evidence against himself, in a criminal prosecution."[134] The rule in *Purnell* is remarkably broad: the evidence in question, although certainly consisting of papers, were neither *personal* papers, nor *private* papers. They were papers that were available for anyone's inspection at the University,[135] and no claim was made that Dr. Purnell had even written them. Nevertheless, the King's Bench found that to trigger the rule against self-incrimination, it was sufficient that the government sought

---

127. Nagareda, *supra* note 11, at 1619 n.172 (citing, among others, Fisher v. United States, 425 U.S. 391, 418 n.4 (1976) (Brennan, J., concurring) ("Without a doubt, the common-law privilege against self-incrimination in England extended to protection against the production of incriminating personal papers prior to the adoption of the United States Constitution."), and Alito, Jr., *supra* note 78, at 35 ("[T]he common law privilege against compelled self-incrimination . . . , as interpreted at the time of the Bill of Rights, encompassed the compulsory production of papers.")).

128. Justice Thomas lists the case as "explicitly" recognizing that compelled production of incriminating documents falls within the protections of the Fifth Amendment. United States v. Hubbell, 530 U.S. 27, 51 (2000) (Thomas, J., concurring). Professor Nagareda notes that the case "provides the most extensive treatment" of self-incriminatory documents. Nagareda, *supra* note 11, at 1620.

129. R v. Purnell (1748) 96 Eng. Rep. 20 (KB) [20]. For this offense, the students were eventually punished "in an academical way" and sentenced, among other things, to two years' imprisonment and to "go round immediately to all the Courts in Westminster Hall, with a paper on their foreheads denoting their crime." R v. Whitmore (1748) 96 Eng. Rep. 20 (KB).

130. *Purnell*, 96 Eng. Rep. at [20].

131. *Id.*

132. *Id.* at [22].

133. *Id.*

134. *Id.* at [23]. The court would go on to observe that it was aware of "no instance, wherein this Court has granted a rule to inspect books in a criminal prosecution nakedly considered." *Id.*

135. *Id.* at [22].

to compel Dr. Purnell to furnish this evidence.[136] What animated the court's decision was simply that the state sought to *compel* a criminal defendant to *do* something that would help to secure his own conviction.[137]

The same rule was applied in *The Queen v. Mead*[138] and *The King v. Cornelius*,[139] in both of which the King's Bench squarely refused to grant government requests to compel documentary production by criminal defendants.[140] It appears that the only caselaw, prior to *Fisher* and its progeny, that comes even close to expressing a contrary position with respect to the production of physical evidence is *Ewing v. Osbaldiston*, where the King's Bench permitted the production of documents by civil subpoena because the defendant had already admitted in his answer to the complaint that he was liable.[141] Almost twenty years later, the Court of Chancery treated this rule, announced in a bare postcard of an opinion, with skepticism. The court reaffirmed that the right against self-incrimination with respect to papers and effects applies only to those papers and effects that would tend to subject a respondent to liability under the laws of England, but not when they would tend to incriminate under the laws of a foreign sovereign.[142]

In short, contemporaneous dictionaries and treatises affirm that the right against self-incrimination applied to the production of any *evidence*, and not merely to oral testimony. These sources, in turn, were based on a firm foundation of English caselaw that clearly established such a rule many years before the adoption of the Fifth Amendment. How, then, did we get to *Fisher*, an opinion so completely unmoored from the Self-Incrimination Clause's historical foundation?

C. Early State Constitutions

This Section now arrives at *Fisher* and its conclusion—based solely on the use of the word "witness"—that the Self-Incrimination Clause applies only to oral testimony.[143] The text of the Self-Incrimination Clause itself refers, not to "giving evidence," or similar language, but to a prohibition against compelling a person in a criminal case "to be a *witness* against himself."[144] Being a witness, the *Fisher* Court concluded in 1976, must refer exclusively to *oral testimony*.[145]

But as this Article observed in Section II.A, all the literature contemporaneous with the adoption of the Bill of Rights shows that "witness" and "evidence" were synonymous. And this is where the constitutional background becomes critical.

136. *Id.* at [23].
137. *Id.*
138. (1703) 92 Eng. Rep. 119 (KB).
139. (1743) 93 Eng. Rep. 1133 (KB).
140. For a more detailed discussion of *Mead* and *Cornelius*, see Nagareda, *supra* note 11, at 1621–23.
141. (1834) 58 Eng. Rep. 721 [722].
142. The King of Two Sicilies v. Willcox (1851) 61 Eng. Rep. 116 [128].
143. Fisher v. United States, 425 U.S. 391, 397, 409 (1976).
144. U.S. CONST. amend. V, cl. 3 (emphasis added).
145. *Fisher*, 425 U.S. at 409.

The year the colonies declared their independence from England, five of them—beginning with Virginia and followed by Pennsylvania, Delaware, Maryland, and North Carolina—adopted Bills of Rights.[146] Each of these Bills of Rights unequivocally affirmed that, in criminal prosecutions, one cannot "be compelled to give evidence against himself."[147] All referred to "evidence," and made no mention of "witnesses" in this context.[148] Massachusetts followed suit in 1780, and New Hampshire in 1783.[149] The text of these constitutional provisions clearly stated what we already know: the law of the land prohibited the compulsion, by the state, of a criminal defendant to produce *any* incriminating evidence, not just sworn, oral testimony.[150] The word "witness," as employed by the Fifth Amendment, was not used in a single provision.

Yet the final draft of the Federal Bill of Rights, prepared by James Madison in 1789, in response to much concern among the states that the federal constitution ought to contain a Self-Incrimination Clause, uses the word "witness" instead.[151] This language was adopted without debate or discussion by the select committee considering the Bill in Congress. Only John Laurence, Congressman from New York, commented. He "addressed himself to what he called the proposal that 'a person shall not be compelled to give evidence against himself.'"[152] Representative Laurence proposed changing a different portion of language of the clause—to limit its scope to "criminal cases"—and the resulting language passed without discussion.[153]

"[N]o state, either in its own constitution or in its recommended amendments, had a Self-Incrimination Clause phrased like that introduced by Madison. . . ."[154] And unfortunately, neither Madison's presentation of his Bill of Rights nor his papers or correspondence hint at why he switched "give evidence" with "be a witness."[155] The best we can guess is that, perhaps, Madison sought to make the

---

146. *See generally* THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe, ed. 1909) (compiling relevant state constitutions and Bills of Rights).

147. VA. CONST. of 1776, § 8; PA. CONST. of 1776, IX; DEL. CONST. of 1776, § 15; MD. CONST. of 1776, XX; N.C. CONST. of 1776, VII.

148. VA. CONST. of 1776, § 8; PA. CONST. of 1776, IX; DEL. CONST. of 1776, § 15; MD. CONST. of 1776, XX; N.C. CONST. of 1776, VII.

149. MASS. CONST. of 1780, art. XII ("No subject shall . . . be compelled to accuse, or furnish evidence against himself."); N.H. CONST. of 1783, art. XV (using Massachusetts's "furnish evidence" language).

150. See analysis, *supra* Sections II.A–B.

151. U.S. CONST. amend. V, cl. 3.

152. LEVY, *supra* note 9, at 424.

153. *Id.* at 424–25.

154. *Id.* at 423.

155. *Cf. id.* ("Madison said nothing whatever that explained his intentions concerning the self-incrimination clause."). Notably, Professor Levy does not remark on the difference at all, except to observe that "[w]e have only the language of [Madison's] proposal, and that revealed an intent to incorporate into the Constitution, the whole scope of the common-law right." *Id.* Professor Levy's chief concern in these pages is not with the difference between "evidence" and "witness" but with the fact that Madison's proposal contained no limitation to "criminal cases," which would have expanded the applicability of the right of self-incrimination substantially. *Id.*

language of the Fifth Amendment conform with the remainder of the Constitution, where the word "evidence" is absent, but the word "witness" is used repeatedly in exactly the same manner.

Professor Nagareda has much to offer on this point,[156] and so we start there. He begins by observing that the word "witness" first appears in the Treason Clause of Article III.[157] That clause requires that a conviction for treason must rest upon "the *Testimony* of two Witnesses to the same overt act, or on Confession in open court."[158] Professor Nagareda correctly observes that the Constitution here specifically qualifies "witnesses" with "testimony," thereby implying that "witness" potentially could mean something broader than oral testimony.[159] The sources discussed *supra* in Sections II.A and II.B confirm Professor Nagareda's theory, as do the laws from which the "two-witness rule" was derived: the Hebrew scriptures[160] and the Roman canon law of proof, both of which required the verbal testimony of two eyewitnesses to a crime for conviction (or, in the case of the Roman canon law, a confession).[161]

Article III's Treason Clause therefore shows that the Framers considered it necessary to qualify the term "witness" with "testimony" when they meant for "witness" to be limited to oral testimony. This outcome is also compelled by an examination of the Sixth Amendment's Compulsory Process and Confrontation clauses. The first of these provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[162] As Professor Nagareda has established through extensive historical research, Madison did the same to the Compulsory Process Clause as he had done to the Self-Incrimination Clause: he replaced the term "evidence," found in all the state constitutional versions of this right, with the term "witness."[163] But, of course, no legal tradition has concluded that the Compulsory Process Clause's specific reference solely to "witnesses" is intended to limit the defendant's right to the

---

at 423–24 ("Madison's proposal certainly applied to civil as well as criminal proceedings . . . [T]he clause could also apply to any testimony that fell short of making one vulnerable to criminal jeopardy or civil penalty . . . but nevertheless exposed him to . . . other injury to name and reputation."). Representative Laurence would cabin the scope of the Amendment to "criminal cases," leaving us with the complete language of the Self-Incrimination Clause we have today.

156. *See* Nagareda, *supra* note 11, at 1609–15.

157. U.S. CONST. art. III, § 3, cl. 1.

158. *Id.* (emphasis added).

159. Nagareda, *supra* note 11, at 1610.

160. *Deuteronomy* 19:15 (New Revised Standard Version) ("Only on the evidence of two or three witnesses shall a charge be sustained."). To observe the biblical two-witness rule applied, the reader may refer to Matthew's account of the trial of Jesus of Nazareth. *Matthew* 26:60–61 (New Revised Standard Version) ("At last two [witnesses] came forward and said, 'This fellow said, "I am able to destroy the temple of God and to build it in three days."'").

161. LANGBEIN, *supra* note 36, at 4.

162. U.S. CONST. amend. VI.

163. Nagareda, *supra* note 11 at 1610–11; *see also* Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1111 n.187 (1999).

presentation of oral communications. To the contrary, from as early as 1807, the federal courts have recognized that the Compulsory Process Clause surely refers to physical evidence as well.[164]

Similarly, the term "witness" appears in the Confrontation Clause, which provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."[165] Professor Nagareda, whose principal research on the issue was completed before the major decision in *Crawford v. Washington*,[166] expressed concern over this clause because it posed a challenge to our shared reading of the term "witness" in the Self-Incrimination Clause as meaning "evidence."[167] His concern was that resolving the then-raging controversy over the Confrontation Clause's applicability to out-of-court statements in the affirmative would lead to the conclusion that "witness," for Confrontation Clause purposes, referred to testimonial witnesses only.[168] If the Sixth Amendment's reference to "witnesses" applied to out-of-court statements, he feared, the Court would continue its crabbed reading of the term "witness" in the Fifth Amendment. His concerns, however, were misplaced.

The Supreme Court ultimately concluded that the Confrontation Clause applied to out-of-court statements that amounted to "testimonial statements" to law enforcement.[169] This would appear to suggest that, in fact, "witness," for constitutional purposes, means *testimonial* witness, just as Professor Nagareda feared.[170] But there is no need to fear *Crawford*'s result, because it squares with the central point of the preceding sections: there is ultimately no difference, for the purposes of the Fifth Amendment, between a subpoena *ad testificandum* and a subpoena *duces tecum*. Both call for witnesses, either to present evidence through oral testimony, or to bring in and authenticate physical evidence, accordingly.[171] If, for example, the government sought to admit laboratory results confirming that a certain object contained drugs, then those results would first have to be authenticated before they could be admitted.[172] The government would also be prohibited from admitting, for example, an alleged murder weapon—or cellphone-tower records,

---

164. United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) ("This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process . . . does not extend to their bringing with them such papers as may be material in the defence."), *cited with approval in* Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987).

165. U.S. CONST. amend. VI.

166. 541 U.S. 36 (2004).

167. Nagareda, *supra* note 11, at 1613 ("It would be a serious mistake, however, to pluck from the Confrontation Clause this revisionist interpretation of the word "witnesses" and to wield it . . . as a justification to restrict the Self-Incrimination Clause to the compelled production of evidence akin to witness testimony.").

168. *Id.* at 1614–15 (emphasizing that early versions of the Confrontation Clause, unlike the Compulsory Process and Self-Incrimination Clauses, never referred to "evidence" and that consequently we should not read the word "witness" the same way in the Confrontation Clause and the Compulsory Process and Self-Incrimination clauses).

169. *See Crawford*, 541 U.S. at 59, 68.

170. Nagareda, *supra* note 11, at 1613.

171. *See* United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (noting that the only difference is that, for a subpoena *duces tecum*, "a witness is summoned for the purpose of bringing with him a paper in his custody").

surveillance footage, and so on—without laying a foundation, through the testimony of a custodian of records, that the object is what it purports to be and is therefore relevant and admissible.[173] If *Crawford* and its progeny have taught us anything, it is that a law-enforcement officer's assertion in a sworn declaration, for example, that "this object, a semiautomatic handgun, is what it purports to be," would be inadequate under the Sixth Amendment.[174] And without that foundational statement, the evidence would be inadmissible. In this way, an accused has the right, through the Confrontation Clause, to confront even the *physical* evidence against him. For the purposes of the Confrontation Clause, the term "witness" refers to "evidence," just as it does for the purposes of the Self-Incrimination Clause.

The U.S. Constitution's repeated reference to "witnesses," then, consists of repeated references to all manners of "giving evidence," not of exclusive references to oral communications presented under oath by fact witnesses, as the Supreme Court's Fifth Amendment caselaw following *Boyd* suggests.[175] This conclusion brings us to the final stop in our constitutional travels: the Judiciary Act of 1789. That Act, passed by the First Congress and written and voted on by many of the same men who voted on and approved of the Fifth Amendment,[176] contained a specific provision regarding the production of discovery in trials at law. The Act states:

> [A]ll the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery*. . . .[177]

---

172. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (requiring a drug analyst to testify regarding the lab results under the Confrontation Clause when the government attempted to produce only an affidavit with the results).

173. *See* FED. R. EVID. 104 (relevance); FED. R. EVID. 901 (authentication).

174. *Cf. Melendez-Diaz*, 557 U.S. at 311 (holding that the affidavits prepared by drug analysts were "testimonial statements" and therefore the analysts were "witnesses" subject to the Confrontation Clause).

175. The Treason Clause and its qualification to "Testimony" serves as the sole exception. U.S. CONST. art. III, § 3, cl. 1.

176. The Judiciary Act of 1789 has long been accorded particular value in interpreting the Constitution, because, as the Supreme Court has explained:

> That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the convention which framed the Constitution and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest authority.

Patton v. United States, 281 U.S. 276, 301–02 (1930). The Evidence Act of 1851 in England reached the same conclusion as the Judiciary Act of 1789 with respect to the compulsion of evidence. *See* 14 & 15 Vict. c. 99, § 3 (Eng.).

177. ch. 20, § 15, 1 Stat. 73 (emphasis added).

In other words, in trials at law, the rules of discovery governing the production of books and papers was limited to "the ordinary rules of proceeding in chancery," which, as this Article has observed in Sections II.A and II.B, flatly prohibited the compulsion of physical evidence that would tend to incriminate the subject of the subpoena.[178]

Neither this Article nor Professor Nagareda's is the first to make this observation. The most salient instance is, in fact, none other than *Boyd v. United States* itself, which lauded "the wisdom of the Congress of 1789" for restricting the discovery provisions of its Judiciary Act to what would have been authorized under chancery rules.[179] "Now it is elementary knowledge," the Court unhelpfully quipped, citing a single treatise, "that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property."[180] And from this bare conclusion, Justice Joseph Bradley went on to categorically to declare:

> [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.[181]

Justice Bradley was correct, but he did his controversial majority opinion few favors by neglecting to fully substantiate the historical reasoning behind his decision.[182] Perhaps he simply took it for granted that his readers would understand what he considered obvious, and what the preceding discussion establishes: to compel an accused to produce physical evidence is to compel him to be a witness against himself.

III. REASSESSING COMPELLED PRODUCTION UNDER THE FIFTH AMENDMENT

Our analysis has come full circle. We began with *Boyd* and its insufficiencies,[183] then observed *Boyd*'s deterioration and eventual death at the altar of the act-of-production doctrine in *Fisher*.[184] Then we retreated to the Fifth Amendment's

178. *See also* Nagareda, *supra* note 11, at 1622 (discussing the discovery restrictions in the Judiciary Act of 1789).

179. 116 U.S. 616, 631 (1886).

180. *Id.* (citing CHARLES EDWARD POLLOCK, A TREATISE ON THE POWER OF THE COURTS OF COMMON LAW TO COMPEL THE PRODUCTION OF DOCUMENTS FOR INSPECTION 27 (1853)).

181. *Id.* at 631–32.

182. Professor Nagareda correctly accuses Justice Miller, the author of *Boyd*'s famous concurrence (which had the added benefit of correctly noting that the service of a subpoena would only have implicated the Fifth, not the Fourth Amendment), of similarly failing to substantiate his reasoning. *See* Nagareda, *supra* note 11, at 1589–90.

183. *See supra* Section I.A.

184. *See supra* Section I.B.

prehistory, where the phrase "being a witness" clearly included the production of physical evidence, and where compulsion of either oral testimony or physical evidence from a criminal defendant was considered abhorrent to the law of discovery.[185] We finally returned to the Constitution itself and to a new reading of *Boyd* that makes it look, we hope, less outrageous.[186] But there is no need to advocate for a "resurrection" of *Boyd*, as Professor Nagareda has called for.[187] The majority opinion in *Boyd* and its even more sensible concurrence[188] are over 150 years old and are riddled with errors and omissions that detract from its credibility. Rather, it is necessary to reassess completely our approach to the Fifth Amendment in terms that are historically and logically sound.

The preceding analysis has established that the Self-Incrimination Clause is, at least regarding the question posed by this Article, rather simple in its operation. Its terms are strict: no person "shall be compelled in any criminal case to be a witness against himself,"[189] and to "be a witness" means to give or furnish evidence.[190] The focus of the Clause, then, is narrow: it prohibits the admission of evidence that is the result of compelling the suspect to give evidence against himself on his own, irrespective of whether that evidence is testimonial or physical, and of whether, for example, it implicates some privacy right protected by the Fourth Amendment.[191] The Self-Incrimination Clause does not, however, render it impossible to obtain the evidence *at all*—it simply prohibits the government from compelling the suspect from *herself* performing the act of production. Instead, the government must obtain the evidence on its own, through the legal processes that the Fourth Amendment makes available.[192] In short, our doctrine ought to render unto the Fifth Amendment the things that are the Fifth's, and render unto the Fourth Amendment what are the Fourth's.[193]

Approaching discrete evidentiary issues with this simple framework dispels many of the doctrinal difficulties that have burdened the Supreme Court's Fifth Amendment jurisprudence. Using demonstrative evidence, blood draws, and handwriting and voice exemplars as case studies, this Article takes each in turn.

Demonstrative Evidence. As discussed above, *Holt v. United States* created an opening in *Boyd*, that would later be exploited by *Fisher*, in which the Court concluded that the Fifth Amendment does not bar the admission of what amounts to

185. *See supra* Sections II.A–B.

186. *See supra* Section II.C.

187. *See generally* Nagareda, *supra* note 11 (arguing that there is a "convincing case to resurrect the holding of *Boyd*").

188. Boyd v. United States, 116 U.S. 616, 639 (1886) (Miller, J., concurring).

189. U.S. CONST. amend. V.

190. *See supra* Part II.

191. *See id.*

192. U.S. CONST. amend. IV. See *supra* notes 25–31 and accompanying text for analysis of the Fourth Amendment warrant requirement.

193. *Cf. Matthew* 22:21 (Bible passage using similar language to create separation between the respective worlds of the emperor and God).

demonstrative evidence—in that case, testimony of a law-enforcement officer that a particular blouse fit the defendant.[194] Using this framework, we first ask whether the testimony consists of evidence. Certainly, the defendant donning the blouse consists of demonstrative evidence. We must then ask, was the defendant compelled to don the blouse? Did he agree to do so (in which case he was not compelled)? Or did a law-enforcement officer threaten him with physical punishment or some other form of compulsion to force him to don the blouse?[195] If the defendant agreed to wear the blouse (perhaps hoping for O.J. Simpson's luck),[196] then it is perfectly admissible. If he refused and put it on only under duress, the evidence is inadmissible. The court could, however, issue a warrant authorizing a seizure and search of the defendant, thereby permitting law enforcement to force the demonstrative against his will.[197] Absent a probable-cause objection, the defendant would have no grounds to object to the admission of this evidence.

Blood draws. Similarly, there should be no doubt that, if a defendant is truly compelled to submit to a blood draw against his will, he is "giving evidence" against himself. It defies common sense to suppose otherwise, but the Supreme Court, perhaps guided by a desire to avoid conflating the Fourth and Fifth Amendments, as the *Boyd* Court did, refused to recognize that giving blood could implicate the Fifth *and* the Fourth Amendments.[198] It instead conceded only that the draw was a search, but did not fall within the ambit of the Self-Incrimination Clause.[199] A blood draw could implicate both, but a warrant would solve the problem. For if law enforcement obtains a warrant that authorizes a blood draw—a type of search—the defendant is no longer *compelled* to give the blood *on his own accord*, which is the ill against which the Self-Incrimination Clause is directed.

Exemplars. At first glance, handwriting and voice exemplars pose a unique challenge.[200] A physical demonstration of the fitting of a blouse, the physical movement of a suspect to a lineup identification room, or the physical strapping-down of a suspect to administer a blood draw are all seizures and searches (because they require the movement of the suspect) and can be effectuated without the suspect's

194. Holt v. United States, 218 U.S. 245, 252–53 (1910).

195. Such an act would, of course, implicate the Fifth Amendment's Due Process Clause as well. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991) (holding that the defendant's coerced confession violated both the Fifth and Fourteenth Amendments).

196. Kenneth Noble, *Trying on Bloody Gloves, Simpson Finds Them Tight*, N.Y. TIMES, June 16, 1995, at A16.

197. The same rationale would apply to another important form of demonstrative evidence: the pre-trial lineup identification. Compelling a defendant to participate in a pre-trial lineup would violate the Fifth Amendment, but a magistrate could issue a warrant authorizing a seizure of the defendant, thereby forcing into the line-up area against her will.

198. Schmerber v. California, 384 U.S. 757, 767–68 (1966) (holding that a blood draw did not implicate the Fifth Amendment at all but conceding that a blood draw is a search within the meaning of the Fourth); *see also* Missouri v. McNeely, 569 U.S. 141 (2013) (denying *per se* rule that would allow warrantless blood draws as a violation of the Fourth Amendment).

199. *Schmerber*, 384 U.S. at 767.

200. *See* Nagareda, *supra* note 11, at 1628–29.

affirmative compliance, consent, or participation.[201] And, of course, because they constitute seizures or searches, they can be authorized by a warrant under the Fourth Amendment. But no person can force a suspect to speak or write. Short of authorizing a law-enforcement officer to hypnotize the suspect, a magistrate cannot craft a warrant that could give the power to any agent to force a person to write a sentence or say a word. Justice Marshall's concern was well stated, then, in a seminal handwriting-exemplar case, that he could "not accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect."[202] This is why even Professor Nagareda, who otherwise expressed great reluctance to extend his findings to forms of evidence other than documents, had to concede that exemplars presented a "close call" and ultimately concluded that they are no different than a compelled oral statement.[203]

But under the framework suggested by this Article, exemplars are no more challenging a case than the others discussed. Rather, they should simply fall within the clear confines of the Self-Incrimination Clause's protections, and therefore, compelling their production should be flatly prohibited. The police can obtain exemplars any number of other ways—through inspection of the suspect's papers (either in custody or in his personal effects, provided such a search complies with the Fourth Amendment) or through surreptitious audio recording (again, provided such recording complies with the strictures of the Fourth Amendment). Although the Fifth Amendment imposes a barrier, law enforcement's efforts to obtain incriminating evidence do not need to be thwarted altogether.

CONCLUSION

"The challenge that the Fifth Amendment's self-incrimination clause poses to the State is to convict and sentence the defendant based on its own evidence . . . ."[204] In as concise a form as it can perhaps be stated, the government is prohibited from compelling the defendant to do its job. Perhaps, as King Claudius feared, in the afterlife the rules are different, and we can be "compell'd," by a power higher than the State, "[e]ven to the teeth and forehead of our faults / To give in evidence."[205] But to animate the core of the Self-Incrimination Clause in our lifetimes—to respect the dignity of the subject against the nearly limitless power of a government on earth, administered by humans and not the divine—the doctrine must conform to the text's history and its logic: that no person be compelled to give evidence, testimonial or otherwise, against herself.

---

201. *See, e.g.*, Florida v. Royer, 460 U.S. 491, 504–06 (1983) (finding that moving the suspect to another room without affirmative consent constituted a seizure).

202. United States v. Mara, 410 U.S. 19, 33 (1973) (Marshall, J., dissenting).

203. Nagareda, *supra* note 11, at 1628–39.

204. Fountain, *supra* note 17, at 297.

205. SHAKESPEARE, *supra* note 1, act 3, sc. 3.