COMPULSION "TO BE A WITNESS"
AND THE RESURRECTION OF BOYD

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For more than a century, judges and commentators have sought to determine the proper meaning of the Self-Incrimination Clause of the Fifth Amendment. Although the Supreme Court during this period has expanded dramatically the scope of protection afforded by the Clause with regard to self-incriminatory oral statements, the Court has retreated steadily from its 1886 decision in Boyd v. United States, which had provided full-scale constitutional protection to self-incriminatory documents. In this Article, Professor Nagareda draws upon the text of the Fifth Amendment, the content of related constitutional guarantees, and recent scholarship on the history of the privilege against self-incrimination to argue for a revival of the Fifth Amendment holding of Boyd. He concludes that the constitutional prohibition upon compulsion of a person "to be a witness" against himself is best understood as synonymous with the bar upon compulsion of a person "to give evidence" against himself found in state sources contemporaneous with the framing of the Bill of Rights. Such a reading not only supports the holding of Boyd but, more broadly, serves to clarify the relationship between the Fifth Amendment (as a categorical ban against the compelled giving of incriminatory evidence) and the Fourth Amendment (as a regulation of the unilateral taking of such evidence by government agents). At the same time, Professor Nagareda's reading serves to underscore the textual support for much of modern self-incrimination jurisprudence including, most significantly, the use immunity doctrine.

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INTRODUCTION

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."\(^1\) As Henry Friendly said of this language, "[t]he picture immediately conveyed is of a defendant on trial for crime being dragged, kicking and screaming, to the stand or, more realistically, being imprisoned for refusal to testify."\(^2\) Another common "picture" is of a criminal suspect being beaten, tricked, or coerced into making a self-incriminatory statement while in police custody. These have come to be the most familiar scenarios for the application of the Fifth Amendment stricture against the compulsion of a person "to be a witness against himself."

The continued vitality of that stricture, however, increasingly does not center upon these conventional situations. Many of the most challenging cases at the intersection of criminal procedure and the law of evidence have focused upon other scenarios, where the government seeks not the generation of a self-incriminatory statement but, instead, the turning over of preexisting information that tends to incriminate the provider. The prevalence of such cases corresponds to the rise of the Information Age. If anything, they are likely to become even more common as the technology for the retention of information and government demands for its contents continue to multiply.

\(^1\) U.S. Const. amend. V.
For more than a century, the Supreme Court has traveled the wrong path in this area, so much so that the Court has left Americans on the verge of the twenty-first century with less protection against compelled self-incrimination than they enjoyed under the common law of the eighteenth century or the Court's own decisions of the nineteenth. The Court's missteps not only have distorted the meaning of the Fifth Amendment but also have obscured the proper relationship between that amendment and the other major constitutional provision that constrains information gathering by the government in the criminal process: the Fourth Amendment.

The origin of the Court's error lies in its treatment of self-incriminatory documents, though the implications of that error extend substantially further to all forms of preexisting materials. Much of criminal investigation in modern times does not center on the elicitation of statements that recount criminal activity. Rather, criminal investigation in a wide range of areas turns on the government obtaining incriminatory documents, often from the very person incriminated thereby. The government frequently obtains such documents not by way of outright seizure but, instead, through the issuance of a subpoena or its equivalent—a directive, backed by penalties for contempt. As one commentator observes, "subpoenas and summonses for documents have become a staple of investigations regarding every variety of sophisticated criminal activity, from violations of regulatory provisions to political corruption and large-scale drug dealing." Concern surrounding the compelled production of self-incriminatory documents is a common thread that ties together the otherwise disparate recent controversies over the investigative powers of the Internal Revenue Service and over Independent Counsel Kenneth Starr's Whitewater probe.

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3 Samuél A. Alito, Jr., Documents and the Privilege Against Self-Incrimination, 48 U. Pitt. L. Rev. 27, 30 (1986). In keeping with this trend, Rule 17(c) of the Federal Rules of Criminal Procedure provides that "[a] subpoena may ... command the person to whom it is directed to produce the books, papers, documents or other objects designated therein."

4 See IRS Oversight: Hearings Before the Senate Comm. on Fin., 105th Cong. 58 (1998) (statement of Ray Cody Mayo, Jr., Assistant Dist. Attorney, Caddo Parish, Louisiana) (testifying that, during his practice as tax attorney, he was audited and that his "clients and business associates were bombarded with IRS summonses" in retaliation for his legal advice to them to assert their privilege against self-incrimination).

5 The Independent Counsel sought various documents from former Deputy Attorney General Webster Hubbell in an effort to ascertain whether political supporters of President Clinton had funneled sham consulting fees to Hubbell in exchange for his silence in the Whitewater investigation and, relatedly, whether Hubbell himself had evaded federal taxes upon those fees. Hubbell turned over the documents only upon receiving immunity against the use of his act of production or any evidence derived therefrom. The Independent Counsel subsequently indicted Hubbell for various tax-related offenses. The district court dismissed the indictment on the theory that such a prosecution necessarily would
In 1886, the Supreme Court in *Boyd v. United States* held that the Fifth Amendment, among other constitutional provisions, bars the government from compelling persons suspected of crime to turn over self-incriminatory documents. In the century since *Boyd*, the Court has steadily retreated from this position, even as the Court has extended dramatically the protection the Fifth Amendment gives to self-incriminatory statements. In the wake of the Court's 1976 decision in *Fisher v. United States* and its progeny, observers accurately have described *Boyd* as "dead." Under the reasoning of *Fisher*, the Fifth Amendment generally does not bar the government from compelling a person to produce documents that are self-incriminatory in content. Only when the person's act of production itself reveals new information beyond the contents of the documents does the Fifth Amendment apply.

This development, I contend, is a considerable mistake. Contrary to the view of the modern Court and the substantial weight of academic commentary, I argue that the text of the Fifth Amendment,


6 116 U.S. 616 (1886).

7 Among the most dramatic extensions—certainly, one of the most vigorously debated to the present day—is the Court's famous decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), prescribing the use of specific warnings prior to custodial interrogation of a suspect as well as an exclusionary remedy for any incriminatory statements obtained in the absence of such warnings. But cf. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (finding that Congress overruled *Miranda*).


10 See Note, The Life and Times of *Boyd v. United States* (1886-1976), 76 Mich. L. Rev. 184, 212 (1977); see also Doe, 465 U.S. at 618 (O'Connor, J., concurring) ("Our decision in *Fisher* . . . sounded the death knell for *Boyd*.").

11 See *Fisher*, 425 U.S. at 410-11. If the Fifth Amendment does apply, the government either must do without the subpoenaed documents or, to obtain them, must grant use immunity to the person whose act of production is self-incriminatory. See infra Part II.C.4 (discussing standards for use immunity).

12 In a thoughtful article, Robert Mosteller takes *Fisher* as given and seeks to explicate the proper approach to its application. See Robert P. Mosteller, Simplifying Subpoena Law: Taking the Fifth Amendment Seriously, 73 Va. L. Rev. 1, 5-6 (1987) (noting that he "accepts as sound *Fisher*'s basic premise that the fifth amendment protects documents only when the act of producing them involves testimonial self-incrimination and does not directly protect their contents"). By contrast, I question the correctness of *Fisher* as a matter of first principles and seek to construct a new framework in its stead. I share Mosteller's declared objective to "[t]reat[ ] documentary subpoenas as part of the familiar fabric of
the historical context of its adoption, and the Court’s own analytical framework for self-incriminatory oral statements together form a convincing case to resurrect the holding of *Boyd*. That move, in turn, would serve to reconceptualize the relationship between the Fourth and Fifth Amendments and, in so doing, would give rise to a coherent body of constitutional doctrine capable of dealing in a principled manner with the self-incrimination scenarios of the future.\(^\text{13}\)

\(^3\) See infra Part II.C.1 (explaining how my position would unify Fifth Amendment doctrine).

Several other commentators argue against Fifth Amendment protection for documents. Samuel Alito contends that “the fifth amendment privilege simply does not address the problem of subpoenas for existing documents, and that this problem is one that must be resolved on nonconstitutional grounds.” Alito, supra note 3, at 78. As explained in greater depth below, Alito marshals much of the relevant interpretive material, but he fails to draw the correct inferences therefrom. See, e.g., infra note 157 (discussing Alito’s treatment of contemporaneous state sources).

Many of the same errors (and several others) hijack the analysis of Akhil Amar, who applauds the holding in *Fisher*. See Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 82 (1997) (“Oblying a suspect to hand over incriminating words or things already in existence can be distinguished from oblying him to be a witness—to testify in response to clever questions put by a prosecutor.”). The discussion of the Fifth Amendment in Amar’s book tracks, virtually verbatim, the material in an earlier coauthored article. See Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 (1995).

Robert Heidt argues “for a standard which would enforce subpoenas for documents over a claim of privilege in almost every instance.” Robert Heidt, The Fifth Amendment Privilege and Documents—Cutting Fisher’s Tangled Line, 49 Mo. L. Rev. 439, 443 (1984). Heidt bases his stance, however, upon the Court’s erroneous distinction between testimonial and nontestimonial communications. Compare id. at 456 with infra Part II.C.1 (criticizing this distinction).

My position overlaps at points with that of Robert Gerstein, who argues for what he describes as a “moral autonomy approach,” which would extend the protection of the Fifth Amendment to any demand for production that “requires an exercise of moral judgment, a decision either to present the evidence of guilt to the court or to conceal or falsify it.” Robert S. Gerstein, The Demise of *Boyd*: Self-Incrimination and Private Papers in the Burger Court, 27 UCLA L. Rev. 343, 389 (1979). In terms of methodology, however, Gerstein’s approach differs starkly from mine. He bases his stance upon notions of personal privacy derived from moral philosophy. Cf. David Dolinko, Is There a Rationale for the Privilege Against Self-Incrimination?, 33 UCLA L. Rev. 1063, 1122-37 (1986) (questioning capacity of moral philosophy, particularly Gerstein’s, to yield coherent construction of Fifth Amendment).

\(^\text{13}\) The present time is especially apt for this enterprise, not just because of the political controversies mentioned earlier but, more importantly, due to the development in the 1990s of a substantial literature on the origins of the privilege against self-incrimination and its reception in this country. Much of this literature originally appeared in various law review articles subsequently collected, in slightly modified form, in *The Privilege Against Self-Incrimination* (R.H. Helmholz et al. eds., 1997). For a significant addition to this literature focusing upon the American experience, see John Fabian Witt, Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903, 77 Tex. L. Rev. 825 (1999); see also T.P. Gallanis, The Rise of Modern Evidence Law, 84 Iowa L.
My argument is straightforward: The application of the Fifth Amendment turns upon the meaning of the phrase "to be a witness." It is the compulsion of a person to assume "witness" status that violates the Fifth Amendment. The phrase "to be a witness" in the Fifth Amendment is best understood as synonymous with the phrase "to give evidence" used in the proposals for a bill of rights formulated by state ratifying conventions upon consideration of the original Constitution. The compulsion of a person to produce self-incriminatory documents is literally the compulsion of that person "to give evidence" against himself—that is, to turn over documents for possible use as incriminatory evidence in a subsequent criminal trial.

As a legal educator as well as a commentator, I do not advance lightly the proposition that one set of words ought to be read as synonymous with another. One must remain alert, however, to those unusual instances in which a legal text uses one set of words as a shorthand form for another. Sources on language contemporaneous with the framing of the Fifth Amendment often define the word "witness" in terms of the giving of evidence. And the equation of the two phrases becomes much more than just linguistically plausible when one considers the conspicuous lack of uproar over James Madison's substitution of the wording in the Fifth Amendment for that uniformly used in the proposals from the state ratifying conventions. My reading gains additional force from the use of the word "witness" elsewhere in the Constitution and from contemporaneous common law. It is indisputable—indeed, all commentators to address the question concur—that common law, at the time of the founding, specifically forbade the compelled production of self-incriminatory documents.

Text and history do not provide the sole support for my position, however. As a doctrinal matter, reading the phrase "to be a witness"
as synonymous with the phrase "to give evidence" serves to clarify the relationship between the Fourth and Fifth Amendments. Much of the criticism of Boyd rightly has focused on the premise of Justice Bradley's opinion for the Court that seizures of incriminatory documents are "unreasonable" under the Fourth Amendment and, on that basis alone, amount to the compelling of a person to "be a witness against himself" in violation of the Fifth.\textsuperscript{18} In the century since Boyd, the Court has devoted much energy to the rejection of Justice Bradley's mistaken understanding of the Fourth Amendment.\textsuperscript{19} In so doing, however, the Court has thrown out the Fifth Amendment baby with the Fourth Amendment bath water. Specifically, the Court has failed to give due consideration to the view—stated, without elaboration, in Justice Miller's concurring opinion in Boyd—that compelled production of self-incriminatory documents independently violates the Fifth Amendment, even though the seizure thereof would be permissible under the Fourth. This article calls for the rehabilitation of Boyd, and for a consequent reorientation of Fifth Amendment jurisprudence as a whole, by explicating the wisdom of the Miller view.

The crucial dividing line is not, as the modern Court would have it, between those acts of production that give the government additional incriminatory information beyond the contents of the materials produced and those acts of production that do not. Rather, the fundamental distinction is between the compelled giving of self-incriminatory evidence to the government (categorically impermissible under the Fifth Amendment) and the unilateral taking of such evidence by the government (permissible, when done in compliance with the Fourth). Indeed, that is precisely the position that the Court itself has taken when applying the Fifth Amendment to self-incriminatory oral statements: The government may intercept them through its own investigative savvy, in accordance with the Fourth Amendment, but it may not compel a person to produce them himself.\textsuperscript{20}

The exposition of my argument proceeds in three parts. Part I presents an overview of Fifth Amendment doctrine on the compelled production of self-incriminatory documents, tracing the shift from Boyd to the Court's current position. Because the Court's doctrinal path is relatively well-described in the secondary literature, I set forth my account in abbreviated form. At points, however, I draw attention

\textsuperscript{18} See Boyd v. United States, 116 U.S. 616, 633-35 (1886); see also Fisher v. United States, 425 U.S. 391, 409 (1976) (stating that "the foundations for [Boyd's view of the Fourth Amendment] have been washed away").

\textsuperscript{19} See infra note 52 (citing cases illustrating modern Court's approach).

\textsuperscript{20} See infra notes 195-97 and accompanying text.
to features of the Court's decisions that heretofore have received too little notice.

The core of the argument comes in Part II, which presents the textual, historical, and doctrinal grounds for equating the phrase "to be a witness" with the phrase "to give evidence." Though this Part thus rejects a distinction between oral statements and preexisting materials, such as documents, one readily may explain the results in many of the cases in which the Court first articulated that distinction—cases that focused not upon documents but, instead, upon evidence extracted from or related to the body of a criminal suspect. In particular, one may understand these bodily evidence cases in terms of the distinction advocated here between the compelled giving and the unilateral taking of evidence.

Part II then explains how my view sheds new light on the relationship between the Fourth and Fifth Amendments and on the Court's doctrine of use immunity—the latter consisting of the notion that the government may compel a person to incriminate himself upon a grant of immunity against the use in a subsequent criminal prosecution not only of the immunized testimony but also any other evidence "directly or indirectly derived" therefrom. Resurrection of Justice Miller's concurrence in *Boyd* would simplify greatly the inquiry of courts seeking to implement a grant of use immunity in a subsequent criminal trial. Apart from this practical virtue, the view advanced here also refutes the claim recently advanced by one prominent commentator, who maintains that the use immunity doctrine is incongruous with the rest of Fifth Amendment law.

Finally, Part III sets forth the implications that my position would have for three significant areas apart from the compelled production of documents generated by persons of their own accord. This Part calls for the abandonment of more lenient constitutional treatment for government efforts to obtain records required to be generated and retained under a regulatory program. From there, this Part proceeds to discuss the difficult issues that arise with respect to generally applicable reporting requirements, as exemplified by the familiar regime for federal income taxation and by statutes designed to deter hit-and-run drivers. Finally, this Part discusses the implications of my revisionist view for the production of nondocumentary physical evidence.

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22 See Amar, supra note 12, at 46-47, 63.
I

THE COURT'S MISTAKEN PATH

Before turning to the details of the Court's passage from *Boyd* to *Fisher*, it is worthwhile to set forth in general terms the nature of the problem that preexisting materials pose under the Fifth Amendment.

A. The Essential Problem

The Court understandably has encountered little difficulty in deeming the Fifth Amendment applicable to the compulsion of self-incriminatory statements.\(^\text{23}\) In their most familiar form—an oral remark\(^\text{24}\)—self-incriminatory statements literally are generated out of thin air. They have no existence except as the product of action on the part of a person. And speech is the usual process by which a person recounts information contained in that person's memory.

Extraction of self-incriminatory statements, of course, is not the only investigative technique that the government might seek to use as part of the criminal process. Upon compliance with the Fourth Amendment, the government may seize "persons"—literally, may restrain their bodies through arrest. But such action will not yield any statements, much less self-incriminatory ones, unless the person speaks. Seizure of a person suspected of a crime, in other words, does not itself yield the contents of the person’s memory; rather, a further act—typically, the act of speaking—must take place. The Fifth Amendment carves out the compulsion of a person "to be a witness against himself" from other conceivable investigative techniques and provides that such compulsion is categorically off-limits: hence, the familiar paraphrasing of the Fifth Amendment in terms of a right to remain silent—that is, to decline to engage in the act of speaking.

For Fifth Amendment doctrine, the fundamental problem posed by preexisting materials, such as documents, is that they have a physical existence independent from the person whom they incriminate. The government may get its hands on an incriminatory document through its own unilateral action, as long as the government satisfies the requirements of the Fourth Amendment for a valid search and seizure. Seizure in itself, typically without the need for any further action by any person, will yield the incriminatory contents of the document. To get one's hands on the document, in other words, is to obtain the incriminatory information contained therein.

\(\text{23}\) See supra note 7 and accompanying text.

\(\text{24}\) Self-incriminatory statements may come in other forms, such as written statements or expressive gestures.
Valid search and seizure, however, is not the only conceivable means by which the government might obtain an incriminatory document. 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. That, among other things, would relieve government agents from the burden of actually having to obtain a valid search warrant and then to execute it. The question with which the Supreme Court has struggled for more than a century is whether—and, if so, to what degree—to equate for purposes of the Fifth Amendment the compelled production of self-incriminatory documents with the compelled giving of self-incriminatory statements.

B. Subpoenas as Seizures

Conventional accounts of the constitutional treatment of self-incriminatory documents start with the Court's 1886 decision in *Boyd v. United States*.

But that case actually is not the beginning of the story. More than fifty years prior to *Boyd*, the Court embraced in a dictum the notion that the compelled production of self-incriminatory documents would amount to the giving of evidence against one's self.

1. The Reyburn Dictum

In *United States v. Reyburn*, the defendant stood convicted of issuing a commission for a seagoing ship with the intent that the ship be used to attack a foreign nation with which the United States was at peace. The narrow issue in *Reyburn* was whether the trial judge had erred in permitting the government to use secondary evidence of the contents of the commission—specifically, whether the government had made an adequate showing of its inability to obtain the original commission. In the course of agreeing that the government had done all it reasonably could to obtain the original, the Supreme Court spoke to the compelled production of self-incriminatory documents. The Court noted that, even if the government had managed to compel John Chase—the person thought to have received the commission from the defendant—to appear as a prosecution witness, Chase "could

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25 116 U.S. 616 (1886). As examples of the conventional account, see, e.g., Alito, supra note 3, at 31; Gerstein, supra note 12, at 362; Heidt, supra note 12, at 444.
27 See id. at 363.
28 See id. at 364. The modern version of the best evidence rule, see Fed. R. Evid. 1004(2), permits the admission of secondary evidence of "the contents of a writing" upon a showing that the original writing cannot "be obtained by any available judicial process or procedure." Id.
not have been compelled to produce the commission, and thereby fur-
nish evidence against himself."29

Although the Court offered no citation for this proposition, the circumstances of Reyburn make it clear that the compelled production by Chase of the original commission would have been highly self-in-
criminatory. The government had charged Chase with the crime of receiving the disputed commission, though he remained at large at the time of Reyburn's trial.30 As I explain in greater detail in Part II, the Reyburn dictum from 1832 comes as no surprise, given the prohibition at common law, dating at least from the preceding century, against the compelled production of self-incriminatory documents. Until Boyd, however, the Court would not set forth explicitly such a limitation as a principle of constitutional law.

2. Conflating the Fourth and Fifth Amendments

The reasoning of Justice Bradley's opinion for the Court in Boyd is easy enough to summarize: The compelled production of self-incriminatory documents amounts to an unreasonable search and seizure within the meaning of the Fourth Amendment and, for that reason, also constitutes the compulsion of a person "to be a witness against himself" in violation of the Fifth.31 A brief word about the circumstances of Boyd makes the Court's conflation of the Fourth and Fifth Amendments more readily understandable, though not analyti-
cally sound.

Boyd arose from a routine forfeiture proceeding under the fed-
eral customs revenue laws. The government had entered into a con-
struction contract with the defendants, permitting them to import, on a duty-free basis, sufficient glass to replace the quantity drawn from their supply stocks to complete the construction project. The govern-
ment became suspicious, however, when the defendants subsequently imported not just one duty-free replacement shipment but also a large additional quantity of glass in a second duty-free shipment, predicated on the assertion that glass in the first shipment had broken in transit.32

29 Reyburn, 31 U.S. (6 Pet.) at 366-67. It is worthy of note that the particular phrasing used by the Court—"furnish evidence" against himself—is identical to that in some state sources contemporaneous with the framing of the Fifth Amendment. See infra note 125 and accompanying text. The Court's choice of language is ambiguous as to whether the compelled production of the commission would tend to incriminate Chase due to the con-
tents of the commission, due to the mere act of its production, or both.

30 See Reyburn, 31 U.S. (6 Pet.) at 364 (noting that, although "a bench warrant had been repeatedly issued out against the said Chase.... he could not be found").


32 For a concise description of the factual dispute in Boyd, see Alito, supra note 3, at 33 (clarifying facts by reference to briefs in case).
Acting on the government's motion, a federal district court ordered the defendants to produce the invoice for the first replacement shipment—apparently, on the theory that the contents of the invoice might undercut the defendants' story of broken glass.

The statute that authorized the court order was particularly draconian, providing that a refusal to produce the specified document "shall be taken" as a "confess[ion]" of the government's underlying allegations. A confession, in turn, would subject the defendants not only to the forfeiture of any illegally imported goods but also to the prospect of criminal sanctions.

The Court's notion that an order to produce self-incriminatory documents is tantamount to a Fourth Amendment seizure may well have stemmed from the legislative history of the particular statute in Boyd. Although commentators have made surprisingly little of the point, Justice Bradley emphasized for the Court that Congress had enacted the provision in question to replace earlier Civil War legislation that had authorized district judges to issue warrants for federal agents to "enter any place or premises where any invoices, books, or papers [were] deposited relating to the [illegally imported] merchandise, . . . and to take possession of such books or papers." Simply as a matter of legislative history, then, the compelled production of documents in Boyd stood as a substitute for their seizure. The Court, moreover, was eminently correct to say that the compelled production of documents "accomplishes the substantial object of" the earlier leg-

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33 See Boyd, 116 U.S. at 618.
37 The Court noted that the earlier authorization of seizures "was the first legislation of the kind that ever appeared on the statute book of the United States." Boyd, 116 U.S. at 621. One commentator attributes the legislation substituting the compulsion of document production to the post-Civil War lobbying efforts of business interests from prominent ports. See Alito, supra note 3, at 32.
islation authorizing their seizure.\textsuperscript{38} Either way, the result would be for the government to get the documents.

The difficulty comes in the further assertion that, because of this similarity in ultimate effect, the compelled production of documents should be treated as "the equivalent of a search and seizure" for constitutional purposes.\textsuperscript{39} As I shall explain in greater depth, the Fourth and Fifth Amendments ultimately are not about end results; instead, they articulate two very different sorts of restraints upon two distinct means of information gathering by the government in the criminal process.\textsuperscript{40} The initial analytical error of Justice Bradley's opinion for the Court in \textit{Boyd} thus consists of an error of characterization: the determination to treat as search and seizure the compelled production of self-incriminatory documents.

As Justice Miller observed in a concurring opinion joined by Chief Justice Waite, the statute in \textit{Boyd} authorized "[n]othing" within the purview of the Fourth Amendment.\textsuperscript{41} To the contrary, by authorizing an order for the defendants to produce the disputed invoice in court, the statute \textit{eliminated} the need for any search by government agents through the defendants' papers or for any seizure of the disputed invoice therefrom. The whole point, in other words, was to replace unilateral action by the government—intruding upon the "premises where any invoices, books, or papers [were] deposited,"\textsuperscript{42} in the words of the earlier legislation—with the compulsion of action by the defendants themselves.

The Court in \textit{Boyd} proceeded to compound its initial error of characterization by holding that search and seizure of incriminatory "private papers" is inherently "unreasonable."\textsuperscript{43} The \textit{Boyd} Court's conception of privacy, however, remained tied closely to common law property rights.\textsuperscript{44} Justice Bradley emphasized that the defendants had property rights in the disputed invoice superior to all other persons.\textsuperscript{45} The situation presented in \textit{Boyd} thus, in the Court's view, was unlike

\textsuperscript{38} \textit{Boyd}, 116 U.S. at 622. To the same effect, the Court stated: "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, ... it contains their substance and essence, and effects their substantial purpose." Id. at 635.

\textsuperscript{39} Id. at 635.

\textsuperscript{40} See infra Part II.C.1, C.3.

\textsuperscript{41} \textit{Boyd}, 116 U.S. at 640 (Miller, J., concurring).


\textsuperscript{43} \textit{Boyd}, 116 U.S. at 630.

\textsuperscript{44} On the relationship between the reasoning in \textit{Boyd} and legal formalism, see Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 948-56 (1977) [hereinafter Formalism].

\textsuperscript{45} See \textit{Boyd}, 116 U.S. at 623-24.
“the case of stolen goods, the owner from whom they were stolen [be-
ing] entitled to their possession,” or “the case of goods seized on at-
tachment or execution, the creditor [being] entitled to their seizure in 
satisfaction of his debt.”46 In support of this property-based ap-
proach, Justice Bradley relied heavily upon Lord Camden’s opinion in 
the 1765 English case of Entick v. Carrington,47 upholding a damage 
verdict in a trespass action “for entering the plaintiff’s dwelling-
house . . . , and breaking open his desks, boxes, &c., and searching and 
examining his papers” pursuant to a “general warrant[ ].”48

The critical point is that the Boyd majority’s decision to deem 
unreasonable the trespassory search and seizure of a person’s pa-
pers—whether or not buttressed by Entick49—cannot be squared with 
the language of the Fourth Amendment on two grounds. First, a cate-
gorical bar upon search and seizure of papers over which a person has 
paramount property rights is inconsistent with the decidedly un-
categorical phrasing of the Fourth Amendment. In relevant part, 
the Fourth Amendment declares “[t]he right of the people to be se-
cure in their persons, houses, papers, and effects, against unreasonable 
searches and seizures.”50 That would be an exceedingly odd way to 
phrase a right of “the people” if its true meaning were to forbid cate-
gorically the search and seizure of “their . . . papers” in the sense of all 
papers over which a given person might have property rights superior 
to all others. Their papers are quintessentially those that are theirs in

46 Id. at 624.
48 Boyd, 116 U.S. at 625-26. From Entick, the Boyd Court took the proposition that: 
It is not the breaking of his doors, and the rummaging of his drawers, that 
constitutes the essence of the offence; but it is the invasion of his indefeasible 
right of personal security, personal liberty and private property, where that 
right has never been forfeited by his conviction of some public offence,—it is 
the invasion of this sacred right which underlies and constitutes the essence of 
Lord Camden’s judgment.

Id. at 630.
49 Even on its own terms, Entick remains the subject of considerable debate. The mod-
ern Court and most commentators take Entick to stand simply for the proposition that 
general warrants are impermissible. See, e.g., Berger v. New York, 388 U.S. 41, 58 (1967); 
(1961); 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 
§ 1.1(a), at 4 (3d ed. 1996). Others contend that the case supports the broader proposition 
that seizures of private papers are unreasonable, even if pursuant to a particularized war-
rant. See, e.g., Eric Schnapper, Unreasonable Searches and Seizures of Papers, 71 Va. L. 
Rev. 869, 880-84 (1985). If only a rejection of general warrants, Entick is a curious prece-
dent for Justice Bradley to have invoked in Boyd, given that the court order there was not 
at all general but, instead, sought the production of one shipping invoice, described partic-
ularly. See David P. Currie, The Constitution in the Supreme Court: The First Hundred 
Years, 1789-1888, at 445 (1985); Friendly, supra note 2, at 701 n.131.
50 U.S. Const. amend. IV.
the sense of property law. Yet, by its terms, the Fourth Amendment does not protect "the people" against all searches and seizures of "their . . . papers," just from "unreasonable" searches and seizures.\(^{51}\)

Second, the *Boyd* majority's categorical approach for "papers" is difficult to reconcile with the listing of other protected things. The Fourth Amendment places "persons, houses, papers, and effects" on par with one another. It has never been doubted, however, that the government may seize a "person[ ]," as long as it does so in a reasonable manner. There is not and has never been a categorical bar upon arrests. To say that search and seizure of "papers" is inherently unreasonable is to elevate that category of things to a higher level of protection than has ever been accorded to "persons"—literally, bodies—of "the people" themselves, even though search and seizure of "persons" arguably is more intrusive.\(^{52}\)

So, what of *Boyd*, if not as a Fourth Amendment decision? Writing for the Court, Justice Bradley added, without extended analysis, that the unreasonable search and seizure of incriminatory papers under the Fourth Amendment amounts to the compulsion of a person "to be a witness against himself" contrary to the Fifth.\(^{53}\) As one commentator insightfully notes, this leap from the Fourth to the Fifth Amendment may have stemmed from the conception of personhood prevalent in the late nineteenth century—specifically, the notion that invasions of property are inseparable from compulsion of the property owner.\(^{54}\) The *Boyd* Court also may have seen the invocation of the

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\(^{51}\) See *Boyd*, 116 U.S. at 641 (Miller, J., concurring) ("[N]ot all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.").

\(^{52}\) Textual points aside, the Court in the decades after *Boyd* would recoil from Justice Bradley's expansive construction of the Fourth Amendment. The Court initially read *Boyd* to forbid only search and seizure for mere evidence—that is, incriminatory items that are not themselves contraband (say, a drug dealer's stash of cocaine) or the fruits or instrumentalities of criminal activity (a stolen car or the knife used to commit a murder). See generally Gouled v. United States, 255 U.S. 298, 309 (1921) (upholding seizure of "contracts . . . used as instruments . . . for perpetrating frauds upon the Government"); Formalism, supra note 44, at 967-68 ("By defining 'instrumentalities' broadly, judges were able to admit virtually any evidence, so long as the search itself was upheld." (footnote omitted)). By the late 1960s, even the nominal stricture against search and seizure of mere evidence would fall, see Warden v. Hayden, 387 U.S. 294, 306 (1967) (noting that rationale of *Gouled* has been "discredited"), though the Court still did not overrule *Boyd* outright.

\(^{53}\) See *Boyd*, 116 U.S. at 633-35.

\(^{54}\) As James Boyd White explains:

Property was an extension of the person, indeed in some ways a definition of the person, for the relations defined by property holdings were political and social as well as economic. This is perhaps why the use of one's property in a criminal proceeding was felt to violate the fifth amendment prohibition of compulsory self-incrimination, as well as the fourth amendment prohibition of unreasonable seizures.
Fifth Amendment as necessary, given that the Court, at the time, had yet to recognize an exclusionary remedy for Fourth Amendment violations.\(^{55}\)

The *Boyd* Court’s holding as to the Fifth Amendment, however, need not depend upon acceptance of its interpretation of the Fourth. As Justice Miller observed in his concurring opinion:

> The order of the [district] court under the statute is in effect a subpoena *duces tecum*, and, though the penalty for the witness's failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear.\(^{56}\)

Justice Miller did not help his intellectual legacy by omitting the reasoning behind his conclusion. What was “quite clear” to Justice Miller in 1886 is precisely what has eluded the Court as a whole in the century that followed. My enterprise here ultimately is to resurrect the Fifth Amendment holding of *Boyd*—that the compelled production of self-incriminatory preexisting materials constitutes the compulsion of a person “to be a witness against himself”—by explaining the soundness of Justice Miller’s view. Before turning to that job, however, I detail the dramatically different path taken by the modern Court.

**C. The Act-of-Production Doctrine**

With its decisions in *Fisher v. United States*\(^{57}\) and its progeny, the Court in the mid-1970s put to rest the proposition that the Fifth Amendment generally protects persons against the compelled production of preexisting materials that are incriminatory in content. The intellectual roots of that move came earlier, however, in a series of cases that did not concern documents but, rather, incriminatory evidence drawn from or related to the bodies of criminal suspects in po-

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56 *Boyd*, 116 U.S. at 639 (Miller, J., concurring).

lice custody. For present purposes, the important point is that the Court there drew a fundamental distinction between testimonial communication, the compulsion of which the Fifth Amendment prohibits, and other forms of incriminatory evidence, the obtaining of which is governed only by the Fourth. Thus, for example, compelling a person to make a self-incriminatory oral statement—the classic form of testimonial communication—implies the Fifth Amendment, but extracting a blood sample from the person’s body does not.

In the bodily evidence cases, the Court did not devote significant attention to constitutional text or history. The Court’s restriction of the Fifth Amendment to testimonial communication nonetheless amounts to an implicit construction of the crucial phrase therein: “to be a witness.” For the Court, “to be a witness” is to do something akin to what a witness does on the stand at trial, namely, to bring into existence testimony consisting of the witness’s recollection of past events. By the time of Fisher, in 1976, the only point left to be re-

58 The first such case dates from the early twentieth century. See Holt v. United States, 218 U.S. 245, 252-53 (1910) (compelling defendant to put on garment believed to have been worn by murderer).

59 See infra Part II.C.2 (noting that one can explain results of many bodily evidence cases while adhering to Justice Miller’s view of Fifth Amendment in Boyd).

60 The phrase “testimonial communication” stems from Justice Holmes’s declaration for the Court in 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, not an exclusion of his body as evidence when it may be material.” Holt, 218 U.S. at 252-53 (emphasis added). To forbid the police from forcing Holt to don a blouse associated with a murder, said the Court, would amount to “an extravagant extension of the Fifth Amendment.” Id. at 252.

The Court subsequently relied on the reasoning in Holt to uphold a wide variety of investigative techniques against Fifth Amendment challenges. See United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (voice exemplars); Gilbert v. California, 383 U.S. 263, 266-67 (1967) (handwriting exemplars); United States v. Wade, 388 U.S. 218, 222-23 (1967) (exhibition in police lineup, including speaking of words used by perpetrator of bank robbery); Schmerber v. California, 384 U.S. 757, 761-64 (1966) (blood sample).

61 See Schmerber, 388 U.S. at 761.

62 The closest thing to textual analysis comes in a fleeting passage in Schmerber, where the Court correctly identifies the “critical question” as whether the defendant was “compelled ‘to be a witness against himself’” but then appends a footnote in which the Court flatly declares that “our decision cannot turn on the Fifth Amendment’s use of the word ‘witness.’” Id. at 761 & n.6.

63 Akhil Amar advances such a reading of the constitutional text. See Amar, supra note 12, at 82 (“Obliging a suspect to hand over incriminating words or things already in existence can be distinguished from obliging him to be a witness—to testify in response to clever questions put by a prosecutor.”). For a similar reading of the Court’s precedents, see In re Grand Jury Proceedings, 814 F.2d 791, 794 (1st Cir. 1987).
solved was whether to treat documents as testimonial communications or simply as nontestimonial preexisting evidence.

As in Boyd, the underlying dispute in Fisher was quite ordinary. Agents of the Internal Revenue Service (IRS) had interviewed various taxpayers as part of investigations into the possibility that such persons had cheated on their federal income taxes. Alerted by the IRS inquiries, the taxpayers transferred to their attorneys from their accountants certain documents connected with the preparation of the tax returns in question. This move did not fool the IRS, however, as its agents soon “learn[ed] of the whereabouts of the documents.”

Armed with this knowledge, the IRS nonetheless did not attempt to seize the documents from the attorneys’ offices. Indeed, as I shall discuss later, the prospect that the government might well have been positioned to seize the documents stands as an important detail in Fisher overlooked by previous commentators. In any event, instead of effecting a seizure, the IRS issued summonses to the attorneys, ordering them to produce the accounting documents. The case came to the Supreme Court upon litigation to contest the enforcement of the summonses.

1. Decoupling Content from Production

The Fifth Amendment issue in Fisher emerged through a circuitous route. The taxpayers claimed that they had transferred the requested documents to their attorneys in the course of seeking legal advice and, on that ground, invoked the attorney-client privilege. Crediting for the sake of argument the taxpayers’ account of the reasons for the transfer, Justice White noted for the Court that principles of attorney-client privilege would protect the documents only to the extent that the documents would have been protected in the hands of the taxpayers themselves. And the status of the documents in the hands of the taxpayers, in turn, depended on the applicability of the

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65 See infra Part II.C.3 (arguing that, where government can satisfy demands of Fourth Amendment for seizure of incriminatory documents, government may offer suspect opportunity to turn over such documents as less intrusive alternative to their seizure).
66 The federal tax laws specifically authorize the issuance of such summonses, without any initial judicial determination. See 26 U.S.C. § 7602(a)(2) (1994). “[A]lthough statutory restrictions prevent the IRS from issuing a summons arbitrarily, these restrictions are not stringently applied.” Sara Denise Trujillo, Are a Taxpayer's Private Papers Protected from an IRS Summons Under the Fifth Amendment?, 59 Temp. L.Q. 467, 470 (1986). For general background on the legal framework for IRS investigations, see id. at 468-78.
68 See id. at 402.
69 See id. In this manner, the Court reasoned, the law would avoid discouraging clients from seeking legal advice for fear that documents protected in their own hands by the Fifth
Fifth Amendment. Thus, although the IRS had directed the summonses in *Fisher* to the attorneys rather than to the taxpayers, the Court nonetheless needed to address whether the Fifth Amendment would have barred enforcement of the summonses against the taxpayers themselves.

The Court initially observed that its modern Fourth Amendment decisions had undercut drastically Boyd’s premise that search and seizure of private papers is inherently unreasonable. But there still remained the possibility that the compelled production of self-incriminatory documents might constitute an independent violation of the Fifth Amendment. Citing the bodily evidence cases, the Court considered it “clear that the Fifth Amendment does not independently prescribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.” The Court acknowledged that a summons in the nature of a subpoena for self-incriminatory documents “without doubt involves substantial compulsion.” But the Court held that such a summons nonetheless “does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought.” In short, if directed to the taxpayers themselves, the IRS summonses in *Fisher* would have required them simply to hand over the documents, not to recite what the documents said through the generation anew of any oral statements.

With this reasoning, the *Fisher* Court gutted Boyd’s holding that the Fifth Amendment flatly bars the compelled production of documents if their contents will incriminate the producing person. Two

Amendment somehow might lose their protected status when turned over to an attorney for the purpose of seeking legal advice. See id. at 403-04.

70 See id. at 405.

71 The Court easily cast aside the initial suggestion that the attorneys could decline to produce the documents simply because they might incriminate their taxpayer clients. The Fifth Amendment guards against compelled self-incrimination, said the Court, not the compelled incrimination of others. See id. at 396-98 (relying principally on the Court’s earlier decision in *Couch v. United States*, 409 U.S. 322 (1973)). Indeed, that limitation flows readily from the text of the Fifth Amendment itself, which bars only the compulsion of a person “to be a witness against himself,” not compulsion to be a witness against someone else.

There was no suggestion in *Fisher* that the attorneys themselves had committed any crime in connection with their clients’ tax returns, such as would have positioned the attorneys to invoke their own Fifth Amendment rights.

72 See *Fisher*, 425 U.S. at 407-09; see also supra note 52 (discussing major Supreme Court cases undercutting Boyd’s analysis of Fourth Amendment).

73 *Fisher*, 425 U.S. at 408.

74 Id. at 409.

75 Id.
months later, the Court would distance itself still further from Boyd by making clear that duly authorized search and seizure does not constitute compelled self-incrimination under the Fifth Amendment simply because the documents seized are incriminatory. At long last, the Court would draw the distinction between search and seizure, on the one hand, and subpoenas, on the other, that had eluded Justice Bradley in Boyd: "[T]he individual against whom [a] search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence." In short, the person whose documents are seized is "not asked to say or to do anything."

The Court nonetheless did not foreclose completely Fifth Amendment challenges to document subpoenas. Rather, in Fisher, the Court articulated what has come to be known as the act-of-production doctrine. The central premise of the doctrine, as its name suggests, is to distinguish between the unprotected contents of documents and the act by which they are produced in response to a subpoena or its equivalent. The doctrine posits that, in some instances, the act of producing the requested documents—"wholly aside from the[ir] contents"—will amount to a testimonial communication within the purview of the Fifth Amendment.

I ultimately am less concerned with the details of the act-of-production doctrine than with the more fundamental folly of its effort to decouple document content from the act of document production. As I shall discuss shortly, the most convincing construction of the Fifth Amendment would eliminate entirely the act-of-production doctrine by resurrecting Boyd's holding that all compelled production of documents that are self-incriminatory in content constitutes the compulsion of a person "to be a witness against himself." At this juncture, however, a brief exposition of the act-of-production doctrine serves to convey a more precise sense of its meaning and application. Even if one momentarily accepts Fisher's decoupling of document content from the act of document production, the shortcomings of the act-of-production doctrine on its own terms are enough to make one skeptical of its merit.

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76 See Andresen v. Maryland, 427 U.S. 463, 477 (1976) (holding that "the search of an individual's office for business records, their seizure, and subsequent introduction into evidence do not offend the Fifth Amendment[ ]").
77 Id. at 474.
78 Id. at 473.
79 See Mosteller, supra note 12, at 4 (describing framework of Fisher).
80 Fisher, 425 U.S. at 410. The act-of-production doctrine "was not an innovation conceived by the Fisher Court" but, instead, had been advanced by earlier commentary seeking somehow to explain the result in Boyd. See Alito, supra note 3, at 45-46.
81 See infra Part II.
2. Fisher on Its Own Terms

In Fisher, the Court observed that the act of production conveys several implicit admissions from the producing person: that the requested documents exist; that the producing person had enough control over the documents to produce them; and that the documents are authentic, in the sense of being those requested in the subpoena. Simply as a practical matter, a person cannot produce a document that does not exist or one over which the person has no control. For this reason, admissions of existence and control are implicit in every act of production. Likewise, one hardly could say that a person has engaged in an act of document production at all if that person were to produce a stack of overtly described fakes. One does not comply with a subpoena, in other words, by handing over documents other than the ones requested. Rather, every act of production worthy of being so labeled implicitly authenticates the documents produced, even if that implicit authentication is nothing more than a ruse to lead the government astray. As a result, if the Court were to say that the generation of these sorts of implicit admissions is, in itself, enough to trigger the Fifth Amendment, the practical effect would be to resurrect Boyd's flat prohibition upon the compelled production of self-incriminatory documents. The Court did not take that path. But, to avoid doing so, the Court created under the aegis of the act-of-production doctrine an analytical framework dramatically at odds with its treatment of self-incriminatory oral statements.

These differences come in two basic types. First, the Court has made Fifth Amendment protection for the act of production turn upon the government's preexisting knowledge concerning the requested documents. Second, the Court has subjected acts of production to a more exacting standard of self-incrimination than the Court applies under the Fifth Amendment generally.

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82 See Fisher, 425 U.S. at 410 ("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."). For illustrative purposes, I focus upon the Fisher Court's treatment of the implicit admissions of existence and control. For criticism of the Court's analysis with regard to implicit authentication, see infra notes 89, 105.

83 See Mosteller, supra note 12, at 18 ("Producing a document in response to a subpoena demonstrates that the defendant possessed that document, or at least had sufficient control over it that he could provide it upon demand. The act of production communicates this implicit information in every case . . . ").

84 See Alito, supra note 3, at 50 ("The act of producing documents will always be of value for authentication purposes.").
a. The Irrelevance of Preexisting Knowledge. As noted earlier, all acts of production implicitly confirm the existence of the subpoenaed documents and their control by the producing person. But, under Fisher, only some such acts "rise[] to the level of testimony within the protection of the Fifth Amendment." 85 The difference turns upon the extent of the government's knowledge at the time of the subpoena.

The implicit admissions of existence and control on the particular facts of Fisher were not enough to trigger the Fifth Amendment, said the Court, because they—among other things—did not convey any additional information to the government.86 Rather, in Fisher, "[t]he existence and location of the papers [requested] are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."87 With this cryptic reference to a "foregone conclusion," the Court appears to have meant that the IRS already knew about both the existence of the disputed documents (apparently, from the IRS agents' initial interviews with the taxpayers) and the location of the documents (in the hands of the taxpayers' attorneys). As such, any act of production on the part of the taxpayers would not "rise[ ] to the level of testimony,"88 because that act—again, as distinct from the unprotected contents of the documents themselves—would not tell the government anything that it did not already know.89 By contrast,

85 Fisher, 425 U.S. at 411.
86 See id. The Court also held that the implicit admissions of existence and control in Fisher were not incriminatory. See id. at 412. For criticism of that point, see infra Part I.C.2.b.
87 Fisher, 425 U.S. at 411.
88 Id.
89 To illustrate the significance attached by current doctrine to the government's preexisting knowledge, I focus here upon the reasons why the Court considered the admissions of existence and control implicit in the act of production in Fisher to be insufficient to garner Fifth Amendment protection. The same emphasis upon preexisting knowledge enters current doctrine more subtly in connection with Fisher's notion that implicit authentication of the documents produced might, in some instances, trigger the Fifth Amendment. The IRS summonses in Fisher itself did not do so, asserted the Court, because "[t]he taxpayer would be no more competent to authenticate the accountant's workpapers or reports by producing them than he would be to authenticate them if testifying orally." Id. at 413 (footnote omitted).

As Robert Mosteller has noted, the Court's assertion that the taxpayers could not have authenticated the requested documents through their act of production is flatly incorrect under the minimal standard of authentication used in modern evidence law. See Mosteller, supra note 12, at 16. More fundamentally, the Fisher Court's unwillingness to trigger the Fifth Amendment based upon implicit authentication appears to replicate the Court's error with regard to the implicit admissions of existence and control. The suggestion of Fisher is that implicit authentication through the act of production would not be enough to trigger the Fifth Amendment as long as the government need not rely—not just
eight years later in *United States v. Doe*, the Court would uphold the invocation of the Fifth Amendment as a barrier to document production where the district court—applying *Fisher*—had found that the government was unaware of the existence of the subpoenaed documents. As part of a criminal investigation into the role of a sole proprietor in obtaining public contracts, the government in *Doe* had sought the production of a wide range of business documents—described simply by general category—of the sort that one might think a sole proprietor would retain. This generalized form of knowledge on the government’s part was not enough, said the Court in *Doe*, to bring the case within the “foregone conclusion” category, absent any indication in the record that the government “‘kn[ew], as a certainty, that each of the myriad documents demanded’” was retained by the particular proprietor targeted by the subpoena. In *Doe*, the government simply was “‘attempting to compensate for its lack of knowledge’” by issuing a series of “‘broad-sweeping subpoenas.’”

The lesson of *Fisher* and *Doe*—that the Fifth Amendment is of no avail when the existence and location of the requested documents are a “foregone conclusion”—fundamentally misconceives the nature of the constitutional inquiry in four related respects. First, consider the constitutional text. The Court’s restriction of the Fifth Amendment to the compulsion of testimonial communication—a distinction drawn from the bodily evidence cases—rests ultimately upon an implicit conception of what it means to compel a person “to be a witness against himself” in the parlance of the Fifth Amendment. Whether a person is compelled to assume the status of a “witness against himself” turns upon what the person is compelled to do by the government—to utter self-incriminatory speech, in the case of interrogation, or to produce self-incriminatory documents, in the case of a subpoena. The status of being a witness against oneself has nothing to do with the extent of the government’s preexisting knowledge of what the wit-
ness might have to say, whether orally through speech or implicitly through action. In the trial context, for instance, a witness is no less of a witness when the attorney doing the questioning already knows the answers to the questions that she poses.

Second, Fifth Amendment principles from outside the context of document subpoenas drive home the foregoing inference from the text. Within the realm of the Fifth Amendment, Fisher's focus upon the government's preexisting knowledge is anomalous. As Justice Brennan tellingly observed in his separate opinion in Fisher: In no other area of Fifth Amendment discourse does the Court make the protection of that provision depend upon the degree to which the government already knows what the witness is compelled to disclose. To the contrary, it would be just as unconstitutional for the government to compel self-incriminatory oral statements from a person whom the government already knows, to a moral certainty, to have committed a given crime as it would be for the government to compel the exact same statements where the government has little preexisting knowledge of the person's guilt. When it comes to self-incriminatory oral statements, in other words, the government's preexisting knowledge is irrelevant. The Fifth Amendment, instead, stands as a prohibition upon a particular method of information gathering in itself, apart from the extent of information that the government already has.

Third, even if understood most narrowly in terms of the presentation of testimony at trial, the status of being a witness does not turn upon the degree to which the person in that status will add to "the sum total of... information" known by the government. Some wit-

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96 See Fisher v. United States, 425 U.S. 391, 429 (1976) (Brennan, J., concurring) ("I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him."); see also Alito, supra note 3, at 49 (noting that Fifth Amendment "privilege has never been restricted to testimony that is not cumulative").

Justice Brennan was willing to endorse the result in Fisher—upholding enforcement of the IRS summonses—based upon "the wholly business rather than personal nature of the papers" involved. Fisher, 425 U.S. at 414. As to personal papers, however, Justice Brennan would have rehabilitated the holding of Boyd by tying it to modern notions of constitutional privacy, understood in terms of an enclave of private thought insulated from government intrusion. See id. at 416-28. The Court as a whole, however, has expressly rejected—rightly, in my view—a conception of the Fifth Amendment privilege against self-incrimination grounded in modern notions of constitutional privacy. See United States v. Balsys, 118 S. Ct. 2218, 2232 (1998) (noting that use immunity doctrine is inconsistent with privacy rationale); Fisher, 425 U.S. at 399 ("[T]he Court has never suggested that every invasion of privacy violates the privilege."). By its terms, the Fifth Amendment does not protect some amorphous enclave of privacy; it simply prohibits one particular method of information gathering by the government in the criminal process—the compulsion of a person "to be a witness against himself." For a nontextual refutation of a privacy-based justification for the Fifth Amendment, see Dolinko, supra note 12, at 1107-37.
nesses are valuable to their proponents simply because they make more believable or coherent the information already presented to the jury through other evidence in the case. There is an outer boundary to this, of course, when the “probative value” of the witness “is substantially outweighed by the danger of . . . needless presentation of cumulative evidence.”\footnote{Fed. R. Evid. 403.} But even that boundary rests within the sound discretion of the trial judge;\footnote{Rule 403 merely provides that cumulative evidence “may be excluded,” not that it shall or must be. Id.} witness status does not automatically disappear because of cumulativeness.

Finally, Fisher’s focus on preexisting government knowledge is highly speculative and unwieldy to apply in practice. Fisher seeks to identify when the government’s preexisting knowledge has become so detailed as to make a “foregone conclusion” any information that might be revealed by the act of document production. Generalized knowledge—that people of a particular sort typically keep certain kinds of records—is not enough under Doe’s application of the Fisher framework.\footnote{See supra notes 90-94 and accompanying text.} But the government obviously need not have so much knowledge as to be aware of the contents of the documents themselves, as that virtually would eliminate the need to issue a subpoena for the documents in the first place. The problem comes in determining where, between these two extremes, to draw the line. As one circuit judge recently lamented: “Somewhere in that range is an imaginary line which, unlike the equator, can never be fixed or defined with clarity.”\footnote{United States v. Hubbell, 167 F.3d 552, 601 (D.C. Cir. 1999) (Williams, J., dissenting in part), cert. granted, 68 U.S.L.W. 3204 (U.S. Oct. 12, 1999) (No. 99-166).} As a result, “the operational meaning of the ‘act of production’ doctrine . . . will largely turn on district courts’ discretion in [the] metaphysical classification of prosecutors’ knowledge.”\footnote{Id.} Not surprisingly, commentators have long documented the divergent positions taken by the lower federal courts seeking to apply Fisher and its progeny.\footnote{See, e.g., Heidt, supra note 12, at 443 n.14 (observing that “Fisher has produced utter confusion in the lower courts”); id. at 480 n.170 (summarizing divergent approaches of lower courts); Mosteller, supra note 12, at 35-40 (same); Trujillo, supra note 66, at 487-94 (same); Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States, 95 Harv. L. Rev. 683, 686-90 (1982) (same).}

b. A Separate Standard of Self-Incrimination. In addition to its emphasis upon the government’s preexisting knowledge, the Fisher Court made a second doctrinal move to avoid backsliding to the result in Boyd: The Court tied the act-of-production doctrine to a niggardly...
standard of self-incrimination out of line with that generally applied to Fifth Amendment claims. Specifically, the Court stated that the admissions of existence and control implicit in the act of document production in Fisher—even if testimonial in nature—were not incriminatory. The Court observed that "it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers." Because the existence of the workpapers and their control by the taxpayers were not illegal in themselves, the Court was "quite unprepared" to say that the implicit admission of either fact through the act of production "pose[d] any realistic threat of incrimination to the taxpayer."

In determining what counts as incrimination under the Fifth Amendment, the Court curiously did not cite its leading decision on that question. In Hoffman v. United States, the Court held in 1951 that the protection afforded by the Fifth Amendment against compelled self-incrimination "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman, for example, could refuse to answer questions directed at whether he recently had made contact with another individual sought as a witness by a federal grand jury. Though Hoffman's answers themselves would not have amounted to confessions of illegal activity, his answers nevertheless might have indicated that Hoffman assisted the missing witness in concealing his whereabouts from the grand jury—else how would Hoffman have been able to contact that individual? At the very least, said the Court, "it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that . . . the answer[s] cannot possibly have such a tendency' to incriminate."

Hoffman's broad view of what constitutes incrimination makes sense when one considers the text of the Fifth Amendment. Though

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103 For a similar observation, see Gerstein, supra note 12, at 380-82; Heidt, supra note 12, at 476-77.
105 Id. in addressing whether the act of production in Fisher would implicitly authenticate the requested documents, the Court similarly stated that there was no "substantial threat of self-incrimination." Id. at 413. That conclusion, however, appears to turn upon the erroneous premise noted earlier, see supra note 89, that the taxpayer's actions would not suffice to authenticate the documents under the ordinary evidentiary standards for authentication.
106 341 U.S. 479 (1951).
107 Id. at 486.
108 See id. at 488.
109 Id. (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)).
commonly paraphrased in terms of a constitutional privilege against self-incrimination, the pertinent language of the Fifth Amendment does not speak in those terms. Instead, it refers to a person being "compelled in any criminal case to be a witness against himself." To be a witness—even if understood most narrowly, for the moment, in terms of actual testimony on the witness stand at a criminal trial—is not necessarily to take the fact finder all the way to an ultimate conclusion about the defendant's guilt. Rather, it is a familiar principle of evidence law that a witness merely might provide one proverbial "brick in the wall"—an adage strikingly similar to the Hoffman Court's reference to one "link in the chain of evidence" that ultimately establishes the defendant's guilt. Indeed, as noted earlier, a given witness simply might make more worthy of belief other incriminatory evidence offered by the prosecution at trial.

All of this belies the reasoning deployed by the Fisher Court to cabin the reach of the act-of-production doctrine. The existence of the document produced is inherently a "link in the chain of evidence" pointing to guilt—indeed, the most basic link—for, if the document did not exist in the first place, it could not constitute evidence at all. To accept, as Fisher does, the notion that acts of production convey the implicit admission that the requested documents exist thus—if taken seriously—is to bring all acts of production within Hoffman's ordinary standard for incrimination. If anything, as I now explain, attention to the Court's ordinary approach to Fifth Amendment cases serves to highlight an even more fundamental defect in the act-of-production doctrine.

3. Fisher's Larger Folly

The crucial starting point of the act-of-production doctrine is to decouple the content of documents from the act by which they are produced. To determine whether a given act of production triggers the Fifth Amendment, under the logic of Fisher, one must look only to that act itself. Most importantly, one must ignore that the documents themselves are incriminatory in content. As such, the perspective mandated by Fisher takes on an unreal, make-believe quality. It is rather like the Wizard of Oz imploring supplicants to pay no attention to the man behind the curtain. As one commentator accurately observes: "[T]he act-of-production theory is woefully out of touch with the realities of subpoena practice," for "[b]oth prosecutors and wit-

\[110\] U.S. Const. amend. V.
\[111\] See Fed. R. Evid. 401 advisory committee's note.
\[112\] See supra note 80 and accompanying text.
nesses served with document subpoenas are invariably interested in the documents’ contents, not the testimonial component of the act of production.”¹¹³ The folly of Fisher is that it gets its focus precisely backward.

The creation of a separate, less protective, unduly complicated, and wrong set of Fifth Amendment principles for document subpoenas stems, at bottom, from the modern Court’s implicit construction of the phrase “to be a witness” in terms of testimonial communication. With respect to self-incriminatory oral statements—the most familiar form of testimonial communication and one that the Court always has deemed worthy of Fifth Amendment protection—the question is simply whether the content of the statements to be compelled would incriminate the speaker under the ordinary standard of Hoffman. Thus, Hoffman could refuse to engage in the act of making an oral statement to the grand jury—that is, he could decline to answer the prosecutor’s questions—on the ground that the content of his answers might incriminate him.¹¹⁴ The question was not whether the act of making that statement—wholly apart from the content of the statement itself—would be enough to trigger the Fifth Amendment.¹¹⁵

It would be one thing if the confining of the Fifth Amendment to testimonial communication—a limitation transplanted by the modern Court to the world of document subpoenas from the bodily evidence cases—made for a workable body of doctrine with resonance in the real world of the criminal process. For the reasons canvassed above, that is not so. It would be one thing if the distinction were the product of reasoned analysis—indeed, of any analysis—of the language and history of the Fifth Amendment. To the contrary, it is precisely because the Court has not parsed the phrase “to be a witness” but, instead, has defined it only indirectly and by implication that the Court has meandered along a mistaken doctrinal path for more than a century.

Misled by Justice Bradley’s conflation of the Fourth and Fifth Amendments in Boyd, the modern Court has 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 to

¹¹³ Alito, supra note 3, at 46.
¹¹⁴ See supra note 108 and accompanying text.
¹¹⁵ In the next Part, I again take up the comparison of the Court’s treatment of testimonial forms of evidence with its framework for documentary evidence. With regard to either form, I contend, the Fifth Amendment bars the compulsion of a person to engage in an act of production as long as the content of the thing produced—an oral statement created anew or preexisting material—is incriminatory in content. See infra note 199 and accompanying text.
obtain incriminatory documents by seizure and by subpoena. The false choice is between adherence to the \textit{Boyd} majority's erroneous view that all government efforts to obtain incriminatory documents are unconstitutional—whether by unilateral seizure or through an act of production by the document holder compelled by subpoena—and the position of the current Court that both seizures and subpoenas are generally permissible means to obtain such materials.

Both the Court and commentators have devoted too little attention to a third option: the position of Justice Miller's concurrence in \textit{Boyd}. What is perfectly permissible under the Fourth Amendment for the government to seize through unilateral action is not permissible for the government to obtain through the particular information gathering method barred by the Fifth Amendment: namely, compulsion of a person "to be a witness against himself" in the sense of giving evidence against himself. The constitutional violation occurs, in other words, when the act of production consists of the compelled act of the person to be incriminated rather than a unilateral act on the part of the government itself. The next Part sets forth the affirmative case for this view.

\textbf{II}

"To Be a Witness" /s "To Give Evidence"

As I explain in the sections that follow, the precise wording of the Fifth Amendment, its historical context, and the body of constitutional doctrine developed by the Court itself for self-incriminatory oral statements together form a convincing case to resurrect Justice Miller's alternative rationale for the holding in \textit{Boyd}. To compel a person "to be a witness," properly understood, is to compel that person "to give evidence"; and it is the compulsion of that act of giving evidence in itself—whether in the form of speech, production of pre-existing documents, or otherwise—that violates the Fifth Amendment. To put the point another way, the compulsion of a person to engage in \textit{any} production of self-incriminatory "evidence" is unconstitutional, not just compulsion of those acts of production that happen to incriminate the producer above and beyond the content of what is produced. By contrast, the unilateral taking of incriminatory evidence by the government—a "seizure," in common parlance—does not implicate the Fifth Amendment and may proceed in accordance with the Fourth.
A. Text

The crucial textual question is easily stated: What exactly does the Fifth Amendment mean when it uses the word "witness"? One quickly may discard one conceivable definition: namely, a reading of the word "witness" to mean eyewitness, in the sense of one who sees and hears events. A prohibition upon the compulsion of a person to be an "[eye]witness against himself" would be nonsensical. The status of being an eyewitness is not one that can be "compelled" or otherwise placed upon a person by the government or anyone else. One inevitably is an eyewitness of one's own actions—at least, aside from the extraordinary scenario of acts performed during a state of unconsciousness, which generally cannot form the basis for criminal sanctions at all. Accordingly, one must look to some other, more legalistic definition of witness status.

As a first cut at a legal definition, one might read the word in the sense used in the law of evidence, to concern only actual testimony as a witness at trial. To compel a person "to be a witness," under this view, would mean to compel the person literally to take the witness stand. Indeed, to the modern eye, this seems the most obvious of all conceivable meanings of the phrase. There can be no serious doubt that such action would violate the Fifth Amendment under any plausible construction. As the Court itself has held, however, that is not all—indeed, not nearly all—that is forbidden. With respect to self-incriminatory oral statements, the Court has gone substantially beyond a construction of the phrase "to be a witness" in the sense of testimony on the witness stand at trial. Specifically, the Court has long understood the Fifth Amendment to bar the compulsion of self-incriminatory statements in the pretrial stage.

If the phrase "to be a witness" means something more than just taking the witness stand at trial, then what parameters does that phrase convey? To answer that question, one must develop a more precise sense of how the phrase got into the Fifth Amendment in the

116 See Model Penal Code § 2.01(1)-(2) (1985) (providing that “[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act” and that “a bodily movement during unconsciousness” does not constitute such act).

117 See supra note 2 and accompanying text.

118 For analysis of the Fifth Amendment in the pretrial phase, see, e.g., Miranda v. Arizona, 384 U.S. 436, 460-61 (1966); Bram v. United States, 168 U.S. 532, 562-64 (1897).

I do not mean to suggest that the application of the Fifth Amendment to the pretrial phase is either obvious or straightforward. As I shall discuss later, it was common practice in the early eighteenth century for justices of the peace to question criminal suspects in the pretrial phase and to transcribe incriminatory statements for use at trial. As I shall explain, however, there are good textual reasons to understand the Fifth Amendment to disallow such practices. See infra notes 162-71 and accompanying text.
first place. It is beyond dispute—indeed, all legal historians who have addressed the point concur—that the phrase “to be a witness” was the linguistic innovation of James Madison, the drafter of the Fifth Amendment.\textsuperscript{119} The phrase did not appear in any of the proposals for a bill of rights put forward by the various state ratifying conventions; nor did the phrase appear in any of the forerunners to the Fifth Amendment found in state constitutions at the time of the founding.\textsuperscript{120} Upon recognition that Madison's language has no precise forebears, both the Court and commentators have been too quick to conclude that historical context can do little, if anything, to inform the interpretation of the Fifth Amendment.\textsuperscript{121} As I now explain, it is precisely the unprecedented nature of Madison's language—the conspicuousness of its departure from the phrasing consistently used by the states—that is the key to its proper interpretation.

B. Context

The most plausible construction of the phrase “to be a witness” is as the equivalent of the phrase “to give evidence” found in contemporaneous state sources. Several of the state ratifying conventions put forward proposals for constitutional provisions on the subjects ultimately covered by the Fifth Amendment. In terms of their language on the subject of compelled self-incrimination, these proposals contained no variation in wording; rather, they are striking for their uniformity, each providing that, in all criminal prosecutions, a person may not “be compelled to give evidence against himself.”\textsuperscript{122}

\textsuperscript{119} See, e.g., Levy, supra note 13, at 422-23 (describing Madison's phrasing as "original"); Eben Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination, supra note 13, at 109, 137 (observing that Madison's draft "diverged substantially from any of the proposals submitted by the state conventions").


\textsuperscript{120} For more detailed discussion of the contemporaneous state sources, see infra notes 124-25 and accompanying text.

\textsuperscript{121} See, e.g., United States v. Balsys, 118 S. Ct. 2218, 2223 (1998) (asserting that "there is no helpful legislative history"); Alito, supra note 3, at 78 (rejecting "any hope of a textual answer"); Witt, supra note 13, at 833 (lamenting "just how little evidence exists for the early meaning of the self-incrimination clauses").

The language used by the state ratifying conventions comes as no surprise. In an insightful recent article, legal historian Eben Moglen traces the prohibition upon compulsion “to give evidence” to section 8 of the 1776 Virginia Declaration of Rights, a provision widely imitated in other state constitutions and declarations of fundamental rights. In fact, at the time of the founding, all of the state constitutions to address the problem of compelled self-incrimination spoke in terms of a right against compulsion either “to give evidence” or, equivalently, “to furnish evidence.”

The reasons for Madison’s substitution of the phrase “to be a witness” for the phrase “to give evidence” in state sources remain a mystery, as he left no explanation for the change. The more important question for the present day—one that actually can be answered—is what to make of the change. Whatever Madison thought he was doing, his handiwork went forth into the broader political community that ratified the Fifth Amendment. What to make of the phrase “to be a witness” thus turns not on personal biography but, instead, on

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One commentator critical of Amar raises in passing, but does not develop in any detail, the possibility that the language used in contemporaneous state constitutions might bear upon the meaning of the word “witness” in the Fifth Amendment: “It... could be that the state constitutional language is evidence of the probable intended meaning and scope of the federal constitutional language, rather than a sharp contrast to it. Amar’s discussion does not decisively repudiate this possibility.” Michael Stokes Paulsen, Dirty Harry and the Real Constitution, 64 U. Chi. L. Rev. 1457, 1482 n.49 (1997) (citation omitted) (reviewing Amar, supra note 12).

See Moglen, supra note 119, at 134. Leonard Levy similarly observes:

Section 8... became a model for other states and for the United States Bill of Rights. Indeed the Virginia Declaration of Rights became one of the most influential constitutional documents in our history. The committee draft was reprinted in the Philadelphia newspapers even before Independence, making it available to the delegates from all the states assembled in the Second Continental Congress. That committee draft was republished all over America, and even in England and on the Continent, in time to be a shaping force in the framing of other state constitutions.

Levy, supra note 13, at 409.


See Levy, supra note 13, at 423 (“Madison said nothing whatever that explained his intentions concerning the self-incrimination clause. Nor do his papers or correspondence illuminate his meaning.”); Moglen, supra note 119, at 138 (“[Madison] left no document and made no recorded comment on the principles behind his drafting.”).
close attention to the historical context surrounding the Fifth Amendment: specifically, the absence of outcry upon Madison’s change in language; the understanding of the noun “witness” in contemporaneous sources on language; the use of similar language elsewhere in the Constitution; and, perhaps most tellingly, contemporaneous common law, which clearly barred the compelled production of self-incriminatory documents.

Before parsing these various historical clues, I hasten to underscore the caution with which I say that the phrase “to be a witness” in the Fifth Amendment is best read as synonymous with the phrase “to give evidence” in the state proposals. In legal scholarship no less than in legal practice, one properly should be reluctant to equate one set of words with another. That sentiment is the product of prudence and good sense, but it should not prevent one from recognizing the rare instance in which that reluctance is an interpretive hindrance rather than a help. To be sure, words in a text may be ambiguous; historical inferences alone are susceptible to error; and the jump from common law to constitutional law is one to be made only with care. My contention is simply that a reading of the Fifth Amendment that rehabilitation Justice Miller’s view in Boyd offers the most coherent explanation for the various clues available to us. Indeed, as I shall explain after my historical foray, an understanding of the Fifth Amendment as a prohibition upon the compelled giving of evidence, as distinct from its taking by the government, does not merely have the virtues of textual and historical fidelity; it also serves to clarify both the relationship between the Fourth and Fifth Amendments and the judicial inquiry necessary to apply the latter to document subpoenas.

1. The Ratification of the Fifth Amendment

One striking feature of the historical record is that it contains no evidence of opposition to Madison’s unique phrasing127—certainly, no evidence to suggest that state leaders somehow thought that Madison had bamboozled them by altering the substance of their proposals through linguistic sleight-of-hand. If contemporary observers had understood Madison’s handiwork to make a substantive change to the proposals uniformly put forward by the state ratifying conventions, one would expect to find at least a peep of objection. There was none.

127 See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 8.14(b), at 447 (2d ed. 1992) (“The phrasing of the privilege [against self-incrimination] in the Fifth Amendment... was... quite distinctive, but its uniqueness at the time attracted no attention.”); see also Levy, supra note 13, at 424-25 (noting that First Congress referred Madison’s draft of Fifth Amendment to select committee “that included one member from each state” but that committee “made no change” to draft).
notwithstanding the substantial overlap between the leaders of the state ratifying conventions and the membership of the First Congress that approved the Bill of Rights. In itself, of course, silence is a slippery tool of interpretation; but there is a good deal more than just silence here.

When the First Congress debated the proposed Bill of Rights—including the rephrased Fifth Amendment as penned by Madison—the only member to address the issue of self-incrimination spoke of it in terms of the familiar restriction in the state proposals on compulsion of a person "to give evidence against himself." Contemporaneous essays in the popular press similarly attest to the importance of recognizing a right not to be compelled "to furnish evidence" against oneself—the phrasing used in some contemporaneous state constitutions.

2. Contemporaneous Sources on Language

The notion that observers at the time might equate Madison's phrase "to be a witness" with the proposed phrase "to give evidence" is not surprising when one considers the matter in purely linguistic terms. Upon tracing the history of the word "witness" over the centuries, the *Oxford English Dictionary* defines it as "[o]ne who gives evidence in relation to matters of fact under inquiry." In fact, the use of the phrase "gives evidence" as synonymous with the noun "witness" remains a common feature of modern dictionaries from England that deal specifically with legal terminology.

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128 See David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 3-4 (1997) (observing that "many of [the] members [of the First Congress]—James Madison, Oliver Ellsworth, Elbridge Gerry, Rufus King, Robert Morris, and William Paterson being only the most conspicuous examples—had helped to compose or to ratify the Constitution itself").

129 1 Annals of Cong. 782 (Joseph Gales ed., 1789) (statement of Rep. Lawrence); see also Levy, supra note 13, at 424 (observing that Lawrence "restated Madison's phrasing in the language of the more familiar clause deriving from Section 8 of the Virginia Declaration of Rights, as if they were the same").

130 See The Federal Farmer No. 6 (Dec. 25, 1787), reprinted in Cogan, supra note 122, § 9.2.4.2, at 333; Brutus No. 2 (Nov. 1, 1787), reprinted in Cogan, supra note 122, § 9.2.4.1, at 333.

131 My argument here is descriptive. I take no position on the normative question of whether the sources to which I point are correct as a linguistic matter to define the word "witness" in terms of the giving of evidence.


133 See, e.g., A Concise Dictionary of Law 391 (Elizabeth A. Martin ed., 1983) (defining "witness" as "[a] person who gives evidence" and repeating that locution in more specific illustrations of word); Mozley and Whiteley's Law Dictionary 386 (John B. Saunders ed., 8th ed. 1970) (defining "witness" as "[a] person who, on oath or solemn affirmation, gives evidence in any case or matter").
More significantly for present purposes, the leading legal dictionaries contemporaneous with the drafting of the Fifth Amendment define the word “witness” as one who “gives evidence in a cause.” Law dictionaries published shortly after the ratification of the Bill of Rights reflect the same understanding. Indeed, the notion that to be a “witness” is to give evidence is not confined to dictionaries focused on the law. The 1828 first edition of Noah Webster’s landmark American Dictionary of the English Language defines the word “witness” in terms of “furnish[ing] evidence or proof.”

3. “Witness” Elsewhere in the Constitution

Apart from the words of the Fifth Amendment itself, other clues to the meaning of the word “witness” appear elsewhere. One common technique of constitutional interpretation seeks to ascertain the meaning of particular words through close examination of the same or a similar word in other provisions of the Constitution itself—a method that Akhil Amar aptly dubs “intratextualism.” The word “witness” appears not only in the Fifth Amendment but also, in plural form, in

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Most of the early dictionaries cited here and in proximate notes do not contain pagination. One nonetheless may locate easily the quoted material, given that the words defined are, of course, arranged in alphabetical order.

One member of the current Supreme Court has cited Cunningham’s definition, though without any apparent consideration of the prospect that the constitutional phrase “to be a witness” ought to be construed as equivalent to the proposed phrase “to give evidence.” See Doe v. United States, 487 U.S. 201, 221 n.2 (1988) (Stevens, J., dissenting).


Writing in the early twentieth century, John Henry Wigmore asserted, without explanation, in his landmark treatise on the law of evidence that the difference in phrasing between the Fifth Amendment and the state proposals carries no difference in substance. See 4 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 2263, at 3122 (1st ed. 1905); see also id. § 2252, at 3105.

137 See Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 748 (1999).
three other provisions that concern the criminal process: the Treason Clause of Article III; the Compulsory Process Clause of the Sixth Amendment; and the Confrontation Clause of the same amendment. These other appearances of the word “witness” lend credence, by way of comparison, to the notion that the phrase “to be a witness” in the Fifth Amendment is most plausibly read to encompass not merely testimonial communication but also the giving of evidence in other forms.

One easily may parse the reference in the Treason Clause. There, the word “witnesses” quite plainly refers exclusively to testimony at trial: “No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court.” In short, the text of the Treason Clause demands a restrictive interpretation of the word “witnesses” by expressly limiting it to “testimony.”

The two appearances of the word “witnesses” in the Sixth Amendment bear more extensive examination. The Compulsory Process Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” The Confrontation Clause also uses the word “witnesses,” providing that the accused shall enjoy the right “to be confronted with the witnesses against him.” Together, these two components of the Sixth Amendment enable criminal defendants not only to build a case of their own (by “obtaining” favorable “witnesses” through service of legal “process”) but also to test the government’s case against them at trial (by “confront[ing]” the government’s “witnesses”).

Consider first the Compulsory Process Clause. The manner by which this clause became part of the Sixth Amendment is remarkably similar to the enactment history of the Fifth Amendment prohibition upon compulsion of a person “to be a witness against himself.” James Madison included in the Sixth Amendment a right to compulsory process to obtain exculpatory “witnesses,” even though virtually all of the

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138 U.S. Const. art. III, § 3, cl. 1 (emphasis added).
139 Id. amend. VI.
140 Id.
141 See Peter Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 154-55 (1974) (“The [Compulsory Process Clause] guarantees the accused a basis for introducing evidence ‘in his favor,’ and the [Confrontation Clause] guarantees the accused a basis for challenging the evidence ‘against him.’”). Under the Compulsory Process Clause, the defense is not limited to building its case by availing itself of the ordinary rules for service of process in order to obtain witnesses. The Supreme Court has held that the Clause necessarily implies a right to present witness testimony at trial. See Washington v. Texas, 388 U.S. 14, 18, 23 (1967).
proposals from the state ratifying conventions spoke in terms of a right to "call for" exculpatory "evidence."\textsuperscript{142} Virtually all of the contemporaneous state constitutions to address the issue likewise spoke in terms of "evidence" or favorable "proofs" rather than "witnesses."\textsuperscript{143} Here, too, there was no sign of protest upon Madison's change of wording\textsuperscript{144}—again, no indication that the substitution of "witnesses" for "evidence" reflected a change of substance.

To the contrary, the right to compulsory process has long been thought to entitle the defense to the issuance of subpoenas to compel not only the testimony of recalcitrant witnesses but also the production of documents. Presiding over the 1807 treason trial of Aaron Burr, Chief Justice John Marshall specifically held that the Compulsory Process Clause entitled the defense to serve a subpoena on the President to compel the production of certain military documents thought to bear upon the treason charge.\textsuperscript{145} For purposes of the Compulsory Process Clause, a witness is no less of a witness if compelled to produce documents rather than to testify at trial. For its part, the modern Supreme Court has cited approvingly this aspect of the \textit{Burr} opinion, describing it as "[t]he first and most celebrated analysis" of the Compulsory Process Clause.\textsuperscript{146} Similarly, Akhil Amar infers that, "[i]f the defendant has a Sixth Amendment right to present exculpatory \textit{witnesses} to the jury, surely he must also have a right to present exculpatory \textit{physical evidence}."\textsuperscript{147} In short, no one has argued that the Compulsory Process Clause entitles the defense to avail itself of legal process to obtain only those forms of exculpatory evidence that consist of testimonial communication.

Insofar as some observers have argued powerfully for such a limitation on the word "witness" anywhere in the Constitution, they have

\begin{footnotes}
\item[142] See Richard A. Nagareda, Reconceiving the Right to Present Witnesses, 97 Mich. L. Rev. 1063, 1111 n.187 (1999) (discussing state proposals, only one of which spoke in terms of compulsory process to obtain "witnesses").
\item[143] See id. at 1110 & n.185, 1111 & n.186.
\item[144] See id. at 1112.
\item[145] As Chief Justice Marshall observed:  
A subpoena duces tecum varies from an ordinary subpoena only in this[:] that a witness is summoned for the purpose of bringing with him a paper in his custody. . . . 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.
\item[147] Amar, supra note 12, at 95. Amar first presented his account of the Sixth Amendment in Akhil Reed Amar, Twenty-Fifth Annual Review of Criminal Procedure—Foreword: Sixth Amendment First Principles, 84 Geo. L.J. 641 (1996), an article that his book reprints, essentially verbatim.
\end{footnotes}
done so with regard to the related Confrontation Clause of the Sixth Amendment. As I now explain, critics of the Court’s Confrontation Clause jurisprudence have argued for a construction of the word “witnesses” in that provision in a manner akin to the restrictive sense of witness testimony specified in the Treason Clause. They have done so, however, primarily to avoid placing the Confrontation Clause on a collision course with the various exceptions to the rule against hearsay that predate the Constitution and that largely continue in force today.

The major debate over the meaning of the Confrontation Clause has centered on the extent to which it prohibits the prosecution from admitting incriminatory evidence in the form of hearsay—that is, an out-of-court statement of a declarant other than the person who recounts that statement in the form of testimony as a witness at trial.148 The basic textual question is whether hearsay declarants count as “witnesses” with whom the accused must “be confronted.” If so, then the many longstanding evidence rules that permit the admission of hearsay would give rise to constitutional concern, for hearsay declarants—by definition—make their statements out of court. The Supreme Court effectively has treated hearsay declarants as “witnesses” but has avoided the need to strike down the various hearsay exceptions by construing the Confrontation Clause simply as a demand that hearsay offered by the prosecution must come “within a firmly rooted hearsay exception” or otherwise bear “particularized guarantees of trustworthiness.”149 The Confrontation Clause thus is “one of the very few instances in which the Court has tied closely the substance of a constitutional guarantee to the content of ordinary legislation—albeit in the form of evidence rules with deep [common-law] roots.”150

Some members of the Court as well as some commentators have criticized sharply this approach, arguing that the Confrontation Clause generally does not reach hearsay declarants. These critics, in large part, would reconcile the Clause with the existence of the many hearsay exceptions by restricting the word “witnesses” to those persons who actually testify at trial plus those out-of-court statements that take place in some formalized context—for instance, statements made in police custody or grand jury testimony that jurors might be prone to regard as equivalent to actual witness testimony at trial.151 Under this

148 See Fed. R. Evid. 801(c) (defining hearsay).
150 Nagareda, supra note 142, at 1121.
151 See White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring) (stating that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits,
view, only a small sliver of hearsay evidence would implicate the Confrontation Clause at all.

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 Akhil Amar seeks to do—as a justification to restrict the Self-Incrimination Clause to the compelled production of evidence akin to witness testimony. Even on his own terms, Amar himself is not faithful to his methodology of intratextualism. He insists upon reading the word “witness” in the Fifth Amendment so as to reach only testimony-like evidence in the manner of his revisionist account of the Confrontation Clause. But, at the same time, he asserts that the Confrontation Clause encompasses not only “a right to observe and examine the government’s witnesses,” but also—“surely,” he says—a “right to observe and examine the government’s physical evidence, although the [Sixth Amendment] does not explicitly say so.” Yet physical evidence—the murder weapon, the proverbial bloody glove, and the like—comes from no formalized proceeding and is in no way apt to be seen as the equivalent of actual witness testimony at trial.

Apart from the contradictions within Amar’s own intratextual argument, there are good reasons not to apply the same definition of the word “witness” for purposes of confrontation and self-incrimination. Under the Confrontation Clause, the need to consider the constitutional status of evidence in the form of some preexisting docu-
ment or other tangible thing simply does not arise. There is no realistic danger of the prosecution using documentary or physical evidence to incriminate the defendant while at the same time disabling the defense from confronting it. Short of surreptitiously (that is, illegally) transmitting evidence to the jury room, it is not possible for the prosecution somehow to place before the jury an incriminatory document or item of physical evidence without, at the same time, enabling the defense to see it. Rather, the prosecution must admit such material in the form of exhibits in open court. Insofar as the law of evidence presents any prospect of incriminatory material being put before the jury without confrontation by the defense, it does so only by way of hearsay; and both the Court and its critics accordingly have focused the debate over the Confrontation Clause upon the hearsay context. To jump from that debate to an interpretation of the Fifth Amendment is to miss the distinctive nature of the problem that has led the critics of the Court's Confrontation Clause jurisprudence to their restrictive account of the word "witnesses."

The enactment history of the Confrontation Clause reinforces the case against readily equating its use of the word "witnesses" with similar language in the Self-Incrimination Clause. In contrast to the history of the Self-Incrimination Clause, the word "witnesses" did not appear in the Confrontation Clause as a substitute or synonym for "evidence." To the contrary, the state proposals that addressed the issue of confrontation in criminal trials uniformly spoke of a defendant's right to confront "witnesses." 155 Contemporaneous provisions in state constitutions followed the same pattern. 156

155 The state proposals also included the defendant's "accusers" among those—in addition to the prosecution's "witnesses"—with whom the defendant must be confronted. See N.Y. Proposal (July 26, 1788), reprinted in Cogan, supra note 122, § 12.1.2.2, at 401 (“[I]n all Criminal Prosecutions, the Accused ought ... to be confronted with his accusers and the Witnesses against him.”); N.C. Proposal (Aug. 1, 1788), reprinted in Cogan, supra note 122, § 12.1.2.3, at 401 (right "to be confronted with the accusers and witnesses"); Pa. Minority Proposal (Dec. 12, 1787), reprinted in Cogan, supra note 122, § 12.1.2.4, at 402 (right "to be confronted with the accusers and witnesses"); R.I. Proposal (May 29, 1790), reprinted in Cogan, supra note 122, § 12.1.2.5, at 402 (right "to be confronted with the accusers and witnesses"); Va. Proposal (June 27, 1788), reprinted in Cogan, supra note 122, § 12.1.2.6, at 402 (right "to be confronted with the accusers and witnesses").

156 See Del. Declaration of Rights of 1776, § 14, reprinted in Cogan, supra note 122, § 12.1.3.1, at 402 (right "to be confronted with the accusers or witnesses"); Md. Declaration of Rights of 1776, para. 19, reprinted in Cogan, supra note 122, § 12.1.3.3, at 403 (right "to be confronted with the witnesses against him"); Mass. Const. of 1780, pt. I, art. XII, reprinted in Cogan, supra note 122, § 12.1.3.4.c, at 404 (right "to meet the witnesses against him face to face"); N.H. Const. of 1783, pt. I, art. XV, reprinted in Cogan, supra note 122, § 12.1.3.5., at 405 (right "to meet the witnesses against him face to face"); N.C. Declaration of Rights of 1776, § VII, reprinted in Cogan, supra note 122, § 12.1.3.8.b, at 410-11 (right "to confront the Accusers and Witnesses with other Testimony"); Pa. Const. of 1790,
this history, the Confrontation Clause is more like the Treason Clause (which uses the word “witnesses” in a restrictive sense of “testimony” at trial) than either the Compulsory Process Clause or the Self-Incrimation Clause (both of which use the word “witness,” or its plural, as a synonym for the proposed word “evidence”).

Finally, it cannot be emphasized enough that the restrictive revisionist reading of the Confrontation Clause seeks, first and foremost, to read that provision in tandem with the various hearsay exceptions contemporaneous with its enactment. As I next explain, similar attention to the common-law background of the privilege against self-incrimination reinforces the inference that the Fifth Amendment phrase “to be a witness” would have been understood readily at the time to encompass the compelled giving of documentary evidence.

4. Contemporaneous Common Law

Simply to recognize the connection between Madison's chosen word “witness” and the proposed word “evidence” is to shed doubt upon the modern Court's distinction between testimonial communication—most commonly, oral statements—and preexisting materials. A preexisting document turned over by a person can be as much an item of self-incriminatory evidence as words uttered anew by that person. If anything, previous commentators concede as much by erroneously asserting that Madison's change of language indicates a determination to exclude self-incriminatory documents from the protective reach of the Fifth Amendment.157

One need not rely solely upon the ordinary meaning of the word “evidence” to support the notion that the Fifth Amendment does not call for distinctions among various forms of self-incriminatory mate-

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157 Samuel Alito readily acknowledges that a prohibition on compelling a person “to give evidence” would be “most naturally interpreted to apply both to live testimony and to documents.” Alito, supra note 3, at 79. He fails to recognize the implications of this acknowledgment, however, by insisting that “any hope of a textual answer is dispelled by the history surrounding the drafting and adoption of the [Self-Incrimation] Clause because history shows that the language of the Clause was apparently chosen as a stylistic variation of more broadly worded state constitutional provisions.” Id. at 78. Alito thus falls into the trap of assuming that Madison's change in language reflects a change in meaning.

Akhil Amar makes the same error. He praises the Supreme Court's decision in Fisher based upon his insistence that, “[i]n contrast to the constitutional provisions in some states, the Fifth Amendment does not prohibit the government from compelling a defendant to 'furnish evidence against himself.'” Amar, supra note 12, at 82.
trial. The strongest support for such a view comes from the body of common law contemporaneous with the Fifth Amendment.

a. The Recent Historical Literature. In recent years, legal historians have generated a substantial literature on the origins of the privilege against self-incrimination and, more specifically, its reception in this country in the form of the Fifth Amendment. It would be a gross underestimation of recent historical scholarship, however, to infer that the Fifth Amendment affords only those protections that existed in the eighteenth century. To the contrary, some of what we rightly consider to be among the most obvious implications of the Fifth Amendment—that a person may not be compelled to testify in his own criminal trial or to incriminate himself in the pretrial phase—were discerned only after the ratification of the Bill of Rights.

As legal historians have observed, the common law of evidence at the time of the Fifth Amendment included various disparate and "overlapping" doctrines that, for many decades thereafter, alleviated the need for courts to ask whether the Constitution independently bars the compulsion of self-incriminatory testimony at trial. At the time of the Fifth Amendment, a person could not be compelled "to be a witness against himself" in the most obvious sense of that phrase—namely, to give testimony under oath in his own criminal trial. That result stemmed not from a common law privilege against self-incrimination as such but, rather, from then-prevailing rules of witness qualification. The common law of evidence disqualified as witnesses all persons with an interest in the case being tried—the defendant being the person most obviously interested in his own criminal trial. The government thus could not compel a criminal defendant to testify under oath at trial; rather, the disqualification of interested witnesses applied no matter what the government or the defendant might wish.

Only when the process of evidence reform in the nineteenth century began to erode this and other related doctrines did it become necessary for courts to consider whether the Fifth Amendment stands as an independent, constitutional bar on compulsion of trial testimony. Not surprisingly, the courts concluded that the Fifth Amendment

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159 See Smith, supra note 158, at 149-53; Witt, supra note 13, at 849.

160 See Witt, supra note 13, at 866-68 (discussing impact of evidence reform). For more detailed expositions of the developments that led to the abandonment of the general disqualification of interested witnesses, see Ferguson v. Georgia, 365 U.S. 570, 575 (1961);
Amendment prohibition on compulsion of a person "to be a witness" means that the government may not compel a person to testify under oath in his own criminal trial. By its terms, the Fifth Amendment does not require all interested persons to be disqualified as witnesses; but it does bar categorically the compelling of a person to be a witness against that person’s wishes.

One sees a similar process at work with respect to the pretrial phase. As John Langbein has observed, it was common practice under English statutory law dating from the sixteenth century for justices of the peace (JPs) to question criminal suspects in the pretrial phase and to transcribe any incriminatory statements for use at trial. Other commentators have identified evidence of similar practices in the American colonies, built upon the English model. As Langbein emphasizes, however, pretrial questioning by JPs must be understood as part of the approach to criminal adjudication that prevailed in England until the late eighteenth century: one that contemplated no role for defense counsel and that continued to hold as dogma the notion that "the trial court was meant to serve as counsel" for the defendant. "Although persons accused of ordinary felony began to be allowed counsel in the 1730s, defense counsel did not become quantitatively significant until the 1780s"—that is, roughly the time of our Constitution. Until the defendant could test the government’s case through the use of a lawyer, the defendant had every incentive to speak at trial—albeit, by way of unsworn statements rather than


161 See Witt, supra note 13, at 892-93 (discussing developments in New York); see also Smith, supra note 158, at 179 (tracing similar developments in England upon abolition of disqualification of interested persons as witnesses).

162 See John H. Langbein, The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in The Privilege Against Self-Incrimination, supra note 13, at 82, 91-92 (discussing practice in England under Marian Committal Statute of 1555). Even here, overlapping rules of evidence frequently prevented the admission of pretrial statements as incriminatory evidence at trial. See id. at 236 n.57 ("By the mid-eighteenth century, the pretrial examinations were not being read at trial routinely, partly as a consequence of a . . . notion that preferred the oral evidence of the victim and the other accusing witnesses . . .").


163 See Moglen, supra note 119, at 116-17 (discussing American JP manuals); Witt, supra note 13, at 834-35 (crediting Moglen’s account).

164 See Langbein, supra note 162, at 82.

165 Id. at 84.

166 Id. at 83.

167 See id. at 83, 87.
testimony under oath, due to the aforementioned disqualification of interested persons as witnesses.\textsuperscript{168}

The use of pretrial interrogation waned in England upon the emergence of a new approach that conceptualized criminal procedure in the now-familiar form of an adversarial contest between lawyers for the government and for the defense.\textsuperscript{169} It thus comes as no surprise that, when first confronted directly with the question, the Supreme Court regarded the Fifth Amendment as applicable to the pretrial phase of the criminal process.\textsuperscript{170} It is abundantly clear that the Bill of Rights—in something of a cutting-edge development for its time—contemplates precisely the sort of adversarial criminal process that supplanted pretrial interrogation by JPs under English law. The Bill of Rights does not merely tolerate the use of defense counsel; the Sixth Amendment affirmatively provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”\textsuperscript{171}

Some of what we today consider the most important implications of the Fifth Amendment thus were discerned only decades after its enactment, only upon subsequent reforms in the law of evidence or fundamental changes in the structure of criminal trials anticipated by the Bill of Rights itself. Recognition of that history, however, should not obscure the major thrust of my argument here: As to self-incrimi-

\textsuperscript{168} See supra notes 158-59 and accompanying text.

\textsuperscript{169} See Langbein, supra note 162, at 92 (noting that England did not reform its statutes on subject until “well into the age of modern lawyer-dominated criminal procedure”).

\textsuperscript{170} The first substantial discussion from the Court comes in \textit{Brain v. United States}, 168 U.S. 532, 562-64 (1897), though the Court displayed no awareness of English practice under the Marian statutes.

\textsuperscript{171} U.S. Const. amend. VI. Apart from the adversarial tenor of the Sixth Amendment, the use of the phrase “in any criminal case” in the Fifth Amendment itself does not require one to limit to the trial phase the prohibition of compelled self-incrimination. As one commentator explains:

“In” does not mean that compulsion triggers the privilege only when it occurs during a person's criminal trial. The requisite compulsion can occur in any situation in which a witness is under subpoena or other legal requirement to testify: grand jury, civil trial, legislative or administrative hearing, pre-trial proceeding, or discovery. Thus, “in” modifies the phrase “any criminal case,” not the phrase “be compelled.” “In any criminal case” means that the witness is protected by the privilege in the face of a possible criminal prosecution, present or future, in which he would be the defendant—not that the privilege exists only during the course of a “criminal case.”

natory documents, the content of common law at the time of the Bill of Rights is consonant with the text of the Fifth Amendment, properly construed. The crucial historical observation—one not seriously disputed by the Supreme Court, legal commentators, or historians on the subject—\(^{172}\) is that the common law at the time of the Bill of Rights specifically recognized a privilege against self-incrimination by way of documents. And, here, I really do mean a common law privilege against self-incrimination, not some overlapping evidentiary rule on the subject of documentary evidence. At the very least, this observation reinforces the view that those who ratified the Fifth Amendment would not have been surprised in the least by the proposition that self-incriminatory documents come within the category of evidence that a person may not be compelled to give.\(^{173}\)

\(^{172}\) All sources to address the point concur that common law at the time of the Fifth Amendment barred the compelled production of self-incriminatory documents. See, e.g., 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."); Alito, supra note 3, 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."); Gerstein, supra note 12, at 356 ("The original conception of the evil of compelled self-incrimination... was gradually broadened and dilated to encompass the protection of private papers in a series of eighteenth century cases." (footnote omitted)); Heidt, supra note 12, at 445 n.20 ("Several eighteenth century cases suggested that the common law privilege against self-incrimination extended to protection against submission of documents.").

It is not surprising as a historical matter that the privilege against self-incrimination at common law should have been more firmly established with regard to documentary evidence than testimony. Based upon an examination of English sources from the 1750s, legal historian T.P. Gallanis points to "the primacy of writings over testimony" as the focus of evidence law at that time. Gallanis, supra note 13, at 509.

\(^{173}\) Eben Moglen advances the broader claim that the founding generation sought in the Fifth Amendment to constitutionalize what they perceived to be the then-existing principles of common law criminal procedure:

The constitutionalization of the self-incrimination privilege, completed by the first Congress, was part of the larger process by which a diverse collection of criminal procedure doctrines became fundamental law in the United States. Those rules were components of the common law's structure for protecting subjects' rights under the eighteenth-century British constitution. Once conceived as fundamental law, the rules—originally subsidiary or ancillary doctrines of uncertain scope—themselves became rights that individuals could invoke.

Moglen, supra note 119, at 138; see also id. at 133 (observing that American colonists sought "to treat elements of common law criminal procedure as fundamental law protecting against legislative innovation or tyrannical suppression"); id. at 136 ("It cannot be sufficiently stressed that the constitutional provisions were primarily devices to protect existing constitutional arrangements as Americans saw them rather than a program of law reform."); 3 Joseph Story, Commentaries on the Constitution of the United States § 1782, at 660 (Fred B. Rothman & Co. 1991) (1833) (referring in passing to Fifth Amendment
b. The Common Law Cases. The major common law decisions on the subject of self-incriminatory documents come from the King's Bench in the decades prior to the American Revolution. *The King v. Purnell*\(^{174}\) provides the most extensive treatment of the subject. By information, the English government had charged Purnell with criminal "neglect of his duty" as vice-chancellor of Oxford University based upon his failure to punish two persons "who had spoken treasonable words in the streets of Oxford."\(^{175}\) The government called upon the King's Bench to order the university to produce for inspection by government agents certain university statutes said to "direct the conduct of the vice-chancellor."\(^{176}\) As it happened, the university official with custody of the documents was Purnell, such that the order sought by the government would have had to run against Purnell himself.\(^{177}\)

prohibition of compelled self-incrimination as "but an affirmance of a common law privilege").

If Moglen is right, of course, his characterization of the Fifth Amendment as an effort to constitutionalize then-existing common law would lend even stronger support to my position with respect to documentary evidence specifically. Whether Moglen's broad claim represents an accurate account of the founding generation's overarching objective is a question that I leave to legal historians. As Witt observes:

The view that the self-incrimination clauses constitutionalized the common-law privilege had a weak antebellum pedigree. . . . But because of the overlapping common-law rules of privilege and disqualification, antebellum lawyers and judges had no occasion to work out in any systematic way the relationship between the common-law rules and the constitutional provisions. Witt, supra note 13, at 898 (footnote omitted). My point here is a narrower one: simply that common law at the time of the founding is, at the very least, pertinent to the determination of what counts as evidence—and, hence, what constitutes being a witness—for purposes of the Fifth Amendment.

\(^{174}\) 96 Eng. Rep. 20 (K.B. 1748). For a shorter report of the same case, see 95 Eng. Rep. 595 (K.B. 1748). One commentator devotes substantial discussion to *Purnell*. See Gerstein, supra note 12, at 357-59 (arguing that *Purnell* supports application of full Fifth Amendment protection in documents). He does so, however, in support of a theory of the Fifth Amendment predicated upon personal privacy, not upon a historically informed parsing of the specific language of that provision. Cf. supra note 96 (rejecting privacy-based conception of Fifth Amendment).

\(^{175}\) *Purnell*, 96 Eng. Rep. at 20. A note appended by the case reporter strongly hints that the government may have sought production of the original university statutes by Purnell as a means of political harassment. Though the original university statutes were located in Oxford, copies were "very numerous and easy to be met with" through other sources. Id. at 23. Upon the ruling from the King's Bench that Purnell could not be compelled to produce the originals, the government "immediately" dropped its underlying criminal case against him, the litigation to that point having cost Purnell "several hundred pounds." Id. at 23-24.

\(^{176}\) Id. at 22.

\(^{177}\) See id. The published report of the case suggests that there was some initial confusion on the part of counsel for the government as to the particular person against whom an order of production would need to run. Counsel for the government initially sought to distinguish certain prior decisions—which I shall discuss momentarily—on the ground that
The King's Bench refused to issue the requested order, emphasizing that a court may not "make a man produce evidence against himself, in a criminal prosecution."\textsuperscript{178} Indeed, the King's Bench frankly stated that it was aware of "no instance, wherein this Court has granted a rule to inspect books in a criminal prosecution nakedly considered."\textsuperscript{179} In support of its holding, the court pointed to two earlier decisions—\textit{The Queen v. Mead}\textsuperscript{180} and \textit{The King v. Cornelius}\textsuperscript{181}—in which it had articulated the same limitation. Given the sparseness of English case reports during this period—a feature to which \textit{Purnell} is a notable exception—it is something of a challenge to reconstruct the precise facts of these two earlier cases. But the arguments by counsel in \textit{Purnell} help to fill the factual gaps.

In \textit{Mead}, the defendant and eight other persons stood accused of executing an office of public trust—as highway surveyors incorporated by the Crown—without having taken certain oaths required by law.\textsuperscript{182} The government called upon the King's Bench to compel the production of two books thought to indicate the absence of the required oaths.\textsuperscript{183} As it happened, the defendant Mead "was the person who kept the books" sought to be produced.\textsuperscript{184} The King's Bench refused

\begin{footnotesize}
\begin{enumerate}
\item[178] \textit{Purnell}, 96 Eng. Rep. at 23.
\item[179] Id.
\item[183] See id.
\item[184] \textit{Purnell}, 96 Eng. Rep. at 22 (citing \textit{Mead}); cf. supra note 177 (discussing government counsel's erroneous attempt in \textit{Purnell} to distinguish \textit{Mead} on its facts).
\end{enumerate}
\end{footnotesize}
to compel production, stating it "would be to make a man produce evidence against himself in a criminal prosecution."\textsuperscript{185}

As for the second precedent, \textit{Cornelius}, the defendants there were charged with the misdemeanor of "taking money on granting of licences to alehouse-keepers"—in essence, accepting bribes.\textsuperscript{186} The government sought certain books thought to support the bribery charges. The King's Bench refused, holding—as subsequently paraphrased in \textit{Purnell}—that to require the defendants to turn over the books would be "to make the defendants furnish evidence against themselves."\textsuperscript{187}

The decisions that culminated in \textit{Purnell} were far from anomalous in the legal world contemporaneous with the Fifth Amendment. As the Supreme Court would observe in \textit{Boyd}, a "cardinal rule" of proceedings in chancery was "never to decree a discovery which might tend to convict the party of a crime."\textsuperscript{188} In fact, as part of the landmark Judiciary Act of 1789, the First Congress empowered the federal courts "in the trial of actions at law . . . to require the parties to produce books or writings in their possession or power," but only "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."\textsuperscript{189}

Matters of precedent aside, one additional and heretofore overlooked feature of \textit{Purnell} has special significance, for it bears indirectly upon the relationship between our Fourth and Fifth Amendments. By refusing to grant the order sought by the government, the King's Bench in \textit{Purnell} effectively distinguished between the compelled production of documents and unilateral action whereby government agents might have obtained the university statutes. Counsel for the government had noted—without apparent contradiction by the defense—that "[t]he Crown is the founder and lawgiver of the university, and as such has a right to inspect those laws."\textsuperscript{190} That the government might have asserted this right by actually searching for the desired documents in the university's archives, however, did not mean that the government could compel Purnell to produce them. A right to engage in the equivalent of search and seizure, in other

\begin{footnotes}
\textsuperscript{185} \textit{Mead}, 92 Eng. Rep. at 119.
\textsuperscript{187} \textit{Purnell}, 96 Eng. Rep. at 23.
\textsuperscript{188} \textit{Boyd v. United States}, 116 U.S. 616, 631 (1886).
\textsuperscript{189} Act of Sept. 24, 1789, ch. 20, § 15, 1 Stat. 73, 82, quoted in \textit{Boyd}, 116 U.S. at 631.
\textsuperscript{190} \textit{Purnell}, 96 Eng. Rep. at 23; see \textit{Gerstein}, supra note 12, at 357 ("Although the [Oxford University] charter was granted by the Crown, and the King would have access to it as 'visitor' of the University, the order to produce it as evidence of crime was refused." (footnote omitted)).
\end{footnotes}
words, did not imply a right to compel production from the person to be incriminated by the documents sought.

This is precisely the distinction that Justice Bradley missed in his opinion for the Supreme Court in *Boyd*\textsuperscript{191} and that has continued to elude the Court in the century thereafter. The distinction is not, as the modern Court would have it, between testimonial communication and preexisting forms of incriminatory evidence. Rather, the fundamental distinction is between two different modes of information gathering by the government: the compulsion of a person "to be a witness against himself" in the sense of giving self-incriminatory evidence—testimonial, documentary, or otherwise—and the taking of such evidence by the government through its own actions. The former is forbidden categorically by the Fifth Amendment, whereas the latter may take place, upon compliance with the strictures of the Fourth. This view not only finds support in the constitutional language and its historical context; it also has the virtue of clarifying several aspects of constitutional doctrine, as I now explain.

C. Doctrine

A reading of the phrase "to be a witness" as synonymous with the phrase "to give evidence" would lend unity to Fifth Amendment doctrine by bringing the treatment of documents and other preexisting material into line with that of oral statements. Specifically, such an interpretation counsels the abandonment of *Fisher's* ill-conceived act-of-production doctrine and its underlying distinction between testimonial communication and preexisting forms of evidence that may be self-incriminatory. To jettison these features of Fifth Amendment doctrine, however, would not require the Court to abandon entirely the line of bodily evidence cases from which *Fisher* drew its testimonial-nontestimonial distinction. To the contrary, a distinction between the compelled giving of evidence (forbidden by the Fifth Amendment) and the taking thereof (regulated by the Fourth) would preserve the holdings in many of the bodily evidence cases and highlight the analytical missteps of the Court in the remainder. In addition, a clear understanding of the relationship between the Fourth and Fifth Amendments would make more workable and readily understandable the familiar principle that the government may compel a person to incriminate himself upon a grant of use immunity.

\textsuperscript{191} See supra note 39 and accompanying text.
1. Unifying Fifth Amendment Doctrine

The act-of-production doctrine in *Fisher* has the effect of doubling the hurdles to successful invocation of the Fifth Amendment in the face of a document subpoena: It is not enough that the documents to be produced are themselves incriminatory in content under ordinary Fifth Amendment principles and, for that reason, might be used by the government as evidence in a subsequent criminal trial. In addition, the act by which the documents are produced must itself be incriminatory in the sense of revealing additional information to the government beyond that contained in the contents of the documents.\(^\text{192}\)

The treatment of document subpoenas is markedly out of line with the rest of Fifth Amendment doctrine. In the pretrial stage, the most common way that a person might give evidence against himself as a result of government compulsion is through an oral statement. In that situation, the statement itself is the evidence in the sense that it has the potential to be admitted into evidence—in the form of a transcription, recording, or hearsay statement\(^\text{193}\)—in a subsequent criminal trial. Here, the act of speaking is the act of production; it is the means by which the person gives evidence to the government. And it is the compulsion of that act—being a witness by giving evidence—that the Fifth Amendment proscribes.

This observation comes into sharper focus when one considers that there are alternatives available to the government for the obtaining of incriminatory speech. In a criminal trial of a given person, the government might present testimony from a third party who overheard the person make incriminatory statements out of court.\(^\text{194}\) The government might engage in the wiretapping of telephone conversations involving the person in question, upon compliance with the Fourth Amendment.\(^\text{195}\) The government likewise might record conversations between the suspected person and a government informant\(^\text{196}\) or might call the informant as a witness to testify about such

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\(^\text{192}\) See supra note 80 and accompanying text.

\(^\text{193}\) Admission of the defendant's out-of-court statements, recounted at trial by a third party who overheard them, would not run afoul of the rule against hearsay. Rather, the out-of-court statements of a party are not within the definition of hearsay at all, when offered as evidence against that party at trial. See Fed. R. Evid. 801(d)(2)(A).

\(^\text{194}\) See supra note 193.


In short, the government, acting in accordance with the Fourth Amendment, may obtain incriminatory speech through its own investigative techniques.

In a passage overlooked by previous commentators, the *Fisher* Court made exactly this observation. The Court, however, failed to draw the right inference therefrom: Although the government may obtain the contents of incriminatory speech through the exercise of its own investigative powers, what the government may not do is to compel a person to produce incriminatory speech. It is the compulsion of that act of production—the compulsion of a person to speak—that the Fifth Amendment forbids.

Once one recognizes the line between unilateral government seizure of incriminatory oral statements and government compulsion thereof, the act-of-production doctrine falls like a house of cards. In the world of document subpoenas, the act of production consists of the act of handing over the documents rather than the act of speaking. Compliance with a subpoena is the act by which a person literally gives evidence to the government. *Fisher*'s error lies in its suggestion that one should care about acts of production only in cases involving documents and other preexisting forms of evidence. The Fifth Amendment prohibition of compelled self-incrimination is *all about* the act of production, whether through the act of speech (for oral statements) or the act of handing over papers (for documentary evidence). It is the compulsion of that act that the Fifth Amendment bars, not the resultant obtaining of evidence that is incriminatory in content.

A distinction between the compelled giving and unilateral taking of evidence goes far to reveal the fallacy behind one counterfactual scenario that some observers put forward in a good-faith attempt to apply the logic of *Fisher*. These observers seek to imagine a world in which the documents in question do not come into the government's hands as a result of any act on the part of the person whom they incriminate but, instead, materialize "as if by magic before a subpoena has been issued." Such an image does serve to separate dramati-

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199 See Gerstein, supra note 12, at 395 ("Certainly there is no particular reason to think that evidence of crime should as such be immune from disclosure, in whoever's hands it might be found. It is being witness against ourselves we are protected against, not the use of incriminating evidence against us.").
cally the contents of the documents from any act of production, but it completely misses the constitutional point. Absent truly extraordinary circumstances, incriminatory documents do not appear magically in the government’s hands; instead, they appear as the result of some act, either by the government unilaterally (a seizure) or by some person (either the individual incriminated by the documents or, conceivably, a third party). To pretend, even for the sake of argument, that documents appear without an act of production is to assume away the Fifth Amendment, the pertinent language of which is all about compelled acts of production.

2. Revisiting the Bodily Evidence Cases

Once one draws the right constitutional distinction, the treatment of document subpoenas under the Fifth Amendment is straightforward. By definition, subpoenas for documents seek to compel an act of production and, in those instances in which the contents of the documents requested would incriminate the producing person under ordinary Fifth Amendment standards, such compulsion is unconstitutional. To recognize that the document subpoena cases are easy to resolve under the Fifth Amendment, however, is not to deny the existence of harder, borderline cases.

The modern Court’s misconstruction of the phrase “to be a witness” stems ultimately from the bodily evidence cases, which construed the Fifth Amendment to reach only testimonial communication—chiefly, oral statements. In the discussion that follows, I explain how the distinction advocated here between the giving and the taking of evidence readily explains the results in the leading bodily evidence cases. For the most part, those cases do not involve compelled acts of production in any meaningful sense. The act of production is the act of the government itself, not of the person to be incriminated. Some of the bodily evidence cases, however, do cross the line drawn here between the compelled giving and the unilateral taking of evidence.

The most familiar case in this line—Schmerber v. California serves as a useful starting point. There, the Court held that the extraction by a physician of a blood sample from the defendant, in police custody on suspicion of drunk driving, implicated the protections of the Fourth Amendment but not those of the Fifth. For present pur-

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201 See supra note 60 and accompanying text.
203 As to the Fourth Amendment, the Court ultimately upheld the taking of a blood sample as “reasonable” under the circumstances presented. See id. at 772.
poses, the key to the case is that Schmerber's body—his "person," in the parlance of the Fourth Amendment—was legitimately in police custody, in the same manner as the police might have obtained custody, through a duly authorized seizure, of a locked safe or computer owned by Schmerber. That the government subsequently extracted the contents of Schmerber's body rather than the contents of some container owned by him is of little moment, given that the Fourth Amendment places the "persons" of "the people" on par with their "papers, and effects." To put the point differently: Schmerber literally had to sit still for the taking of his blood sample in the same manner as he would have had to sit still—figuratively—while the police might use their own ingenuity to gain access to a safe or a computer hard drive duly seized from Schmerber's home.

In each instance, there is no giving of evidence in any meaningful sense; there is just a taking of evidence by the government—the extracting of the blood sample, the cracking of the safe, or the accessing of the hard drive. In fact, in a separate opinion in one of the later bodily evidence cases, Justice Fortas took a similar view of Schmerber. The Court thus was entirely correct to treat the action of the government in Schmerber as triggering the protections of the Fourth Amendment (the constitutional provision that addresses unilateral government action to obtain evidence) but not the Fifth (which concerns government compulsion of a person to perform an act of production).

Other cases involving donning a garment from the crime scene and standing in a police lineup follow the same logic as Schmerber. There plainly would be no Fifth Amendment objection if the government—through its own investigative savvy, plus the help of Madame

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204 See United States v. Wade, 388 U.S. 218, 261 (1967) (Fortas, J., concurring in part and dissenting in part) ("Schmerber, which authorized the forced extraction of blood from the veins of an unwilling human being, did not compel the person actively to cooperate—to accuse himself by a volitional act . . . .").

205 Some commentators mistakenly invoke Schmerber to cast aside a conception of the Fifth Amendment as a bar on the compulsion of a person to assist the government in the criminal investigative process. See Amar, supra note 12, at 66-67 (asking rhetorically: "[D]oesn't Schmerber legitimate dramatic instrumental use of a person against himself?"); see also Dolinko, supra note 12, at 1083 & n.109 (reading Schimerber similarly). To say that Schmerber stands for such a proposition is to treat the person's mere physical presence in the police station as a form of compelled assistance to the government. That is a mistake, for the presence of the person is not the product of government compulsion within the province of the Fifth Amendment but, rather, the duly authorized product of a unilateral seizure—an arrest—governed separately by the Fourth.

206 See Holt v. United States, 218 U.S. 245 (1910); see also United States v. Mara, 410 U.S. 19, 37 (1973) (Marshall, J., dissenting) (noting that, in Holt and Schmerber, "the individual was required, at most, to submit passively to a blood test or to the fitting of a shirt").

207 See Wade, 388 U.S. 218.
Tussaud’s Wax Museum—had constructed a highly accurate life-size model of a particular person and then, say, placed on the model the suspicious garment or propped up the model in a police lineup. The garment and lineup cases are readily explicable on the ground that, having legitimately seized the person of the defendant, the government effectively has constructed a life-size model of the person’s body. And, having done so, the government should be no worse off with the person’s actual body legitimately in its custody than the government would have been if it had constructed a life-size model. Here, again, Justice Fortas was on the right track, noting that the mere exhibition of a person in a police lineup, like exhibition at trial itself, “is an incident of the State’s power to arrest, and a reasonable and justifiable aspect of the State’s custody resulting from arrest.”

A further observation highlights the contrast between the garment and police lineup cases, on the one hand, and subpoenas that seek incriminatory documents, on the other: When it comes to the appearance of a person’s body, the government could have constructed a life-size model based upon its own police work. The whole reason to compel the production of an incriminatory document, by contrast, is that the government could not have constructed the document through its own police work.

By contrast, two of the later bodily evidence cases—involving the compelled generation of handwriting and voice exemplars—are much closer calls. There, the government made the defendants either write out or recite orally particular words to be matched, respectively, with writings duly seized from the crime scene or with oral communications duly intercepted during criminal activity. Though one might

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208 The latter is analogous to what happens in the situation of photographic lineup—something never thought to implicate the Fifth Amendment at all, as it involves no compelled action whatsoever from the person incriminated thereby.

209 Wade, 388 U.S. at 259-60 (Fortas, J., concurring in part and dissenting in part). Justice Fortas is also correct, however, in his further contention that compelling a person in a lineup to utter specific words allegedly spoken by the perpetrator of a bank robbery amounts to a violation of the Fifth Amendment. The compelled speaking of words used by the robber is “the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilege against compelled self-incrimination.” Id. at 260 (Fortas, J., concurring in part and dissenting in part). That amounts, in short, to the giving of evidence by the defendant, not the unilateral taking thereof by the government of its own accord.

210 See Gilbert v. California, 388 U.S. 263 (1967); see also United States v. Eugo, 444 U.S. 707, 713, 716 (1980) (relying on Gilbert to uphold authority of IRS to summon taxpayer to provide handwriting exemplars).


212 The earliest sources that I found to address situations like these come from long after the ratification of the Fifth Amendment. Writing in 1905, Wigmore draws a distinction similar to mine. He states that the inspection of the body of a person duly arrested on
try to cram these cases into the mold of Schmerber, the better view is
that compulsion of a person "to give evidence" in the form of a hand-
writing or voice exemplar violates the Fifth Amendment. Either con-
stitutes a compelled act of production—literally, the creation of the
exemplar—on the part of the person to be incriminated. These cases
thus are indistinguishable from a compelled oral statement while in
police custody—one classic scenario that the Court has held to trigger
the Fifth Amendment.

Here, once more, Justice Fortas was on target. Dissenting in the
handwriting exemplar case, he noted that the defendant there was
"compelled to cooperate, not merely to submit; to engage in a voli-
tional act, not merely to suffer the inevitable consequences of arrest
and state custody; to take affirmative action which may not merely
identify him, but tie him directly to the crime." Consistent with the
Fourth Amendment, the government unilaterally may seize docu-
ments that contain the handwriting of a person and may intercept ex-
amples of the person's voice by way of duly authorized wiretaps or
recordings made by government informants. What the government
may not do is to compel the person to produce exemplars in order to
provide a link in the chain of incriminatory evidence.

That some of the bodily evidence cases thus involve close calls
should not obscure my overarching point that the document subpoena
cases are not close calls. In the bodily evidence cases, one must take
considerable care in order to apply faithfully a distinction between
unilateral government seizure of evidence (to be analyzed under the

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213 Gilbert, 388 U.S. at 291-92 (Fortas, J., concurring in part and dissenting in part). In a
later case, Justice Marshall cited favorably Justice Fortas's view, explaining that:
Wade and Gilbert clearly were not direct and easy extensions of Schmerber and Holt. For it is only in Wade and Gilbert that the Court, for the first time,
held in effect that an individual could be compelled to give to the State evidence against himself which could be secured only through his affirmative co-
operation—that is, "to accuse himself by a volitional act which differs only in
degree from compelling him to act out the crime." The voice and handwriting
samples sought in Wade and Gilbert simply could not be obtained without the
individual's active cooperation.

388 U.S. at 261 (Fortas, J., concurring in part and dissenting in part)).

214 See supra notes 195-97.
Fourth Amendment) and compulsion of a person "to give evidence" (to be analyzed under the Fifth). The compelled turning over of documents is not a close call at all, for it plainly involves a compelled act of production on the part of the person to be incriminated rather than a seizure effected through unilateral government action.

The confusion in *Fisher* on this point may well have stemmed from nothing more than the sequence in which the Court's cases on the Fifth Amendment arose. The Court decided the bodily evidence cases before it addressed the treatment of self-incriminatory documents in *Fisher*. As a result, the misleading focus in the bodily evidence cases on the presence of testimonial communication had become an entrenched part of Fifth Amendment case law by the time of *Fisher* and, not surprisingly, led the Court in that case down the wrong analytical path.

3. The Fourth Amendment Caveat

At this juncture, it is worthwhile to make explicit a point that is lurking within the doctrinal discussion thus far: The government remains perfectly free to call upon a person to produce self-incriminatory documents as a substitute for their seizure—that is, where the government, if it wished, could swoop in unannounced to seize the documents and, by so doing, make unnecessary any act of production on the person's part. In effect, the government can say: "Give us the documents, for if you don't, we'll simply come in and get them ourselves."

a. Document Production as a Substitute for Seizure. Nothing in the Fourth Amendment obligates the government to undertake search and seizure in all situations in which such action is permissible. Rather, the government remains free to offer the person in question the less intrusive option of turning over the documents. Such an offer should not be regarded as entailing the compelled giving of evidence within the meaning of the Fifth Amendment. Rather, the scenario of document production to avert a seizure should be treated in the same way as actual seizure of the documents by way of unilateral government action—a situation governed only by the Fourth Amendment, not the Fifth.\(^{215}\)

If anything, affording an opportunity to turn over the requested documents as a way to avert their seizure might well be affirmatively desirable from the standpoint of many persons suspected of criminal

activity. Under well-established Fourth Amendment law, government agents may seize evidence of other, previously unsuspected crimes if they happen to come across such evidence in "plain view" during the course of a duly authorized and executed search.\textsuperscript{216} The voluntary turning over of documents eliminates the possibility that government agents might come across other incriminatory nuggets while leafing through the person's files.

Identification of those situations in which the government may seek document production in lieu of seizure turns upon the differences in the substantive standards for subpoenas and search warrants.\textsuperscript{217} As a matter of constitutional due process, the Supreme Court has held that subpoenas must be reasonable in scope and must particularly describe the documents to be produced\textsuperscript{218}—requirements that closely parallel the demands of the Fourth Amendment for reasonable searches and seizures and for a particular description of the "things to be seized."

Significant differences nonetheless remain. To obtain a search warrant, the government must make a showing of "probable cause" and must put forward a particular description of "the place to be searched."\textsuperscript{219} There are no comparable requirements for the issuance of subpoenas.\textsuperscript{220} Thus, to take one notable example, "grand juries are able to use subpoenas freely to pursue tenuous, preliminary leads in

\textsuperscript{216} See Horton v. California, 496 U.S. 128, 142 (1990) (stating that police may seize items "discovered during a lawful search authorized by a valid warrant" if, upon discovery, "it was immediately apparent to the officer that [the items] constituted incriminating evidence").

\textsuperscript{217} My focus here is upon differences in the substantive standards for subpoenas and search warrants. As a procedural matter, subpoenas often may be issued without judicial approval—such as when used by a grand jury, see United States v. Calandra, 414 U.S. 338, 343 (1974)—whereas warrants may not.

\textsuperscript{218} See Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 208-09 (1946); see also Fed. R. Crim. P. 17(c) (authorizing court to "quash or modify" subpoena for documents "if compliance would be unreasonable or oppressive"); 2 Charles Alan Wright, Federal Practice and Procedure § 275, at 159 (2d ed. 1982) ("A subpoena duces tecum must be reasonable and specific. . . . A subpoena that fails to describe any specific documents is too broad, but it is not necessary that the subpoena designate each particular paper desired. Designation of kinds of documents with reasonable particularity will suffice." (footnotes omitted)).

As a practical matter, the standard of particularity is lower for a subpoena issued by a grand jury than for one issued in anticipation of trial. See United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991) (noting that grand jury subpoena "is presumed to be reasonable" and may not be quashed on relevancy grounds unless "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

\textsuperscript{219} U.S. Const. amend. IV.

\textsuperscript{220} See Oklahoma Press, 327 U.S. at 208-09, 215-16; LaFave & Israel, supra note 127, § 8.3(c), at 384; see also United States v. Powell, 379 U.S. 48, 57 (1964) (finding probable cause not required for IRS summons).
circumstances in which probable cause could never be demonstrated." In practical terms, then, the government may call upon a person to turn over self-incriminatory documents as a way to avert their seizure only when the government has "probable cause" to believe that a crime has been committed—as determined under ordinary Fourth Amendment standards—and knows where the documents are located.

There is little reason to think that these situations represent the norm rather than the rare exception in the run of document subpoena scenarios. In all likelihood, however, *Fisher* itself was one of these exceptional situations. There, as the Court observed only in passing, the government knew "the whereabouts of the [accounting] documents" in question; and, given the intensified suspicion focused upon the taxpayers in the aftermath of their initial interviews with IRS agents, it appears likely that the IRS could have made a showing of probable cause. As such, the Court might have treated *Fisher* simply as a vehicle to set forth the unastounding proposition that the government may call on persons to produce documents as a substitute for their seizure.

In the event that such an offer is rejected—that is, if the taxpayers in *Fisher* had stood firmly upon their Fifth Amendment rights—the appropriate course of action on the government's part would be to effect a seizure (what the Fourth Amendment, by hypothesis, permits the government to do under the circumstances), not to compel acts of production on the part of the taxpayers (what the Fifth Amendment forbids, at least absent a grant of immunity). In this manner, authority to seize would not imply authority to compel the production of documents just as, conversely, authority to compel production under current law does not imply authority to seize.

b. Case Law and Commentary. There are tentative, undeveloped hints in a precious few lower court opinions of the foregoing interaction between the Fourth and Fifth Amendments. Under

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221 Alito, supra note 3, at 37 n.48.
222 *Fisher v. United States*, 425 U.S. 391, 394 (1976); see also Alito, supra note 3, at 49 ("In *Fisher*, the existence and possession of the taxpayers' papers were well established, but this was due to the odd factual setting.").
223 *Fisher*, 425 U.S. at 393-94.
224 See Wright, supra note 218, § 274, at 151 n.5 ("If party to whom subpoena duces tecum is directed does not comply with subpoena, officers who serve it are not entitled to disregard refusal and seize the documents subpoenaed.").
Fisher, the act of document production is not testimonial—and, hence, is outside the protection of the Fifth Amendment—when the existence of the requested documents and their control by the person in question are a “foregone conclusion.”\footnote{Fisher, 425 U.S. at 411; see also supra Part I.C.2.a (criticizing this “foregone conclusion” concept).} Attempting to apply this aspect of the act-of-production doctrine, a few lower courts have postulated that one can identify “foregone conclusion” scenarios by asking whether the government can “establish its knowledge of the existence, possession, and authenticity of subpoenaed documents with ‘reason-able particularity’”—a choice of phrase that harkens to the particularity requirement of the Fourth Amendment.\footnote{United States v. Hubbell, 167 F.3d 552, 579 (D.C. Cir. 1999) (quoting In re Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 93 (2d Cir. 1993)), cert. granted, 68 U.S.L.W. 3204 (U.S. Oct. 12, 1999) (No. 99-166). In a footnote accompanying this statement, the D.C. Circuit in \textit{Hubbell} refers explicitly to the similarity between its reading of Fisher’s “foregone conclusion” doctrine and the particularity requirement of the Fourth Amendment. \textit{Hubbell}, 167 F.3d at 579 n.34. One commentator tends toward the same position, though without the use of rhetoric that overlaps with the Fourth Amendment. See Mosteller, supra note 12, at 33.} The problem is that, because of Fisher, the lower courts have not demanded nearly enough of the government. Particularity is not all that the Fourth Amendment demands; it also calls for a showing of probable cause. Only when the government can satisfy both of these requirements should the government be free to seek document production in lieu of document seizure.

The proposition that one should treat specially those instances in which the government could have obtained a valid search warrant for incriminatory documents finds its strongest support in secondary commentary. That proposition—advanced here from the wording of the Fifth Amendment, its historical context, and the existing treatment of oral statements—dovetails with the insights derived through other channels by William Stuntz.\footnote{See William J. Stuntz, Self-Incrimination and Excuse, 88 Colum. L. Rev. 1227 (1988).} In Stuntz’s view, much of current doctrine concerning the Fifth Amendment privilege against self-incrimination makes sense if one conceives that right in terms of the familiar defense of excuse in substantive criminal law. Stuntz’s thesis is that the situations in which the Fifth Amendment permits a person to resist government compulsion are those in which the person—absent a constitutional privilege against self-incrimination—could interpose a defense of excuse to a charge of perjury or contempt.\footnote{See id. at 1229.} Whether Stuntz’s view works as an overall theory of the Fifth Amendment privilege against self-incrimination is a question that one
need not resolve for present purposes. The key point is that, when speaking specifically to document subpoenas, Stuntz draws a distinction along the lines advanced here: Where the government lawfully could have seized the documents, Stuntz contends that a substantive defense of excuse would be unavailable in the absence of the Fifth Amendment privilege against self-incrimination and, hence, that the privilege—conceived as a substitute for an excuse defense—should likewise be unavailable. By contrast, where the government could not lawfully have seized the documents, a substantive defense of excuse would be available to a charge of contempt for refusal to turn over the documents. Hence, Stuntz says, the Fifth Amendment privilege should apply in this second scenario. Oddly enough, Stuntz does not develop explicitly what his distinction would seem to imply: namely, a construction of the Fifth Amendment under which all document subpoenas are unconstitutional outside of the unusual circumstance in which the government could have seized the desired documents. My observation here is simply that the line drawn by Stuntz based upon substantive principles of excuse is the same line dictated by the most convincing reading of the wording and historical context of the Fifth Amendment.

4. Use Immunity

I have focused thus far upon what one might describe as the compliance scenario—that is, the initial question of when a person successfully may invoke the Fifth Amendment to quash a subpoena for self-incriminatory documents. Fifth Amendment questions, however, do not arise only in situations of this sort. More complex questions may arise in another situation, which I shall label the immunity scenario: namely, when the government obtains incriminatory documents upon a grant of use immunity and later brings a criminal prosecution against the producing person based ostensibly upon other evidence. Clarification of the relationship between the Fourth and Fifth Amendments sheds new light upon the immunity scenario. As I

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229 Stuntz expressly states that he does not set forth his excuse-based view of the Fifth Amendment privilege against self-incrimination as a description of the prevailing understanding of that provision at the time of the founding. See id. at 1231. He advances, instead, the more modest proposition that an excuse-based view simply serves to explain much of current Fifth Amendment doctrine. See id. at 1231-32.

230 See id. at 1278 ("[T]here are two very different categories of documents—those that the government can obtain only by subpoena because probable cause is absent, and those the government can obtain with or without the defendant's cooperation.").

231 See infra note 235 and accompanying text.

232 See, e.g., Hubbell, 167 F.3d at 564-67 (discussing prosecution brought after obtaining documents based upon grant of use immunity).
discuss here, a reading of the Fifth Amendment phrase "to be a witness" as synonymous with the phrase "to give evidence" serves not only to make the application of the use immunity doctrine more workable in practice but also to refute an attack upon the merits of that doctrine recently advanced by one prominent commentator.233

a. The Collision of Use Immunity and the Act-of-Production Doctrine. The use immunity doctrine stems from the Supreme Court's 1972 decision in Kastigar v. United States.234 There, the Court held that the government may compel a person to provide self-incriminatory testimony upon a grant of immunity against the use, in a subsequent criminal prosecution, of the testimony itself or of any information "directly or indirectly derived" therefrom.235 In the event of a criminal prosecution, the government bears "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."236 Use immunity, said the Court, "is coextensive with the scope of the [Fifth Amendment] privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."237 In so holding, the Court cast aside its earlier suggestions that only a broader form of immunity—so-called transactional immunity from criminal prosecution for any offense to which the immunized testimony relates—would be sufficient to compel self-incrimination.238

The central challenge of the immunity scenario stems from the peculiar interaction of the use immunity doctrine of Kastigar and the act-of-production doctrine of Fisher.239 Under the reasoning of

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233 See infra notes 244-47 and accompanying text (discussing Akhil Amar's view of use immunity).
234 406 U.S. 441 (1972).
235 Id. at 453. The phrase "directly or indirectly derived" stems from the federal use immunity statute upheld in Kastigar and that continues in force to the present day. See 18 U.S.C. § 6002 (1994). As a historical matter, the Court in Kastigar pointed out that the practice of compelling self-incrimination upon a grant of immunity in some form is well grounded in common law. See Kastigar, 406 U.S. at 445 n.13.

The phrase "use immunity" itself is something of an understatement, given that Kastigar calls for what one more accurately might label "use plus use-fruits immunity." Amar, supra note 12, at 58.
236 Kastigar, 406 U.S. at 460.
237 Id. at 453.
238 See id. at 450-51 (discussing dicta from Court's earlier decision in Counselman v. Hitchcock, 142 U.S. 547 (1892)). For a more detailed account of the Court's switch to use immunity from transactional immunity, see Kenneth J. Melilli, Act-of-Production Immunity, 52 Ohio St. L.J. 223, 223-34 (1991).
239 Melilli correctly points to the interaction of the use immunity and act-of-production doctrines as a source of formidable difficulty under current law. See Melilli, supra note 238, at 258 ("[I]t may be that the artificial separation of privileged and unprivileged components of a single act [of document production], without additional criteria or refinement,
Fisher, the only aspect of a subpoena for self-incriminatory documents that potentially implicates the Fifth Amendment is the act of production, as distinct from the unprotected contents of the documents themselves. Upon a grant of use immunity for the act of production, the government remains free—at least, in theory—to prosecute the person based upon the unimmunized contents of the documents plus any other incriminatory evidence to which those contents might lead.

In the event of such a prosecution, the court must ascertain, per Kastigar, whether the incriminatory evidence offered by the government at trial was "directly or indirectly derived" from the immunized act of production.

In many instances—quite possibly, the substantial majority—the government might not have obtained the contents of the documents but for the grant of use immunity with regard to the act of production. Without the grant of immunity, in other words, the government may well have learned nothing. If found to be "directly or indirectly derived" from the immunized act of production, the contents of the documents will become protected as such, even though they are not protected directly by the Fifth Amendment as construed in Fisher.

cannot be carried forward with any precision into the concept of derivative use.

Alito, supra note 3, at 46 n.101 (noting that interaction of use immunity and act-of-production doctrines "threatens to drive the fifth amendment into the realm of metaphysics"). Melilli, however, would address the problem by narrowing considerably the use immunity doctrine in Kastigar, at least in the context of documentary evidence. Melilli's specific proposal is that:

Whenever the government attempts to use the subpoenaed items to prove the very fact which constituted the privileged (and hence immunized), testimonial component of the act of production [i.e., existence, possession, or authenticity of the documents], such is a proscribed derivative use. Conversely, whenever the government attempts to use the subpoenaed items to prove any other fact, such use is sufficiently attenuated from the immunized act of production so as to be permissible.

Melilli, supra note 238, at 260. This solution gets things completely backward. The problem lies not in the scope of use immunity correctly set forth in Kastigar but, instead, in the textually implausible and ahistorical legal fiction that is the act-of-production doctrine. The right solution consists of casting aside the latter doctrine, not in cutting back use immunity in the context of document requests.


See Alito, supra note 3, at 59 ("[A]ct-of-production immunity will impose practical restrictions on the prosecution only to the extent that the information implicitly conveyed by the act of production is not also obtainable from the documents' contents.").

See Kastigar, 406 U.S. at 453.

See Stuntz, supra note 227, at 1278 ("While the government may immunize the act of production and thereby compel the suspect to turn the document over, the grant of immunity must as a practical matter cover the document’s contents, since only in that way can the government ensure that it gains nothing from the disclosure of the document’s existence."); see also Mosteller, supra note 12, at 43-49 (arguing that extent to which document content must be immunized as derivative fruit of immunized act of production depends on nature of incriminatory information conveyed by that act).
In short, under current law, the inquiry required by *Kastigar* has the potential to cripple the prosecution after both the government and the defense have expended substantial resources to ready a criminal case for trial. Indeed, in those instances where the application of *Kastigar* is uncertain, the matter may well be resolved only after a lengthy appeal from a trial judge’s application of the bar upon the use of derivative fruits.

To permit the government to compel the act of document production upon a grant of use immunity and only thereafter—potentially, years later—to attempt to determine whether the contents of the documents also must garner constitutional protection under *Kastigar* is like shooting first and asking questions later. A better approach would seek to resolve in the early stages of the criminal process the Fifth Amendment issues surrounding the contents of incriminatory documents and, in so doing, to eliminate the need to address such questions retrospectively, after a prosecution has been geared up.

My reading of the Fifth Amendment would focus attention at the outset not upon the act of production (about which the government rarely, if ever, cares in itself) but upon the incriminatory contents of the documents (what the government really wants). To compel a person to turn over documents that are self-incriminatory in content is literally to compel that person “to be a witness against himself” in the sense of giving evidence against himself. Document production of this sort violates the Fifth Amendment, properly understood, unless the government can secure the person’s consent to produce the document voluntarily—as the government often might in exchange for the foregoing of a Fourth Amendment search. The key point is that obtaining documents by way of either voluntary production or a proper seizure (if voluntary production is not forthcoming) raises no immunity questions to be resolved in a subsequent criminal prosecution.

Where the government cannot seize the documents, it must either abandon its effort to compel their production or grant use immunity, under the terms of *Kastigar*, with respect to the contents of the docu-

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The Court itself has yet to specify when a grant of use immunity with respect to the act of production will bar the use of document contents as derivative fruits. The Court, however, has intimated that situations of this sort may be quite common. See Braswell v. United States, 487 U.S. 99, 117 (1988) (stating in dictum that “a grant of act of production immunity can have serious consequences” for government, for it “may result in the preclusion of [other] crucial evidence” upon application of *Kastigar*). Writing prior to his appointment to the Court, then-Judge Scalia embraced the notion that document content may constitute the derivative fruit of an immunized act of production. See In re Sealed Case, 791 F.2d 179, 182 (D.C. Cir. 1986) (“[T]he fact that the contents of the tapes [produced upon a grant of use immunity] are unprivileged does not mean that they will necessarily remain untainted [through operation of use immunity principles].”).

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ments themselves. If the government chooses the use immunity route, a court would, of course, have to police the boundary set by *Kastigar* in the event of a subsequent criminal prosecution by asking whether any other incriminatory evidence offered by the government was "directly or indirectly derived" from the immunized documents. The crucial difference is that the decision to immunize document content will be made consciously at the outset of the investigative process, not—as the indirect, and probably unintended, consequence of the interaction between *Fisher* and *Kastigar*—long after the criminal process has proceeded apace. In particular, the status of document content will be resolved not by a court applying *Kastigar* after the fact but, rather, by the official in whose hands the criminal process has long placed the discretion to grant or to withhold immunity in the first place: the prosecutor.

b. Explaining *Kastigar*. My view of use immunity differs dramatically from that recently advanced by Akhil Amar. I seek to implement practicably the promise of *Kastigar*, whereas Amar assails its merit as an interpretation of the Fifth Amendment. For Amar, the use of immunized testimony to find other incriminatory evidence—what *Kastigar* forbids—differs "'only by a shade from the permitted use for that purpose of [a person's] body or his blood.'" Amar contends that, if one accepts the correctness of the bodily evidence cases like *Schmerber*, the logic of *Kastigar* "unravels." He would replace *Kastigar* with a regime in which the government could compel testimonial communication "in a civilized pretrial hearing" but could not use that testimony as evidence in a subsequent criminal trial; however, the government could use any evidence derived from the testimony.

This stance rests upon not only a misunderstanding of the bodily evidence cases but also a consequent misapprehension of the textual basis for *Kastigar*. As suggested earlier, the bodily evidence cases do not stand for the proposition that the government may compel a person to give evidence from his own body and that the government then may use that evidence to find other incriminatory material. On the whole, the situations presented in the bodily evidence cases—most obviously, the extraction of the blood sample in *Schmerber*—instead
involves the taking of evidence. To say that the government may do so and thereafter seek to derive additional incriminatory evidence through other means is not at all anomalous. For constitutional purposes, the situation that prompts Amar's critique of *Kastigar* is indistinguishable from one in which the government literally takes evidence—in the form of incriminatory speech, documents, or physical evidence—through a duly authorized seizure and then follows up on the leads derived therefrom. That is not a constitutional anomaly; it is what good police work is all about.

Once one properly conceives of the Fifth Amendment as a prohibition on the compulsion of a person "to give evidence" against himself, the logic of *Kastigar* becomes clear. Although the Court did not speak in such terms, the textual premise of *Kastigar* is that there is no compelled giving of evidence as long as the government conducts itself as if it never was given the evidence at all. That is precisely what *Kastigar* demands through its prohibition upon the use, in a subsequent criminal trial, not just of the particular incriminatory material obtained upon the grant of immunity but also of any derivative fruits.

To rephrase the point, it is well within the parameters of everyday language to posit that a person gives the government not just the immunized item of evidence—the self-incriminatory testimony or the telltale document—but also any additional evidence "directly or indirectly derived" therefrom. In ordinary parlance, after all, it is fair to say that rich parents "give" to their college-bound daughter the car that she chooses to purchase with a birthday gift of $10,000 in cash. What is given quite plausibly includes derivative fruits. By no stretch of the English language, however, does it include incriminatory evidence derived in a manner wholly unconnected to the item of evidence given upon a grant of immunity. The Court in *Kastigar* thus was correct to reject earlier dicta suggesting that only transactional immunity would suffice under the Fifth Amendment.

In short, my view both makes *Kastigar* more workable in application and more readily understandable in terms of the specific language in the Fifth Amendment. Indeed, as I discuss in the next Part, the continued viability of the use immunity doctrine forms an important component of the legal regime that would arise from the long-overdue embrace of Justice Miller's position in *Boyd*.

249 A reading of the Fifth Amendment as prohibiting the compelled giving of evidence also helps to explain the Court's subsequent clarification that use immunity under *Kastigar* does not entitle a person to lie in immunized testimony. See United States v. Apfelbaum, 445 U.S. 115 (1979) (holding that government may use false immunized testimony as basis for perjury prosecution). Use immunity is immunity to give evidence without fear of its subsequent use, not immunity to give falsified pseudo-evidence.
III
IMPLICATIONS FOR MODERN GOVERNANCE

What would the world look like if the phrase “to be a witness” in the Fifth Amendment were equated with the phrase “to give evidence”? In this Part, I initially summarize the framework for document subpoenas, pointing out how my analysis would require a rethinking of the treatment currently accorded to so-called required records. I also discuss the strategic implications of my analysis for document destruction and the decision to invoke the Fifth Amendment. I then turn to two related areas of Fifth Amendment jurisprudence in which the modern Court, on occasion, has gone substantially astray: generally applicable reporting requirements and nondocumentary physical evidence.

A. Document Subpoenas

The implications for document subpoenas are clear enough: The act-of-production doctrine announced in Fisher would be added to the list of wisely discarded constitutional doctrines.\(^\text{250}\) In its place, the principle expounded by Justice Miller in Boyd would be installed as a cornerstone of Fifth Amendment doctrine, buttressed by the textual, historical, and doctrinal analysis set forth in the preceding Part.

The government may not compel a person to engage in the production of documents that are self-incriminatory in content, subject to two qualifications. The first qualification is that the government may call upon the person in question to turn over documents if it has sufficient information to obtain a search warrant for them. If that offer is rejected, the government could not compel production by way of a subpoena but could, by hypothesis, undertake a seizure. The second qualification centers upon the prospect of use immunity. Per Kastigar—reenergized by the textual analysis above—the government would have the option of compelling the production of documents that are incriminatory in content upon a grant of use immunity with respect to the documents themselves and any derivative fruits.\(^\text{251}\) Apart from these options, the government could seek incriminatory documents through any other proper law enforcement technique. In

\(^{250}\) Although the underlying facts of Fisher are not entirely clear in pertinent part, there is strong reason to believe that the appropriate result in that specific case would have been for the government simply to seize the disputed accounting papers upon obtaining a search warrant. See supra notes 222-23 and accompanying text.

\(^{251}\) Use immunity is likely to be of particular value in connection with the investigation of large-scale criminal enterprises—drug trafficking rings, organized crime, and the like—where the government seeks information from minor players not so much to incriminate those individuals but, primarily, to build its case against higher-ups.
particular, in keeping with current law, the government would remain free to compel the production of evidence from one person that merely incriminates another. As the Court correctly has held, that would not by any stretch of the English language constitute the compulsion of a person to be a witness "against himself."252

The practical consequence of these changes is likely to be more seizures and more grants of use immunity. In these respects, however, Fifth Amendment practice for documentary evidence simply would come to resemble the current regime for self-incriminatory oral statements. The government could take testimonial and nontestimonial forms of incriminatory evidence. But a person could not be compelled to give either form of evidence, absent a grant of use immunity.253

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252 See Couch v. United States, 409 U.S. 322, 328 (1973) ("The Constitution explicitly prohibits compelling an accused to bear witness 'against himself'; it necessarily does not proscribe incriminating statements elicited from another.").

253 The position advanced in this Article takes no stance on the merits of the Supreme Court's collective entity doctrine. That doctrine originated in a series of decisions dating from the early twentieth century in which the Court addressed the Fifth Amendment issues raised by efforts to obtain corporate documents. The Court held that collective entities, such as corporations, do not constitute persons within the meaning of the Self-Incrimination Clause of the Fifth Amendment and, hence, cannot claim the protection of that clause in their own right. See Hale v. Henkel, 201 U.S. 43, 75 (1906). Under current law, in other words, the constitutional prohibition of compelled self-incrimination protects natural persons, but not juridical ones. But cf. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (applying Double Jeopardy Clause of Fifth Amendment to corporate defendants).

The Court has gone on to hold that, because collective entities can act only through their agents, a person under compulsion in his capacity as an agent to produce documents of the collective entity may not resist production on the ground that the contents of the documents or the act of production will incriminate him personally. See Braswell v. United States, 487 U.S. 99, 100 (1988) (finding that custodian of corporate records may not resist subpoena for such records on ground that act of production would incriminate himself); Bellis v. United States, 417 U.S. 85, 100-01 (1974) (finding that law firm partner may not invoke personal privilege against self-incrimination to refuse production of partnership financial records); Wilson v. United States, 221 U.S. 361, 384-85 (1911) (finding that corporate agent may not resist subpoena on ground that contents of corporate documents would incriminate himself). But cf. Braswell, 487 U.S. at 118 (adding that government may not introduce agent's act of production on behalf of collective entity as evidence in criminal prosecution of agent personally). Because the collective entity is a separate juridical person, a subpoena issued to the agent as an agent calls for an act of the collective entity itself. And the Fifth Amendment, of course, bars only compelled self-incrimination, not the compelled incrimination of one person (the agent personally) by another person (the collective entity, albeit acting through the agent). See Couch, 409 U.S. at 328.

Whether the collective entity doctrine stands as a faithful construction of the Fifth Amendment is a subject beyond the scope of this Article. The question centers not upon the meaning of the word "witness" in the Fifth Amendment—my focus here—but, instead, upon the meaning of the word "person." Indeed, the doctrine ultimately concerns the relationship between the concept of personhood under the Fifth Amendment and the distinctive body of legal principles that govern collective entities as separate juridical persons.
1. Required Records

In sketching the foregoing legal regime, I have focused on documents generated and retained by private persons of their own accord—for instance, to transcribe their thoughts (as in a personal diary) or, more commonly, in connection with business transactions (legal or otherwise). There is no principled reason, however, to use a different regime when a subpoena happens to seek the production of documents required by the government to be generated and retained—which the Court has labeled “required records.”

In the leading case on the subject, *Shapiro v. United States,* the Court dealt in 1948 with a subpoena for the production of sales records required by a wartime price control statute to be retained and made available for inspection. Shapiro “produced the records, but claimed constitutional privilege.” The Court rejected his claim and affirmed Shapiro’s conviction for various crimes under the price control law. The Court cryptically noted that “there are limits which the Government cannot constitutionally exceed in requiring the keeping of records” for inspection and potential use in a criminal prosecution. Those limits are not exceeded, however, where “there is a sufficient relation between the activity sought to be regulated and the

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254 The Supreme Court has not definitively resolved the Fifth Amendment status of personal diaries and the like. Opining upon the accounting documents at issue in *Fisher,* the Court cautioned that the case did not involve a subpoena for a “personal diary.” *Fisher v. United States,* 425 U.S. 391, 401 n.7 (1976). In a subsequent case, Justice O’Connor flatly declared that “the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind,” but other Justices expressly declined to go that far. Compare *United States v. Doe,* 465 U.S. 605, 618 (1984) (O’Connor, J., concurring), with id. at 619 (Marshall, J., joined by Brennan, J., concurring in part and dissenting in part) (“I continue to believe that under the Fifth Amendment ‘there are certain documents no person ought to be compelled to produce at the Government’s request.’”) (quoting *Fisher,* 425 U.S. at 431-32 (Marshall, J., concurring))).

For their part, lower federal courts have declined to extend Fifth Amendment protection to personal diaries and their ilk. See, e.g., In re Grand Jury Subpoena, 1 F.3d 87, 88, 90-93 (2d Cir. 1993) (personal calendar sought in connection with investigation into securities violations); *Senate Select Comm. on Ethics v. Packwood,* 845 F. Supp. 17, 18, 22-23 (D.D.C. 1994) (diary of Senator Robert Packwood sought in connection with ethics investigation into allegations of sexual harassment).

255 335 U.S. 1 (1948).
256 Id. at 5.
257 Id. at 32. Two decades later, the Court added that:

The premises of the [required records] doctrine, as it is described in *Shapiro*, are evidently three: first, the purposes of the United States’ inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed ‘public aspects’ which render them at least analogous to public documents.
public concern [here, over wartime price gouging] so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records."\(^{258}\) Required records must lie outside the protection of the Fifth Amendment, reasoned the Court, else one would "frustrate the congressional intent" behind the price control statute.\(^{259}\)

There are several problems here. Most significantly, the required records doctrine misconstrues the relationship between regulatory authority and the Bill of Rights. To say, as the Court correctly does in *Shapiro*, that Congress has substantive authority to control prices and that Congress clearly considered important the enforcement of wartime price controls by way of criminal sanctions is not to say that Congress may pursue such a policy by way of compelled self-incrimination.\(^{260}\) Congress undoubtedly has the substantive power to enact wide-ranging criminal statutes as well, but that authority has never been thought, in itself, to render inapplicable the Fifth Amendment. To turn away a Fifth Amendment claim upon the mere invocation of substantive regulatory authority, as *Shapiro* does, is to determine the scope of constitutional protection according to nothing more than the say-so of Congress.

This shortcoming of *Shapiro* stems from two deeper flaws in Fifth Amendment doctrine discussed earlier: *Boyd*’s linking of the Fifth Amendment with an erroneous conception of the Fourth Amendment and the modern Court’s focus upon testimonial communication as the touchstone for Fifth Amendment protection. From a practical standpoint, the need to cast aside the Fifth Amendment as a barrier to obtaining required records was accentuated at the time of *Shapiro* only because of *Boyd*’s earlier holding that seizures of documents in private hands are categorically unreasonable under the Fourth Amend-

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\(^{258}\) *Shapiro*, 335 U.S. at 32.

\(^{259}\) Id.

\(^{260}\) As Justice Frankfurter stated in dissent:

> The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become 'public' records in the sense that they fall outside the constitutional protection of the Fifth Amendment.

Id. at 53 (Frankfurter, J., dissenting).
To recognize Fifth Amendment protection for required records in addition to the wildly expansive Fourth Amendment protection afforded by *Boyd* thus would have made the price control statute practically unenforceable. When *Boyd*'s Fourth Amendment mistake is abandoned, on the other hand, the practical need to restrict one's reading of the Fifth Amendment correspondingly subsides. For its part, however, the modern Court has yet to recognize the extent to which its abandonment of the Fourth Amendment holding in *Boyd* undercuts the practical basis for the required records doctrine.262

In addition, although the Court in *Shapiro* did not recognize the point, its required records doctrine is much in the mold of the Court's divergent Fifth Amendment treatment of testimonial communication and documents.263 To posit, as the modern Court does, that the Fifth Amendment covers only testimonial communication is implicitly to read the phrase "to be a witness" in terms of what witnesses do at trial. Specifically, it is to say that constitutional protection runs only to those vessels of self-incrimination that are themselves brought into being by way of government compulsion—such as the oral statements that witnesses provide on the stand—and not to materials that preexist such compulsion. An argument along these lines at least would have covered the required records doctrine with a fig leaf of textual plausibility. But once one correctly reads the prohibition on compelling a person "to be a witness" in terms of giving evidence, any principled basis for the required records doctrine disappears. The application of the Fifth Amendment does not turn on the pedigree of the evidence to be given to the government. The question simply is whether the thing to be given under compulsion qualifies as evidence in the sense of something that the government potentially may use in a criminal trial. That, of course, is exactly what the government had done in *Shapiro*. Indeed, the government had used a "name and other unspecified leads obtained from" the requested documents "to search out" other evidence of criminal violations.264

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261 In the period between *Boyd* in 1886 and *Shapiro* in 1948, the Court had begun to whittle down the former's expansive view of the Fourth Amendment. But *Boyd* still stood, at least nominally, for the proposition that mere incriminatory evidence—not itself contraband or an instrumentality of crime—could not be seized. See supra note 52.

262 To the contrary, the Court has continued to cite the required records doctrine—and *Shapiro*, in particular—as good law. See Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 556-59 (1990). For further discussion of *Bouknight*, see infra Part III.C.

263 The first case to draw that distinction—*Holt v. United States*, 218 U.S. 245 (1910)—was decided thirty-eight years prior to *Shapiro*, though the distinction would not reach full flower until the bodily evidence cases of the 1960s. See supra Part II.C.2.

264 *Shapiro*, 335 U.S. at 5.
To continue the required records doctrine upon the resurrection of full-scale Fifth Amendment protection for documents generally would create a curious anomaly, for it would mean that the government would be better off when it compels people to create and to retain documents than it would be with respect to documents generated by private persons of their own accord. The Fifth Amendment does not countenance such backward nonsense. When the required records doctrine is abandoned, the government would remain free to require the generation and retention of records in connection with regulatory regimes that do not entail criminal sanctions. Seizures of required records would be regulated by the Fourth Amendment. And the government could compel their production in the same manner as it can any other self-incriminatory document: through a grant of use immunity. In fact, in his dissenting opinion in *Shapiro*, Justice Frankfurter argued that the Court should have read certain language in the price control statute to provide immunity broad enough to supplant claims of Fifth Amendment protection.

2. Strategic Implications

Constitutional doctrine does not exist in isolation from legal practice and litigation strategy. Here, I consider the impact of the doctrinal regime sketched above for the incidence of document destruction and the decision to invoke the Fifth Amendment.

a. Document Destruction. Resurrection of Justice Miller’s view in *Boyd* is unlikely to precipitate the destruction of self-incriminatory documents. To replace the vagaries of Fisher’s act-of-production doctrine with the more categorical protection suggested here, if anything, would be to discourage document destruction, for those in fear of self-incrimination would have greater confidence in the invocation of the Fifth Amendment. The one regime that really would invite document destruction is one that would accord less, not more, constitutional protection against compelled disclosure.

It is undoubtedly the case—as it has been for centuries—that persons firmly dedicated to the concealment of their criminal misdeeds will, for that reason, seek to destroy all physical traces of their acts.

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265 One open question would be what, if any, limitations the Fourth Amendment independently imposes upon seizures of incriminatory records generated solely for purposes of compliance with regulatory requirements.

266 See *Shapiro*, 335 U.S. at 49 (Frankfurter, J., dissenting); see also id. at 73-74 (Rutledge, J., dissenting) (arguing for similar recognition of immunity).

267 Cf. United States v. Feldman, 83 F.3d 9, 14 (1st Cir. 1996) (rejecting contention that Fifth Amendment includes “right to destroy voluntarily prepared documents” in course of affirming conviction for obstruction of justice by way of document destruction).
There is an outer limit even to those efforts, insofar as document destruction would imperil ongoing activities. The point here is simply that the marginal effect of a move to the Miller view in Boyd from the current Court’s stance in Fisher is very unlikely to be in the direction of increased document destruction; it may well prompt less.

b. The Decision to Take the Fifth. A motion to quash a document subpoena based upon the Fifth Amendment is not a riskless enterprise. As a practical matter, the invocation of the Fifth Amendment is a strong signal that the person doing the invoking may well have something to hide. When a subpoena for documents is quashed, the government remains free to pursue other legitimate investigative channels that ultimately may uncover some underlying crime, including search and seizure in accordance with the Fourth Amendment.

That invocation of the Fifth Amendment might prompt intensified investigation, however, is not itself unconstitutional. The Fifth Amendment simply provides that no person shall be compelled “to be a witness against himself”; it does not prohibit the government from compelling a person to refuse “to be a witness against himself.” Apart from the prohibition of prosecutorial comment to the jury upon a defendant’s refusal to take the witness stand in a criminal trial, there are no special limitations that apply to the government upon the refusal of a person to engage in self-incrimination. The government, in other words, does not violate the Fifth Amendment simply by precipitating its invocation. If that were so, then it often would be difficult for the government to steer clear of constitutional violations, for the person in question—as compared to the government—is better positioned to make an initial assessment of when a subpoena seeks self-incriminatory documents.

It is true that the government may not force a defendant to take the witness stand in a criminal trial simply to put the defendant in the position of having to invoke the Fifth Amendment before the jury.

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268 See generally Friendly, supra note 2, at 703 (arguing that rejection of Boyd would not precipitate document destruction, because “[i]n many instances . . . records cannot be destroyed without imperilling the further operations of the business”).

269 See Amar, supra note 12, at 53 (“Merely focusing preliminary investigation on someone who takes the Fifth . . . makes that person worse off, and yet—so far—the courts have allowed the government to do just that.”).

270 See Griffin v. California, 380 U.S. 609, 615 (1965); see also Carter v. Kentucky, 450 U.S. 288, 305 (1981) (building on Griffin to require that jury be instructed against drawing inferences from defendant’s failure to testify).

271 See generally LaFave & Israel, supra note 127, § 24.4(a), at 1031 (“[T]he right of the defendant [under the Fifth Amendment] is not only to avoid giving incriminatory re-
But the reason why that is unconstitutional is because compelling the defendant to take the witness stand in the first place—prior to any overt invocation of the Fifth Amendment—is a clear-cut violation of the prohibition on compulsion of a person "to be a witness against himself."\textsuperscript{272}

To translate the point to the language of the state ratifying conventions: The invocation of the Fifth Amendment undoubtedly serves as a tip-off to possible criminality, but it—by definition—does not give evidence to the government in the sense of anything potentially useable as evidence in a subsequent criminal prosecution.\textsuperscript{273} Indeed, this observation reveals the textual basis for the prohibition of prosecutorial comment upon the invocation of the Fifth Amendment by a defendant at trial. For its part, the Court regarded prosecutorial comment as an impermissible burden on the invocation of the Fifth Amendment, but the Court did not relate that notion to the constitutional text.\textsuperscript{274} That is easily done, however. If the invocation of the Fifth Amendment could form the basis for adverse comment by the government to the jury—if it could, in other words, form a kind of evidence to be wielded against the invoking person in a criminal case—then that invocation itself would amount to the giving of self-incriminatory evidence to the government.\textsuperscript{275} Prosecutorial comment

\begin{itemize}
\item \textsuperscript{272} See supra note 2 and accompanying text.
\item \textsuperscript{273} See supra note 122 and accompanying text (noting that state proposals speak of compulsion to "give evidence").
\item \textsuperscript{274} See Griffin, 380 U.S. at 614.
\item \textsuperscript{275} There is rhetoric in Griffin that points in this direction. See id. ("What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." (emphasis added)); see also Stephen J. Schulhofer, Some Kind Words for the Privilege Against Self-Incrimination, 26 Val. U. L. Rev. 311, 334-35 (1991) (emphasizing this neglected passage as key to Griffin).
\end{itemize}
must be barred in order to maintain the distinction between the pro-
hibited compulsion of a person "to give evidence" and the permitted
placing of a person in a position to refuse "to give evidence."276

The proposition that invocation of the Fifth Amendment may
form the basis for further investigation might seem, at first glance, in
tension with the use immunity doctrine of Kastigar. Close attention to
the language of the Fifth Amendment, however, serves to reconcile
these two concepts. The use immunity doctrine simply provides that,
in order to compel a person to give evidence against himself—self-
incriminatory testimony, documents, or other items potentially usea-
ble as evidence in a subsequent criminal trial—the government must
immunize the person whom it has compelled against the use of that
particular item of evidence plus any derivative fruits.277 The predicate
of Kastigar, however, is that the immunized testimony otherwise
would constitute evidence. As such, the question that remains is sim-
ply whether that particular item of evidence is all that the government
has compelled the person to give. Kastigar answers that question
"no," positing that what is given to the government includes not only
the immunized testimony but also its derivative fruits.278 By contrast,
the government may obtain and, ultimately, may use what one might
characterize as derivative fruits of a person's invocation of the Fifth

276 In South Dakota v. Neville, 459 U.S. 553 (1983), the Court held that the Fifth
Amendment does not bar the government from admitting as incriminatory evidence at trial
the refusal of a person to submit to a blood-alcohol test upon being duly stopped on suspi-
cion of drunk driving. Neville, however, does not undercut the principle that invocation of
the Fifth Amendment may not itself be used as evidence.

First, Neville's refusal to submit to a blood-alcohol test upon being invited to do so by
the police arguably was not predicated upon invocation of the Fifth Amendment or, for
that matter, any legal ground at all. See id. at 555 (noting that Neville simply "refused to
take the test, stating 'I'm too drunk, I won't pass the test'").

Second and more importantly, the holding in Neville must be understood in light of
the underlying principle—established earlier in Schmerber—that the extraction of blood
for purposes of a blood-alcohol test, even without the cooperation of the criminal suspect in
police custody, does not implicate the Fifth Amendment. See supra notes 202-04 and ac-
companying text (explaining that Schmerber Court based its holding on premise that tak-
ing of blood from criminal suspect in custody does not amount to testimonial
communication, but reaching same result by distinguishing between unilateral taking and
compelled giving of incriminatory evidence). Because even the involuntary extraction of
a blood sample would not implicate the Fifth Amendment upon the arrest of a person sus-
pected of drunk driving, the Neville Court reasoned that the government surely may take
the lesser step of offering drivers the "option of refusing [a blood-alcohol] test, with the
attendant penalties for making that choice." Neville, 459 U.S. at 563. The crucial point is
that the situation in Neville differs fundamentally from one where the act in which the
person refuses to engage—the giving of testimony, the turning over of a document, and the
like—does amount to the giving of evidence and, hence, is within the aegis of the Fifth
Amendment.

278 See id.
Amendment. But this is so because that invocation is not itself evidence in the first place. As such, the predicate for the protection of derivative fruits in *Kastigar* is not satisfied.

To be sure, the framework described here does not offer great solace to those engaged in crime: A complete failure to respond at all to a subpoena for documents amounts to contempt. A response consisting of the invocation of the Fifth Amendment—whether conceived in terms of *Fisher*’s act-of-production doctrine or, more broadly, along the lines of Justice Miller’s concurrence in *Boyd*—may well prompt the government to poke around and, perhaps, to detect the underlying criminal scheme. And disclosure without objection amounts to self-incrimination that would not be considered “compelled” within the meaning of the Fifth Amendment.279 The preferred position of persons engaged in crime, of course, would be to have elicited no attention whatsoever from the government in the first place. The Fifth Amendment, however, is not an entitlement to escape detection. It is simply a prohibition on the compulsion of a person “to be a witness against himself” in the sense of giving evidence against himself. As long as one of the available options is to refuse to give evidence—as distinct from an implicit tip-off to the government that itself cannot constitute evidence in a criminal trial—there is no Fifth Amendment violation. As I explain in the next section, this last point takes on greater significance in connection with the Court’s treatment of reporting requirements.

**B. Generally Applicable Reporting Requirements**

I have focused thus far on the compelled giving of evidence in response to some specific, personalized inquiry. Asking a question that seeks a self-incriminatory answer and serving a subpoena that seeks self-incriminatory documents fall readily into this category. Fifth Amendment issues also may arise, however, with respect to a generally applicable reporting requirement. Here, I refer to a requirement for some category of persons, on pain of criminal sanctions, to report certain information to the government—information that, in a given instance, may incriminate the reporting person under ordinary Fifth Amendment standards.

I consider here the implications that my revisionist reading of the Fifth Amendment would have for these sorts of reporting requirements. As I explain, equating the phrase “to be a witness” with the

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proposed phrase "to give evidence" would not, for the most part, require the Court to revamp its case law in this difficult area. If anything, such a reading of the Fifth Amendment would serve usefully to highlight the textual basis for much of the reasoning used in current law. On occasion, however, the Court has abandoned constitutional principle in the service of what one most charitably may describe as pragmatism in the face of growing government demands for self-incrimination.

I. Compliance Through Invocation of the Fifth Amendment

The most familiar form of required reporting—the filing of an income tax return—provides a useful starting point. Though explicitly authorized by constitutional amendment, the regime for federal income taxation does not render inapplicable the Bill of Rights. The Sixteenth Amendment does not implicitly repeal the Fifth. In a given instance, an accurate accounting of income might well be incriminatory under ordinary Fifth Amendment standards. To take a stark example, a tax return that truthfully reported the receipt of vast sums unrelated to employment, capital gains, gifts, or other legitimate sources of income undoubtedly would set off alarm bells within the IRS. For this reason, of course, candor on Form 1040 is not the general practice of those engaged in crime.

In United States v. Sullivan, one of its earliest cases on reporting requirements and the Fifth Amendment, the Court dealt with a taxpayer’s refusal to report his income—a refusal that, in turn, resulted in a criminal conviction. A truthful statement of income would have implicated the taxpayer in the unlawful sale of liquor. Writing for the Court, Justice Holmes declared that, "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." Though more of a rhetorical flourish than a parsing of the Fifth Amendment, this pithy statement actually amounts to a sound construction of the constitutional text. Both the requirement to report

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280 U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").
281 Imagine the boon to the Treasury if it were!
282 274 U.S. 259 (1927).
284 See Sullivan, 274 U.S. at 262-63. The case arose in the context of Prohibition-era restrictions on liquor sales. See id.
285 Id. at 263.
one's income and the related prohibition upon false reports flow from
the distinction drawn in the previous section between the prohibited
compulsion of a person "to be a witness" and the permitted placing of
a person in a position to refuse "to be a witness" by invoking the Fifth
Amendment. Instead of not reporting at all or lying about one's in-
come, one may "take the Fifth."

Like the criminal wrongdoer who has received a subpoena for
telltale documents, the taxpayer with something to hide faces a diffi-
cult strategic choice: A failure to report will be a crime in itself; invo-
cation of the Fifth Amendment raises a red flag that may prompt
intensified investigation; and truthful reporting—that is, disclosure of
one's ill-gotten income—would amount to self-incrimination uncom-
pelled and, hence, unprotected by the Fifth Amendment. To put a
person to such a choice has never been deemed unconstitutional with
respect to document subpoenas or, for that matter, demands for self-
incriminatory testimony; and there is no good reason to take a differ-
ent view for generally applicable reporting requirements. As long as
invocation of the Fifth Amendment would not itself give evidence to
the government for potential use in a subsequent criminal trial, the
Fifth Amendment is satisfied.

2. When Invocation Itself Gives Evidence

The Court's decision in Marchetti v. United States neatly illus-
trates the unusual situation in which invocation of the Fifth Amend-
ment would itself give the government incriminatory evidence. Marchetti concerned provisions of the federal tax code that required
persons engaged in the business of accepting bets both to register with
the IRS and to pay an occupational tax—in essence, a reporting
requirement and tax for "bookies." Although various federal and
state laws criminalized gambling, the Court emphasized that the un-
lawful nature of the underlying activity was not, in itself, a barrier to
its taxation. A hypothetical analogue in the present day would be a
reporting requirement and accompanying tax for drug dealers.

Not surprisingly, given the criminalization of gambling, Marchetti
did not step forward to invoke the Fifth Amendment as a basis on
which to comply with the reporting requirement. Like the taxpayer in
Sullivan, Marchetti did nothing. Upon a criminal prosecution for

286 The Supreme Court has so held in the specific context of federal income tax returns.
288 See id. at 42-44.
289 See id. at 44, 58.
290 See id. at 50.
failure to register and to pay the bookie tax, the Court held that Marchetti's earlier failure to invoke the Fifth Amendment did not prevent him from doing so successfully as a complete defense at trial.291 Writing for the Court, Justice Harlan noted that to require Marchetti to present his Fifth Amendment claim to the IRS "would have obligated him 'to prove guilt to avoid admitting it.'"292

The nature of the reporting requirement in Marchetti was such as to foreclose the crucial option that most reporting requirements leave open: compliance with the reporting requirement through the invocation of the Fifth Amendment. Raising the Fifth Amendment prior to prosecution effectively would have revealed Marchetti's status as a bookie—a revelation that would have incriminated him under the laws against gambling.293 In fact, the federal tax laws imposed no limitation upon the use of the required report—whether a truthful report or one merely invoking the Fifth Amendment—in a criminal prosecution under the separate statutory regimes that criminalized gambling. For its part, the Court in Marchetti declined on prudential grounds to read a use limitation into the statute, leaving that determination to Congress.294 As such, information obtained as a consequence of the reporting requirement remained "readily available to assist the efforts of state and federal authorities" to enforce the criminal laws against gambling.295

Where compliance with a reporting requirement through the invocation of the Fifth Amendment would itself give evidence to the government, a person like Marchetti faces a choice that the Fifth Amendment forbids the government to impose: the choice between criminal prosecution for failure to report (or for untruthful reporting) and the truthful giving of self-incriminatory evidence. To pose that choice is the classic form of compulsion prohibited by the Fifth

291 See id. at 50-51, 60.
292 Id. at 50 (quoting United States v. Kahriger, 345 U.S. 22, 34 (1953) (Jackson, J., concurring)). The Court went on to note that the required records doctrine of Shapiro did not apply to the situation presented in Marchetti. See id. at 56-57 ("Marchetti was not, by the provisions now at issue, obliged to keep and preserve records . . . ; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony."). The Court applied the reasoning in Marchetti to two similar cases decided on the same day. See Grosso v. United States, 390 U.S. 62 (1968) (excise and occupational tax on wagering); Haynes v. United States, 390 U.S. 85 (1968) (registration of certain firearms).
293 See Marchetti, 390 U.S. at 48 (noting that Marchetti "was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" (footnote omitted)).
294 See id. at 58-60.
295 Id. at 47.
Amendment. It is no different from telling a person on the witness stand to incriminate himself, else he will face a jail term for contempt (or perjury).

It is not always so easy to ascertain when compliance with a reporting requirement through invocation of the Fifth Amendment will, in itself, amount to self-incrimination. Three years after Marchetti, the Court addressed a more complicated situation in California v. Byers.\(^2\) The case concerned a typical hit-and-run law: a statutory requirement for any driver "'involved in an accident resulting in damage to any property'" to stop at the accident scene and to give his name and address.\(^3\) The state charged Byers not only with misdemeanor failure to comply with this reporting requirement but also with the misdemeanor of passing another car without "maintaining the 'safe distance.'"\(^4\)

In structural terms, the situation in Byers is identical to that in Marchetti. In both cases, there existed a reporting requirement supported by criminal sanctions for those who failed to report. The critical feature of Byers—like Marchetti—is that the person charged with failure to report could not realistically have complied with the reporting requirement by invoking his Fifth Amendment rights. Identification of one's self at the accident scene would supply a "link in the chain of evidence" that the government might use—indeed, did use—as the basis for a criminal prosecution.\(^5\) In this respect, self-identification at the accident scene is not merely a link in the chain of incrimination; in practical terms, it is the crucial link.

It is true that self-identification under the statute in Byers is ambiguous in a way that identifying one's self as a bookie is not: The reporting requirement in Byers extended not to persons who caused accidents through criminal misconduct but, more broadly, to all persons "'involved in' accidents resulting in property damage. A given person thus might remain at the scene as someone "'involved in" the accident simply as a victim or an eyewitness. In fact, the Court in Byers sought to distinguish Marchetti on this ground. Writing for a plurality of the Court, Chief Justice Burger observed that the reporting requirement in Marchetti focused upon a "'highly selective group inherently suspect of criminal activities,'" whereas the reporting requirement in Byers—like the obligation to file an income tax return—

\(^3\) Id. at 426 (citation omitted).
\(^4\) Id. at 425-26 (citation omitted).
\(^5\) See id. at 462 (Black, J., dissenting) ("[I]f Byers had stopped and identified himself as the driver of the car in the accident, he would have handed the State an admission to use against him at trial . . . ").
was "directed at the public at large." Concurring separately, Justice Harlan embraced the same view in the course of supplying the decisive fifth vote to reject Byers's Fifth Amendment claim.

This reasoning, however, misconceives the central lesson that runs from Sullivan through Marchetti: that a given person may be punished for failure to comply with a generally applicable reporting requirement only insofar as that person might have complied by invoking the Fifth Amendment. To say that some other group of people might comply with a given reporting requirement without incriminating themselves is no different from saying that some people on the witness stand might answer a given question without incriminating themselves. It is of no significance that the question "Were you present at the scene of the murder?" might be answered in the negative by virtually everyone in the population. The actual murderer still may invoke the Fifth Amendment to avoid having to answer that question.

To put the point another way: The government should not be able to compel self-incrimination from a given individual by artfully drafting a reporting statute so as also to encompass many other persons who face no risk of self-incrimination. The Fifth Amendment ban on compelled self-incrimination is not a tailoring requirement for statutory drafting but rather a limitation quintessentially designed for invocation in the face of the generally applicable requirement for persons to give evidence—to appear as witnesses at trial, to respond to subpoenas, and so on—when called upon by the legal system. In this respect, the bar upon compelled self-incrimination is, by its nature, an entitlement to an exception in those circumstances in which satisfaction of one's general obligation to give evidence would be self-incriminatory. To point to the general applicability of a given reporting

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300 Id. at 430 (citations omitted).
301 As Justice Harlan explained:

The statutory schemes involved in Marchetti and related cases focused almost exclusively on conduct which was criminal. . . .

In contrast, the 'hit and run' statute in the present case predicates the duty to report on the occurrence of an event which cannot, without simply distorting the normal connotations of language, be characterized as 'inherently suspect'; i.e., involvement in an automobile accident with property damage.

Id. at 454, 456 (Harlan, J., concurring) (citation omitted).

302 Stephen Schulthofer aptly phrases the point:

To understand the modern significance of the [Fifth Amendment] privilege we have to start with the background principle that applies in its absence. The power of government to compel testimony has been considered essential to the functioning of courts, essential to orderly dispute resolution. . . . [T]he general rule is that the government can legitimately compel witnesses to say what they know, subject only to limited privileges and exceptions.

The Fifth Amendment is the most famous of these exceptions.

Schulthofer, supra note 275, at 313.
requirement as a justification for its application in such a way as to compel self-incrimination in a given instance—as the Court in *Byers* does—is to misconstrue fundamentally the nature of the Fifth Amendment.\textsuperscript{303}

Rogue drivers most assuredly are not entitled to hit others and to drive away with impunity. But they do remain protected by the Fifth Amendment, no less than the perpetrators of even more heinous crimes that may be equally difficult to detect through legitimate investigative techniques. In accordance with ordinary use immunity principles, it would be permissible to require a driver to remain at the scene of an accident in order to identify himself, as long as such action—plus any evidence directly or indirectly derived therefrom—could not be used in a subsequent criminal prosecution. In fact, as a saving construction, the California Supreme Court in *Byers* had read such a limitation into the hit-and-run law for accidents involving property damage.\textsuperscript{304}

In response to the concern that use immunity would cripple the government's efforts to prosecute hit-and-run drivers, the *Byers* dissenters made a further observation about the statutory scheme: The California legislature actually had enacted a use limitation for reports made by drivers involved in accidents more severe in nature and, hence, more likely to warrant criminal punishment than those of the sort in *Byers*—namely, accidents that do not merely involve property damage but also result "in either personal injury or death."\textsuperscript{305} In short, as the California legislature appears to have recognized, a principled approach to the Fifth Amendment would not portend social chaos.

\textsuperscript{303} One perhaps might attempt to salvage the result in *Byers* by fashioning an argument that *Byers* implicitly consented not to assert what otherwise would be his Fifth Amendment rights in an accident situation in exchange for his state-granted license to drive a car. Such a view, however, would call into play the separate body of law—beyond the scope of this article—that seeks to distinguish permissible conditions upon state-granted privileges from unconstitutional conditions. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) (discussing unconstitutional conditions as problem cutting across many different areas of constitutional law). The key point is that any such argument in the nature of implied consent would start from the premise that I defend here: that, absent consent, the invocation of the Fifth Amendment may not itself be used as incriminatory evidence against the invoking person.

\textsuperscript{304} The Supreme Court of the United States granted the writ of certiorari in *Byers* "to assess the validity of the California Supreme Court's premise that without a use restriction [the hit-and-run statute] would violate the privilege against compulsory self-incrimination." *Byers*, 402 U.S. at 427 (emphasis added).

\textsuperscript{305} Id. at 475 (Brennan, J., dissenting).
C. Nondocumentary Physical Evidence

A reading of the Fifth Amendment to bar the compulsion of a person "to give evidence" would counsel the same treatment for nondocumentary physical evidence as for documentary evidence. Both plainly come within the category of evidence, for both potentially may be used against the providing person in a criminal trial. Both have a physical existence independent from the act by which they are produced; indeed, both preexist the act of production. Once one discards the mistaken notion that, in order "to be a witness," one must bring into being an item of evidence as a product of government compulsion in the manner that witnesses at trial generate testimony out of thin air, there remains no good reason to distinguish among forms of preexisting evidence. The government should not be in a stronger position to compel the production of a weapon or a bloody garment linking the producing person to a homicide than the government would be to compel the production of a document, the contents of which would provide the same link.

The Court itself has treated nondocumentary physical evidence in the manner of documents by applying to both areas the act-of-production doctrine. In *Baltimore City Department of Social Services v. Bouknight*, the Court turned away a Fifth Amendment challenge to a court order to compel the production of an infant thought to have been severely abused—possibly, killed—by his custodial parent. *Bouknight* followed an earlier "court-approved protective supervision order" whereby the city social service agency permitted Bouknight to retain custody of the infant, notwithstanding earlier instances of severe abuse. Under the terms of the order, Bouknight had agreed to cooperate with the agency's efforts to ensure the safety of the infant in her custody.

Speaking through Justice O'Connor, the Court effectively treated the infant sought to be produced in the same manner as a document sought by subpoena. Although Bouknight could not claim any Fifth Amendment protection, the Court's reasoning applied equally to nondocumentary physical evidence.

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307 See id. at 563 (Marshall, J., dissenting) ("Not only could [Bouknight] face criminal abuse and neglect charges for her alleged mistreatment of [her infant son] Maurice, but she could also be charged with causing his death. The State acknowledges that it suspects that Maurice is dead, and the police are investigating his case as a possible homicide.").
308 Id. at 552.
309 Some lower courts prior to *Bouknight* had applied the framework of *Fisher* to nondocumentary physical evidence. See, e.g., United States v. Authement, 607 F.2d 1129 (5th Cir. 1979) (brass knuckles); Commonwealth v. Hughes, 404 N.E.2d 1239 (Mass. 1980) (firearm); see also Fisher v. United States, 425 U.S. 391, 430 n.1 (1976) (Marshall, J., concurring) (observing that "[t]he Court's [act-of-production] theory would appear to apply to real evidence as well [as documentary evidence]").
Amendment protection for "the contents or nature of the thing demanded"—that is, any incriminatory information that might be gleaned from examination of the infant's body—she could assert protection for her act of production.\textsuperscript{310} That act, said the Court, would amount to an "implicit communication of control over [the infant] at the moment of production"—a fact that, in turn, "might aid the State in prosecuting Bouknight."\textsuperscript{311}

Based simply on application of the act-of-production doctrine, one might have thought that Bouknight would have prevailed on her Fifth Amendment claim. The Court held otherwise, however, invoking both the required records doctrine of Shapiro and the reporting requirement cases culminating in Byers.\textsuperscript{312} From these precedents, the Court drew the broad proposition that "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."\textsuperscript{313} That principle is a fair one to draw from Shapiro and Byers as a matter of precedent but, for the reasons set forth earlier, the logic of both decisions is irretrievably flawed.\textsuperscript{314}

The Court in Bouknight was right to treat requests for nondocumentary physical evidence like requests for documents. My approach would take the same view, albeit by substituting a more protective framework based on the rehabilitation of Boyd for the act-of-production doctrine in Fisher. The Bouknight Court considerably overstated its case, however, by suggesting that the Fifth Amendment must give way any time that the government has some legitimate regulatory regime in force with regard to nondocumentary physical evidence. That makes no more sense in this context than it does for the required records sought in Shapiro or the reporting demanded in Byers.

A different rationale for the holding in Bouknight would rest not on some generalized regulatory authority of the government but, more narrowly, upon the existence of the court order—essentially, a judicially approved contract—whereby Bouknight forestalled the taking of her infant son by agreeing to cooperate with the protective efforts of the social service agency.\textsuperscript{315} To say that Bouknight may not resist the agency's subsequent demand to produce the child is simply

\begin{itemize}
\item \textsuperscript{310} Bouknight, 493 U.S. at 555.
\item \textsuperscript{311} Id.
\item \textsuperscript{312} See id. at 556-57.
\item \textsuperscript{313} Id. at 556.
\item \textsuperscript{314} See supra Part III.A.1 (criticizing Shapiro) and B.2 (criticizing Byers).
\item \textsuperscript{315} "Bouknight's attorney signed the order, and Bouknight in a separate form set forth her agreement to each term" therein. Bouknight, 493 U.S. at 552.
\end{itemize}
to hold Bouknight to the terms of her deal. The Court alluded only in passing to the contractual nature of Bouknight's arrangement with the agency and, even then, merely as a detail that reinforced the general regulatory interests of the government. The appropriate analogy is not to Shapiro or to Byers but, instead, to the agreement of a person, by contract, not to assert legal rights that the person otherwise might be entitled to interpose. To take an even more dramatic example, persons convicted of crime as a result of a plea bargain thereby may lose rights to which ordinary citizens are constitutionally entitled—the right to vote being among the most prominent illustrations. Bouknight thus is best understood as correct on its facts, not as a general endorsement of reduced Fifth Amendment protection for nondocumentary physical evidence whenever the government has some legitimate regulatory presence in the area.

CONCLUSION

For more than a century, the Supreme Court has fundamentally misunderstood what it means "to be a witness" in the parlance of the Fifth Amendment. That phrase does not merely encompass incriminatory evidence that itself is brought into being under government compulsion in the manner of witness testimony at trial. Properly understood in historical context, the phrase "to be a witness" is best regarded as synonymous with the phrase "to give evidence" proposed by the state ratifying conventions.

The upshot of this view would be a substantial reorientation of Fifth Amendment jurisprudence. Such a revisionist reading—built on Justice Miller's 1886 concurrence in Boyd—counsels the application of Fifth Amendment protection to the compelled production of all

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316 As a policy matter, recognition of a Fifth Amendment right on Bouknight's part to resist a demand to produce the infant in the face of her contractual agreement to the contrary might well lead to fewer abusive parents being afforded the chance to retain their children under government supervision after initial instances of abuse. Absent the ability to protect children by examining them under the terms of a contract previously entered into by an abusive parent, social service agencies likely would be more inclined, at the margin, simply to take children away from such a parent.

317 See Bouknight, 493 U.S. at 559. The Court stated:

By accepting care of Maurice subject to the custodial order's conditions (including requirements that she cooperate with [the city social service agency], follow a prescribed training regime, and be subject to further court orders), Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the State's regulatory interests and subject to inspection by [the agency].

Id.

materials potentially useable as evidence against the producing person in a criminal trial, in the same manner that current doctrine bars the compulsion of self-incriminatory oral statements. This position not only is textually grounded and faithful to history, it also has the considerable doctrinal virtue of clarifying the relationship between the Fifth Amendment as a flat prohibition against the compelled giving of evidence and the Fourth Amendment as a regulation of the unilateral taking of evidence by the government. Even more importantly, this view holds the promise of Fifth Amendment jurisprudence capable of serving as a principled brake on the augmentation of government power in the twenty-first century.

In these respects, Justice Miller was indeed prescient. For more than a century since his concurrence in Boyd, the Supreme Court has been wrong to ignore his guidance.