

3-2003

## Fishing for Clarity in a Post-Hubbell World: The Need for a Bright-Line Rule in the Self-Incrimination Clause's Act of Production Doctrine

Thomas Kiefer Wedeles

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Thomas Kiefer Wedeles, Fishing for Clarity in a Post-Hubbell World: The Need for a Bright-Line Rule in the Self-Incrimination Clause's Act of Production Doctrine, 56 *Vanderbilt Law Review* 613 (2019)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol56/iss2/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Fishing for Clarity in a Post-*Hubbell* World: The Need for a Bright-Line Rule in the Self-Incrimination Clause’s Act of Production Doctrine

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 613 |
| II.  | BACKGROUND .....  | 618 |
|      | A. <i>Procedure</i> .....   | 619 |
|      | B. <i>Case Law—From Boyd to Doe II</i> .....  | 620 |
|      | C. <i>United States v. Hubbell</i> .....  | 626 |
|      | 1. <i>Procedural Posture</i> .....  | 626 |
|      | 2. <i>The Majority Opinion</i> .....  | 629 |
|      | 3. <i>Justice Thomas’s Concurrence</i> .....  | 630 |
| III. | A BRIEF HISTORY OF THE PRIVILEGE AGAINST SELF-<br>INCRIMINATION AROUND THE TIME OF THE FRAMING OF<br>THE UNITED STATES CONSTITUTION ..... | 632 |
|      | A. <i>The Preconstitutional Colonial Privilege</i> .....  | 633 |
|      | B. <i>Elevation to Constitutional Status</i> .....  | 636 |
| IV.  | THE PROBLEMS <i>HUBBELL</i> RAISES .....  | 638 |
|      | A. <i>Has the Court Muddied the Waters?</i> .....   | 639 |
|      | B. <i>Has Justice Thomas Muddied the Waters?</i> .....  | 640 |
|      | C. <i>The Response to Hubbell</i> .....   | 642 |
|      | D. <i>The Test Case</i> .....   | 644 |
| V.   | THE SOLUTION.....   | 646 |
|      | A. <i>Let the Sleeping Boyd Lie</i> .....   | 646 |
|      | B. <i>Let the Framers’ Intent Guide the Test Case</i> .....   | 647 |
| VI.  | CONCLUSION.....   | 651 |

## I. INTRODUCTION

Americans have always taken particular pride in the right to be free from government intrusion into their homes and, metaphysically speaking, their minds. The authors of the Bill of Rights carved out this protective zone in the Fourth and Fifth

Amendments to the United States Constitution.<sup>1</sup> While modern Fourth Amendment protection has most often been interpreted as a privacy-based protection,<sup>2</sup> the Fifth Amendment's Self-Incrimination Clause<sup>3</sup> protects against government compulsion to implicate oneself in the commission of a crime. The development of the Fifth Amendment privilege reflects many of this nation's "fundamental values and most noble aspirations."<sup>4</sup> These values and aspirations help protect individual citizens from excessive governmental intrusion and were foremost in the Framers' minds.<sup>5</sup> By the same token, the proper enforcement of our laws is often dependent upon the introduction of incriminating evidence "independently secured through skillful investigation."<sup>6</sup> Rule of law is no less important to the preservation of a free society than freedom from government intrusion.<sup>7</sup> The interplay between these competing interests has

1. See, e.g., William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 394 (1995) ("Fourth and Fifth Amendment law are the traditional guardians of a particular kind of individual privacy—the ability to keep secrets from the government."). The Fourth Amendment provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

2. See, e.g., *Warden v. Hayden*, 387 U.S. 294, 304 (1966) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property . . .").

3. See U.S. CONST. amend. V.

4. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The Court mentioned several values, including:

. . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load[;] . . . our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life[;] . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

*Id.* (internal citations omitted).

5. See *id.*

6. See *Andresen v. Maryland*, 427 U.S. 463, 477 (1976) (citing *Watts v. Indiana*, 338 U.S. 49, 54 (1949)).

7. See, e.g., *Murphy*, 378 U.S. at 93-94 (White, J., concurring) ("Among the necessary and most important powers of the States as well as the Federal Government to assure the effective

produced much of the Supreme Court's jurisprudence concerning the privilege against self-incrimination. The Court has routinely held that a suspect's oral testimony, usually in the form of a compelled confession, may not be used as evidence against the suspect.<sup>8</sup>

This privilege has not been limited to oral testimony. Most often in the context of white-collar criminal prosecutions, the Supreme Court has held that the act of producing subpoenaed documents that incriminate the producing party may have communicative aspects that warrant Fifth Amendment protection.<sup>9</sup> These white-collar crimes are "often buried and corrosive ventures where the prosecutor and the grand jury have little more than a hunch to direct their attention in the first instance."<sup>10</sup> Therefore, the government typically makes liberal use of the subpoena power in connection with a white-collar crime grand jury investigation.<sup>11</sup> The grand jury has at its disposal the power of the subpoena *duces tecum*, which summons an individual to produce documents before the grand jury.<sup>12</sup>

In certain instances, this communicative act of producing subpoenaed documents implicates the Fifth Amendment's Self-Incrimination Clause. The current Supreme Court act of production jurisprudence holds that the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination when faced with a subpoena or summons to turn over incriminating documents.<sup>13</sup> The act of production doctrine protects those communicative aspects of compliance with a subpoena, independent of the contents of the documents themselves.<sup>14</sup> In other words, as long as the contents of the self-incriminating documents were voluntarily

---

functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries . . .").

8. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 432-35 (2000) (holding that the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), established concrete constitutional guidelines regarding custodial police interrogations that govern the admissibility of oral statements made during such interrogations).

9. See, e.g., *Fisher v. United States*, 425 U.S. 391, 410 (1976) ("The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.").

10. H. Richard Uviller, *Fisher Goes on the Quintessential Fishing Expedition and Hubbell is off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 334 (2001).

11. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.12, at 459 (3d ed. 2000).

12. *Id.* A subpoena *duces tecum* is "[a] subpoena ordering the witness to appear and to bring specified documents or records." BLACK'S LAW DICTIONARY 1440 (7th ed. 1999). The definition derives from the Latin meaning of "*duces tecum*," which is "[b]ring with you." LAFAVE ET AL., *supra* note 11, at 515.

13. *Fisher*, 425 U.S. at 396-97; accord *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) (stating that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind").

14. See *Fisher*, 425 U.S. at 410-11.

prepared, requiring the individual to turn over these documents is not the same as forcing that person to be a witness against himself.<sup>15</sup>

In 2000, the Supreme Court took up the act of production doctrine in a case stemming from the Whitewater Independent Counsel's investigation and prosecution of former Deputy Attorney General Webster L. Hubbell.<sup>16</sup> The Supreme Court, in *United States v. Hubbell*, affirmed the decision of the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") dismissing Hubbell's case on the ground that the Independent Counsel was unable to demonstrate with "reasonable particularity" that he had prior awareness of the documents sought when he issued the subpoena duces tecum.<sup>17</sup> The Independent Counsel "was not investigating tax-related issues when he issued the subpoena," and he learned about Hubbell's crimes through the investigation into whether Hubbell might have obstructed the Whitewater investigation.<sup>18</sup> Therefore, the documents produced by Hubbell provided the "necessary linkage" between his subpoena and subsequent indictment.<sup>19</sup>

As a development in the doctrine, the *Hubbell* decision is not a major departure from the Court's decision in *Fisher*, generally considered to be the authoritative formulation of act of production jurisprudence.<sup>20</sup> The *Fisher* Court held that "[t]he act of producing

---

15. See *id.* "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer." *Id.* at 410. However, the Court emphasized that the taxpayer in *Fisher* added "little or nothing to the sum total of the Government's information by conceding that he in fact [had] the papers." *Id.* at 411. Therefore, according to the Court, enforcement of the summons would not offend the privilege against self-incrimination but was instead a matter of "surrender." *Id.* (citing *In re Harris*, 221 U.S. 274, 279 (1911)).

16. *United States v. Hubbell*, 530 U.S. 27, 30 (2000).

17. *Id.* at 32-34.

18. *Id.*; see also *United States v. Hubbell*, 167 F.3d 552, 565 (D.C. Cir. 1999) ("Using the contents of the documents Hubbell turned over to the grand jury, the Independent Counsel identified and developed evidence that culminated in the prosecution at issue in this case.").

19. *Hubbell*, 530 U.S. at 33 (quoting *Hubbell*, 167 F.3d at 581).

20. Compare William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 865 (2001) (noting that "[t]he Supreme Court appeared to conclude [in *Hubbell*] that unless the government knows—really knows—of a particular document's existence, a subpoena's target is free to refuse to turn the document over," which is the essential holding of *Fisher* (emphasis added)), and *infra* Part IV (noting the conspicuously limited response to the *Hubbell* decision from the lower courts and from commentators), with Uviller, *supra* note 10, at 335 (arguing that "the pragmatic implications for future exploratory investigations [of the *Hubbell* decision] are dire"), and Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers*, 29 AM. J. CRIM. L. 123, 129 (2002) ("After *Hubbell*, prosecutors no longer can use a grand jury subpoena duces tecum and a grant of 'act of production immunity' to compel production of documents by an individual who is subject or

evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer.”<sup>21</sup> However, in a concurrence in *Hubbell*, Justice Thomas, joined by Justice Scalia, invited a reexamination and reconsideration of the “original meaning of the Fifth Amendment’s Self-Incrimination Clause” and thus the rationale of the *Fisher* case.<sup>22</sup> Justice Thomas suggested that the privilege protects against “the compelled production not just of incriminating testimony, but of any incriminating *evidence*.”<sup>23</sup> The phrase “any incriminating evidence” is surprisingly broad, because it indicates that any person in possession of potentially incriminating documents could refuse to turn them over pursuant to a subpoena duces tecum. The individual could simply decide that she did not want to hand over the documents, and the government would be unable to force her to do otherwise without a grant of use immunity.<sup>24</sup> What is even more surprising about this suggestion is the fact that, according to the Framers’ understanding of the privilege, it may be exactly right.

Justice Thomas’s concurrence did not resolve the issue, however. The opinion left open the outcome of a case in which the government has specific knowledge of a document’s existence and knows its contents, but does not know the document’s location. In other words, the only information the government is asking the target of the investigation to provide is the location of the document.<sup>25</sup> In this hypothetical test case, the prosecution cannot obtain a warrant because they are unable to identify the document’s location with reasonable particularity (they also may be unable to demonstrate probable cause). They would therefore have to use a narrowly tailored subpoena to procure the document. The subpoena attempts to compel the individual to turn over the document to the prosecution. Can the government use the subpoena power to compel the individual to turn

---

target of a grand jury investigation without risking the loss of their ability to prosecute that individual.”).

21. *Fisher v. United States*, 425 U.S. 391, 410 (1976); *see also Hubbell*, 167 F.3d at 567 (“Whether addressed to oral testimony or to documentary evidence, the doctrine necessitates a showing of: i) the compulsion; ii) of testimony; iii) that incriminates.”).

22. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring).

23. *Id.* (emphasis added).

24. *See infra* note 79. Use immunity allows a court to compel the subject of a criminal investigation to turn over incriminating documents in exchange for a promise by the government not to use those documents as evidence in the target’s prosecution.

25. Therefore, the document’s location is the only information the government cannot identify with reasonable particularity. *See supra* notes 17-19.

over the document? Does the breadth of a subpoena duces tecum really matter? Should it?

In the next case that the Supreme Court faces presenting an act of production issue, the Court should establish a clear precedent that regardless of the breadth of a subpoena request, any such request that compels an individual to produce incriminating documents violates the Self-Incrimination Clause. Although this conclusion is difficult for prosecutors to accept, it is supported by the history and context of the adoption of the privilege against self-incrimination. Furthermore, this understanding of the Fifth Amendment does not preclude the government from unilaterally searching for and seizing the document pursuant to proper Fourth Amendment procedure.

This Note argues that the Supreme Court should reevaluate its current understanding of the act of production doctrine. Specifically, the Court should examine the growing body of scholarship, which Justice Thomas alluded to in his concurrence in *Hubbell*, suggesting that the current doctrine betrays the fundamental protections provided by the Self-Incrimination Clause. In Part II, this Note explores the Court's understanding of the doctrine from the era of sacrosanct property rights to the modern rise of the government's interest in investigating document-intensive white-collar crime. With this background in mind, Part III outlines the privilege against self-incrimination as it was understood around the time of the drafting of the the Constitution. Part IV introduces the problems the *Hubbell* Court's decision raises with respect to this history. In particular, this Note identifies a gap in the Court's modern understanding of the doctrine, and in Part V, this Note provides guidance and recommendations on the resolution of this lacuna in a way that is historically faithful, yet still protects the government's interest in effectively prosecuting white-collar crime. Ultimately, this Note concludes that a reexamination of the current act of production doctrine is essential to prevent government interference with the right to be free from compelled self-incrimination.

## II. BACKGROUND

The background of the act of production doctrine demonstrates the way in which the Supreme Court has interpreted the privilege against self-incrimination as it relates to documentary evidence in white-collar criminal investigations. However, before examining this line of cases, it is important to gain an initial understanding of how prosecutors and grand juries gather this type of evidence.

*A. Procedure*

The grand jury's power to investigate potential criminal wrongdoing derives from its ability to use the subpoena authority traditionally given to the court that impaneled the jury.<sup>26</sup> Grand jury subpoenas are either *ad testificandum*, compelling an individual to appear before the grand jury and testify under oath, or subpoenas *duces tecum*.<sup>27</sup> The subpoena *duces tecum* allows the grand jury to obtain tangible evidence, usually either physical evidence or documents.<sup>28</sup> Within the realm of criminal procedure, the subpoena *duces tecum* is quite similar to a search warrant.<sup>29</sup>

However, as LaFave, Israel, and King note, the subpoena *duces tecum* offers prosecutors several advantages over the search warrant because it imposes a lower requirement on the government to justify the compulsion exerted upon individuals to produce documents or physical evidence.<sup>30</sup> First, the subpoena *duces tecum* can issue without a showing of probable cause, while a search warrant clearly cannot.<sup>31</sup> Second, a "party served may be required to undertake the extensive task of bringing together records from different locations and sorting through them to collect those covered by the subpoena."<sup>32</sup> Third, where the grand jury needs to obtain records from a third party, a subpoena will be less disruptive to the third party's operations than a search warrant.<sup>33</sup> Fourth, the government may decline to include the justification for the selection of particular records and evidence in a subpoena because, in contrast to a warrant, no such statement is required.<sup>34</sup> Finally, any objection to the scope or issuance of the subpoena must be raised "prior to the response, and the consequence is the quashing of the subpoena. This allows the government to refashion the subpoena to meet the sustained objections, and there is no loss of evidence that could have been obtained through a curable illegality."<sup>35</sup>

These features of the subpoena *duces tecum* are important to an understanding of the act of production doctrine as it relates to the

---

26. LAFAVE ET AL., *supra* note 11, § 8.3(a).

27. *See id.*

28. *Id.* §§ 8.3(a), 8.12(a).

29. *See id.* § 8.3(c).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

privilege against self-incrimination. The subpoena provides a grand jury with broad powers to explore and investigate potential criminal wrongdoing. In so doing, it also has the potential to compel individuals to implicate themselves in this wrongdoing. While the notion of lay citizens wielding this power is laudable, it also raises the specter of excessive government interference with an individual's freedom from self-incrimination. The history of the Supreme Court's treatment of the act of production doctrine underscores this concern.

### B. Case Law—From *Boyd* to *Doe II*

The development of the doctrine has proceeded from a broad interpretation of the Fifth Amendment privilege at the time of the doctrine's initial articulation to the current, more narrow interpretation. In the late nineteenth century, the Supreme Court first acknowledged a constitutional protection against self-incrimination in the context of document production.<sup>36</sup>

The factual circumstances in *Boyd v. United States* were fairly ordinary. The United States initiated a seizure action against the defendants for thirty-five boxes of plate glass allegedly smuggled into the country through the port of New York.<sup>37</sup> In an effort to gather evidence against the defendants, the government issued a subpoena for the invoices for twenty-nine of the thirty-five boxes.<sup>38</sup> After the defendants were convicted at trial, the Court reversed the conviction, reasoning that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling [the defendant] to be a witness against himself, within the meaning of the Fifth Amendment . . ."<sup>39</sup> The Court based its holding in *Boyd* on a coextensive understanding of the privilege against self-incrimination and the Fourth Amendment right to security in one's home and papers.<sup>40</sup> *Boyd* was decided in the *Lochner* era, when property rights were inviolate and "a person's right to his property include[d] the right not to have it introduced against him in a criminal

---

36. See *Boyd v. United States*, 116 U.S. 616, 631-32 (1886).

37. *Id.* at 617.

38. See *id.* at 618.

39. *Id.* at 634-35.

40. See U.S. CONST. amend. IV; *Boyd*, 116 U.S. at 633 ("[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."); see also Sbauna J. Sullivan, Note, *Fifth Amendment Protection and the Production of Corporate Documents*, 135 U. PA. L. REV. 747, 751 (1987) ("The *Boyd* court viewed the compelled production of personal papers as the equivalent of forcing testimony from an individual because the content of the papers was private.").

case.”<sup>41</sup> Although the Court emphasized the primacy of protection for personal papers and records over business records, the use of the latter as evidence against the defendant was still considered a violation of a defendant’s “natural” property rights.<sup>42</sup>

The privilege was understood in a similar fashion for eighty years, until the middle of the twentieth century when the Court began to narrow its scope.<sup>43</sup> One theory that explains the demise of *Boyd*, and the rise of the modern act of production doctrine, is the decline of the *Lochner*-era notion of the inviolability of property rights.<sup>44</sup> During the *Lochner* era, the Court was far more willing to protect common-law property and liberty rights from the interference of the political

41. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 884 (1995); see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 803 (1989) (“In its own eyes, the *Lochner* Court was not regulating economics; it was protecting liberty—the liberty of contract. That a man was free to do as he pleased with his own property—that is property in which he had a ‘vested right’—was axiomatic in the thinking of many at that time. From this point of view, *Lochner* did not involve mere ‘economics’ but rather the most fundamental liberties of man against the state.”); see also Richard A. Nagareda, *Compulsion “To Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1587 (1999) (“The *Boyd* Court’s conception of privacy . . . remained tied closely to common law property rights.”).

42. See *Boyd*, 116 U.S. at 626-27. “The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.” *Id.* at 627 (citing *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1066 (1765)). In *Entick*, an editor suspected of treasonous libel sued for trespass after the government entered his home to search for incriminating documents. 19 Howell’s State Trials at 1030. Lord Camden found that, under the general warrant power, to search the “secret cabinets and bureaus of every subject in this kingdom . . . whenever the secretary of state shall think fit to charge” was oppressive to those innocent of criminal wrongdoing. *Id.* at 1063. In finding for *Entick*, Lord Camden held that the common law precluded such incriminating searches, reasoning that “the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust. . . .” *Id.* at 1072-73. Although this case is often cited as the foundation for the right against unreasonable searches and seizures, the *Boyd* Court found that “the unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment . . . .” *Boyd*, 116 U.S. at 633.

43.

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution.

*Hale v. Henkel*, 201 U.S. 43, 66-67 (1906).

44. See, e.g., Amar & Lettow, *supra* note 41, at 885 (“As the twentieth century wore on, the spirit of the *Lochner* era declined, and so did *Boyd* and its progeny.”).

branches of the government.<sup>45</sup> But with the decline of this mode of analysis, and with the 1937 decision in *West Coast Hotel v. Parrish*, the Court allowed some measure of interference with these common-law rights.<sup>46</sup> Another, somewhat related explanation is that the rise of the modern regulatory state necessitated empowering the government with the ability to gather evidence against the perpetrators of white-collar crimes.<sup>47</sup> As Professor Stuntz notes, the government in the nineteenth and early twentieth century did not need to conduct paper searches to the extent they do today for the ordinary criminal investigation.<sup>48</sup> The paper searches so valuable in the modern regulatory state are “the key to solving white-collar crime . . . not street crime,” with which law enforcement of an earlier era was far more concerned.<sup>49</sup> In addressing the modern act of production cases, the Court initially borrowed from Justice Holmes’s view 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.”<sup>50</sup> In 1966, Justice Brennan used this logic when he wrote for the Court that bodily evidence could be extracted from a defendant and used as evidence against him at trial.<sup>51</sup> In *Schmerber v. California*, the Court established the rule that evidence taken from a defendant, in that case blood taken from a hospitalized defendant following a drunk driving accident, was not testimonial in nature.<sup>52</sup> The *Schmerber* Court distinguished *Boyd*’s

---

45. See, e.g., Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 885 (1987) (“For the most part, liberty and property are defined by reference to the common law. Interests protected at common law—including most prominently the right to private property, the right to bodily integrity and other rights protected in the *Lochner* era—are axiomatically entitled to protection.”).

46. 300 U.S. 379, 399 (1937); see Sunstein, *supra* note 45, at 882.

47. See, e.g., Stuntz, *supra* note 1, at 402 (“[W]hite-collar crime in the eighteenth century had a very different cast than today. It included much less in the way of business crime, because the mass of regulatory statutes that define such crimes today did not exist.”).

48. See *id.*

49. *Id.*

50. *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (emphasis added).

51. See *Schmerber v. California*, 384 U.S. 757, 761 (1966). The *Schmerber* Court relied in part on Holmes’s decision in *Holt*, where the Court held that a prisoner could be compelled to model a blouse that would potentially incriminate him in the crime. *Id.* at 763 (citing *Holt*, 218 U.S. at 252-53). Holmes reasoned 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.” *Id.* (quoting *Holt*, 218 U.S. at 252-53).

52. See *id.* at 761; see also Amar & Lettow, *supra* note 41, at 861 (noting the incongruity of admitting “reliable physical evidence” such as blood because it is not testimonial, while excluding

precepts on the ground that “the privilege is a bar against compelling ‘communications’ or ‘testimony,’ but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.”<sup>53</sup> After *Schmerber*, the government was able to obtain physical evidence from the defendant that incriminated him in criminal wrongdoing.

The current understanding of the act of production doctrine began in 1973 with the Court’s decision in *Couch v. United States*.<sup>54</sup> However, two 1976 cases and their progeny effectively “put to rest the proposition that the Fifth Amendment generally protects persons against compelled production of preexisting materials that are incriminatory in content.”<sup>55</sup> *Fisher v. United States* was a tax case in which the petitioner’s attorney was called upon to produce documents delivered by the attorney’s clients following the preliminary stages of

---

“reliable physical fruit” such as a bloody knife or a dead body because it is “witnessing” against oneself).

53. *Schmerber*, 384 U.S. at 764.

54. 409 U.S. 322 (1973). The facts in *Couch* mirror the facts in many of the later cases and are the most applicable to modern white-collar prosecutions. Ms. Couch was the “sole proprietress” of a restaurant and had for fourteen years given her tax records to her accountant for the purpose of preparing income tax returns. *Id.* at 324. In connection with an IRS investigation into possible income tax fraud and the resulting summons, Ms. Couch’s accountant turned over the documents to her attorney. *Id.* at 325. When the Internal Revenue Service (“IRS”) petitioned the U.S. District Court for the Western District of Virginia to enforce the summons, Ms. Couch intervened, asserting that her ownership of the records in question warranted a Fifth Amendment privilege barring their production. *Id.* The Court found that “the ingredient of personal compulsion” against Ms. Couch was missing because the summons and the district court order enforcing it were directed against Ms. Couch’s accountant. *Id.* at 329. Emphasizing the suspect’s expectation of privacy, the Court rejected Couch’s Fifth Amendment claim because there was “no semblance of governmental compulsion against the person of the accused.” *Id.* at 336.

55. Nagareda, *supra* note 41, at 1590; see *Andresen v. Maryland*, 427 U.S. 463 (1976); *Fisher v. United States*, 425 U.S. 391 (1976). The petitioner in *Andresen* was an attorney in solo practice whose real estate settlement activities came under the scrutiny of two Maryland State’s Attorneys’ offices investigating fraud in the Washington, D.C. area. See *Andresen*, 427 U.S. at 465. A warrant was issued for the seizure of documents related to the sale and conveyance of the lot in question from the petitioner’s law office. *Id.* at 466. At trial, the petitioner objected to the admission into evidence of some of the seized documents on Fourth and Fifth Amendment grounds. *Id.* at 467. The trial court returned forty-five of the fifty-two items seized in the search to the petitioner, but found that the seizure of the remaining items did not violate the petitioner’s Fourth or Fifth Amendment rights. *Id.* Petitioner was convicted of five counts of “false pretenses” and three counts of fraudulent misappropriation by a fiduciary. *Id.* at 469. The Court affirmed the conviction on the grounds that the petitioner was “not asked to say or do anything.” *Id.* at 473, 484. Although the Court conceded that the records seized were incriminating and that some of those records contained statements made by the petitioner, it found that “there is no chance in this case of petitioner’s statements being self-deprecatory and untrustworthy because they were extracted from him—they were already in existence and had been made voluntarily.” *Id.* at 471, 477. The Court relied on *Fisher* in deciding that the petitioner’s statements were not self-incriminatory because they were “voluntarily committed to paper before the police arrived to search for them.” *Id.* at 477.

an IRS investigation into possible civil or criminal liability.<sup>56</sup> The Court framed the Fifth Amendment question in the context of the petitioner's attorney-client privilege.<sup>57</sup> If the document in question had been privileged in the hands of the petitioners, that privilege also would have applied to the lawyer by virtue of the attorney-client privilege.<sup>58</sup> Relying on its decision in *Couch*, the Court found that the compelled production of the documents did not violate the Fifth Amendment, because the subpoena did not operate against the accused.<sup>59</sup> Justice White wrote for the Court that "[i]t is extortion of information from the accused himself that offends our sense of justice"<sup>60</sup> and concluded that "[t]he taxpayer is the 'accused,' and nothing is being extorted from him."<sup>61</sup> Although the summonses were directed to the attorneys, the Court nevertheless addressed the applicability of the Fifth Amendment privilege to the taxpayers themselves.<sup>62</sup> The Court separated the union that *Boyd* created between the Fourth and Fifth Amendment protections, reasoning that to interpret the Fifth Amendment as providing privacy protection for the contents of a man's "mouth or pen" would be to read that constitutional provision as repetitive of the Fourth Amendment's property-based privacy protection.<sup>63</sup>

Moreover, *Fisher* provided authoritative guidance on the substantive governmental right to use the subpoena power. The Court established that the act of producing evidence in response to a subpoena could have communicative aspects of its own wholly aside from the contents of the papers produced since, at a minimum, the act of production doctrine acknowledges the existence of the requested documents.<sup>64</sup> Though Justice White conceded this testimonial aspect of compliance with a grand jury subpoena, he reasoned that the Fifth Amendment's protections would not be implicated as long as the

---

56. See *Fisher*, 425 U.S. at 393-95.

57. *Id.* at 396.

58. See *id.*

59. See *id.* at 397-99.

60. *Id.* at 398 (quoting *Couch*, 409 U.S. at 328).

61. *Id.*

62. See *id.* at 396-97; see also Nagareda, *supra* note 41, at 1593.

63. *Fisher*, 425 U.S. at 400.

64. See *id.* at 410. Moreover, Professor Nagareda notes that "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." Nagareda, *supra* note 41, at 1595.

defendant voluntarily prepared the documents in question.<sup>65</sup> *Fisher* removed most of the constraints on the subpoena power by holding that “the privilege against self-incrimination protects only the act of producing subpoenaed evidence and not the evidence itself.”<sup>66</sup> Finally, the Court noted that where “[t]he existence and location of the papers are a foregone conclusion and the [defendant] adds little or nothing to the sum total of the government’s information by conceding that he in fact has the papers,” the defendant has not been compelled to incriminate himself.<sup>67</sup> Implicit in the Court’s line of reasoning is that admissions of the existence and possession of documents or records do not trigger the Fifth Amendment protection against self-incrimination, because the evidence offered satisfies the foregone conclusion test.<sup>68</sup> When the government has sufficient preexisting knowledge about the documents or records summoned, apart from existence and possession, the question becomes one “not of testimony but of surrender.”<sup>69</sup> With this opinion, the Court laid the foundation for its emphasis upon the breadth of the subpoena as the crucial variable in determining whether compliance with such a subpoena violated the privilege against self-incrimination.

Over the course of the next twenty-five years, the Court routinely applied *Fisher* to white-collar act of production cases.<sup>70</sup> By

---

65. *Fisher*, 425 U.S. at 410-11 (“[H]owever incriminating the accountant’s workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.”).

66. Stuntz, *supra* note 1, at 444. Stuntz noted the *Fisher* decision’s irony in terms of privacy protection. He explained that “[s]ubpoenas can and do require disclosure of material that is much more private than the sorts of things police officers find in car searches, yet the subpoenas are much less heavily regulated than the searches.” *Id.*

67. *Fisher*, 425 U.S. at 411.

68. Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 29 (1987) (“In *Fisher*, the Supreme Court suggested that implicit admissions concerning the existence and possession of documents did not rise to the level of testimony protected by the Fifth Amendment where the substance of the admissions could be characterized as foregone conclusions.”). As Professor Mosteller notes, in *Fisher* the Court outlined two other justifications for the foregone conclusion doctrine: first, “the government is in no way relying on the ‘truth-telling’ of the [witness] to prove” existence and possession, and second, “the existence and possession are not substantially at issue in the case.” *Id.* at 30 (citing *Fisher*, 425 U.S. at 411-12).

69. *Fisher*, 425 U.S. at 411 (quoting *In re Harris*, 221 U.S. 274, 279 (1911)).

70. For example, in *United States v. Doe* (“*Doe I*”), the Court held that when the preparation of business records is voluntary, no compulsion is present and the contents of the subpoenaed documents in question are not privileged under the Fifth Amendment. 465 U.S. 605, 610-12 (1984). *Doe I* presented the question of whether the privilege against self-incrimination applied to the business records of a sole proprietorship. *Id.* at 606. The respondent in *Doe I* received five subpoenas of varying scope from a grand jury investigating corruption in the awarding of county and municipal contracts. *Id.* The Supreme Court found that the respondent had voluntarily prepared the documents in question, and that the subpoena would not force him to “restate, repeat, or affirm the truth of their contents.” *Id.* at 611-12. In differentiating between the

the time of the *Hubbell* decision, the act of production doctrine had evolved quite far from where it had begun in *Boyd* more than a century earlier.

### C. United States v. Hubbell

Although Webster Hubbell's case presented the Court with a familiar act of production scenario, the players and circumstances were anything but typical. The case was a by-product of Whitewater Independent Counsel Kenneth W. Starr's investigation into possible criminal activity by President and Mrs. Clinton and their associates, and Mr. Hubbell was one of its targets.<sup>71</sup>

#### 1. Procedural Posture

A provision in the Ethics in Government Act empowered Independent Counsel Kenneth Starr to ask the Special Division of the D.C. Circuit ("Special Division") to refer to him matters related to the independent counsel's prosecutorial discretion.<sup>72</sup> As a result of such a request, Starr began his investigation into Hubbell's billing and expense practices while a member of the Rose law firm in Little Rock, Arkansas.<sup>73</sup> Hubbell pleaded guilty to two felony counts and, pursuant to the plea agreement, agreed to cooperate with Starr's investigation

---

contents of the documents and the act of producing those documents, the Court relied on its holding in *Fisher*, reasoning that a defendant cannot avoid compliance with a subpoena by asserting that the contents of the documents requested contain incriminating evidence. *Id.* at 611. If the documents were voluntarily prepared, the contents of those documents are not privileged for purposes of the Self-Incrimination Clause. *Id.* at 612; *see also id.* at 618 (O'Connor, J., concurring) ("[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."). However, the Court in *Doe I* fleshed out *Fisher* as that decision related to the act of responding to a subpoena *duces tecum*. *See Doe I*, 465 U.S. at 612-13 (citing *Fisher*, 425 U.S. at 410); *see also* *Curcio v. United States*, 354 U.S. 118, 125 (1957) ("The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena."). If compliance with the subpoena tacitly admits certain facts about the documents' existence, possession, and whereabouts, then responding to the subpoena may be testimonial, and thus the government is prohibited from compelling such an admission if it tends to incriminate the defendant in criminal wrongdoing. *See Doe I*, 465 U.S. at 617. In *Doe v. United States* ("*Doe II*"), the Court rejected the petitioner's argument that "every written and oral statement significant for its content is necessarily testimonial for purposes of the Fifth Amendment." 487 U.S. 201, 208 (1988). In rejecting *Doe's* claim that this was compulsory self-incrimination, the Court held that "[i]t is consistent with the history of and the policies underlying the self-incrimination clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information." *Id.* at 212.

71. *United States v. Hubbell*, 11 F. Supp. 2d 25, 27 (D.D.C. 1998).

72. 28 U.S.C. § 594(e)(2000); *see* *United States v. Hubbell*, 167 F.3d 552, 554-55 (D.C. Cir. 1999).

73. *See id.* at 555.

by providing full, complete, accurate, and truthful information about Whitewater and related transactions.<sup>74</sup>

In 1996, while Hubbell was serving his jail sentence as part of his plea agreement, the Independent Counsel discovered that Hubbell had been receiving consulting fees since 1994.<sup>75</sup> Starr sought and obtained another referral from the Special Division under § 594(e) to investigate (1) whether Hubbell had violated any criminal tax or mail and wire fraud statutes, and (2) whether he had committed any crimes including, but not limited to, obstruction of justice, perjury, false statements, and mail and wire fraud related to the consulting fees.<sup>76</sup> Specifically, Starr sought “to determine whether a relationship existed between [the consulting fees] and Mr. Hubbell’s testimony with respect to Whitewater and Madison-related matters.”<sup>77</sup> Starr obtained what the D.C. Circuit described as a broad-reaching subpoena duces tecum from the grand jury investigating the possibility of Hubbell’s criminal wrongdoing. In response, Hubbell invoked his Fifth Amendment privilege.<sup>78</sup> Hubbell delivered over 13,000 pages of documents specified in the subpoena only after the Independent Counsel granted him use immunity pursuant to 18 U.S.C. §§ 6002, 6003.<sup>79</sup>

74. *See id.* These transactions included President and Mrs. Clinton’s relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, and Capital Management Services, Inc. *Id.* at 554-55. The story of this investigation and its results is beyond the scope of this Note.

75. *See id.* at 555. According to the second indictment, the consulting fees included \$100,000 from Hong Kong China Limited, an entity controlled by the Riady Family through the Lippo Group, and \$62,775 from the Revlon Corporation. *Id.*

76. *See id.*

77. *Id.* at 555-56.

78. *See id.* at 563. Indeed, the D.C. Circuit used the breadth of the government’s knowledge as a key factor to determine if an individual has been compelled to incriminate himself: “We conclude that the testimonial value varies directly with the quantum of information that the government seeks to extract through compelling the expression of the contents of an individual’s mind and inversely with the quantum of information in the government’s possession at the time of the relevant subpoena issues.” *Id.* at 575.

79. These provisions, relating to use immunity, provide:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to . . . a court or grand jury of the United States . . . and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

18 U.S.C. § 6002 (2000).

In the case of an individual who has been or may be called to testify . . . the United States district court for the judicial district in which the proceeding is or may be held shall issue . . . an order requiring such individual to give testimony or provide other

Unfortunately for Hubbell, the contents of the production led to the Independent Counsel's second prosecution. In April of 1998, a grand jury in the District of Columbia returned a ten-count indictment charging Hubbell with tax-related crimes and mail and wire fraud.<sup>80</sup> The U.S. District Court for the District of Columbia dismissed the indictment as a violation of § 6002, because the government had obtained the evidence against Hubbell either directly or indirectly from the "testimonial aspects of [Hubbell's] immunized act of producing [the] documents" and referred to Hubbell's case as "the quintessential fishing expedition."<sup>81</sup> The district court emphasized that the Independent Counsel freely admitted that the breadth of the subpoena allowed him to build the case against Hubbell based upon information subpoenaed for a case that was different "in all material respects."<sup>82</sup>

On appeal, the D.C. Circuit also focused on the breadth of the subpoena. The D.C. Circuit vacated the district court's judgment and remanded with instructions to the Independent Counsel to demonstrate with "reasonable particularity a prior awareness that the exhaustive litany of documents sought in the subpoena existed and were in Hubbell's possession. . . . To the extent that the information conveyed through Hubbell's compelled act of production provides the necessary linkage, however, the indictment deriving therefrom is tainted."<sup>83</sup> Judge Wald, in a dissent, argued that "as long as the prosecutor could make use of information contained in the documents or derived therefrom without any reference to the fact that respondent had produced them in response to a subpoena, there would be no improper use of the testimonial aspect of the immunized act of production."<sup>84</sup> According to Judge Wald, Hubbell's Fifth Amendment privilege and statutory use immunity would only protect him from the

---

information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

§ 6003. See *Hubbell*, 167 F.3d at 563. For an explanation of the constitutional foundation of statutory use immunity, see *Kastigar v. United States*, 406 U.S. 441, 443-45 (1972). Though a detailed analysis of Hubbell's grant of immunity is a significant aspect of Hubbell's case, it is beyond the scope of this Note. In short, use immunity prevents the government from using documents produced pursuant to a grant of immunity, and the Court has held that the scope and protection of use immunity is coextensive with the scope of the privilege against self-incrimination. See *United States v. Hubbell*, 530 U.S. 27, 38 (2000); see also *Kastigar*, 406 U.S. at 458-59.

80. See *Hubbell*, 530 U.S. at 31.

81. *Id.* at 32; see also *United States v. Hubbell*, 11 F. Supp. 2d 25, 33-37 (D.D.C. 1998).

82. *Hubbell*, 11 F. Supp. 2d at 37.

83. *Hubbell*, 167 F.3d at 581.

84. *Hubbell*, 530 U.S. at 33 (citing *Hubbell*, 166 F.3d at 602 (Wald, J., dissenting)).

prosecutor's use of information obtained by the subpoena that was beyond what the prosecutor would have known if the documents and records appeared unsolicited in his office, "like manna from heaven."<sup>85</sup>

On remand, Starr acknowledged that he could not satisfy the D.C. Circuit's reasonable particularity standard and entered into a conditional plea agreement with Hubbell.<sup>86</sup> The agreement provided for the dismissal of the charges unless the Court's disposition of the case made it "reasonably likely that Hubbell's act of production immunity would not pose a significant bar to his prosecution."<sup>87</sup> According to the agreement, if this condition were not met, a guilty plea would be entered and Mr. Hubbell would receive a sentence free of the possibility of jail time.<sup>88</sup> The Court granted certiorari to determine "the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena" and affirmed the D.C. Circuit's decision.<sup>89</sup>

## 2. The Majority Opinion

At the outset, the majority relied on Justice Holmes's reasoning in *Holt v. United States*<sup>90</sup> to explain that, within the text of the Fifth Amendment, the protection granted to a "witness" is limited to the protection against compelled incriminatory communications that are testimonial in nature.<sup>91</sup> The Court distinguished between compulsion to extort communications from a defendant and compulsion to engage in conduct that may be incriminating.<sup>92</sup> It implied that while the former is impermissible, the latter might be permissible.<sup>93</sup> The Court recounted the history of the act of production cases, discussed above, and with an emphasis on *Fisher*, applied the law of those cases to the facts of Hubbell's case.<sup>94</sup>

---

85. *Id.* (quoting *Hubbell*, 166 F.3d at 602 (Wald, J., dissenting)).

86. *Id.*

87. *Id.* at 33-34.

88. *See id.* at 34.

89. *Id.*

90. 218 U.S. 245 (1910).

91. *Hubbell*, 530 U.S. at 34.

92. *Id.* at 34-35 (citing *Holt*, 218 U.S. at 252-53).

93. *See id.* at 34 n.9 ("[T]he 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." (quoting *Holt*, 218 U.S. at 252-53)); *see also* *Pennsylvania v. Muniz*, 496 U.S. 582, 594-98 (1990) (drawing the same distinctions as the "post-*Schmerber* cases" between testimonial and nontestimonial oral or written communications).

94. *See Hubbell*, 530 U.S. at 35-41. Specifically, the Court emphasized two important, though conflicting, points. First, the Court pointed out that "a person may be required to produce

Justice Stevens wrote that the government had already made derivative use of the testimonial aspect of Hubbell's act of producing the documents requested by the subpoena, thereby violating his use immunity.<sup>95</sup> The majority opinion continued to emphasize the breadth of the subpoena. In finding that use immunity runs coextensively with the privilege against self-incrimination, the Court held that the Independent Counsel had not shown that he had any "prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by [Hubbell]."<sup>96</sup> Thus, Hubbell's act of producing these documents was testimonial in nature, and when the Independent Counsel used these documents as part of the 1998 indictment, he violated Hubbell's use immunity. Furthermore as the "statutory guarantee of use and derivative-use immunity is as broad as the constitutional privilege" against self-incrimination, any violation of Hubbell's immunity was also a violation of his Fifth Amendment rights.<sup>97</sup> Accordingly, the Court ordered the indictment against Hubbell dismissed and affirmed the D.C. Circuit's judgment.<sup>98</sup>

### 3. Justice Thomas's Concurrence

Justice Stevens's majority opinion in *Hubbell* is not a major departure from settled act of production doctrine.<sup>99</sup> Justice Thomas's concurring opinion, on the other hand, is a novel and profound reexamination of the scope and meaning of the Self-Incrimination Clause. Justice Thomas emphasized the fact that "[n]one of [the] Court's cases . . . has undertaken an analysis of the meaning of [the term 'witness'] at the time of the founding."<sup>100</sup> The opinion began by noting the substantial support for the proposition that, at the time of the Founding, "witness" meant a person "who gives or furnishes evidence."<sup>101</sup> This meaning is obviously broader than the Court's understanding of the term in the context of modern act of production

---

specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not compelled within the meaning of the privilege." *Id.* at 35-36. Second, the Court "made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect . . . the act of production itself may implicitly communicate statements of fact." *Id.* at 36.

95. *See id.* at 41; *see also supra* note 79.

96. *Hubbell*, 530 U.S. at 41, 45.

97. *See id.* at 46. For a description of use immunity, *see supra* note 79.

98. *Id.*

99. *But see* Uviller, *supra* note 10, at 333 ("This reading of the *Hubbell* message, which is hopefully erroneous, implies a substantial doctrinal shift.").

100. *See Hubbell*, 530 U.S. at 50 (Thomas, J., concurring).

101. *Id.*

doctrine.<sup>102</sup> Justice Thomas then explained that the privilege against self-incrimination was adopted in the Virginia Declaration of Rights in 1776,<sup>103</sup> reflecting the general common-law protection for compelled production of incriminating physical evidence, including papers and documents, suggested by the definition of “witness.”<sup>104</sup> The opinion noted that seven other states followed Virginia’s lead in adopting provisions whereby citizens were granted the privilege to be free from compulsion *to give evidence* or *to furnish evidence*.<sup>105</sup>

Justice Thomas next described the history surrounding James Madison’s authorship of the Fifth Amendment in response to the demands from the states for a federal bill of rights.<sup>106</sup> Justice Thomas noted that Madison replaced the phrases “to give evidence” or “to furnish evidence” with the phrase “to be a witness” in the Fifth Amendment.<sup>107</sup> This substitution attracted no attention in Congress or in the state legislatures responsible for ratifying the Bill of Rights, thereby implying that the states, and everyone else, understood the alternative phrasings to be synonymous.<sup>108</sup>

102. *Id.* Justice Thomas began his opinion with a survey of the definition of “witness” in the eighteenth- and nineteenth-century dictionaries, as well as in prominent English cases that arose before the founding of the United States. *See id.* at 50, 51 n.2; *see also* Nagareda, *supra* note 41, at 1608-09 (“Contemporaneous essays in the popular press similarly attest to the importance of recognizing a right not to be compelled ‘to furnish evidence’ against oneself . . .”) (citing *The Federal Farmer* No. 6 (Dec. 25, 1787), *reprinted in* NEIL H. COGAN ET AL., *THE COMPLETE BILL OF RIGHTS* § 9.1.2.1, at 333 (Neil H. Cogan ed., 1997); *Brutus* No. 2 (Nov. 1, 1787), *reprinted in* COGAN ET AL., *supra*, § 9.2.4.1, at 333).

103. The Virginia Declaration of Rights provided

[t]hat in all capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whole unanimous consent he cannot be found guilty, *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

VA. DECL. OF RIGHTS ch. I, § VIII (emphasis added).

104. *See Hubbell*, 530 U.S. at 52 (Thomas, J., concurring) (citing Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 133-34 (R. Helmholz et al. eds., 1997)).

105. *See Hubbell*, 530 U.S. at 52 (Thomas J., concurring) (emphasis added) (citing relevant clauses from each state’s constitution).

106. *Id.* at 53.

107. *See* U.S. CONST. amend. V.

108. *See Hubbell*, 530 U.S. at 53 (citing 3 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 290-91 (2d ed. 1999)). Professor Nagareda points out:

One striking feature of the historical record is that it contains no evidence of opposition to Madison’s unique phrasing—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

The opinion concluded by reasoning that the breadth of the definition of “witness” in other clauses of the Constitution supports the proposition that the term encompasses one who gives evidence.<sup>109</sup> For example, in 1807, Chief Justice Marshall held that the Compulsory Process Clause<sup>110</sup> grants an accused the right to secure papers, not just testimony, material to his defense.<sup>111</sup> Thus, to be a witness under the Compulsory Process Clause includes the presentation of documents in one’s defense—an analogous interpretation of the term Madison contemplated in the Fifth Amendment’s Self-Incrimination Clause.<sup>112</sup> Although neither the *Hubbell* majority opinion nor Justice Thomas’s concurrence departed from the act of production doctrine established in *Fisher*, Justice Thomas indicated his willingness to reconsider the propriety of that doctrine in light of historical considerations.<sup>113</sup>

### III. A BRIEF HISTORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AROUND THE TIME OF THE FRAMING OF THE UNITED STATES CONSTITUTION

To illustrate the apparent incongruity between the *Hubbell* Court’s majority interpretation of the act of production doctrine and the understanding of the privilege around the time of the Founding, some historical background is required.

---

to find at least a peep of objection. There was none, 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.

Nagareda, *supra* note 41, at 1607-08.

Indeed, Justice Thomas noted that “the only Member of the First Congress to address self-incrimination during the debates on the Bill of Rights treated the phrases as synonymous, restating Madison’s formation as a ban on forcing one to give evidence against himself.” *Hubbell*, 530 U.S. at 53 (Thomas, J., concurring) (internal quotes omitted) (citing 1 ANNALS OF CONGRESS 753-54 (J. Gales ed., 1834) (statement of Rep. Laurance)).

109. *Hubbell*, 530 U.S. at 54 (Thomas, J., concurring).

110. “[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI (emphasis added).

111. *Hubbell*, 530 U.S. at 54 (Thomas, J., concurring) (citing *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d C.C.D. Va.) (1807)).

112. *See id.* at 54-56 (analyzing cases such as *United States v. Nixon*, 418 U.S. 683, 711 (1974), to support the proposition that the definition of “witness” includes the presentation of documents and records and not just oral testimony). *But see* KEN GORMLEY, ARCHIBALD COX: THE CONSCIENCE OF A NATION 275 (1997) (explaining President Nixon’s understanding of the word “testimony” as meaning oral testimony only, not documents).

113. *See Hubbell*, 530 U.S. at 56.

### A. *The Preconstitutional Colonial Privilege*

The American notion of the privilege against self-incrimination, though firmly rooted in our libertarian past, is not as clear-cut as some commentators have posited.<sup>114</sup> In the colonies, “[t]he right against self-incrimination evolved . . . as part of the reception of the common law’s accusatorial system of criminal procedure.”<sup>115</sup> At the same time, a right to remain silent during the course of a trial in colonial America would have been “little more than a right not to defend oneself at all” since at the time there was nominal representation for a criminal defendant at trial.<sup>116</sup> Still, at least in principle, the citizens of the American colonies enjoyed freedoms similar to their English counterparts.<sup>117</sup> Many colonial charters and constitutions expressly guaranteed to the colonists the rights of Englishmen.<sup>118</sup> Although these provisions were initially general, providing Americans with equivalent privileges and liberties, the new colonies soon began to provide specifically for their citizens’ rights.<sup>119</sup> For example, the first law passed by the first New York General Assembly in 1683 was the “Charter of Libertyes and Priviledges [sic],” and it provided, inter alia, the right to a grand jury.<sup>120</sup> It was widely accepted among New York lawyers in the middle of the eighteenth

---

114. Compare Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1099-1100 (1994) (“[S]ocioeconomic forces militated in favor of expansion of summary jurisdiction, or its equivalent, in British North America during the eighteenth century. In this crucial sense, self-incrimination became more, rather than less, important to the administration of colonial criminal justice in the decades preceding independence.”), with LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 368-432 (1968) (tracing a clean linear path from the origins of the privilege to its adoption into colonial common law).

115. LEVY, *supra* note 114, at 333.

116. See John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 828 (1999) (noting that the absence of representation at trial meant that if a defendant declined to speak in his own defense, he was in effect declining to provide a defense).

117. See, e.g., BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 26 (1977) (“When Englishmen migrated, they took with them, as it was later put in Parliamentary debate, all of the first great privileges of Englishmen on their backs.” (internal citations omitted)).

118. See *id.* at 27 (citing the 1620 Charter of New England, the 1629 Charter of Massachusetts Bay, the 1632 Charter of Maryland, the 1662 Charter of Connecticut, the 1663 Charters of Rhode Island and Carolina, the 1732 Charter of Georgia, and the 1765 Charter of Virginia).

119. See *id.* at 33.

120. See *id.* at 44. The jury in general, and the grand jury in particular, began as a check on the government’s centralized power, but soon emerged as a body that “enjoyed a roving commission to ferret out official malfeasance or self-dealing of any sort and bring it to the attention of the public at large.” AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 85 (1998).

century that the maxim of English common law, *nemo tenetur accusare seipsum*—"no man is bound to accuse himself"—was equally applicable in the American common law.<sup>121</sup> A brief examination of the colonial common law shows that American judges applied the protection inherent in these provisions to incriminating documentary evidence.

Although the records of colonial American trials are scant at best, Levy recounts a 1702 New York treason trial involving documentary evidence and the government's attempts to compel the production of that evidence.<sup>122</sup> The trial of Nicholas Bayard and John Hutchins arose from some critical comments that Bayard made accusing the New York Lieutenant-Governor, the New York Chief Justice, and members of the governing council of "nefarious actions ranging from bribery to oppression."<sup>123</sup> Bayard drafted a number of addresses containing these accusations, and in response, the Lieutenant Governor ordered him to be investigated and charged with an obscure form of treason, for which the sentence was capital punishment.<sup>124</sup> During the preliminary investigation phase of the case, the Lieutenant Governor employed inquisitorial tactics to gather evidence about the addresses from the defendants' acquaintances, but several of them refused to produce copies.<sup>125</sup> Bayard and Hutchins were arrested shortly thereafter, the former being held in London, while the latter was held in New York.<sup>126</sup> According to Bayard's complaints in London, Hutchins was being held without bail until he produced the documents the government demanded.<sup>127</sup> The defendants were convicted at trial, prompting Bayard and some associates in London to complain that Hutchins had been compelled to incriminate

---

121. See LEVY, *supra* note 114, at 369-70. Levy argues that the privilege did not become firmly rooted until the "rise of a substantial propertied class and the growing complexity and prosperity of colonial business required the services of a trained legal profession." *Id.* at 368. As the profession grew, so did the need for law books, in which the American lawyers discovered that in England, the privilege had developed to the point discussed in this section. *Id.* at 370-73.

122. *Id.* at 379-80.

123. *Id.* at 379.

124. See *id.* Bayard delivered these addresses while in a sort of exile in London, where he had gone after making some remarks critical of Governor Benjamin Fletcher's policies toward New York merchants. Incidentally, at the same time, a number of those merchants stood accused of having "farmed the excise"—a colonial form of tax evasion—and invoked a version of the privilege against self-incrimination when called upon to "discover upon oath what profits they had made by [their] farme." Counsel for the merchants denounced the oath as an infringement of English liberties. *Id.* at 378.

125. See *id.* at 379. The government argued that the production of copies of the addresses could be compelled because it sought to prosecute only the authors of the addresses and not those suspects examined in the hopes of betraying the defendants. See *id.*

126. See *id.* at 379-80.

127. See *id.* at 379.

himself in a criminal matter.<sup>128</sup> The Attorney-General of England found that the colonial government in New York had compelled Hutchins to produce a self-incriminating document and that his refusal to do so formed the basis of the charge against him.<sup>129</sup> Subsequently, the Privy Council in London overturned the convictions and ordered the sentences annulled.<sup>130</sup> Although the colonial government had not scrupulously honored the privilege, the highest government officials recognized its legitimacy and “vied with each other in denying that they had abridged it.”<sup>131</sup>

The historical record also contains cases involving incriminating documents and records. By the middle of the eighteenth century, in England and in the colonies, the privilege began to include “protection against the necessity of producing books and documents that might tend to incriminate the accused.”<sup>132</sup> In the English common law, to compel a defendant to turn over corporate records would be to force him to “furnish evidence against himself” in violation of the privilege against self-accusation.<sup>133</sup> Lord Mansfield wrote that a criminal defendant could not be compelled to produce any incriminating documentary evidence, even if the government knows that the defendant possesses the material in question.<sup>134</sup> Moreover, in the wake of Lord Camden’s decision in *Entick v. Carrington*,<sup>135</sup> Americans brought the argument against the seizure of documents and records to bear upon the writ of assistance, a device “used by

---

128. *See id.* at 380.

129. *See id.* Furthermore, at the same time that the Americans were developing the doctrine of the privilege as it relates to documentary evidence, the English courts were grappling with the same issues. *See* E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 34 (1949). Morgan points to two cases, *King v. Purnell*, 96 ENG. REP. 20, 23 (Y.B. 1748), and *Roe v. Harvey*, 98 ENG. REP. 302, 305 (Y.B. 1769), for the proposition that “the privilege applie[d] to all documents in the possession of the person whom their contents will criminate.” *Id.* However, Morgan further notes that this proposition was qualified by the American cases dealing with compelled production of documentary evidence. *Id.*

130. *See* LEVY, *supra* note 114, at 380.

131. *Id.* In a 1735 Pennsylvania heresy case, Benjamin Franklin wrote a pamphlet defending a Presbyterian minister accused of having “deistic notions,” which stated that “[i]t was contrary to the common rights of mankind, no man being obligated to furnish matter of accusation against himself,” but he did not distinguish between oral and written material. *See id.* at 383.

132. *Id.* at 390. For example, in a 1744 case, the court refused the prosecution’s request that “the defendant be required to turn over the records of his corporation . . .” *Id.*; *see also* *Rex v. Cornelius*, 93 ENG. REP. 1133, 1134 (K.B. 1744).

133. *See* LEVY, *supra* note 114, at 390.

134. *See id.* Around this same time, the English courts began to wrestle with the question of whether the evidence could be seized by a search warrant and introduced against the accused at trial. At the outset, the right to silence was extended to prevent the use of general warrants to seize private papers in seditious libel cases. *See id.*

135. For a discussion of the facts and holding of *Entick*, *see supra* note 42 and accompanying text.

customs officials to search for contraband" or goods that had been smuggled into a colonial port in violation of statutes regulating colonial trade.<sup>136</sup> Based on a natural rights theory of property, the Anglo-American common law recognized protections against a person being compelled to produce incriminating documents and records.<sup>137</sup>

### B. Elevation to Constitutional Status

By the time of the American Revolution and the ratification of the Constitution, the seeds of the fundamental rights that were to be embodied in the Bill of Rights had been planted in many of the American colonies.<sup>138</sup> Moreover, in a majority of the colonial constitutions predating the Bill of Rights, the privilege against self-incrimination was couched in terms of a provision that, in a criminal case, the accused should not be compelled to give evidence against himself.<sup>139</sup> With these provisions in effect, James Madison replaced the phrases "to give evidence" or "to furnish evidence" in the state constitutions with "to be a witness" when he drafted the Fifth Amendment.<sup>140</sup> Indeed, after initially opposing the idea, Madison finally agreed to a federal bill of rights in response to declining support from the states for ratification of the federal Constitution.<sup>141</sup> The logical implication here is that the silence from these state representatives—who at times had been quite obstreperous—following

136. See LEVY, *supra* note 114, at 395. Levy points to the disparity in the procedures employed by the common-law courts, where the privilege was more firmly established, and the admiralty courts hearing customs cases. *Id.* These admiralty courts, armed with the testimony of informers who received one-third of the value of the ship and cargo in the event of a conviction, often prosecuted cases on the basis of an information or accusation alone, rather than a grand jury subpoena. *Id.* Colonial merchants argued that these courts were inquisitorial in nature and that they violated English common-law principles. *Id.* In England, commercial cases were tried in the Court of Exchequer, which provided the same protections as ordinary common-law courts. *Id.*

137. For a discussion of some of the more prominent of these cases, see *infra* note 213 and accompanying text.

138. See *id.*

139. See Morgan, *supra* note 129, at 23 (citing *Twining v. New Jersey*, 211 U.S. 78, 109 (1908)). Morgan notes that the jurisdictional scope of the courts applying the privilege varied, but that by the time of the constitutional ratification, the privilege was well established in various forms. *Id.* For example, "[i]n six of the Colonial Constitutions preceding 1789 the provision forbade compelling a person to give evidence against himself in criminal prosecutions," but "in Maryland the prohibition applied in a common court of law or in any other court." *Id.*; accord R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764-65 (1934) ("[T]his privilege had been inserted in the constitutions or Bills of Rights of seven American States before 1789.").

140. See Nagareda, *supra* note 41 at 1604-05.

141. See ROBERT J. MORGAN, *JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS* 132-36 (1988).

this change supports a collateral understanding of the differing versions of the text.<sup>142</sup> As Professor Morgan notes, “Upon separation from Britain, Americans became free to shape their laws in ways consistent with their new form of government.”<sup>143</sup> The fact that the states ratified Madison’s version without objection suggests a broader protection than that currently provided. Although the privilege against self-incrimination, as part of the Bill of Rights, served as a buffer against the concentration of power within the legislative and executive branches,<sup>144</sup> the constitutional protection adopted in 1789 was not as broad as English precedent might have warranted.<sup>145</sup> Many of the pre-1789 colonial constitutions prohibited compelled self-incrimination “in a common law court or in any other court,” while the federal provision only mentioned criminal prosecutions.<sup>146</sup> However, even if the privilege was limited to criminal cases, the fact remained that in these criminal cases, the use of the phrase “witness” replaced the preexisting language without resistance from the ratifying states.<sup>147</sup> As Professor Richard Nagareda observes, the reasons for Madison’s substitution are lost to history, but the fact that no member of the First Congress objected to the substitution remains.<sup>148</sup> In fact, the one member of Congress who did address the issue of self-incrimination mentioned it in terms of the version from the contemporaneous state constitutions.<sup>149</sup>

To support his proposition that the substitution meant that Madison understood the definition of a witness to include the giving of

---

142. *Id.* at 176. “At the Constitutional Convention, Madison said that he would ‘always exclude inconsistent principles in framing a system of government.’” *Id.*

143. *Id.* at 175.

144. *See id.* at 138. Those arguing against passage of a federal bill of rights pointed to the absence of an equivalent protection in the British constitutional system. *Id.* Madison cleverly used this argument against those making it, because as Morgan notes, “[t]he two systems are not comparable . . . because the British have raised barriers against the crown” with the Magna Carta, “but they have left the powers of Parliament indefinite.” *Id.*

145. *See Morgan, supra* note 129, at 23.

146. *Id.* The Court has since clarified the scope of the protection in superficially noncriminal settings. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) (“The privilege afforded 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.”).

147. *See, e.g., Pittman, supra* note 139, at 788 (“In all of the debates on the Federal Constitution in the adopting conventions, there were but few allusions to this privilege, and, when mentioned, it was mentioned as a privilege against torture.”); *see also supra* notes 141-42.

148. *See Nagareda, supra* note 41, at 1607-08.

149. *See id.* at 1608; *see also LEVY, supra* note 114, at 424. The speaker, a Federalist lawyer from New York, addressed the proposal prohibiting compelled self-incrimination in terms of the language from section VIII of the Virginia Declaration of Rights, which in turn spoke of a prohibition against a witness’s being compelled to give evidence against himself. *Id.*

evidence, Nagareda identifies three distinct lines of historical authority.<sup>150</sup> First, he points to contemporaneous sources of language reflected in the Oxford English dictionary, which defines “witness” as “one who gives evidence in relation to matters under inquiry.”<sup>151</sup> Second, Nagareda examines the meaning of “witness” within the Compulsory Process Clause, utilizing what Amar calls “intratextualism” to support the notion that the Founders intended for the term to have the same meaning in adjoining amendments in the Bill of Rights.<sup>152</sup> Finally, the meaning of the term in contemporaneous common law lends credence to the notion that the Framers understood the definitions of the two terms to be synonymous.<sup>153</sup> However, with the onset of the twentieth century and the decline of the *Lochner* era,<sup>154</sup> the privilege no longer provided a categorical protection against the compelled production of incriminating books or papers.<sup>155</sup>

#### IV. THE PROBLEMS *HUBBELL* RAISES

The two main opinions in *Hubbell* raise the possibility that a fissure may be forming in the Court’s understanding of the act of production doctrine. In the future, the Court may have an opportunity to use a case involving a narrowly tailored subpoena to reevaluate its current understanding of the doctrine as it relates to documentary

150. See Nagareda, *supra* note 41, at 1608-23.

151. See *id.* at 1608-09.

152. See *id.* at 1609-10 (citing Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999)). But see Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 759 (2000).

Amar pays no attention at all to the institutional capacities of the judges who would be charged with practicing intratextualism. . . . Interpreters cannot choose among possible interpretive rules solely on the basis of some first-best theory of constitutional meaning. Rather, interpretive doctrine must combine a theory of constitutional obligation with an assessment of the capacities and competence of the interpreters who will apply the doctrine.

153. See Nagareda, *supra* note 41, at 1615-23. Nagareda identifies several cases for the proposition that the Anglo-American common law had adopted the definition of a witness as one who gives evidence. *Id.*

154. See Rubinfeld, *supra* note 41, at 803; see also John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HAST. CONST. L.Q. 115, 122 (2002) (“It was during the *Lochner* era, which roughly spanned the years 1897 to 1937, that libertarian theory reached its zenith in constitutional law.”).

155. See Morgan, *supra* note 129, at 36-37. The two most common situations leading to the loss of the privilege in these cases are the following: first, a corporate officer with custody over corporate documents who has no right to object to the production of those papers on the grounds that they may reveal his guilt. See *id.* at 34 (citing *Essgee Co. of China v. United States*, 262 U.S. 151, 158 (1923)); second, a person with possession of public documents or official records who “has no privilege to refuse to produce them even though they contain personally incriminating matter.” *Id.* (citing *Wilson v. United States*, 221 U.S. 361 (1911)); see also *supra* Part III.

evidence in white-collar criminal prosecutions. In the meantime, we are left with a vague notion of how this opportunity may take shape.

A. *Has the Court Muddied the Waters?*

Despite Professors Uviller and Mosteller's strong concerns, and Professor Stuntz's mild concern,<sup>156</sup> the *Hubbell* decision does not change the act of production doctrine much. The Court's holding in *Fisher* remains largely intact. However incriminating Webster Hubbell's tax records were in his second prosecution, the act of producing those records would not in and of itself have involved testimonial self-incrimination if the Independent Counsel had not made derivative use of those documents in Hubbell's prosecution.<sup>157</sup> The contents of the documents formed the basis for Hubbell's prosecution, and this use of the documents was problematic because Starr learned of the existence of the documents only by virtue of Hubbell's response to the subpoena.<sup>158</sup> Furthermore, Uviller's suggestion that *Hubbell* may cause the phoenix of *Boyd* to stir in her ashes<sup>159</sup> is misplaced. The Fourth Amendment's dictates concerning search warrants provide that, in the event that procedural safeguards are satisfied, the government may unilaterally violate the sanctity of an individual's home to search for incriminating documents or records.<sup>160</sup> The relevant inquiry as to whether the government has violated an individual's Fifth Amendment privilege remains an issue of whether or not the individual has been subjected to compulsory self-incrimination. An individual under subpoena can be incriminated in two ways—either by incriminating oral testimony or by a response to a subpoena duces tecum where the act of production tacitly admits

---

156. See, e.g., Stuntz, *supra* note 20, at 865 (noting that the *Hubbell* case marks "some movement" in the direction toward making the Fifth Amendment privilege against self-incrimination, not the Fourth Amendment, the primary legal shield against abusive subpoena practice).

157. See *Fisher v. United States*, 425 U.S. 391, 410-11 (1976); see also *United States v. Doe* ("Doe I"), 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) ("[T]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in [*Boyd*], but our decision in [*Fisher*] sounded the death knell for *Boyd*.").

158. See *United States v. Hubbell*, 530 U.S. 27, 45 (2000) ("[R]espondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena.").

159. See Uviller, *supra* note 10, at 333. Specifically, Uviller expressed concern about the renewed fusion of the Fourth and Fifth Amendment protections articulated by the *Boyd* Court. *Id.* at 334.

160. See Stuntz, *supra* note 1, at 409 ("Warrants are supposed to protect citizens—when the police have one, that usually means they did what they were supposed to do. Cases involving warrants are the least likely to raise serious legal issues.").

incriminating information.<sup>161</sup> As Professor Nagareda points out, unreasonable seizure of incriminating documents does not itself violate the Fifth Amendment protection from being compelled to be a witness against oneself.<sup>162</sup> The more persuasive view, Nagareda notes, is that the compelled production of self-incriminating documents independently violates the Fifth Amendment privilege, despite the fact that it may not violate the Fourth Amendment.<sup>163</sup> The majority in *Boyd* did not share this view.<sup>164</sup>

### B. *Has Justice Thomas Muddied the Waters?*

In his *Hubbell* dissent, Justice Thomas calls for a reconsideration of the scope and meaning of the Fifth Amendment.<sup>165</sup> Specifically, what did the term “witness” mean when James Madison wrote that “[n]o person . . . shall be compelled . . . to be a *witness* against himself?”<sup>166</sup> Was the contemporaneous understanding of the Fifth Amendment only that no one shall be compelled to give oral testimony against himself? Or, did the existing definition of witness conform to the common-law definition adopted by the states at the time of the Founding? In other words, did the definition of “witness” include the presentation of evidence, oral or documentary, against an individual?<sup>167</sup>

Justice Thomas’s opinion is both controversial and thought-provoking.<sup>168</sup> His sweeping historical examination demonstrates that the term “witness” may have had a broader meaning during the development of the common-law privilege against self-incrimination and at the time the privilege was elevated to constitutional status.<sup>169</sup> Justice Thomas provides four distinct lines of reasoning to buttress his contention that the Fifth Amendment may protect against the

---

161. See *Doe I*, 465 U.S. at 611; see also *Fisher*, 425 U.S. at 410 (explaining the basis for the communicative aspects of producing evidence in response to a subpoena).

162. See Nagareda, *supra* note 41, at 1581.

163. See *id.*

164. See *Boyd v. United States*, 116 U.S. 616, 638-41 (1886) (Miller, J., concurring); see also Sullivan, *supra* note 40, at 751.

165. *But see* Uviller, *supra* note 10, at 324. While he finds it “historically sound and logically persuasive,” Uviller dismisses Justice Thomas’s opinion on the grounds that it would be too difficult to convince three members of the Court to reverse the *Schmerber* Court’s decision that self-incriminatory physical evidence is forbidden under the Fifth Amendment. *Id.*

166. U.S. CONST. amend. V. (emphasis added).

167. See Uviller, *supra* note 10, at 324.

168. See *id.* (“With a long, scholarly exegesis on the original meaning of the privilege, [Justices Thomas and Scalia] issue a warm invitation to the bar to afford the Court a future opportunity to remake some basic constitutional doctrine—with devastating effect.”).

169. See *United States v. Hubbell*, 530 U.S. 27, 49-50 (2000) (Thomas, J., concurring).

compelled production of incriminating documentary evidence.<sup>170</sup> First, Justice Thomas uses the definition of “witness” in dictionaries published around the time of the Founding to demonstrate that a “witness” is an individual who “gives or furnishes evidence,” “gives evidence in a case,” “a giver of evidence,” and “that which furnishes evidence or proof.”<sup>171</sup> Employing classic textualist methodology, Justice Thomas derives meaning from these definitions of “witness” at the time of the Founding.<sup>172</sup> Second, Justice Thomas explicates the Anglo-American common-law definition of the term to further illustrate the meaning at the time of the Founding.<sup>173</sup> In England and in America, the eighteenth-century “common law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents.”<sup>174</sup> Under the common law around the time the Framers outlined the scope of the privilege, to be a “witness” meant “to furnish evidence.”<sup>175</sup>

Third, when the colonies drafted protections for individual rights in the colonial constitutions, they granted a right against compulsion “to give evidence,” or “to furnish evidence,” against oneself.<sup>176</sup> Using the language from section 8 of the 1776 Virginia Declaration of Rights as a model, seven states joined in adding this meaning of the term to the privilege against self-incrimination during the decade-long prelude to the Constitutional Convention.<sup>177</sup> During ratification of the Constitution, those states proposing to add a bill of rights put forward draft provisions employing the broad protection against compulsion “to give evidence” against oneself.<sup>178</sup> In response to these proposals, James Madison drafted the Fifth Amendment.

---

170. *See id.* at 50-56.

171. *Id.* at 50.

172. *See id.* at 50, 51 n.2; *see also* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994) (“Doctrine is the work of judges and of those who comment on and rationalize their decisions. But our allegiance and that of the judges is ultimately owed to the Constitution itself.”)

173. *Hubbell*, 530 U.S. at 51.

174. *Id.* (citing Morgan, *supra* note 129, at 34); *see also* Nagareda, *supra* note 41, at 1620-21 (explaining that in two landmark eighteenth-century cases, the King’s Bench refused to issue orders compelling the production of self-incriminating documents, emphasizing that in a criminal prosecution, a court may not make a man produce evidence against himself).

175. *Hubbell*, 530 U.S. at 51-52.

176. *Id.* at 52.

177. *See id.*; *see also* Moglen, *supra* note 114, at 1118-19 (relating George Mason’s seminal formulation of individual rights embodied in the Virginia Declaration of Rights); Pittman, *supra* note 139, at 787-89 (noting the nearly exact replication of Virginia’s model in the rest of those colonies adopting the privilege).

178. *Hubbell*, 530 U.S. at 52. Justice Thomas also points to “[s]imilarly worded proposals to protect against compelling a person ‘to furnish evidence’ against himself from prominent voices outside the [constitutional] convention.” *Id.* at 53.

However, as noted above, Madison substituted the phrase "to be a witness" for "to give evidence," or "to furnish evidence."<sup>179</sup> As Justice Thomas and Professor Nagareda note, the absence of resistance to this substitution strongly suggests a contemporaneous understanding of the similarities between these two terms.<sup>180</sup>

Finally, Justice Thomas argues that a broad understanding of the term "witness" is consistent with the meaning of the same term in the Sixth Amendment's Compulsory Process Clause.<sup>181</sup> In the 1807 treason trial of Aaron Burr, Chief Justice Marshall reasoned that the right to obtain witnesses on behalf of an accused includes the right to subpoena documentary evidence.<sup>182</sup> The Court in *United States v. Nixon* endorsed this broad interpretation,<sup>183</sup> and in *Hubbell*, Justice Thomas argues that the term's broad meaning in one clause should have the same interpretative scope in an adjoining provision of the Bill of Rights.<sup>184</sup> Therefore, Justice Thomas concludes that *Fisher* departed from the historical backdrop of the Fifth Amendment and rests on a flawed interpretation of the incriminatory implications of responding to a subpoena duces tecum.<sup>185</sup>

### C. *The Response to Hubbell*

Commentators have criticized the *Hubbell* decision, arguing that it either misinterprets or directly contravenes the *Fisher* Court's understanding of the act of production doctrine.<sup>186</sup> Professor Uviller argues that the Court's decision in *Hubbell* is an improper reading of *Fisher*.<sup>187</sup> The proper inquiry, according to Uviller, is not whether the Independent Counsel learned anything by reading the subpoenaed

179. *Id.* at 51-53.

180. *See id.* at 53; *see also* Nagareda, *supra* note 41, at 1607-09 (noting this understanding, even though many of the same leaders who ratified the Bill of Rights had a hand in their states' respective linguistic proposals).

181. *Hubbell*, 530 U.S. at 54.

182. *See id.*

183. 418 U.S. 683, 711 (1974).

184. *See Hubbell*, 530 U.S. at 55 (Thomas, J., concurring). *But see* Gormley, *supra* note 112, at 275 (describing President Nixon's contrary, though probably self-serving, interpretation of the definition of testimonial evidence).

185. *Id.* at 56.

186. Compare Uviller, *supra* note 10, at 312 ("What drew my attention to the *Hubbell* decision was the fact that my clear understanding of the *Fisher* doctrine is exactly what was rejected by the Supreme Court, and by the nearly unanimous vote of 8-1."), with Cole, *supra* note 20, at 190 ("*Hubbell* has, at least in practical effect, overruled *Fisher* and restored full, meaningful (as opposed to 'act of production') Fifth Amendment protection to most private papers in the possession of an individual.>").

187. *See* Uviller, *supra* note 10, at 326.

documents, but whether he used the information to prosecute Hubbell.<sup>188</sup> *Fisher* suggests that with his grant of immunity, Hubbell was protected only from the admission of those documents covered by the government's grant of *Kastigar* use immunity.<sup>189</sup> Uviller reads *Hubbell* to mean that, in the future, "the telltale contents of the freely recorded documents, such as inculpatory testimony, cannot be forcibly pried from the hands of its custodian."<sup>190</sup> He warns that the *Hubbell* decision "is disturbing for the threat it poses to the free-ranging grand jury investigation of official corruption, financial crimes, and other frauds."<sup>191</sup> Uviller's concerns are misplaced because of his emphasis on the breadth of the subpoena issued. Uviller acknowledges that the subpoena issued in *Hubbell* was likely overbroad.<sup>192</sup> However, he counters this deficiency with the fact that Webster Hubbell raised no claim as to overbreadth and even had "the thirteen thousand pages ready to hand over when immunity was accorded him."<sup>193</sup> The problem with Uviller's critique is that he acknowledges the constitutional limitation on overly broad or burdensome subpoenas but does not offer any standard for determining whether a subpoena violates this prohibition. Presumably, Uviller would leave the determination of overbreadth to judges on a case-by-case basis.

Professor Mosteller has also criticized the *Hubbell* decision along these lines.<sup>194</sup> Mosteller acknowledges that using the contents of a subpoena may violate the privilege against self-incrimination if the government does not know both the contents and *location* of the documents at the time the subpoena is issued.<sup>195</sup> However, in criticizing *Hubbell*, he also focuses upon the breadth of the subpoena

---

188. *See id.*

189. *See Fisher v. United States*, 425 U.S. 391, 411 (1976). If the government knows of the existence and location of the documents, the defendant adds little or nothing to the government's case by responding to the subpoena, and the privilege does not apply. *Id.*

190. Uviller, *supra* note 10, at 333.

191. *Id.* at 334; *see also* Cole, *supra* note 20, at 190-91 (noting that the subpoena duces tecum has not lost all its investigatory power in the post-*Hubbell* world, because

[i]f prosecutors can show prior knowledge of the existence, location, and authenticity of the documents, then the act of production has no testimonial value, and a court must reject a witness's assertion of an act of production privilege. In that case, the prosecution can obtain the documents without an immunity grant and is free to use both the act of production and the contents of the documents to prosecute the witness.

192. Uviller, *supra* note 10, at 323.

193. *Id.*

194. *See, e.g.,* Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidenc: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487 (2001) (arguing that the Independent Counsel's aggressive prosecution of Webster Hubbell led to the damage done by the Court's decision in *United States v. Hubbell*).

195. *Id.* at 533.

issued.<sup>196</sup> In articulating what Mosteller calls a “far-reaching” implication, the Court rejected the “position that a broad subpoena calling for production of classes of business records falls outside the protection of the Fifth Amendment under the foregone conclusion doctrine.”<sup>197</sup> In other words, *Hubbell* was an easy way for the Court to declare that such a subpoena is overly broad. The Independent Counsel’s “reckless litigation strategy” presented the Court with a perfect situation to declare overbreadth of a subpoena, thereby violating the privilege against self-incrimination.<sup>198</sup> Mosteller underscores his emphasis on subpoena breadth by presenting a series of hypotheticals and demonstrating that the Court’s resolution of these cases under *Hubbell* depends on subpoena breadth as it relates to the foregone conclusion doctrine.<sup>199</sup>

Both critics of the *Hubbell* decision fail to effectively articulate a judicially cognizable standard for determining the limits of subpoena overbreadth. Instead, the decision as to when a subpoena will be broad enough to violate the privilege against self-incrimination is left to the lower federal courts based on the facts of each individual case. The use of this standard-based determination in the context of compelled self-incrimination has potentially dangerous implications. As explained below, judicial regulation of subpoena breadth allows judges to permit a defendant to incriminate himself in the commission of a crime if the context of the situation suggests that the subpoena in question is not overly broad. Such judicial regulation does not comport with a restrained interpretation of the Self-Incrimination Clause. A constitutional right, which embodies a given meaning, should not be subject to compromise under a pliable standard within a context-determinative basis.<sup>200</sup>

#### D. The Test Case

The majority of act of production cases fall neatly into the Court’s categorization in *Fisher* as to when the government may

---

196. *Id.* at 512-13.

197. *Id.* at 511-12.

198. *Id.* at 523.

199. *Id.* at 523-30. The Court discussed the foregone conclusion doctrine in *Fisher v. United States* and stated that “[t]he existence and location of the papers 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.” 425 U.S. 391, 411 (1976).

200. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-69 (1992) (outlining the competing arguments over rules versus standards in modern Supreme Court jurisprudence).

compel a defendant to turn over self-incriminating documents.<sup>201</sup> However, the Court has not addressed every type of white-collar criminal case it might face in the future. Hypothetically, the Court will be faced with a situation in which the government has a good idea about the existence and contents of the document, but does not know the document's location. In this case, the procedural hurdles to obtaining a search warrant are insurmountable, so the prosecution will use a narrowly tailored subpoena duces tecum to compel the individual in question to turn over the documents. The issue, then, is whether the government can use its subpoena power to compel production of the document. As noted above, courts have struggled to fashion a standard by which to determine if a subpoena is too broad for the purposes of the Self-Incrimination Clause.<sup>202</sup> The time has come to abandon the search for such a standard. Instead, the Court should establish a rule prohibiting judges from making ad hoc determinations as to which subpoenas are too broad for purposes of self-incrimination.

In the modern world of white-collar crime, it is relatively easy to find analogues to the test case. For example, the stock market bubble of the late 1990s gave rise to questionable practices by corporate directors and managers, market analysts, bankers, lawyers, and auditors.<sup>203</sup> The increased use of electronic data storage and the Internet have augmented the likelihood that incriminating evidence will be saved on a hard drive or in an E-mail account. Against this backdrop, prosecutors, defendants, and the courts face the challenging task of addressing a situation in which the government knows that a document exists and knows its contents with reasonable certainty, but does not know the document's location. The test case could involve an E-mail or a piece of paper, but the effect on the act of production and the question raised is the same: Can the government use a narrowly tailored subpoena duces tecum to compel the individual possessing the document to produce it to the government? Under the Court's holding in *Fisher*, the answer to this question is almost certainly yes, as long

---

201. See, e.g., *United States v. Doe* ("Doe I"), 465 U.S. 605, 610-11 (1984). In rejecting *Boyd's* notion of a "zone of privacy" protecting an individual and his personal records from compelled production, the Court held that "[a]s we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from *compelled* self incrimination. When the preparation of business records is voluntary, no compulsion is present." *Id.*

202. See *supra* Part II.B.

203. See, e.g., Kurt Eichenwald & Diana B. Henriques, *Enron's Many Strands: The Company Unravels; Enron Buffed Image to a Shine Even as it Rotted from Within*, N.Y. TIMES, Feb. 10, 2002, at A1 (tracing the Enron Corporation's spectacular rise and spectacular fall from the time of the inauguration of President George W. Bush to the date of the company's bankruptcy filing on December 4, 2001).

as the act of producing the document would not in and of itself incriminate the individual under subpoena.<sup>204</sup> However, under the Framers' view, the government cannot compel production of the document in question.<sup>205</sup> According to this view, use of the subpoena duces tecum to force an individual to provide evidence subsequently admitted against that individual in a criminal trial violates the Fifth Amendment privilege against self-incrimination.

The modern understanding of the act of production doctrine in the wake of *Fisher* and its progeny therefore appears inconsistent with the Framers' understanding of the privilege against self-incrimination. The Fifth Amendment's provision that no one may be compelled to be a witness against himself contradicts the Court's holding in *Fisher* to the extent that the decision allows the compelled production of documents containing self-incriminatory information.

## V. THE SOLUTION

The Supreme Court should establish that the privilege against self-incrimination, as it relates to documentary evidence, may not be violated by even a narrowly tailored subpoena request. In reevaluating the act of production doctrine in white-collar prosecutions, the Court should not revive the majority opinion in *Boyd*, which held that the Fifth Amendment protection runs together with Fourth Amendment privacy interests. Instead, the Court should undertake a reasoned effort to effectuate the Framers' intent and establish a bright-line rule to protect the citizenry from concentration of governmental power used to compel the production of self-incriminating documents.

### A. *Let the Sleeping Boyd Lie*

This conclusion does not mean, however, that the Court should revive its holding in *Boyd*. When the states ratified the Fifth Amendment, they did so with the understanding that serving as a witness included the presentation of documentary evidence.<sup>206</sup> State representatives were conspicuously silent when Madison substituted his own terminology, thus providing support for the notion that the

---

204. See *Fisher*, 425 U.S. at 410-11.

205. See *supra* Part III.B.

206. See Ralph Rossum, "Self-Incrimination": *Original Intent*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 274-76, 281-84 (Eugene W. Hickok, Jr. ed., 1991).

two phrasings were considered synonymous.<sup>207</sup> Although the *Boyd* Court was closer to the original understanding of the privilege than the *Fisher* Court, the majority opinion in *Boyd*, holding that the Fourth and the Fifth Amendment privileges run together, is incorrect. To argue that the privilege against self-incrimination runs with the Fourth Amendment privilege to be secure in one's home and papers suggests that the Fourth Amendment privilege may never be pierced, because in theory, the privilege against self-incrimination may never be pierced. But the Court has held that the Fourth Amendment only protects against *unreasonable* searches and seizures.<sup>208</sup> As Justice Miller wrote in *Boyd*, "it is obvious that [the Framers] only intended to restrain the abuse, while they did not abolish the power" of searching private houses and seizing private documents and records.<sup>209</sup> Hence, it is only unreasonable searches and seizures that are forbidden.<sup>210</sup>

### B. Let the Framers' Intent Guide the Test Case

Interpretation of the privilege at the time it was articulated in the Bill of Rights demonstrates that it should not be subject to compromise via a context-specific judicial determination.<sup>211</sup> According to the history of the Self-Incrimination Clause, to be compelled to be a witness against oneself includes being compelled to give evidence against oneself. There is evidence that this interpretation of the privilege extended to what we now call "white-collar" crimes. To a certain extent, the situations contemplated by modern white-collar prosecutors were familiar to the English and colonial governments that helped formulate the original protections the privilege provides.<sup>212</sup> The privilege was invoked in commercial cases as a protection from the inquiries of a colonial government that was at that time merely a minor regulatory state. Though the regulatory landscape of modern white-collar crime has clearly grown more nuanced and diverse, the principles remain similar, and there are examples from the colonial era that demonstrate that the Framers

---

207. See Nagareda, *supra* note 41, at 1607-08.

208. See, e.g., *Elkins v. United States*, 364 U.S. 206, 222 (1960) ("[W]hat the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." (emphasis added)).

209. *Boyd v. United States*, 116 U.S. 616, 641 (1886) (Miller, J., concurring).

210. *Id.*

211. See *supra* Part III.

212. See, e.g., Stuntz, *supra* note 1, at 414-15 (pointing to the eighteenth-century New England trade laws and the cases against Boston smugglers in the 1750s).

had some exposure to earlier versions of white-collar crime.<sup>213</sup> Although the common-law right to be free from unlawful searches and seizures eventually developed to allow the government to gather incriminating evidence against a defendant, the right to be free from self-incrimination was intended to be nearly absolute.<sup>214</sup> Furthermore, the rise of twenty-first-century white-collar crime provides the opportunity for prosecutors to exert ever greater power over the individual defendant.<sup>215</sup> Now, perhaps more so than in the past, the time has come to reclaim the protection against the compelled production of self-incriminating documents the Framers contemplated in the Fifth Amendment.

Therefore, Justice Thomas's historical analysis in *Hubbell* is sound: the meaning of the term "witness" at the time of the Founding was broader than the Court's current understanding of that term.<sup>216</sup> But Justice Thomas stopped short of the test case described above. Applying the Framers' intent to the test case, the government will likely be unable to compel the individual to turn over the document, because it would require the target of the investigation to provide a link in the chain of evidence that could ultimately lead to his

---

213. See *id.* Stuntz compares the inquiries of the High Commission and the Star Chamber to the same procedures used to gain access to warehouses and homes of those accused of violating commercial trade laws. *Id.* He implies that the same concerns surrounding the compulsion of self-incriminating information from a defendant in a case for heresy are present in a case for trade violations. See *id.* at 414-16. For example, in 1722, New York merchants, on the advice of London-educated counsel, resisted a statute authorizing civil and military officers in New York to exact an "oath of purgation" from a suspect accused of trading with the French. See LEVY, *supra* note 114, at 381. The merchants realized that this oath would compel them to incriminate themselves in the violation of the trade prohibition. *Id.* When New York enacted a new statute regulating the fur trade by a tax device, the oath of purgation was "conspicuously absent from its provisions." *Id.*; see also *Entick v. Carrington*, 19 Howell's State Trials 1029, 1073 (1765) (justifying the common-law prohibition of compelling self-incrimination as a protection for the innocent as well as the guilty). Shortly before the American Revolution, two future presidents of the Continental Congress, Henry Laurens and John Hancock, were accused of smuggling goods into American ports in violation of existing customs statutes. See LEVY, *supra* note 114, at 395-98. Laurens denounced the inquisitory procedures of the vice-admiralty courts, in large part because of "the willingness of the admiralty judge to abridge the right against self-incrimination." *Id.* at 396. In Hancock's 1768 trial, his friends and relatives were examined and reexamined, Hancock's office was searched, his desk was rifled, and his papers were seized. See *id.* at 397. The local papers in Boston were outraged at the inquisitorial methods used to gather evidence against Hancock. See *id.* at 398. John Adams, representing Hancock, argued that the approach employed by the admiralty courts was abhorrent to the English common law. See *id.*

214. See Stuntz, *supra* note 1, at 416 ("The claim was not that suspected heretics should be free from compelled self-incrimination, but that everyone should be.").

215. For a brief application of the above argument to the search for encrypted documents, see Greg Sergienko, *United States v. Hubbell: Encryption and the Discovery of Documents*, 7 RICH. J.L. & TECH. 31 (2001), available at <http://www.richmond.edu/jolt/v7i4/article1.html> (last visited Jan. 21, 2003).

216. See *United States v. Hubbell*, 530 U.S. 27, 56 (2000) (Thomas, J., concurring).

prosecution. Thus, the only way to obtain this document would be to satisfy the Fourth Amendment's procedural requirements and to obtain a warrant allowing the government to unilaterally search the location where the document is believed to exist. This solution provides the protection from unreasonable searches and seizures, as well as from being compelled to be a witness against oneself. By satisfying the procedural requirements for a search warrant, the government may unilaterally conduct its criminal investigations without using evidence obtained when the target of the investigation produced the evidence in question. Moreover, greater reliance on search warrants has certain advantages, because warrants serve as a check on unscrupulous behavior by prosecutors *and* defendants.<sup>217</sup> Although search warrants require that the government use independent means to learn about the location of the document in order not to infringe upon constitutional rights, this approach conforms to the Framers' conception of the appropriate protections an individual should enjoy against the concentration and abuse of governmental power.<sup>218</sup> Under a proper understanding of the Self-Incrimination Clause, individuals like Webster Hubbell or the defendant in the test case would avoid being compelled to implicate themselves in the commission of a crime.

Once the Framers' intent is recognized, the breadth of a subpoena would no longer determine whether a request for documents violates *Fisher's* foregone conclusion test.<sup>219</sup> Judges would be relieved of the difficult inquiry into whether the overbreadth of a subpoena—whether or not the subpoena is a “fishing expedition”—serves to compel the target of a criminal investigation to provide this crucial link in the chain of evidence ultimately used against him.<sup>220</sup> Instead, the use of any evidence obtained by subpoena as part of a criminal investigation (without a grant of use immunity), regardless of the breadth of the subpoena request, would violate the privilege against

---

217. See Sergienko, *supra* note 215.

A search warrant has the advantage, from the prosecutor's perspective, of not giving the possible defendant notice of the documents and thereby allowing the person subject to the subpoena to destroy the documents. The use of a subpoena *duces tecum* under such circumstances seems more consistent with an unscrupulous prosecutor's desire to get the documents and then construct an after-the-fact claim to have been able to identify them.

218. See, e.g., Pittman, *supra* note 139, at 789 (“The provision of the Federal Bill of Right against compulsory self-incrimination not only was an answer to numerous instances of colonial misrule but also was a shield against the evils that lurk in the shadows of a new and untried sovereignty.”).

219. See *Fisher v. United States*, 425 U.S. 391, 411 (1976).

220. For an argument that “*Fisher's* focus on preexisting government knowledge is highly speculative and unwieldy to apply in practice,” see Nagareda, *supra* note 41, at 1599.

self-incrimination. The target of such an investigation would be protected from being a witness against himself in the course of the investigation, and law enforcement would be able to gather evidence through grants of immunity and via search warrants.

Certainly, the notion that in 2003, the Supreme Court should cast aside a settled branch of its jurisprudence in favor of a textual interpretation that was popular in the late eighteenth century is difficult to grasp. However, when interpreting the text and intent of the Bill of Rights, the language must be the starting point.<sup>221</sup> Although blind adherence to the Framers' intent for its own sake is a misguided approach, a constitutional doctrine should be reevaluated in light of this intent when the current interpretation of the doctrine operates unjustly against the citizenry.<sup>222</sup> In this situation, the language and history of the Self-Incrimination Clause demonstrates that the Court has strayed far from the Framers' view of the Fifth Amendment with potentially dangerous results.

The judicial branch should not be permitted to compromise a right secured to the citizenry by the Fifth Amendment. If the privilege against self-incrimination is to have the force and effect to protect citizens in a complex and ever changing regulatory landscape, the meaning of the privilege, as contemplated by those who authored and ratified it, must be accorded respect by the judiciary. By attempting to craft a standard of subpoena breadth that will not violate the privilege against self-incrimination, judges engage in an exercise dangerous not only to their own obligations to follow those standards, but also to the

---

221. See, e.g., AMAR, *supra* note 120, at 296 ("Granted, lawyers and judges must often go beyond the letter of the law, but the text itself is an obvious starting point of legal analysis.").

222. Compare H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985):

Early interpreters usually applied standard techniques of statutory construction to the Constitution. When a consensus eventually emerged on a proper theory of constitutional interpretation, it indeed centered on "original intent." But at the time, that term referred to the "intentions" of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else.[.]

with Fried, *supra* note 172, at 1152:

If what the Constitution meant were open to reinterpretation from the ground up . . . if a new story could be started, a new argument made at each instance of its application—not just by the Supreme Court, but by lower courts, state courts, and officials at all levels—then, whatever might be said about the "correctness" of some of these intentions, the ensemble of purportedly constitutional activities would exhibit an incoherence that must be further from the reason for having a Constitution than the departure worked by any particular doctrine, no matter how far afield it may have wandered.

rights of the accused.<sup>223</sup> Indeed, the very legitimacy of judicial power depends upon effectuating the meaning of the Constitution.

## VI. CONCLUSION

The protections in the Bill of Rights were *intended* to thwart the regulatory power of the newly created centralized government.<sup>224</sup> Having emerged from English rule and facing a tenuous republican democracy, the Framers knew all too well the dangers of concentrated power and a centralized government with excessive authority over the citizenry. It would be wise to honor their intent and construe the act of production doctrine in accordance with the Framers' understanding of the privilege against self-incrimination. Judicial regulation of subpoena breadth runs counter to this notion. The Supreme Court should declare that, regardless of subpoena breadth, using evidence produced by the target of a criminal investigation as a link in the chain of evidence against him violates the privilege against self-incrimination. This bold step will secure the rights of the accused, as well as ensure that the state's investigatory power, derived from the consent of the governed, reflects those protections embodied in the Bill of Rights. At the same time, interests in the rule of law will be protected by a greater reliance on traditional Fourth Amendment search and seizure methods. As Justice Frankfurter wrote, "[o]nce we conceive of the rule of law as embracing the whole range of presuppositions on which government is conducted and not as a technical doctrine of judicial authority, the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued."<sup>225</sup> With a reasoned and measured reevaluation of the current act of production doctrine, the Supreme Court has the

---

223. Madison contemplated this model of judicial restraint when he sketched the contours of American republican government, reasoning that a republic is "a government which derives all its powers directly or indirectly from the great body of the people. . . . It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it. . . ." THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

224. See Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 648 (1986) ("[F]ifth Amendment principles suggest that the regulatory rationale alone cannot justify the distinction between personal and organizational documents. Because the Fifth Amendment is concerned with the integrity of the process of law enforcement, its effect on the success of prosecutions should be relatively unimportant."); see also ROBERT A. GOLDWIN, FROM PARCHMENT TO PAPER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 91 (1997) ("Madison concluded . . . that 'the great object in view' of every bill of rights, no matter what its form, is to 'limit and qualify the powers of Government.'").

225. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 235 (1955).

opportunity to take an important step toward realizing Frankfurter's ideal.

*Thomas Kiefer Wedeles\**

---

\* I would like to thank Professor Richard Nagareda for his insight and generosity of time in commenting on an early version of this Note. Thanks also go to Professor Donald Hall for initially drawing my attention to the *Hubbell* opinion. Molly Van Etten Smith and Joshua Wolfe provided incredibly helpful edits above the line, while Shawn Johnson's work below the line was invaluable. My thanks go to the three of you, as well as to the Senior Editorial Board of the Vanderbilt Law Review, for all of your hard work. Finally, four people merit special thanks: Dr. Ann Serow, for first showing me that government and law are both noble undertakings worth pursuing; my parents, Ellen and Roy Wedeles, for their love and support; and my wife Jennifer, for her continued love, encouragement, and advice. I am indebted to you all.