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## THE PROPHYLACTIC FIFTH AMENDMENT

TRACEY MACLIN\*

JUSTICE KENNEDY: So beating a prisoner to compel a—a statement is not a Fifth Amendment violation.

DEPUTY SOLICITOR GENERAL PAUL CLEMENT: That's right, Justice Kennedy. It's not a Fifth Amendment violation. . . .

. . . .

JUSTICE KENNEDY: What about the order of a trial judge in a civil case who orders the witness held in contempt and confined unless he testifies, and—and there's a valid Fifth Amendment privilege that the judge is overlooking? No Fifth Amendment violation there?

CLEMENT: No. I don't think there's a Fifth Amendment—I don't think there's a complete Fifth Amendment violation. The courts intervene there to protect the privilege.<sup>1</sup>

### INTRODUCTION

The right guaranteed by the Fifth Amendment's Self-Incrimination Clause appears straightforward: no person "shall be compelled in any criminal case to be a witness against himself."<sup>2</sup> Despite its basic terms, historical pedigree, and well-known status as a constitutional right, the public's understanding of what is protected by the Fifth Amendment is often ill informed, and even sophisticated lawyers are not always capable of explaining the scope and application of the

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<sup>1</sup> Transcript of Oral Argument at 18-19, *Chavez v. Martinez*, 538 U.S. 760 (2003) (No. 01-1444).

<sup>2</sup> U.S. CONST. amend. V. While the Court, over a century ago, described the words of the Self-Incrimination Clause as "concise[]," *Bram v. United States*, 168 U.S. 532, 548 (1897), and "generic," *id.* at 543, one student of the provision has rightly noted that application of the clause "can be deceptively complex," STEVEN M. SALKY, *THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION*, at ix (2009); *cf.* ALAN M. DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT? COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11*, at 28-29 (2008) (noting that some of the amendment's terms "are relatively simple to interpret," while other parts of the provision are subject to differing meanings).

right.<sup>3</sup> Indeed, supporters of the right not “to be a witness against [one]self”<sup>4</sup> have not been particularly adept at explaining why America needs the Fifth Amendment.<sup>5</sup> This uncertainty about the scope of the privilege, as well as the inability to persuasively defend it, may be due to the fact that many Americans do not consider the Fifth Amendment one of the “respectable freedoms”—like the right to freedom of speech or freedom of religion.<sup>6</sup> Too many people

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<sup>3</sup> The best example of the public’s misunderstanding of the Fifth Amendment is the view that persons enjoy a “right to remain silent” when questioned by police. As explained in a recent article, Americans’ understanding of what the Fifth Amendment protects is deeply flawed. See Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 260-63 (explaining why the Supreme Court’s rulings in *Chavez v. Martinez*, 538 U.S. 760 (2003), *Berghuis v. Thompkins*, 560 U.S. 370 (2010), and *Salinas v. Texas*, 133 S. Ct. 2174 (2013), show that the Fifth Amendment does not protect all persons during their interactions with police and does not always protect silence).

<sup>4</sup> U.S. CONST. amend. V. Judges and lawyers often refer to the right embodied in the Fifth Amendment as the “privilege” against compelled self-incrimination. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 316 (1999). As Leonard Levy rightly notes, this characterization is unfortunate. See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT*, at xv (2d ed. 1986) (explaining that “[a]lthough the right against self-incrimination originated in England as a common-law privilege, the Fifth Amendment made it a constitutional right, clothing it with the same status as other rights, like freedom of religion, that we would never denigrate by describing them as mere privileges”); *id.* at xvi (“The right or ‘privilege’ against self-incrimination was not a phrase known to the framers of the Fifth Amendment. They spoke more broadly of the right of a person not to be a witness against himself. The first state bill of rights spoke of one’s right not to be compelled to give evidence against himself.”). Nonetheless, throughout this Article I will use the term “privilege” to describe the right guaranteed by the Fifth Amendment.

<sup>5</sup> See, e.g., ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955) (“A good many efforts have been made to rationalize the privilege, to explain why it is a desirable or essential part of our basic law. None of the explanations is wholly satisfactory.”); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147 (1986) (arguing that contemporary efforts to justify the privilege are unconvincing, and stating that the privilege “can be explained by specific historical developments, but cannot be justified either functionally or conceptually” (footnote omitted)); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 320 (1991) (“In spite of the many Supreme Court opinions that laud the privilege in reverential terms, the precise purpose it serves has never been adequately explained or defended.”); Mickey Kaus, *The Fifth Is Now Obsolete*, N.Y. TIMES, Dec. 30, 1986, at A19 (arguing that there is no persuasive justification for the privilege, and that the amendment’s original purpose to protect religious and political freedoms can be served “by other, far less destructive, constitutional rules”).

<sup>6</sup> LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 19 (1983) (“Americans have always been quick to defend what are considered the respectable freedoms: press, religion, assembly. But those accused of crime have had few defenders. Few men have rushed to uphold the constitutional prohibitions against unreasonable search and seizure or against compelled self-incrimination when it was a kilo of heroin that was seized or a confession forced from a father accused of bludgeoning his daughter to death.”).

associate the Fifth Amendment with criminals, and believe that only guilty individuals invoke the Fifth.<sup>7</sup>

On the other hand, despite some misunderstanding about the constitutional nuances of the Fifth Amendment, informed citizens realize that the privilege bars law enforcement officers from using coercion to compel an incriminating statement from a suspect. As some have observed, “[t]he heyday of what came to be known in American culture as the ‘third degree’—the infliction of physical pain or mental suffering to obtain information about a crime—was the first third of the twentieth century.”<sup>8</sup> Despite what police officials said or thought about the third degree in the 1930s,<sup>9</sup> the use of coercion, whether physical or psychological, was (and still is) condemned by most Americans.<sup>10</sup> And, if a legal basis were needed to support condemnation of police coercion to obtain incriminating statements, many folks would point to the Fifth Amendment’s privilege against compelled self-incrimination.

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<sup>7</sup> See *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (“Too many, even those who should be better advised, view th[e] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.”); LEVY, *supra* note 4, at vii (acknowledging the public perception that when someone invokes the Fifth Amendment, the person “seems to be saying that he has something to hide, making the Fifth Amendment appear to be a protection of the guilty,” and observing that “[w]ithout doubt the right against self-incrimination is the most misunderstood, unrespected, and controversial of all rights”); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 193 (“The persistent inability of courts and scholars to dispel the doubts surrounding the privilege is attributable to the ambivalence of most Americans—including the Justices of the Supreme Court of the United States—when they think of the privilege. . . . [M]any are reluctant to accept the logical consequences of a generous interpretation of the privilege, particularly in view of the shelter it affords the guilty and the nonconformist.”).

<sup>8</sup> YALE KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE* 505 (14th ed. 2015).

<sup>9</sup> After the publication of the Wickersham Commission Report in 1931, which documented pervasive use of the third degree in some police departments, see NAT’L COMM’N ON LAW OBSERVANCE & ENF’T, *REPORT ON LAWLESSNESS IN LAW ENFORCEMENT* 4 (1931), one scholar noted the standard law enforcement reaction to allegations that the police used third degree tactics. RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 70 (2008) (noting that the Wickersham Report “was greeted by the police with two answers which they regarded as conclusive: first, there wasn’t any third degree; and second, they couldn’t do their work without it” (quoting DONALD L. SMITH, *ZACHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW* 10 (1986))).

<sup>10</sup> KAMISAR ET AL., *supra* note 8, at 506-07 (“The Wickersham Report and other widely publicized accounts of the third degree led to a fundamental distrust of the police—an attitude that made it very difficult to obtain convictions. Although some of their colleagues hotly disputed the findings of the Wickersham Commission, police reformers realized that the third degree ‘had become a black mark on the image of policing’ and that they had to abolish it.” (quoting LEO, *supra* note 9, at 78)); see also DERSHOWITZ, *supra* note 2, at 47 (“The visual image of a violation of the privilege for most Americans remains the police beating or torturing a confession out of a person in their custody: the old ‘third degree.’”).

Tellingly, those who instruct police detectives on the proper methods of interrogation tell their pupils that coercion and coercive questioning is forbidden by the Constitution. Police interrogation manuals and other training materials are “the medium through which investigators acquire their working knowledge of the constitutional law of criminal procedure, the primary source of external restraint on their interrogation practices.”<sup>11</sup> Indeed, the author of the first published police interrogation manual admonished his readers never to utilize third-degree tactics.<sup>12</sup> And Fred Inbau, who wrote the first edition of what became “the most widely read and best known police interrogation manual in American history,”<sup>13</sup> unequivocally opposed the use of coercion during police interrogation.<sup>14</sup> Today’s interrogation manuals similarly proscribe using coercion or its equivalent during interrogation.<sup>15</sup>

Of course, the Supreme Court, until very recently, had not disagreed with the view that the Constitution bars police from using coercion while interrogating a suspect. In a series of cases from the mid-1930s to the mid-1960s, the Court reversed state court convictions where police utilized coercion to obtain incriminating statements from suspects, and those statements were later admitted at trial.<sup>16</sup> Concededly, the Court relied on the Fourteenth Amendment’s Due Process Clause as the constitutional basis for reversing state court convictions. The Due Process Clause provided the basis for judgment in these cases, in large part, because the Fifth Amendment’s Self-Incrimination Clause was not applicable to the states during this time.<sup>17</sup> Although the Fifth

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<sup>11</sup> LEO, *supra* note 9, at 109.

<sup>12</sup> W.R. KIDD, POLICE INTERROGATION 46-47 (1940) (asserting that “[t]he third degree should never be used by the police,” and noting that “[p]erhaps the greatest harm done by the third degree methods lies in the eventual harm to the department”).

<sup>13</sup> KAMISAR ET AL., *supra* note 8, at 507.

<sup>14</sup> FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953); *see also* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 27 (1962); Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 20 (1961).

<sup>15</sup> *See, e.g.*, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 212-16 (4th ed. 2001).

<sup>16</sup> The first case where the Court reversed a state court conviction because police coerced a confession was *Brown v. Mississippi*, 297 U.S. 278 (1936). *Brown* and some of the other early cases are discussed in KAMISAR ET AL., *supra* note 8, at 508-15, and GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 144-59 (2012).

<sup>17</sup> The Court made the privilege applicable to the States in *Malloy v. Hogan*, 378 U.S. 1, 3 (1964). While the Court was announcing constitutional restraints on state police interrogations, it “had little occasion [to address] . . . the constitutional issues in dealing with federal interrogations.” *Miranda v. Arizona*, 384 U.S. 436, 463 (1966). This was because Congress had adopted Rule 5(a) of the Federal Rules of Criminal Procedure, which required that suspects held by federal officers be promptly taken before a federal magistrate, *see* FED. R. CRIM. P. 5(a), and the Court’s implementation of that Rule in *McNabb v. United States*,

Amendment did not dictate the judgment in these cases, there was no reason to believe that the Justices were divided over the question of whether the Fifth Amendment barred coercion during police interrogation, or in any other legal proceeding, formal or informal. As Justice White's dissenting opinion in *Escobedo v. Illinois*<sup>18</sup> observed: the Fifth Amendment "addresses itself to the very issue of incriminating admissions [obtained by police during custodial interrogation] . . . and resolves it by proscribing only compelled statements."<sup>19</sup> Once the amendment became applicable to state officials, even Justices opposed to the result in *Miranda* understood that the Fifth Amendment barred police coercion during the interrogation process.<sup>20</sup>

This consensus that the Fifth Amendment bars government officials, whether it be the police, a judge, or legislative committee, from using coercion to demand incriminating answers was toppled after the Court's ruling in *Chavez v. Martinez*.<sup>21</sup> In that case, six Justices agreed that the Fifth Amendment does not protect against government use of coercion to induce incriminating responses; when government officials employ compulsion to obtain statements, a violation of the Constitution occurs only if those statements are used in a criminal case.<sup>22</sup>

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318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), made reliance on the Fifth Amendment unnecessary in federal cases. See *Miranda*, 384 U.S. at 463.

<sup>18</sup> 378 U.S. 478 (1964).

<sup>19</sup> *Id.* at 497 (White, J., dissenting).

<sup>20</sup> Cf. Justice Byron R. White, Recent Developments in Criminal Law, Address Before the Conference of Chief Justices in Council of State Governments at the 19th Annual Meeting of the Conference of Chief Justices (Aug. 3, 1967), in *KAMISAR ET AL.*, *supra* note 8, at 669-70 (explaining that while reasonable men may differ about the answer, the question presented in *Miranda*—whether a person under arrest is subject to compulsion when questioned by police in the station house—"is a perfectly straightforward one under the Fifth Amendment," and the answer given by *Miranda* "is plainly a derivative of *Malloy v. Hogan*, [which] appl[ie]d the Fifth Amendment to the States").

<sup>21</sup> 538 U.S. 760 (2003).

<sup>22</sup> In *Chavez*, Justice Thomas wrote for four Justices when he stated: "We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case. . . . The text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution." *Id.* at 766-67 (plurality opinion) (citations omitted). Justice Souter, joined by Justice Breyer, appeared to agree with the plurality's view on this point, although Justice Souter's view is not clear. See *id.* at 777 (Souter, J., concurring in the judgment) ("As [the plurality] points out, the text of the Fifth Amendment . . . focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence."). While Justice Souter's opinion discussed the scope of the privilege and concluded that Martinez did not state a valid § 1983 claim for a Fifth Amendment violation, he offers a legal analysis different from that proffered by Justice Thomas. See *infra* notes 76-87 and accompanying text. Ultimately, however, one could conclude that a majority of the Justices in *Chavez* agreed that coercive police interrogation that produces incriminating statements does not violate the Fifth

Interestingly, before *Chavez*, the Court had not squarely confronted the issue of when a violation of the Fifth Amendment occurs.<sup>23</sup> Over fifty years ago, the Court acknowledged that the right against self-incrimination “has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion.”<sup>24</sup> Back then, the “conceptual difficulty of pinpointing” when a constitutional violation occurs—when the Government employs compulsion, or when the compelled statement is actually admitted at trial—was unimportant.<sup>25</sup> *Chavez* forced the Court to decide when the violation occurs. Six Justices gave us their answer: a violation occurs when compelled incriminating statements are introduced in a criminal case. Coercion during police interrogation does not violate the Fifth Amendment.<sup>26</sup> This answer not only resolved the Fifth Amendment claim raised in *Chavez*, but it also left no doubt that Americans do *not* enjoy a right to remain silent. Nor do persons, after *Chavez*, enjoy a substantive right to be free from coercive governmental questioning, or a constitutional protection against penalties or forms of punishment short of the initiation of a criminal case, such as a contempt order from a judge for failing to answer an incriminating question.

When carefully examined, *Chavez* is a troubling ruling from several vantage points. The most disquieting aspect of *Chavez*, however, is Justice Thomas’s effort to remake Fifth Amendment law. As will be explained below, Justice Thomas’s opinion in *Chavez* is ultimately an effort to transform the Self-Incrimination Clause from a substantive right to a judge-made prophylactic rule. Part I of this Article describes *Chavez* and the reasoning behind the Court’s Fifth Amendment ruling.<sup>27</sup> Part II critiques the legal analysis of Justice Thomas’s and

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Amendment, unless those statements are admitted at a later prosecution. See John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 763 (2005) (noting that under the plurality’s analysis, “[t]he privilege is irrelevant as a source of enforceable rights if the government never seeks to introduce the confession”).

<sup>23</sup> See DERSHOWITZ, *supra* note 2, at 31 (“There is no direct precedential support for the conclusion that the privilege against self-incrimination is violated at the point when compulsion is employed, rather than at the point when its fruits are admitted at the criminal trial. But nor is there any direct support for the opposite view. It was an open question prior to [*Chavez*].”).

<sup>24</sup> *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 57 n.6 (1964) (citation omitted).

<sup>25</sup> *Id.*

<sup>26</sup> See *Chavez*, 538 U.S. at 770 (plurality opinion); *id.* at 777 (Souter, J., concurring in the judgment).

<sup>27</sup> The Justices also addressed whether Officer Chavez’s actions violated Martinez’s right to substantive due process under the Fourteenth Amendment. A majority of the Justices could not agree on the disposition of Martinez’s substantive due process claim. Ultimately, Justice Souter wrote for a majority of the Court, in Part II of his opinion, when he ruled that Martinez was entitled to a remand to determine the scope and merits of his substantive due process claim. *Id.* at 779-80 (Souter, J., concurring in the judgment).

Justice Souter's opinions in *Chavez*. While Justices Thomas and Souter insist that their reasoning was commanded by the Court's precedents, the facts in *Chavez* not only confronted the Court with a novel legal issue, but also, as the discussion below will show, the Court's precedents pointed in a different direction than the result embraced by either Justice. Finally, Part III identifies some of the consequences for Fifth Amendment law under the logic of *Chavez*.

#### PART I

The facts in *Chavez* are tragic. Oliverio Martinez was shot and severely wounded during a confrontation with police.<sup>28</sup> Two officers were questioning a person when Martinez approached on his bicycle.<sup>29</sup> The officers ordered Martinez "to dismount, spread his legs, and place his hands behind his head."<sup>30</sup> Martinez obeyed.<sup>31</sup> Martinez was frisked and a knife was discovered in his waistband.<sup>32</sup> A struggle then ensued, with the parties disagreeing about what happened next.<sup>33</sup> What is undisputed is that one of the officers yelled, "He's got my gun!"<sup>34</sup> The other officer then shot Martinez several times.<sup>35</sup> The shooting left Martinez "permanently blinded and paralyzed from the waist down."<sup>36</sup>

A patrol supervisor, Officer Ben Chavez, who was not involved in the shooting, accompanied Martinez to the hospital and later questioned him over a forty-five-minute period while he was under arrest and receiving treatment for his wounds at a hospital.<sup>37</sup> Officer Chavez gave no *Miranda* warnings before questioning, nor did he stop when Martinez protested that he was in extreme pain and requested that the interrogation end.<sup>38</sup> Martinez eventually made incriminating statements to Officer Chavez, but no formal proceedings were ever brought against Martinez, as he was not charged with a crime.<sup>39</sup>

Martinez filed a federal civil rights lawsuit pursuant to 42 U.S.C. § 1983 against Officer Chavez, claiming that the coercive questioning at the hospital violated the Fifth Amendment.<sup>40</sup> Two lower federal courts ruled that Officer

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<sup>28</sup> *Id.* at 764 (plurality opinion).

<sup>29</sup> *Id.* at 763.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 763-64.

<sup>33</sup> *Id.* at 764.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 764-65. Generally speaking, when a plaintiff files a § 1983 claim against a state official, the official may be entitled to qualified immunity, which would bar the lawsuit. *See, e.g.,* Pearson v. Callahan, 555 U.S. 223, 237 (2009). Whether the official is entitled to qualified immunity turns on a two-pronged inquiry: a court must consider whether the facts

Chavez was not entitled to qualified immunity because he violated Martinez's clearly established constitutional right not to be subjected to coercive interrogation.<sup>41</sup> Specifically, the Court of Appeals for the Ninth Circuit ruled that Officer Chavez's coercive questioning violated Martinez's Fifth Amendment rights "[e]ven though Martinez's statements were not used against him in a criminal proceeding."<sup>42</sup> The Ninth Circuit also concluded that Martinez's Fifth Amendment right was clearly established constitutional law because a reasonable police officer "would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation."<sup>43</sup>

A. *Setting the Table*

The reasoning and result in *Chavez* were forecast by the federal government's amicus brief supporting Officer Chavez. Put succinctly, the Solicitor General told the Justices that the Fifth Amendment does not control the actions of police officers. The constitutional privilege is a trial right; it does not govern what officers do in the field.<sup>44</sup> According to the Solicitor General, the "sole concern" of the Fifth Amendment is to afford protection against being forced to give

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alleged show that the official's conduct violated a constitutional right, and if so, whether that right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). It should be noted that lower courts are no longer strictly circumscribed to the precise order of the *Saucier* two-step inquiry, and may exercise their discretion in resolving either of the two inquiries before the other. *See Pearson*, 555 U.S. at 236. *But see* *Camreta v. Greene*, 563 U.S. 692, 706-07 (2011) (recognizing such discretion, but cautioning that lower courts "should think hard, and then think hard again" before abandoning *Saucier*'s sequential two-step framework).

<sup>41</sup> *See* *Martinez v. City of Oxnard*, 270 F.3d 852, 857-58 (9th Cir. 2001); *Martinez v. City of Oxnard*, No. CV-98-9313-FMC(AJWX), 2000 WL 35502983, at \*6-7 (C.D. Cal. Aug. 1, 2000).

<sup>42</sup> *Martinez*, 270 F.3d at 857.

<sup>43</sup> *Id.* at 858.

<sup>44</sup> *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Chavez v. Martinez*, 538 U.S. 760 (2003) (No. 01-1444) ("Numerous distinctive aspects of Fifth Amendment doctrine confirm that the Self-Incrimination Clause provides a 'trial right' for criminal defendants, rather than a limit on the primary conduct of law-enforcement officers in the field." (citations omitted)). The petitioner's brief made a similar argument. *See* Brief for Petitioner at 13, *Chavez* (No. 01-1444) ("Only if and when an individual is compelled to be a 'witness' against himself 'in a[] criminal case' is there a violation of the Compulsory Self-Incrimination Clause. And that final but crucial step occurs only if the compelled statement is used, either directly or derivatively, in an actual prosecution."). Petitioner's brief also argued that the Fourteenth Amendment's Due Process Clause "does not give an individual a freestanding—let alone an unqualified—'substantive right to silence.'" *Id.* at 22-23 (quoting *Cooper v. Dupnik*, 963 F.2d 1220, 1248 (9th Cir. 1992)); *see also id.* at 29-31.



testimony to the infliction of penalties affixed to criminal acts.<sup>45</sup> To illustrate the limited role of the Fifth Amendment, the Solicitor General contrasted the differing functions of the Fourth and Fifth Amendments. The Fourth Amendment, which guarantees a right to be free of unreasonable searches and seizures, controls the actions of police in the field.<sup>46</sup> Because officers sometimes confront exigent circumstances while on patrol, certain Fourth Amendment rules are relaxed when police encounter an emergency.<sup>47</sup> By contrast, according to the Solicitor General, “[i]n the Fifth Amendment context, the need for such an exemption is reduced, because the Amendment itself does not directly regulate primary police conduct.”<sup>48</sup> Finally, during the oral argument in *Chavez*, at the start of his presentation, Deputy Solicitor General Paul Clement told the Justices that “the privilege against self-incrimination is not a direct limit on the primary conduct of . . . law enforcement officers.”<sup>49</sup> A few moments later, Clement described the Court’s decision in *United States v. Balsys*<sup>50</sup> as standing for the proposition that “the self-incrimination privilege is unusual because it’s not purely and simply binding on the Government. It doesn’t say that in all contexts, the Government cannot coerce confessions.”<sup>51</sup>

#### B. *The Opinion*

Justice Thomas’s opinion in *Chavez* followed the direction of the federal government’s brief.<sup>52</sup> First, relying on the text of the Fifth Amendment, Justice Thomas explained that Martinez’s Fifth Amendment right was not violated because he “was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.”<sup>53</sup> To support this conclusion, Justice Thomas found that police interrogation is not part of a “criminal case” under the Fifth Amendment. Justice Thomas asserted that a “criminal case” for Fifth Amendment purposes “at the very least requires the initiation of legal

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<sup>45</sup> See Brief for the United States, *supra* note 44, at 15 (quoting *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Transcript of Oral Argument, *supra* note 1, at 17.

<sup>50</sup> 524 U.S. 666 (1998).

<sup>51</sup> Transcript of Oral Argument, *supra* note 1, at 20. In *Balsys*, the Court ruled that a resident alien subpoenaed to testify about his wartime activities in Europe between 1940 and 1945 and his immigration to the United States in 1961, could not invoke the Fifth Amendment to refuse to answer because he feared prosecution by the foreign governments of Lithuania and Israel. See *Balsys*, 524 U.S. at 669. There, the Court held that “concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.” *Id.*

<sup>52</sup> Three members of the Court—Chief Justice Rehnquist, Justice O’Connor, and Justice Scalia—joined Justice Thomas’s opinion analyzing and resolving Martinez’s Fifth Amendment claim. See *Chavez v. Martinez*, 538 U.S. 760, 762 (2003).

<sup>53</sup> *Id.* at 766 (plurality opinion).

proceedings.”<sup>54</sup> Obviously, no legal proceedings had commenced against Martinez.<sup>55</sup> Although Thomas did not address “the precise moment when a ‘criminal case’ commences” for Fifth Amendment purposes, he was certain that “police questioning does not constitute a ‘case’ any more than a private investigator’s precomplaint activities constitute a ‘civil case.’”<sup>56</sup> While compelled statements induced by police cannot be used at a defendant’s criminal trial, “it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.”<sup>57</sup> Justice Thomas also explained that Martinez was “never made to be a ‘witness’ against himself in violation of the Fifth Amendment’s Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case.”<sup>58</sup> Therefore, Justice Thomas maintained, the text of the amendment is not violated by “the mere use of compulsive questioning, without more.”<sup>59</sup>

Second, Justice Thomas explained that the Court’s precedents did not support finding that Martinez’s Fifth Amendment right was violated. Justice Thomas observed: “It is well established that the government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies.”<sup>60</sup> According to Justice Thomas, the Court’s prior cases established that “mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.”<sup>61</sup> He noted that persons can be compelled to provide incriminating statements “so long as those statements (or evidence derived from those statements) cannot be used against the speaker in any criminal case.”<sup>62</sup> In fact, Justice Thomas compared Martinez’s situation to the “immunized witness forced to testify on pain of contempt.”<sup>63</sup> To be sure, the immunized witness knows that his compelled testimony cannot be used against him at a later trial; Martinez, however, lacked such knowledge.<sup>64</sup> That difference, in Justice Thomas’s judgment, did not mean Martinez suffered a constitutional harm—both the immunized witness and Martinez were subjected

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 764.

<sup>56</sup> *Id.* at 767.

<sup>57</sup> *Id.* at 767 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 767-68 (citing *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984); *Kastigar v. United States*, 406 U.S. 441, 443 (1972)).

<sup>61</sup> *Id.* at 769.

<sup>62</sup> *Id.* at 768 (citing *Brown v. Walker*, 161 U.S. 591, 602-04 (1896); *Kastigar*, 406 U.S. at 458; *United States v. Balsys*, 524 U.S. 666, 671-72 (1998)). Justice Thomas also cited the “penalty cases,” notably *Lefkowitz v. Turley*, 414 U.S. 70 (1973), and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). See *Chavez*, 538 U.S. at 768.

<sup>63</sup> *Chavez*, 538 U.S. at 769.

<sup>64</sup> *Id.*

to governmental compulsion. Thus, as Justice Thomas put it, the immunized witness's ex ante knowledge that his compelled testimony cannot be used against him, "does not make the statements of the immunized witness any less 'compelled.'"<sup>65</sup>

Justice Thomas acknowledged that where immunity has not been granted, the compelled statements of witnesses testifying before a grand jury or legislative committee cannot be used at a later trial.<sup>66</sup> He also recognized that officials cannot punish public employees or government contractors "to induce them to waive their *immunity* from the use of their compelled statements in subsequent criminal proceedings."<sup>67</sup> However, under Justice Thomas's view of the Fifth Amendment, "immunity is not itself a right secured by the text of the [Fifth Amendment], but rather a prophylactic rule" the Court has announced to enforce it.<sup>68</sup>

To support his understanding of how the Fifth Amendment protects against compelled self-incrimination in criminal cases, Justice Thomas drew an important distinction between *assertion* of one's Fifth Amendment rights and *violation* of the right itself. According to Justice Thomas, a person can assert the Fifth Amendment in any proceeding.<sup>69</sup> However, "a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case."<sup>70</sup> Therefore, Justice Thomas explained, the Court has created "an evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been immunized from use and derivative use in a future criminal proceeding before it is compelled."<sup>71</sup> But judicially created rules designed to protect a "constitutional right," do not, under Justice Thomas's view, "extend the scope of the constitutional right itself."<sup>72</sup>

Offering two examples of how the Fifth Amendment operates, Justice Thomas observed that in the "penalty cases," the Fifth Amendment may be "asserted" by a witness in a noncriminal proceeding or setting "in order to safeguard the core constitutional right defined by the Self-Incrimination Clause—the right not to be compelled in any criminal case to be a witness against oneself."<sup>73</sup> Similarly, the *Miranda* warnings and the rule mandating that statements obtained in violation of *Miranda* be excluded from criminal

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<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 771.

<sup>67</sup> *Id.* at 768 n.2 (citing *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968); *Turley*, 414 U.S. 70).

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* at 770.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 770-71 (citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *Maness v. Meyers*, 419 U.S. 449, 461-62 (1975)).

<sup>72</sup> *Id.* at 772.

<sup>73</sup> *Id.*

proceedings, are prophylactic measures designed to safeguard the “right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning.”<sup>74</sup> Applying this logic, Justice Thomas concluded that because Martinez was not compelled to be a “witness” against himself in any “criminal case,” his Fifth Amendment claim has no merit.<sup>75</sup>

Justice Souter wrote an opinion in which he agreed with Justice Thomas’s analysis of the Fifth Amendment, although he believed that the Court’s ruling “requires a degree of discretionary judgment greater than Justice Thomas acknowledges.”<sup>76</sup> Justice Souter subscribed to Justice Thomas’s reading of the text of the amendment, which “focuses on courtroom use of a criminal defendant’s compelled, self-incriminating testimony.”<sup>77</sup> According to Justice Souter, the “core of the guarantee” of the Fifth Amendment is the exclusion of any coerced statement from the “courtroom.”<sup>78</sup> But because Martinez sought a monetary remedy for Officer Chavez’s coercive conduct, Souter maintained, his claim is “well outside the core of Fifth Amendment protection.”<sup>79</sup>

That Martinez’s claim falls out of the “core” of Fifth Amendment protection, however, did not necessarily justify rejecting his claim, according to Justice Souter. Relying on a view Justice Harlan outlined in his dissent in *Miranda*, Justice Souter explained that expansions of the textual guarantee are warranted “if clearly shown to be desirable means to protect the basic right against the invasive pressures of contemporary society.”<sup>80</sup> Such extensions of the core right, according to Justice Souter, explained several of the Court’s Fifth Amendment precedents, including rulings forbidding compulsion of witnesses in civil proceedings, requiring grants of immunity in advance of compelled testimony before grand juries, and preventing governmental threats or penalties that undermine the right to immunity.<sup>81</sup> This prophylactic understanding of the Fifth

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 772-73 (explaining that “the absence of a ‘criminal case’ in which Martinez was compelled to be a ‘witness’ against himself defeats his core Fifth Amendment claim”). Justice Thomas also opined on a question not presented to the Court: Officer Chavez’s failure to read *Miranda* warnings to Martinez did not violate Martinez’s constitutional rights and cannot be grounds for a § 1983 action. *Id.* at 772. That conclusion is based on the view that *Miranda* warnings are not constitutional rights themselves, but merely prophylactic measures designed to protect the Fifth Amendment. *Id.* (“We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause . . .”).

<sup>76</sup> *Id.* at 777 (Souter, J., concurring in the judgment). Justice Breyer joined Justice Souter’s opinion in its entirety.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 515 (1966) (Harlan, J., dissenting)).

<sup>81</sup> *See id.* at 777-78 (collecting cases).

Amendment, according to Justice Souter, also explained *Miranda*.<sup>82</sup> Put differently, many of the Court's Fifth Amendment rulings are "outside the Fifth Amendment's core, with each case expressing a judgment that the core guarantee, or the judicial capacity to protect it," would be undercut without such "complementary protection."<sup>83</sup>

According to Justice Souter, Martinez did not demonstrate the "powerful showing" needed to justify expanding protection of the core Fifth Amendment to include civil liability.<sup>84</sup> The "most obvious drawback" to Martinez's claim was "its risk of global application" every time a police officer violates the rules announced in *Miranda* and its progeny, or every time a government official violates one of the rules announced by the Court's other Fifth Amendment precedents.<sup>85</sup> Without explaining why, Justice Souter stated that recognizing civil liability in such scenarios "would revolutionize" Fifth Amendment doctrine, and begged the question why such an extension was necessary.<sup>86</sup> Finally, Justice Souter had "no reason to believe" that current law had been defective in protecting the core Fifth Amendment right.<sup>87</sup>

## PART II

### A. *Should the Text of the Fifth Amendment Be Read Literally?*

The text of the Self-Incrimination Clause was the ultimate basis for rejecting Martinez's claim that his Fifth Amendment right was violated when Officer Chavez coerced him to make incriminating statements.<sup>88</sup> Indeed, Justice Thomas

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<sup>82</sup> See *id.* at 778.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *Miranda*, 384 U.S. at 515, 517 (Harlan, J., dissenting)).

<sup>85</sup> *Id.* Justice Souter's concern was summarized as follows:

If obtaining Martinez's statement is to be treated as a stand-alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much threatens a penalty in derogation of the right to immunity, or whenever the police fail to honor *Miranda*? Martinez offers no limiting principle or reason to foresee a stopping place short of liability in all such cases.

*Id.* at 778-79 (footnote omitted). Justice Souter feared that awarding Martinez compensation would mean that federal courts would have to also award compensation in all of the instances he described. Justice Souter's concern "seems to suggest a fear of too much justice." *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

<sup>86</sup> *Chavez*, 538 U.S. at 779 ("Martinez has offered no reason to believe that the guarantee has been ineffective in all or many of those circumstances in which its vindication has depended on excluding testimonial admissions or barring penalties.").

<sup>87</sup> *Id.*

<sup>88</sup> The first sentence of Justice Thomas's opinion appears to cast doubt about whether Chavez compelled Martinez to incriminate himself: "This case involves a 42 U.S.C. § 1983 suit arising out of petitioner Ben Chavez's *allegedly* coercive interrogation of respondent Oliverio Martinez." *Id.* at 763 (plurality opinion) (emphasis added). Despite Justice Thomas's

chided Justice Kennedy, who believed that Martinez's Fifth Amendment right was violated,<sup>89</sup> for "indifference to the text of the Self-Incrimination Clause, as well as a conspicuous absence of a single citation to the actual text of the Fifth Amendment."<sup>90</sup> But the notion that the text of the Fifth Amendment properly and definitively resolves the issue raised in *Chavez* is facetious and ignores a century of the Court's Fifth Amendment rulings, which have rejected a literal reading of the amendment when deciding the scope and meaning of the Self-Incrimination Clause. Equally troubling, a literal and wooden reading of the Fifth Amendment privilege as a basis for the Court's judgment makes no sense because the text of the amendment is subject to differing interpretations—both broad and narrow.

Acknowledging the ambiguous nature of the privilege is unremarkable. As legal historian John Langbein has observed, the "history of the privilege against self-incrimination at common law has long been murky."<sup>91</sup> Further, the Framing generation was aware of the problem, as have been several generations of lawyers and judges.<sup>92</sup> Because Justice Thomas often professes to be concerned

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suggestion that Martinez may not have been coerced, counsel for Chavez conceded during the oral argument that Chavez used coercion to obtain incriminating statements. *See* Transcript of Oral Argument, *supra* note 1, at 14 ("I acknowledge that there is coercion in this case. We don't—we don't blanch on that. There was coercion and the facts of this case are tragic, but the—but the reality is this. This officer was there to find out a very important piece of information under extraordinarily exigent circumstances.").

<sup>89</sup> *See Chavez*, 538 U.S. at 789-90 (Kennedy, J., concurring in part and dissenting in part) ("A constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place."); *id.* at 791 (explaining that the Fifth Amendment "protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future").

<sup>90</sup> *Id.* at 773 n.4 (plurality opinion).

<sup>91</sup> John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, in R. H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 82, 100 (1997).

<sup>92</sup> *See, e.g.,* LEVY, *supra* note 4, at 422-27. As Levy explains, James Madison's original proposal for the Fifth Amendment right used phrasing that was "original," and his placement of the privilege in the Bill of Rights was "unusual." *Id.* at 423. Madison's language "revealed an intent to incorporate into the Constitution the whole scope of the common-law right." *Id.* According to Levy:

Madison's [original] proposal certainly applied to civil as well as criminal proceedings and in principle to any stage of a legal inquiry, from the moment of arrest in a criminal case, to the swearing of a deposition in a civil one. And not being restricted to judicial proceedings, it extended to any other kind of governmental inquiry such as a legislative investigation. . . . Madison, going beyond the recommendations of the states and the constitution of his own state, phrased his own proposal to make it coextensive with the broadest practice.

*Id.* at 423-24.

After Madison's proposal was amended so that the right "be confined to criminal cases," *id.* at 424, if one interpreted the privilege literally, it "excluded from its protection parties and

with the intention and thinking of the Framing era when deciding constitutional cases,<sup>93</sup> it is a bit ironic that his opinion in *Chavez* paid no attention to the uncertain background surrounding the privilege and failed to cite any history of the amendment to support his conclusion that no violation of the Fifth Amendment occurs when police use coercion to obtain incriminating statements. It is worth noting that Justice Thomas's opinion departs from a line of common law precedent predating the Bill of Rights. English and American courts in the seventeenth century "protected" common law defendants from giving self-incriminating testimony by preventing them from giving any kind of testimony sworn under oath.<sup>94</sup> In contrast, witnesses for the prosecution and witnesses in civil cases were given the opportunity to decline to answer incriminating questions,<sup>95</sup> and they invoked the privilege at high rates.<sup>96</sup> In other words, English courts in the era antedating the Bill of Rights recognized the privilege of a witness not to answer incriminating questions. "But the evidentiary privilege extended only to sworn witnesses. It didn't extend to criminal defendants, who weren't sworn and who were expected (though never 'compelled') to talk."<sup>97</sup> This historical understanding of the privilege against self-incrimination underscores the long-standing practice of extending the privilege in noncriminal

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witnesses in civil and equity suits as well as witnesses before nonjudicial governmental proceedings such as legislative investigations," *id.* at 425.

<sup>93</sup> See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (stating that he is not convinced that the Court's prior precedents on the constitutionality of roadblocks under the Fourth Amendment were correctly decided and doubting that "the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing"); *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring) (stating that considerable evidence suggests that the original meaning of the Fifth Amendment "protects against the compelled production not just of incriminating testimony, but of any incriminating evidence," and expressing a willingness to "reconsider the scope and meaning of the Self-Incrimination Clause"); cf. *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (noting that the Court's Commerce Clause precedents have "drifted far from the original understanding of the Commerce Clause" and suggesting that the Court "ought to temper [its] Commerce Clause jurisprudence in a manner that both makes sense of [its] more recent case law and is more faithful to the original understanding of that Clause").

<sup>94</sup> See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2659 (1996).

<sup>95</sup> *Id.* ("Unlike defendants, prosecution witnesses and witnesses in civil cases were sworn, and when they invoked the privilege, the courts forbade other trial participants from asking them incriminating questions.").

<sup>96</sup> *Id.* at 2659 n.131 ("In the trial of Sir John Friend, 13 How. St. Tr. 1, 17 (1669), Lord Chief Justice Treby said of a witness, 'no man is bound to answer any questions that will subject him to a penalty or to infamy.'").

<sup>97</sup> Email from Albert W. Alschuler, Professor of Law, Northwestern Univ. Pritzker Sch. of Law, to Tracey Maclin, Professor of Law, Bos. Univ. Sch. of Law (Feb. 5, 2017, 04:41 EST) (on file with author).

settings that could lead to later criminal punishment.<sup>98</sup> As a matter of history, Justice Thomas's opinion ignores that "the privilege not to give answers in non-criminal settings that could lead to criminal prosecution *was* the original privilege against self-incrimination."<sup>99</sup>

Although this is not the forum for a detailed review of the Fifth Amendment's origins and history,<sup>100</sup> to fully understand the right not to be compelled to be a witness against oneself, it is important to recall a few details about its history and development. The First Congress, which proposed the Bill of Rights for ratification to the states, positioned the Self-Incrimination Clause in the Fifth Amendment, and not the Sixth Amendment. The Fifth Amendment contains an amalgam of rights, including the right to have a grand jury's presentment or indictment before being charged with a "capital, or otherwise infamous crime," the right against double jeopardy, the right to due process before being deprived of life, liberty or property, and the right not to have private property taken for public use, without just compensation.<sup>101</sup> The Sixth Amendment collected the procedural rights of the criminally accused after indictment.<sup>102</sup> By not placing the privilege in the Sixth Amendment, Congress afforded a right that extended to persons who had not been charged with a criminal offense. Put another way, "the location of the self-incrimination clause in the Fifth Amendment rather than the Sixth [Amendment] proves that the Senate, like the House, did not intend to restrict that clause to the criminal defendant only nor only to his trial."<sup>103</sup> The right embodied in the privilege, even considering that the text says "criminal case," stated a "principle broadly enough to apply to witnesses and to any phase of the proceedings."<sup>104</sup>

When Justice Thomas concluded that Martinez's Fifth Amendment right was not violated because his compelled statements were not used in a criminal

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<sup>98</sup> See Alschuler, *supra* note 94, at 2659.

<sup>99</sup> Email from Albert W. Alschuler to Tracey Maclin, *supra* note 97.

<sup>100</sup> Several scholars have provided comprehensive studies of the Fifth Amendment's history. See generally R. H. HELMHOLZ ET AL., *supra* note 91; LEVY, *supra* note 4; LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 9-19 (1959); 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 821-26b (Chadbourn rev. 1970); Alschuler, *supra* note 94; E. M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

<sup>101</sup> U.S. CONST. amend. V.

<sup>102</sup> See *id.* amend. VI. The Sixth Amendment guarantees the right to a speedy and public trial by an impartial jury of one's peers, to be informed of the nature and cause of the accusation, to be confronted by all witnesses, to have a compulsory process for obtaining one's own witnesses, and to have the assistance of counsel for one's defense. *Id.*

<sup>103</sup> LEVY, *supra* note 4, at 427.

<sup>104</sup> *Id.* Without disputing this history, another scholar of the Fifth Amendment's origins notes that "the legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege." Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1123 (1994).



prosecution, he was not enforcing the provision as written. Instead, Justice Thomas put his own gloss on the text.<sup>105</sup> In commenting on the literal words of the privilege, Justice Brennan once observed:

The words of the Fifth Amendment do not, in terms, suggest that government may compel men to incriminate themselves provided it promises that it will not prosecute them for the crimes revealed. The clause does not prohibit a *prosecution* or *conviction*; it prohibits the application *vel non* of compulsion to an individual to force testimony that incriminates him, regardless of whether he is actually prosecuted.<sup>106</sup>

Put differently, despite his professed fealty to the text of the Fifth Amendment, Justice Thomas did exactly what Justice Douglass criticized the majority for in *Ullmann v. United States*,<sup>107</sup> nearly fifty years earlier:

The guarantee is that no person “shall be compelled in any criminal case to be a witness against himself.” The majority does not enforce that guarantee as written but qualifies it; and the qualification apparently reads, “but only if criminal conviction might result.” Wisely or not, the Fifth Amendment protects against the compulsory self-accusation of crime without exception or qualification.<sup>108</sup>

Moreover, although none of the Justices who rejected Martinez’s Fifth Amendment claim are willing to admit it, the text of the privilege is not as clear they contend. The right guaranteed by the Fifth Amendment extends beyond “self-incrimination,” a term not found in the text. As Levy explains:

The “right against self-incrimination” is a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him. The clause extended, in other words, to all the injurious as well as incriminating consequences of disclosure by witness or party.<sup>109</sup>

Put simply, to interpret the privilege as confined to a right against self-incrimination “stunts the wider right . . . not to be a witness against oneself.”<sup>110</sup> Ultimately, Justice Thomas neglects a crucial point: the literal terms of the Fifth Amendment privilege do not convey a single meaning. The Justices recognized

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<sup>105</sup> In fairness to Justice Thomas, he is not the first jurist to do this.

<sup>106</sup> *Piccirillo v. New York*, 400 U.S. 548, 564 (1971) (Brennan, J., dissenting).

<sup>107</sup> 350 U.S. 422 (1956).

<sup>108</sup> *Id.* at 443 (Douglas, J., dissenting).

<sup>109</sup> LEVY, *supra* note 4, at 427.

<sup>110</sup> *Id.*

this fact long ago. In 1896, the Court stated that the right embodied in the Fifth Amendment “is obviously susceptible of two interpretations.”<sup>111</sup>

On the one hand, if she were so inclined, a judge could literally read the text of the Fifth Amendment to protect a person against any harmful disclosure, including civil liability, regardless of whether that person was charged with a crime. Such a broad reading of the clause is not forbidden by the text, and many judges, from the Framing era to more modern times, have expressly adopted this broad reading of the privilege.<sup>112</sup> In *Brown v. Walker*, a majority of the Court acknowledged that the amendment could be construed literally “as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace or expose him to unfavorable comments.”<sup>113</sup> The dissenters went even further. Three of the dissenting Justices in *Brown* read the privilege to guarantee an absolute right to silence, which Congress could not divest even with a grant of immunity,<sup>114</sup> while the fourth dissenter read the amendment to protect a person “from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution.”<sup>115</sup>

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<sup>111</sup> *Brown v. Walker*, 161 U.S. 591, 595 (1896).

<sup>112</sup> *See, e.g., Ullman*, 350 U.S. at 450-53 (“The Fifth Amendment was designed to protect the accused against infamy as well as against prosecution.”); *id.* at 454 (“When public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.”); *Brown*, 161 U.S. at 630 (Field, J., dissenting) (“The Fifth Amendment of the Constitution of the United States gives absolute protection to a person called as a witness in a criminal case against the compulsory enforcement of any criminating testimony against himself. . . . No substitute for the protection contemplated by the amendment would be sufficient were its operation less extensive and efficient.”); *id.* at 631 (“All [phrases or words of any provision of the amendment] are to be construed liberally that they may have the widest and most ample effect.”); *United States v. James*, 60 F. 257, 265 (N.D. Ill. 1894) (“[T]he privilege of silence, against a criminal accusation, guaranteed[sic] by the fifth amendment, was meant to extend to all the consequences of disclosure.”). Additionally, as Levy notes:

After the adoption of the Fifth Amendment, the earliest state and federal cases were in accord with [the view that the right not to be a witness against oneself included protection against any injurious disclosures], which suggests that whatever the wording of the constitutional formulation, it did not supersede or even limit the common-law right. . . . The state courts of the framers’ generation followed the extension of the right to cover self-infamy as well as self-incrimination, although the self-infamy rule eventually fell into disuse.

LEVY, *supra* note 4, at 427-29 (footnote omitted).

<sup>113</sup> *Brown*, 161 U.S. at 595.

<sup>114</sup> *See id.* at 610 (Shiras, J., dissenting) (asserting that the Fifth Amendment means “not merely that every person should have such immunity [from compelled testimony], but that his right thereto should not be divested or impaired by any act of Congress”).

<sup>115</sup> *Id.* at 631 (Field, J., dissenting). In the end, the *Brown* majority chose to interpret the amendment “to effect a practical and beneficent purpose.” *Id.* at 596 (majority opinion). According to the majority, the Fifth Amendment does not “protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede,

On the other hand, if a judge were so inclined, she could read the text to mean that a violation of the Fifth Amendment only occurs when the Government compels a person to testify against himself in a criminal trial.<sup>116</sup> As then-Justice Rehnquist noted, “the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial.”<sup>117</sup> Moreover, a judge could go further by literally reading the text to permit the prosecution to introduce “evidence obtained prior to trial by police or judicial coercion” because “[t]he words of the Fifth Amendment say nothing about *evidence*.”<sup>118</sup> Indeed, a strict (and plausible) reading of the text of the Fifth Amendment:

[P]rohibits the government only from compelling a person to *testify*—that’s what “a witness” does—“against himself” in “any criminal case.” Its words do not prohibit the *police* from testifying about—or playing a recording of—what the defendant said when he was merely a suspect and not yet a witness, after the police compelled him to speak but before the criminal trial began. Nor does it prohibit a *clerk* from reading the transcript of testimony the person was compelled by a judge to give in a noncriminal case. So long as the defendant himself is not called as an actual witness by the prosecution and compelled to give live testimony against himself at the criminal trial itself, the text of the Constitution—literally read, as Justice Thomas said it should be—is not violated.<sup>119</sup>

Although this literal interpretation of the text might be shocking to persons raised during an era when police on television shows and in the movies inform suspects of their “right to silence,” it is a plausible view of the Fifth Amendment’s bare terms.

In light of these alternative readings of the privilege, it is not obvious why Justice Thomas’s interpretation of the text is the only permissible reading of the privilege. Certainly, Justice Thomas, who fails to cite any history of the Fifth Amendment, makes no effort to explain why his literal reading is the only, let alone best, interpretation of the Fifth Amendment. What Justice Thomas ignores in *Chavez* is that the Court disavowed a literal interpretation of the Fifth Amendment at the end of the nineteenth century. Just as the Government did in *Chavez* in 2003, the federal government in 1892 urged the Court in *Counselman v. Hitchcock*<sup>120</sup> to construe the Fifth Amendment literally. The Court demurred:

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hinder or obstruct the administration of criminal justice.” *Id.*

<sup>116</sup> In 1936, dicta from the Court’s decision in *Brown v. Mississippi*, 297 U.S. 278 (1936), observed that the Self-Incrimination Clause of the Fifth Amendment is restricted to “the processes of justice by which the accused may be called as a witness and required to testify,” *id.* at 285.

<sup>117</sup> *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

<sup>118</sup> DERSHOWITZ, *supra* note 2, at 29. As Alan Dershowitz rightly notes, such a result was “categorically rejected by the entire court in [*Chavez*].” *Id.*

<sup>119</sup> *Id.* at 29-30.

<sup>120</sup> 142 U.S. 547 (1892).

“It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself.”<sup>121</sup> Certainly, the amendment covers cases where the Government compels a defendant to testify at his own prosecution; “but it is not limited to them.”<sup>122</sup> The object of the privilege was to guarantee that a “person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.”<sup>123</sup> The *Counselman* Court explained that the text of the Fifth Amendment limits the privilege “to criminal matters, but it is as broad as the mischief against which it seeks to guard.”<sup>124</sup> Since 1892, in case after case, the Court has turned away efforts to read the privilege in a literal manner.<sup>125</sup> The problems associated with a literal reading of the Fifth Amendment, coupled with the Court’s consistent disapproval of such an approach, prompted Erwin Griswold, “the conservative Dean of . . . Harvard Law School,”<sup>126</sup> in 1962 to provide this answer to the question of whether the Fifth Amendment should be read literally: “This is a question which was raised and answered long ago, so long ago in fact that lawyers tend to take it for granted. But early courts saw that the protection of the amendment itself would be an empty gesture if it was literally applied.”<sup>127</sup> Incredibly, Justice Thomas’s opinion in *Chavez* ignores all of this.

In light of the above discussion, it is understandable why Justice Kennedy eschewed a literal interpretation of the Constitution in deciding whether Officer Chavez violated the Fifth Amendment when he employed coercion to obtain an incriminating statement from Martinez. According to Justice Kennedy, the Court’s precedents and the nation’s “legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of the Government, not merely an evidentiary rule governing the work of the

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<sup>121</sup> *Id.* at 562. In *Counselman*, the Government argued that a grand jury proceeding is not a “criminal case” within the meaning of the Fifth Amendment. *Id.* The Court rejected that view. *See id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See, e.g.,* *Ullmann v. United States*, 350 U.S. 422, 438 (1956) (“[T]he history of the privilege establishes . . . that it is not to be interpreted literally.”); *Quinn v. United States*, 349 U.S. 155, 161-65 (1955) (discussing the application of the Fifth Amendment to the case before the Court, but not pausing to consider whether a hearing conducted by a subcommittee of the House of Representatives was in fact a “criminal case” within the meaning of the Fifth Amendment); *Emspak v. United States*, 349 U.S. 190, 194 (1955) (explaining in a case where a witness was subpoenaed to testify before a congressional committee, that “no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination”); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (rejecting the government’s argument that the Fifth Amendment “does not apply in any civil proceeding”).

<sup>126</sup> LEVY, *supra* note 4, at viii.

<sup>127</sup> GRISWOLD, *supra* note 5, at 54-55.

courts.”<sup>128</sup> It requires a considerable degree of judicial arrogance to insist that the Fifth Amendment must be read literally.<sup>129</sup> The Court’s Self-Incrimination Clause jurisprudence, which is more than a century old, says the exact opposite. But Justice Thomas must believe he knows better.

B. *The Court’s Precedents*

Justice Thomas in *Chavez* also insisted that his literal interpretation of the privilege and resultant conclusion that Martinez did not suffer a Fifth Amendment violation were mandated by the Court’s precedents. According to Justice Thomas, prior rulings established that “mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.”<sup>130</sup> Like his analysis of the Fifth Amendment’s text, Justice Thomas’s discussion of the Court’s precedents is one-sided and omits consideration of cases where the Court found Fifth Amendment violations because government officials employed coercion to obtain incriminating admissions.

To be sure, in one of the so-called “penalty cases,”<sup>131</sup> *Garrity v. New Jersey*,<sup>132</sup> the Court held that the Fifth Amendment bars “use in subsequent criminal proceedings of statements obtained under threat of removal from office.”<sup>133</sup> But

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<sup>128</sup> *Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (Kennedy, J., concurring in part and dissenting in part).

<sup>129</sup> Justice Kennedy’s reaction to Justice Thomas’s and Justice Souter’s reading of the Fifth Amendment is worth quoting in-full:

The conclusion that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding strips the Clause of an essential part of its force and meaning. This is no small matter. It should come as an unwelcome surprise to judges, attorneys, and the citizenry as a whole that if a legislative committee or a judge in a civil case demands incriminating testimony without offering immunity, and even imposes sanctions for failure to comply, that the witness and counsel cannot insist the right against compelled self-incrimination is applicable then and there. Justice Souter and Justice Thomas, I submit, should be more respectful of the understanding that has prevailed for generations now. To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights. A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom. Today’s decision undermines one of those respected precepts.

*Id.* at 793-94.

<sup>130</sup> *Id.* at 769 (plurality opinion).

<sup>131</sup> The “penalty cases” refer to a series of cases where “the state not only compelled an individual to appear and testify, but also sought to induce him to forego the Fifth Amendment privilege by threatening to impose economic or other sanctions ‘capable of forcing the self-incrimination which the Amendment forbids.’” *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)).

<sup>132</sup> 385 U.S. 493 (1967).

<sup>133</sup> *Id.* at 500 (emphasis added). Interestingly, the *Garrity* Court did not—as Justice

*Garrity* was just one of several cases interpreting the Fifth Amendment's application to government efforts to induce incriminating statements. Other rulings, announced before and after *Garrity*, involve cases where the Court found Fifth Amendment violations when government officials utilize compulsion to induce a statement, "even where there was no possibility that a statement would be used in a criminal trial, and even where no statement was generated."<sup>134</sup>

As already discussed, *Counselman* rejected the government's efforts to impose a narrow interpretation to the amendment's phrase "in any criminal case" and held that the privilege is applicable in a grand jury proceeding.<sup>135</sup> A literal reading of the amendment's text in *Counselman* "would have drained the privilege of most of its vitality."<sup>136</sup> After *Counselman*, it was still available for the Government to contend that the amendment's text—"in any criminal case"—meant that the privilege was unavailable when the compelled testimony was sought in a civil case. *McCarthy v. Arndstein*<sup>137</sup> eliminated that argument.

After being adjudged an involuntary bankrupt, Arndstein was subpoenaed to testify before a special commissioner to examine and distribute his assets pursuant to federal bankruptcy law.<sup>138</sup> At a civil bankruptcy hearing, Arndstein invoked the privilege to certain questions.<sup>139</sup> Arndstein made no incriminating statements and was not prosecuted for a criminal offense; he was, however, judged in contempt.<sup>140</sup> Arndstein subsequently filed a writ of habeas corpus seeking his release.<sup>141</sup> The federal government argued before the Court, in light of the Fifth Amendment's text, that the privilege does not apply in a civil proceeding; the Court, however, disagreed.<sup>142</sup>

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Thomas did in *Chavez*—adopt a literal interpretation of the privilege. See *id.* at 496-500 (discussing the Court's prior decisions of applying the privilege outside of a strict interpretation of "criminal case"). For a comprehensive review of *Garrity* and its impact on the prosecution of police officers, see generally Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309 (2001).

<sup>134</sup> Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1341 (2003); see also *id.* at 1341-43 (collecting cases).

<sup>135</sup> See *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *supra* notes 120-24 and accompanying text.

<sup>136</sup> Charles E. Moylan, Jr. & John Sonsteng, *The Privilege Against Compelled Self-Incrimination*, 16 WM. MITCHELL L. REV. 249, 280 (1990). As Charles Moylan and John Sonsteng explain, *Counselman* "reasoned that the privilege was available in any forum, civil or criminal, legislative or judicial, investigative or adjudicative, so long as the testimony there compelled might later be used against the witness 'in any criminal case.'" *Id.*

<sup>137</sup> 266 U.S. 34 (1924).

<sup>138</sup> *Id.* at 38.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 40 ("The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as

The Court explained that the privilege “is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.”<sup>143</sup> If the protections of the privilege are operative in a grand jury proceeding and a civil bankruptcy hearing, neither of which is a “criminal case,” logic suggests that the amendment’s protections are operative during police interrogation, especially when the target of the interrogation “reasonably believes [that his disclosures] could be used in a criminal prosecution or could lead to other evidence that might be so used.”<sup>144</sup> This is exactly the situation Martinez faced.

In *Spevack v. Klein*,<sup>145</sup> a companion case to *Garrity*, a lawyer faced a disciplinary proceeding for professional misconduct.<sup>146</sup> The lawyer refused to testify and would not produce any of his records, invoking the Fifth Amendment.<sup>147</sup> Although the lawyer did not incriminate himself and faced no subsequent criminal prosecution, he was ordered disbarred by the New York courts.<sup>148</sup> The Supreme Court, however, ruled that the State employed impermissible compulsion and thus violated the lawyer’s Fifth Amendment right.<sup>149</sup> In light of *Garrity*’s ruling excluding compelled statements and their fruits from a subsequent criminal prosecution,<sup>150</sup> *Spevack*’s holding seems “justifiable only on the ground that it is an essential measure to protect against self-incrimination—to prevent what may well be a successful attempt to elicit incriminating admissions.”<sup>151</sup> Tellingly, none of the dissenters in *Spevack* relied on the Fifth Amendment’s text in rejecting *Spevack*’s claim. Even Justice Harlan, “the great dissenter” on the Warren Court,<sup>152</sup> acknowledged that the

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settled.”).

<sup>143</sup> *Id.*

<sup>144</sup> *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

<sup>145</sup> 385 U.S. 511 (1967).

<sup>146</sup> *Id.* at 512.

<sup>147</sup> *Id.* at 512-13.

<sup>148</sup> *Id.* at 513. Relying on *Cohen v. Hurley*, 366 U.S. 117 (1961), which held that the privilege was not applicable in state disbarment proceedings, *see id.* at 125-29, the New York courts ruled that the privilege was unavailable to *Spevack* in legal disciplinary proceedings, *see In re Spevack*, 213 N.E.2d 457, 457-58 (N.Y.), *aff’g* 24 A.D.2d 653 (N.Y. App. Div. 1965).

<sup>149</sup> *Spevack*, 385 U.S. at 516 (“The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as ‘the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . . .’” (quoting *United States v. White*, 322 U.S. 694, 698 (1944))).

<sup>150</sup> *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *supra* notes 132-34 and accompanying text.

<sup>151</sup> *Spevack*, 385 U.S. at 531 (White, J., dissenting).

<sup>152</sup> *See generally* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER

“Constitution contains no formulae with which we can calculate the areas within . . . which the privilege should extend, and the Court has therefore been obliged to fashion for itself standards for the application of the privilege.”<sup>153</sup>

Likewise, in *Gardner v. Broderick*<sup>154</sup> and *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*,<sup>155</sup> a New York City police officer and New York City sanitation employees, respectively, filed civil actions claiming that they had been unlawfully dismissed from their jobs because they refused to waive their Fifth Amendment privilege when subpoenaed to testify before a grand jury investigating criminal activity.<sup>156</sup> Again, in both cases, no incriminating statements were obtained from the city workers and no criminal charges were filed.<sup>157</sup> None of the city workers were offered immunity for their testimony.<sup>158</sup> Nonetheless, the Court, speaking through Justice Fortas in both cases, concluded that the workers could not be dismissed from their jobs for invoking and thereby refusing to waive their Fifth Amendment rights.<sup>159</sup> What Justice Fortas wrote in *Gardner* seems equally applicable to *Chavez*: “[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.”<sup>160</sup> If the privilege prevents government officials from attempting to coerce a waiver from city employees, “regardless of its ultimate effectiveness,” a fortiori, it should prevent Officer Chavez from attempting to coerce an incriminating statement from Martinez.

Five years after *Gardner* and *Uniformed Sanitation Men*, the Court decided *Lefkowitz v. Turley*.<sup>161</sup> Two architects licensed by the State of New York “were

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OF THE WARREN COURT (1992) (chronicling Justice Harlan’s jurisprudence, and describing him throughout his time on the Court as a “great dissenter”).

<sup>153</sup> *Spevack*, 385 U.S. at 522 (Harlan, J., dissenting).

<sup>154</sup> 392 U.S. 273 (1968).

<sup>155</sup> 392 U.S. 280 (1968).

<sup>156</sup> See *Uniformed Sanitation Men*, 392 U.S. at 281-83; *Gardner*, 392 U.S. at 274-75.

<sup>157</sup> See *Uniformed Sanitation Men*, 392 U.S. at 282; *Gardner*, 392 U.S. at 274-75.

<sup>158</sup> See *Uniformed Sanitation Men*, 392 U.S. at 282; *Gardner*, 392 U.S. at 274-75.

<sup>159</sup> See *Uniformed Sanitation Men*, 392 U.S. at 283 (“[The workers] were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege.”); *Gardner*, 392 U.S. at 278 (“[Gardner] was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination.”). The Court in *Gardner* distinguished its facts from *Garrity*, explaining that *Garrity* did not address the discrete question presented in *Gardner*, namely “whether a State may discharge an officer for refusing to waive a right which the Constitution guarantees to him.” *Gardner*, 392 U.S. at 277.

<sup>160</sup> *Gardner*, 392 U.S. at 277.

<sup>161</sup> 414 U.S. 70 (1973).



summoned to testify before a grand jury investigating [criminal conduct].”<sup>162</sup> At the grand jury, “[t]hey were asked, but refused, to sign waivers of immunity, the effect of which would have been to waive their right not to be compelled in a criminal case to be a witness against themselves.”<sup>163</sup> As a result of their refusal to sign the waiver, any existing contracts the architects had with the State were cancelled, and they were disqualified from further transactions with the State for five years.<sup>164</sup> As in *Arndstein*, *Spevack*, *Gardner*, and *Uniformed Sanitation Men*, the architects made no incriminating statements and no criminal charges were filed against them.<sup>165</sup> The architects filed a civil claim alleging that the State’s action cancelling their existing and future contracting rights violated the Fifth Amendment.<sup>166</sup> The Court upheld their claim.<sup>167</sup>

Although Justice White perceived “little legal or practical basis” for upholding a Fifth Amendment claim in *Spevack* where a lawyer “incriminated himself in no way whatsoever” during a disciplinary proceeding and did not face criminal charges,<sup>168</sup> in *Turley* he saw things differently. Justice White’s majority opinion explained that the goal of the Fifth Amendment “was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.”<sup>169</sup> This principle, according to Justice White, “reflected the settled view” of the Court.<sup>170</sup> Thus, there was “no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises . . . in the context of official inquiries into the job performance of a public contractor.”<sup>171</sup> Nor was the State’s interest in maintaining the integrity of its civil service and contracting business enough to override the Fifth Amendment rights of the architects.<sup>172</sup> Furthermore, even though the architects had made no incriminating statements and faced no criminal charges, Justice White explained that the rulings in *Garrity*, *Gardner*, and *Uniformed Sanitation Men* controlled.<sup>173</sup> When the State asked questions that were potentially incriminating, required the waiver of the architects’ Fifth Amendment protection, and disqualified the architects as

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<sup>162</sup> *Id.* at 75.

<sup>163</sup> *Id.* at 76.

<sup>164</sup> *Id.* at 71-72.

<sup>165</sup> *Id.* at 76.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See *Spevack v. Klein*, 385 U.S. 511, 531 (1967) (White, J., dissenting).

<sup>169</sup> *Turley*, 414 U.S. at 77 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

<sup>170</sup> *Id.* (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)).

<sup>171</sup> *Id.* at 78.

<sup>172</sup> See *id.* at 78-79 (noting that “claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well” (citing *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967))).

<sup>173</sup> See *id.* at 82.

public contractors for refusal to sign a waiver, New York officials sought to obtain “what *Garrity* specifically prohibited—to compel testimony that had not been immunized.”<sup>174</sup>

Finally, Justice White saw no merit in the State’s argument that the architects had experienced no compulsion within the meaning of the Fifth Amendment nor suffered a forbidden penalty by being disqualified as public contractors for refusing to answer the grand jury’s questions.<sup>175</sup> Leaving no doubt about when the constitutional violation occurred, Justice White expressly agreed with the lower court’s conclusion that “the [architects’] disqualification from public contracting for five years as a penalty for asserting a constitutional privilege *is violative of their Fifth Amendment rights.*”<sup>176</sup> This last point made clear that the architects’ Fifth Amendment rights were violated upon imposition of the disqualification from public contracting. Their constitutional rights were not held in abeyance until some future time when a compelled statement might be introduced or used in a criminal case. Just as the architects possessed a present right not to be compelled, Martinez possessed the same right while being interrogated.<sup>177</sup>

Lastly, there is *Lefkowitz v. Cunningham*,<sup>178</sup> which addressed whether a political party official could be removed from his position by the State and barred for five years from holding any other party or public office because he refused to waive his Fifth Amendment privilege when testifying before a grand jury.<sup>179</sup> Patrick Cunningham refused to waive the privilege when subpoenaed to testify before a grand jury that was investigating his conduct in the political positions he occupied.<sup>180</sup> As in the cases described above, Cunningham made no incriminating statements to the grand jury and later faced no criminal charges.<sup>181</sup> As a result of his refusal to waive the privilege, a New York statute mandated Cunningham’s immediate removal from his political party offices.<sup>182</sup> Cunningham then filed a civil action and sought injunctive relief against

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<sup>174</sup> *Id.*

<sup>175</sup> *See id.* at 83.

<sup>176</sup> *Id.* at 83 (emphasis added) (quoting *Turley v. Lefkowitz*, 342 F. Supp. 544, 549 (W.D.N.Y. 1972)).

<sup>177</sup> *See Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (Kennedy, J., concurring in part and dissenting in part) (“The Clause provides both assurance that a person will not be compelled to testify against himself in a criminal proceeding and a continuing right against government conduct intended to bring about self-incrimination.” (citing *Turley*, 414 U.S. 70, 77 (1973))).

<sup>178</sup> 431 U.S. 801 (1977).

<sup>179</sup> *See id.* at 802-03.

<sup>180</sup> *Id.* at 803.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* at 803-04.

enforcement of the statute on the ground that the law violated his Fifth Amendment right.<sup>183</sup> The Court upheld his claim.<sup>184</sup>

Chief Justice Burger's majority opinion in *Cunningham* relied upon *Garrity*, *Gardner*, *Uniformed Sanitation Men*, and *Turley* for the established principle that Government "cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized."<sup>185</sup> The Chief Justice explained that "the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids."<sup>186</sup> Chief Justice Burger stated that the New York law threatened Cunningham with grave consequences, including the loss of positions that carry substantial prestige and political influence, solely because he would not relinquish his Fifth Amendment right.<sup>187</sup> Thus, the law was "constitutionally indistinguishable from the coercive provisions" invalidated in *Gardner*, *Uniformed Sanitation Men*, and *Turley*.<sup>188</sup>

Justice Thomas's opinion in *Chavez* proceeds as if these cases are irrelevant to the question before the Court.<sup>189</sup> For example, Justice Thomas read the text of the Fifth Amendment, specifically, the term "criminal case," to require the "initiation of legal proceedings,"<sup>190</sup> and explained that police interrogation does

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<sup>183</sup> *Id.* at 804.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 806.

<sup>186</sup> *Id.*

<sup>187</sup> *See id.* at 807.

<sup>188</sup> *Id.*

<sup>189</sup> Although by no means on all fours with *Chavez*, Justice Kennedy's opinion in *Chavez* convinces me that *McKune v. Lile*, 536 U.S. 24 (2002), also undermines Justice Thomas's vision of what the Fifth Amendment protects. A Kansas prison rehabilitation program required convicted sex offenders to acknowledge their past crimes in order to be eligible to participate in the program and enjoy some of the program's benefits not accorded to other prisoners. *Id.* at 30 (plurality opinion). Robert Lile contended that requiring him to admit his past crime violated the Fifth Amendment. *Id.* at 31. A plurality of the Justices found that because the program promotes an important penological goal and offers minimal incentives to prisoners to participate, it does not violate the Fifth Amendment. *See id.* at 47-48. While Lile lost his claim, according to his separate opinion in *Chavez*, Justice Kennedy noted that all nine Justices in *Lile* "proceeded from the premise that a present, completed violation of the Self-Incrimination Clause could occur if an incarcerated prisoner were required to admit to past crimes on pain of forfeiting certain privileges or being assigned harsher conditions of confinement." *Chavez v. Martinez*, 538 U.S. 760, 793 (2003) (Kennedy, J., concurring in part and dissenting in part); *see also Lile*, 536 U.S. 24 (plurality opinion); *id.* at 48 (O'Connor, J., concurring in the judgment); *id.* at 54 (Stevens, J., dissenting). In other words, "[n]o Member of the [*Lile*] Court suggested that the absence of a pending criminal proceeding made the Self-Incrimination Clause inquiry irrelevant." *Chavez*, 538 U.S. at 793 (Kennedy, J., concurring in part and dissenting in part).

<sup>190</sup> *Chavez*, 538 U.S. at 766 (plurality opinion).

not constitute a “case” under the Fifth Amendment.<sup>191</sup> If police questioning is not a “case,” it is not obvious why a grand jury proceeding is one. But after *Counselman* rejected the Government’s argument that a grand jury hearing is not a “criminal case” within the meaning of the Fifth Amendment,<sup>192</sup> why does it matter that Justice Thomas believes that police questioning is not a “criminal case”? Moreover, why does it matter after *Miranda* explicitly put to rest the notion that the privilege does not apply in the police station or to police interrogation generally? As Chief Justice Warren observed:

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion [exerted by police] cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.<sup>193</sup>

Put another way, if *Miranda* left no doubt that the privilege “fully” applies during police interrogation, why does it matter, when interpreting the meaning of the Fifth Amendment, “that police questioning does not constitute a ‘case’ any more than a private investigator’s precomplaint activities constitute a ‘civil case’”?<sup>194</sup> Indeed, over fifty years ago, the federal government told the Court:

It has long been recognized . . . that the policies underlying the privilege may be violated by informal compulsion exerted by a law-enforcement officer acting under color of authority. We have no doubt therefore, that it is possible for a suspect’s Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer.<sup>195</sup>

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<sup>191</sup> See *id.* at 767. Justice Souter’s separate opinion in *Chavez* did not address or attempt to define when a “criminal case” begins for determining when a compelled statement is used within the meaning of the Fifth Amendment.

<sup>192</sup> See *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *supra* notes 120-24 and accompanying text.

<sup>193</sup> *Miranda v. Arizona*, 384 U.S. 436, 460-61 (1966) (citations omitted).

<sup>194</sup> *Chavez*, 538 U.S. at 767 (plurality opinion).

<sup>195</sup> Brief of Respondent at 28, *Westover v. United States*, No. 761, *consolidated*, *Miranda v. Arizona*, 386 U.S. 436 (1966); see also Brief of Respondent at 40-41 n.44, *Anderson v. United States*, 318 U.S. 350 (1943) (No. 10-513) (“Logically and practically there is no real difference between torture in the courtroom to compel a witness to testify and torture outside to obtain a confession to read at the trial. The scope of the privilege is not to be limited by technical notions of the scope of a ‘criminal case’ but ‘is as broad as the mischief against which it seeks to guard.’” (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892))

In any event, the above cases—*Garrity*, *Spevack*, *Gardner*, *Uniformed Sanitation Men*, *Turley*, and *Cunningham*—clearly show that the Warren and Burger Courts believed that the “initiation of legal proceedings” was not required to trigger Fifth Amendment protection. Not only were there no “criminal cases” in *Spevack*, *Gardner*, *Uniformed Sanitation Men*, *Turley*, and *Cunningham*, there were no incriminating statements that could be used in a criminal prosecution, if such a prosecution had been initiated. Nonetheless, the Court in each of these cases concluded that the Fifth Amendment was violated. In addition, these cases also show what Justice Thomas insisted the text of the amendment does not authorize, namely, government compulsion to induce incriminating admissions violates the Fifth Amendment. To reiterate, these rulings demonstrate that even when no incriminating statements were obtained and no subsequent criminal charges were filed, the Fifth Amendment “does not tolerate the attempt, regardless of its ultimate effectiveness,” to coerce self-incrimination.<sup>196</sup>

Justice Thomas’s opinion never discusses the *holdings* of these cases. Only in a footnote does he get close to acknowledging part of the holdings of *Uniformed Sanitation Men* and *Turley* when he writes that the Government may not “penalize public employees and government contractors to induce them to waive their *immunity* from the use of their compelled statements in subsequent criminal proceedings.”<sup>197</sup> But he couples that description with the assertion that “immunity is not itself a right secured by the text of the Self-Incrimination Clause, but rather a prophylactic rule we have constructed to protect the Fifth Amendment’s right from invasion.”<sup>198</sup>

Justice Thomas’s statement that immunity is not a textual right is true, but utterly unhelpful. Whatever one thinks of the use of prophylactic rules in constitutional decision-making,<sup>199</sup> my reading of *Garrity*, *Spevack*, *Gardner*,

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(citations omitted)).

<sup>196</sup> *Gardner v. Broderick*, 392 U.S. 273, 279 (1968); *cf. Spevack v. Klein*, 385 U.S. 511, 531 (1967) (White, J., dissenting) (noting that the Court’s ruling is based on the premise that “it is an essential measure to protect against self-incrimination—to prevent what may well be a successful attempt to elicit incriminating admissions”).

<sup>197</sup> *Chavez*, 538 U.S. at 768 n.2 (Thomas, J., concurring in part and dissenting in part) (citing *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973)).

<sup>198</sup> *Id.*

<sup>199</sup> Compare JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 173-98 (1993) (recognizing that the text of the Constitution cannot address all issues that will arise in constitutional litigation, but arguing that the prophylactic rules announced in *Miranda* were illegitimate), and Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105-06, 123-47 (1985) (questioning the legitimacy of prophylactic rules generally, and arguing that *Miranda*’s prophylactic were plainly illegitimate), with David A. Strauss, *Miranda, The Constitution, and Congress*, 99 MICH. L. REV. 958, 960 (2001) (contending that “constitutional rules—routinely, unavoidably, and quite properly—treat ‘the Constitution itself’ as requiring ‘prophylaxis’”),

*Uniformed Sanitation Men, Turley, and Cunningham* convinces me that the Court believed it was applying the *real* Fifth Amendment. There is no indication in any of these cases that the Court thought it was enforcing some judge-made or “prophylactic” rule. Thus, Justice Thomas proffers revisionist analysis when he suggests that these cases do not enforce “a constitutional right.”<sup>200</sup> As the above discussion demonstrates, the Court was enforcing the Fifth Amendment in each of these cases.

And as far as immunity is concerned, what is the point of asserting that immunity is not mentioned in the text of the amendment, but instead is a judge-made rule? This is true, but why does it matter in *Chavez* where the target of the Government’s compulsion was never given immunity for his compelled statements? More pertinent, because he believes that immunity is not a constitutional right, Justice Thomas contended that Martinez’s ignorance that his compelled statements could not be used at a criminal trial was constitutionally irrelevant. Justice Thomas’s view of the constitutional significance of immunity is dead wrong. In each of the cases discussed above, the witness does not have immunity, and thus, her Fifth Amendment rights are violated because she cannot be compelled to answer without this safeguard against later use. In *Gardner* and *Uniformed Sanitation Men*, for example, the police officer’s and sanitation employees’ Fifth Amendment rights were violated because they were dismissed from their jobs after refusing to waive their Fifth Amendment right without the protection of immunity. In contrast, the Court found in *Brown* that compelling a witness to speak with the grant of immunity would not violate the Fifth Amendment.<sup>201</sup> Time and again, the Court has recognized that without immunity to assure a witness that her statement cannot be used against her in a criminal case, she cannot be compelled to answer without violating her Fifth Amendment rights.

This was precisely the situation Martinez faced. As he lay in a hospital receiving treatment for gunshot wounds related to the recent officer-involved shooting, Martinez was interrogated by Officer Chavez without receiving *Miranda* warnings. Despite clearly and repeatedly telling Officer Chavez that he did not want to answer any questions about the shooting, Officer Chavez continued to question Martinez. Eventually, Martinez made incriminating statements. Martinez was not granted immunity. It follows, bearing in mind

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and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190-95, 207-09 (1988) (arguing that prophylactic rules announced by the Court are not only legitimate, but are a “central and necessary” component of constitutional decision-making).

<sup>200</sup> See *Chavez*, 538 U.S. at 772 (plurality opinion) (“Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person. As we explained, we have allowed the Fifth Amendment privilege to be asserted by witnesses in noncriminal cases in order to safeguard the core constitutional right defined by the Self-Incrimination Clause—the right not to be compelled in any criminal case to be a witness against oneself.”).

<sup>201</sup> *Brown v. Walker*, 161 U.S. 591, 610 (1896).

*Arndstein*, *Spevack*, and the entire line of cases Justice Thomas overlooks, that Martinez could not be compelled to speak without this assurance of immunity. To paraphrase Justice White's opinion in *Turley*, Officer Chavez sought to obtain what the Court's precedents barred—"to compel testimony that had not been immunized."<sup>202</sup> It does not matter where the witness is when she is compelled to speak, be it a grand jury proceeding, bankruptcy hearing, hospital, or police interrogation room. Unless the witness *knows* that the compelled statement cannot be used against him—unless he has been granted immunity—he cannot be compelled to answer. Put differently, if the witness does not *know* that his statements cannot be used against him *later* in a criminal case, his Fifth Amendment right is *presently* violated. Each of these cases demonstrate this proposition and Justice Thomas declined to see this as a compelling, distinguishing factor.<sup>203</sup> Justice Thomas's opinion departs from this very long and consistent line of precedents.

A century of Fifth Amendment doctrine establishes that the privilege and immunity (either judicial or legislative) work together to produce the same result. As noted many years ago, "[i]t is accepted that the privilege against self-incrimination includes some degree of immunity from use of testimony procured in violation of the privilege."<sup>204</sup> Justice Black put it nicely when he noted "a witness does not need any [immunity] statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute."<sup>205</sup> Perhaps, that is why the Court has recognized that immunity statutes "have 'become part of our constitutional fabric.'"<sup>206</sup> Because the Fifth Amendment itself demands some form of immunity, either by statute or court action in the form of a suppression order or reversal of a conviction obtained with the use of compelled testimony, Justice Thomas's description of immunity is not only incorrect, it is unhelpful and adds nothing to the constitutional analysis in *Chavez*.<sup>207</sup>

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<sup>202</sup> *Turley*, 414 U.S. at 82.

<sup>203</sup> See *supra* notes 46-47 and accompanying text.

<sup>204</sup> McKay, *supra* note 7, at 231.

<sup>205</sup> *Adams v. Maryland*, 347 U.S. 179, 181 (1954).

<sup>206</sup> *Kastigar v. United States*, 406 U.S. 441, 447 (1972) (quoting *Ullmann v. United States*, 350 U.S. 422, 438 (1956)).

<sup>207</sup> Dershowitz writes that "Justice Thomas's narrow reading of the text of the privilege *seems to support* the conclusion that immunity is not constitutionally required before a witness can be compelled to answer self-incriminating questions." DERSHOWITZ, *supra* note 2, at 47 (emphasis added). Dershowitz explains why:

In a civil case or a legislative hearing, there is no textual prohibition against compelling testimony. And since compelled or coerced testimony, according to Thomas, will be "automatically" excluded from "any criminal case" in which the person is a defendant, it would seem to follow that a formal grant of immunity should no longer be required as a prerequisite for imprisoning a witness who refuses to answer self-incriminating questions.

*Id.* at 47-48. Carolyn Frantz appears to share Dershowitz's view that, after *Chavez*, immunity

## PART III

Despite the disputed and elusive nature of the history of the Fifth Amendment, little controversy is raised by claiming that at the time of the Framing, the Fifth Amendment was intended “to prohibit improper methods of interrogation.”<sup>208</sup>

may no longer be a prerequisite in order to compel incriminating statements in noncriminal proceedings. According to Frantz, *Chavez’s* understanding of the Fifth Amendment:

ought to change practice in at least one very significant respect: the Court ought to allow testimony to be compelled in noncriminal proceedings, and wait to use the suppression remedy to address whatever problems arise in the criminal trial. This change of practice would alter the privilege’s role in a variety of contexts. Essentially, government actors could compel individuals to make incriminating statements, so long as they were willing to risk having to forgo use of that evidence and its fruits in a subsequent criminal trial. Of course, they may do this now, but only if they explicitly grant up-front immunity. The new understanding of the privilege would seem to remove that requirement.

Carolyn J. Frantz, *Chavez v. Martinez’s Constitutional Division of Labor*, 2003 SUP. CT. REV. 269, 288.

Although I agree with Dershowitz’s criticism of Justice Thomas’s interpretation of the Fifth Amendment, I doubt that the Court is ready to adopt the view that a formal grant of immunity is no longer required before imprisoning a witness who refuses to provide self-incriminating admissions. The Court has made it clear that while the government can compel self-incriminatory statements, it must provide immunity commensurate with the privilege to satisfy the Constitution. *See* *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973) (“[I]f answers are to be required [by a state contractor subpoenaed to testify before a grand jury] States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.”); *Kastigar*, 406 U.S. at 461 (“The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This [federal immunity] statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties.”); *Ullmann v. United States*, 350 U.S. 422, 439 (1956) (“Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases.”); *Brown v. Walker*, 161 U.S. 591, 610 (1896) (“While the [Fifth Amendment] is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer . . .”). Imprisoning a person for refusing to testify without an immunity grant would violate the Fifth Amendment because imprisonment would be a penalty equal to, if not greater than, the penalties suffered by Spevack, Gardner, the sanitation workers, Turley, and Cunningham.

<sup>208</sup> Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in HELMHOLZ ET AL., *supra* note 91, at 181, 185. In an influential article, Alschuler summarizes what the Fifth Amendment protected during the Framing era:

The Fifth Amendment privilege prohibited (1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency. The Amendment prohibited nothing more, or at least the sources mention nothing more. The Self-Incrimination Clause neither mandated an accusatorial system nor afforded defendants a right to remain silent. It focused upon improper methods of gaining information from criminal suspects.

Alschuler, *supra* note 94, at 2651-52 (footnotes omitted).



Under today's legal standards,<sup>209</sup> Officer Chavez subjected Oliverio Martinez to an improper method of interrogation; he used coercion to induce incriminating statements that Martinez might have reasonably believed "could be used in a criminal prosecution or could lead to other evidence that might be so used."<sup>210</sup> Under the Court's precedents, Officer Chavez's methods were sufficient to establish a violation of the Fifth Amendment. Justice Thomas has indicated that the original meaning of the Fifth Amendment is important when deciding today's cases.<sup>211</sup> Ironically, in *Chavez*, he paid no attention to the fact that, viewed from the Framers' perspective, the Fifth Amendment focused on improper methods of securing information from criminal suspects.<sup>212</sup> Instead, Justice Thomas employed a literal reading of the text to conclude that Martinez had not stated a claim under the Fifth Amendment. There are multiple reasons why the Court rejected a literal interpretation of the Fifth Amendment over a century ago. The meaning of the text is far from clear; as written, the privilege is susceptible to differing interpretations. Moreover, the bare terms of the privilege "yield[] to no convenient formula."<sup>213</sup> Even Justice Harlan, a model Supreme Court Justice for many conservatives, recognized the text cannot and should not control how the Court interprets the Fifth Amendment.<sup>214</sup> Certainly, the members of the *Chavez* plurality understood that the Court's precedents have

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<sup>209</sup> I agree with Alschuler's judgment that our legal system and institutions are starkly different from what the Framers lived under. Thus, "restoring the original understanding of the Fifth Amendment privilege is impossible." Alschuler, *supra* note 94, at 2667. Likewise, "[t]he history of the privilege against self-incrimination provides only limited guidance in resolving the Fifth Amendment issues that confront modern courts." *Id.* at 2669. Finally, when considering what influence the original understanding of the Fifth Amendment should have when resolving modern legal controversies, it is important to recall that "[n]othing closely resembling stationhouse interrogation occurred at the time of the Fifth Amendment's framing." *Id.*; cf. John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 831 (1999) ("Crossing the bridge between historical analysis and doctrinal reasoning can be a risky venture; changes in institutions, practices, and surrounding legal rules make most moves from historical narrative to contemporary legal interpretation exceedingly complicated. Thus, the history of a doctrine can rarely, if ever, be relied on to lead to determinate conclusions about contemporary legal questions.").

<sup>210</sup> *Kastigar*, 406 U.S. at 445.

<sup>211</sup> See *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring); *supra* note 93 and accompanying text.

<sup>212</sup> See *supra* notes 207-09 and accompanying text.

<sup>213</sup> McKay, *supra* note 7, at 194.

<sup>214</sup> See *Spevack v. Klein*, 385 U.S. 511, 522 (1967) (Harlan, J., dissenting); *supra* note 153 and accompanying text. In another case, *Emspak v. United States*, 349 U.S. 190 (1955), Justice Harlan stated: "A valid claim of privilege against self-incrimination under the Fifth Amendment has two requisites: (1) the privilege must be adequately invoked, and (2) a possible answer to the question against which the privilege is asserted must have some tendency to incriminate the person to whom the question is addressed," *id.* at 203 (Harlan, J., dissenting). Martinez satisfied both requisites.

repeatedly rejected a literal reading of the privilege to determine the scope and meaning of the Self-Incrimination Clause.<sup>215</sup>

What then, explains the reasoning behind *Chavez*? Perhaps members of the Court worried that recognizing a claim for Martinez would allow terrorist suspects, subjected to harsh and brutal interrogation techniques by government officials, to bring lawsuits in federal court.<sup>216</sup> While that concern may explain some of the motivation behind the result in *Chavez*, I submit that the reasoning of *Chavez* is propelled by a different and larger objective. The six Justices who denied Martinez's claim view the Fifth Amendment as a prophylactic protection, and not a substantive constitutional right. I believe these Justices were persuaded, in part, by the Solicitor General's argument that the Fifth Amendment does not control the actions of police officers.<sup>217</sup> If the Fifth Amendment does not control the conduct of officers in the field, then the privilege does not bar the use of coercion to obtain a confession in every context, but rather merely controls the use of statements in the courtroom. That is why the Deputy Solicitor General told the Justices "the self-incrimination privilege is unusual because it's not purely and simply binding on the government. It doesn't say that in all contexts, the government cannot coerce confessions."<sup>218</sup> Under this logic, a coerced confession becomes constitutionally problematic only when it is used in a criminal trial to help convict a person. If a compelled statement is introduced or used at a criminal trial, the judiciary can intervene to protect the values underlying the privilege by ordering suppression of the statement, or reversing the conviction. Thus, the Fifth Amendment does not provide a substantive right against government compulsion to induce incriminating disclosures; rather, it is a prophylactic. This understanding, I believe, explains Justice Thomas's statement that "the privilege is a prophylactic one,"<sup>219</sup> and Justice Souter's understanding that the Court is free to expand *vel non* the "core of Fifth Amendment protection" depending on whether the claimant has made a persuasive case.<sup>220</sup>

Of course, this view of the Fifth Amendment has disturbing consequences. As recognized by Justice Breyer during the oral argument in *Chavez*, when the Fifth Amendment is construed as merely prophylactic, there will be scenarios where significant harm is incurred, but there is no constitutional basis for judicial

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<sup>215</sup> See *supra* notes 120-27 and accompanying text.

<sup>216</sup> See Parry, *supra* note 22, at 838 ("Concerns about terrorism, unstated in the opinions but on display in the briefs, feed the uncertainty of the middle and strengthen the hand of the justices who would narrow the privilege and limit the scope of substantive due process.").

<sup>217</sup> See *supra* notes 44-48 and accompanying text.

<sup>218</sup> Transcript of Oral Argument, *supra* note 1, at 20.

<sup>219</sup> *Chavez v. Martinez*, 538 U.S. 760, 772 n.3 (2003) (plurality opinion).

<sup>220</sup> See *id.* at 777-78 (Souter, J., concurring in the judgment); cf. Frantz, *supra* note 207, at 281 (stating Justice Thomas's and Justice Souter's opinions in *Chavez* recharacterized prior Fifth Amendment "decisions as mere prophylactic protections for the privilege, rather than as applications of the privilege itself").

intervention because under the reasoning of *Chavez* there has been no constitutional injury.<sup>221</sup> Imagine, for example, police violate the Fifth Amendment by not giving *Miranda* warnings or by employing psychological coercion to obtain a confession from an innocent suspect. State officials then use the confession in a grand jury proceeding to indict this suspect, use the confession to deny bail, and use the confession at a pretrial hearing to determine whether the suspect should be tried in juvenile or adult court.<sup>222</sup> In such a scenario, as Justice Breyer recognized, a person might be detained before trial “in jail for a week or a month and he’s been hurt, all right.”<sup>223</sup> But, if criminal charges are later dismissed, one can argue that the innocent suspect has suffered no Fifth Amendment violation because his compelled statement was never used in a courtroom setting.<sup>224</sup> Moreover, interpreting the Fifth Amendment as a prophylactic does nothing for the person envisioned in Justice Kennedy’s hypotheticals presented at the beginning of this Article.<sup>225</sup> Physically abusing a suspect to obtain a confession—or a judge’s order in a civil case holding a witness, who asserts a valid Fifth Amendment privilege, in contempt and confined until the witness testifies—involves no Fifth Amendment violation under the logic of *Chavez*.<sup>226</sup> During the oral argument in *Chavez*, Justice Breyer

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<sup>221</sup> See Transcript of Oral Argument, *supra* note 1, at 22-23 (“But there are a set of cases where it will hurt people. The set of cases where it will hurt people is where because [the police] violated *Miranda* but didn’t beat him up, and got a statement, they kept him jail. . . . So there he is in jail for a week or a month and he’s been hurt, all right.”).

<sup>222</sup> See *Crowe v. Cty. of San Diego*, 608 F.3d 406, 425 (9th Cir. 2010).

<sup>223</sup> Transcript of Oral Argument, *supra* note 1, at 23.

<sup>224</sup> See, e.g., *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) (“The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.” (citing *Chavez*, 538 U.S. at 767 (plurality opinion)); *Renda v. King* 347 F.3d 550, 559 (3d Cir. 2003) (“[I]t is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution.”). *But see Stoot v. City of Everett*, 582 F.3d 910, 924 (9th Cir. 2009) (“Where . . . a suspect’s criminal prosecution was not only initiated, but was commenced *because* of her allegedly unwarned confession, the ‘criminal case’ contemplated by the Self-Incrimination Clause has begun.” (quoting *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026-27 (7th Cir. 2006)); *Higazy v. Templeton*, 505 F.3d 161, 173 (2d Cir. 2007) (holding that “[arrestee’s] initial appearance . . . was part of the criminal case against [him]”).

<sup>225</sup> See *supra* note 1 and accompanying text.

<sup>226</sup> When posing this latter hypothetical, Justice Kennedy may have been thinking about *Maness v. Meyers*, 419 U.S. 449 (1975). In *Maness*, the Court addressed whether in a civil hearing a lawyer may be held in contempt for advising his client in good faith not to produce subpoenaed materials (allegedly obscene magazines) on the ground that the materials may incriminate the client. *Id.* at 458. The Court ruled that the lawyer may not be penalized even though his advice caused the client to disobey the court’s order. *Id.* at 465-66. The *Maness* Court explained that the Fifth Amendment “would be drained of its meaning” if a lawyer “could be penalized for advising his client in good faith to assert it.” *Id.* Although the lawyer’s client was also held in contempt and fined for refusing to produce the court-ordered materials,

seemed worried that the result in *Chavez* would also decide these hypothetical cases.<sup>227</sup> Breyer was correct; *Chavez*'s logic means that no Fifth Amendment violation occurred in these scenarios.

Although reading the Fifth Amendment as a prophylactic (rather than a constitutional right) entails the harm described above, from another perspective, interpreting the Fifth Amendment as merely prophylactic means that the Court can "rein in the privilege by transforming large parts of current doctrine into prophylactic rules that may be subject to congressional override"<sup>228</sup> or judicial overruling.<sup>229</sup> Ultimately, I believe, the aim of Justice Thomas's opinion was to reshape Fifth Amendment doctrine. Other scholars have recognized that the reasoning of *Chavez* can significantly influence how the privilege is interpreted in future cases.<sup>230</sup> While Justices Thomas and Souter insisted that precedent commanded their interpretation of the Fifth Amendment, this is incorrect. The reasoning of the six Justices "enunciates a new approach with real implications

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the Court in *Maness* did not address the validity of the contempt penalty imposed on the client. *Id.* at 455 n.5. Justice Kennedy's hypothetical poses the issue left open in *Maness*: Would holding a witness in a civil case—who has a valid Fifth Amendment privilege—in contempt and confined until the witness testifies, violate the Fifth Amendment?

<sup>227</sup> See Transcript of Oral Argument, *supra* note 1, at 23 ("I don't know if we should—it seems to me what we're going to decide in this case is effectively going to decide that.").

<sup>228</sup> Parry, *supra* note 22, at 837.

<sup>229</sup> See, e.g., *Montejo v. Louisiana*, 556 U.S. 778 (2009). The Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), in *Montejo*, 556 U.S. at 797. *Jackson* had ruled that, under the Sixth Amendment right to counsel, police are barred from initiating interrogation of a criminal defendant once he has requested counsel at an arraignment. *Jackson*, 475 U.S. at 636. The *Jackson* Court essentially applied its prior ruling in *Edwards v. Arizona*, 451 U.S. 477 (1981), to the Sixth Amendment context. See *Jackson*, 475 U.S. at 636. In *Edwards*, a Fifth Amendment case, the Court ruled that under *Miranda*, police are forbidden from initiating questioning of an arrestee after the arrestee has invoked his right to counsel during custodial interrogation. *Id.* at 484-85. A later case, *Minnick v. Mississippi*, 498 U.S. 146 (1990), extended the *Edwards* rule to scenarios where an arrestee had actually consulted with counsel, *id.* at 151-52. In explaining why *Jackson* should be overruled, Justice Scalia, the author of *Montejo*, noted the "prophylactic protection" provided by *Miranda*, *Edwards*, and *Minnick*, and stated that "[t]hese three layers of prophylaxis are sufficient" to protect the constitutional rights of persons subjected to police interrogation. *Montejo*, 556 U.S. at 794-95.

<sup>230</sup> See, e.g., Frantz, *supra* note 207, at 279-80 ("By focusing the privilege on the use at trial of compelled statements at trial, *Chavez* has a potentially significant impact on the privilege."); cf. Marvin Zalman, *Reading the Tea Leaves of Chavez v. Martinez: The Future of Miranda*, 40 CRIM. L. BULL. 299, 332 (2004) ("A closer examination of *Chavez* discloses fault lines in the Court's understanding of the Fifth Amendment privilege that will undoubtedly come into play in its [then] anticipated decisions in *Seibert* and *Patane*."); Geoffrey B. Fehling, Note, Verdugo, *Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 484 (2011) ("The aftermath of *Chavez* is unclear, leaving courts to attempt to protect the Fifth Amendment's constitutional guarantees without exercising too much discretion in interpreting the scope of constitutional rights." (footnote omitted)).

for the future.”<sup>231</sup> Justice Thomas in particular has not been afraid to take bold steps in order to change constitutional doctrine, especially constitutional rules announced by whom he perceived to be liberal Justices. According to one report, “Thomas is laying the ground work for opinions that may be outliers now, but could plant seeds for the future.”<sup>232</sup> But, as demonstrated within a year of the Court’s decision, *Chavez* is no outlier.

In *United States v. Patane*,<sup>233</sup> Justice Thomas relied on *Chavez* to reverse a ruling requiring suppression of a gun found after a suspect, who had been arrested and interrogated without the provision of *Miranda* warnings, and incriminated himself during the interrogation.<sup>234</sup> Justice Thomas wrote for a plurality of the Court in *Patane* when he explained that “a mere failure to give *Miranda* warnings does not, by itself, violate a suspect’s constitutional rights or even the *Miranda* rule.”<sup>235</sup> According to Justice Thomas, it follows from this proposition that police do not violate the Fifth Amendment or *Miranda* by negligent or even deliberate failures to provide *Miranda* warnings: “Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, ‘[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy’ for any perceived *Miranda* violation.”<sup>236</sup> What case supports this understanding of Fifth Amendment law?

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<sup>231</sup> Frantz, *supra* note 207, at 280.

<sup>232</sup> Ariane de Vogue, *Clarence Thomas’ Supreme Court Legacy*, CNN: POLITICS (Oct. 22, 2016, 10:06 AM), <http://www.cnn.com/2016/10/22/politics/clarence-thomas-supreme-court-25-years/> [https://perma.cc/36HQ-QCTF]. This same story quotes Ken Blackwell and Ken Klukowski, two conservative pundits, stating that “Justice Thomas is writing for history.” *Id.*

<sup>233</sup> 542 U.S. 630 (2004).

<sup>234</sup> *Id.* at 634-35 (plurality opinion).

<sup>235</sup> *Id.* at 641. Of course, after years of stating that *Miranda* was merely a prophylactic rule and not required by the Constitution, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Court disavowed these statements and held that *Miranda* “announced a constitutional rule,” and thus, could not be overturned by a congressional statute, *id.* at 444. As one observer has noted, although the *Dickerson* dissenters (Justices Scalia and Thomas) conceded that characterizing or viewing the *Miranda* doctrine as prophylactic “might have rendered *Miranda* jurisprudence coherent, they rejoiced in the Court’s failure to rely on it because, believing that such prophylaxis was an ‘immense and frightening antidemocratic power [that] does not exist,’ they suggested that ‘incoherence [might be] the lesser evil.’” *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 301 (2004) (alterations in original). In *Patane*, Justice Thomas stated “the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.” *Patane*, 542 U.S. at 636. Thus, “*Patane* revealed that the *Dickerson* dissenters, eschewing their own rhetoric that ‘incoherence [might be] the lesser evil,’ have fulfilled their own prophecy.” *The Supreme Court, 2003 Term—Leading Cases, supra*, at 301 (footnote omitted). For a meticulous critique of *Patane*, see Yale Kamisar, Tribute, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda “Poisoned Fruit” Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004).

<sup>236</sup> *Patane*, 542 U.S. at 641-42 (alteration in original) (quoting *Chavez v. Martinez*, 538 U.S. 760, 790 (2003)).

Justice Thomas cites *Chavez*. The future will reveal what further impact *Chavez* will have on the Fifth Amendment.

#### CONCLUSION

Considering the Self-Incrimination Clause, then-Chief Judge Magruder of the United States Court of Appeals for the First Circuit wrote, “[o]ur forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day.”<sup>237</sup> In *Chavez*, not only did Justice Thomas ignore “a lot of history,” he also failed to heed the admonition that “the history of the privilege establishes . . . that it is not to be interpreted literally.”<sup>238</sup> Justice Thomas had other concerns. The history of the Fifth Amendment and the Court’s precedents were obstacles to Justice Thomas’s goal of transforming the Self-Incrimination Clause from a substantive right into a judge-made prophylactic rule. When Justice Stevens complained that Justice Thomas’s opinion was “fundamentally flawed” because “it incorrectly assumes that coercive interrogation is not unconstitutional when it occurs because it merely violates a judge-made ‘prophylactic’ rule,”<sup>239</sup> Justice Thomas offered no rebuttal. Perhaps, Justice Thomas’s silence to this complaint suggests that Justice Stevens correctly diagnosed what Justice Thomas was doing: transforming the Self-Incrimination Clause from a substantive *right* into a judge-made prophylactic rule.

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<sup>237</sup> *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954).

<sup>238</sup> *Ullmann v. United States*, 350 U.S. 422, 438 (1956).

<sup>239</sup> *Chavez*, 538 U.S. at 788-89 n.3 (Stevens, J., concurring in part and dissenting in part).