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## RIPENESS OF SELF-INCRIMINATION CLAUSE DISPUTES

MICHAEL J. ZYDNEY MANNHEIMER\*

Historically, disputes regarding witnesses' claims pursuant to the Self-Incrimination Clause of the Fifth Amendment,<sup>1</sup> regardless of the varying contexts in which they arise, have been resolved at the time each claim is made. Thus, for example, where a witness before a Congressional committee is asked a question she believes calls for an incriminatory response, and the committee disagrees, the witness typically will refuse to answer and the committee can commence a contempt proceeding against her. In such a proceeding, the court will resolve the Self-Incrimination Clause dispute because the witness' claim of the constitutional privilege, if valid, will provide her a complete defense to the contempt charge. Similarly, a person who suffers a legal detriment because he refuses to provide incriminating information to the government in a less formalized setting will often bring an action challenging the government's right to impose the detriment upon him because it amounts to compulsion to incriminate himself. Again, the court will resolve the Self-Incrimination Clause dispute to determine whether the invoker's<sup>2</sup> rights have been violated.

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<sup>1</sup> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. The Clause has been held to bind the States as well as the federal government via the Due Process Clause of the Fourteenth Amendment. See *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). This article assumes such incorporation was proper and that the Clause applies equally to State and federal action. But see George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 221 (2001) (arguing persuasively that different standards should govern with respect to the criminal procedure provisions of the Bill of Rights depending on whether federal or State action is at issue).

<sup>2</sup> This article often uses the term "invoker" to refer to the person who invokes, or could invoke, the Fifth Amendment's privilege against self-incrimination. See Robert Heidt, *The*

Yet, three Terms ago, in *Chavez v. Martinez*, a majority of the Supreme Court held that the Self-Incrimination Clause is not violated unless and until a person's compelled self-incriminatory words are actually used against him in a criminal judicial proceeding.<sup>3</sup> This throws into question the historic practice of addressing Self-Incrimination Clause issues without regard for the procedural posture of the particular case. If a violation of the Self-Incrimination Clause is not complete until a person has been required to be a "witness against himself" "in [a] criminal case," then, arguably, neither of the disputes mentioned above should be decided at all because neither is ripe for review.

The Court has not yet come to terms with a ripeness requirement with respect to claims of the constitutional privilege against self-incrimination. For example, in the Term before *Chavez* was decided, the Court considered the claim of a state prisoner that by requiring his admission of guilt in a prison program for sex offenders, on pain of expulsion from the program and the imposition of less desirable conditions of confinement, the State violated his constitutional privilege against self-incrimination.<sup>4</sup> Though the Court ultimately rejected the claim, it did so on the ground that the prisoner had not experienced compulsion sufficient to make out a violation of the Self-Incrimination Clause.<sup>5</sup> None of the nine Members of the Court considered the possibility that the claim should have been rejected because the plaintiff had never been a "witness against himself" "in [a] criminal case," and therefore the claim was not ripe for review. Likewise, subsequent to *Chavez*, in *Hiibel v. Sixth Judicial District Court*, the Court addressed the constitutionality of a Nevada statute requiring individuals to identify themselves when asked to do so by the police.<sup>6</sup> The Court rejected the claim that the statute violated the Self-Incrimination Clause, reasoning that mere disclosure of one's name ordinarily "present[s] no reasonable danger of incrimination."<sup>7</sup> The dissenters<sup>8</sup> strongly disagreed, arguing that "[a]

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*Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1066 (1982).

<sup>3</sup> See 538 U.S. 760 (2003) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.); *id.* at 777 (Souter, J., joined by Breyer, J., concurring in the judgment).

<sup>4</sup> See *McKune v. Lile*, 536 U.S. 24, 30-32 (2002) (plurality opinion).

<sup>5</sup> See *id.* at 35 (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ.); *id.* at 48-49 (O'Connor, J., concurring in the judgment).

<sup>6</sup> 124 S. Ct. 2451 (2004).

<sup>7</sup> *Id.* at 2460.

<sup>8</sup> Although Justice Stevens wrote only for himself, three other Justices, who dissented primarily on Fourth Amendment grounds, indicated their basic agreement with Justice Stevens' Self-Incrimination Clause analysis as well. See *id.* at 2465 (Breyer, J., joined by Souter and Ginsburg, JJ., dissenting) ("There are sound reasons rooted in Fifth Amendment

person's identity obviously bears informational and incriminating worth."<sup>9</sup> Again, however, none of the Justices considered the possibility that, since the defendant had never been a "witness against himself" "in [a] criminal case," the issue was unripe pursuant to the principles enunciated in *Chavez*.

Since the Burger Court era, the Court has been quite stringent in enforcing the requirement that any dispute<sup>10</sup> be ripe for review in order to satisfy the "case or controversy" requirement of Article III of the Constitution.<sup>11</sup> In the Self-Incrimination Clause context, however, the Court has failed to perceive its own gradual slippage from deciding concrete cases to deciding those in which the actual danger of a violation of the Clause, properly understood, is remote at best. This slippage is largely a result of the Court's failure to distinguish between claims of the constitutional privilege against self-incrimination litigated after a criminal conviction, on the one hand, from those litigated in the investigatory stage of a criminal matter and those arising in contexts wholly unrelated to criminal matters, on the other.

This article argues that, in light of the renewed understanding of the Self-Incrimination Clause exemplified by *Chavez*, the federal courts should refuse to address disputes over the validity of claims of the constitutional privilege against self-incrimination unless there is at least an imminent danger that a person's words will be used against her in a criminal judicial proceeding.<sup>12</sup> Part I examines the elementary rules that govern a claim of

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considerations for adhering to this Fourth Amendment legal condition circumscribing police authority to stop an individual against his will.") (citing *id.* at 2461-64 (Stevens, J., dissenting)).

<sup>9</sup> *Id.* at 2464 (Stevens, J., dissenting).

<sup>10</sup> "Dispute" is used broadly here, as the ripeness doctrine has been applied not only to claims but also to defenses, in criminal cases as well as civil. See, e.g., *United States v. Quinones*, 313 F.3d 49, 57-60 (2d Cir. 2002) (considering ripeness of defendants' pre-trial claim that Federal Death Penalty Act is unconstitutional).

<sup>11</sup> See U.S. CONST. art. III, § 2.

<sup>12</sup> This article's focus is limited to claims of the constitutional privilege against self-incrimination that ultimately make their way into federal court. This is because the ripeness requirement, like all justiciability requirements stemming from the federal Constitution, binds only the federal courts and does not apply even to a state court when considering a federal claim. See, e.g., *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (citation omitted) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution."); *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) ("We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory."). Several prominent

the constitutional privilege against self-incrimination in all varieties of settings, ranging from those in which the invoker of the privilege has already had her words used against her in a criminal proceeding, to those in which there is not even a hint that this will ever occur. Part II discusses *Chavez v. Martinez*, which, for the first time, held that a Self-Incrimination Clause violation occurs only if and when a person's compelled statements are used against her in a criminal proceeding, and then discusses the conflict between *Chavez* and the courts' historic practice of addressing disputes over claims of the constitutional privilege against self-incrimination before a criminal prosecution is initiated. Part III examines the ripeness doctrine in general terms, and then argues that the Court must take the ripeness requirement more seriously in Self-Incrimination Clause cases. This Part re-examines the various types of Self-Incrimination Clause disputes with ripeness in mind and proposes a framework for deciding whether each type presents a ripe controversy. It argues that the Self-Incrimination Clause is similar to its Fifth Amendment neighbor, the Takings Clause, in this respect: there is no absolute right to silence pursuant to the Self-Incrimination Clause just as there is no absolute right to property pursuant to the Takings Clause. Thus, an individual faced with the decision whether to incriminate himself or herself is in the same position as one whose property has been taken. Each must await further government action—the initiation of criminal proceedings in the one case and the refusal to pay just compensation in the other—before the issue is ripe for review.

## I. SELF-INCRIMINATION CLAUSE JURISPRUDENCE

The Supreme Court's jurisprudence on the Self-Incrimination Clause has addressed claims that arise in a variety of contexts. On one end of the spectrum, the Court has addressed claims of the constitutional privilege

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commentators, beginning with Paul Freund, have argued that this rule is incorrect and that state courts ought to be bound by federal justiciability standards when considering federal claims. See Paul Freund, *The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 95 (1952). See generally William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263 (1990); William P. Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U. L.J. 473 (1981); see also Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 311-12 & nn. 174, 176 (1980). If so, then the principles suggested in this article would have much broader application. Such a question is, however, beyond the scope of this article. Of course, nothing prevents the States from adopting their own justiciability rules that mirror those that constrain federal court jurisdiction, and at least some have done so. See Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1154-56 (1984).

against self-incrimination litigated after a criminal conviction of the person whose compelled statements have been used against him or her at trial. At the other end, the Court has addressed Self-Incrimination Clause disputes arising in contexts where the threat of criminal prosecution is, at best, remote. The Court has consistently ignored these distinctions and resolved these different types of disputes by applying principles universally applicable to all, on the assumption that the Clause is violated at the time that self-incriminating statements are compelled.

#### A. THE VARYING CONTEXTS IN WHICH SELF-INCRIMINATION CLAUSE DISPUTES ARE LITIGATED

The Supreme Court has addressed disputes regarding the Self-Incrimination Clause both before and after a criminal prosecution has taken place. In both categories of cases, the dispute can arise in a variety of settings: before a grand jury; before a Congressional committee; before an administrative agency or other analogous governmental body; and in a civil action.

##### 1. *After the Initiation of a Criminal Prosecution*

Even if one knew nothing about Self-Incrimination Clause jurisprudence, one could easily guess that the Supreme Court would have had occasion to address Self-Incrimination Clause disputes after a criminal prosecution and conviction. The core of the Self-Incrimination Clause concerns the defendant who claims to have been “compelled . . . to be a witness against himself,” leading to his conviction of a criminal charge, in violation of the Clause. Only in very rare cases does the compulsion itself occur at trial, since the core meaning of the Clause has been clear to actors in the criminal justice system for some time: no defendant can be required to testify at his or her own criminal trial. Thus, the compulsion and the “witnessing” typically occur at two different times, the former prior to trial and the latter at trial. One way in which the compulsion does occur at trial is where the government does not directly force the defendant to testify, but indirectly pressures him to do so by commenting on his silence at trial, making the decision to remain silent “costly.”<sup>13</sup>

More often, the purported compulsion will have occurred before trial but the Self-Incrimination Clause dispute will not have been fully litigated until after a prosecution has been initiated. For example, the putative defendant will have made disclosures to a state or federal grand jury, and a prosecutor will attempt to use those disclosures against her at a criminal

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<sup>13</sup> See *Griffin v. California*, 380 U.S. 609, 614 (1965).

trial. The Supreme Court has long addressed Self-Incrimination Clause disputes arising in this way.<sup>14</sup> Sometimes, the dispute arises because the putative defendant has arguably been compelled to provide disclosures in a civil action and those disclosures are later used to prosecute her for a crime.<sup>15</sup> In other cases, the dispute arises because the putative defendant has arguably been compelled to make disclosures before an administrative agency to which she has been subpoenaed, and, again, a prosecutor then seeks to use the evidence against her in a criminal prosecution.<sup>16</sup> And in some cases, an arguably compelled disclosure made before a Congressional or other legislative committee is later used against the defendant in a criminal prosecution.<sup>17</sup>

Finally, Self-Incrimination Clause disputes often arise in less formal settings. These are analogous to the cases in which testimony has arguably been compelled before an administrative agency. However, the "proceeding" is an informal one and the body requesting the information has neither subpoena power nor contempt power, although less formally recognized persuasive forces are at work. For example, the Court has addressed whether statements induced by a state probation officer, during a compulsory meeting, could properly be used against the probationer at a subsequent criminal trial,<sup>18</sup> and whether disclosures made on a mandatory federal income tax return were properly used against the taxpayer to convict him of a criminal charge.<sup>19</sup> In perhaps the most common type of case falling into this category, the defendant claims that a confession was coerced from him by the police and that confession is later used against him at trial, thereby making the suspect an unwilling "witness against himself" "in [a] criminal case."<sup>20</sup> The Supreme Court has long addressed such

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<sup>14</sup> See *Heike v. United States*, 227 U.S. 131, 139-40 (1913); see also *New Jersey v. Portash*, 440 U.S. 450, 451-52 (1979); *United States v. Washington*, 431 U.S. 181, 183-85 (1977); *United States v. Monia*, 317 U.S. 424, 426 (1943).

<sup>15</sup> See, e.g., *United States v. Kordel*, 397 U.S. 1, 2-4 (1970) (interrogatories in federal civil condemnation proceeding); *United States v. Blue*, 384 U.S. 251, 256 (1966) (disclosures in federal tax proceedings); *Feldman v. United States*, 322 U.S. 487, 488-89 (1944) (testimony in state bankruptcy proceeding).

<sup>16</sup> See, e.g., *Garrity v. New Jersey*, 385 U.S. 493, 494-95 (1967) (testimony before state attorney general); *Smith v. United States*, 337 U.S. 137, 141-45 (1949) (testimony before federal Office of Price Administration).

<sup>17</sup> See, e.g., *Adams v. Maryland*, 347 U.S. 179, 179-80 (1954).

<sup>18</sup> See *Minnesota v. Murphy*, 465 U.S. 420, 422-25 (1984).

<sup>19</sup> See *Garner v. United States*, 424 U.S. 648, 649-50 (1976).

<sup>20</sup> I have argued elsewhere that where coercion is used by governmental officials to extract a confession, the Fourth Amendment's prohibition of unreasonable searches and seizures is violated, and when the confession is used at trial against the defendant, the Self-

claims, starting in 1897 with *Bram v. United States*.<sup>21</sup> With its *Miranda* jurisprudence,<sup>22</sup> the Court has created a distinct doctrinal line to address the problem of the inherently coercive nature of the interrogation room and has grounded that doctrinal line squarely in the Self-Incrimination Clause.<sup>23</sup>

## 2. *Before (or Unrelated to) the Initiation of a Criminal Prosecution*

Very often, the courts will address Self-Incrimination Clause disputes before a criminal prosecution is instituted. The Supreme Court has recognized that the privilege can apply in any setting, not only in a "criminal case." As the Court wrote in *McCarthy v. Arndstein*:

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. The privilege protects a mere witness as fully as it does one who is also a party defendant.<sup>24</sup>

Using as a springboard its statement in *McCarthy* that the Fifth Amendment privilege "applies" in settings other than criminal proceedings, the Court has gone further and concluded that the Self-Incrimination Clause "'privileges [the witness] not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"<sup>25</sup>

Thus, the Court has generally assumed, at least until recently,<sup>26</sup> that the Self-Incrimination Clause protects two separate and distinct rights. Aside

Incrimination Clause is violated. See Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 60-61 (2002).

<sup>21</sup> 168 U.S. 532 (1897). Two earlier cases addressed the issue of the use of allegedly coerced confessions against a defendant in a criminal case, but these cases did not cite the Fifth Amendment and may have treated the issue as raising merely sub-constitutional evidentiary questions. See *Pierce v. United States*, 160 U.S. 355, 357 (1896); *Hopt v. Utah*, 110 U.S. 574, 583-87 (1884).

<sup>22</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>23</sup> See Mannheimer, *supra* note 20, at 69-72.

<sup>24</sup> 266 U.S. 34, 40 (1924); accord *Maness v. Meyers*, 419 U.S. 449, 464 (1975); see also E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 29-34 (1949) (noting that the privilege applies in legislative and administrative bodies); Note, *Applicability of Privilege Against Self-Incrimination to Legislative Investigations*, 49 COLUM. L. REV. 87, 89 (1949) (noting that application of the privilege has been extended to forfeiture, bankruptcy, and other civil proceedings).

<sup>25</sup> *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)); accord *Kastigar v. United States*, 406 U.S. 441, 461 (1972) (writing that the Fifth Amendment privilege against self-incrimination "usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer").

<sup>26</sup> See *infra* Part II.A.



from protecting against the possibility of a person's compelled statements being used against him or her in a criminal judicial proceeding,<sup>27</sup> the Clause "also is operative before criminal proceedings are instituted; it bars the government from using compulsion to obtain incriminating information from any person."<sup>28</sup>

Thus, in case of a dispute over a claim of the constitutional privilege, the parties need not, under current law, wait until after a criminal prosecution is initiated for resolution of the dispute. Instead, once the dispute arises, the parties can have it resolved in court, often in a contempt proceeding. In *United States v. Mandjuano*, the Supreme Court outlined the typical procedure when the dispute arises in the grand jury, though the description is equally applicable to other fora:

If the witness interposes his privilege, the grand jury has two choices. If the desired testimony is of marginal value, the grand jury can pursue other avenues of inquiry; if the testimony is thought sufficiently important, the grand jury can seek a judicial determination as to the bona fides of the witness' Fifth Amendment claim, in which case the witness must satisfy the presiding judge that the claim of privilege is not a subterfuge. If in fact there is reasonable ground to apprehend danger to the witness from his being compelled to answer, the prosecutor must then determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness.<sup>29</sup>

Where the contempt court has found a good faith basis for the claim of the constitutional privilege, and "[i]f immunity is sought by the prosecutor and granted by the presiding judge, the witness can then be compelled to answer, on pain of contempt, even though the testimony would implicate the witness in criminal activity."<sup>30</sup>

If, on the other hand, the presiding judge feels there is no justification for the claim of privilege, the grand jury witness will be held in contempt. Then, the grand jury witness has two options. If she stands in contempt,

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<sup>27</sup> See *United States v. Patane*, 124 S. Ct. 2620, 2626 (2004) (plurality opinion) ("[T]he core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.").

<sup>28</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 327 (1976) (Brennan, J., concurring in part and dissenting in part); see *Garner v. United States*, 424 U.S. 648, 653 (1976) ("[T]he privilege protects against the use of compelled statements as well as guarantees the right to remain silent absent immunity."); *Maness*, 419 U.S. at 461 (writing that privilege "assure[s] that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action"); see also Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2472 (2002) ("[I]n the Court's view, any time the government compels testimony in any sort of official proceeding, the Fifth Amendment is violated . . .").

<sup>29</sup> 425 U.S. 564, 575 (1976) (quotations and citations omitted).

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

again, the grand jury will not obtain the needed information and she will be punished as a contemnor. On the other hand, the grand jury witness can usually purge herself of the contempt by then providing the requested testimony.<sup>31</sup> However, if she does, it is not at all clear that she can later challenge the admissibility of that testimony in a criminal trial on the ground that she was compelled to provide it on pain of contempt.<sup>32</sup>

The courts address with some frequency the validity of such a claim of the constitutional privilege outside the confines of a criminal prosecution. For example, as noted above, a grand jury witness may claim the privilege and refuse to answer questions and a dispute arises over whether the privilege is properly claimed. The dispute can take a number of forms.<sup>33</sup> For example, the questioner and the grand jury witness might disagree over whether the question truly calls for a response that might incriminate the witness.<sup>34</sup> Also, the grand jury witness might be granted immunity, and the disagreement is over whether the immunity conferred is broad enough to supplant the constitutional privilege, thereby requiring that the witness answer.<sup>35</sup> A third dispute can arise over whether the government has acted with compulsion, such as by attaching a penalty or the deprivation of a benefit to a claim of the constitutional privilege.<sup>36</sup> Finally, the dispute can be over whether the grand jury witness has adequately apprised the grand jury of her intention to rely on the privilege.<sup>37</sup>

Similarly, as noted above, the Self-Incrimination Clause dispute can arise when a person has been called before an administrative agency or analogous body and is asked potentially incriminatory questions. Again, the dispute can arise where the questioner and the invoker disagree over

<sup>31</sup> See *id.* at 606 (Brennan, J., concurring in the judgment) ("If the invocation of the privilege is disallowed, the putative defendant will then have the opportunity to answer the question posed prior to the imposition of sanctions for contempt.") (citing *Garner*, 424 U.S. at 663). Obviously, she can also appeal the contempt citation.

<sup>32</sup> See *infra* text accompanying notes 133-46.

<sup>33</sup> The types of disputes discussed do not exhaust the possibilities of disputes that can arise under the Self-Incrimination Clause. These four, however, in one form or another, appear to be the most common.

<sup>34</sup> See, e.g., *Hoffman v. United States*, 341 U.S. 479, 482 (1951); *Blau v. United States*, 340 U.S. 159, 160-61 (1950); *Mason v. United States*, 244 U.S. 362, 363-67 (1917); *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906).

<sup>35</sup> See, e.g., *Kastigar v. United States*, 406 U.S. 441, 442 (1972); *Ullmann v. United States*, 350 U.S. 422, 424-26 (1956); *Jack v. Kansas*, 199 U.S. 372, 372-74 (1905); *Counselman v. Hitchcock*, 142 U.S. 547, 548-60 (1892).

<sup>36</sup> See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-06 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973); *Stevens v. Marks*, 383 U.S. 234, 238 (1966).

<sup>37</sup> See, e.g., *Rogers v. United States*, 340 U.S. 367, 370-71 (1951); *United States v. Monia*, 317 U.S. 424, 427 (1943).

whether: the question actually calls for an incriminatory response;<sup>38</sup> the immunity conferred is broad enough to replace the constitutional privilege and require the invoker to answer;<sup>39</sup> compulsion has been utilized by the government;<sup>40</sup> or the invoker has effectively waived the constitutional privilege by failing to claim it.<sup>41</sup> Again, this dispute is often resolved in court prior to the initiation of any criminal prosecution.

Likewise, it is sometimes the case that a person is called before a Congressional or state legislative committee and a Self-Incrimination Clause dispute arises. Obviously, the same issues can arise in such a context.<sup>42</sup> Once again, the dispute is often resolved in court at the time it arises, in advance of "any criminal case."

Finally, the dispute can arise in a civil case, in which a litigant is ordered by the court, in the course of discovery, to make potentially self-incriminating disclosures. Again, the same issues can arise.<sup>43</sup> And again, the dispute is often fully litigated before there is any hint of a criminal prosecution. As the Court held in *United States v. Saline Bank of Virginia*, one of the oldest cases addressing compelled self-incrimination, "[t]he rule

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<sup>38</sup> See, e.g., *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77-79 (1965) (required registration with Attorney General); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923) (deportation proceedings).

<sup>39</sup> See, e.g., *United States v. Freed*, 401 U.S. 601, 603-04 (1971) (requirement that gun owner register with Internal Revenue Service); *Albertson*, 382 U.S. at 79-81; *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 53-54 & n.2 (1964) (testimony before special bi-state investigatory commission); *United States v. Murdock*, 284 U.S. 141, 146-49 (1931) (testimony before Internal Revenue Service agent).

<sup>40</sup> See, e.g., *McKune v. Lile*, 536 U.S. 24, 30-32 (2002) (plurality opinion) (statements made as part of prison sex offender treatment program); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285-86 (1998) (testimony before clemency board); *Baxter v. Palmigiano*, 425 U.S. 308, 312-13 (1976) (testimony before prison disciplinary board); *Spevack v. Klein*, 385 U.S. 511, 512-13 (1967) (hearing before state "Judicial Inquiry").

<sup>41</sup> See, e.g., *Haynes v. United States*, 390 U.S. 85, 88-89 (1968) (registration of firearm); *Grosso v. United States*, 390 U.S. 62, 63-65 (1968) (payment of taxes); *Marchetti v. United States*, 390 U.S. 39, 40-43 (1968) (payment of taxes and registration with Internal Revenue Service); *Malloy v. Hogan*, 378 U.S. 1, 3, 6 (1964) (testimony compelled before state inquiry conducted by "referee" appointed by state court); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 113 (1927) (testimony before immigration agent).

<sup>42</sup> See *Emspak v. United States*, 349 U.S. 190, 192-94 (1955) (dispute over whether witness properly claimed privilege); *Quinn v. United States*, 349 U.S. 155, 157-60 (1955) (same).

<sup>43</sup> See, e.g., *Maness v. Meyers*, 419 U.S. 449, 450-54 (1975) (in suit for injunctive relief against purveyor of pornography, where self-incriminatory matter was subpoenaed, dispute arose as to likelihood of future prosecution); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that the privilege applies in federal bankruptcy proceedings).

clearly is, that a party is not bound to make any discovery [in a civil case] which would expose him to penalties."<sup>44</sup>

## B. GENERAL PRINCIPLES GOVERNING SELF-INCRIMINATION CLAUSE DISPUTES

A number of principles emerge from the cases addressing whether a claim of the constitutional privilege has been properly made, regardless of the setting. This article focuses on three of those principles. First, the invoker of the constitutional privilege must affirmatively claim the privilege in order to take advantage of it. Second, in order for the sought-after information to be deemed incriminatory as to the invoker, the threat of future prosecution must be real and not speculative. Finally, although the courts must grant the invoker considerable leeway in determining whether a question calls for an incriminatory response, the courts, and not the invoker herself, must be the ultimate arbiter.

### 1. *The Requirement That the Invoker Claim the Constitutional Privilege at the Time the Incriminatory Response is Called For*

One rule that has emerged from the Supreme Court's jurisprudence on the Self-Incrimination Clause is that the invoker must claim the Fifth Amendment privilege at the time the incriminatory response is called for.<sup>45</sup> Thus, if the would-be invoker simply refuses to answer the question without giving a reason, or gives a reason other than the constitutional privilege, she is automatically subject to punishment for contempt, irrespective of whether a proper claim of that privilege would have been valid.<sup>46</sup> In addition, if, instead of claiming the constitutional privilege, she testifies falsely, she is liable for perjury, even if a claim of that privilege at the time would have

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<sup>44</sup> 26 U.S. 100, 104 (1828); *see also* *Boyd v. United States*, 116 U.S. 616, 631 (1886) ("[O]ne cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property.").

<sup>45</sup> There are narrow exceptions to this rule. For example, if the government attaches a penalty to the assertion of the constitutional privilege itself, the invoker need not claim it in order to preserve a later claim that she has been compelled to speak. *See Minnesota v. Murphy*, 465 U.S. 420, 434-35 (1984). In addition, the requirement of a timely objection is excused in those rare instances where requiring an assertion of the constitutional privilege is tantamount to "oblig[ing] [one] 'to prove guilt to avoid admitting it.'" *Marchetti*, 390 U.S. at 50 (quoting *United States v. Kahringer*, 345 U.S. 22, 34 (1953)).

<sup>46</sup> *See, e.g., Rogers v. United States*, 340 U.S. 367, 369-70 (1951) (holding a claim of constitutional privilege invalid where witness gave different reason upon refusal to answer and claimed that privilege as "pure afterthought" only the following day when given opportunity to purge herself of contempt).

been proper.<sup>47</sup> Moreover, if the putative invoker answers without making a claim of the Fifth Amendment privilege, she cannot "unring the bell": she cannot take her answer back, and retroactively claim that privilege.<sup>48</sup> Similarly, where "criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."<sup>49</sup> And once information is divulged, either without proper objection or because the objection has come too late, it may be used by the authorities for any purpose, including direct evidence of the invoker's guilt at a subsequent criminal trial.<sup>50</sup>

These requirements, the Court has reasoned, strike the appropriate balance between "the Fifth Amendment privilege and the generally applicable principle that governments have the right to everyone's testimony."<sup>51</sup> If the subject of the inquiry does not object, the government may not know that it is about to elicit arguably incriminatory testimony. Whether a seemingly innocuous question might lead to incriminating testimony is a matter peculiarly within the knowledge of that person, and she must put the government on notice that this is so if she is to preserve her claim that her answer was compelled.<sup>52</sup>

Thus, in *United States v. Monia*, the defendants had been subpoenaed before a grand jury and gave testimony without ever claiming the constitutional privilege.<sup>53</sup> They were later indicted for crimes relating to their testimony.<sup>54</sup> They argued that the indictment should be dismissed, but the Supreme Court disagreed, holding that the defendants voluntarily

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<sup>47</sup> See *United States v. Wong*, 431 U.S. 174, 178 (1977).

<sup>48</sup> See *Rogers*, 340 U.S. at 371 (holding that witness not permitted "to select any stopping place in the testimony"); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 113 (1927) ("The privilege may not be relied on and must be deemed waived, if not in some manner fairly brought to the attention of the tribunal which must pass upon it."); *Brown v. Walker*, 161 U.S. 591, 596 (1896) ("[I]f the witness himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.").

<sup>49</sup> *Rogers*, 340 U.S. at 373; see also Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1753 (1979).

<sup>50</sup> See, e.g., *Garner v. United States*, 424 U.S. 648, 665 (1976) ("[S]ince Garner made disclosures instead of claiming the privilege on his tax returns [h]e . . . was foreclosed from invoking the privilege when such information was later introduced as evidence against him in a criminal prosecution."); *United States v. Kordel*, 397 U.S. 1, 10 (1970) (holding that the defendant's "failure at any time to assert the constitutional privilege" when answering interrogatories in civil matter "leaves him in no position to complain now that he was compelled to give testimony against himself").

<sup>51</sup> *Garner*, 424 U.S. at 655.

<sup>52</sup> *Id.*

<sup>53</sup> 317 U.S. 424, 426 (1943).

<sup>54</sup> See *id.*

testified and therefore were not "compelled": "The amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."<sup>55</sup>

## 2. *The Minimal Need for Concreteness of the Threat of a Future Prosecution*

It is well settled that in order for a person to claim the Fifth Amendment privilege, the threat that she ultimately will be prosecuted based on her disclosures must be real and concrete, not imaginary or speculative. The definitive exposition of this rule comes from the English case of *Regina v. Boyes*:

[T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and insubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice . . . . [I]t would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.<sup>56</sup>

Early in the Supreme Court's jurisprudence on the Self-Incrimination Clause, it adopted this rationale to limit the reach of the Clause. Thus, in *Brown v. Walker*, in upholding a federal immunity statute for the first time, the Court quoted this passage at length.<sup>57</sup> It reasoned that the Self-Incrimination Clause "presupposes a legal detriment to the witness arising from" his disclosures, and that if no criminal prosecution were possible

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<sup>55</sup> *Id.* at 427; see also *Garner*, 424 U.S. at 654 ("[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself."); *Rogers v. United States*, 340 U.S. 367, 370 (1951) ("If [the witness] desired the protection of the privilege against self-incrimination, she was required to claim it."); *Smith v. United States*, 337 U.S. 137, 147 (1949). Again, there are exceptions to this rule. See *supra* note 45.

<sup>56</sup> *Regina v. Boyes*, 1 Best & S. 311, 330-31 (1861); see also *United States v. Freed*, 401 U.S. 601, 603-04 (1971) (holding that where person supplying personal information might be implicated in future crimes, "the claimant is not confronted by 'substantial and real' but merely 'trifling or imaginary, hazards of incrimination'" (quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968))).

<sup>57</sup> 161 U.S. 591, 599-600 (1896).

because immunity was granted, the Clause does not prohibit compulsion to make the disclosures.<sup>58</sup>

In most cases, the Court has been willing to presume that if a disclosure would implicate the witness in activity that is actually addressed by a criminal statute, the mere possibility of prosecution is sufficient to render the putative response incriminatory.<sup>59</sup> The Court has sometimes characterized “the test [a]s whether the testimony might later subject the witness to criminal prosecution.”<sup>60</sup> Thus, in *Blau v. United States*, the witness had refused to answer questions before a federal grand jury regarding whether she was employed by the Communist Party, at a time when the Smith Act<sup>61</sup> forbade knowingly belonging to any organization that advocated overthrow of the government.<sup>62</sup> The Court held that the very existence of the Smith Act was sufficient to render incriminatory the answer to the grand jury’s question, and that the witness therefore could refuse to answer.<sup>63</sup>

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<sup>58</sup> *Id.* at 600, 604; see also *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 102 (1964) (White, J., concurring) (“The privilege protects against real dangers, not remote and speculative possibilities.”); *Mason v. United States*, 244 U.S. 362, 365-66 (1917).

<sup>59</sup> *But see California v. Byers*, 402 U.S. 424, 428 (1971) (plurality opinion) (conceding that, where California law required those involved in auto accident to stop and provide vital information, “there is some possibility of prosecution—often a very real one,” but concluding that “the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by [such] statutes”); cf. *id.* at 448 (Harlan, J., concurring in the judgment) (arguing that state’s statutory scheme “entails genuine risks of self-incrimination from the driver’s point of view”).

<sup>60</sup> *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

<sup>61</sup> 18 U.S.C. § 2385 (2005).

<sup>62</sup> 340 U.S. 159, 159-61 (1950).

<sup>63</sup> See *id.* at 161; see also *Haynes v. United States*, 390 U.S. 85, 97 (1968) (“[A] prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution.”); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965) (“[M]ere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege.”); *Emspak v. United States*, 349 U.S. 190, 200 (1955) (detailing prosecutions pursuant to Smith Act instituted just prior to witness’s appearance before Congressional committee as demonstrating a real danger of prosecution). O’Neill, *supra* note 28, at 2517, contends that “prior to the Court’s decision in *Dennis v. United States*, 341 U.S. 494 (1951)], it certainly could not have placed a witness in legal jeopardy if she answered in the affirmative a question about Communist Party membership.” The argument is untenable. In *Dennis*, *id.* at 510-11, the Supreme Court *rejected* a challenge to the Smith Act based on the First Amendment. Certainly, prospective Smith Act defendants had much to fear so long as that Act was on the statute books, even before the Supreme Court put its imprimatur on the Act by declaring its constitutionality.

3. *The Sharing of Responsibility Between Invoker and Judge Regarding Whether the Invoker's Answer Would be Incriminatory*

The final governing principle, related to the second, is that, while the invoker of the Fifth Amendment privilege must necessarily be afforded some deference when determining whether a question calls for an incriminatory response, the courts, and not the invoker herself, must make the final determination. While the second principle discussed centers on the possibility of a prosecution, the third focuses on whether, assuming there is to be a prosecution, the disclosure could be used to prove the case against the invoker. Early on, the courts acknowledged that too little deference to the invoker would defeat the purpose of the privilege. Only the invoker knows what the answer would be, and only she knows why a seemingly innocuous response might connect her, through a chain of other evidence, to nefarious activity. Therefore, to require her to disclose precisely *why* a question calls for an incriminatory response would require her to make the very disclosures she fears and which she arguably has a constitutional right not to make.

This was made clear in what is considered the first important Self-Incrimination Clause case, *United States v. Burr*,<sup>64</sup> decided only sixteen years after the adoption of the Clause. *Burr* was neither a Supreme Court case nor, strictly speaking, a Self-Incrimination Clause case, since it never cited the Clause.<sup>65</sup> Authored by Chief Justice Marshall sitting as Circuit Justice, however, the decision in *Burr* set the standard for later Self-Incrimination Clause cases in the Supreme Court. A federal grand jury, considering charges against former Vice-President Aaron Burr, called Burr's secretary, a Mr. Willie, as a witness to decipher the contents of a letter in Willie's handwriting.<sup>66</sup> Willie refused to answer questions regarding the letter, arguing that even to admit understanding the contents or knowing the provenance of the letter could tend to incriminate him in his boss's illicit scheme.<sup>67</sup> Chief Justice Marshall held for the circuit court that Willie need not answer the questions. In so doing, he established a standard of broad deference to the witness. The issue for the court is "whether *any* direct answer to [the question propounded] can implicate the witness."<sup>68</sup> If not, then the witness must answer.<sup>69</sup> Otherwise, the witness "must be the

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<sup>64</sup> 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14692e).

<sup>65</sup> See O'Neill, *supra* note 28, at 2524.

<sup>66</sup> *Burr*, 25 F. Cas. at 38.

<sup>67</sup> *Id.* at 38-39.

<sup>68</sup> *Id.* at 40.

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



sole judge what his answer would be.”<sup>70</sup> If the witness “say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.”<sup>71</sup> The reason for this result is simple: for the court to participate in considering whether the witness’s answer would be truly incriminatory, the witness would have to disclose the answer, at least to the court; but this would, according to the *Burr* court, defeat the privilege.<sup>72</sup> As the court wrote:

The court cannot participate with [the witness] in this judgment, because [the court] cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims.<sup>73</sup>

However, more recently, the Court has stated that courts must take a more active role, at least to the extent of determining whether an invoker’s fear of self-incrimination is reasonable. The Court has cited with approval language from *Regina v. Boyes* that indicates that such a role is appropriate:

[T]o entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is *reasonable ground to apprehend danger* to the witness from his being compelled to answer.<sup>74</sup>

The Court has also stated that the privilege “protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”<sup>75</sup> Thus, the question is one for both the invoker and the court: the

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

<sup>71</sup> *Id.*

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

<sup>73</sup> *Id.*; see also *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”).

<sup>74</sup> 1 Best & S. 311, 329-30 (1861) (emphasis added); see, e.g., *United States v. Mandujano*, 425 U.S. 564, 575 (1976); *Mason v. United States*, 244 U.S. 362, 365 (1917) (quoting *Boyes*, 1 Best & S. at 329-30); *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906) (“[W]e must consider whether we can see reasonable grounds for believing that the book was privileged . . .”).

<sup>75</sup> *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); accord *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451, 2461 (2004) (reiterating that answer is not incriminatory “absent a reasonable belief that the disclosure would tend to incriminate him”); *Maness v. Meyers*, 419 U.S. 449, 461 (1975). The Court gave this standard some teeth in *Mason*. There, before a grand jury investigating allegations of illegal gambling, the witness had been asked whether there was a game of cards being played at a table at which he was sitting on a particular night, and he refused to answer. *Mason*, 244 U.S. at 363. The Court ruled that the witness was properly held in contempt because it was no crime “in Alaska to sit at a table where

invoker must determine whether an answer could be incriminatory, but, if she does, the court must determine whether such a belief is reasonable based on the limited information at its disposal.

## II. CHAVEZ V. MARTINEZ: A NEW VIEW OF THE SELF-INCRIMINATION CLAUSE

As detailed above, the Court has allowed parties to litigate disputes arising under the Self-Incrimination Clause not only after a criminal prosecution has been initiated, but also in advance of any such prosecution, even when no realistic threat of prosecution has been posed. This position has been a result of the Court's historic assumption that the Self-Incrimination Clause gives rise to a right, not only not to have compelled statements used against their maker, but a distinct and independent right not to have the government compel one to disclose self-incriminatory information in the first place. This assumption, however, has been undercut recently by the Court's first clear holding on the issue in *Chavez v. Martinez*.<sup>76</sup> The Court held there what it had indicated before only in dictum<sup>77</sup> and what a good many commentators had argued<sup>78</sup> based on the

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cards are being played, or to join in such a game unless played for something of value." *Id.* at 367.

<sup>76</sup> 538 U.S. 760 (2003).

<sup>77</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (dictum) ("Although conduct by law enforcement officials prior to trial may ultimately impair [the privilege against self-incrimination], a constitutional violation occurs only at trial.").

<sup>78</sup> See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 869 n.36 (1995) ("[A] Fifth Amendment violation occurs at the point when compelled testimony is introduced in a criminal case."); Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 464-65 (2002) ("[U]se of a compelled statement in a criminal case is a necessary precondition for a violation of the privilege."); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 261-62 (1988) (distinguishing between the collection of the confession and its use); Martin R. Gardner, *Section 1983 Claims Under Miranda: A Critical View of the Right to Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277, 1288 (1993) ("A violation [of the Self-Incrimination Clause] does not occur until the product of . . . compulsion is used against the suspect, i.e. until she becomes a witness against herself.") (footnote omitted); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 921 (1989) ("[U]nlike [F]ourth [A]mendment rights, [F]ifth [A]mendment rights are not violated unless and until the statement is used against the person making it . . . ."); O'Neill, *supra* note 28, at 2472 ("[T]he introduction of the compelled statement may occur 'in' a 'criminal case,' and it is this introduction that violates the Fifth Amendment—not the act of compelling the testimony."); Larry J. Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 417 n.168 (1977) (noting that person's Self-Incrimination Clause rights violated

language of the Constitution: that the Clause is violated only if and when a person's statements are actually used against her in a criminal judicial proceeding. This signals a sea-change in how the Court views the Self-Incrimination Clause and throws into question the courts' historic willingness to address disputes under the Clause prior to the initiation of a criminal prosecution. Cognizant that its pronouncement might throw much of its Self-Incrimination Clause jurisprudence into disarray, the *Chavez* Court attempted to explain away the apparent inconsistency. Unfortunately, the explanation consisted of little more than question-begging assertions, and *Chavez* left even more confusion in its wake by evading the question of the propriety of premature adjudication of Self-Incrimination Clause disputes.

#### A. THE DECISION IN *CHAVEZ*

In *Chavez*, Martinez and two police officers engaged in a scuffle, during which Martinez was shot several times, leaving him permanently blind and paralyzed from the waist down.<sup>79</sup> When Martinez was brought to a local hospital and awaited emergency medical treatment, a third police officer, Chavez, questioned him for ten minutes over a forty-five-minute period.<sup>80</sup> Martinez pleaded with Chavez that he would not say anything until he received medical attention, yet Chavez continued the interrogation.<sup>81</sup> During this questioning, Martinez made a number of self-incriminating statements.<sup>82</sup> Martinez survived the ordeal but was never prosecuted, so his statements were never used against him in a criminal proceeding.<sup>83</sup> Rather, he brought an action for damages pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of his rights pursuant to the Self-Incrimination Clause, as incorporated by the Fourteenth Amendment.

A majority of the Court held that the Self-Incrimination Clause had not been violated because Martinez's confession was never used against him. The Court rejected Martinez's contention that the term "criminal case" as used in the Clause "encompass[es] the entire criminal investigatory process,

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only when statements "used against him at trial"); George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 426 n.95 (1986) (similar).

<sup>79</sup> 538 U.S. at 763-64 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).

<sup>80</sup> *Id.* (plurality opinion).

<sup>81</sup> *Id.* at 783-87 (Stevens, J., concurring in part and dissenting in part).

<sup>82</sup> *Id.* at 764 (plurality opinion).

<sup>83</sup> *Id.* (plurality opinion).

including police interrogations.”<sup>84</sup> Instead, Justice Thomas wrote for a plurality of four Justices that “a ‘criminal case’ at the very least requires the initiation of legal proceedings.”<sup>85</sup> Accordingly, the plurality held 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>86</sup> In a concurring opinion, Justice Souter, joined by Justice Breyer, indicated a basic agreement with the plurality’s reading of “the core of the guarantee against compelled self-incrimination.”<sup>87</sup> A majority of the Court thus rejected the claim that the Self-Incrimination Clause can be violated before a person’s statements are ever used against him “in [a] criminal case,” that is, in some criminal judicial proceeding.<sup>88</sup>

The outcome of *Chavez* appears to undercut a principal assumption underlying much of the Supreme Court’s Self-Incrimination Clause jurisprudence. Much of that jurisprudence is built on the premise that those who invoke the Fifth Amendment privilege in administrative agency hearings, civil actions, legislative committee hearings, grand jury proceedings, and other less formal settings have a legally enforceable right not to have the government compel them to provide self-incriminating disclosures that might later be used against them in a criminal prosecution. The view of the Self-Incrimination Clause contemplated by *Chavez* is very different. Under *Chavez*, there is no constitutional right to be free of government compulsion to provide information. One has a constitutional right only to avoid having any such compelled statements, or any evidence derived therefrom, used against one in a “criminal case.”

That is, the Self-Incrimination Clause can be seen as having two distinct elements—compulsion and witnessing in a criminal case—both of which must be fulfilled before a violation of the Clause occurs. After all, the Clause is not offended where a criminal defendant voluntarily testifies at trial in a criminal prosecution against him, because there is “witness[ing]” in a “criminal case” but no compulsion. Neither is the Clause offended when there is compulsion but no “witness[ing]” in a “criminal case,” as when a person is required to answer questions before a

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<sup>84</sup> *Id.* at 766 (plurality opinion); see also *id.* at 777 (Souter, J., joined by Breyer, J., concurring in the judgment).

<sup>85</sup> *Id.* at 766 (plurality opinion).

<sup>86</sup> *Id.* at 767 (plurality opinion).

<sup>87</sup> *Id.* at 777 (Souter, J., joined by Breyer, J., concurring in the judgment).

<sup>88</sup> *Accord* United States v. Patane, 124 S. Ct. 2620, 2623 (2004) (plurality opinion) (“Potential violations [of the Self-Incrimination Clause] occur, if at all, only upon the admission of [compelled incriminatory] statements into evidence at trial.”); see also Mannheim, *supra* note 20, at 87-88.

Congressional committee. But if the Clause is not violated at the time a witness before a Congressional committee is compelled to answer, but only much later, if and when the government seeks to use that answer in a criminal proceeding against that person, why should federal courts be getting involved at all at the Congressional committee stage? The *Chavez* Court's attempt to answer that question unfortunately fell short of a satisfactory explanation.

B. THE *CHAVEZ* EXPLANATION: EARLY ADJUDICATION OF SELF-INCRIMINATION CLAUSE DISPUTES AS A PROPHYLACTIC MEASURE

Both the plurality and Justice Souter attempted to explain how the result in *Chavez* was consistent with the courts' historic willingness to adjudicate Self-Incrimination Clause disputes before a criminal prosecution is even instituted. Neither attempt, however, was very successful. Indeed, both were largely exercises in question-begging.

Both the plurality and Justice Souter distinguished between the "core" Fifth Amendment right not to have compelled self-incriminating testimony used against one in a criminal proceeding, on the one hand,<sup>89</sup> and the Court-created "prophylactic rules,"<sup>90</sup> or the "'extensions' of the bare guarantee,"<sup>91</sup> on the other. Both discussed, as an example of the latter, the Court-created rule that a claim of the Fifth Amendment privilege may be fully litigated even before a criminal prosecution is even threatened. The plurality spoke of the supposed "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>92</sup> Justice Souter recounted the various iterations of that rule, which the Court has held "bar[s] compulsion to give testimonial evidence in a civil proceeding; requir[es] a grant of

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<sup>89</sup> See *Chavez*, 538 U.S. at 772 (2003) (plurality opinion) (describing "the core constitutional right defined by the Self-Incrimination Clause" as "the right not to be compelled in any criminal case to be a witness against oneself"); *id.* at 777 (Souter, J., concurring in the judgment) (opining that Martinez's proposed "constitutional cause of action for compensation would . . . be well outside the core of Fifth Amendment protection").

<sup>90</sup> *Id.* at 770 (plurality opinion) ("[W]e have created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause.").

<sup>91</sup> *Id.* at 777 (Souter, J., concurring in the judgment) ("'[E]xtension[s]' of the bare guarantee may be warranted if clearly shown to be desirable means to protect the basic right against the invasive pressures of contemporary society." (quoting *Miranda v. Arizona*, 384 U.S. 436, 510 (1966) (Harlan, J., dissenting) (citation omitted))).

<sup>92</sup> *Id.* at 770-71 (plurality opinion) (emphasis added).

immunity *in advance* of any testimonial proffer; [and] preclud[es] threats or impositions of penalties that would undermine the right to immunity.”<sup>93</sup> And both pointed to the rule first enunciated in *Miranda v. Arizona*<sup>94</sup> of “conditioning admissibility [of statements] on warnings and waivers.”<sup>95</sup>

Both the plurality and Justice Souter proceeded to justify and defend (or at least rationalize) the existence of these rules ancillary to the core Fifth Amendment right. The plurality defended the so-called “evidentiary privilege” in this way: “By allowing a witness to insist on an immunity agreement *before* being compelled to give incriminating testimony in a noncriminal case, the privilege preserves the core Fifth Amendment right from invasion by the use of that compelled testimony in a subsequent criminal case.”<sup>96</sup> Justice Souter agreed with this assessment, arguing that such ancillary rules are necessary because “the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection.”<sup>97</sup>

But these arguments employ purely circular reasoning. Neither the plurality nor Justice Souter ever explained *how* such a rule protects the “core” Fifth Amendment right or why such a rule is essential for doing so. Certainly, where immunity has been formally granted, the government may not use the compelled statements or any evidence discovered as a result in a criminal proceeding against the witness. But the Court simply assumed, with no support, that formalized immunity is the *only* way to protect the “core” Fifth Amendment rights of the witness, and that any Self-Incrimination Clause dispute surrounding the witness’s statement must be settled “*before* it is compelled.”<sup>98</sup> The Court did not consider the possibility of an alternative mode of adjudication that permits compulsion in all instances and requires that the parties wait to litigate any dispute until there is a real possibility that the compelled statement or its fruits will be used in a criminal case against its maker.

The plurality also adverted to the waiver rule<sup>99</sup> in defending the ancillary Fifth Amendment rule allowing litigation of Self-Incrimination

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<sup>93</sup> *Id.* at 778 (Souter, J., concurring in the judgment) (emphasis added).

<sup>94</sup> 384 U.S. 436 (1966).

<sup>95</sup> *Chavez*, 538 U.S. at 778 (Souter, J., concurring in the judgment); *see also id.* at 772 (plurality opinion) (“We have . . . established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in criminal cases of confessions obtained through coercive custodial questioning.”).

<sup>96</sup> *Id.* at 771 (plurality opinion).

<sup>97</sup> *Id.* at 778 (Souter, J., concurring in the judgment).

<sup>98</sup> *Id.* at 771 (plurality opinion) (emphasis added).

<sup>99</sup> *See supra* Part I.B.1.

Clause disputes prior to the time when a violation of the right is truly threatened. It wrote:

Because the failure to assert the privilege will often forfeit the right to exclude the evidence in a subsequent "criminal case," it is necessary to allow assertion of the privilege prior to the commencement of a "criminal case" to safeguard the core Fifth Amendment trial right. If the privilege could not be asserted in such situations, testimony given in those judicial proceedings would be deemed "voluntary"; hence, insistence on a prior grant of immunity is essential to memorialize the fact that the testimony had indeed been compelled and therefore protected from use against the speaker in any "criminal case."<sup>100</sup>

But "allow[ing] assertion of the privilege prior to the commencement of a 'criminal case'" is a far cry from allowing the resolution of a dispute regarding claim of the constitutional privilege at that time. If a witness asserts the Fifth Amendment privilege, but is compelled to answer nonetheless, one would be hard-pressed to claim that her statements were voluntarily given. Thus, the plurality was simply wrong when it asserted that "insistence on a prior grant of immunity is *essential* to memorialize the fact that the testimony had indeed been compelled." Arguably at least, a mere claim of the constitutional privilege, regardless of whether it is honored, should be all that is needed to "memorialize th[at] fact."

This is not to say that the historic rule allowing early adjudication of Self-Incrimination Clause disputes necessarily lacks constitutional foundation merely because it is termed a prophylactic rule. The Court has created many prophylactic rules that are constitutionally based.<sup>101</sup> However, the Court's authority to create such constitutionally-based prophylactic rules is limited.<sup>102</sup> Only when strict necessity dictates the need for a prophylactic rule may the Court impose such a judge-made rule on the other branches of government and the States.<sup>103</sup> While several different

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<sup>100</sup> *Chavez*, 538 U.S. at 771-72 (plurality opinion) (citations omitted).

<sup>101</sup> See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1037 (2001) ("Constitutional criminal procedure is rife with prophylactic rules . . ."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) ("[P]rophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law."); see also Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 25 (2001) (suggesting that "there really isn't any such thing as a distinctively prophylactic rule that is in any important way distinguishable from the more run-of-the-mill doctrine that courts routinely establish and implement regarding every constitutional norm").

<sup>102</sup> See generally Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985).

<sup>103</sup> See Klein, *supra* note 101, at 1068 ("Caution requires that the Court generate prophylactic rules . . . only when absolutely necessary."); Brian K. Landsberg, *Safeguarding*

verbal formulae have been suggested to measure the necessity for such a rule, all encompass the essential notion that the rule is illegitimate unless its benefits in advancing constitutional norms clearly outweigh its costs.<sup>104</sup>

For example, the rule enunciated in *Miranda*, establishing an irrebuttable presumption of compulsion in the interrogation room if certain warnings are not issued and certain waivers obtained,<sup>105</sup> is prophylactic in the sense that it protects even suspects who are completely nonplused by custodial interrogation. Such a prophylactic rule is arguably justified only because the courts' prior attempt to determine, on a case-by-case basis, which suspects would not have disclosed information but for the pressure brought to bear on them during custodial interrogation was a project fraught with enormous inefficiencies.<sup>106</sup> First, because such an attempt relies on the determination of a number of variable historical facts peculiarly within the knowledge of the interrogator and the suspect, a court's determination of these predicate historic facts is bound to be inaccurate in some degree.<sup>107</sup> More importantly, the ultimate issue—whether a confession was coerced or was instead the product of free will—cannot be determined objectively but involves a fundamentally “normative judgment about what police practices we as a society are willing to allow.”<sup>108</sup> Usually, the inefficiencies created by such indeterminacy inure to the detriment of the criminal suspect.<sup>109</sup> *Miranda* is justified, then, only if it produces significantly fewer “false-negatives,” i.e., instances in which a confession that was “compelled”

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*Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999) (“Necessity is the basis for fashioning a prophylactic rule.”).

<sup>104</sup> See Caminker, *supra* note 101, at 13 (proposing that the Court determine whether to create prophylactic rule “by balancing (a) the strength of the individual’s interest in avoiding wrongful deprivation of the [constitutional right] at issue; (b) the value of additional specific safeguards in reducing . . . deprivations that really should not occur under the substantive law; and (c) the cost to legitimate government interests in providing such additional safeguards”); Klein, *supra* note 101, at 1032-33 (arguing that constitutional prophylactic rules are legitimate only where (1) remedies for actual violation of the Constitution prove ineffective and (2) use of the prophylaxis is “more effective and involve[s] only acceptable costs”); Landsberg, *supra* note 103, at 926 (arguing that prophylactic rules may be created based only “on a balancing that takes into account not only necessity, but also federalism, the separation of powers, and three predictive difficulties: predicting the need for the rule, its efficacy, and its unintended consequences”); Strauss, *supra* note 101, at 193 (suggesting that constitutional prophylactic rules are legitimated only by courts’ need “to minimize the sum of error costs and administrative costs” in enforcing constitutional norms).

<sup>105</sup> See Mannheim, *supra* note 20, at 71.

<sup>106</sup> See *id.* at 69-70.

<sup>107</sup> See Caminker, *supra* note 101, at 10.

<sup>108</sup> Mannheim, *supra* note 20, at 114; accord Caminker, *supra* note 101, at 10-11.

<sup>109</sup> See Caminker, *supra* note 101, at 11 (“[T]he case-specific-voluntariness-test produced more false-negatives than the Court could tolerate . . .”).



within the meaning of the Fifth Amendment is determined to have been freely given, "without unduly disrupting legitimate law enforcement interests."<sup>110</sup>

But neither the plurality nor Justice Souter in *Chavez* engaged in any similar calculus with respect to the question whether a prophylactic rule was essential to preserve a Congressional committee witness' Self-Incrimination Clause rights. If, as *Chavez* tells us, those rights are limited to the right not to have compelled disclosures used against one in a criminal case, then suppression of such compelled disclosures and their fruits at that time appears to afford a completely satisfactory mechanism for securing those rights. At the least, Justices Souter and Thomas failed to explain why this is not the case.<sup>111</sup> Again, a constitutional rule that can be characterized as prophylactic is not automatically illegitimate. Yet, by the same token, a judge-made rule that results from the Court's expansion of a constitutional norm beyond what the Court itself deems to be the limits of that norm cannot be made legitimate merely by terming the rule "prophylactic."

In short, *Chavez* created a conflict with prior law by holding that a violation of the Self-Incrimination Clause arises only if and when a person's compelled statements are used against her in a criminal proceeding, and, at the same time, by failing to explain adequately the Court's own precedents that appear to assume the contrary. In light of *Chavez*, a true inquiry is sorely needed focusing on the *ripeness* of disputes over claims of the Fifth Amendment privilege against self-incrimination in advance of the initiation of a criminal case.

### III. THE RIPENESS DOCTRINE AND CLAIMS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

While *Chavez* teaches that the Self-Incrimination Clause is not violated unless and until a person's compelled statements are used against her in a criminal proceeding, much of the Court's Self-Incrimination Clause jurisprudence has developed from cases in which no criminal prosecution was pending, inevitable, or even anywhere in sight. While *Chavez* attempted to explain this state of affairs, the explanation is unpersuasive. A thorough review of Self-Incrimination Clause cases through the lens of the ripeness doctrine is in order.

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<sup>110</sup> *Id.* at 13.

<sup>111</sup> To be fair, their task was to decide the case before them, not to justify more than a century of Self-Incrimination Clause jurisprudence.

## A. THE RIPENESS DOCTRINE

The Supreme Court has developed a general doctrine of ripeness, precluding the federal courts from reaching the merits of a dispute if it would be premature to do so. In particular, in determining whether a federal court can properly pass on the legality of a threatened governmental action that might arguably infringe on a person's rights, the Court has looked to the likelihood that that governmental action will come to fruition.<sup>112</sup> Although it is only relatively recently that the Supreme Court has articulated ripeness as a constitutionally-based doctrine, it has long held that ripeness is an indispensable requirement for federal court involvement in a matter.<sup>113</sup>

One commentator has identified three "interrelated, but analytically distinct" uses of the ripeness doctrine:

First, the ripeness doctrine has perhaps most frequently been used to measure the demands of substantive statutory or constitutional causes of action. This application of the doctrine . . . is an aspect of actionability analysis—that is, the determination of whether the litigant has stated a claim on which relief can be granted. Second, ripeness review often has been employed to determine whether the litigant's asserted harm is real and concrete rather than speculative and conjectural. . . . Third, the ripeness requirement has been used to serve the goals of prudent judicial decision making . . . so as to ensure more accurate rulings by the courts and to allow the challenged government action to run its course more completely.<sup>114</sup>

These last two concerns are especially closely related. Only where the factual record is reasonably clear that a litigant will inevitably suffer harm will the resulting judicial decision-making be sufficiently precise to justify

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<sup>112</sup> The ripeness doctrine also comes into play when courts are asked to determine private rights. See, e.g., *Coffman v. Breeze Corp.*, 323 U.S. 316 (1945). However, this article focuses on the doctrine as applied to the adjudication of public rights.

<sup>113</sup> See Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162 (1987) ("[A]lthough the ripeness demand may have begun as an exercise in judicial discretion, it is now firmly planted in the Constitution.") (footnote omitted).

<sup>114</sup> *Id.* (footnote omitted); see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.4 (1st ed. 1989) ("[T]he ripeness requirement . . . enhances judicial economy by limiting the occasion for federal court jurisdiction and the expenditure of judicial time and revenues [and] enhance[s] the quality of judicial decision-making by ensuring that there is an adequate record to permit effective review."); C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 931 (1985) ("The requirement that the plaintiff's asserted injury be both real and immediate is justified as a means of assuring that a question is presented with sufficient concreteness and adversity to permit informed judicial resolution."); Varat, *supra* note 12, at 274 n.3 ("[T]he ripeness doctrine is partially concerned with whether there is a sufficiently solid factual basis for deciding the substantive issues.").

the interference of the courts.<sup>115</sup> This desire for waiting to ensure better and more precise judicial decision-making is reinforced where the alternative is judicial interference with the work of other governmental—not just private—actors.<sup>116</sup> Thus, the ripeness doctrine seeks to strengthen the twin pillars of our constitutional architecture: separation of powers and federalism.<sup>117</sup>

The question of whether a dispute is ripe for review is governed by two considerations: “the hardship to the parties of withholding court consideration” and “the fitness of the issues for judicial decision.”<sup>118</sup> The former consideration looks to “the present effects and hardships imposed by the threat of future government action”<sup>119</sup> and is considered to be constitutionally based.<sup>120</sup> The latter consideration, which is more of a prudential constraint,<sup>121</sup> serves the goals of ensuring that the facts are

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<sup>115</sup> See Nichol, *supra* note 113, at 177 (“Litigation based upon hypothetical possibility rather than concrete fact is apt to be poor litigation. The demand for specificity, therefore, stems from a judicial desire for better lawmaking.”).

<sup>116</sup> See *id.* at 176 (“Ripeness analysis has been used . . . to prevent judicial intrusions on proper and efficient allocations of governmental powers.”).

<sup>117</sup> See CHEMERINSKY, *supra* note 114, § 2.4.1 (“Ripeness advances separation of powers by avoiding judicial review in situations where it is unnecessary for the federal courts to become involved because there is not a substantial hardship to postponing review.”); 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3532.1 (2d ed. 1984); Floyd, *supra* note 114, at 931 (“[T]he ripeness doctrine serves separation of powers and federalism concerns.”); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's “Hypothetical” Barriers*, 68 N.D. L. REV. 1, 22 (1992) (“Ripeness doctrine can allow other branches of government the opportunity to work . . .”); Nichol, *supra* note 113, at 178 (“[T]he ripeness formula . . . allows the courts to postpone interfering when necessary so that other branches of government, state and federal, may perform their functions unimpeded.”); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (discussing the “principles of equity, comity and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities”); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (noting that “important considerations of federalism” militate against “the fashioning of prophylactic procedures” by a federal court “for a state agency designed to minimize [unconstitutional] misconduct” by some of its employees).

<sup>118</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); see CHEMERINSKY, *supra* note 114, § 2.4.1; see also Nichol, *supra* note 113, at 161 (noting that *Abbott Labs.* is “still . . . the ‘leading discussion’ of the doctrine”) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983)).

<sup>119</sup> Nichol, *supra* note 113, at 172-73.

<sup>120</sup> See CHEMERINSKY, *supra* note 114, § 2.4.1 (“The focus on whether there is a sufficient injury without pre-enforcement review seems inextricably linked with the constitutional requirement for cases and controversies . . .”); Varat, *supra* note 12, at 299 (“[C]ertainty of injury to the rights asserted in the suit [is] the constitutional core of ripeness.”).

<sup>121</sup> See CHEMERINSKY, *supra* note 114, § 2.4.1 (“[T]he focus on the quality of the record seems prudential.”).

sufficiently developed for accurate judicial resolution while preventing friction between the judiciary and the other organs of government.<sup>122</sup>

The question of the hardship to the parties of waiting for court consideration of the issue revolves around the "certainty of injury to the rights asserted."<sup>123</sup> There are essentially two situations in which the Supreme Court has consistently held that injury is sufficiently certain so that the hardship requirement has been satisfied.<sup>124</sup> The first situation arises "when an individual is faced with a choice between forgoing allegedly unlawful behavior and risking likely prosecution with substantial consequences."<sup>125</sup> Second, sufficient hardship justifying preenforcement judicial review has been found "where the enforcement of a statute or regulation is certain and the only impediment to ripeness is simply a delay before the proceedings commence."<sup>126</sup>

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<sup>122</sup> See Nichol, *supra* note 113, at 161 n.54.

<sup>123</sup> Varat, *supra* note 12, at 299.

<sup>124</sup> A third possible category that has been identified is where "collateral injuries that are not the primary focus of the lawsuit" are substantially likely to occur absent court review. CHEMERINSKY, *supra* note 114, § 2.4.1. This category, however, derives from a single Supreme Court case, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), which has been almost uniformly criticized. See *infra* Part III.C.

<sup>125</sup> CHEMERINSKY, *supra* note 114, § 2.4.2; see also WRIGHT ET AL., *supra* note 117, § 3532.2 ("[I]t is enough to challenge a statute that the plaintiff is presently conforming to its requirements, or must arrange its affairs to conform."); see, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-53 (1967). Hardship in this situation is increased if the "allegedly unlawful" behavior is not only lawful, but constitutionally protected. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); see also CHEMERINSKY, *supra* note 114, § 2.4.2 ("The Supreme Court [in *Steffel*] found the matter ripe because denying review would impose substantial hardship, forcing the plaintiff to choose between unnecessarily giving up possibly protected speech or risking arrest and criminal punishment."); Nichol, *supra* note 113, at 166 ("Rather than force citizens to curtail the exercise of their asserted [F]irst [A]mendment rights in order to avoid prosecution, courts have permitted facial challenges to regulations of expression even before the institution of other legal proceedings."). Admittedly, "some Supreme Court cases deviate from this principle." *Id.* at 103-04 (discussing *Int'l Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954) and *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947)). Chemerinsky describes these decisions as "unjust and inconsistent with" the bulk of precedent. See CHEMERINSKY, *supra* note 114, § 2.4.2. See also Mansfield, *supra* note 117, at 20-21 (characterizing *Boyd* as "egregious"); WRIGHT ET AL., *supra* note 117, § 3532.4, at 170-71 (noting that both *Boyd* and *Mitchell* were "insensitive to the hardship of denying decision," have been heavily criticized, and were "seriously undermined" by *Clemens v. Fashing*, 457 U.S. 957 (1982)). In addition, *Mitchell* appears to have been overruled *sub silentio* by *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). See CHEMERINSKY, *supra* note 114, § 2.4.2; see also Floyd, *supra* note 114, at 932 (noting that "the Court has recognized the unjustified hardships caused by" decisions such as *Boyd* and *Mitchell*).

<sup>126</sup> CHEMERINSKY, *supra* note 114; accord *Buckley v. Valeo*, 424 U.S. 1, 12, 116-17 (1976); *Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 508 (1972); see *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute

The second consideration<sup>127</sup> courts use to determine whether an issue is ripe for review is the fitness of the issue for judicial resolution. Because in the context of preenforcement review a factual record is unlikely to have developed, the question of fitness generally turns on whether the issue is a purely legal one or, rather, is highly fact-intensive:

The more a question is purely a legal issue the analysis of which does not depend on a particular factual context, the more likely it is that the Court will find ripeness. But the more judicial consideration of an issue would be enhanced by a specific set of facts, the greater the probability that a case seeking preenforcement review will be dismissed on ripeness grounds.<sup>128</sup>

**B. TAKING RIPENESS SERIOUSLY:<sup>129</sup> APPLYING RIPENESS PRINCIPLES TO DISPUTES OVER THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION**

In order to analyze how the ripeness doctrine would apply in cases where there is a dispute over a claim of the Fifth Amendment privilege against self-incrimination, let us first consider the legislative or administrative hearing as the paradigmatic context where such a dispute might arise. This has been chosen as the paradigm because the legislative or administrative hearing is a forum where a person can be legally

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against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.”); *see also* CHEMERINSKY, *supra* note 114, § 2.4.2 (“[T]he Court has found substantial hardship . . . where the enforcement of a statute or regulation is certain and the only impediment to ripeness is simply a delay before the proceedings commence.”); *cf.* *Ashcroft v. Mattis*, 431 U.S. 171, 172 n.2 (1977) (*per curiam*) (holding that suit, brought by father of teen killed by police as he attempted to escape arrest, to declare Missouri statute authorizing such actions unconstitutional was unripe, although plaintiff had second son who might also be killed if police attempted to arrest him, because “[s]uch speculation is insufficient to establish the existence of a present, live controversy”); *Rizzo v. Goode*, 423 U.S. 362, 373 (1976) (rejecting intervention by federal court to prevent future misconduct by city officials based on twenty incidents having occurred “in a city of three million inhabitants, with 7,500 policemen”); *Floyd*, *supra* note 114, at 932-33 (justifying finding that such cases were unripe because “there was considerable uncertainty whether the plaintiffs would again engage in a course of conduct that would expose them to the allegedly unconstitutional statute or practice, and, if so, whether the statute or practice would be applied to them”).

<sup>127</sup> It appears that both hardship and fitness must be sufficiently shown to demonstrate that an issue is ripe for review. *See* CHEMERINSKY, *supra* note 114, § 2.4.3. It is unclear whether and to what extent a deficiency of one will be excused because the other is particularly compelling. *See id.*

<sup>128</sup> *Id.*; *accord* Mansfield, *supra* note 117, at 69 (“Issue appraisal in the ripeness context . . . often centers on whether the question is one of law.”); *see, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 200-01, 203 (1983).

<sup>129</sup> With apologies to RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

compelled to testify and even incriminate herself, without the further complication present when considering the grand jury.<sup>130</sup>

*1. The Basics: No Dispute Over the Claim of the Constitutional Privilege*

Before looking at how ripeness principles would apply to a dispute over a claim of the Fifth Amendment privilege, it will be necessary to review the procedure currently followed when there is no dispute, that is, where a witness makes a concededly valid claim of that privilege. Suppose a witness before a Congressional committee is asked a question that she believes calls for an incriminatory response and she raises a claim of the constitutional privilege. If the committee agrees, it has two options: move on to another line of questioning that does not call for self-incriminatory responses or grant the witness immunity—the scope of which both parties agree upon—and direct her to answer. It will choose the former if, on balance, the benefit of receiving the information does not outweigh the costs associated with its inability to use any information uncovered against the witness in a subsequent prosecution. It will choose the latter if the opposite is true.<sup>131</sup>

*2. Two Models for Resolving a Dispute Over the Claim of the Constitutional Privilege*

Suppose now that the witness and the committee disagree over whether she has validly claimed the Fifth Amendment privilege. The witness is directed to answer and she persists with her claim of the constitutional privilege. Two possible models exist to resolve this dispute. Pursuant to an “early adjudication model,” which is the model used under current law, the Self-Incrimination Clause dispute may, and ordinarily must, be resolved at the time the conflict arises. Pursuant to a “postponed adjudication model,” the parties wait to resolve the dispute until criminal proceedings are initiated against the witness, if that ever occurs.

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<sup>130</sup> See *infra* Part III.F.

<sup>131</sup> This analysis concededly oversimplifies the extent to which the Congressional committee members in our example, located within the legislative branch of government, share a community of interest with the eventual prosecuting authorities, the Attorney General and the particular United States Attorney in whose jurisdiction the eventual criminal case would happen to fall, who serve under the President in the executive branch. Lack of cooperation and communication and, indeed, downright antagonism, in this context between these two loci of power is certainly a possibility. However, these problems would exist irrespective of whether the position proposed by this article is adopted.

a. The Early Adjudication Model

Pursuant to the early adjudication model, the committee will bring a contempt proceeding against the witness in court. It is at this point that the Self-Incrimination Clause dispute will be resolved—either her claim of the constitutional privilege will be held valid and her refusal to answer will be upheld, or her Fifth Amendment claim will be held invalid and she will be held in contempt.<sup>132</sup> If the former occurs, the committee may, again, grant her immunity if on balance it feels her information is worth the price. If not, the committee will not obtain the information it seeks.

If the witness is held in contempt, she might purge herself of the contempt by answering the question but she does so at the risk of forever waiving her claim of the Fifth Amendment privilege. It is true that in some decisions the Supreme Court has implied that once an objection is made, it is preserved for all time. If the witness then answers the question after having objected, she may raise the issue at a later date if a prosecutor seeks to admit her answers against her in a criminal proceeding.<sup>133</sup> However, such a procedural mechanism for protecting Fifth Amendment rights has not been recognized as inherent in the Fifth Amendment itself.<sup>134</sup> Instead, such mechanisms have been permitted to develop as a matter of sub-constitutional rules that may prescribe one type of response over another to a question that calls for a self-incriminating answer.<sup>135</sup> Although "[t]he privilege protects persons from being compelled to become witnesses against themselves, [it] is silent concerning the procedure by which they

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<sup>132</sup> See *Maness v. Meyers*, 419 U.S. 449, 467 (1975) ("The witness, once advised of the right, can choose for himself whether to risk contempt in order to test the privilege before evidence is produced.").

<sup>133</sup> See *United States v. Mandujano*, 425 U.S. 564, 576 (1976) ("[U]nless immunity is conferred . . . testimony may be suppressed, along with its fruits, if it is compelled over an appropriate claim of privilege."); *United States v. Blue*, 384 U.S. 251, 256 (1966) (reinstating indictment but remanding for opportunity for defendant to move to suppress previously compelled disclosures); *Adams v. Maryland*, 347 U.S. 179, 181 (1954) (holding that the Fifth Amendment protects a witness "from the use of self-incriminating testimony he is compelled to give over his objection").

<sup>134</sup> See *Maness*, 419 U.S. at 470 ("[W]ith no state statute or rule guaranteeing a privilege or assuring that at a later criminal prosecution the compelled magazines would be inadmissible, it appears that there was no avenue other than assertion of the privilege, with the risk of contempt, that would have provided assurance of appellate review in advance of surrendering the magazines.").

<sup>135</sup> See *id.* at 468 ("[T]his is not a case where state law is clear that a response to compulsory process under protest renders the response inadmissible in any criminal prosecution against the witness . . ."); see also *id.* at 463 ("Here the 'cat' was not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back.").

should object to such compulsion."<sup>136</sup> As Westen and Mandell explained, under current law:

The Constitution . . . states no preference for a witness's response to such choices. The privilege against self-incrimination does not prescribe silence as the sole permissible response. Nor does it create a right to remain silent as opposed to a right to avoid compulsory self-incrimination in other ways. Rather, it offers the witness the right to avoid the evils of compulsory self-incrimination by guaranteeing at least one constitutionally acceptable response to his [F]ifth [A]mendment predicament.<sup>137</sup>

The procedure that must be used when the witness is faced with the requirement that she incriminate herself is, oddly enough, that preferred by the very government putting her to the choice.<sup>138</sup>

It appears to be "the traditional rule" that those who want to attack "rulings rejecting testimonial privileges [must] stand on their claims of privilege and face contempt, rather than testify."<sup>139</sup> And the government may well express a preference that the Congressional committee witness continue to assert the privilege rather than disclose information and later move for suppression of the compelled statement.<sup>140</sup> This is because where

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<sup>136</sup> Peter Westen & Stewart Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521, 524 (1982).

<sup>137</sup> *Id.* at 533-34 (footnote omitted).

<sup>138</sup> *Accord id.* at 534 ("Any preference that may exist for silence, or for any other specific response, derives from state law."); *see id.* at 523 ("An individual is constitutionally entitled to be free from state compulsion to incriminate himself. The state, however, has legitimate interests in requiring individuals to assert constitutional claims—including claims under the privilege of self-incrimination—by procedures that minimize the resulting burdens on the state.").

<sup>139</sup> *Id.* at 542; *see also* Gary A. Schlessinger, Comment, *Testimonial Waiver of the Privilege Against Self-Incrimination and Brown v. United States*, 48 CAL. L. REV. 123, 127 n.23 (1960) ("[W]hen a federal court incorrectly orders a witness to testify, the witness must either risk jail or abandon the privilege."); Westen & Mandell, *supra* note 136, at 543 ("Traditionally, a witness who wishes to appeal a trial judge's decision to overrule a testimonial privilege must be willing to stand in contempt to do so.").

<sup>140</sup> *See* Westen & Mandell, *supra* note 136, at 532 ("The state has . . . a strong and legitimate interest in preferring that a witness faced with [F]ifth [A]mendment compulsion respond by remaining silent, rather than by making a tainted statement."); *see also* Garner v. United States, 424 U.S. 648, 665 n.21 (1976) (holding that taxpayer must remain silent on tax returns rather than disclose incriminating information because "[a]ny other rule would deprive the Government of its choice between compelling the evidence from the claimant in exchange for immunity and avoiding the burdens of immunization by obtaining the evidence elsewhere"). Westen & Mandell, *supra* note 136, at 534-35, argue that the Court in *United States v. Kordel*, 397 U.S. 1 (1970), "implicitly held" that the U.S. has a "common law preference for silence as a method for asserting [F]ifth [A]mendment claims," at least in the context presented there.

A third option, of course, is that the Congressional committee witness can lie. However, the Court has expressly held that perjury is never preferable to either of the other two options. *See* United States v. Wong, 431 U.S. 174, 178 (1977) ("[E]ven the predicament



a statement is compelled, not only the statement itself but all other evidence derived therefrom is suppressible.<sup>141</sup> Moreover, upon a motion to suppress, the government has the burden of proving that its evidence did not derive from the compelled statement.<sup>142</sup> And the broadest application of this rule would prohibit even non-evidentiary uses of evidence derived from the compelled statement, such as the formation of litigation strategies.<sup>143</sup> The strain of proving that compelled statements did not taint other evidence or lead to non-evidentiary uses has been known to sabotage more than one prosecution.<sup>144</sup>

Thus, the government might well prefer the rule that the Congressional committee witness must remain silent in order to preserve her claim of the constitutional privilege. On the other hand, no statute or common-law rule under current law—at least at the federal level—“explicitly spell[s] out the proper way to raise [F]ifth [A]mendment claims.”<sup>145</sup> Consequently, our paradigmatic witness before a Congressional committee who is ordered to answer a question over a claim of the Fifth Amendment privilege, is left with a dilemma: refuse to answer and face contempt; or answer the question on the off-chance that some future court will not deem that response to have been the dis-preferred one. As the second Justice Harlan described it: “[A] witness may sometimes have to walk a tightrope between waiver of his privilege, if he answers a question later held to be incriminatory, and contempt, if he refuses to answer a question later held to be nonincriminatory.”<sup>146</sup>

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of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury.”); see also Westen & Mandell, *supra* note 136, at 549 (“A witness is not entitled to lie because of a reasonable fear that she will otherwise be subjected to contempt or self-incrimination . . .”).

<sup>141</sup> See *Kastigar v. United States*, 406 U.S. 441 (1972); Westen & Mandell, *supra* note 136, at 531.

<sup>142</sup> See Westen & Mandell, *supra* note 136, at 531.

<sup>143</sup> See generally Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351 (1987).

<sup>144</sup> The most notable examples were the prosecutions of Oliver North and John Poindexter in relation to the so-called “Iran-Contra” affair of the mid-1980s. See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 920 F.2d 940 (D.C. Cir. 1991); R.S. Ghio, Note, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 243-51 (1992); see also Amar & Lettow, *supra* note 78, at 878-79 (arguing that the “staggering” burden put on the prosecution in *Poindexter* and *North* to prove that their cases were entirely uninfluenced by the defendants’ prior immunized testimony essentially transformed the immunity bestowed into transactional immunity).

<sup>145</sup> Westen & Mandell, *supra* note 136, at 533.

<sup>146</sup> *Emspak v. United States*, 349 U.S. 190, 212 (1955) (Harlan, J., dissenting). Justice Black similarly described

this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting

Moreover, the decision whether or not to claim the constitutional privilege must be made on the spot with little time for reflection or deliberation.<sup>147</sup> It must also be made, at least sometimes, without counsel, for there is no general constitutional right to an attorney in a grand jury proceeding, a legislative or administrative hearing, a civil case, or a less formalized adversary setting.<sup>148</sup> For an indigent person, this means that consultation with counsel is a virtual impossibility. And even if she can afford an attorney, there is no constitutional requirement that she be allowed to consult with counsel before making this weighty decision.<sup>149</sup>

### b. The Postponed Adjudication Model

One can imagine an alternative system allowing, or even requiring, postponement of the resolution of the Self-Incrimination Clause dispute. As under current law, such a system would require the Congressional committee witness to memorialize her objection to the question. However, unlike current law, she would also be required to provide the information if she is pressed for an answer by the committee, even without a formal grant

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the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it.

Rogers v. United States, 340 U.S. 367, 378 (1951) (Black, J., dissenting); *see also* Maness v. Meyers, 419 U.S. 449, 463 (1975) ("[N]oncompliance risk[s] both an immediate contempt citation and a final criminal contempt judgment against the witness if, on appeal, [his attorney's] advice [to plead the privilege] prove[s] to be wrong."); Westen & Mandell, *supra* note 136, at 547 n.95 ("[T]he privilege against self-incrimination may not provide breathing room for witnesses who are reasonably uncertain as to whether they possess a valid claim of privilege.").

<sup>147</sup> Westen & Mandell, *supra* note 136, at 537, argue that "[t]he state may not demand a preferred response of silence from a witness who has no opportunity to reflect on his choice of responses." However, they intuit this rule from a single Supreme Court decision that supports such a rule, at best, only by implication. *See id.* at 537-38 (discussing Garrity v. New Jersey, 385 U.S. 493 (1967)). Similarly, they argue that "[t]he state cannot insist on silence if the state is responsible for a witness's uncertainty whether silence is preferred." *Id.* at 539. Again, they cite only a single Supreme Court decision for this supposed rule, *see id.* (discussing United States v. Knox, 396 U.S. 77 (1969)), and, again, that decision does not directly support the proposition that such a rule currently exists. However persuasive is Westen and Mandell's intuition that such a witness *ought* to be able to take the "answer now, litigate later" approach in these circumstances (and, indeed, as I argue, *must* take that approach), it is far from clear that current law gives that witness the option.

<sup>148</sup> *See, e.g.,* United States v. Mandujano, 425 U.S. 564, 581 (1976) ("A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel.") (quotations omitted); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (rejecting general constitutional right to counsel in civil cases).

<sup>149</sup> *See, e.g.,* Mandujano, 425 U.S. at 581 ("[T]he witness may not insist upon the presence of his attorney in the grand jury room.").

of immunity. Only after she has answered and the prosecuting authorities have instituted criminal proceedings against her in which they wish to use this answer, or any derivative evidence, could the Self-Incrimination Clause dispute be resolved via a motion to suppress. We can call this the "postponed adjudication model."

Note that pursuant to the postponed adjudication model, the ability to "answer now, litigate later" would not depend on the vagaries of any sub-constitutional rule. The Self-Incrimination Clause itself would permit the witness to litigate the issue even if she has acquiesced to the order to answer the question. So long as she has memorialized her claim of the Fifth Amendment privilege by making it before being directed to answer, she cannot be deemed to have waived that privilege by answering.

This is, in essence, the position advocated by Justice White in his separate opinion in *Maness v. Meyers*. He believed that the Fifth Amendment itself renders testimony suppressible when given over a claim of privilege, even in the absence of a sub-constitutional rule to that effect. He wrote:

[W]hat of the case . . . where the claim of privilege is overruled . . . ? It seems to me that in such event the witness is nevertheless protected by a constitutionally imposed use immunity if he answers in response to the order and under threat of contempt. If, contrary to the expectations of the judge but consistent with the claim of the witness and his lawyer, the State later finds the answer or its fruits incriminating and offers either against the witness in a criminal prosecution, the witness has a valid objection to the evidence on the ground that he was coerced by a court order to reveal it and that it is therefore compelled self-incrimination barred from use by the Fifth Amendment.<sup>150</sup>

As under current law, a claim of the constitutional privilege is necessary to preserve the issue; unlike current law, however, the objection is also sufficient.

### 3. *Ripeness of Self-Incrimination Clause Disputes Arising in the Legislative or Administrative Hearing*

Keeping in mind at least the hypothetical availability of the postponed adjudication model, let us consider how traditional ripeness principles would apply to a dispute over the application of the Self-Incrimination Clause in the legislative or administrative hearing context.<sup>151</sup> To do so, it

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<sup>150</sup> *Maness*, 419 U.S. at 474 (White, J., concurring in the result); see also *Garrity*, 385 U.S. at 531 (White, J., dissenting); Westen & Mandell, *supra* note 136, at 540-41 (discussing Justice White's view).

<sup>151</sup> If there is no dispute—that is, if all parties agree that the witness has properly objected to the government's use of compulsion to wrench self-incriminating information from her—the result under either model is the same. Under the early adjudication model, the

will be necessary to look back at some of the different types of disputes that can arise: over whether the question calls for an incriminatory response; over whether the witness has properly made her claim of the Fifth Amendment privilege; over whether the government has used compulsion; and over the scope of immunity.<sup>152</sup> For each type of dispute, we will apply to our paradigm case the two considerations that determine whether any issue is ripe for review: the hardship to the witness of waiting for judicial review of the order to answer and the fitness of the issue for judicial review. Such an analysis demonstrates two things. First, in the wake of *Chavez*, there can be no credible claim of hardship to the witness resulting from a requirement that she wait until the institution of criminal proceedings against her before any Self-Incrimination Clause dispute is resolved. Second, even before *Chavez*, it was clear that most types of Self-Incrimination Clause disputes in the pre-prosecution mode are particularly unfit for judicial review.

a. Disputes Over Whether an Incriminatory Response was Called For

First, let us consider the case where the parties disagree over whether the question calls for an incriminatory response on the part of the witness.

i. Hardship to the Witness

What is the hardship to the witness of requiring that she answer a question to which she has a Fifth Amendment objection? That is, in the pre-prosecution mode, is there threatened or actual injury to the witness falling into either of the two categories<sup>153</sup> sufficient to make the issue ripe?

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government will grant the witness immunity and she will be required to answer but her answer and its fruits cannot be used against her in a later prosecution. See *supra* text accompanying notes 29-30. Under the postponed adjudication model, the government will order the witness to answer over her objection and she will be required to answer but her answer and its fruits cannot be used against her in a later prosecution. See O'Neill, *supra* note 28, at 2473 (suggesting that "Congress can compel incriminating statements from a witness [but] the statements would not be admissible in that witness's future criminal trial"); *id.* at 2547 (similar). Thus, the only difference is whether immunity is formally granted. See *id.* at 2551 (equating a congressional decision to grant immunity with its decision "to ignore the Fifth Amendment privilege altogether"). Under the postponed adjudication model, formal grants of immunity would be recognized for what they are—formal—and would become superfluous.

<sup>152</sup> See *supra* text accompanying notes 34-43. This list is meant not to be exhaustive but rather to aid in understanding how a traditional ripeness analysis can apply to various types of disputes. These categories do cover many of the disputes that have reached the Supreme Court.

<sup>153</sup> See *supra* text accompanying notes 124-26.

First, there is no actual injury yet because the witness has not been put to the choice of foregoing arguably legally-protected behavior or violating the law. To understand why, we must turn again to *Chavez*. *Chavez* teaches that the witness' rights pursuant to the Self-Incrimination Clause extend no further than the right to have compelled statements excluded from evidence in any criminal proceedings against her. They do not include the various prophylactic mechanisms the courts have set in place in order to protect the core right. Thus, just as a suspect in police custody has no constitutional right to have warnings read to him and a waiver obtained pursuant to *Miranda* before giving an incriminating statement,<sup>154</sup> neither does our Congressional committee witness have a constitutional right to refuse to answer a question propounded to her. She has only the right not to have that answer or its fruits used against her in a later prosecution. She thus suffers no hardship *with respect to that right* when she is required to answer a question even over a valid claim of the constitutional privilege, as long as she is able to litigate the admissibility of the information provided and its fruits at the appropriate time—when the government seeks to use them against her.

Second, the injury is not inevitable. Prosecutors have extraordinarily wide discretion in deciding whether to bring criminal charges.<sup>155</sup> Thus, it can hardly be said that a criminal prosecution is inevitable. Moreover, the injury would occur, not from the mere institution of charges, but from the use of the compelled testimony or its fruits against the witness-turned-defendant. Until the prosecutor manifests an intent to use such evidence against the former witness, there is no inevitability of injury.

In fact, where the dispute is over whether the question calls for an incriminatory response, the postponed adjudication model effectively forecloses the government's use of the response in a later criminal proceeding against the witness altogether. After all, if the government later seeks to use the response against the witness, it is, by definition, incriminatory as to her, since, according to the government at least, it supplies a link in the chain of evidence proving her guilt. Of course, the parties will still need to litigate just prior to trial the admissibility of any evidence arguably derived from the response. However, this is true even where formal immunity is granted under the early adjudication model. Thus, the postponed adjudication model not only imposes no hardship to

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<sup>154</sup> See Mannheimer, *supra* note 20, at 122-24.

<sup>155</sup> See Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 143 n.29 (1974) ("Because the decision to instigate a criminal prosecution is usually discretionary with the prosecuting authorities, even a person with a settled intention to disobey the law can never be sure that the sanctions of the law will be invoked against him.").

the witness's Self-Incrimination Clause rights, it virtually eliminates the need to litigate the issue of the incriminating nature of the response: *any* response and its fruits that the government wants to use against the witness in a criminal prosecution must be excluded.

The same result obtains even if, as some have argued,<sup>156</sup> the government should be able to admit into evidence anything derived from the compelled statement. Under this theory, the Self-Incrimination Clause does not prohibit the admission of physical evidence derived even from a compelled statement.<sup>157</sup> Accordingly, the witness has no right pursuant to the Self-Incrimination Clause to keep from the Congressional committee information that might lead to other evidence against her. She has only the right pursuant to that Clause to keep her own compelled statements themselves from being used against her. Again, allowing her to move to suppress those statements prior to trial affords her an adequate remedy to secure that right. And since such statements are, by definition, incriminatory, she can be assured of winning that motion every time.

Thus, according to neither accepted theory of hardship has this prong of the ripeness requirement been satisfied. The witness suffers no current injury to her Self-Incrimination Clause rights because the Constitution affords her no right to avoid disclosing self-incriminatory information and she is not "chilled" from exercising any rights she does have; and the violation of her rights is not inevitable, for it is contingent on the government's instituting a prosecution against her, which is by no means certain.

One might ask why, if there is no hardship to the witness of waiting for resolution of a meritorious claim of the Fifth Amendment privilege against

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<sup>156</sup> See, e.g., Amar & Lettow, *supra* note 78, at 858-59, 911; Mannheimer, *supra* note 20, at 125.

<sup>157</sup> A plurality of the Supreme Court recently wrote that "[t]he Self-Incrimination Clause . . . is not implicated by the admission into evidence of the physical fruit of a voluntary statement." *United States v. Patane*, 124 S. Ct. 2620, 2626 (2004) (plurality opinion) (emphasis added). Yet, in *Patane*, the issue was the admissibility of physical evidence discovered as a result of questioning not preceded by the warnings and waiver prescribed by *Miranda*. See *id.* at 2624. A statement resulting from such questioning can by no means be deemed "voluntary," since the rule enunciated in *Miranda* conclusively presumes, to the contrary, that such a statement is compelled. See Mannheimer, *supra* note 20, at 71 ("The *Miranda* rule . . . establishes a conclusive presumption that, without the appropriate warnings and waiver, any response by a suspect to custodial interrogation has been 'compelled' within the meaning of the Self-Incrimination Clause . . ."). The *Patane* plurality's conclusion that such a statement is "voluntary" so that physical evidence derived from it need not be excluded paid inadequate attention to the very foundation of *Miranda* and appears to be an artifice allowing the Court to avoid confronting the real issue: whether physical evidence derived even from a *compelled* statement need be suppressed.

self-incrimination, have witnesses typically not chosen to follow this route, even if they are not required to. Why, that is, would a witness ever choose to stand on the privilege and risk contempt rather than take the postponed adjudication model's approach, confident that statements following a valid claim of the constitutional privilege, and their sequelae, are inadmissible in evidence against the witness in a criminal prosecution? There are essentially three reasons. First, most if not all witnesses will consider factors in addition to possible criminal liability, such as loss of employment and damage to reputation, when deciding to risk contempt rather than provide self-incriminating responses.<sup>158</sup> Second, witnesses, and their attorneys, have become inured to a system in which the Supreme Court has repeatedly announced in dicta—incorrectly, as *Chavez* informs us—that the constitutional privilege against self-incrimination protects witnesses from divulging information that might later be used against them in a criminal case. Most importantly, however, under current law, the witness has no assurance that she can take the “talk now, litigate later” approach. Indeed, most signs point to the contrary.<sup>159</sup>

Thus, considerations beyond the scope of the Self-Incrimination Clause have created a system in which the early adjudication model is the norm. Yet, ironically, not only does the postponed adjudication model cause no hardship to the witness, at least with respect to her rights pursuant to the Self-Incrimination Clause properly understood, but it seems also that it is the early adjudication model that most strains the witness's Self-Incrimination Clause rights.<sup>160</sup>

## ii. Fitness for Judicial Review

The other consideration that must be examined to determine whether this Self-Incrimination Clause dispute is ripe in the pre-prosecution mode is the fitness of the issue for judicial review. While the hardship analysis rests in large part upon the renewed understanding wrought by *Chavez* of the rights actually protected by the Self-Incrimination Clause, the lack of fitness of Self-Incrimination Clause disputes for judicial review in the pre-prosecution mode has been manifest for some time.

Under the early adjudication model, at the point the contempt court must determine whether our Congressional committee witness's claim of the constitutional privilege is valid, it has virtually no information at its

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<sup>158</sup> See O'Neill, *supra* note 28, at 2515 (noting that during House Un-American Activities Committee hearings in the early 1950s, witnesses' “reputations, livelihoods, and even families hung on the answers given”).

<sup>159</sup> See *supra* text accompanying notes 134-40.

<sup>160</sup> See *supra* text accompanying notes 134-49.

disposal. It has general information regarding the purpose of the hearing, it knows the questions asked of the witness, and it might have the answers to any questions that the witness deemed unobjectionable (though, as discussed below, this might simply create additional problems). It may be that only the witness herself will know why the answer to a seemingly innocuous question might be incriminating, and yet it is ultimately the contempt court that must decide whether her fear of disclosing self-inculpatory information is reasonable.<sup>161</sup> The court must decide the fate of the witness while sealed in a virtual juridical vacuum.

Of course, it is possible to institute procedures to address these concerns, such as by having the witness explain herself to the judge *ex parte* and *in camera*. While such procedures might ameliorate the lack of fitness of the issue for judicial review, they are not a panacea. In the early stages of an investigation, the judge may not fully comprehend how the response sought could possibly furnish a link in the chain of evidence connecting the witness to a crime. Even with the aid of counsel, the witness may not herself fully comprehend this either, and may not be able explain this to the judge except in the most vague and conclusory way.

The result of all this may well be that courts will err on the side of upholding the witness's claim of the constitutional privilege.<sup>162</sup> Yet while defense attorneys may cheer this result, fans of an accurate and impartial accommodation between the genuine rights of witnesses pursuant to the Fifth Amendment and the truth-seeking function of investigative bodies should hope for more.

This strain on the courts' resources caused by their having to decide such weighty matters on such a paltry factual record is almost wholly unnecessary. Under a postponed adjudication model, the issue of whether a given response is incriminatory would virtually never have to be litigated. This is because, again, if the prosecution were to seek to admit evidence of the response against the witness-turned-defendant in a criminal proceeding, then that response was, by definition, incriminating. The postponed adjudication model in this instance is a misnomer because it does not merely postpone adjudication of the Self-Incrimination Clause dispute—it eliminates the necessity of that adjudication. By requiring the witness to answer the question when she is ordered to do so, this model automatically confers immunity on the witness when she gives an answer that is responsive to the question. There is nothing left to litigate. When it comes

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<sup>161</sup> See *supra* Part I.B.3.

<sup>162</sup> See Note, *supra* note 49, at 1768 ("If there is a discernible trend in testimonial waiver cases, it is toward greater deference to exercises of the [F]ifth [A]mendment privilege . . .").



to considerations of fitness for review, then, the postponed adjudication model wins hands down.

b. Disputes Over Whether the Constitutional Privilege was Waived

Next, we must consider another major area of dispute: where the parties disagree over whether the privilege was waived.

i. Hardship to the Witness

The witness suffers minimal hardship by being required to wait to resolve such a dispute because, for the same reasons already discussed, she has not suffered constitutional injury and no such injury is inevitable. Again, this is not to say that she suffers no injury. If she is unsure whether her position is correct, she will have to choose between standing in contempt or divulging information that can later be used against her if her position turns out to be incorrect. But, again, the Self-Incrimination Clause, properly understood, does not provide her the right to refuse to divulge the information. So it does no constitutional harm to her to require her to choose between obeying and disobeying the law.<sup>163</sup>

ii. Fitness for Judicial Review

In addition, for all the reasons stated previously with regard to disputes over whether the question calls for an incriminatory response, a dispute over whether the witness has waived the Fifth Amendment privilege is generally unfit for judicial review. If the dispute is simply over whether the witness has put the objection in the proper form, of course, the record is likely sufficient because the dispute is easily resolvable; the court need merely look at whether the witness actually invoked the Fifth Amendment. However, for the same reason, such disputes will rarely occur. More likely, the dispute will revolve around whether the witness has waived the objection by raising it too late.<sup>164</sup>

Such cases occur where the witness was not fully appreciative of the incriminating nature of a line of questioning at the outset and instead became aware of the danger of self-incrimination only after a more obviously incriminating query had been posed. The question for the

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<sup>163</sup> See *McGautha v. California*, 402 U.S. 183, 213 (1971) (noting that "the Constitution does not . . . always forbid requiring [a person] to" make difficult choices).

<sup>164</sup> There is a nice symmetry here: the dispute here is essentially whether the objection came too late, whereas the dispute over whether a question calls for an incriminatory response is often a question of whether the objection has been raised too early.

contempt court then becomes whether the witness has crossed the *Rogers*<sup>165</sup> Rubicon—that is, whether her answers to the first few questions operated as a waiver of an objection to all others in the same line of questioning.<sup>166</sup> Matters become more complicated, and the record even less fit for judicial review, under these circumstances. The court must determine, not simply whether the answer would be incriminating, a task hard enough in itself, but whether the answer would be *further* incriminating in light of the answers already given.<sup>167</sup> That is, the question becomes not whether the answer could be incriminating but whether it would be marginally incriminating given the already incriminating testimony. Again, this determination is made by a court that is almost wholly “in the dark” as to the eventual, and hypothetical, case against the witness.<sup>168</sup> Thus, not only must the court “determine whether an answer will be . . . ‘further incriminating’ before the judge knows exactly what the answer will be”<sup>169</sup>—the same problem presented when the court must merely determine whether an answer will be incriminating—but the court has the further, seemingly impossible task of determining whether an answer would be further incriminating “without knowing what other evidence there is or eventually might be against the witness.”<sup>170</sup>

Contrast this paltry state of the record with the one that will exist just prior to trial. The prosecution will know, and will be able to present to the court upon a motion to suppress, what evidence it intends to produce against the witness-turned-defendant. With the aid of defense counsel, the court will be able to determine from the evidence as it *has* developed, rather than guess about how the evidence *will* develop, whether the witness was justified in objecting when she did. The contrast between an abstract, hypothetical dispute and a concrete, real one could not be more stark.

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<sup>165</sup> *Rogers v. United States*, 340 U.S. 367, 372-75 (1951); see *supra* text accompanying notes 48-50.

<sup>166</sup> See Note, *supra* note 49, at 1759 (“A witness without immunity faces the dilemma of refusing to answer, possibly risking contempt, and invoking the privilege too late, only to discover that its protections have been waived.”); see also *id.* at 1754 (“[I]t [is] difficult for a witness to determine whether answering one question will operate as a waiver of the privilege to refuse to answer further inquiries.”).

<sup>167</sup> See *id.* at 1755 (“[F]ederal courts have adhered . . . to a ‘further incrimination’ approach to testimonial waiver, focusing the inquiry on whether the information sought could further incriminate the witness . . .”).

<sup>168</sup> See *id.* at 1758 (“[T]he judge must essentially determine, without knowing what the bulk of the evidence in the case could eventually consist of, that the absence of the [further incriminating] information sought would not cause a reasonable doubt to exist in the minds of jurors.”).

<sup>169</sup> *Id.* at 1759.

<sup>170</sup> *Id.*

Again, the lack of fitness of judicial review of this type of dispute in the pre-prosecution mode is clear, especially when compared to the superiority of proceeding, pursuant to the postponed adjudication model, via a motion to suppress just prior to trial, if there is to be one.<sup>171</sup>

c. Disputes Over Whether the Government Employed Compulsion

When we consider disputes over whether the government has utilized compulsion, we must change our hypothetical case, for it is well accepted that the threat of contempt acts as compulsion within the meaning of the Self-Incrimination Clause. Positing a civil case gives the same result, since there, too, the presiding judge has the power to hold a litigant in contempt if she fails to comply with discovery demands. Suppose, instead, that a Congressional committee witness, a federal employee, is told that she must waive immunity before the committee—effectively waiving the privilege prospectively as to all questions—or she will lose her job. If the witness disputes that the committee has the right to do this, she might, pursuant to the early adjudication model, refuse to sign the waiver, lose her job, and then bring a civil action to get her job back, the separate civil action now being the functional equivalent of the contempt proceeding in the earlier hypotheticals.<sup>172</sup> Pursuant to the postponed adjudication model, she would be required to waive immunity, answer all questions, and, if she is ever prosecuted, move to suppress the information she provided and its fruits on the ground that her testimony was compelled by the government's threat that a refusal to waive immunity would result in her loss of employment. In either event, the question is the same: whether the government's threat constituted compulsion within the meaning of the Self-Incrimination Clause.

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<sup>171</sup> The overwhelming majority of criminal indictments result in guilty pleas. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 8 (3d ed. 2003) ("[T]he conviction rate obtained by guilty pleas typically nears or exceeds ninety percent."). At least some of these take place before motions to suppress are litigated. Once again, the "postponed" adjudication model becomes, in many cases, a non-adjudication model, saving scarce judicial and prosecutorial resources and giving us all the more reason to prefer this to the early adjudication model.

<sup>172</sup> See, e.g., *Spevack v. Klein*, 385 U.S. 511, 512-13 (1967) ("judicial inquiry" witness required to waive immunity on pain of being barred from practicing his profession); see also *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-06 (1977) (grand jury witness required to waive immunity on pain of being barred from public office); *Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973) (grand jury witness required to waive immunity on pain of being barred from entering into contracts with State).

## i. Hardship to the Witness

What is the hardship to the witness of waiting to adjudicate this Self-Incrimination Clause dispute? As in the earlier hypotheticals, there is none because the injury to her Self-Incrimination Clause rights has not yet occurred and is not inevitable. Again, pursuant to *Chavez*, a person has no right not to be compelled to incriminate herself; she has only the right not to have such statements used against her in a criminal proceeding. Thus, when she is faced with what she considers compulsion to incriminate herself, even if she is correct, her rights have not yet been violated. The harm thus does not fall into the first category of the hardship analysis. Nor does it fall into the second category: the harm is not inevitable because the government may or may not ultimately bring criminal charges against the witness. Where prosecutorial discretion is interposed between compulsion—even assuming it is compulsion—and the use of the statements “in [a] criminal case,” the injury becomes speculative rather than certain.

Note, however, in this unique instance, the potential harshness of the postponed adjudication model. At the time the questions are propounded, the witness must make a decision whether to acquiesce in the waiver of immunity and keep her job or, alternatively, sacrifice her job in order to avoid providing information that might later be used against her, an option a rational witness might well choose. Of course, the information could be used against her only if a court would later hold that no compulsion has occurred, but at the time she makes her decision, the witness does not know what a court would do. The witness might gamble that a later court would hold the government’s threat to constitute compulsion, and answer the questions to keep her job, only to find out later when she is prosecuted that she was not “compelled” at all, and her answers and their fruit can be used against her. Under the early adjudication model, the witness takes a chance also, by refusing to answer the questions, losing her job, and suing to get it back. But the price of being wrong in that instance, the loss of her job, is probably far lower than the price tag attached to being wrong under the postponed adjudication model—criminal liability and possible imprisonment.

The harshness of this result, however, would not flow from a principled application of the ripeness doctrine in Self-Incrimination Clause cases. It is, rather, a result of the notion, unfortunately reinforced by some of the Supreme Court’s jurisprudence in this area, that information can be disclosed over the objection of the invoker and still not be “compelled.” Thus, while the Supreme Court has held that it constitutes compulsion to require a witness before an administrative agency or grand jury to provide

information on pain of being barred from pursuing her livelihood, as in our example,<sup>173</sup> it has been less solicitous of those in less formalized settings, especially prison inmates, where the government either offers to bestow a benefit or threatens to exact a price in order to obtain self-incriminating information.<sup>174</sup> It is at least arguable that compulsion should be recognized for purposes of the Fifth Amendment whenever a person has claimed the privilege after the government has made such an offer or a threat.<sup>175</sup> It stands to reason that even if compulsion cannot be presumed merely by the asking of a question, that presumption should at least shift when an objection to the question has been made on Self-Incrimination Clause grounds. It seems that this would be a fair counterbalance to the requirement that the invoker provide the information when it is requested and only later seek to avoid its use against her.

## ii. Fitness for Judicial Review

A dispute over whether compulsion has been utilized, unlike the other types of disputes that have been addressed, can be considered fit for judicial review at the time the alleged compulsion is used. This is because the question is wholly independent of the information the witness has been asked to disclose. Whether it constitutes compulsion for the government to exact the loss of employment as the price for exercising the constitutional privilege against self-incrimination appears to be a pure question of law. This question of law is separable from whether the witness succumbed to the pressure, what she said as a result, or whether and to what extent it formed a link in the chain of evidence against her. The same appears to be true of any other detriment the government could impose or benefit it could refuse to confer. Thus, this consideration weighs in favor of treating as ripe disputes over whether compulsion has been employed.

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<sup>173</sup> See *supra* note 172.

<sup>174</sup> See, e.g., *McKune v. Lile*, 536 U.S. 24, 37-38 (2002) (plurality opinion) (opining that “[a] prison clinical rehabilitation program” requiring convicted sex offenders to admit all prior sex crimes does not utilize compulsion “if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life”); *id.* at 50-51 (O’Connor, J., concurring in the judgment) (opining that “restrictions on the personal property [an inmate] can keep in his cell, a reduction in his visitation privileges, a reduction in the amount of money he can spend in the canteen, and a reduction in the wage he can earn through prison employment” were too “minor” to constitute compulsion).

<sup>175</sup> See, e.g., *id.* at 54 (Stevens, J., dissenting) (arguing that the Court had never before “held that a person who has made a valid assertion of the privilege may nevertheless be ordered to incriminate himself and sanctioned for disobeying such an order”).

However, it seems that both hardship *and* fitness must be sufficiently shown to render a dispute ripe for review.<sup>176</sup> And even if some compromise were permitted, it would likely operate to excuse a more sparse factual record where hardship considerations demonstrate “a compelling need for immediate judicial review.”<sup>177</sup> This is “[b]ecause the hardship requirement is constitutionally based,” whereas fitness is deemed to be a prudential concern, so “in all likelihood [the former] is less flexible.”<sup>178</sup> Accordingly, disputes over whether the government’s actions constitute compulsion, even though they might be fit for judicial review, should be deemed unripe until criminal proceedings have been initiated.

#### d. Disputes Over the Scope of Immunity

Finally, the dispute could center around whether the scope of immunity is sufficient to supplant the Fifth Amendment privilege against self-incrimination. In one sense, the early adjudication model is wholly unavailable here. Since the law is relatively well settled that a witness is entitled to use-plus-derivative-use immunity, the only issues that remain address implementation of this standard. That is, the only remaining dispute is over whether any particular piece of evidence or non-evidentiary material deriving from the compelled statement is immunized from use. Even under current law, this is addressed, and can only be addressed, once criminal proceedings have been instituted and the government knows what evidence it wishes to set forth against the witness-turned-defendant.

Suppose, however, that Congress takes the lead from some in the academic community who have argued that mere use immunity is sufficient to supplant the privilege<sup>179</sup> and passes a statute providing that all immunity hereinafter granted by any of its committees will be mere use immunity. Suppose further that our hypothetical Congressional committee witness is the first to be granted such immunity in exchange for her testimony and she chooses to dispute that the scope of the immunity granted is equivalent to the constitutional privilege it purports to replace.

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<sup>176</sup> See CHEMERINSKY, *supra* note 114, § 2.4.3; see also *Poe v. Ullman*, 367 U.S. 497 (1961) (holding claim to be unripe despite the fact that it addressed a pure legal issue). *But see* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 80 (2d ed. 1987) (suggesting that either hardship or fitness is sufficient to make a claim ripe for review).

<sup>177</sup> CHEMERINSKY, *supra* note 114, § 2.4.3.

<sup>178</sup> *Id.*

<sup>179</sup> See *supra* text accompanying note 157.

i. Hardship to the Witness

As with the other types of disputes addressed, such a witness cannot claim hardship from being required to wait and litigate her claim later. First, she suffers no injury to her Self-Incrimination Clause rights from being required to answer the committee's questions, something she would have to do even if the immunity were broader. This is because, again, the Clause is violated only when the compelled statement or, arguably, its fruits are used against her criminally. Second, such injury is again not inevitable because the nature of prosecutorial discretion renders the possibility of injury highly speculative.

Indeed, the postponed adjudication model would render formal grants of immunity utterly superfluous. Pursuant to such a model, whenever the witness is compelled to divulge over her objection information that turns out to be incriminatory, immunity automatically attaches to anything she says. Since immunity need never be granted formally, there likewise need not be any immediate litigation over the scope of that immunity. It seems completely natural that such litigation should await a future date, if that date ever even comes.

ii. Fitness for Judicial Review

On the other hand, the issue concerning the scope of immunity, in the rare case that it arises, is a purely legal one. Thus, it ought to be considered fit for judicial review. Yet, for the reasons already discussed,<sup>180</sup> such fitness for review does not counterbalance the lack of any current or inevitable injury to the witness requiring redress. Accordingly, even this type of dispute ought not be addressed in the pre-prosecution mode.

C. RIPENESS UNDER *DUKE POWER*

As shown above, disputes regarding a claim of privilege pursuant to the Self-Incrimination Clause generally do not satisfy traditional ripeness requirements, at least under the two accepted theories of "hardship." However, it is at least arguable that such disputes can be considered ripe pursuant to a third application of the "hardship" requirement: where collateral injuries not the focus of the lawsuit are inevitable or have already occurred. In such cases, the injuries stemming from the arguably invalid government action are unrelated to the arguable invalidity of the government's conduct.<sup>181</sup> Yet such a theory of ripeness has been endorsed by the Supreme Court in but a single, exceptional case—*Duke Power v.*

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<sup>180</sup> See *supra* text accompanying notes 176-78.

<sup>181</sup> See CHEMERINSKY, *supra* note 114, § 2.4.2.

*Carolina Environmental Study Group, Inc.*<sup>182</sup>—that can most charitably be described as an outlier and which does not conform to any generally acceptable notion of ripeness. To see why, an extensive discussion of that case is required.

In *Duke Power*, an environmental group, a labor union, and residents who lived near the sites of two planned nuclear power plants sued the Nuclear Regulatory Commission to invalidate the Price-Anderson Act.<sup>183</sup> That Act,<sup>184</sup> in essence, limited total liability for a nuclear accident to \$560 million, irrespective of whether damage to life, health, and property would actually exceed that amount.<sup>185</sup> The plaintiffs made essentially two claims: first, they argued that the Act arbitrarily interfered with their property rights in violation of the Due Process Clause of the Fifth Amendment by artificially truncating the compensation that would be due them should a nuclear accident occur;<sup>186</sup> and second, they claimed “that in the event of a nuclear accident their property would be ‘taken’ without any assurance of just compensation” in violation of the Takings Clause of the same Amendment.<sup>187</sup> While no such accident had yet occurred, the plaintiffs alleged that a number of injuries would inevitably occur if the nuclear plants were merely built, such as an increase in the temperature of two nearby lakes used for recreational purposes due to the use of lake water to cool the reactor, and the emission of low levels of non-natural radiation into the environment.<sup>188</sup> The lawsuit was premised on the theory that without the limitation-of-liability provisions of the Price-Anderson Act, nuclear power plants would not be built because of industry concern over potential liability in case of accident, and these alleged injuries would not occur.<sup>189</sup>

Even though no nuclear accident had occurred, triggering the liability-limiting provisions of the Price-Anderson Act, the Court held that the claims were ripe. Having already held that the plaintiffs had standing because of the injuries that were alleged to be inevitable,<sup>190</sup> the Court held, in a matter of two sentences, that those same injuries were sufficient to satisfy the “hardship” requirement of the ripeness test. Opining that the

<sup>182</sup> 438 U.S. 59 (1978).

<sup>183</sup> *Id.* at 67. The plaintiffs also sued the utility planning to construct the plants, but the Court held that its “presence or absence [in the suit] makes no material difference to [the] consideration of the merits.” *Id.* at 72 n.16.

<sup>184</sup> See 42 U.S.C. § 2210(e) (2000).

<sup>185</sup> *Duke Power*, 438 U.S. at 64-67.

<sup>186</sup> *Id.* at 69.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 72-74.

<sup>189</sup> *Id.* at 69, 74-75.

<sup>190</sup> This conclusion, while dubious, is beyond the scope of this article.



ripeness issue "need not long detain" the Court, it held that its "conclusion that [the plaintiffs] will sustain immediate injury from the operation of the disputed power plants" satisfied the hardship requirement.<sup>191</sup> Thus, "while the primary injury that was the focus of the lawsuit was not ripe—uncompensated losses from a nuclear accident—other injuries existed to make the case justiciable."<sup>192</sup>

Analogously, with respect to our hypothetical Congressional committee witness, one might construct a persuasive argument to show that hardship within the meaning of *Duke Power* will occur if she is required to make disclosures of information without a promise of immunity. Pursuant to such a theory of hardship, the witness undoubtedly suffers some hardship by being required to answer the committee's questions even over a proper claim of the Fifth Amendment privilege. She may well suffer ostracism from her community, ignominy amongst her friends, family, and colleagues, and all the other tangible and intangible effects that flow from disclosure of involvement in criminal activity. Indeed, that is likely why most witnesses when asked to incriminate themselves would prefer not to, even if they could be assured that the answers will never be used against them. Moreover, without a contemporaneous grant of immunity, the witness will suffer the anxiety of not knowing whether her words will be used against her. Of course, the Supreme Court has long held that the Self-Incrimination Clause protects only against the prospect of a future prosecution, not loss of reputation and the like.<sup>193</sup> Nonetheless, pursuant to *Duke Power*, damage to these ancillary interests, even though not themselves protected by the Self-Incrimination Clause, might be sufficient to render ripe the disputed claim of the constitutional privilege against self-incrimination.

However, *Duke Power* has been roundly criticized for stretching the concept of ripeness beyond all recognition. The central vice of the decision is that it conflated the separate ripeness and standing inquiries by holding that the allegedly inevitable injury that was sufficient to give the plaintiffs standing was also sufficient to make their claim ripe for review, even though those injuries were completely unrelated to their claim.<sup>194</sup> The plaintiffs alleged injury in fact from the threatened operation of the nuclear plants in the form of an increase in the emission of non-natural radiation

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<sup>191</sup> *Id.* at 81.

<sup>192</sup> CHEMERINKSY, *supra* note 114, § 2.4.2.

<sup>193</sup> See, e.g., *Brown v. Walker*, 161 U.S. 591, 605-06 (1896) ("The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge.").

<sup>194</sup> See Varat, *supra* note 12, at 298.

and in the temperature of the lakes they used for recreation. But they did not, and could not, claim any legal right to be free from these effects. The only legal right they claimed, the right not to be arbitrarily under-compensated in the case of a nuclear accident, was in no way in any danger and was wholly unrelated to the types of injuries that gave them standing.<sup>195</sup> As Professor Varat has cogently observed:

*Duke Power* shifted the focus from the certainty of occurrence of the allegedly unlawful conduct to the certainty of occurrence of the concrete injury that gives the plaintiff a personal stake in the outcome of the case. The shift equates ripeness with standing and permits adjudication of claims of right—even though injury to those rights is not and may never be threatened—if a favorable decision could prevent injury of another kind.<sup>196</sup>

If ripeness is to be differentiated from standing, “the Court must focus on harm to the rights claimed to be unlawfully disregarded,” for “[r]ipeness is meaningful” as an inquiry separate and apart from standing “only if applied to the issue raised in the case.”<sup>197</sup> Of course, in the run of cases, the alleged injury that confers standing on the plaintiffs will be the same alleged injury that is asserted to make the claim ripe.<sup>198</sup> However, “[i]n the rare case like *Duke Power*” where this is not true, “the inquiries are separate and should be treated as such.”<sup>199</sup>

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<sup>195</sup> See *id.* (“[T]he Court held the constitutional dimension of ripeness satisfied by the imminence of the injury that gave the plaintiffs standing, instead of requiring the imminence of injury to the legal rights asserted in the suit.”); *id.* at 303 (“The imminent threat of environmental injury to the plaintiffs did not make any more likely the events that might threaten injury to the due process rights asserted in the suit.”); see also Floyd, *supra* note 114, at 927 (“The only immediate injury was unrelated to any arguable claim of right by the plaintiffs. And their only arguable claim of right—application of the limitation of liability provision—was not ripe.”).

<sup>196</sup> Varat, *supra* note 12, at 279.

<sup>197</sup> *Id.* at 304; see also Floyd, *supra* note 114, at 931 (arguing that the Court’s ruling violated the general principle that the injury upon which jurisdiction rests must “have some logical nexus with the statute or constitutional provision relied upon”).

<sup>198</sup> See Varat, *supra* note 12, at 304.

<sup>199</sup> *Id.* *Duke Power* has also been criticized for grossly misapplying not only the hardship dimension of ripeness but the fitness aspect as well. The Court addressed the constitutionality of the limitation-of-liability provisions of the Price-Anderson Act, even though these provisions would be triggered only by an actual nuclear accident, and even though it was entirely speculative not only whether such an accident would ever occur, but also what the resultant injury would be. This is conjecture squared. Most striking is the disconnect in the Court’s ripeness discussion, in which it brushed aside claims that the factual record was inadequate for such a weighty determination, and its discussion of the merits, in which it acknowledged the difficulties of determining such a claim in advance of a catastrophe. See Varat, *supra* note 12, at 307 (“The Court’s assessment in *Duke Power* that it had at the time of its decision as many of the factual tools as it would have had if it had awaited application of the Price-Anderson limitation is strikingly unpersuasive, given the

It should come as little surprise, then, that *Duke Power* has been largely dismissed by the academic community as anomalous. A "principled application of the Court's articulated justiciability doctrine would have

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very terms in which the Court framed its holding."). Thus, in its discussion of ripeness, the Court wrote, "Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, it would not . . . significantly advance [the Court's] ability to deal with the legal issues presented nor aid . . . in their resolution." *Duke Power*, 438 U.S. at 81-82. Yet, in its discussion of the merits, the Court's reasoning clearly indicates that a firmer factual context would indeed help it resolve the issues. The Court acknowledged that there was "considerable uncertainty as to the amount of damages which would result from a catastrophic nuclear accident," *id.* at 84 n.28, uncertainty that would no doubt vanish if such an accident ever occurred. The Court rejected the argument that the \$560 million cap was arbitrary because "whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized." *Id.* at 86. Yet, the Court would be in a much stronger position to determine whether the liability cap was truly arbitrary in the aftermath of a disaster when the true amount of damages would no longer be "imponderable[.]" In a similar vein, the Court declared that "the hard truth is that no one can ever know" if "the \$560 million fund would not insure full recovery in all conceivable circumstances." *Id.* at 84-85. Of course, it was irrelevant whether the compensation would be adequate "in all conceivable circumstances," instead of the circumstances that actually arise; and when they did arise, the answer to this question obviously would be known. See Varat, *supra* note 12, at 305 ("After an accident, the Court would have known the actual disparity between the damage caused by the accident and the amount of compensation afforded by the Price-Anderson scheme."). In addition, at the time a nuclear accident occurred, the liability cap of Price-Anderson might be altered or even repealed altogether. See *id.* at 305-06. Likewise, the Court rejected the plaintiffs' claim that the waiver of defenses on the part of the utility companies required by the Act in exchange for the liability limitation was of no use because the utilities had no defenses under state tort law: "Since there has never been . . . a case arising out of a nuclear incident like those covered by the Price-Anderson Act, any discussion of the standard of liability that state courts will apply is necessarily speculative." *Duke Power*, 438 U.S. at 91. Again, if the Court had waited until such an incident actually occurred, and the Price-Anderson Act had been pled as a defense to a state tort suit, much of this uncertainty would have disappeared as well. See Varat, *supra* note 12, at 305 ("After an accident [t]he Court would have known what realistic alternate sources of recovery would have been available to future plaintiffs absent Price-Anderson—[a] set of facts that probably will vary over time."). Finally, and "particularly troubling," *id.* at 307, the Court depended on the fact that "in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief." *Duke Power*, 438 U.S. at 85. This assumption was based on a supposed "commitment" in the Act requiring Congress to examine other avenues of redress in the event of a catastrophe. Yet, the Court had no idea how a future Congress would react to a disaster. "If the Court was truly as able to decide without knowing how Congress would react as it would be with that knowledge," then, presumably, Price-Anderson is constitutional no matter what a future Congress does. Varat, *supra* note 12, at 307. And if so, "one wonders why the Court took comfort in the existence of [Congress's] statutory commitment" in deciding that the Act is constitutional. *Id.* Thus, the Court's own determination of the merits in *Duke Power* demonstrates how far off the mark its fitness determination was. In light of its prior cases, this determination was "something of a mystery." *Id.*

compelled the Court to find the case nonjusticiable on . . . ripeness grounds."<sup>200</sup> The Court reached the decision it did only by altering "its general view of justiciability."<sup>201</sup> Professor Varat has concluded that "the [C]ourt was unjustified in acting this way,"<sup>202</sup> and that *Duke Power* is "untenable on its own terms."<sup>203</sup> Professor Floyd has bluntly concurred: "The Court's approach in *Duke Power* was fundamentally in error."<sup>204</sup>

It is commonly accepted that the result in *Duke Power* flowed from purely political considerations. The district court had struck down the Price-Anderson Act on the grounds advanced by the plaintiffs.<sup>205</sup> Had the Supreme Court merely reversed with directions to dismiss based purely on justiciability grounds, a constitutional shadow on the Act would have remained. The constitutionality of the Act might have remained in doubt until the extraordinary circumstance of a nuclear accident had occurred, seriously curtailing the principal benefit of the Act, which was to assure putative private investors in nuclear power that their liability was limited in case of disaster. Moreover, while no suit could have been brought in federal court until such a disaster occurred, a dismissal on justiciability grounds would have left open the possibility that a state court, not bound by Article III justiciability constraints,<sup>206</sup> might have agreed with the constitutional analysis of the district court.<sup>207</sup> Such an invalidation of the Act would have remained unreviewable by the Supreme Court.<sup>208</sup>

Thus, the result in *Duke Power* can best be explained as a consequence of the Court's "desire to remove the constitutional doubts raised by the district court's judgment of unconstitutionality"<sup>209</sup> and "place a constitutional stamp of approval on [the] important federal policy" manifested in the Price-Anderson Act.<sup>210</sup> It appears that "the Court was

<sup>200</sup> Varat, *supra* note 12, at 278.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 280.

<sup>203</sup> *Id.* at 279.

<sup>204</sup> Floyd, *supra* note 114, at 927; *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 150 (4th ed. 1996) (arguing that *Duke Power* is "virtually impossible to reconcile with prior authority").

<sup>205</sup> *See* Carolina Envtl. Study Group v. Duke Power Co., 431 F. Supp. 203, 222-23 (W.D.N.C. 1977), *rev'd*, 438 U.S. 59 (1978).

<sup>206</sup> *See supra* note 12.

<sup>207</sup> *See* Varat, *supra* note 12, at 308-14.

<sup>208</sup> *Id.* at 310-12; *see* Doremus v. Bd. of Educ., 342 U.S. 429 (1952).

<sup>209</sup> Varat, *supra* note 12, at 309.

<sup>210</sup> *Id.* at 278; FALLON ET AL., *supra* note 204, at 150 (arguing that *Duke Power* is "most plausibly explained as responsive to ad hoc considerations – especially the desire to reverse on the merits the district court's ruling that an important federal statute was

motivated by its perception of the public interest in prompt resolution of the constitutionality of the limitation of liability provision," and not by a principled application of the ripeness doctrine.<sup>211</sup> However understandable the reasons for the decision,<sup>212</sup> it seems clear that *Duke Power* was "sui generis and not likely to be followed in its seemingly logical implications."<sup>213</sup>

In short, our hypothetical Congressional committee witness has only *Duke Power* on her side when it comes to arguing why her disputed claim under the Self-Incrimination Clause is ripe for review. Yet *Duke Power* is a sui generis case, limited to its facts, and driven by political considerations beyond the scope of proper judicial decision-making. It has been attacked in the commentary and all but ignored in the case law. Accordingly, a *Duke Power* theory does not provide the hardship necessary to render a dispute over the Self-Incrimination Clause ripe for review.<sup>214</sup>

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unconstitutional"); see also Varat, *supra* note 12, at 315 ("[T]here is ample reason to think the Court wanted to decide *Duke Power* in order to approve Price-Anderson.").

<sup>211</sup> Floyd, *supra* note 114, at 927; see also Varat, *supra* note 12, at 303 ("*Duke Power* . . . is actually a departure from all its predecessors.").

<sup>212</sup> See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 95 (1978) (Rehnquist, J., concurring in the judgment) ("I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute."); *id.* at 103 (Stevens, J., concurring in the judgment) ("I cannot . . . criticize the statesmanship of the Court's decision to provide the country with an advisory opinion on an important subject. Nevertheless, . . . [w]e are not statesmen; we are judges.").

<sup>213</sup> Varat, *supra* note 12, at 309; see also *id.* at 326 (asserting that *Duke Power* is a so-called "[that] day and train only" decision) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (alteration in original)).

<sup>214</sup> In what appears to be the only reported post-*Chavez* analysis by a federal court of the ripeness of a Self-Incrimination Clause dispute, the U.S. Court of Appeals for the Ninth Circuit fell into the "*Duke Power* trap." In *United States v. Antelope*, 395 F.3d 1128, 1130-31 (9th Cir. 2005), the defendant claimed that the government's revocation of probation violated his rights pursuant to the Self-Incrimination Clause because the revocation was based on his "refus[al] to incriminate himself as part of his sex offender treatment" that was a condition of his probation. The district court had held that Antelope's "objection . . . would not be ripe until [he were] 'prosecuted or subject to prosecution' for additional crimes," if he were to reveal any. *Id.* at 1132. The Ninth Circuit disagreed. However, while purporting to conduct a ripeness inquiry, the court merely held that Antelope had standing. See *id.* (identifying the issue as "whether Antelope suffered an injury in fact"). Without citing to *Duke Power*, the court repeated the fallacy of that decision by basing its ripeness determination, not on whether Antelope had suffered injury to an interest protected by the Self-Incrimination Clause, as properly understood, but on whether he had suffered *any* injury. See *id.* at 1133 ("[H]e has already suffered the very serious and non-hypothetical injury of imprisonment after he invoked his Fifth Amendment right.").

## D. RIPENESS LESSONS FROM THE TAKINGS CLAUSE

Pursuant to traditional ripeness principles, many disputes over the Self-Incrimination Clause are not ripe when the claim of the constitutional privilege is asserted. This conclusion is reinforced by comparing that Clause to its Fifth Amendment neighbor, the Takings Clause. While addressing very different concerns, the two share a common characteristic: each is “bifurcated,” insofar as each is violated only if the government has taken two separate actions.

The Takings Clause provides that “private property [shall not] be taken for public use, without just compensation.”<sup>215</sup> It is clear from the face of the Clause that two governmental actions must coalesce before the Clause has been violated: first, the government must take property; second, it must refuse to render “just compensation.”<sup>216</sup> Suppose that a taking has clearly occurred but that it cannot fairly be said that the government has refused to pay just compensation, because no compensation has been sought through the means made available by the government. Any claim for a violation of the Takings Clause in such a situation should be deemed unripe.<sup>217</sup>

This application of the ripeness doctrine was first fully explicated by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.<sup>218</sup> There, the owner of land who planned to develop it as a residential subdivision sued a local planning commission, claiming that the commission had “taken” the land through the application of strict zoning laws and regulations.<sup>219</sup> The Court determined that the claim was unripe for review because the developer had “not yet . . . utilized the procedures [the State] provide[d] for obtaining just compensation.”<sup>220</sup>

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<sup>215</sup> U.S. CONST. amend. V. The Takings Clause applies to the States via the Fourteenth Amendment. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1896). As used in this article, “Takings Clause” refers to both the incorporated and unincorporated versions of the Clause.

<sup>216</sup> As the Court wrote in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 330, 348 (1996), a “regulatory takings claim . . . has two components. First, [the property owner] must establish that the regulation has in substance ‘taken’ his property . . . . Second, [he] must demonstrate that any proffered compensation is not ‘just.’”

<sup>217</sup> See CHEMERINSKY, *supra* note 114, § 2.4.3, at 109.

<sup>218</sup> 473 U.S. 172 (1985).

<sup>219</sup> *Id.* at 175.

<sup>220</sup> *Id.* at 186. The Court also held the claim unripe for review for a separate and independent reason: the developer had “not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property.” *Id.* That is, the developer had not yet proved that there had been a “taking.” This aspect of the ripeness doctrine in the Takings Clause context has been developed separately from the application of the ripeness doctrine with which this article is primarily concerned. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-21 (2001); *Suitum v. Tahoe Reg’l Planning Agency*, 520

The Court explained that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."<sup>221</sup> Thus, if the government provides a process by which compensation may be obtained, and "if resort to that process 'yield[s] just compensation,'" the Constitution has not been violated.<sup>222</sup> Where a property owner has not yet "used the procedure and been denied just compensation," its constitutional rights have not been violated and its Takings Clause claim is unripe for review in federal court.<sup>223</sup> On the other hand, a Takings Clause issue becomes ripe in this

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U.S. 725, 734 (1997); *MacDonald, Sommer & Frates*, 477 U.S. at 348-49; *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *Agin v. City of Tiburon*, 447 U.S. 255, 260-62 (1980). See generally R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVT'L. L. 101 (1994). While this strand of the ripeness doctrine is interesting in its own right, its usefulness is limited in understanding how the ripeness doctrine should be applied to Self-Incrimination Clause disputes. That is because the question of whether a taking has occurred is most directly analogous, in the Self-Incrimination Clause context, to the question of whether a statement has been compelled. Yet, while the former tends to be convoluted and fact-intensive, the latter is amenable to simpler and more categorical decision-making. See *supra* Part III.B.3.c.ii.

This article focuses on the second aspect of the ripeness doctrine applied by the Court to Takings Clause cases—that just compensation must be refused before a claim accrues—because, as discussed below, it is directly analogous to this article's proposed rule that a dispute over a claim of the constitutional privilege against self-incrimination is not ripe for review unless and until there is an inevitable danger that a person's words will be used against him or her in a criminal case. See *infra* notes 231-36 and accompanying text. Thus, a fuller discussion of the other application of the ripeness doctrine to the Takings Clause is beyond the scope of this article. For an excellent dissection of this area of the law, see generally Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

<sup>221</sup> *Williamson County*, 473 U.S. at 194 n.13.

<sup>222</sup> *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984)) (alteration in original); see also *id.* at 195 ("[T]he State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking."); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) ("If the condemnation proceedings do not . . . deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful."); *Suitum*, 520 U.S. at 734 ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.") (quoting *Williamson County*, 473 U.S. at 195) (internal quotation marks omitted); *MacDonald, Sommer & Frates*, 477 U.S. at 350 ("[A] court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide."); *Hodel*, 452 U.S. at 297 n.40 ("[A]n alleged taking is not unconstitutional unless just compensation is unavailable.").

<sup>223</sup> *Williamson County*, 473 U.S. at 195; see also Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 9, 23 (1992).

sense when the government makes clear its intention not to provide just compensation:

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution.<sup>224</sup>

This application of the ripeness doctrine makes perfect sense in traditional ripeness terms.<sup>225</sup> First, applying hardship analysis, one must ask whether the case involves the promulgation of a statute or regulation that forces the landowner to choose between forgoing his rights and risking prosecution or other sanctions. Clearly, this is not such a case: that the government has taken property does not unlawfully put the landowner to such a choice. Indeed, he need not do anything at all but wait for the government to either pay him just compensation or refuse to do so.<sup>226</sup> Until the government takes the latter course, it has not done anything "wrong." Moreover, until the government clearly signals its intent to fail to render just compensation, expressly or through inaction, there is no inevitability that this will occur and, hence, no hardship to the landowner of waiting.<sup>227</sup>

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<sup>224</sup> *Del Monte Dunes*, 526 U.S. at 717 (citations omitted).

<sup>225</sup> It bears mention, however, that four Justices have recently indicated their belief that this aspect of *Williamson County* should be reconsidered. See *San Remo Hotel, L.P. v. City of San Francisco*, 125 S. Ct. 2491, 2507 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in the judgment); see also Kassouni, *supra* note 223, at 3 (arguing that traditional ripeness analysis "has been largely ignored by courts when constitutional property rights are at issue").

<sup>226</sup> Kassouni argues that there is a "potential 'chilling effect' on private property rights if owners are required to spend years in court without any assurance that their just compensation claims will even be reviewed." Kassouni, *supra* note 223, at 22. Kassouni does not identify how that "chilling effect" manifests itself, but presumably the principal such effect is that landowners are chilled from developing their land in the way they want until the land-use regulations in question have been determined to have effected a taking without just compensation. Whatever validity this observation has with respect to the first *Williamson County* ripeness requirement, it is inapposite with respect to the second. Where the landowner's position is that his property has been taken and he awaits just compensation, he *has* no further development rights in the property that can be "chilled"; the land-use regulations are valid. The only question is: who pays for them, the landowner or the government? See *Suitum*, 520 U.S. at 744 (noting that the landowner sought "not to be free of the [land use] regulations but to be paid for their consequences"). Of course, if the government loses the suit, it may rescind the regulation in response rather than continue to pay, allowing the landowner to once again exercise his development rights. But that is entirely up to the government; it is not an option to which the landowner has any right.

<sup>227</sup> Kassouni argues that this ripeness requirement for Takings Clause claims "effectively close[s] the federal courthouse doors to aggrieved property owners," because any state level



Even if hardship could be shown, however, just compensation claims are paradigmatically unfit for judicial review. The very notion of “just compensation” makes resolution of the case turn on the distinct characteristics of the unique piece of property that has been taken. As the Court has noted: “[V]aluation issues peculiarly require a [well] developed record . . . . Without evidence of actual figures supporting various valuation theories, a court is not able to discern ‘what legal issues it is deciding, what effect its decision will have on the adversaries, [or] some useful purpose to be achieved in deciding them.’”<sup>228</sup> Where property has already undergone some valuation process pursuant to existing state proceedings, a court reviewing such a record is in a far better position than one starting essentially from scratch. Of course, in many cases the government’s determination of what is “just compensation” will be zero, because its position will be that no taking has occurred at all. However, the benefits of allowing local authorities, who are presumably more attuned to local conditions and markets, to have the first opportunity to make the initial valuation<sup>229</sup> in cases where only the compensation issue is contested arguably justify the establishment of a bright-line rule requiring the initial resort to those authorities in all cases.

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decision affording inadequate compensation would be entitled to res judicata effect and therefore immune from review. Kassouni, *supra* note 223, at 43, 44. This argument suffers from three flaws. First, it assumes that whatever mechanism the state has in place to determine just compensation claims would be an inverse condemnation proceeding, which is judicial in nature and entitled to res judicata effect. However, the procedure might just as readily take some other form. Second, in the Takings Clause context, as with any federal issue, ultimate resort can, at least in theory, be had in one federal court: the U.S. Supreme Court. See *San Remo Hotel*, 125 S. Ct. at 2505 (“[M]ost of the cases in our takings jurisprudence . . . came to us on writs of certiorari from state courts of last resort.”). Finally, and most importantly, the argument assumes that state judges are unwilling to apply, or incapable of applying, federal law with fidelity. Yet, as the Court wrote just recently, “[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions.” *Id.* at 2507. Moreover, in every other context, we presume the same: takings jurisprudence “is not the only area of law in which [the Court] ha[s] recognized limits to [the] ability to press . . . federal claims in federal court.” *Id.* Indeed, motions to suppress evidence in criminal cases are based largely on federal constitutional grounds, and yet we entrust the overwhelming bulk of such decisions to state court judges every day of every week of every year. Ultimately, it is Kassouni’s distrust of state judges to follow federal law that causes him concern, not any flaws in the Supreme Court’s ripeness doctrine. Irrespective of whether such a distrust is well founded, it certainly is not limited to the Takings Clause context.

<sup>228</sup> *Reg’l Rail Reorg. Act Cases*, 419 U.S. 102, 146 (1974) (quoting *Pub. Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237, 244 (1952)).

<sup>229</sup> See *id.* at 147 (“[W]e would necessarily be forced to a speculative interpretation of a statute not clear on the subject of valuation before the court entrusted with its construction has given us the benefit of its views.”).

Note, too, that this branch of the ripeness tree would not exist if *Duke Power* had any vitality outside of the specific factual context in which it was decided. A landowner could very easily make out an argument that his claim is ripe for review pursuant to *Duke Power* even absent a denial of just compensation. Again, pursuant to *Duke Power*, an issue may be deemed ripe where injuries have resulted from arguably invalid government action but those injuries are unrelated to the arguable invalidity of the government's conduct. In the Takings Clause context, a landowner who is unable to develop his or her land in such a way as to maximize its overall utility has certainly been injured, just as the future neighbors of the nuclear power plant in *Duke Power* were harmed by the threatened increase in background radiation levels. Yet, just as the plaintiffs in *Duke Power* did not even argue that they had a legal right to a certain background level of radiation, the landowner cannot argue that he or she has any right under the Takings Clause to make beneficial use of his or her property.<sup>230</sup> The landowner has only the right to compensation for his or her inability to do so. Accordingly, the Takings Clause paradigm is further demonstration that the *Duke Power* theory of ripeness is defunct.

When viewed through the lens of the ripeness doctrine, disputes over the Self-Incrimination Clause start to look a lot like Takings Clause cases. Just as two governmental actions must come together before a Takings Clause claim accrues—the taking and the refusal to render just compensation<sup>231</sup>—so too must two governmental actions coalesce before a dispute over the Self-Incrimination Clause matures: compulsion and witnessing.<sup>232</sup> Just as a Takings Clause plaintiff can demonstrate no hardship—no present or inevitable deprivation of her constitutional rights<sup>233</sup>—before the second of the two elements has occurred, neither can the invoker of the constitutional privilege against self-incrimination show that his or her rights are currently or presently under attack until the “other shoe has fallen.”<sup>234</sup> And just as questions of valuation of property in Takings Clause cases are paradigmatically unfit for judicial review until local authorities, familiar with local conditions, have made their best attempt to derive “just compensation,”<sup>235</sup> so too are questions about

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<sup>230</sup> See *supra* note 226 and accompanying text.

<sup>231</sup> See *supra* note 216 and accompanying text.

<sup>232</sup> See *supra* note 88 and accompanying text.

<sup>233</sup> See *supra* notes 225-27 and accompanying text.

<sup>234</sup> See *supra* Parts III.B.3.a.i, III.B.3.b.i, III.B.3.c.i, III.B.3.d.i.

<sup>235</sup> See *supra* notes 228-29 and accompanying text.

arguably self-incriminating statements generally too abstract for resolution when divorced from the context of a criminal case against their maker.<sup>236</sup>

Yet, while the Supreme Court has utilized the ripeness doctrine to require that the federal courts avoid deciding Takings Clause cases before the disputes have fully matured, the Court has affirmatively encouraged abstract and premature decision-making in the Self-Incrimination Clause realm. *Chavez v. Martinez*<sup>237</sup> represents a step in the right direction. One can only hope that the federal courts, and ultimately the Supreme Court, follow that decision to its logical conclusion and begin to employ a principled application of the ripeness doctrine to disputes over claims of the Self-Incrimination Clause.<sup>238</sup>

#### E. SELF-INCRIMINATION CLAUSE CASES AND THE GOALS OF THE RIPENESS DOCTRINE

It appears that application of the ripeness doctrine to disputes over claims of the constitutional privilege against self-incrimination should generally result in postponed adjudication of those disputes. This conclusion is reinforced when we look back over the goals of the ripeness doctrine and recognize that these goals are realized by a strict application of the doctrine to Self-Incrimination Clause disputes.

As with other justiciability requirements, the ripeness doctrine seeks to advance both separation-of-powers and federalism concerns.<sup>239</sup> Application of the doctrine to disputes over claims of the Fifth Amendment privilege against self-incrimination serves these twin goals. Thus, in our main example of the Congressional committee witness who claims the privilege, under current law, the committee must stop what it is doing and have a federal court—which may be quite unfamiliar with the committee's work—decide whether the witness may be required to answer. If not, the court will then put the committee to the choice of either formally granting the witness immunity or attempting to obtain the information it seeks from another source. Pursuant to a robust application of the ripeness doctrine, the committee must essentially make the same decision,<sup>240</sup> but without the annoyance and inconvenience visited upon them by the interference of a

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<sup>236</sup> See *supra* Parts III.B.3.a.ii, III.B.3.b.ii.

<sup>237</sup> 538 U.S. 760 (2003) (plurality opinion); see *supra* Part II.A.

<sup>238</sup> But see *United States v. Antelope*, 395 F.3d 1128, 1132-33 (9th Cir. 2005) (applying superficial ripeness analysis).

<sup>239</sup> See *supra* note 117 and accompanying text.

<sup>240</sup> See *supra* note 151.

federal court.<sup>241</sup> Moreover, the friction between the judicial and legislative branches occasioned by the early adjudication model is quite likely unnecessary, for it may well be that no prosecution will ever be brought.<sup>242</sup>

So, too, would a robust application of the ripeness doctrine to disputes over claims of the constitutional privilege against self-incrimination further federalism concerns. Under current law, a person may bring a civil suit in federal court claiming that a state or local government has unlawfully meted out punishment or refused to confer a benefit based on the civil plaintiff's refusal to make self-incriminating statements.<sup>243</sup> As is the case any time a federal court sits in judgment over the constitutionality of the actions of a local authority, the potential for friction is manifest. Application of the ripeness doctrine reduces that friction considerably. First, again, it is quite likely that no charges will ever be brought against the civil plaintiff, so resolution of the dispute becomes wholly unnecessary. For example, in *McKune v. Lile*, the Court addressed the merits of the Self-Incrimination Clause dispute despite the fact that no criminal prosecution had ever been brought as a result of self-incriminatory statements arguably compelled by the state's sexual offender rehabilitation program.<sup>244</sup> Second, if charges are brought, the overwhelming likelihood is that they will be brought in state, not federal, court, and it is the state court that will have the opportunity to rule on the Self-Incrimination Clause issue in the form of a motion to suppress. Accordingly, in the overwhelming majority of cases, no federal court will ever have to get involved in the dispute. The benefits to a healthy federal system of the application of the ripeness doctrine in this context are obvious.<sup>245</sup>

## F. A CAVEAT ABOUT GRAND JURIES

It is at least arguable that the ripeness analysis described above does not apply to claims of the constitutional privilege against self-incrimination

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<sup>241</sup> See O'Neill, *supra* note 28, at 2544 ("[T]he separation of powers doctrine prohibits the courts from interfering with Congress's legitimate exercise of its power to compel testimony in support of its constitutional prerogatives."); see also Nichol, *supra* note 113, at 162 ("[T]he ripeness requirement has been used . . . to allow the challenged government action to run its course more completely.").

<sup>242</sup> See CHEMERINSKY, *supra* note 114, § 2.4.1, at 101 ("Ripeness advances separation of powers by avoiding judicial review in situations where it is unnecessary for the federal courts to become involved . . .").

<sup>243</sup> See, e.g., *McKune v. Lile*, 536 U.S. 24, 30-32 (2002) (plurality opinion).

<sup>244</sup> See *id.* at 34 (plurality opinion).

<sup>245</sup> See Nichol, *supra* note 113, at 177 ("[T]he ripeness formula . . . allows the courts to postpone interfering when necessary so that other branches of government, state and federal, may perform their functions unimpeded.").

made in the grand jury, and that current law, which adjudicates disputes over such claims at the time the claim is made, is actually correct. The above analysis dictates that claims of the Fifth Amendment privilege in the context of a legislative or administrative hearing are not ripe for review until criminal proceedings are initiated against the invoker. This is because a "witness" before a legislative or administrative agency is not the same type of "witness" with which the Fifth Amendment is concerned. The Self-Incrimination Clause speaks of a witness "in any criminal case," and a legislative or administrative agency hearing is hardly a "criminal case." A legislative or administrative agency hearing witness becomes a witness in a "criminal case" only when criminal proceedings are instituted against her. But when does that "criminal case" actually begin? Depending on the answer to that question, the above analysis might not apply to claims of the privilege made in the grand jury: arguably, a grand jury witness is a "witness" "in [a] criminal case."

In *Chavez v. Martinez*, the plurality declined to "decide . . . the precise moment when a 'criminal case' commences."<sup>246</sup> It decided only "that police questioning does not constitute a 'case' any more than a private investigator's precomplaint activities constitute a 'civil case.'"<sup>247</sup> Based on this passage alone, one might conclude that grand jury proceedings are not part of a "criminal case." First, there is the analogy to civil cases and the "precomplaint activities" of a private investigator. If "precomplaint" proceedings are not part of a "civil case," then, by analogy, "pre-indictment" proceedings are not part of a "criminal case." If a civil case does not begin until a complaint is filed, then a criminal case does not begin until an indictment is filed.

Second, there is the analogy between "police questioning" and the role of the grand jury. Modern police investigations perform a role historically undertaken by grand juries. While most investigations today are performed by law enforcement officials, and grand jury proceedings occur only after an investigation is virtually complete, in an earlier age, in which there were no professional police forces, the bulk of the investigative work was performed by the grand jury itself.<sup>248</sup> Thus, one might argue that, just as a

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<sup>246</sup> 538 U.S. 760, 767 (2003) (plurality opinion).

<sup>247</sup> *Id.*

<sup>248</sup> See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 15 (2002). Simmons notes that

[f]or centuries after their inception, grand juries operated in a legal and political context in which there were no police force and no prosecutor—in other words, a criminal justice system with no neutral professionals to evaluate the credibility of witnesses and to weigh the various legal, political, social, and moral considerations involved in charging an individual with a crime.

police investigation does not open a "criminal case," neither does its analogue, a grand jury investigation.

However, there is good reason to think that the grand jury process itself is part of the "criminal case."<sup>249</sup> Although the Fifth Amendment speaks of the "criminal case," the Sixth Amendment addresses "criminal prosecutions."<sup>250</sup> Unless we are to assume that the framers and ratifiers of the Bill of Rights used language carelessly and erratically, we must assume that the two terms are not interchangeable, especially since they appear in contiguous provisions of the same document. Moreover, the term "criminal case" appears to be broader. The Sixth Amendment is uniquely concerned with *trial* rights: for example, that trial be public, that a jury determine guilt or innocence, that the defendant be allowed to cross-examine the witnesses against him, and that he have competent counsel.<sup>251</sup> The Sixth Amendment generally does not apply until formal charges have already been brought.<sup>252</sup> In short, the Sixth Amendment states that one has the right not to be *convicted* unless certain conditions are met.

The Fifth Amendment has a broader scope.<sup>253</sup> It states, at least in part, that one is not even to be *tried* unless certain conditions are met. If these conditions are not satisfied, an accused is entitled to dismissal even before

*Id.*

<sup>249</sup> The Supreme Court long ago wrote that a "case before [a] grand jury [is] a criminal case." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). However, in the very next paragraph, the Court wrote that the Self-Incrimination Clause "insure[s] that a person 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." *Id.* (emphasis added). Thus, it is unclear whether the *Counselman* Court subscribed to the view suggested here that self-incriminating testimony could not even be compelled in a grand jury proceeding or, on the contrary, this was an early, if imprecise, expression of the conventional view that self-incriminating testimony that was compelled in the grand jury—as in "any [other] investigation"—could not be used in a later prosecution. O'Neill comes to the former conclusion, but with little analysis. O'Neill, *supra* note 28, at 2470 ("[A] grand jury proceeding . . . doubtless qualifies as being part of a 'criminal case.'").

<sup>250</sup> The Sixth Amendment provides for a number of rights enjoyed by the accused "[i]n all criminal prosecutions." U.S. CONST. amend. VI.

<sup>251</sup> The Court has held that a defendant is entitled to counsel at all "critical stages" of the proceeding, some of which certainly occur before trial. *See, e.g., Bell v. Cone*, 535 U.S. 685, 695 (2002). However, the right to counsel is nonetheless essentially a trial right, for the right to counsel before trial exists only to the extent that the lack of counsel at that time can fatally affect the accused individual's trial rights. *See, e.g., Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (noting that arraignment is a "critical stage" because "[a]vailable defenses may be . . . irretrievably lost, if not then and there asserted").

<sup>252</sup> *See, e.g., Kirby v. Illinois*, 406 U.S. 682, 690 (1972).

<sup>253</sup> *See Counselman*, 142 U.S. at 563 ("A criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5 of the amendments.").

the prosecution opens its case. Thus, the right to a grand jury indictment<sup>254</sup> is the right not to be prosecuted by anything less, and can be enforced before conviction.<sup>255</sup> Likewise, the right to be free from double jeopardy<sup>256</sup> is the right not to be prosecuted if one has already been acquitted or convicted of the "same offense," and also can be enforced before trial.<sup>257</sup> Certainly, the Self-Incrimination Clause in part protects a trial right just as those catalogued in the Sixth Amendment do.<sup>258</sup> Yet, if that were all that Clause protected, one would think that it should make its appearance in the Sixth Amendment. It appears that the placement of the Self-Incrimination Clause in the Fifth Amendment rather than the Sixth signifies that a "criminal case" can exist before a "criminal prosecution[]" commences.<sup>259</sup>

Thus, it appears that the focus of the Fifth Amendment as a whole is in protecting people from prosecution, and not simply—as the Sixth Amendment does—from conviction. If so, it makes perfect sense to read the Self-Incrimination Clause as requiring, at the very least, use immunity *in the grand jury itself*: that is, if a witness is compelled to make self-incriminatory statements to a grand jury, she cannot be indicted by the same grand jury but only by a grand jury that has not been tainted by those statements. And because, by virtue of the Fifth Amendment's Grand Jury Clause,<sup>260</sup> a grand jury indictment is a necessary precondition to a federal prosecution, no compelled self-incriminatory statement, even if made before a Congressional committee, can be used even to institute charges against its maker.

<sup>254</sup> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend V.

<sup>255</sup> See *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, 802 (1989) (noting that "a defect [in grand jury proceedings] so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried," and therefore can be raised in an interlocutory appeal); accord *O'Neill*, *supra* note 28, at 2482.

<sup>256</sup> "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend V.

<sup>257</sup> See *Abney v. United States*, 431 U.S. 651, 659 (1977) (holding that order denying motion to dismiss indictment on grounds of double jeopardy was appealable on interlocutory basis because defendant was "contesting the very authority of the Government to hale him into court to face trial on the charge against him"); accord *O'Neill*, *supra* note 28, at 2482.

<sup>258</sup> See *supra* note 13 and accompanying text; accord *O'Neill*, *supra* note 28, at 2482.

<sup>259</sup> See *O'Neill*, *supra* note 28, at 2482 ("It could be argued . . . that the decision to place the self-incrimination clause in the Fifth Amendment represented a conscious desire to separate the trial rights embodied in the Sixth Amendment from the arguably *pretrial* protections contained in the Fifth Amendment.").

<sup>260</sup> See *supra* note 254.

Pursuant to this theory, a dispute over the claim of the constitutional privilege against self-incrimination made in a grand jury proceeding arguably is ripe for review at the time the claim is made and dishonored. At the least, it is a much closer question—one this Article does not undertake to answer—whether a claim of the Fifth Amendment privilege against self-incrimination made in the grand jury should be resolved right then and there.

### CONCLUSION

The Self-Incrimination Clause is in a state of flux. Conventional wisdom holds that the Clause prohibits the government from compelling self-incriminating statements from the unwilling. Thus, courts have allowed Self-Incrimination Clause disputes to be adjudicated at the point of compulsion, even if no “witnessing” in a “criminal case” has occurred or ever will. Unfortunately, as is often the case, conventional wisdom here is more conventional than it is wise. The plain language of the Clause, as accurately discerned in *Chavez v. Martinez*,<sup>261</sup> conflicts with this century-old assumption about its scope. The Clause itself says only that no one can be compelled to have her testimony used against her in a “criminal case,” thus transforming her into a “witness.” *Chavez* teaches that only compulsion plus witnessing in a criminal case makes out a violation of the Clause. Strict application of the ripeness doctrine demands that disputes over the Clause be postponed until such compelled witnessing either has occurred or is about to.

The defense bar will certainly resist the notion that claims of the Fifth Amendment privilege cannot be adjudicated at the time they are made. Indeed, prosecutors will likely be hesitant as well, for the procedure proposed by this article is one to which all are unaccustomed. Yet those who continue to adhere to the conventional thinking about the Self-Incrimination Clause commit the grievous legal sin of “confound[ing] the familiar with the necessary.”<sup>262</sup> In this case, what is familiar—the adjudication of unripe Self-Incrimination Clause disputes—is not only unnecessary. It is also unconstitutional.

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<sup>261</sup> 538 U.S. 760 (2003) (plurality opinion); see *supra* Part II.A.

<sup>262</sup> *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J. concurring).



