

Constitutional Interpretation and Coercive Interrogation after *Chavez v. Martinez*

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I. INTRODUCTION

Consider the following situations. First, police arrest a suspect in a robbery, take him to the station, and leave him in a room. After a while, an officer enters the room and says, “I’m going to ask you a few questions about the robbery. We know you did it, but I want you to tell me what happened in your own words.” The suspect answers the questions and makes incriminating statements. No one ever says anything to the suspect

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about any rights he might have with respect to interrogation. The government seeks to use those statements at trial.

Second, investigators seek to question a government employee during an administrative audit of the use of government credit cards. The employee says she does not want to respond for fear she might incriminate herself. Her supervisor tells her she must answer the questions or lose her job. She responds and the government later seeks to prosecute her based on her incriminating statements.

Third, law enforcement officials arrest a person suspected of taking part in a terrorist attack. He refuses to provide any information. Partly to obtain a confession and partly to learn if future attacks are imminent, officials engage in a variety of coercive interrogation tactics, such as hooding, sleep deprivation, prolonged uncomfortable positions, drastic temperature changes, slapping, and shaking.¹ Broken, the suspect provides incriminating and useful information.

The first situation is a straightforward *Miranda* problem. The suspect never received the *Miranda* warnings, and none of the exceptions apply, with the result that any incriminating statements made during that interrogation must be excluded.² The second situation also seems straightforward. The witness will receive use and derivative-use immunity for any incriminating statements that she made in response to her supervisor's threats.³ The only difference between the two situations is that *Miranda*'s application to otherwise un compelled testimony has been described as a possibly non-constitutional prophylactic rule, whereas the remedy of immunity for compelled incrimination in civil cases – whether or not the witness is a government employee responding to threats – has been described as a constitutional right.⁴ Even that difference might seem minor after the Court held in *Dickerson v. United States* that “*Miranda* is a constitutional decision.”⁵ The third situation is easiest of all. The

¹ U.S., Israeli, and British forces have used similar tactics to interrogate suspected terrorists. See John T. Parry, *What is Torture, Are We Doing It, and What if We Are?*, 64 U. PITT. L. REV. 237, 241-42, 250 (2003).

² See *Miranda v. Arizona*, 384 U.S. 436 (1966). For the exceptions to *Miranda*, see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 519-26 (3d ed. 2000).

³ See *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

⁴ For statements that *Miranda* is prophylactic in a non-constitutional sense, see *Oregon v. Elstad*, 470 U.S. 298, 306-08 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). For statements that a constitutional right to receive immunity in response to compelled incrimination applies in civil cases, see *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *Maness v. Myers*, 419 U.S. 449 (1975); *Tucker*, 417 U.S. at 440.

⁵ 530 U.S. 428, 438 (2000).

interrogation violates the privilege against self-incrimination, any statements were involuntary as a matter of due process, and the suspect may bring a claim for damages under 42 U.S.C. § 1983 or *Bivens*.⁶

Yet the three cases are harder than they first appear. What if the government never seeks to use the statements against any of the suspects – has there been any violation of a constitutional right, or is the government free to compel incriminating statements so long as they are not used at trial? At least with respect to the third case, the damages claim remains regardless of what happens at trial – yet what is the source of the claim? If the claim asserts a violation of the privilege, then surely the suspects in the other cases could also state a claim for damages. If the claim asserts a violation of due process, what exactly is the scope of the right, and does it extend to the other cases as well? Given the context of the case and the government’s strong interest in obtaining information, does the suspect in the third case have a good constitutional claim on the merits? Finally, if these suspects never made incriminating statements, could they still seek damages for their interrogators’ unconstitutional conduct?

Last Term, in *Chavez v. Martinez*,⁷ the Supreme Court addressed most of these issues. In six opinions, the Court wrestled with the scope of the privilege, the status of *Miranda*, and the proper method of defining substantive due process rights. A majority of the Court ruled that violations of *Miranda* will never support a claim for damages and violations of the privilege against self-incrimination will almost never support a damages claim. Four justices would have gone further, moreover, to hold that damages are never available for violations of the privilege and that large parts of self-incrimination doctrine are merely non-constitutional prophylactic rules. Little was said about the possibility of damages for violations of the due process constraint on involuntary confessions. The Court’s decision means, in short, that civil rights actions over coercive interrogation practices will now fall largely within the domain of substantive due process, most likely under the notoriously vague “shocks

⁶ *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971) (allowing damages action against federal agents directly under the Constitution); see *Wiggins v. Martin*, 150 F.3d 671 (7th Cir. 1998) (discussing § 1983 claims alleging widespread use of torture by Chicago police); *Wilson v. City of Chicago*, 120 F.3d 681 (7th Cir. 1997) (same). For collections of cases involving torture or other physically abusive interrogation tactics by law enforcement in the United States, see *Chavez v. Martinez*, 123 S. Ct. 1994, 2011-12 (2003) (Stevens, J., concurring in part and dissenting in part); John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANS. L. 73, 98 n.120 (2002) [hereinafter Parry, *Judicial Restraints*]; Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 13 & n.73 (1986).

⁷ 123 S. Ct. 1994 (2003).

the conscience” test. And, critically, at least three justices were prepared to hold in *Chavez* that no substantive due process right to be free of coercive interrogations exists if government interests in obtaining information are sufficiently strong.

This article takes *Chavez* as the point of departure for considering a series of issues relating to constitutional interpretation, criminal procedure, and civil rights litigation. Tempting though it may be to dismiss *Chavez* because the Court was so fractured, the divisions on the Court are precisely what makes the case significant because they reveal the fault lines that run through much of our constitutional jurisprudence. Part II describes the facts and proceedings in *Chavez*, highlights the central features of the various opinions, and begins the task of analyzing the implications of *Chavez* for self-incrimination, due process, and civil rights litigation. Part III assesses *Chavez*’s impact on the privilege against self-incrimination, including the *Miranda* doctrine but also – and more significantly – the doctrine of requiring immunity as a remedy for violations of the privilege. I explain how the plurality opinion undermines core aspects of self-incrimination doctrine.

Because the plurality opinion described much of privilege doctrine as prophylactic, moreover, Part IV addresses the ongoing debate over the legitimacy of prophylactic rules in criminal procedure and constitutional law. *Chavez* may be more important on this issue than *Dickerson* and it is at least the necessary pendant to *Dickerson* – together, the cases reveal a majority of the Court’s intention to preserve *Miranda* while carefully limiting its scope and effectiveness.⁸ *Chavez* is critical to this effort because it highlights a pervasive flaw in constitutional interpretation: although remedies are fundamental to the definition of constitutional rights, the Court rarely acts as if remedies were a meaningful part of constitutional doctrine. Until it extricates itself from the debate over prophylactic rules, the Court will not be able to take remedies seriously as an aspect of constitutional law. Indeed, after *Chavez*, we should seriously consider jettisoning the idea of prophylactic rules entirely.

Part V returns to the issue of coercive interrogation. I first provide an account of the privilege against self-incrimination that is true to the remedies available for its violation, and I pay particular attention to the context of civil rights claims for damages. Text, history, and policy

⁸ The Court has a chance to refine this position in two pending cases. See *United States v. Patane*, U.S., No. 02-1183 (reconsidering fruit of the poisonous tree doctrine’s applicability to *Miranda*); *Missouri v. Seibert*, U.S. No. 02-1371 (considering validity of intentional interrogation without warnings followed by warnings and a second round of interrogation).

support, on balance, a broad privilege, including *Miranda* – but without a damages remedy the right remains weak. Drawing on Justice Harlan’s admonishment that self-incrimination issues reflect broader issues of constitutional policy, I turn to the role of due process doctrines within the constitutional protection against coercive interrogation. Violations of the due process voluntariness test will not support a damages claim under current doctrine, and substantive due process is inadequate on its own. In the process, I also consider what *Chavez* tells us about the Court’s substantive due process jurisprudence more generally – in brief, that the Court remains sharply divided over the definition of substantive due process rights, and rights claims may have to yield to law enforcement needs, perhaps especially in the context of fighting terrorism. Indeed, under the plurality’s analysis, the Constitution permits torture. Finally, with these concerns in mind, I propose a broad damages remedy for violations of the privilege and the due process voluntariness test.

II. *CHAVEZ V. MARTINEZ*

On the evening of November 28, 1997, Olivero Martinez, a farm worker, rode his bicycle home along a dark path through a vacant lot in Oxnard, California. Nearby, police officers Maria Peña and Andrew Salinas were investigating suspected drug activity. While they were questioning another person, they heard Martinez’s bicycle. Peña and Salinas ordered Martinez to stop, dismount, and place his hands behind his head while they frisked him.

Salinas found a knife in Martinez’s waistband, which Martinez later claimed he used for work. Salinas apparently suspected the knife had a different purpose. On the crucial issue of what happened next, accounts diverge. According to Peña and Salinas, Martinez pulled away as Salinas sought to handcuff him. As Salinas tried to subdue Martinez, they began to struggle. Somehow, Martinez pulled Salinas’s gun and pointed it at the officers. Martinez, by contrast, charged that Salinas tackled him without warning after finding the knife and then drew his gun as they struggled. Martinez grabbed Salinas’s hand to prevent him from using the gun.

Under both versions, Salinas next yelled, “He’s got my gun.” Peña responded by drawing her own gun and shooting Martinez several times in the head, chest, and legs, leaving him blind and paralyzed from the waist down. The officers then handcuffed Martinez and placed him under arrest. Soon thereafter, police officer Ben Chavez arrived at the scene with paramedics. After discussing the events with Peña and Salinas, Chavez

rode in the ambulance when Martinez was taken to the hospital.⁹

At the hospital, Chavez spent forty-five minutes attempting to obtain a statement from Martinez at the same time that hospital personnel were attempting to treat him. Seeking a statement from a person who was involved in an altercation with police officers was plainly a legitimate investigative goal. But Martinez was also a suspect in potential criminal activity arising from the altercation, yet Chavez never gave him the warnings required by *Miranda*. Moreover, the transcript of the interrogation makes clear that Martinez was not always coherent, was in great pain, and believed he might be dying.¹⁰ Chavez stopped the interrogation twice, apparently to allow treatment, but he also responded to many of Martinez's cries of pain with the demand that Martinez tell him what had happened and repeatedly told Martinez that he ought to talk if he thought he was dying.¹¹

Martinez could not say when he was born, did not respond to questions asking him his name, and at first said that he did not know what had happened.¹² Chavez used leading questions to get more information, and Martinez admitted fighting with the police, although he was unable to say why.¹³ At one point Martinez agreed that he had grabbed Salinas's gun, and at another point he said he pulled the gun from its holster.¹⁴ He insisted, however, that he simply wanted Salinas to stop, and he denied any intention to shoot the gun.¹⁵ Martinez also admitted drinking alcohol and using heroin that day. In light of his condition at the hospital and the nature of the interview, little that Martinez said – whether exculpatory or

⁹ I have drawn this account from Justice Thomas's opinion, *see Chavez*, 123 S.Ct. at 1999, and the Ninth Circuit's opinion, *see Martinez v. City of Oxnard*, 270 F.2d 852, 854 (9th Cir. 2001), as well as from the parties' briefs, *see* Brief for the Petitioner at 2-3 and Brief for the Respondent at 1-2, *Chavez v. Martinez*, 123 S. Ct. 1994 (2003) (No. 01-1444). The parties also disagreed about when Salinas found Martinez's knife, but the Ninth Circuit and Supreme Court assumed Salinas found the knife during the patdown.

¹⁰ *See* Statement of Olivero Martinez, in Joint Appendix, *Chavez v. Martinez*, 123 S. Ct. 1994 (2003) (No. 01-1444). Chavez and Martinez spoke in Spanish but the transcript includes an English translation.

¹¹ *See id.* at 9-11, 13-15, 18-20.

¹² *See id.* at 7-10.

¹³ *See id.* at 11.

¹⁴ *See id.* at 11, 15-16.

¹⁵ *See id.* at 12, 17. When first asked why he grabbed the gun, Martinez responded, "Yo quería tirar." *Id.* at 12. According to the translator, "The word 'tirar' has three different meanings: to shoot, to throw away, [or] to drop. Because of the ungrammatical structure of this sentence, the phrase is subject to more than [one] interpretation." *Id.* at 23. In the context of the entire transcript, I do not believe Martinez was admitting that he wanted to shoot the gun (although, of course, that could have been his actual intention).

inculpatory – can be deemed clearly reliable.

Martinez never faced any charges arising out of these events. Instead, he sued under 42 U.S.C. § 1983 in the United States District Court for the Central District of California, claiming that Peña and Salinas had stopped him without probable cause and used excessive force against him in violation of the Fourth Amendment and that Chavez had subjected him to a coercive interrogation in violation of the Fifth, Eighth, and Fourteenth Amendments.¹⁶

The District Court rejected Chavez's assertion of qualified immunity and granted summary judgment to Martinez on his Fifth and Fourteenth Amendment interrogation claims.¹⁷ The court compared the case to *Mincey v. Arizona*, a due process involuntary confession case in which the Supreme Court ruled that the results of a hospital interrogation of a suspect in extreme pain were inadmissible, and it found that “under the totality of the circumstances [Martinez's] statement was not voluntarily given.”¹⁸ In its analysis of qualified immunity, the court concluded that “no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain was constitutionally permissible.”¹⁹

Chavez appealed the denial of qualified immunity.²⁰ The Ninth Circuit agreed that Chavez's questioning had been unconstitutionally coercive but also considered an issue that the district court had not addressed – whether a violation of the privilege against self-incrimination could occur if the state never sought to use the statements. Relying on its

¹⁶ See *Chavez*, 123 S. Ct. at 2000; Brief for Petitioner, *supra* note 9, at 3. Martinez also sued the City of Oxnard and two other individuals but dismissed those claims during the district court litigation. See Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication, *Martinez v. City of Oxnard*, CV 98-9313 FMC (AJWx) (C.D. Cal. Aug. 1, 2000) [hereinafter Order], in Petition for Writ of Certiorari at 16a, *Chavez v. Martinez*, 123 S. Ct. 1994 (2003) (No. 01-144). Because Martinez sued state officials, all of his claims actually arose under the Fourteenth Amendment, which incorporates the Fourth, Eighth, and most of the Fifth Amendments against the states. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (Self-Incrimination Clause); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment); see also *Chavez*, 123 S. Ct. at 2008-09 (Scalia, J., concurring in part in the judgment).

¹⁷ See Order, *supra* note 16, at 30a. The court denied summary judgment to Martinez on his other claims. See *id.*

¹⁸ *Id.* at 22a-23a (citing *Mincey v. Arizona*, 437 U.S. 385 (1978)).

¹⁹ *Id.* at 29a.

²⁰ See *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (allowing interlocutory review of denials of qualified immunity).

en banc opinion in *Cooper v. Dupnik*,²¹ the court held that coercive interrogation violates the privilege if the subject of the interrogation “could reasonably believe [that the statement] might be used in a criminal prosecution or lead to evidence that might be so used.”²² The court recognized that the Supreme Court described the privilege against self-incrimination in *United States v. Verdugo-Urquidez* as “a fundamental trial right of criminal defendants,” with the result that, “[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.”²³ The Ninth Circuit, however, characterized this statement as dicta and declared itself bound by *Cooper*.²⁴

The court then considered whether Chavez’s conduct also “violated the Fourteenth Amendment.”²⁵ Again relying on *Cooper*, the court stated simply that coercive interrogation violates the Fourteenth Amendment whether or not the resulting statement is ever used in a criminal proceeding.²⁶ Finally, relying, as had the district court, on *Mincey v. Arizona*, the court held that Martinez’s Fifth and Fourteenth Amendment rights were clearly established at the time Chavez acted.²⁷

In a confusing welter of opinions, the Supreme Court reversed the denial of qualified immunity and remanded for further proceedings. Justice Thomas wrote the lead opinion, which Chief Justice Rehnquist joined in full and which Justices O’Connor and Scalia joined for most relevant portions. Justice Thomas first endorsed the Supreme Court’s current approach to issues of qualified immunity: “we must first determine whether the officer’s alleged conduct violated a constitutional right [before] consider[ing] whether the asserted right was ‘clearly established.’”²⁸

²¹ 963 F.2d 1220, 1238-44 (9th Cir. 1992) (en banc).

²² *Martinez v. City of Oxnard*, 270 F.3d 852, 857 (9th Cir. 2001).

²³ 494 U.S. 259, 264 (1990).

²⁴ *Martinez*, 270 F.3d at 857 & n.3.

²⁵ *Id.* at 857; see *Chavez*, 123 S. Ct. at 2008-09 (Scalia, J., concurring in part in the judgment) (arguing this language must be a reference to substantive due process).

²⁶ See *Martinez*, 270 F.3d at 857; *Cooper*, 963 F.2d at 1244-48.

²⁷ See *Martinez*, 270 F.3d at 858-59.

²⁸ *Chavez*, 123 S. Ct. at 2000 (plurality opinion) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siebert v. Gilley*, 500 U.S. 226, 232-33 (1991). Justice Thomas’s actual language – “we must first determine whether the officer’s alleged conduct violated a constitutional right. If not, the officer is entitled to qualified immunity, and we need not consider whether the asserted right was ‘clearly established’” – oddly suggests that defendants should receive immunity rather than dismissal on the merits of the claim if no federal rights were violated. For discussions of the Court’s qualified immunity methodologies, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV.

Justice Thomas began his examination of Martinez's rights with the self-incrimination claim. He stressed that the text of the Fifth Amendment states, "No person . . . shall be compelled *in any criminal case* to be a witness against himself," and endorsed the Court's statement in *Verdugo-Urquidez* that the self-incrimination privilege is a trial right.²⁹ He quickly concluded that Martinez had no Fifth Amendment claim because the state never initiated any criminal proceedings against him and never compelled him to give formal testimony.³⁰ Justice Thomas went on to explain why the Ninth Circuit's holding could not "be reconciled with our case law."³¹ He characterized the Court's precedents as standing for the idea that "the government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies."³² It followed, according to Justice Thomas, that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness."³³

Justice Thomas next considered the significance of "prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause."³⁴ The first such rule is "an evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been immunized from use and derivative use in a future criminal proceeding."³⁵ The second is "the *Miranda* exclusionary rule,"³⁶ which Justice Thomas described as prophylactic without mentioning the Court's holding in *Dickerson* that "*Miranda* is a constitutional decision"³⁷ – a statement that, while admittedly ambiguous, is nonetheless relevant to whether *Miranda*

L. REV. 1731, 1749-53, 1820-24 (1991); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) [hereinafter Jeffries, *Right-Remedy*].

²⁹ *Chavez*, 123 S. Ct. at 2000-01 (plurality opinion) (quoting U.S. CONST. amend. V) (emphasis added by the Court).

³⁰ *Id.*

³¹ *Id.* at 2001.

³² *Id.*

³³ *Id.* at 2002. Justice Thomas also declared that Martinez's probable lack of knowledge that the compelled statement could not be used against him made no difference, because his ignorance did not increase the degree of compulsion and he would receive "*automatic* protection" from the use in criminal proceedings of that statement or evidence derived from it. *Id.* at 2002 (emphasis in original).

³⁴ *Id.* at 2003.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 530 U.S. 428, 438 (2000).

can support a § 1983 claim.³⁸

Because prophylactic rules “do not extend the scope of the constitutional right itself,” Justice Thomas declared, “violations [of these rules] do not violate the constitutional rights of any person.”³⁹ More to the point, Justice Thomas asserted that Chavez’s failure to comply with *Miranda* “did not violate Martinez’s constitutional rights and cannot be grounds for a § 1983 action.”⁴⁰ In short, Chavez’s interrogation of Martinez outside *Miranda* could not support a damages claim under the Fifth Amendment.

Justice Thomas moved quickly to insist that his analysis “do[es] not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial.”⁴¹ Rather, any claims would simply arise under due process.⁴² Justice Thomas also asserted that his switch to due process analysis was consistent with *Graham v. Connor*, which held that claims of excessive force during any “seizure” of a person must be analyzed under the Fourth Amendment, not due process, because the Fourth Amendment “provides an explicit textual source of constitutional protection.”⁴³ Justice Thomas explained that if Martinez could bring a claim under the privilege, then he should not be able to bring a claim under due process, but if he had no privilege claim, due process might be available.⁴⁴

³⁸ See *id.* at 446, 454 (Scalia, J., dissenting) (criticizing the ambiguity of the majority opinion); Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898, 899-902 (2001) (same). For assessments of *Dickerson* that contend *Miranda* is a constitutional and a prophylactic ruling, see WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 109-11 (2001); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001) [hereinafter Klein, *Identifying*]; David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958 (2001).

³⁹ *Chavez*, 123 S. Ct. at 2003 (plurality opinion). Justice Thomas’s discussion of immunity seems in tension with his concurring opinion in *United States v. Hubbell*, 530 U.S. 27, 49-56 (2000), in which he relied on original understandings to suggest that the privilege prohibits compelled production of documents in criminal investigations absent immunity.

⁴⁰ *Chavez*, 123 S. Ct. at 2004 (plurality opinion).

⁴¹ *Id.*

⁴² See *id.*

⁴³ 490 U.S. 386, 395 (1989); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (characterizing *Graham* as holding that the availability of any specific constitutional claim precludes reliance on due process).

⁴⁴ See *Chavez*, 123 S. Ct. at 2004 & n.5 (plurality opinion). For criticisms of *Graham*, see Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303, 399-407 (2001); Toni

On the one hand, this explanation is inconsistent with *Graham* if the privilege is an “explicit textual source of protection” against coercive interrogation. On the other hand, if Justice Thomas’s trial right interpretation of the privilege is correct, then it does not protect against custodial coercion outside the trial, and his statement is consistent with *Graham*. More interesting is the fact that the other five justices – all of whom seem to agree that the privilege provides at least some protection against coercive interrogation – did not even consider *Graham*’s application to Martinez’s claims. With only four justices willing to invoke *Graham* and the apparent willingness of other justices to allow overlapping constitutional claims, one might plausibly conclude that *Graham*’s doctrinal significance is shaky.⁴⁵

As Justice Thomas analyzed the substantive due process issue, two claims were available to Martinez.⁴⁶ The first was that the interrogation “shocked the conscience.”⁴⁷ The “most likely” foundation for such a claim is conduct that was, first, “intended to injure” and, second, “unjustifiable by any government interest.”⁴⁸ Justice Thomas found no evidence of intent to injure.⁴⁹ He also asserted that “the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died [without telling] his side of the story.”⁵⁰

The second substantive due process claim that Justice Thomas

M. Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086 (1998); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003). See also Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 75-76 (2001) (arguing for due process as a source of some criminal procedure doctrines precisely because it is more general than the Fifth Amendment).

⁴⁵ See JOHN C. JEFFRIES, JR., *ET AL.*, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 41 (2003 Supp.) (highlighting the fact that in *Chavez*, “by contrast [with *Graham*], although six justices addressed and rejected the claim under the Fifth Amendment, a majority of the Court expressed a willingness to have the claim addressed as a matter of substantive due process”).

⁴⁶ Only Chief Justice Rehnquist and Justice Scalia joined this part of the opinion. Justice O’Connor did not join Justice Thomas’s discussion of due process and did not express any view on the issue.

⁴⁷ The “shocks the conscience” standard originated in *Rochin v. California*, 342 U.S. 165 (1952), and the Court applied it to a § 1983 police misconduct claim in *Lewis*, 523 U.S. 833.

⁴⁸ *Chavez*, 123 S. Ct. at 2005 (plurality opinion) (quoting *Lewis*, 523 U.S. at 849).

⁴⁹ *Id.* at 2005.

⁵⁰ *Id.*

considered was that Chavez's interrogation of Martinez deprived him of a fundamental right under circumstances that would not satisfy strict scrutiny. Justice Thomas insisted on a "careful description" of any potential fundamental right.⁵¹ But he then interpreted Martinez's claim broadly and found "no basis in our prior jurisprudence or in our Nation's history and traditions to suppose that freedom from unwanted police questioning is so fundamental that it cannot be abridged absent a 'compelling state interest.'"⁵²

Significantly, Justice Thomas failed to consider whether Martinez's statements were voluntary, even though that issue had been central to the lower courts' analysis. Due process prohibits the use at trial of involuntary statements – a protection that is distinct from the Self-Incrimination Clause.⁵³ Language in some of the due process cases also suggests a substantive right to be free of coercive interrogation that produces an involuntary statement regardless of whether the government seeks to use the statement at trial.⁵⁴ Moreover, some lower courts have allowed § 1983 actions based on violations of the due process voluntariness test.⁵⁵

⁵¹ *Id.* at 2006 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁵² *Id.* Justice Thomas noted the Court should take account of Martinez's medical condition and the urgency of the situation, and his ultimate analysis referred to "these circumstances," *id.*, but his reasoning turned on the supposed assertion of a broad right to be free from unwanted police questioning.

⁵³ See *Dickerson v. United States*, 530 U.S. 428, 432-34 (2000); *Colorado v. Connelly*, 479 U.S. 157, 163 (1986); WHITE, *supra* note 38, at 39-51.

⁵⁴ See *Connelly*, 479 U.S. at 163-67 (characterizing exclusion of testimony as a remedy for unconstitutionally coercive interrogation tactics and thereby suggesting that the interrogation and not the admission of testimony was the focus of due process); *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (stating a confession obtained "through the use of threats is violative of due process"); *Stein v. New York*, 346 U.S. 156, 182 (1953) (stating violent interrogation "serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law"); *Williams v. United States*, 341 U.S. 97, 101 (1951) (stating violent interrogation methods "deprive[] the victim of a right under the Constitution"); *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) (conceding violent interrogation "per se, is an outlaw"); *Chambers v. Florida*, 309 U.S. 227, 240-41 (1940) ("The Constitution proscribes such lawless means irrespective of the end."); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (describing interrogation methods as "revolting to the sense of justice"); see also WHITE, *supra* note 38, at 39-48; John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 748-51 (2002).

⁵⁵ See *Wilson v. Lawrence County*, 260 F.3d 946, 952-54 (8th Cir. 2001); *Edwards v. Pretsch*, 180 F. Supp. 2d 499, 506 (S.D.N.Y. 2002); Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1348 n.61 (2003) [hereinafter Klein, *Silence*] (collecting earlier cases); Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 434-44, 449-50 (1994)

Whether Justice Thomas simply chose not to consider the voluntariness issue, whether he thought it was irrelevant to the substantive due process claim, or whether he thought it was subsumed within the shocks to the conscience inquiry, is unclear. In previous cases, however, the Court has indicated that compulsion for purposes of the privilege is the same as involuntariness for purposes of due process,⁵⁶ which could mean that the *Chavez* plurality saw no reason to consider voluntariness once it had finished with the privilege. Notably, moreover, in his discussion of the self-incrimination claim, Justice Thomas dismissed *Mincey v. Arizona* – upon which the district court and court of appeals had relied and which Justices Kennedy and Ginsburg would cite in their opinions – as “a case addressing the *admissibility* of a coerced confession under the *Due Process* Clause.”⁵⁷ His failure to consider the voluntariness claim as an independent basis for damages, combined with his characterization of *Mincey* as a case solely about admissibility of evidence, supports the idea that Justice Thomas believes a due process involuntary confession claim is different from a substantive due process claim and cannot support a § 1983 action, perhaps because, as a procedural or fair trial claim, it is the functional equivalent of a compelled confession claim under the privilege.⁵⁸

Justice Souter delivered a two part opinion. The second part was a majority opinion joined by Justices Stevens, Kennedy, Ginsburg, and Breyer, and it stated simply that the viability of Martinez’s substantive due process claim would be an issue for remand.⁵⁹ The first part, joined only by

[hereinafter Klein, *Deconstitutionalized*] (collecting cases and discussing efforts to obtain damages for violations of *Miranda*); see also Mark A. Godsey, *The New Frontier of Constitutional Confession Law – The International Arena*, 91 GEO. L.J. 851, 889-95 (2003) (suggesting the Supreme Court’s 1986 decision in *Colorado v. Connelly* is the doctrinal source for due process damages claims relating to confessions).

⁵⁶ See *Oregon v. Elstad*, 470 U.S. 298, 307, 309 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984). For additional discussion of this issue, see *infra* notes 259-62 and accompanying text.

⁵⁷ *Chavez*, 123 S. Ct. at 2004 n.4 (plurality opinion) (discussing *Mincey v. Arizona*, 437 U.S. 385 (1978)) (emphasis in original).

⁵⁸ See also Brief for the Petitioner, *supra* note 9, at 8 (arguing the due process involuntary confession cases are about fair trial procedures); Brief for the United States as Amicus Curiae Supporting Petitioner, at 17, *Chavez v. Martinez*, 123 S. Ct. 1994 (2003) (No. 01-1444) (same).

⁵⁹ *Id.* at 2008 (majority opinion). Justices Stevens, Kennedy, and Ginsburg joined this part of the opinion to ensure a controlling judgment. See *id.* at 2012-13 (Stevens, J., concurring in part and dissenting in part); *id.* at 2018 (Kennedy, J., concurring in part and dissenting in part); *id.* at 2019-20 (Ginsburg, J., concurring in part and dissenting in part). Justice Scalia’s opinion took issue with the idea that Martinez’s substantive due process claim remained alive on remand. He read the Ninth Circuit’s opinion – correctly, in my view – as ruling in part that Martinez had a valid substantive due process claim, and he joined

Justice Breyer, explained how they reached that holding. Justice Souter began by agreeing with the plurality that Martinez could not bring a § 1983 claim based on the Fifth Amendment or *Miranda*. His reasoning, however, was quite different from that of the plurality. According to Justice Souter, grants of immunity and allowing witnesses to invoke the privilege outside the criminal trial – as well as *Miranda* – are all “Fifth Amendment holdings” even if they are also “outside the Fifth Amendment’s core.”⁶⁰

Presumably for that reason, Justice Souter refused to state that a violation of the Fifth Amendment or *Miranda* could never support a § 1983 claim. Rather, he found only that Martinez had failed to make “the ‘powerful showing’ . . . necessary to expand protection of the privilege against self-incrimination to the point of civil liability he asks us to recognize here.”⁶¹ As a result, Justice Souter agreed that Martinez could only bring a Fourteenth Amendment substantive due process claim. Referring to Justice Stevens’s separate opinion, he said simply that “Martinez has a strong argument in support of such a position” and held that the validity of the claim was a matter for remand.⁶²

Justice Thomas’s opinion seeking to reverse that ruling. *Id.* at 2008-09 (Scalia, J., concurring in part in the judgment). Justice Scalia also asserted that, if the Ninth Circuit had not addressed the substantive due process claim, Martinez had waived it by not raising it before the Ninth Circuit. *Id.* at 2009-10.

⁶⁰ *Id.* at 2007 (Souter, J., concurring in the judgment).

⁶¹ *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 515, 517 (1966) (Harlan, J., dissenting)). Justice Souter did not directly address the relevance of the due process involuntary confession cases, but he seemed to equate them with the privilege. After noting Martinez’s testimony “would clearly be inadmissible” as a matter of due process under *Mincey v. Arizona*, 437 U.S. 385 (1978), see *Chavez*, 123 S. Ct. at 2006 (Souter, J., concurring in the judgment), he distinguished the exclusion remedy from the damages remedy. “To recognize such a constitutional cause of action for compensation would, of course, be well outside the core of Fifth Amendment protection.” *Id.* at 2006-07. Yet he then suggested that Chavez’s conduct might be sufficient to support a damages claim as a matter of substantive due process. *Id.* at 2008. If Justice Souter meant to say that all involuntary statements support a substantive due process claim for damages, he presumably would have said so clearly, and such a result would have made his careful discussion of the privilege largely irrelevant from a plaintiffs’ or remedial standpoint because damages would be available for the same conduct under due process. Thus, Justice Souter probably meant to recognize two tiers of due process claims – those that qualify for the exclusion remedy, and those that also qualify for damages. Where he would draw the line between the two was also left unsaid.

⁶² *Id.* at 2008. Justice Souter wrote the majority opinion in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), which held government interests can justify government conduct that otherwise would violate substantive due process rights. Having seen Justice Thomas’s straightforward application of that idea in *Chavez*, see 123 S. Ct. at 2005, while also sympathizing with Justice Stevens’ views, Justice Souter may have decided it would be

Carefully read, Justice Souter's opinion asserts that *Miranda* and other doctrines that protect the core trial right of the privilege against self-incrimination are themselves interpretations of the Constitution and are not merely prophylactic or non-constitutional. His reliance on Justice Harlan's *Miranda* dissent underscores that the question for him was whether to expand protection of Fifth Amendment rights by allowing an additional remedy beyond the exclusionary rule for their violation. Put differently, his focus was on the appropriate remedy as well as, to some extent, on the relationship of remedies to the scope of rights, and his opinion is largely an example of exercising discretion to select an appropriate remedy for a constitutional violation.⁶³

Justice Stevens, in turn, directly contested Justice Thomas's discussion of substantive due process and his failure to consider the due process voluntariness cases. He noted that the Court has found in numerous cases that "unusually coercive police interrogation procedures" violate the Fourteenth Amendment's Due Process Clause.⁶⁴ He declared that the interrogation of Martinez "was the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous means" and was thus "a classic example of a violation of a constitutional right 'implicit in the concept of ordered liberty.'"⁶⁵ Justice Stevens also took Justice Thomas to task for characterizing *Miranda* as prophylactic and non-constitutional in apparent defiance of *Dickerson*.⁶⁶ For all of his focus on due process, however, Justice Stevens never said clearly which due process claims should support a damages cause of action, perhaps because he felt the facts of this case easily supported a claim for damages.

better to remain silent rather than seek in this case to resolve the tension between the two positions.

⁶³ See John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 282 (2000) (arguing for greater consideration of alternatives to damages in civil rights actions and modification of qualified immunity doctrine to obtain this result) [hereinafter Jeffries, *Disaggregating*]; cf. Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989) (arguing for a more sensitive consideration of the source and scope of various criminal procedure rights in order to provide the most appropriate remedies for their violation). Whether the exclusionary rule is a sufficient remedy by itself for Fifth Amendment violations is doubtful, especially in the *Miranda* context, where the incentives favor police disregard of the required warnings. See Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 502-25 (2002) (examining the incentives to violate *Miranda* and concluding they overwhelm the incentives to comply in many instances); Klein, *Silence*, *supra* note 55, at 1355-57 (same).

⁶⁴ *Id.* at 2011 (Stevens, J., concurring in part and dissenting in part).

⁶⁵ *Id.* at 2010, 2012 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

⁶⁶ *Id.* at 2012-13 n.3.

Insisting that “[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear,” Justice Kennedy dissented from the Court’s rejection of Martinez’s self-incrimination claim.⁶⁷ First, however, he concurred in the plurality’s conclusion that a *Miranda* violation can never support a § 1983 claim. Yet unlike Justice Thomas, he cited *Dickerson* for the idea that the *Miranda* warnings are “a constitutional requirement.”⁶⁸ The reason why a violation of *Miranda* cannot support a § 1983 claim, therefore, is not the lack of a constitutional violation. Instead, the question – as it had been for Justice Souter – was one of remedial discretion. The exclusionary rule, according to Justice Kennedy, “is a complete and sufficient remedy.”⁶⁹

Although a *Miranda* violation could not support a § 1983 claim, Justice Kennedy insisted that Chavez had violated the Fifth Amendment because the Self-Incrimination Clause is more than a trial right. Rather, it is “a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts.”⁷⁰ The substantive aspect of the Clause “protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future.”⁷¹ Moreover, relying on *Kastigar v. United States*, Justice Kennedy stated that the privilege against self-incrimination applies whenever a “testimonial duty” arises, whether “civil or criminal, administrative or judicial, investigatory or adjudicatory.”⁷² Finally, the relevance of “what the witness reasonably believes will be the future use of a statement . . . indicates the existence of a present right.”⁷³ Although he did not say so directly, Justice Kennedy clearly took issue with Justice Thomas’s assertion that the ability to invoke the privilege in non-criminal proceedings is only prophylactic and is not a constitutional aspect of the Self-Incrimination Clause.

Justice Kennedy sought to bolster his argument by appealing to popular understandings of the privilege:

⁶⁷ *Id.* at 2013 (Kennedy, J., concurring in part and dissenting in part).

⁶⁸ *Id.* (citing *Dickerson v. United States*, 530 U.S. 428, 444 (2000)).

⁶⁹ *Id.*; see *supra* note 63.

⁷⁰ *Chavez*, 123 S. Ct. at 2014 (Kennedy, J., concurring in part and dissenting in part).

Justice Kennedy recognized that Justices Thomas and Souter had relied on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), but he asserted the case was inapposite because it addressed concerns different from those at issue in *Chavez*. See *Chavez*, 123 S. Ct. at 2014-15 (Kennedy, J., concurring in part and dissenting in part).

⁷¹ *Id.* at 2014.

⁷² *Id.* (quoting *Kastigar v. United States*, 406 U.S. 441, 444 (1972)).

⁷³ *Id.*

It should come as an unwelcome surprise to judges, attorneys, and the citizenry as a whole that if a legislative committee or a judge in a civil case demands incriminating testimony without offering immunity, and even imposes sanctions for failure to comply, that the witness and counsel cannot insist the right against compelled self-incrimination is applicable then and there.⁷⁴

Moreover,

To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights. A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom.⁷⁵

Ultimately, Justice Kennedy insisted that these basic understandings support the conclusion that the Self-Incrimination Clause prohibits “the act of torturing to obtain a confession.”⁷⁶

Justice Kennedy recognized that a majority disagreed with him and preferred due process as the vehicle for considering Martinez’s claims. But that disagreement, he contended, should not affect the outcome of the case:

Turning to this essential, but less specific, guarantee, it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person. The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.⁷⁷

Justice Kennedy admitted that the police “may have legitimate reasons, born of exigency, to question a person who is suffering or in distress.” He insisted, however, that the police may not – as Chavez did – “prolong a suspect’s suffering against the suspect’s will,” “give the impression that severe pain will be alleviated only if the declarant cooperates,” or otherwise

⁷⁴ *Id.* at 2015.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2016.

⁷⁷ *Id.*

“exploit [a suspect’s] pain and suffering with the purpose and intent of securing an incriminating statement.”⁷⁸

Although Justice Kennedy supported damages for violations of either the privilege or the due process clauses that result from “severe pain or pressure for purposes of interrogation,”⁷⁹ he, too, did not discuss the overall relationship between damages claims and confessions that are involuntary as a matter of due process. Like Justice Stevens, he may have thought exploration of this issue was unnecessary on the facts of this case. Yet his position that damages should be available for violations of the privilege creates the possibility that he would also support damages for a broad range of involuntary confessions.

Justice Ginsburg joined Justice Kennedy’s discussion of the Self-Incrimination and Due Process Clauses.⁸⁰ She would have gone farther, however. To Justice Ginsburg, the case did not turn on Martinez’s beliefs about the connection between medical treatment and giving a statement, or on Chavez’s intentions.⁸¹ Rather, as in *Mincey v. Arizona*, the record made clear that “‘the totality of the circumstances in this case’ establishes ‘that [Martinez’s] statement was not voluntarily given.’ It is indeed ‘hard to imagine a situation less conducive to the exercise of a rational intellect and a free will.’”⁸² Although she did not say that damages should be available any time a statement “was not voluntarily given,” Justice Ginsburg’s opinion comes closest to suggesting that violation of the due process voluntariness test will support a claim for damages.

The Court’s opinions in *Chavez* reveal important divisions and tensions in criminal procedure and civil rights jurisprudence. Less clear is whether any of them helps chart a path toward resolution of these tensions.

III. CHAVEZ AND THE DESTABILIZATION OF SELF-INCRIMINATION DOCTRINE

The *Chavez* plurality sought to restrict the privilege against self-incrimination, cast doubt on the status of *Miranda* only three years after *Dickerson*, and – in a startling move – suggested that the grant of immunity for compelled testimony is nothing more than a non-constitutional prophylactic rule. Although reasonable minds can certainly differ about the proper scope of the privilege, the plurality’s analysis is flawed, and the root

⁷⁸ *Id.* at 2017.

⁷⁹ *Id.* at 2016.

⁸⁰ *Id.* at 2018 (Ginsburg, J., concurring in part and dissenting in part). She did not express a view on the status of *Miranda* or its ability to support a § 1983 action.

⁸¹ *Id.*

⁸² *Id.* at 2019 (quoting *Chavez*, 123 S. Ct. at 2018 (Kennedy, J., concurring in part and dissenting in part) (quoting *Mincey v. Arizona*, 437 U.S. 385, 398 (1978))).

of the flaw is the plurality's – and, indeed, the entire Court's– difficulty grappling with the place of remedies in constitutional law.

A. The Uncertain Scope of the Privilege

For the *Chavez* plurality, the privilege against self-incrimination is a trial right, by which they mean that a compelled confession implicates the Fifth Amendment only when the government seeks to introduce it at trial. The privilege is irrelevant as a source of enforceable rights if the government never seeks to introduce the confession. For Justices Souter and Breyer, the core of the privilege is the trial right, but it also sweeps more broadly. Only Justices Kennedy and Ginsburg clearly embraced an expansive conception of the privilege as a robust constraint on conduct outside the trial. And only they would have used the Fifth Amendment to hold that *Chavez*'s conduct violated the Constitution.

The text of the privilege – “No person . . . shall be compelled in any criminal case to be a witness against himself”⁸³ – feeds the Court's uncertainty. The *Chavez* plurality plausibly contended that these words apply only when a person is “prosecuted for a crime” and do not extend to “the entire criminal investigatory process, including police interrogations.”⁸⁴ Others, however, have read the text more broadly and equally plausibly to include, at least, “a person haled before a grand jury, who is already the subject of a complaint or is believed by the prosecutor to be a likely subject for indictment” and “any witness in criminal proceedings.”⁸⁵

The original understanding of the privilege also creates uncertainty, in part because it reveals a legal context dramatically and perhaps

⁸³ U.S. CONST. amend V.

⁸⁴ *Chavez*, 123 S. Ct. at 2000; *see also id.* at 2000-01 (“In our view, a ‘criminal case’ at the very least requires the initiation of legal proceedings. We need not decide today the precise moment when a ‘criminal case’ commences; it is enough to say that police questioning does not constitute a ‘case’ any more than a private investigator’s precomplaint activities constitute a ‘civil case.’”).

⁸⁵ Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 676 (1968). Judge Friendly also included “the preliminary hearing before a magistrate of a person against whom a complaint has been filed,” *id.*, but the *Chavez* plurality’s interpretation seems to include preliminary hearings. For a roughly consistent discussion of the text’s possibilities, see Clymer, *supra* note 63, at 459-61. For a compelling argument that the word “witness” in both the Fifth and Sixth Amendments leads to the conclusion that the privilege bars the use of “compelled pretrial statements as evidence of guilt,” *see* Donald A. Dripps, *Against Police Interrogation – And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 724 n.95 (1988) [hereinafter Dripps, *Against*].

irretrievably different from our own.⁸⁶ Thus, some commentators have argued the privilege applies to pretrial custodial interrogation because such questioning is the modern-day equivalent of founding-era pretrial examination by magistrates.⁸⁷ Yet application of the privilege (or its common law precursors) to pretrial examination in the founding era was uncertain. To the extent the privilege prohibited torture and examination under oath but not unsworn examination,⁸⁸ it plainly applied in some pretrial contexts, but the allowance of unsworn testimony makes the analogy less exact than some of its proponents might desire. Moreover, other commentators use the original understanding *against* the privilege, suggesting it is outdated if its primary purpose was to prevent torture.⁸⁹

Against these uncertainties, which create space for the plurality's interpretation, stands a host of cases, stretching back over a century, that allow invocation of the privilege outside of criminal trials and outside the criminal process altogether.⁹⁰ As Justice Rehnquist explained in *Michigan v. Tucker*,

Where there has been genuine compulsion of testimony, *the right has been given broad scope*. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, to civil proceedings, to congressional investigations, to juvenile proceedings, and to other statutory

⁸⁶ See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996). For other accounts, see Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule, Part I*, 53 OHIO ST. L.J. 101 (1992), *Part II*, 53 OHIO ST. L.J. 497 (1992); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994).

⁸⁷ See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 438 (1987) [hereinafter Schulhofer, *Reconsidering*]; Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*, reprinted in 22 MICH. J. L. REF. 437, 494 (1989).

⁸⁸ See Alschuler, *supra* note 86, at 2651-53; see also Herman, *Part I, supra* note 86, at 162-63 (providing a consistent assessment of the pre-revolutionary era).

⁸⁹ See David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1077-79 (1986). For actual cases of torture, critics of the privilege rely on the due process clauses for a remedy. See *id.* at 1079-80.

⁹⁰ For a discussion of the cases, see Clymer, *supra* note 63, at 459; *infra* notes 96-103 and accompanying text.

inquiries.⁹¹

Against this background, the *Chavez* plurality's suggestion that the constitutional scope of the privilege should be limited to a defendant's testimony in criminal prosecutions would dramatically reengineer Fifth Amendment doctrine. Absent a strong justification for such a move – and few judges or scholars would argue that text or original understanding alone, even if clear, is sufficient in the face of longstanding practice and precedent⁹² – we must look elsewhere to determine the proper scope of the privilege.

Given the longstanding precedent in favor of a privilege broader than a criminal trial right, one might plausibly look to the Court's own words for a more certain understanding of the privilege. Yet caselaw ends up pointing in inconsistent directions. Cases from the Warren Court describe a strong privilege that constrains police conduct well before trial. One of the farthest reaching cases is *Murphy v. Waterfront Commission*, which sets out a list of "polices of the privilege" intended to drive the development of doctrine:

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

⁹¹ 417 U.S. 433, 440 (1974) (emphasis added and citations omitted).

⁹² Compare *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (suggesting "stare decisis and reliance interests" may make it "too late in the day" to return to the original understanding of the commerce clause), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing against overruling *Hans v. Louisiana*, 134 U.S. 1 (1890), even if it contravenes the text of the Constitution, because "the question is . . . close," *Hans* has been "consistently adhered to for almost a century," and it has had a "pervasive effect upon statutory law"), with *United States v. Hubbell*, 530 U.S. 27, 49-56 (2000) (Thomas, J., concurring) (suggesting original understandings of the privilege against self incrimination could require revision of existing doctrine to provide broader protection for documents).

realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."⁹³

Under *Murphy*'s interpretation of these somewhat vague policies, the plurality's analysis in *Chavez* is insupportable.

Two years after *Murphy*, the Court reaffirmed the expansive view of the Fifth Amendment in *Miranda v. Arizona*. The Court described the privilege "in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life.'"⁹⁴ As a result, the Court insisted that "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."⁹⁵ Even leaving aside the constitutional status of the *Miranda* warnings, this conception of the privilege is inconsistent with that of the *Chavez* plurality and perhaps finds resonance only in the opinions of Justices Kennedy and Ginsburg.

Worth noting, as well, is that the Warren Court cases drew on a tradition of judicial celebration of the privilege. These laudatory statements describe the privilege as a broad right and often as a powerful constraint on government conduct wherever it takes place. As early as 1886, in *Boyd v. United States*, the Court declared that the Fourth and Fifth Amendments together stand for the following proposition:

[A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.⁹⁶

So, too, in *Brown v. Walker*, in the course of upholding the statutory

⁹³ 378 U.S. 52, 55 (1964).

⁹⁴ 384 U.S. 436, 460 (1966) (quoting *Murphy*, 378 U.S. at 55)..

⁹⁵ *Id.* at 467.

⁹⁶ 116 U.S. 616, 631-32 (1886). Six years later, the Court toned down the rhetoric but insisted that the privilege – which it described as "an ancient principle of the law of evidence" – "must have a broad construction in favor of the right which it was intended to secure." *Counselman v. Hitchcock*, 142 U.S. 547, 562, 563 (1892); *see also id.* at 584-85 (noting "the manifest purpose of the constitutional provisions, both of the States and of the United States, . . . to prohibit the compelling of testimony of a self-criminating kind from a party or a witness," and requiring a "liberal construction" for "constitutional provisions for the protection of personal rights").

immunity provisions applicable to Interstate Commerce Commission proceedings, the Court emphasized the importance of the privilege:

So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.⁹⁷

The Court concluded its opinion by declaring that the privilege “is justly regarded as one of the valuable prerogatives of the citizen.”⁹⁸

Bram v. United States applied the privilege to a statement obtained during custodial interrogation. The Court endorsed the language and reasoning of *Boyd* and *Brown*, and stated that, at common law, the privilege “was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes.”⁹⁹ Because

⁹⁷ 161 U.S. 591, 597 (1896). The Court also provided the following justification for the privilege:

While the admissions or confession of the prisoner, when voluntarily and freely made, have always ranked high in the scale of criminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier [British] trials . . . made the system so odious as to give rise to a demand for its total abolition.

Id. at 597.

⁹⁸ *Id.* at 610; *see also* *ICC v. Brimson*, 154 U.S. 447, 478-80 (1894) (relying on *Boyd* and *Counselman* to hold the privilege applies to administrative proceedings). The dissenters in *Brown* would have held that the transactional immunity provided by the statute could not displace the privilege. Justice Field observed that “[t]he reprobation of compulsory self-incrimination is an established doctrine of our society” that reflects “the long struggle between the opposing forces of the spirit of individual liberty . . . and the collective power of the State.” *Brown*, 161 U.S. at 637 (Field, J., dissenting). He also contended that “the essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one,” and he decried the “sense of personal degradation” that accompanied compelled incrimination. *Id.* The *Brimson* dissenters appear to have agreed with the Fifth Amendment holding, but they disagreed with the majority’s conclusion that a contempt proceeding for refusal to comply with an administrative investigation is an Article III case or controversy. *See ICC v. Brimson*, 155 U.S. 3, 4 (1894) (Brewer, J., dissenting).

⁹⁹ 168 U.S. 532, 545 (1897). The Court also ruled that the constitutional privilege follows the common law rule, which it described in the following way:

Bram's statements were not "the result of a purely voluntary mental action" and rather were "the result of either hope or fear, or both, operating on the mind," the Court found the confession involuntary and remanded for a new trial at which the confession would be inadmissible.¹⁰⁰

Even *Twining v. New Jersey*, which rejected incorporation of the privilege against the states in 1908, described it as "universal in American law . . . [,] a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions."¹⁰¹ Although the Court concluded the privilege is not sufficiently fundamental to be incorporated through due process, the Court nonetheless recognized it as "a just and useful principle of law."¹⁰² Far from being an aberrational departure from contrary baseline rules, in other words, the arguments of *Murphy* and *Miranda* draw on a line of precedent that declared and sought

Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy, came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind

Id. at 548.

¹⁰⁰ *Id.* at 562. Three justices dissented.

¹⁰¹ 211 U.S. 78, 91 (1908), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹⁰² *Id.* at 107. In rejecting incorporation, the Court reasoned that (1) the privilege was insufficiently recognized as a matter of British and American history in the founding era, *see id.* at 102-09, (2) of all the rights litigants had claimed should apply at civil or criminal trials as a matter of due process – including trial by jury – the Court had at that time only found two: the court should have jurisdiction and the parties should have notice and the opportunity to be heard, *see id.* at 110-11, and (3) there is disagreement over the value of the privilege and in any event "it cannot be ranked with ["immutable principle[s] of justice" such as] the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property," *id.* at 113. The second reason suggests a trial right interpretation, but only the third reason hints at disagreement with the privilege itself, and the Court was careful not to endorse the "doubt[s]" about the value of the privilege that it traced to "the days of Bentham." *Id.* Rather, the Court suggested that the privilege "is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient." *Id.* In dissent, the first Justice Harlan relied on *Boyd*, 116 U.S. at 631-33, as support for incorporation.

to justify an expansive privilege.¹⁰³

Importantly, however, the Warren Court cases also provide an alternate approach. In a series of dissents, Justice Harlan agreed that the privilege is a set of “basic principles capable of expansion” depending on the Court’s “policy choices.”¹⁰⁴ But Justice Harlan urged a more focused and pragmatic balancing of interests in place of the broad generalities of *Murphy*. The policy choice, he said, must recognize “the essential tension that springs from the uncertain mandate which this provision of the Constitution gives to this Court.”¹⁰⁵ Thus, the Court must balance “the history and purposes of the privilege [with] the character and urgency of the other public interests involved.”¹⁰⁶ Proponents of an expanded privilege must make a “powerful showing that [the] new rules are plainly desirable in the context of our society . . . before those rules are engrafted onto the Constitution.”¹⁰⁷ Judge Friendly’s criticism of the Warren Court’s privilege

¹⁰³ At least three caveats are also worth noting. First, although the privilege long has been celebrated, the celebration has never been unanimous. Thus, in *Palko v. Connecticut*, Justice Cardozo suggested doubts about the need for the privilege as a trial right while also endorsing constitutional limits on custodial interrogation:

[The privilege] might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

302 U.S. 319, 325-26 (1937) (citations omitted); *see also Twining*, 211 U.S. at 113 (“The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day”). Second, these dissenting views ensured that incorporation of the privilege against the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), would be controversial. For some, at least, it remains so today. *See Dripps, Against, supra* note 85 (suggesting “disincorporation”). Third, celebration of the privilege in older cases does not justify the privilege by itself. *See Friendly, supra* note 85, at 679 (arguing rhetoric like that quoted in the text amounts to “eloquent phrases . . . accepted as a substitute for thorough thought”). Yet these celebrations deserve more consideration than they commonly receive from critics of the privilege. *See infra* notes 198-218 and accompanying text.

¹⁰⁴ *Id.* at 511 (Harlan, J., dissenting).

¹⁰⁵ *California v. Byers*, 402 U.S. 424, 450 (1971) (Harlan, J., dissenting); *see also Murphy*, 378 U.S. at 81 (Harlan, J., concurring in the judgment) (“Almost entirely absent from the statement of ‘policies’ is any reference to the particular problem of this case; at best, the statement suggests the set of values which are on one side of the issue.”).

¹⁰⁶ *Spevack v. Klein*, 385 U.S. 511, 523 (1967) (Harlan, J., dissenting).

¹⁰⁷ *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting).

cases sounded similar themes.¹⁰⁸ Under this analysis, the privilege is more than a criminal trial right, but only when circumstances warrant its expansion.

In *United States v. Verdugo-Urquidez*, the Court signaled a third approach that rejected, not just *Murphy*, but any expansive view of the privilege. Writing for the Court in a case about the extraterritorial application of the Fourth Amendment, Chief Justice Rehnquist paused “to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case.”¹⁰⁹ He explained that “[t]he privilege against self-incrimination is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.”¹¹⁰

The *Verdugo-Urquidez* dictum draws on several sources. First, of course, is a reading of the text that limits the privilege to trial proceedings. Second, perhaps, is a sense that the balance of policies advocated by Justice Harlan weighs clearly against an expansive privilege. Third, the facts of many self-incrimination cases present issues of admissibility. In these cases, the Court is, of necessity, discussing the application of the privilege at trial and so it is an easy step to describe the privilege as only a trial right. Moreover, some earlier cases contain language that arguably described the privilege as only a trial right. Thus, in *Oregon v. Elstad*, the Court said that “the prosecution has actually violated the defendant’s Fifth Amendment rights” when it “introduce[s] an inadmissible confession at trial.”¹¹¹ Whatever the source for Chief Justice Rehnquist’s assertion, Martinez has no Fifth Amendment complaint under the trial right approach – indeed, no one whose testimony is compelled in any way, even without a grant of immunity, has cause to complain under the privilege so long as the testimony is not introduced at a criminal trial.

The most recent case to address these issues in any detail before *Chavez* was *United States v. Balsys*, but *Balsys* simply muddied the waters.

¹⁰⁸ See Friendly, *supra* note 85, at 679-98; see also HENRY J. FRIENDLY, BENCHMARKS 266-84 (1967).

¹⁰⁹ 494 U.S. 259, 264 (1990).

¹¹⁰ 494 U.S. at 264. Because the privilege was not at issue, Chief Justice Rehnquist’s words were dicta, but later decisions have cited the statement as the foundation for limiting the scope of the privilege. See *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (quoting *Verdugo-Urquidez* to describe the privilege as “a fundamental trial right”). Chief Justice Rehnquist cited *Kastigar v. United States*, 406 U.S. 441, 453 (1972), as support for the claim that a violation of the Fifth Amendment occurs only at trial. As I explain at *infra* note 192, however, a fair reading of *Kastigar* does not support that claim.

¹¹¹ 470 U.S. 298, 316 (1985); see also *id.* at 306-07 (“The Fifth Amendment prohibits its use by the prosecution in its case in chief only of compelled testimony.”).

Justice Souter's majority opinion declares that the Self-Incrimination Clause "provide[s] a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits."¹¹² This language seems to treat the privilege as a right extending beyond the criminal trial. Yet the Court refused to take that step; instead it cited the contrary statement in *Verdugo-Urquidez* and merely "assum[ed], arguendo" that the privilege creates more than a trial right.¹¹³ Similarly, the Court explicitly rejected *Murphy*'s expansive view of the privilege but did not reject the idea that the scope of the privilege turns on policy assessments. To the contrary, the Court said that *Murphy*'s flaw was not the use of policy analysis but simply the failure "to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope."¹¹⁴ Thus, *Balsys* gestures simultaneously in the direction of Justice Harlan and *Verdugo-Urquidez* – hardly a position of stability.

If the text provides no answer and precedent points in inconsistent directions, then perhaps the solutions of other commentators will point the true path. Two recent articles, however, suggest otherwise. First, Susan Klein describes the privilege against self-incrimination as a trial right but argues it "can be protected only by applying the privilege in any pretrial setting where questioning may elicit an incriminating response."¹¹⁵ Importantly, Klein does not explicitly say that the privilege applies as a right in these situations; instead she adopts the argument, set out in *Michigan v. Tucker*, that "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage."¹¹⁶ Nonetheless, she insists that compelled incrimination in any of these "pretrial settings" should be treated as a constitutional violation meriting "injunctive and other relief."¹¹⁷

Yet Klein stands on disputed ground with her insistence that

¹¹² 524 U.S. 666, 674 (1998). At issue in *Balsys* was whether a witness in a domestic proceeding may invoke the privilege for fear that any incriminating testimony may be used in a foreign prosecution. By a 7-2 vote, the Court answered no. For discussion of *Balsys*, see Diane Marie Amann, *International Decision – United States v. Balsys*, 92 AM. J. INT'L L. 759 (1998). For discussion of the privilege in international criminal law, see Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998).

¹¹³ *Id.* at 691 n.12 (citing *Verdugo-Urquidez*, 494 U.S. at 264).

¹¹⁴ *Id.* at 691.

¹¹⁵ Klein, *Silence*, *supra* note 55, at 1341.

¹¹⁶ 417 U.S. 433, 440-41 (1974). The *Tucker* Court, however, described the ability to assert the privilege outside the criminal trial as a "right." *See id.* at 440.

¹¹⁷ Klein, *Silence*, *supra* note 55, at 1341.

disregard of the privilege outside a criminal trial can violate the Constitution if the privilege itself is only a trial right. True, the best way to protect the privilege may be to allow its invocation outside the trial, but that reasoning simply mirrors the reasoning of *Miranda*, which imposed “proper safeguards” to guarantee the core right.¹¹⁸ Klein’s analysis, in other words, puts us into the same uncertain terrain of constitutional common law and prophylactic rules that *Miranda* inhabits, and she freely admits her willingness to go there.¹¹⁹ In her view, which is well-argued and nuanced, quasi-constitutional prophylactic rules are not theoretically troubling and – perhaps more important – such rules are simply a necessary part of constitutional adjudication.¹²⁰ Although Klein is plainly correct that prophylactic rules are part of contemporary constitutional interpretation, her argument gives insufficient attention to whether there is really any difference between prophylactic rules and other constitutional law.

Second, Steven Clymer argues that the privilege against self-incrimination is a trial right that bars admission of compelled testimony.¹²¹ He also argues that the Constitution requires the privilege to be available in non-criminal contexts. The crucial point, he insists, is that no constitutional violation exists until the government attempts to use a compelled statement at trial.¹²² Yet the argument in support of this conclusion is a sleight of hand. If the privilege may be asserted in non-criminal settings, but the right not to incriminate oneself is violated only at trial, then there is no self-incrimination violation if the government ignores assertion of the privilege prior to trial. Witnesses can invoke the privilege until they are blue in the face, but that invocation will be meaningless unless a trial follows. In the meantime, the government is free to compel statements because the compulsion – by itself – does not violate the Constitution (subject, of course, to possible due process constraints). What, then, does the

¹¹⁸ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

¹¹⁹ See Klein, *Silence*, *supra* note 55, at 1351-52 (arguing *Miranda* is constitutional common law); see also Klein, *Deconstitutionalized*, *supra* note 55, at 481-88 (same); Klein, *Identifying*, *supra* note 38, at 1032-33, 1037-44 (defining and providing examples of “constitutional prophylactic rules”).

¹²⁰ See *id.* at 1034-35.

¹²¹ See Clymer, *supra* note 63, at 449-50.

¹²² See *id.* at 459-65, 492-93. Clymer thus echoes Akhil Amar. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 206-207 n.55 (1997) (“it is this introduction [of a compelled statement] that violates the Fifth Amendment”). Although I am critical of Clymer’s trial right analysis, he is undoubtedly correct that the trial right view is logical and has substantial support among the justices. I agree, moreover, with his assertion that, if the privilege is ultimately a rule of admissibility, then we should at least give it real force rather than create exceptions that undermine its effectiveness. See also Loewy, *supra* note 63, at 927-28 (taking a similar approach to *Miranda*).

Constitution really require outside the criminal trial?

Clymer may be suggesting the existence of a constitutional right without a remedy. Or, he could mean that the ability to raise the privilege outside a criminal trial is something less than a right. Perhaps it is a “safeguard” based on the policy choice that it is better to allow the privilege in non-criminal proceedings than to undermine the trial right. If that is true, then Clymer and Klein end up in similar territory, although both might deny it: any rule that goes beyond prohibition of compelled testimony in a criminal trial is a prophylactic safeguard, enforceable for Klein but apparently not for Clymer.

Klein’s and Clymer’s arguments bring us back to the *Chavez* plurality, which showed the same concern for distinguishing between the core constitutional right and prophylactic rules, albeit with less nuance than Klein and less sleight of hand than Clymer.

B. Prophylactic Rules and Self Incrimination

Justice Thomas’s opinion follows *Verdugo -Urquidez* to reach the same conclusion as Clymer: the privilege is a trial right, so that it cannot be violated unless and until a compelled statement is “admitted as testimony . . . in a criminal case.”¹²³ But he quickly went beyond Clymer’s analysis. Justice Thomas admitted that precedent allows assertion of the privilege in “non-criminal cases” unless immunity is granted, but he insisted that granting immunity is merely a “prophylactic rule[] designed to safeguard the core constitutional right protected by the Self-Incrimination clause.”¹²⁴ In other words, nothing in the Constitution requires grants of immunity or allows assertion of the privilege outside the criminal process; the Court has simply developed these rules to ensure that the constitutional right is protected. These rules do not, however, “extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person.”¹²⁵

Indeed, Justice Thomas signaled some openness to going farther. He asserted that the privilege applies as a constitutional matter only “when a ‘criminal case’ commences” but refused to specify when that happens – except to say that “at the very least [it] requires the initiation of legal

¹²³ *Chavez*, 123 S. Ct. at 2001 (plurality opinion); see also *id.* at 2002 (“Mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness”); *id.* at 2003 (“a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case”) (emphasis original).

¹²⁴ *Id.* at 2002-03.

¹²⁵ *Id.* at 2003.

proceedings.”¹²⁶ How, then, should we treat a grand jury proceeding? It is a legal proceeding, but one could plausibly maintain that a “criminal case” does not begin until the filing of formal charges.¹²⁷ If that is true, then under Justice Thomas’s analysis, the privilege does not apply in grand jury proceedings as a matter of constitutional right.

Justice Thomas’s opinion provides additional support for that interpretation. He noted that the government can compel witnesses to testify at trial or before a grand jury if they are not targets, and that they can be compelled even if they are targets so long as they receive immunity. Yet, he never described the receipt of immunity as a right; instead, it is merely “well-established” by “case law.”¹²⁸ Moreover, in the same paragraph, he observed that government employees may be compelled to testify on pain of losing their jobs only if they receive immunity, and he described that protection as a prophylactic rule.¹²⁹ The structure of this paragraph of the opinion seems to exhibit a purposeful ambiguity. It tends to the conclusion that all immunity is prophylactic, but it stops short of saying so in plain words.

Unlike Clymer, then, Justice Thomas developed and embraced the logical conclusions of the trial right argument. The Constitution clearly requires only suppression of compelled statements at trial. Most of the remaining doctrine, perhaps even all of it, is prophylactic. Importantly, moreover – and here Justice Thomas diverges from Klein – prophylactic rules are necessarily non-constitutional rules. Indeed, assuming Justice Thomas still holds to the tenets of Justice Scalia’s *Dickerson* dissent – which he joined – Congress can modify or reject prophylactic rules

¹²⁶ *Id.* at 2000-01.

¹²⁷ The beginning of a criminal case varies with the perspective of the people involved and the context in which the question is asked. The best definition might include grand jury proceedings, but the filing of formal charges by the prosecution is clearly a defensible choice as well. For a variety of perspectives, see *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) (“A criminal prosecution under article 6 of the amendments is much narrower than a ‘criminal case,’ under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.”); *Fellers v. United States*, 124 S. Ct. 1019, 1022 (2004) (“The Sixth Amendment right to counsel is triggered at or after the time that judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”) (citations and internal quotation marks omitted); *United States v. Awadallah*, 349 F.3d 42 (2nd Cir. 2003) (holding the term “criminal proceedings” includes grand jury proceedings for purposes of the material witness statute, 18 U.S.C. § 3144); AMAR, *supra* note 122, at 221-22 (arguing a criminal case begins with the filing of charges against the defendant).

¹²⁸ *Chavez*, 123 S. Ct. at 2001 (plurality opinion).

¹²⁹ *See id.* at 2002 & n.2.

precisely because they are not constitutional.¹³⁰

In short, Justice Thomas categorized the doctrine of requiring immunity for compelled self-incrimination in non-criminal cases – and perhaps even in some criminal proceedings – as a non-constitutional rule subject to congressional oversight. This assertion is literally unprecedented. Before *Chavez*, the Court had insisted that the Constitution requires at least use and derivative-use immunity in exchange for compelled, incriminating testimony. Thus, in *Kastigar v. United States*, the Court considered the constitutionality of the federal use immunity statute. If immunity were simply a prophylactic doctrine, the result would have been obvious – Congress could adopt whatever immunity statute it desired, including a statute providing for no immunity. But the Court said that the existence of the Fifth Amendment’s privilege against self-incrimination required a “constitutional inquiry” into “whether the immunity granted under this statute is coextensive with the scope of the privilege.”¹³¹ If the immunity statute was not “as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer.”¹³² Put differently, persons from whom the government seeks to compel incriminating testimony have a constitutional right to silence or immunity in equal amounts. Numerous cases before and after *Kastigar* also characterize immunity in civil and criminal proceedings as a constitutional right.¹³³

¹³⁰ See *Dickerson v. United States*, 530 U.S. 428, 445-47, 454 (2000) (Scalia, J., dissenting). The Court’s power to craft such rules, on the other hand, is far more troubling to Justices Scalia and Thomas. See *id.* at 454, 457-461; see also Joseph D. Grano, *Prophylactic Rules in Criminal Procedure, A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Joseph D. Grano, *Miranda’s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988). Cf. Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 25 (2001) (suggesting the word “prophylactic” “inappropriately raises concerns of legitimacy where none should exist”).

¹³¹ *Kastigar v. United States*, 406 U.S. 441, 449 (1972); see also *id.* at 453.

¹³² *Id.* at 449.

¹³³ See *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (stating “the scope of the ‘use and derivative-use’ immunity that [the federal immunity statute] provides is coextensive with the scope of the constitutional privilege against self-incrimination”); *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (“It has long been held that [the privilege against self-incrimination] not only permits a person to refuse to testify against himself at a criminal trial at which he is a defendant, but also ‘privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings’ . . . ‘unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom’”) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77-78 (1973)); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 (1983) (characterizing the “Fifth Amendment right” as a claim to silence or immunity that exists at the time of questioning, in this case during a civil deposition);

Even *Michigan v. Tucker* insisted that the ability to invoke the privilege outside a criminal trial is a “right.”¹³⁴

While the most striking aspect of the plurality’s analysis is its wholesale revision of the immunity doctrine, worth noting as well is that Justice Thomas also consigned *Miranda* to the prophylactic category. He was hardly the first to do so, of course.¹³⁵ But coming only three years after *Dickerson* asserted *Miranda*’s constitutional status, the willingness of four justices to downgrade it again is surprising and significant. If *Miranda* is prophylactic in the sense that violations of *Miranda* do not violate the Constitution, then the basis for applying *Miranda* to void a congressional statute in *Dickerson* is elusive at best.¹³⁶ Indeed, in the same Term it decided *Dickerson*, the Court upheld a statutory departure from what it called a prophylactic rule about briefing in potentially frivolous indigent criminal appeals.¹³⁷ If both rules are prophylactic in the sense of going beyond what the Constitution requires, then the result should have been the same – upholding the statute – in both cases.¹³⁸

Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964) (describing the immunity requirement as “the constitutional rule”); Ullmann v. United States, 350 U.S. 422, 431 (1956) (holding the Immunity Act of 1954 “protects a witness who is compelled to answer to the extent of his constitutional immunity”); Counselman v. Hitchcock, 142 U.S. 547, 586 (1892) (striking down the 1868 federal immunity statute in part because it did not “supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and [was] not a full substitute for that provision”). See also *Kastigar*, 406 U.S. at 449-55 (discussing *Counselman*, *Ullmann*, and *Murphy*).

¹³⁴ 417 U.S. 433, 440 (1974). See also *Bram v. United States*, 168 U.S. 532 (1897) (applying the privilege to suppress a statement made during police interrogation).

¹³⁵ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306-08 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

¹³⁶ Which was exactly Justice Scalia’s point in *Dickerson*. See *Dickerson*, 530 U.S. at 445-46 (Scalia, J., dissenting). If, however, one believes that prophylactic rules have constitutional status as interpretations and applications of the text, then striking down 18 U.S.C. § 3501 as inconsistent with *Miranda* was perfectly legitimate. See Strauss, *supra* note 38.

¹³⁷ *Smith v. Robbins*, 528 U.S. 259 (2000) (limiting the scope of *Anders v. California*, 386 U.S. 738 (1967)).

¹³⁸ Indeed, one would expect the Court to be more likely to reject state deviation from a prophylactic rule than federal deviation. Yet *Dickerson* struck down a federal deviation, while *Smith v. Robbins* upheld a state deviation. If both rules are prophylactic, the only possible explanation – besides politics – is that the *Miranda* rule, whether or not prophylactic, is also constitutional, while the *Anders* rule is merely prophylactic. *Dickerson* suggests such an explanation, but neither it nor *Smith v. Robbins* provides an explanation of how we should sort this out, and the *Chavez* plurality seems to reject the distinction entirely. For a helpful comparison of *Dickerson* and *Smith*, see Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 756-59 (2001) [hereinafter Thomas, *Remedial Rights*].

Lest readers think I have overstated the plurality's position, remember again what Justice Thomas did not say. He described the ability to assert the privilege outside criminal proceedings, and the corresponding entitlement to immunity, as a prophylactic "evidentiary privilege," but he never considered that it might be a rule of constitutional law. Second, he never said clearly that the privilege applies as a matter of constitutional right in all criminal proceedings. Third, *Dickerson* is entirely absent from the opinion, and *Miranda* is once again a nonconstitutional, prophylactic rule. Certainly, later cases will be able to ignore or distinguish the reasoning of the plurality, but a fair reading of Justice Thomas's opinion makes plain that four justices agreed to a dramatic restatement of the privilege against self-incrimination and that the other five justices were splintered in their response.

IV. MAKING CONSTITUTIONAL LAW: RIGHTS, REMEDIES, AND PROPHYLACTIC RULES

Many commentators are comfortable, not merely with the idea of prophylactic rules that protect constitutional rights by creating a buffer zone of prohibited conduct beyond the scope of the actual right, but also with prophylactic rules that go beyond core constitutional rights yet are themselves enforceable as constitutional law.¹³⁹ The *Chavez* plurality, by contrast, articulated a more rigid dichotomy between constitutional law and non-constitutional, minimally enforceable prophylactic rules subject to congressional modification to the same extent as any other form of federal common law.

The reason for the plurality's insistence on a sharp divide, I believe, is not just a general concern about the legitimacy of prophylactic rules, but also an uncertainty about how to treat constitutional remedies. This problem arises in two contexts. First, when the Court develops rules that "safeguard" a core right – *Miranda*, of course, being the most notable example – these rules can be seen as simply protective remedies and not actual constitutional requirements. Second, whenever the Court discusses

¹³⁹ See, e.g., WHITE, *supra* note 38; David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 56; Klein, *Identifying*, *supra* note 38; Schulhofer, *Reconsidering*, *supra* note 87, at 448-51; Strauss, *supra* note 38; see also Caminker, *supra* note 130 (suggesting the word "prophylactic" should be discarded but embracing the general approach to constitutional law that prophylactic rules represent); Clymer, *supra* note 63 (appearing to be comfortable with non-constitutional rules but less certain about their enforceability); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 73 n.47 ("Most of the academic literature accepts the legitimacy of prophylaxis, with the debate focusing on how to justify it.").

the contours of a constitutional right, it must also consider how that right will be applied and in particular how to remedy violations of that right.

It is tempting to think of remedies and rights as different things. Evan Caminker suggests, for example, that “there is commonly some slippage between rights and the doctrinal rules that enforce those rights.”¹⁴⁰ Against this slippage, we might insist that the right remains inviolable – the only true constitutional rule – even as courts under- or over-enforce it.¹⁴¹ Indeed, the concern that prophylactic rules over-enforce the Constitution could be a critical factor for the justices in the *Chavez* plurality, who may equate over-enforcement with undesirable judicial activism.

As constitutional scholars have begun to realize, however – and as generations of private law scholars have recognized – rights and remedies do not exist in separate, sealed environments. Remedies help define the scope of a right. And if rights are things that have value, then surely a large part of their value is the remedies that are available for violations of those rights.¹⁴² Finally, not only does enforcement of a right require the crafting of some remedy, but concerns about the appropriateness of various remedies can shape the scope of a right.¹⁴³ Justice Harlan’s Fifth

¹⁴⁰ Caminker, *supra* note 130, at 28; *see also* Jeffries, *Right-Remedy*, *supra* note 28 (exploring and justifying gaps between rights and remedies in civil rights litigation).

¹⁴¹ *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (suggesting the Court underenforces constitutional norms that should nonetheless be considered binding to their “full conceptual boundaries”); Henry P. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (suggesting some decisions – including *Miranda* – go beyond what the Constitution requires and should be considered constitutional common law subject to congressional modification or override).

¹⁴² As Susan Bandes put it, “By definition, a right must be enforceable. What would be the measure of a right whose transgression carried no penalty? It would look more like a hope, or a request, than a guarantee.” Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 306 (1995).

¹⁴³ Daryl Levinson summarizes the point in this way:

Constitutional rights do not, in fact, emerge fully formed from abstract interpretation of constitutional text, structure, and history, or from philosophizing about constitutional values. The rights-essentialist picture, in which courts begin with the pure, Platonic ideal of a constitutional right and only then pragmatically apply the right through the vehicles of implementation and remediation, bears little resemblance to the actual judicial practice of rights-construction. . . . [C]onstitutional rights are inevitably shaped by, and incorporate, remedial concerns. Constitutional adjudication is functional not just at the level of remedies, but all the way up. [In the structural reform context, moreover,] rights and remedies are redefined in an iterated process that often stretches out

Amendment dissents and Justice Souter's opinion in *Chavez* seem to recognize the validity of this point.

Both sides of this debate score important points. The "cash value" of a right is critical to any realistic definition or understanding of its meaning. Yet rights surely are more than the sum of their enforcement; the articulation of constitutional norms beyond the context of available remedies may modify behaviors and serve valuable civic, political, and precedential purposes.¹⁴⁴ So, too, the withholding or granting of remedies can serve institutional and systemic goals that judges legitimately may consider.¹⁴⁵

Rights and remedies, then, are linked. When a court articulates and applies a norm, the entire process gives meaning to the claimed right.¹⁴⁶

over a number of years in an effort to achieve concrete changes in public institutions.

Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873-74 (1999). David Cole concludes his discussion of "the inextricable relationship between rights and remedies" with the following observation:

If right and remedy cannot easily be divided, then Congress's "remedial" measures are just as likely to affect the substantive scope of the right at issue as the Court's "substantive" interpretations are likely to determine the remedies available. Thus, it may be impossible to draw the line the Court asserts. If the remedial/substantive distinction cannot be maintained in practice, the fact that it might be defended as a theoretical matter is not of much significance.

Cole, *supra* note 139, at 67. Tracy Thomas is more concise: "Prophylactics are not rules; they are remedies. A remedy is an intrinsic component of every legal 'right.'" Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 363 (2002) [hereinafter Thomas, *Looking Glass*]; see also Thomas, *Remedial Rights*, *supra* note 138. For articles that laid the groundwork for these claims, see Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992), and Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

¹⁴⁴ See Levinson, *supra* note 143, at 905-11; cf. Catharine A. MacKinnon, "Freedom from Unreal Loyalties": *On Fidelity in Constitutional Interpretation*, 65 FORDHAM L. REV. 1773 (1997) (insisting the Constitution is legitimate only if held to its textual promise of equal protection of the laws while also insisting the Constitution as it exists in practice validates enormous amounts of inequality).

¹⁴⁵ See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); Fallon & Meltzer, *supra* note 28, at 1787-91; Jeffries, *Disaggregating*, *supra* note 63, at 279-81.

¹⁴⁶ See Levinson, *supra* note 143, at 857; Thomas, *Looking Glass*, *supra* note 143, at 371 (arguing "rights are comprised of two key components: the inert skeletal matter of the substantive guarantee and the operative lifeblood of the remedy"). Evan Caminker seems to make essentially the same point when he says,

Moreover, the creation and assessment of remedies is a core judicial function.¹⁴⁷ And, as Susan Klein and David Strauss have powerfully shown, prophylactic rules (and remedies) are an inescapable part of constitutional adjudication.¹⁴⁸ Finally, as Evan Caminker nicely explains (using *Miranda* and the due process involuntary confession doctrine as his examples), even if we could discern a correct constitutional norm, we could never apply that rule in a way that would generate a precisely correct result in every case.¹⁴⁹ Nearly all constitutional interpretation consists of approximations.

The crucial step is how to deal with these insights. We could vow to do better in our efforts to interpret and apply a “real” but always elusive Constitution. The better course, I think, is not to treat imprecision and approximation as a loss. The Constitution is less a theoretical treatise than it is a charter of government that we put into practice.¹⁵⁰ That practice, in turn, means not just the articulation of general norms but also the effort to make those norms concrete. If putting the Constitution into practice inevitably generates imprecision, we should accept that imprecision, at least most of the time, as the real thing – that is, as the Constitution. Thus I quibble with, for example, Richard Fallon’s statement that “the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”¹⁵¹ If the meaning of the Constitution is so elusive in individual cases that we cannot discern or apply it with any precision, then we must consider the possibility – indeed, we must accept –

Judicial implementation of constitutional rights requires two major steps. First, the Supreme Court must interpret the Constitution to identify the constitutional norm relevant to resolving a given dispute. . . . The second step is for the Supreme Court to *translate further* that conception of a constitutional right or duty into a more specific and workable set of doctrinal rules that can feasibly be applied to safeguard that right or enforce that duty in specific cases.

Caminker, *supra* note 130, at 6-7 (emphasis added).

¹⁴⁷ See Fallon, *supra* note 145, at 57 (“A crucial mission of the Court is to implement the Constitution successfully.”). Indeed, a federal court lacks jurisdiction over a case if no judicial remedy is available. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-09 (1998); Thomas, *Remedial Rights*, *supra* note 138, at 689-90.

¹⁴⁸ See Klein, *Identifying*, *supra* note 38; Strauss, *supra* note 38; see also Dorf & Friedman, *supra* note 139, at 76 n.60 (equating the issues surrounding prophylactic rules in constitutional law with issues raised by constitutional remedies); Thomas, *Looking Glass*, *supra* note 143, at 363 (“Prophylactics are not rules; they are remedies.”).

¹⁴⁹ See Caminker, *supra* note 130, at 8-20, 26-27.

¹⁵⁰ Cf. Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1492 (1996) (emphasizing the idea that law is a practice in time).

¹⁵¹ Fallon, *supra* note 145, at 57.

that the Constitution does not have a precise meaning. The tools we develop to reach results in individual cases – including prophylactic rules – do not serve simply to implement imperfectly a precise constitutional meaning. Rather, these tools, together with the results of individual cases, *are* the meaning of the Constitution.¹⁵² Once we are able to recognize the Constitution that we have in practice, we will be in a better position to achieve the Constitution that we theorize about.¹⁵³

Several conclusions follow from these points. First, the rigid distinction between constitutional rights and a lesser category of prophylactic rules and remedies is insupportable. Second, prophylactic rules and remedies have a constitutional dimension because of their role in shaping constitutional meaning. Third, nearly all prophylactic rules are constitutional law in the most meaningful sense of constraining government conduct and providing remedies to injured individuals. Perhaps we can conceive of two levels of prophylactics – constitutional prophylactics and garden-variety prophylactics – but I do not know how we would tell the difference between the two unless it turned on whether Congress may change the rules in the second category but not in the first. Yet then one category of prophylactic rules would be indistinguishable from the rest of constitutional law. As I already have argued, I see little value in such a distinction.¹⁵⁴

¹⁵² Or at least a large part of constitutional meaning – as I have admitted, the articulation of imprecise constitutional norms has value independent from the focus on concrete results. At first blush, my claim seems similar to the Court’s statement in *Cooper v. Aaron* that its interpretations of the Constitution are as much the supreme law of the land as the text of the Constitution itself. 358 U.S. 1, 18 (1958). The similarity holds to the extent the Court meant to say that its interpretations of the Constitution *are* the Constitution. After all, the text must be interpreted to be applied, and it acquires meaning only from the process of interpretation. See, e.g., Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988) (arguing that legal indeterminacy reflects social plurality, with the result that constitutional interpretation should be a dialogue of continuous renewal and revision). As will become clear, however, I do not believe that this position leads to a conclusion of judicial exclusivity in constitutional interpretation.

¹⁵³ Thus, my position, while admittedly reductive, is not a “crude positivism” that makes the remedy the only thing of importance. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1055 (2004). Remedies reveal much of the real world value and meaning of rights, so much so that we cannot talk about rights in any concrete way without taking remedies into account. Sabel & Simon’s article provides an excellent example. Their recognition of the importance of remedies and of remedial discretion leads them to reconceptualize the basic rights claim of public law litigation as one of destabilization. See *id.* at 1055-56.

¹⁵⁴ Indeed, some commentators come close to saying that all constitutional doctrine is prophylactic in the sense that it seeks to implement an elusive or abstract constitutional meaning. For example, Caminker demonstrates that the due process involuntary

If rights, remedies, and prophylactic rules are all part of constitutional meaning, then it also seems inevitable that Congress has a role in defining what the Constitution means. Congress can modify the remedies available for violations of constitutional rights.¹⁵⁵ If remedies help to define rights, then Congress also has some power to define constitutional rights. Moreover, if the Constitution does not have a precise meaning, courts have less room to claim exclusive authority over constitutional interpretation because the existence of imprecision – even after the courts rule – confirms that other outcomes would be equally consistent with reasonable views of what the Constitution requires. Put differently, imprecision suggests that, as an institutional matter, courts often will not be able to provide precise interpretations of the Constitution and may not even be able to provide the best interpretation in every case.¹⁵⁶ If so, then if Congress stays within the scope of reasonable disagreement

confession test is just as prophylactic as the *Miranda* warnings that have partly displaced it, because “both are instrumental devices designed to safeguard constitutional values.” Caminker, *supra* note 130, at 26-27. Describing doctrine in this way supports my point. Few would suggest that Supreme Court constitutional interpretation is illegitimate simply because the resulting doctrine is almost always prophylactic in this sense. Similarly, few would contend that Congress may displace all constitutional doctrine because it is prophylactic. Rather, because constitutional meaning is necessarily imprecise, there is always a sense in which interpretation and doctrine are prophylactic by virtue of being approximations, but these approximations are usually all we have of the Constitution in practice.

¹⁵⁵ Compare *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971) (allowing damages action based on the Constitution), with *Chappell v. Wallace*, 462 U.S. 296 (1983) (barring a *Bivens* claim in military context where statutory remedies were arguably available); see *Miller v. French*, 530 U.S. 327 (2000) (upholding Prison Litigation Reform Act’s limitations on injunctive relief in litigation over the constitutionality of prison conditions); *Williams v. Taylor*, 529 U.S. 362 (2000) (holding the Antiterrorism and Effective Death Penalty Act requires federal court deference to reasonable interpretations of constitutional law by state courts); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996) (holding Congress can create remedies that displace the action recognized in *Ex parte Young*, 209 U.S. 123 (1908)); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (holding Congress has broad discretion to fashion remedies for unconstitutional uses of literacy tests as a prerequisite for voting).

¹⁵⁶ For discussions of institutional constraints on constitutional interpretation by the Court and Congress, see Cole, *supra* note 139, at 59-71, Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 40-43 (2000) (focusing on areas of relative executive advantage), Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997), Sager, *supra* note 141, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 95-128 (1999). For the best recent statement in support of judicial exclusivity in constitutional interpretation (or, at least, in support of giving the Courts the exclusive last word on what is constitutional), see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

created by the necessary imprecision of putting the Constitution into practice, courts should hesitate before substituting their own views.¹⁵⁷

Worth remembering here is that the Constitution has always meant more than what the courts say it means.¹⁵⁸ Congress has broad power to interpret the Constitution in its daily practice of implementing the document through legislation and other actions. The executive branch, too, has some independent power to “say what the law is” and thus engages in constitutional interpretation.¹⁵⁹ Notwithstanding its periodic insistence on

¹⁵⁷ For purposes of this article, I am relatively agnostic on whether the states also have this power. See *Smith v. Robbins*, 528 U.S. 259 (2000) (allowing California to adopt a less restrictive procedure than the one set out in *Anders v. California*, 386 U.S. 38 (1967) for determining whether an indigent’s criminal appeal is frivolous); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (inviting “Congress and the States” to develop alternative safeguards for the privilege against self-incrimination) (emphasis added). Compare Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60-69 (1998) (suggesting the Supreme Court should engage in provisional adjudication that allows state experimentation with constitutional doctrine); Dorf & Friedman, *supra* note 139, at 103-06 (suggesting state legislatures should have the same power as Congress to craft protections for constitutional rights that depart from the *Miranda* warnings but are adequate to protect Fifth Amendment rights). My focus here is separation of powers. That said, there is a significant difference between allocating the power to interpret the constitution within the federal government, and sharing that power with the states. Although I am not concerned if states have some power to change constitutional meaning – uniformity is not an overriding goal in general, see Dorf, *supra*, at 65-67; Mark Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999); Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1734 (1991) – at the end of the day we should preserve overall federal supremacy in constitutional interpretation.

¹⁵⁸ Also worth remembering is that the Court rarely stands fast against majoritarian views. See Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003) (making this point and collecting supporting materials); cf. Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (making a roughly similar argument about aspects of the Court’s interaction with non-judicial actors); but see Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups”*, 12 CORNELL J. L. & PUB. POL’Y 503, 510 (2003) (suggesting statistics demonstrate the Court’s “increasing aggressiveness . . . in reviewing federal statutes”). This point generates a potential objection to my analysis: why do we need to give Congress a formal role in making constitutional law when it usually gets what it wants anyway? At least a partial answer is that Congress already has a formal role through the creation and modification of remedies, and we need to confront this power seriously rather than maintain the pretense of judicial exclusivity.

¹⁵⁹ For discussions of coordinate branch authority to interpret the Constitution, see LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (3d ed. 2001); Johnsen, *supra* note 156; Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial*

judicial exclusivity, the Court, too, has accepted the authority of the political branches to interpret the Constitution. For example, *McCulloch v. Maryland*¹⁶⁰ adopted a deferential view of Congress's ability to interpret its own powers – although recent cases have made clear that the Court intends to police those limits to some degree.¹⁶¹ The tiers of equal protection review similarly give state and federal legislatures room in most instances to decide for themselves what actions are appropriate under the Constitution, so long as they stay within the bounds of reasonableness.¹⁶² Consider, too, *Nixon v. United States*, in which the Court ruled that the political question doctrine disabled it from hearing a claim that the Senate's interpretation of its power to “try all Impeachments” was unconstitutional.¹⁶³ As a result, the Senate's interpretation of what the Constitution requires in an impeachment trial is final and conclusive.¹⁶⁴

Review, 70 U. CHI. L. REV. 887, 924-25 (2003); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994).

¹⁶⁰ 17 U.S. (4 Wheat.) 316 (1819).

¹⁶¹ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000). For a consistent discussion of the Court's history of deferring to Congress's constitutional judgment, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1, 30-40 (2003) [hereinafter Post & Siegel, *Protecting*].

¹⁶² This view of legislative activity finds particular resonance in Sager's emphasis on the institutional constraints that prevent federal courts from enforcing constitutional rights to their full extent, with the result that legislatures are left with the responsibility to give effect to constitutional norms. Where I differ from Sager is in describing the proper force of these norms. For Sager, they represent the “full conceptual boundaries” of the Constitution. See Sager, *supra* note 141, at 1213. To some extent, his claim is indisputable – the Constitution can be read to support norms that go beyond existing doctrine. I would argue, however, that these norms are at best arguments until a court or legislature turns them into rights. Cf. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606 (1986), reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203, 210 (Martha Minow, et al. eds., 1993) (“it is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes legal interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism”).

¹⁶³ 506 U.S. 224 (1993) (refusing to decide the meaning of U.S. CONST. art. I, sec. 3, cl. 6).

¹⁶⁴ For an insightful discussion of the inverse correlation between the strength of the political question doctrine and strong theories of judicial review, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). Another example of this link comes from Rebecca Brown's criticism of *Nixon* for threatening the separation of powers (and resulting protections of individual liberty) by undermining judicial review. See Rebecca L. Brown, *When Political Rights Affect Individual Rights*, 1993 SUP. CT. REV. 125. The alternative view of cases like *Nixon*, and of political questions generally, is that the Court does not intervene because, in fact, there has been no violation of the Constitution. See Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976); see also

Justice Jackson's influential concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* also supports extrajudicial constitutional interpretation.¹⁶⁵ To assess the constitutionality of President Truman's seizure of the steel mills, Justice Jackson suggested three categories of executive action. For the first category, "[w]hen the President acts pursuant to an express or implied authorization of Congress,"¹⁶⁶ he asserted that executive action should be "supported by the strongest of presumptions and the widest latitude of judicial interpretation."¹⁶⁷ In other words, if Congress and the President agree that the President should have a particular power, the Court rarely should intrude with a contrary view. The necessary result of this inquiry is to leave the political branches with a presumptive last word in most cases on the extent of presidential power, at least when they agree.¹⁶⁸

Finally, the Fourteenth and Fifteenth Amendments give Congress the power to "enforce" their provisions "by appropriate legislation."¹⁶⁹ In the Voting Rights Act, Congress used this power to prohibit state voting practices that the Court had ruled were constitutional – that is, practices that did not violate the Fourteenth or Fifteenth amendments – thus raising the

Brown, *supra*, at 132 n.33, 153 n.106 (endorsing Henkin's views). This approach, in other words, requires us to wink at the Court's purported reasoning and to substitute a "real" interpretation that portrays the Court as engaged in judicial review rather than deference to the constitutional interpretation of another branch. Although there is great value in figuring out "what's really going on" in Supreme Court decisions, that kind of analysis should not distract us from also taking the Court's articulated reasoning seriously on its own terms.

¹⁶⁵ 343 U.S. 579 (1952).

¹⁶⁶ *Id.* at 635 (Jackson, J., concurring).

¹⁶⁷ *Id.* at 637.

¹⁶⁸ The recognition of shared interpretive authority also emerges from Justice Jackson's second category, which encompasses cases in which "the President acts in absence of either a congressional grant or denial of authority [and] can rely only on his own independent powers." *Id.* When reviewing this kind of action, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* If no clear legal rules govern situations like these, the President frequently will have the last word on the constitutional scope of his or her power. Justice Jackson's analysis retains its influence. See *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (redefining the categories as "point[s] along a spectrum" rather than "three pigeonholes"); see also HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 140 (1990) (arguing *Dames & Moore* "inverted" *Youngstown* "by finding legislative 'approval' when Congress had given none"). Whether or not Jackson's precise analysis is the law today, he would have given Congress and the president the last word on executive power in many instances, and *Dames & Moore* follows the same course.

¹⁶⁹ See U.S. CONST. amend. XIV § 5, amend XV § 2; see also U.S. CONST. amend. XIII § 2 (same enforcement power).

question of what, exactly, Congress was “enforcing.”¹⁷⁰ In *South Carolina v. Katzenbach*,¹⁷¹ *Katzenbach v. Morgan*,¹⁷² and *City of Rome v. United States*,¹⁷³ the Court nonetheless upheld the Act. In *South Carolina*, the Court relied on the record compiled by Congress of racial discrimination in the use of literacy tests – which turned a permissible practice into a violation of the Constitution – and stressed Congress’s discretion in choosing an appropriate remedy for this constitutional violation.¹⁷⁴ In *Rome*, the Court was careful to assert that Congress had merely created a prophylactic remedy.¹⁷⁵ In *Morgan*, however, the Court went further and declared that Congress has an independent power to decide on its own what constitutes a violation of equal protection, at least so long as it expands the right.¹⁷⁶

The Court’s more recent decision in *City of Boerne v. Flores*¹⁷⁷ can be read to repudiate *Morgan*’s effort to share interpretive power with Congress: Congress cannot “alter[] the meaning of the Free Exercise Clause” and has no “power to determine what constitutes a constitutional violation.”¹⁷⁸ Yet the Court admitted that Congress may prohibit states from engaging in conduct permitted by the Fourteenth Amendment. Congress may go beyond the Constitution so long as there is “congruence between the means used and the ends to be achieved” and the legislation is not “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”¹⁷⁹ The Court clearly meant to draw a line

¹⁷⁰ Compare Voting Rights Act § 4, 79 Stat. 437, 439 (prohibiting use of literacy tests as a prerequisite to enfranchisement), and Voting Rights Act § 5, 79 Stat. at 439 (prohibiting voting practices that have the purpose or effect of “denying or abridging the right to vote on account of race or color), with *Mobile v. Bolden*, 446 U.S. 55 (1980) (holding only changes in voting practices made with the intent to discriminate violate the Constitution), and *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959) (holding literacy tests as a prerequisite to voting are constitutional).

¹⁷¹ 383 U.S. 301 (1966).

¹⁷² 384 U.S. 641 (1966).

¹⁷³ 446 U.S. 156 (1980).

¹⁷⁴ 383 U.S. at 333-34.

¹⁷⁵ 446 U.S. at 177.

¹⁷⁶ 384 U.S. at 651 n.10, 653-56.

¹⁷⁷ 521 U.S. 507 (1997).

¹⁷⁸ *Id.* at 519. See also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (questioning *Morgan*’s reasoning).

¹⁷⁹ *Id.* at 530, 532. As the Court said in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), “Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat

between the power to declare constitutional law and the power to enforce or remedy it. But if remedies are part of the definition of rights, what the Court actually said is that Congress can't go too far in its own interpretations of the Constitution.¹⁸⁰

The exact scope of Congress's power to alter remedies remains doctrinally unclear, as *Boerne* and its progeny – including *Dickerson* – demonstrate.¹⁸¹ This lack of clarity reflects, in part, the Court's struggle to balance the undeniable remedial authority of Congress against the perceived need to limit that power to ensure that Congress cannot use remedies to reinterpret the Constitution. Yet some of this uncertainty may also reflect a suspicion that the camel's nose is already inside the tent: the ability under *Boerne* to craft remedies to deter constitutional violations necessarily includes the power to alter the shape of the Constitution in practice.

As a test, *Boerne*'s "congruence and proportionality" standard provides a reasonable approach to defining the scope of Congressional power to interpret the Constitution,¹⁸² so long as we are careful about defining the reference points for this means-ends test.¹⁸³ If constitutional

broader swath of conduct, including that which is not itself forbidden by the Amendment's text." The Court described such legislation as "prophylactic." *Id.*; see *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) (same).

¹⁸⁰ Compare McConnell, *supra* note 156, at 184 (arguing legislation is valid under § 5 if it is "within a reasonable range of plausible interpretations"); Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 459-73 (2000) [hereinafter Post & Siegel, *Equal*] (arguing the better interpretation of *Boerne*, as applied in *Kimel*, is that § 5 allows Congress to remedy or deter "conduct that would violate the Equal Protection Clause" and forbids legislation that is "constitutionally unreasonable or [tends] toward a substantive account of the Equal Protection Clause that the Court wishes to suppress"). Worth noting here is that the Court would retain its *Marbury* power to "say what the law is" because it would have the last word on whether Congress went too far. See Post & Siegel, *Equal*, *supra*, at 472.

¹⁸¹ See *Dickerson v. United States*, 530 U.S. 428 (2000); *Boerne*, 521 U.S. 507. Compare *Hibbs*, 123 S. Ct. 1972 (using *Boerne* to uphold gender discrimination damages claim against states), with *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (using *Boerne* to invalidate disability discrimination damages claim against states); *Kimel*, 528 U.S. 62 (using *Boerne* to invalidate age discrimination damages claim against states); *Florida Prepaid Postsec. Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (using *Boerne* to invalidate patent infringement damages claim against states).

¹⁸² See Thomas, *Remedial Rights*, *supra* note 138, at 733-39 (endorsing the test in general); Marci C. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999) (same).

¹⁸³ See Dorf & Friedman, *supra* note 139, at 90-94 (appearing to approve of the congruence and proportionality test so long as it is not too strict); Post & Siegel, *Equal*, *supra* note 180, at 462 (warning against "the tendency to allow the *Boerne* test to slide into a kind of narrow tailoring").

interpretation is inevitably imprecise, the Court should not require too close a fit between its interpretation of the Constitution and the interpretation reflected in congressional legislation that modifies remedies. Put differently, the Court should recognize the imprecision of constitutional interpretation and the role that shifting ideas of appropriate remedies play in fixing constitutional meaning, as well as institutional issues that may vary depending on the constitutional provisions at issue. As a consequence, Congress should have real leeway to modify the perimeter of constitutional rights by altering the available remedies.¹⁸⁴

As Barry Friedman has suggested, the best way to manage imprecision and the accompanying uncertainty about the scope of Congress's role is through an ongoing dialogue between the branches.¹⁸⁵ Such a dialogue could create a rough sense of the core and perimeter of various constitutional doctrines and implicates a variety of questions and concerns. In light of my concern with the role of remedies in defining constitutional interpretation, part of this effort might include the following questions: what remedies are available for violation of a constitutional right, and what purposes do those remedies serve?

The second question helps define the core of the constitutional right. If we give a remedy with a particular purpose in mind, then the scope of the right should encompass at least that purpose. The answer to the question, of course, will rarely be clear. For example, we generally exclude statements obtained in violation of *Miranda*, but we still must determine whether the

¹⁸⁴ See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 961 (3d ed. 2000) (suggesting “it may not make much sense to speak of *the* meaning of a given constitutional provision; one may instead have to talk of a *set of plausible meanings*, with a different subset corresponding to each of the key legal institutions empowered to ascribe meaning to the provision for purposes peculiar to that institution’s work”). Importantly, this approach gives Congress room to expand *or* contract rights under Section 5. That is to say, there is no one-way ratchet in favor of expanding or contracting rights, although institutional concerns could be invoked to limit the power of Congress to contract rights in certain contexts. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (suggesting Congress can expand but not contract rights at the margins of constitutional doctrine). Compare *Cole*, *supra* note 139, at 69-71 (endorsing a version of the “ratchet” theory), and *Dorf & Friedman*, *supra* note 139, at 90 (arguing *Boerne* allows a one-way “remedial ratchet”), with *TRIBE*, *supra*, at 946 (arguing the one-way ratchet ignores the fact that, “[w]hichever way Congress turns, it may be increasing the protection afforded to one constitutionally recognized right, value, or interest while at the same time decreasing that afforded to another”).

¹⁸⁵ See *Friedman*, *supra* note 143; Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577 (1993); see also Post & Siegel, *Equal*, *supra* note 180, at 513-22 (discussing the interaction of Court and Congress in the shaping of equal protection law and jurisprudence); Post & Siegel, *Protecting*, *supra* note 161, at 25.

core right is to be free from compulsion, to remain silent, or something else. The first question also affects the scope of the right but leaves more room for contrary legislative judgment about the efficacy and desirability of various remedies. Whether we label it prophylactic, or constitutional common law, or perhaps just quasi-constitutional, some level of remedy is constitutionally necessary in most cases, even though the exact scope of remedy is something that Congress may address.¹⁸⁶

In sum, prophylactic rules are a legitimate part of constitutional law, and in the vast majority of circumstances they are no different from other constitutional doctrines. For that reason, we should consider abandoning the term “prophylactic” and the very idea that certain kinds of constitutional rules are different from and perhaps less legitimate than others because of their scope. Constitutional interpretation by Court, Congress, or President does not give us the Constitution, more or less.¹⁸⁷ It gives us all the Constitution we have. Yet the fact that doctrines formerly known as prophylactic are now simply constitutional does not insulate them from congressional interference. Through the process of modifying remedies, Congress can alter the definition of constitutional rights so long as it does not go too far.

V. THE CONSTITUTION AND COERCIVE INTERROGATION

A. Redescribing the Fifth Amendment Privilege

As the preceding discussion should suggest, there is no obviously precise or proper interpretation of the privilege against self-incrimination. At best, we can struggle to define a core and shifting periphery of doctrine. Clearly within the core is a narrow trial right: the ban on forcing a person to testify against herself at her criminal trial. A slightly broader reading of the text would include testimony by any person at a criminal trial, before a grand jury, or at a preliminary hearing.¹⁸⁸ The rest of this section starts from a remedial perspective to confirm and expand this broader view of the

¹⁸⁶ See Fallon & Meltzer, *supra* note 28, at 1778-87 (noting the Constitution does not require a remedy for every violation of a right, so long as remedies are available in most cases). I quarrel with this point only to the extent that I doubt the value in many circumstances of calling something a right in the absence of a remedy. Worth noting here is that although I object to the term “prophylactic,” it could survive as a way to mark out the areas of constitutional doctrine over which Congress (and perhaps the states) shares interpretive authority. For a discussion of core vs. prophylactic rights that emphasizes the possibilities this distinction creates for experimentation, see Dorf, *supra* note 157, at 70-73.

¹⁸⁷ See Monaghan, *supra* note 141 (suggesting the Court sometimes gives us more than the Constitution, in the form of constitutional common law); Sager, *supra* note 141 (suggesting the Court sometimes gives us less than the Constitution, in the form of underenforced norms).

¹⁸⁸ See Friendly, *supra* note 85, at 676.

core. To some extent, this section makes a descriptive claim – that text and history, with the assistance of the remedial perspective, tell us what the current scope of the privilege really is. But my goals are critical and prescriptive as well. I seek to justify a fairly expansive core doctrine even as I admit the limits of my arguments, and I ultimately concede an area of shared interpretation between Court and Congress.¹⁸⁹

1. Learning from Immunity

The Supreme Court has developed two remedies for people from whom incriminating statements have been compelled in a custodial or formal setting but outside a criminal trial. The first is narrow and close to the text: the compelled statement is excluded from evidence at a subsequent criminal trial. The second is broader: the person from whom the statement was taken receives immunity from the use or derivative use of that statement in a subsequent criminal investigation or prosecution.¹⁹⁰ Initially, therefore, the privilege against self-incrimination is more than a right not to be called to testify at trial; it also takes account of conduct outside the trial.¹⁹¹ Although the exclusionary remedy clearly suggests a trial right, the broad remedy of use and derivative-use immunity suggests something more.

To some extent, immunity can be described as ultimately about the trial as well. Under *Kastigar*, a grant of immunity allows the government to compel testimony and use it against other people (most obviously at trial) and protects the person who gave the testimony from having compelled information used against her (again, most obviously at trial).¹⁹² Yet this

¹⁸⁹ Cf. Fallon & Meltzer, *supra* note 28, at 1737-38 (suggesting constitutional doctrine should be normatively attractive and descriptively accurate). I take incorporation of the privilege for granted throughout my discussion. Compare Dripps, *Against*, *supra* note 85 (suggesting the Supreme Court should “disincorporate” the privilege).

¹⁹⁰ See *Chavez*, 123 S. Ct. at 2002 (plurality opinion).

¹⁹¹ Here I should note a third remedy or protection associated with the privilege: the protection against comment by the prosecution on one’s express or implied assertion of the privilege. See *Griffin v. California*, 380 U.S. 609 (1965). This particular remedy or protection supports a trial right interpretation of the privilege, but it is also a key precedent for a broader constitutional right to remain silent. In other words, it can also be described as a trial remedy that protects a broader right.

¹⁹² See Clymer, *supra* note 63, at 465-66 (making this point). The same objection and response can be made about the cases involving restrictions on use by state actors of economic threats to compel incriminating statements. See *id.* at 467-72 (making the objection). Similarly, Mark Godsey relies on *Kastigar* to support the trial right theory of self-incrimination. He claims the Court “made clear that the ‘sole concern’ of the privilege was not the forcible extraction of statements; rather the privilege only prohibits such statements from being introduced at trial or similar proceeding to inflict criminal penalties upon the person who was ‘compelled’ to speak.” Godsey, *supra* note 55, at 877 (quoting *Kastigar*, 406 U.S. at 453). Yet Godsey quotes the Court out of context. In the course of

description wrongly ignores the fact that the immunity remedy also provides a real, enforceable protection against compelled incrimination outside the courtroom. Absent a grant of immunity, again as per *Kastigar*, the Constitution forbids compelling a person to incriminate herself in a variety of formal and custodial settings.¹⁹³ In short, following *Michigan v. Tucker* and *Minnesota v. Murphy*, the privilege is, first, a trial right not to have compelled statements used against one and, second, a broader right not to have statements compelled by state actors where those statements might be used against the speaker in a criminal trial. The immunity remedy means that, contrary to the claims of some commentators, compulsion of testimony outside the courtroom – without more – violates the privilege.

While I think this analysis supports a fairly broad scope for the privilege, one could still reasonably insist that the real focus of the right remains the criminal trial, and that the remedies developed by the Court are simply powerful methods of protecting the witness from testifying against herself in any meaningful way, whether directly or indirectly.¹⁹⁴ To the extent that objection has force, the immunity remedy is broader than the underlying right, and we ought to be concerned about its legitimacy as inviolable constitutional law. Justice Thomas resolved this concern by simply classifying immunity as a prophylactic rule presumably subject to congressional override. Based on the assumption that the privilege is only a trial right, he has the better of the argument – Congress can modify or reject the immunity remedy. And once we accept this analysis for immunity, its application to *Miranda* follows *a fortiori*. Yet we need not go so far with

explaining that the Constitution requires only use and derivative-use immunity, the Court said:

The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being “forced to give testimony leading to the infliction of ‘penalties affixed to . . . criminal acts.’” Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.

Kastigar, 406 U.S. at 453 (citations omitted). Nothing in this statement declares the privilege to be only a trial right. To the contrary, the entire thrust of the Court’s analysis – that immunity must be coextensive with the privilege, both of which apply outside the trial (as used by the Court, the word “testimony” clearly means more than trial testimony) – undermines Godsey’s claim.

¹⁹³ Obviously, if the view of the dissenters in *Brown v. Walker*, 161 U.S. 591 (1896), had prevailed, immunity would rarely if ever be an option, and the privilege would be far stronger and plainly more than a trial right. But the rejection of their position and the resulting allowance of immunity does not mean that the privilege is only a trial right. It is weaker outside the courtroom than it could have been, but it still has force.

¹⁹⁴ See, e.g., Clymer, *supra* note 63, at 459-78.

Justice Thomas. The best course is to recognize what the remedies tell us: the core right itself goes beyond the trial. While Congress has a role in defining the right by modifying the remedies available for violations of the privilege, it would go too far were it to adopt remedies that define the privilege as only a trial right.

2. Justifying a Broad Privilege

The remedial perspective helps describe the actual scope of the right protected by the privilege but does not by itself justify that scope. Attacks on the privilege, most notably by David Dolinko and Judge Henry Friendly, undermine many of the policy arguments that the Court employed in *Murphy*.¹⁹⁵ Yet several arguments remain available to buttress a broad

¹⁹⁵ See Dolinko, *supra* note 89; Friendly, *supra* note 85. While Dolinko's analysis is impressive and convincing, he overplays his hand in a few instances. First, and most important, the privilege can protect innocent defendants. Compare *infra* notes 219-29 and accompanying text, with Dolinko, *supra* note 89, at 1074-77, and Dripps, *Against, supra* note 85, at 715-16 (expanding on Dolinko's point to argue the privilege will never protect innocent defendants but might cause their conviction by denying them exculpatory evidence). Second, Dolinko suggests the privilege cannot be justified on the ground that it makes the trial more of an equal contest, because if we really wanted to achieve this goal, we would "enabl[e] the defendant to develop and present any facts or legal arguments that could establish his innocence." Dolinko, *supra* note 89, at 1076-77. Surely this is an example of the best being the enemy of the good. True, we could increase the funds available for indigent criminal defense, which would allow greater development of evidence and arguments and better serve the equalization goal than merely allowing the privilege. But if legislatures do not approve the large expense necessary to equalize criminal trials by giving more tools to the defense, then denying tools to the prosecution may be the only reasonable way to achieve this goal. Dolinko then dismisses the claim that incriminating statements should be excluded because they are unreliable, on the ground that "other unreliable sorts of evidence are routinely admitted at trial. *Id.* at 1077 n.76. Yet by the logic of his equalization argument, he ought to have argued for excluding all unreliable evidence. Third, Dolinko claims the privilege undermines popular esteem for the criminal justice system. *Id.* at 1088-89. To some extent, Justice Kennedy addressed this issue in *Chavez*. See 123 S. Ct. at 2015 (Kennedy, J., concurring in part and dissenting in part). More generally, Dolinko conveniently ignores the social meaning of *Miranda*. The Court's decision in *Dickerson* suggests an appreciation for the fact that the privilege is seen – rightly or wrongly – as a cornerstone of the criminal justice system, particularly at the investigative stage. See also Alschuler, *supra* note 86, at 2664. Finally, Dolinko contends privacy arguments for the privilege fail, in part because by their logic the privilege should apply any time an incriminating statement would result in adverse consequences from the state, criminal or otherwise. Dolinko, *supra* note 89, at 1114-15. This claim seems ahistorical. At the time the privilege developed, there was no well-developed regulatory state with a general practice of imposing civil penalties for non-compliance with law. In that context, the privacy rationale for a privilege only in criminal proceedings is more forceful. In the present context, Dolinko's objection suggests the privacy rationale eroded as times changed, but one could just as easily use his objection as support for extending the privilege to non-criminal proceedings, at least when penalties are

privilege at trial and beyond.

The first argument draws from the text. Whatever our individual views of the privilege, the text of the Constitution clearly creates at least a criminal trial right. As I already have noted, moreover, the most convincing textual interpretations support the cases that have applied the privilege to other proceedings in addition to the trial. The logic of the text, in other words, supports a broader privilege, and we should accept that logic as a matter of constitutional principle. Even the approach to constitutional interpretation that I outlined earlier in this article would not allow us to “pick and choose which of its provisions we are willing to obey” or to “constru[e] the privilege to death because we think its basic policy is mistaken.”¹⁹⁶ In short, we must accept the criminal trial right, and once we do so, we must also read the text fairly to include other proceedings, too¹⁹⁷

The second argument is historical. As best we can recapture the original understanding, the privilege was intended to prohibit “(1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency.”¹⁹⁸ That is, as Albert Alschuler concludes, the privilege centered less on a right to remain silent at trial and more on “improper methods of gaining information from criminal suspects.”¹⁹⁹ In addition, Eben Moglen has argued that constitutionalization of the privilege emerged from revolutionary concerns about maintaining liberty and autonomy against despotic governments. The privilege was part of a package of rights linked to the “function of the jury trial in limiting governmental power.”²⁰⁰ During ratification, anti-federalists transferred

severe enough. Cf. Alschuler, *supra* note 86, at 2647 n.83 (noting the Fifth Amendment privilege is narrower than the *nemo tenetur* maxim in one respect: “the older maxim could be invoked successfully when there was no risk of criminal punishment but merely a risk of civil liability or of injury to reputation”).

¹⁹⁶ See Dripps, *Against*, *supra* note 85, at 723-24.

¹⁹⁷ See *id.* at 724; Friendly, *supra* note 85, at 676.

¹⁹⁸ Alschuler, *supra* note 86, at 2651.

¹⁹⁹ *Id.* at 2652.

²⁰⁰ See Moglen, *supra* note 86, at 1087; see also *id.* at 1114-18. Although her focus is more general and does not explicitly touch on criminal procedure, Joyce Appleby compliments Moglen’s argument in her discussion of how liberal ideas became an important part of revolutionary ideology. She contends that beginning in the 1740s and 50s, colonial society became more atomized and less interdependent.

For a large number of men coming of age in the 1740s and 1750s the contrasting statuses of free and unfree, dependent and independent, came to represent stark alternatives. . . . This new social situation made contemporaries peculiarly sensitive to threats against their personal freedom. Among the many satisfying human goals, liberty came to

this concern about tyranny to the federal government, and they insisted on a bill of rights that would include protection against “the potentially oppressive use of the criminal justice system by the new federal government.”²⁰¹

The concern about tyranny seems excessive, not only from our perspective but also from that of others in the founding generation. Moreover, by itself, this concern does not require a broad privilege against self-incrimination because the due process clauses and the First Amendment could handle much of this work if there were no privilege.²⁰² From an originalist perspective, of course, that argument fails – the privilege was understood to restrict improper methods of obtaining information from suspects, and so it should be interpreted (but perhaps with some concerns

overshadow all others. This changing balance between the demands of the community and the individual helps explain two puzzling American developments in the revolutionary era: why the colonists reacted with such frenzied apprehensiveness to Parliamentary efforts to enforce imperial controls, and why liberalism with its core affirmation of the individual’s claim upon society to protect his natural rights could so easily have displaced the devotion to order which animated colonial life a half-century earlier.

JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 144 (1992).

²⁰¹ Moglen, *supra* note 86, at 1122. As Moglen explains more fully, four states proposed complete bills of rights that included language to constitutionalize the privilege, and he finds some evidence in the ratification debates to link these proposals with concerns about liberty and despotism. *See also* SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, at 31 (1999) (highlighting the anti-federalist desire for a bill of rights to preserve “essential personal liberties retained by the people [including] trial by jury”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 536-43 (1969) (discussing the antifederalist desire for a bill of rights to preserve liberty). Moglen and Alschuler disagree slightly on how the privilege operated in the early republic. Moglen focuses on the role of section 8 of George Mason’s Virginia Declaration of Rights, which said an accused cannot “be compelled to give evidence against himself,” as a forerunner of the privilege. Moglen, *supra* note 86, at 1118 (quoting the Declaration). He construes this language to include a right to silence that functioned as a symbolic statement about the limits of state power but was not observed in ordinary criminal trials. *Id.* at 1126-27. Alschuler focuses on the idea of the privilege as a constraint on government conduct, not a right to be silent at trial, and he contends the broader right to remain silent emerged in the nineteenth century. *See Alschuler, supra* note 86, at 2656-57. Both agree, in other words, that a right to remain silent in criminal trials became generally accepted only after adoption of the privilege.

²⁰² *See Dolinko, supra* note 89, at 1079-80, 1085-87; Dripps, *Against, supra* note 85, at 713, 716-17, 731.

about incorporation).²⁰³ In any event, history has more to say about the privilege.

If a right to remain silent was not established as part of the privilege or was uncertain at the founding, it certainly emerged in state and federal law during the nineteenth century, most strongly out of the decision to allow defendants to give sworn testimony. To protect defendants and satisfy constitutional concerns, the ability to testify under oath usually was linked to a prohibition against commenting on the silence of a defendant who chose not to testify.²⁰⁴ Much later, in *Griffin v. California*,²⁰⁵ the Supreme Court ratified these concerns by holding that the Constitution forbids comment on the defendant's refusal to testify, thus cementing at least a limited right to silence one year before *Miranda*.

In the late nineteenth century, moreover, the Supreme Court – influenced by libertarian ideas associated with the Republican party and classical legal thought – strengthened and expanded the constitutional privilege in a series of cases that interpreted it as more than a trial right.²⁰⁶

²⁰³ *Cf.* *United States v. Hubbell*, 530 U.S. 27, 49-56 (2000) (Thomas, J., concurring) (suggesting the original understanding of the privilege could require protection for incriminating documents similar to what the Court recognized in *Boyd* but later backed away from). Compare Justice Scalia's argument in *Burnham v. Superior Court*, that what counts is what the founding (or amending) generation understood, even if that understanding was incorrect as a factual matter. *See* 495 U.S. 604, 611 (1990) (plurality opinion). By extension, even if the founding generation chose cumbersome methods or reacted to over-inflated concerns, what counts is what they thought and did.

²⁰⁴ *See* Alschuler, *supra* note 86, at 2660-63. For a history of the constraints on testimony by criminal defendants and the move to allowing defendants to testify under oath in England and the United States, see George Fisher, *The Jury's Rise as a Lie Detector*, 107 *YALE L.J.* 575 (1997).

²⁰⁵ 380 U.S. 609 (1965); *see also* *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964) (referring to a suspect's "absolute right to remain silent" during interrogation).

²⁰⁶ *See* *Bram v. United States*, 168 U.S. 532 (1897); *Brown v. Walker*, 161 U.S. 591 (1896); *ICC v. Brimson*, 154 U.S. 447 (1894); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Boyd v. United States*, 116 U.S. 616 (1886). For discussion of the late nineteenth century Court's insistence on the primacy of liberty, see OWEN M. FISS, *VIII HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 19-20, 45-46, 389-90 (1993) (highlighting the Fuller Court's emphasis on liberty); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DECLINE OF THE LOCHNER ERA POLICE POWERS JURISPRUDENCE* 6 (1993) (noting the links between liberty of contract and anti-slavery and Republican ideals); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1728-31, 1737-40 (1976) (noting classical legal thought's emphasis on individuality and free will); *see also* Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 *TEX. L. REV.* 661, 667-69, 686-87 (1995) (summarizing the scholarly consensus on the Fuller Court's concern for liberty); Stephen A. Siegel, *The Revision Thickens*, 20 *LAW & HIST. REV.* 631, 634-35 (2002) (same).

Although these decisions may have been “excessive” in their portrayal of the government “in the role of a despotic power,”²⁰⁷ and the Court stepped back from their implications in *Twining v. New Jersey*,²⁰⁸ they plainly resonated with revolutionary and anti-federalist traditions that shaped the original understanding of the privilege and still exist in American culture.²⁰⁹

One way of thinking about the late nineteenth century privilege cases is to see them as exercises in translating the privilege from the context of the founding era to the different circumstances of an emerging regulatory state.²¹⁰ That process continues today, mindful of tradition but also cognizant of the pressures created by change.²¹¹ If the privilege reflects a concern about state power over criminal suspects, then taking that concern seriously may require a logical application of the privilege to a variety of proceedings and circumstances, even if we reject some of the rhetoric in the earlier cases.²¹² So, for example, if the Fuller Court’s concern about liberty drove expansion of the privilege in the late nineteenth century, concerns about police discretion and institutionalized racism may explain the Warren Court cases.²¹³ Today, as the ongoing war on crime expands into the war on terror, concerns about liberty and police discretion – and a renewed concern about physical coercion – support a continued broad privilege.²¹⁴ This perspective, in brief, uses history and persisting ideological

²⁰⁷ CHARLES FAIRMAN, VII HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 741 (1987) (criticizing *Boyd*).

²⁰⁸ 211 U.S. 78 (1908). But of course, *Twining* also comfortably asserted that jury trials are not fundamental. See *id.* at 110-11. In other words, *Twining* set its face against, not just the privilege, but against an entire “cluster” of rights that revolutionary theorists saw as essential to restraining despotic power. See Moglen, *supra* note 86, at 1087.

²⁰⁹ Akhil Amar thus gets it half right when he classifies *Boyd* as a *Lochner*-era case. He treats *Lochner v. New York*, 198 U.S. 45 (1905), as a stand-in for an overweening and now-disregarded emphasis on property rights, with the result that *Boyd*, too, is an aberration. See AMAR, *supra* note 122, at 22-25. Amar is correct that *Boyd* and *Lochner* are kin, but he misses their shared emphasis on a more general conception of liberty against a potentially despotic government that goes beyond rights to property, and he ignores the clear connection between these cases and aspects of the revolutionary tradition.

²¹⁰ See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

²¹¹ One could even use the problem of translation to help explain constitutional imprecision and even to justify giving Congress a role in the creation of constitutional meaning.

²¹² Thus, the analogy between founding-era pretrial examination by a magistrate and contemporary stationhouse interrogation has a firmer basis when seen as an issue of translation. See *supra* notes 87-88 and accompanying text.

²¹³ See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1155-59 (1998).

²¹⁴ For contemporary proposals to control police discretion and safeguard liberty interests, see Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); Parry, *Judicial Restraints*, *supra* note 6, at 122-38.

commitments about constitutional liberty to rehabilitate to some extent the privacy and autonomy rationales frequently derided by critics of the privilege.

Bear in mind, however, that the process of translation is more complicated, because it could result in narrowing the scope of the right (unless translation operates as only a one-way ratchet, which seems untenable). Even as I argue for a broad privilege, others could respond that circumstances have made the privilege unnecessary in formal proceedings and that the war on terror makes the liberty and discretion arguments swing against the privilege, or they could make the less dramatic argument that the development of due process doctrine has created a better way to address these concerns.²¹⁵ Also, of course, one could object that my translation argument takes place at too high a level of generality (although it does draw on specific discussions of the privilege).²¹⁶ To my mind, the text provides an adequate backstop against claims such as these, but the argument is hardly ironclad.

Whatever their limits, the textual and historical arguments work together to create a strong inference that the privilege must apply in the stationhouse as well as the courtroom. Yale Kamisar's famous comparison between the "mansions and gatehouses" of criminal procedure – that is, between the protective environment of the public criminal trial and the concealed rooms of police interrogation – captures the argument.²¹⁷ And no one has distilled this point more forcefully than Stephen Salzberg:

If the drafters of the fifth amendment's privilege against self-incrimination intended that, as long as the possibility of incrimination in a criminal case exists, no magistrate, judge or court of the United States could compel a person to answer questions – even though the person is given a lawyer, the proceedings are public and recorded and scrupulously fair – could they possibly have intended to permit other officials (police and prosecutors) to compel the same answers in secret sessions, most often unrecorded, without the suspect having counsel, and with no judicial protection against the nature

²¹⁵ See *supra* note 89 and accompanying text (discussing the argument that the original purposes of the privilege no longer support it).

²¹⁶ In the end, this exercise lends support to Michael Klarman's claim that translation is indeterminate and tends simply to confirm the views of the person employing it. See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 394-412 (1997).

²¹⁷ YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 27-40 (1980).

and manner of questioning? Such an honest question deserves an honest answer; the answer is *Miranda*.²¹⁸

One might even argue that, once we follow the logic of the privilege to include other proceedings, the burden of persuasion should rest on those who oppose applying it to police interrogation.

Stephen Schulhofer has provided a third argument for the privilege that I find more compelling than the first two because it homes in on the issue of reliability. Schulhofer contends that “the privilege helps many innocent defendants and that acquitting these innocents is more important than convicting an equal or somewhat larger number of guilty defendants.”²¹⁹ Rather than rely on theoretical or historical claims, Schulhofer grounds his argument in a fundamental decision facing any attorney who represents an innocent defendant:

Can you think of any reason why might not put your client on the stand if you have the choice? Of course you can. Every lawyer can. Your client might have a highly prejudicial prior record that will become admissible once he takes the stand. There are likely to be suspicious transactions or associations that your innocent client will have to explain. But he may look sleazy. He may be inarticulate, nervous, or easily intimidated. His vague memory on some of the details may leave him vulnerable to clever cross-examination. Most ordinary citizens find that being a witness in any formal proceeding is stressful and confusing. The problems are bound to be heightened when the witness happens to be on trial for his life or his liberty. Some people can handle this kind of situation, but others, especially if they are poor, poorly educated or inarticulate, cannot. They may handle the experience poorly whether or not they are guilty.²²⁰

²¹⁸ Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 14 (1986); see also Dripps, *Against*, *supra* note 85, at 724-25 & n.97 (agreeing with Saltzburg). In light of more recent historical research, one could quibble with Saltzburg’s assertion of exactly what the founding generation understood the privilege to mean, but his basic point remains sound.

²¹⁹ Stephen J. Schulhofer, *Some Kind Words for the Privilege against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329 (1991) [hereinafter Schulhofer, *Kind Words*]. Schulhofer provides statistics that support an inference in his favor: 23% of felony defendants and 34% of misdemeanor defendants who invoked the privilege in Philadelphia in the early 1980s were acquitted. See *id.* at 329-30. These numbers do not mean that the acquitted defendants were innocent, but one hopes that the fact of acquittal – especially when the defendant did not take the stand and deny the charges – means that many of them were.

²²⁰ *Id.* at 330.

In other words, Schulhofer's argument fills out the Court's brief reasoning in *Griffin v. California* supporting the holding that the Fifth Amendment bars comment on a defendant's silence.²²¹ This reasoning, in turn, buttresses the claim in *Murphy* that the privilege, "while sometimes 'a shelter to the guilty,' is often a protection to the innocent."²²² So, too, Schulhofer's words resonate with the Court's more amorphous concern in *Brown* about "press[ing]," "browbeat[ing]," and "entrap[ping]" defendants.²²³

Nor can this logic be confined to trial testimony. The same concerns support the Court's application of the privilege to other formal proceedings at which defendants or other witnesses must choose whether to testify.²²⁴ In other words, application of the privilege in these contexts has an affirmative policy justification that goes beyond text and history and is independent of the more familiar rationale of protecting the trial right.²²⁵

Finally, Schulhofer's rationale also applies to police interrogation. Even critics of the privilege usually admit – as the Court held in *Miranda* – that compulsion is inherent in stationhouse interrogation, although they often prefer unrealistic alternatives to the privilege, such as judicially supervised questioning of suspects.²²⁶ Not only is compulsion inherent to interrogation, but well-trained police interrogators are able to manipulate a suspect through a variety of techniques, including threats and deception.²²⁷ And these techniques are not practiced only on the guilty. In addition to those who are acquitted at trial, many of those arrested, held, and interrogated are never charged with a crime. In other words, large numbers of suspects who endure the inherent and often actual compulsion of

²²¹ 380 U.S. 609, 613-15 (1965).

²²² *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

²²³ *Brown v. Walker*, 161 U.S. 591, 596 (1896).

²²⁴ See *Michigan v. Tucker*, 417 U.S. 433, 440 (1974) (listing proceedings at which the privilege is available to witnesses).

²²⁵ See *id.* at 440-41 (contending the broad scope of the privilege is necessary to protect the trial right); Klein, *Silence*, *supra* note 55, at 1341.

²²⁶ See *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966); Alschuler, *supra* note 86; AMAR, *supra* note 122, at 65-68; Dripps, *Against*, *supra* note 85; Friendly, *supra* note 85, at 712. Others urge reliance on the due process clauses to constrain abusive police interrogation. See Clymer, *supra* note 63, at 472-78; Dolinko, *supra* note 89, at 1079-80; Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 896-909 (1979). See also KAMISAR, *supra* note 217, at 37 (discussing claims that compulsion as a constitutional concept does not apply to police interrogation). Compare *Dickerson v. United States*, 530 U.S. 428, 448-50 (2000) (Scalia, J., dissenting) (appearing to argue much interrogation is not coercive).

²²⁷ See Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1233-46 (2001).

interrogation are innocent.²²⁸ That fact gives real weight to concerns about individual dignity and autonomy. More important, that fact should make it no surprise that “in a small but significant number of cases, widely employed interrogation practices create a significant risk of false confessions that, in turn, leads to an unacceptable risk of wrongful convictions resulting from such confessions.”²²⁹ In short, the text does not forbid extending the privilege to police interrogation, history supports it, and the reliability concern about convicting innocent defendants applies here with as much force as in the courtroom. In addition, a liberty or dignity concern about subjecting innocent suspects to the compulsion inherent in interrogation even if they never give a false confession provides further support for applying the privilege to custodial situations.

What, then, of *Miranda*'s controversial holding that the Fifth Amendment not only applies to police interrogation but also requires police to warn suspects of their rights?²³⁰ The *Miranda* remedy excludes statements even when a defendant cannot present individualized proof of compulsion and made no effort to invoke the privilege during the interrogation. Failure to give the *Miranda* warnings itself generates the remedy unless one of the exceptions to *Miranda* applies. A fair assessment of this remedy could support a broad right to remain silent.²³¹ Alternatively, *Miranda* might simply stand for the right to be advised of and allowed to assert one's rights in a custodial setting.²³² Critically, under almost any construction, the remedy that *Miranda* provides compels the conclusion that the decision broadens the scope of the Fifth Amendment, although subsequent cases limited the remedy and thereby reined in the right.²³³ Indeed, it is precisely because *Miranda* sought to expand the scope

²²⁸ See KAMISAR, *supra* note 217, at 36 (citing statistics from the 1950s and 60s); Klein, *Deconstitutionalized*, *supra* note 55, at 462 (citing statistics from the 1980s). If as many as 50% of those arrested are never convicted of a crime, *see id.*, then inherently coercive interrogation is practiced on large numbers of the innocent as well as on the guilty.

²²⁹ WHITE, *supra* note 38, at 139; *see also* White, *supra* note 227, at 1224-29.

²³⁰ *Miranda v. Arizona*, 384 U.S. 436, 461, 467-74 (1966).

²³¹ See Michael Avery, *You Have a Right to Remain Silent*, 30 FORDHAM URB. L. J. 571, 583-87 (2003).

²³² See Dorf & Friedman, *supra* note 139, at 63-64, 78; compare George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081 (2001) (arguing *Miranda* should be seen today as basically a notice case), with Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIM. 567 (2001) (arguing *Miranda* should continue to be understood as a prophylactic self-incrimination case).

²³³ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306-08 (1985) (allowing admission of defendant's statement given after warnings even though defendant had already been interrogated in violation of *Miranda*); *New York v. Quarles*, 467 U.S. 649, 654 (1984)

of the Fifth Amendment that the Court called it prophylactic in the later cases as a way of retreating from the full implications of the decision.

The point I want to make, of course, is not only that a broad definition of the right in *Miranda* compels a broad remedy but also that the broad remedy provided by *Miranda* compels a broader definition of the right, while a narrower definition of the right necessarily creates more room for congressional modification of the remedy. So, if the focus of the privilege is actual, compelled incrimination under circumstances that go beyond some assumed baseline of normal interrogation, then the *Miranda* remedy, premised on a presumption of inherent compulsion in custodial settings, seems quite broad, and Congress should have room to tinker with it – perhaps even to the extent of 18 U.S.C. § 3501, which the Court struck down in *Dickerson*. If, on the other hand, the right encompasses more than protection against actual compulsion, then the *Miranda* remedy is a tighter fit and Congress has less room to maneuver.

Miranda's additional holding that suspects can waive their right to remain silent²³⁴ – even though waiver takes place in the same problematic atmosphere of interrogation – is central to interpreting the right that the Court created. The availability of waiver – effectively a limit on the remedy created by the warnings – allows a reading of *Miranda* that deemphasizes the rights to remain silent and to be free in general of the compulsion inherent in interrogation. With waiver, the Court concluded police interrogation is constitutionally permissible despite the fact that compulsion is inherent in it, and it may even have believed that some compulsion is desirable.²³⁵ *Miranda* thus implements, perhaps imperfectly, a broad conception of fairness in criminal investigation – a better atmosphere for suspects but without hamstringing legitimate police attempts to solve crimes. To that end, the Court expanded the privilege against self-incrimination to include a substantive right to be free of some but not all of

(allowing a public safety exception to *Miranda*); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (allowing use of the fruits of an interrogation that violates *Miranda*); *Harris v. New York*, 401 U.S. 222 (1971) (allowing use for impeachment of statements taken in violation of *Miranda*); Levinson, *supra* note 143, at 909-10.

²³⁴ See 384 U.S. at 475.

²³⁵ Thus, the Court implicitly rejected the alternative of examination by or in the presence of a magistrate. The Court also stepped back from holding that police interrogation must take place in the presence of counsel, which could have followed from *Escobedo v. Illinois*, 378 U.S. 478 (1964). See Klein, *Deconstitutionalized*, *supra* note 55, at 423 (“at the time *Escobedo v. Illinois* was decided, many commentators feared that its sweeping language regarding the need for counsel before confessions are taken and its attack on the use of confessions in general presaged the development of a new rule that would bar both uncounseled confessions and volunteered statements”).

the compulsion inherent in interrogation.²³⁶ Put another way, the *Miranda* warnings can be seen as intended to dispel enough compulsion to allow a suspect to reflect on whether to talk or remain silent.²³⁷

But because the remedy provided by *Miranda* turns on a presumption of compulsion, it will apply regardless of the actual amount of compulsion felt by each individual. In some cases – perhaps particularly those involving hardened or experienced criminals – the amount of compulsion arising out of the fact of interrogation alone will not be significant. Suspects in these cases will be fully capable of reflecting on whether to talk or remain silent even if no warnings are given. The certain existence of such cases could tempt Congress to craft a more precise remedy that accomplishes the goal of reducing compulsion.²³⁸

Section 3501, which essentially sought to overrule *Miranda* and reassert the totality of the circumstances test as the only standard for assessing custodial interrogation, was plainly inadequate.²³⁹ Yet if we accept that Congress has some power to define the right in the course of modifying the remedy, then it need not go as far as *Miranda*.²⁴⁰ Assume, for example, that Congress decides the remedy of exclusion should be available in federal court if the suspect was aware neither that her statements could be used against her nor that she could seek the assistance of counsel at any time (as well as when any statement is compelled or involuntary under the totality of the circumstances test). Although confessions might be admitted under this rule where suspects mistakenly believe they have an obligation to respond to police questioning, this

²³⁶ Compare Clymer, *supra* note 63, at 479-85 (arguing *Miranda* rests on a finding of inherent coercion in custodial interrogation but is still a case about admissibility of evidence and the need to safeguard the trial right).

²³⁷ See 384 U.S. at 467 (stating the goal of the warnings is “to combat” – not entirely dispel – “these pressures and to permit a full opportunity to exercise the privilege”); *id.* at 469-70 (acknowledging warnings cannot really dispel the coercion inherent in interrogation). This substantive right, of course, encompasses an idea of notice, but it is also a right to a lesser degree of the coercion presumed to be part of police interrogation. Compare Thomas, *supra* note 232 (arguing *Miranda* should be understood today to create a procedural due process right to notice).

²³⁸ See Caminker, *supra* note 130, at 14-18.

²³⁹ See *Dickerson*, 530 U.S. at 436; Caminker, *supra* note 130, at 20; Dorf & Friedman, *supra* note 139, at 72.

²⁴⁰ *Miranda*, of course, says that any alternative “safeguards” for the privilege must be “fully as effective” as those announced by the Court. See *Miranda v. Arizona*, 384 U.S. 436, 490 (1966). Thus, I disagree, not with the Court’s effort to define its holding as an interpretation of the Fifth Amendment, *see id.* (“In any event . . . the issues presented are of constitutional dimension”), but with its attempt to assert too rigid a distinction between right and remedy at the periphery of the privilege.

remedy – and the corresponding definition of the right that it entails – takes account of the actual level of compulsion and focuses on the suspect’s ability to reflect on whether to talk or remain silent. Whether or not this hypothetical statute provides a good remedy for the routine coercion of police interrogation, the outer limits of the right and remedy are questions of constitutional policy best left to Congress. Although the question would be close, this statute should survive judicial review if it reflects a reasonable interpretation of *Miranda* and defines a right that is sufficiently close to what the Court sought to accomplish.²⁴¹

3. The Critical Role of Damages

For all my efforts to justify a broad constitutional privilege outside the criminal courtroom and especially in the stationhouse, its status remains uncertain. To see why, remember the central issue in *Chavez: Martinez* asked the courts to hold that damages are available under 42 U.S.C. § 1983 as an additional remedy – and, sometimes, the only available remedy – for violations of the privilege. Of course, damages will almost never be available for violations of the privilege during courtroom proceedings, because the judge, prosecutor, and police officers acting as witnesses would have absolute immunity in any resulting civil rights action.²⁴² But the remedy of automatic use and derivative-use immunity that would flow from these violations is probably sufficient (especially since the remedy would likely also trigger a mistrial if the violation occurred at trial). In any event

²⁴¹ For other hypothetical statutes, see Caminker, *supra* note 130, at 20-24; Dorf & Friedman, *supra* note 139 (analyzing an extensive series of hypotheticals).

²⁴² See *Brisco v. LaHue*, 460 U.S. 325 (1983) (police officers acting as witness); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors). Injunctive relief will almost never be available for violations of the privilege in or out of court. Plaintiffs seeking injunctive relief against government officials must demonstrate standing to seek prospective relief, which in turn requires a realistic claim that they are reasonably likely to suffer future harm of the type they are complaining about. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). In this context, a plaintiff would have to claim that she is likely to be questioned by police about criminal activity in the future (which comes close to an assertion that she is likely to be suspected of criminal activity in the future), that the interrogation is likely to be coercive, and – depending on one’s exact definition of the privilege – perhaps also that the authorities will somehow succeed in introducing the resulting statements at trial. Cf. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999) (en banc) (suggesting *Lyons* rests in part on the unlikelihood that plaintiff would engage in future misconduct requiring police intervention). Of course, the inability to obtain injunctive relief also weakens the underlying right, but because *Lyons* applies to all rights claims, that problem – while significant and relevant – has no special salience here. See Parry, *Judicial Restraints*, *supra* note 6, at 117-18 (discussing advantages of injunctive relief, including enhancement of the meaning and value of rights).

the disallowance of damages here flows from a general concern about imposing liability on courtroom actors regardless of the constitutional right violated and has nothing to do with the privilege in particular.

The world outside the courtroom is different. Subject to a variety of restraints, damages generally are available for violations of constitutional rights by non-courtroom state actors.²⁴³ If damages were available for violation of the privilege outside the courtroom, then the scope and strength of the privilege would be more firmly established – it would be like other rights. Purely from a remedial perspective, moreover, the privilege literally would be worth more to those whom it protects. So, too, its deterrent power would increase significantly from that provided by immunity and exclusion alone.²⁴⁴

If the privilege applies as a matter of constitutional right outside the criminal trial, then limiting the remedies to immunity and exclusion of testimony creates an unstable right, precisely because the lack of a damages remedy suggests there may not really be a substantive right. The immunity and exclusion remedies, after all, can be described as safeguards for a trial right.²⁴⁵ Coming from the other direction, if these remedies are merely safeguards for a trial right, then one can easily understand the argument against imposing damages on state actors in federal civil rights actions for violations of non-constitutional rules. At best, we are left in a tenuous position. But if the right is to be as strong as its definition in caselaw often indicates, then damages should be available.

Perhaps the Court already realizes this. Justice Thomas's opinion, in particular, suggests he understood that the scope of the remedies provided for violation of the privilege helps to define the scope of the right. Allowing damages for conduct outside the trial would be inconsistent with the view that the privilege only protects a trial right. Moreover, he saw that even the immunity remedy is in tension with that view, and thus he went out of his way to declare immunity merely a prophylactic protection for the trial right.²⁴⁶ For his part, Justice Souter's approach to the appropriate remedy matches his Harlan-derived vision of the privilege as a right that goes beyond trial but that does so only weakly. He, too, understood that allowing damages as a routine matter would make the right more powerful than his sense of the appropriate policy balance would allow. Thus, when

²⁴³ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (defining the qualified immunity standard that largely determines when such claims may be heard on the merits).

²⁴⁴ See Levinson, *supra* note 143, at 904 (“a right with less remedy is worth *less* and a right with more remedy is worth *more*”) (emphasis original).

²⁴⁵ See *supra* notes 190-94 and accompanying text (discussing this point).

²⁴⁶ See *Chavez*, 123 S. Ct. at 2003-04 (plurality opinion).

he declared his reluctance to “expand the protection of the privilege against self-incrimination to the point of civil liability,”²⁴⁷ he explicitly linked the scope of the privilege to the package of available remedies. Finally, Justice Kennedy insisted that damages should be available (although not for *Miranda* violations) precisely because the right is a substantive protection that sweeps more broadly than the criminal trial.²⁴⁸

Without damages, the set of remedies for violations of the privilege is probably inadequate. Consider particularly situations in which law enforcement officials conclude it is worth compelling a statement from one person in order to have evidence that will lead to more significant suspects. In that situation, immunity and exclusion will provide inadequate deterrence, with the result that the right will be violated more often than if damages were available. And, as Steven Clymer has shown, in the context of *Miranda* the incentives to violate the privilege overwhelm the incentives to comply with it.²⁴⁹

That said, perhaps we should broaden the focus. As Justice Harlan emphasized, decisions about the constitutional constraints on custodial interrogation – and the remedies for unconstitutional interrogations – are issues of constitutional, not just Fifth Amendment, policy.²⁵⁰ If we get adequate protection against compelled incrimination outside the Fifth Amendment privilege, then we have less at stake in whether the privilege is a trial right or, if it is, whether damages are available for its violation. If, on the other hand, there is a gap in protection, we must decide how much of a gap, if any, we want to tolerate. Put bluntly, both the trial right interpretation of the privilege and the interpretation I have advanced are logical. If the Due Process Clauses do the same work as my interpretation of the privilege, then the choice between the two interpretations becomes less important. But if the Due Process Clauses are not coextensive with my interpretation of the privilege, then accepting the trial right interpretation also requires accepting a gap in protection against compelled testimony.

Chavez suggests that the Court will allow compelled testimony and coercive interrogation (to the extent there is a difference between the two) at the price, at most, of use and derivative-use immunity and exclusion of evidence, so long as the coercion is not too shocking. In my view, the protection that *Chavez* would provide is far too little. Either due process

²⁴⁷ *Id.* at 2007 (Souter, J., concurring in the judgment).

²⁴⁸ *Id.* at 2014 (Kennedy, J., concurring in part and dissenting in part).

²⁴⁹ See Clymer, *supra* note 63, at 502-25.

²⁵⁰ See *Miranda v. Arizona*, 384 U.S. 436, 511 (1966) (Harlan, J., dissenting) (arguing the Court has already addressed issues of compelled incrimination under the due process clause, so there is no need to expand the privilege against self-incrimination as well).

will have to provide a great deal of protection in order to narrow the gap, or we must embrace a conception of the privilege as a right that goes beyond the trial and is enforceable by damages – or both. The next section addresses the scope of the due process protection against coercive interrogation. As we will see, without doctrinal change, the due process right and remedy are almost certainly inadequate.

B. Due Process and Coercive Interrogation

The Due Process Clauses intersect with interrogation in two ways. First, involuntary confessions are inadmissible as a matter of due process. Second, some interrogation practices are so severe that they violate substantive due process rights and will support a claim for damages even under the position adopted by the *Chavez* plurality.²⁵¹ The *Chavez* plurality ducked the question of when conduct that produces a confession that is involuntary and thus inadmissible can also support a damages claim. By contrast, the lower courts in *Chavez* and Justice Ginsburg, and to some extent Justices Stevens and Kennedy, seemed to take the position that there is substantial overlap between inadmissible involuntary confessions and substantive due process-violating interrogation practices.

1. Involuntary Confessions

A confession is involuntary in violation of due process if “a defendant’s will was overborne’ by the circumstances surrounding the giving of a confession.”²⁵² To make this determination, a court must consider “the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.”²⁵³ Moreover, when describing the details of an interrogation, courts often describe the interrogators’ actions as “coercive.”²⁵⁴ But the Court has also insisted that “a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient.”²⁵⁵ Other cases make clear that “promises of leniency, threats of adverse consequences to others,

²⁵¹ See *Chavez*, 123 S. Ct. at 2004-05 (conceding damages are available for interrogation practices that violate substantive due process rights); see also Clymer, *supra* note 63 (arguing the privilege and *Miranda* are trial rights and due process standards control the availability of damages); Loewy, *supra* note 63 (same).

²⁵² *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

²⁵³ *Id.* (quoting *Schneckloth*, 412 U.S. at 226).

²⁵⁴ See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) (concluding defendant’s “will was overborne in such a way as to render his confession the product of coercion”); *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (holding some form of “official coercion” or “oppressive” or “overreaching” police conduct is a necessary part “of the inquiry into constitutional ‘voluntariness’”).

²⁵⁵ *Fulminante*, 499 U.S. at 287.

and certain types of deception would qualify as improper police practices, which, at least in the context of a prolonged interrogation, might be sufficient to render a resulting confession involuntary.”²⁵⁶ The test, in other words, is whether the interrogation tactics made the confession involuntary, and coercion is a short hand description of the kind of atmosphere in which a defendant would make an involuntary statement.²⁵⁷ While easily stated, the test is famously difficult to apply in a consistent manner.²⁵⁸

Importantly, moreover, the Supreme Court appears to equate the circumstances that make a confession involuntary with the level of pressure necessary to make testimony compelled in violation of the privilege against self-incrimination.²⁵⁹ One result of this equation is that few courts will find a confession involuntary under due process if the suspect received the *Miranda* warnings, waived them, and thus apparently spoke free of Fifth Amendment compulsion.²⁶⁰

Not everyone agrees with the equation of compulsion and involuntariness. Stephen Schulhofer, for example, maintains that the two inquiries are obviously distinct. Compulsion, for Schulhofer, is pressure, but due process requires the additional step of breaking a suspect’s will

²⁵⁶ WHITE, *supra* note 38, at 46.

²⁵⁷ See *Fulminante*, 499 U.S. at 287 n.3 (“Our prior cases have used the terms ‘coerced confession’ and ‘involuntary confession’ interchangeably ‘by way of convenient shorthand.’) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960)).

²⁵⁸ See *Dickerson*, 530 U.S. at 444 (stating a totality of the circumstances inquiry into voluntariness “is more difficult than *Miranda* for officers to conform to, and for courts to apply in a consistent manner”); WHITE, *supra* note 38, at 39-48; see also Catharine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2201 (1996) (arguing that, despite its complexity, the due process inquiry has not relied solely on a totality of the circumstances inquiry and instead has “exhibit[ed] the creation of per se rules, a focus on ordinary people, and a concern with procedural safeguards that have come to be identified with *Miranda*”).

²⁵⁹ See *Dickerson*, 530 U.S. at 444 (appearing to assume that terms such as “involuntary,” “totality of the circumstances,” and “compelled” describe the same inquiry); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) (“unwarned statements that are *otherwise voluntary* within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*”) (emphasis added); *id.* at 309 (“It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.”) (emphasis added); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (equating Fifth Amendment compulsion with “coercion”); see also Alschuler, *supra* note 86, at 2626-27 n.6 (suggesting compulsion for purposes of the privilege and coercion for purposes of due process are functionally the same).

²⁶⁰ See WHITE, *supra* note 38, at 120-22.

through coercion, thus making a confession not just compelled but also involuntary.²⁶¹ In the context of this article, Schulhofer's approach appears to contemplate three levels of constitutional concern about interrogation: concern under the privilege for non-coercive compulsion that would exclude more testimony than would current doctrine; concern under due process for additional pressure – coercion – that breaks the will and makes a confession involuntary; and concern under substantive due process for coercion that shocks the conscience and supports an award of damages. I sympathize with Schulhofer's position – and depending on how the Court would apply a damages remedy, some version of his approach could become a reality²⁶² – but the rest of my discussion will assume that compulsion and involuntariness are the same under current doctrine.

Before *Chavez*, several lower courts allowed damages claims for violations of the voluntariness test. By contrast, few courts had allowed damages claims for violations of *Miranda*.²⁶³ Because the Court was fractured in *Chavez*, the validity of the lower court cases remains up for grabs. With no clear resolution of the issue by the Court, we can expect continued § 1983 litigation over violations of the voluntariness test. Yet if compulsion and involuntariness are the same thing, then the best interpretation of *Chavez* is that damages are almost never available for involuntary confessions unless the conduct that made the confession involuntary is conscience-shocking. Remember that the four justice plurality would have held that damages are never available for compelled testimony in violation of the privilege, and Justices Souter and Breyer declared that damages should rarely be available in such cases. In short, the best we can say about the implications of *Chavez* is that it seems unlikely the Court will embrace anytime soon the position that every involuntary confession will support a damages claim. Far more clearly than the privilege, in other words, the due process voluntary confession doctrine is a trial right.

2. Interrogation and Substantive Due Process

With the involuntary confession doctrine operating as a trial right, we immediately find a potential gap in protection against coercive interrogation. The *Chavez* plurality's approach to substantive due process confirms the gap and demonstrates its breadth. The plurality considered

²⁶¹ See Schulhofer, *Reconsidering*, *supra* note 87, at 440-46; Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 944-48 (2001).

²⁶² See *infra* note 314 and accompanying text.

²⁶³ See *supra* note 55.

two approaches to substantive due process: shocks the conscience, and fundamental rights. The shocks the conscience test has an uneasy place in substantive due process doctrine. *Sacramento v. Lewis* resurrected it from apparent dormancy, but with significant ambiguity. *Lewis* seemed to suggest the test applies to executive conduct while the familiar fundamental rights-liberty interest dichotomy applies to legislative action.²⁶⁴ Yet, *Lewis* also suggested that the fundamental rights analysis is a second step after a finding that conduct shocks the conscience.²⁶⁵ In *Chavez*, however, Justice Thomas treated the two inquiries as alternatives.²⁶⁶ No other justice clearly disputed this point.²⁶⁷

Even before *Lewis*, however, critics on and off the Court charged that the shocks the conscience test was simply too vague to be applied, and the charge was renewed after *Lewis*, buoyed, perhaps, by Justice Scalia's Cole Porter-inspired riff against it.²⁶⁸ *Chavez* does little to help in this area.

²⁶⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Arguably, the shocks the conscience standard was actually rehabilitated in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), in which the Court declared that the City's "alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can not properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." *Id.* at 128. As Harry Tepker has observed, the Court apparently meant that the plaintiff had not shown the City's failure to act was more than a typical state-law tort claim. See Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 207-08 (2000).

²⁶⁵ *Id.* at 847 n.8.

²⁶⁶ See *Chavez*, 123 S. Ct. at 2005 (plurality opinion).

²⁶⁷ Justice Souter's discussion of substantive due process quoted *Lewis*'s shocks the conscience standard and so could be read as suggesting that the fundamental rights standard should not also be available. See *id.* at 2008 (Souter, J., concurring in the judgment) (quoting *Lewis*, 523 U.S. at 849). Justice Kennedy said little about the precise due process framework he employed, but he cited *Rochin v. California*, 342 U.S. 165 (1952) – the original shocks the conscience case – as support for his claim that "torture or its equivalent . . . violates an individual's fundamental right to liberty." *Id.* at 2016 (Kennedy, J., concurring in part and dissenting in part).

²⁶⁸ See *Lewis*, 523 U.S. at 861 (Scalia, J., concurring in the judgment) ("today's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test"). Justice Kennedy's concurrence responded by describing the test as grounded in "traditions, precedents, and historical understanding [as] the starting point, but not in all cases the ending point." *Id.* at 857 (Kennedy, J., concurring). For other criticisms of *Lewis* and the shocks the conscience test, see Robert Chesny, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction between Legislative and Executive Action*, 50 SYR. L. REV. 981 (2000); Tepker, *supra* note 264; Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437 (2001); *The Supreme Court, 1997 Term – Leading Cases*, 112 HARV. L. REV. 192 (1998). For a more sympathetic treatment of the test as simply a shorthand for asking whether action is constitutionally arbitrary, see Rubin, *supra* note 44, at 845-47.

Justices Breyer, O'Connor, and Souter said nothing about the range of conduct that shocks the conscience. Justices Stevens, Kennedy, and Ginsburg urged a fairly expansive view. Justice Thomas, joined by Justices Scalia and Rehnquist, urged a restrictive view.

Critically, Justice Thomas's opinion seems clearly in line with *Lewis* on two issues. First, the shocks the conscience test is a back stop, meant to forbid "only the most egregious official conduct."²⁶⁹ The *Chavez* plurality and *Lewis* suggest that the egregious conduct requirement will usually require that the official acted with the "intent to injure."²⁷⁰ In other words, the default culpability standard for shocks the conscience damages claims is specific intent – acting with the purpose of causing the injury – rather than reckless disregard or even knowledge that injury is likely to occur. If so, then there almost certainly will be a large gap between the shocks the conscience test and a trial right conception of the privilege. In the hands of the *Chavez* plurality, then, shocks the conscience is not just a shorthand for constitutionally arbitrary conduct – as some commentators had suggested – because it plainly requires plaintiffs to show that official conduct is "egregious," not just that it is unconstitutional and arbitrary enough to require exclusion of evidence.²⁷¹

Second, *Lewis* mentioned and the *Chavez* plurality makes much of the idea that conduct only shocks the conscience if it is "unjustifiable by any government interest."²⁷² According to the plurality, the need to obtain "key evidence" justifies relentless interrogation of a seriously wounded man. In fact, the possibility that Martinez may have been dying simply heightened the government's need and, hence, the justification for the interrogation.²⁷³ Nor was this simply Justice Thomas's idea. The Solicitor General made the same argument in an amicus brief.²⁷⁴ Unless the Court places limits on the necessity idea, this argument justifies a range of otherwise shocking government conduct, potentially including torture.

The simple fact that the government can raise a necessity claim to justify coercive interrogation and perhaps even torture, while obviously troubling, is not a fatal objection. Many – although not all – of the commentators who have considered the issue agree that torture is justifiable

²⁶⁹ See *Chavez*, 123 S. Ct. at 2005; *Lewis*, 523 U.S. at 846.

²⁷⁰ See *Chavez*, 123 S. Ct. at 2005 (plurality opinion); *Lewis*, 523 U.S. at 848-54; see also *supra* note 62 (noting the uncomfortable position in *Chavez* of Justice Souter, who wrote the lead opinion in *Lewis*).

²⁷¹ Compare Rubin, *supra* note 44, at 845-47.

²⁷² See *Chavez*, 123 S. Ct. at 2005; *Lewis*, 523 U.S. at 849.

²⁷³ See *Chavez*, 123 S. Ct. at 2005.

²⁷⁴ See Brief for United States, *supra* note 58, at 21-23.

in extremely rare cases.²⁷⁵ Nonetheless, the Court's use of the necessity rationale in an interrogation context is distressing. The Court articulated a very relaxed standard – is there “any government interest”? If the government can supply a need, then the conduct apparently will not shock the conscience. In future cases, the Court should toughen the standard significantly across the board or at least require greater justification for conduct that is more shocking than Chavez's interrogation of Martinez. In difficult cases, the need for information already exerts enormous pressure in favor of harsh methods, with the inevitable result that a vague or lenient standard is bound to fail.²⁷⁶

²⁷⁵ For an argument to that effect and a collection of other authorities, see Parry & White, *supra* note 54, at 760-65. Put differently, despite the obvious and strong constitutional prohibition on torture, *see id.* at 751-53; Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003), the individual constitutional right to be free of torture is not absolute. (International law takes a different view. *See infra* note 276.) The most common pro-torture hypothetical is the “ticking time bomb” scenario, in which law enforcement officials know a bomb will explode imminently in a crowded location, and they have in custody a person whom they are certain knows where the bomb is – yet that person will not talk. *See Parry & White, supra* note 54, at 760-61.

²⁷⁶ For example, in *Public Committee Against Torture in Israel v. Israel*, the Supreme Court of Israel ruled that torture was illegal but the necessity defense would be available for officials prosecuted for the use of torture. After discussing the ticking time bomb scenario, the court suggested that the imminence requirement of the necessity defense might be met even if the hypothetical bomb “is set to explode in a few days, or perhaps even after a few weeks.” H.C. 5100/94, 53(4) P.D. 817 (1999), *reprinted in* 38 I.L.M. 1471, 1486 (1999). In other words, the magnitude of the potential harm controlled and warped the imminence requirement. *See Parry & White, supra* note 54, at 764 n.95. The Chavez plurality's necessity rationale is also troubling because of the conflict it creates with our obligations under international law. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment flatly forbids torture as well as “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” Pt. 1, art. 1, ¶ 1, & art. 16, ¶ 1 (1984), *available at* <http://www.un.org/documents/ga/res/39/a39r046.htm>. The Convention does not define “cruel, inhuman or degrading treatment or punishment,” and in the course of giving its consent to the Convention, the U.S. Senate attempted to craft a more precise definition: “the United States considers itself bound by the obligation . . . to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term . . . means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment – Reservations, Declarations, and Understandings I(1), 136 Cong. Rec. S17491 (daily ed. Oct. 27, 1990). In other words, the Senate declared that the Convention only bans conduct that is already unconstitutional and gave federal courts the ultimate power to define the United States' understanding of its international obligations. At the same time, however, the Convention also declares that no

Still, the shocks the conscience test is not the sum of substantive due process. The *Chavez* plurality made clear that the more familiar fundamental rights test also applies to substantive due process claims challenging official conduct. If the Court recognizes an interest as a fundamental right, the government may trample that right only if it can pass the strict scrutiny test: its action must be narrowly tailored to serve a compelling state interest.²⁷⁷ In *Bowers v. Hardwick*²⁷⁸ and *Washington v. Glucksberg*,²⁷⁹ the Court set out a method for determining whether an interest rises to the level of a fundamental right. The Court requires a “careful description” of the claimed right and asks whether that right is “deeply rooted” in history and tradition.²⁸⁰

The point of the careful description requirement was to prevent analysis at too high a level of generality that would open the door to judicial activism.²⁸¹ Yet the plurality opinion in *Chavez* throws that requirement aside after paying lip service to it. Rather than focusing on Martinez’s specific circumstances and tailoring the analysis to them, Justice Thomas insisted that Martinez sought a broad “freedom from unwanted police questioning,” and he easily rejected the argument.²⁸² Freedom from unwanted questioning while severely wounded or near death would have been a more careful description of the claimed right, and Justice Thomas might then have had to determine whether the state had a compelling interest under the circumstances.²⁸³

justification is possible for acts of state torture. See Convention, *supra*, pt. 1, art. 2, ¶ 2. Thus, unless the Court changes course, the *Chavez* plurality’s statement that an action does not shock the conscience if there is “any government interest” creates a contradiction within our obligations under the Convention.

²⁷⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

²⁷⁸ 478 U.S. 186 (1986), *overruled on other grounds by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

²⁷⁹ 521 U.S. 702.

²⁸⁰ *Id.* at 721; *Bowers*, 478 U.S. at 190-91; see *Chavez*, 123 S. Ct. at 2006 (plurality opinion) (adopting this position).

²⁸¹ See *id.*; *Bowers* 478 U.S. at 191, 194 -95; Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (Scalia, J.). For criticism of the idea that the Court should proceed from the most specific level of generality, see LAURENCE H. TRIBE & MICHAEL DORF, *ON READING THE CONSTITUTION* (1991); Jack M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1994).

²⁸² *Chavez*, 123 S. Ct. at 2006 (plurality opinion).

²⁸³ As Mark Kelman noted in a different context, the use of a broad or narrow frame to guide analysis is a choice that varies from case to case depending on a party’s situation – so the inconsistent application of the “careful description” test should come as no surprise.

Chavez, together with *Lawrence v. Texas*²⁸⁴ and the earlier case of *Troxel v. Granville*,²⁸⁵ makes clear that the *Bowers*/*Glucksberg* methodology is malleable and that its application will be inconsistent and uncertain, depending in part upon how much room the Court is willing to make in individual cases for generalizations and historical change.²⁸⁶ Sometimes that malleability will aid those asserting a right, as in *Lawrence* and *Troxel*, while at other times it will impede their efforts, as in *Bowers* and *Glucksberg*. Whether it ultimately will aid or impede Martinez in his suit against Chavez is a matter for remand, at least for now.²⁸⁷

Even if the fundamental rights approach is open to manipulation, it has one virtue. Rather than simply articulate “any . . . interest,” the government must demonstrate a “compelling interest” and show that the means it has employed to achieve that interest are narrowly tailored to serve that interest.²⁸⁸ In the context of interrogation, for example, this standard suggests that the government could use torture in a ticking time bomb scenario, but only as something close to a last resort.²⁸⁹

See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

²⁸⁴ 123 S. Ct. 2472 (2003).

²⁸⁵ 530 U.S. 57 (2000) (plurality opinion) (stating parents have a fundamental right to make decisions about the care, custody, and control of their children). The Court was as badly fractured in *Troxel* as it was in *Chavez*.

²⁸⁶ For example, in *Lawrence*, the Court criticized *Bowers* for “fail[ing] to appreciate the extent of the liberty at stake,” which went beyond the right to engage in particular sexual conduct to encompass “the most private human conduct, sexual behavior, and in the most private of places, the home.” 123 S. Ct. at 2478. The Court also faulted *Bowers* for failing to recognize that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Id.* at 2480 (quoting *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring)).

²⁸⁷ Remember that, despite the plurality’s reasoning, a bare majority of the Court agreed that Martinez’s substantive due process claim remained available, although there was no clear majority rationale. See *Chavez*, 123 S. Ct. at 2008; *supra* note 59. On remand, the Ninth Circuit held that Martinez had a clearly established right to be free of coercive police interrogation and sent the case back to the district court for further proceedings. See *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003), *rehg. en banc denied*, 354 F.3d 1168 (9th Cir. 2004).

²⁸⁸ Compare *Lewis*, 523 U.S. at 849 (stating action justified “by any government interest” does not shock the conscience), with *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating strict scrutiny requires proof of a compelling interest), and *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (same).

²⁸⁹ Cf. Parry, *What is Torture*, *supra* note 1, at 260 (arguing the principle of escalation requires that torture be the last in a series of progressively more coercive practices). The fundamental rights approach still raises problems under international law because it still allows justification of torture. See *supra* note 276. But the fundamental rights approach, at least, puts a real straightjacket on government action.

But pressure may still arise to put a thumb in the government's side of the scale. Presumably, the test is not "strict in theory but fatal in fact" in the due process context any more than – after *Grutter v. Bollinger*²⁹⁰ – it is in the equal protection context.²⁹¹ If so, then we need to remember *Korematsu*, which teaches that the test is easier to meet in times of war or crisis.²⁹² After September 11, we have been told repeatedly that we are in a war on terrorism that requires real sacrifices of liberty to ensure security, and we have deployed forces in Afghanistan and Iraq, in part to combat terror. Disturbing reports suggest that some of our forces have come close to or even crossed the line of illegally coercive interrogation.²⁹³ Because of the context of fighting terrorism, moreover, these reports often seem to come with a built-in claim of justification.

Substantive due process constraints on coercive interrogation, in sum, do not provide as much protection as one might first expect. In situations in which they perceive a need for information, officials will be tempted to cross the line between constitutional and unconstitutional conduct. Although these actions might lead to exclusion of evidence and use immunity, *Chavez* – not to mention generally accepted substantive due process doctrine – suggests that damages will be hard to come by.

C. Managing the Gap

A gap clearly exists between the amount of protection a substantive rights conception of the privilege, enforceable by damages, could provide (or that a due process voluntariness test backed up by damages could provide), and the protections actually provided by the privilege and due process under the *Chavez* plurality's conception of current doctrine. We must face, in other words, a series of choices about how strong the constitutional constraints on interrogation need to be.

One possible response is to affirm the status quo as it appears to exist after *Chavez*. Evidence can be excluded and immunity granted for violations of the privilege or the due process voluntariness test, but damages are not available unless the unconstitutional conduct rises to a particularly egregious level. Under this regime, the right to be free of coercive interrogation is mild in most cases and is a strong but not absolute constraint only as official conduct gets close to torture. Justifications for this position might include skepticism about the amount of harm actually

²⁹⁰ 123 S. Ct. 2325 (2003).

²⁹¹ But note that Justice Kennedy seemed to suggest some practices are never permissible. See *Chavez*, 123 S. Ct. at 2017 (Kennedy, J., concurring in part and dissenting in part).

²⁹² *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁹³ See Parry, *What is Torture*, *supra* note 1, at 237-38, 249-51.

inflicted by conduct that falls short of the substantive due process standard.²⁹⁴ Some harms, after all, are inevitable when governments act, but – as the Court time and again insists – not all of them are of constitutional dimension.

In the context of determining how criminal procedure and civil rights litigation overlap, we could add a level to this argument to say that even when harm rises to a constitutional level, it is not necessarily a constitutional tort. The remedy could be something other than damages, so that the strength of the constitutional right would be relatively weaker where harm is at the low end of the constitutional scale. The Court in *Lewis* seems to have adopted some version of this view, and the *Chavez* plurality simply relied on that understanding.²⁹⁵ Although this argument has force, we need to place it in the context of unconstitutionally coercive interrogation techniques that will be practiced against people – like Martinez – who are never charged with a crime, including suspects who are in fact innocent. People in this situation do not have access to even the low-level remedies of exclusion and immunity. From the remedial perspective, they have few if any constitutional rights during custodial interrogation. For them, “it is damages or nothing.”²⁹⁶ Whether we should tolerate this conception of the right and the amount of harm it allows is ultimately a value judgment – one which I believe should be resolved in favor of allowing a damages cause of action.

One could also argue in favor of the post-*Chavez* status quo by emphasizing the need to free law enforcement officials from microscopic review of their actions because greater legal regulation – and particularly damages liability – would cause, and perhaps already causes, over-deterrence. While common in the context of civil rights litigation, this argument is inadequate at such a broad level. If damages were available for violations of the privilege or the due process voluntariness test, we would see more litigation, which would increase costs to officers and local governments. But that is exactly the point of allowing damages. We live now in a

²⁹⁴ In this sense, the Court’s treatment of interrogation claims could be compared to the traditional reluctance of common law judges to recognize emotional distress claims. See RESTATEMENT (SECOND) OF TORTS § 46 & cmts. (1965); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 491-503 (1998).

²⁹⁵ See *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998) (highlighting the concern expressed in *Paul v. Davis*, 424 U.S. 693, 701 (1976), about turning the Constitution into a “font of tort law”).

²⁹⁶ *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

situation of under-deterrence, and any effort to move toward the optimum level of deterrence requires increased incentives, which damages will provide. Moreover, the general claim that constitutional tort litigation leads too quickly to over-deterrence is largely speculative, and there is reason to fear that under-deterrence is the more likely risk even when damages are available.²⁹⁷ Further, amidst the concern about deterrence we should not lose sight of the fact that damages also serve the critical goal of compensating people for harms inflicted by governments and their agents.²⁹⁸

I do not mean to dismiss the over-deterrence argument out of hand. The question whether testimony has been compelled in violation of the privilege or coerced in violation of due process turns on the totality of the circumstances.²⁹⁹ Tests of this kind can easily be applied inconsistently, which would make the deterrent effects of civil rights claims uncertain as compared to the status quo of no claims at all except under substantive due process. While the shocks the conscience and fundamental rights tests risk being under-inclusive, the totality of the circumstances standard risks being over-inclusive. This may be particularly true if claims can be brought by any suspect who feels she was subjected to compulsion or coercion whether or not she actually provided incriminating information.

Against this concern rests the fact that civil rights litigation requires plaintiffs to navigate a variety of hurdles that screen out large numbers of claims, including many that would be valid on the merits.³⁰⁰ Plaintiffs whose confessions were admitted at their criminal trial and who were convicted of a crime will have a particularly difficult time bringing successful claims.³⁰¹ Plaintiffs who made incriminating statements but were never charged are likely not to bring claims unless the official conduct was fairly severe (as in *Chavez*), at least in part because damages awards are

²⁹⁷ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 370 (2000); see also Parry, *Judicial Restraints*, *supra* note 6, at 113-15 (summarizing this issue).

²⁹⁸ See *Carey v. Phipps*, 435 U.S. 247, 254 (1978) (“the basic purpose of a § 1983 damages award should be to compensate”).

²⁹⁹ See *supra* notes 259-62 and accompanying text.

³⁰⁰ See Parry, *Judicial Restraints*, *supra* note 6, at 111-13 (explaining that, because of the many obstacles to successful § 1983 litigation, damages rarely manage to provide full compensation on an individual or aggregate level).

³⁰¹ See Klein, *Deconstitutionalized*, *supra* note 55, at 445-48 (noting collateral estoppel may prevent plaintiffs from relitigating admissibility of purportedly compelled testimony, citing *Allen v. McCurry*, 449 U.S. 90 (1980), and damages for a conviction and wrongful imprisonment will be unavailable unless the plaintiff can first overturn her conviction, citing *Heck v. Humphrey*, 512 U.S. 477 (1994)).

likely to be small if the jury learns of the statements (assuming juries are unlikely to reward someone they see as a wrongdoer except in very compelling cases). As a result, the plaintiffs most likely to have viable claims are precisely those who were mistreated, made no incriminating statements, and were released. Damages in many of these cases are likely to be small as well, with the result that not all plaintiffs will come forward. Recognizing a broader cause of action, in short, is unlikely to open the flood gates of litigation unless the level of compulsion routinely employed by law enforcement officials is more severe than most of us likely would expect.

Because the concern about over-deterrence is real but not overriding, the easiest way to address it is simply not to allow damages for *all* violations of the privilege or due process. Justice Kennedy, for example, would require more than a violation of *Miranda* before making damages available, while Justice Souter would allow damages for violations of the privilege (including *Miranda*) only in compelling cases.³⁰² These more nuanced positions remind us that we can exclude claims in which the compulsion was relatively minor or merely presumed – that is, claims in which the right is weaker and the appropriate remedy is exclusion or immunity. We should not embrace Justice Kennedy’s or Justice Souter’s specific positions too quickly, however. Preventing damages for all violations of *Miranda* while also maintaining all of the exceptions that allow admission of compelled testimony at trial would, in Susan Klein’s words, “render *Miranda* ineffectual.”³⁰³ Justice Souter’s desire to limit damages to truly extraordinary cases would have an even more severe impact on the privilege as a whole. The damages remedy must be more expansive even if it does not apply in all cases.

The over-deterrence argument has a final piece in an era in which law enforcement must guard against terrorism as well as ordinary crime. In a situation of over-deterrence, law enforcement officials will play it safe, which translates into less effective policing and a resulting increase in at least certain kinds of crimes. Increased crime, of course, means more harm and less social welfare (assuming we exclude or discount the benefits to criminals). Even if one is willing to accept increased crime as the price for increased liability, the calculus should change – so the argument goes – when the resulting harm increases exponentially. Terrorism provides this exponential increase in harm, and so those who formerly were skeptical

³⁰² See *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring in the judgment); *id.* at 2013 (Kennedy, J., concurring in part and dissenting in part).

³⁰³ Klein, *Silence*, *supra* note 55, at 1355. *Chavez*, of course, appears to do exactly this, but cases pending before the Court create the opportunity to undo some of the damage. See *supra* note 8.

about over-deterrence need to rethink their position.

This argument also has force, but the substantive due process framework already provides that otherwise improper police conduct may be justified by exigent circumstances, and this exception could continue to be a part of any new model we adopt. More generally, despite the real concern about terrorism, the fact remains that the bulk of law enforcement resources, particularly at the state and local levels, are devoted to preventing and solving more common crimes. If we need special rules for terrorism, then we should apply them in that context rather than across the board. Extreme cases should not control everyday doctrine.³⁰⁴

Taking all of these concerns into account, the best way to manage the gap is to allow damages where the plaintiff can prove (1) an intentional violation of *Miranda*,³⁰⁵ (2) conduct that actually compels testimony in violation of the privilege or renders a confession involuntary in violation of due process, or (3) conduct that under the circumstances amounts to compulsion or coercion as an objective matter whether or not a confession or other incriminating statement results.³⁰⁶ This position weeds out minor cases where there was no actual compulsion and little fault can be ascribed to the interrogator, but it also increases deterrence, advances the goal of compensation, and confirms the privilege (including *Miranda*) and due process as rights that constrain conduct outside the courtroom.³⁰⁷

³⁰⁴ Cf. GEOFFREY C. HAZARD, ET AL., *THE LAW AND ETHICS OF LAWYERING* 312 (3rd ed. 1999) (“The danger of such extreme examples is that, by focusing our attention on the rare and exceptional, they may train us to see moral choice only when it is presented in stark terms The hard ethical questions in life arise not only in those rare instances that mirror the moralist’s stark hypotheticals, but also in the vaguer, infinitely more complex arena of ordinary life.”).

³⁰⁵ See Klein, *Silence*, *supra* note 55, at 1354-55 (making this argument).

³⁰⁶ In the second and third categories, the general rule of *Colorado v. Connelly* – that police conduct and not the suspect’s mental condition is the touchstone – would remain in place. See 479 U.S. 157, 164 (1986); cf. Klein, *Deconstitutionalized*, *supra* note 55, at 471-73 (raising concerns about damages for all involuntary confessions because liability might turn on “the particular susceptibility of the suspect” rather than on the amount of coercion). More generally, the focus on intent and actual conduct during interrogation should allow my proposal to skirt the Court’s reluctance to allow damages for negligent deprivations of due process rights. See *County of Sacramento v. Lewis*, 523 U.S. 833, 848-50 (1998); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986).

³⁰⁷ When I suggest this is the best result, I mean that the Supreme Court should back away from its holdings and suggestions in *Chavez* and adopt this position instead. Critically, however, and in line with my discussion of its proper role on constitutional interpretation, Congress could prohibit damages in such cases by statute. (What Congress cannot do is modify the remedies so much that the privilege is reduced to being only a trial right.) Note, as well, that if damages were available for violations of the voluntariness test, then it could

An obvious objection to this proposal is that it allows overlapping causes of action in contradiction to the doctrine of *Graham v. Connor*.³⁰⁸ But with five justices willing to ignore that doctrine in *Chavez*, the objection has little force. To the extent it does, the Court should abandon *Graham*.³⁰⁹ One could also object that including intentional violations of *Miranda*, which allows damages in some cases even without actual compulsion, makes *Miranda* stronger than it ought to be. If *Miranda* were already a strong doctrine, this objection would have force. But *Miranda* is riddled by numerous exceptions, and allowing damages for intentional violations is a rough way to even the playing field. If the Court were to rein in the exceptions and make *Miranda* a more powerful rule of exclusion,³¹⁰ then allowing the additional remedy of damages might make the right too powerful, which in turn would justify capping the remedies short of damages.

A more significant objection is that allowing damages for all compelled or involuntary confessions would ultimately lead the Court to raise the standard for excluding testimony. The unintended consequence of my proposal, in other words, would not only be fewer damages claims than I anticipate, but also fewer excluded confessions. Criminal suspects could end up worse off. This strikes me as a significant concern. Yet if, as I have suggested, the number of claims under my proposal is not overly high, a careful Court that looked beyond the breathless claims made in briefs and actually considered what was happening in the district courts would feel little incentive to modify the totality of the circumstances test.³¹¹

Finally, one could advance a textual objection to allowing claims for violations of the privilege even when no incriminating testimony has been compelled. The Fifth Amendment bars compelling a person “to be a witness against himself,”³¹² and one could reasonably argue these words require not just compulsion but compulsion of a statement. As a result, my

be described as a substantive due process right. Thus, one way to describe my proposal on the due process side is as a large expansion of a substantive due process right to be free of coercive interrogation and abandonment of the shocks the conscience standard

³⁰⁸ 490 U.S. 386 (1989).

³⁰⁹ See *supra* notes 43-45 and accompanying text.

³¹⁰ See *supra* note 122, 233.

³¹¹ For example, charges of too many civil rights cases are probably overstated, and in any event success rates in civil rights claims are lower than in other categories of cases, which should give some pause to reflexive claims of over-deterrence. See THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 172-82 (5th ed. 2004) (summarizing several studies); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review*, 5 WM. & MARY BILL RTS. J. 427, 492-96 (1997).

³¹² U.S. CONST., amend V.

proposal would have to be rewritten to allow damages for violations of the privilege when incriminating testimony was compelled, and damages for violations of due process whether or not a confession resulted.³¹³

I am relatively agnostic about this modification. On the one hand, I am not convinced the text requires this limitation. On the other hand, admitting the objection and making the modification might also address the objection that my proposal would harm suspects by raising the bar for excluding confessions. If damages were available only when a statement was actually compelled in violation of the privilege, the class of potential plaintiffs for that cause of action would decrease and the Court would feel less pressure to tinker with the test for compulsion. At the same time, however, if damages remain available for violations of the due process voluntariness standard, then the Court might raise the bar on the due process side. The result could be a distinction between compulsion under the privilege and involuntariness under due process.³¹⁴ Again, such a result probably would be unnecessary because the increase in litigation would not be nearly as great as over-deterrence agitators tend to assume. Yet so long as the standard for excluding incriminating statements under the privilege remains the same, then raising the bar on the due process side – so long as it stops well short of current substantive due process standards – may be a price worth paying.

CONCLUSION

The fractured decision in *Chavez* displays the tensions in self-incrimination and due process jurisprudence. One group of justices seeks to rein in the privilege by transforming large parts of current doctrine into prophylactic rules that may be subject to congressional override. While admitting a damages remedy for violations of substantive due process, they would define the cause of action so narrowly and create such significant exceptions that few will ever be able to take advantage of it. On the other end of the Court, Justices Kennedy and Ginsburg – and probably Justice Stevens as well – seek to create a broad remedy against coercive interrogation practices. The justices in the middle hold the balance of power, yet they seem unable to articulate a complete approach.

Especially in the self-incrimination context, the Court's tensions are

³¹³ This revision would also help satisfy proponents of *Graham v. Connor*.

³¹⁴ As I noted earlier, Stephen Schulhofer has long advocated a distinction between compulsion under the privilege and involuntariness under due process. *See supra* notes 261-62 and accompanying text. I doubt, however, that he would embrace the distinction I develop in the text. His view is that the current standard for compulsion is too high and should be lowered relative to due process, and so he would presumably prefer a single totality of the circumstances test for both provisions to a harder due process test.

magnified by its unwillingness to recognize remedies as integral parts of constitutional rights and a corresponding inability to use remedies to shape doctrine. The justices in the middle come closest to appreciating the importance of remedies, but rather than spark doctrinal change, that realization risks producing uncertainty. Concerns about terrorism, unstated in the opinions but on display in the briefs, feed the uncertainty of the middle and strengthen the hand of the justices who would narrow the privilege and limit the scope of substantive due process.

For all of this, *Chavez* could mark a turning point in constitutional jurisprudence. Faced with doctrinal tension that results in part from ignoring the proper place of remedies and wallowing in the swamp of prophylactic rules, the Court should choose a different course. The idea of prophylactic rules should be abandoned. Because the Constitution is imprecise, all constitutional doctrine fails to match with one or the other ideal interpretation of the document, but the doctrine is nonetheless constitutional law in every sense of the term. Critically, however, the Court's understanding of the Constitution must make more room for Congress. With its admitted power over the precise scope of remedies, Congress necessarily plays a role in creating constitutional meaning.

In the context of coercive interrogation, these insights should lead the Court to recognize that the immunity remedy makes the privilege more than a trial right even as Congress may be able to modify the periphery of the doctrine, including *Miranda*. Similarly, by taking a remedial approach, we also learn that rights enforceable through damages actions are worth more than right enforceable through more limited remedies. Most unconstitutionally coercive interrogation – whether under the privilege or under due process – falls in the latter category. As a result, the right to be free of coercion is weak. Only damages can make it strong.