FOR WHOM THE DATA TOLLS: A REUNIFIED THEORY OF FOURTH AND FIFTH AMENDMENT JURISPRUDENCE

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Data privacy demands a reunified theory of the Fourth and Fifth Amendments. Data technologies allow personal information to be disembodied from physical bodies and "possessed" simultaneously by both first persons and third parties. As a result, the government has been able to use a divide-and-conquer strategy to obtain incriminating evidence alternately from the data intermediary or from the suspect.

Currently, Fourth Amendment doctrine and Fifth Amendment doctrine work at cross-purposes. The privacy community has already sounded the alarm on the "third-party doctrine," which allows the government to sidestep the Fourth Amendment when demanding evidence from third parties. But few have noted the equally potent "required records doctrine," which allows the government to circumvent the Fifth Amendment privilege against self-incrimination when demanding evidence directly from first persons. Taken together, the two exceptions swallow the rule, allowing the government to evade both Fourth and Fifth Amendment review at every turn.

This Article argues that juxtaposing the two exceptions together offers clues for how to resolve the reciprocal line-drawing problems. The first clue is that one excludes only "third parties" from constitutional protection, while the other excludes only "first parties." The second is that the third-party doctrine grew out of cases upholding the autonomy of natural persons, whereas the required records doctrine drew its authority from the need to regulate commercial activities of business entities. Reframing the jurisprudence along those two axes offers a more coherent conception of the case law, and acknowledges the vital interdependencies between the two Amendments.

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"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."[1]

No man is an island, entire of itself . . . . [A]ny man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee. . . . Another may be sick too, and sick to death, and this affliction may lie in his bowels, as gold in a mine, and be of no use to him; but this bell that tells me of his affliction, digs out, and applies that gold to me: if by this consideration of another's danger, I take mine own into contemplation . . . .[2]

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1 LEWIS CARROLL, THROUGH THE LOOKING GLASS, ch. 6 (1872), *quoted in* Shapiro v. United States, 335 U.S. 1, 43 n.5 (1948) (Frankfurter, J., dissenting).

2 JOHN DONNE, *Meditation XVII*, *in* DEVOTIONS UPON EMERGENT OCCASIONS (1624), *reprinted in* 3 THE WORKS OF JOHN DONNE, D.D., DEAN OF SAINT PAUL'S, 1621-1631, at 575 (John W. Parker ed., 1839).

I. IT TOLLS FOR WE

We are witnessing the fall of Big Data. We use a multitude of digital devices and we trust none of them to guard our data. They betray us to friends,[3] lovers,[4] parents,[5] employers,[6] advertisers,[7] hackers[8]—and worst of all to the police.[9] In 1948, Justice Jackson wrote in dissent: "It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to."[10] Today, we carry cell phones, health monitors, watches, and glasses that record where we are, who is with us, and what is being said and done at all times.[11] It is not that we necessarily have anything to hide,[12] but constant vigilance takes its toll. Unaddressed, those risks will alter the *kinds* of data we

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3 Jane Bailey, *A Perfect Storm: How the Online Environment, Social Norms, and Law Shape Girls' Lives*, *in* EGIRLS, ECITIZENS (Jane Bailey & Valerie Steeves eds., 2015).

4 Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Michelle Cottle, *The Adultery Arms Race*, THE ATLANTIC, Oct. 14, 2014, http://www.theatlantic.com/magazine/archive/2014/11/the-adultery-arms-race/380794 ("Spouses now have easy access to an array of sophisticated spy software that would give Edward Snowden night sweats: programs that record every keystroke; that compile detailed logs of our calls, texts, and video chats; that track a phone's location in real time; that recover deleted messages from all manner of devices (without having to touch said devices); that turn phones into wiretapping equipment; and on and on.").

5 DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS (2014).

6 City of Ontario v. Quon, 560 U.S. 746 (2010); Karen E.C. Levy, *The Contexts of Control: Information, Power, and Truck-Driving Work*, 31 INFO. SOC'Y 160 (2015).

7 JOSEPH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH (2012); Janice Y. Tsai et al., *The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study*, 22 INFO. SYS. RES. 254 (2011); Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES (Feb. 16, 2012), http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

8 *See* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Mat Honan, *How Apple and Amazon Security Flaws Led to My Epic Hacking*, WIRED (Aug. 6, 2012, 8:01 PM), http://www.wired.com/2012/08/apple-amazon-mat-honan-hacking/all; Sam Kashner, *Both Huntress and Prey*, VANITY FAIR, Nov. 2014, http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy; Brian Krebs, *Online Cheating Site AshleyMadison Hacked*, KREBS ON SECURITY (July 19, 2015, 11:40 PM), http://krebsonsecurity.com/2015/07/online-cheating-site-ashleymadison-hacked.

9 Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013), *rev'd*, 2015 WL 5058403 (D.C. Cir. Aug. 28, 2015) (per curiam). *But cf.* Riley v. California, 134 S. Ct. 2473 (2014) (holding that the police may not search cell phones incident to arrest without a warrant); ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015).

10 United States v. Shapiro, 335 U.S. 1, 71 (1948) (Jackson, J., dissenting).

11 *See, e.g.*, Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681 (2011); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution,* 86 MINN. L. REV. 1137, 1152, 1176 (2002); Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 623–26 (2011).

12 *See generally* DANIEL J. SOLOVE, NOTHING TO HIDE (2010); ANITA ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE (2011).

keep.[13] We will be less honest with our devices, as well as with ourselves. And even if only some individuals are deterred, all of us are affected.

Privacy scholars have been warning for quite some time now that we need stronger data protections against "third-party" data intermediaries.[14] Increasingly, mobile devices are tethered to cloud storage services such that files saved locally by the user are automatically duplicated to remote servers controlled by commercial entities.[15] That redundancy offers many real benefits: peace of mind against data loss or theft, convenient access across multiple devices, and improvements in service and troubleshooting, to name a few. But the cost is severe—forfeiture of constitutional protections. Current doctrine holds that when copies of data are held by a "third party," the police may acquire those copies at any time, for any reason, without triggering the strictures of the Fourth Amendment.[16] The third-party doctrine has long been controversial, and the steady drumbeat against it has intensified to fever pitch in recent years.[17]

But a parallel risk has gone quietly unheeded: the original data stored by "first persons" on their local devices. A troubling rule known as the "required records doctrine" allows the government to obtain incriminating data records directly from suspects themselves without

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13 *See* Bryan H. Choi, *A Prospect Theory of Privacy*, 51 IDAHO L. REV. 623 (2015); Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015).

14 *See* SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY (2000); DANIEL SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2006); Freiwald, *supra* note 11; Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 825–26 (2005) [hereinafter Slobogin, *Subpoenas and Privacy*]; Strandburg, *supra* note 11.

15 *See* Riley v. California, 134 S. Ct. 2473, 2491 (2014) ("Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference. Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another." (citation omitted)); *cf.* JONATHAN L. ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT (2008) (describing the rise of "tethered appliances").

16 *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) [hereinafter Kerr, *Third Party Doctrine*].

17 *See id.* at 563 n.5 ("A list of every article or book that has criticized the doctrine would make this the world's longest law review footnote."); Strandburg, *supra* note 11, at 616 n.10; *see also* United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (questioning the merit of the third-party doctrine); ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015) (describing the constitutional issues as "weighty" and "daunting," but reserving them for another day); United States v. Guerrero, 768 F.3d 351, 360–61 (5th Cir. 2014) ("This is not to say that the Supreme Court may not reconsider the third party doctrine in the context of historical cell site data or some other new technology."). *But cf.* United States v. Wheelock, 772 F.3d 825, 829 (8th Cir. 2014) ("Of the separately concurring justices, it was only Justice Sotomayor who voiced any dissatisfaction with the doctrine, and even then, she did not outright advocate its abandonment.").

running afoul of the Fifth Amendment. The government simply stipulates that specific records must be kept by law, and then those records become categorically excluded from the privilege against self-incrimination. Conceptually, the required records doctrine is so troubling that even the government has refrained from invoking it regularly.[18] But the required records doctrine has made an abrupt comeback—a new development that will become only more enticing as the third-party doctrine recedes.

In short, when the government cannot obtain incriminating evidence from first parties, it can seize it from third parties, and when such evidence is unavailable from third parties, the government can compel it from first parties. The third-party exception to the Fourth Amendment circumvents Fifth Amendment protections, and the required records exception to the Fifth Amendment sidesteps Fourth Amendment protections. Heads, the government wins; tails, the citizen loses.

That pliability is the direct product of reading each Amendment in isolation rather than in harmony. That was the warning of *Boyd v. United States*, the landmark Supreme Court decision that famously declared the Fourth and Fifth Amendments must be read as one, lest they be divided and conquered.[19] *Boyd* fused both Amendments together to shield "private papers" against undue government scrutiny.[20] The basic tenet of *Boyd* was that a person's essential "self" extends beyond his ephemeral thoughts and speech to his tangible papers and effects.[21] If the pen is the tongue of the soul,[22] then our writings harbor

18 *See infra* note 145 and accompanying text.

19 Boyd v. United States, 116 U.S. 616, 635 (1886) (arguing that the Amendments should be "liberally construed" because a "close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right"); *see also* Shapiro v. United States, 335 U.S. 1, 69 (1948) (Frankfurter, J., dissenting) ("[T]he Court's opinion disregards the clarion call of the *Boyd* case: *obsta principiis*. For, while it is easy enough to see this as a petty case and while some may not consider the rule of law today announced to be fraught with unexplored significance for the great problem of reconciling individual freedom with governmental strength, the *Boyd* opinion admonishes against being so lulled.").

20 *Boyd*, 116 U.S. at 630 ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty[,] and private property, where that right has never been forfeited by his conviction of some public offense . . . . In this regard the fourth and fifth amendments run almost into each other."). Exhaustive analysis of *Boyd* can be found elsewhere in the literature. *See, e.g.*, Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 31–35 (1986); Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 813–14; Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 174 (1977).

21 *Boyd*, 116 U.S. at 630; *see also* Robert S. Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 361 (1979) (discussing the notion that a person is "embodied" in his papers); Richard A. Nagareda, *Compulsion 'To Be a Witness'*

our innermost thoughts and ideas.[23] From that premise, it followed that "compulsory production of the private books and papers" of a person was equivalent to "compelling him to be a witness against himself."[24]

But *Boyd* was rashly cast aside, blamed for the follies of its progeny.[25] Subsequent cases extended *Boyd*'s logic too far, interpreting joint protection to mean absolute immunity. Any police seizure of personal property was a compelled self-incrimination in violation of the Fifth Amendment, and any compelled self-incrimination was an "unreasonable" seizure in violation of the Fourth Amendment as well. This mutual bootstrapping stonewalled legitimate law enforcement efforts.[26] Though never overruled, *Boyd* declined sharply in influence.

Divided, the Amendments have fallen. Over the last century an anti-*Boyd* backlash punted privacy from Fifth Amendment theory.[27]

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and the Resurrection of Boyd, 74 N.Y.U. L. REV. 1575, 1589 & n.54 (1999) (noting the conception of personhood that treated property as an extension of the person).

22 3 MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE OF LA MANCHA 171 (Henry Edward Watts trans. 1895).

23 *See* Entick v. Carrington, 19 Howell's State Trials 1029, 1038 (1765) ("[R]ansacking a man's secret drawers and boxes . . . is like racking his body to come at his secret thoughts."). *See generally* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008). *But see* Gerstein, *supra* note 21, at 361 ("But the core image of the evil of compelled self-incrimination involves more than breaking into a kind of strongbox of thoughts; it involves compelling people to engage actively in the process of condemning themselves.").

24 *Boyd*, 116 U.S. at 634–35; *see also* Fisher v. United States, 425 U.S. 391, 405 (1976) ("The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd v. United States*."). There is some scholarly disagreement as to whether the self-incrimination clause extended to written documents before *Boyd*. *Compare* Nagareda, *supra* note 21, at 1619 & n.172 ("[T]he common law at the time of the Bill of Rights specifically recognized a privilege against self-incrimination by way of documents."); Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 808 ("Throughout the nineteenth century, courts looked to the Fifth Amendment, not the Fourth Amendment, in analyzing the validity of subpoenas, and most believed that the Fifth Amendment's injunction against compelling a person to testify against himself *prohibited* the government from demanding incriminating documents from a suspect."); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 411–12 (1995) [hereinafter Stuntz, *Substantive Origins*, *with* Gerstein, *supra* note 21, at 356–62 ("What these cases present is not, in fact, a doctrine extending the privilege against self-incrimination to private papers, but two separate doctrines, one involving the production of papers in evidence, and the other relating to self-incrimination. . . . Through most of the course of the nineteenth century, therefore, there was no development in America of the application of the self-incrimination privilege to private papers.").

25 *See infra* Part III.B.

26 Stuntz, *Substantive Origins*, *supra* note 24, at 428. *But see* Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 837–41 ("[T]he impossibility rationale is a dangerous one *regardless* of the context, for the government can always make pleas that the Fourth Amendment and other constitutional rights make its law enforcement job difficult.").

27 *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1107–22 (1986); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995) [hereinafter Stuntz, *Privacy's Problem*]; Stuntz, *Substantive Origins*, *supra* note 24, at 443–44; *see also Fisher*, 425 U.S. at 400–01 ("The

Since then, all the king's men have been unable to put the pieces back together again.[28] The prevailing wisdom is that the privilege against self-incrimination is not fundamentally "about" privacy—even if it generates some privacy spillovers.[29] After all (it is believed), only a very particular mode of government inquiry is barred: "*No person . . . shall be compelled in any criminal case to be a witness against himself.*"[30] While the government may not extract forced confessions of sin,[31] it may obtain the same information in any other manner.[32] Moreover, the Fifth Amendment protects only against self-*incriminations*, not any other unwanted disclosures.[33] Therefore, how could the Fifth Amendment be a "privacy" protection when its scope is so limited?[34]

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proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court . . . . [The Framers] did not seek in still another Amendment the Fifth to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.").

28 *See* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898 (1995) ("Current Fifth Amendment doctrine is a quagmire."); Dolinko, *supra* note 27, at 1147 (concluding that "the role of the privilege in American law can be explained by specific historical developments, but cannot be justified either functionally or conceptually" (footnote omitted)); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228, 1261–62 (1988) [hereinafter Stuntz, *Self-Incrimination and Excuse*] ("It is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory.").

29 *See* Andresen v. Maryland, 427 U.S. 463, 477 (1976) ("[T]he Fifth Amendment protects privacy to some extent."); Bernard D. Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1, 21 ("[T]here is no coherent notion of privacy that explains the privilege; rather it is the privilege that produces a degree of privacy by insulating the suspect or defendant from compulsion to produce oral or documentary evidence."); *cf.* H. Richard Uviller, *Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell Is off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 334 (2001) (criticizing the Supreme Court for reviving "the ghost of *Boyd* . . . as 'privacy' is once again asserted as an adjunct of the right to be free of testimonial compulsion").

30 U.S. CONST. amend. V.

31 United States v. Hubbell, 530 U.S. 27, 34 n.8 (2000) ("Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber . . . ."); *cf.* Gerstein, *supra* note 21, at 346, 348 (describing the "paradigm case" as "compelling the accused to make a full and public confession"). *But see infra* note 51.

32 Dolinko, *supra* note 27, at 1109 ("Why should we think that a person who is legally compelled to reveal incriminating information about himself suffers a loss of privacy different in degree or in quality from that which he would experience if anyone else revealed the same information?").

33 *Id.* at 1114–15 ("If there is no risk of incrimination, the privilege will permit compelling an individual to divulge information that could subject him to severe civil penalties, to loss of his livelihood and public ostracism, and even to the risk of death. If protection of individual privacy were truly a central purpose of the privilege, would it not extend to these other forms of infringement of privacy?" (footnotes omitted)).

34 *See* Fisher v. United States, 425 U.S. 391, 400 (1976) ("If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its

Shunted from Fifth Amendment discourse, privacy concerns have been relegated largely to the catch-all provision of the Fourth Amendment: "*The right . . . to be secure . . . against unreasonable searches and seizures*."[35] The reason for the split is undisputed: it was a direct repudiation of *Boyd*. Conventional wisdom has now traveled to the opposite extreme, with most jurists convinced the two Amendments share no overlap at all.[36] The Fourth Amendment defends against physical intrusions (persons, places, things), while the Fifth Amendment defends against mental extractions (memories, thoughts, beliefs).[37] But the Fourth Amendment alone cannot bear the full weight of privacy. Balance is needed.

The rise of Big Data proves *Boyd*'s prescience. Increasingly sophisticated data technologies have blurred the line between physical evidence and mental knowledge.[38] Our daily actions are captured as

protections would presumably not be lifted by probable cause and a warrant or by immunity."); Couch v. United States, 409 U.S. 322, 328 (1973) (the privilege "adheres basically to the person, not to information that may incriminate him"); Gerstein, *supra* note 21, at 349–50, 368–69, 376 (1979) ("Surely, it is not the content of a confession of guilt that is to be protected, for the particulars of a criminal act are by definition a matter of concern to the legal authorities and not within the private sphere."); Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 9 (1986) ("The privilege has never been an absolute protector of privacy . . . . The government has always had the power to demand testimony in exchange for a grant of immunity."); Stuntz, *Self-Incrimination and Excuse*, *supra* note 28, at 1232–34 (noting "two major stumbling blocks to a privacy theory of the privilege": (1) the privilege does not protect physical evidence, but only "testimonial" or "communicative" conduct; and (2) the privilege focuses only on the criminal consequences of disclosure, not the disclosure itself).

35 U.S. CONST. amend. IV.

36 *See* United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) ("The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States*, but our decision in *Fisher v. United States* sounded the death-knell for *Boyd*." (citations omitted)); Gerstein, *supra* note 21, at 376 ("To deny that the protection of privacy is a significant factor in the fifth amendment is to deny the 'intimate relationship' between the fourth and fifth amendments posited by *Boyd*."); Uviller, *supra* note 29, at 315, 329–32 ("The Fifth Amendment simply does not apply to acquisition of documents by subpoena except in those few instances in which the act of production has evidentiary value in itself."). *But see* Nagareda, *supra* note 21, at 1642 n.254 ("The Supreme Court has not definitively resolved the Fifth Amendment status of personal diaries and the like.").

37 *See* Peter Arenella, Schmerber *and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982); Kiel Brennan-Marquez, *A Modest Defense of Mind-Reading*, 15 YALE J.L & TECH. 214 (2013); Stuntz, *Substantive Origins*, *supra* note 24, at 401–02, 418–19 ("As the many challenges to the oath *ex officio* showed, questioning in such cases had a strong tendency to focus on the suspect's thoughts. . . . The suspect's testimony about his thoughts mattered more in heresy prosecutions than in robbery cases. A robber's state of mind could be proved by his conduct; this was less true where the crime itself hinged on belief."). Some have been dismissive of this argument on the basis that the protection of mental privacy is not bulletproof. *See* Amar & Lettow, *supra* note 28, at 890–91.

38 *See* Riley v. California, 134 S. Ct. 2473, 2484 (2014) ("[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

data, which in turn predicts our next actions. The information stored in dossier databases creeps ever closer to the information stored in our heads.[39] Yet digitally stored data slips between the cracks, receiving protection from neither the Fourth Amendment nor the Fifth Amendment. Surely this is not the governance the Framers intended.

This Article argues that we must reunify Fourth and Fifth Amendment jurisprudence in order to restore the Amendments to their intended function. Both the Fourth and Fifth Amendments are procedural constraints on government access to information.[40] They were given separate forms because they were drafted for an analog, agricultural society, before the onslaught of complex business organizations and digital computer technologies. But their overarching purpose is clear: to set a strong default against government entitlement to information, and to impose transaction costs on the government whenever it seeks to transfer information to itself by fiat.[41]

Part II begins by tracing the nebulous history of the required records exception to the Fifth Amendment, including its sudden reemergence in recent prosecutions of offshore tax evasion. Left unchecked, the courts' careless articulation of the doctrine will allow unbridled expansion well beyond its original formulation. Going forward, the recent offshore banking cases foreshadow troubling extensions of the doctrine to other contexts where third-party sources are unavailing or simply inconvenient.

Part III draws parallels to the development of the third-party exception to the Fourth Amendment. In both settings, courts have allowed the exception to swallow the rule. Somehow, texts that were originally intended to *limit* government authority have become instruments used to *expand* it. Our Constitution of limited government has gotten twisted into a government of limited Constitution.

Finally, Part IV juxtaposes the two exceptions together and suggests how they might be re-harmonized going forward. The first

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39 *See* Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 12 (2008) ("[D]ata mining technologies allow the state and business enterprises to record perfectly innocent behavior that no one is particularly ashamed of and draw surprisingly powerful inferences about people's behavior, beliefs, and attitudes.").

40 *See* Scott E. Sundby, *"Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1779–85 & n.98 (1994) ("The passage of the Bill of Rights primarily was an effort to satisfy Antifederalist concerns about an overreaching national government and, in this sense, is most properly characterized as an expression of distrust of the government.").

41 Incriminating information can be obtained via the Fourth Amendment through reasonable searches and seizures, or compelled via the Fifth Amendment through grants of use immunity. *See* Gerstein, *supra* note 21, at 376 ("[T]he protection of the fourth can be lifted by a showing of probable cause, that of the fifth cannot; the protection of the fifth can be lifted by immunity from prosecution, that of the fourth cannot.").

principle is that we must stop denying that the two Amendments sometimes overlap. Previous scholars have offered extraordinarily helpful delineations of the two Amendments, much of which is beyond reproach.[42] But the consistent shortcoming of those theories has been their inability to resolve boundary cases that implicate both Amendments—such as bodily evidence, private diaries, and now Big Data. A better understanding is that these difficult cases are not minor outliers at the fringes, but core concerns at the intersection. After all, if both Amendments set a heavy presumption against government access to information, then for certain forms of information, it is inevitable that those protections would overlap.

Conversely, the second principle is that any exceptions that subtract protection—including the third-party doctrine and the required records doctrine—must be consistent across both Amendments. An exception crafted for one amendment should not be so unruly that it undermines the proper functioning of the other Amendment. The required records doctrine should not authorize the government to conduct unreasonable searches and seizures, nor should the third-party doctrine authorize the government to compel self-incriminations. By the same token, if it is truly imperative to override the protections of one Amendment, then that reason should be equally compelling with respect to both. Thus, the required records exception emanated from an extraordinary need to rein in abuses of the corporate veil; likewise, the third-party exception was originally rooted in the autonomy of free persons to testify against their neighbors.[43] If those principles justify altering the basic constitutional configuration, then surely they retain vitality regardless of which Amendment is invoked.

Ultimately, the joint purpose of the two Amendments is to set strong default presumptions against the arbitrary exercise of government power.[44] In that respect they are indeed "technology-

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42 *See infra* notes 244–46 and accompanying text.

43 *See* Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 834–37 ("As Professor Coombs has argued, people in possession of information about others, even information that is 'private' and obtained through an intimate relationship, have 'an autonomy-based right to choose to cooperate with the authorities.' . . . That analysis only makes sense, however, when the third party is a person." (quoting Mary Irene Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationship*, 75 CAL. L. REV. 1593, 1643 (1987)).

44 *See, e.g.*, Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002) ("The Fourth Amendment protects power not privacy. . . . [T]he amendment is best understood as a means of preserving the people's authority over government—the people's sovereign right to determine how and when government may intrude into the lives and influence the behavior of its citizens."); Stuntz, *Substantive Origins*, *supra* note 24, at 395 ("Fourth and Fifth Amendment law has traditionally limited government evidence gathering in order to guard individual

neutral"—courts should err on the side of applying both Fourth and Fifth Amendment scrutiny *especially* when new technologies present cases of first impression.[45] It is not the content and form of the *information* that is salient, nor the subjective intentions and beliefs of individual *citizens*. Rather, it has always been the manner and mode by which the *government* acts that is the pivotal constitutional fulcrum.

II. FIRST-PARTY PROBLEMS

As we mind-meld with our digital devices and embrace an expansive concept of virtual self, our relationship with the Fifth Amendment privilege against self-incrimination needs to be recast.[46] As a legal matter, current doctrine is prohibitively clear: only "persons" are protected by the privilege against self-incrimination, and the meaning of "persons" has been restricted to natural persons only—not corporate persons.[47] We are not born with our devices, and even if we were, courts have further excluded biological elements that are physically separable from the body (such as blood samples or fingerprints) on the rationale that such elements "speak" for themselves.[48] Yet as a matter of daily practice, it is equally clear that digital data is a different beast.[49] Data records are cognitive prosthetics: tools that artificially extend our

privacy, but the limits and the protection have mattered most in settings in which there have been serious concerns about the government's power to regulate the relevant conduct.").

45 *Contra* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

46 *See* Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution*, 2010 WIS. L. REV. 1049 (2010); Andy Clark & David Chalmers, *The Extended Mind*, 58 ANALYSIS 7 (1998); *cf.* Riley v. California, 134 S. Ct. 2473, 2494–95 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" (quoting Boyd v. United States, 116 U.S. 616, 630 (1886))).

47 *See* Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 49–59, 94–100 (1987) (describing the development of the "artificial entities" exception); *see also* Alito, *supra* note 20, at 65–68 & n.171 ("English precedents at the time of the adoption of the fifth amendment extended the protection of the privilege against self-incrimination to corporate as well as individual records.").

48 *See* Alito, *supra* note 20, at 40 n.67, 41–45; Amar & Lettow, *supra* note 28; Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1870 (2005). *See generally* Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976); Schmerber v. California, 384 U.S. 757 (1966) (compelled blood tests).

49 *See* Riley v. California, 134 S. Ct. 2473, 2490 (2014) ("Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different.").

limited mental capacities by offloading memory to a secondary storehouse.[50]

The Fifth Amendment privilege against self-incrimination is often attributed to the cruelties of torture chambers and heresy trials, but it should be understood more simply as the product of oppressive colonial taxation. Religious and political persecutions may have inspired barristers in old-world England,[51] but the American Revolution was fought over tax disputes.[52] In forming a new federal government explicitly authorized to tax and spend, the independent colonies were understandably wary of repeating history. Tax resistance was so foundational to the revolutionaries that it took more than a century of independence, plus several costly wars, for that collective ethos to falter and fade.[53]

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50 Computer operating systems use a similar technique called "paging" to optimize the use of prime memory capacity. *See* ABRAHAM SILBERSCHATZ ET AL., OPERATING SYSTEM CONCEPTS 315–19 (7th ed. 2005); *Virtual Memory*, WIKIPEDIA, https://en.wikipedia.org/wiki/Virtual_memory (last modified Aug. 28, 2015).

51 The romantic view has long held that the privilege emerged in England as a direct refutation of the oath *ex officio*, used by ecclesiastical courts to extract confessions of heresy. *See* Amar & Lettow, *supra* note 28, at 895–98. It is an appealing narrative that continues to be credited in modern case law. *E.g.*, United States v. Hubbell, 530 U.S. 27, 34 n.8 (2000). But more recent scholarship tells a different story of convergent evolution, that the earlier development in Christian canon law of *nemo tenetur prodere seipsum* ("no one is obliged to accuse himself") was distinct from the later development in English common law. *See* John Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1072 (1994) (citing R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 982 (1990)).

52 *Cf.* Boyd v. United States, 116 U.S. 616, 624–25 & n.4 (1886) (noting that the colonial practice of "issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods" was "the worst instrument of arbitrary power" because it put "the liberty of every man in the hands of every petty officer"); Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 456–59 (2010) (arguing that the "colonial era objections to the excesses of investigatory practices that led to provisions in the Bill of Rights . . . pertained to the enforcement of import and revenue laws"); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 783 (1935) ("The real reason for the American insistence that the privilege against self-incrimination be made a constitutional privilege may possibly be traced to . . . the proceedings instituted to enforce the laws of trade in the colonies."). Tying the Fifth Amendment more directly to the "intolerable" acts leading up to the American Revolution, rather than to more distant ecclesiastical debates, seems almost too obvious to mention. Yet it has been consistently overlooked in the literature. *See, e.g.*, Amar & Lettow, *supra* note 28, at 895–98; Stuntz, *Substantive Origins*, *supra* note 24, at 411–16 (arguing that the privilege against self-incrimination was directed primarily at neutralizing prosecutions of heresy).

53 *See* Tony Freyer & Andy Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy Since 1960*, 45 ARIZ. ST. L.J. 1297, 1363 (2013) ("The United States began the criminalization of money laundering in 1986, as part of the larger effort against illegal drugs."). Arguably, of course, the anti-tax ethos remains alive and well. *See* Christopher M. Pietruszkiewicz, *Of Summonses, Required Records and Artificial Entities: Liberating the IRS from Itself*, 73 MISS. L.J. 921, 923–24, 927 (2004) (estimating the tax gap at $300 billion, while

As the nation transitioned from upstart to establishment, the Fifth Amendment privilege became an awkward relic whose anti-tax basis—difficult to excise outright—was instead repurposed for police interrogations and street crimes.[54] At the same time, advances in data technologies made it easier to obtain incriminating evidence from third parties such as banks and accountants, reducing the need for direct confrontations with taxpayers themselves. But as further advances have made tax evasion easier to hide,[55] first-party data is becoming critical once again. After giving it wide berth for many decades, the Department of Justice has returned to the age-old tactic of compelling private citizens to produce documentation of their own tax crimes. Suddenly, the Fifth Amendment privilege has taken on renewed significance.

A. *Offshore Tax Accounts: More Records, More Problems*

In 2008, with the help of a whistleblower, the U.S. government launched a major, unprecedented investigation of the Swiss bank UBS for aiding and abetting offshore tax evasion.[56] The case yielded a criminal indictment as well as a civil suit against the bank.[57] To settle the charges, UBS agreed to pay a $780 million fine and also to disclose the account information of a select number of its U.S. clients.[58] Armed with that information, the government launched grand jury investigations against a number of individual taxpayers, and obtained subpoenas ordering those taxpayers to produce records of all their foreign bank holdings.[59]

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noting that "the audit rate of the Internal Revenue Service dropped below less than one-half of one percent" because of insufficient resources).

54 *See* Stuntz, *Substantive Origins*, *supra* note 24, at 442.

55 Itai Grinberg, *Beyond FATCA: An Evolutionary Moment for the International Tax System* (Jan. 27, 2012) (unpublished manuscript), http://ssrn.com/abstract=1996752 ("The ability to make, hold, and manage investments through offshore financial institutions has increased dramatically in recent years, while the cost of such services has plummeted." (footnote omitted)).

56 *See* Beckett G. Cantley, *The UBS Case: The U.S. Attack on Swiss Banking Sovereignty*, 7 BYU INT'L L. & MGMT. REV. 1 (2011); Lynnley Browning, *Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion*, N.Y. TIMES, June 18, 2010, at B3.

57 *See* Cantley, *supra* note 56, at 16–17.

58 United States v. UBS AG, No. 09-20423 (S.D. Fla. July 9, 2009), *dismissed per stipulation*, Agreement Between the U.S. & Swiss Confederation, 2009 WL 2524345 (Aug. 19, 2009); Gary S. Wolfe, *Why Tax Evasion Is a Bad Idea: UBS and Wegelin Bank*, PRAC. TAX LAW., Spring 2013, at 39. In the end, UBS disclosed 4,735 accounts out of the nearly 52,000 accounts initially demanded by the U.S. government. Wolfe, *supra*, at 39–40.

59 Several pleas resulted in multi-million dollar penalties, while an amnesty program recovered more than $5.5 billion in unpaid taxes. Lynnley Browning, *First Client from U.S. Is Arrested in UBS Case*, N.Y. TIMES, Apr. 3, 2009, at B3; Lynnley Browning, *Inquiry Widens as UBS Client Pleads Guilty*, N.Y. TIMES, July 29, 2009, at B4; Lynnley Browning, *Former UBS*

Tax enforcement is an information problem: the government must obtain financial data either directly from the (first-party) taxpayer, or indirectly from a third-party custodian—such as the taxpayer's employer, banker, accountant, or lawyer.[60] In many cases, third parties are reliable founts of information. But offshore banking has long been problematic because of jurisdictional obstacles and because countries like Switzerland have actively promoted cultures of bank secrecy.[61]

Since foreign banks were shielded by cross-border barriers, Congress assigned reporting requirements directly onto those still subject to domestic jurisdiction: the first-party taxpayers. Under the

Client in Florida Pleads Guilty to Tax Evasion, REUTERS (Jan. 8, 2013, 9:35 PM) http://www.reuters.com/article/2013/01/09/swissbanks-ubs-idUSL1E9C90FY20130109 ($26.6 million civil penalty and $667,700 in back taxes); David Kocieniewski, *Get Out of Jail Free? No, It's Better*, N.Y. TIMES, Sept. 12, 2012, at A1; Laura Saunders, *U.S. Is Preparing More Tax-Evasion Cases*, WALL ST. J., Jan. 31, 2013, at C1.

60 Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1735 (2010) ("A core problem for enforcement of tax laws is asymmetric information. . . . The government is forced to obtain that information after the fact, either from the taxpayer or from third parties."); Pietruszkiewicz, *supra* note 53, at 946 ("The tax structure in the United States is based on a system of self-reporting which depends significantly on the good-faith of the taxpaying public to disclose information . . . ."); Grinberg, *supra* note 55 ("Most governments of major developed countries agree that access to information from other countries is vital to the full and fair enforcement of their tax laws."); *see also* Thomas Zehnle & George Clarke, *When the Wall Comes Crumbling Down: What to Do with Taxpayers Who Cannot or Will Not Voluntarily Disclose*, 31 BNA TAX MGMT. WKLY. REP. 216 (2012) ("The problem for the U.S. tax enforcers, of course, was that they did not have access to the bank documents that would identify the account holders at these financial institutions. Many of the banks to which these cards were linked were located in jurisdictions where IRS and DOJ did not have a practical way of obtaining the records; e.g., a workable treaty process or an information sharing agreement.").

61 *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 29 (1974) ("When law enforcement personnel are confronted with the secret foreign bank account or the secret financial institution they are placed in an impossible position. In order to receive evidence and testimony regarding activities in the secrecy jurisdiction they must subject themselves to a time consuming and ofttimes fruitless foreign legal process. Even when procedural obstacles are overcome, the foreign jurisdictions rigidly enforce their secrecy laws against their own domestic institutions and employees." (quoting H.R. REP. NO. 91-975, at 12–13 (1970))); Grinberg, *supra* note 55 ("The chief obstacle was the fact that four OECD member states—Austria, Belgium, Luxembourg, and Switzerland—were committed to bank secrecy as a bar to tax information exchange upon request. . . . Significant non-OECD financial centers (e.g., Hong Kong, Liechtenstein, Panama, and Singapore) felt comfortable following the lead of Switzerland and the other OECD bank secrecy jurisdictions in rejecting exchange upon request of bank information."). *But see* Freyer & Morriss, *supra* note 53, at 1298 (noting the minority view that offshore financial centers are "an important part of the world financial system"). In recent years, international cooperation has made bank secrecy more difficult to achieve. *See* Grinberg, *supra* note 55 ("At the start of the 21st century, neither governments nor financial institutions believed the institutions had a systematic role in quelling offshore tax evasion. Today, all the emerging systems for cross-border tax cooperation assume financial institutions will function as cross-border tax agents . . . .").

Bank Secrecy Act (BSA),[62] all U.S. residents holding more than $10,000 abroad are required to keep records and file reports on their foreign financial transactions, assets, and accounts.[63] Reports must be filed annually, and tax records must be kept "available for inspection as authorized by law" for a period of at least five years.[64]

In the UBS cases, several taxpayers objected on Fifth Amendment grounds. They argued that being forced to provide the subpoenaed information subjected them to the classic "cruel trilemma" of having to choose between self-incrimination, contempt, or perjury.[65] Providing the requested records could prove tax violations, while refusing to provide any records at all violated the BSA recordkeeping provisions—both potential felonies.[66] Falsifying the records would be perjury. Thus the taxpayers protested that there was no lawful way to assert the Fifth Amendment privilege.

The government responded by invoking the required records doctrine.[67] Stated simply, the Fifth Amendment cannot be used to shield records that are required for compliance with a public regulatory scheme—no matter how self-incriminating those documents may be.[68] A required records statute may compel the creation of new records, the preservation of those records, and the production of the records for inspection.[69] According to the government, the taxpayers waived their Fifth Amendment privilege *a priori* as a condition of being "allowed" to

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62 Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114, 1118–24 (1970) (codified at 31 U.S.C. § 5311 et seq.).

63 31 U.S.C. § 5314(a); 31 C.F.R. § 1010.306(c); 76 Fed. Reg. 10234, 10234–35 (Feb. 24, 2011).

64 *See* 37 Fed. Reg. 6912, 6913–14 (Apr. 5, 1972); 75 Fed. Reg. 65806, 65808 (Oct. 26, 2010); 31 C.F.R. §§ 1010.350, 1010.420. Note that the statute of limitations for willful criminal tax offenses is six years. 26 U.S.C. § 6531.

65 *Cf.* Nagareda, *supra* note 21, at 1654 ("To say that some other group of people might comply with a given reporting requirement without incriminating themselves is no different from saying that some people on the witness stand might answer a given question without incriminating themselves.").

66 *See, e.g.*, United States v. Doe, 741 F.3d 339, 342–43 (2d Cir. 2013) ("He claims that the grand jury's subpoena requires him either to produce documents that might incriminate him or to confirm that he failed to register his foreign bank accounts, which itself could be incriminating."); *In re* M.H., 648 F.3d 1067, 1069 (9th Cir. 2011) ("M.H. argues that if he provides the sought-after information, he risks incriminating himself in violation of his Fifth Amendment privilege. . . . On the other hand, if M.H. denies having the records, he risks incriminating himself because failing to keep the information when required to do so is a felony."); *see also* 26 U.S.C. §§ 6001, 7203. This objection is hardly novel. *See, e.g.*, J. Roger Edgar, *Tax Records, the Fifth Amendment and the "Required Records Doctrine"*, 9 ST. LOUIS U. L.J. 502, 512 (1965).

67 *See, e.g.*, *Doe*, 741 F.3d at 343.

68 *See* Stuntz, *Substantive Origins*, *supra* note 24, at 432.

69 Alito, *supra* note 20, at 74 ("A required records statute may compel three distinct acts that bear upon the contents of the documents: (a) the preservation or nondestruction of records; (b) the organization of existing records; and (c) the creation of new records.").

hold assets abroad.[70] Because offshore banking could be prohibited in its entirety, the government claimed, lesser burdens such as recordkeeping and reporting requirements are simply the price of admission.[71] In other words, no privilege can arise where none existed before.

The courts of appeal have ruled uniformly in favor of the government.[72] The Ninth Circuit's opinion was the first to be issued, and set the template for the other decisions.[73] The Ninth Circuit accepted the government's characterization of the doctrine, namely that the Fifth Amendment "privilege does not extend to records required to be kept as a result of an individual's voluntary participation in a regulated activity."[74] The court was further persuaded that "no one is required to participate in the activity of offshore banking."[75]

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70 Brief for Appellee at 38, *Doe*, 741 F.3d 339 (2d Cir. 2013) (No. 13-403-cv), 2013 WL 2451566. *Contra* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."); Meltzer, *supra* note 29, at 6 ("[S]uch waivers were ill defined and mythical. Since 'the waiver' was said to result from the statutory requirements, the waiver rationale was generally no more than a statement that records required to be kept are not privileged because they are required to be kept."); Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 686–87 (1965) ("The judicial theory of implied waiver is troublesome in the area of required information because it avoids, with admirable facility, the crucial issue of whether the individual's constitutional privilege against self-incrimination should be subservient to government power. . . . The question is whether the government can constitutionally remove the privilege against self-incrimination by mere entry into a field as a regulatory agency. . . . [I]n fact the theory pays only lip service to the interests of the individual and disguises its one-sided approach behind language of a consent that does not exist; the waiver is coerced from the individual by his mere entering or remaining in the activity.").

71 Brief for Appellee, *supra* note 70, at 5 ("The 'required records' doctrine prevents a witness from using the Fifth Amendment's privilege against self-incrimination to refuse to comply with recordkeeping and reporting requirements that Congress imposed *as conditions of engaging in activity that Congress could prohibit entirely*." (emphasis added)). A parallel rationale also appears in the Fourth Amendment context. *See, e.g.*, Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006) (holding that the government may conduct warrantless home visits to verify eligibility for welfare program, because the government may withhold welfare benefits in their entirety).

72 Seven courts of appeal have issued decisions. United States v. Chabot, 793 F.3d 338 (3d Cir. 2015); *Doe,* 741 F.3d 339 (2d Cir. 2013); United States v. Under Seal, 737 F.3d 330 (4th Cir. 2013); *In re* Grand Jury Proceedings, No. 4-10, 707 F.3d 1262 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 129 (2013); *In re* Grand Jury Subpoena, 696 F.3d 428 (5th Cir. 2012); *In re* Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011, 691 F.3d 903 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2338 (2013) [hereinafter *Special Grand Jury Subpoena*]; *In re* M.H., 648 F.3d 1067 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

73 *See Special Grand Jury Subpoena*, 691 F.3d at 909 ("We need not repeat the Ninth Circuit's thorough analysis, determining that records under the Bank Secrecy Act fall within the exception. It is enough that we find—and we do—that all three requirements of the Required Records Doctrine are met in this case."); *Under Seal*, 737 F.3d at 335; *In re Grand Jury Proceedings*, 707 F.3d at 1269; *In re Grand Jury Subpoena*, 696 F.3d at 433–34.

74 *In re M.H.*, 648 F.3d at 1071–72.

75 *Id.* at 1078.

In applying the required records doctrine, the court stated that the doctrine consists of three elements: "(1) the purpose of the government's inquiry is [essentially] regulatory, not criminal; (2) the information requested is contained in documents of a kind the regulated party customarily keeps; and (3) the records have public aspects."[76] All three elements were met.

First, the court found that the BSA's recordkeeping requirements are not "essentially criminal," because "[t]here is nothing inherently illegal about having or being a beneficiary of an offshore foreign banking account."[77] The court admitted that "enforcement of criminal laws 'was undoubtedly prominent in the minds of the legislators'" when enacting the BSA, but countered that criminal liability was not the only concern—Congress was "equally concerned with civil liability."[78] In other words, a regulation remains "essentially regulatory" as long as criminal enforcement is not the *sole* purpose.[79]

Second, the court determined that the records required by the BSA were just "basic account information that bank customers would customarily keep" to access their foreign bank accounts.[80] Whether petitioners *actually* kept such records was ancillary to what the court felt they *should* have kept.[81] Here, the court felt bank records were *ipso facto* the type of information that any ordinary person would keep. The court also raised in dicta that perhaps the mere fact of being required could be enough to bootstrap a new "custom" of keeping records.[82]

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76 *Id.* at 1073 (quoting *In re* Grand Jury Proceedings (Doe M.D.), 801 F.2d 1164, 1168 (9th Cir. 1986)).

77 *Id.* at 1073–76.

78 *Id.*; *see also* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 26–30 (1974) ("Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracies to steal from the U.S. defense and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies." (quoting H.R. REP. NO. 91-975, at 12–13 (1970))).

79 *In re M.H.*, 648 F.3d at 1074 ("[T]hat Congress aimed to use the BSA as a tool to combat certain criminal activity is insufficient to render the BSA essentially criminal as opposed to essentially regulatory.").

80 *Id.* at 1076. *But cf.* United States v. Doe, 741 F.3d 339, 348 (2d Cir. 2013) ("Doe's argument that the statute is criminally focused has some force.").

81 *In re M.H.*, 648 F.3d at 1076 (stating that account holders "necessarily ha[ve] access to such essential information as the bank's name, the maximum amount held in the account each year, and the account number").

82 *Id.*; *see also* United States v. Under Seal, 737 F.3d 330, 336–37 (4th Cir. 2013) ("[F]oreign account holders can reasonably be expected to follow the law governing their choice to engage in offshore banking. Accordingly, we conclude that the records sought are of a kind

Third, the court was persuaded that any regulatory scheme having an "essentially regulatory" purpose (per the first prong) "necessarily has some 'public aspects.'"[83] The court specifically rejected the argument that documents having "special privacy interests" (such as bank records, tax documents, or confidential patient records) should be exempt.[84] Having private aspects did not preclude records from having public aspects too.[85]

Taken together, those three elements add up to a three-card Monte: anything goes. Under the court's formulation, hardly any regulation can be called "essentially criminal." Indeed, even in the face of overwhelming evidence that the BSA "has as its primary goal the enforcement of the criminal law,"[86] the Ninth Circuit held that Congress's "equal concern" with civil enforcement negated the BSA's criminal orientation.[87] Passing the first element becomes a draftsman's art, as trivial as paying lip service to civil sanctions. The remaining two elements are even less onerous. For the "customarily kept" prong, the court noted, "most" courts "simply make a cursory statement that the records are, or are not, customarily kept."[88] After all, the only difference between what is customarily kept and what is actually kept is the courts' say-so. Not surprisingly, there have been "no cases in which any court has held that records are not required because they are not 'customarily

'customarily kept' . . . ."); Brief for Appellee, *supra* note 70, at 44 ("It is not 'tautological' to conclude that individuals 'customarily' or 'ordinarily' follow the law.").

83 *In re M.H.*, 648 F.3d at 1076–79.

84 *Id.* at 1078; *see also Under Seal*, 737 F.3d at 337 ("That the records sought are typically considered private does not bar them from possessing the requisite public aspects.").

85 *In re M.H.*, 648 F.3d at 1076–77 ("Where personal information is compelled in furtherance of a valid regulatory scheme, as is the case here, that information assumes a public aspect."). *But see* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring) ("A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.").

86 *Cal. Bankers*, 416 U.S. at 80–81 & n.1 (Douglas, J., dissenting) ("Congressman Patman, author of the [BSA], stated: 'This is really a bill which, if enacted into law, will be the longest step in the direction of stopping crime than any other we have had before this Congress in a long time.'").

87 United States v. Doe, 741 F.3d 339, 349 (2d Cir. 2013) ("The question becomes whether a statute with mixed criminal and civil purposes can be 'essentially regulatory' with respect to the required records exception. We agree with our sister circuits: the fact '[t]hat a statute relates both to criminal law and to civil regulatory matters does not strip the statute of its status as "essentially regulatory."'").

88 *In re M.H.*, 648 F.3d at 1076.

kept.'"[89] Finally, under the Ninth Circuit's formulation, all public legislation is enacted in the public interest. Thus any record—no matter how private—instantly acquires "public aspects" just by virtue of Congress's decree.

To be sure, the UBS cases are an unsympathetic lot. But they beg the larger question: when should the government's power to legislate and regulate trump the citizen's constitutional protections? By issuing a rapid succession of copycat opinions, the courts of appeal have presented a unanimous front against tax evasion.[90] But the reinvigorated required records doctrine threatens to expand well beyond bank records to phone records, health records, and all other content stored on our digital devices. How far should the required records exception reach?

B. *An Uneasy Exception: How Do You Solve a Problem like* Shapiro*?*

In a digital society, the required records doctrine is a most dangerous exception. Though established more than half a century ago, the doctrine has remained surprisingly amorphous.[91] Arguably, the only point of clear agreement is that the rule was first established by *Shapiro v. United States*, a case forged of wartime exceptionalism.[92] If bad facts

89 *Doe*, 741 F.3d at 350; *see also* Brief for Appellee, *supra* note 70, at 42–43 (arguing that the "customarily kept" factor "was never an element of the required-records doctrine but simply a term that was part of the regulatory scheme in *Shapiro*").

90 *See* cases cited *supra* note 72.

91 *See, e.g.*, Amar & Lettow, *supra* note 28, at 869–71 (calling the doctrine an "open-ended test . . . without any principled basis"); Nagareda, *supra* note 21, at 1644 (stating that the required records doctrine lacks "any principled basis"); Saltzburg, *supra* note 34, at 10 ("The longevity of the required records doctrine is, of course, not proof of its wisdom."); Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 160–61 (1992) (noting that "the existing jurisprudence concerning the role of the Fifth Amendment privilege in statutorily required record-keeping and reporting procedures" is in a "state of confusion" comparable to "reading tea leaves").

92 Shapiro v. United States, 335 U.S. 1 (1948) (5-4 decision). Occasionally, the doctrine is traced back further to cases such as *Davis v. United States*, 328 U.S. 582 (1946), and *Wilson v. United States*, 221 U.S. 361 (1911), both of which were heavily relied upon by *Shapiro*. *See* 335 U.S. at 18 n.24, 33 n.42, 35 n.46; United States v. Shapiro, 159 F.2d 890, 892 (2d Cir. 1947) ("It was settled by *Wilson v. United States* that the constitutional immunity does not attach to records required by law, for these are public documents." (citation omitted)). *But see Shapiro*, 335 U.S. at 58 (Frankfurter, J., dissenting) ("The conclusion reached today that all records required to be kept by law are public records cannot lean on the *Wilson* opinion."); *id.* at 72 n.2 (Rutledge, J., dissenting) ("The *Wilson* case dealt only with corporate records . . . . None were required by law to be kept, in the sense that any federal law required that they be kept and produced for regulatory purposes.").

make bad law, war facts make foggy law.[93] While there have been multiple efforts to distill a cogent rule from *Shapiro*, the opinion has proved empty of guidance.

Shapiro involved the enforcement of emergency price controls to curb price gouging for shortages during the Second World War. Whipped-up fears of bootlegging had led Congress to authorize broad requirements that all vendors keep sales records and make them available for inspection upon demand.[94] It was in that heightened state of war hysteria that William Shapiro, a fruit-and-produce wholesaler in New York City, was ordered to submit his books to the local price control office.[95] Shapiro complied with the order after lodging his Fifth Amendment objection. Based on information gleaned from those records, the government located a cooperating witness, and Shapiro was convicted of illegal "tie-in sales" to that lone witness.[96] His conviction was upheld on appeal.[97]

In denying Shapiro's Fifth Amendment claim, the Supreme Court put legislation above Constitution.[98] The Court explained that all valid exercises of congressional power must be enforceable, and that the privilege against self-incrimination would thwart enforcement; ergo, the constitutional privilege had to yield to the legislative power.[99] "It is not

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93 *Shapiro*, 335 U.S. at 10–12 & nn.11–13 (noting that consideration of the bill began "on December 9, 1941, the day after Congress declared the existence of a state of war between this country and the Imperial Government of Japan," and deferring to Congress's protestations that "the swiftly moving pace of war" justifies "urgent," "emergency" powers of investigation and enforcement); *see also* Saltzburg, *supra* note 34, at 11–15 ("*Shapiro* was a wartime case in which the Court might well have been influenced in its assessment of constitutional principles by a sense of public urgency.").

94 *Shapiro*, 335 U.S. at 8–15 (detailing the extensive legislative history); *Shapiro*, 159 F.2d at 891 ("The Administrator, by a previous valid regulation, had required such records to be kept by persons of defendant's trade status." (citation omitted)).

95 *Shapiro*, 335 U.S. at 4–5; *Shapiro*, 159 F.2d at 891; *see also* Bernard D. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 708 (1951).

96 *Shapiro*, 159 F.2d at 891.

97 *Id.* at 894, *aff'd*, 335 U.S. 1 (1948).

98 *See* Nagareda, *supra* note 21, at 1643 ("To say, as the Court correctly does in *Shapiro*, that Congress has substantive authority to control prices and that Congress clearly considered important the enforcement of wartime price controls by way of criminal sanctions is not to say that Congress may pursue such a policy by way of compelled self-incrimination.").

99 *See Shapiro*, 335 U.S. at 53–54 (Frankfurter, J., dissenting) ("The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become 'public' records in the sense that they fall outside the constitutional protection of the Fifth Amendment."); *see also* Marchetti v. United States, 390 U.S. 39, 57 (1968) ("The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if

questioned here," the Court begged matter-of-factly, "that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power."[100] The Court further credited Senate testimony that "no investigatory power can be effective without the right to insist upon the maintenance of records," for otherwise "a person may violate the Act with impunity and little fear of detection."[101] The need for price stability was "urgent"[102] and the legislative intent to achieve effective enforcement was plain.[103]

Earlier cases had excluded corporate records from Fifth Amendment protection on the theory that corporate records were "public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection."[104] The hitch was that William Shapiro had not engaged in corporate enterprise. Nevertheless, the Court worried that it would be

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this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress."); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 217 (1967) ("A government that can roam at will through all records that it may demand to inspect because it may demand that they be kept is not a government that is bound to respect individual privacy.").

100 *Shapiro*, 335 U.S. at 32–33.

101 *Id.* at 11; *see also id.* at 15 ("It is difficult to believe that Congress, whose attention was invited by the proponents of the Price Control Act to the vital importance of the licensing, recordkeeping and inspection provisions in aiding effective enforcement of the Lever Act, could possibly have intended § 202(g) to proffer a 'gratuity to crime' by granting immunity to custodians of non-privileged records."). *But see id.* at 69–70 (Frankfurter, J., dissenting) ("While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice."). Ironically, Shapiro was convicted primarily on the basis of oral testimony, and the government's brief attempted to downplay the significance of Shapiro's records in securing the verdict. *Id.* at 35–36 (majority opinion); Brief for the United States at 39–42, *Shapiro*, 335 U.S. 1 (No. 49) (characterizing the information as an "incidental revelation").

102 *Shapiro*, 335 U.S. at 11 n.11 (quoting Senate report).

103 *Id.* at 15, 22–24; Saltzburg, *supra* note 34, at 12 ("The point which is rarely mentioned about the case is that Chief Justice Vinson, writing for the Court, devoted the vast majority of his opinion to the construction of the immunity provisions in the legislation, not to the constitutional question raised by the required records doctrine. He found a clear congressional intent to use the record-keeping and inspection requirements not only to obtain information but also to aid law enforcement."). *But see Shapiro*, 335 U.S. at 44–49, 46 n.13 (Frankfurter, J., dissenting) ("The language yields no support for the Government's sophisticated reading adopted by the Court. Nor is there anything in the legislative history to transmute the clear import of § 202 into esoteric significance. So far as it bears upon our problem, the legislative history of the Act merely shows that § 202 in its entirety was included for the purpose of 'obtaining information.'").

104 *Shapiro*, 335 U.S. at 16–18 (quoting Wilson v. United States, 221 U.S. 361, 381 (1911)); *see also id.* at 22 ("[T]he assertion of a claim to such a privilege in connection with records which are in fact non-privileged is unavailing to secure immunity, where the claimant is a corporate officer."); Meltzer, *supra* note 95, at 701–06.

"incongruous" to limit enforcement of emergency price controls to corporate officers only, while leaving unincorporated businessmen like Shapiro free to shirk the law.[105] So the Court adopted a more expedient formulation: *all* required records were "documents having public aspects" that fell outside the scope of "the [Fifth Amendment] privilege which exists as to private papers."[106] At best, the Court committed a logical error, *viz.*, if all corporate records are required records, and all corporate records are public documents, then all required records (corporate or non-corporate) are public documents.[107] At worst, the Court simply caved to wartime politics.[108]

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105 *Shapiro*, 335 U.S. at 22–24 ("[I]t is most difficult to comprehend why Congress should be assumed to have differentiated sub silentio, for purposes of the immunity proviso, between records required to be kept by individuals and records required to be kept by corporations."); *id.* at 15 ("It is difficult to believe that Congress . . . could possibly have intended § 202(g) to proffer a 'gratuity to crime' by granting immunity to custodians of non-privileged records."). The lower court was troubled by the same problem. *See* United States v. Shapiro, 159 F.2d 890, 893–94 (2d Cir. 1947) ("To hold that the power to subpoena is subject to a grant of immunity from prosecution would thus destroy the only sure method by which the agencies may inspect the records in their enforcement duties. Such a holding would destroy the value of record-keeping requirements—which are unquestionably valid—by making their use dependent upon the waiver by suspected wrongdoers of the privilege against self-incrimination." (citation omitted)). *But see Shapiro*, 335 U.S. at 65–67 (Frankfurter, J., dissenting) ("The distinction between corporate and individual enterprise is one of the deepest in our constitutional law, as it is for the shapers of public policy."); *id.* at 71 (Jackson, J., dissenting) ("[W]e should have no hesitation in holding that the Government must lose some cases rather than the people lose their immunities from compulsory self-incrimination.").

106 *Shapiro*, 335 U.S. at 30, 32–34 ("[T]he privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.'"). *But see id.* at 65 (Frankfurter, J., dissenting) ("While Congress may in time of war, or perhaps in circumstances of economic crisis, provide for the licensing of every individual business, surely such licensing requirements do not remove the records of a man's private business from the protection afforded by the Fifth Amendment. Even the exercise of the war power is subject to the Fifth Amendment."); Nagareda, *supra* note 21, at 1644 ("[A]lthough the Court in *Shapiro* did not recognize the point, its required records doctrine is much in the mold of the Court's divergent Fifth Amendment treatment of testimonial communication and documents. . . . [But t]he application of the Fifth Amendment does not turn on the pedigree of the evidence to be given to the government."). The conclusory language of *Shapiro* strongly foreshadows the language later used to justify administrative subpoenas. *See* Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 816 ("In *United States v. Powell*, decided in 1964, the Court reiterated that a government agency subpoena for records is valid if the records are 'relevant' to an investigation conducted for a 'legitimate purpose' (meaning one authorized by statute). As applied, the *Powell* relevance standard is extremely easy to meet." (footnotes omitted)); *id.* at 818 ("*Ryan* blithely announced that the minimal *Powell* requirements for administrative subpoenas aimed at corporations governed subpoenas for private tax records as well. The Court reached this conclusion 'for the reasons given in [*Powell*],' without any further discussion." (footnotes omitted)).

107 To show the formal fallacy: All A is B; all A is C; therefore, all B is C. *See Shapiro*, 335 U.S. at 18 n.24 ("Thus the significant element in determining the absence of constitutional privilege was the fact that the records in question had been validly required to be kept . . . . The

As Justice Frankfurter admonished in dissent, those arguments were "question-begging."[109] If the ends of law enforcement are what define Fifth Amendment scope, then the Fifth Amendment becomes vanishingly small.[110] To be sure, the Court paid lip service to "limits which the government cannot constitutionally exceed in requiring the keeping of records."[111] But what those limits might be, the Court did not say.[112]

As discussed in the remaining parts of this section, the Court's search for a limiting principle came in two waves, both of which backfired badly. The first was a weak cutback against allowing the government to single out criminalized groups such as communists and mobsters.[113] The Court announced that the government could not require citizens to keep "inherently criminal" records, i.e., where the very act of compliance proves one's guilt. While the focus in these cases was rightly on whether the *government's request* was improper, the principle was drawn too narrowly and so it was too easily cheated.

Attempting a different tack, the second set of cases turned instead to whether any part of the *citizen's response*—e.g., the creation of the records, or the act of turning them over to the government—was improperly compelled.[114] Ironically, that shift only caused further

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fact that the individuals claiming the privilege were corporate officers was significant only in that . . . the records required to be kept were corporate.").

108 *See* Alito, *supra* note 20, at 73 ("For these and possibly other reasons, the required records rule has been regarded for nearly forty years like an illegitimate war baby.").

109 *Shapiro*, 335 U.S. at 51 (Frankfurter, J., dissenting) ("Subtle question-begging is nevertheless question-begging. Thus: records required to be kept by law are public records; public records are non-privileged; required records are non-privileged. If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses.").

110 *Id.* at 70–71 (Jackson, J., dissenting) ("[W]e cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice 'to the limits of its logic.'"); *see also id.* at 54 (Frankfurter, J., dissenting) ("[T]he notion that whenever Congress requires an individual to keep in a particular form his own books dealing with his own affairs his records cease to be his when he is accused of crime, is indeed startling."); *id.* at 75–76 (Rutledge, J., dissenting) ("I seriously doubt that . . . Congress could enact a general law requiring all persons, individual or corporate, engaged in business subject to congressional regulation to produce . . . any and all records, without other limitation, kept in connection with that business. Such a command would approach too closely in effect the kind of general warrant the Fourth Amendment outlawed."). *But cf.* Smith v. Richert, 35 F.3d 300, 303 (7th Cir. 1994) ("The hypothetical case in which every individual is required to maintain a record of everything he does that interests the government is remote from the case of the individual who enters upon a regulated activity knowing that the maintenance of extensive records available for inspection by the regulatory agency is one of the conditions of engaging in the activity.").

111 *Shapiro*, 335 U.S. at 32–33.

112 *See* Alito, *supra* note 20, at 41–53, 72–73; McKay, *supra* note 99, at 216 ("The central difficulty with *Shapiro*, frequently noted, is its overbreadth." (footnote omitted)).

113 *See infra* Part II.B.1.

114 *See infra* Part II.B.2.

retraction of Fifth Amendment protection for private papers writ large. After all, if the Fifth Amendment—a provision concerning *compelled* testimony—did not apply to records required by government mandate, how could it apply to private papers created freely without any such compulsion? Faced with that paradox, the Court rounded down: it abolished the public/private distinction and withdrew Fifth Amendment protection for *all* documents. In short, placing constitutional scrutiny upon the citizen rather than the government led to a startling erosion of Fifth Amendment scope.

1. Inherently Criminal Records

In the 1950s, the immediate period following *Shapiro*, the government embraced the Court's open invitation to use registration and recordkeeping requirements to enforce regulatory interests.[115] In response, the Court slowly recognized that the government should not be allowed to require records that are inherently incriminating. Requiring citizens to submit written confessions of guilt was a bridge too far. Unfortunately, what began as a promising development has been turned into a dead end.

The anti-Communist cases centered on the Subversive Activities Control Act of 1950 (McCarran Act), which required all "Communist-action" and "Communist-front" organizations to register with the government and provide complete membership lists.[116] At the time, mere membership in the Communist Party was a crime.[117] Nevertheless, in *Communist Party v. SACB*, a 5-4 majority of the Supreme Court upheld the registration requirement against Fifth Amendment challenge.[118] The majority protested that just asking "potentially incriminatory" questions could not trigger the Fifth Amendment,[119]

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115 *See, e.g.*, Narcotic Control Act of 1956, Pub. L. No. 84-728, § 201, 70 Stat. 567, 574; Internal Revenue Code of 1954, Pub. L. No. 83-591, §§ 5841, 6001, 68A Stat. 1, 725, 731; Revenue Act of 1951, Pub. L. No. 82-183, § 471, 65 Stat. 452, 529–31; Johnson Act, Pub. L. No. 81-906, 64 Stat. 1134, 1135 (1951); Subversive Activities Control Act, Pub. L. No. 81-831, 64 Stat. 987, 993–95 (1950).

116 Subversive Activities Control Act, Pub. L. No. 81-831, 64 Stat. 987 (1950).

117 *See* Alien Registration Act of 1940 (Smith Act), Pub. L. No. 76-670, 54 Stat. 670, 670–71 (1940) (codified at 18 U.S.C. §§ 2385–2387); Scales v. United States, 367 U.S. 203 (1961).

118 Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 106–10 (1961) (5-4 decision); Saltzburg, *supra* note 34, at 17–18.

119 *Communist Party*, 367 U.S. at 107–08 ("But it is always true that one who is required to assert the privilege against self-incrimination may thereby arouse the suspicions of prosecuting authorities. Nevertheless, it is not and has never been the law that the privilege disallows the asking of potentially incriminatory questions or authorizes the person of whom they are asked to evade them without expressly asserting that his answers may tend to incriminate him.").

because it is up to each citizen to assert the privilege as an affirmative defense.[120] The wiser dissenting Justices pointed out that no citizen should be forced to go through the sham of case-by-case adjudication when every registration is, by design, a compelled self-incrimination.[121]

Four years later, in *Albertson v. SACB*, the dissenting voices rightly prevailed as the Court reversed course and unanimously struck down the registration requirements.[122] The *Albertson* Court explained that "[t]he risks of incrimination which the petitioners take in registering are obvious," given that the registration requirement is "not . . . in an essentially noncriminal and regulatory area of inquiry" but rather "in an area permeated with criminal statutes."[123]

At the time, none of the Justices seemed to consider *Shapiro* apposite.[124] The only mention by the Court—in either case—was a brief note that *Shapiro* could be "put to one side," because Communist registrations involved the "making" of new records while *Shapiro* concerned "the surrender of pre-existing records."[125] Apparently the required records doctrine was understood to be a limited exception with no power to compel the creation of new data records.[126]

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120 *Id.* at 107 ("We cannot know now that the Party's officers will ever claim the privilege. There is no indication that in the past its highranking officials have sought to conceal their identity, and no reason to believe that in the future they will decline to file a registration statement . . . .").

121 *Id.* at 183 (Douglas, J., dissenting) ("The present requirement for the disclosure of membership lists is not a regulatory provision, but a device for trapping those who are involved in an activity which, under federal statutes, is interwoven with criminality. The primary effect of the required registration is not disclosure to the public but criminal prosecution."); *id.* at 196 (Brennan, J., dissenting) ("Claiming the privilege here does more than attract suspicion to the claimant; it admits an element of his possible criminality. Moreover, registration is unique because of the initial burden it puts on the potential defendant to come forward and claim the privilege. He may thereby arouse suspicions that previously had not even existed and, indeed, virtually establish a prima facie case against himself.").

122 Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

123 *Id.* at 77, 79; *see also* John H. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 S. CT. REV. 103, 116 (1966) (suggesting that "*Albertson* stands at the threshold of an effort by the Court to re-examine this whole group of cases").

124 *See* Mansfield, *supra* note 123, at 114 ("Conspicuous by its absence is any reference in *Albertson* to *Shapiro v. United States*."); Meltzer, *supra* note 29, at 7 ("*Shapiro*, for reasons not readily apparent, was not cited in the Government's brief in *Albertson* . . . .").

125 *Communist Party*, 367 U.S. at 179–81 (Douglas, J., dissenting).

126 *But see id.* at 201 (Brennan, J., dissenting) ("If the admission both of officership status and knowledge of Party activities cannot be compelled in oral testimony in a criminal proceeding, I do not see how compulsion in writing in a registration statement makes a difference for constitutional purposes."); *Albertson*, 382 U.S. at 78 ("[I]f the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."); *cf.* United States v. Doe, 741 F.3d 339, 350 (2d Cir. 2013) ("We need not address whether, in another case, records 'customarily kept' *only* because they are required by law satisfy the prerequisites of the required records doctrine.").

That perfunctory dismissal of *Shapiro* proved premature. Just two terms later, the Court raised *Shapiro sua sponte* in a trio of anti-mobster cases.[127] Those cases involved a strikingly similar scheme of registration and taxation intended to root out the underground gambling activities and firearms sales associated with organized crime.[128] Here, too, the Court had initially allowed the registration requirements to stand;[129] earlier cases had held—a la *Communist Party*—that the Fifth Amendment privilege could not be asserted prospectively for "future acts that may or may not be committed."[130] Now following *Albertson*, the Court struck down those regulations in three jointly issued opinions—*Marchetti*, *Grosso*, and *Haynes v. United States*.[131] As the Court explained, Congress may not use "ingeniously drawn legislation" to target only a "selective group inherently suspect of criminal activities."[132] Requiring individuals to register as gamblers was analogous to requiring individuals to register as Communists: both amounted to coerced confessions of criminality.

This time, the Court made a more serious effort to explain why the required records doctrine did not give the government free rein. Returning to *Shapiro*, the progenitor case, the Court distilled three limiting "premises of the doctrine":

> first, the purposes of the United States' inquiry must be *essentially regulatory*; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has *customarily kept*; and third, the records themselves must have assumed "*public aspects*" which render them at least analogous to public documents.[133]

Superficially, those are the same three elements recently recited in the UBS offshore banking cases. But as originally formulated in *Marchetti*, *Grosso*, and *Haynes*, the Court carefully stopped short of endorsing them as the sole limitations of the doctrine. Instead, the

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127 *See* Brief for the United States on Reargument at 3, Marchetti v. United States, 390 U.S. 39 (1968) ("On June 12, 1967, the Court restored these two cases to the docket for reargument this Term, and requested counsel to discuss, in addition to the question previously specified, the following questions: . . . (1) What relevance, if any, has the required records doctrine, *Shapiro v. United States*, 335 U.S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U.S.C. §§ 4411, 4412?").

128 *Cf.* California v. Byers, 402 U.S. 424, 429–30 (1971) (outlining the doctrinal link between the Communist registration cases and the gambling registration cases).

129 *See Marchetti*, 390 U.S. at 41 n.1.

130 United States v. Kahriger, 345 U.S. 22, 32 (1953); *accord* Lewis v. United States, 348 U.S. 419 (1955); Saltzburg, *supra* note 34, at 15–17; Note, *supra* note 70, at 694–95.

131 *See Marchetti*, 390 U.S. 39; Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

132 *Marchetti*, 390 U.S. at 51–52, 57.

133 *Grosso*, 390 U.S. at 67–68 (emphases added); *see also Marchetti*, 390 U.S. at 56.

Court stated merely that it was enough to find them present in *Shapiro* and absent in the cases at hand.[134] The Court left leeway for further limitations to be added as needed.[135]

Defects with the *Marchetti-Grosso* test were immediately apparent. One easy workaround was to transfer recordkeeping duties from first-party citizens to third-party corporations (which lack Fifth Amendment standing). Accordingly, in quick succession, Congress enacted the Bank Secrecy Act to require domestic banks to record and report their customers' financial transactions,[136] and amended the National Firearms Act to require weapons manufacturers to register all sales and transfers of firearms.[137] Both statutes were sustained on review, with the Court explaining that organizations "have no privilege against compulsory self-incrimination," nor may they vicariously assert Fifth Amendment claims on behalf of their customers.[138]

A more troubling workaround dodged the "inherently criminal" designation by perversely collecting *more* data, not less. By broadening the class of obligated record keepers, a dragnet trawling for criminals could masquerade as a civil regulation directed at the general public. For example, in *California v. Byers* a plurality of the Court applied the required records doctrine to uphold "hit and run" statutes requiring all drivers involved in car accidents to stop and exchange identifying information.[139] By expanding the denominator to "all drivers" or even "all drivers involved in an accident," rather than "all drivers involved in

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134 *Marchetti*, 390 U.S. at 56 ("Moreover, we find it unnecessary for present purposes to pursue in detail the question, left unanswered in *Shapiro*, of what 'limits . . . the government cannot constitutionally exceed in requiring the keeping of records . . . .'" (alteration in original)); *Grosso*, 390 U.S. at 68 ("There is no need for present purposes to examine the relative significance of these three factors, or to undertake to define more specifically their incidents, for both the first and third factors are plainly absent from this case."). *Contra* United States v. Walden, 411 F.2d 1109 (4th Cir. 1969) (holding that the required records doctrine encompasses a tax provision requiring the bonding of a distillery).

135 *Cf.* Saltzburg, *supra* note 34, at 24–25 (outlining a five-factor test); Alexander P. Robbins, *The Required Records Doctrine and Offshore Bank Accounts*, U.S. ATT'YS' BULLETIN, May 2013, at 10 ("The Supreme Court, in *Grosso*, did not state that a record's being 'customarily kept' was a necessary condition for application of the required records doctrine. *Grosso* simply noted that the record's being 'customarily kept' was one of three 'premises' or 'factors' in *Shapiro*, and then disposed of the case on other grounds.").

136 Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 25–26 (1974) (explaining that the Bank Secrecy Act "was enacted by Congress in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability").

137 United States v. Freed, 401 U.S. 601, 602–04 & n.1 (1971).

138 *Cal. Bankers*, 416 U.S. at 55, 71–75; *Freed*, 401 U.S. at 605–06 ("The transferor—not the transferee—makes any incriminating statements. True, the transferee, if he wants the firearm, must cooperate to the extent of supplying fingerprints and photograph. But the information he supplies makes him the lawful, not the unlawful possessor of the firearm.").

139 California v. Byers, 402 U.S. 424 (1971); *see also* Stuntz, *Self-Incrimination and Excuse*, *supra* note 28, at 1284–85 (calling *Byers* a "famously unpersuasive opinion").

an *incriminating* accident," the Court concluded that the reporting requirement was not "inherently criminal."[140] "Most" car accidents do not create criminal liability, the Court soothed. Two decades later, the Court played the denominator trick again in *Baltimore City Department of Social Services v. Bouknight*. The case involved a child custody dispute where a mother refused to present her child to the government agency after being placed under court-ordered supervision for suspected child abuse.[141] The Court defined the denominator as all custodial guardians, not just those suspected of child abuse.[142] Therefore, the order to produce the child did not single out the mother for criminal inquisition, but was made "for compelling reasons unrelated to criminal law enforcement and as part of a broadly applied regulatory regime."[143]

As one commentator has chided: "The government should not be able to compel self-incrimination from a given individual by artfully drafting a reporting statute so as also to encompass many other persons who face no risk of self-incrimination."[144] The "inherently criminal" test describes the rare case where the government's recordkeeping requirement is tailored so perfectly to the criminalization that there can be no doubt of its unconstitutionality. However, it was never intended to rule out Fifth Amendment claims in *other* scenarios where the fit is less perfect.

By deferring the difficult task of defining an outer limit, *Shapiro* left ample room for the required records doctrine to expand at will. Indeed, both *Byers* and *Bouknight* were oddball cases that had nothing

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140 *Byers*, 402 U.S. at 430–31 ("[The California Vehicle Code] . . . is directed at all persons—here all persons who drive automobiles in California. This group, numbering as it does in the millions, is so large as to render § 20002(a)(1) a statute 'directed at the public at large.' . . . Moreover, it is not a criminal offense under California law to be a driver 'involved in an accident.' . . . [T]he statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment."). *But see* Meltzer, *supra* note 29, at 12–13 (explaining that "the group to which a claimant belongs [may be indicative but] is not generally conclusive" of that claimant's personal risk of incrimination); Nagareda, *supra* note 21, at 1655 ("Rogue drivers most assuredly are *not* entitled to hit others and to drive away with impunity. But they do remain protected by the Fifth Amendment, no less than the perpetrators of even more heinous crimes that may be equally difficult to detect through legitimate investigative techniques.").

141 Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 559–60 (1990) ("The State imposes and enforces that obligation [to permit inspection of the child] as part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders.").

142 *Id.* at 559–60 ("Persons who care for children pursuant to a custody order, and who may be subject to a request for access to the child, are hardly a 'selective group inherently suspect of criminal activities.' . . . Even when the court allows a parent to retain control of a child within the court's jurisdiction, that parent is not one singled out for criminal conduct, but rather has been deemed to be, without the State's assistance, simply 'unable or unwilling to give proper care and attention to the child and his problems.'").

143 *Id.* at 561.

144 Nagareda, *supra* note 21, at 1654.

to do with corporate records, business records, or even any "records" at all. Until recently, however, the doctrine remained largely dormant—mainly due to voluntary forbearance by the government.[145] In the intervening decades the doctrine was raised in only a smattering of lower court cases, nearly all involving licensed businesses and not individual citizens.[146] Of the few additional cases heard by the Supreme Court, most have been unremarkable: a set of follow-on cases addressing retroactive applicability of *Marchetti-Grosso*,[147] and a lone extension of the "inherently suspect" classification to marijuana users.[148] That said, the UBS offshore banking cases show once again that voluntary forbearance is an unreliable substitute for constitutional clarity.

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145 United States v. Fox, 721 F.2d 32, 35 n.3 (2d Cir. 1983) (noting that the government's manual for criminal tax trials "'has not embraced' the required records doctrine in tax cases"); Stuart v. United States, 416 F.2d 459, 462 n.2 (5th Cir. 1969) (noting the government's concession that, although "a taxpayer is not protected from production of his own records, since he is required to keep such papers . . . 'the Department of Justice has, however, refrained from making that argument in recent years'"); Alito, *supra* note 20, at 73 ("The Supreme Court has been wary of embracing the required records rule, and government authorities have been markedly reluctant to rely on it. For example, one of the most potentially useful applications of the [required records] doctrine—to the records that the tax laws require every taxpayer to keep—has not been pressed by the government despite early, favorable lower court precedent." (footnotes omitted)); Pietruszkiewicz, *supra* note 53, at 954 ("[T]he United States is unwilling to rely on the required records doctrine in circumstances where tax records are at issue."); McKay, *supra* note 99, at 217 ("That *Shapiro* has not led, as it could have, to substantially more authoritarian government practices is more a tribute to the self-restraint of government officials than to any meaningful limits in *Shapiro*."); *see also* Brief for Appellee, *supra* note 70, at 40 (disclaiming that taxpayer records are not "required records").

146 Those regulated business activities included drug prescriptions, Doe v. United States, 801 F.2d 1164 (9th Cir. 1986); Doe v. United States, 711 F.2d 1187 (2d Cir. 1983); United States v. Lartey, 716 F.2d 955, 961 n.3 (2d Cir. 1983); United States v. Rosenberg, 515 F.2d 190 (9th Cir. 1975); hazardous waste disposals, Envtl. Def. Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983); real estate escrow deposits, *In re* Midcity Realty Co., 497 F.2d 218 (6th Cir. 1974); sales by car dealerships, Underhill v. United States, 781 F.2d 64 (6th Cir. 1986); Bionic Auto Parts v. Fahner, 721 F.2d 1072 (7th Cir. 1983); sales by livestock dealers, United States v. Lehman, 887 F.2d 1328 (7th Cir. 1989); and the hiring of farm labor, Donovan v. Mehlenbacher, 652 F.2d 228 (2d Cir. 1981); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir. 1972). *But see* Rajah v. Mukasey, 544 F.3d 427, 442 (2d Cir. 2008) (applying the exception to personal passports and visa forms to enforce immigration laws against non-resident aliens); United States v. Wujkowski, 929 F.2d 981, 984, 986 (4th Cir. 1991) (remanding for more careful examination when applying the exception to "documents held on a 'personal and/or business basis'"); United States v. Porter, 711 F.2d 1397, 1404–05 (7th Cir. 1983) (rejecting the government's argument that the required records exception applies to personal tax records, because "the taxpayer's substantive activities are not positively 'regulated' by the IRS sufficient to create a *Shapiro*-type interest in unconditional access to those records").

147 United States v. U.S. Coin & Currency, 401 U.S. 715 (1971); Mackey v. United States, 401 U.S. 667 (1971); *see also* Garner v. United States, 424 U.S. 648 (1976); United States v. Knox, 396 U.S. 77 (1969).

148 Leary v. United States, 395 U.S. 6 (1969).

2. Act of Production

In the 1970s and 1980s, a larger problem emerged as courts began to pick apart the distinction between public records and private records. Lying at the heart of the required records cases was the axiom that "private" papers were fundamentally off limits.[149] But that presumption was abruptly exploded in a series of tax enforcement cases beginning with *Fisher v. United States*.[150]

In *Fisher*, the Court announced that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale."[151] Specifically, the Court rejected the idea that the Fifth Amendment should protect the *contents* of any document, no matter how incriminating those contents might be.[152] The Fifth Amendment applies to people, not information.[153] Once information has been transferred from a person to a fixed medium, the document becomes a standalone object that speaks for itself.[154] Subsequent cases doubled down, declaring that the respective "privacy" of a document is immaterial for Fifth Amendment purposes.[155] All that matters is

149 *See* United States v. Shapiro, 159 F.2d 890, 892 (1947), *aff'd*, 335 U.S. 1 (1948) ("The principle that the constitutional privilege against self-incrimination protects individuals against being forced to produce private documents for inspection, but not against being forced to produce public documents, is quite clear.").

150 Fisher v. United States, 425 U.S. 391 (1976).

151 *Id.* at 409; *see also* Alito, *supra* note 20, at 42–44.

152 *Fisher*, 425 U.S. at 409–10 ("[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer . . . . The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else."); *see also* Alito, *supra* note 20, at 46 ("[T]he act-of-production theory is woefully out of touch with the realities of subpoena practice. Both prosecutors and witnesses served with document subpoenas are invariably interested in the documents' contents, not the testimonial component of the act of production."); Nagareda, *supra* note 21, at 1601 ("[O]ne must ignore that the documents themselves are incriminatory in content. As such, the perspective mandated by *Fisher* takes on an unreal, make-believe quality. It is rather like the Wizard of Oz imploring supplicants to pay no attention to the man behind the curtain.").

153 *See* United States v. Hubbell, 530 U.S. 27, 34–35 (2000) ("[T]here is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating.").

154 *Fisher*, 425 U.S. at 409 (stating that a subpoena does not compel anyone to "restate, repeat, or affirm the truth of the contents of the documents sought"); *id.* at 410 n.11 ("[U]nless the Government has compelled the subpoenaed person to write the document, the fact that it was written by him is not controlling with respect to the Fifth Amendment issue." (citing Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968))).

155 *See* United States v. Doe, 465 U.S. 605 (1984) [*Doe I*]. *Compare id.* at 618 (O'Connor, J., concurring) ("I write separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."), *with id.* at 619 (Marshall, J., concurring in part and dissenting in part) ("I continue to believe that under the Fifth Amendment 'there are certain documents no

whether a *person* has been compelled to testify against himself—and a document is not a person.[156]

While documents were suddenly stripped of protection, the Court offered a consolation prize: the Fifth Amendment could cover the citizen's "act of producing" documents to the government, if the act itself would be self-incriminating.[157] Even this allowance has been stingily drawn, however. It does not apply where the document's existence is a "foregone conclusion," because then the act of production provides no new "testimony."[158] Nor does it apply to police seizures of documents, which do not compel the witness to "act" in any manner.[159] Thus in practice, the act of production doctrine shields documents only as long as they remain secret and unknown—small comfort from a constitutional standpoint. In these ways, the shift in focus from government acts of compulsion to citizen acts of production has dwindled dramatically the scope of Fifth Amendment protection.[160]

The required records doctrine and the act of production doctrine thus share a strange coexistence within Fifth Amendment jurisprudence.[161] As explained earlier, *Shapiro* ducked the problem of

person ought to be compelled to produce at the Government's request.'"), *and* Smith v. Richert, 35 F.3d 300, 303 (7th Cir. 1994); *see also* Nagareda, *supra* note 21, at 1642–43 nn.254, 257.

156 *See* Andresen v. Maryland, 427 U.S. 463, 473 (1976) ("[I]n this case, petitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing. . . . [T]he protection afforded by the Self-Incrimination Clause of the Fifth Amendment 'adheres basically to the person, not to information that may incriminate him.'" (citation omitted)). Even when the document's content is compelled, it must further communicate some testimonial element. *See* Doe v. United States, 487 U.S. 201 (1988) [*Doe II*] (ruling that a consent directive instructing foreign banks to release customer information is not "testimonial" in nature).

157 *Fisher*, 425 U.S. at 410 n.11 ("In the case of a documentary subpoena the only thing compelled is the act of producing the document . . . ."); *Doe I*, 465 U.S. at 612–14 ("Although the contents of a document may not be privileged, the act of producing the document may be.").

158 *Fisher*, 425 U.S. at 411 ("The question is not of testimony but of surrender." (quoting *In re* Harris, 221 U.S. 274, 279 (1911)); *Hubbell*, 530 U.S. at 44–45. *But see* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 81 (1965) ("The judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation . . . ."); Nagareda, *supra* note 21, at 1596–99 ("In no other area of Fifth Amendment discourse does the Court make the protection of that provision depend upon the degree to which the government already knows what the witness is compelled to disclose.").

159 *Andresen*, 427 U.S. at 473–74.

160 *Cf.* Stuntz, *Privacy's Problem*, *supra* note 27, at 1025 ("[T]hough privacy means many things and though Fourth and Fifth Amendment law protect many interests, one fairly well-defined and fairly narrow interest, the interest in secrecy, seems predominant.").

161 *See* United States v. Chabot, 793 F.3d 338, 343 (3d Cir. 2015) (offering "several reasons for continuing to apply the required records exception to the Fifth Amendment privilege, even though the threshold framework for applying the privilege to documents appears to have changed to a degree"); United States v. Doe, 741 F.3d 339, 346 (2d Cir. 2013) ("This Court has

"private papers" by inventing a legal fiction: required records could be compelled because the recordkeeping requirement transformed them into pseudo-public records.[162] Yet *Fisher* and its progeny eliminated the need for such pretense. Henceforth, documents could be compelled regardless of whether their contents were "public" or "private." Conversely, the act of production doctrine applies only when the government has no knowledge of a document's existence. Yet the required records doctrine provides an easy way for the government to stipulate that the document must exist. One cannot plead ignorance of documents one is obligated to keep. In short, the act of production doctrine allows the government to subpoena documents it has knowledge of, and when such knowledge is lacking, the required records doctrine allows the government to command those documents into existence.

Transient, oral statements remain subject to the privilege, but they are increasingly displaced by new, twenty-first century data technologies that shift all information into the fixed-media realm.[163] As we time-shift and place-shift more of our daily reality, a constitutional provision confined to in-person interactions is an anachronistic device.[164] It converts the Fifth Amendment from technology-agnostic to technology-atheist.

III. THIRD-PARTY PROBLEMS

We have seen this story before. Fourth Amendment jurisprudence, too, has been wrestling with an old exception made unruly by modern data technologies. Under the "third-party doctrine," any evidence provided by third parties is categorically excluded from Fourth

twice explicitly rejected the idea that the required records exception has been abrogated by the act of production cases."); United States v. Spano, 21 F.3d 226, 230 (8th Cir. 1994).

162 *See supra* notes 104–07 and accompanying text; *see also* Note, *supra* note 70, at 685 ("The [*Shapiro*] Court apparently reasoned that title to records having 'public aspects' is partially vested in the government; the individual thus is merely a 'custodian' and his property interest in the records is insufficient to support a claim of the privilege against self-incrimination.").

163 *See* Nagareda, *supra* note 21, at 1584 ("The question with which the Supreme Court has struggled for more than a century is whether—and, if so, to what degree—to equate for purposes of the Fifth Amendment the compelled production of self-incriminatory documents with the compelled giving of self-incriminatory statements.").

164 *See* Riley v. California, 134 S. Ct. 2473, 2489, 2491 (2014) ("We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future. . . . [T]he data on a phone can date back to the purchase of the phone, or even earlier. . . . Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another."); *cf.* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1897–901 (2007) (analyzing uses of time-shifting and place-shifting under copyright law).

Amendment protection.[165] In today's digital society, where so much information is captured as data and then routed through cyber intermediaries, the third-party doctrine has become a greedy exception that leaves little room over for the Fourth Amendment.[166]

The standard explanation for this gap in coverage is twofold. First, since *Katz v. United States*, courts have held that a taking of information does not constitute a Fourth Amendment "search or seizure" unless a citizen has a "reasonable expectation of privacy" in that information.[167] Second, since *Smith v. Maryland*, the dominant view has been that one cannot have a "reasonable expectation of privacy" in information held by third parties.[168] Stuck within that framework, critics of the third-party doctrine have been vying over the proper understanding of "privacy."[169]

Yet the *Katz* "reasonable expectation of privacy" test was never about privacy at all. To the contrary, it was plainly intended to *minimize* privacy's significance within a larger balancing of interests. As originally articulated, Justice Harlan's famous concurrence described two steps, each one framed as a potential bar against Fourth Amendment protection: (1) the citizen could waive his subjective expectation of privacy, or (2) the court could disqualify the claim on some other basis having nothing to do with privacy.[170] By design, therefore, the court's objective determination always overrides the citizen's subjective privacy.[171] The "reasonable expectation of privacy" test is not just

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165 Kerr, *Third Party Doctrine*, *supra* note 16, at 563 ("The rule is simple: By disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed.").

166 *See, e.g.*, Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 106–07 (2008); Ric Simmons, *From* Katz *to* Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1321–35 (2002); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1138 (2002); Strandburg, *supra* note 11, at 634. *But see* Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV BULL. 39, 42–44 (2011) (arguing that courts have backed away from the third-party doctrine in recent decades).

167 Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

168 Smith v. Maryland, 442 U.S. 735, 743–44 (1979).

169 *Compare, e.g.*, David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381 (2013), *and* Priscilla J. Smith, *Much Ado About Mosaics: How Original Principles Apply to Evolving Technology in* United States v. Jones, 14 N.C. J.L. & TECH. 557 (2013), *with* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012). *See generally* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010); DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008).

170 *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

171 *See* Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015).

circular;[172] it is a logical trap. Even if a perfect model of empirical privacy were mapped, the mere fact that an expectation is *universal* as a matter of fact does not necessarily make it *reasonable* as a matter of law.[173]

In short, what has led Fourth Amendment doctrine astray has been its single-minded fixation on "privacy"—just as the error in Fifth Amendment doctrine has been its obsessive avoidance of "privacy." Instead, the true concern of both Amendments is the propriety of the government intrusion. Privacy is one proxy for making that determination, but it is hardly the only one; property is another proxy, for example. Recently, when the Supreme Court revived a trespass rule rooted in property-based conceptions,[174] many Fourth Amendment scholars were dismayed.[175] Yet, such a pluralistic approach is perfectly sensible under a framework that understands the Fourth Amendment not as a "privacy" rule or as a "property" rule, but more fundamentally as a limitation on government power.[176]

An outsized focus on privacy has turned the Fourth Amendment on its head. Courtesy of the third-party doctrine, courts have granted the government carte blanche to access broad swaths of evidence

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172 Circularity has been the leading critique of the Harlan test. *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1268 (1999) ("As every criminal procedure class learns, if the key to that definition is the word 'expectation,' the definition is circular. People expect what they think will happen, and what they think will happen is a function of what has happened in the past. By altering its behavior, the government can change how people expect it to behave. Thus, if the government is bound only to respect people's expectations, it is not bound at all, for it can easily condition the citizenry to expect little or no privacy."); *see also* Rubenfeld, *supra* note 166, at 106–07 ("To avoid self-validation, the Court has sought to root individuals' privacy expectations in widespread social norms drawn from 'outside of the Fourth Amendment'—that is, from outside the law enforcement context." (citing Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978))).

173 *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (police policy of automatically strip-searching every arrestee is objectively reasonable); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 961 (1989) ("Because the [objectively] reasonable person is not simply an empirical or statistical 'average' of what most people in the community believe, the mental distress at issue also cannot be understood as a mere empirical or statistical prediction about what the majority of persons in a community would be likely to experience.").

174 Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012).

175 *See, e.g.*, Stephen E. Henderson, *After* United States v. Jones*, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J.L. & TECH. 431, 449–50 (2013) ("Unfortunately, nobody has a clue what theory of trespass to chattel the Court was invoking, and thus we do not know what will suffice in other circumstances."); Benjamin J. Priester, *Five Answers and Three Questions After* United States v. Jones *(2012), the Fourth Amendment "GPS Case"*, 65 OKLA. L. REV. 491, 496, 530–32 (2013) (struggling to reconcile *Jones* with *Katz*, and concluding therefore that "the Court punted on resolving all of the difficult and interesting problems").

176 *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998); Ku, *supra* note 44, at 1326.

without being subject to *any* constitutional scrutiny.[177] This failing cannot be fixed by doubling down on privacy—just as Fifth Amendment doctrine cannot be fixed by disavowing privacy. In both contexts, the fundamental problem is that the benefit of doubt has been flipped to favor the government rather than the citizen. This is not how the Bill of Rights was intended to function.[178]

A. *Right Lines Not Bright Lines*

The third-party doctrine evolved out of an earlier set of "third-person" cases that turned on the personal autonomy of natural persons.[179] These cases concerned "false friend" informants who agreed willingly to cooperate with the government and snitch on their former associates.[180] Many (though not all) of the informants wore wires to record incriminating conversations—yet the act of recording was not the cause of complaint. Instead, the Fourth Amendment claim in these cases was that the government should not be allowed to use social *deceit* to obtain information. The Court rejected that argument out of hand, noting that the use of undercover agents had long been a traditional and necessary component of policing.[181]

The third-person cases were motivated by the liberal ethos that no one may control the testimony of another person.[182] The focus of the judicial reasoning was not on the privacy of the information being disclosed, but on the freedom of one person to speak out against another. It was an easy call for the Court to make; indeed, the Court

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177 *See* Slobogin, *supra* note 14, at 808–09, 822–26 ("Since today most subpoenas for personal documents are aimed at third-party recordholders, the upshot of these developments is that the government is almost entirely unrestricted, by either the Fifth or Fourth Amendment, in its efforts to obtain documentary evidence of crime."); *see also* Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2004).

178 United States v. Di Re, 332 U.S. 581, 595 (1948) ("But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of criminals from punishment.").

179 Kerr, *Third Party Doctrine*, *supra* note 16, at 567–68.

180 United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

181 *See Lewis*, 385 U.S. at 208–10 ("[I]t has long been acknowledged by the decisions of this Court that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." (citing Andrews v. United States, 162 U.S. 420, 423 (1896), and Grimm v. United States, 156 U.S. 604, 610 (1895))).

182 *See generally* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT ch. 6 (2007).

seemed to expect no better from the "shady characters" who occupied the criminal "underworld."[183] Those engaged in illegal activities "assumed the risk" that their morally corrupt companions might rat to the police to save their own skin.[184]

The business records cases that followed were different in kind.[185] Instead of informal conversations poached on the sly, these cases largely involved formal documents entrusted to professional intermediaries such as accountants and bankers.[186] As the cases transitioned from individual third persons to institutional third parties, the rationale of personal autonomy flipped from the free ability of third persons to choose to testify, to the inability of first persons to object to third-party testimony.

At the brink stood *Couch v. United States*.[187] There, the documents at issue were tax records that had been transferred by the defendant to her personal accountant—who was then subpoenaed by the government. Unlike the undercover informants, Ms. Couch's accountant never agreed to cooperate as a witness. Nevertheless, the Court adhered to the original rationale of third-person autonomy. "What information is not disclosed is largely in the accountant's discretion," the Court explained, because the accountant's "own need for self-protection [against criminal prosecution] would often require the right to disclose the information given him."[188] Because the accountant *could* choose to betray the defendant's trust—even though he had not—the defendant could not claim any legitimate expectation of privacy.[189]

Three years later, in *United States v. Miller*, the sea change continued.[190] The defendant was a whiskey bootlegger under investigation for tax fraud. The government subpoenaed two banks for copies of the defendant's cash deposit slips—records that were required to be kept pursuant to the Bank Secrecy Act.[191] This time, the bank's

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183 See *On Lee*, 343 U.S. at 756 ("Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law. Certainly no one would foreclose the turning of state's evidence by denizens of the underworld.").

184 *White*, 401 U.S. at 752 ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . But if he has no doubts, or allays them, or risks what doubt he has, the risk is his.").

185 *But cf.* Kerr, *Third Party Doctrine*, *supra* note 16, at 569–70.

186 There were notable, outlandish exceptions. *See* United States v. Payner, 447 U.S. 727 (1980) (spy operation to steal documents out of a banker's briefcase while out at dinner).

187 Couch v. United States, 409 U.S. 322 (1973).

188 *Id.* at 335–36.

189 *Id.*

190 United States v. Miller, 425 U.S. 435 (1976).

191 See *supra* notes 136–38 and accompanying text for further discussion of the Bank Secrecy Act as an end run around of the Fifth Amendment.

right of autonomy was a nonfactor. Although the language of "risk assumption" lingered, its meaning had drifted.[192] No longer was it the risk that friends *might* testify; now it was the guarantee that bank records *must* testify. The banks were offered no choice in the matter. The deposit slips were "the business records of the banks" not the "private papers" of the customer.[193] Looming over the case was the mandate of the Bank Secrecy Act; it seemed illogical to the Court to forbid government access under the Fourth Amendment to records validly required under the Fifth Amendment.[194] In that respect, *Miller* shared a close kinship to *Shapiro*.

The high water mark came in *Smith v. Maryland*, which not only extended the Fourth Amendment exclusion from banks to telephone companies, but codified it as a general rule for all "third parties" with or without a legislatively enacted recordkeeping requirement.[195] The defendant, Michael Lee Smith, had been harassing his victim, Patricia McDonough, with threatening and obscene phone calls. To prove they had the right man, the police—without obtaining a warrant—asked the telephone company to record all numbers dialed from the defendant's home line. When the defendant objected that the police had acted improperly in conducting warrantless surveillance, the Court was skeptical: first, whether anyone could genuinely believe dialed numbers were private, given how readily they are intercepted;[196] and second, that even if the defendant had mistakenly believed otherwise, there could never be an objectively legitimate expectation of privacy in information voluntarily turned over to a third party.[197] The defense had already conceded (unwisely) that no expectation of privacy would exist if the

192 *Miller*, 425 U.S. at 443 ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."). *But cf.* Kerr, *Third Party Doctrine*, *supra* note 16, at 569 (arguing that the risk assumption argument was never well-explained).

193 *Miller*, 425 U.S. at 440–41.

194 *Id.* at 442–43 ("The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they 'have a high degree of usefulness in criminal tax, and regulatory investigations and proceedings.'").

195 Smith v. Maryland, 442 U.S. 735, 743–44 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

196 *Id.* at 742 ("[P]en registers and similar devices are routinely used by telephone companies 'for the purposes of checking billing operations, detecting fraud and preventing violations of law.'" (quoting United States v. N.Y. Tel. Co., 434 U.S. 159, 174–75 (1977))).

197 *Id.* at 743–44. *But see* Strandburg, *supra* note 11, at 638 ("Notably, however, the cases cited in support of this proposition, other than *Miller*, all deal with situations in which the government obtained the information via the voluntary actions of the third party in question . . . .").

calls had been placed through a live operator.[198] The Court then extrapolated (even more unwisely) that replacing human discretion with automated switching equipment should not change the constitutional result.[199]

Since *Smith*, the third-party doctrine has been extended to every imaginable type of data record.[200] By converting a "third-person" rule into an impersonal "third-party" rule, *Miller* and *Smith* failed to anticipate the significance of computer automation. While most Court observers now believe the third-party doctrine's days are numbered,[201] the next logical question that nobody has been asking is how to stop Fifth Amendment jurisprudence from tumbling down the same rabbit hole.

B. *Expectations of Reasonable Government*

The story of the third-party doctrine overrunning the Fourth Amendment is invariably painted as the failure of privacy theory. Yet that account overlooks the parallel developments in Fifth Amendment jurisprudence, where privacy concerns have been conspicuously absent. This Article has argued throughout that the decline of Fourth Amendment scope and the decline of Fifth Amendment scope are inextricably linked. If the latter cannot be attributed to misconceptions of "privacy," then neither can the former. Instead, we must look for a different story.

The standard account of Fourth Amendment theory delineates two separate eras: the old property-based regime and the modern privacy-based regime.[202] According to this conventionally taught view, the

198 *Smith*, 442 U.S. at 744–45.

199 *Id.* ("We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.").

200 *See, e.g.*, City of Ontario v. Quon, 560 U.S. 746 (2010) (pager text messages); United States v. Payner, 447 U.S. 727 (1980) (loan records); United States v. Davis, 785 F.3d 498 (11th Cir. 2015) (en banc) (cell site records); Kerns v. Bader, 663 F.3d 1173, 1184 (10th Cir. 2011) (medical records); *see also* Slobogin, *supra* note 14, at 824–25 (noting that the Supreme Court has applied *Miller*'s rationale to personal records from phone companies, lenders, medical institutions, auditors and accountants, trustees in bankruptcy, government institutions, and Internet service providers).

201 *See, e.g.*, Jane Bambauer, *Other People's Papers*, 94 TEX. L. REV. (forthcoming 2015) ("The third party doctrine may be dismantled soon, and for good reason."); Henderson, *supra* note 166; Strandburg, *supra* note 11, at 649 ("[I]t is at a minimum fair to say that the evolving case law in this area by and large rejects a wooden application of the aggressive third party doctrine.").

202 Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 67–68 (2013) [hereinafter Kerr, *Curious History*].

property paradigm was a good effort that ultimately fell short.[203] The principle of property "possession" was unable to keep pace with new technologies that transcended the physical realm. The paradigm shift to privacy marked a fresh start, providing a better way to recognize intangible entitlements. Since then, the initial optimism has worn off and the privacy framework has come under heavy attack as being ungrounded and amorphous. Some have argued for a return to the safe, familiar harbors of property law; others have lobbied for yet another reset.

Two cases feature prominently in the conventional narrative. The first plot point is *Boyd v. United States*,[204] which launched the property-based regime by lashing the Fourth Amendment to "possession." Under that view, the permissibility of a search or seizure turned on who held proper title over the evidence in dispute. If the citizen's possession was valid, the government's taking was a Fourth Amendment violation; if not, the citizen had no Fourth Amendment claim.[205] By the middle of the twentieth century, however, the property model had lost favor as foolish consistencies sprouted hobgoblin doctrines.[206] Out of that crumbling edifice emerged the second plot point. In *Katz v. United States*,[207] the Supreme Court abruptly turned its back on property underpinnings, whose authority had been "eroded," and proposed instead a new regime modeled on privacy norms. Privacy was seen as the successor to property.

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203 *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790–91 (1994) ("*Boyd*'s effort to fuse the Fourth and Fifth Amendments has not stood the test of time and has been plainly rejected by the modern Court. . . . [E]ven if ultimately incorrect, the fusion was an intelligible and principled response . . . ."); Stuntz, *Privacy's Problem*, *supra* note 27, at 1050 & n.113 ("Today, most constitutional law scholars ignore *Boyd*. Those who teach and write about criminal procedure, on the other hand, tend to treat the case as an icon. . . . *Boyd* is conventionally seen as the *Miranda* of its day, a criminal procedure case that courageously protected the rights (particularly the privacy rights) of individuals against the government. Its passing—essentially nothing in *Boyd*'s holding is good law anymore—is mourned as a sign of citizens' diminished protection against an overly aggressive criminal justice system.").

204 116 U.S. 616 (1886).

205 Cases like *Gouled v. United States*, 255 U.S. 298 (1921), and *Marron v. United States*, 275 U.S. 192 (1927), attempted to draw byzantine distinctions between "mere evidence" and "instrumentalities of crime." Only the latter could be seized without violating the Fourth or Fifth Amendments. *See* Stuntz, *Privacy's Problem*, *supra* note 27, at 1053. Eventually, the entire jumble was overturned in *Warden v. Hayden*, 387 U.S. 294, 301 (1967) ("Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband.").

206 *See Hayden*, 387 U.S. at 304 ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." (citing Silverman v. United States, 365 U.S. 505, 511 (1961), and Jones v. United States, 362 U.S. 257, 266 (1960))).

207 389 U.S. 347 (1967).

This standard account presents a false dichotomy between property and privacy, rather than understanding them as cumulative frameworks. A better reading of *Boyd* and *Katz* is that they act in concert, not conflict, for the joint proposition that *any* use of police power is unreasonable unless the government rebuts that presumption[208]—either by applying for a warrant ex ante or by explaining ex post the need for action without warrant.[209] The Constitution places the burden of proof upon the government, not the individual citizen, and the government should not be allowed to duck its constitutional obligations through legal or technological ruses.

Boyd wielded the language of property as a defensive shield, evoking intuitions against trespass deeply encoded in land ownership. The government had attempted to sidestep Fourth Amendment protections by substituting subpoenas for police searches.[210] Suspecting tax fraud on duty-free shipments of glass, the government did not obtain a warrant; instead it ordered petitioners to produce an invoice for the transaction or be found guilty by default. At trial, the government argued that asking petitioners to produce a document did not rise to the level of a "search or seizure" because the police never committed any

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208 Riley v. California, 134 S. Ct. 2473, 2482 (2014) ("As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006))); Maryland v. King, 133 S. Ct. 1958, 1969 (2013) ("[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995))); Soldal v. Cook County, 506 U.S. 56, 71 (1992) ("'[R]easonableness is still the ultimate standard' under the Fourth Amendment . . . ." (quoting Camara v. Municipal Court, 387 U.S. 523, 539 (1967))); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) ("The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . ."); Amar, *supra* note 203, at 801 ("The core of the Fourth Amendment, as we have seen, is neither a warrant nor probable cause, but reasonableness."). Over time, courts have acknowledged other recurring situations that are reasonable even in the absence of formal warrant. Plain sight, reasonable suspicion, police safety, exigency, and other "special needs" are among the established arguments that courts have endorsed. *See also* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18–19 (1991) (cataloging exceptions to the warrant requirement). *But see* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999) ("[T]he Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions; thus, they never anticipated that 'unreasonable' might be read as a standard for warrantless intrusions.").

209 *See* Amar, *supra* note 203, at 774 ("[A] lawful warrant would provide—indeed, was designed to provide—an absolute defense in any subsequent trespass suit. Warrants then, were friends of the searcher, not the searched." (footnote omitted)); David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. (forthcoming 2015); Stuntz, *Substantive Origins*, *supra* note 24, at 409–10 ("As Akhil Amar has noted, the Fourth Amendment was phrased as a limitation on warrants rather than a warrant requirement . . . . Warrants were seen to provide inappropriate refuge for government misbehavior." (footnote omitted)).

210 *See* Nagareda, *supra* note 21, at 1586–87 ("Simply as a matter of legislative history, then, the compelled production of documents in *Boyd* stood as a substitute for their seizure. . . . Either way, the result would be for the government to get the documents.").

actual entry.[211] The Court responded with two very modern intuitions. First, that a compelled giving is equivalent to a forcible taking, in that orders backed by the threat of the law are tantamount to acts of physical violence.[212] Second, that establishing crystalline rules—such as a property right to exclude—is a powerful way to strengthen protections for rightsholders.[213]

Borrowing the property framework was a simple way to package the argument that constitutional protections must remain robust. By doing so, the Court was able to extend Fourth Amendment protection from trespasses against land to trespasses against papers and other chattel. Unfortunately, subsequent cases like *Gouled*[214] and *Weeks*[215] took the metaphor too far, treating "possession" as though it were a rigid talisman against any and all government inquiry.[216] A search or seizure became unreasonable *because* it targeted valid possessory interests—such as a house or office—and reasonable *because* it targeted illegitimate ones—such as stolen goods, contraband, or other instrumentalities of crime.[217] There appeared to be little self-

211 *See* Boyd v. United States, 116 U.S. 616, 621–22 (1886); Nagareda, *supra* note 21.

212 *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

213 *See, e.g.*, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 609–10 (1988) (suggesting that the heavy reliance in property law on hard-edged "crystalline" doctrines serves a rhetorical function of expressing how we ought to treat strangers); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1791–93 (2004) ("Property is more 'exclusion-based' than other rights because, for a given resource, exclusion uses a low-cost signal for a bundle of related uses against all those lacking the owner's permission."); *cf.* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."); Rubenfeld, *supra* note 166, at 109–12 (articulating a hypothetical "Stranger Principle" for judging the reasonableness of police actions); Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

214 Gouled v. United States, 255 U.S. 298 (1921), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967).

215 Weeks v. United States, 232 U.S. 383 (1914).

216 Orin Kerr has argued that Fourth Amendment doctrine continues to be heavily influenced by property law. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–10 (2004) [hereinafter Kerr, *New Technologies*] ("Descriptively speaking, the basic contours of modern Fourth Amendment doctrine are largely keyed to property law. Although the phrase 'reasonable expectation of privacy' sounds mystical, in most (though not all) cases, an expectation of privacy becomes 'reasonable' only when it is backed by a right to exclude borrowed from real property law."). *But cf.* Kerr, *Curious History*, *supra* note 202, at 87 (reversing himself and arguing that "[p]roperty traditionally had played a role in Fourth Amendment law . . . .[b]ut it was never the exclusive test" (footnote omitted)).

217 *Gouled*, 255 U.S. at 309 (stating that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him" but "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise

consciousness that unmooring the Fourth Amendment from "reasonableness" might invite unreasonable outcomes.[218]

Within a generation, the property conceit turned into a sword against the citizen.[219] A 5-4 majority in *Olmstead* made a simple error: mechanically extending the possession rule to a new context where property-based intuitions were largely absent.[220] New communications technologies allowed the government to hear private conversations from afar without trespassing on either real property or personal property. Because there was no trespass, the *Olmstead* majority explained, warrantless wiretaps did not infringe the Fourth Amendment.[221] The only physical contact was on external telephone lines, over which the subject had no cognizable property claim. Nor could the caller's intangible words be "seized" from the wires.[222] Without any pendent property claim to uphold, the Court rejected the Fourth Amendment claim.[223]

Olmstead was problematic because it flipped the default orientation of the Fourth Amendment away from guarding the citizen to empowering the government.[224] Suddenly the property paradigm was

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of the police power renders possession of the property by the accused unlawful and provides that it may be taken").

218 The "mere evidence" rule created by *Gouled* was widely criticized as nonsensical, preventing prosecutors from using plainly incriminatory evidence, and was eventually overturned by *Warden*, 387 U.S. at 300 nn.6–7 (collecting commentary).

219 *See* Clancy, *supra* note 176, at 316–20; Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 611 (1996).

220 Olmstead v. United States, 277 U.S. 438 (1928).

221 *Id.* at 457 ("The [wire] insertions were made without trespass upon any property of the defendants."); *cf.* Silverman v. United States, 365 U.S. 505 (1961) (finding trespass and Fourth Amendment violation where officers used a heating duct to amplify their eavesdropping).

222 *See Olmstead*, 277 U.S. at 464 ("The amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects."); Goldman v. United States, 316 U.S. 129 (1942); *see also* Katz v. United States, 389 U.S. 347, 368 (1967) (Black, J., dissenting) ("It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. . . . That there was no trespass was not the determinative factor . . . ."); Cloud, *supra* note 219, at 592.

223 *Olmstead*, 277 U.S. at 464 ("The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."). The issue of standing continues to be a major obstacle to Fourth Amendment assertion. *See* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (requiring "a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect"); Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."); *cf.* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (denying Article III standing to challenge secret surveillance programs due to failure to allege definite harm).

224 *See* Kerr, *New Technologies*, *supra* note 216, at 828 ("New technologies more commonly expose information that in the past would have remained hidden, resulting in meager Fourth

not a castle but a prison. As new data technologies outgrew the metaphor of physical trespass, the government still should have had to prove that its police tactics were reasonable. Instead, it was now the citizens who had to prove that the government's actions were a trespass—an impossible feat. The failure was not with the property paradigm, but with pegging the Fourth Amendment to a standard other than reasonableness.

Eventually *Olmstead* was overturned by *Katz*, as the Court sought to restore the pro-citizen orientation of the Fourth Amendment.[225] The Court announced that the concept of "constitutionally protected areas" is not a "talismanic solution to every Fourth Amendment problem,"[226] and that *Olmstead*'s twist on the property-based trespass doctrine "can no longer be regarded as controlling."[227] Whether police conduct like wiretapping violates the Fourth Amendment depends upon what the individual "seeks to preserve as private," not upon the "presence or absence of a physical intrusion."[228] In short, trespass is *one* basic way to assert unreasonableness, but the Fourth Amendment contemplates more than just trespass claims.

Like the paradigm shift in *Boyd*, the paradigm shift in *Katz* was an additive move.[229] Just as property rhetoric had bridged the gap from trespasses on land to trespasses on chattel, privacy rhetoric extended

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Amendment protection in new technologies."); *see also id.* at 804–05 (collecting a long line of commentary critiquing the effect of *Olmstead* on the Fourth Amendment and new technologies).

225 *Katz*, 389 U.S. at 353 ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

226 *Id.* at 351–52 & n.9.

227 *Id.* at 353 n.15.

228 *Id.* at 351, 353 ("For the Fourth Amendment protects people, not places.").

229 *See* United States v. Jones, 132 S. Ct. 945, 953 (2012) ("What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed."). On the other hand, Peter Swire has observed that abandonment of the property-based approach was not strictly additive. He argues that *Warden v. Hayden*, 387 U.S. 294 (1967), the forerunner to *Katz*, "reduc[ed] the privacy protection offered by prior law" by rejecting the "mere evidence" rule. Peter P. Swire, Katz *Is Dead. Long Live* Katz, 102 MICH. L. REV. 904, 906 (2004). However, the faults of the property regime should not be attributed as consequences of the privacy regime. *See Hayden*, 387 U.S. at 306–07 ("The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction, obscuring the reality that government has an interest in solving crime. . . . For just as the suppression of evidence does not entail a declaration of superior property interest in the person aggrieved . . . the refusal to suppress evidence carries no declaration of superior property interest in the State . . . ." (footnote omitted)).

that bridge from tangible violations to intangible violations. It was a direct repudiation of *Olmstead* to suggest that something intangible could be searched and seized by the government.[230] Doing so restored Fourth Amendment oversight to a new social context that should have had it all along.[231]

What the Court did not do is replace "property" with "privacy"; the Court has repeatedly rejected any "blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment."[232]

Contrary to popular belief,[233] a close reading of *Katz* shows that the Court did not abandon the property conceit. The Court was less interested in recognizing a "right to privacy"[234] than in instructing the government to act reasonably in all circumstances.[235] What *Katz* rejected was not the inclusion of property harms but the petty exclusion of "non-property" harms.[236] In that respect, Orin Kerr is absolutely

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230 *See Katz*, 389 U.S. at 352–53; *id.* at 362 n.* (Harlan, J., concurring) ("[T]oday's decision must be recognized as overruling *Olmstead v. United States*, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment." (italics added)); *id.* at 365 (Black, J., dissenting) ("[T]he Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future?"). Though previous decisions had recognized a Fourth Amendment interest in "conversations," *see* Berger v. New York, 388 U.S. 41, 51–53 (1967), *Katz* generalized the rule to intangible information.

231 *See Katz*, 389 U.S. at 351–52 & nn.10–12 ("But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." (footnotes omitted)).

232 Rakas v. Illinois, 439 U.S. 128, 147 (1978); *see also Jones*, 132 S. Ct. at 951 n.5 ("[A] seizure of property occurs, not when there is a trespass, but 'when there is some meaningful interference with an individual's possessory interests in that property.' Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that which was present here: an attempt to find something or to obtain information." (citation omitted)).

233 *See, e.g.*, Strandburg, *supra* note 11, at 629 ("By overruling *Olmstead*, *Katz* . . . severed the Fourth Amendment's ties to trespass doctrine . . . .").

234 In fact, the majority was explicit that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Katz*, 389 U.S. at 350; *see also* Kerr, *New Technologies*, *supra* note 216, at 818 & n.88.

235 *Katz*, 389 U.S. at 358–59 ("Omission of [advance] authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'" (second alteration in original) (citations omitted)).

236 *See* Katz, 389 U.S. at 352–53 ("It is true that the absence of [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry, for that Amendment was thought to limit only searches and seizures of tangible property. But '[t]he premise that property interests control the right of the Government to search and seize has been

correct that property law continues to be influential in shaping Fourth Amendment doctrine.[237] Nor should we expect anything less, since many property rules are distillations of generally accepted privacy principles. Yet, Kerr is too sanguine in observing that *Katz* was merely a "shift of degree" that "has not substantially changed the basic property-based contours of Fourth Amendment law."[238] The very malady we are facing today is the temptation to cling too tightly to one regime to the detriment of all others.

The *Katz* majority offered "privacy" as a contrast, to help convey the idea that Fourth Amendment reasonableness is not limited to "property" rules.[239] Justice Harlan's "reasonable expectation of privacy" test did not necessarily contradict that view. But it did dilute the significance of individual privacy preferences in the overall calculus of reasonableness, allowing judges to freely downplay privacy relative to other factors such as law enforcement.

Even so, all might have been well had the "reasonable expectation of privacy" test been merged into the overarching "reasonable search or seizure" test. Instead, courts partitioned the two inquiries: first, considering only whether the *citizen's* conduct had been reasonable, and if yes, only then considering whether the *police's* conduct had been reasonable. Even where the government's conduct was manifestly unreasonable, courts would dismiss claims based solely on a preliminary assessment of the citizen's behavior, without ever weighing the totality of the circumstances. The upshot is that many courts have been dismissing Fourth Amendment claims without ever assessing the government's reasonableness. This is backwards.

IV. A BIG BANG THEORY OF DATA PRIVACY

How do we create something from nothing? At one end, Fourth Amendment doctrine has disqualified protection for data records held by third parties. At the other end, Fifth Amendment doctrine has whittled away protection for data records held by first parties. When

discredited.'" (second alteration in original) (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)) (citing Goldman v. United States, 316 U.S. 129 (1942), and Olmstead v. United States, 277 U.S. 438 (1928))).

237 Kerr, *New Technologies*, *supra* note 216, at 809–10, 815 ("Although the phrase 'reasonable expectation of privacy' sounds mystical, in most (though not all) cases, an expectation of privacy becomes 'reasonable' only when it is backed by a right to exclude borrowed from real property law. . . . Although no one theory explains the entire body of Fourth Amendment doctrine, property law provides a surprisingly accurate guide."); *see also* Florida v. Jardines, 133 S. Ct. 1409 (2013); Jones v. United States, 132 S. Ct. 945 (2012).

238 Kerr, *New Technologies*, *supra* note 216, at 816.

239 *See* Clancy, *supra* note 176, at 354–55.

evidence cannot be obtained from a first party, the government can turn to the third-party doctrine; and when evidence cannot be obtained from third parties, the government can turn to the required records doctrine. Between the two exceptions, it seems there is little room for any light to escape. Unmooring the two Amendments and treating them as disjointed protections has allowed the government to play each one off the other. The future is looking dim.

Yet, if we start instead from the canon of construction that the Fourth and Fifth Amendments cannot add up to a nullity,[240] then there must be some inviolable core where both Amendments speak in unison to limit the government's power.[241] In that regard, *Boyd* was correct to view the two Amendments as sharing an "intimate relation" and "throw[ing] great light on each other."[242] Both Amendments are concerned with placing limitations on the government's power to extract incriminating evidence.[243] Some redundancy must be intended by design.

In recent years, a handful of scholars have revisited the heresy of reading the Fourth and Fifth Amendments together for shared meaning. Three theories have been proposed: Richard Nagareda's "give or take" theory,[244] Richard Uviller's "mental or physical" theory,[245] and Michael Pardo's "reasonable plus categorical" overlap theory.[246] Each captures a different and useful insight of the relationship between the two Amendments. But none provides a satisfactory answer to the line-

240 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (declaring it necessary to "insure that what was proclaimed in the Constitution [does] not become but a 'form of words' in the hands of government officials." (citation omitted)).

241 *See* Riley v. California, 134 S. Ct. 2473, 2491 (2014) ("[T]he Founders did not fight a revolution to gain the right to government agency protocols."); Pardo, *supra* note 48, at 1874 ("Under the [*Boyd*] Court's view, the two Amendments overlapped to protect citizens by creating a zone from which the government could not extract evidence, neither by searching and seizing the evidence, nor, as the Government had done in *Boyd,* by ordering its production. This inviolable zone was tied to the notion of property . . . ." (footnote omitted)). One counterargument is that losing relevance due to changed conditions does not mean that, say, the Third Amendment has lost all meaning and purpose. There is a difference, however, between shrinking the *reason* to bring a claim and shrinking the *right* to bring a claim.

242 Boyd v. United States, 116 U.S. 616, 633 (1886).

243 *See* Lopez v. United States, 373 U.S. 427, 455 (1963) (Brennan, J., dissenting) ("[The Fourth Amendment] embodies a more encompassing principle . . . that government ought not to have the untrammeled right to extract evidence from people. Thus viewed, the Fourth Amendment is complementary to the Fifth. The informing principle of both Amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion." (citation omitted)).

244 Richard A. Nagareda, *Compulsion "to Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575 (1999).

245 H. Richard Uviller, *Foreword:* Fisher *Goes on the Quintessential Fishing Expedition and* Hubbell *Is off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311 (2001).

246 Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857 (2005).

drawing problems posed by the third-party doctrine and the required records doctrine.

Neither Nagareda nor Uviller are comfortable acknowledging any overlap between the two Amendments.[247] According to them, each Amendment occupies an entirely separate zone, so it becomes important to define precisely where that boundary is. Pardo sets himself apart by embracing the uncomfortable truth that some overlap between the Amendments is unavoidable. Yet Pardo pulls his punches; instead of viewing the Fourth and Fifth Amendments as having equal vitality, he treats the Fifth as subsidiary to the Fourth.[248] That concession limits the potential impact of his theory, because it places Fifth Amendment scope in the position of being unable to inform or influence Fourth Amendment scope.

This Article proposes a different synthesis, starting from the fixed premise that the two Amendments *must* share an interrelationship. If so, then any exceptions—including the required records doctrine and the third-party doctrine—must be applied consistently across both Amendments.

Returning to the original purposes of each exception provides some helpful clues. The third-party doctrine draws a bright line between first parties and third parties. But more fundamentally its aim was to uphold the basic liberty to testify against one's neighbor—a function that applies only to natural persons, not artificial corporations or databases. Conversely, the required records doctrine stemmed from cases concerning the business records of collective entities, not the intimate documents of natural persons.[249] But because recordkeeping duties are necessarily imposed on first parties, it also reinforces the division between first parties and third parties.

Thus two common parameters can be identified: (1) the distinction between first parties and third parties; and (2) the distinction between natural persons and business entities. Arranging the case law according to these parameters puts a new twist on an old story. Yes, Fourth and Fifth Amendment doctrine were pried apart at the turn of the twentieth

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247 *See* Nagareda, *supra* note 244, at 1587 ("[T]he Fourth and Fifth Amendments . . . articulate two very different sorts of restraints upon two distinct means of information gathering by the government in the criminal process."); Uviller, *supra* note 245, at 330 ("So, prevalent thinking would have it that the two Amendments do not 'run almost into each other.' They diverge sharply to protect in different ways two very different aspects of personal security and autonomy.").

248 *See* Pardo, *supra* note 246, at 1879 ("Courts should see potential Fifth Amendment events as a subset of potential Fourth Amendment events. Fifth Amendment questions, thus, should be understood as arising second in a two-part inquiry.").

249 *Cf.* Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 841–44 (looking to Fifth Amendment doctrine to show that "the distinction between personal and impersonal records is a crucial one" that "resonate[s] with Fourth Amendment concerns").

century to rein in the unique abuses that emerged from corporate innovations.[250] But at the turn of the twenty-first century, the government's abuses of Big Data are showing that the accommodations made for corporations should be treated as a special case. In all other cases, the Fourth and Fifth Amendments should again be read together, in accordance with the time-honored instruction of *Boyd*.

A. *Resurrecting* Boyd

Nagareda's key insight is that the Fourth and Fifth Amendments share a reciprocal relationship that hinges on the actions of the government, not the citizen.[251] Under his framework, the two Amendments do not overlap: The Fourth restricts the "unilateral taking" of evidence through searches and seizures, while the Fifth restricts the "compelled giving" of self-incriminatory evidence.[252] Since all transfers of information are either by giving or by taking, Nagareda divides the two Amendments into perfect complements. Whenever acquiring information from an unwilling witness, the government must choose either the Scylla of the Fourth Amendment or the Charybdis of the Fifth.

Importantly, Nagareda's concern is not whether the desired documents are "private" or "public" but only whether they are seized or received.[253] Either choice provides the government adequate opportunity to obtain the information it needs. The Fourth Amendment allows evidence to be taken whenever it is "reasonable" to do so.[254] Likewise, the Fifth Amendment allows the government to compel evidence to be given as long as the witness is promised immunity from prosecution.[255]

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250 *See* Stuntz, *Privacy's Problem*, *supra* note 27, at 1052–54.

251 Nagareda, *supra* note 244, at 1623 ("[T]he fundamental distinction is between two different modes of information gathering by the government: the compulsion of a person 'to be a witness against himself' in the sense of *giving* self-incriminatory evidence—testimonial, documentary, or otherwise—and the *taking* of such evidence by the government through its own actions. The former is forbidden categorically by the Fifth Amendment, whereas the latter may take place, upon compliance with the strictures of the Fourth.").

252 *Id.* at 1603, 1607.

253 *See* Stuntz, *Privacy's Problem*, *supra* note 27; Bambauer, *supra* note 201.

254 Riley v. California, 134 S. Ct. 2473, 2493–94 (2014) ("Our holding, of course, is not that the information on a cell phone is immune from a search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. . . . [O]ther case-specific exceptions may still justify a warrantless search of a particular phone.").

255 *See* United States v. Hubbell, 530 U.S. 27 (2000); Kastigar v. United States, 406 U.S. 441 (1972); Nagareda, *supra* note 244, at 1640; *see also* Amar & Lettow, *supra* note 28.

Where *Boyd* went astray, Nagareda argues, was in overlaying each Amendment to block the normal operation of the other. Thus any compelled production of "private" papers amounted to an unreasonable search and seizure, and vice versa, any seizure of "private" papers amounted to a compulsory self-incrimination.[256] That "error of characterization" was problematic because it sealed off all access to private information.[257] Certain violations, especially "white collar" crimes, would have become well-nigh unenforceable if incriminating documents could be placed utterly beyond the reach of prosecutors just by crying "privacy."[258]

On the other hand, by rejecting *Boyd* in its entirety, the modern Court overreacted by setting up a "false choice" of double or nothing.[259] If *Boyd* stood for the proposition that "all government efforts to obtain incriminatory documents are unconstitutional," then current doctrine traveled to the opposite extreme of holding that "both seizures and subpoenas are generally permissible means to obtain such materials."[260] But unconditional access is just as imprudent as unconditional immunity. As the government's appetite for data records has expanded steadily from select business records to omniscient personal surveillance, the Court's commitment to the "anything-goes" approach has been wearing thin.[261]

		Fourth Amendment	
		Unreasonable Search/Seizure (No Taking)	Unilateral Taking
Fifth Amendment	Privileged Testimony (No Giving)	*Boyd*	Nagareda's "third option"
	Compelled Giving	Use immunity	Current doctrine

Table 1: Nagareda's give-or-take model

Nagareda offers a third option. The government may "take" evidence even when it cannot compel the subject to "give" that evidence

256 Nagareda, *supra* note 244, at 1585, 1589.

257 *Id.* at 1587; *see also* Stuntz, *Privacy's Problem*, *supra* note 27, at 1048 ("Protecting people's ability to keep secrets tends to limit the government's substantive power.").

258 Stuntz, *Substantive Origins*, *supra* note 24; Uviller, *supra* note 245, at 334.

259 Nagareda, *supra* note 244, at 1602–03.

260 *Id.* at 1603.

261 *See* Riley v. California, 134 S. Ct. 2473 (2014); United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring); United States v. Hubbell, 530 U.S. 27 (2000).

against himself.[262] Once the Fourth Amendment threshold of reasonableness has been met, the government may seize a subject's private papers for purposes of incrimination.[263] But authorization to conduct a Fourth Amendment search does not negate the Fifth Amendment privilege.[264] The right of the government to "take" documents does not impart a correlative duty upon the subject to "give" those same documents. To be sure, the government may extend the courtesy of a written wish list in lieu of a physical intrusion—but if that offer is declined, the government cannot simply swap a seizure for a subpoena.[265]

Accordingly, Nagareda concludes, *Boyd* reached the right outcome but for the wrong reasons.[266] The government failed its obligations under the Fourth Amendment by not obtaining a warrant, as well as under the Fifth Amendment by not offering immunity. Under those circumstances, the Court was correct to find that the government's subpoena was unconstitutional. Had the government obtained a warrant, Nagareda suggests, perhaps the outcome might have been different.[267]

A fourth box is implied—though not explicitly developed by Nagareda. A person could be compelled to "give" evidence even when the government cannot "take" that evidence from him. The classic example is "use immunity."[268] Once the government promises immunity from prosecution, the subject becomes obligated to produce the requested documents. But authorization under the Fifth Amendment does not confer carte blanche to flout the Fourth Amendment and conduct unreasonable searches or seizures. The fact

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262 Nagareda, *supra* note 244, at 1603.

263 *Id.* at 1640 ("[T]he government may call upon the person in question to turn over documents if it has sufficient information to obtain a search warrant for them. If that offer is rejected, the government could not compel production by way of a subpoena but could, by hypothesis, undertake a seizure.").

264 *Id.* at 1632 ("[A]uthority to seize would not imply authority to compel the production of documents just as, conversely, authority to compel production under current law does not imply authority to seize.").

265 *Id.* ("[T]he government may call on persons to produce documents as a substitute for their seizure. In the event that such an offer is rejected . . . the appropriate course of action on the government's part would be to effect a seizure . . . not to compel acts of production on the part of the taxpayers . . . .").

266 *Id.* at 1587 ("As Justice Miller observed in a concurring opinion joined by Chief Justice Waite, the statute in *Boyd* authorized '[n]othing' within the purview of the Fourth Amendment." (alteration in original)).

267 *Id.* at 1588–89 ("[A] categorical bar upon search and seizure of papers . . . is inconsistent with the decidedly uncategorical phrasing of the Fourth Amendment.").

268 *Id.* at 1637–38, 1640 ("Where the government cannot seize the documents, it must either abandon its effort to compel their production or grant use immunity, under the terms of *Kastigar* . . . .").

that a witness has been compelled to testify does not thereby permit the government to storm the witness's home without Fourth Amendment cause.

Nagareda celebrates that asymmetry as a way of revitalizing the Fifth Amendment privilege without diminishing the government's right of access under the Fourth Amendment.[269] His larger point is that *Boyd* should be resurrected, but only to the extent that the government's acquisition of information should always be subject to *either* the Fourth or the Fifth Amendment. He denies that the government should be subject to *simultaneous* review, as in *Boyd*. Such overlap can be avoided as long as the two Amendments can be perfectly bifurcated.

Having offered a crisp conceptual division, however, Nagareda candidly admits that there are "harder, borderline cases" that blur the line between "giving" and "taking."[270] In particular, he points to the bodily evidence cases, where the evidence is so intimately attached to the person that it cannot be taken without also being given. Unwilling to concede any overlap, Nagareda splits the baby. He proposes that a Fourth Amendment "taking" occurs when the citizen remains passive, such as for the extracting of blood samples, donning of garments, and standing in police lineups.[271] A Fifth Amendment "giving" occurs when the citizen must actively cooperate, for example in the creation of handwriting and voice exemplars.[272]

Yet, the proposed split is unnatural and it forces Nagareda to compromise his guiding principles. For one thing, he abruptly switches the spotlight from the government to the citizen. Suddenly, the constitutionality of the government's action is to be measured not by the government's choice of force, but by whether the citizen is deemed a "passive" or "active" participant. Second, the proposed split revives the distinction between preexisting evidence and unrecorded evidence, which Nagareda otherwise rejects.[273] From a practical standpoint, the only reason blood samples can be collected "passively" while handwriting exemplars cannot, for example, is because the former already exist while the latter do not. Nagareda rejects that reasoning

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269 *Id.* at 1579–81.

270 *Id.* at 1626.

271 *Id.* at 1627–29; *see also* Pardo, *supra* note 246, at 1877 (noting that the exclusion of bodily evidence is contrary to Nagareda's general theory). Another difficult set of cases that Nagareda neglects is evidence taken from—but not of—the body. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (pumping stomach to retrieve two morphine pills is an invalid search because it "shocks the conscience").

272 *See* Nagareda, *supra* note 244, at 1629 (arguing that such exemplars are "indistinguishable from a compelled oral statement while in police custody").

273 *Id.* at 1615–23 ("The distinction is not, as the modern Court would have it, between testimonial communication and preexisting forms of incriminatory evidence.").

when applied to documents—why should bodily evidence be any different? Third, this split also contradicts Nagareda's position that the government's preexisting knowledge should be irrelevant to the constitutional inquiry.[274] For example, he suggests that the use of the defendant's body as a stage prop is not a "giving" of evidence because the police could just as well construct a wax replica of the defendant's body.[275] But having an alternate source of testimony does not mean the government can compel the defendant himself to testify.[276] In short, Nagareda does not have a good answer for the bodily evidence cases.

Another set of "harder, borderline cases" are the custodial evidence cases, i.e., those involving evidence entrusted to a third-party custodian. Nagareda does not confront these cases directly, but they raise closely related questions of personhood and self.[277] Whereas the bodily evidence cases look inward to ask how much of our own flesh and blood we may claim as our actual "persons," the custodial evidence cases look outward to ask how much *beyond* our physical bodies we may claim as our constructive "persons." The general rule, of course, is that evidence taken from or given by one person to incriminate another person cannot be an incrimination of *self* because it incriminates an *other*.[278] Yet, there are complications. The Court has recognized that those who owe confidentiality as a matter of law, such as attorneys or doctors, are entitled to claim vicarious protections on behalf of their clients or

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274 *Id.* at 1596–99 ("The status of being a witness against oneself has nothing to do with the extent of the government's preexisting knowledge of what the witness might have to say, whether orally through speech or implicitly through action.").

275 *Id.* at 1627–28 ("There plainly would be no Fifth Amendment objection if the government—through its own investigative savvy, plus the help of Madame Tussaud's Wax Museum—had constructed a highly accurate life-size model of a particular person and then, say, placed on the model the suspicious garment or propped up the model in a police lineup.").

276 *Id.* at 1598 ("In no other area of Fifth Amendment discourse does the Court make the protection of that provision depend upon the degree to which the government already knows what the witness is compelled to disclose.").

277 *See id.* at 1641 n.253 ("Whether the collective entity doctrine stands as a faithful construction of the Fifth Amendment is a subject beyond the scope of this Article. The question centers not upon the meaning of the word 'witness' in the Fifth Amendment—my focus here—but, instead, upon the meaning of the word 'person.' Indeed, the doctrine ultimately concerns the relationship between the concept of personhood under the Fifth Amendment and the distinctive body of legal principles that govern collective entities as separate juridical persons."). More metaphysically, when does compelling the incrimination of another also compel the incrimination of one's own self? ERNEST HEMINGWAY, FOR WHOM THE BELL TOLLS (1940) ("[A]ny mans *death* diminishes *me*, because I am involved in *Mankinde*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*." (quoting John Donne)); RALPH KEYES, THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN 20–21 (2006) ("First they came for the communists . . . ." (quoting Martin Niemoller)).

278 Nagareda, *supra* note 244, at 1641 ("[I]n keeping with current law, the government would remain free to compel the production of evidence from one person that merely incriminates another. As the Court correctly has held, that would not by any stretch of the English language constitute the compulsion of a person to be a witness 'against himself.'").

patients.[279] Similarly, the spousal privilege recognizes an analogous merger by matrimony—even if the medieval concept of coverture has been largely abandoned.[280] If personal fiduciaries can be subsumed as extensions of one's own person, then an even stronger argument exists for institutional fiduciaries, especially those that deal with automated data.[281] In sum, it is not enough to ask whether the government has conducted a unilateral taking or a compelled giving, but also how far the "person" extends.

Uviller addresses that last question by drawing the limit strictly at the "mind." He argues that people's *minds* are protected by the Fifth Amendment, while *physical* things are protected by the Fourth Amendment.[282] Other scholars have pointed out that the divide between the mental realm and the physical realm is not as clean as Uviller hopes.[283] Nevertheless, Uviller captures an intuitive sentiment that our

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279 Fisher v. United States, 425 U.S. 391, 402–05 (1976) ("Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. 'It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.'" (alterations in original)); *cf.* Couch v. United States, 409 U.S. 322, 335–36 (1973) (implying that a fiducial duty of confidentiality could support a Fourth Amendment claim). *But see* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 69 (1974) ("Nor do we think that the California Bankers Association or the Security National Bank can vicariously assert such Fourth Amendment claims on behalf of bank customers in general.").

280 Trammel v. United States, 445 U.S. 40, 44 (1980) ("This spousal disqualification sprang from . . . the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one."). *But cf.* Mosteller, *supra* note 47, at 97–99 (husband-wife business partnerships).

281 *See* Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E-Mail*, 2008 U. CHI. LEGAL F. 121, 165 (2008); Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. (forthcoming 2015); Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014), http://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html.

282 Uviller, *supra* note 245, at 329–30; *see also* Pardo, *supra* note 246, at 1876 ("Under [Uviller's] view, the relationship is that the Fifth Amendment protects 'a person's sovereignty over the contents of his mind,' and the Fourth Amendment protects 'security in places and things.'").

283 *See* Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351 (2012); Dov Fox, *The Right to Silence as Protecting Mental Control*, 42 AKRON L. REV. 763, 793–95 (2009) ("[E]ven the most sophisticated operations of mind are deeply integrated with the mechanical operations of biological organisms."); Pardo, *supra* note 246, at 1876; *see also* Blitz, *supra* note 46, at 1098–100; Adam J. Kolber, *Criminalizing Cognitive Enhancement at the Blackjack Table*, *in* MEMORY AND LAW 307, 321 (2012) ("If we want to encourage thought, then perhaps we ought to encourage machine-assisted thought as well. . . . In fact, some have argued that we cannot limit what is part of our 'minds' in any principled way to the confines of our brains or bodies. . . . Therefore, even if there are special moral grounds for protecting the mental lives of human beings . . . the mental lives of human beings extend to the physical world, including certain devices."); Michael S. A. Graziano, Opinion, *Are We Really Conscious?*, N.Y. TIMES, Oct. 12, 2014, at SR12.

thoughts and ideas are sacred—our essential identity and self—whereas our "physical" aspects are more separable.[284]

Like Nagareda, Uviller rejects *Boyd*'s "overlap doctrine" as "thoroughly discredited and deeply interred."[285] Likewise, he is in agreement that the government can access evidence asymmetrically: Fourth Amendment protections can be invaded by proper process, while Fifth Amendment protections can be penetrated only "by the substitution of fully compensatory immunity."[286]

Where they differ is that Nagareda focuses on the government's conduct while Uviller focuses on the citizen's conduct. Nagareda would not penalize the citizen's choice to supplement biological memory with artificial recording technologies.[287] The relevant inquiry is whether the *government* has overstepped its powers, not whether the citizen has made a tactical error in a game of wits against the government.[288]

For Uviller, by contrast, the key inquiry is whether the *citizen* has fixed the content in tangible form, at which point he forfeits all Fifth Amendment claim to that content.[289] Accordingly, Uviller is especially vexed by *United States v. Hubbell*, which held that the Fifth Amendment can continue to protect documents even though they have already been turned over to the government.[290] In *Hubbell*, the defendant had produced a trove of documents after being promised immunity for one set of offenses.[291] The government then combed through those documents, and used them to prosecute the defendant separately on a second set of offenses. The Court took umbrage that the government

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284 *Cf.* Daniel M. Haybron, *Happiness and Its Discontents*, N.Y. TIMES BLOG (Apr. 13, 2014, 8:00 PM), http://opinionator.blogs.nytimes.com/2014/04/13/happiness-and-its-discontents ("[W]e don't worry about taking medicine for pain the way we often do about taking 'happiness' pills like antidepressants. We worry that by artificially changing our mood we risk not being 'us.' But no one feels inauthentic because he took ibuprofen to relieve his back pain.").

285 Uviller, *supra* note 245, at 321.

286 *Id.* at 330.

287 *Cf. supra* notes 46 & 50 and accompanying text.

288 Nagareda, *supra* note 244, at 1615 ("A preexisting document turned over by a person can be as much an item of self-incriminatory evidence as words uttered anew by that person."); *id.* at 1637–38 ("My reading of the Fifth Amendment would focus attention at the outset not upon the act of production (about which the government rarely, if ever, cares in itself) but upon the incriminatory contents of the documents (what the government really wants).").

289 Uviller, *supra* note 245, at 328 ("And the contents of a writing, not itself produced by coercion, are without the protection of the Fifth Amendment.").

290 United States v. Hubbell, 530 U.S. 27, 42–43 (2000) ("It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution. The documents did not magically appear in the prosecutor's office like 'manna from heaven.' . . . It was only through respondent's truthful reply to the subpoena that the Government received the incriminating documents . . . ." (footnote omitted)).

291 *Id.* at 30–31.

had conducted an improper "fishing expedition."[292] By contrast, Uviller believes the government's misconduct should have been a moot point, because the Fifth Amendment claim was rendered void *ab initio* by the citizen's voluntary act of recordation.

Pardo builds upon the work of Nagareda and Uviller, but he breaks rank by voicing that some overlap is unavoidable.[293] Like Uviller, Pardo defines Fifth Amendment events as efforts to compel content from the "mind" of a suspect, but unlike Uviller, he classifies them also as Fourth Amendment events.[294] Pardo points out that Uviller's mind/body distinction fails because the Fourth Amendment protects "persons," and "one's mind belongs to one's person."[295] Pardo makes a similar challenge to Nagareda: the give/take dichotomy breaks down when it comes to forcible takings from the mind, such as lie detection. He contends that no amount of Fourth Amendment "reasonableness" could justify "strap[ping] unwilling suspects to the machine and extract[ing] their thoughts for use against them in a criminal trial."[296]

As soon as one accepts that *something* (e.g., mental thoughts) is inviolable under both the Fourth Amendment and the Fifth Amendment, then the real question is not *whether* the Amendments overlap but *how broadly* to draw that overlap. Pardo defines that zone of overlap to include any efforts by the government to acquire the "propositional content of one's knowledge or beliefs" directly from the "mind."[297] Notably, he excludes all physical embodiments—including documents and presumably digitally stored data.

Pardo's claim is an important beachhead, but ultimately a modest one. Information held exclusively in one's mind rarely triggers an

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292 *Id.* at 42 ("What the District Court characterized as a 'fishing expedition' did produce a fish, but not the one that the Independent Counsel expected to hook."); *see also* Morrison v. Olson, 487 U.S. 654, 712–13, 728 (1988) (Scalia, J., dissenting) ("In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." (quoting Robert H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), *reprinted in* 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940))).

293 Pardo, *supra* note 246, at 1880 ("Both Uviller and Nagareda incorrectly assumed that the Amendments diverge to protect different events, rather than overlapping in some situations.").

294 *Id.* at 1861.

295 *Id.* at 1876.

296 *Id.* at 1878 ("As with blood samples, the government could strap unwilling suspects to the machine and extract their thoughts for use against them in a criminal trial. Now, Nagareda may bite the bullet here and say that such conduct is not protected because it involves forced submission rather than compelled giving. But authorizing the government to use suspects' thoughts (their knowledge and beliefs), taken against their will, against them in a criminal trial more plausibly provides a *reductio ad absurdum* for Nagareda's theory."). *But see* Brennan-Marquez, *supra* note 37.

297 Pardo, *supra* note 246, at 1874–75, 1880 ("[S]uch content may not be compelled—even if the government's evidence gathering was reasonable under the first part of the inquiry.").

independent Fourth Amendment event, because there is not much the government can seize other than the person himself. As a result, Pardo's paradigm example is a lackluster one: arrests for refusals to speak.[298] Pardo refuses to extend his theory to anything residing outside the body, even if it would reveal the same "propositional content of one's knowledge or beliefs" that he would consider inviolable if residing inside the mind.

B. *Rasterizing* Boyd

Harmonizing Fourth and Fifth Amendment doctrine begins with two basic claims: that the provisions were originally written for natural persons not business entities; and that they were written in order to limit government power not to augment it.[299] Relinking the two Amendments requires sensitivity to those original concerns. As long as the government deals directly with natural persons, Nagareda and Pardo point the right way back to *Boyd*. But the courts' struggles to integrate two modern innovations—corporations and digital data—suggest that the classical approach must be adapted for artificial constructs of personhood. Here, Pardo and Uviller offer some clues by showing that a joint purpose of the two Amendments is to shield the "mind" from government intrusions.

Who holds the evidence?	Fourth Amendment scrutiny?	Fifth Amendment scrutiny?
First person	Yes	Yes
Third person	No	No

Table 2: Fourth and Fifth Amendment scope for natural persons

The most basic cases are exchanges between the government and "first persons." Consistent with the Framers' understanding, both

298 *See id.* at 1881, 1891, 1898 ("One concerns statutes that criminalize the failure of suspects to identify themselves during *Terry*-style stop-and-frisks; the other concerns the prosecution's use at trial of a defendant's silence prior to formal arrest as evidence of the defendant's guilt.").

299 Braswell v. United States, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting) ("Our long course of decisions concerning artificial entities and the Fifth Amendment . . . illuminated two of the critical foundations for the constitutional guarantee against self-incrimination: first, that it is an explicit right of a natural person, protecting the realm of human thought and expression; second, that it is confined to governmental compulsion."); Boyd v. United States, 116 U.S. 616, 635 (1886) ("[C]onstitutional provisions for the security of person and property should be liberally construed."); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1632–33 (2011) ("Although corporations were known in American colonial times, the Constitution itself includes no specific reference to corporations. . . . [S]cholars agree that before independence there were only a small handful of corporations." (footnote omitted)).

Fourth and Fifth Amendment protections operate with full force. Incriminating evidence may not be "taken" from citizens except by valid Fourth Amendment search, and it need not be "given" by the citizen unless granted Fifth Amendment immunity. As Nagareda persuasively argues, each Amendment may be triggered separately depending on which mode of information gathering the government chooses. And as Pardo points out, there is also some inviolable core where the two Amendments overlap and provide joint immunity. But joint coverage is not the death knell for law enforcement; it merely means the government must satisfy the conditions of two amendments, not just one.

Exchanges between the government and "third persons" are equally straightforward. Neither the Fourth nor the Fifth Amendment may be invoked by a defendant to block another free-willed person from assisting the government. If a third-person witness wishes to testify about a conversation heard, a picture seen, or a letter read, then that person is entitled to do so without being censored by the first-person defendant. Where the third person owes a duty of confidentiality or loyalty, that person may choose to invoke vicariously the same protections available to the first person; but he is not obligated to do so if it conflicts with his own best interests.

Thus far, the constitutional scheme is neat and elegant. It protects citizens against the government but not against their fellow citizen. It also accommodates legitimate law enforcement interests within the constitutional framework, without leaving any gaps in coverage between the Fourth and Fifth Amendments.

	Natural person	Artificial entity
First party	Fourth: yes Fifth: yes	Fourth: no? Fifth: no
Third party	Fourth: no Fifth: no	Fourth: yes? Fifth: yes?

Table 3: Fourth and Fifth Amendment scope for artificial entities

During the twentieth century, innovations in business law tore apart that tidy tapestry. As eloquently explained by Bill Stuntz, a key factor in *Boyd*'s downfall was the rise of corporations and the administrative state.[300] By limiting individual liability, the corporate veil

300 Stuntz, *Substantive Origins*, *supra* note 24, at 430 ("The Court did not reject constitutional privacy protection for corporations because such protection was unnecessary, or because the owners' and employees' privacy was already sufficiently protected, or for any other principled reason. . . . The principle of *Boyd* ran squarely into the emerging regulatory state, and the principle lost.").

encouraged business partners to pool resources and take on greater financial risks.[301] That growth unlocked incredible economies of scale, but also allowed massive amplification of wrongdoing without proportionate penalty.[302]

Many of the distortions in current Fourth and Fifth Amendment doctrine can be traced back to that compelling need to regulate large conglomerates. At the turn of the twentieth century, the Court began to extend personhood rights to corporations, but then it balked.[303] In a Sherman Act case brought at the height of trust-busting fervor, the Court stripped corporations of all Fifth Amendment protections for the simple reason that allowing corporations to withhold their documents from inspection "would practically nullify the whole Act of Congress."[304] Ostensibly, the removal of Fifth Amendment privileges was justified on the theory that corporations are "artificial creature[s] of the state."[305] More pragmatically, it occurred for reasons of public policy.[306]

To be sure, the text of the Fifth Amendment could be read differently. Thoughtful challenges have been raised that shareholders and officers do not waive their individual rights when joining a

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301 Pollman, *supra* note 299, at 1634 ("The corporate form was particularly well suited to developing these capital-intensive, large-scale businesses. By incorporating, companies could obtain large amounts of capital while limiting investors' participation in management. And unlike a sole proprietorship or a partnership, shareholders of a corporation have limited liability for the corporation's debts . . . ." (footnotes omitted)).

302 Mosteller, *supra* note 47, at 95 ("One important factor is size; large size alone will often preclude fifth amendment protection.").

303 Stuntz, *Substantive Origins*, *supra* note 24, at 427–28 ("The same year it decided *Boyd*, the Supreme Court held that corporations were 'persons' for purposes of the Fourteenth Amendment. . . . If artificial persons counted in the later Amendment, it seemed plausible to suppose that they would count in the earlier ones as well. . . . As the twentieth century approached, these arguments looked more than plausible; they looked *right*." (footnotes omitted)). *See generally* Pollman, *supra* note 299. *But cf.* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

304 Stuntz, *Substantive Origins*, *supra* note 24, at 429 (quoting Hale v. Henkel, 201 U.S. 43, 70 (1906)); *accord* Cloud, *supra* note 219, at 600.

305 Cloud, *supra* note 219, at 599 ("Unlike a natural person, whose natural rights existed before the creation of the state, a corporation was an artificial creature of the state, and owed duties to its creator." (footnote omitted)); Pollman, *supra* note 299, at 1656 ("As noted, corporations enjoy Fourth Amendment safeguards against unreasonable regulatory searches, but do not have a Fifth Amendment privilege against self- incrimination.").

306 *See* Mosteller, *supra* note 47, at 71 ("[T]he only rationale remaining to justify this sacrifice of an individual's self-incrimination interest is the need for effective regulation of corporations, partnerships, and unincorporated associations."); Note, *supra* note 70, at 693 ("For example, in the area of corporate records, where distinctions based on property concepts were first developed, the overwhelming need of the government to have access to business records was obviously, indeed often explicitly, uppermost in the reasoning of the courts.").

collective enterprise.[307] Nevertheless, the courts have forcefully charted the opposite course: when the government compels evidence from an artificial business entity, neither the entity nor its representatives may refuse on Fifth Amendment grounds.

The public policy reasons for monitoring corporations remain as salient as ever. To be sure, perhaps the rationale has been stretched too thin: it now encompasses unincorporated businesses, labor unions, collective entities, and even sole proprietorships.[308] The breadth of that expansion threatens to blur the line between business entities and natural persons.[309] But the extraordinary lengths to which courts felt compelled to bend the law to rein in corporations speaks to the ongoing need to preserve some kind of "business entities" exception.

Moreover, those same considerations call into question why corporations should have Fourth Amendment standing.[310] When the state interest is so overpowering that the basic privilege against self-incrimination must be set aside, it is difficult to contemplate any case where search and seizure would be "unreasonable."[311] Alternatively, if there are such cases where the Fourth Amendment *should* protect corporations against the government, then it casts doubt on the need to deny Fifth Amendment protections for the same. Either way,

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307 *See, e.g.*, Wilson v. United States, 221 U.S. 361 (1911); Mosteller, *supra* note 47, at 59–61 ("[T]he waiver argument is nothing more than a rhetorical device used to justify denying the privilege to individuals who hold positions of responsibility in collective entities on the basis of public necessity.").

308 *See* sources cited *supra* note 47; Braswell v. United States, 487 U.S. 99 (1988) (sole shareholder of corporation); Bellis v. United States, 417 U.S. 85 (1974) (collective entities and partnerships); Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946) ("[T]he Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers . . . ."); United States v. White, 322 U.S. 694 (1944) (labor unions); Wheeler v. United States, 226 U.S. 478 (1913) (former corporate officers); *Wilson*, 221 U.S. 361 (corporate custodians); *Hale*, 201 U.S. 43 (corporations). *But see* United States v. Doe, 465 U.S. 605 (1984) (sole proprietorship); Curcio v. United States, 354 U.S. 118 (1957) (labor union custodians).

309 *White*, 322 U.S. at 699 ("But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. . . . And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination . . . .").

310 *See* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 797 (1996). In recent years, many scholars have raised parallel concerns against allowing corporations to use the First Amendment to duck regulatory oversight. *See, e.g.*, TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012).

311 The few cases that seem most troubling are those involving pure, arbitrary harassment. But such cases can be distinguished because the true target tends to be not the entity but its members. *E.g.*, NAACP v. Alabama, 357 U.S. 449 (1958) (denying access to NAACP membership lists where the demand was made for intimidation purposes).

harmonizing Fourth Amendment exclusions with Fifth Amendment exclusions offers a way to temper the irrationalities of both.

In the twenty-first century, data technologies are the new test case. Like corporations, data repositories exist in limbo between first persons and third persons. Housed in artificial chassis, as opposed to artificial charters, the data is simultaneously a virtual extension of the person and physically separate from the person at the same time. Yet, categorically excluding data repositories from constitutional protection is proving problematic. Our data is deeply imbued with our personhood, and leaving it unguarded leaves our persons unprotected by the Constitution.

A better approach focuses not on labeling what the technology "is," but on the character of the government's action. Whenever the government is prosecuting a natural person, full constitutional protections should apply. The government should not be able to demand data from a third-party data custodian as a means of avoiding proper process against the individual citizen; the law should treat that request as though it were being imposed directly upon the citizen. The data may be seized from the third-party custodian only under the same conditions that it could be seized from the citizen, and it may be subpoenaed from the third-party custodian only upon appropriate grant of immunity to the citizen.[312] It should not matter whether the data is stored locally versus remotely, or in one's brain versus in an artificial extension of one's brain.[313]

On the other hand, if the real subject of investigation is a corporation, not a citizen, then the opposite applies. A corporation has no legal right to withhold information from the government; it should not matter whether, where, or how the corporation's information is stored. When the corporation itself is the relevant first party, it has no right to refuse.

Ultimately, we may discover that some subset of data should be truly off limits, despite being fixed in digital bits outside the physical body. After all, Pardo is right that there is an inviolable core where the two Amendments overlap. And although Pardo limits his claim to the intangible "mind," Nagareda argues persuasively that tangible fixation should be immaterial to the Amendments' scope. The "mind" is a flexible construct that comprises not just our biological neurons but also

312 *See* Slobogin, *Subpoenas and Privacy*, *supra* note 14, at 831–33 (arguing that third-party recordholders remain subject to first-party interests).

313 *Cf.* Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 267 (2004) (positing that the Fifth Amendment protects "cognition," which is defined as "the acquisition, storage, retrieval, and use of knowledge").

our technological aids—whether paper or silicon.[314] Data technologies improve our memory and analytic functions by orders of magnitude. As with physical prosthetics—such as artificial limbs, cochlear implants, face transplants, and more—mental prosthetics may be separable yet not separate from our identity of self, and we should not be so quick to dismiss them out of hand.[315] Taking too formalist an approach to dividing the mental from the menial would strangle the freedoms we hold most dear.[316]

C. *Rendering* Boyd

To be clear, the framework proposed here is one of best fit, not one of first principles.[317] Modern Fourth and Fifth Amendment doctrine bears little resemblance to its historical form anyway—in part because there was not much doctrine to speak of before *Boyd*, but also because the Framers did not anticipate the substantial impact that corporations would have on modern society.[318] But the alterations made for corporations can be limited to corporations. Beyond that, the overarching goal is to restore the protection of citizens against the inquisitions of the government.

Accordingly, the proposed framework seeks to minimize disruptions to existing case law. The vast majority of cases can be accepted as having reached the right outcomes, if not for the right reasons. Only a handful of opinions need to be culled, and they are ones that already draw the most criticism.

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314 *Cf.* SHERRY TURKLE, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET 21 (1995) ("As human beings become increasingly intertwined with the technology and with each other via the technology, old distinctions between what is specifically human and specifically technological become more complex."); Yoni Van Den Eede, *In Between Us: On the Transparency and Opacity of Technological Mediation*, 16 FOUND. SCI. 139, 149 (2011) ("In the case of hybrid intentionality, the human does not merely embody the technology; the two of them merge and form a new entity. In such a cyborg relation—e.g., persons with brain implants, people who take drugs—there can no longer be made a distinction between the 'share' of intentionality of the human and the technology. The technology is not simply used, but incorporated.").

315 *See* Kolber, *supra* note 283.

316 *See* Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("Moreover, 'in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be.' . . . Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.").

317 Pardo, *supra* note 246, at 1860, 1862–66 ("My approach is a middle way between the two dominant methods for constitutional theorizing in this area: top-down, normative and bottom-up, descriptive.").

318 *See* Pollman, *supra* note 299, at 1632–33 & n.14.

	Good fit	Poor fit
First persons	• *Hubbell*, *Boyd* (private papers)[319] • "Inherently criminal records" cases[320] • *Riley* (cell phones)[321]	• Offshore banking cases[322] • *Bouknight* (custodial children)[323] • *Byers* (hit-and-run)[324] • Bodily evidence cases[325] • Act of production cases[326]
Third persons	• False friends cases[327]	• *Couch* (accountant)[328]
First entities	• *Cal. Bankers* (banks)[329] • *Freed* (gun vendors)[330]	• *Shapiro* (fruit vendor)[331]
Third entities	• *Katz* (wiretapping)[332]	• *Smith* (phone records)[333] • *Miller* (bank records)[334]

Table 4: Mapping theory to case law

Most disputes involving in-person interactions with the police are readily intuitive to most judges, and thus can be set aside as correctly decided. In general, Fourth Amendment scrutiny applies to unilateral takings, and Fifth Amendment scrutiny applies to compelled givings. The crucial point here is to settle definitively that *Boyd* was correctly decided after all.

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319 United States v. Hubbell, 530 U.S. 27 (2000); Boyd v. United States, 116 U.S. 616 (1886).

320 Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

321 Riley v. California, 134 S. Ct. 2473 (2014).

322 *See supra* note 72 (collecting cases).

323 Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990).

324 California v. Byers, 402 U.S. 424 (1971).

325 Maryland v. King, 133 S. Ct. 1958 (2013) (DNA samples); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (urine samples); United States v. Euge, 444 U.S. 707 (1980) (handwriting exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars); United States v. Wade, 388 U.S. 218 (1967) (police lineups); Schmerber v. California, 384 U.S. 757 (1966) (blood samples); Holt v. United States, 218 U.S. 245 (1910) (donning of garments).

326 United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391, 405 (1976).

327 *See supra* note 180 and accompanying text.

328 Couch v. United States, 409 U.S. 322 (1973).

329 Cal. Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

330 United States v. Freed, 401 U.S. 601 (1971).

331 United States v. Shapiro, 335 U.S. 1 (1948).

332 Katz v. United States, 389 U.S. 347 (1967).

333 Smith v. Maryland, 442 U.S. 735 (1979).

334 Miller v. United States, 425 U.S. 435 (1976).

Similarly, cases involving third persons have presented little conceptual difficulty. As a general rule, courts rarely allow a defendant to suppress the testimony of any person who volunteers to testify. One lingering point of contention, however, is whether fiduciaries can be compelled against their will to provide testimony against their clients.

As we move to cases concerning the regulatory oversight of corporations, most of those cases can be explained as the product of a *sui generis* policy exception, as described at greater length above. In general, the Court has been quite consistent on this front, with the exception of two situations. First, it has sometimes removed constitutional protections for individual businessmen despite the absence of collective enterprise.[335] Second, it has occasionally extended constitutional protections to individual representatives of collective entities.[336] But those departures have been exceedingly rare.

Meanwhile, it is no news that the most vociferous attacks have been levied against cases in which the government reaches through third-party entities to compile incriminating evidence against individual citizens. The unifying motif of these cases is that they have involved government acquisition of data from companies—not for purposes of business oversight but for pass-through investigation of private citizens. These are the cases that have been most urgently contested, and for good reason, under both Fourth Amendment doctrine as well as Fifth Amendment doctrine.

Less heed has been paid to the kindred problem of government access to data held by first persons. Yet, if the third-party doctrine cases raise legitimate constitutional concerns, then those same concerns should be mirrored and magnified when we hold our data closer to our chests. Whether it is GPS data, health and fitness tracking, or device usage logs, the government should not be able to incriminate us by reaching through our digital accessories without constitutional justification. Perhaps these data devices should be understood as constructive extensions of our actual person; alternatively, they can be considered artificial entities that owe fiducial "duties" to their bearer. Either way, it is these cases—beginning with the required records cases—that thus far have been underexamined and unsung, and which require greater, renewed attention in a changed era where anything and everything can be recorded.

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335 United States v. Shapiro, 335 U.S. 1 (1948). Perhaps a deeper review of the case would show, however, that the defendant was involved in illicit collective enterprise.

336 Curcio v. United States, 354 U.S. 118 (1957).

CONCLUSION

Boyd was written for a simpler time. The Gilded Age was riding high on industrialization and mechanization; the hangover had not yet hit. When it did, collective outrage against faceless corporations led the Court to pierce *Boyd*'s *obsta principiis*. The Fourth and Fifth Amendments were divided so corporations could be conquered. Many have sounded the death-knell for *Boyd*—and yet it has endured.[337] In other, non-business contexts, the relationship between government and citizen was left largely untouched.[338] Now, other scholars have begun to retrace *Boyd*'s steps to show how the two Amendments could be read in harmony without defeating valid state interests in business regulation.

Today, Big Data is similarly punch-drunk on personalization and automation. On a superficial level, the impersonality of data technologies resembles the impersonality of corporate bureaucracies, so the temptation is to treat data like business as usual. But that would be serious error. Allowing the government arbitrary and unlimited access to personal data—whether from first persons or from third-party custodians—is far more invasive and oppressive than allowing arbitrary and unlimited access to business records. None of us is an island.[339] We are more than our physical bodies, and the exposure of our every intimate data diminishes us. The bell is tolling. Are we asking the right questions?

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337 Stuntz, *Substantive Origins*, *supra* note 24, at 446 ("*Boyd* may be dead in Fifth Amendment law, but its spirit lives on in the law of search and seizure."); Uviller, *supra* note 245, at 315 & n.20 ("*Boyd* itself was shot down more than once, only to rise again like a Phoenix.").

338 Stuntz, *Privacy's Problem*, *supra* note 27, at 1062 ("But most of what the police do is quite different from house searches and wiretaps. . . . [T]here are many, many more street encounters than searches of private homes. House searches turn out not to be so paradigmatic after all.").

339 *See* Cohen, *supra* note 23, at 1906 ("The self who benefits from privacy is not the autonomous, precultural island that the liberal individualist model presumes."); SOLOVE, *supra* note 169, at 91 ("We do not live in isolation, but among others, and social engagement is a necessary part of life.").