

# Self-Incrimination's Covert Federalism

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The Privilege against Self-Incrimination is widely lauded by courts as an “ancient,”<sup>2</sup> “venerable,”<sup>3</sup> “noble”<sup>4</sup> principle of justice, a “precious”<sup>5</sup> privilege of free men, and the “essential mainstay” of the American “accusatorial” system of criminal prosecution.<sup>6</sup>

One might infer from such plaudits that the privilege enjoys even more judicial protection than newer rights of speech and religion. Indeed, the U.S. Supreme Court may unwittingly lend support to that view by means of the contrasting ways it analyzes First and Fifth Amendment rights. The Court analyzes First Amendment rights of speech and religion by weighing individual speech and religion interests against governmental interests, and by allowing governmental interests to override individual interests whenever governmental interests are “compelling.”<sup>7</sup>

In contrast, when the Court analyzes Fifth Amendment claims of privilege, the Court does not engage in balancing, at least not overtly. Although the Court occasionally finds that interests being asserted are not ones that the privilege safeguards<sup>8</sup> or that if they are, defendants waived them,<sup>9</sup> once the Court

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<sup>2</sup> *Maness v. Meyers*, 419 U.S. 449, 461 (1975).

<sup>3</sup> *Old Chief v. United States*, 519 U.S. 172, 189 n.9 (1997).

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

<sup>5</sup> *United States v. Washington*, 431 U.S. 181, 193 (1977) (Brennan, J., dissenting).

<sup>6</sup> *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

<sup>7</sup> *See, e.g., Church of Lukumi Babalu Awe, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993); *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 226 (1989).

<sup>8</sup> *See, e.g., United States v. Dionisio*, 410 U.S. 1 (1973) (holding that voice exemplars are not testimonial acts protected by the privilege).

finds that a defendant is asserting non-waived interests that the privilege protects, the Court does not override them simply because the government has a strong interest in eliciting his testimony. The Court may say that the public has a right to every man's evidence.<sup>10</sup> And the Court may allow governments to enforce that right by compelling wives to testify against their husbands, doctors to testify against their patients, journalists to testify against their sources, and mothers to testify against their children. However, when it comes to compelling persons to give sworn testimony that they fear may incriminate them, the government's interest in eliciting testimony seems to fall by the wayside. Or so one might assume.

It is also natural to assume that once the U.S. Supreme Court interprets the privilege to prevent the state from using a witness's testimony against him, Congress may not disregard the interpretation by authorizing the state to use such testimony against him. Indeed, the Court seemed to support that view in *Dickerson v. United States*,<sup>11</sup> holding that Congress may not lawfully replace Court-imposed *Miranda* warnings with a provision that authorizes the federal government to use any statement against an arrestee that is "voluntary."<sup>12</sup>

I shall argue that the foregoing assumptions are both mistaken and that both mistakes derive from a failure to appreciate the significance of *Murphy v. Waterfront Commission*.<sup>13</sup> The decision in *Murphy*, which the Court recently reaffirmed in *United States v. Balsys*,<sup>14</sup> demonstrates that the Court is willing not only to resolve Fifth Amendment cases by weighing individual interests against governmental interests but also to override a judicial witness's Fifth Amendment interests relatively easily, namely, whenever state and federal governments lack the power to elicit a witness's testimony by granting the witness immunity. *Murphy* also suggests that the federal courts have authority to effectuate the testimonial interests that underlie the privilege by adopting rules of federal common law or constitutional common law that Congress, in turn, has constitutional authority to modify.

Commentators fail to appreciate *Murphy*'s significance because they focus on only one of the two things that *Murphy* does. They focus on its

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<sup>9</sup> See, e.g., *United States v. Kordel*, 397 U.S. 1 (1970).

<sup>10</sup> *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

<sup>11</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>12</sup> *Id.* at 432 (holding that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress").

<sup>13</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

<sup>14</sup> *United States v. Balsys*, 524 U.S. 666, 680 (1998).

interpretation of the privilege to protect witnesses before one government within the United States (whether state or federal) from being compelled to give testimony that may incriminate them in the courts of other governments within the United States (whether state or federal). The true significance of *Murphy*, however, lies in a covert and companion ruling in *Murphy* that serves as a predicate for *Murphy*'s interpretation of the privilege -- an interpretation that, in the end, is relatively prosaic, given *Murphy*'s companion ruling.

*Murphy*'s companion ruling has passed largely unnoticed, but it enabled the *Murphy* Court to interpret the privilege in the way it did. The companion ruling is a federal or constitutional common law rule of use immunity: it is a rule to the effect that each and every government within the United States has authority to grant any witness a certain measure of immunity in the courts of every other government within the United States, simply by ordering the witness to testify over the witness's claim that testifying will lead to self-incrimination in the courts of those other governments.

To support these assertions, I shall (1) describe two Supreme Court cases, *United States v. Murdock*<sup>15</sup> and *United States v. Balsys*,<sup>16</sup> that serve as bookends to *Murphy*, (2) show how *Murphy* implicitly revises the scope of the Fifth and Fourteenth Amendment privilege, (3) examine *Murphy*'s companion ruling, which imposed a federal exclusionary rule on national and state governments, (4) analyze the individual and governmental interests at issue in cross-governmental assertions of the privilege, (5) examine the doctrinal dependence of *Murphy*'s revised privilege on *Murphy*'s exclusionary rule, and (6) identify the doctrinal source of *Murphy*'s authority to impose the exclusionary rule on national and state governments.

## **I. Two Contrasting Cases to *Murphy*: *Murdock* and *Balsys***

*Murphy* is best understood by reference to the prior and subsequent decisions of *United States v. Murdock* and *United States v. Balsys*, respectively.

In *Murdock*, the defendant was subpoenaed by a U.S. Internal Revenue agent at a time when the privilege against self-incrimination applied only to the federal government and not to the states.<sup>17</sup> The federal agent ordered Murdock under penalty of contempt to disclose the identities of persons to whom Murdock allegedly made payments for which he had claimed IRS deductions.<sup>18</sup> In

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<sup>15</sup> *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>16</sup> *United States v. Balsys*, 524 U.S. 666 (1998).

<sup>17</sup> *Murdock*, 284 U.S. at 146-47.

<sup>18</sup> *Id.* at 147.

response to the order, Murdock invoked the Fifth Amendment privilege. Murdock argued that, although he did not fear that his answers would incriminate him in the federal courts, he feared that they might incriminate him in state court.<sup>19</sup> The U.S. Supreme Court, speaking unanimously, rejected Murdock's claim of privilege.<sup>20</sup> The Court held that the Fifth Amendment is a limitation on the federal government alone, and that, as such, it prohibits the federal government from *both* compelling a person testify in federal court *and* using the testimony against him in federal court -- not from compelling him to provide testimony in federal court that might be used against him by a state.<sup>21</sup> In the Court's words, "[I]mmunity against state prosecution is not essential to the validity of federal [orders to testify]. [F]ull and complete immunity against prosecution by the [same] government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."<sup>22</sup>

*Balsys* arose long after the intervening cases of *Murphy v. Waterfront Commission* and *Malloy v. Hogan* in which the Court held the privilege to be applicable to the states through the Fourteenth Amendment. *Balsys* was identical to the earlier *Murdock* decision, except that *Balsys* involved fear of foreign prosecution rather than state prosecution.<sup>23</sup> *Balsys* was subpoenaed by the federal government and ordered to testify to his wartime activities in Lithuania from 1940 to 1945.<sup>24</sup> Like *Murdock*, *Balsys* did not believe that his testimony would incriminate him in federal court.<sup>25</sup> Nevertheless, *Balsys* invoked the Fifth Amendment and refused to testify, claiming that his testimony might incriminate him in the courts of Lithuania, Germany, and Israel.<sup>26</sup> The U.S. Supreme Court, by a vote of 7-2, rejected *Balsys*'s Fifth Amendment claim, holding that because *Malloy* had rendered all governments within the United States subject to the privilege, the privilege protects persons from compelled testimony under two conditions: (1) where the compulsion and incrimination both occur at the hands of the "same sovereignty" within the United States, regardless of whether the same sovereignty is state or federal, and (2) where the compulsion and

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<sup>19</sup> *Id.* at 148.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 149.

<sup>22</sup> *Id.* The Court refers to this as the "same sovereignty" conception of the privilege against self-incrimination. See *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

<sup>23</sup> *United States v. Balsys*, 524 U.S. 666, 670 (1998).

<sup>24</sup> *Id.* at 670.

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

<sup>26</sup> *Id.*

incrimination occur serially at the hands of two or more governments within the United States, regardless whether one such government compels a witness to testify and another such government uses the testimony to incriminate him.<sup>27</sup> However, *Balsys* said, the privilege does not prevent a government within the United States from compelling a person to give testimony that a foreign government might use against him.<sup>28</sup>

Rejecting the privilege where compulsion occurs in the United States and incrimination occurs abroad might appear inconsistent with upholding the privilege where compulsion and incrimination occur serially within the United States. It is not. When *Balsys* held that a witness is protected if compelled by one government within the United States (whether state or federal) to make statements that would incriminate him or her in the courts of another government within the United States (whether state or federal), *Balsys* was merely reaffirming an interpretation of the privilege against self-incrimination that the Court reached in *Murphy v. Waterfront Commission* some 35 years earlier.<sup>29</sup> As we shall see, *Murphy*'s interpretation of the privilege was relatively prosaic when rendered in 1964, and it remains so today. But it is prosaic only by virtue of a further, covert exercise in *Murphy* of the Court's common law jurisdiction to regulate relations among governments of the United States -- an exercise that remains as startling today as it was then.

Nevertheless, *Balsys* is instructive in its own right. When juxtaposed to *Murdock*, *Balsys* reveals something significant about the constitutional interests that the privilege protects. Following the Court's decision in *Murdock*, one would have been justified in concluding that the interests that individuals possess under the privilege are not affected unless the "same sovereignty" both compels testimony from a witness and incriminates him as a result.<sup>30</sup> After all, just as the individual interests that the privilege protects are not affected when a private person, acting independently of the state, coerces a suspect to make a confession

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<sup>27</sup> *Id.* at 668, 674-80.

<sup>28</sup> *Id.* at 673-74 (holding that the privilege provides a witness with "the right against compelled self-incrimination when [the witness] reasonably fear[s] prosecution by [a] government whose power the Clause limits, but not otherwise"). The Court suggested in dictum, however, that the privilege might apply if the United States orders a witness to testify "for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries." *Id.* at 698.

<sup>29</sup> See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 53 n.1 (1964) (holding that now that the privilege is "fully applicable to the State and to the Federal Government, the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government").

<sup>30</sup> See *United States v. Murdock*, 284 U.S. 141, 149 (1931).

that the person thereafter delivers to the state,<sup>31</sup> one might have inferred from *Murdock* that the interests that individuals possess that the privilege protects are not affected unless the state that compels a witness to make incriminating statements does so because that state itself wishes to incriminate him.<sup>32</sup>

Alternatively, until the Court decided *Balsys*, one might have reasoned that the interests that individuals possess under the privilege are so robust that they prohibit governments that are subject to the privilege from compelling a person to make statements that will incriminate him in any jurisdiction, domestic or foreign.

The Court's decision in *Balsys* negates both conclusions. The interests that individuals possess under the privilege can be affected when a government that has no intention of prosecuting a person seeks to compel him to make statements that another government may use against him. For, otherwise, *Balsys* would have repudiated *Murphy*'s view that no government within the United States may compel a person to make statements that will incriminate him in the courts of another government in the United States. Nevertheless, those interests are not so robust as to protect witnesses who fear that their compelled testimony in the United States will incriminate them in foreign courts.

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<sup>31</sup> Cf. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (holding that the statements of defendant, who approached a police officer and confessed to a crime because the "voice of God" told him to do so, are not "involuntary" in the meaning of the Fifth Amendment).

<sup>32</sup> Cf. *Balsys*, 524 U.S. at 682-83 (holding that "[a]lthough the Clause serves a variety of interests in one degree or another, . . . at its heart lies the principle that the courts of a government *from which a witness may reasonably fear prosecution* may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt") (emphasis added); *Murphy*, 378 U.S. at 98 (White, J., concurring) (stating that "where there is only one government involved, be it state or federal, not only is the danger of prosecution more imminent [but] the likely purpose of the investigation [is] to facilitate prosecution and conviction . . ."); *Knapp v. Schweitzer*, 357 U.S. 371, 380 (1958) (holding that "[t]he sole -- although deeply valuable -- purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling *that same Government* to convict a man out of his own mouth") (emphasis added); *Hale v. Henkel*, 201 U.S. 43, 69 (1906) (holding that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty"). As one authority puts the point, "Where the crime is a foreign crime, any motive to inflict brutality upon a person because of the incriminating nature of the disclosure -- any '*conviction hunger*' as such -- is absent." 8 JOHN H. WIGMORE, EVIDENCE, § 2258, at 345 (McNaughton rev. 1961) (quoted in *Murphy*, 378 U.S. at 56 n.5) (emphasis added).

## II. *Murphy's Revision of the Fifth and Fourteenth Amendment Privilege*

*Murphy v. Waterfront Commission* arose at a mid-point between *Murdock* and *Balsys* and was decided on the same day as *Malloy v. Hogan*.<sup>33</sup> *Murphy* is significant because in addition to explicitly interpreting the privilege against self-incrimination, it implicitly contains a further ruling of considerable note. *Murphy's* further ruling has not received the attention it deserves because commentators have been distracted by the *Murphy* Court's open ambivalence regarding the precise scope of the privilege.

*Murphy* involved a witness, Murphy, whom the combined states of New York and New Jersey (acting through the bi-state Waterfront Commission pursuant to an interstate compact) had granted immunity from prosecution in New York and New Jersey and ordered to testify.<sup>34</sup> Murphy invoked the privilege against self-incrimination, arguing that he feared his testimony would be used against him in federal court.<sup>35</sup> When Murphy refused to testify, the Waterfront Commission held him in contempt.<sup>36</sup> Murphy sought review in the U.S. Supreme Court from the citation of contempt.<sup>37</sup>

Murphy faced two obstacles in persuading the Court to accept his claim of privilege: (1) the Court had not yet held that the privilege against self-incrimination was applicable to the states through the Fourteenth Amendment, and (2) the Court's earlier decision in *Murdock* had confined the protections of the privilege to persons who are compelled and incriminated by the same sovereignty.<sup>38</sup> The U.S. Supreme Court easily disposed of the first obstacle by advertent to its decision of the same day in *Malloy v. Hogan*, holding the Fifth Amendment applicable to the states through the Fourteenth Amendment.<sup>39</sup>

The *Murphy* Court's response to the second obstacle was openly ambivalent. The Court straddled two independent grounds for holding Murphy to be protected by the privilege, one of which was broader than the other. On the one hand, the Court opined that a person has a rightful claim of privilege if a government within the United States (whether state or federal) compels the witness to make statements that he reasonably fears might be used against him by

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<sup>33</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>34</sup> *Murphy*, 378 U.S. at 53.

<sup>35</sup> *Id.* at 53-54.

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

<sup>37</sup> *See id.* at 54.

<sup>38</sup> *United States v. Murdock*, 284 U.S. 141, 149 (1931).

<sup>39</sup> *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

any government *anywhere* (whether domestic government or foreign).<sup>40</sup> However, this broad ruling has not withstood the test of time, because the *Balsys* Court explicitly dismissed it as unfounded dictum 34 years later.<sup>41</sup>

On the other hand, *Murphy* also ruled in *Murphy*'s favor on a further and narrower ground that *Balsys* later reaffirmed -- namely, that the privilege protects a witness from being compelled by any government within the United States to give testimony that may incriminate him in the courts of any government within the United States. The Court argued that the narrower ground was inherent in *Malloy v. Hogan* itself:

[The] policies and purposes [of the privilege] are defeated when a witness "can be whipsawed into incriminating himself under both state and federal law even though" the constitutional privilege against self-incrimination is applicable to each. . . .

. . . .

. . . In every "whipsaw" case, either the "compelling" government or the "using" government is a State, and, until today [in *Malloy*], the States were not deemed fully bound by the privilege against self-incrimination. Now that both governments are fully bound by the privilege, the conceptual difficulty of pinpointing the alleged violation of the privilege on "compulsion" or "use" need no longer concern us.<sup>42</sup>

The *Balsys* Court not only embraced this language from *Murphy*<sup>43</sup> but paraphrased it in its own words:

After *Malloy* had held the privilege binding on the state jurisdictions as well as the National Government, it would . . . have been intolerable to allow a prosecutor in one or the other jurisdiction to eliminate the privilege by offering immunity less complete than the privilege's dual jurisdictional reach. . . .

. . . .

Prior to *Murphy*, such "whipsawing" efforts had been permissible, but arguably less outrageous since, as the opinion notes, "either the 'compelling' government or the 'using' government [was] a State, and,

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<sup>40</sup> *Murphy*, 378 U.S. at 77-80.

<sup>41</sup> *United States v. Balsys*, 524 U.S. 666, 689, 694 (1998).

<sup>42</sup> *Murphy*, 378 U.S. at 55, 57 n.6.

<sup>43</sup> *Balsys*, 524 U.S. at 694-95.



until today, the States were not deemed fully bound by the privilege against self-incrimination.”<sup>44</sup>

*Murphy*'s interpretation of the privilege (i.e., that the privilege protects persons from being compelled by government *A* to make statements that will incriminate him in the courts of government *B*, provided that *A* and *B* are both governments within the United States) seems entirely appropriate. Indeed, given *Murphy*'s covert ruling that I discuss in the next section, *Murphy*'s interpretation of the privilege borders on being prosaic. Nevertheless, the reason the *Murphy* Court provides to support that interpretation (i.e., that it follows from *Malloy*'s incorporation of the privilege into the Fourteenth Amendment) is a non sequitur. Incorporation is a judgment regarding *which governments* are subject to a constitutional right, not a judgment regarding the *scope of the right* to which governments are subject. At the time *Malloy* was decided, the reigning scope of the Fifth Amendment privilege was the same-sovereignty rule of *Murdock*, which can be paraphrased as follows:

***Murdock's Same-Sovereignty Rule (paraphrased):*** The *federal* government shall not compel a person to be witness against himself in *its* courts.

Incorporation is the process by which courts seize upon a right against the federal government and render it a right against state action.<sup>45</sup> To the extent that *Murphy* merely incorporated the Fifth Amendment privilege as interpreted in *Murdock*, the Fourteenth Amendment would have consisted of the following:

***Fourteenth Amendment Incorporation of the Same-Sovereignty Rule:***  
No *state* shall compel a person to be a witness against himself in *its* courts.

Accordingly, if the *Murphy* Court had merely incorporated *Murdock*'s same-sovereignty interpretation of the privilege, the Court would have denied *Murphy*'s claim, because the states of New York and New Jersey were not both compelling him to testify and incriminating him on the basis of his testimony. The two states were, indeed, compelling *Murphy* to testify, but they were leaving

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<sup>44</sup> *Id.* at 667, 682 n.7.

<sup>45</sup> See Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1196 (1992).

it to the federal government to decide whether to incriminate him on the basis of his compelled testimony.

*Murphy*'s claims regarding incorporation, therefore, are fallacious. As long as the Fourteenth Amendment merely incorporates *Murdock*'s same-sovereignty rule, the "policies and purposes"<sup>46</sup> of the privilege cannot be defeated unless the same sovereignty compels and incriminates. To be sure, a witness in a dual sovereignty case may feel "whipsawed."<sup>47</sup> However, unless the two sovereignties are acting in concert, the whipsawing is not "intolerable,"<sup>48</sup> unless one rejects the very thing that incorporation assumes -- namely, that what is being incorporated is the reigning, same-sovereignty rule as interpreted in *Murdock*.

Now it is true that only one of the two governments in *Murdock* was a sovereignty to which the privilege did not apply, while all of the governments in *Murphy* were sovereignties to which the privilege applied. However, as long as the constitutional prohibition by which each government is bound is that of both compelling and incriminating a witness, the privilege is not violated unless a sovereignty to which the privilege applies does what the privilege prohibits -- namely, both compels testimony from a witness and uses the testimony against the witness.

The same response applies to the *Murphy* Court's effort to predicate its interpretation of the privilege on "the conceptual difficulty of pinpointing the alleged violation of the privilege on 'compulsion' or 'use'"<sup>49</sup> when several governments within the United States are involved. There is no such difficulty under *Murdock*, given that *Murdock* requires that "compulsion" and "use" both occur at the hands of the same sovereignty.<sup>50</sup>

This is not to say that *Murphy* was wrongly decided. To the contrary, even if *Balsys* was right to hold that the privilege does not protect a witness who fears foreign incrimination, *Murphy* was on firm ground in holding that the privilege protects a witness from being compelled by a government within in the United States to give testimony that might incriminate him in the courts of that or another government within the United States. However, the strength of that view of the privilege depends upon two things.

First, it is premised on the fact that rather than merely incorporating the Fifth Amendment privilege into the Fourteenth Amendment, *Murphy* actually

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<sup>46</sup> *Murphy*, 378 U.S. at 55.

<sup>47</sup> *See id.*

<sup>48</sup> *Balsys*, 524 U.S. at 667.

<sup>49</sup> *Murphy*, 378 U.S. at 57 n.6.

<sup>50</sup> *United States v. Murdock*, 284 U.S. 141, 149 (1931).

expanded the interpretation of the Fifth and Fourteenth Amendment into something like the following:

**Murphy's Revised Fifth Amendment Privilege:** The *federal* government shall not compel a person to be a witness against himself in any *federal or state* court.

**Murphy's Revised Fourteenth Amendment Privilege:** No *state* shall compel a person to be a witness against himself in any *federal or state* court.

Combining the substance of these revisions of the Fifth and Fourteenth Amendment privilege, *Murphy* effectively embraced a single constitutional privilege for all courts within the United States, one that we can call the "Revised Privilege:"

**Murphy's Revised Privilege:** No *government within the United States* shall compel a person to be a witness against himself in the courts of any *government within the United States*.<sup>51</sup>

There is nothing strange about an inter-governmental constitutional right of that kind. On the contrary, it is analogous to the prevailing Fourth Amendment rule, that no government within the United States may introduce evidence against a defendant that was illegally seized from him by any government within the United States.<sup>52</sup> It is also analogous to the interpretation of the Double Jeopardy Clause that Justices Brennan and Marshall, in dissent, expounded in *Heath v.*

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<sup>51</sup> The *Balsys* Court recognized as such, observing that, "After *Malloy*, the Fifth Amendment limitation could no longer be seen as framed for one jurisdiction alone . . ." *Balsys*, 524 U.S. at 681. See also *id.* at 683 ("After *Murphy*, [it was understood] that the state and federal jurisdictions were as one.").

<sup>52</sup> See WAYNE LAFAVE, JEROLD ISRAEL & NANCY KING, CRIMINAL PROCEDURE, vol. 2, § 3.1(e), p. 28 (St. Paul, Minn.: West Publishing Co., 1999). To my knowledge, the U.S. Supreme Court has not yet held that the Fourth Amendment dictates this rule, although it has held that the federal courts, in exercise of their supervisory power, will not introduce evidence seized illegally by state officials. *Elkins v. United States*, 364 U.S. 206, 218 (1960). However, lower federal courts have held that the Constitution precludes the use of evidence seized illegally by state courts. See, e.g., *United States v. Self*, 410 F.2d 984 (10th Cir. 1969). State courts have held that the Fourth Amendment precludes the states from using evidence seized illegally by the federal government. See, e.g., *State v. Harms*, 449 N.W.2d 1, 7 (Neb. 1989); *State v. Krogness*, 388 P.2d 120, 122 (Or. 1963).

*Alabama*,<sup>53</sup> namely, that no government within the United States may hold a person in jeopardy of an offense for which he has already been held in jeopardy by any government within the United States.<sup>54</sup>

Second, the Court could not have embraced the Revised Privilege in *Murphy* and, yet, subsequently ruled against the respondent in *Balsys*, unless the Court had separately exercised authority to do something *further* in *Murphy* that we have not yet discussed -- something that has not yet received the scholarly attention it deserves. It is that further exercise of authority in *Murphy* that is the subject of the next section.

### III. *Murphy's Federal Exclusionary Rule*

The states of New York and New Jersey granted Murphy immunity from prosecution in their courts, ordered him to testify, and held him in contempt when he refused to do so.<sup>55</sup> Murphy appealed his contempt citation, arguing that he had a right to remain silent because testifying would incriminate him in federal court.<sup>56</sup> New York and New Jersey knew that they had no legislative authority to compel the federal government to grant Murphy immunity, and they also knew that the federal government had not granted him such immunity.<sup>57</sup> Nevertheless, New York and New Jersey believed they were justified in holding Murphy in contempt because they believed that, even if the Fourteenth Amendment incorporated the privilege and made it applicable to the states, what the Fourteenth Amendment incorporated was *Murdock's* same-sovereignty rule, thereby leaving them free to compel Murphy to testify, provided that they themselves did not use his testimony against him. We have seen, of course, rather than merely *incorporating* the same sovereignty rule, the *Murphy* Court *reinterpreted* the Fifth and Fourteenth Amendments to contain a Revised Privilege that prohibits any government within the United States (whether state or federal) from compelling a witness to give testimony that would incriminate him within any government within the United States (whether state or federal).

Against that background, one would have thought that, by virtue of having brought Murphy within the protections of the privilege, the Court would have vindicated Murphy's decision to remain silent. That is to say, one would have thought that the Court would have reversed the Waterfront Commission's

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<sup>53</sup> *Heath v. Alabama*, 474 U.S. 82 (1985).

<sup>54</sup> *Id.* at 95.

<sup>55</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 53-54 (1964).

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

<sup>57</sup> *Id.*

ruling that held Murphy in contempt for remaining silent. Significantly, the Court did the opposite. The Court held that, although Murphy had a Fifth and a Fourteenth Amendment right not to be compelled by New York and New Jersey to give testimony that would incriminate him in federal court, and although New York and New Jersey lacked legislative authority to compel the federal government to grant Murphy immunity, and although the federal government had not granted him immunity, Murphy was nevertheless obliged to testify and could lawfully be held in contempt for refusing to do so.<sup>58</sup>

The unappreciated significance of *Murphy* lies in the reason the Court gave for upholding New York and New Jersey's contempt citation against Murphy. The reason Murphy had no right to remain silent, the Court said, was that even though New York and New Jersey lacked legislative authority to compel the federal government to grant Murphy immunity, and even though the federal government had refrained from granting him immunity, Murphy nevertheless already *possessed* immunity from federal prosecution. Murphy possessed it by virtue of an "exclusionary rule" that the Court said barred the federal courts from incriminating Murphy on the basis of any testimony that Murphy might have given after New York and New Jersey had overruled his claim of privilege and ordered him to testify. In the Court's words:

We conclude, moreover, that in order to implement this constitutional rule [i.e., the Revised Privilege] and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.<sup>59</sup>

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<sup>58</sup> The *Murphy* Court upheld the contempt citation against Murphy. *Murphy*, 378 U.S. at 78. The Court also recognized that Murphy invoked the privilege in a reasonable good faith belief that he could preserve his claim of privilege only by remaining silent; and, therefore, the Court directed that, before the contempt citation be enforced, Murphy be given an opportunity to cure his contempt by testifying. *Id.* at 80 (holding that "the judgment of the New Jersey courts ordering petitioners to answer the questions may remain undisturbed," but that "[f]airness dictates that petitioners should now be afforded an opportunity, in light of this development, to answer the questions"). The Court's decision is consistent with the principle that the state may not convict a witness for remaining silent under conditions in which he reasonably, albeit mistakenly, believes that he has a right to remain silent. See Peter Westen & Stewart Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521, 544-46, 548-50 (1982).

<sup>59</sup> *Murphy*, 378 U.S. at 79.

Now it might be thought that rather than fashioning an exclusionary rule that was binding on federal and state courts alike, the Court in *Murphy* was simply exercising its “supervisory power” over the federal courts to prohibit them from using any evidence that New York and New Jersey compelled from Murphy under penalty of contempt. Indeed, Justices Harlan and Clark separately concurred in the judgment in *Murphy*, arguing that (1) rather than overturning *Murdock*’s same-sovereignty rule, the Court ought to reaffirm *Murdock* (and thus affirm that Murphy had no Fifth or Fourteenth Amendment grievance against being compelled by New York and New Jersey to make statements that might subject him to incrimination in the federal courts), and (2) having reaffirmed *Murdock*, the Court ought nevertheless to invoke its supervisory jurisdiction over the federal courts to prohibit the federal courts from using Murphy’s testimony against him.<sup>60</sup> The Court, however, rejected Harlan and Clark’s position. The Court not only replaced *Murdock*’s same-sovereignty rule with the Revised Privilege, but it also fashioned an exclusionary rule that goes beyond its supervisory power. The exclusionary rule is not confined to preventing the federal courts from incriminating a witness on the basis of testimony compelled from him by a state, but also prevents state courts from incriminating a witness on the basis of testimony compelled from him by the federal government or by other states.<sup>61</sup>

Alternatively, it might be thought that the reason Murphy had no grounds to fear that his testimony would be used against him in federal court (and, hence, no right to remain silent in the face of the order to testify) was not that *Murphy* imposed a special exclusionary rule on the testimony and fruits of testimony of a special set of witnesses (i.e., witnesses who are ordered by a government within the United States to testify over their objection doing so will incriminate them in *other* governments within the United States). Rather, the argument goes, the reason that Murphy had no grounds to fear that his testimony would be used against him in federal court was that the privilege against self-incrimination is itself a self-executing exclusionary rule with respect to the use by any government within the United States of the testimony and fruits of testimony of

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<sup>60</sup> *Id.* at 91-92.

<sup>61</sup> *Id.* at 53 n.1 (“Since the privilege is now fully applicable to the State and to the Federal Government, the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government.”); *id.* at 78 (“We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”).

any witness who is wrongfully ordered to testify after rightly objecting that testifying will incriminate him.<sup>62</sup>

The foregoing argument has superficial appeal. After all, with respect to an arrestee who makes incriminating statements to the police in response to wrongful threats of physical violence, the privilege is a “self-executing”<sup>63</sup> exclusionary rule that not only prohibits *that* jurisdiction from using the coerced statements against the arrestee, but, under the Revised Privilege of *Murphy* discussed in the last section, also prohibits any *other* jurisdiction within the United States from using the statements against him. Accordingly, or so the argument goes, because New York and New Jersey wrongfully ordered Murphy to testify without having obtained a grant of immunity for him from the federal government, any testimony Murphy would have given would have been wrongfully “compelled” from him.<sup>64</sup>

Moreover, just as an arrestee may respond to police coercion by first talking and then quashing his statements from being used against him, so too Murphy was entitled to respond to New York and New Jersey’s wrongful decision to overrule his claim of privilege and order him to testify, by testifying and then quashing the testimony from being used against him in federal court. Indeed, it is precisely because Murphy would have thus possessed immunity in every jurisdiction within the United States as soon as he had testified that he had no right to continue to remain silent when New York and New Jersey overruled his claim of privilege and ordered him to testify. Or so it might be argued.

The foregoing argument would have some force if one of two things were true: (1) if the pressures on judicial witnesses to testify under wrongful penalties of contempt were truly analogous to the pressure on arrestees of wrongful police violence, or (2) if governments were truly indifferent as to whether judicial witnesses respond to wrongful orders to testify by first testifying and then quashing their testimony, or by remaining silent and then appealing their wrongful contempt citations. However, neither is true. The pressures on an arrestee whom the police wrongfully threaten with violence are not analogous to the pressures on a judicial witness who is wrongfully threatened with contempt. An arrestee whom police wrongfully threaten with imminent violence unless he testifies has no avenue for protecting himself from both violence and self-incrimination except by first submitting to the police threats and then moving to

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<sup>62</sup> Cf. *United States v. Blue*, 384 U.S. 251, 255 (1966) (“[T]his Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused’s rights under the Constitution, federal statutes, or federal rules of procedure.”).

<sup>63</sup> Cf. *United States v. Patane*, 542 U.S. 630, 640 (2004) (plurality opinion).

<sup>64</sup> U.S. Const., amend V.

exclude the compelled testimony from thereafter being used against him. In contrast, a public witness who is wrongfully threatened with contempt can protect himself from both incarceration and self-incrimination by standing on his silence and seeking judicial review of his contempt citation. Indeed, Murphy followed precisely that path, placing himself in a position in which the U.S. Supreme Court could have fully protected him by vacating New York and New Jersey's contempt order, had the Court regarded it as a violation of his privilege against self-incrimination.

In addition, rather than being indifferent as to how witnesses invoke the privilege in response to judicial orders to testify, governments tend to have pronounced preferences as to how witnesses do so. For purposes of the privilege, witnesses who possess rightful claims are indifferent as to whether they first submit to orders to testify and thereafter quash their testimony and its fruits, or whether they steadfastly remain silent until the orders can be appealed and reversed. Prosecutors, however, pay a price when witnesses with rightful claims of privilege adopt the former response over the latter. When a judicial witness responds to a wrongful order to testify by remaining silent, the prosecutor's position does not change, because the witness merely denies the prosecutor the benefit of testimony to which, it turns out, the prosecutor was never entitled. However, when a judicial witness responds to a wrongful order to testify by testifying and thereafter quashing the testimony and its fruits from being used against him, the prosecutor incurs a considerable disadvantage. The prosecutor must now prove that the state has not used the witness's testimony or any of its "fruits" to build its criminal case against the witness.<sup>65</sup>

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<sup>65</sup> See generally Westen & Mandell, *supra* note 58, at 528-35. The U.S. Supreme Court has held that the scope of the "fruits" exclusion is greater for testimony extracted under official grants of immunity and for testimony "compelled" from suspects "involuntarily" than for statements elicited in violation of *Miranda*. *United States v. Patane*, 542 U.S. 630, 642 (2004). For criticism of this discrepancy, see Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda "Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004); Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998). Furthermore, the lower federal courts have held that the scope of "fruits" exclusion is broader for statements extracted under official grants of immunity than for statements compelled from suspects involuntarily. Kate Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 WASH. U. L. Q. 1603, 1608-48 (1994). For criticism of the latter discrepancy, see *id.* at 1674-91, and Steven Clymer, *Compelled Statements from Police Officers and Garrity*, 76 N.Y.U.L. REV. 1309, 1341-62 (2001). Unfortunately, Clymer misstates the import of the line of cases beginning with *Garrity v. New York*, 385 U.S. 493 (1967), and ending with *Gardner v. Broderick*, 392 U.S. 273 (1968). *Garrity* explicitly held that the state may not do what the police interrogators in *Garrity* actually did -- and, in doing so, *Garrity* implicitly held that the state may not threaten to do what the interrogators in *Garrity* actually did -- namely, to incriminate an officer on the basis of



The prosecutorial preference for silence as the method for invoking rightful claims of privilege is so pronounced that when a judicial witness responds to a wrongful judicial order to testify by testifying truthfully rather than remaining silent, or by testifying falsely rather than remaining silent, the witness is deemed to have waived claims of privilege that the witness would otherwise possess.<sup>66</sup>

The controlling case on the government's preference for silence over truthful testimony is *Maness v. Meyers*.<sup>67</sup> Maness was a lawyer in Texas who represented a client who had been subpoenaed to produce documents for possible use in a future civil suit for an injunction.<sup>68</sup> The client consulted with attorney Maness, and Maness advised his client to refuse to comply with the trial judge's order -- that is, to refuse to produce the documents -- on the ground that the documents might incriminate the client under Texas law.<sup>69</sup> The trial judge held attorney Maness in contempt for advising his client to defy his order.<sup>70</sup>

Maness sought review in the U.S. Supreme Court from his contempt conviction. Texas argued to the Court that once the trial judge overruled the

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incriminating statements that they elicit from him by telling him (1) that he will be fired if he invokes the privilege in response to *any* questions, and (2) that he will be prosecuted on the basis of anything incriminating he says in response to questions. *Garrity*, 385 U.S. at 495. In contrast, the Court later held in *Broderick* that the state may do something quite different -- and, in doing so, *Broderick* implicitly held the state may threaten to do something quite different -- namely, to discharge an officer for refusing to answer questions that are "specifically, directly, and narrowly relat[ed] to the performance of his official functions," after telling him (1) that he will be fired if he refuses to answer such questions, (2) that he will be fired if he answers them and his answers reveal him to be unfit to be an officer, and (3) that he will not be prosecuted on the basis of any incriminating answers he gives. *Broderick*, 392 U.S. at 278. Clymer fallaciously assumes that because the threats of the latter kind are legal, the threat in *Garrity* was also "perfectly legal." Clymer, *supra*, at 1345-46. To be sure, the Court later held in *Baxter v. Palmigiano*, 425 U.S. 308 (1975), that a state may impose civil disabilities on a suspect for refusing to answer narrowly tailored questions -- and, hence, may presumably both threaten a suspect to that effect and incriminate him on the basis of any statements he gives in response to such threats -- even though the state does not provide him with immunity from his answers later being used to incriminate him. *Baxter*, 425 U.S. at 316. But even *Baxter* does not allow a state to do what New Jersey did in *Garrity*, namely, to incriminate a suspect on the basis of statements that the state elicits under a threat to impose the civil disability of employment discharge on a suspect in the event that he invokes the privilege in response to any questions.

<sup>66</sup> See *Maness v. Meyers*, 419 U.S. 449 (1975) (where the witness testified truthfully); *Knox v. United States*, 396 U.S. 77 (1969) (where the witness testified falsely).

<sup>67</sup> *Maness v. Meyers*, 419 U.S. 449 (1975).

<sup>68</sup> *Id.* at 450.

<sup>69</sup> *Id.* at 452.

<sup>70</sup> *Id.* at 454.

client's Fifth and Fourteenth Amendment claims of privilege and ordered the client to produce the documents under penalty of contempt, the privilege had the self-executing effect of barring Texas from using the documents against the client; and that because the client acquired such self-executing immunity as soon as the judge overruled the client's claims of privilege and ordered him to testify, Maness's advice to the client to remain silent was unlawful.<sup>71</sup> The Court rejected Texas's argument.<sup>72</sup>

The Court assumed, *arguendo*, that Texas could have lawfully held Maness in contempt if Maness had advised his client to remain silent after Texas had granted the witness immunity.<sup>73</sup> However, the state of Texas had not granted the client immunity. In its absence, the Court said, Maness was obliged to assume that, if his client had responded by producing the documents (rather than by refusing to produce them), his client would have been deemed to have waived his Fifth and Fourteenth Amendment claims.<sup>74</sup> In the Court's words:

[The Fifth Amendment privilege] is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. . . .

. . . .

On this record, with no state statute or rule guaranteeing a privilege or assuring that at a later criminal prosecution the compelled magazines would be inadmissible, it appears that there was no avenue other than assertion of the privilege, with the risk of contempt, that would have provided assurance of appellate review in advance of surrendering the magazines.<sup>75</sup>

The Court ruled to the same effect in *Kordel v. United States*.<sup>76</sup> The defendant in *Kordel*, Feldten, was served with an interrogatory in a civil suit.<sup>77</sup> Feldten feared that if he refused to answer, he risked forfeiting the property that was at issue in the case, and that if he answered, he risked incriminating himself in a future criminal prosecution.<sup>78</sup> Ultimately, Feldten opted to respond by (1) answering

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<sup>71</sup> *Id.* at 465.

<sup>72</sup> *Id.* at 465-66.

<sup>73</sup> *Id.* at 466-67.

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

<sup>75</sup> *Id.* at 466, 470.

<sup>76</sup> *Kordel*, 397 U.S. 1 (1970).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *See id.* at 8-9.

the interrogatories, and then (2) seeking in the subsequent criminal case to quash his incriminating answers on the ground that they had been compelled.<sup>79</sup> The U.S. Court of Appeals ruled in Feldten's favor, holding that answers that are given under threat of forfeiture are "involuntary" and, hence, compelled for Fifth Amendment purposes.<sup>80</sup> The U.S. Supreme Court reversed.<sup>81</sup> The U.S. Supreme Court did not deny that a threat of forfeiture can constitute forbidden pressure on a witness to incriminate himself.<sup>82</sup> Rather, the Court held that Feldten, by answering in response to the forbidden pressure rather than remaining silent, waived any Fifth Amendment objections he may have had: "[Feldten's] failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself."<sup>83</sup>

This does not mean that the *Murphy* Court was wrong to uphold New York and New Jersey's contempt order, or wrong to rule that Murphy acquired use immunity in federal court at the very moment New York and New Jersey ordered him to testify over his claim of privilege. Rather, it means that the *reason* that Murphy acquired immunity in federal court was not that New York and New Jersey's order to Murphy to testify was unlawful -- and not that the privilege had the self-executing effect of immunizing Murphy against being incriminated in federal or state court based on anything he might say in response to the unlawful order. The privilege is not a self-executing grant of immunity to persons who respond to unlawful orders to testify by testifying rather than remaining silent.<sup>84</sup> Nor was New York and New Jersey's order to Murphy to testify unlawful. If the order had been unlawful, the *Murphy* Court would not have upheld the contempt citation. The Court would have sustained his decision to remain silent by reversing the judgment of contempt against him.

The reason that the *Murphy* Court upheld the judgment of contempt was that the order was *lawful* despite the Court's embrace of the Revised Privilege. The order was lawful because of a further and covert ruling in *Murphy* regarding the relationship between New York and New Jersey's legitimate interests in obtaining Murphy's testimony and the legitimate interests of other governments within the United States (whether federal or state) in being able to prosecute Murphy for his crimes.

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<sup>79</sup> *Id.* at 5-6.

<sup>80</sup> *Id.* at 2-3, 7.

<sup>81</sup> *Id.* at 13.

<sup>82</sup> *Id.* at 8.

<sup>83</sup> *Id.* at 10.

<sup>84</sup> *Maness v. Meyers*, 419 U.S. 449, 466 (1975).

After interpreting the Fifth and Fourteenth Amendments to embody the Revised Privilege, *Murphy* proceeded to rule that any government within the United States (whether it is state or federal) that wishes to elicit testimony from a witness who fears self-incrimination in the courts of another government within the United States may do so without subjecting the witness to any risk of self-incrimination, and it may do so simply by ordering the witness to testify over the witness's claim of privilege.<sup>85</sup> Moreover, it may do so because, by virtue of ordering the witness to testify over the witness's claim that his testimony will incriminate him in courts of another government within the United States, the ordering government automatically vests the witness with immunity in the courts of those other governments.<sup>86</sup>

Notice that the source of this inter-governmental immunity does not lie in any legislative authority that governments within the United States possess to grant immunity that is binding on other governments within the United States. After all, the state of New York has no authority to grant a witness immunity that is binding on other states or on the federal government whenever New York chooses to extend it -- say, pursuant to a plea bargain in which the witness pleads guilty in New York in return for New York's promise of immunity in federal court.

Nor does the inter-governmental immunity originate in the terms of the Revised Privilege. The Revised Privilege merely guarantees that a witness will not be compelled by government *A* to give testimony that will incriminate him in government *B*. The Revised Privilege takes no position on whether the protection consists of allowing the witness to remain silent or granting the witness immunity. Like the privilege against self-incrimination as originally construed in *Murdock*, the Revised Privilege is satisfied whichever of the two protections -- silence or immunity -- is provided, because each ensures that the person will not "be compelled to be a witness against himself."<sup>87</sup>

It follows, therefore, that when the *Murphy* Court ruled that *Murphy*'s protection consisted of immunity in the courts of government *B*, it was because the Court did more than promulgate the Revised Privilege. The Court itself created and imposed an immunity rule to effectuate the Revised Privilege in inter-governmental contexts. In short, *Murphy* consists of two rulings, not one. The first, as we have seen, is *Murphy*'s embrace of the Revised Privilege over mere incorporation of the privilege as construed in *Murdock*. The second is

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<sup>85</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77-79 (1964).

<sup>86</sup> *Id.*

<sup>87</sup> U.S. Const., amend V.

*Murphy's* superimposition of what *Balsys* called "a federally mandated exclusionary rule"<sup>88</sup> to protect witnesses while enabling governments to elicit testimony. *Murphy's* combined effect can be stated as follows:

**Murphy's Revised Privilege:** No government within the United States shall compel a person to be a witness against himself in the courts of any government within the United States.

**Murphy's Exclusionary Rule:** When a government within the United States orders a witness to testify over the witness's Fifth and Fourteenth Amendment claims that testifying will incriminate him or her in the courts of another government within the United States, the latter government may not use the witness's resulting testimony or its fruits to incriminate the witness.

*Murphy's* Exclusionary Rule generates dramatic inter-governmental effects. It vests every state within the United States with functional authority to grant use immunity that is binding on sister states within the United States; it vests states within the United States with further authority to grant use immunity binding on the federal government; and it vests the federal government with functional authority to grant immunity binding on the states. It does this all without requiring the immunity-granting government, *A*, to notify, consult with, or accommodate the prosecutorial authorities of government *B*.

#### IV. Individual and Governmental Interests in Cross-Governmental Assertions of the Privilege

The question thus arises: Whence comes this Exclusionary Rule? What is the source of the Court's authority to frame such an Exclusionary Rule and impose it upon federal and state governments alike? To answer the question, we must first examine the interests, both individual and governmental, that underlie the Revised Privilege and its accompanying Exclusionary Rule.

I shall start with the interests that witnesses possess in not making statements that they fear will incriminate them elsewhere. In doing so, I shall distinguish between two commonplace concepts of constitutional "rights." The term "rights" can be used in two very different ways. Sometimes when we speak of constitutional rights, we are referring to *prima facie* rights -- that is,

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<sup>88</sup> United States v. *Balsys*, 524 U.S. 666, 683 (1998).

constitutional interests on a person's part that, though presumptively entitled to solicitude, can be outweighed by countervailing state interests depending upon the circumstances. Thus, we can meaningfully say, "People within the United States possess a Fourth Amendment right not to be searched with respect to places in which they have reasonable expectations of privacy, but their rights are sometimes outweighed by the state's interest in conducting searches, including searches incident to valid arrests."

At other times, however, when we speak of constitutional rights, we are referring to rights, *all things considered* -- that is, constitutional interests on a person's part that are not only presumptively entitled to solicitude but actually suffice under the circumstances to outweigh any countervailing state interests. Thus, we can meaningfully say, "People within the United States *usually* have a Fourth Amendment right not to be searched with respect to places in which they have reasonable expectations of privacy, but they have *no such right* regarding searches incident to valid arrests."

The difference between *prima facie* rights and rights, all things considered, is real, though the malleable term "rights" tends to obfuscate the difference. The two usages of "rights" straddle the difference between rebuttable constitutional entitlements, on the one hand, and irrebuttable or indefeasible constitutional entitlements, on the other. The difference is between constitutional interests that, regardless of their weight, are nevertheless capable in principle of being outweighed by governmental interests to the contrary, and constitutional interests that are not outweighed by the particular governmental interests that obtain under the present circumstances.<sup>89</sup>

Together, *Murphy* and *Balsys* stand for the proposition that witnesses like *Murphy* have a right, all things considered, not to be compelled to be witnesses against themselves with respect to other governments within the United States, but that witnesses like *Balsys* do not possess such a right with respect to foreign governments. Indeed, the Revised Privilege is stated in precisely such terms. What *Murphy* and *Balsys* do not explicitly address, however, is whether both classes of witnesses possess *prima facie* rights not to be compelled to be witnesses against themselves -- that is, constitutionally protected interests in not being compelled by any government within the United States to be witnesses against themselves with respect to any government anywhere, albeit constitutional interests that might be outweighed by countervailing governmental interests.

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<sup>89</sup> See generally Peter Westen, *The Rueful Rhetoric of Rights*, 33 U.C.L.A.L. REV. 977 (1986).

There are two alternatives regarding how best to conceptualize the rights of witnesses in inter-governmental contexts today. The two conceptions are mutually exclusive and, hence, cannot both be correct. The first conception denies that witnesses possess any constitutional interests at all in remaining silent, unless the interests that they possess suffice to outweigh all countervailing governmental interests under the circumstances. The second conception recognizes that witnesses can possess constitutional interests in remaining silent, even when the interests are outweighed by superior governmental interests to the contrary:

**Conception 1:** With respect to witnesses before governments within the United States, no set of witnesses exists who possess mere *prima facie* rights not to be compelled to incriminate themselves in the courts of *any* government, whether domestic or foreign. Rather, a mere subset of witnesses exists -- namely, witnesses who fear self-incrimination in the courts of governments *within the United States* -- and they possess something more than *prima facie* rights. They possess a right, all things considered, that they not be compelled to incriminate themselves in courts within the United States.

or

**Conception 2:** All witnesses before governments within the United States do, indeed, possess *prima facie* constitutional rights not to be compelled to incriminate themselves in the courts of *any* government, whether domestic or foreign; but their *prima facie* rights can be outweighed when those rights conflict with superior governmental interests to the contrary.

The difference between 1 and 2 is constitutionally significant because if Conception 2 is valid, it means that the difference between *Balsys* and *Murphy* was not that *Balsys*'s individual constitutional interests were any weaker than *Murphy*'s, but that the countervailing governmental interests in *Balsys* were stronger than the countervailing governmental interests in *Murphy*.

The difference between 1 and 2 is also analogous to how one conceptualizes the constitutional rights of witnesses seventy years earlier when *Murdock* was decided -- and, therefore, to how one understands the Court's shift in 1964 from *Murdock*'s same-sovereignty rule to *Murphy*'s Revised Privilege. After all, just as there are two alternatives regarding how best to conceptualize

the rights of witnesses like *Balsys* today, so, too, there are two alternatives regarding how best to conceptualize the rights of witnesses like *Murdock* in 1932. One possibility is to say, “*Murdock* lost his case because he possessed neither a *prima facie* right nor a right, all things considered, that he not be compelled by the federal courts to give testimony that would incriminate him in state court.” The alternative is to say, “*Murdock* lost his case because although he did, indeed, possess a *prima facie* right not to be compelled by the federal courts to give testimony that would incriminate him in state court, his *prima facie* right was outweighed by the federal court’s superior interest in obtaining his testimony.” The difference between these two conceptions matters because if the first is correct, it means that the *Murphy* Court not only overruled *Murdock* but also dramatically changed its view regarding the constitutional interests that witnesses like *Murdock* and *Murphy* possess in inter-governmental contexts within the United States. In contrast, if the latter conception is correct, it may mean that although *Murphy* overrules *Murdock*, it does so not because the *Murphy* Court thought that *Murphy*’s constitutional interests were stronger than *Murdock*’s, but because the countervailing governmental interests of respective governments were stronger in 1932 -- before the Fifth Amendment privilege was incorporated into the Fourteenth Amendment -- than they were after the privilege was incorporated in 1964.

In the end, Conception 2 is, indeed, the stronger conception. *Balsys*’s actual interests, after all, were identical to *Murphy*’s: the two witnesses both wished to avoid the dilemma of being caught between the rock of being immediately punished for criminal contempt and the hard place of being punished later based on their testimony.<sup>90</sup> The real difference between *Balsys* and *Murphy*, as we shall see below, was not that *Balsys* had weaker *prima facie* rights than *Murphy*, but that the government of the United States had more to lose by protecting *Balsys* from the dilemma than the governments of New York, New Jersey, and the United States had to lose by protecting *Murphy* from the dilemma.

The reason that the United States had more to lose in *Balsys* than in *Murphy*, however, was not that *Balsys*’s mix of individual and governmental interests was any different than *Murphy*’s. *Balsys*’s *prima facie* interest in not being compelled to incriminate himself was identical to *Murphy*’s. The respective governmental interests of New York, New Jersey, and the United

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<sup>90</sup> See *United States v. Balsys*, 119 F.3d 122, 129 (2nd Cir. 1997) (noting that a witness’s dilemma is “no less cruel nor any less imposed by a government within the United States merely because the testimony is ultimately used by a foreign nation”), *rev’d*, 524 U.S. 666 (1998).



States in *Murphy* were identical to the respective interests of the United States, Lithuania, and Israel in *Balsys*. Rather, the difference between *Murphy* and *Balsys* is that by virtue of its authority to superintend all criminal trials within the United States in which such interests are at stake, the U.S. Supreme Court was in a position to do something in *Murphy* that it could not do in *Balsys*. It was able to fashion and impose an exclusionary rule that was largely in the collective interests of all the parties concerned.

Consider, first, the conflicting state and individual interests at issue in *Balsys*. Balsys had a *prima facie* interest in not being compelled to incriminate himself, albeit a *prima facie* interest that was ultimately overridden by the United States government's competing interests.<sup>91</sup> The United States, Lithuania, and Israel, in turn, shared an interest in Balsys's plight, albeit not sufficiently so to override their governmental interests to the contrary: the United States shared an interest in his plight by virtue of the Fifth Amendment; Lithuania and Israel shared an interest in his plight by virtue of being signatories to the International Covenant on Civil and Political Rights, including its provisions regarding the privilege against self-incrimination.<sup>92</sup>

Nevertheless, the United States also had a countervailing interest in *Balsys*. Although the United States had no interest of its own in prosecuting Balsys, it did have an interest in eliciting testimony from him under oath regarding the conditions under which he immigrated into the United States. Unfortunately, being unable to grant Balsys immunity that would bind Lithuania and Israel, the United States could not both protect its interest in eliciting testimony from him and protect Balsys's Fifth Amendment interest in not incriminating himself. Given the conflict between Balsys's Fifth Amendment interest and the United States's countervailing interests, the *Balsys* Court held that the government's interests prevailed.<sup>93</sup> The significance of *Balsys* is that it confirms a latent feature of the privilege with respect to judicial witnesses that has always existed but that becomes apparent only in inter-governmental cases -- namely, that a judicial witness's Fifth and Fourteenth Amendment rights not to

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<sup>91</sup> Cf. *Balsys*, 524 U.S. at 691 (stating that "the aspirations furthered by the [privilege against self-incrimination]" are as fully present when government *B* is a foreign sovereignty as when government *B* is a government within the United States).

<sup>92</sup> See *id.* at 695 n.16.

<sup>93</sup> *Id.* at 698 ("We therefore must suppose that . . . some evidence will in fact be lost to the domestic courts [if we recognize a right in Balsys to remain silent], and we are accordingly unable to dismiss the position of the United States in this case, that domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient to invoke the privilege."). Cf. *Schmerber v. California*, 384 U.S. 757, 762 (1966) ("[T]he privilege has never been given the full scope which the values it helps to protect suggest.").

be compelled to self-incriminate are only as strong as the government's ability to obtain the witness's testimony by granting immunity, and that when the government lacks the authority to obtain testimony by granting immunity, the witness's interest in not being compelled to self-incriminate yields accordingly.<sup>94</sup>

In contrast, consider the respective interests in *Murphy*. Like *Balsys*, *Murphy* had a *prima facie* interest in not being compelled to incriminate himself. Again, like the governments in *Balsys*, the combined states of New York and New Jersey as well as the government of United States shared *Murphy*'s interest in not being compelled to incriminate himself: New York and New Jersey shared it because, regardless of whether the Fourteenth Amendment codified the expanded Revised Privilege, the Fourteenth Amendment at the very least incorporated the Fifth Amendment. Again, like the United States in *Balsys*, New York and New Jersey had no interests in incriminating the witness before them, and yet they possessed strong interests in eliciting his testimony. Finally, like the United States's relationship in *Balsys* to the governments of Lithuania and Israel, New York and New Jersey had no legislative authority to grant *Murphy* use immunity that would be binding on the government of the United States.

The real difference between the two cases is that the U.S. Supreme Court was in a position in *Murphy* to do something that it could not do in *Balsys*. The

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<sup>94</sup> See Daniel Steinbock, *The Fifth Amendment at Home and Abroad: A Comment on United States v. Balsys*, 31 U. TOL. L. REV. 209, 215 (2000) ("*Balsys* . . . in effect, defines the Self-Incrimination Clause by the scope of its immunity substitute. . . . [T]he immunity tail wag[s] the self-incrimination dog.").

Commentators have struggled to find a robust and principled rationale for the privilege in judicial settings. See, e.g., Allen and Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 247 (2003); Michael Green, *The Privilege's Last Stand*, 65 BROOK. L. REV. 627, 628-706 (1999). The most plausible rationale is the interest of judicial witnesses in not being placed in the "cruel trilemma" of self-incrimination, contempt, or perjury. See *Balsys*, 524 U.S. at 713 ("This Court has often found . . . that the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth."); *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) ("At its core, the privilege reflects 'our fierce unwillingness to subject those suspected of crime to the cruel [choice] of self-accusation, perjury or contempt.'") (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988)); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) ("[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma . . ."). Yet commentators, who examine the normative nature of a judicial witness's interest in avoiding the trilemma, question whether such an interest can actually suffice to support a constitutional right as venerable as the privilege. Green, *supra*, at 630-32. *Balsys* casts light on that debate by revealing that, while the *prima facie* rights that the privilege protects in judicial witnesses may be venerable, they are also quite weak because they are outweighed by the government's interest in acquiring testimony from such witnesses whenever immunity is unavailable to reconcile the conflicting interests.

Court in *Murphy* was able to grant and enforce an immunity regime that it could not effectuate in *Balsys*. It was able to treat New York and New Jersey's order to Murphy (to testify over his claim that testifying would incriminate him in the federal courts) as a grant of use immunity that the Court itself could enforce by virtue of its authority to review federal court actions for violations of the Fifth and Fourteenth Amendments. By virtue of being able to enforce a regime of inter-governmental immunity within the United States, the Court in *Murphy* was able both to vindicate Murphy's *prima facie* right not to be compelled to incriminate himself and to address the governmental interests of New York, New Jersey, and the United States. The Court vindicated Murphy's *prima facie* interests by ensuring that he had immunity. The Court vindicated New York and New Jersey's interests by enabling them to elicit Murphy's testimony. The Court vindicated the United States government's interest in safeguarding Murphy's *prima facie* interest in not being compelled to incriminate himself, without seriously infringing upon the interests of the United States in being able to prosecute Murphy if it wished.

The Court did not, as it might first appear, impair the interests of the United States in being able to prosecute Murphy. Use immunity is not transactional immunity.<sup>95</sup> *Murphy*'s imposition of use immunity did not bar the United States from prosecuting Murphy altogether. It merely prohibited the United States from using Murphy's testimony or its fruits to build its case against him. To be sure, once Murphy's incriminating testimony existed, the United States might have wished to use it. But, as *Murphy* pointed out, the incriminating testimony would never have existed in the first place if the Court had not granted Murphy immunity.<sup>96</sup> The grant of use immunity, the Court said, left the United States in the same prosecutorial posture that it would have occupied if immunity had not been granted in the first place.<sup>97</sup>

The foregoing analysis of *Murphy* and *Balsys* may have force, but it raises questions of its own: If *Murphy*'s Exclusionary Rule does, indeed, maximize the individual and governmental interests of all parties involved in inter-jurisdictional invocations of the privilege among governments within the United States, why did it take so long for the rule to be adopted? Why did governments within the United States not join with one another to adopt the rule long ago? Why did it fall to the U.S. Supreme Court to adopt it on their behalf?

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<sup>95</sup> See *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (discussing the differences between use immunity and transactional immunity).

<sup>96</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 84, 100 (1964).

<sup>97</sup> *Id.* at 101.

There are three principal reasons. First, although an Exclusionary Rule of *Murphy*'s sort does indeed maximize all the interests of some of the parties (i.e., the personal interests of the testifying witness and the official interests of the government that is ordering him to testify), and although it advances some interests of all the parties (i.e., the interest of the prosecuting government in not having to compel witnesses to incriminate themselves), an Exclusionary Rule also potentially jeopardizes the interests of the prosecuting government. After all, *Murphy* has the functional effect of empowering any government within the United States (government *A*) to grant use immunity that is binding on every other government within the United States (government *B*), simply by ordering a witness to testify over the witness's objection that his or her testimony will incriminate the witness in the courts of government *B*.

In theory, such testimony does, indeed, leave government *B* in the same position it would have occupied if the witness had never testified in the first place. In practice, though, it may leave government *B* unable to prosecute the witness; because unless government *B* has sufficient notice of government *A*'s testimonial orders to be able to sequester the evidence it has already gathered or to erect a credible Chinese Wall between the witness's testimony and its future evidence-gathering, government *B* may be unable to sustain its burden of proving that it did not use the witness's testimony or its fruits in gathering its evidence.<sup>98</sup>

Second, state and federal governments face collective action barriers to doing what is in their mutual interests. Government *A* cannot compel witnesses to testify merely because government *A* hopes or believes it is probable that government *B* will agree not to use their testimony or its fruits against them. Witnesses can only be compelled to testify if it is clear that government *B* will not use the evidence against them. Individual prosecutors in government *B* may be able to grant use immunity to witnesses in government *A* whose testimony affects their particular cases, but the only institution in government *B* that can guarantee use immunity in the courts of government *B* to any witness whom government *A* may order to testify over the witness's claim of privilege is the legislature of government *B*. Yet unless the legislature of *A* is also willing to reciprocate and grant use immunity to witnesses before the courts of government *B*, the legislature of *B* has nothing to gain and something to lose by granting use immunity to witnesses before the courts of government *A*. As a result, no government is willing to grant immunity until other governments do so; and

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<sup>98</sup> Cf. *Turkish v. United States*, 623 F.2d 769, 775 (2d Cir. 1980).

because all governments are in the same position, none of them is willing to take the initiative to grant immunity.<sup>99</sup>

Third, although the U.S. Congress today may have authority to require that all governments within the United States (including the federal government) grant use immunity to witnesses whom other governments within the United States order to testify over claims of inter-governmental privilege, Congress had no authority to do so at the time *Murphy* was decided, and it has little political incentive to do so today. With respect to relations between the federal government and the states, Congress's authority over the federal courts is undoubtedly broad enough (1) to bar the federal courts from using testimony that a state has compelled from a witness under penalty of contempt,<sup>100</sup> and (2) to bar state courts from using testimony that the federal government has compelled from a witness under penalty of contempt.<sup>101</sup> With respect to relations among the several states, Congress probably has authority under Section 5 of the Fourteenth Amendment to prohibit states from using testimony that another state has compelled from a witness under penalty of contempt. Nevertheless, at the time *Murphy* was decided, it was unclear in several respects that Congress possessed authority to require use immunity along the lines of the Exclusionary Rule that *Murphy* mandates. For one thing, until *Murphy* reinterpreted the privilege along the lines of the Revised Privilege, it was thought that the constitutional rights of witnesses were confined to cases in which the same government both compelled and incriminated; as long as that remained true, Congress lacked authority under Section 5 to protect witnesses in inter-government contexts.<sup>102</sup> Moreover, even after *Murphy* was decided, it was doubtful for some years that use immunity -- as opposed to broader kinds of transactional immunity -- sufficed to address a witness's Fifth and Fourteenth Amendment interests. As long as that doubt remained, the problem of interstate assertions of the privilege could not be

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<sup>99</sup> In theory, jurisdictions could solve such collective action problems by enacting reciprocity statutes according to which state *A* agrees to grant immunity to witnesses in state *B* at the request of state *B* if state *B* enacts legislation committing itself to do the same thing. Cf. REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 2 (1968) (applying to jurisdictions "in which this or a substantially similar reciprocal law is in effect"). In practice, however, the political will for such action is unlikely to exist.

<sup>100</sup> Cf. *Elkins v. United States*, 364 U.S. 206, 212 (1960).

<sup>101</sup> Cf. *Adams v. Maryland*, 347 U.S. 179, 183 (1954) (upholding a federal statute providing witnesses who testify before Congress with immunity from both federal and state prosecution on the basis of their testimony).

<sup>102</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress has no authority under Section 5 of the Fourteenth Amendment to construe constitutional rights more broadly than the Court).

resolved to the satisfaction of all the parties, because transactional immunity would have altogether negated any ability on government *B*'s part to prosecute witnesses who had testified under compulsion in government *A*.

The *Murphy* Court could not have simply reinterpreted the privilege along the lines of the Revised Privilege while leaving it to Congress to decide whether to adopt a rule of use immunity to effectuate the Revised Privilege, due to three distinct problems: a legal problem, a political problem, and a substantive problem (which I shall discuss in the following section). The legal problem was that, for nearly a decade after *Murphy* was decided, it remained unclear whether Congress was capable of protecting inter-governmental witnesses without granting transactional immunity, something that would have been anathema to governments in the position of government *B*.<sup>103</sup> The political problem was that, even if Congress had known that it had authority to impose use immunity on the states, and even if Congress had known that use immunity sufficed for Fifth and Fourteenth Amendment purposes, Congress would not have acted because there was no political pressure within Congress for the enactment of such statutes.

All of this suggests that, if the Court in *Murphy* had not superimposed an Exclusionary Rule, thereby largely maximizing the interests of all parties concerned, no other branch of the federal government or combination of state governments was likely to have been able to do so.

## V. The Revised Privilege's Dependence upon *Murphy*'s Exclusionary Rule

We are now in a position to appreciate the relationship between the Revised Privilege and the Exclusionary Rule. The Court in *Murphy* did not first embrace the Revised Privilege and then set about to see how it might enforce the rule. If the Court had done so, it could only have protected *Murphy* from self-incrimination by doing the very thing that it was unwilling to do for *Balsys* -- namely, uphold *Murphy*'s decision to remain silent and, thereby, negate the interests of New York and New Jersey in obtaining *Murphy*'s testimony. The *Balsys* Court refused to protect *Balsys* at the cost of imposing that testimonial burden on the United States, and there is no reason to think that the *Murphy* Court would have been willing to protect *Murphy* at the cost of imposing that same burden on New York and New Jersey.

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<sup>103</sup> *Cf.* *United States v. Blue*, 384 U.S. 251, 255 (1966) (referring to transactional immunity as a "drastic . . . step [that] might advance marginally some of the ends served by exclusionary rules, but . . . would also increase to an intolerable degree interference with the public interest in having the guilty brought to book").

In reality, of course, the *Murphy* Court devised a mechanism by which it could protect Murphy without negating New York and New Jersey's interests in obtaining his testimony and largely without subverting the interests of the United States in being able to prosecute him. This mechanism was the Exclusionary Rule. Because the Court was able to do in *Murphy* what it was unable to do in *Balsys* -- namely, impose a rule that largely maximized the interests of everyone concerned -- the Court was able to expand the scope of the privilege to protect Murphy from being compelled by government *A* to incriminate himself in the courts of government *B*. The Court in *Murphy* did not resort to the Exclusionary Rule after previously deciding to embrace the Revised Privilege. The Court embraced the Revised Privilege because the Exclusionary Rule enabled the Court to vindicate the expanded protections of the Revised Privilege at no cost to the government.

This analysis reveals why it was substantively impossible for the Court in *Murphy* to embrace the Revised Privilege while leaving it to the Congress to decide whether to enforce it through the Exclusionary Rule. Given the delicate balance the Court believed existed between the *prima facie* interests of witnesses and the prosecutorial interests of governments, the Court did not believe witnesses were entitled to the protections of the Revised Privilege unless the protections could be granted without impinging upon strong governmental interests to the contrary. The Court could achieve those objectives only by grounding the Revised Privilege in the Exclusionary Rule.

This also explains why, once the Court appreciated the feasibility of the Exclusionary Rule, the decision to enlarge the protection of the privilege qua the Revised Privilege was an obvious, and even prosaic, move. It was obvious because the *prima facie* rights that the privilege protects have been the same from the outset: the rights of all witnesses not to be compelled to incriminate themselves with respect to any court, domestic or foreign. The governmental interests have also largely been the same (with the sole exception of certain governmental interests that *Malloy's* decision to incorporate the privilege brought into play, as we shall see below).

The constitutional weight that a witness's *prima facie* right possesses *vis-à-vis* countervailing governmental interests has been the same, too, namely, weight that suffices to protect a witness as long as he can be protected without seriously abridging (1) the interests of government *A* in eliciting evidence under grants of immunity, and (2) the interests of government *B* in prosecuting offenders. Once the Court recognized that by adopting the Exclusionary Rule it could protect the *prima facie* rights of witnesses while largely maximizing the interests of governments *A* and *B*, the *prima facie* weight that the privilege has

always possessed made adopting the Revised Privilege obvious.

Finally, this analysis casts light upon why the Court may have decided *Murdock* narrowly and how *Murdock* stands in relationship to *Malloy*. I have argued that the nature and weight of the *prima facie* rights that underlie the privilege have been the same from the outset -- including, therefore, the time at which *Murdock* was decided. I have also argued that the governmental interests that underlie inter-governmental assertions of the privilege have also been the same from the outset, including, again, at the time *Murdock* was decided. The Court, however, rejected *Murdock*'s claim of privilege despite the fact that, by virtue of its power to superintend federal and state adjudications, the Court had the power in 1932 to effectuate *Murdock*'s *prima facie* Fifth Amendment rights by imposing an Exclusionary Rule upon the states -- thereby prohibiting the states from using *Murdock*'s testimony or its fruits against him. Why did the *Murdock* Court fail to vest *Murdock*'s testimony with use immunity effective against the states, given that doing so would have protected *Murdock*'s *prima facie* Fifth Amendment rights without substantially thwarting the states' interests in being able to prosecute him? There are two reasons why an Exclusionary Rule in *Murdock* would have been a greater intrusion on the interests of the states than the Exclusionary Rule of *Murphy*.

First, when *Murdock* was decided, the Fifth Amendment privilege applied only against the federal government, leaving the states with no federal interest in safeguarding the *prima facie* rights of witnesses like *Murdock*. By the time *Murphy* was decided, however, the governmental interests had changed. The *Murphy* Court could have rightly observed that by imposing use immunity on the states, it was furthering an interest the states themselves now possessed under the Fourteenth Amendment, an interest to safeguard *prima facie* rights of witnesses like *Murdock* and *Murphy* not to be incriminated in the courts of the states by testimony that was compelled from the witnesses by another government within the United States.

Second, if *Murdock* had imposed the Exclusionary Rule on the states, the result would have been a regime of use immunity that always worked against the states and never in their favor. As long as the privilege applied only to the federal government, the states would always be in the position of government *B* and never in the position of government *A*. That is, the states would always have been governments that bore the burden of use immunity, rather than governments that received the benefit of use immunity. In contrast, by the time *Murphy* was decided, the privilege was binding on the states through the Fourteenth Amendment, and states like New York and New Jersey could find themselves in the position of government *A* -- that is, in the position of governments that



wished to elicit testimony from witnesses who, without immunity, would not testify at all. By imposing the Exclusionary Rule in *Murphy*, the Court could achieve something that it could not have done by imposing it in *Murdock*: it could further the interests of the states (when states are in the position of government *A*) in eliciting testimony from witnesses who will not otherwise testify for fear that their testimony will incriminate them in the courts of the federal government or sister states.

I have emphasized the distinction between *prima facie* rights and rights, all things considered, because the distinction is essential to understanding the relationship between the Revised Privilege and the Exclusionary Rule, and between *Murphy* and *Balsys*. The distinction is also revealing for another reason. Typically, the judicial act of incorporating a constitutional right, all things considered, from one of the original eight amendments into the Fourteenth Amendment does not alter the scope of the original right against the federal government.<sup>104</sup> The reason is that an individual's *prima facie* rights under the original amendment remain the same, whether the amendment is incorporated or not; the countervailing interests of the federal government also remain the same; and, therefore, the balance that the original amendment strikes between those *prima facie* rights and the interests of the federal government also remains the same.

We have seen, however, that the mere act of incorporation altered the scope of the Fifth Amendment right, all things considered, even with respect to the federal government itself. Even apart from its effect on the states, the act of incorporation enlarged the Fifth Amendment from the following:

***Fifth Amendment Privilege (paraphrased):*** The federal government shall not compel a person to be a witness against himself in *its* courts.

to the following:

***Fifth Amendment Privilege (revised):*** The federal government shall not compel a person to be a witness against himself in *any* court within the United States.

Now we can see why: although a witness's Fifth Amendment *prima facie* rights remain the same both before and after incorporation, and although the interests of the federal government also remain the same, the mere act of incorporation

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<sup>104</sup> See Amar, *supra* note 45, at 1196.

significantly changes something. Incorporation changes the benefits to the states of the Court's imposing an Exclusionary Rule to effectuate a witness's *prima facie* rights, by putting the states in the position of sometimes being *beneficiaries* of the Exclusionary Rule rather than always being burdened by exclusion.

Incorporation enables the Court to impose an Exclusionary Rule on the states without infringing upon the collective interests of the states. By enabling the Court to protect a witness's *prima facie* rights in an inter-governmental context without infringing upon the interests of the states, incorporation not only extends the Fifth Amendment to the states through the Fourteenth Amendment, it also enlarges the scope of the witness's Fifth Amendment right against the federal government itself. In that respect, the *Murphy* Court was correct, though not for the reasons it gave, that incorporation helps explain the expansion in scope of the privilege from the same-sovereignty rule of *Murdock* to the Revised Privilege of *Murphy*.

## VI. The Doctrinal Source of *Murphy*'s Exclusionary Rule

What, then, is the textual or implicit constitutional source of the Court's authority to impose a legal rule that largely maximizes the interests of all the government entities concerned, but that the entities are inhibited (by the dynamics of collective action) from adopting on their own?

To address this question, it is important to distinguish between the two kinds of common law that federal courts are capable of creating -- namely, federal common law and constitutional common law. Federal common law is federal case law that the federal courts develop pursuant to statutory delegations by Congress or pursuant to constitutional provisions that delegate lawmaking power to Congress and, implicitly, also to the federal courts (subject to override by Congress).<sup>105</sup> Thus, just as the Congress has authority to legislate pursuant to its enumerated powers, the federal courts have implied and derivative authority to fashion common law in those areas, where appropriate -- subject always, however, to Congress's authority to provide otherwise.<sup>106</sup> The federal common law of admiralty is a good example. The power of Congress to establish rules of decision regarding admiralty can be derived from and is implied by Congress's

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<sup>105</sup> See *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640-41 (1981). See generally Henry Friendly, *In Praise of Erie -- and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405-22 (1964).

<sup>106</sup> See Peter Westen & Jeffrey Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 325-41 (1980).

power to regulate interstate and foreign commerce.<sup>107</sup> Until Congress acts, however, the federal courts have implied and derivative authority to fashion a common law of admiralty, subject always to override by Congress.<sup>108</sup>

In contrast to federal common law that is derivative of powers that the Constitution grants to Congress, constitutional common law is derivative of rights that the Constitution creates in persons.<sup>109</sup> Ordinarily, when the federal courts construe constitutional rights, they create constitutional law, namely, a body of case law on constitutional rights that is final and binding on all persons and institutions, including the Congress.<sup>110</sup> However, the federal courts can also do something else, at least in theory: they can create constitutional common law. They can create a body of case law on constitutional rights that is binding on all persons and institutions except Congress -- a jurisprudence of rights that is authoritative, subject to Congress's authority to provide otherwise.<sup>111</sup>

*Murphy's* Exclusionary Rule can be traced to two possible sources: (1) federal common law and, specifically, a derivative of an implied power of Congress to resolve collective action problems for state and national governments; and (2) the constitutional common law of the Fifth and Fourteenth Amendments.

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<sup>107</sup> Cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979).

<sup>108</sup> See, e.g., *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205-09 (1996) (explaining *Moragne v. State Marine Lines*, 398 U.S. 375 (1970)).

<sup>109</sup> I take the term "constitutional common law" from an article by Henry Monaghan. Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975). Monaghan and I both use "constitutional common law" in contradistinction to "federal common law," but we use the two terms differently. Monaghan uses "federal common law" in contradistinction to "constitutional common law" in order to refer to areas in which the federal courts fashion case law pursuant to statutory delegations from Congress, *id.* at 12-18; while I *also* use "federal common law" to refer to areas in which the federal courts fashion case law pursuant to their derivative authority to make law, where appropriate, in areas, like admiralty, in which no statutory delegation exists but in which the Constitution grants final legislative power to Congress. In contrast, Monaghan uses "constitutional common law" to refer to *all* areas in which the federal courts derive their authority to make law not from statutory delegations but from constitutional provisions that grant final authority to Congress, *id.* at 13-18, while I confine "constitutional common law" to areas in which the federal courts derive their non-final authority to make law from constitutional provisions defining *individual rights*.

<sup>110</sup> Cf. *Dickerson v. United States*, 530 U.S. 428, 430 (2000) (holding that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress").

<sup>111</sup> See *supra* note 109; cf. *Carlson v. Green*, 446 U.S. 14, 53 (1980) (Rehnquist, J., dissenting).

### A. The Exclusionary Rule as Federal Common Law

The Exclusionary Rule may have its source in an authority of the U.S. Congress -- and, derivatively, of the federal courts in the fashioning of federal common law -- that is implicit in the numerous provisions of the Constitution that grant the federal government exclusive or concurrent power with the states to legislate in specific areas precisely for the reason that the dynamics of public choice inhibit the several states from doing what is in their collective interests. There are many such instances in the Constitution, but two salient ones are the Interstate Commerce Clause of Article I and the Full Faith and Credit Clause of Article IV.<sup>112</sup>

The Framers of the Constitution recognized that, if forced to act individually, the states were likely to favor local economic interests over out-of-state interests (and, hence, to erect trade barriers until other states first opted to lower their trade barriers), despite the fact that the people of all the states would benefit from a common market. The Interstate Commerce Clause empowers Congress -- and derivatively the federal courts in their common law capacity -- to create a common market that is in the states' mutual interests but that the states, if left to their own, might subvert because of their difficulty in acting collectively.<sup>113</sup>

Similarly, the Framers recognized that, if forced to act individually, states might refrain from granting full faith and credit to the judgments of others states until other states first opted to grant full faith and credit to theirs. Therefore, it might happen that no state would grant full faith and credit to sister state judgments, despite the fact that all states would benefit from a regime in which every state grants full faith and credit to the judgments of every other state. Accordingly, the Full Faith and Credit Clause imposes on the states a regime of mutual recognition of judgments that is decidedly in their mutual interests but that the dynamics of collective action inhibit the states from adopting. The Clause does so in two ways: (1) it vests persons with limited constitutional rights to the recognition of interstate judgments, regardless of what Congress might do to the contrary; and (2) it gives Congress power to enact legislation that gives even further effect to interstate judgments than the Clause prescribes. In so far as the Clause gives Congress the latter power, it also implicitly empowers the

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<sup>112</sup> See U.S. Const., art I, sec. 8, cl. 3 (Interstate Commerce Clause); U.S. Const., art. IV, sec 1 (Full Faith and Credit Clause).

<sup>113</sup> See generally Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

federal courts to create a federal common law of interstate judgments, subject to Congress's authority to provide otherwise.

The Interstate Commerce Clause and the Full Faith and Credit Clause address specific collective action problems, but it can be argued they are specific instantiations of implicit power on the part of Congress, and derivatively the federal courts in areas of their expertise, to resolve collective action problems where Congress and the federal courts firmly believe that they are imposing what the states themselves would admit to be in their collective interests but that the states, acting individually, are unable to achieve.<sup>114</sup>

### **B. The Exclusionary Rule as Constitutional Common Law**

An alternative textual source exists that suffices to sustain the Exclusionary Rule without obliging one to make reference to an "implied" power of Congress to solve collective action problems, and, hence, to the derivative authority of the federal courts to create federal common law pursuant to that implied power. The alternative source is the Fifth Amendment itself. After all, the Revised Privilege presupposes the Exclusionary Rule. And the Exclusionary Rule furthers a witness's *prima facie* Fifth and Fourteenth Amendment rights in an inter-governmental context. It arguably follows, therefore, that the Exclusionary Rule is itself a right that the Fifth and Fourteenth Amendments constitutionally require.

Unfortunately, deriving the Exclusionary Rule from the Fifth Amendment presents problems of its own. If the Exclusionary Rule itself is a constitutional right that the Fifth and Fourteenth Amendments constitutionally require, then the Congress has no lawful authority to reduce its scope. Yet the present scope of

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<sup>114</sup> It can be argued, of course, that if the Framers of the Constitution wished to vest the Congress with generic authority to resolve collective action problems, it would have done so, and that their silence should, therefore, be taken as a negation of that authority. However, if arguments from silence were decisive, they would deny the federal courts the authority to create federal common law of any kind, including a common law of admiralty, because nothing in the Constitution gives the federal courts authority to create federal common law.

Although I am not able to pursue it here, I think it can be argued that the federal courts' expansive reading of Congress's authority under the Commerce Clause to cover matters that involve neither commerce nor interstate movement shows they are treating the Commerce Clause as if it were a generic authority in Congress to resolve collective action problems. *Cf. Rancho Viejo v. Gale Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004) (holding that Congress has authority under the Commerce Clause to protect the arroyo southwestern toad from extinction, despite the fact that it has no economic value, lives only in California, and does not cross interstate borders).

the Exclusionary Rule is sweeping: it constitutes an immediate grant of use immunity to any witness to whom any court within the United States issues an unappealed order to testify over the witness's claim that doing so may incriminate him or her in the courts of a government within the United States. If the Exclusionary Rule is a matter of constitutional right, then Congress may not modify it by conditioning such immunity on safeguards to ensure that such immunity does not unnecessarily disadvantage prosecutions elsewhere within the United States.

To examine whether the Exclusionary Rule is a matter of constitutional right, let us assume that Congress undertakes to mitigate the potential burdens that *Murphy* use immunity can impose on prosecutions in government *B*, by enacting the following statute:

**Hypothetical Section 1000:** Any witness, whom the United States government or the government of a State orders to testify under oath and under penalty of contempt despite the witness's claim that testifying may incriminate him or her in the courts of another government within the United States, shall, in the event the witness testifies, be immunized against use of the testimony or its fruits to incriminate the witness in the courts of such other government, provided, however, that the following conditions are met: (1) the witness shall identify the government or governments within the United States that the witness believes may wish to use the witness's testimony to incriminate him or her;<sup>115</sup> (2) the agency or court that contemplates ordering the witness to testify shall postpone doing so for a period of twenty-four hours with respect to jury trials and for a period of forty-eight hours with respect to all other proceedings, during which it shall direct the party who seeks the witness's testimony to notify the attorney general(s) of the government(s) in which the witness fears incrimination that the witness will be testifying under immunity; (3) the agency or court that orders the witness to testify shall take whatever measures it regards as appropriate and that are consistent with the First, Sixth, and Fourteenth Amendments to ensure that, for a period of sixty days, the testimony is not disseminated to the prosecutorial authorities of such other governments, unless they request it, including placing the official

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<sup>115</sup> A witness cannot claim that by identifying the jurisdiction that the witness believes may use the witness's testimony against the witness, the witness alerts the jurisdiction to the witness's possible wrongdoing and, hence, incriminates himself or herself within the meaning of the privilege, because the same thing occurs every time a witness invokes the privilege.

transcript of the witness's testimony under seal and taking the witness's testimony in closed session.<sup>116</sup>

Hypothetical Section 1000 imposes conditions on grants of immunity that are unconditional under *Murphy*. When compared with the unconditional Exclusionary Rule of *Murphy*, however, Section 1000 is better designed to maximize the collective interests of all parties with interests regarding inter-governmental claims of the privilege. It is also consistent with the oft-expressed view that, except where immunity is required to remedy wrongful compulsions to testify,<sup>117</sup> legislatures are better equipped than judges to formulate standards and procedures regarding grants of immunity.<sup>118</sup>

These are reasons for believing that the enactment of a statute like Section 1000 ought to be regarded as being within Congress's lawful authority. If Congress has the authority to impose conditions upon an Exclusionary Rule that *Murphy* treats as unconditional, however, it must be because the Exclusionary Rule is not itself a constitutional *right*, but, rather, a matter of

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<sup>116</sup> Cf. F.R. Crim. Proc. 6 (authorizing the federal courts to take testimony in closed session and place it under seal in order to preserve the secrecy of grand jury proceedings).

<sup>117</sup> See *Doe v. United States*, 465 U.S. 605, 616 n.16 (1984).

<sup>118</sup> The defendant in *Doe* refused to produce documents that the federal government had subpoenaed for fear that if he produced them, the federal government would use their production to incriminate him. *Id.* at 607. The defendant argued to the U.S. Supreme Court that it ought either to uphold his silence or grant him "constructive immunity" in the event he produced the documents. *Id.* Although the Court upheld the witness's decision to remain silent, the Court refused to grant him such immunity: "We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the [federal immunity] statute requires. As we stated in *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), in passing the use immunity statute, 'Congress gave certain officials in the Department of Justice exclusive authority to grant immunities.' . . . The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. . . . Congress expressly left this decision exclusively to the Justice Department." *Id.* at 616. See also *United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005) ("We have consistently held that a District Court is without authority to confer immunity on a witness sua sponte."); *United States v. Moussaoui*, 382 F.3d 453, 466 (2004) ("The circuit courts . . . have uniformly held that district courts do not have any authority to grant immunity, even when a grant of immunity would allow a defendant to present material, favorable testimony."); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966) (Burger, J.) (opinion of the court) (the power to grant immunity "is one of the highest forms of discretion conferred by Congress on the Executive" and cannot be assumed by the judiciary). But see *United States v. Mackey*, 117 F.3d 24, 27 (1st Cir. 1997) (stating that "in certain extreme cases of prosecutorial misconduct," a court may condition a prosecutor's privilege to proceed with the trial of a case on its granting a witness immunity).

constitutional common law. It is a judicial interpretation of rights that the Fifth and Fourteenth Amendment privileges create, but a judicial interpretation that Congress is nevertheless free to override.

Unfortunately, one cannot refer to constitutional common law in the context of the privilege without confronting *Miranda v. Arizona*.<sup>119</sup> *Miranda* generated a question that was not answered for thirty-five years. The question was whether the *Miranda* warnings were a constitutional right (and, hence, a rule that Congress could not lawfully replace with a contrary rule) or a constitutional common law interpretation of the privilege (and, hence, an interpretation that Congress could lawfully replace with a contrary rule). The U.S. Supreme Court resolved that question in *Dickerson v. United States*<sup>120</sup> -- at least with respect to the particular “involuntariness” test that Congress enacted in 18 U.S.C. Section 3501 as an intended substitute for *Miranda* warnings<sup>121</sup> -- by declaring the *Miranda* warnings to be a constitutional right that Congress cannot replace with the involuntariness test of Section 3501.<sup>122</sup>

The issue in *Dickerson* was fully vetted at the time and, hence, can be taken to be correctly decided.<sup>123</sup> However, the fact that the *Miranda* warnings are not a matter of constitutional common law does not mean that judicial interpretations of the privilege are never a matter of constitutional common law. *Murphy* implicitly held that witnesses have a *prima facie* right not to be compelled by any government within the United States to make statements that might incriminate them in the courts of any government, domestic or foreign -- a view of such *prima facie* rights that is entirely consistent with the Court’s prior ruling in *Murdock* and subsequent ruling in *Balsys*. However, *Murphy* did not stop there. *Murphy* also devised and imposed an Exclusionary Rule that enables

<sup>119</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>120</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>121</sup> My colleague Yale Kamisar does not take *Dickerson* to stand for the proposition that *Miranda* warnings are constitutionally based warnings that Congress may not replace with adequate, alternative protections of its own devising. Rather, he understands *Dickerson* to hold that even if the *Miranda* warnings are rules of constitutional common law that Congress may replace with adequate, alternative protections of its own, Congress may not do what Congress bald-facedly did in Section 3501 -- namely, simply reinstate the “voluntariness” test that *Miranda* explicitly declared to be inadequate. See Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 395, 410, 414-15, 425 (2001).

<sup>122</sup> *Dickerson*, 530 U.S. at 438.

<sup>123</sup> But see Justice Thomas’s plurality opinion in *United States v. Patane*, 542 U.S. 630 (2004), joined by Chief Justice Rehnquist and Justice Scalia, in which the three of them argue that *Miranda* is a “prophylactic rule” that “goes beyond” what the Fifth and Fourteenth Amendments require. *Id.* at 638. For criticism of that view, see Kamisar, *supra* note 65, at 99-107.



governments within the United States to give effect to that *prima facie* right in a way that arguably maximizes their governmental interests and, at the very least, does not seriously intrude upon them.

The Exclusionary Rule is a workable rule of immunity. Indeed, it is probably the best rule of immunity that courts can devise, given that they are institutionally obliged to derive their rulings from generalized principles. However, it does not follow that *Murphy*'s Exclusionary Rule is the best rule of immunity that *any* institution of the federal government can devise to maximize the interests of governments while fully safeguarding the *prima facie* rights of witnesses. Congress is free to do something that courts may not -- namely, to draw arbitrary lines, e.g., twenty-four hours, forty-eight hours, sixty days -- without having to justify them by reference to principle. It may be that arbitrary lines are precisely what best serve the collective interests of governments with respect to inter-governmental claims of privilege.

*Dickerson* invalidated Congress's attempt to replace *Miranda* warnings with the "involuntariness" test of Section 3501.<sup>124</sup> The *Dickerson* Court invalidated Section 3501 because, although Section 3501 arguably did a better job than *Miranda* in advancing the government's interests in gathering evidence from suspects, Section 3501 intruded excessively upon a suspect's *prima facie* right not to be compelled to be a witness against himself.<sup>125</sup>

The contrary is the case with the Act of Congress that I have hypothesized for replacing *Murphy*'s Exclusionary Rule ("Section 1000"). Section 1000 not only does a better job than the Exclusionary Rule in advancing the mutual interests of governments within the United States in gathering evidence and prosecuting offenses, it does so without in any way intruding upon the *prima facie* rights of persons not to be compelled to be witnesses against themselves. Indeed, unless Congress abolished the Exclusionary Rule altogether, it could scarcely do anything in refining the rule that would abridge the *prima facie* interests of witnesses.<sup>126</sup>

It follows, therefore, that unless the Constitution is to be interpreted to preclude government from doing what best serves the governmental and constitutional interests of all concerned, the Exclusionary Rule of *Murphy* must be a rule of constitutional common law that Congress is free to override.

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<sup>124</sup> *Dickerson*, 530 U.S. at 439.

<sup>125</sup> *Id.* at 441.

<sup>126</sup> Depending upon the findings it makes, Congress may even have authority to abolish the Exclusionary Rule altogether, thereby reinstating the same-sovereignty rule of the privilege.

## VII. Conclusion

*Murphy*'s Exclusionary Rule -- and its relationship to the Revised Privilege that implicitly underlies the decisions in *Murphy* and *Balsys* -- reveals something significant about the scope of the privilege against self-incrimination with respect to judicial witnesses. Despite the Supreme Court's fulsome praise of the privilege,<sup>127</sup> *Murphy* and *Balsys* reveal that the Fifth and Fourteenth Amendment privileges are only as strong as the government's ability to elicit testimony under grants of use immunity. Where governments within the United States lack authority to grant witnesses immunity, the privilege against self-incrimination that witnesses ordinarily possess yields to the governments' interests in obtaining their testimony.

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<sup>127</sup> See cases cited *supra* notes 2-6 and accompanying text.