I. INTRODUCTION

The Fifth Amendment’s self-incrimination clause provides that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.” 1 From an early age, children are familiar with the concept of the Fifth Amendment. 2 Even if not “schooled in the particulars” of the Fifth Amendment legal doctrine, individuals still have beliefs about what is fundamentally fair regarding the Fifth Amendment. 3

Visualize the following scenario: Local police arrive at a suspect’s home to talk about a theft that occurred in the suspect’s neighborhood. The police ask the suspect to accompany them to the police station to answer some questions, and the suspect, willing to help, agrees to accompany the police officers to the station. After an hour of questioning, the suspect notices that the officer begins to take a more aggressive, accusatorial approach to the questioning. Finally the officer asks, “If we were to search your home, we would find that stolen property, wouldn’t we?” Unwilling to sound nervous answering such an accusatorial question, the suspect remains silent for fear of possible incrimination. After a few seconds of silence, the suspect answers a couple more questions and the interview ends. A few days after the interview, the police charge the suspect with the crime. At the suspect’s trial the prosecutor uses the suspect’s interview silence as evidence of the suspect’s guilt. The prosecutor explains to the jury that a suspect who is not guilty would have explained his or her innocence in light of such accusations.

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1 U.S. Const. amend. V.


3 See id.
After the jury reaches a guilty verdict, the suspect sits in disbelief that the act of remaining silent could be used as evidence of guilt. Despite the suspect’s disbelief, the Supreme Court held by a plurality in the recent case *Salinas v. Texas*\(^4\) that a suspect’s pre-arrest, pre-Miranda\(^5\) silence can be used as a substantive inference of guilt.\(^6\) This note critically examines *Salinas v. Texas* and argues that its implications unconstitutionally burden the policies underlying the Fifth Amendment. This note further provides a more practical solution to the complex problem of using a suspect’s silence as evidence of guilt. Part II begins with the important Fifth Amendment history that led to *Salinas v. Texas*.\(^7\) Specifically, Part II.A of this note explains the Supreme Court’s Fifth Amendment self-incrimination policy regarding interrogations.\(^8\) Part II.B reviews and analyzes important Supreme Court cases regarding the use of a suspect’s silence, including the *Jenkins*\(^9\) impermissible burden test.\(^10\) Part II.C explains the previous circuit court split on the use of pre-arrest, pre-Miranda silence.\(^11\) Part III analyzes the *Salinas v. Texas* case and argues that the plurality and dissenting opinions burden the policies behind the Fifth Amendment.\(^12\) Finally, Part IV provides a workable and practical bright-line solution to the complex problem of silence that does not burden the policies underlying the Fifth Amendment.\(^13\)

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**II. FIFTH AMENDMENT SELF-INCrimINATION BACKGROUND**

**A. Self-Incrimination Clause Policy and United States v. Bram**

Supreme Court and Fifth Amendment critics both agree that, despite the self-incrimination clause’s language being fundamental to our constitution, “the law and the lawyers . . . have never made up their minds

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\(^{4}\) 133 S. Ct. 2174 (2013) (plurality opinion).

\(^{5}\) Id. at 2183–84. A pre-arrest, pre-Miranda setting refers to the period of time before a suspect’s arrest and before a suspect has been read his or her Miranda rights. Id. at 2177–78.

\(^{6}\) Id. at 2183.

\(^{7}\) See infra Part II.

\(^{8}\) See infra Part II.A.


\(^{10}\) See infra Part II.B.

\(^{11}\) See infra Part II.C.

\(^{12}\) See infra Part III.

\(^{13}\) See infra Part IV.
just what it is supposed to do or just whom it is intended to protect.”  

For instance, in *Murphy v. Waterfront Commission of New York Harbor*, the Supreme Court explained that it would “not do . . . to assign one isolated policy to the privilege” because the Court’s own treatment of the self-incrimination clause utilizes a variety of policy considerations. Among the self-incrimination policy considerations listed in *Murphy*, one policy consideration in particular targeted governmental interrogation: “[A] fear that self-incriminating statements will be elicited by inhumane treatment and abuses.” While the *Murphy* Court acknowledged interrogation as a distinct policy among others underlying the self-incrimination clause, the Court did not explain the policy’s origin or how the Court originally dealt with cases involving governmental interrogation.

The Supreme Court’s initial Fifth Amendment decisions and interpretations did not materialize right away. More than one hundred years had passed since the Fifth Amendment was first included in the Constitution before the Supreme Court started focusing on cases involving the self-incrimination clause. For instance, in *Bram v. United States*, the Court decided its first self-incrimination clause case regarding governmental interrogation. In *Bram*, a fellow sailor accused the defendant of murdering another member of the ship’s crew, and the police arrested the defendant when the ship docked. While in custody, a police detective secluded the defendant in a private office, stripped the defendant of his clothes, and accused him repeatedly of murdering his fellow crew member. In response to the accusations, the defendant made statements denying any guilt and those statements were then admitted against the defendant as evidence of a confession.

16 *Id.* at 56 n.5.
17 *Id.* at 55.
18 See *id*.
20 168 U.S. 532 (1897).
21 *Id.* at 565. See also Bloch, *supra* note 19, at 1612.
22 *Bram*, 168 U.S. at 536–37.
23 *Id.* at 539.
24 *Id.* at 539–41.
The main issue the Bram Court considered was whether the trial court erroneously admitted the defendant’s statements as a murder confession.\(^{25}\) Even though the Court in Bram dealt with a confession, the Court grounded its holding in the Fifth Amendment’s self-incrimination clause.\(^{26}\) Specifically, the Court noted that “wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’”\(^{27}\) According to the rule of law established by the Court, a confession is “compelled” from a suspect and cannot be admitted against the suspect where the government has exerted “any degree of influence” during the suspect’s interrogation.\(^{28}\) Such a low threshold, where “any” influence is sufficient enough to find a “compelled” statement, colored the Court’s historically mindful perspective on the Fifth Amendment as a tool against unjust methods of interrogation.\(^{29}\) Specifically, the policy behind the Fifth Amendment’s self-incrimination clause is rooted in the “principles of humanity and civil liberty” originating from “protests against the inquisitorial and manifestly unjust methods of interrogating accused persons” which occurred in England over 100 years prior to America’s founding.\(^{30}\) By extending the historically rooted Fifth Amendment policy to the policy underlying the Bram threshold rule, the Court noted that “any degree of influence” exerted is sufficient to find compulsion because “the law cannot measure the force of the influence used, or decide . . . its effect upon the mind of the [suspect]” during an interrogation.\(^{31}\) Inevitably, the Court in Bram held that given the influential circumstances surrounding the defendant’s interrogation, the defendant’s statements were compelled and erroneously admitted against him.\(^{32}\)

\(^{25}\) Id. at 541.

\(^{26}\) Id. at 542.

\(^{27}\) Id. (emphasis added).

\(^{28}\) Id. at 543 (emphasis added).

\(^{29}\) Id. at 543–45.

\(^{30}\) Id. at 544. The Court elaborated upon the influential importance of England’s abusive history to fundamental American jurisprudence ideals by remarking about how “deeply . . . the ancient system impressed themselves upon the minds of the American colonists . . . that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.” Id. at 544–45.

\(^{31}\) Id. at 543 (citations omitted).

\(^{32}\) Id. at 565.
Even though *Bram* was the first Supreme Court case dealing with compelled confessions and the self-incrimination clause in an interrogation setting, the Court anticipated another issue present in interrogation settings that may have found a workable solution within *Bram’s* policy. Before announcing its holding, the *Bram* Court made certain to address its views on the use of silence as a substantive inference of guilt using the *Bram* policy as an operative backdrop. Even though many state supreme courts at that time allowed a suspect’s silence to be used as an inference of guilt, the Court notes in dicta that it does not necessarily approve the use of silence in such a way. The Court makes sure to point out an exception to the states who have allowed such an inference where “the accused was . . . involuntarily impelled to make a statement, when but for the improper influences he would have remained silent.” Using the facts and policies in *Bram* to illustrate its point, the Court stated that:

> [I]f learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something when . . . otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that, if he did reply, he would be benefited thereby.

Consistent with *Bram’s* paradigm that “any degree of influence” is compelling because the law cannot measure the effect of force upon the suspect’s mind, the Court argues that silence cannot be used against a suspect that would have remained silent but for the fear that such silence

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33 See supra text accompanying note 21.
34 See *Bram*, 168 U.S. at 563.
35 Id.
36 Id. at 559. See also 2 PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 588–88 (2nd ed., 1897).
37 See *Bram*, 168 U.S. at 563 (“[I]t must not be considered that by referring to these [state] authorities, we approve them . . . .”).
38 Id. at 549.
39 Id. at 563 (emphasis added).
40 Id. at 543.
would be held against him or her.\footnote{Id. at 562–63.} In other words, any police inquiry is compelling to a suspect when that suspect knows that the government will use his or her silence as a substantive inference of guilt.\footnote{Id.} Despite \textit{Bram}'s dicta being consistent with \textit{Bram}'s holding and policy, the Supreme Court has ignored \textit{Bram}'s reasoning on the government's compelling and abusive use of silence in subsequent Fifth Amendment cases.\footnote{See infra Part II.B.}

\textbf{B. Notable Supreme Court Cases Regarding the Fifth Amendment and the Use of Silence}

\textit{1. Miranda v. Arizona}

The next time the Supreme Court dealt significantly with governmental interrogation and the Fifth Amendment self-incrimination clause was in the 1966 landmark case \textit{Miranda v. Arizona}.\footnote{384 U.S. 436 (1966).} In \textit{Miranda}, the Court granted certiorari for four separate cases, each dealing with the government securing a confession from a defendant while he or she was in custody.\footnote{Id. at 456–57.} The \textit{Miranda} court recognized the inherently compelling pressures present during a suspect’s interrogation and concluded that without proper Fifth Amendment safeguards, a confession secured while a suspect is in custody cannot be used against him or her.\footnote{Id. at 467 (“In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.””).} The Court in \textit{Miranda} did not, however, overrule \textit{Bram}'s compelled threshold rule; instead, the Court merely added a layer of procedural rules on top of \textit{Bram} to further safeguard the Fifth Amendment privilege against self-incrimination so that confessions may be properly secured during custodial interrogations without compelling the suspect.\footnote{Id. at 461–63 (noting that the Court has “adhered to [Bram’s] reasoning” but that “judicial precedent [also] clearly establishes its application to incommunicado interrogation”).}

One of the procedural safeguards announced in \textit{Miranda} was the “right to remain silent.”\footnote{Id. at 467–68.} The Court announced that “[a]t the outset, if a person in custody is to be subjected to interrogation, he must first be informed in
Informing a suspect of his right to remain silent must also be met with an “explanation that anything said can and will be used against the individual in court” to make the defendant aware of the right and “the consequences of forgoing it.”50 After a suspect has been made aware of the right to remain silent, he or she may elect to waive the right and “agree to answer questions or make a statement.”51 However, if a suspect indicates that he or she “wishes to remain silent, the interrogation must cease.”52

The Miranda Court reversed three of the cases, holding that none of the suspects were informed of their rights prior to custodial interrogation and as a result, any confessions secured while a suspect is in custody could not be used against him or her.53 For the same reasons, the Miranda Court affirmed the fourth case, explaining that the state’s highest court in that case already ruled that the confession could not be used against the defendant because the police did not inform the defendant of his right to remain silent prior to in-custody questioning.54

2. Griffin v. California

One year prior to Miranda, the Court dealt with the use of silence as a substantive inference of guilt in Griffin v. California.55 Unlike the cases in Miranda dealing with government interrogation, the Griffin Court granted certiorari to answer whether the prosecution and trial court’s comment on a defendant’s choice not to testify at his or her own trial violated the Fifth Amendment’s self-incrimination clause.56

In Griffin, the defendant was convicted of first-degree murder and chose not to testify at his murder trial.57 At trial, the state court instructed the jury that if the defendant “does not testify . . . the jury may take that failure into consideration as tending to indicate the truth of such evidence”

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49 Id. The Court noted that “[m]ore important[ly], such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere” because it is not only the “the subnormal or woefully ignorant who succumb to an interrogator’s imprecations.” Id. at 468.
50 Id. at 469.
51 Id. at 479.
52 Id. at 474.
53 Id. at 499.
54 Id. at 498.
56 Id. at 611.
57 Id. at 609.
and any reasonable negative inferences that follow. The prosecution also commented on the defendant’s choice not to testify and the death penalty was later imposed on the defendant. The Supreme Court in *Griffin* reversed the judgment of the state trial court, explaining that such a comment on a defendant’s right not to testify was “a penalty imposed by courts” for a defendant’s exercise of his Fifth Amendment right against self-incrimination and thereby “cut[] down on the privilege by making its assertion costly.” The Court went on to explain that “[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”

3. *Doyle v. Ohio and Wainwright v. Greenfield*

In *Doyle v. Ohio*, the Court granted certiorari to determine whether, after receiving Miranda rights, a defendant’s subsequent silence can be used for impeachment purposes when the defendant testifies at his or her own trial. In *Doyle*, two defendants were arrested for marijuana possession and read their Miranda rights. Both defendants remained silent post-arrest, post-Miranda. In both of their respective trials, the defendants took the stand and explained that they were framed in the events leading up to their arrest. In an effort to impeach and weaken each defendant’s explanation of the story, the prosecutor asked the defendants at each of their trials why they had not explained their “frameup story” to the arresting officer at the time of their arrests. After being convicted, both defendants appealed, arguing “that the trial court erred in allowing the prosecution to use the defendant’s “post-arrest,” post-Miranda “silence” to impeach their testimony at trial.

The Supreme Court agreed with the defendants and reversed their convictions, reasoning that the *Miranda* decision controlled the holding in

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58 *Id.* at 610.
59 *Id.* at 610–11.
60 *Id.* at 614.
61 *Id.*
63 *Id.* at 611.
64 *Id.* at 612–13.
65 *Id.*
66 *Id.* at 613–14.
67 *Id.*
68 *Id.* at 615.
The Court reasoned that, after an arrestee is notified of the right to remain silent, the use of an arrestee’s subsequent silence for impeachment purposes “would be fundamentally unfair and a deprivation of due process” because an arrestee’s silence post-arrest, post-Miranda could be “nothing more than the . . . exercise of . . . Miranda rights.” The Court highlighted similar reasoning used in a previously decided case with similar facts, noting that when a person is told “that he may remain silent, that anything he says may be used against him . . . it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest.”

A decade after the Doyle decision, the Court extended Doyle’s reasoning in Wainwright v. Greenfield to preclude a prosecutor from using a suspect’s post-arrest, post-Miranda silence as a substantive inference of guilt as well.

4. Jenkins v. Anderson

After the Doyle court prohibited the use of post-arrest, post-Miranda silence for impeachment purposes, subsequent cases on the use of silence became more problematic when courts began distinguishing between pre-arrest silence, post-arrest silence, and whether a suspect had received Miranda warnings. The Supreme Court took note of these cases and, in

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69 Id. at 617, 620.

70 Id. at 618, 617. The Court highlighted similar reasoning used in a previously decided case with similar facts, noting that when a person is told “that he may remain silent, that anything he says may be used against him . . . it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest.” Id. at 619 (quoting United States v. Hale, 422 U.S. 171, 182–83 (1975) (White, J., concurring)). Although both have a similar holding, in Hale the Court used its supervisory powers over the federal courts whereas in Doyle the cases came from a state court. Id. at 617–18 n.8.

71 Id. at 617. The Court also noted that post-arrest, post-Miranda silence “may be inherently ambiguous even apart from the effect of Miranda warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation.” Id. at 617–18 n.8.


73 Id. at 295.

74 See Jenkins v. Anderson, 447 U.S. 231, 240–41 (1980) (holding that the use of pre-arrest, pre-Miranda silence for impeachment purposes is constitutional); Fletcher v. Weir, 455 U.S. 603, 604–07 (1982) (using almost the same exact reasoning in Jenkins, the court held that the use of post-arrest, pre-Miranda silence for impeachment purposes is constitutional); Salinas v. Texas, 133 S. Ct. 2174, 2184–85 (2013) (holding in a plurality (continued)
Jenkins v. Anderson, 75 granted certiorari to decide whether a defendant’s pre-arrest, pre-Miranda silence could be used for impeachment purposes. 76

In Jenkins, the defendant killed an individual and waited two weeks before turning himself into the authorities, claiming that he killed in self-defense. 77 During cross-examination of the defendant at trial, the prosecutor attempted to impeach the defendant’s credibility by highlighting that the defendant waited two weeks before surrendering to authorities, implying that the defendant would have spoken out earlier if he had actually killed in self-defense. 78 After being convicted of manslaughter, the defendant appealed, claiming that the prosecutor’s comment on his pre-arrest silence violated his constitutional rights. 79

The Supreme Court in Jenkins affirmed the defendant’s conviction, holding that the use of pre-arrest silence for impeachment purposes does not violate the constitution. 80 In reaching its conclusion, the Court posited that even though it is concerning that a defendant might not stay silent for fear that such silence could be used for impeachment purposes, “the Constitution does not forbid ‘every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.’” 81 The Court went on to establish a two-pronged balancing test for determining when the exercise of a constitutional right has been impermissibly burdened by government conduct. 82

The first prong of the impermissible burden test considers the “legitimacy of the challenged governmental practice.” 83 In Jenkins, the Court reasoned that once a defendant decides to testify, the issue of truth becomes much more relevant and the use of impeachment facilitates the “reliability of the criminal process” by furthering the “truth-finding function” of the court. 84

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75 Jenkins, 447 U.S. at 232.
76 Id.
77 Id.
78 Id. at 233.
79 Id. at 234.
80 Id. at 240-41.
81 Id. at 236 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)).
82 Id. at 238.
83 Id.
84 Id.
The second prong of the impermissible burden test is a threshold question that considers whether the challenged government practice “impairs to an appreciable extent any of the policies behind the rights involved.”\footnote{Id. at 236 (internal quotation marks omitted).} In \textit{Jenkins}, the Court noted that using silence to impeach a defendant’s credibility did not impermissibly burden the exercise of his Fifth Amendment rights because a criminal defendant does not have a right to commit perjury when voluntarily taking the stand to testify.\footnote{Id. at 237–38 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)) (citations omitted) (“Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately. . . .”).} The Court also noted an important distinction between where the government induces the defendant to remain silent in \textit{Doyle} and the absence of any government-induced action in \textit{Jenkins}.\footnote{Id. at 240 (“In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given \textit{Miranda} warnings. Consequently, the fundamental unfairness present in \textit{Doyle} is not present in this case.”).}

5. \textit{Berghuis v. Thompkins}

In \textit{Berghuis v. Thompkins},\footnote{130 S. Ct. 2250 (2010).} the Court granted certiorari to determine whether, after receiving Miranda rights and remaining silent for hours, a defendant’s subsequent statement can be used as a substantive inference of guilt when that defendant did not sufficiently invoke the right to remain silent.\footnote{Id. at 2258–59.}

The defendant in \textit{Berghuis} was arrested for murder, read his Miranda rights, and interrogated for three hours.\footnote{Id. at 2256.} During his interrogation, the defendant did not invoke his right to remain silent but remained largely silent during most of the interrogation.\footnote{Id.} Near the end of the three hours, the interrogator asked the defendant, “Do you pray to God to forgive you for shooting that boy down?”\footnote{Id. at 2257.} The defendant answered affirmatively, and the interrogation ended shortly after.\footnote{Id.} After being charged with multiple
offenses, the defendant moved to suppress the statements made during his interrogation, claiming that he had invoked his right to remain silent and did not waive this right. The Supreme Court in Berghuis upheld the defendant’s conviction, holding that the defendant did not invoke his right to remain silent and waived this right.

First, the Court explained that an invocation of the right to remain silent must be “unambiguous” and that a defendant’s silence is not sufficient to constitute a waiver. The Court reasoned that the defendant could have either expressly invoked his right or could have just remained silent, but the defendant did not expressly invoke his right and eventually broke his silence when he spoke to answer a question.

Second, the Court noted that while the government has a heavy burden proving a defendant has waived his or her Miranda rights, a waiver of rights need not be express and can be implied through words or conduct. The defendant in Berghuis never expressly waived his rights and even explicitly stated that he refused to sign a waiver form. The Court reasoned, however, that the defendant waived his rights because he made an uncoerced statement after understanding both his right to remain silent and the ensuing consequences if he chose to speak.

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94 Id.
95 Id. at 2264.
96 Id. at 2260.
97 Id.
98 Id. (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)) (internal quotation marks omitted) (“[W]aiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”).
99 Id. at 2261 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)) (“[T]he defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.”).
100 Id. (“Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”).
101 Id. at 2262–63 (emphasizing that both the defendant and the interrogator read aloud the Miranda rights right before interrogation).
C. Previous Circuit Split on the Use of a Defendant’s Pre-Arrest, Pre-Miranda Silence as a Substantive Inference of Guilt

Before the Supreme Court decided Salinas v. Texas, the circuit courts split on the issue of whether pre-arrest, pre-Miranda silence could be used as a substantive inference of guilt when the defendant does not take the stand at his or her own trial. Almost every circuit court that heard the issue travelled one of two paths in reaching their conclusion: extending the holding of either Jenkins or Griffin. All of the circuit courts that held the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt to be constitutional—except one—extended Jenkins to reach their result. On the contrary, all of the circuit courts that held the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt to be unconstitutional—except one—extended Griffin to reach their result.

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102 133 S. Ct. 2174 (2013) (plurality opinion).
103 See infra Parts II.C.1–II.C.2.
104 See infra Parts II.C.1–II.C.2.
105 The Fifth Circuit Court did not rely on any case law, but instead held that a defendant’s conduct prior to custodial interrogation or Miranda warnings did not implicate the Fifth Amendment. United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996).
106 United States v. Oplinger, 150 F.3d 1061, 1066–67 (9th Cir. 1998) (agreeing with Justice Steven’s concurrence in Jenkins); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (citing Jenkins, the 11th Circuit noted that “[t]he government may comment on a defendant’s silence if it occurred prior to the time that he is arrested and given his Miranda warnings”).
107 The 6th Circuit is the only court that used Jenkins to hold pre-arrest, pre-Miranda silence inadmissible. Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) (“[T]he privilege against self-incrimination applies to a prearrest situation, an analysis such as the one employed by the Court in Jenkins leads us to the conclusion that the use of prearrest silence as substantive evidence of guilt is an impermissible burden upon the exercise of that privilege.”).
108 United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (“The general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised.”); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (“Griffin remains unimpaired and applies equally to a defendant’s silence before trial, and indeed, even before arrest.”); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (noting that the “circuit has been vigilant in enforcing this rule” when referencing Griffin).
1. Circuit Courts Finding the Use of Pre-Arrest, Pre-Miranda Silence as a Substantive Inference of Guilt Constitutional

The Ninth, Eleventh, and Fifth Circuit Courts found that the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt is constitutional. The Ninth and Eleventh Circuit Courts both reached their conclusion by extending Jenkins, reasoning that the use of pre-arrest, pre-Miranda silence for impeachment purposes is similar enough to the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt.

For instance, in United States v. Rivera, three suspects were arrested shortly after their flight when airport investigators found cocaine in their suitcases. After their conviction, one of the defendants argued that his due process rights were violated when the prosecutor commented that he had a “deadpan reaction” upon the investigator finding cocaine in his suitcase. The Eleventh Circuit extended the use of silence for impeachment posited in Jenkins, claiming that “government may comment on a defendant’s silence if it occurred prior to the time that he is arrested and given his Miranda warnings” even when the defendant has not taken the stand in his or her own defense. The Ninth Circuit also extended Jenkins in a similar way.

Likewise, in United States v. Zanabria, the Fifth Circuit Court used reasoning parallel to the Eleventh and Ninth Circuit Courts but did not explicitly refer to Jenkins in its holding. In Zanabria, the defendant was arrested for possession and unlawful importation of cocaine with intent to

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109 See cases cited supra, notes 105–06.
110 See infra notes 112–15.
111 944 F.2d 1563 (11th Cir. 1991).
112 Id. at 1565–66.
113 Id. at 1566–67 (internal quotation marks omitted).
114 United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).
115 United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (held that use of this pre-arrest, pre-Miranda silence was constitutional by agreeing with Justice Steven’s concurrence in Jenkins that the “privilege against compulsory self-incrimination is irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak”).
116 74 F.3d 590 (5th Cir. 1996).
117 See id. at 593 (“The fifth amendment protects against compelled self-incrimination but does not . . . preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference.”).
The defendant, through his wife’s testimony, claimed duress as a defense to the charges, explaining that he was forced to engage in the illegal activity to pay off an unidentified third-party in response to threats toward his young daughter. After conviction, the defendant claimed that the government violated his Fifth Amendment right against self-incrimination when the prosecutor, in an attempt to disprove the duress defense, commented that the defendant had never mentioned any of the threats prior to his arrest. The Fifth Circuit Court affirmed the conviction, however, stating that the Fifth Amendment did not protect silence that was not compelled by the government.

2. Circuit Courts Finding the Use of Pre-Arrest, Pre-Miranda Silence as a Substantive Inference of Guilt Unconstitutional

The First, Sixth, Seventh, and Tenth Circuit Courts found that the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt was unconstitutional. The First, Seventh, and Tenth Circuit Courts reached their conclusions by extending Griffin, reasoning that precluding the government from making an inference of guilt when the defendant does not take the stand in Griffin is similar enough to precluding the government from also making an inference of guilt about a defendant’s silence pre-arrest, pre-Miranda.

For instance, in United States ex rel. Savory v. Lane, the defendant stabbed two people and was asked prior to arrest to submit to voluntary police questioning to determine what he knew about the murders. The defendant declined to be questioned, declaring, “I don’t want to talk about it. I won’t make any statements.” After conviction, the defendant argued that the trial court erred in allowing the prosecutor to use the defendant’s refusal to talk to police pre-arrest, pre-Miranda as an inference of guilt. The Seventh Circuit Court agreed that the trial court had erred, reasoning that “[t]he right to remain silent, unlike the right to counsel,
attaches before the institution of formal adversary proceedings” and making an inference about such silence is unconstitutional—similar to *Griffin*. The First and Tenth Circuit courts also extended *Griffin* in a similar way.

Unlike the First, Seventh, and Tenth Circuit Courts that extended *Griffin*, the Sixth Circuit Court in *Combs v. Coyle*, extended *Jenkins* to reach the conclusion that the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt is unconstitutional. In *Combs*, an off-duty officer shot the defendant after witnessing the defendant shoot and kill two people in a parking lot. Before the defendant was placed in an ambulance, an arriving on-duty officer asked him about the shootings and the defendant responded only by telling the officer to talk to his lawyer.

After being convicted on two counts of aggravated murder, the defendant appealed, claiming ineffective assistance of counsel at trial. Specifically, the defendant argued that his counsel failed to object to both the court’s jury instruction and prosecutor’s comment about the use of his statement and subsequent silence as a substantive inference of guilt. The Court agreed with the defendant, reasoning that the Fifth Amendment right against self-incrimination applies to pre-arrest scenarios and the analysis in *Jenkins* led the Court to its ultimate conclusion. Using the *Jenkins* impermissible burden test, the Sixth Circuit Court noted that the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt...

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128 Id. at 1017.
129 Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding that the prosecutor’s comment upon pre-arrest, pre-Miranda silence was unconstitutional because the defendant sufficiently relied on the Fifth Amendment from his “first ... interrogation through trial”).
130 United States v. Burson, 952 F.2d 1196, 1200–01 (10th Cir. 1991) (holding that the defendant’s apparent lack of cooperation answering questions was sufficient invocation of his privilege against self-incrimination).
131 205 F.3d 269 (6th Cir. 2000).
132 Id. at 285.
133 Id. at 273.
134 Id. at 279 (“Although Combs’s statement referred not to silence but to his right to an attorney, the admissibility of the statement is properly analyzed as a comment on prearrest silence... Combs’s statement is best understood as communicating a desire to remain silent outside the presence of an attorney.”).
135 Id. at 278.
136 Id. at 279.
137 Id. at 285.
would impair the policies behind the Fifth Amendment because the defendant would be under significant pressure to waive his right against self-incrimination in order to explain the silence. Moreover, the Sixth Circuit Court also noted that the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt was not a legitimate governmental practice because the probative value of silence was minimal and “may even subvert the truthfinding process.”

III. SALINAS V. TEXAS

In December 1992, two brothers were shot and killed in their own home, and six shotgun shell casings were found at the crime scene. The subsequent police investigation led them to an individual, Genovevo Salinas, who agreed to both hand over his shotgun for ballistics testing and voluntarily submit to questioning at the police station. At the station, Salinas was not in custody, not read his Miranda rights, and began answering questions. During questioning, the police asked Salinas whether his shotgun would match the shells found at the victims’ home. Salinas did not answer the question but instead he “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up.” Salinas then continued answering other questions, the interview eventually concluded, and Salinas was allowed to leave because the police lacked sufficient evidence to charge him with the murders.

A few days after his interview, the police finally had sufficient evidence to charge Salinas with the murders but were unable to find him until 2007. Salinas did not testify at his trial, but the prosecutors used his silence and subsequent reaction to the 1992 interview shotgun question

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138 Id. (noting the difference in policies between the use of pre-arrest, pre-Miranda silence for impeachment purposes and the use of pre-arrest, pre-Miranda silence as a substantive inference of guilt).

139 Id. The Court noted that the probability of perjury increases when the defendant is forced to explain himself in light of knowing his silence may be used as an inference of guilt. Id.


141 Id.

142 Id.

143 Id.

144 Id. (internal quotations omitted).

145 Id.

146 Id.
as a substantive inference of guilt.\textsuperscript{147} After his conviction, Salinas appealed twice, in two different state appellate courts, arguing that the government’s use of his pre-arrest, pre-Miranda silence violated the Fifth Amendment.\textsuperscript{148} Both state appellate courts affirmed Salinas’s conviction on the grounds that “pre-arrest, pre-Miranda silence was not “compelled” within the meaning of the Fifth Amendment.”\textsuperscript{149} The United States Supreme Court granted certiorari to resolve the lower court split by determining “whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.”\textsuperscript{150}

\textbf{A. Justice Alito’s Plurality Opinion and the Impermisible Burden}

Justice Alito, joined by Justice Roberts and Justice Kennedy, never answered the question that the Court granted certiorari over because, according to Alito, Salinas never sufficiently invoked his Fifth Amendment privilege against self-incrimination by remaining silent.\textsuperscript{151} Alito explained that individuals who wish to invoke the Fifth Amendment privilege against self-incrimination, notwithstanding two exceptions that Salinas did not qualify for,\textsuperscript{152} “must claim it’ at the time [they] rel[y] on it.”\textsuperscript{153} Alito failed to realize, however, that establishing silence as an insufficient method of invoking the Fifth Amendment self-incrimination

\begin{itemize}
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} at 2178–79.
  \item \textsuperscript{149} \textit{Id.} at 2178.
  \item \textsuperscript{150} \textit{Id.} at 2179.
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.} at 2178–80. The first exception to the requirement of invoking the Fifth Amendment self-incrimination privilege is where “a criminal defendant need not take the stand to assert the privilege at his own trial.” \textit{Id.} (citing Griffin v. California, 380 U.S. 609, 613–15 (1965)). Salinas did not qualify for this exception because he was being interviewed at a police station when the privilege could have been invoked. \textit{Id.} The second exception to the requirement of invoking the Fifth Amendment self-incrimination privilege is where “government coercion makes [the] forfeiture of the privilege involuntary” similar to the “inherently compelling pressures” of being in placed in police custodial interrogation. \textit{Id.} at 2180 (citing Miranda v. Arizona, 384 U.S. 436, 467–68 (1966)). Salinas was not under “inherent compelling pressures” because he submitted to police questioning voluntarily. \textit{Id.}
  \item \textsuperscript{153} \textit{Id.} at 2179 (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).
\end{itemize}
privilege places an impermissible burden on the policies underlying the Fifth Amendment and is therefore unconstitutional. 154

1. The Impermissible Burden Test

As mentioned above, 155 the Jenkins impermissible burden test determines the constitutionality of a government practice by balancing the legitimacy of the practice against whether the practice “impairs to an appreciable extent any of the policies behind” the Fifth Amendment self-incrimination privilege. 156 Requiring a suspect to expressly invoke the Fifth Amendment in a pre-arrest, pre-Miranda setting does possess some legitimacy. Invocation of the Fifth Amendment self-incrimination privilege provides important notice so that the government may argue why the testimony is not self-incriminating or possibly grant immunity to self-incriminating testimony. 157 Alito remarked, however, that establishing silence as a sufficient method of Fifth Amendment invocation “would needlessly burden the Government’s interests in obtaining testimony and prosecuting criminal activity.” 158 Alito did not elaborate upon this conclusion beyond illustrating past case scenarios requiring Fifth Amendment invocation that are not comparable to the facts in Salinas. 159

The second prong of the impermissible burden test weighs the burden of the practice against its legitimacy to determine whether such practice

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154 See supra Part II.B.4.
155 See supra Part II.B.4.
See also supra Part II.B.4.
157 Salinas, 133 S. Ct. at 2179.
158 Id. at 2181.
159 Id. Breyer’s dissenting opinion correctly points out that Alito’s opinion, in an attempt to show that precedent supports silence as an insufficient method of Fifth Amendment invocation, elaborates upon cases that are unrelated to the facts in Salinas. Id. at 2186–88. Alito first mentioned Roberts v. United States, where the Court dealt with a defendant who refused to cooperate with police investigators by not giving testimony that would incriminate others and received a harsher sentence as a result of his lack of cooperation. 445 U.S. 552, 554–56, 560 (1980). Roberts, however, dealt with a sentencing hearing and not a criminal trial. Id. at 560. Furthermore, the Salinas dissent points out that the Fifth Amendment self-incrimination privilege only protects an individual from incriminating himself and does not protect others from incrimination. Salinas, 133 S. Ct. at 2187. Alito also mentioned Minnesota v. Murphy, where the Court did not deal with silence at all, but instead dealt with a defendant who answered questions and later attempted to invoke his Fifth Amendment self-incrimination privilege. 465 U.S. 420, 422–25 (1984). See also Salinas, 133 S. Ct. at 2181, 2188.
impairs, to an appreciable extent, the policies underlying the Fifth Amendment. As explained previously, one of the Court’s several policies underlying the Fifth Amendment self-incrimination privilege specifically targets governmental interrogation as a result of the Court’s fear of a government that elicits self-incriminating statements from suspects through abusive methods. The Court consistently handles the fear of governmental abuse by upholding the precedent and policy behind Bram v. United States, the Court’s first Fifth Amendment case dealing with governmental interrogation. In Bram, the Court was cognizant of the potential for governmental abuse and determined that any method of interrogation where the government has exerted “any degree of influence” upon a suspect can be considered abusive because “the law cannot measure the force of the influence used, or decide . . . its effect upon the mind of the [suspect].” While Bram holds that testimony elicited under these conditions must always be excluded as a violation of the Fifth Amendment, the Bram Court, in dicta, stated that the use of silence against a defendant can be just as abusive when considering Bram’s policy behind governmental interrogation. Despite Bram’s dicta on the use of silence, the Supreme Court has never subsequently relied on Bram’s reasoning on silence, but upholds Bram otherwise.

Even if Justice Alito’s opinion provided a legitimate government practice, holding silence as an insufficient method to invoke the Fifth Amendment self-incrimination privilege places an impermissible burden on the policies underlying that privilege that far outweighs any legitimacy in the government practice. Alito’s holding creates three distinct, yet overlapping burdens: pre-arrest, pre-Miranda scenarios that only result in a

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160 Jenkins, 447 U.S. at 236.
161 See supra Part II.A.
164 Bram, 168 U.S. at 543 (emphasis added).
165 Id.
166 See supra text accompanying notes 34–43.
167 See supra Part II.B.
168 See supra text accompanying notes 157–158.
169 See supra Part III.A.1.
suspect’s incrimination; unclear Fifth Amendment invocation standards; and a lack of triggered procedural effects upon a suspect’s Fifth Amendment invocation.170

a. The Fifth Amendment Invocation Trilemma

Alito’s holding posits three scenarios for a suspect that is asked an incriminating question in a pre-arrest, pre-Miranda setting: the suspect stays silent,171 the suspect fails to invoke the Fifth Amendment privilege against self-incrimination through some other conduct,172 or the suspect sufficiently invokes the Fifth Amendment privilege against self-incrimination.173 There is a possibility that all three scenarios will incriminate the suspect.

Alito told us that the first two pre-arrest, pre-Miranda scenarios listed—a majority of the scenarios—can certainly be used against the suspect as an inference of guilt.174 The Court should be fearful about creating scenarios where incrimination is so easily accomplished because police are no longer the only source of governmental influence upon a suspect. In conjunction with Thomas’s opinion,175 Alito has effectively caused the Court to be a primary governmental antagonist merely through its Salinas decision.176 Compared to Bram, where the government was fearful of eliciting incriminating statements through any degree of influence,177 Alito’s ruling incriminates a suspect merely where a suspect finds themselves in the first or second pre-arrest, pre-Miranda scenarios.178 Theoretically, a pre-arrest, pre-Miranda suspect may walk away from

170 See infra Part III.A.1.a.
171 See Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013) (plurality opinion) (holding that a suspect does not invoke “by simply standing mute.”).
172 See id. (“Petitioner’s Fifth Amendment claim fails because he did expressly invoke the privilege.”).
173 See id.
174 See id. (“Petitioner’s Fifth Amendment claim fails because he did not expressly invoke the privilege” and invocation cannot be made “by simply standing mute.”).
175 See infra Part III.B.
176 See infra Part III.A.1.b–III.A.1.c.
177 Bram v. United States, 168 U.S. 532, 544 (1897) (noting that the Court is cautious of abusive means of eliciting statements through interrogation because it may be tempting “to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions”).
178 See Salinas, 133 S. Ct. at 2178. See also supra text accompanying notes 171–172.
questioning. However, if a suspect does not sufficiently invoke the Fifth Amendment, the mere act of walking away could be used against the suspect. The implications are even worse where a suspect knows about the propensity for pre-arrest, pre-Miranda incrimination, effectively deterring voluntary inquiry with the police. Even where a knowledgeable suspect is not deterred from inquiry, the Salinas court, through its creation of these two incriminating scenarios, has placed a considerable degree of influence on a suspect, thereby likely barring any statements made during the inquiry anyway.

The third scenario—where a suspect sufficiently invokes the Fifth Amendment—may seem like a proper way to avoid the influence and incriminating aspects of the first two scenarios. However, the third scenario burdens a suspect with uncertainty about self-incrimination because Alito never reached the question of whether sufficient Fifth Amendment invocation can be used against a suspect as a substantive inference of guilt in a pre-arrest, pre-Miranda setting. Therefore, there is nothing preventing lower courts from holding that the mere act of Fifth Amendment invocation is an inference of a suspect’s guilt. Ultimately, a government practice that can result only in a suspect’s incrimination is abusive and burdens the policies underlying the Fifth Amendment.

b. Unnecessarily Burdensome Fifth Amendment Invocation Standards

The Court’s Fifth Amendment invocation requirements add another layer of burden upon a suspect who is already burdened by the uncertainty of whether sufficient Fifth Amendment invocation could be incriminating in a pre-arrest, pre-Miranda setting. The Court maintains there is “no

179 See Salinas, 133 S. Ct. at 2177–78.
180 See id. (noting that Salinas was not in custody and did not receiving Miranda warnings when he voluntarily answered questions, but a suspect cannot invoke the Fifth Amendment by “simply standing mute”).
181 See Bram, 168 U.S. at 543 (“A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner.”).
182 Salinas, 133 S. Ct. at 2179.
183 See United States v. Okatan, 728 F.3d 111, 119 (2d Cir. 2013). In Okatan, a case decided after Salinas, the Second Circuit Court had to “address the question the Supreme Court left unanswered in Salinas” where the Okatan defendant had sufficiently invoked his Fifth Amendment self-incrimination privilege. Id.
184 See supra text accompanying notes 182–183.
ritualistic formula . . . to invoke the [Fifth Amendment] privilege”” except noting that silence is insufficient.\textsuperscript{185} Alito suggests that making silence a sufficient Fifth Amendment invocation method would create “line-drawing” issues when determining at what point silence becomes “expressive conduct” and movement becomes “surprise and anxiety,” both of which may be used against a suspect.\textsuperscript{186} Ironically, Alito’s holding also creates “line-drawing” problems because a defendant does not know what conduct might be sufficient to invoke the Fifth Amendment where silence is insufficient and there is no “ritualistic” Fifth Amendment invocation formula.\textsuperscript{187}

The “line-drawing” distinctions created by Alito’s ruling are unnecessarily problematic compared to Miranda right invocation standards used in similar interrogation settings. For instance, in a post-arrest, post-Miranda setting, the Court requires Miranda right invocations to be “unambiguous” because it “results in an objective inquiry that avoid[s] difficulties of proof” where silence is an insufficient Miranda right invocation.\textsuperscript{188} Unlike pre-arrest, pre-Miranda settings where silence is incriminating, the Court’s post-arrest, post-Miranda cases suggest that a post-arrest, post-Miranda suspect has more constitutional protection because using a suspect’s post-arrest, post-Miranda silence is

\textsuperscript{185} Salinas, 133 S. Ct. at 2178 (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

\textsuperscript{186} Id. at 2183. Alito stated that the pre-arrest, pre-Miranda invocation rule “has not proved difficult to apply” but does not provide any pre-arrest, pre-Miranda case support. Id. The only cases Alito cited in support of a workable pre-arrest, pre-Miranda standard are two post-arrest, post-Miranda cases: Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) and Davis v. United States, 512 U.S. 452 (1994). Id. Alito tried to explain that both Berghuis and Davis share “similar” invocation standards with pre-arrest, pre-Miranda standards. Id. The Fifth Amendment and Miranda invocation standards are not similar, however, because Berghuis and Davis have an “unambiguous” Miranda invocation standard, see id., while Fifth Amendment invocations in pre-arrest, pre-Miranda settings have “no ritualistic formula” for invocations. Id. at 2178.

\textsuperscript{187} See, e.g., Berghuis, 130 S. Ct. at 2260 (internal quotation marks omitted). An “unambiguous” post-arrest, post-Miranda invocation standard also “provide[s] guidance to officers” to correctly follow Miranda procedures, like cutting off questioning, upon a suspect’s invocation. Id. (internal quotation marks omitted). This procedural effect upon Miranda right invocation, however, helps suspects realize that they have sufficiently invoked their Miranda rights and highlights the need for similar a procedural effect where Fifth Amendment invocation is required in a pre-arrest, pre-Miranda setting. See infra Part III.A.1.c.
unconstitutional even where the suspect did not invoke his or her Miranda rights.\textsuperscript{189} The existence of this disturbing and unnecessary discrepancy within a suspect’s Fifth Amendment rights depends solely on whether the suspect is in a pre-arrest, pre-Miranda setting or in a post-arrest, post-Miranda setting.

c. No Triggered Procedural Effect Upon Fifth Amendment Invocation

Alito’s holding does not explain what procedural effect occurs upon sufficient Fifth Amendment invocation in a pre-arrest, pre-Miranda setting.\textsuperscript{190} The lack of a triggered procedural effect upon Fifth Amendment invocation compounds the burden already placed upon a suspect who is both uncertain how to sufficiently invoke the Fifth Amendment\textsuperscript{191} and unsure if sufficiently invoking the Fifth Amendment will be self-incriminating.\textsuperscript{192} Compared to a post-arrest, post-Miranda setting—where a suspect actually sees the procedural effect manifest upon invoking Miranda rights\textsuperscript{193}—Alito’s holding creates the possibility that a suspect who sufficiently invokes the Fifth Amendment in a pre-arrest, pre-Miranda setting could be completely unaware that he or she has sufficiently invoked the Fifth Amendment.\textsuperscript{194} The absence of a triggered procedural effect upon a suspect’s sufficient Fifth Amendment invocation may incentivize police to exploit the suspect’s unawareness. For example, without triggered procedural effects upon a suspect’s Fifth Amendment invocation, an interrogator could persist with questioning until a suspect incriminates himself or herself and the suspect would never know that he or she had sufficiently invoked in the first place. Furthermore, the police

\textsuperscript{189} Wainwright v. Greenfield, 474 U.S. 284, 295 (1986); Doyle v. Ohio, 426 U.S. 610, 617 (1976) (“Silence in the wake of these [Miranda] warnings may be nothing more than the arrestee’s exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.”). \textit{But cf. Berghuis}, 130 S. Ct. at 2269 (noting that a suspect is not required to invoke his or her Miranda rights where the suspect simply remains silent post-arrest, post-Miranda, but a suspect may waive the right to remain silent by not invoking his Miranda rights and subsequently making uncoerced statements in light of evidence that the suspect fully understood his or her own rights).

\textsuperscript{190} See Salinas, 133 S. Ct. at 2184 (2013) (plurality opinion).

\textsuperscript{191} See supra Part III.A.1.b.

\textsuperscript{192} See supra Part III.A.1.b.

\textsuperscript{193} See, e.g., Berghuis, 130 S. Ct. at 2260.

\textsuperscript{194} See Salinas, 133 S. Ct. at 2184.
may also be incentivized to delay an arrest or delay reading Miranda rights where the police know that a suspect has less constitutional protection to prevent incrimination in a pre-arrest, pre-Miranda scenario than a post-arrest, post-Miranda scenario. Courts are cognizant of similar scenarios where the absence of triggered procedural rules incentivizes police to exploit the suspect’s situation. Ultimately, Alito’s holding risks transforming the Fifth Amendment into a privilege merely in name rather than a privilege that provides an actual remedy.

B. Justice Thomas’s Concurring Opinion and the Impermissible Burden

Justice Thomas, joined by Justice Scalia, wrote a short concurring opinion agreeing with Justice Alito’s judgment. Thomas, however, wrote that even if a suspect invokes the Fifth Amendment privilege against self-incrimination, a prosecutor’s comments about “precustodial silence” would not compel a suspect to “give self-incriminating testimony.” The way Thomas worded his holding suggests that the use of silence is not compelling, testimonial, or possibly even self-incriminating, but Thomas did not elaborate upon this. Instead, Thomas argued that the Court should not extend Griffin v. California—where the Court held that the prosecution cannot use a defendant’s failure to testify as a substantive

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195 See supra Part III.A.1.b. Concerning the use of post-arrest, pre-Miranda silence, the Court has held that a defendant’s post-arrest, pre-Miranda silence can be used for impeachment purposes where the defendant testifies, Fletcher v. Weir, 455 U.S. 603, 607 (1982), but the Court has never dealt with the issue of whether post-arrest, pre-Miranda silence can be used as an inference of guilt where the defendant does not testify. Marty Skrapka, Silence Should Be Golden: A Case Against the Use of A Defendant’s Post-Arrest, Pre-Miranda Silence As Evidence of Guilt, 59 Okla. L. Rev. 357, 378–79 (2006). Therefore, officers may be incentivized to use this particular pre-arrest and post-arrest distinction to their advantage as well.

196 United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997) (noting that the absence of a triggered procedural rule upon custody “would create an incentive for arresting officers to delay interrogation in order to create an intervening ‘silence’ that could then be used against the defendant”); United States v. Nunez-Rios, 622 F.2d 1093, 1101 (2d Cir. 1980) (“In the absence of such a prophylactic rule, police might have an incentive to delay Miranda warnings in order to observe the defendant’s conduct.”). See also Marc Scott Hennes, Manipulating Miranda: United States v. Frazier and the Case-in-Chief Use of Post-Arrest, Pre-Miranda Silence, 92 Cornell L. Rev. 1013, 1015 (2007).

197 Salinas, 133 S. Ct. at 2184 (Thomas, J., concurring).

198 Id.

199 Id.

inference of guilt—to cover pre-arrest, pre-Miranda silence. Salinas most likely argued to extend Griffin’s holding because Griffin deals with substantive inferences of guilt when a defendant does not testify. Likewise, Salinas most likely did not argue to extend Jenkins because Jenkins deals with using silence for impeachment when a defendant does testify. Salinas should have also argued to extend Jenkins, however, because Griffin deals specifically with a defendant’s silence at trial, while Jenkins deals specifically with a suspect’s pre-arrest, pre-Miranda silence.

1. The Impermissible Burden Test

As mentioned above, the Jenkins impermissible burden test determines the constitutionality of a government practice by weighing the legitimacy of the government practice against whether the practice “impairs to an appreciable extent any of the policies behind [the Fifth Amendment self-incrimination privilege].” Thomas argued that the government’s practice of drawing adverse inferences from a defendant who refuses to explain incriminating circumstances does not compel a suspect “to be a witness against himself.” Thomas elaborated by quoting Justice Scalia’s dissent in Mitchell v. United States: “I imagine in most instances, a guilty defendant would choose to remain silent despite the adverse inference, on the theory that it would do him less

201 Id. at 615.
202 Salinas, 133. S. Ct. at 2184 (Thomas, J., concurring.).
203 Griffin, 380 U.S. at 614 (noting that using a defendant’s failure to testify as a substantive inference of guilt is a “penalty imposed by courts for exercising a constitutional privilege”).
204 Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (“[I]mpeachment follows the defendant’s own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial.”).
205 Griffin, 380 U.S. at 611 (“The case is here . . . to consider whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment . . . ”).
206 Jenkins, 447 U.S. at 238 (“We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant’s credibility.”).
207 See supra Part II.B.4.
208 Jenkins, 447 U.S. at 236 (internal quotation marks omitted). See also supra text accompanying notes 162–167.
209 Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (plurality opinion) (internal quotation marks omitted).
damage than his own cross-examined testimony.”211 Furthermore, Thomas argued that history comports with the government practice because “English and American courts strongly encouraged defendants to give unsworn statements and drew adverse inferences when they failed to do so.”212

Under Justice Thomas’s opinion, using a suspect’s pre-arrest, pre-Miranda silence as a substantive inference of guilt is outweighed by the appreciable burden the practice places upon the policies underlying the Fifth Amendment.213 As noted above,214 the incriminating pre-arrest, pre-Miranda scenarios burden the policies underlying the Fifth Amendment. In addition to the incriminating pre-arrest, pre-Miranda scenarios, allowing the use of pre-arrest, pre-Miranda silence to be admitted against a suspect further burdens the policies underlying the Fifth Amendment because of the similarity between admitting a coerced confession as evidence of guilt and admitting silence as evidence of guilt.215 For instance, allowing a coerced confession to be admitted against a suspect burdens the policies underlying the Fifth Amendment because of its highly prejudicial effect on a jury and lack of probative value.216 Furthermore, the highly prejudicial effect upon a jury tempts the government to incriminate the suspect through coercive practices when the government knows it will not be sanctioned.217 Similarly, pre-arrest, pre-Miranda silence is highly prejudicial,218 has little probative value,219 and will tempt the government to incriminate suspects because there are no consequences for using pre-arrest, pre-Miranda silence as a substantive inference of guilt.220

The Court has previously held that a suspect’s post-arrest, post-Miranda silence has a highly prejudicial effect upon a jury because of

211 Salinas, 133 S. Ct. at 2184 (quoting Mitchell, 526 U.S. at 331 (Scalia, J., concurring)) (internal quotation marks omitted).
212 Id.
213 See supra text accompanying notes 155–169.
214 See supra Part III.A.1.a.
216 See Bram v. United States, 168 U.S. 532, 541–42 (1897).
217 See id. (noting that the government’s temptation to incriminate a suspect through coercive methods when there are no sanctions is what “made the system so odious as to give rise to a demand for its total abolition”).
218 See infra notes 221–227 and accompanying text.
219 See infra notes 229–236 and accompanying text.
220 See supra text accompanying notes 163–164.
unwarranted negative inferences a jury may make about the suspect.\textsuperscript{221} As mentioned above,\textsuperscript{222} the \textit{Doyle} Court held that the probative value of post-arrest, post-Miranda silence is “insolubly ambiguous” because the suspect may simply be exercising his Miranda rights.\textsuperscript{223} Justice Alito, agreeing with Justice Thomas,\textsuperscript{224} quoted the \textit{Doyle} Court when he stated that pre-arrest, pre-Miranda silence is “insolubly ambiguous”\textsuperscript{225} However, unlike \textit{Doyle}, Alito did not resolve this ambiguity in favor of the suspect.\textsuperscript{226} Specifically, while a suspect could be relying on the Fifth Amendment by remaining silent, a suspect may also be trying to think of a lie by remaining silent.\textsuperscript{227} Both Thomas and Alito fail to realize, however, that the use of silence during \textit{any} interrogation, whether before or after arrest, has little to no probative value.\textsuperscript{228}

Many critics who study the probative value of silence have assessed the differences between “common sense assumptions” about suspects who are silent and “justified conclusions based on scientific psychology.”\textsuperscript{229} Courts uphold a common interpretation that silence is evidence of a suspect’s acquiescence to another’s accusations, but there are many other interpretations of silence that must be taken into account.\textsuperscript{230} First, suspects may remain silent in the face of accusations because they believe that asserting their innocence would be useless.\textsuperscript{231} This belief can arise out of an inherent distrust for law enforcement\textsuperscript{232} or by acknowledging that

\begin{footnotesize}
\textsuperscript{222} See supra Part II.B.3.
\textsuperscript{223} \textit{Doyle}, 426 U.S. at 617.
\textsuperscript{224} \textit{Salinas} v. Texas, 133 S. Ct. 2174, 2184 (2013) (plurality opinion) (internal quotation marks omitted) (“A defendant is not compelled . . . to be a witness against himself simply because a jury has been told that it may draw an adverse inference from his silence.”).
\textsuperscript{225} \textit{Id.} at 2176.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} See infra notes 229–236 and accompanying text.
\textsuperscript{230} \textit{Id.} at 39.
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.} at 40. (quoting Ronald Weitzer & Steven Tuch, \textit{Racially Biased Policing: Determinants of Citizen Perceptions}, 83 SOC. FORCES 1009, 1017 (2005)) (internal quotation marks omitted) (acknowledging that perceptions of police are divided along race lines through empirical data showing that “[t]hree times as many blacks as whites believe

\textit{(continued)}
interrogators often have a predetermined bias about a suspect’s guilt.\textsuperscript{233} Second, suspects may remain silent because they do not want to be tricked into confessing.\textsuperscript{234} Third, suspects may remain silent because they become angry or afraid in light of accusations.\textsuperscript{235} Finally, suspects may remain silent because they do not know how to answer the question.\textsuperscript{236} Despite Alito and Thomas’s narrow-minded interpretations of silence, silence actually has multiple interpretations, and as a result, silence retains low probative value regardless of when the silence occurred.

C. Justice Breyer’s Dissenting Opinion and the Impermissible Burden

Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, noted that the Court’s past Fifth Amendment cases separate into three categories: “circumstances” that did not require Fifth Amendment invocation,\textsuperscript{237} “circumstances” that required Fifth Amendment invocation that police prejudice is ‘very common’ throughout the U.S., and blacks are about six times as likely as whites to believe it is very common in their own city.’

\textsuperscript{233} Thompson, supra note 229, at 41 (citing Christian A. Meissner & Saul M. Kassin, YOU’RE GUILTY SO JUST CONFESS! COGNITIVE AND BEHAVIORAL CONFIRMATION BIASES IN THE INTERROGATION ROOM, IN INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, 85, 89 (2004)) (“Psychology professors Christian Meissner and Saul Kassin discovered evidence . . . that law enforcement investigators often presume the guilt of suspects prior to the commencement of an interview or interrogation. Investigators then use the interview or interrogation to confirm their suspicion of guilt.”).

\textsuperscript{234} Thompson, supra note 229.

\textsuperscript{235} Id. at 47 (quoting Gisli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 28 (2003)) (internal quotation marks omitted) (“[I]nvincibly angry . . . about being accused or suspected of a crime of which they are innocent . . . . Likewise, guilty suspects may feign anger . . . to convince others of their innocence.”) (source quoted altered from original). Furthermore, suspects may remain silent as a result of becoming nervous that they will be falsely assumed guilty. Id. at 48.

\textsuperscript{236} Id. at 49 (quoting Stefan H. Krieger, A TIME TO KEEP SILENT AND A TIME TO SPEAK: THE FUNCTIONS OF SILENCE IN THE LAWYERING PROCESS, 80 OR. L. REV. 199, 220–31 (2001)) (internal quotation marks omitted) (“When individuals are unsure of how to respond to ambiguous comments or conduct by others, they may remain silent to gauge the situation and determine whether or not to respond or terminate discourse.”).

\textsuperscript{237} Salinas v. Texas, 133 S. Ct. 2174, 2185 (2013) (Breyer, J., dissenting) (plurality opinion). Breyer cited Griffin v. California, which held that a defendant’s failure to testify cannot be used as a substantive inference of guilt. 380 U.S. 609, 615 (1965). Breyer also cited Miranda v. Arizona, noting that “it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation.” 384 U.S. 436, 468 n.37. (1966).
because of ambiguity regarding whether the Fifth Amendment was at issue, or “circumstances” that did not require Fifth Amendment invocation despite the ambiguity regarding whether the Fifth Amendment was at issue. Breyer noted that Salinas fell into the third category and found that the Fifth Amendment precluded the prosecution from using Salinas’s pre-arrest, pre-Miranda silence as a substantive inference of guilt because the “circumstances” surrounding Salinas’s silence created an inference that Salinas was relying on his Fifth Amendment privilege against self-incrimination. Specifically, the police told Salinas he was a suspect, the interrogation took place at the police station, no counsel was present, the interrogation was a criminal investigation, and the accusatory shotgun question was a switch in subject matter from previous questions being asked.

1. The Impermissible Burden Test

As mentioned above, the Jenkins impermissible burden test determines the constitutionality of a government practice by weighing the legitimacy of the government practice against whether the practice appreciably burdens the policies underlying the Fifth Amendment. Compared to Alito and Thomas’s opinions, Breyer’s dissenting opinion comes closest to solving the silence problem, but Breyer’s opinion still presents problems that appreciably burden the policies underlying the Fifth Amendment.

Breyer grouped the Court’s Fifth Amendment cases on “silence” into these “circumstances” in an attempt to illustrate some workable standard that future readers can hope to ascertain when there is a need for Fifth


240 Id. at 2189 (“All told, this third category of cases receives the same treatment as the first: Circumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment. So, too, in today’s case.”).

241 Id. at 2189.

242 See supra Part II.B.4.

243 See supra text accompanying notes 162–167.
Amendment invocation, but the Court’s past Fifth Amendment “circumstances” seem arbitrarily decided and inherently problematic. 244

The first circumstance—“whether one can fairly infer that the individual being questioned is invoking the Amendment’s protection”—offers no workable definition of what constitutes a “fairly infer[red]” Fifth Amendment invocation.245 This is analogous to Alito’s opinion where there is no ascertainable Fifth Amendment invocation standard.246 Alito’s rule-based approach, despite its problems, at least ruled out silence as a proper way to invoke the Fifth Amendment.247 Comparably, Breyer did not preclude anything as a sufficient Fifth Amendment invocation except noting where the Court’s Fifth Amendment silence cases either arbitrarily required Fifth Amendment invocation or did not require it.248

The second circumstance—whether it is important for the government to know a suspect is invoking the Fifth Amendment where invocation is unclear249—is also problematic. Breyer was a little more helpful here by offering two examples of “important” circumstances: where the government doubts the “risk of self-incrimination,” and where “immunity” may be granted.250 That said, Breyer did not give us a standard of “importance” beyond these two examples.251 Instead, Breyer noted that there is a third set that undermines the concept of categorizing the second set of circumstances because the third set of circumstances requires Fifth Amendment invocation but the requirement is excused for “good reason.”252 Furthermore, beyond remarking on the “inherent penalization” example, Breyer offered no standard for what constitutes “good reason for excusing the individual” from invoking the Fifth Amendment besides listing prior arbitrarily decided case law.253

244 Salinas, 133 S. Ct. at 2189 (Breyer, J., dissenting) (“Circumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment.”).
245 Id.
246 See supra Part III.A.1.b.
247 Salinas, 133 S. Ct. at 2184.
248 Id. at 2185–89 (Breyer, J., dissenting).
249 Id. at 2189.
250 Id. at 2190. Breyer held that the circumstances surrounding Salinas’s arrest were not important for the government to know whether Salinas invoked the Fifth Amendment because the government did not need to doubt the risk of self-incrimination and did not need to know whether immunity should be granted. Id.
251 See id. at 2190–91.
252 Id. at 2189.
253 Id. at 2189–90.
Despite its problems, Breyer’s opinion comes off as more honest and illustrative than Alito or Thomas’s opinions because Breyer expressed an awareness of his opinion’s potential limitations. Specifically, Breyer noted, “other cases may arise where facts and circumstances surrounding an individual’s silence present a closer question” and “will not always prove easy to administer.” While remaining cognizant of these problems, Breyer still maintains that his opinion is less problematic than the other opinions presented in Salinas.

IV. A PROPOSED SOLUTION TO SALINAS V. TEXAS’S FIFTH AMENDMENT SELF-INCRIMINATION BURDEN

As explained above, not one of the Salinas opinions adequately resolve the problem surrounding a suspect’s pre-arrest, pre-Miranda silence. Instead, all three Salinas opinions impermissibly burden the policies underlying the Fifth Amendment. A proposed solution to the problem does not have to be as intricate or needlessly complex as the Court makes Fifth Amendment cases out to be. As one critic points out, the “federal courts have carved out a ‘needlessly complex and compartmentalized’ system that employs pre-arrest, post-arrest and pre-Miranda, post-Miranda distinctions.” Rather than continue to make distinctions between whether a suspect remained silent before or after certain events, a bright-line rule would help dispel confusion in the case law, reduce litigation, and actually further the government’s interests when it applies.

A. The Bright-line Fifth Amendment Silence Rule

Subject to a minor exception, the Fifth Amendment privilege against self-incrimination should provide that the government cannot use a suspect’s silence as a substantive inference of guilt where the suspect remains silent during any criminal police inquiry, regardless of the circumstances involved. A police inquiry is triggered when a governmental figure asks an incriminating question directed at a suspect or

254 Id. at 2190.
255 Id.
256 Id. (noting that despite the problems with the “circumstances” approach, “the administrative problems accompanying the plurality’s approach are even worse”).
257 See supra Part III.
“any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Furthermore, a suspect is “silent” when, in the face of police inquiry, the suspect does not expressly speak. This definition of silence extends to any expressive conduct where the suspect is not expressly speaking. For instance, if a suspect chooses to walk away from an incriminating inquiry, the act of walking away cannot be used as evidence of guilt.

The one minor exception to the bright-line rule occurs if a suspect, either implicitly or explicitly, remarks about his or her own silence during trial. For instance, even where a defendant does not take the stand to testify on their own behalf, if defense counsel uses the defendant’s silence as part of an argument, this would “open the door” for the prosecution to then comment on the defendant’s silence.

This exception would also apply where a defendant takes the stand and has his or her silence used against them for impeachment purposes, like in Jenkins v. Anderson. If the suspect does not want to take the stand in his defense, the law should not use his silence against him as an inference of guilt. However, where the defendant takes the stand and voluntarily “cast[s] aside his cloak of silence,” the truth-finding function of the court is necessary because a suspect does not have the unfair advantage of a right.

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259 Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (determining when police questioning occurs by also defining its functional equivalent).

260 See Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010) (“If Thompkins wanted to remain silent, he could have said nothing in response to Helgert’s questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation.”).


263 Id. at 1277–78.

264 447 U.S. at 238. While the proposed solution still utilizes pre-arrest and post-arrest distinctions with respect to silence as an impeachment tool, resolving this distinction is beyond the scope of the proposed solution because the proposed solution provides a defendant with an inconsequential choice not to testify. By choosing not to testify, a defendant’s silence is thereby afforded absolute protection by the proposed solution unless defense counsel opens the door by using the defendant’s silence as part of an argument.
to commit perjury.\footnote{Id.} This exception does not leave the suspect in a position where self-incrimination would be impossible to escape because the suspect has a choice to not testify in his or her own defense.

**B. Miranda Rights and the Fifth Amendment Bright-line Silence Rule**

As mentioned above,\footnote{See supra Part II.B.1.} Miranda rights exist for the purpose of safeguarding the Fifth Amendment from inherently compelling interrogation pressures by providing procedural rights—like the right to remain silent—to arrestees.\footnote{Miranda v. Arizona, 384 U.S. 436, 467 (1966).} Comparably, by giving suspects the right to remain silent during any police inquiry without penalty, the bright-line rule has a very similar scope of protection to Miranda rights. At first glance, the scope of the bright-line rule’s protections may appear to exalt the Fifth Amendment’s status over Miranda rights. Despite the scope of protection, however, the bright-line rule is not in conflict with Miranda, and the bright-line rule’s scope of protection does not exalt over Miranda’s status as a necessary Fifth Amendment safeguard.

1. **Miranda Subsumes the Proposed Bright-Line Rule in a Post-Arrest, Post-Miranda Setting**

According to the proposed bright-line rule, the Fifth Amendment applies during any police interrogation,\footnote{See supra Part IV.A.} while an arrestee’s Miranda rights are triggered during police custodial interrogations.\footnote{Miranda, 384 U.S. at 444 (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”).} As a result, the proposed bright-line rule may appear to provide superior silence rights for suspects when compared to those who have been read their Miranda rights. For instance, while the bright-line rule provides a suspect with the right to remain silent during any police inquiry without invoking the Fifth Amendment, a suspect in a post-arrest, post-Miranda setting must “unambiguously” invoke his or her right to remain silent.\footnote{Berghuis v. Thompkins, 130 S. Ct. 2250, 2259–60 (2010).}

Even though the proposed bright-line rule applies during any police interrogation, Miranda’s function is still necessary to safeguard an arrestee’s Fifth Amendment right from being violated by the inherent pressures facing an arrestee in a post-arrest, post-Miranda setting. Unlike a
pre-arrest, pre-Miranda suspect that has the option of walking away from a police interrogation without penalty and inherently compelling pressures—restricted freedom, aggressive police presence, and susceptible surroundings—are uniquely antagonistic in post-arrest, post-Miranda settings and leave an arrestee without many options to prevent self-incrimination. Miranda rights, like the right to cut off questioning upon invocation of the right to remain silent, provide an arrestee with the necessary procedural options to combat the antagonistic pressures present in a post-arrest, post-Miranda setting. An arrestee that remains silent without invoking his or her Miranda right to remain silent does not simply forgo constitutional protection, however. The Court has ruled that a suspect can remain silent without invoking his or her Miranda rights, and the government is still prohibited from commenting on that silence. The scope of the Fifth Amendment bright-line rule’s protection would simply be subsumed when a suspect is in a post-arrest, post-Miranda setting because Miranda already precludes the government from commenting on an arrestee’s silence while simultaneously providing necessary procedural Fifth Amendment safeguards for arrestees.

2. Berghuis v. Thompkins and the Proposed Bright-Line Rule

The Fifth Amendment bright-line silence rule does not conflict with the most recent Supreme Court case on the Miranda right to remain silent. As mentioned above, the Berghuis Court held that, despite staying silent

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271 Miranda, 384 U.S. at 461 (“As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”).

272 Id. at 474.

273 Id. at 475.

274 Wainwright v. Greenfield, 474 U.S. 284, 295 (1986); Doyle v. Ohio, 426 U.S. 610, 618 (1976) (“While it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.”). See also Berghuis, 130 S. Ct. at 2263 (“If Thompkins wanted to remain silent, he could have said nothing in response to Helgert’s questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation.”); United States v. Hale, 422 U.S. 171, 180 (1975) (“Not only is evidence of silence at the time of arrest generally not very probative of a defendant’s credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant’s previous silence than is warranted.”).

275 See supra Part II.B.5.
for hours, an arrestee waives Miranda rights if the arrestee understands his or her rights and makes subsequent uncoerced statements that are not unambiguously indicative of invoking the right to remain silent.\textsuperscript{276} Also mentioned above,\textsuperscript{277} the bright-line rule’s scope of protection extends only so far as to preclude the government from commenting on an individual’s silence and does not protect an individual’s statements when he or she expressly chooses to speak. The reasoning in \textit{Berghuis} mirrors the proposed bright-line rule because the Court noted that if the arrestee had simply remained silent, he would not have waived his Miranda rights.\textsuperscript{278}

\textbf{C. The Fifth Amendment Bright-line Silence Rule and the Impermisible Burden Test}

The Fifth Amendment bright-line silence rule passes the \textit{Jenkins} impermissible burden test. The government has an interest in efficiently punishing the guilty,\textsuperscript{279} and the proposed bright-line rule would actually further the government’s interest in efficiency. While the government would always prefer that a suspect truthfully and voluntarily incriminate themselves during a police inquiry,\textsuperscript{280} for many reasons, the government should equally prefer that a suspect choose to remain silent during any police inquiry as well.

A suspect may be compelled to speak when he or she knows that remaining silent will be incriminating. This may lead to many unfavorable results for the government. For example, if a suspect is compelled to speak because silence is incriminating, that suspect may decide to lie instead of remaining silent. Government should prefer silence to lying because lying can lead to misinformation and fruitless investigations.\textsuperscript{281} Another unfavorable result occurs where, rather than remaining silent for fear of incrimination, a suspect responds to illegal coercion and moves to exclude the response at trial.\textsuperscript{282} The government should prefer silence to the possibility of illegal coercion because an excluded response inhibits the

\textsuperscript{276} \textit{Berghuis}, 130 S. Ct. at 2263.
\textsuperscript{277} See supra Part IV.A.
\textsuperscript{278} See \textit{Berghuis}, 130 S. Ct. at 2263 (“If Thompkins wanted to remain silent, he could have said nothing in response to Helgert’s questions, or he could have unambiguously invoked his \textit{Miranda} rights and ended the interrogation.”).
\textsuperscript{280} \textit{Id.} at 448.
\textsuperscript{281} Peter Westen & Stewart Mandell, \textit{To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the “Preferred Response,”} 19 AM. CRIM. L. REV. 521, 529 (1982).
\textsuperscript{282} \textit{Id.} at 531.
government’s ability to efficiently prosecute the accused. For instance, if a court finds even one illegally coerced statement that must be excluded, the government then has “the affirmative duty to prove that the evidence it proposes to use [at trial] is derived from a legitimate source wholly independent of the compelled testimony.” Moreover, the government cannot use any subsequent statements or “fruits” found in connection with an excluded statement.

The proposed bright-line rule provides little to no burden on the policies underlying Fifth Amendment because the defendant has a choice to not incriminate himself by simply remaining silent, thereby avoiding a burden on the defendant’s right or any problems of compulsion. As the Bram Court stated, “the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner.” Regarding the bright-line rule, the law does not have to measure any effect upon the mind because it leaves enough options for a suspect not to worry about the government using silence as evidence of guilt if a suspect has an explicit right to remain silent in the face of any police interrogation.

V. CONCLUSION

The use of pre-arrest, pre-Miranda silence as a substantive inference of guilt burdens the policies underlying the Fifth Amendment. As explained above, one of the Court’s several policies underlying the Fifth Amendment self-incrimination privilege specifically targets governmental interrogation through the Court’s fear of eliciting self-incriminating statements from suspects through abusive methods. The Court consistently handles its fear of governmental abuse by continuing to uphold the precedent and policy behind Bram v. United States, the Court’s first Fifth Amendment case dealing with governmental interrogation. In

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283 Id.
284 Id. (quoting Kastigar v. United States, 406 U.S. 441, 460 (1972)).
287 See supra Part.II.A.
289 See generally Bram, 168 U.S. at 543–45. The Court has upheld Bram’s holding and policy modernly even where Fifth Amendment procedural laws have changed. Miranda v. Arizona, 384 U.S. 436, 461–63 (1966) (noting that the Court has “adhered to [Bram’s]
Bram, the Court was mindful of the potential for governmental abuse and determined that any method of interrogation where the government has exerted “any degree of influence” upon a suspect can be considered abusive because “the law cannot measure the force of the influence used, or decide . . . its effect upon the mind of the [suspect].”290 While Bram holds that testimony elicited under these conditions must always be excluded as a violation of the Fifth Amendment,291 the Bram Court, in dicta, stated that the use of silence against a defendant can be just as abusive when considering Bram’s policy behind governmental interrogation.292 Despite Bram’s dicta on the use of silence, the Supreme Court has never subsequently relied on its reasoning on silence but upholds Bram otherwise.293 Using Bram as the source of Fifth Amendment self-incrimination policy with respect to interrogations, all three Salinas opinions burden the policies underlying the Fifth Amendment.294

Justice Alito’s opinion in Salinas v. Texas appreciably burdens the policies underlying the Fifth Amendment for several reasons. First, Alito’s holding creates burdening pre-arrest, pre-Miranda scenarios where silence and failure to invoke the Fifth Amendment will incriminate a suspect.295 Furthermore, even if a suspect wanted to avoid incrimination through Fifth Amendment invocation, Alito does not answer if invoking the Fifth Amendment would preclude incrimination.296 Second, even if a suspect wanted to invoke the Fifth Amendment, the Court’s Fifth Amendment invocation standards are unclear.297 Finally, there are no procedural effects upon Fifth Amendment invocation, tempting the government to exploit a situation where a suspect is not even aware that he or she has invoked the Fifth Amendment.298

Justice Thomas’s concurring opinion also burdens the policies underlying the Fifth Amendment. In addition to the same burdensome and

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290Bram, 168 U.S. at 543 (emphasis added).
291Id.
292See supra text accompanying notes 34–42.
293See supra Part II.B.
295See id. at 2178. See also supra Part III.A.1.a.
296See Salinas, 133 S. Ct. at 2178. See also supra Part III.A.1.a.
297See Salinas, 133 S. Ct. at 2178. See also supra Part III.A.1.b.
298See Salinas, 133 S. Ct. at 2184 (Thomas, J., concurring). See also supra Part III.A.1.c.
exploitive scenarios that are found in Alito’s opinion, Thomas’s opinion suggests that pre-arrest, pre-Miranda silence has probative value because a suspect would normally deny accusations rather than remain silent. 299 Admitting pre-arrest, pre-Miranda silence as evidence of guilt would be the same as admitting a coerced confession because both are highly prejudicial, have low probative value, and tempt the government when there are no sanctions for using these methods to incriminate the suspect. 300

In previous cases, the Court has held that silence can be highly prejudicial because of its ambiguity in a post-arrest, post-Miranda scenario. 301 Confusingly, Alito and Thomas agree in Salinas that silence can also be probative because it is ambiguous in a pre-arrest, pre-Miranda setting. 302 Specifically, a suspect who remains silent in the face of an accusation may just be thinking of a lie rather than relying on the Fifth Amendment. 303 Alito and Thomas do not understand, however, that silence is highly prejudicial and has low probative value regardless of when the silence occurred. 304 For instance, a suspect may remain silent because he or she is anxious about being tricked into confessing, distrusting of police, or simply unsure how to answer the question. 305

Justice Breyer’s dissenting opinion comes closest to fixing the Fifth Amendment silence problem, but Breyer still burdened the policies underlying the Fifth Amendment. Breyer’s dissenting opinion does not preclude the government from using pre-arrest, pre-Miranda silence. 306 Instead, despite acknowledging inherent problems, Breyer listed “circumstances” based on prior case law where Fifth Amendment invocation was required. 307 Breyer’s “circumstances” approach illustrates the Court’s arbitrarily decided case law on Fifth Amendment silence even

299 Salinas, 133 S. Ct. at 2184 (Thomas, J., concurring). See supra Part III.B.1.
300 See supra Part III.B.1.
302 See supra text accompanying notes 224–225.
303 Salinas, 133 S. Ct. at 2176.
304 See supra Part III.B.1.
305 See supra text accompanying notes 229–236.
306 Salinas, 133 S. Ct. at 2185–89 (Breyer, J., dissenting). See also supra Part III.C.1.
307 Salinas, 133 S. Ct. at 2189 (Breyer, J., dissenting) (“Circumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment.”). See also supra Part III.C.1.
though Breyer suggested that his approach is still better than the implications stemming from Thomas’s and Alito’s opinions.308

A Fifth Amendment bright-line rule would fix the pre-arrest, pre-Miranda silence problem by precluding the government from using a suspect’s silence during any police inquiry.309 At first glance, the bright-line rule may appear to exalt its status over Miranda rights.310 However, the bright-line rule is merely an extension of current Miranda case law,311 and Miranda is still needed to provide necessary procedural tools that the bright-line rule does not offer.312 Furthermore, the Fifth Amendment bright-line rule passes the Jenkins impermissible burden test.313 Regarding the legitimacy of the bright-line rule, the government should actually prefer that a suspect remain silent instead of possibly burdening the government further with a coerced confession.314 Furthermore, a suspect that cannot remain silent might also be tempted to lie, creating misinformation and wild-goose chases.315 The bright-line rule also does not burden the policies underlying the Fifth Amendment because the defendant has a choice to not incriminate himself by simply remaining silent, thereby avoiding any problems of compulsion or a burden on the defendant’s Fifth Amendment privilege against self-incrimination.316

308 Salinas, 133 S. Ct. at 2190–91 (Breyer, J., dissenting). See also supra Part III.C.1.
309 See supra Part IV.A.
310 See supra Part IV.B.
311 See supra Part IV.B.
312 See supra Part IV.B.
313 See supra Part II.B.4.
314 See supra text accompanying note 282.
315 See supra text accompanying note 281.
316 See supra Part IV.C.