
INTRODUCTION

On February 22, 1983, the United States Supreme Court held that the admission into evidence of a defendant's refusal to submit to a blood alcohol test does not violate the United States Constitution's fifth amendment right against self-incrimination, which is made applicable to the states through the fourteenth amendment. The Court also held that the failure of a state to warn a defendant of the consequences of refusal did not violate his or her constitutional rights under the fourteenth amendment's Due Process Clause.

The decision in South Dakota v. Neville is significant in several aspects. First, the Court's refusal to remand the case, based on the presence, as urged by the dissent, of adequate and independent state grounds, may provide guidance for the resolution of future cases involving state and federal constitutional provisions. If a state holds that both federal and state constitutional provisions are violated, the state court must analyze not only the federal provisions, but state law as well, before the Court will recognize adequate and independent state grounds. Second, there is the immediate, practical impact on the states' ability to enforce drunk driving laws. The Court's holding in South Dakota v. Neville favorably affects the ability of the state to enforce drunk driving laws since evidence of refusal to submit to a blood alcohol test can be admitted. Third, the Court chose to rest its decision on the ab-

1. U.S. Const. amend. V, which provides: "No person ... shall be compelled in any criminal case to be a witness against himself. . . ." Id.
3. Id. at 924. The fifth amendment of the Constitution provides: "No person ... shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
4. Id. at 919 n.5. The South Dakota Supreme Court reached adequate, but not independent, state grounds when it held that admission of refusal evidence violated federal and state constitutions but it supported its holding by analysis of federal privilege only.
5. Id.
6. After certiorari was granted in South Dakota v. Neville, one commentator noted that if the Court were to hold that defendant's refusal to submit to a blood test was inadmissible the state's ability to enforce drunk driving laws would be seriously hindered. Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal, 20 Am. Crim. L. Rev. 31, 31 (1982).
7. 103 S. Ct. at 918.
sence of impermissible coercion and on the underlying values of the fifth amendment. There must be officially coerced self-incrimination for there to be a fifth amendment violation, otherwise a defendant's incriminating testimony does not conflict with the Constitution's guarantee of the privilege against self-incrimination.

By deciding *South Dakota v. Neville* solely on the lack of impermissible coercion, the Court did not seize a propitious opportunity to clarify the distinction previously drawn between testimonial and physical evidence in *Schmerber v. California*. Under this paradigm, compelled testimonial evidence was excluded from admission by the privilege against self-incrimination, while compelled physical evidence was not protected by the privilege and therefore held to be admissible. Moreover, the *Neville* decision reflects the current Court's literal interpretation of the scope and values of the fifth amendment privilege against self-incrimination. This article will address: (1) the history and policies used by the Court to interpret the privilege; (2) the public policy arguments concerning the admission of refusal evidence in drunk driving cases; (3) the adequate and independent state grounds is-

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8. *Id.* at 922. "Since no impermissible coercion is involved when the suspect refuses to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground [impermissible coercion]." *Id.*

9. *Id.* at 923. "[T]he values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." *Id.*

10. United States v. Washington, 431 U.S. 181, 187 (1977). "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Id.* As noted by Professor Levy in his historical review of the fifth amendment, "[t]he element of compulsion or involuntariness was always an essential ingredient of the right (against self-incrimination)...." L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 328 (1968). The core value of the right against self-incrimination is violated when the government compels testimony. Michigan v. Tucker, 417 U.S. 433, 440 (1974) (right has been afforded broad scope when genuine compulsion of testimony is present). The right has been interpreted broadly, despite the constitutional language which could be narrowly construed as applicable only when a defendant is called to testify against himself at a criminal trial. *Id.* at 440 (application of privilege has not been limited to self-incriminating testimony by defendants at criminal trial). The Court's expansive interpretation of the Constitution's literal language is made possible by construing the provisions with regard to their underlying principles, purposes, and policies. United States v. Lefkowitz, 285 U.S. 452, 467 (1932). The Court has interpreted Constitutional provisions with regard to their establishing principles, such that the literal meaning of the words used does not measure their purpose or scope. *Id.*; Fisher v. United States, 425 U.S. 391, 417 (1976) (Brennan, J., concurring) ("History and principle, not the mechanical application of its wording, have been the life of the Amendment.").

11. 384 U.S. 757, 764 (1966) (distinction has emerged between testimonial or communicative evidence and physical or real evidence).

12. *See* notes 48, 63-66 *infra.*
sue raised by the dissent; (4) the viability of the testimonial–physical evidence distinction; and (5) the current Court’s interpretation of what constitutes “compulsion” under the fifth amendment.

BACKGROUND

Historical Development of the Fifth Amendment

Although the fifth amendment expressly states that “[n]o person . . . shall be compelled, in any criminal case, to be a witness against himself . . .,” this language does not settle the meaning or the scope of the privilege. The framers of the fifth amendment selected language that could have been interpreted as only extending a testimonial privilege to criminal defendants. However, such a literal, narrow interpretation would have rendered the fifth amendment nugatory—since at the time of its conception the defendant was deemed incompetent to testify. As to the precise meaning and scope of the privilege against self-incrimination, one commentator has suggested that even the drafters of the Bill of Rights were unsure of the meaning of the privilege, and of the maxim, *nemo tenetur seipsum prodere*, upon which it was founded. One Justice has noted that the Court has lost sight of the original meaning of the privilege and that neither the law or lawyers have determined with finality either the scope of the privi-

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13. U.S. Const. amend. V.
16. Id. at 149; De Luna v. United States, 308 F.2d 140, 149 (5th Cir. 1962). Madison could not have had the accused in mind because, at that time, the accused was held not competent to testify. Id. See also Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). “It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself.” Id. L. Levy, supra note 10, at 407 (literal meaning superfluous because defendant was not permitted to testify at his trial).
17. Bonventre, supra note 14, at 33-34. The whole maxim is “*Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*” Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 Harv. L. Rev. 71, 83 (1891). It has been translated by Wigmore as “though no one is bound to become his own accuser, yet when once a man has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself.” Id. at 83 n.2. The maxim is usually given in the shorter form “*nemo tenetur seipsum prodere.*” Id. at 83.
18. Bonventre, supra note 14, at 33-34 (the question of the meaning of the maxim and the privilege remains unresolved.).
lege, nor to whom it extends.\textsuperscript{20} Since the scope of the privilege is not limited by the literal language of the fifth amendment, the Court has construed the provisions of the privilege in conjunction with the principles upon which it was founded.\textsuperscript{21}

In order to determine the underlying nature, values, and principles of the privilege, it is necessary to examine the history of its development in England and America.\textsuperscript{22} The origins of this type of privilege can be traced as far back as Biblical times.\textsuperscript{23} However, the origins of the modern privilege are usually traced to the reaction against the oath \textit{ex officio}\textsuperscript{24} used by ecclesiastical courts in England.\textsuperscript{25} The struggle against the oath \textit{ex officio} was seen by some as a jurisdictional battle by the state and common law courts to limit the power of the Church and the ecclesiastical courts.\textsuperscript{26} Others, including the lawyers of the day, opposed the oath as repugnant to the customary adversarial common law system.\textsuperscript{27} Puritans and other religious dissenters who were subjected to the oath \textit{ex officio} in heresy trials, welcomed the privilege as a means to

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\item 20. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 n.5 (1964) citing Kalven, \textit{Invoking the Fifth Amendment - Some Legal and Impractical Considerations}, 9 \textit{Bull. Atomic Sci.} 181, 182 (1953) ("Law and the lawyers . . . have never decided what the privilege is supposed to do or whom it is to protect.").
\item 21. See notes 13-16 supra.
\item 22. Bonventre, supra note 14, at 35-38 (for short synopsis).
\item 23. See Miranda v. Arizona, 384 U.S. 436, 459 n.27 (1966), citing Maimonides, \textit{Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin}, C. 18, 6, III Yale Judaica Series 52-53 ("the principle that no man is to be declared guilty on his own admission is a divine decree."). Id. See also Lamm, \textit{The Fifth Amendment and Its Equivalent in the Halakah}, 5 \textit{Judaism} 53 (Winter 1956).
\item 24. L. Levy, supra note 10 at 46-47. The oath \textit{ex officio} was a sworn statement which required the accused to answer all questions truthfully, despite the lack of formal charges, the denial of the right to confront his accusers, and the withholding of the nature of the evidence against him. \textit{Id.}
\item 25. Morgan, \textit{The Privilege Against Self-Incrimination}, 34 Minn. L. Rev. 1 (1949). In 1589 Sir Edward Coke, an attorney, relied upon the \textit{Prohibitio Formata} and the maxim "\textit{nemo tenetur seipsum tenetur}" to obtain from the common law court a prohibition of the ecclesiastical courts' use of the oath. \textit{Id.} at 8. The discontent among those who suffered under this inquisitional system forced Parliament to enact the \textit{Prohibitio Formata} in the fourteenth century, thus denying use of the oath \textit{ex officio} to combat heresy. \textit{Id.} at 3-7. See generally Pittman, \textit{The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America}, 21 Va. L. Rev. 763 (1935). The stubborness of John Lilburn for refusing to take the oath \textit{ex officio} was representative of many others in similar circumstances in 1637. \textit{Id.} at 770. Note, \textit{The Georgia Right Against Self-Incrimination: Historical Anomaly or Vanguard of Justice?}, 15 Ga. L. Rev. 1104 (1981). Ecclesiastical courts initiated the inquisitional oath \textit{ex officio} during the early thirteenth century, after Pope Innocent III authorized its use. \textit{Id.} at 1105. The High Commission and the Star Chamber were permitted to use the oath \textit{ex officio} during the fifteenth and sixteenth centuries, primarily for the political purpose of exposing heretics. \textit{Id.} at 1106.
\item 26. DeLuna, 308 F.2d at 146.
\item 27. Morgan, supra note 28, at 9 (to the common law lawyers this system was repugnant to the laws of the land).
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avoid religious persecution. Although debated among commentators, the use of torture has been cited as playing a role in the birth of the privilege against self-incrimination in England and America.

The reason for the presence of the privilege against self-incrimination in the Bill of Rights has been debated among constitutional lawyers and historians. Although debate concerning the privilege was scarce during the Federal Constitutional Convention, it was therein referred to as a privilege against torture. The privilege was ultimately adopted as a portion of Article V of the Bill of Rights upon the motion of the four states which had not yet ratified the Constitution. The fact that the federal government was not required to follow the common law may have provided the incentive for adoption of the privilege. Although an analysis of the history and language of the right against self-incrimination may

29. Compare Pittman, supra note 25, at 788 (in all of the debates concerning the federal constitution the privilege was mentioned as protecting against torture) with Ellis, A Comment on the Testimonial Privilege of the Fifth Amendment, 55 IOWA L. REV. 829, 835 (1970) (privilege was not developed as a response to torture).
30. See generally Pittman, supra note 25, at 783. Privilege came up through our colonial history as protection against physical compulsion and the moral compulsion that a pious soul felt when required to swear to an oath. Id. See, e.g., 4 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2250 (1905). Wigmore concluded that agitation in France against inquisitional features of the Ordinance of 1670 was a factor in the American's insistence on inclusion of the privilege in the Constitution. Bonventre, supra note 14, at 34, citing Twining v. New Jersey, 211 U.S. 78, 107-08 (1908) (some argue that neither the colonists or the founders considered the privilege important). Pittman, supra note 25, at 764-66. Pittman's research of the records of the French Assembly lend credence to the opposite conclusion, now generally accepted, that the Americans and the English influenced the French adoption of the privilege. Id. at 765-66. Moreover, the fact that colonists were to administer English common law and that the colonies were settled by English religious dissenters fleeing persecution administered through use of the oath ex officio gives weight to the proposition that the colonists did recognize the privilege. Id. at 769. Also, the privilege was recognized by the constitutions of at least seven states before 1789. Id. at 764-65. The absence of the privilege in English constitutional documents may be attributed to its widespread acceptance and recognition in the common law (to which the colonists were entitled) as a "fundamental principle of liberty and justice." Id. at 774. Pittman concluded that the privilege was included in the Constitution because the prerogative courts of the Royal Governors utilized inquisitorial proceedings to elicit confessions, before the accused could claim the privilege in a trial by jury. Id. at 783-84.
32. Id. at 788.
33. See id. at 789, quoting Patrick Henry, "Congress may introduce the practice of the civil law in preference to that of the common law . . . . They may introduce the practice . . . of torturing to extort confessions of crime . . . . They will tell . . . you they must have a criminal equity, and extort confessions by torture, in order to punish with still more relentless severity." Id.
provide insight into the historical origins of the privilege, it provides only limited insight into the core values supporting the privilege, or its scope. Although this is so, the Court has drawn from these sources to apply the privilege in a modern context.

Government action which violates a core value of the fifth amendment, in its most pristine form, occurs when the government compels a defendant to make a statement, or procures an illegal waiver of the privilege, through the use of its authority. Apart from this explicit core violation, the Court has balanced the individual's interest in the protection of his or her constitutional rights against the state's interest in the administration of the criminal justice system. In conducting a balancing analysis, the Court has had to identify the fifth amendment values and policies involved before it could determine whether these values and policies had been unduly burdened.

In *Murphy v. Waterfront Commission*, Justice Goldberg compiled an extensive list of the public policies which were to be protected by the invocation of the privilege: (1) avoiding submitting the accused to the trilemma of choosing from among self-accusation, perjury, or contempt; (2) providing an adversarial criminal

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34. Arenella, *supra* note 6, at 36. See Boventre, *supra* note 14, at 33. Wigmore and Levy have thoroughly researched the privilege's history, only to reach opposite conclusions regarding its value. Those desirous of limiting the scope of the privilege will cite the work of the former, while those favoring a broad interpretation will rely upon the latter. However, those who emphasize the history of the privilege neglect that "a noble principle often transcends its origins" and that misunderstandings have created cherished principles and institutions. United States v. Grunewald, 233 F.2d 556, 581 (2d Cir. 1956) (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957).

35. Bonventure, *supra* note 14, at 35 (origins of the privilege do provide some guidance on its nature and values).

36. *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 459 (1979) (core violations occur when state authority is used to extract a statement or coerce an illegal waiver of the privilege); Kastigar v. United States, 406 U.S. 441, 453 (1972) (privilege prevents forced testimony that leads to infliction of penalties for crimes and prohibits governmental use of compelled testimony in any manner); Malloy v. Hogan, 368 U.S. 1, 6 (1964) (privilege protects rights to remain silent, unless one voluntarily speaks, and prevents penalty for silence); Knapp v. Schweitzer, 347 U.S. 371, 380 (1958) (primary purpose is to prevent government from compelling incriminating testimony from mouth of accused and using it to convict him); Hoffman v. United States, 341 U.S. 479, 486 (1951) (privilege prevents compulsion of witness to furnish evidence that could lead to criminal sanction).

37. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (to determine if a constitutional right has been impermissibly burdened, the legitimacy of the challenged governmental practice should be considered); Brown v. United States, 356 U.S. 148, 156 (1958) (other party's interests and regard for court's function of ascertaining truth are weighed in the balance of considerations in determining scope and limits of the privilege).


justice system; (3) prohibiting the use of inhumane or abusive treatment as a means of eliciting self-incriminating statements; (4) requiring a fair balance of the interests of the individual and the state in a proceeding in which the government must bear the burden of proof; (5) protecting the right to privacy; (6) promoting the belief that self-incriminating statements are unreliable; and (7) providing protection of the innocent, though the guilty might also be sheltered.

Since these public policies were stated in an abstract manner, the Court has been able to construe the amendment liberally. This expansive approach has also been made possible by the common law origins of the privilege, and the ability of the Constitution to conform to new experiences. However, the fifth amendment has not been interpreted so broadly that all self-incriminating statements are prohibited; to do so would have hampered the administration of criminal justice. Traditionally, when faced with fifth amendment cases involving self-incrimination, the task before the Court was simply to determine whether the accused had been compelled to give incriminating testimony out of his own mouth. However, the Court has also heard arguments that attempted to extend the application of self-incrimination principles to the issue of body evidence. In an early fifth amend-

40. Id. at 55.
41. Arenella, supra note 4, at 37. See, e.g., Miranda v. Arizona, 384 U.S. 436, 461 (1966) ("In this court, the privilege has consistently been accorded a liberal construction."). Id. at 55. Ullman v. United States, 350 U.S. 422, 426 (1955) ("This constitutional protection must not be interpreted in a hostile or niggardly spirit"); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) ("The privilege is . . . as broad as the mischief it seeks to guard against"); Boyd v. United States, 116 U.S. 616, 635 (1886) (the Court must adhere "to the rule that Constitutional provisions for the security of person and property should be liberally construed; a close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right . . . ."); DeLuna, 308 F.2d at 144, 149 ("The history of the development of the right of silence is a history of accretions, not of an avulsion . . . . Our courts . . . have not stood for a narrow constitutional construction of the fifth amendment based on a literal reading of the language in the light of its historical origins.").
42. Bonventre, supra note 25, at 41-42 (liberal interpretation is made possible by the fact that the privilege is based on a flexible common law doctrine.).
43. Weems v. United States, 217 U.S. 349, 373 (1910) (the Court has stated its responsibility to interpret constitutional rights based not only on the past, but on the future, so the Constitution retains meaning and power). Hurtado v. California, 110 U.S. 516, 530-31 (1884) (liberal interpretation of the privilege is supported by the fact that the Constitution was created with the capability to conform to the new experiences of the future, so that it remains useful).
44. See DeLuna, 308 F.2d at 145 (those seeking to limit the policy of the privilege have stated that the guilty are the sole beneficiaries of the privilege and that justice would survive if the privilege was narrowed in scope).
45. See note 36 supra.
46. See notes 48, 53, 63-66 infra.
ment case incorporating the use of body evidence,\textsuperscript{48} the Supreme Court held that the fifth amendment does not preclude requiring a defendant to wear certain clothing for identification purposes.\textsuperscript{49} In reaching this conclusion, the Court relied on the lack of physical or moral compulsion to extort communications from the accused.\textsuperscript{50}

Although relatively few cases dealing with body evidence and the testimonial-physical evidence distinction have reached the Supreme Court, \textit{Schmerber v. California},\textsuperscript{51} decided in 1966, is one such case.\textsuperscript{52} \textit{Schmerber} held that the extraction of blood for alcohol content analysis, and the use of that analysis as evidence, did not violate the privilege against self-incrimination.\textsuperscript{53} The privilege was not violated because, in the Court's opinion, the evidence was neither testimonial nor communicative.\textsuperscript{54} Even though the Court held that the state did compel the test, the compulsion was not in a manner that violated any public policy supporting the privilege against self-incrimination.\textsuperscript{55} The state compelled blood test did not violate the defendant's right against self-incrimination because his \textit{testimonial} capacities were not involved.\textsuperscript{56} The Court, focusing on the fifth amendment principle of the inviolability of the human personality, held that the values of the privilege had never been afforded their full scope.\textsuperscript{57} Consequently, the Court could limit the privilege by establishing a distinction between compelled \textit{testimonial} evidence, the use of which would be prohibited at trial, and compelled \textit{physical} evidence, which would be considered admissible evidence.\textsuperscript{58} This imprecise distinction resulted from the Court's compromise between the interests of the individual's right

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\item \textsuperscript{47} Note, \textit{Constitutional Limitations on the Taking of Body Evidence}, 78 \textit{Yale L.J.} 1074, 1074 (1969). Body evidence refers to a suspect's easily identifiable physical characteristics such as sex, race, height, build, hair color, and facial marks. Body evidence also refers to other characteristics that can only be obtained by a degree of invasion into the suspect's privacy, such as blood type, finger prints, and concealed distinguishing marks. \textit{Id.}
\item \textsuperscript{48} \textit{Holt v. United States}, 218 U.S. 245 (1910).
\item \textsuperscript{49} \textit{Id.} at 252-53.
\item \textsuperscript{50} \textit{Id.} See generally, for other types of body evidence held admissible by courts other than the United States Supreme Court, \textit{Smith v. United States}, 324 F.2d 879, 882 (D.C. Cir. 1963) (palm prints), \textit{cert. denied}, 377 U.S. 954 (1964); \textit{Blackford v. United States}, 247 F.2d 745, 754 (9th Cir. 1957) (drugs removed from rectum), \textit{cert. denied}, 356 U.S. 914 (1958); \textit{United States v. Amorosa}, 167 F.2d 596, 599 (3d Cir. 1948) (photographs).
\item \textsuperscript{51} 384 U.S. at 757.
\item \textsuperscript{52} \textit{Id.} at 764-65.
\item \textsuperscript{53} \textit{Id.} at 761.
\item \textsuperscript{54} \textit{Id.} at 765.
\item \textsuperscript{55} \textit{Id.} at 763, 765.
\item \textsuperscript{56} \textit{Id.} at 765.
\item \textsuperscript{57} \textit{Id.} at 762-63.
\item \textsuperscript{58} \textit{Id.}
against self-incrimination and the requirements of effective law enforcement.\textsuperscript{59}

Despite the reference to the testimonial-physical evidence distinction, \textit{Schmerber} failed to address the issue whether the refusal to submit to a blood alcohol test was admissible into evidence.\textsuperscript{60} The ambiguity of the Court's reasoning in \textit{Schmerber}\textsuperscript{61} has lead to differing approaches by the states in attempting to properly balance the individual's constitutional rights against the state's interest in removing drunk drivers from the nation's highways.\textsuperscript{62}

Following \textit{Schmerber}, the Court continued to utilize the testi-

\textsuperscript{59} Id. at 761. See Arenella, \textit{supra} note 4, at 39.

\textsuperscript{60} 384 U.S. at 765 n.9 (issue unaddressed because defendant failed to object to admission of refusal evidence at trial).

\textsuperscript{61} Id.

This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the “search,” and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. [citations omitted].

Petitioner had raised a similar issue in this case, in connection with a police request that he submit to a “breathalyzer” test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under \textit{Griffin} v. \textit{California}, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. We think general Fifth Amendment principles, rather than the particular holding of \textit{Griffin}, would be applicable in these circumstances, see \textit{Miranda} v. \textit{Arizona}, 384 U.S. at p. 468, n.37, [further citations omitted]. Since trial here was conducted after our decision in \textit{Malloy} v. \textit{Hogan}, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements. [Id.]

\textsuperscript{62} Compare \textit{Hill} v. \textit{State}, 366 So. 2d 318, 324-25 (Ala. 1979) (refusal to submit to chemical test for intoxication is conduct giving rise to an inference of guilt, not a testimonial communication protected by the fifth amendment); \textit{State v. Swayze}, 197 Neb. 149, 152, 247 N.W.2d 440, 443 (1976) (court relies upon distinction in \textit{Schmerber} to hold that the privilege against self-incrimination is limited to giving of oral testimony and does not extend to results of chemical tests); \textit{City of Westerville v. Cunningham}, 15 Ohio St. 2d 121, —, 239 N.E.2d 40, 42 (1968) (admission of evidence of accused's refusal to submit to chemical test for intoxication does not infringe on his constitutional right); \textit{with State v. Andrews}, 297 Minn. 260, —, 212 N.W.2d 863, 864 (1973) (\textit{Schmerber} is not authority for admitting evidence of refusal to submit to blood test, since refusal is testimonial and protected by the fifth amendment), cert. \textit{denied}, 419 U.S. 881 (1974); \textit{Dudley v. State}, 548 S.W.2d 706, 707 (Tex. Crim. App. 1977) (\textit{Schmerber} is authority for holding evidence of refusal to submit to blood test inadmissible for refusal is communicative in nature).
Monomial-physical distinction to hold that the admitted body evidence produced by lineups, writing exemplars, and voice samples did not violate the accused's privilege against self-incrimination. Recognizing that written or spoken words have communicative content, the Court also has held that the use of words for identification is admissible while the use of words for their content value is inadmissible. Since the Court held body evidence admissible in the cases it reviewed after Schmerber, the Court had established a conservative attitude towards interpretation of the scope of the privilege against self-incrimination prior to its decision in South Dakota v. Neville.

The Problem and the Solution: Drunk Driving and Implied Consent

The Court has recognized the significant threat created by drunk drivers to the life and safety of Americans on the nation's highways. In order to encourage motorists suspected of driving while intoxicated (DWI) to submit to tests for determining alcohol

65. Wade, 388 U.S. at 222.
66. See, e.g., United States v. Dionisio, 410 U.S. 1 (1973) (when subpoenaed, a suspect in a criminal prosecution refused to read transcript into recording device for purpose of comparing his voice with the voice recorded on a tape from a wire tap. Id. at 3; the Court held that the compelled voice sample was not violative of the fifth amendment since it was used to measure the physical properties of the suspect's voice, not for the communicative content. Id. at 5-7.); United States v. Mara, 410 U.S. 19, 20-22 n.* (1973) (suspect refused to submit handwriting exemplars when subpoenaed; the Court reasoned that the directive compelled physical, not testimonial, characteristics, and that government compulsion of written answers to incriminating questions, or of a signature on an incriminating statement, would be testimonial, thus violative of the fifth amendment). But see Fisher v. United States, 425 U.S. 391, 409 (1976) (subpoena of suspect's tax work papers, compiled by accountant, involves compulsion but it does not compel oral testimony or compel suspect to affirm truth of their content; fifth amendment is not violated, despite facially incriminating nature of the papers, since it only protects compelled testimonial communications); Andresen v. Maryland, 427 U.S. 463, 466, 473 (1976) (seizure of business papers as evidence of land fraud was found constitutional since the papers contained statements made voluntarily by the suspect; no compulsion was present).
67. See notes 63-66 supra.
68. See, e.g., Perez v. Campbell, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring and dissenting) (three Justices recognized that the death count on the nation's highways exceeded the death count of all American wars combined); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (Justice Blackmun commented that the nation must set aside personal convenience to lessen the death toll caused by drunk driving, and that imposition of jail terms rather than fines might be a welcome development); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (the Court noted the increased slaughter on the highways and approved of scientific methods used to strictly enforce traffic laws).
content, each state has enacted an implied consent statute.\textsuperscript{69} Implied consent laws were an outgrowth of \textit{Rochin v. California},\textsuperscript{70} wherein the Court ruled that pumping the accused's stomach for narcotics constituted forcible seizure of body evidence in violation of due process.\textsuperscript{71} Consequently, in 1953, New York enacted an implied consent statute which subsequently became a model for other states.\textsuperscript{72} Under an implied consent statute, a motorist is deemed to have given his or her implied consent to submit to sobriety tests by virtue of driving on highways within the state.\textsuperscript{73} In order to encourage consent to sobriety tests, most implied consent statutes authorize adverse consequences, such as revocation of driver's licenses.\textsuperscript{74}

In footnote nine of its opinion in \textit{Schmerber},\textsuperscript{75} the Supreme Court reserved the question of whether admission of evidence of refusal to submit to a blood-alcohol test violated the privilege against self-incrimination.\textsuperscript{76} However, the language of footnote nine in \textit{Schmerber}\textsuperscript{77} was sufficiently ambiguous as to allow state courts to hold that such evidence was either admissible or inadmissible.\textsuperscript{78} A majority of courts, narrowly interpreting footnote nine of \textit{Schmerber},\textsuperscript{79} have held that refusal evidence is admissible,\textsuperscript{80} because of the fact that: (1) such evidence is physical—rather than testimonial—in nature; and (2) since there is no constitutional right to refuse the test, it follows that there is no constitutional right to have the fact of refusal excluded.\textsuperscript{81} On the other
hand, the courts in the minority hold that refusal evidence is inadmissible because of its communicative nature.82

Current state statutes regarding evidence of refusal to submit to a blood alcohol test generally classify the evidence as admissible or inadmissible.83 Twenty-four states, including South Dakota, allow admission of refusal evidence;84 seven state statutes hold such evidence is inadmissible.85 The statutes of the remaining

(1971) (not testimonial communication); People v. Sudduth, 65 Cal. 2d 543, —, 421 P.2d 401, 403, 55 Cal. Rptr. 393, 395 (1967), cert. denied, 389 U.S. 850 (1967) (breathalyzer test only produces physical evidence, therefore it is admissible); Davis v. State, 367 N.E.2d 1163, 1167 (Ind. Ct. App. 1977) (refusal to submit to breathalyzer is non-communicative physical evidence); State v. Holt, 261 Iowa 1089, 1097-98, 156 N.W.2d 884, 888-89 (1968) (court cites Schmerber as authority to hold refusal to submit to blood test as admissible non-testimonial evidence); State v. Dugas, 252 La. 345, —, 211 So. 2d 285, 289 (1968) (refusal to submit to compelled blood test is admissible physical evidence); State v. Meints, 189 Neb. 264, 266, 202 N.W.2d 202, 203 (1972) (suspect’s refusal to submit to chemical test is admissible); City of Westervile v. Cunningham, 15 Ohio St. 2d 121, —, 239 N.E.2d 40, 42 (1968) (admission of evidence of accused’s refusal to submit to chemical test for intoxication does not infringe on his constitutional rights). For cases holding that lack of constitutional right to have evidence excluded follows from lack of constitutional right to refuse the test. See Campbell, 479 P.2d at 692 (since person has no right to refuse the test comment upon refusal is proper); Dugas, 211 So. 2d at 289 (since body evidence does not violate privilege against self-incrimination, neither does admission of refusal); People v. Hartz, 65 A.D.2d 172, —, 411 N.Y.S.2d 57, 60 (1978) (admission of refusal is not a penalty of constitutional right, since accused has no constitutional privilege to refuse the test).

82. Gay v. City of Orlando, 202 So. 2d 896, 898 (Fla. Dist. Ct. App. 1967) (although results of a properly administered breathalyzer test are admissible, refusal evidence is an inadmissible by product of testimony), Andreus, 297 Minn. at —, 212 N.W.2d at 864, See Dudley, 548 S.W.2d at 707.

83. See notes 84-86 infra.


85. HAWAII REV. STAT. § 286-159 (1976); MASS. GEN. LAWS ANN. ch. 90, § 24(e) (West Cumm. Supp. 1982); N.M. STAT. ANN. § 66-8-111 (1978), construed in McKay v. Davis, 99 N.M. 29, —, 653 P.2d 860, 862 (1982); R.I. GEN. LAWS § 31-27-2(b)(1) (1956) (If defendant elects to testify, refusal evidence is admissible); UTAH CODE ANN. § 411-6-44.10(8) (Cumm. Supp. 1983); VA. CODE § 18.2-268(c), (i), (m), (n) (Cumm. Supp. 1983) (A declaration of refusal may be admitted as prima facie evidence and evi-
nineteen states, while not directly addressing the issue of admissibility, provide that the accused's license will be revoked if he refuses to submit to a blood alcohol test, and that the fact of refusal may be proven on review of the revocation at a subsequent hearing.\(^6\)

In construing the South Dakota statute, the South Dakota Supreme Court adopted the minority view, holding that a defendant's refusal to submit a blood test is communicative evidence, and that the testimonial evidence was a compelled choice, involuntarily given.\(^7\) Because of the division among the states over the admissibility of evidence of refusal to submit to blood alcohol tests, and the presence of fifth amendment self-incrimination violations, the Supreme Court granted certiorari.\(^8\)

**PUBLIC POLICY CONSIDERATIONS**

In holding that the admission of evidence of refusal to submit to a blood alcohol test does not violate the fifth amendment,\(^9\) the Court did not expressly state that it balanced the public policy of removing drunk drivers from the highway against an individual's privilege against self-incrimination. Since the Court noted the hazards created by drunk driving,\(^9\) and it extended the reasoning of *Schmerber*,\(^1\) one may imply that the Court did, in fact, balance
dence that explains the reason for the refusal may be introduced); W. VA. CODE §§ 17C-5-4 to -5-7 (Cumm. Supp. 1983).


88. South Dakota v. Neville, 103 S. Ct. at 920.

89. Id. at 918.

90. Id. at 920. Accidents caused by drunk driving occur with tragic frequency. The court has often lamented the tragedy.

91. Schmerber v. California 384 U.S. 757 (1966). The Court recognized in
state interests against individual rights.

Traditionally, blood alcohol tests provide a fairly reliable means of determining the amount of alcohol in a person's system. The use of these tests provide objective, scientific data to complement sometimes fallible human observation. Thus, blood tests provide a jury with convincing, reliable evidence of intoxication.

Although the inferences to be drawn from evidence of refusal to submit to a blood test may be weaker than those drawn from an administered blood test, there are those who argue that refusal evidence is highly probative circumstantial evidence reflecting the accused's consciousness of guilt. By virtue of a defendant's refusal to submit to the blood test, prosecutors lack an important piece of evidence. In order to obtain a conviction, refusal evidence can operate as substitute evidence. Absent some other scientific or circumstantial proof of drunkenness, the exclusion of refusal evidence could seriously handicap the state's case since a jury might consider the absence thereof as indicative of a weak or non-incriminating case. Consequently, jury speculation regard-

Schmerber that a coerced blood test does to some degree infringe on policies underlying the fifth amendment, however the policies have been limited in scope by the Court in the past. Id. Schmerber continued the limitation of those policies by holding that only compelled testimonial evidence was barred by the fifth amendment. Id. The Court held that since the accused has no constitutional right to refuse the blood test, he has no constitutional right to have evidence of refusal excluded. See also South Dakota v. Neville, 103 S. Ct. at 920.

92. Schmerber, 384 U.S. at 771.
93. People v. Sudduth, 65 Cal. 2d 543, —, 421 P.2d 401, 403, 55 Cal. Rptr. 393, 395 (1967) (holding that it is indisputable that objective scientific data of intoxication is invaluable in supplementing imperfect human observations).
94. Arenella, supra note 6, at 32 (implied consent statutes give police authority to secure scientific proof of intoxication, thus providing the jury with reliable and convincing evidence).
95. South Dakota v. Neville, 103 S. Ct. at 923 (the State wants the accused to take the test because the inferences of intoxication arising from refusal are far less than those resulting from an administered test).
96. See, e.g., People v. Ellis, 65 Cal. 2d 529, —, 421 P.2d 393, 397, 55 Cal. Rptr. 385, 389 (1966) (Conduct similar to refusal of blood test is not testimonial. By acting guilty, one gives rise to inferences of guilt from circumstantial evidence of his conduct); State v. Meints, 202 N.W.2d at 204 (it is reasonable to infer that a refusal to take a test indicates accused fears the results and his consciousness of guilt).
97. Brief for Petitioner at 23.
98. Note, supra note 47, at 1083 (refusal evidence can take substantially the same place in the prosecutor's case as the evidence sought by examination).
99. Brief for Petitioner at 23.
100. Id. at 23-24 (if no evidence of refusal is presented, its absence will have an effect on the jury). But see Brief for Respondent at 12, South Dakota v. Neville, 103 S. Ct. 916 (1983) (state can convict accused without admission of refusal evidence by presenting arresting officer's testimony concerning suspect's behavior). See also Arenella, supra note 4, at 32.
ing the absence of refusal evidence could be the cause of lower conviction rates on DWI charges.101

Opponents of the admission of refusal evidence base their arguments on: (1) the lack of relevancy of refusal evidence;102 (2) the ability to serve the public policy of reducing the number of drunk drivers through strict enforcement of the law in other ways;103 and (3) the unwarranted loss of liberty resulting from admission of refusal evidence.104 Empirical evidence suggests that refusal evidence is irrelevant to the issue of guilt, or consciousness of guilt.105 The suspect may refuse to take the test based on any number of reasons, among them fear, religious convictions,106 or the desire to exercise a statutory right.107 Since the refusal may be based on reasons other than guilt, it is arguable that refusal evidence is inferior to other verifiable data.108 Moreover, there is the possibility that admission of refusal evidence will prejudice the defendant.109 Juries may place undue emphasis on the refusal to submit to the blood test as evidence of guilt or, in the alternative, convict the accused of the DWI charge as punishment for refusing the examination.110 In addition, those opposed to admission of refusal evidence counter the argument that exclusion of refusal evidence results in fewer DWI convictions by pointing to poor law enforcement, and the presence of jurors guilty of the same offense, as additional contributory factors.111

In addition to the questionable reliability of refusal evidence, opponents of admitting refusal evidence argue that the public policy sought to be furthered by the admissibility, i.e. enforcement of DWI statutes, may be accomplished without the use of refusal evi-

102. Note, supra note 80, at 310.
103. Id. at 312.
104. See id.
105. Id. at 310-11, citing Argeriou, Refusing to Take Breathalyzer—Rebutting Adverse Presumption, 11 CRim. L. Bull. 350 (1975) (analysis of records of 281 DWI offenders found not to reflect consciousness of guilt or desire to conceal incriminating evidence).
106. See note 61 supra.
108. Note, supra note 47, at 1083.
109. See People v. Knutson, 17 Ill. App. 2d 251, —, 149 N.E.2d 461, 463 (1958) (evidence of refusal could prejudice jury by inferring accused was drunk).
110. Note, supra note 47, at 1083.
Rather than admitting into evidence the refusal to submit to a blood alcohol test, the removal of drunk drivers from the road might be accomplished by the enactment of statutes permitting the revocation of driver's licenses upon the refusal to submit to the test. State legislatures may further the policy by enacting statutes that raise the age requirement for purchase of alcohol, limit the hours and days that alcohol may be sold or served, and by limiting the number of available liquor licenses. In addition, the arresting police officer's testimony concerning: (1) the accused's driving behavior and performance on field sobriety tests; (2) the presence of an alcohol odor, or of open alcohol containers in the vehicle; and (3) the accused's demeanor may all be used as evidence to gain a DWI conviction.

Since the public policy of reducing alcohol related traffic fatalities may be met by alternatives less restrictive of the fifth amendment privilege against self-incrimination, those opposing admission of refusal evidence seem to present the better reasoned view. By ruling that refusal evidence is admissible, the Supreme Court has narrowly construed the protection offered by the fifth amendment, and has impliedly ruled that the state's public policy interest outweighs individual rights. A public policy capable of enforcement by other means should not be allowed to prevail over individual rights, for such action might lead to the depreciation of those rights.

The South Dakota v. Neville decision thus greatly enhances the ability of the states to enforce their implied consent statutes. The states may now present either scientific evidence of intoxication obtained from a blood test or, if the defendant refuses to take the blood test, evidence of such refusal.

112. Note, supra note 80, at 312 (excluding refusal evidence does not denigrate state policy of removing drunk driver from road).
114. Id. See, e.g., ALA. CODE § 32-5-192 (1975); CAL. VEH. CODE § 13,353(b)-13,353(c) (1971); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1982).
117. Note, supra note 80, at 312.
118. See notes 90-91 and accompanying text supra.
119. Boyd v. United States, 116 U.S. 616, 635 (1886). Narrowly construed constitutional provisions reduce their efficacy. The courts are responsible for the prevention of stealthy encroachments. Id.
121. See Arenella, supra note 4, at 31-32.
FACTS AND HOLDINGS

On July 19, 1980, Mason Neville was stopped by the police of Madison, South Dakota, for failing to stop at a stop sign. The arresting officers noticed that Neville staggered upon exiting his car, and that he smelled of alcohol. Neville subsequently failed several field sobriety tests. Neville was placed under arrest and informed of his Miranda rights, which he indicated he understood; he was further informed that under the state implied consent law his license could be revoked upon refusal to submit to a blood alcohol test. Neville refused the test stating, "I'm too drunk, I won't pass the test."

Neville's case was argued before the South Dakota Supreme Court on September 28, 1981. The state court decision, holding evidence of Neville's refusal inadmissible, was issued on December 2, 1981. The South Dakota Supreme Court held that the state statute which allowed admission of refusal evidence violated the federal and state privilege against self-incrimination and was, therefore, unconstitutional. The state court's ruling was based on the categorization of the "refusal evidence" as "communicative," and the "testimony" as involuntary. In order to resolve the split among authorities with regard to this issue, the Supreme Court granted certiorari in May of 1982.

The United States Supreme Court reversed the South Dakota Supreme Court by holding that a refusal to submit to a blood alcohol test is admissible into evidence and that such admission does not violate the fifth amendment right against self-incrimination.

ANALYSIS

Adequate and Independent State Grounds

The Court's willingness to grant certiorari in South Dakota v. Neville, in spite of the presence, as argued by Justice Stevens in dissent, of adequate and independent state grounds, arguably ex-
emplifies what that Justice has called the Court's "unfortunate lack of judicial restraint." Justice Stevens has argued that granting certiorari in such cases compounds the problems of delay caused by the increased workload already experienced by the Court because state courts may, upon remand, reinstate their original decision by basing the subsequent determination exclusively on the state constitution. Whether state courts possess adequate and independent grounds for reaching their original decision is thus a critical issue which the Court must address before it decides it has jurisdiction to review a case.

Concerning this issue, the Supreme Court has formulated and consistently followed the rule that it will not review a state court decision that involves a state question that has been decided on adequate and independent state grounds. In Murdock v. City of Memphis, the Court explained the adequate and independent state grounds doctrine as follows:

But when we find that the State court has decided the Federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwith-

135. Stevens, Some Thoughts on Judicial Restraint, 66 Am. Judicature 177, 180 (Nov. 1982) (Court fails to exercise judicial restraint in deciding what questions to review and when to review them).

136. Id. at 178.

137. Lego v. Twomey, 404 U.S. 477, 489 (1972) "Of course, the states are free, pursuant to their own law, to adopt a higher standard." Id. See, e.g., South Dakota v. Opperman, 428 U.S. 364, 376 (1976) on remand, 247 N.W.2d 675, 677 (S.D. 1976) (South Dakota Supreme Court reinstated its original ruling that a search for marijuana was unreasonable under the state constitution).

138. See Henry v. Mississippi, 379 U.S. 443, 446 (1965) (Court will decline to review state judgments based on adequate and independent state grounds, even if judgment also decides a federal question); Eustis v. Bolles, 150 U.S. 361, 367 (1893) (if a state court based its decision on state and federal grounds, with an independent and valid state ground capable of sustaining the judgment, the Court will not take jurisdiction).

139. Herb v. Pitcairn, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."). Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874) ("We have already laid down the rule that we are not authorized to examine these other [state] questions for the purpose of deciding whether the State court ruled correctly on them or not.").

140. 87 U.S. (20 Wall.) at 590.
standing the error in deciding the Federal question.\textsuperscript{141}

The Court restated and clarified the adequate and independent state grounds doctrine in \textit{Herb v. Pitcairn}:\textsuperscript{142}

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.\textsuperscript{143}

The federal system of government and the principle of separation of powers necessitate the doctrine of adequate and independent state grounds.\textsuperscript{144} As the Court has stated, the reason for this doctrine "is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction."\textsuperscript{145}

It is well settled that if the record reveals that a state question of law has been raised, decided, and is sufficient to decide the case, regardless of any federal question of law, the Court will not review the judgment.\textsuperscript{146} In the more difficult cases where the state court opinion is less clear, the Court has noted that the question of "what to do with cases in which the record is ambiguous, but presents reasonable grounds to believe that the judgment may rest on decision of federal questions, has long vexed the Court."\textsuperscript{147} The Court has held that the simplest procedure, in cases where the record is ambiguous, is to hold the case in abeyance and apply to the state court for clarification.\textsuperscript{148} The question of what to do with

\textsuperscript{141} Id. at 635.
\textsuperscript{142} 324 U.S. at 117.
\textsuperscript{143} Id. at 125-26.
\textsuperscript{144} See note 145 and accompanying text infra.
\textsuperscript{145} Herb v. Pitcairn, 324 U.S. at 125.
\textsuperscript{146} Eustis v. Bolles, 150 U.S. at 366:

It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment. \textit{Id.}

See also \textit{Ward v. Love County}, 253 U.S. 17, 22-23 (1920). State decisions based on independent non-federal grounds, as well as federal grounds, cannot be reviewed by the Court. \textit{Id.}

\textsuperscript{147} Herb v. Pitcairn, 324 U.S. at 126.
\textsuperscript{148} Id. at 128. "We think the simplest procedure . . . where the record is deficient, is to hold the case pending application to the state court for clarification or amendment." \textit{Id.}
cases having ambiguous records arguably presented itself in South Dakota v. Neville, for the same language was relied on by the majority, and by the dissent, in reaching their differing conclusions as to the presence, or lack thereof, of adequate and independent state grounds.\textsuperscript{149}

In his dissenting opinion in South Dakota v. Neville, Justice Stevens focused on the decision rendered by the South Dakota Supreme Court to conclude that its judgment was based on adequate and independent state grounds.\textsuperscript{150} The issue before the South Dakota Supreme Court, as identified by Justice Stevens,\textsuperscript{151} was "whether SDCL 32-23-10.1 is a violation of Neville's federal and state constitutional privilege against self-incrimination."\textsuperscript{152} Justice Stevens noted\textsuperscript{153} that the lower court resolved the issue before it by holding "evidence of the accused's refusal to take a blood test violates the federal and state privilege against self-incrimination and therefore SDCL 32-23-10.1 is unconstitutional."\textsuperscript{154}

Given that the South Dakota Supreme Court clearly held the statute violated the state constitution, Justice Stevens commented that the holding was adequate to support a state judgment beyond the Court's power of review.\textsuperscript{155} After establishing that the lower court had adequate state grounds for its decision, the dissent opined that independent state grounds also existed since the South Dakota Supreme Court neither expressly nor impliedly construed article VI, section 9 of the South Dakota Constitution to be the equivalent of the fifth amendment.\textsuperscript{156} Independent state grounds exist, under Justice Stevens' interpretation, unless the Court has "explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the

\begin{footnotesize}
\textsuperscript{149} Compare notes 160-61 and accompanying text infra with notes 169-71 and accompanying text infra.

\textsuperscript{150} South Dakota v. Neville, 103 S. Ct. at 924 (Stevens, J., dissenting). "In this case, the Court has no power to reverse the judgment of the South Dakota Supreme Court, because its decision rests on an adequate and independent state ground." \textit{Id.}

\textsuperscript{151} \textit{Id.} at 924.

\textsuperscript{152} State v. Neville, 312 N.W.2d at 725 (emphasis added), citing U.S. Const. amend. V; S.D. Const. art. VI, § 9.

\textsuperscript{153} South Dakota v. Neville, 103 S. Ct. at 925 (Stevens, J., dissenting).

\textsuperscript{154} State v. Neville, 312 N.W.2d at 726.

\textsuperscript{155} South Dakota v. Neville, 103 S. Ct. at 925 (Stevens, J., dissenting) (emphasis added). "Thus, the South Dakota Supreme Court unambiguously held that the statute violated the State Constitution. The holding is certainly adequate to support its judgment and is beyond our power to review." \textit{Id.}

\textsuperscript{156} \textit{Id.} at 925. "We lack jurisdiction because the South Dakota Supreme Court has not indicated, explicitly or implicitly, that its construction of Article VI, § 9, of the South Dakota Constitution was contingent on our agreement with its interpretation of the Fifth Amendment to the United States Constitution." \textit{Id.}
\end{footnotesize}
Federal Constitution.” Given that the South Dakota Supreme Court had “always assumed the independent nature of [their] state constitution, regardless of any similarity between the language of that document and the federal constitution,” Justice Stevens reasoned that in *State v. Neville* the South Dakota Supreme Court continued to construe their constitution independently of the United States Constitution. The dissent then relied on the lower court’s explicit recognition that: *Schmerber* was decided in light of the more liberal definition of ‘evidence’ as used in our state constitution. Since the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D. Const. art. VI, § 9 and the Fifth Amendment of the U.S. Constitution.

Because of the South Dakota Supreme Court’s previously consistent independent construction of their state constitution, Justice Stevens concluded that this language should also be construed as evidence of independent grounds.

Although, the majority in *South Dakota v. Neville* concurred with the dissent that adequate state grounds existed for the lower court’s decision, the majority held that independent state grounds did not exist. The majority based its argument on a two-pronged analysis.

First, the majority identified the issues before the lower court as “whether the Fifth Amendment privilege against self-incrimination applies to refusal evidence,” and “whether this testimonial evidence was compelled for purposes of applying the Fifth Amendment standard.” Thus, the majority held that the issues before the state court had been framed solely with reference to the federal constitutional privilege. Therefore, the majority concluded that the doctrine of adequate and independent state grounds was not a barrier to Supreme Court review.

Second, the majority noted that the South Dakota Supreme Court had relied on cases interpreting the federal privilege against

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157. *Id.* at 925.
158. 247 N.W.2d 673, 674 (S.D. 1976).
160. *State v. Neville*, 312 N.W.2d at 726 n.*.
162. *Id.* at 99 n.5. “Although this would be an adequate state ground for decision, we do not read the opinion as resting on an independent state ground.” *Id.*
163. *Id.* at 919 n.5.
165. *Id.* at 726.
167. *Id.*
self-incrimination to reach their holding that admission of refusal evidence violated the fifth amendment.\textsuperscript{168} According to the majority, the state court then "concluded without further analysis that the state privilege was violated as well."\textsuperscript{169} The Neville majority held that this lack of "further analysis" was evidenced by the South Dakota court's conclusion that "[s]ince the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D. Const. Art. VI, § 9 and the Fifth Amendment of the U.S. Constitution."\textsuperscript{170} The majority thus concluded that this language indicated the state constitution was not, in this instance, independent of the United States Constitution; as a result, the second prong of the majority's adequate and independent state grounds test was not satisfied.\textsuperscript{171}

In reaching this conclusion, the Court compared the language used by the South Dakota court with that of the state court opinion reviewed by the Supreme Court in Delaware v. Prouse.\textsuperscript{172} The Delaware court in State v. Prouse\textsuperscript{173} had held that "[t]he Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and violation of the latter is necessarily a violation of the former."\textsuperscript{174} Since the Supreme Court had relied upon this language to conclude that the Court had jurisdiction in Delaware v. Prouse,\textsuperscript{175} the Court reasoned that the similar language found in State v. Neville gave them jurisdiction in the latter case as well.\textsuperscript{176}

The majority's opinion in South Dakota v. Neville appears to comport with the precedent set by Delaware v. Prouse.\textsuperscript{177} Yet, the fact that the majority and the dissent in South Dakota v. Neville relied upon the same language to reach opposite conclusions on

\textsuperscript{168} Id. "The cases relied on by the court to resolve these issues analyze the federal privilege against self-incrimination." Id.

\textsuperscript{169} Id.

\textsuperscript{170} State v. Neville, 312 N.W.2d at 726 n.*. \textit{But see} notes 159-60 and accompanying text supra (Justice Steven's dissent relied upon the same language to reach the opposite conclusion).

\textsuperscript{171} South Dakota v. Neville, 103 S. Ct. at 919 n.5.

\textsuperscript{172} Id.; 440 U.S. 648, 652 n.4 (1979).


\textsuperscript{174} Id. at 1362.

\textsuperscript{175} South Dakota v. Neville, 103 S. Ct. at 919 n.5. "In such a situation, we concluded, this Court has jurisdiction to review the federal constitutional issue decided below." Id.

\textsuperscript{176} Id. "This was precisely the reasoning we found sufficient in Prouse to give us jurisdiction to hear the case and decide the federal constitutional issue." Id.

\textsuperscript{177} 440 U.S. at 652. \textit{See} notes 170, 172-75 and accompanying text supra.
the adequate and independent state grounds issue\textsuperscript{178} may indicate that sufficient ambiguity existed in the record to make the dictates of \textit{Herb v. Pitcairn}\textsuperscript{179} applicable. As discussed above, \textit{Herb v. Pitcairn} held that the Supreme Court should hold a case in abeyance and apply to the state for clarification when the record is ambiguous as to whether state law was construed to decide the case.\textsuperscript{180} The majority avoided disposition of the case in accordance with the dictates of \textit{Herb v. Pitcairn} by selecting an issue that focused solely on the federal question and ignored the state constitutional question.\textsuperscript{181} Since \textit{Herb v. Pitcairn} seems applicable, and assuming the dictates of that case are to remain viable, the Court should have held \textit{South Dakota v. Neville} in abeyance pending clarification by the state.

The conclusions reached by the Supreme Court resolved the federal questions involved.\textsuperscript{182} Nonetheless, South Dakota and other states remain free to hold refusal evidence inadmissible by clearly informing the Court, in subsequent cases, that their decisions are based on their respective state constitutions. The state courts' decisions can thereby remain untouched by the Supreme Court.\textsuperscript{183} This is so because of that characteristic of federalism which permits a state to provide an individual greater protection under the state constitution than is required under the United States Constitution.\textsuperscript{184}

\textbf{Admissibility of Refusal Evidence}

\textit{The Physical-Testimonial Evidence Distinction}

After holding that the absence of adequate and independent state grounds allowed the Supreme Court to review the South Dakota decision, the Court noted that it had granted \textit{certiorari}\textsuperscript{185} to resolve the disparity among jurisdictions concerning the constitu-

\begin{itemize}
\item \textsuperscript{178} Compare notes 160-61 and accompanying text \textit{supra} with notes 169-71 and accompanying text \textit{supra}.
\item \textsuperscript{179} 324 U.S. at 128.
\item \textsuperscript{180} See note 148 and accompanying text \textit{supra}.
\item \textsuperscript{181} See notes 163-65 and accompanying text \textit{supra}.
\item \textsuperscript{182} South Dakota v. Neville, 103 S. Ct. at 918. "We now address a question left open in \textit{Schmerber,} . . . hold that the admission into evidence of a defendant's refusal to submit to such a test likewise does not offend the right against self-incrimination." \textit{Id}.
\item \textsuperscript{183} Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506, 512 (1938) (on remand the state court was not precluded from reassessing a tax based upon a revised statute eliminating the portion held unconstitutional by the court).
\item \textsuperscript{184} Oregon v. Hass, 420 U.S. 714, 719 (1975) (state may under its own laws, impose greater restriction on police activity than may the Supreme court based on the Constitution).
\end{itemize}
tionality of admitting refusal evidence.\textsuperscript{186} A question left open after \textit{Schmerber} was whether evidence of the refusal to submit to a blood alcohol test was admissible at trial.\textsuperscript{187} The disparity had arisen among the states on this issue,\textsuperscript{188} because footnote nine in \textit{Schmerber}, and the testimonial-physical evidence distinction made therein,\textsuperscript{189} was capable of being interpreted as supporting either the admission or exclusion of refusal evidence.\textsuperscript{190} The Court in \textit{Schmerber} had noted that "[t]he distinction which has emerged, often expressed in different ways, is that the privilege [against self-incrimination] is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."\textsuperscript{191}

A majority of state courts have held that admission of refusal evidence is not violative of the fifth amendment right against self-incrimination because refusal evidence is physical—rather than testimonial—in nature,\textsuperscript{192} and because the admissibility of refusal evidence logically follows from the fact that there is no constitutional right to refuse to take the blood test in the first place.\textsuperscript{193} After considering the majority position, the Supreme Court went on to recognize the logic favoring admissibility found in Justice Traynor's analogies between refusal evidence and flight or suppression of evidence.\textsuperscript{194} Although the Court did not rest its decision on the testimonial-physical evidence distinction—choosing instead to rely on the lack of that degree of impermissible coercion by the state that must be present in order to invoke the fifth amendment privilege—further analysis of Justice Traynor's reasoning is warranted because the Court indicated that "in other cir-

\textsuperscript{186} South Dakota v. Neville, 103 S. Ct. at 920. "Since other jurisdictions have found no Fifth Amendment violation from the admission of evidence of refusal to submit to blood-alcohol tests, we granted certiorari to resolve the conflict." \textit{Id.}

\textsuperscript{187} \textit{Schmerber}, 384 U.S. at 765 n.9 (1966). "[W]e think petitioner's contention [refusal evidence is inadmissible] is foreclosed by his failure to object on this ground to the prosecutor's question and statements." \textit{Id.}

\textsuperscript{188} See note 61 and accompanying text supra. South Dakota v. Neville, 103 S. Ct. at 921. See also cases cited at note 62 supra.

\textsuperscript{189} \textit{Schmerber}, 384 U.S. at 765.

\textsuperscript{190} See cases cited at note 62 and accompanying text supra.

\textsuperscript{191} \textit{Schmerber}, 384 U.S. at 764.

\textsuperscript{192} South Dakota v. Neville, 103 S. Ct. at 921. "Most courts applying general Fifth Amendment principles to the refusal to take a blood test have found no violation of the privilege against self-incrimination." \textit{Id.} See note 81 and accompanying text supra.

\textsuperscript{193} See note 81 and accompanying text supra.

\textsuperscript{194} South Dakota v. Neville, 103 S. Ct. at 921-22. "While we find considerable force in the analogies to flight and suppression of evidence suggested by Justice Traynor, we decline to rest our decision on this ground." \textit{Id.}
cumstances" it might find this type of analysis persuasive.\textsuperscript{195}

In \textit{People v. Sudduth},\textsuperscript{196} Justice Traynor had noted that "[a] refusal that might operate to suppress evidence of intoxication... should not be encouraged as a device to escape prosecution."\textsuperscript{197} In \textit{Sudduth}, the California Court relied on its reasoning in \textit{People v. Ellis}\textsuperscript{198} to find that refusal to take a breathalyzer test was admissible physical evidence.\textsuperscript{199} In \textit{People v. Ellis}, Justice Traynor had held that a defendant’s refusal was circumstantial evidence of consciousness of guilt, similar to evidence of escape from custody, false alibi, flight, suppression of evidence, and failure to respond to accusatory statements when not in police custody.\textsuperscript{200} As the court noted, the accused "[b]y acting like a guilty person... does not testify to his guilt, but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind."\textsuperscript{201} Justice Traynor went on to hold that the inferences flowing from guilty conduct and testimonial products were not proscribed by the privilege against self-incrimination.\textsuperscript{202} However, it has been suggested that Justice Traynor failed to distinguish between the inference of guilt drawn from the conduct of flight or the suppression evidence, and the inference of guilt drawn from the communication by the defendant of his or her desire not to take the blood test.\textsuperscript{203}

The minority view, relied on by the South Dakota Supreme Court in \textit{State v. Neville}, emphasized the communicative aspects of the accused’s refusal.\textsuperscript{204} The Texas and Minnesota courts, in \textit{Dudley v. State}\textsuperscript{205} and \textit{State v. Andrews},\textsuperscript{206} respectively, expressed the minority view on which the South Dakota court relied.\textsuperscript{207} In \textit{Dudley v. State} the Texas court held that "if a communication, written, oral, or otherwise involves an accused’s consciousness of the facts and the operations of his mind in expressing it, such is

\begin{itemize}
  \item \textsuperscript{195} Id.
  \item \textsuperscript{196} 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966), cert. denied, 389 U.S. 850 (1967).
  \item \textsuperscript{197} Id. at —, 421 P.2d at 403, 55 Cal. Rptr. at 395.
  \item \textsuperscript{198} Id. "The reasoning in \textit{People v. Ellis}... is fully applicable... Id. See \textit{People v. Ellis}, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
  \item \textsuperscript{199} People v. Sudduth, 421 P.2d at 404-05, 55 Cal. Rptr. at 396-97.
  \item \textsuperscript{200} 421 P.2d at 397, 55 Cal. Rptr. at 389.
  \item \textsuperscript{201} Id. at 397-98, 55 Cal. Rptr. at 389-90 (emphasis added).
  \item \textsuperscript{202} Id. at 398, 55 Cal. Rptr. at 390.
  \item \textsuperscript{203} See Comment, \textit{The Admissibility of Refusals in Drunk Driving Prosecutions: A Violation of the Fifth Amendment}, 10 Pac. L.J. 141, 150 (1979).
  \item \textsuperscript{204} 312 N.W.2d at 726. The minority view emphasizes that a refusal is a "[t]acit or overt expression and communication of defendant’s thoughts." Id.
  \item \textsuperscript{205} 548 S.W.2d 706 (Tex. Crim. App. 1977).
  \item \textsuperscript{206} 297 Minn. 260, 212 N.W.2d 863 (1973), cert. denied, 419 U.S. 881 (1974).
  \item \textsuperscript{207} State v. Neville, 312 N.W.2d at 726.
\end{itemize}
testimonial and communicative in nature."\textsuperscript{208} The Supreme Court of Minnesota noted that the communicative nature of the expression of refusal, whether oral or physical, is evidenced by the realization that it is the testimonial equivalent of the statement "[b]ecause I fear that the examination will produce evidence of my guilt, I refuse to permit it."\textsuperscript{209} If the view is accepted that this type of evidence is, in fact, "communication," then the United States Supreme Court decision in \textit{Schmerber} would be applicable.\textsuperscript{210} \textit{Schmerber} clearly states that the privilege against self-incrimination protects any form of a suspect's communications or compelled responses.\textsuperscript{211}

Despite the disparity between the state courts in application of the testimonial-physical evidence distinction, the Supreme Court declined to clarify this distinction in \textit{South Dakota v. Neville}.\textsuperscript{212} In so declining, the Court recognized,\textsuperscript{213} as it had in \textit{Schmerber}, that:

\begin{quote}
There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.\textsuperscript{214}
\end{quote}

As the majority in \textit{Neville} pointed out, the difficulty of distinguishing physical from testimonial evidence is demonstrated by such cases as \textit{Estelle v. Smith}.\textsuperscript{215} In \textit{Estelle}, the Court had held that compelled disclosures during a court ordered psychiatric examination were inadmissible since such disclosures were: (1) compelled, and (2) testimonial.\textsuperscript{216} In \textit{Neville}, since the Court found that no impermissible coercion was involved—"the state did not directly compel respondent to take the test, for it gave him the choice of submitting to the test or refusing"—the Court was able to hold that

\begin{footnotesize}
\textsuperscript{208} 548 S.W.2d at 707.
\textsuperscript{209} 212 N.W.2d at 846 (citing Note, \textit{supra} note 47, at 1084.
\textsuperscript{210} \textit{See} note 211 and accompanying text infra.
\textsuperscript{211} Schmerber v. California, 384 U.S. at 763-64. "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications . . . ." \textit{Id}.
\textsuperscript{212} 103 S. Ct. at 921-22. "We decline to rest our decision on" the grounds of testimonial or physical evidence. \textit{Id} at 922.
\textsuperscript{213} \textit{Id}.
\textsuperscript{214} 384 U.S. at 764.
\textsuperscript{216} \textit{Id} at 463-65.
\end{footnotesize}
the fifth amendment had not been violated, without having to con-
front the difficult task of drawing the distinction between testimo-
nial and physical evidence.\textsuperscript{217}

In spite of the Court's failure to confront the issue in \textit{Neville},
the testimonial-physical evidence distinction appears to remain vi-
able: the Court stated it would "draw possible distinctions when
necessary for decision in other circumstances."\textsuperscript{218} It should be
noted, however, that in deciding future cases that require a distinc-
tion between testimonial and physical evidence, the Court indi-
cated in \textit{Neville} that it may favor reasoning, similar to Justice
Traynor's, which concludes that refusals are physical evidence.\textsuperscript{219}
Therefore, since refusal evidence \textit{can be} communicative in nature,
i.e., where the defendant actually states, "I refuse to take the test,"
and thereby protected by the fifth amendment,\textsuperscript{220} courts must
carefully analyze arguments that find refusal evidence analogous
to physical evidence of flight and suppression in order to deter-
mine whether the privilege has been violated. Despite the clarifi-
cation of admissibility of refusal evidence in blood alcohol tests,
the Court's failure to clarify the testimonial-physical evidence dis-
tinction also indicates that questions concerning the admissibility
of refusal evidence \textit{in other contexts} will continue to arise.\textsuperscript{221} Had
the Supreme Court clarified the testimonial-physical distinction in
\textit{South Dakota v. Neville},\textsuperscript{222} state courts may have been sufficiently
guided to decide future cases similarly, without disparity between
the jurisdictions. Elimination of such disparity would undoubt-
edly have contributed to reducing the Court's case load in the
future.

\textbf{Compulsion and Fifth Amendment Policies}

As the Court held in \textit{Neville}, compulsion must be present
before the privilege against self-incrimination can be asserted.\textsuperscript{223}
Although South Dakota avoided \textit{directly} compelling Neville to re-

\begin{footnotesize}
\begin{enumerate}
\item[217.] 103 S. Ct. at 922 ("[s]ince no impermissible coercion is involved . . . we prefer to rest our decision on this ground, and draw possible distinctions when neces-
   sary for decision in other circumstances").
\item[218.] \textit{Id.}
\item[219.] See note 194 and accompanying text \textit{supra}.
\item[220.] See note 82 and accompanying text \textit{supra}.
\item[221.] Arenella, \textit{supra} note 4, at 47, 61 (A hypothetical situation exemplifies such
   a context. Suspect arrested for robbery is not given his \textit{Miranda} warning and re-
   sponds negatively when asked to relate the events that occurred on the night of the
   robbery. Assuming the state seeks to introduce the refusal as evidence, it would
   not make sense to exclude the refusal statement because of the \textit{Miranda} violation
   yet admit evidence of the refusal itself as physical evidence.).
\item[222.] See 103 S. Ct. at 922.
\item[223.] South Dakota v. Neville, 103 S. Ct. at 922. \textit{Accord} United States v. Washin-
\end{enumerate}
\end{footnotesize}
fuse the test, by giving him the choice of submitting to the test, or refusing it, the presence of the choice did not mean that he was not compelled. In the extreme view, a core violation of the fifth amendment (telling an accused to testify at trial) does not directly compel the accused to incriminate himself, for he may choose to commit perjury or contempt rather than self-accusation. Since the presence of a choice did not, in and of itself, determine whether compulsion existed, the threshold question for the Court in Neville was whether the particular "choice" at issue impaired any of the policies underlying the privilege against self-incrimination.

In reaching its decision in Neville, the Court recognized that the policies of the fifth amendment prohibit choices that force the cruel trilemma of self accusation, perjury, or contempt of the defendant. Similarly prohibited are those choices that force a person to confess rather than submit to a test that is painful, dangerous, or violative of religious beliefs. The Court held that the choice given Neville was not violative of either of the two policies previously mentioned, nor of other policies underlying the fifth amendment; therefore the compelled choice was not protected by the privilege against self-incrimination.

Although Neville may not have faced the cruel trilemma referred to above, he was, however, confronted with the dilemma of submitting to the test and providing a prosecutor with evidence of his drunkenness, or refusing to submit and again providing prosecutor with incriminating evidence. Since either alternative of this dilemma could have produced incriminating evidence, the fifth amendment policy against compelled self-accusation arguably

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225. Id.
227. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Justice Goldberg identified these policies as "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt" and "our fear that self-incriminating statements will be elicited by inhumane treatments and abuses." Id.
229. Id. at 923. "In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered . . . ." Id.
230. State v. Neville, 312 N.W.2d at 724. See also People v. Thomas, 46 N.Y.2d 100, —, 385 N.E.2d 584, 590 (1978) (Fuchsberg, J., dissenting), cert. denied, 444 U.S. 891 (1979) (defendant was compelled to produce self-incriminating evidence though state offered choice of refusing or submitting to blood alcohol test).
231. Id. at —, 385 N.E.2d at 590.
should have been applicable.\textsuperscript{232}

Another fifth amendment policy that could have been advanced is the requirement that the state produce evidence against the accused by its own independent labors, and not by forcing it from the defendant's lips.\textsuperscript{233} This policy would appear to prohibit the use of refusal evidence by the state. In \textit{South Dakota v. Neville}, the state required the accused to furnish potentially incriminating evidence—by \textit{either} submitting to or refusing the test\textsuperscript{234}—despite the fact, as mentioned earlier, that prohibiting the use of the refusal evidence would not have deprived the state of the evidence necessary for a conviction.\textsuperscript{235} In \textit{Neville}, evidence of refusal was admitted despite the fact that the arresting officer's testimony concerning the accused's driving behavior, his demeanor, and the results of field sobriety tests were all available as alternative sources of independently acquired evidence.\textsuperscript{236}

In \textit{Neville}, the court did not articulate or analyze these, or any other fifth amendment policies, when it held that the rights of the accused were not violated by the choice offered him.\textsuperscript{237} Rather than analyze such policies, the Court held that since the state could constitutionally compel a blood test, it could also decide when, and if, to allow an option to refuse the test, and to affix any attendant penalties for refusing.\textsuperscript{238} By allowing evidence of refusal to be admitted, the state, in essence, forced the accused to bear witness against himself in violation of the fifth amendment.\textsuperscript{239}

\textbf{Conclusion}

The decision in \textit{South Dakota v. Neville} will aid the states in accomplishing the commendable and necessary public policy of removing drunk drivers from the nation's highways. However, as noted in this article, public policy could be served by alternative measures that include reliance on the arresting officer's testimony and legislation that reduces the availability of alcoholic bev-

\begin{itemize}
\item \textsuperscript{232} \textit{Murphy}, 378 U.S. at 55.
\item \textsuperscript{233} Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961). \textit{See also Murphy}, 378 U.S. at 55 (a fair balance between the state and the individual requires government to shoulder entire load when prosecuting an individual).
\item \textsuperscript{234} State v. Neville, 312 U.S. at 724.
\item \textsuperscript{235} See notes 112-16 and accompanying text supra.
\item \textsuperscript{236} State v. Neville, 312 U.S. at 724.
\item \textsuperscript{237} See note 6 supra.
\item \textsuperscript{238} South Dakota v. Neville, 103 S. Ct. at 924 (given that the offered blood test is legitimate, the State may offer a second option to refuse and may fix penalties for choosing the second option).
\item \textsuperscript{239} People v. Rodriguez, 80 Misc. 2d 1060, —, 364 N.Y.S.2d 786, 790 (1975) (statute which allows refusal evidence to be admitted as penalty for refusing, compels defendant to bear witness against himself).
\end{itemize}
The alternative measures available should be adopted by the states for they are less restrictive and provide greater protection to the rights of the individual citizen.

The Court's decision that independent state grounds were not present indicates that the states must be explicit in their reasoning and analysis when construing state and federal questions. As demonstrated by Neville, language susceptible of ambiguous interpretation does not guarantee that the present Court will seek clarification from the state before deciding the case.

The Court's comment regarding the considerable force of Justice Traynor's opinions on the testimonial-physical distinction may indicate that future arguments based on similar reasoning will be favorably considered by the Court. The Court indicated that the testimonial-physical distinction remains viable. However, the Court's reluctance to provide any clarification, and its comments as to the difficulty of so doing, indicates that the state and lower federal courts will be forced to wrestle with the testimonial-physical evidence distinction for several years before the Supreme Court lends additional guidance.

Resolution of the compulsion issue in Neville in favor of the state reflects the narrow scope the current Court attributes to the policies and values underlying the fifth amendment. Since the public policy of removing drunk drivers from the highway can be furthered without admission of refusal evidence, the decision in Neville represents an unnecessary encroachment on individual rights.

Mark A. Ellis—'85

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240. See notes 112-16 and accompanying text supra.
It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

Id.