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PANEL ONE: ALTERNATIVES TO THE MIRANDA WARNINGS: THE PATHS NOT TAKEN: THE SUPREME COURT'S FAILURES IN DICKERSON

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BIO: * James I. Farr Professor of Law, University of Utah College of Law (cassellp@law.utah.edu). Thanks to those who offered suggestions on this Article, especially the participants in this Symposium. Thanks also to the lawyers who helped me fight the good fight during Dickerson in various ways, including Doug Beloof, Reg Brown, David Castro, Dan Collins, Ted Cooperstein, Doug Cox, Bob Cyncar, Ron Eisenberg, Miguel Estrada, Bruce Fein, Joe Grano, Sarah Hart, Chuck Hobson, Bob Hoyt, Gary Malphrus, Jim Manek, Josh Marquis, Andy McBride, Edwin Meese III, Greg Munson, Michael O'Neil, Patrick Philbin, Rick Romley, Devallis Rutledge, Kyle Sampson, Kent Scheidegger, Chris Simpkins, Scott Sommerville, David Wilson, Ken Woodington, and especially Paul Kamenar, Bill Otis, Lee Otis, and Trish Cassell. I also want to extend a special note of thanks to Yale Kamisar for suggesting this Symposium and, more generally, for all the interest he has shown in my work over the years. In fact, my desire to pursue the Dickerson litigation was prompted, in part, by Yale's admission to me a few years ago that he "wasn't sure" what the Supreme Court would do if it ever faced 3501. Yale, I should never have let you convince me to throw Miranda into the briar patch!

SUMMARY:

... "Where's the rest of the opinion?" That was my immediate reaction to reading the Supreme Court's terse decision in Dickerson, delivered to me via email from the clerk's office a few minutes after its release. ... In Dickerson, the Court gives as a ground for not overruling Miranda the lack of any significant harm to law enforcement. ... Congress, of course, has no authority to modify the content of constitutional rights either directly or under the guise of its remedial powers. ... In brief concluding paragraphs on this issue, Dickerson first quoted Chief Justice Burger's concurring view, in a 1980 case, that "the meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its stricture; I would neither overrule Miranda, disparage it, nor extend it at this late date. ... Finally, Dickerson's claim that it is more difficult for law enforcement officers to comply with a voluntariness test than deliver Miranda warning demolishes a strawman. ... * * * * * In short, what the Court could have said in Dickerson was this: There is a factual question about whether Miranda has harmed legitimate law enforcement efforts. ... what would have been the result of Dickerson properly acknowledging that there was harm to law enforcement from Miranda? Does it necessarily follow that Miranda should have been overruled? ...

TEXT:

[*898]

"Where's the rest of the opinion?" That was my immediate reaction to reading the Supreme Court's terse decision in *Dickerson*, delivered to me via email from the clerk's office a few minutes after its release. Surely, I thought, some glitch in the transmission had eliminated the pages of discussion on the critical issues in the case. Yet, as it became clear that I had received all of the Court's opinion, my incredulity grew.

Just six months earlier, the Court had appointed me to defend my victory in the Fourth Circuit, where I had persuaded that court to hold that 18 U.S.C. 3501 validly replaced the "prophylactic" *Miranda* requirements as the standard for the admissibility of confessions in federal court. n1 My appointment stemmed from the Justice Department's virtually unprecedented decision to align itself with the criminal defendant it was prosecuting in arguing against admitting his confession. The Department and *Dickerson* filed briefs urging reversal of the Fourth Circuit, supported by amicus briefs from the ACLU and several other civil rights organizations. I responded with a brief defending the Fourth Circuit's decision, supported by amicus briefs from the United States House of Representatives, leading Senators, seventeen states, and many of the nation's law enforcement officials, prosecutors, [*899] and victims' organizations. At oral argument in April, an active Court n2 wrestled with the contending positions. Meanwhile, the press and public awaited what many projected would be, regardless of the outcome, a landmark ruling.

Yet the case ended with a whimper, rather than a bang. On June 26, 2000, the Court announced it had reversed the decision below. The rationale for the reversal was only briefly sketched out. The entire majority opinion spans just a few pages (about eight in West's *Supreme Court Reporter*). n3 Only about half of those pages address the substantive constitutional issues. n4 The opinion briefly concludes that *Miranda* announced a "constitutional rule," had "constitutional underpinnings," and was "constitutionally based." n5 Surprisingly, at no point does the majority explicate precisely what this means. Justice Scalia's dissent highlights a critical omission in the majority opinion:

It takes only a small step ... [for the Court to] come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States." It cannot say that, because a majority of the Court does not believe it. n6

One would think this a sufficiently important issue for the majority to respond to it - either to affirm or deny the claim. Yet the majority did not trouble itself to answer.

The description of *Miranda* as a "constitutional rule" was sufficient to achieve the Court's apparent twin aims: striking down 3501 while leaving in place its various decisions crafting exceptions to *Miranda*. n7 [*900] But this result-oriented "success" came at the great cost of any pretense of consistency in the Court's doctrine. For example, *Dickerson*'s assertion that *Miranda* created a "constitutional" rule contradicts numerous clear statements in earlier opinions. Surprisingly, these statements can be traced to Chief Justice Rehnquist, the author of the *Dickerson* opinion. Although *Miranda* itself contains constitutional language, then-Justice Rehnquist had written as early as 1974 in *Michigan v. Tucker* n8 that *Miranda*'s safeguards were "not themselves rights protected by the Constitution" n9 From this premise, the Court allowed derivative evidence from a non-*Mirandized* statement to be used against a defendant because "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards" of *Miranda*. n10 Building on *Tucker*, in a series of cases spanning nearly three decades, the Court repeated the characterization of *Miranda* rules as "prophylactic" and relied on that rationale to limit the reach of *Miranda*. n11 At the same time, numerous federal courts of appeals reaching the issue had understood these statements to mean that *Miranda* rights were not constitutional in character. n12 Indeed, no less than the preeminent academic defender of *Miranda* - Yale Kamisar - had also seemingly acknowledged that, under prevailing doctrine, *Miranda* rights were not constitutionally required. n13

[*901] This issue of the Court's "deconstitutionalization" of *Miranda* lies at the heart of the question presented in *Dickerson*. Yet, by my count, the majority opinion devotes only three substantive sentences to explaining why the Court's own, repeated statements should not be taken at face value. The majority acknowledges that "language" in some

of its earlier opinions supports the view that Miranda rights are not constitutionally required. But, the majority says, these cases prove not that Miranda is not a constitutional rule, but only that "no constitutional rule is immutable." n14 Instead, asserts the majority, such exceptions are a "normal part of constitutional law." n15 Chief Justice Rehnquist does not pause to offer any explanation why then that language had been used in more than a half-dozen Supreme Court opinions on various Miranda issues.

The majority's cursory treatment of this central issue leaves Miranda doctrine incoherent. As others in this Symposium have pointed out, n16 there is no rationale for numerous results over the last twenty-five years. Why can the "fruits" of Miranda violations be used against a defendant? The traditional rule excludes fruits of, for example, unconstitutional searches. n17 In *Oregon v. Elstad*, the Court said very specifically that the reason for not following the Fourth Amendment rule in the Miranda context was that "a simple failure to administer Miranda warnings is not in itself a violation of the Fifth Amendment." n18 The majority in *Dickerson* viewed these statements not as "proving that Miranda is a nonconstitutional decision" but rather that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." n19 Again, in its haste to dispose of the case, the Court [*902] did not tarry to explain the difference. n20 Similarly, in *New York v. Quarles*, the Court carved out a "public safety" exception to Miranda. The Fifth Amendment admits of no such public safety exception; the police cannot coerce an involuntary statement from a suspect and use it against him even if there are strong public safety reasons for doing so. The rationale *Quarles* gave, however, was that the Miranda rules were nonconstitutional rules subject to modification by the Court. n21 *Dickerson* hazards no attempt at explaining *Quarles*. In short, as Justice Scalia's dissent cogently argues, the Court in *Dickerson* behaved like "some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy." n22 Or, as Akhil Amar has written, *Dickerson* reads like little more than the pronouncement: "The Great and Powerful Oz Has Spoken!" n23

While other authors in this Symposium have discussed aspects of this doctrinal incoherence at some length, n24 the point I pursue here is whether this doctrinal incoherence was necessary. Perhaps the Court simply had no choice in the face of irreconcilable lines of cases. My thesis is that *Dickerson* could have been written coherently - that the Court could have crafted other resolutions that would have allowed it to harmonize its doctrine far more effectively than the skimpy, jerry-built opinion the Court announced.

Part I describes a different path the Court could have taken to reconcile both its decisions describing Miranda as a sub-constitutional rule and those applying Miranda to the states. The Court could have treated Miranda as a form of constitutional common law, an interim court-created remedy for the enforcement of Fifth Amendment rights. That path would have been more consistent with *Dickerson's* emphasis on respect for precedent and would have effectively reconciled all of the Miranda cases.

Part II articulates still another path the Court could have followed to sustain 3501. The Court could have concluded that 3501, bolstered by improved tort remedies and other post-Miranda innovations in the law, provided a viable substitute to Miranda.

Part III lays out yet another path available to the Court for sustaining 3501 - and harmonizing its decisions. This section explains [*903] how the Court's assertion of its power to promulgate Miranda conflicted with its more recent decision in *City of Boerne v. Flores*. n25 *Boerne* regulated congressional enforcement of constitutional rights, adding a "congruence and proportionality" requirement to any enforcement scheme. Applying *Boerne* to judicial enforcement of Fifth Amendment rights - that is, to Miranda - reveals that Miranda's exclusionary rule lacks "congruence and proportionality" to the underlying Fifth Amendment. The Court could have solved these problems by viewing Miranda as creating a presumption of involuntariness that could be rebutted by the prosecution.

Part IV addresses one last conflict between *Dickerson* and settled doctrine. In *Dickerson*, the Court gives as a ground for not overruling Miranda the lack of any significant harm to law enforcement. But Congress has reached precisely the opposite conclusion. In numerous other cases involving disputed factual questions, the Court has given

deference to congressional findings. Dickerson should have followed these other decisions in evaluating whether to modify Miranda to uphold 3501.

Part V concludes with an exploration of how Dickerson might have encouraged Congress to adopt alternatives to Miranda - alternatives like videotaping of police interrogation - that might have offered a way of better protecting suspects' rights during questioning and society's interest in obtaining voluntary confessions. The absence of any discussion of alternatives to Miranda is Dickerson's most serious failure.

I. Section 3501 As Modification of Constitutional Common Law

Perhaps the simplest way for the Court to reconcile its various pronouncements was to treat Miranda as a form of "constitutional common law," to use the phrase made famous in Henry Monaghan's 1975 article in the *Harvard Law Review*.ⁿ²⁶ Under this view, the Miranda rules are interim remedies not required by the Constitution, but designed in the absence of legislation to assist in protecting constitutional rights. The Court has exercised such power in other cases, perhaps most notably in the 1971 decision *Bivens v. Six Unknown Federal Narcotics Agents*.ⁿ²⁷ There the Court created the right to sue the federal government for violations of constitutional rights - the so-called Bivens remedy. The Court has also crafted a judicially-devised remedy for enforcing Fourth Amendment rights - the exclusionary [*904] rule of *Mapp v. Ohio*.ⁿ²⁸ Because the Court has crafted extraconstitutional measures, like the exclusionary rule, to protect constitutional rights from infringement by the states,ⁿ²⁹ this understanding of Miranda is consistent with its application to the states.ⁿ³⁰

For present purposes, the salient feature of constitutional common law is that it is subject to change - change by the Court and, in appropriate cases, by Congress. The Bivens doctrine illustrates this evolutionary aspect. In subsequent cases, the Court has allowed Congress to modify the Bivens structure, so long as an alternative adequate to protect constitutional rights remains in place. In *Bush v. Lucas*,ⁿ³¹ for instance, the Court refused to allow a Bivens action by a federal worker for a violation of First Amendment rights because Congress had created a different remedy through federal personnel statutes. In reaching this holding, the Court recognized that the other remedy was not as fully effective as a judicially-created damages remedy.ⁿ³² Nonetheless, the Court explained that the touchstone for assessing the constitutionality of Congress's remedial regime was not whether it matched in every respect the judicially-devised regime for which it substituted. Rather, the touchstone was whether the congressional regime provided "meaningful" protection for the constitutional right at issue. If it did, then its strength compared to the judicially-devised scheme was irrelevant.ⁿ³³

Similarly, in *Smith v. Robbins*, a case decided just a few months before Dickerson, the Court held that its procedure for dealing with frivolous appeals could be superseded by a California procedure.ⁿ³⁴ In words that echo the cases interpreting Miranda, the Court said that the procedure imposed on the states by *Anders v. California*ⁿ³⁵ was simply a "prophylactic framework" and not "a constitutional command." Accordingly, California could substitute an alternative procedure. [*905] The Robbins Court warned that "any view ... that converted [the Anders procedure] from a suggestion into a straitjacket would contravene [our] established practice of allowing the States wide discretion, subject to the minimum requirements of the [Constitution], to experiment with solutions to difficult policy problems."ⁿ³⁶ The test for whether the substitute California procedure was constitutional was whether it provided the "minimum safeguards" to protect the constitutional right at issue.ⁿ³⁷

Under a constitutional common law approach, the Dickerson case could have been resolved straightforwardly in a way that reconciled Miranda with its progeny. Like the interim measures in Bivens and Anders, the Court could have viewed the Miranda rules as an interim "prophylactic framework" designed to safeguard Fifth Amendment rights. This would justify Miranda, since the Court is free (as in Bivens and Anders) to craft rules that assist in the enforcement of constitutional rights. At the same time, this view would fit precisely the language and rationale of post-Miranda exceptions cases - Tucker, Quarles, Elstad, and the like - which were predicated on Miranda as a "prophylactic" device. Indeed, Justice Harlan's concurring opinion in Bivens even used the phrase "prophylactic measures" to describe the Bivens remedial device, the same phrase that the Court would later use to describe the Miranda rules.ⁿ³⁸

Under this view of Miranda, Congress can replace the Miranda rules provided it leaves in place "meaningful safeguards." Section 3501 meets this test. As explained more fully below, 3501 fully protects against the admission of compelled statements in violation of the Fifth Amendment. n39 Congress, of course, has no authority to modify the content of constitutional rights either directly or under the guise of its remedial powers. n40 By the same token, it could not abrogate a judicially-devised protective measure necessary to the survival of a constitutional right. But that is very different from saying that Congress has no authority to modify a ruling that "overprotects" a constitutional right, as Miranda's automatic rule excluding all unwarned custodial statements clearly does. n41 Overprotection means protection beyond what the Constitution requires. It is in precisely that area that Congress [*906] must be free to fashion or modify rules as it thinks wisest. n42 Indeed, if Congress had no role in making independent judgments about what the law should be once constitutional requirements are satisfied, it is difficult to see that it would have any role at all. Rules required by the Constitution and rules beyond those required by the Constitution together exhaust the universe of rules. If the judicial branch is empowered to establish for all time the latter as well as the former, then there is nothing left for Congress to do. n43

This line of argument was presented in my brief. n44 Yet the majority opinion does not explain why it preferred instead to repudiate, sub silencio, the rationale of Tucker, Quarles, Elstad. Nor does the Court explain why it relies on ambiguous implications from dicta in Miranda to trump specific discussions in the Court's later opinions explicating Miranda. Instead, the Court's response was essentially to cloud the distinction between constitutional requirements and nonconstitutional protective measures. The Court carried out this strategy through a virtual army of seemingly refined phrases - "constitutionally rooted," "of constitutional dimension" and the like - to characterize Miranda's status. But these characterizations do nothing to resolve, and in fact seem designed to obscure, the fundamental incoherence of the Court's position: admitting that confessions obtained in violation of Miranda do not always amount to compelled self-incrimination, but maintaining nonetheless that it is unconstitutional for Congress to permit the admission of such statements even if they have been shown to be voluntary under conventional Fifth Amendment principles. n45

[*907] Dickerson implicitly assumes that, in order to provide an additional shield for the exercise of a constitutional right, the Court has the authority to invalidate an act of Congress even if that act alone adequately protects against actual violations of that right. That, however, is precisely the authority the Court refused to exercise in Bush and Chilicky. In those cases, the Court found that Congress was in a better [*908] position than the courts to evaluate the costs and benefits of differing approaches, n46 and that the Court had "no legal basis that would allow [it] to revise [Congress's] decisions." n47 The same is true with custodial questioning. It is not possible through any feasible set of rules to assure that interrogations never become coercive. The only way to foreclose that possibility completely is to prohibit custodial questioning altogether, just as the only way to prevent any violations of defendants' rights at trial would be to prohibit all prosecutions. The Miranda Court declined to impose this prohibition, and with good reason.

Because perfection is impossible, estimating the effectiveness of laws intended to decrease the number of constitutional violations, how many there are to be decreased, and the cost to other values that one preventive rule or another is likely to impose, are necessarily matters of judgment and degree. "Congressional competence at "balancing governmental efficiency and the rights of [individuals],' ... is no more questionable" in the context of custodial interrogations than in other settings. n48 Accordingly, there was no sounder basis for disturbing Congress's judgment as to what measures are best designed to effectuate that balance fairly in this instance than there was in Bush or Chilicky.

To the extent that Dickerson answers any of these concerns, it is through two, very briefly developed arguments that are misplaced as an answer to the constitutional common law approach. First, the Court notes that, "with respect to proceedings in state courts, our "authority is limited to enforcing the commands of the United States Constitution.'" n49 Of course, if the Court can "enforce" constitutional commands with nonconstitutional prophylactic rules, as cases like Tucker, Quarles, and Elstad squarely held, then this statement provides no basis for concluding that the Miranda rules are constitutionally required. Moreover, the proposition that the Court has some authority to impose on the States measures that are not strictly constitutionally necessary, but are designed to assist in enforcing constitutional rights, is hardly revolutionary. It is consistent with what the Miranda Court itself said on the subject. Whatever else is in dispute about the Miranda decision, it is clear that the Court believed its specific rule could be legislatively superseded by

others. Nor is *Miranda* the only instance in which the Court has claimed this power. The Court has engaged in a similar task in several other areas. n50 For example, [*909] the Court has applied the act of state doctrine to the states as a judicially created, nonconstitutional rule that is not compelled by the Constitution n51 and subject to congressional modification. n52 Similarly, under the dormant commerce clause doctrine, Congress is free to validate state actions that would otherwise be prohibited by the Court's decisions. n53

Yet another example of the Court applying extraconstitutional rules to the states was discussed during oral argument in *Dickerson*, but did not find its way into the Court's opinion. The rule of *Chapman v. California*, n54 is a clear counter-example to *Dickerson*'s claim that rules applied to the states may not be superseded legislatively by Congress. n55 *Chapman* involved a state constitution provision which established a standard for deciding reversible versus harmless error. n56 The Court held that federal law overrode the state standard, but was unclear about the basis for the rule it announced. n57 It is clear, however, that the *Chapman* standard is not mandated by the Constitution. n58 Indeed, as the *Chapman* opinion itself states, the responsibility, and presumably the authority, of the Court to fashion such a rule exists only "in the absence of appropriate congressional action." n59 A court-made rule, like that in *Chapman*, that overrides a state constitutional provision yet is subject to revision by Congress, can only be explained as federal common law. n60

Justice Scalia pursued this issue at oral argument, explaining to Solicitor General Waxman that: "In *Chapman v. California*, which was decided the term after *Miranda* and which also involved a procedural [*910] rule, we said: "We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth Amendment right is a Federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.'" n61 This statement demonstrates the Justices' awareness of the statement in *Chapman* about fashioning a constitutional rule, applicable to the states, that is nonetheless subject to congressional modification. Yet the *Dickerson* majority choose not to explain why it would not view *Miranda*, decided just one year before *Chapman*, in the same way.

The only other explanation the Court gave for concluding that *Miranda* was a constitutionally based rule was *Miranda*'s application in habeas proceedings. In a footnote, the Court recounted the federal habeas statute, which makes relief available for claims that a person "is in custody in violation of the Constitution or law or treaties of the United States." n62 The Court then asserted, in a single sentence, that "since the *Miranda* rule is clearly not based on federal law or treaties, our decision allowing habeas review for *Miranda* claims obviously assumes that *Miranda* is of constitutional origin." n63 The truth is that nothing could be less clear or obvious. The Court had never said any such thing in the prior habeas cases. Moreover, another straightforward inference was possible to explain *Miranda*'s application on habeas. *Miranda* could be viewed as part of the "law of the United States," which, for purposes of 2254(a), includes not only federal statutes, but also decisional law designed to help effectuate the federal Constitution or statutes. The Court had taken a similar view of the same phrase used in a similar context in the federal question jurisdictional statute n64 and had attached such a construction to the words "laws of the several States" to include state court decisions in *Erie Railroad Co. v. Tompkins*. n65 This is the approach of not only Larry Yackle, a leading habeas commentator, n66 but of the Department of Justice. In the 1993 case *Withrow v. Williams*, n67 when a *Miranda* issue [*911] was before the Court on habeas, the Deputy Solicitor General told the Court that *Miranda* could indeed be viewed as a "law" of the United States under the habeas statute. n68 In *Dickerson*, however, the Department of Justice simply reversed its position, n69 without even acknowledging (much less explaining) the about face. n70 Interestingly, during the oral argument in *Withrow*, at least one Justice appeared to agree with this position, going so far as to concur with the idea of constitutional common law:

QUESTION: Do you think that the exclusionary rule is a "law" of the United States that was involved in *Stone*?

MR. ROBERTS: I think it is what's been described as constitutional common law.

QUESTION: Yeah, I think so, too. n71

As this colloquy illustrates, the answers to such questions are, at a minimum, far from "clear" and "obvious."

* * * * * In short, what the Court could have said in upholding 3501 was this: In considering 3501, Congress balanced the costs and benefits of a rule excluding all unwarned confessions against the costs and benefits of allowing the trial court to decide on the facts of each case whether the suspect spoke voluntarily. It knew the obvious, namely, that a court is distinctly less likely to find an unwarned statement to have been voluntary, but that sometimes the court would decide that other circumstances proved the statement's voluntary character. It also knew that there would be some cases where allowing the jury to hear that statement would prove the difference between a successful and unsuccessful prosecution of a dangerous criminal. Finally, it understood the damage to public confidence in the criminal justice system, not to mention the risk to public safety, that results when the jury reaches the wrong result because it is not allowed to hear highly probative evidence. Weighing all these considerations, Congress concluded that the cost of slightly less police deterrence - that is, marginally diminished deterrence resulting from the significant risk (as opposed to the certainty) of excluding an unwarned confession - was [*912] outweighed by the benefits of admitting such a confession, so long as it is voluntary. Because Congress's modification of Miranda's extraconstitutional and overprotective exclusionary rule continues to forbid in all instances the government's use of involuntary statements, it fully affords defendants their rights under the Fifth Amendment, and thus is constitutionally sound.

II. The Path Not Taken: 3501 as an Adequate Alternative to Miranda

The second way Dickerson could have been resolved hinges on the issue of alternatives to Miranda. The Miranda Court itself invited - indeed "encouraged" - Congress and the states to craft alternative approaches to the Miranda rules. n72 The Miranda Court promised that "our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform." n73 This was one reason that Congress in 1968 chose to adopt 3501. n74

Section 3501 creates far stronger incentives for police officers to deliver Miranda-type warnings than existed before 1966. The press and academic commentators have written about Dickerson as though the issue were the "overruling" of Miranda or "the end of Miranda warnings." By doing so, they overlook an important and obvious feature of 3501, namely that all of the Miranda warnings remain part of the voluntariness determination. The truth is that the warnings themselves were never at stake in Dickerson.

Police officers would have generally continued to give Miranda warnings if the Fourth Circuit had been affirmed and if 3501 had been upheld. Section 3501 directs the courts to consider the following when making voluntariness determinations:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and

when giving such confession. n75

[*913] The prominence that Miranda warnings enjoyed under 3501 means that, if the Court had upheld the statute, federal law enforcement officers would almost certainly have continued to give them. They would have done so because it would assist in obtaining a favorable ruling on the admissibility of a statement a trial. n76

This was not merely my view. The Department of Justice specifically stated in its brief in *Dickerson* that federal agents would continue to deliver Miranda warnings. n77 Indeed, it is a little discussed fact that federal agents gave Miranda warnings even before they were required to do so by the Miranda opinion. n78 Their doing so provides a real-world confirmation of the Fourth Circuit's view that "nothing [in 3501] provides those in law enforcement with an incentive to stop giving the now familiar Miranda warnings." n79

Section 3501's encouragement to agents to give Miranda warnings might alone have been viewed as creating a viable alternative to Miranda. n80 But 3501 cannot be assessed in splendid isolation. n81 Since 1966, Congress and the courts have greatly expanded the civil, criminal, and administrative penalties against federal officers who coerce suspects. For example, in 1966, it was as a practical matter impossible for a suspect to sue a federal officer who coerced a confession. That changed in 1971, with *Bivens v. Six Unknown Agents*, which recognized a federal civil rights suit against individual federal agents for violations of constitutional rights. n82 Bolstering the *Bivens* suits against individual agents, Congress in 1974 passed amendments to the Federal Tort Claims Act. These amendments waived sovereign immunity for suits against the federal government arising out of acts or omissions by [*914] federal law enforcement agents involving "assault, battery, false imprisonment, abuse of process" and the like. n83 In addition to civil suits, the federal government now has in place a much more developed system of criminal and administrative penalties against its officers who coerce suspects into confession. For example, the Civil Rights Division of the Department of Justice now routinely investigates allegations of police brutality during interrogation. n84

My amicus brief advanced this position, explaining why it provided greater protection against truly coerced confessions than the Miranda framework. n85 The Court responded to this issue in five sentences. The five sentences (with numbers inserted for ease of reference) are:

[1] We agree with the amicus' contention that there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided (citing cases). [2] But we do not agree that these additional measures supplement section 3501's protections sufficiently to meet the constitutional minimum. [3] *Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. [4] As discussed above, section 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confessions. [5] The additional remedies cited by amicus do not, in our view, render them, together with section 3501, an adequate substitute for the warnings required by *Miranda*. n86

These five sentences exemplify the "nine headed Caesar" that Justice Scalia decried. The first sentence describes the position I advanced. The second sentence says that my position was rejected. The third and fourth sentences briefly describe *Miranda* and 3501, and the fifth sentence repeats the conclusion that my argument is rejected - that Caesar has given a "thumbs down" to my position. But why the thumbs down? The Court, after all, had relied on similar remedies in refusing to extend the Fourth Amendment exclusionary rule to immigration proceedings in *INS v. Lopez-Mendoza*. n87 Yet here the Court offers no explanation for refusing to find the alternative remedies adequate.

An interesting omission from this part of the opinion is any reference to *Miranda*'s requirement that any alternative be shown to be "at [*915] least as effective [as *Miranda*] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." n88 Perhaps the *Dickerson* Court omitted it because, as a matter of precedent, the "equally effective" language obviously is not necessary to *Miranda*'s holding. n89 Moreover, the

language could not be reconciled with the Court's later descriptions of Miranda. Miranda's various statements about the need for equally effective alternatives all occur in those parts of the opinion where the Court seems to say that any statement police obtain without explaining to the defendant his rights is necessarily compelled. But as noted earlier, n90 cases such as Quarles make clear that those portions of Miranda cannot be read that way. In Quarles and similar cases, suspects' statements were found admissible despite having been obtained without either compliance with Miranda or any "equally effective" alternative. Once those portions of Miranda are properly understood, the force of the "equally effective" dicta disappears. The Court can insist on warnings or their equivalents only if the admission of a statement obtained without these measures would violate the Constitution. Dickerson, as Justice Scalia pointed out, makes no such assertion. n91 Nor could any such assertion be reconciled with Quarles and related cases. The surviving justification for a "warnings or equivalent" requirement is instead to help prevent future Fifth Amendment violations. This is the way that Dickerson describes Miranda. Dickerson explains that the old voluntariness test "raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." n92 In briefly mentioning the "equally effective" language in an earlier part of the opinion, the Court "clarified" that it means a "procedure that is effective in securing Fifth Amendment rights." n93 If this is true, however, other prophylactic measures that provide equivalent protection against the use of actually compelled statements are constitutionally sufficient even if they do not provide equivalent assurance that the suspect was informed of his rights so long as they sufficiently reduce the "risk" of a violation and [*916] "secure" the underlying Fifth Amendment right to be free from giving an involuntary statement. n94

* * * * In short, what the Court could have said in upholding 3501 was this: Miranda itself invited Congress and the states to adopt reasonable alternative procedures for protecting suspects during custodial interrogation. Section 3501, when considered against the backdrop of other statutory and judiciary protections against police coercion, provides sufficient protection to comply with the Constitution.

III. Section 3501 as a Modification of Miranda's Irrebuttable Presumption

So far, this Article has focused on unresolved inconsistencies between Dickerson and the rest of Miranda doctrine. But Dickerson's doctrinal problems extend into other areas as well. Perhaps the most glaring deficiency is the latitude that the Court has given itself in promulgating constitutional "rules" as opposed to the constraints it has imposed on Congress, an ostensibly co-equal branch of government. In particular, in its landmark 1997 decision, *City of Boerne v. Flores*, n95 the Court demarcated clear limits on the power of Congress to promulgate prophylactic rules protecting constitutional rights. Yet in Dickerson, the Court refused to abide by the same rules.

Here it useful to recall the developments leading up to the Boerne decision. n96 The Supreme Court had decided in *Employment Division v. Smith* n97 that government decisions burdening religious practices need only survive a rational basis test, not the more demanding compelling interest test. Under rational basis scrutiny, the Court upheld Oregon's law prohibiting the use of peyote in Native American religious ceremonies. Congress then held extensive hearings on the subject, concluding that the rational basis test inadequately protected First Amendment free exercise rights. At the behest of Senators Orrin [*917] Hatch and Ted Kennedy, among others, Congress passed the Religious Freedom Restoration Act ("RFRA") requiring all state and federal laws burdening religion to satisfy the compelling interest test.

In *City of Boerne*, the Supreme Court struck down RFRA as unconstitutional. The Court concluded that, even though Congress has the power to "enforce" constitutional rights under Section 5 of the 14th Amendment, Congress lacked the power to mandate the compelling interest test across the states for all laws. The Court was concerned that Congress might use its "enforcement" power effectively to rewrite the Constitution. To prevent such rewriting under the guise of remediation, the Court required that there be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." RFRA, the Court concluded, could not survive that test because it effectively changed the First Amendment standard, dictating a new constitutional rule that states were required to follow. n98

With those limits on Congress in mind, it may be useful to employ a thought experiment to see how the Boerne limitations might apply in the Miranda context. Imagine for a moment that the Supreme Court had never adopted the Miranda procedures. Congress, however, decided to step in and require those procedures. Assume that Congress passed a federal statute requiring state police officers to recite the Miranda warnings and - this is the most important part - mandated that state courts could not admit into evidence any confession obtained without these warnings. Under *City of Boerne*, such a sweeping enactment would be beyond the powers of Congress. The enactment would effectively "rewrite" the Fifth Amendment's prohibition of involuntary statements and require a vast reworking of state police operations around the country. The enactment would make "a substantive change in constitutional protections."ⁿ⁹⁹ It is hard to see how such a change would be a "congruent and proportionate" enforcement device for protecting Fifth Amendment rights.

The obvious application of this exercise is to consider how Boerne's limitations on Congress would apply to the Court's decision in *Miranda*. *Miranda* goes beyond the Fifth Amendment in requiring the suppression of voluntary but unwarned confessions, like the confession given by Dickerson. *Miranda*'s rules are out of proportion because they "prohibit ... substantially more" police practices than would "likely be held unconstitutional under the applicable" Fifth Amendment standard.ⁿ¹⁰¹ To be sure, confessions obtained without [*918] complying with *Miranda*'s procedures may sometimes be involuntary. But there is little reason to believe that this will be true all the time or even most of the time. As Justice O'Connor observed a few years before Dickerson:

In case after case, the courts are asked ... to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. Whether the suspect was in "custody," whether or not there was "interrogation," whether warnings were given or were adequate, whether the defendant's equivocal statement constituted an invocation of rights, whether waiver was knowing and intelligent - this is the stuff that *Miranda* claims are made of. While these questions create litigable issues under *Miranda*, they generally do not indicate the existence of coercion ... sufficient to establish involuntariness.ⁿ¹⁰²

In Dickerson, for example, the district court found Dickerson's unwarned statements voluntary under the Fifth Amendment. The voluntariness of the statements in this case is typical of *Miranda* violations that have reached the Court over the years.ⁿ¹⁰³

Miranda's lack of proportionality is shown not only by its overbroad reach in particular cases, but also by its unlimited application. *Miranda*'s automatic exclusionary rule applies to every episode of custodial questioning conducted by every level of government, federal, state, and local, numbering in the hundreds of thousands each year. It is not limited to a particular period of time or to jurisdictions with a particular history of abuse. It contains no mechanism for a jurisdiction to extricate itself by showing that it has had a long history of compliance with the Self-Incrimination Clause.ⁿ¹⁰⁴ The "indiscriminate scope" of the rules is itself strong evidence that they are disproportionate.ⁿ¹⁰⁵

The Court has also looked to the scope of the problem Congress is addressing when considering the breadth of prophylactic rules. The scope of the problem to which *Miranda* was responding remains unclear, but the evidence of epidemic police abuse was, and is, quite limited. *Miranda* did refer to "anecdotal evidence" concerning abusive [*919] police interrogation,ⁿ¹⁰⁶ which no doubt was a problem in exceptional cases before *Miranda* - just as it remains a problem in some exceptional cases today. But the bulk of the justification in the opinion came from an examination of "police manuals and texts" on techniques for questioning suspects.ⁿ¹⁰⁷ The difficulties with this material as evidence of pervasive coercion in custodial interrogations are legion.ⁿ¹⁰⁸ In fact, the *Miranda* majority acknowledged that it had little idea about typical practices.ⁿ¹⁰⁹ Moreover, while the tactics in the police manuals were offered as evidence of compulsion, the *Miranda* Court concluded only that the tactics created the "potentiality for compulsion."ⁿ¹¹⁰ Thus, the opinion in effect admits its failure to demonstrate that the techniques and circumstances it characterized as giving rise to potential compulsion pervasively resulted in actual compulsion.ⁿ¹¹¹ Nor is that particularly surprising, for it is clear

that the Miranda Court's true concern was with the potentially coercive circumstances themselves, not with actual compulsion - just as it is clear that, in passing RFRA, "[the 103d] Congress's concern was with the incidental burdens imposed" on religion by neutral laws, not with deliberate persecution. n112

Dickerson rests on an understanding of the Court's power that extends it far beyond Congress's. The Court is entitled, of course, to the last word in interpreting the Constitution in the *Marbury v. Madison* sense. But questions of "constitutional rules" are of a different order. As Justice Scalia's dissent pointedly notes, Dickerson in no way equates a violation of Miranda's "constitutional rule" with a violation [*920] of the Constitution. n113 Instead, Dickerson describes Miranda as rejecting the old, totality-of-the-circumstances voluntariness test because it "raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." n114 But this, of course, was precisely the type of protection Congress sought to extend to First Amendment freedoms in *City of Boerne*. n115 In refusing to apply a *Boerne* analysis to its own rule, the Court is asserting greater authority to craft such protective devices than Congress possesses. Yet, if anything, congressional power in this area should be broader than judicial power. The Constitution explicitly confers on Congress the power to "enforce" constitutional rights in Section 5 of the 14th Amendment and the power to adopt "necessary and proper" legislation in Article I, Section 8. In contrast, any power that the Constitution confers on the Court to enforce rights is purely an inferential one, presumably no greater than the power possessed by Congress, and perhaps even lesser. n116

Dickerson's rigid adherence to rules that lack congruence and proportionality is particularly suspect in light of a modest modification that was proposed in Dickerson. The lack of congruence and proportionality between Miranda's rules and Fifth Amendment violations could have been cured by changing Miranda's irrebuttable presumption to a rebuttable one. Under Miranda doctrine, the "failure to administer Miranda warnings creates a presumption of compulsion" which is "irrebuttable for purposes of the prosecution's case in chief." n117 In other contexts, such rigid presumptions are typically justified on the ground that they "avoid the costs of excessive inquiry where a per se rule will achieve the correct result in almost all cases." n118 The Miranda presumption, however, operates to achieve incorrect results in many cases.

[*921] The Court has acknowledged that "per se rules should not be applied ... in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." n119 Under *Boerne*, the irrebuttable presumption creates a jarring lack of "congruence and proportionality." Indeed, to apply an irrebuttable presumption is effectively to change the Fifth Amendment's compulsion standard to a new, warnings-and-waiver standard, thus "altering the meaning" of the Fifth Amendment n120 and "substantively redefining the State's legal obligations" during custodial interrogation. n121

The simple way to avoid flagrant inconsistency with the *Boerne* principle would have been for the Court to have modified Miranda so that it operated as a rebuttable presumption - that is, confessions taken without following the Miranda procedures would have been presumed involuntary unless the state could prove otherwise. Justice Clark suggested this approach in his dissent in *Miranda* as an intermediate position between the majority and the other dissenters. He proposed that "in the absence of warnings, the burden would be on the State to prove ... that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary." n122

This allocation of burdens, superimposed on 3501 (which can easily be read in this fashion n123), would have brought 3501's prophylactic effect even closer to that of Miranda's exclusionary rule by explicitly conferring a preferred status to confessions obtained in compliance with Miranda. At the same time, it would have eliminated the single feature of Miranda's irrebuttable presumption most objectionable under *Boerne*: the imposition of a standard for the admissibility of custodial confessions more stringent than the constitutional voluntariness standard, and the attendant automatic exclusion of many statements that in fact comply with the constitutional standard. In contrast, [*922] a rebuttable presumption would have been a proportionate response to the various risks identified by the Miranda Court. It would also have preserved the assistance the Miranda factors provide to the courts in structuring the voluntariness

inquiry, while ending the irrational mechanical application of those factors to exclude unwarned confessions, even when the confession is unquestionably voluntary.

In *Illinois v. Gates*, n124 the Court performed a similar modification to a test it previously suggested but came to regard as overly rigid. In *Gates*, the Court rejected the two-pronged "Spinelli-Aguilar" test for determining probable cause in favor of a totality-of-the-circumstances approach. Raising a concern that applies equally to the *Miranda* doctrine, the Court explained that "the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts." n125 Yet, in restoring the totality-of-the-circumstances approach, the Court emphasized that the Spinelli-Aguilar factors remained "highly relevant" in determining probable cause, n126 and later cases have examined them. n127 Thus, just as the Spinelli-Aguilar factors now serve "not as inflexible, independent requirements applicable in every case," but rather as "guides to a magistrate's determination of probable cause," n128 so too the *Miranda* factors would have guided determination of voluntariness issues.

Making the *Miranda* presumption rebuttable would not have returned the law to its pre-*Miranda* state. When *Miranda* was decided, the constitutional assignment of the burden for establishing voluntariness was unclear. n129 A rebuttable *Miranda* presumption could have been crafted that would place the burden on the government to establish voluntariness while making delivery of *Miranda* warnings an important part of the calculus.

The *Dickerson* majority's response to this possibility was astonishing. The idea of viewing *Miranda* as a rebuttable presumption was presented to the Court not only in my brief on behalf of the Fourth [*923] Circuit, but was also suggested in separate briefs filed by the United States House of Representatives, by a number of United States Senators, and nineteen states. n130 The majority said only - in a single sentence in a concluding footnote - that it would not consider the various suggestions that had been advanced by the various amici because of "the procedural posture of this case." n131 The Court's reasoning here is quite strained. In its concluding footnote, the Court cites three cases standing for the proposition that the Court generally will not reach arguments that have not "been urged by either party in this Court." n132 But, in *Dickerson*, both of the parties were attacking the decision below - the very reason that various amici organizations were compelled to file briefs defending the decision. In those circumstances, refusing to consider the amici's arguments because they were not presented by the parties effectively allowed a stipulated outcome, the very thing that the Court has long held impermissible. n133 With a case in this posture, it also meant that the Court departed from the normal rule that respondents (in this case, amicus respondents) could raise any argument in support of the judgment below. n134 Instead, on the Court's view, only the Fourth Circuit's arguments could be considered as a basis for sustaining 3501, even though the Court's ruling would preclude any other supportive arguments from ever being raised.

In *Dickerson*, with institutional representatives from Congress and a significant number of states asking for clarification on an important point of *Miranda*, it is hard to understand why the Court would not say something about the issue. n135 Moreover, the Court reached the [*924] larger issue of whether *Miranda* should be overruled in its entirety - an issue not squarely presented in any amicus brief. It is difficult to understand why the Court would reach, on its own initiative, this broader question of whether to overrule *Miranda*, but not the narrower question subsumed within it of whether to modify one particular facet of *Miranda*.

* * * * * In short, what the Court could have said in upholding 3501 was this: The power to promulgate prophylactic rules protecting constitutional rights is not unlimited. The Court, no less than Congress, is bound by the principle of *City of Boerne* that prophylactic rules must be "congruent and proportionate" to the underlying constitutional right. To make *Miranda*'s procedures congruent and proportionate to the Fifth Amendment, the failure to follow the procedures in obtaining a confession will raise a presumption of involuntariness, a presumption that can be rebutted by appropriate evidence of voluntariness.

IV. Section 3501 as Reflecting Congressional Factfinding on Miranda's Harm

This Article has thus far sketched three alternative resolutions of the Dickerson case, resolutions that would have largely reconciled the Court's varying pronouncements on Miranda doctrine without requiring the Court to abandon the Miranda framework. But, because Dickerson itself ultimately reached the broader question of whether to retain Miranda, it is appropriate for this Article to say a few words about the stare decisis issue. On this question, too, Dickerson jarringly departed from other Court holdings.

A. Failing to Consider Miranda's Costs

Stare decisis requires a consideration of the arguments for and against retaining a legal rule, with the balance tipped from the start in favor of retention. n136 When considering whether to modify other precedents, the Court has routinely assessed cost as part of the inquiry. n137 In the Miranda context, a critical issue would be the cost of [*925] the decision, measured in terms of its harms to law enforcement. Indeed, the legitimacy of inquiring into cost can be traced to Miranda itself, where the Court promised that its decision was "not intended to hamper the traditional function of police officers in investigating crime." n138 In later rulings, too, the Court has described Miranda as "a carefully crafted balance designed to fully protect both the defendants' and society's interests," n139 further underscoring the need to consider Miranda's effect on prosecution.

This question of Miranda's costs is a purely empirical one, requiring calculation of how many dangerous criminals go free as a result of the Miranda rules. In our system of government, Congress is the branch charged with reviewing such issues. As the Court has acknowledged, Congress has superior fact-finding powers because it is not "bound by the parties' submissions; rather, it can conduct hearings, canvass constituents, and obtain information from a broad range of sources." n140 Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." n141 Academic commentators have also recognized Congress's comparative advantage. n142

Because of Congress's comparative advantage in assembling information, the Court has routinely given great weight to congressional factual findings in evaluating the constitutionality of federal statutes. A prime illustration comes from *United States v. Morrison*, n143 decided just five weeks before Dickerson. There, the Court invalidated the civil suits provision in the Violence Against Women Act (VAWA) on grounds that they exceeded Congress's power under the Commerce Clause. Both the five justices in the majority and the four justices in dissent prominently discussed the existence and effect of congressional findings on the effect of violence against women on interstate commerce. The majority acknowledged, and did not question, the congressional finding "regarding the serious impact that gender-motivated violence has on victims and their families." n144 The dissent asserted that [*926] "the business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact." n145

The same kind of findings that confronted the Court in *Morrison* existed in Dickerson. As ably recounted in Professor Michael O'Neil's recent article, n146 the Senate Judiciary Committee held a series of hearings on how the Miranda rules were affecting day-to-day law enforcement. The Committee ultimately concluded that the "rigid and inflexible requirements" established in Miranda were "unreasonable, unrealistic, and extremely harmful to law enforcement." n147 The Committee cited various studies demonstrating Miranda's harmful effect on prosecuting crimes. n148 These conclusions impelled Congress to pass 3501.

Perhaps one might argue that the Congressional factfinding process was flawed in various ways. For example, Professor Yale Kamisar's interesting and extended analysis of the "tone" of the legislative process leads him to believe that Congress acted without careful deliberations. n149 Whatever the merits of Kamisar's view, it is hard to see how the quality of the congressional debate has a bearing on the weight to be given to the findings. Within our scheme of separated powers, the Court has no role in kibitzing on the way in which Congress reaches its decisions. n150 Moreover, Kamisar's review focuses primarily, if not exclusively, on Congress's legal determinations about the

constitutionality of 3501 - not Congress's factual determinations about the underlying harm to law enforcement. n151 Because of his focus on jurisprudential issues, Kamisar does not appear to dispute that, in 1968, Congress had ample evidence from police administrators and prosecutors that Miranda was hampering their efforts to bring dangerous criminals to book. n152 Kamisar's article does not substantively discuss [*927] statistical presentations made to the Senate Judiciary Committee by, among others, District Attorney Frank Hogan of New York County, n153 then-District Attorney Arlen Specter of Philadelphia, n154 and District Attorney Aaron Koota of Kings County, New York. n155 While one might draw different conclusions from this data, n156 Congress's determination does seem to be, at the very least, one quite reasonable interpretation. Traditionally, reasonableness is all that the Court has required of Congress in evaluating the factual underpinnings of legislation. n157

Alternatively, the Court might have concluded that the congressional determinations had become outdated by the time Dickerson arrived at the Court in 2000, since Congress reached its conclusions in 1968. Yet it is hard to understand how congressional findings could be made to have any sort of expiration date, particularly where more recent congressional hearings have tended to reaffirm Congress's earlier action. n158 More importantly, Miranda itself was predicated on the promise that its rules would not "constitute an undue interference with a proper system of law enforcement." n159 Miranda's predictive claim - made, of course, in 1966 without the benefit of real world evaluation of the new rules n160 - would have to give way to congressional factfinding based on their actual operation.

Faced with such unattractive grounds for dealing with the congressional findings, Dickerson adopted a remarkable approach: it ignored [*928] them. In deciding to retain Miranda, the Court simply offered its own independent determination that Miranda had not been so harmful as to require modification. In brief concluding paragraphs on this issue, Dickerson first quoted Chief Justice Burger's concurring view, in a 1980 case, that "the meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its stricture; I would neither overrule Miranda, disparage it, nor extend it at this late date." n161 Dickerson next asserted that "Miranda has become embedded in routine police practices to the point where the warnings have become part of our national culture" n162 and that the Court's "subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling" n163 Finally, the Court maintained that a totality-of-the-circumstances, voluntariness test "is more difficult than Miranda for law enforcement officers to conform to" n164

What is obviously missing from Dickerson's analysis is any acknowledgment - let alone analysis - of congressional fact-finding on these very issues. This was a dramatic departure from the approach of Morrison and many other cases recognizing congressional primacy on factfinding. n165 Moreover, taken on their own merits, the Court's articulated reasons for finding Miranda not to be harmful are remarkably weak. With respect to Chief Justice Burger's conclusion that "law enforcement practices have adjusted to [Miranda's] strictures," was the Chief Justice asserting that law enforcement had accommodated to Miranda, thereby avoiding harmful effects? Or, as seems more likely, was he saying that law enforcement had reconciled itself to the harmful effects? This latter interpretation of Chief Justice Burger's remarks would square his views with those of, for example, the nation's largest law enforcement organization, the Fraternal Order of Police. n166 When deciding how to interpret his remarks, it is instructive that Chief Justice Burger, after retiring from the Court, held the view that [*929] Miranda should be overruled. n167 With respect to the Court's subsequent cases reducing any harmful impact from Miranda, the Court did not acknowledge that these modifications have been around Miranda's edges. While the Court has created impeachment, derivative use, and public safety exceptions, Miranda's basic rule excluding non-Mirandized statements from the state's case-in-chief remains intact. The available empirical evidence suggests that these exceptions have marginal effects at best. The public safety exception, for instance, appears to apply in fewer than 1% of all cases. n168 Moreover, while it is true that some post-Miranda issues have been resolved in favor of law enforcement, it is equally true that others have been resolved in favor of criminal defendants. No less a defender of Miranda than the redoubtable Yale Kamisar has acknowledged that "it must also be said that the new Court has interpreted Miranda fairly generously in some important respects." n169 Those important respects include the waiver rules dealing with the circumstances in which police can even ask questions of suspects. In 1981, the Court in *Edwards v. Arizona* created an absolute bar to questioning a suspect who requests counsel. n170 In later decisions, the Court applied this "second layer of prophylaxis" n171 to questioning about even

unrelated crimes n172 and even to questioning after counsel had been provided. n173 It is precisely these rules that law enforcement agencies like the FBI have identified as producing most of Miranda's harm. n174 It is thus entirely possible that [*930] the Court's recent modifications have increased, not decreased, Miranda's societal costs. Dickerson makes no attempt to assay the net effect of the Court's varying decisions.

Finally, Dickerson's claim that it is more difficult for law enforcement officers to comply with a voluntariness test than deliver Miranda warning demolishes a strawman. Federal officers were planning to deliver Miranda warnings even if 3501 had been upheld, n175 which means that whatever useful effect they provided law enforcement would have been continued. In addition, the brightness of Miranda's "bright-line" rule has also been oversold. Justice O'Connor, for example, wrote just a few years before Dickerson that "Miranda creates as many close questions as it resolves" n176 - a position that she simply abandoned (without explanation) in joining the Dickerson opinion. n177 But in the final analysis, the overarching issue remains not how bright the rule is, but the costs of the rule. Dickerson simply fails to offer any assessment of these costs.

Setting aside the particular problems with Dickerson's specific authorities, a more fundamental point is the Court's judicial vantage point on Miranda. The Brethren all are handicapped in assessing the harmful effects of restraints on law enforcement practices. By definition, the Justices receive information only about cases that were successfully prosecuted - that is, cases in which police and prosecutors were able to amass sufficient evidence to pursue the case (and ultimately have it find its way to the Supreme Court). In other words, only cases that are formally charged fall within the ken of the judicial system. The bulk of Miranda's costs lie hidden elsewhere - in cases where Miranda prevents police from ever obtaining confessions vital to successful prosecutions. In a trilogy of recent articles, I have offered three different ways of calculating these hidden costs of Miranda: through "before-after" studies of confession rates, analysis of the drop in crime clearance rates after Miranda, and comparison of contemporary confession rates with those that prevailed at the time of Miranda n178 In 1968, the Senate Judiciary Committee looked at these [*931] very same types of information in reaching its factual conclusion about Miranda's harms. n179 Dickerson does not explain what to make of the social science data on Miranda's effects. n180

B. Law Enforcement Experience with Miranda

Perhaps the Court could have compensated for the inadequacies in its judicial vantage point by relying on other sources of information. In some Miranda cases, for example, the Court has alluded to law enforcement experience as a basis for sustaining the Miranda rules. n181 Dickerson, however, does not mention the numerous law enforcement amicus briefs in the case - no doubt because these briefs flatly contradicted its position. In fact, what may have been the largest collection of law enforcement groups ever to file briefs in a Supreme Court case supported 3501. Briefs urging affirmance of the Fourth Circuit were filed by seventeen State Attorneys General, the National District Attorneys Association, the FBI Agents Association, the nation's largest rank and file law enforcement organization (the Fraternal Order of Police), the nation's second largest rank and file law enforcement organization (the National Association of Police Organizations), the International Association of Chiefs of Police, and a number of other groups. n182 On the other side, not even a [*932] single prominent law enforcement group would support Dickerson's position. n183

The Court did have one brief from a law enforcement agency claiming that Miranda was not harmful. The Department of Justice's brief claimed that "federal law enforcement agencies have concluded that the Miranda decision itself generally does not hinder their investigations." n184 But this statement had been so thoroughly discredited by the time of the oral argument that the Court understandably gave it no weight.

After the Department filed its brief containing these representations, Senators Orrin Hatch and Strom Thurmond wrote to the Attorney General that they had received information that the Drug Enforcement Administration had reached the opposite conclusion and requested that the Attorney General "provide to us at your earliest convenience an explanation for the seemingly misleading statements" contained in the Department's brief. n185 With its hand forced, the Department of Justice released documents from federal law enforcement agencies about the effects of Miranda and lodged them with the Court. The lodged materials came from a number of federal agencies, including some (like the

Internal Revenue Service) that presumably only rarely conduct custodial interrogations and therefore only rarely suffer any harm from the Miranda rules. Buried at the end of the lodging were several memos from the Drug Enforcement Administration, the federal agency that probably conducts a higher percentage of custodial interrogations than any other federal law enforcement agency. As had apparently been reported to Senators Hatch and Thurmond, these memos indicated that the DEA had suffered serious harms from Miranda. In an undated memo written in 1998 by the DEA's Deputy Chief Counsel, the DEA explained that it was in favor of the Department attempting to obtain a favorable ruling on 3501. n186 In a memo dated October 13, 1999, the DEA's Chief of [*933] Operations reported that the agency's experience "highlights the need to reform the formal, prophylactic requirements of Miranda." n187 Joining the DEA, the FBI also reported that offshoots of the Miranda requirements, such as the rule of *Edwards v. Arizona*, have had "an impact on numerous FBI investigations." n188 As Senators Hatch and Thurmond concluded after reviewing these materials, they seriously undermine the impression created by the United States' merits brief "that federal law enforcement agencies uniformly support the Justice Department's decision in this case to challenge the constitutionality of 18 U.S.C. 3501." n189

Yet the Department was not finished with its misleading effort to minimize Miranda's damaging effects on federal law enforcement. The Department came up with new statistics in its reply brief - filed shortly before the oral argument. The Department's reply brief asserted that, between 1989 and 1999, "according to the Justice Department's records, federal courts suppressed approximately 78 statements under Miranda - i.e., one out of every 9,300 federal prosecutions." n190 This representation must have come as something of a surprise to Senators on the Judiciary Committee. Several Senators had previously requested from the Department comprehensive information about federal cases in which Miranda problems had prevented prosecution so that they could illustrate the harms from Miranda. In a 1997 response to the Senators, the Justice Department had answered that "the Department's filing system and records do not readily yield a definitive list of such cases." n191 The Department therefore provided to the Senators only a list of cases in which "adverse [*934] Miranda rulings made by the federal courts have been reviewed by the Solicitor General," an incomplete list which "no doubt excludes a number of cases in which confessions were suppressed under Miranda" n192 It was this same incomplete list that the Department was now attempting to pass off to the Court as a firm accounting of Miranda's harm to law enforcement. A few days after the Department filed its reply brief, Senators Orrin Hatch and Strom Thurmond sent a letter to the Attorney General (with a copy to the Supreme Court) powerfully challenging the accuracy of those figures. The Senators' letter included more than eighty additional cases of statements suppressed under Miranda that were not included in the Department's calculations (more than doubling the figures the Department itself had come up with!) and explained how the Department's representations were seriously misleading. n193 Two days later, the Solicitor General sent a letter to the Supreme Court admitting that dozens of the cases identified by the Senators were not included in the Department's calculations. n194

While the misrepresentations in the Department's brief to the Court are very troubling, perhaps even more disturbing was the Department's refusal to give weight to the congressional findings of harm. While the Department's brief tersely mentioned the congressional findings, n195 the Department nonetheless believed it was free to revisit the evidence on its own rather than follow its traditional role of defending congressional laws and conclusions. n196 It was only because of Senators Hatch and Thurmond's prompt response that this strategy did not succeed in keeping from the Court considerable evidence of Miranda's harm.

This evidence of harm posed a dilemma to the Dickerson majority on the stare decisis question. It was no doubt aware that the potential costs of the Dickerson decision were crucial to any stare decisis calculus. At the same time, the Court was confronted with a congressional determination that Miranda's costs were substantial, findings supported [*935] by numerous social science studies, law enforcement amicus briefs, and the recent conclusions of the DEA and FBI. In the face of this evidence, any serious effort by the Court to grapple with the stare decisis issues would have required the Court to acknowledge that Congress could have reasonably concluded that dangerous criminals were going free because of Miranda. Instead, the Court took the easy way out - it dodged the issue.

* * * * In short, what the Court could have said in *Dickerson* was this: There is a factual question about whether *Miranda* has harmed legitimate law enforcement efforts. Congress is the branch of government charged with resolving such questions. Congress held hearings on this subject and reasonably concluded that *Miranda* was seriously hampering police efforts to solve crime and convict criminals. As a result,

V. Alternatives to *Miranda*

... what would have been the result of *Dickerson* properly acknowledging that there was harm to law enforcement from *Miranda*? Does it necessarily follow that *Miranda* should have been overruled?

Such harm would, at a minimum, be relevant to the Court's calculation whether to retain *Miranda* or return to the earlier voluntariness regime. The Court's stare decisis jurisprudence explicitly acknowledges the relevance of real-world effects. In deciding whether to overrule *Roe v. Wade*, for instance, the controlling opinion from the Court described the decision to overrule as "customarily informed by a series of prudential and pragmatic considerations" n197 These considerations include "the respective costs of reaffirming and overruling a prior case." n198 On this view, the "costs" of the *Miranda* rules are indisputably part of the stare decisis calculation. n199

[*936] Starting from the proper premise that Congress reasonably found *Miranda* to entail significant costs, it would have been interesting to see how the Court then assessed the competing issues. n200 Just exactly how many murderers and armed robbers would the Court find it worth setting free in the interests of retaining the *Miranda* rule? The Court has not proven particularly adept at assessing such tradeoffs. n201 In *Miranda* itself, for example, the Court appeared to balance competing concerns in ways that most Americans found objectionable. Rather than linger over such difficult issues, it is understandable that the Court simply chose to toss off cursory assertions about *Miranda*'s limited harm before galloping off to its disposition, leaving the hard questions to be answered in, ... er ... , later law review symposia. n202

But assuming that the Court had recognized *Miranda*'s harms, would overruling the decision have necessarily followed? Against *Miranda*'s disadvantages, the Court would have needed to assay the advantages. Defenders of *Miranda* have claimed, for example, that *Miranda* entails such benefits as reducing police coercion during the questioning of suspects n203 and communicating to suspects "our societal commitment to restraint in an area in which emotions easily run uncontrolled." n204 Balancing these advantages against *Miranda*'s disadvantages would have been difficult not only because of disagreement about the existence of these benefits, but more generally because of a commensurability problem - these concerns are not susceptible to evaluation on a common scale.

A critique of *Dickerson* for reaching one conclusion or the other on such contentious issues would probably never command broad assent. n205 [*937] But it seems to me that an alternative critique is available, which might draw wider approval. Even assuming that the Court properly struck down 3501, the *Dickerson* opinion is deficient in failing to discuss possible alternatives to *Miranda* that Congress could adopt. *Dickerson*'s silence on reasonable alternatives starkly contrasts with *City of Chicago v. Morales*, n206 a case from the preceding Term. In *Morales*, the Court struck down Chicago's gang-loitering ordinance essentially on vagueness grounds. But the swing justices - Justice O'Connor joined by Justice Breyer - wrote a concurring opinion explaining how Chicago could cure the defects. This led Chicago to adopt a new ordinance conforming precisely to the requirements spelled out in the concurring opinion. Justice O'Connor's *Morales* concurrence illustrates what Professor Erik Luna has helpfully called a "constitutional roadmap." n207 The controlling justices on the Court gave guidance to Chicago so that Chicago's city council could pass an ordinance that complied with the Constitution.

Dickerson should have followed Justice O'Connor's approach in *Morales* - offering some instruction about why 3501 and related enactments were defective and what the Congress needed to do to supplement them. Perhaps some constitutional purists will demur. Touting passive virtues and the like, n208 they will suggest that the Court should take the cases one at a time, leaving the possibility of alternatives to be resolved in a proper case and controversy. In many circumstances, such arguments for judicial restraint might have considerable force. But in the particular context of

Miranda, the case for roadmapping becomes compelling. n209 Miranda is "a decision without a past" n210 - an opinion without foundation in the previous court precedents. n211 As a result, in contrast with other bodies of law, conscientious legislators lack authoritative guidance for any effort to determine what alternatives might satisfy the constitutional requirements. Dickerson offers [*938] no help to the legislature, since it merely offers an unexplained "thumbs down" to the alternative before it, 3501. Perhaps uncertainty might be tolerable if the legislature could simply authorize a test case to explore the acceptability of alternatives to Miranda. But the ability to test alternatives before the Court is limited. A decision by a police agency to depart from Miranda and try some different device risks suppression of a confession. If applied more widely - as might be necessary to obtain appellate review of the issue n212 - it runs the risk of wholesale reversal of criminal convictions, years after the fact.

Dickerson was clearly an "opportunity missed" n213 to make positive reforms, and will continue the "petrification" of the law of pretrial interrogation in this country. n214 For those who think Miranda is the be-all and end-all of rules for this area, perhaps this result will be applauded. But it would be odd if a 1966, 5-4 decision by the Supreme Court embodied the best possible resolution of the competing concerns. Indeed, this Symposium provides considerable evidence of dissatisfaction with Miranda from various quarters. For instance, Professor Laurie Magid and I are concerned that Miranda unduly harms law enforcement. n215 But setting such concerns aside for the moment, it is interesting to hear from Professor Welsh White that Miranda fails to restrain pernicious interrogation practices, n216 from Professor Richard Leo that Miranda has few significant benefits, n217 and from Professor Susan Klein that Miranda fails to provide any real guidance on what kinds of compulsion are permissible during police questioning. n218 Given these complaints, it is hard to fault Professor William Stuntz's conclusion that "Miranda should attract support from neither right nor left." n219

This Symposium also provides considerable evidence for the solution to Miranda defects - the proverbial "win-win" solution that properly protects both suspects and society's legitimate interests. Dickerson should have suggested to Congress that it consider replacing Miranda with a system of videotaping police questioning. Videotaping of interrogations improves on Miranda by providing an objective [*939] record of what happened inside the stationhouse. n220 Videotaping thus allows courts to police the lines between proper and improper tactics, rather than leaving that job to others. n221 Videotaping would also help reduce the number of wrongful convictions from false confessions by revealing those rare cases where suspects (particularly the mentally retarded) are led to confess to crimes they did not commit. n222 I have argued elsewhere that videotaping could largely replace the Miranda regime. n223 Other commentators - including prominently Stephen Schulhofer, Welsh White, and Richard Leo - have urged that videotaping should supplement the Miranda regime. n224 And between these varying positions there certainly are a range of possibilities for using videotaping in combination with various parts of the Miranda regime. n225 Yet the Court's opinion in Dickerson contains not even the briefest discussion of this (or other) alternatives n226 - it gives no roadmap for legislators to follow. The result, not surprisingly, has been inaction in Congress and legislatures on possible alternatives to Miranda. n227

Reasonable people can disagree about exactly which of these various alternatives would have been preferable. But if this Symposium suggests nothing else, it is that society has compelling reasons [*940] constantly to examine how to improve its regulations of police interrogation. Miranda itself recognizes this point. Miranda went out of its way pointedly to "encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." n228 The Miranda Court explained that "we cannot say that the Constitution necessarily requires adherence to any particular solution" to the issues lurking in police questioning of suspects. n229 "Our decision," promised Miranda, "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect." n230

Thirty-four years later, the Dickerson Court chose not to repeat this encouragement to Congress and the states; nor did it renew Miranda's promise to avoid creating a constitutional straitjacket. Instead, making a virtue out of vice, Dickerson tells us that the Miranda procedures have become part of our "national culture" n231 - a cultural straitjacket presumably not susceptible to reform.

Miranda needs reform - a point many in this Symposium have advanced. The true tragedy of Dickerson is, then, not the path that the Court chose - but the paths that it seemingly foreclosed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights Search & Seizure Exclusionary Rule Criminal Law & Procedure Interrogation Miranda Rights General Overview Criminal Law & Procedure Interrogation Voluntariness

FOOTNOTES:

n1. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999). For background of the litigation leading to the Fourth Circuit's decision, see Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. 3501 and the Overhauling of Miranda*, 85 Iowa L. Rev. 175, 208-23 (1999).

n2. I was interrupted for questions approximately sixty-two times in my thirty minute argument.

n3. *Dickerson v. United States*, 120 S. Ct. 2326, 2329-37 (2000).

n4. See 120 S. Ct. at 2332-37.

n5. *Id.* at 2334.

n6. *Id.* at 2337 (Scalia, J., dissenting).

n7. Others in this Symposium have articulated at great length reasons for believing Dickerson does not change Miranda doctrine. See Yale Kamisar, *Foreword: From Miranda to 3501 to Dickerson to ...*, 99 Mich. L. Rev. 879, 893-94 (2001) ("What has been reaffirmed, at least as far as the Chief Justice is concerned, is not the Miranda doctrine as it burst on the scene in 1966, but Miranda with all its exceptions attached ..."); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030, 1071 (arguing that Dickerson "holds that the law is to stay exactly as it was pre-Dickerson"); George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 Mich. L. Rev. 1081, 1112 (2001) (arguing that Dickerson leaves exceptions to

Miranda in place, but locating Miranda rule in the Due Process Clause); see also Charles D. Weisselberg, In the Stationhouse After Dickerson, 99 Mich. L. Rev. 1121, 1162 (2001) (noting that Dickerson "left Miranda standing, but with all of the exceptions and modifications that have been crafted during the last thirty-four years"). This conclusion seems unassailable, although an intermediate appellate court from Colorado disagrees. See *People v. Trujillo*, 2000 WL 1862933 (Colo. App. 2000). Both the text and rationale of Dickerson require leaving the pre-Dickerson exceptions in place, as the Tennessee Supreme Court has explained in a carefully reasoned decision. See *State v. Walton*, 41 S.W.3d 75 (Ten. 2001) (pre-Dickerson exceptions to Miranda remain good law).

n8. 417 U.S. 433 (1974)

n9. *Id.* at 444.

n10. *Id.* at 445-446

n11. See, e.g., *Davis v. United States*, 512 U.S. 452, 457 (1994) (noting that Miranda is "one of a series of recommended procedural safeguards" that are "not themselves rights protected by the Constitution"); *Oregon v. Elstad*, 470 U.S. 298, 307 & n.1(1985) (holding that "a simple failure to administer Miranda warnings is not in itself a violation of the Fifth Amendment"); *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984) ("The failure to provide Miranda warnings in and of itself does not render a confession involuntary.").

n12. See, e.g., *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *DeShawn v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994); *United States v. Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997); *United States v. Abrego*, 141 F.3d 142, 168-70 (5th Cir. 1998), cert. denied, 119 S. Ct. 182 (1998); *United States v. Davis*, 919 F.2d 1181, 1186 (6th Cir. 1990), reh'g en banc denied, 1991 U.S. App. Lexis 3934; *Clay v. Brown*, 1998 U.S. App. Lexis 17115, reported in table format, 151 F.3d 1032 (7th Cir.); *Winsett v. Washington*, 130 F.3d 269, 274 (7th Cir. 1997); *Warren v. City of Lincoln*, 864 F.2d 1436, 1441-42 (8th Cir. 1989) (en banc), cert. denied, 490 U.S. 1091 (1989); *United States v. Lemon*, 550 F.2d 467, 472-73 (9th Cir. 1977); *Lucero v. Gunter*, 17 F.3d 1347, 1350-51 (10th Cir. 1994); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

n13. Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 Mich. L. Rev. 929, 970 (1995) [hereinafter Kamisar, "Fruits"] ("According to a majority of the present Court, [failure to follow Miranda] does not seem to violate a constitutional right at all."). In a more detailed discussion of these issues, Kamisar explained (accurately, it turns out!) why Miranda nonetheless has

constitutional foundations. See Yale Kamisar, Can (Did) Congress "Overrule" Miranda?, 85 Cornell L. Rev. 883, 936-50 (2000) [hereinafter Kamisar, Congress].

n14. *Dickerson v. United States*, 120 S. Ct. 2326, 2335 (2000).

n15. *Id.*

n16. See, e.g., Kamisar, *supra* note 7, at 895 ("I usually discount criticism of a case when made by losing counsel, but this time I am sympathetic when Paul Cassell complains [about] the 'skimpy, jerry-built opinion....'"); Klein, *supra* note 7, at 1071 (characterizing the "terrible" *Dickerson* opinion as a "squandered opportunity to rationalize contradictory case law."); David A. Strauss, *Miranda, the Constitution, and Congress*, 99 Mich. L. Rev. 958, 958 (2001) ("It is not clear that the majority opinion ever really answered" the central questions posed in the case.); see also Barry Friedman & Michael C. Dorf, *Shared Constitutional Interpretation After Dickerson*, N.Y.U. Law School Public Law and Legal Theory, Research Paper No. 13 (Fall 2000) (concluding "a Court brimming with its own importance has paid insufficient attention to its core obligation: to explain the basis for its decisions. That shortcoming is nowhere more obvious than in the line of post-Miranda cases culminating in *Dickerson*.").

n17. E.g., *Nardone v. United States*, 308 U.S. 338, 340-43 (1939).

n18. *Oregon v. Elstad*, 470 U.S. 298, 306 n.1 (1985).

n19. 120 S. Ct. at 2335.

n20. This point is pursued in more detail, and in more powerful prose, in 120 S. Ct. 2326, 2342-43 (Scalia, J., dissenting).

n21. See *New York v. Quarles*, 467 U.S. 649, 658 n.7 (1984) (justifying holding on the ground that "absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind").

n22. 120 S. Ct. at 2342 (Scalia, J., dissenting).

n23. Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 89 n.212 (2000).

n24. See supra note 16.

n25. 521 U.S. 507 (1997).

n26. Henry P. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 42 (1975).

n27. 403 U.S. 388 (1971).

n28. 367 U.S. 643 (1961).

n29. E.g., *Bivens v. Six Unknown Agents*, 403 U. S. 388, 391-95 (1971); *Mapp v. Ohio*, 367 U.S. 643, 655-60 (1961). See also *Bush v. Lucas*, 462 U.S. 367, 374-75 (1983) (discussing application of enforcement measures to the states).

n30. The search and seizure exclusionary rule is different from Miranda's exclusionary rule because it is a remedy for actual violations of the Fourth Amendment. Adopting an analogous approach in the Fifth Amendment context would mean suppressing evidence only in cases in which a defendant's constitutional right against compelled self-incrimination has actually been violated. This is precisely the approach of 3501.

n31. 462 U.S. 367 (1983).

n32. *Id.* at 372-73, 377.

n33. *Id.* at 368, 386-90; see also *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (remedial regime replacing judicially-devised one upheld because it contained "meaningful safeguards" for the constitutional rights at issue even though it failed to provide as "complete relief" as a *Bivens* remedy).

n34. See *Smith v. Robbins*, 528 U.S. 259 (2000).

n35. 386 U.S. 738 (1967).

n36. *Smith*, 528 U.S. at 273.

n37. *Id.* at 276.

n38. E.g., *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987).

n39. See *infra* notes 72-94 and accompanying text (discussing safeguards against coerced confessions provided by 3501 and other measures).

n40. *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

n41. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (*Miranda* "sweeps more broadly than the Fifth Amendment itself"); *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("The *Miranda* rule 'overprotects' the value at stake.").

n42. See *Smith*, 528 U.S. at 284 ("We address not what is prudent or appropriate, but only what is

constitutionally compelled.") (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)); cf. *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959).

n43. Professor Strauss's interesting article in this Symposium takes the view that Miranda should be viewed as part and parcel of ordinary constitutional jurisprudence, akin to the interpretation of the First Amendment rights found in, for example, *New York Times v. Sullivan*, 376 U.S. 254 (1964). See Strauss, *supra* note 16, at 960-66. On this view, Strauss argues, the Court properly struck down 3501 because it was not "as good or better" than the constitutional Miranda rules. *Id.* at 969-70. The difficulty with this argument from analogy, however, is that it requires a justification for analogizing Miranda to the "constitutional" interpretation exemplified by Sullivan rather than to the "prophylactic" interpretation exemplified by Bivens. If I read him correctly, Strauss fails to offer any explanation for viewing Miranda as akin to Sullivan rather than to Bivens. As I have tried to argue here, the case for the Bivens analogy is strong. Unlike the Sullivan analogy, a Bivens analogy fits both the terminology of Miranda doctrine (e.g., "prophylactic rule") and its practical effects ("overprotection" of the right, replacement by Congress, etc.). Of course, if the Bivens analogy is correct, Congress was free to replace the Miranda rule not with a rule that was, in Strauss's terms, "as good or better" than Miranda, but rather with one that satisfied the constitutional minimum. See *supra* notes 32 - 33.

n44. See Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below at 4-28, *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (No. 99-5525). This document, and many others related to the Dickerson case, are available on my website at www.law.utah.edu/cassell [hereinafter Cassell website].

n45. Professor Schulhofer's provocative contribution to this Symposium argues that all of the Justices in *Dickerson* share some misconception that Fifth Amendment rights during custodial police questioning are somehow distinct from "ordinary" Fifth Amendment rights. See Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 Mich. L. Rev. 941 (2001). The cases Schulhofer cites for the "ordinary" principle, however, illustrate only the special point that imposing a penalty on a person for exercising the Fifth Amendment is constitutionally forbidden. See *Hoffman v. United States*, 341 U.S. 479 (1951) (criminal contempt); *Griffin v. California*, 380 U.S. 609, 614 (1965) ("Comment on the refusal to testify ... is a penalty imposed by courts for exercising a constitutional privilege."); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (penalty of loss of public employment); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968) (the "privilege against self-incrimination does not tolerate the attempt ... to coerce a waiver ... on penalty of the loss of employment"); *Brooks v. Tennessee*, 406 U.S. 605, 611 (1972) (striking down rule because it "imposed a penalty for petitioner's initial silence"); *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (viewing disqualification from public contracting as an impermissible "penalty for asserting a constitutional privilege" (internal quotation omitted)); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-06 (1977) ("Government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions."); *New Jersey v. Portash*, 440 U.S. 450, 455-56 (1979) (explaining that the rule considered in *Brooks v. Tennessee* was found unconstitutional because it "imposed a penalty on the right to remain silent"); *Carter v. Kentucky*, 450 U.S. 288, 301 (1981) (explaining that no adverse-inference instruction must be given to jury because "the penalty" for not testifying "may be just as severe [as in *Griffin*] when ... the jury is left to roam at large with only its untutored instincts to guide it ... "). Since Schulhofer's cases reflect only a prohibition of penalizing the exercise of the privilege of silence, they provide no rational support for Schulhofer's notion that merely questioning a suspect in

custody automatically violates the Fifth Amendment unless an elaborate set of protective procedures is followed. See generally Joseph D. Grano, *Confessions, Truth and the Law* 137-39 & n.151 (1996).

Schulhofer further argues that Fifth Amendment exceptionalism is of recent origin, attributable purely to the Tucker-Elstad-Quarles lines of cases which "drained Fifth Amendment compulsion of its distinctive content" by equating it with Fourteenth Amendment voluntariness. See Schulhofer, *supra*, at 949-50. But Court precedent before *Miranda* specifically recognized the congruence of the voluntariness standard and the self-incrimination standard in the specific context of custodial questioning. See *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (stating that voluntariness standard and Fifth Amendment standard for admission of confessions are "the same standard"). Schulhofer also claims that the fact that Fifth Amendment precedent condemns certain practices as "impermissibly compelling per se" demonstrates that the voluntariness standard is "entirely foreign to the Court's Fifth Amendment jurisprudence ..." Schulhofer, *supra*, at 947-48. But per se prohibitions were recognized under the voluntariness standard as well. See, e.g., *Stein v. New York*, 346 U.S. 156, 182 (1953) (holding that where suspect is threatened with violence, there "is no need to weigh or measure its effects on the will of the individual," because such confessions are "too untrustworthy to be received as evidence of guilt"). It is therefore unsurprising to find the Court's cases routinely treating compulsion under the Fifth Amendment and involuntariness as the same standard in substance. See *Portash*, 440 U.S. at 458-59 (treating compulsion in the Fifth Amendment sense as an interchangeable concept with coercion and involuntariness); *Garrity*, 385 U.S. at 495-98 (same).

Of course, as a final problem, Schulhofer's position would require repudiating numerous post-*Miranda* cases, such as *Tucker*, *Quarles*, and *Elstad*. Small wonder, then, that, although he advanced this position to the Court in *Dickerson*, see Brief for Amicus Curiae The American Civil Liberties Union in Support of Petitioner at 7-11, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525) (authored in part by Schulhofer), not a single Justice even nibbled on it. At least I got two votes!

n46. *Bush v. Lucas*, 462 U.S. 367, 387-90 (1983).

n47. *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988).

n48. *Chilicky*, 487 U.S. at 425 (quoting *Bush*, 462 U.S. at 389) (internal citation omitted); see also *Palermo*, 360 U.S. at 343, 353 n.11 (discovery rules for criminal defendants).

n49. *Dickerson*, 120 S. Ct. at 2333 (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991)).

n50. See *supra* notes 27-38 and accompanying text (discussing *Mapp*, *Bivens*, and similar cases).

n51. See e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964).

n52. See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180-81 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968). For further discussion of the act of state analogy to *Miranda*, see Cassell, *supra* note 1, at 238-39.

n53. The doctrine furthers the constitutional "right to engage in interstate trade," *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (internal quotations omitted), by invalidating state laws that unduly burden or interfere with such commerce. The Court's decisions in this area are certainly "constitutionally based" on the Commerce Clause, but Congress is free to modify them. See, e.g., *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174-75 (1985); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 436 (1856).

n54. 386 U.S. 18 (1967).

n55. The following discussion draws heavily on the amicus brief from the Criminal Justice Legal Foundation, which presented this argument to the Court. See Brief of Amicus Criminal Justice Legal Foundation, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n56. See *Chapman*, 386 U.S. at 20 & n.3.

n57. See Daniel Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 2, 24-26 (1994).

n58. 386 U.S. at 24-26.

n59. 386 U.S. at 21.

n60. Meltzer, *supra* note 57, at 26 ("The harmless error rule should be seen as constitutional common law.").

n61. Tr. of Oral Argument at 14, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525) (quoting *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added)).

n62. *Dickerson*, 120 S. Ct. at 2333 n.3 (quoting 28 U.S.C. 2254(a)).

n63. 120 S. Ct. at 2333 n.3 (emphases added).

n64. See *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850-51 (1985) (providing that federal common law as articulated in rules that are fashioned by court decisions constitutes "laws" as that term is used in 28 U.S.C. 1331).

n65. 304 U.S. 64 (1938).

n66. See Larry W. Yackle, *Post Conviction Remedies* 97, at 371 (1981 & 1996 Supp.) (concluding Miranda rules can be viewed as "federal 'law' which, under the [habeas] statute, may form the basis for habeas relief").

n67. See Tr. Of Oral Argument at 15-16, *Withrow v. Williams*, 507 U.S. 680 (1993) (No. 91-1030). While the transcript of oral argument does not identify the justices who are speaking, I have listened to the tape and believe the justice is Justice Stevens.

n68. 68.Tr. of Oral Argument at 14-15, *Withrow v. Williams*, 507 U.S. 680 (1993) (No. 91-1030).

n69. 69.See Brief of the United States at 24, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n70. 70.Curiously, in *Withrow*, the prisoner was represented by Seth Waxman. When Mr. Waxman became

Solicitor General, he apparently directed the Department to reverse, without explanation, its earlier position.

n71. 71.Tr. of Oral Argument at 18, *Withrow v. Williams*, 507 U.S. 680 (1993) (No. 91-1030) (quotation marks inserted around "law").

n72. 384 U.S. 436 (1966).

n73. *Miranda*, 384 U.S. at 467.

n74. See S.Rep No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N 2112.

n75. 18 U.S.C. 3501(b) (1994).

n76. See *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (noting that Mirandized statements rarely found involuntary), quoted with approval in *Dickerson*, 120 S. Ct. at 2336; see also *Welsh S. White, Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 Mich. L. Rev. 1211, 1219 (2001) (noting that a survey of cases suggests that successful challenges to Mirandized confessions are rare).

n77. See Brief of Amicus Dep't of Justice, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n78. See *infra* note 174 (discussing FBI practice). *United States v. Dickerson*, 166 F.3d 66 (4th Cir. 1999).

n79. 9. *United States v. Dickerson*, 166 F.3d 66 (4th Cir. 1999).

n80. Section 3501 also extended additional protections to suspects in at least one other way. See *Cassell*,

supra note 1, at 243 (noting 3501's requirement that courts consider the suspect's awareness of the nature of the charges against him, a requirement that extends further than Miranda doctrine found in *Colorado v. Spring*, 479 U.S. 564, 577 (1987)).

n81. See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1483-1538 (1987) (courts should consider entire legal landscape in construing statutes).

Several critiques of the constitutionality of 3501 appear to suffer from the problem of analyzing the statute alone without considering the supplemental devices bolstering 3501. See, e.g., Kamisar, *Congress*, supra note 13 (discussing only 3501); Klein, supra note 7, at 1057; Strauss, supra note 16, at 969.

n82. See supra notes 27-33 and accompanying text.

n83. 28 U.S.C. 2680(h) (1994).

n84. See 28 C.F.R. 0.50 (1994) (establishing Justice Department's Civil Rights Division).

n85. See Brief of Court-Appointed Amicus at 28-40, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525). Other commentators have also raised this issue. See, e.g., Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 Wash. & Lee L. Rev. 1149, 1184-87, 1203-04 (1998).

n86. 120 S. Ct. at 2335.

n87. 468 U.S. 1032, 1044-45 (1984).

n88. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

n89. Cf. *Harris v. New York*, 401 U.S. 222, 224 (1971) ("Some comments in the Miranda opinion can

indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.").

n90. See *supra* notes 11-13 and accompanying text.

n91. 120 S. Ct. at 2337-38 (Scalia, J., dissenting).

n92. 120 S. Ct. at 2335 (emphasis added) (internal citation omitted).

n93. 120 S. Ct. at 2334 n.6 (emphasis added).

n94. Cf. *Smith v. Robbins*, 120 S. Ct. 746, 759 (2000) (upholding against constitutional challenge an alternative to *Anders* procedure that provided protection for constitutional right at issue at least as good as contained in *Anders*). Bolstering this point is the congressional judgment that 3501 would effectively secure suspects' rights, a point pursued at greater length in Part III, *infra*. Cf. *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1987) (deferring to congressional judgments on effectiveness issues). Also, during the sixteen months 3501 was in effect in the Fourth Circuit, it appeared that, in practice, 3501 has indeed been at least as effective as the *Miranda* regime at protecting Fifth Amendment rights.

n95. 521 U.S. 507 (1997).

n96. See generally Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 *Mont. L. Rev.* 249 (1995).

n97. 494 U.S. 872 (1990).

n98. For trenchant criticism of *Boerne*, see Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 *Harv. L. Rev.* 153 (1997).

n99. Boerne, 521 U.S. at 532.

n100. *Id.* at 520. See *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 644-50 (2000).

n101. *Kimel*, 120 S. Ct. at 647.

n102. *Withrow v. Williams*, 507 U.S. 680, 709-10 (1993) (O'Connor, J., dissenting) (citations omitted) (collecting numerous illustrations).

n103. See, e.g., *United States v. Green*, 592 A.2d 985, 986 n.2 (D.C. 1991) (statement specifically found to be voluntary below), cert. granted, 504 U.S. 908 (1992) (No. 91-1521) and cert. dismissed, 507 U.S. 545 (1993); *Oregon v. Elstad*, 470 U.S. 298, 315 (1985) ("It is ... beyond dispute that respondent's earlier [un-Mirandized] remark was voluntary."); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) ("There is no evidence or suggestion that Hass' statements to [police] ... were involuntary or coerced."); *Michigan v. Tucker*, 417 U.S. 433, 445 (1974) ("the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination").

n104. Cf. *Boerne*, 521 U.S. at 533 (commenting favorably on the presence of such devices as a means of assuring proportionality).

n105. See *Kimel*, 120 S. Ct. at 650.

n106. See *Miranda v. Arizona*, 384 U.S. 436, 445-46 (1966). Interestingly, *Miranda* did not cite any contemporary cases in which the police had extracted a confession through threatened force. For this point, it relied on such dated information as the Wickersham Report in 1931 and a few Supreme Court cases in the 1940s and early 1950s. 384 U.S. at 445-46. *Miranda* went on to conclude that police coercion "is not, unfortunately, relegated to the past or to any part of the country," *id.* at 446, resting this assertion on a few additional isolated and dated reports. *Id.* The Court conceded, however, that "the examples given above are undoubtedly the exception now." *Id.* at 447.

n107. *Miranda*, 384 U.S. at 448.

n108. See generally *id.* at 532-33 (White, J., dissenting).

n109. *Id.* at 448.

n110. *Id.* at 457.

n111. *Id.* at 645. It is also noteworthy that both the executive and legislative branches reached their own conclusions, contemporaneously with *Miranda*, that coercion as traditionally understood was not pervasive in custodial interrogations. See President's Comm'n on Law Enforcement and Admin. of Justice, *The Challenge of Crime in a Free Society* 93 (1967) (stating, based on pre-*Miranda* data, that "today the third degree is almost nonexistent"); S. Rep. No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2134 (reviewing congressional testimony from expert witnesses on lack of coercive techniques and concluding *Miranda*'s contrary findings were based on an "overreaction to defense claims that police brutality is widespread"); see generally Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387, 473-78 (1996) [hereinafter Cassell, *Social Costs*] (collecting evidence on limited number of involuntary confessions in 1966).

n112. *Boerne*, 521 U.S. at 531-32.

n113. 120 S. Ct. at 3227 (Scalia, J., dissenting); see also discussion at *supra* note 91 and accompanying text.

n114. 120 S. Ct. at 2335 (internal citation omitted).

n115. See S. Rep. No. 103-111, at 8 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1897 ("By lowering the level of constitutional protection for religious practices, [Smith] has created a climate in which the free exercise of religion is jeopardized.").

n116. Compare *Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (upholding congressional ban on literacy tests), with *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51-54 (1959) (refusing to strike down literacy tests under Court's authority to enforce the Equal Protection Clause).

n117. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

n118. *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). Per se rules are also sometimes justified on the grounds that exceptions are not sufficiently "important to justify the time and expense necessary to identify them." *Id.* (internal citation omitted). This rationale has no application when considering 3501. Congress has determined to the contrary that the judiciary should devote such additional energy as may be needed (if any) to making accurate (rather than presumptive) voluntariness determinations in federal criminal cases. Moreover, because confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran v. Burbine*, 475 U.S. 412, 426 (1986), individualized voluntariness determinations would appear to be time well spent.

n119. *Coleman*, 501 U.S. at 737.

n120. Cf. *Boerne*, 521 U.S. at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

n121. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 648 (2000). See generally J. Grano, *supra* note 45, at 198 (arguing that *Miranda* "substituted for the constitutional rule a new substantive rule of its own making").

n122. 384 U.S. at 503 (Clark, J., dissenting).

n123. Section 3501(a) provides that a confession "shall be admissible in evidence if it is voluntarily given" (emphasis added), implying that the presumption is against admissibility unless and until voluntariness is established. The Court, of course, has a duty to read congressional enactments so as to comply with the Constitution.

n124. 462 U.S. 213 (1983).

n125. *Id.* at 234-35 (footnote omitted).

n126. *Id.* at 230.

n127. See, e.g., *Alabama v. White*, 496 U.S. 325, 328 (1990).

n128. *Gates*, 462 U.S. at 230 n.6.

n129. See *Developments in the Law - Confessions*, 79 Harv. L. Rev. 935, 1069-70 (1966) (noting majority rule that prosecution proves voluntariness and minority rule that defendant proves involuntariness). After *Miranda*, the issue has been clarified, but has not been definitively resolved. *Lego v. Twomey*, 404 U.S. 477, 489 (1972), definitely suggests that the prosecution must prove voluntariness. See generally 3 Wayne R. LaFare et al., *Criminal Procedure* 10.3(c) at 429 (2d ed. 1999) (noting *Lego* "raises serious doubts" about placing burden on defendant to prove involuntariness). But some states continue to place the burden on the defendant to show involuntariness. See, e.g., *Chambers v. State*, 742 So.2d 466, 468 (Fla. Dist. Ct. App. 1999).

n130. Brief of Amicus Curiae of the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Affirmance at 15-16, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525); Brief for the States of South Carolina et al. as Amici Curiae Urging Affirmance at 5-16, *Dickerson*, 120 S. Ct. 2326 (2000) (No. 99-5525); Brief of Amicus Curiae of Senators Orrin G. Hatch et al. Urging Affirmance at 7-9, *Dickerson*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n131. *Dickerson*, 120 S. Ct. at 2336-37 n.8.

n132. *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979) (emphasis added); see also *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (declining to reach issue "since it was not raised by either of the parties here or below"); *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (declining to reach argument that "has never been advanced by petitioners in this case").

n133. See *Young v. United States*, 315 U.S. 257, 259 (1942) ("The proper administration of the criminal law cannot be left merely to the stipulation of the parties.").

n134. The Court allows greater freedom in responding to a question presented, because a respondent may, without cross-petitioning, "urge any grounds which would lend support to the judgment below," *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977), including "grounds different from those upon which the court below rested its judgment." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

n135. Presumably the House of Representatives could have intervened in *Dickerson* to defend the statute, an action which would seem to have given it "party" status for purpose of having its arguments considered. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); see generally, Note, Executive Discretion and the Congressional Defense of Statutes, 92 *Yale L.J.* 970 (1983). It truly elevates form over substance to refuse to consider the arguments by the House because they were instead presented in the form of an amicus brief.

n136. I should emphasize that I in no way question stare decisis doctrine. Cf. Gary Lawson, *The Constitutional Case Against Precedent*, 17 *Harv. J.L. & Pub. Pol'y.* 23 (1994); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *Yale L.J.* 1535 (2000).

n137. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991).

n138. *Miranda*, 384 U.S. at 477.

n139. *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986).

n140. Michael Edmund O'Neill, *Undoing Miranda*, 2000 *BYU L. Rev.* 185, 281 [hereinafter O'Neill, *Undoing*]; see also Michael Edmund O'Neill, *Miranda Remediated*, 3 *Greenbag* 149 (2000) [hereinafter O'Neill, *Remediated*].

n141. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broadcasting Sys.*,

Inc. v. F.C.C., 512 U.S. 622 (1944); accord *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

n142. See, e.g., Klein, *supra* note 7, at 1066-68 (2001) (taking this view and collecting supporting citations).

n143. 120 S. Ct. 1740 (2000).

n144. *Id.* at 1752. Nonetheless, for the majority these findings could not be given decisive weight on the ultimate question of effect on interstate commerce because "they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." This mixed question of fact and law was, the majority concluded, for the judiciary.

n145. *Id.* at 1760 (Souter, J., dissenting).

n146. O'Neill, *Undoing*, *supra* note 140, at 210-33.

n147. S. Rep. No. 90-1097, at 46 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2132.

n148. See *id.* at 42, 45, reprinted in 1968 U.S.C.C.A.N. 2112, 2128, 2131-32.

n149. Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 *Cornell L. Rev.* 883, 894 (2000).

n150. Cf. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 558-59 (1993) (Scalia, J., concurring).

n151. See Kamisar, *supra* note 149, at 910 (giving five reasons for disbelieving Committee's analysis on the

constitutionality of 3501).

n152. Professor Kamisar does point to a "conspicuous absence of any law professors at subcommittee hearings" as one reason for not crediting the Senate Judiciary Committee's report. *Id.* at 902. While I am sure many of us in the academy will find merit in Kamisar's suggestion that academics are vital to congressional deliberations, this is no requirement for crediting legislative findings. Also, other defenders of Miranda did testify at the hearings. See, e.g., *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong. 1159 (1967)* (hereinafter *Controlling Crime Hearings*) (statement of Vincent L. Broderick on behalf of the American Civil Liberties Union).

n153. See *id.* at 1120-23.

n154. *Id.* at 200-02.

n155. *Id.* at 223.

n156. Compare, e.g., Cassell, *Social Costs*, *supra* note 111, at 395-418 (using the studies as reason for finding significant harm from Miranda), with Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 *Nw. U. L. Rev.* 500, 516-47 (1996) [hereinafter *Schulhofer, Practical Effect*] (reading the same studies differently).

n157. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 82-83 (1981) (in evaluating the constitutionality of a statute, "the District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence").

n158. See, e.g., Cassell, *supra* note 1, at 208-09 (noting congressional hearings urging the Justice Department to enforce 3501); see also *infra* notes 185-196 and accompanying text (noting efforts of Senators Hatch and Thurmond to support 3501).

n159. *Mapp v. Ohio*, 367 U.S. 643 (1961).

n160. The Court claimed that the FBI had operated under similar rules, but this claim was transparently flawed. See Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General on the Law of Pretrial Interrogation 48-49 (1986), reprinted in 22 Mich. J.L. Reform 437, 501-02 (1989) [hereinafter OLP Report].

n161. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

n162. 120 S. Ct. at 2336.

n163. *Id.*

n164. *Id.*

n165. See *supra* notes 143-145 and accompanying text.

n166. See The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions: Hearings ... of the Senate Comm. on the Judiciary, 106th Cong. (1999) (statement of Gilbert G. Gallegos, President of the Grand Lodge, Fraternal Order of Police) ("Sometimes we hear the claim that police have 'learned to live with Miranda' as an argument against any change in the rules used in our courts. If what is meant by this is that police will do their very best to follow whatever rules the Supreme Court establishes, it is true police have 'teamed [sic] to live with Miranda' ... But if what is meant by this is that police 'live with' and do not care about the harmful effects of these Court rules, nothing could be further from the truth ... too often these rules interfere with the ability of police officers to solve violent crimes and take dangerous criminals off the streets.").

n167. Interview with Timothy Flannigan, biographer of Chief Justice Burger, in Washington, D.C. (Apr. 6, 2001). Part of his reasoning may have been that, contrary to his 1980 position that Miranda should neither be "disparaged" nor "extended," the Court had in fact extended Miranda in various ways, including in particular the line of cases originating with *Edwards v. Arizona*, 451 U.S. 477 (1981), which significantly restricts the ability of law enforcement officers to question suspects. It is this line of cases that has been identified by federal law enforcement agencies as creating the most harmful effects from Miranda. See *infra* note 188 and accompanying

text (noting FBI difficulties under Edwards line of cases).

n168. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 *UCLA L. Rev.* 839, 884-85 (1986).

n169. Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments, and Questions* 509 (9th ed. 1999); see also Kamisar, *Congress*, *supra* note 13, at 951 ("Not all the opinions written in confession cases over the past thirty years have saddened the hearts of Miranda's friends.").

n170. 451 U.S. 477 (1981).

n171. *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991).

n172. See *Arizona v. Roberson*, 486 U.S. 675 (1988).

n173. See *Minnick v. Mississippi*, 498 U.S. 146 (1990).

n174. See Brief of the Federal Bureau of Investigation's Agents Association as Amicus Curiae, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525); *supra* note 167 (noting concern of FBI about Edwards).

Edwards has been arguably weakened in one small respect. In *Davis v. United States*, 512 U.S. 452 (1994), the Court held that a request for counsel had to be unambiguous to trigger the questioning cutoff rules once a suspect had waived his right. Here again, however, the empirical evidence suggests that this modification has not been particularly useful for law enforcement. Cassell & Hayman, *supra* note 168, at 860 (explaining that only 2.3% of cases involved post-waiver invocations of rights, and all of those cases involved suspects who had previously given incriminating information). The three cases involved suspects who had already given incriminating information. *Id.* See generally William J. Stuntz, *Miranda's Mistake*, 99 *Mich. L. Rev.* 975, 988 (2001) (discussing infrequency of those who invoke rights after waivers - "Conditional Talkers" in his lexicon).

n175. See *supra* notes 76-78 and accompanying text.

n176. *Withrow v. Williams*, 507 U.S. 680, 711 (1993) (O'Connor, J., dissenting).

n177. See 120 S. Ct. at 2347 (Scalia, J., dissenting) (noting politely this unexplained reversal by Justice O'Connor).

n178. Cassell, *Social Costs*, supra note 111; Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 *Stan. L. Rev.* 1055 (1998); Cassell & Hayman, supra note 168. Three additional reasons for believing that Miranda harmed law enforcement are the contemporary reports of law enforcement officers to that effect, see Paul G. Cassell, *Reply, All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 *Nw. U. L. Rev.* 1084, 1106-10 (1996); the higher confession rates found in Britain and Canada, see Cassell, *Social Costs*, supra note 111, at 418-22; Cassell & Hayman, supra note 168, at 876-80; and the decline in innocent suspects who are exonerated through confessions, see Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions - And From Miranda*, 88 *J. Crim. L. & Criminology* 497, 551 (1998). These positions, of course, have not been universally accepted by legal academics. Compare, e.g., Schulhofer, *Practical Effect*, supra note 156, George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 *UCLA L. Rev.* 821 (1996), and John J. Donahue III, *Did Miranda Diminish Police Effectiveness?*, 50 *Stan. L. Rev.* 1147 (1998), with, e.g., Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future*, 36 *Hous. L. Rev.* 1251, 1286 (1999) (book review) ("Professor Cassell's research is important because it does remind us that Miranda imposes a cost on thousands of cases.").

n179. See, e.g., *Controlling Crime Hearings*, supra note 152, at 199, 726, 1092.

n180. See Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 *Mich. L. Rev.* 1000, 1010-11 (2001); Klein, supra note 7, at 1075-76.

n181. See, e.g., *Withrow*, 507 U.S. at 713 (citing amicus brief from law enforcement agency as a reason for not contracting Miranda).

n182. The briefs are available on the Cassell website, supra note 44. The brief from the IACP was nominally "in support of neither party" but was in substance fully supportive of the Fourth Circuit's opinion. Brief of Amici Curiae for Americans for Effective Law Enforcement, Inc., Joined by the International Association of Chiefs of Police, Inc., the National Sheriffs' Association, and the Virginia Association of Chiefs

of Police, in Support of Neither Party, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525), available at Cassell website, *supra* note 44.

n183. A brief was filed by individual police officers supporting *Dickerson*, which also contained two minor law enforcement groups: the Police Foundation and the National Black Police Association (not to be confused with the National Organization of Black Law Enforcement Executives, the far more prominent representative of African-American law enforcement officers). Brief of Griffin B. Bell et al. as Amici Curiae in Support of Petitioner, *Dickerson*, 120 S. Ct. 2326 (2000) (No. 99-5525). But the attorneys working on this brief were unable to secure the assent of even a single major law enforcement organization for their position, despite the fact (I have been reliably informed) that they called many of the same nationally prominent groups that ultimately supported the Fourth Circuit.

n184. Brief for the United States at 34, *Dickerson*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n185. Letter from Senators Orrin G. Hatch and Strom Thurmond to Attorney General Janet Reno (Feb. 15, 2000) (available on Cassell website, *supra* note 44); see also 146 Cong. Rec. S760 (daily ed. Feb. 24, 2000) (statement of Sen. Thurmond).

n186. Letter from Robert C. Gleason, Deputy Chief Counsel, Drug Enforcement Agency, to Patty Stemler, Chief, Dep't of Justice Criminal Div., Appellate Section (undated) (available on Cassell website, *supra* note 44).

n187. Letter from Richard A. Fiano, Chief of Operations, Drug Enforcement Agency, to Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Policy Development, Drug Enforcement Agency (Oct. 13, 1999) (available on Cassell website, *supra* note 44). In a curious attempt to undercut these memos written in the ordinary course of business, the DEA's politically-appointed General Counsel wrote a memo on February 22, 2000 (just two days before the Department's lodging with the Court and after the request from Senators Hatch and Thurmond), that attempted to "clarify" some of the statements made in the earlier memos. Letter from Cynthia R. Ryan, Chief Counsel, Drug Enforcement Agency, to Seth P. Waxman, Solicitor General, Dep't of Justice (Feb. 22, 2000) (available on Cassell website, *supra* note 44).

n188. Letter from Larry R. Parkinson, General Counsel, Federal Bureau of Investigations, to Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development, Drug Enforcement Agency (Oct. 19, 1999) (available on Cassell website, *supra* note 44).

n189. Letter from Senators Orrin G. Hatch and Strom Thurmond to Attorney General Janet Reno, *supra* note 185.

n190. Reply Brief for the United States at 17-18, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n191. Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, Dep't of Justice, to Senator Fred Thompson (Nov. 5, 1997), reprinted in *The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions: Hearing before the Senate Subcomm. on Crim. Justice Oversight of the Senate Comm. on the Judiciary, 106th Cong. at 124 (1999)*.

n192. *Id.*

n193. Letter from Senators Orrin G. Hatch and Strom Thurmond to Attorney General Janet Reno and Solicitor General Seth P. Waxman (Apr. 18, 2000) (available on Cassell website, *supra* note 44).

n194. Letter from Solicitor General Seth P. Waxman to General William K. Suter, Clerk, United States Supreme Court (Apr. 20, 2000) (available on Cassell website, *supra* note 44).

n195. Brief for the United States at 19-20, *Dickerson*, 120 S. Ct. 2326 (2000) (No. 99-5525).

n196. See generally Cassell, *supra* note 1, at 223-25 (criticizing the Department for failing to defend 3501). Cf. Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. Pa. L. Rev. 251 (2000) (discussing whether courts should have considered the statute without Justice Department prompting); Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. Pa. L. Rev. 287 (2000) (same).

n197. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion).

n198. *Id.* (emphasis added).

n199. As the Court's references to "costs" makes clear, the Court's own stare decisis jurisprudence directly supplies an answer to Professor Susan Klein's query as to why data on lost convictions should be relevant to Miranda jurisprudence. See Klein, *supra* note 7, at 1076 n.204. But Miranda doctrine as well has long made costs and benefits directly relevant. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986) (describing Miranda as "a carefully crafted balance designed to fully protect both the defendant's and society's interests"). Even Miranda's most ardent supporters seem to agree. See, e.g., Yale Kamisar, The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court, in *The Burger Years* 143, 150 (Herman Schwartz ed., 1987) (noting that striking a balance "is the way Miranda's defenders - not its critics - have talked about the case for the past twenty years"); Schulhofer, Practical Effect, *supra* note 156, at 505 (agreeing that "the size of a legal problem does matter"); see generally Tracey L. Meares & Bernard Harcourt, Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure, 90 *J. Crim. L. & Criminology* 733 (2000).

n200. To be clear, my argument is that the Court should have accepted Congress's factual findings on harm (criminals going free), not that it should have deferred to the congressional determination that interrogations are not inherently coercive. This latter conclusion, a mixed question of fact and law, presents a more difficult case for deference to congressional findings than the purely factual findings discussed in the text. See generally Cassell, *supra* note 1, at 249 n.355 (collecting authorities on the not-inherently-coercive argument).

n201. Cf. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 *Utah L. Rev.* 479 (discussing failures of the criminal justice system in recognizing victims' rights).

n202. Cf. Kamisar, *supra* note 7, at 897 (stating that Dickerson basically said, "Let the professors figure it out.").

n203. See, e.g., Richard A. Leo, *The Impact of Miranda Revisited*, 86 *J. Crim. L. & Criminology* 621, 678 (1996). For a competing view of the evidence on this point, see, e.g., Cassell, *supra* note 111, at 473-78.

n204. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 *U. Chi. L. Rev.* 435, 460 (1987). For competing views of the message sent by Miranda, see, e.g., Joseph D. Grano, *Confessions, Truth and the Law* (1996); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 *U. Chi. L. Rev.* 938, 948 (1987).

n205. For this reason, among others, I have argued for replacing Miranda rather than overruling it.

n206. 119 S. Ct. 1849 (1999).

n207. Erik Luna, *Constitutional Roadmaps*, 90 *J. Crim. L. & Criminology* 1125 (2000).

n208. See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40 (1961). See generally Luna, *supra* note 207, at 1173-85 (discussing various theories of interbranch dialogue).

n209. To be clear, Professor Luna reserves "for another day" the question of whether the Court's "disinclination toward hearing political alternatives can serve as a constitutionally legitimate motivation for judicial decisionmaking and opinion writing." Luna, *supra* note 207, at 1236 n.543. I want to argue here that, at least in the context of replacements for Miranda, such disinclination is illegitimate, or at least inadvisable.

n210. OLP Report, *supra* note 160, reprinted in 22 *U. Mich. J.L. Reform* 564 (1989).

n211. See Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 *Harv. J.L. & Pub. Pol'y* 327, 328 (1997) (collecting authorities on this point).

n212. Cf. Cassell, *supra* note 1, at 200-19 (reviewing protracted litigation involved in getting 3501 before the Supreme Court).

n213. Stuntz, *supra* note 174, at 976.

n214. See OLP Report, *supra* note 160, at 99, reprinted in 22 *U. Mich. J.L. Reform* 548-49.

n215. See Laurie Magid, Deceptive Police Interrogation Practices: How Far is Too Far?, 99 Mich. L. Rev. 1168 (2001); supra Parts IV.A-B.

n216. White, supra note 76, at 1220-21

n217. Leo, supra note 180, at 1027.

n218. Klein, supra note 7, at 1035.

n219. Stuntz, supra note 174, at 976.

n220. See Cassell, Social Costs, supra note 111, at 486-92.

n221. See Stuntz, supra note 174, at 999.

n222. See Cassell, Social Costs, supra note 111, at 488-89; Paul G. Cassell, The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 Harv. J.L. & Pub. Pol'y 523, 582-84 (1999).

n223. See Cassell, Social Costs, supra note 111, at 486-98; Cassell & Fowles, supra note 178, at 1130.

n224. See Leo, supra note 180, at 1028-29; Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. and Criminology 429, 494-96 (1998); Schulhofer, Practical Effect, supra note 156, at 503; Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L. Rev. 105, 154-55 (1997).

n225. For interesting arguments along these lines, see Friedman & Dorf, *supra* note 16; Donald Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow* (2000) (arguing that videotaping could replace the Edwards rules). My proposed videotape replacement for Miranda also retains parts of the Miranda regime. See Cassell, *Social Costs*, *supra* note 111, at 486-98.

n226. Another often-discussed alternative to Miranda is the questioning of suspects by magistrates rather than police officers. See Akhil Reed Amar, *The Constitution and Criminal Procedure* 77 (1997); see also Paul G. Kauper, *Judicial Examination of the Accused - A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224 (1932).

n227. See Luna, *supra* note 207, at 1236-38 n.544.

The only post-Dickerson response in Congress was the introduction of a bill by Senator Leahy that would have repealed the operative provisions of 3501. S. 2830, 106th Cong., 2d Sess. (2000). The bill went nowhere in the 106th Congress. Presumably the majority in Congress prefers the approach of 3501, as evidenced by the amicus briefs in Dickerson, see *supra* note 130 and accompanying text.

n228. 384 U.S. at 467 (emphasis added).

n229. *Id.*

n230. *Id.*

n231. 120 S. Ct. at 2336.