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Dickerson v. United States: The Case That Disappointed Miranda's Critics - And Then Its Supporters

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INTRODUCTION

It is difficult, if not impossible, to discuss *Dickerson* intelligently without discussing *Miranda*, whose constitutional status *Dickerson* reaffirmed (or, one might say, resuscitated). It is also difficult, if not impossible, to discuss the *Dickerson* case intelligently without discussing cases the Court has handed down in the five years since *Dickerson* was decided. The hard truth is that in those five years the reaffirmation of *Miranda*’s constitutional status has become less and less meaningful.

In this chapter I focus on the Court’s characterization of statements elicited in violation of the *Miranda* warnings as not actually “coerced” or “compelled” but obtained merely in violation of *Miranda*’s “prophylactic rules.” This terminology has plagued the *Miranda* doctrine and puzzled and provoked many commentators since then. Justice Rehnquist utilized this label to describe and to diminish *Miranda*—and he was the first Justice ever to do so—thirty-two years ago.

At that time, Justice Rehnquist observed for the Court: “[T]he police conduct at issue here did not abridge respondent’s constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by the Court in *Miranda* to safeguard the privilege.”

Rehnquist’s opinion for a 7–2 majority in *Dickerson* calls *Miranda* “a constitutional decision of this Court,” a case that “announced a constitutional rule that

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* I am grateful to Craig Bradley for his helpful suggestions.


3 Michigan v. Tucker, 417 U.S. 433, 445–46 (1974). Justice Rehnquist was not the first Justice to describe the *Miranda* rules as “prophylactic” (Justice Powell was) but the first to use this terminology to disparage *Miranda*. In Michigan v. Payne, 412 U.S. 47, 53 (1973), in the course of explaining and defending a presumption designed to protect against indicative sentencing when a defendant is retried, Powell spoke approvingly of *Miranda*. He considered the rule protecting against vindictive sentencing “analogous to *Miranda*.”

4 530 U.S. at 432.
Congress may not supersede legislatively;" and one that "laid down ‘concrete constitutional guidelines for law enforcement agencies and courts to follow.’" But the "prophylactic" language has not disappeared. Indeed, since Dickerson was decided the Chief Justice has joined two plurality opinions that refer to the Miranda rules as "a prophylactic employed to protect against violations of the Self-Incrimination Clause" and as "prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause."

REHNQUIST'S VIEWS ON THE WARREN COURT'S CRIMINAL PROCEDURE CASES BEFORE ASCENDING TO THE SUPREME COURT

Mark Tushnet, the author of a new book on the Rehnquist Court (and of Chapter 9 in the present volume), informs us that Rehnquist kept in mind "the constitutional theories of Robert Jackson, the Supreme Court justice for whom he had clerked," and that "to understand Rehnquist, it helps to understand Jackson." If so, this helps explain why Rehnquist did not welcome the Warren Court's "revolution" in American criminal procedure.

In a famous 1944 confession case, Ashcraft v. Tennessee, a majority of the Court concluded that thirty-six hours of continuous relay interrogation was "inherently coercive." It is hard to believe that anybody would disagree with that conclusion today. Yet when Ashcraft was decided, Justice Jackson wrote a powerful dissent, severely criticizing the majority for departing from the traditional "due process"—"totality of the circumstances"—"voluntariness" test.

Five years later, in another coerced confession case, Watts v. Indiana, concurring Justice Jackson warned that the Bill of Rights, as interpreted by the Supreme Court up to that time, had imposed "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself"—good reason for not indulging in any further expansive interpretation of them.

5 Id. at 444.
6 Id. at 435 (quoting from Miranda).
10 Id. at 14.
11 322 U.S. 143.
12 Cf. Scalia, J., dissenting in Minnick v. Mississippi, 498 U.S. 146, 164 (1990), suggesting that the Court might adopt a bright-line rule "marking out the situations in which knowledge or voluntariness cannot possibly be established—e.g., a rule excluding confessions obtained after five hours of continuous interrogation."
14 338 U.S. 49 (1949).
15 Id. at 61.
Justice Jackson’s 1949 observation about the Bill of Rights imposing the maximum restrictions on organized society allowable is worth dwelling on. I have little doubt that many shared Jackson’s view at the time. But looking back on it more than a half-century later, Jackson’s comment seems astonishing.

Jackson’s observation was made more than a decade before the Warren Court’s “revolution” in criminal procedure got underway. Although the right to counsel has aptly been called “the most pervasive” right of an accused, “for it affects his ability to assert any other rights he may have,” 17 1949 was a time when the U.S. Constitution, as then interpreted, did not entitle indigent defendants, in non-capital state criminal prosecutions, to appointed counsel. 18 Thus, in some states whose own laws or court rules did not provide for appointed counsel, indigent persons charged with such serious crimes as manslaughter and armed robbery had to fend for themselves. The year 1949 was also a time when there were no constitutional constraints on pretrial identification (indeed, there was no constitutional restrictions on one-person lineups) — even though mistaken identification has probably been the single greatest cause of conviction of the innocent. 20

Moreover, 1949 was a time when many state courts, and the U.S. Supreme Court as well, were upholding the admissibility of confessions obtained under conditions that would jolt many of us today. 21 It was also a time when state courts were free to admit illegally seized evidence — and most of them did so. 22

Mark Tushnet also tells us that although Rehnquist harbored no hatred or disdain for African Americans, he was “simply indifferent” to their situation and “placed the claims of the civil rights movement in a framework of constitutional theory shaped by his experience as Jackson’s law clerk.” 23 Nor did his views change. Years later, as an important player in Goldwater’s effort to transform the Republican Party, Rehnquist was of the view, Tushnet tells us, “that advocates of civil rights were going too far, trampling on other important constitutional values in their misguided effort to cleanse the United States of racism.” 24

16 When I started teaching law in 1957, I had the distinct impression that a goodly number of my colleagues and many of my students agreed with Jackson.
17 Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).
18 The Supreme Counsel did not construe the Sixth and Fourteenth Amendments as requiring indigent defendants who could not afford a lawyer to be provided with appointed counsel in non-capital state prosecutions until 1963. See Gideon v. Wainwright, 372 U.S. 335.
19 The Supreme Court did not begin to address the problem of lineups and other pretrial identifications until 1967, when it decided a trilogy of cases: United States v. Wade, 388 U.S. 218; Gilbert v. California, 388 U.S. 263; and Stovall v. Denno, 388 U.S. 293.
23 Tushnet, supra note 9, at 23.
24 Id.
This is another reason why Rehnquist was unlikely to be impressed by – or even see the need for – the Warren Court’s criminal procedure revolution. As Dean Kenneth Pye observed as the Warren Court era was coming to an end:

The Court’s concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . Concern with civil rights almost inevitably required attention to the rights of defendants in criminal cases. It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. . . .

If the Court’s espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime.25

So far I have been largely speculating about why Rehnquist was probably discontented with *Miranda* and other Warren Court criminal cases before he himself was appointed to the Supreme Court. But there is more direct – and quite powerful – evidence of Rehnquist’s displeasure with the so-called criminal procedure revolution: a memorandum he wrote when he worked for the Nixon administration.

On April 1, 1969, when he had been Assistant Attorney General in charge of the Office of Legal Counsel for fewer than ninety days, Rehnquist sent a nineteen-page memorandum to John Dean (of Watergate fame), who was then the Associate Deputy Attorney General. The memorandum charged that “there is reason to believe that the Supreme Court has failed to hold true the balance between the right of society to convict the guilty and the obligation of society to safeguard the accused.”26 Therefore, recommended Rehnquist, “the President [should] appoint a Commission to review these decisions, to determine whether the overriding public interest in law enforcement . . . requires a constitutional amendment.”27

Although Rehnquist’s memorandum complained about other matters – such as the ban on comments about a defendant’s refusal to take the stand in his or her own defense, the search and seizure exclusionary rule, and the sharp increase in habeas corpus petitions28 – its heaviest fire was directed at *Miranda*:

26 Memorandum from William H. Rehnquist to John W. Dean, III, re: Constitutional Decisions Relating to Criminal Law, April 1, 1969, Summary of Memorandum, p. 2. The memorandum was marked “administratively confidential,” which, according to Dean, “kept it locked up for many years.” John W. Dean, *The Rehnquist Choice* 268 (2001). I am indebted to Professor Thomas Y. Davies of the University of Tennessee College of Law for calling this memorandum to my attention and providing me with a copy (which he obtained from the National Archives).
27 Id.
28 See id. at 6, 8–9, 12–14.
The past decade has witnessed a dramatic change in the interpretation given by the Supreme Court of the United States to the constitutional rights of criminal defendants. Limitations both drastic and novel have been placed on the use by both the state and federal governments of pre-trial statements of the defendants. . . .

The impact of Miranda and its progeny on the practices of law enforcement officials is far-reaching.

The Court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given which is very likely to have the effect of preventing a defendant from making any statement at all. As Mr. Justice Jackson observed in Watts v. Indiana [a confession case discussed in the text at note 14 supra]:

"Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement under any circumstances."30

The Rehnquist memorandum then made an argument that other critics of the Warren Court's criminal cases, and Miranda particularly, have made.31

The Court, believing that the poor, disadvantaged criminal defendant should be made just as aware of the risk of incriminating himself as the rich, well-counseled criminal defendant, has undoubtedly put an additional hurdle in the way of convicting the guilty.32

I find two things especially interesting about the Rehnquist memorandum: First of all, Rehnquist never mentions a provision of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (usually called §3501 because of its designation under Title 18 of the United States Code) that purports to abolish Miranda and to make the pre-Miranda "voluntariness" rule the sole test for the admissibility of confessions in federal prosecutions. This strikes me as astonishing.

How could the Assistant Attorney General in charge of the Office of Legal Counsel write a good-sized memorandum spelling out the need for a commission to consider repealing or greatly modifying Miranda by constitutional amendment without making any reference to a recently enacted federal law purporting to overturn Miranda? Rehnquist was too good a lawyer, and the nineteen-page document he authored too carefully written, for him to miss a ten-month-old statute that had an important bearing on the subject of his memorandum.

29 Id. at 1.
30 Id. at 5. In the Miranda context, the quotation from Justice Jackson is somewhat misleading. A suspect can waive his Miranda rights and agree to talk to the police without ever consulting with an attorney—and, as every student of police interrogation agrees today, the great majority of suspects do waive their right to counsel, as well as their right to remain silent. As Justice O'Connor emphasized in Moran v. Burbine, 475 U.S. 412, 426 (1986), Miranda rejected the argument—that the actual presence of a lawyer is necessary to dispel the coercion inherent in custodial interrogation.
32 Rehnquist memorandum, supra note 26, at 5.
(Moreover, presumably some of the bright lawyers in his office must have contributed to, or at least seen, a draft of the memorandum.)

One cannot help wondering whether Rehnquist ignored §3501 because he thought it was obviously unconstitutional. It would hardly be surprising if he did.

Only a few days before Rehnquist finished writing the memorandum, the Supreme Court had reversed a conviction because “the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda.” 33 No member of the Court seemed troubled by this language. Indeed, Justice Harlan, one of the Miranda dissenters, concurred in the result “purely out of respect for stare decisis.” 34

This brings me to the other interesting thing about the Rehnquist memorandum. No doubt is expressed about Miranda’s constitutional status. Nowhere are the Miranda rules described as “prophylactic” or “procedural” rules or “protective” of the Self-Incrimination Clause. When he discussed Miranda in April 1969, Rehnquist told us that although “[t]here was no evidence of physical coercion [in Miranda and its three companion cases], nor were the cases examples of unusual psychological pressure having been brought to bear in the interrogation process,” the Court “held that the statements elicited from each of the defendants violated the Fifth Amendment’s privilege against self-incrimination.” 35

This, too, is hardly surprising. The Miranda opinion itself never called the warnings “prophylactic” or “not themselves rights protected by the Constitution.” 36 Nor did any of the three Justices who wrote separate dissenting opinions. 37 Justice White wrote the angriest and most-quoted dissent, but he called the Miranda holding a “reinterpretation of the Fifth amendment” 38 and, although he disagreed, he saw nothing “illegitimate” or improper about it. Indeed, he called Miranda the “mak[ing] [of] new law and new public policy in much the same way [the Court has gone about] interpreting other great clauses of the Constitution.” 39

A year later, in an address he gave at the annual meeting of the Conference of Chief Justices – an address that has never received the attention I think it deserves – Justice White made clear that, as much as he disagreed with the result

34 Id. at 328.
35 Rehnquist memorandum, supra note 26, at 4–5.
36 This is how the Court, speaking through Justice Rehnquist, characterized the Miranda rules in Michigan v. Tucker, 417 U.S. at 444.
37 In Miranda, 384 U.S. at 544, Justice White did say that “the Court’s per se approach may not be justified on the ground that it provides a ‘bright line,’” but he did not suggest that there was anything “illegitimate” or improper about a per se approach or a rule that provides a “bright line.” 38
38 384 U.S. at 531.
39 Id. at 531.
in *Miranda*, he considered the decision a straightforward interpretation of the privilege against self-incrimination:

> Is the arrested suspect, alone with the police in the station house, being "compelled" to incriminate himself when he is interrogated without proper warnings? Reasonable men may differ about the answer to that question, but the question itself is a perfectly straightforward one under the Fifth Amendment and little different in kind from many others which arise under the Constitution and which must be decided by the courts. . . . The answer lies in the purpose and history of the self-incrimination clause and in our accumulated experience.

> . . . In terms of the function which the Court was performing, I see little difference between *Miranda* and the several other decisions, some old, some new, which have construed the Fifth Amendment in a manner in which it has never been construed before, or as in the case of *Miranda*, contrary to previous decisions of the Court and of other courts as well.  

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**THE DEPARTMENT OF JUSTICE MEMORANDUM AND JUSTICE REHNQUIST’S OPINION IN MICHIGAN v. TUCKER**

At the time Rehnquist sent his memorandum to John Dean, it may fairly be said that there was a wide consensus that *Miranda* was a straightforward interpretation of the Fifth Amendment's privilege against self-incrimination and that a confession elicited in violation of the *Miranda* rules was one obtained in violation of the Constitution. A short time later, however, that consensus came to an end.

In June 1969, with the authorization of the head of the Department of Justice, Attorney General John Mitchell, a memorandum “consistent with President Nixon’s frequent criticism of Warren Court decisions on interrogation and related aspects of police procedure” was sent to all United States Attorneys. It explained why “the failure to give the warnings required by *Miranda* will not necessarily require exclusion of a resulting confession.”

The DOJ memorandum made the best case — indeed, the only tenable case — ever made up to that point for the constitutionality of §3501. It foreshadowed the reasoning in later Supreme Court opinions disparaging *Miranda*. I have in mind such cases as *Michigan v. Tucker* (which allowed the testimony of a witness whose identity had been discovered as a result of questioning the defendant without giving him a complete set of warnings); *New York v. Quarles* (another Rehnquist opinion, which recognized a “public safety” exception to the need for the

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Miranda warnings and thus held admissible both the suspect's statement, "the gun is over there," and the gun found as the result of the statement); and Oregon v. Elstad\(^{45}\) (an O'Connor opinion, where the fact that the police had obtained a statement from the defendant when they questioned him without giving him the required Miranda warnings did not bar the admissibility of a later statement obtained at another place when, this time, the police did comply with Miranda).

The reasoning in the DOJ memorandum was quite similar to the reasoning of Justice Rehnquist's opinion in Tucker, an opinion that, in turn, greatly influenced the way later cases viewed Miranda. Indeed, looking back on the memorandum more than three decades later, it seems to have provided a road map for those who wanted to read Miranda as narrowly as possible.

Who wrote the 1969 Justice Department memorandum? Will Wilson, the Assistant Attorney General in charge of the Criminal Division, signed the communication to "United States Attorneys," notifying them that "[t]he attached memorandum sets forth the Department's position in respect to implementing" §3501 and another provision of the Crime Control and Safe Streets Act of 1968 concerning the admissibility of eyewitness testimony.\(^{46}\) But who actually wrote "the attached memorandum"?

The memorandum was described as Attorney General Mitchell's memorandum, but surely Mitchell did not write this memorandum by himself, if he contributed to it at all. The memorandum skillfully dissected both the Miranda opinion and the text of §3501. The writing had a certain talmudic quality to it.

Assistant Attorney General Wilson may have had a hand in writing the memorandum. What about Assistant Attorney General Rehnquist? Given his position and his earlier memo disparaging Miranda, he seems an obvious choice.

Although Rehnquist had not mentioned §3501 in his memorandum, there might be a connection between Rehnquist's memo and the Justice Department's memorandum a short time later defending the constitutionality of §3501. At the time he rejected Rehnquist's proposal,\(^{47}\) Attorney General Mitchell might have asked himself: Why do we need a constitutional amendment to deal with Miranda when we already have a federal statute on the books that purports to overturn that case? Surely the lawyers in the Office of Legal Counsel can make a credible argument that the statute is constitutional.

Whether or not Rehnquist contributed to the DOJ memorandum, he must have known about it and studied it when it was sent to all United States Attorneys and published in its entirety in the Criminal Law Reporter. After all, he was the head of the Office of Legal Counsel. Whether or not he had a hand in writing it, he must have remembered it when he wrote his first opinion of the Court in


\(^{46}\) See DOJ memorandum, supra note 42, at 2350. Wilson's communication to United States Attorneys also contained a brief summary of the arguments in the attached memorandum.

\(^{47}\) According to John Dean, Mitchell had a negative reaction to Rehnquist's proposal because he doubted whether the Nixon Administration could control a constitutional commission. See DEAN, supra note 26, at 268.
a *Miranda* case, the aforementioned *Michigan v. Tucker*. I don't think it can be denied that the arguments Justice Rehnquist makes in *Tucker* are quite similar to those made five years earlier in the DOJ memorandum.

The 1969 memorandum emphasized (as Justice Rehnquist was to do in *Tucker*) that the *Miranda* Court itself had recognized that the Constitution does not require adherence to "any particular solution for the inherent compulsion of the interrogation process," only compliance with "some system to safeguard against [the] inherently compulsive circumstances" that jeopardize the privilege. Therefore, continued the DOJ memorandum, the *Miranda* warnings "are not themselves constitutional absolutes."51

Five years later, in *Tucker*, Justice Rehnquist was to point out that the *Miranda* Court had observed that it could not say that "the Constitution necessarily requires adherence to any particular solution for the inherent compulsion of the interrogation process." Therefore, concluded Justice Rehnquist, the *Miranda* Court itself had recognized that the *Miranda* safeguards "are not themselves rights protected by the Constitution."53

All this is quite misleading. The *Miranda* warnings are not "constitutional absolutes" or "not themselves rights protected by the Constitution" in the sense that another set of procedural safeguards, another system to protect against the inherently compulsive circumstances of custodial interrogation, might constitute a suitable substitute. Unfortunately, however, § 3501 did not provide a suitable substitute. Chief Justice Rehnquist was to make this very point a quarter-century later in *Dickerson* when he wrote the opinion of the Court invalidating § 3501:

> When it had enacted the statutory provision known as § 3501, pointed out the Chief Justice, Congress had "intended . . . to overrule *Miranda*" and simply replace it with the old "totality-of-the-circumstances"—"voluntariness" test — one that the *Miranda* Court had found woefully inadequate.

The author of the majority opinion in *Tucker* overlooked some key language in the *Miranda* opinion:

> We 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 law. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [the *Miranda* warnings] must be observed.55

48 See *Tucker*, 417 U.S. at 444.
49 DOJ memorandum, supra note 42, at 2351 (emphasis added).
50 Id. (emphasis in the original).
51 Id. at 2351-52.
53 Id.
54 See 530 U.S. at 436-37.
55 Id. at 467 (emphasis added).
It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making. We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation . . . so long as they are fully as effective as those described above [the Miranda warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.\(^{56}\)

. . .

We turn now [to the facts of the cases before us] to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.\(^{57}\)

In this respect, the 1969 DOJ memorandum – although it is a piece of advocacy straining to make “a legitimate constitutional argument” in favor of § 3501\(^{58}\) – is more balanced than Justice Rehnquist’s majority opinion in Tucker. Unlike Justice Rehnquist’s opinion, the DOJ memorandum does recognize that, although various alternatives to the method spelled out by Chief Justice Warren for dispelling the inherent coercion of the custodial interrogation are potentially available, “the [Miranda] Court stated, until such ‘potential alternatives for protecting the privilege’ are devised by Congress and the states [384 U.S. at 467], a person must be warned [in accordance with Miranda] prior to any in-custody questioning.”\(^{59}\)

As Geoffrey Stone described it many years ago, in what I consider the classic critique of Tucker, Rehnquist’s reading of Miranda in 1974 constituted nothing less than a “rewriting” of that famous case.\(^{60}\) That is a strong word, but I don’t think it is an exaggeration.

Although the Tucker opinion certainly suggested otherwise, absent any suitable substitute (and there was none in Tucker or any of the other post-Miranda cases), the Miranda warnings are required to dispel the compelling pressures inherent in custodial interrogation. Absent an equally effective alternative, the police must give an individual about to be subjected to custodial questioning the Miranda warnings if the privilege is not to be violated.

To respond directly to the DOJ memorandum and Justice Rehnquist’s opinion in Tucker, absent another equally effective protective device, there is no gap

\(^{56}\) Id. at 490 (emphasis added).

\(^{57}\) Id. at 491 (emphasis added).

\(^{58}\) At one point (2361), the DOJ memorandum states: “The area where we believe the statute [§3501] can be effective and where a legitimate constitutional argument can be made is where a voluntary confession is obtained after a less than perfect warning or a less than conclusive waiver. . . .”

\(^{59}\) Id. (emphasis added).

\(^{60}\) In The Miranda Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99, Professor Stone analyzed the first eleven cases involving Miranda decided by the Supreme Court since Warren Burger became Chief Justice. The subheading for Stone’s ten-and-a-half-page analysis of Tucker was “Miranda Rewritten.” See id. at 115.
between a violation of the *Miranda* warnings and a violation of the privilege — in the context of custodial interrogation the privilege and the *Miranda* warnings are inseparable. The *Miranda* warnings cannot be breached without breaching the privilege as well.

Absent an adequate alternative, the *Miranda* warnings are not "suggested" safeguards (as both the DOJ memorandum and the Tucker Court called them). Nor are they "recommended procedural safeguards" (as the Tucker Court characterized them at one point). Neither are they "protective guidelines" (as Tucker characterized them at another point).

One may disagree strongly with the conclusions the *Miranda* Court reached. One may even think the *Miranda* Court's interpretation of the Fifth Amendment was preposterous. Nevertheless, according to *Miranda*, absent a suitable substitute, the warnings are "an absolute prerequisite to interrogation"; they are safeguards *required by the Constitution* to prevent the privilege from being violated.

In short, as Professor Stone expressed it, "the conclusion that a violation of *Miranda* is not a violation of the privilege is flatly inconsistent with the Court's declaration in *Miranda* that 'the requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege.'"

*Tucker* did not only rewrite *Miranda* by driving a wedge between the privilege and the *Miranda* warnings. It also rewrote *Miranda* by badly blurring the distinction between the privilege against self-incrimination and the "voluntariness" doctrine (the prevailing test for the admissibility of confessions before *Miranda* applied the privilege to custodial interrogation). Thus it seemed to miss the main point of *Miranda*, which was to extend the Fifth Amendment's concept of "compulsion" to include statements obtained in ignorance of one's constitutional rights.

**THE APPARENT DECONSTITUTIONALIZATION OF MIRANDA**

From the point of view of the prosecution, *Tucker* was just about the most appealing case imaginable. The defendant had been questioned and had confessed before *Miranda* was decided. Thus, *Miranda* was just barely applicable. Moreover, the police had only failed to give the defendant one of the four *Miranda* warnings — the advice that he would be provided counsel if he could not afford to hire a

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61 DOJ memorandum, *supra* note 42, at 2352; 417 U.S. at 444.
62 417 U.S. at 443 (emphasis added).
63 *Id.* (emphasis added).
64 384 U.S. at 471.
66 See Justice Rehnquist's discussion of the pre-*Miranda* test in *Tucker*, 417 U.S. at 441–43.
67 In Johnson v. New Jersey, 384 U.S. 719 (1966), the Court ruled that *Miranda* affected only those cases in which *the trial* began after that decision was handed down. This was a mistake. The Court probably should have held that *Miranda* affected only those confessions obtained by *police questioning* conducted after the date of the decision.
lawyer himself. No police officer could be faulted for such an omission at that time—two months before the *Miranda* case was decided.

At one point, Justice Rehnquist informed us that he considered these facts “significant” to the decision in *Tucker*. However, he seemed to forget all about these facts in subsequent cases.

Although, again speaking for the Court, Justice Rehnquist relied heavily on *Tucker* in *New York v. Quarles* (the case that established a “public safety” exception to *Miranda*) and made sure to quote *Tucker’s* language to the effect that “[t]he prophylactic *Miranda* warnings . . . are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected,” he did not mention any of the unusual facts in *Tucker*. Nor, a year later, did Justice O’Connor do so when, in *Oregon v. Elstad*, she, too, chanted the *Tucker* mantra that “[t]he prophylactic *Miranda* warnings are ‘not themselves rights protected by the Constitution.’”

In *Elstad*, a 6–3 majority speaking through Justice O’Connor declined to apply the “fruit of the poisonous tree” doctrine to a “second confession” (one immediately preceded by the *Miranda* warnings) following a confession obtained an hour earlier without giving the defendant the required warnings. Although Justice O’Connor relied heavily on Justice Rehnquist’s opinions in *Tucker* and *Quarles*, she seemed to be even more emphatic about *Miranda’s* subconstitutional status than he was.

The *Elstad* Court chided the state court for having “misconstrued” the protections afforded by *Miranda* by assuming that “a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree.’” There is, Justice O’Connor emphasized, “a vast difference between the direct consequences flowing from coercion of a confession by physical violence [and] the uncertain consequences of disclosure of a ‘guilty secret’ freely given in response to an unwarned but noncoercive question, as in this case.” At one point, she described a person whose *Miranda* rights had been violated as someone “who has suffered no identifiable constitutional harm.”

Justice O’Connor also observed:

> Respondent’s [“fruit of the poisonous tree” argument] assumes the existence of a constitutional violation. . . . But as we explained in *Quarles* and *Tucker*, a procedural

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68 417 U.S. at 447. 69 467 U.S. 649 (1984). 70 Id. at 654. 71 470 U.S. 298 (1985). 72 Id. at 305. 73 Id. at 304. 74 Id. at 312. 75 See id. at 307: “[U]nder *Miranda*, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded. . . . Thus, in the individual case, *Miranda’s* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.”
Miranda violation differs in significant respect from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. . . .

The Miranda exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. . . .

If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.

Although Elstad can be read fairly narrowly, the majority opinion seems to say – it certainly can plausibly be read as saying – that a violation of Miranda is not a violation of a real constitutional right, but only of a procedural safeguard or prophylactic rule designed to protect a constitutional right. Therefore, unlike evidence derived from an unreasonable search or a coerced confession (in the traditional due process sense) – which are real constitutional violations – it is not entitled to, or worthy of, the "fruit of the poisonous tree" doctrine.

When §3501 was enacted, few, if any, had taken it seriously. One of the nation's leading constitutional law scholars, and one whose criticism of the bill containing the anti-Miranda section "was especially weighty" because he was "unsympathetic with the Miranda decision," concluded that offensive as §3501 was, it did not justify a veto of the bill because it was so likely to be held "constitutionally ineffective" that

[n]o responsible trial judge would jeopardize a criminal conviction by following the statute in his rulings on admissibility, nor would a sensible prosecutor even seek a ruling in these terms since it would certainly invite reversal.

A decade and a half later, however, the Burger Court's characterization of Miranda and its comments about the case gave reason to believe that §3501 might survive constitutional attack after all.

It had all started with Tucker, a case whose facts read like a law professor's exam question, a case where the police could hardly have been expected to anticipate all the Miranda warnings, a case that never would have arisen if the Court had thought through its retroactivity jurisprudence. Then came Quarles and Elstad.
When the Warren Court's revolution in criminal procedure was at its height, Judge Henry Friendly complained about what he called "the domino method of constitutional adjudication" – a method that made a case that was extremely appealing from the defendant's perspective the occasion for a general expansion of the rights of the accused.82 (Friendly thought the Court should handle the extremely appealing case on an individualized basis.)

During the Burger Court era, however, it became the turn of the defense-minded to complain about the Court's use of a very sympathetic case from the prosecution's perspective (and it is hard to think of a better example than Tucker) as the occasion to contract the rights of the accused or to throw some dirt on landmark decisions like Miranda. Moreover, the defense-minded couldn't help wondering whether some day the domino effect of Tucker, Quarles, and Elstad would end with the overruling of Miranda.

FROM TUCKER TO DICKERSON – AND BACK AGAIN

In 1999, despite the fact that the Justice Department had instructed the United States Attorney's office not to rely on §3501, a panel of the U.S. Court of Appeals for the Fourth Circuit in United States v. Dickerson83 held that a confession was admissible under that statutory provision. In sustaining the constitutionality of §3501, the Fourth Circuit relied heavily on the fact that the post-Warren Court had "consistently (and repeatedly) ... referred to the [Miranda] warnings as 'prophylactic' ... and 'not themselves rights protected by the Constitution.'"84 Indeed, the Fourth Circuit went so far as to say that §3501 had been "enacted at the invitation of the Supreme Court."85 When the Dickerson case reached the Supreme Court, the Department of Justice refused to defend the constitutionality of §3501. Instead, during the oral arguments in the Supreme Court, Solicitor General Seth Waxman attacked the reasoning of Tucker and its progeny early and often. Again and again, he explained how Miranda is a constitutional decision even though the Miranda warnings are not constitutionally required. The warnings, he pointed out, would not be constitutionally required if Congress or a state legislature were to come up with a suitable substitute (perhaps a videotape system, time limits, or questioning by magistrates). In the absence of an effective alternative, however, emphasized the Solicitor General, the warnings are required.86

To the surprise of some (including myself), Justice O'Connor, author of the majority opinion in Elstad, joined a 7-2 majority opinion "conclud[ing] that

84 Id. at 689.
85 Id. at 672. See also id. at 688–89.
86 Transcript of Oral Arguments in Dickerson, 6-8.
Miranda announced a constitutional rule that Congress may not supersede legislatively.\textsuperscript{87} To the surprise of many (especially myself), Chief Justice Rehnquist, author of the Tucker and Quarles opinions, wrote the opinion of the Court.

The Chief Justice put on a remarkable display of nimble backpedaling.

What about the reasoning in Tucker and Quarles and what Rehnquist had said about Miranda in those cases? In Dickerson, Rehnquist dismissed his Tucker and Quarles opinions in one sentence:

Relying on the fact that we have created several exceptions to Miranda's warnings requirement and that we have repeatedly referred to the Miranda warnings as "prophylactic" \cite{Quarles} and "not themselves rights protected by the Constitution" \cite{Tucker}, the Court of Appeals concluded that the protections announced in Miranda are not constitutionally required.

We disagree with the Court of Appeals conclusion, although we concede that there is some language in some of our opinions that supports the view taken by that court.\textsuperscript{88}

I doubt that any Justice in Supreme Court history has dismissed his own majority opinions more summarily or nonchalantly.

In Tucker, Rehnquist maintained that the fact that the Miranda Court stated that it would not say that "the Constitution necessarily requires adherence to any particular solution for the inherent compulsion of the interrogation process as it is presently conducted"\textsuperscript{89} was proof that "[t]he [Miranda] Court recognized that these procedural rights were not themselves protected by the Constitution."\textsuperscript{90} But in Dickerson the fact that the Miranda Court invited the Congress to consider equally effective alternatives to the Miranda warnings somehow \textit{cut the other way}: "Additional support for our conclusion that Miranda is constitutionally based is found in the Miranda Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination."\textsuperscript{91}

Some portions of Chief Justice Rehnquist's Dickerson opinion read as if he had read the Miranda opinion closely – or thought about it intently – for the first time.

In Tucker, as Professor Stone has pointed out, "[t]he only evidence Mr. Justice Rehnquist offered to support his conclusion [that a violation of Miranda is not a violation of the privilege] was the Court's statement in Miranda that the Constitution does not necessarily require 'adherence to any particular solution' to the problem of custodial interrogation."\textsuperscript{92} In Tucker, he failed to mention that the

\begin{itemize}
\item \textsuperscript{87} 530 U.S. at 444.
\item \textsuperscript{88} Id. at 437–38.
\item \textsuperscript{89} Tucker, 417 U.S. at 444, quoting Miranda, 384 U.S. at 467.
\item \textsuperscript{90} 417 U.S. at 444.
\item \textsuperscript{91} 530 U.S. at 440. As pointed out earlier, the Dickerson Court should have referred to the constitutional right against compelled self-incrimination; "coercion" is a term of art used when the Court is applying the traditional due process test.
\item \textsuperscript{92} Stone, \textit{supra} note 60, at 119 (emphasis added).
\end{itemize}
Dickerson v. United States

Miranda Court had made it clear that "any particular solution" other than the Miranda warnings had to be at least as effective as the Miranda warnings. Chief Justice Rehnquist did not make that mistake in Dickerson: "[The Miranda Court] opined that the Constitution would not preclude legislative solutions that differed from the prescribed Miranda warnings but which were 'at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'"\(^{93}\)

Are we supposed to believe that when Justice Rehnquist wrote his opinion in Tucker he was unaware that the Miranda opinion had stated that unless alternatives were devised by the legislature that were fully as effective as the warnings the fourfold warnings were constitutionally required? The Miranda Court issued the caveat that any alternatives to the warnings had to be "fully as effective" or "at least as effective" as the warnings were in apprising custodial suspects of their right of silence and ensuring a continuous opportunity to exercise that right as many as five times!\(^{94}\)

In Dickerson, Chief Justice Rehnquist points out that the Miranda opinion "is replete with statements indicating that the majority thought it was announcing a constitutional rule."\(^{95}\) "Indeed," he continues, "the Court's ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in Miranda were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege."\(^{96}\)

Are we supposed to believe that Justice Rehnquist did not know the Miranda opinion contained the language referred to above when he told us in Tucker that the Miranda Court itself "recognized that these procedural safeguards [the Miranda warnings] were not themselves rights protected by the Constitution"?\(^{97}\)

In Dickerson, Chief Justice Rehnquist told us that "first and foremost of the factors on the other side – that Miranda is a constitutional decision – is that both Miranda and two of its companion cases applied the rule to proceedings in state courts – to wit, Arizona, California, and New York."\(^{98}\) Since the Supreme Court has no supervisory authority over state courts, reasoned Rehnquist, the Miranda Court must have announced a constitutional rule.\(^{99}\)

"First and foremost of the factors ... that Miranda is a constitutional decision"? If so, why didn't Justice Rehnquist take this into account when he wrote about Miranda's constitutional status (or lack of it) in Tucker and Quarles? Justice Douglas made the same point Justice Rehnquist was to make many years later when Douglas dissented in Tucker.\(^{100}\) Justice Stevens also made the same point when he dissented in Elstad.\(^{101}\) Are we supposed to believe that in the 1970s and

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\(^{93}\) 530 U.S. at 440, quoting Miranda, 384 U.S. at 467 (emphasis added).

\(^{94}\) See 384 U.S. at 444, 467, 476, 478, and 490.

\(^{95}\) 530 U.S. at 439.

\(^{96}\) Id. at 439-40.

\(^{97}\) 417 U.S. at 444.

\(^{98}\) 530 U.S. at 438.

\(^{99}\) See id. at 437-48.

\(^{100}\) See 470 U.S. at 370-71.
Justice Rehnquist didn’t realize the significance of the fact that Miranda’s full name was Miranda v. Arizona? Why did Chief Justice Rehnquist, who could hardly be called a friend of Miranda, come to its rescue? Why did Chief Justice Rehnquist, who could hardly be called a friend of Miranda, come to its rescue? The Chief Justice might have regarded Dickerson as an occasion for the Court to maintain its power against Congress. But that doesn’t explain the unwillingness of Rehnquists and six other Justices “to overrule Miranda ourselves.”

Was the Chief Justice concerned that the “overruling” of Miranda would have wiped out more than three decades of confession jurisprudence – and almost sixty cases? Was this worth doing when the police had come to learn to live fairly comfortably with Miranda? The Chief Justice must have been aware that the police obtain waiver of rights in the “overwhelming majority” of cases and that once they do “Miranda offers very little protection.”

Then there is my favorite reason why Chief Justice Rehnquist and six of his colleagues voted the way that they did: Overruling Miranda after all these years would have caused enormous confusion. The due process–voluntariness–totality of the circumstances test had become “increasingly meticulous through the years.” One week after Miranda, in the course of declining to apply that case retroactively, but only to trials begun after the decision was announced, Chief Justice Warren had pointed out that the traditional “voluntariness” test “now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance.”

If Miranda had been overturned in Dickerson, it would have been extremely difficult for a police officer to know how to respond when (a) a suspect not warned of her rights had asserted what she thought were her rights, or (b) had

102 Of course, there is always the possibility that he would not have voted this way if the Court had been split 4–4 and he could have cast the pivotal vote. He might have voted in favor of Miranda so that he could have assigned the opinion to himself, rather than let someone like Justice Stevens write the opinion of the Court. But I shall proceed on the premise that Chief Justice Rehnquist would have voted the way he did regardless of how his colleagues were voting.


104 530 U.S. at 444.

105 According to Professor Richard A. Leo – a close student of police interrogation and confessions, and a leading commentator on the subject: “Once feared to be the equivalent of sand in the machinery of criminal justice, Miranda has now become a standard part of the machine.” Questioning the Relevance of Miranda in the Twenty-First Century, 99 MICH. L. REV. 1000, 1027 (2001).

106 Id. See also William J. Stuntz, Miranda’s Mistake, 99 MICH. L. REV. 975, 977 (2001).


108 Johnson v. New Jersey, 384 U.S. 719, 730 (1966). Consider, too, Miranda, 384 U.S. at 508 (Harlan, J., dissenting) (“Synopses of the cases [applying the pre-Miranda voluntariness test] would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility.”)

109 Id. (emphasis added). See also id. at 731: “[P]ast decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confession.”
asked the police whether she had a right to remain silent or (c) whether the police had a right to get answers from her or (d) whether she could meet with a lawyer before answering any questions or (e) whether the officer would prevent her from trying to contact a lawyer.

If the Court had wiped out Miranda—after the police had worked with and relied on that landmark case for more than three decades—I venture to say the situation in the "interview room" would have been close to chaotic.

Although it finally said "good riddance" to a thirty-eight-year-old statutory provision that purported to "overrule" Miranda, the Dickerson Court left a number of questions unanswered. It is hard to improve on Professor Donald Dripps's comment:

Once the Court granted [certiorari in Dickerson], court-watchers knew the hour had come. At long last the Court would have to either repudiate Miranda, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent. The Supreme Court of the United States, however, doesn't "have to" do anything, as the decision in Dickerson once again reminds us.110

Logically, Dickerson undermines the holdings in the prophylactic-rule cases, especially Elstad, which repeatedly emphasized that Miranda was a subconstitutional rule. But the Chief Justice did not repudiate any of the prophylactic-rule cases. Indeed, he labored hard to avoid doing so.111 Yet he did not approve of the reasoning in those cases either. How could he?

Rehnquist's one attempt to explain Elstad in light of Dickerson—and most commentators agree that it was an extremely feeble attempt112—was to say:

Our decision in that case [Elstad]—refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases—does not prove that Miranda is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.113

111 See id. at 62.
112 Indeed, Professor Susan Klein commented, with considerable justification, that the Chief Justice's attempt to explain why the "poisonous tree" doctrine developed in search and seizure cases doesn't apply to Miranda violations "comes dangerously close to being a non sequitur." Susan R. Klein, Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 MICH. L. REV. 1030, 1073 (2001).
113 The fact that the Chief Justice's attempt to reconcile Elstad with the "constitutionalized" Miranda doctrine was inadequate does not mean, however, that no tenable explanations exist. As David Strauss has suggested, one might have said that although Miranda strikes the best balance of advantages and disadvantages in the circumstances presented, a different balance might be best in the Elstad circumstances. As Professor Strauss observed, "The fact that the Court refined the balance it struck in Miranda, when cases presenting different circumstances arose, has no bearing on the constitutional status or legitimacy of that decision." David A. Strauss, Miranda, The Constitution, and Congress, 99 MICH. L. REV. 958, 969 (2001).

530 U.S. at 441.
But why is a statement obtained in violation of the *Miranda* rules “different from” evidence obtained in violation of the Fourth Amendment? As far as the “fruit of the poisonous tree” doctrine is concerned, *there is nothing inherently different* between a coerced statement or one obtained in violation of the privilege on the one hand and a violation of the Fourth Amendment on the other.

Last year Chief Justice Rehnquist joined a plurality opinion by Justice Thomas that recognized that “the physical fruit of actually coerced statements” must be excluded.114 In the same case, Deputy Solicitor General Michael Dreeben conceded that if, in response to a grand jury subpoena, a person under threat of contempt of court revealed the existence of a gun, the weapon, as well as the statement itself, would have to be excluded – because where the core privilege against self-incrimination is violated, *the derivative use*, as well as the direct use, of compelled utterances is prohibited.115

The only difference the *Elstad* Court recognized was one between a violation of the Constitution and a violation of a rule or set of rules lacking constitutional status, notably *Miranda*. But didn’t *Dickerson* change that?

If, as the *Dickerson* Court seems to have told us, in the absence of an equally effective alternative procedure (and nobody claims there was an effective alternative in *Elstad* or *Dickerson*), the *Miranda* warnings are constitutionally required – are “constitutional standards for protection of the privilege” – then a breach of the warnings does amount to a breach of the Constitution – and the distinction the *Elstad* Court repeatedly made is no longer valid.

This point did not escape dissenting Justice Scalia: Unless one agrees with the *Elstad* Court that “*Miranda* violations are not constitutional violations,”116 it would be hard to explain why the “fruits” doctrine applies to the fruits of illegal searches but not to the fruits of *Miranda* violations “since it is not clear on the face of the Fourth Amendment that evidence obtained in violation of that guarantee must be excluded from trial, whereas it is clear on the face of the Fifth Amendment that unconstitutionally compelled confessions cannot be used.”117

Nevertheless, a recent *Miranda* “poisoned fruit” case, *United States v. Patane*,118 leaves little doubt that *Elstad* has survived *Dickerson* completely unscathed.

The *Patane* case arose as follows: Without administering a complete set of Mi-

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116 530 U.S. at 455 (Scalia, J., dissenting).
117 *Id.* See also Dripps, supra note 110, at 35: “The Chief Justice must know . . . that the Fifth Amendment exclusionary rule for fruits under *Kastigar* [*v. United States*, 406 U.S. 441 (1972)] is more strict, not more lax, than the Fourth Amendment exclusionary rule. The difference between the Fourth and Fifth Amendment exclusionary rules cut against, not in favor of, reconciling *Elstad* with *Miranda*, *Dickerson*, and *Kastigar*.”

As Professor Dripps points out elsewhere in his article, see *id.* at 31, *Kastigar* makes it quite clear that immunity for testimony compelled by formal process before a grand jury would not be constitutional if evidence derived from compelled testimony were admissible.

118 124 S. Ct. 2620 (2004).
warnings, a detective questioned defendant Patane about the location of a Glock pistol he was supposed to own. Patane responded that the weapon was on a shelf in his bedroom. This admission led almost immediately to the seizure of the weapon where the defendant said it was. The prosecution conceded that Patane's statement was inadmissible, but argued that the physical fruit of the failure to comply with Miranda—the pistol itself—should be admitted. A unanimous panel of the Tenth Circuit disagreed, concluding that "Miranda's deterrent purpose would not be vindicated meaningfully by suppression only of Patane's statement."119

The government relied on both Tucker and Elstad, but Judge Ebel, who wrote the Tenth Circuit opinion, thought that neither case was still good law: Both Tucker and Elstad "were predicated upon the premise that the Miranda rule was a prophylactic rule, rather than a constitutional rule" whereas the "poisonous tree" doctrine "requires suppression only of the fruits of unconstitutional conduct." However, continued Judge Ebel, "the premise upon which Tucker and Elstad relied was fundamentally altered in Dickerson. [That case] undermined the logic underlying Tucker and Elstad."120

Those of you who have come with me this far know that I think Judge Ebel's reading of Dickerson is a plausible, sensible one—indeed a perfectly logical one. Unfortunately, I don't have any votes on the Supreme Court—and five people who do disagree.

There was no opinion of the Court. Justice Thomas announced the judgment of the Court and delivered the three-Justice plurality opinion he'd written. The Court was able to reverse the Tenth Circuit only because Justice Kennedy, joined by Justice O'Connor, concurred in the judgment.

The fact that Justice Scalia joined Thomas's plurality opinion is not surprising. The fact that the Chief Justice did is. In a post-Dickerson confession case, the two dissenters in Dickerson and the author of the majority opinion in Dickerson make strange bedfellows.

At no time in Dickerson did Chief Justice Rehnquist contrast the prophylactic rules of Miranda with the "actual Self-Incrimination Clause." Nor, in Dickerson, did he ever contrast Miranda violations with a "core" violation of the Self-Incrimination Clause itself. Indeed, at no time in Dickerson did Rehnquist call the Miranda rules "prophylactic."121

However, in his Patane plurality opinion, Justice Thomas repeatedly characterizes the Miranda rules as "prophylactic"122 and repeatedly refers to "the core protection afforded by the Self-Incrimination Clause,"123 "the core privilege against

120 Id. at 1019.
121 In Dickerson the Chief Justice did note that earlier cases had characterized the Miranda rules as "prophylactic."
122 See 124 S. Ct. at 2626, 2627, 2630.
123 Id. at 2626.
self-incrimination” protected by prophylactic rules, “the actual right against compelled self-incrimination” and “actual violations of the Due Process Clause or the Self-Incrimination Clause.”

Justice Thomas also tells us, in language very similar to that used in Elstad, that because prophylactic rules such as the Miranda rule “necessarily sweep beyond the actual protections of the Self-Incrimination Clause, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination.”

To be sure, Justice Thomas wrote for only three Justices. But Miranda supporters will gain little comfort from Justice Kennedy’s concurring opinion.

Although Kennedy did not, as Thomas had done, contrast Miranda’s “prophylactic rules” with the “core privilege” or “actual right against compelled self-incrimination,” he did not seem at all troubled by the fact that the plurality had reiterated the old Tucker–Quarles–Elstad rhetoric about Miranda four years after Dickerson. Nor did Kennedy give any indication that he thought Dickerson had any bearing on the case.

Justice Kennedy did mention Dickerson once – but only to say that he “agree[d] with the plurality that Dickerson did not undermine [such cases as Elstad and Quarles] and, in fact, cited [those cases] in support.” (In support of what? Surely not Dickerson’s holding that Miranda is a constitutional decision.)

Not only did Justice Kennedy fail to question the soundness of Elstad’s reasoning in light of Dickerson, he actually praised Elstad. The result in cases like Elstad, he told us, cases upholding the admissibility of evidence obtained “following an unwarned interrogation,” was “based in large part on our recognition that the concerns underlying the Miranda rule must be accommodated to other objectives of the criminal justice system.”

Have I overlooked the companion case to the Patane case, Missouri v. Seibert? I think not. In Seibert, a 5–4 majority did uphold the suppression of a so-called second confession, one obtained after the police had deliberately used a two-stage interrogation technique designed to undermine the Miranda warning. But Justice Souter, who wrote a four-Justice plurality opinion, never relied on Dickerson. His opinion is written just as if Dickerson had never been decided. Nor did Souter ever question the continued validity of Elstad. Indeed, at one point he treated Elstad with some reverence. In the course of rejecting Ms. Seibert’s argument that her confession should be excluded under the “poisonous tree” doctrine developed in Wong Sun v. United States, Justice Souter reminded the defendant that Elstad had “rejected the Wong Sun fruits doctrine for analyzing the admissibility of a subsequent warned confession following an initial failure to administer the warnings required by Miranda.”

124 Id. at 2627.
125 Id.
126 Id. at 2529.
127 Id. at 2627.
128 Id. at 2631 (emphasis added).
129 Id.
132 Id. at 2610 n. 4.
The *Seibert* facts were easy to distinguish from *Elstad*'s, and Justice Souter did so. The failure to advise Mr. Elstad of his *Miranda* rights the first time seemed inadvertent. At one point Justice O'Connor called it an "oversight." This was a far cry from *Seibert*.

As I have observed elsewhere, the decision in *Seibert* turns on its extreme facts and would have turned on these same facts even if *Dickerson* had never been written:

The officer involved had "resort[ed] to an interrogation technique he had been taught." At the first questioning session he had made "a 'conscious decision' to withhold *Miranda* warnings" and after obtaining incriminating statements, had called a short recess (twenty minutes) before resuming the questioning. At the outset of the second session the officer did advise the suspect of her rights, and did obtain a waiver, but he then confronted the suspect with the statements she had made during the first session (when she had not been warned of her rights). Not surprisingly, the suspect confessed again. The new statement was "'largely a repeat of information . . . obtained' prior to the warnings."

The failure to comply with *Miranda* was so deliberate and so flagrant that an 8–1 or 7–2 ruling in favor of the defense would not have been surprising. The fact that the vote on these extreme facts was 5–4 and that the derivative evidence was held inadmissible only because of Justice Kennedy's somewhat grudging concurring opinion is significant evidence of the low state to which *Miranda* has fallen.

It should be noted that although he concurred in the *Seibert* judgment, Justice Kennedy took no more cognizance of *Dickerson* than he had when he concurred in the result in *Patane*. And in *Seibert*, too, he had nice things to say about *Elstad*. That case, he maintained, "was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning." And he left no doubt that in the typical "second confession" case he would admit the evidence.

A final word about Justice Thomas's plurality opinion in *Patane*. At one point, he discusses and quotes from a number of cases that have read *Miranda* narrowly and/or established exceptions to it. Then, in case we haven't quite grasped his message, he tells us: "Finally, nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes any of these observations."

Why not? Aside from invalidating § 3501, did *Dickerson* accomplish anything? A majority of the Court seems to think not. Indeed, *Patane* and *Seibert* leave us

133 *Elstad*, 470 U.S. at 316.
135 124 S. Ct. at 2615.
136 See *id.* at 2616.
137 *Id.* at 2628.
wondering whether any member of the Court believes that Dickerson affected Tucker, Quarles, or Elstad—or, for that matter, any of the nearly sixty confession cases the Court has handed down since Miranda was decided. To borrow a line from Justice Roberts, Dickerson seems to be a decision good for “this day and train only.”¹³⁸

It is not too surprising that only four years after Dickerson was decided Justice Thomas would more or less shrug off that case. After all, Thomas did join Justice Scalia’s long, forceful dissent in Dickerson. What is quite surprising, however, is that the Chief Justice, the author of the majority opinion in Dickerson, would join Thomas’s plurality opinion in Patane.

It is hard to believe that any Justice could write an opinion of the Court “reject[ing] the core premises of Miranda,”¹³⁹ and establishing the groundwork for its overruling,¹⁴⁰ only to come to its rescue a quarter-century later. It is also hard to believe that any Justice could write an opinion of the Court advancing almost every argument conceivable for why Miranda must be said to have announced a constitutional rule only to concur four years later in an opinion written by a colleague neither impressed by, nor even interested in, what that Justice had to say four years earlier. It is doubly astonishing when we are talking about the same Justice.

Despite the fact that he wrote the opinion of the Court in Dickerson, Chief Justice Rehnquist’s majority opinions in Tucker and Quarles make him the Justice who has probably contributed more to the depreciation of Miranda than any other member of the Court. Those opinions drove a wedge between the Miranda rules and the privilege against self-incrimination. There was reason to believe that Dickerson had removed that wedge. But it is hard to miss Patane’s message that the wedge is still there—or has been reinserted.

Moreover, because he wrote the majority opinions in Tucker and Quarles, then flip-flopped in Dickerson and then flip-flopped again in Patane, the Chief Justice has probably contributed more to the confusion over Miranda than any other member of the Court.

¹³⁹ Stone, supra note 60, at 118.
¹⁴⁰ See id. at 123.