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The Paths Not Taken: The Supreme Court's Failures in *Dickerson*

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THE PATHS NOT TAKEN: THE SUPREME COURT'S FAILURES IN *DICKERSON*

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"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.[1] 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,

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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!

1. 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).

and victims' organizations. At oral argument in April, an active Court[2] 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*).[3] Only about half of those pages address the substantive constitutional issues.[4] The opinion briefly concludes that *Miranda* announced a "constitutional rule," had "constitutional underpinnings," and was "constitutionally based."[5] 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.[6]

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*.[7]

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

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

4. *See* 120 S. Ct. at 2332-37.

5. *Id.* at 2334.

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

7. 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

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*[8] that *Miranda*'s safeguards were "not themselves rights protected by the Constitution . . . ."[9] 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*.[10] 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*.[11] 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.[12] 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.[13]

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reasoned decision. *See* State v. Walton, 41 S.W.3d 75 (Ten. 2001) (pre-*Dickerson* exceptions to *Miranda* remain good law).

8. 417 U.S. 433 (1974)

9. *Id.* at 444.

10. *Id.* at 445-446

11. *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) ("[T]he failure to provide *Miranda* warnings in and of itself does not render a confession involuntary.").

12. *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).

13. 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.

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."[14] Instead, asserts the majority, such exceptions are a "normal part of constitutional law."[15] 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,[16] 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.[17] 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."[18] The majority in *Dickerson* viewed these statements not as "prov[ing] that *Miranda* is a nonconstitutional decision" but rather that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[19] Again, in its haste to dispose of the case, the Court

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See Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 936-50 (2000) [hereinafter Kamisar, *Congress*].

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

15. *Id.*

16. *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.*").

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

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

19. 120 S. Ct. at 2335.

did not tarry to explain the difference.[20] 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.[21] *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."[22] Or, as Akhil Amar has written, *Dickerson* reads like little more than the pronouncement: "The Great and Powerful Oz Has Spoken!"[23]

While other authors in this Symposium have discussed aspects of this doctrinal incoherence at some length,[24] 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

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

21. *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").

22. 120 S. Ct. at 2342 (Scalia, J., dissenting).

23. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 89 n.212 (2000).

24. *See supra* note 16.

how the Court's assertion of its power to promulgate *Miranda* conflicted with its more recent decision in *City of Boerne v. Flores*.[25] *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*.[26] 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*.[27] 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

25. 521 U.S. 507 (1997).

26. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 42 (1975).

27. 403 U.S. 388 (1971).

rule of *Mapp v. Ohio*.[28] Because the Court has crafted extraconstitutional measures, like the exclusionary rule, to protect constitutional rights from infringement by the states,[29] this understanding of *Miranda* is consistent with its application to the states.[30]

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*,[31] 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.[32] 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.[33]

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.[34] In words that echo the cases interpreting *Miranda*, the Court said that the procedure imposed on the states by *Anders v. California*[35] was simply a "prophylactic framework" and not "a constitutional command." Accordingly, California could substitute an alternative proce-

28. 367 U.S. 643 (1961).

29. *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).

30. 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.

31. 462 U.S. 367 (1983).

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

33. *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).

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

35. 386 U.S. 738 (1967).

dure. 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."[36] The test for whether the substitute California procedure was constitutional was whether it provided the "minimum safeguards" to protect the constitutional right at issue.[37]

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.[38]

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.[39] Congress, of course, has no authority to modify the content of constitutional rights either directly or under the guise of its remedial powers.[40] 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.[41] Overprotection means protection beyond what the Constitution requires. It is in precisely that area that Con-

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

37. *Id.* at 276.

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

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

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

41. 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) ("[T]he *Miranda* rule 'overprotects' the value at stake.").

gress must be free to fashion or modify rules as it thinks wisest.[42] 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.[43]

This line of argument was presented in my brief.[44] 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.[45]

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42. *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. Cronic, 466 U.S. 648, 665 n.38 (1984)); *cf.* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959).

43. 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.

44. *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].

45. Professor Schulhofer's provocative contribution to this Symposium argues that all of the Justices in *Dickerson* share some misconception that Fifth Amendment rights during cus-

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

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todial 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) ("[C]omment 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) ("[G]overnment 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 "drain[ed] 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!

position than the courts to evaluate the costs and benefits of differing approaches,[46] and that the Court had "no legal basis that would allow [it] to revise [Congress's] decisions."[47] 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.[48] 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.' "[49] 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 superceded 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.[50] For exam-

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

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

48. *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).

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

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

ple, 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[51] and subject to congressional modification.[52] Similarly, under the dormant commerce clause doctrine, Congress is free to validate state actions that would otherwise be prohibited by the Court's decisions.[53]

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*,[54] is a clear counter-example to *Dickerson*'s claim that rules applied to the states may not be superseded legislatively by Congress.[55] *Chapman* involved a state constitution provision which established a standard for deciding reversible versus harmless error.[56] The Court held that federal law overrode the state standard, but was unclear about the basis for the rule it announced.[57] It is clear, however, that the *Chapman* standard is not mandated by the Constitution.[58] 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."[59] 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.[60]

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

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

52. *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.

53. 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).

54. 386 U.S. 18 (1967).

55. 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).

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

57. *See* Daniel Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 2, 24-26 (1994).

58. 386 U.S. at 24-26.

59. 386 U.S. at 21.

60. Meltzer, *supra* note 57, at 26 ("[T]he harmless error rule should be seen as constitutional common law.").

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.' "[61] 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."[62] The Court then asserted, in a single sentence, that "[s]ince 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."[63] 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[64] 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*.[65] This is the approach of not only Larry Yackle, a leading habeas commentator,[66] but of the Department of Justice. In the 1993 case *Withrow v. Williams*,[67] when a *Miranda* issue

61. 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)).

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

63. 120 S. Ct. at 2333 n.3 (emphases added).

64. *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).

65. 304 U.S. 64 (1938).

66. *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").

67. *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.

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.[68] In *Dickerson*, however, the Department of Justice simply reversed its position,[69] without even acknowledging (much less explaining) the about face.[70] 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.[71]

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

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

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

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.

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

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.[72] The *Miranda* Court promised that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform."[73] This was one reason that Congress in 1968 chose to adopt § 3501.[74]

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.[75]

72. 384 U.S. 436 (1966).

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

74. *See* S.REP NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N 2112.

75. 18 U.S.C. § 3501(b) (1994).

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.[76]

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.[77] 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.[78] 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."[79]

Section 3501's encouragement to agents to give *Miranda* warnings might alone have been viewed as creating a viable alternative to *Miranda*.[80] But § 3501 cannot be assessed in splendid isolation.[81] 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.[82] 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

76. *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).

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

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

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

80. 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)).

81. *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.

82. *See supra* notes 27-33 and accompanying text.

federal law enforcement agents involving "assault, battery, false imprisonment, abuse of process" and the like.[83] 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.[84]

My amicus brief advanced this position, explaining why it provided greater protection against truly coerced confessions than the *Miranda* framework.[85] 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*.[86]

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*.[87] 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

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83. 28 U.S.C. § 2680(h) (1994).

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

85. *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).

86. 120 S. Ct. at 2335.

87. 468 U.S. 1032, 1044-45 (1984).

least as effective [as *Miranda*] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[88] Perhaps the *Dickerson* Court omitted it because, as a matter of precedent, the "equally effective" language obviously is not necessary to *Miranda*'s holding.[89] 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,[90] 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.[91] 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."[92] 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."[93] 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

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

89. *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.").

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

91. 120 S. Ct. at 2337-38 (Scalia, J., dissenting).

92. 120 S. Ct. at 2335 (emphasis added) (internal citation omitted).

93. 120 S. Ct. at 2334 n.6 (emphasis added).

"secure" the underlying Fifth Amendment right to be free from giving an involuntary statement.[94]

* * * * *

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,*[95] 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.[96] The Supreme Court had decided in *Employment Division v. Smith*[97] 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

94. *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.

95. 521 U.S. 507 (1997).

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

97. 494 U.S. 872 (1990).

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.[98]

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."[99] It is hard to see how such a change would be a "congruent and proportionate"[100] 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.[101] To be sure, confessions obtained without

98. 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).

99. *Boerne*, 521 U.S. at 532.

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

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

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.[102]

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.[103]

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.[104] The "indiscriminate scope" of the rules is itself strong evidence that they are disproportionate.[105]

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

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

103. *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").

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

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

police interrogation,[106] 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.[107] The difficulties with this material as evidence of pervasive coercion in custodial interrogations are legion.[108] In fact, the *Miranda* majority acknowledged that it had little idea about typical practices.[109] 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."[110] 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.[111] 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.[112]

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

106. *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 "[t]he examples given above are undoubtedly the exception now." *Id.* at 447.

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

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

109. *Id.* at 448.

110. *Id.* at 457.

111. *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 "overreact[ion] 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).

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

of the Constitution.[113] 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."[114] But this, of course, was precisely the type of protection Congress sought to extend to First Amendment freedoms in *City of Boerne*.[115] 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.[116]

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 "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" which is "irrebuttable for purposes of the prosecution's case in chief."[117] 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."[118] The *Miranda* presumption, however, operates to achieve incorrect results in many cases.

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113. 120 S. Ct. at 3227 (Scalia, J., dissenting); *see also* discussion at *supra* note 91 and accompanying text.

114. 120 S. Ct. at 2335 (internal citation omitted).

115. *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.").

116. *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).

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

118. 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,

The Court has acknowledged that "[p]er 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."[119] 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 "alter[ing] the meaning" of the Fifth Amendment[120] and "substantively redefin[ing] the State's legal obligations" during custodial interrogation.[121]

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 "[i]n 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."[122]

This allocation of burdens, superimposed on § 3501 (which can easily be read in this fashion[123]), 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 con-

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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.

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

120. *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.").

121. 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").

122. 384 U.S. at 503 (Clark, J., dissenting).

123. 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.

trast, 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*,[124] 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."[125] Yet, in restoring the totality-of-the-circumstances approach, the Court emphasized that the *Spinelli-Aguilar* factors remained "highly relevant" in determining probable cause,[126] and later cases have examined them.[127] 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,"[128] 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.[129] 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

124. 462 U.S. 213 (1983).

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

126. *Id.* at 230.

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

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

129. *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. LAFAVE 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).

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.[130] 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."[131] 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."[132] 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.[133] 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.[134] 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.[135] Moreover, the Court reached the

130. 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).

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

132. 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").

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

134. 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).

135. 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

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.*

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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.[136] When considering whether to modify other precedents, the Court has routinely assessed cost as part of the inquiry.[137] In the *Miranda* context, a critical issue would be the cost of

(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.

136. 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).

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

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."[138] 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,"[139] 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."[140] Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions."[141] Academic commentators have also recognized Congress's comparative advantage.[142]

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*,[143] 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."[144] The dissent asserted that

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

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

140. 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*].

141. 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).

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

143. 120 S. Ct. 1740 (2000).

144. *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

"[t]he 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."[145]

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,[146] 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."[147] The Committee cited various studies demonstrating *Miranda*'s harmful effect on prosecuting crimes.[148] 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.[149] 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.[150] 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.[151] 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.[152] Kamisar's article does not substantively dis-

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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.

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

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

147. S. REP. NO. 90-1097, at 46 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2132.

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

149. Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 894 (2000).

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

151. *See* Kamisar, *supra* note 149, at 910 (giving five reasons for disbelieving Committee's analysis on the constitutionality of § 3501).

152. 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

cuss statistical presentations made to the Senate Judiciary Committee by, among others, District Attorney Frank Hogan of New York County,[153] then-District Attorney Arlen Spector of Philadelphia,[154] and District Attorney Aaron Koota of Kings County, New York.[155] While one might draw different conclusions from this data,[156] 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.[157]

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.[158] 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."[159] *Miranda*'s predictive claim — made, of course, in 1966 without the benefit of real world evaluation of the new rules[160] — 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

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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).

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

154. *Id.* at 200-02.

155. *Id.* at 223.

156. *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).

157. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 82-83 (1981) (in evaluating the constitutionality of a statute, "[t]he 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").

158. *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).

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

160. 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].

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 "[t]he 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."[161] *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"[162] 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 . . . ."[163] Finally, the Court maintained that a totality-of-the-circumstances, voluntariness test "is more difficult than *Miranda* for law enforcement officers to conform to . . . ."[164]

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.[165] 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.[166] When deciding how to interpret his remarks, it is instructive that Chief Justice Burger, after retiring from the Court, held the view that

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

162. 120 S. Ct. at 2336.

163. *Id.*

164. *Id.*

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

166. *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.").

Miranda should be overruled.[167] 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.[168] 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."[169] 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.[170] In later decisions, the Court applied this "second layer of prophylaxis"[171] to questioning about even unrelated crimes[172] and even to questioning after counsel had been provided.[173] It is precisely these rules that law enforcement agencies like the FBI have identified as producing most of *Miranda*'s harm.[174] It is thus entirely possible that

167. 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).

168. *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).

169. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 509 (9th ed. 1999); *see also* Kamisar, *Congress*, *supra* note 13, at 951 ("[N]ot all the opinions written in confession cases over the past thirty years have saddened the hearts of *Miranda*'s friends.").

170. 451 U.S. 477 (1981).

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

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

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

174. *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

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,[175] 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"[176] — a position that she simply abandoned (without explanation) in joining the *Dickerson* opinion.[177] 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*[178] In 1968, the Senate Judiciary Committee looked at these

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).

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

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

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

178. 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:*

very same types of information in reaching its factual conclusion about *Miranda*'s harms.[179] *Dickerson* does not explain what to make of the social science data on *Miranda*'s effects.[180]

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.[181] *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.[182] On the other side, not even a

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.").

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

180. *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.

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

182. 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.

single prominent law enforcement group would support Dickerson's position.[183]

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."[184] 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.[185] 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.[186] In a memo dated October 13, 1999, the DEA's Chief of

183. 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.

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

185. 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).

186. 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).

Operations reported that the agency's experience "highlight[s] the need to reform the formal, prophylactic requirements of *Miranda*."[187] 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."[188] 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."[189]

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."[190] 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 "[t]he Department's filing system and records do not readily yield a definitive list of such cases."[191] The Department therefore provided to the Senators only a list of cases in which "ad-

187. 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).

188. 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).

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

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

191. 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).

verse *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* . . . ."[192] 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.[193] 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.[194]

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,[195] 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.[196] 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 sup-

192. *Id.*

193. 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).

194. 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).

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

196. *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).

ported 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 . . . ."[197] These considerations include "the respective *costs* of reaffirming and overruling a prior case."[198] On this view, the "costs" of the *Miranda* rules are indisputably part of the stare decisis calculation.[199]

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

198. *Id.* (emphasis added).

199. 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*

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.[200] 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.[201] 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.[202]

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[203] and communicating to suspects "our societal commitment to restraint in an area in which emotions easily run uncontrolled."[204] 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 as-

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Adjudication and Social Science Research in Constitutional Criminal Procedure, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

200. 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).

201. *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).

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

203. *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.

204. 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).

sent.[205] 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*,[206] 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."[207] 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,[208] 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.[209] *Miranda* is "a decision without a past"[210] — an opinion without foundation in the previous court precedents.[211] 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* of-

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

206. 119 S. Ct. 1849 (1999).

207. Erik Luna, *Constitutional Roadmaps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000).

208. *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).

209. 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.

210. OLP REPORT, *supra* note 160, *reprinted in* 22 U. MICH. J.L. REFORM 564 (1989).

211. *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).

fers 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[212] — it runs the risk of wholesale reversal of criminal convictions, years after the fact.

Dickerson was clearly an "opportunity missed"[213] to make positive reforms, and will continue the "petrification" of the law of pretrial interrogation in this country.[214] 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.[215] 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,[216] from Professor Richard Leo that *Miranda* has few significant benefits,[217] and from Professor Susan Klein that *Miranda* fails to provide any real guidance on what kinds of compulsion are permissible during police questioning.[218] Given these complaints, it is hard to fault Professor William Stuntz's conclusion that "*Miranda* should attract support from neither right nor left."[219]

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 objec-

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

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

214. *See* OLP REPORT, *supra* note 160, at 99, *reprinted in* 22 U. MICH. J.L. REFORM 548-49.

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

216. White, *supra* note 76, at 1220-21

217. Leo, *supra* note 180, at 1027.

218. Klein, *supra* note 7, at 1035.

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

tive record of what happened inside the stationhouse.[220] Videotaping thus allows courts to police the lines between proper and improper tactics, rather than leaving that job to others.[221] 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.[222] I have argued elsewhere that videotaping could largely *replace* the *Miranda* regime.[223] Other commentators — including prominently Stephen Schulhofer, Welsh White, and Richard Leo — have urged that videotaping should *supplement* the *Miranda* regime.[224] And between these varying positions there certainly are a range of possibilities for using videotaping in combination with various parts of the *Miranda* regime.[225] Yet the Court's opinion in *Dickerson* contains not even the briefest discussion of this (or other) alternatives[226] — it gives no roadmap for legislators to follow. The result, not surprisingly, has been inaction in Congress and legislatures on possible alternatives to *Miranda*.[227]

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 rea-

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

221. *See* Stuntz, *supra* note 174, at 999.

222. *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).

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

224. *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).

225. 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.

226. 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).

227. *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.

sons 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."[228] 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.[229] "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."[230]

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"[231] — 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.

228. 384 U.S. at 467 (emphasis added).

229. *Id.*

230. *Id.*

231. 120 S. Ct. at 2336.