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Miranda, the Constitution, and Congress

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MIRANDA, THE CONSTITUTION, AND CONGRESS

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Are *Miranda* warnings required by the Constitution, or not? If they are, why has the Supreme Court repeatedly said that the rights created by *Miranda* are "not themselves rights protected by the Constitution"?[1] If not, why can't an Act of Congress, such as 18 U.S.C. 3501, declare them to be unnecessary?

These were the central questions posed by *United States v. Dickerson*.[2] It is not clear that the majority opinion ever really answered them. The majority said that "*Miranda* is constitutionally based,"[3] that *Miranda* has "constitutional underpinnings,"[4] that *Miranda* is "a constitutional decision,"[5] and that *Miranda* "announced a constitutional rule."[6] But the dissent chided the majority for being unable to bring itself 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.'"[7]

To put the dissent's point more precisely, the *Dickerson* majority never said that the Fifth Amendment is violated whenever a statement obtained in violation of *Miranda* is admitted against an accused.[8] The

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1. New York v. Quarles, 467 U.S. 649, 654 (1984) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)); *see also* Oregon v. Elstad, 470 U.S. 298, 306, 307 (1985) (*Miranda* "sweeps more broadly than the Fifth Amendment itself"; "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm"); Davis v. United States, 512 U.S. 452, 457-58 (1994); Withrow v. Williams, 507 U.S. 680, 690-91 (1993); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

2. 120 S. Ct. 2326 (2000).

3. *Id.* at 2334.

4. *Id.* at 2334 n.5.

5. *Id.* at 2329.

6. *Id.* at 2336.

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

8. The dissent's formulation is misleading because even under *Miranda*, what the Constitution (arguably) prohibits is the admission into evidence of statements obtained by

Court's earlier statements to the effect that *Miranda* establishes only a "prophylactic rule" that "sweeps more broadly than the Fifth Amendment itself"[9] seemed to preclude the *Dickerson* majority from making that assertion. The dissent concluded that "[t]he Court therefore acts in plain violation of the Constitution when it denies effect to" § 3501.[10]

At first glance, the dissent's logic seems powerful. The Constitution protects certain rights. The Supreme Court's job is to determine what rights the Constitution protects. If an Act of Congress infringes those rights, it is invalid. But an Act of Congress that does not violate the Constitution must be enforced. If a violation of *Miranda* is not a violation of the Constitution, how can the Court enforce *Miranda* in the face of a contrary Act of Congress?

In fact, however, the dissent's attack on the majority opinion is mistaken — doubly mistaken — and its mistakes illuminate something fundamental about constitutional law. The dissent is mistaken, first, in its understanding of how courts develop the principles of constitutional law that they enforce. *Miranda* rules are "prophylactic" rules that "go beyond the Constitution itself" in the sense that the *Miranda* rules do not simply reflect the values protected by the Fifth Amendment. The *Miranda* rules also reflect judgments about how those values can best be secured, given the capacities and propensities of the various institutions involved — in the case of *Miranda*, the police and the lower courts. Virtually all of constitutional law, however, consists of principles that are shaped in part by institutional judgments of this kind. In *Miranda*, the Court did this shaping self-consciously and more or less explicitly. But in principle, *Miranda* is no different from any number of well-established rules of constitutional law that also, in a sense, "sweep[ ] more broadly than the [Constitution] itself."

The dissent's second mistake is in its conception of Congress's role in developing constitutional principles. When the courts determine that the Constitution requires a certain result, it may follow that Congress cannot disagree — but that conclusion need not follow. It all depends (or at least it should depend) on whether Congress is in a bet-

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custodial interrogation without warnings. It seems doubtful that questioning a suspect in custody without warnings would violate the Constitution if the statements were never used as evidence, unless the interrogation were in some other way abusive. *See, e.g.*, Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1159 (2001). The Self-Incrimination Clause of the Fifth Amendment by itself does not forbid the government to compel answers to questions; indeed the government often does so, when it immunizes witnesses and requires their testimony before grand juries, for example. The Fifth Amendment is violated when compelled statements are admitted into evidence against the speaker in a criminal prosecution. The question about *Miranda* is whether it violates the Constitution to admit into evidence, in a criminal prosecution, statements obtained from the accused by custodial interrogation conducted without warnings.

9. Oregon v. Elstad, 470 U.S. 298, 306 (1985).

10. *Dickerson*, 120 S. Ct. at 2338 (Scalia, J., dissenting).

ter position to make the judgments, including the judgments about other institutions' capacities and propensities, that are necessarily involved in elaborating constitutional law. This mistake by the dissent reflects a common way of thinking about the relationship between the courts and Congress. The common idea is that decisions by the Supreme Court are either "interpretations of the Constitution" or "decisions that Congress can modify." (Decisions in the latter category are sometimes called "constitutional common law."[11]) The mistake is in not recognizing that a decision may be *both* an interpretation of the Constitution *and* a principle that Congress may modify.

The dissent's two mistakes are related. Part of what the courts do, when they elaborate principles of constitutional law, is to make complex judgments of a factual nature about the capacities and propensities of various institutions. Sometimes, Congress will be in as good a position as the courts to make these judgments. When Congress is as qualified as the courts are to make these judgments, Congress is entitled to play a co-equal role in elaborating constitutional principles. Because the dissent in *Dickerson* (and others who echo its logic) failed to understand how principles of constitutional law are developed, it also did not understand how Congress should be allowed to contribute to that process. This second mistake — to understate the proper role of Congress in elaborating constitutional principles — is a characteristic of some of the Supreme Court's most prominent recent decisions.

In this Essay I will try to spell out, and defend, these positions. Specifically, I will argue that it is misleading to ask whether *Miranda* warnings are "required by the Constitution" or are mere "prophylactic rules" that "go beyond" what "the Constitution itself" requires. It is misleading because constitutional rules — routinely, unavoidably, and quite properly — treat "the Constitution itself" as requiring "prophylaxis." In principle *Miranda* is, in this respect, just like many other constitutional rules of undoubted legitimacy.

The conclusion that *Miranda* is as legitimate as other well-established constitutional principles does not entail, however, that Congress is precluded from modifying it. Congress's role does not depend on a distinction between "the Constitution itself" (supposedly untouchable by Congress) and "prophylactic" rules that "go beyond" the Constitution itself (and therefore, supposedly, can be freely changed or rejected by Congress). Nor does Congress's power depend on a distinction between "interpreting" the Constitution (supposedly the province of the courts) and "enforcing" the Constitution (supposedly the province of Congress). Congress's role in the elaboration of

11. This distinction between "*Marbury*-shielded constitutional exegesis" and "congressionally reversible constitutional law" is the basis of the important article by Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975).

constitutional principles is itself a complex constitutional issue. In some areas, Congress can be trusted to superintend the development of constitutional principles; in other areas Congress cannot be trusted to do so. These are, in fact, familiar features of our constitutional order, even if we do not often describe them in this way, and even if the current Supreme Court, in some of its recent decisions, has not properly understood this aspect of the Constitution. Or so I contend.

I. *MIRANDA* AS A PROPHYLACTIC RULE

The Fifth Amendment to the Constitution provides that no person shall "be compelled to be a witness against himself" in any criminal case.[12] If every statement obtained in violation of *Miranda* were "compelled" within the meaning of the Fifth Amendment, then *Miranda* would follow from the Fifth Amendment, in a relatively straightforward fashion.[13] But the Court has not been willing to assert that every statement obtained in violation of *Miranda* is compelled. [14] There are hypothetical examples that seem to make such an assertion implausible: a suspect, sophisticated about criminal law, only ambiguously in custody, still in comfortable surroundings (in his or her own home, say), who answers a single question asked in a surpassingly gentle manner — that kind of thing. Even apart from such an extreme hypothetical case, it is possible to imagine relatively realistic situations in which custodial questioning without warnings would produce answers that we would not characterize as "compelled" in the ordinary sense of that term. [15]

Miranda is based exclusively on the Self-Incrimination Clause of the Fifth Amendment. Why, then, does *Miranda* exclude statements

12. U.S. CONST. amend. V.

13. Only relatively straightforward, because there would still be a question whether a person is a "witness" in a criminal case when statements are obtained from him in an out-of-court interrogation and then admitted into evidence in the criminal prosecution. The definitive (affirmative) answer to this question is given in Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965).

14. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 446 (1987), and Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 951 (2001), for an argument that every statement obtained in violation of *Miranda* (or equivalent safeguards) is "compelled" within the meaning of the Fifth Amendment. Rightly or wrongly, however, the Supreme Court has not adopted this position.

15. The *Miranda* violation in *Oregon v. Elstad* was not too different from the hypothetical, at least if the testimony of the officer is credited: the suspect was questioned in his home, with his mother in a nearby room; it was not clear that he was under arrest; and, according to the officer, the incriminating statement (which was not a confession to a crime but only a statement that the accused was at the scene of the crime) was elicited not by a question but by the officer's assertion that he believed the accused was involved. 470 U.S. 298, 300-01 (1985).

that are not "compelled"? The basic answer is familiar by now. Before *Miranda*, the courts had no choice but to conduct a case-by-case inquiry into whether a particular confession, made in custody, was the product of compulsion or was instead made voluntarily. (Formally the question was whether the statements were "voluntary" for purposes of the Due Process Clause, rather than "compelled" within the meaning of the Self-Incrimination Clause, but those two notions can be equated for present purposes.) Those case-by-case inquiries, which had to consider all the circumstances surrounding the confession, were unsatisfactory in several respects. It is very difficult for a court, after the fact, imaginatively to recreate the conditions that existed in a custodial setting. Even if the courts did have a full understanding of the circumstances in which the confession was made, there is no metric for the courts to use in determining whether those conditions were so coercive that they rendered the confession involuntary for constitutional purposes. Because judicial determinations of voluntariness are unreliable, law enforcement officers might be encouraged to try to compel incriminating statements in relatively subtle ways in the hope that they would later be able to convince the courts that the statements were not compelled. And even if the courts were able to do a satisfactory job of determining voluntariness after the fact, case-by-case determinations, tied as they are to the particular circumstances of each case, give law enforcement authorities who want to do the right thing too little guidance about how they should proceed.

Miranda was designed to address these deficiencies in the case-by-case approach. Whether *Miranda* succeeds or not is, of course, controversial. But the justification for *Miranda* is that — on balance — it does a better job of enforcing the Self-Incrimination Clause than the case-by-case voluntariness approach does. *Miranda* results in the exclusion of some confessions that are not compelled within the meaning of the Fifth Amendment. But on the other side of the ledger, *Miranda* makes it more likely that the courts will exclude statements obtained by compulsion that otherwise would go undetected. Also, *Miranda* will deter law enforcement officers, to some degree, from trying to compel confessions. The characterization of *Miranda* as a prophylactic rule that "goes beyond" the Constitution seems to be a way of saying that *Miranda* represents this kind of deliberate choice to exclude some voluntary confessions, in exchange for the benefits of excluding or deterring some compelled confessions that would otherwise escape detection.

The crucial point, however, is that *every* principle of constitutional law reflects, implicitly, a comparable balancing of costs and benefits.[16] No principle enforces itself; no principle can be perfectly adminis-

16. For another statement of the arguments in the remainder of this section, see David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

tered. In a regime in which courts make case-by-case inquiries into voluntariness, there are inevitably mistakes, in both directions: some compelled confessions are admitted into evidence, and some voluntary confessions are excluded. That is just the result of the fallibility of judicial factfinding. If the Constitution itself requires that all compelled confessions be excluded and all voluntary confessions be admitted, then *Miranda* is, certainly, an imperfect fit. But the case-by-case approach will also be an imperfect fit — and so will any other system.

To put the point another way, the idea that *Miranda* "goes beyond" the Constitution seems to rest on the premise that a case-by-case inquiry into voluntariness is somehow natural, or is found in the Constitution, so that any deviation from that approach is judicial lawmaking of questionable legitimacy. But the Constitution does not ordain any particular institutional mechanism for ensuring that compelled statements are not admitted into evidence. The case-by-case voluntariness approach is just one such mechanism. The Supreme Court has to decide if it is the right mechanism. It will make that decision by determining whether the case-by-case approach, on the whole, strikes the right balance of costs and benefits. The decision to adopt the case-by-case approach is, in this way, no different from a decision to reject that approach in favor of, say, *Miranda*.

This point can be generalized well beyond the Self-Incrimination Clause. Many established principles of constitutional law have the same "prophylactic" character as *Miranda*. Take, for example, the central feature of First Amendment doctrine: the principle that laws that regulate speech on the basis of its content are presumed unconstitutional.[17] The text of the First Amendment, of course, does not say anything about content-based regulation; it just provides that Congress shall make no law "abridging the freedom of speech."[18] The primary justification for the principle condemning content-based regulations is that such regulations are especially likely to be motivated by government hostility to the message being conveyed. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'"[19] But not every content-based regulation is the product of government "disapprov[al of] the speaker's views." A city might want

17. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1888 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). The governing First Amendment principles are actually more complex than this. For example, content-based restrictions are treated differently if they restrict only low-value speech, or if they do not prohibit speech with a certain content but only deny it a subsidy. But the presumption against content-based regulation is unquestionably a central principle of First Amendment law.

18. U.S. CONST. amend. I.

19. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

to permit labor picketing near a hospital while forbidding anti-abortion picketing because it has made a reasonable — perhaps even correct — determination that labor picketing is less likely to lead to violence. But such a content-based regulation would be unconstitutional.[20]

In other words, the principle forbidding content-based regulations is prophylactic. It forbids some restrictions on speech that are not impermissibly motivated and, in that sense, do not offend against the central values of the First Amendment. It does so because a case-by-case inquiry into the government's motives in every case involving a regulation of speech is too likely to produce errors, and too likely to give governments an incentive to conceal their true motivations — to pretend to be suppressing speech for legitimate reasons while in fact suppressing it because they disagree with it. Also, the prohibition against content-based regulation is designed to take account of the institutional limitations and propensities of judges. Judges themselves, in evaluating restrictions on speech, might be influenced by the message of the speaker involved. If they proceed case by case, judges might be unjustifiably receptive to legislation that restricts speech with which they disagree. A clear, categorical rule against content-based regulation makes it much more difficult for judges to be influenced, consciously or not, by such considerations.[21]

These justifications should sound familiar: they are the justifications for *Miranda*, too. Case-by-case determinations are unreliable, because judges will be too likely to make mistakes about the actual nature of a government action; a case-by-case regime gives government officials too great an incentive to be conceal what they are doing. Instead of proceeding case by case, the courts therefore establish a categorical rule that will, inevitably, declare unconstitutional many government actions that are in fact unobjectionable — if the facts could ever be reliably found. The justification for that categorical rule is that it does a better job of enforcing the underlying constitutional command. All of these things are as true of the principle forbidding content-based regulation as they are of *Miranda*. But the former is a well-established principle of unquestioned legitimacy. Is it a "prophylactic" rule that "sweeps more broadly" than the First Amendment "itself"? In a sense it plainly is. But the lesson is not that the centerpiece of First Amendment law must be scrapped in favor of case-by-case inquiries into legislative motive. The lesson is that the prophylactic

20. *See* Police Dep't v. Mosley, 408 U.S. 92 (1972).

21. Justice Scalia, the author of the *Dickerson* dissent, gives this as a reason that courts, in interpreting the Constitution, should try to eschew case-by-case approaches in favor of categorical rules. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80, 1182-85 (1989).

character of *Miranda* does not make its legitimacy suspect in the way suggested by the *Dickerson* dissent.

In *Dickerson*, the defendant and the United States, in explaining why § 3501 was unconstitutional, argued that other cases, besides *Miranda*, established prophylactic rules. One example that the government offered was the elaborate doctrine, also developed under the First Amendment, that defines the circumstances in which a speaker may be held liable for defamation. In these cases, beginning with *New York Times v. Sullivan*,[22] the Supreme Court has held that sometimes the First Amendment prohibits a state from holding a speaker liable even for false and defamatory statements. (For example, a defendant may not be held liable for defaming a public official unless the defendant can be shown to have acted with knowledge that the statement was false or with reckless disregard of the risk of falsity.) The Court has reached this conclusion even though, in the Court's own words, "there is no constitutional value in false statements of fact."[23]

Why are some false statements protected by the First Amendment, even though they have "no constitutional value"? The Court gave the common sense answer in *New York Times v. Sullivan* itself: false speech must be protected to some degree in order to avoid discouraging valuable speech. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[24] In other words, given the inevitable imprecision of judicial factfinding, a regime that protects only speech that has "constitutional value" will end up deterring too much valuable speech. Some speech that has (in the Court's own words) "no constitutional value" must also be protected, because the disadvantages of protecting it are outweighed by the gains.

Again this justification parallels the justification for *Miranda*. The Supreme Court even characterized this line of cases as "extend[ing] a measure of strategic protection to defamatory falsehood."[25] The *Dickerson* dissent tried to explain why the "strategic protection" of *New York Times v. Sullivan* is different from *Miranda*'s "prophylaxis" by saying that the Court adopted the *Sullivan* rules "because the Court . . . viewed the importation of 'chill' as *itself* a violation of the First Amendment—not because the Court thought it could go beyond what the First Amendment *demanded* in order to provide some prophylaxis."[26] But this just asserts the conclusion. *Sullivan* requires that

22. 376 U.S. 254 (1964).

23. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

24. 376 U.S. at 271-72 (quoting NAACP. v. Button, 371 U.S. 415, 433 (1963)).

25. *Gertz*, 418 U.S. at 342.

26. *Dickerson*, 120 S. Ct. at 2344-45 (Scalia, J., dissenting).

statements with "no constitutional value" be protected for "strategic" reasons; if the notion of "go[ing] beyond what the First Amendment demand[s] in order to provide some prophylaxis" has any meaning, then *New York Times v. Sullivan* did it. *Sullivan* held — to use the *Dickerson* dissent's terms — that what "the First Amendment demanded" is precisely "some prophylaxis." *Miranda* held the same thing about the Fifth Amendment.

II. THE *MIRANDA* EXCEPTIONS

Why has the Supreme Court not explicitly adopted this view of *Miranda*? That is, why didn't the majority in *Dickerson* call the dissent's bluff and assert outright that the Self-Incrimination Clause, properly interpreted, requires the *Miranda* rules? Apparently the problem is the Court's repeated statements in earlier cases to the effect that the *Miranda* rules "sweep[] more broadly than the Fifth Amendment itself" and that a violation of *Miranda* does not constitute an "actual infringement of the suspect's constitutional rights."[27]

The Court's statements to this effect uniformly occurred in cases that recognized exceptions to *Miranda* or limits on *Miranda*'s exclusionary rule — instances in which evidence would not be excluded even though it was the product of a violation of *Miranda*. In *Michigan v. Tucker*,[28] the Court allowed the prosecution to use the testimony of a witness who was discovered only because of a violation of *Miranda*. In *New York v. Quarles*,[29] the Court held that a statement obtained in violation of *Miranda* could be admitted under a "public safety" exception. In *Oregon v. Elstad*,[30] the Court held that testimonial fruits of a *Miranda* violation (specifically, a suspect's subsequent confession, obtained in compliance with *Miranda*) could be admitted into evidence against a suspect. In each of these cases, the Court noted that the statements obtained in violation of *Miranda* were not compelled under the case-by-case voluntariness approach, and the Court said (or suggested) that *Miranda* was a "prophylactic rule" that "sweeps more broadly than the Fifth Amendment itself."[31]

The language in these cases is imprecise and a little misleading, but in their logic, and their holdings, the cases are consistent with the basic

27. Oregon v. Elstad, 470 U.S. 298, 306, 308 (1985).

28. 417 U.S. 433 (1974).

29. 467 U.S. 649 (1984).

30. 470 U.S. 298 (1985).

31. *Id.* at 306. *Harris v. New York* held that statements obtained in violation of *Miranda* could be used to impeach a suspect. 401 U.S. 222 (1971). The Court did not explicitly rely on the distinction between "the Fifth Amendment itself" and "prophylactic rules" in *Harris*, but it later treated *Harris* as support for the idea that *Miranda* established such rules. *See, e.g.*, *Elstad*, 470 U.S. at 307.

point: *Miranda*, although "prophylactic" in an important sense, is also required by the Fifth Amendment. *Miranda* excludes some statements that are not "compelled" within the meaning of the Fifth Amendment — in itself an undesirable consequence, so far as the Constitution is concerned — but it does so because, on balance, the benefits of the *Miranda* rules, when compared with a case-by-case inquiry into compulsion, outweigh that undesirable side effect. In certain circumstances, though, the comparison between *Miranda* and the case-by-case approach might come out differently; the balance of costs and benefits might tip in favor of proceeding case by case. The Court reasoned, rightly or wrongly, that cases like *Tucker, Quarles*, and *Elstad* presented such circumstances. These circumstances called for refinement of the *Miranda* rule, but the refinement did not change the basic character of the *Miranda* rules (with or without refinements) — that they are both prophylactic and "found in the Constitution" in the same way as other principles of constitutional law.[32]

In *Elstad*, for example, the defendant made an incriminating statement without receiving *Miranda* warnings, but he made that statement in circumstances that would not support a finding of compulsion in the case-by-case sense. The suspect was then warned and gave a full confession. The Court treated the first statement as inadmissible; the question was whether the full confession was "tainted" and therefore inadmissible, on the assumption that it was the product (the "fruit") of the first statement. (The argument that the confession was the fruit of the first statement is that the defendant gave the confession only because he thought the first statement had let the proverbial cat out of the bag.) The Supreme Court held that the confession was admissible. The Court nevertheless adhered to the rule that, in these circumstances, the confession would not have been admissible if the first statement had been "actually compelled" — that is, if an inquiry under the case-by-case voluntariness approach had concluded that the first confession was compelled.[33]

The Court reasoned that *Elstad* — and other cases in which the Court created an exception to *Miranda*[34] — presented a different balance of costs and benefits from *Miranda* itself.[35] It is true that, under *Elstad*, many of the costs that *Miranda* sought to avoid will be incurred. Courts will have to make a case-by-case inquiry into the voluntariness of a statement obtained without warnings — the first state-

32. For a valuable discussion of the relationship between the *Miranda* "exceptions" and prophylactic rules, see Susan Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001).

33. *See, e.g.*, *Elstad*, 470 U.S. at 318.

34. *See, e.g.*, *Quarles*, 467 U.S. at 657.

35. *See Elstad*, 470 U.S. at 308-09.

ment, in the *Elstad* situation. That determination will be somewhat unreliable, for all the well-known reasons that gave rise to *Miranda.* This is a significant drawback of the *Elstad* rule. *Elstad* also gives the police an incentive to try to coerce incriminating statements by subtle, undetectable means, another of the problems *Miranda* sought to avoid; if the police can do so, they can then, under *Elstad*, try to use those statements, themselves inadmissible, to obtain an admissible confession.

But the Court concluded that in the *Elstad* situation these disadvantages are small enough to be outweighed by the advantages. The unfavorable incentive given to law enforcement officers, the Court reasoned, is not that great. The scenario to worry about is one in which the police (i) withhold warnings; (ii) coerce a statement with enough subtlety to avoid detection in a voluntariness hearing; (iii) then give the suspect warnings; and (iv) use the previous unwarned statement to induce the suspect to confess, or confess again. *Elstad* creates a risk that such police conduct will occur, but the risk is less than the risk of an undetectably coerced confession in the pre-*Miranda* regime, or so the Court thought. On the other hand, without the *Elstad* exception, completely voluntary confessions would be excluded. The Court concluded that in these circumstances the best balance would be struck by admitting the second confession.

Whatever one thinks of the holding in *Elstad*, there is nothing inconsistent, in principle, between this approach and the view that *Miranda* is required by the Self-Incrimination Clause. *Miranda* is required by the Self-Incrimination Clause because that Clause has to be implemented in some way; any method of implementation will strike some balance of advantages and disadvantages; and *Miranda* strikes the best balance in the circumstances presented by that case. In different circumstances, such as in *Elstad* (or *Quarles*, or *Tucker*), a different balance might be best.

To make the comparison to the First Amendment once again, the constitutional rules governing defamation of public officials are different from the rules governing defamation of private individuals, which are in turn different from the rules governing defamation that addresses no subject of public interest. These differences do not mean that the rule of *New York Times v. Sullivan* is not a constitutional rule. They just mean that the constitutional rule that applies in one set of circumstances might have to be altered when different circumstances arise — a wholly unremarkable proposition. The Court in *Dickerson*, in trying to explain why *Elstad* and similar cases did not impugn the constitutional basis of *Miranda*, said that those cases only illustrate that "no constitutional rule is immutable."[36] Perhaps a better way to

36. 120 S. Ct. at 2335.

put it is that often constitutional rules are not simple but require a degree of complexity and refinement — a point that is obvious in many areas of constitutional law. It may be that the Court struck the wrong balance in *Elstad*, or in one of the other cases creating an exception to *Miranda* (or, for that matter, in *Miranda* itself). But the fact that the Court refined the balance it struck in *Miranda*, when cases presenting different circumstances arose, has no bearing on the constitutional status or legitimacy of that decision.

III. THE ROLE OF CONGRESS

If *Miranda* is as legitimate a principle of constitutional law as any other, what does that say about Congress's role in the development of constitutional principles? The *Miranda* opinion itself famously suggested that the precise rules established by that case were subject to being modified by congressional or state legislation, so long as the legislation provided protection equivalent to that provided by the *Miranda* rules themselves. The Court held in *Dickerson* that § 3501 did not provide equivalent protection but rather reverted essentially to the state of affairs that existed before *Miranda* was decided. The dissent did not take issue with that characterization of § 3501, and the Court's conclusion on this point seems clearly correct.

Several questions remain, however. First, if *Miranda* is indeed a constitutional rule, how can it be replaced by legislation, even if the legislation provides equivalent protection? Or, conversely, if the *Miranda* warnings can be replaced by legislation, how can *Miranda* be part of the Constitution?[37] The short answer to these questions is: even if *Miranda* is a fully legitimate principle of constitutional law, why *shouldn't* Congress be able to replace it with some other regime, if Congress's statutory alternative really does as good a job as the *Miranda* rules themselves? Once we recognize that constitutional rules often rest on a judgment about institutional capacities and propensities — the reliability vel non of judicial factfinding procedures, the risks of giving bad incentives to government officials, and so on — there is no good reason to preclude Congress and the states from trying to solve the same problem that the courts are addressing — that is, from trying to implement the Constitution with the best balance of costs and benefits.[38]

37. Apparently, the Court itself began to speak of *Miranda* as an extraconstitutional decision in part because of the statement, in *Miranda*, that Congress or the states could displace the *Miranda* rules by equivalent legislation. *See, e.g.*, *Elstad*, 470 U.S. at 306 n.1.

38. For a discussion of possible legislative responses to *Miranda* that reaches a similar conclusion, by a somewhat different route, see Michael C. Dorf and Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. (forthcoming).

Once again the comparison to *New York Times v. Sullivan* is instructive. While no one, as far as I know, has questioned the legitimacy of *Sullivan* in the way that *Miranda*'s legitimacy is questioned, many people disagree with *Sullivan* on the merits. That is, they maintain that *Sullivan* does not strike the best balance between protecting First Amendment values and allowing states to protect people's reputations. As an alternative to *Sullivan*, many have recommended, in particular, a regime in which courts would determine whether an allegedly defamatory statement was false and, if it was, either require the speaker to publish a retraction or impose strictly limited damages.[39] The argument is that such an alternative would avoid much of the chilling effect that is *Sullivan*'s principal concern while reducing unredressed damage to reputation.

If such a scheme (or some other alternative) did indeed strike as good or better a balance than *Sullivan*, there would be no good reason for the Court to reject a statute that adopted it. But no one questions the constitutional status of *Sullivan*. Analogously, one need not question the constitutional status of *Miranda* to conclude that a legislature could provide a substitute for *Miranda*, if the substitute struck as good a balance as *Miranda* does between the competing interests involved in custodial interrogation.

But who decides whether the alternative strikes as good a balance as *Miranda*? That is the more fundamental question. More precisely, how much deference should the courts give to a legislature's determination that its alternative is equally effective? This question was not really raised by *Dickerson*, because, as I said, it was quite clear that § 3501 was not a serious effort to accomplish what *Miranda* sought to accomplish but was rather just an effort to overrule *Miranda*. But the question is important in practical terms in case Congress, or a state legislature, responds to *Dickerson* by enacting a statute that does seem more genuinely designed to take the *Miranda* Court's invitation seriously. In addition, this question highlights the relationship between *Dickerson* and some of the Court's most important recent decisions — decisions that raised the question of how much deference the courts should give to Acts of Congress that rest on an assessment of facts or institutional circumstances that is different from the Court's own.[40]

The Supreme Court's most significant recent statement on this issue is *City of Boerne v. Flores*,[41] which involved the constitutionality of

39. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771-74 (1985) (White, J., concurring).

40. *See, e.g.*, United States v. Morrison, 120 S. Ct. 1740 (2000); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

41. 521 U.S. 507 (1997).

the Religious Freedom Restoration Act ("RFRA"). RFRA, a federal statute, prohibited any state or federal law from imposing a "substantial[ ] burden[ ]" on the exercise of religion unless the law was the least restrictive means of furthering a compelling state interest.[42] Congress's admitted reason for enacting RFRA was that it disagreed with the Supreme Court's decision in *Employment Division v. Smith*,[43] which held that the Free Exercise Clause of the First Amendment does not forbid Congress or the states from enacting laws that impose burdens on religious practices, so long as those laws do not single out religion and are not motivated by hostility toward religion. Congress sought to justify RFRA as an exercise of its power under Section 5 of the Fourteenth Amendment, which gives Congress the power "to enforce, by appropriate legislation, the provisions of this article."[44] (The Due Process Clause of the Fourteenth Amendment has been interpreted to incorporate the First Amendment's protection of the "free exercise of religion.")

In *City of Boerne*, the Supreme Court held RFRA unconstitutional. The Court reasoned that Congress's power "to enforce" the Fourteenth Amendment did not include the power "to determine what constitutes a constitutional violation."[45] Rather, the Court said, Section 5 gives Congress only the power to remedy what the Court would determine to be violations of the Constitution. The Court then concluded that RFRA exceeded the scope of Congress's remedial power because there was a lack of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[46] RFRA, the Court said, "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[47]

The central distinction that the Court drew in *City of Boerne* — between "enforc[ing] a constitutional right" and "determin[ing] what constitutes a constitutional violation"[48] — is, in an important way, inconsistent with *Dickerson*. In fact, that very distinction is the basis of the *Dickerson* dissent. The *Miranda* rules are, as the Court has said many times, a way of "enforc[ing the] constitutional right" to be free from compelled self-incrimination. Therefore, under the logic of *City*

42. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb *et seq.* (1994)).

43. 494 U.S. 872 (1990).

44. U.S. CONST. amend. XIV, § 5.

45. 521 U.S. at 519.

46. *Id.* at 520.

47. *Id.* at 532.

48. *Id.* at 519.

of Boerne — and according to the decisions that describe the *Miranda* warnings as "prophylactic" rules that "sweep more broadly than" the Self-Incrimination Clause — *Miranda* does not "determine what constitutes a constitutional violation." But that means, according to *City of Boerne*, that *Miranda* falls into Congress's province, not the Court's. *Dickerson* held otherwise.

The problem with *City of Boerne* — and the reason *Dickerson* is correct — is that there is no sharp distinction between interpreting and enforcing the Constitution. Consider again the principle that content-based regulation of speech is presumptively unconstitutional. Does that principle just "enforce" the First Amendment, by helping prevent improperly motivated legislation? Or is it an interpretation that "determines the content" of the First Amendment? The answer is that it is both. Much of what the courts do, when they "interpret" the Constitution and "determine its content," is to design principles that "enforce" the underlying constitutional requirement by preventing or remedying actions that threaten constitutional values.

The decision in *Employment Division v. Smith* reflected a judgment that case-by-case inquiries into government motives will adequately protect the free exercise of religion. That judgment was based in part on a view about the proper understanding of the First Amendment phrase "the free exercise of religion." But, like *Miranda*, *Smith* was based on a judgment about the courts' institutional capacity to detect constitutional violations through a case-by-case inquiry, and on a judgment about the likelihood that the states and the other branches of the federal government would try to evade constitutional requirements (consciously or not) by disguising, as neutral, legislation that was in fact improperly motivated. Those kinds of judgments are involved in "enforcing" the Constitution, a power that *City of Boerne* concedes to Congress; they are also involved in interpreting the Constitution, in *Miranda*, *Smith*, and many other cases. It is simply not possible to draw a sharp distinction between the two; "enforcement" is inextricably, and properly, a part of "interpretation."

This does not answer the question of how far Congress may go in second-guessing the Court's interpretations. The fact that there is no clear distinction between "enforcement" and "interpretation" does not mean that RFRA was constitutional, any more than it means that § 3501 was constitutional. But it does, at least, pose the right question: how much deference should Congress's judgments be given? The Court in *City of Boerne* was explicitly concerned that, if Congress had the power to "interpret" as well as "enforce" the Constitution, there would be no effective limit on Congress's power.[49] That concern is obviously legitimate. The problem is that the device that *City of Boerne*

49. *Id.* at 529.

chose to limit Congress's power — a sharp distinction between interpretation and enforcement — does not hold up.

How much deference should Congress be given, then, when it second-guesses the courts' judgment about what is needed adequately to protect constitutional rights? The answer should depend, not on a conceptual distinction between interpretation and enforcement, but on an assessment of Congress's own capacities and propensities. For example, it has become a fixed point of constitutional law that popularly elected bodies cannot be fully trusted to regulate freedom of expression, because they are too likely to be tempted to limit speech that they dislike.[50] Similarly, legislation that is hostile to certain kinds of minority groups — "discrete and insular" minorities, in the canonical formulation — is more closely reviewed by the courts, partly on the ground that those groups are not able fully to protect themselves in the legislative process.[51] For several decades after the New Deal, the Supreme Court seemed to have settled on the opposite principle when reviewing federal legislation that threatened state prerogatives. The idea was that states are able adequately to protect themselves in Congress, so when only federalism was at stake, Congress's determinations could be trusted completely.[52] Recently, in *City of Boerne* and other cases, the Court has reconsidered this view; the Court's declaration that it will review acts of Congress for "congruence and proportionality" reflects this new distrust of congressional judgments in this area. The Court's new solicitude for states' prerogatives can certainly be criticized, but at least it is potentially directed to the right question: whether, and to what extent, Congress can be trusted to make the judgments involved in the inextricably entwined tasks of interpreting and enforcing the Constitution.

To what extent should the courts trust the legislative judgments underlying any successor to § 3501 that might try to redefine the rights of suspects subjected to custodial interrogation? Statutes that limit the rights of criminal suspects do not receive a full measure of deference from the courts. The Supreme Court has not been very explicit about this, but it shows little tendency to defer to legislative assessments of

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50. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST ch. 5 (1980).

51. The idea that legislation must be more closely scrutinized by the courts when it is directed at "discrete and insular minorities" is, of course, derived from United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938). For criticism, see, for example, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

52. The best-known statement of this position is Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Supreme Court explicitly adopted this approach in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550-51 & n. 11 (1985). *See also generally* Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that informal political institutions protect federalism).

the extent to which criminal suspects should be protected by the Bill of Rights.[53] The courts have never fully articulated the reason for this lack of deference, but, by analogy to other constitutional rights, the reason seems to be that in this area, public hostility to the rights involved might improperly skew a legislature's judgment. Were Congress to respond to *Dickerson* by providing what purported to be an adequate substitute for *Miranda*, the courts could properly undertake a careful review of the justifications advanced for the legislation to ensure that it was indeed based on a convincing assessment of institutional realities. There seems to be no reason, for example, to review such a law under a standard less stringent than that which the Court applies when it is dealing with regulations that are specifically directed to speech but are not based on the content of speech;[54] perhaps an even more rigorous standard might be appropriate. The approach the Court takes should acknowledge that Congress may have superior competence to make the institutional judgments that are involved in deciding what regime should govern custodial interrogation, while still making sure that the courts play their historic role of protecting the rights of criminal suspects.

But the justification for this relatively intrusive judicial review is not that Congress has no role to play in defining constitutional rights. On the contrary: once constitutional rights are understood, as they must be, as partly but inevitably "prophylactic" in nature, there should be no objection, in principle, to Congress's playing a role in their elaboration. *Dickerson* is best justified on the ground that constitutional principles — full-fledged, fully legitimate constitutional principles — are routinely "prophylactic" in the way *Miranda* is. That is why the Court in *Dickerson* was justified in declaring § 3501 unconstitutional. But the other side of that coin is that constitutional interpretation will often rest on the kinds of judgments that Congress is in a good position to make. When it does, Congress's determinations are entitled to an appropriate degree of deference. *United States v. Dickerson*, which is on the surface a ringing reaffirmation of judicial supremacy, contains the seeds of a more full acknowledgement that both the courts and Congress play a legitimate role in the interpretation of the Constitution.

53. For example, the Court has invalidated federal statutes that authorized searches that the Court considered unreasonable, without indicating that the legislative judgment was entitled to deference. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

54. *See, e.g.*, Turner Broad. Syst., Inc. v. FCC, 520 U.S. 180, 192-96 (1997).