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CAN A RULE BE PROPHYLACTIC AND YET CONSTITUTIONAL?

Richard H.W. Maloy†

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I. INTRODUCTION

Prior to June 13, 1966, it was the law of the United States that, before the confession of a suspect in a criminal trial could be introduced into evidence, the trial court must ascertain that that confession was voluntarily given, i.e., the trial judge must determine that in obtaining the confession, the interrogators did not deprive the suspect of his or her rights without due process of law under the Fifth Amendment—the “voluntariness” standard. On June 13, 1966, the rule was changed by the United States Supreme Court in

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Miranda v. Arizona. In that case the Court decided that for a confession to be admissible at trial, the suspect, before interrogation, must have been warned by the interrogators that he or she (1) has a right to remain silent, (2) that any statement that the suspect does make may be used against him or her, and (3) that he or she has a right to the presence of an attorney, either retained or appointed. The Miranda Court said that "[w]e encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of individuals while promoting efficient enforcement of our criminal laws." In 1968, Congress accepted the Court's invitation, and enacted 18 U.S.C. § 3501. That statute overruled Miranda, and returned the nation to the voluntariness standard for confessions made while the suspect is in custody. The three specific warnings required by the Miranda decision were not required, but if they were given, they were simply factors to be considered by the courts in determining whether or not the confession was "voluntarily" made.

2. Id. at 468-73. Two years prior to deciding Miranda, the Supreme Court decided Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964), which held inadmissible certain statements made by an accused in patent ignorance of the law, despite his having retained counsel. Id.
5. Not unlike Congress' overruling of N.L.R.B. v. Bildisco, 465 U.S. 513, 516 (1984), by the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. § 1113, and other instances of Congress' reaction to its displeasure with particular judicial decisions. Senate Report 1097 clearly reveals Congress' dissatisfaction with the Supreme Court's Miranda decision. S. REP. No. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112. "The committee is convinced from the mass of evidence heard by the subcommittee ... that the rigid and inflexible requirements of the majority opinion in the Miranda case are unreasonable, unrealistic and extremely harmful to law enforcement." Id. Congress left no doubt that it thought that by enacting § 3501 it was righting a wrong committed by the Supreme Court. Id. "The committee is of the view that the legislation proposed in section 701 of title II would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws." Id.
6. 18 U.S.C. § 3501(d) (1968). The statute does not apply unless the person is "under arrest or other detention." Id.
7. Other factors were listed, which actually expanded upon the pre-Miranda
Despite this change in the rules as to confessions, law enforcement agencies followed the 1966 law (as determined by the Miranda case), and generally ignored the 1968 statute—§ 3501. The reason for this anomaly is that the Supreme Court never had occasion to rule on the applicability or constitutionality of the statute in a case or controversy brought before it. The Department of Justice, taking the position that the statute is unconstitutional, did not assert it; criminal defendants, preferring that the admissibility of their confessions be tested by the requirements laid down in Miranda, rather than by the less stringent requirements of the statute, understandably likewise did not assert it.

Though the Supreme Court had not ruled on the constitutionality or applicability of the statute, in 1994, Justice Thomas, writing for the Court, proclaimed, by dictum, that 18 U.S.C. § 3501 is “the statute governing the admissibility of confessions in federal prosecutions.” Therefore, as this pronouncement makes clear, unless and until 18 U.S.C. § 3501 was declared unconstitutional, it remained the supreme law of the land.

On February 8, 1999, the Fourth Circuit Court of Appeals in United States v. Dickerson, held in a split (2-1) decision, that “the admissibility of confessions in federal court is governed by 18 U.S.C. § 3501 ... , rather than Miranda.” The court en banc (8-5), declined to rehear the case. On December 6, 1999 the United States Supreme Court granted certiorari to consider the decision in Dickerson. The case was argued on April 19, 2000 and decided on June 26, 2000—the Court declaring the statute unconstitutional in Dickerson v. United States. Most news analysts saw the Court’s job as


9. U.S. CONST. art. VI.

10. 166 F.3d 667, 671 (4th Cir. 1999).

11. Id. at 695.

12. For reasons best known to it, the full complement of the court must have thought the matter well established. Id. In United States v. Leong, No. 96-4876, 1997 WL 351214, at *2 (4th Cir. June 26, 1997), the court appeared about ready to address it, but opted not to do so since the D.O.J. failed to raise the issue. Id.


14. 550 U.S. 428, 120 S. Ct. 2326, 2335 (2000). At the time of publication, United States Reporter page citations were unavailable. Accordingly, the Supreme Court Reporter will be referenced in this article.
being whether to retain *Miranda*, rather than to determine the constitutionality of a statute.\(^{15}\) The thirty-two years which it took the Court to declare an Act of Congress unconstitutional is not the record for such delay. It seems that the 122 years represented by *Regan v. Time, Inc.*,\(^{16}\) is the longest that an unconstitutional federal statute was on the books before it was struck down by the Supreme Court.\(^ {17}\)

What makes the decision particularly curious, is the alignment of Justices and the *ratio decidendi* of the Court’s opinion. The present United States Supreme Court is reputedly composed of a liberal wing,\(^ {18}\) a conservative wing,\(^ {19}\) and two “swing votes,”\(^ {20}\) who often vote with the conservatives.\(^ {21}\) The seven-to-two *Dickerson* decision, while not exactly turning that appraisal into a shibboleth, certainly reflected agreement among some often divergent “wings.” The so-called liberal wing remained inviolate, but the conservative wing was fractured, with one of its members,\(^ {22}\) not only joining the liberals, but authoring the seven member opinion of the court, made so by the joinder of the two “swing votes.” This alignment came as a surprise.\(^ {23}\)

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21. Perhaps for the lack of a better description, one could define the “liberals” as those who are primarily concerned with protecting the rights of individuals, whereas the “conservatives” are more concerned with assuring that the system will be maintained.
22. Chief Justice Rehnquist.
23. Even the three Fourth Amendment cases decided this year gave no indication. The fact-intensive *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000), which concerned a “Terry Stop,” was decided along the five-to-four split. *Id.* In *Florida v. J.L.*, 529 U.S. 266, 272-74 (2000), all Justices ruled that a purely anonymous “tip” does not authorize a “Terry Stop.” *Id.* Only *Bond v. United States*, 529 U.S. 334, 338-39 (2000), could portend a realignment. There the decision turned on the question of whether a bus passenger could expect that personal baggage, placed by him in an overhead rack, might be felt in an exploratory manner by a fellow passenger, giving rise to a “reasonable expectation” that similar exploration might
What makes *Dickerson* perhaps even more unusual, and in fact totally unexpected, is not the realignment, but the *ratio decidendi* of the decision. The Court’s judgment is a holding to the effect that 28 U.S.C. § 3501 is unconstitutional. The Court assigns only one reason for that conclusion—Congress lacked the power to enact it because the Supreme Court decision which Congress sought to overturn, *Miranda v. Arizona*, was a constitutional one. “Congress may not legislatively supersede [Supreme Court] decisions interpreting and applying the Constitution.”

This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction ....  

While acknowledging that “there is language in some of our opinions that supports the view” that *Miranda* was a constitutional decision, Chief Justice Rehnquist listed three reasons why it was a mistake for the Fourth Circuit to conclude otherwise: (1) *Miranda* and two of its companion cases applied its rule to state court cases; (2) the Supreme Court has allowed prisoners to bring habeas corpus proceedings based on *Miranda* violations; and (3) the fact that the *Miranda* Court invited “legislative action to protect the constitutional right against coerced self-incrimination.”

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27. *Id.* at 2329-30.
28. *Id.* at 2333.
29. *Id.* at 2333 n.3. Habeas corpus proceedings may be brought only under (a) the United States Constitution, (b) laws, or (c) treaties of the United States. 28 U.S.C. § 2254(a) (1948). The Court concluded that since the *Miranda* rules are clearly not based on federal laws or treaties, “our decision[s] allowing habeas review for *Miranda* claims obviously assumes that *Miranda* is of constitutional origin.” *Dickerson*, 120 S. Ct. at 2333.
30. *Id.* at 2333-35.
After a brief discussion of each of the three grounds in support of the conclusion that *Miranda* was a constitutional decision (which will be analyzed later in this paper), the Court considered three arguments in favor of the Fourth Circuit's ruling: (1) exceptions to *Miranda* created by the Court; (2) amicus' argument that § 3501 is, in essence, a legislative alternative to *Miranda*; and (3) Justice Scalia's argument in dissent that the *Dickerson* holding is "judicial overreaching." As a make-weight reason for invalidating the statute (18 U.S.C. § 3501), the Court urged that *Miranda* should be saved.

II. THE CONSTITUTIONALITY OF *MIRANDA*

The first ground for the decision in *Dickerson* is that *Miranda* is "constitutionally based." After giving a brief history of the law prior to the *Miranda* decision, Chief Justice Rehnquist wrote that in *Miranda* "we laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" The Supreme Court's supervisory powers over the federal courts is limited to the power to prescribe such rules of evidence and procedure that are "nonconstitutional." The Supreme Court does not have any supervisory power over the courts of the several states. Only the Supreme Court has the power to prescribe rules of evidence or procedure that are constitutional. The Court listed six factors in support of the main reason for its decision:

1. "[B]oth *Miranda* and two of its companion cases applied its rule to proceedings in state courts."
2. "It is beyond dispute that we do not hold a supervisory power over the courts of the several States."
3. "[W]e have allowed prisoners to bring alleged *Miranda* vio-

31. *Id.* at 2348.
32. *Id.* at 2335-36.
33. *Id.* at 2334.
34. *Id.* at 2331 (quoting *Miranda v. Arizona*, 384 U.S. 436, 442 (1966)).
35. *Id.* at 2332.
36. *Id.* at 2333 (citing several Supreme Court decisions in support, except *Murphy v. Florida*, 421 U.S. 794, 797-99 (1975)).
37. *Id.* at 2332.
38. *Id.* at 2328.
39. *Id.* at 2333.
lations before the federal courts in habeas corpus proceedings."^40

(4) "[T]he majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule."^41

(5) "Many of our subsequent cases have also referred to Miranda's constitutional underpinnings."^42

(6) "Additional support for our conclusion that Miranda is constitutionally based is found in the Miranda Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination."^43

Despite the above words, five^44 of the seven member majority in Dickerson have written about Miranda in words which clearly indicate that they did not think that decision was a "constitutional" one. ^45 Chief Justice Rehnquist, and Justices Ginsburg, O'Connor, Scalia, Souter, and Stevens have all written about Miranda in such terms as to leave little doubt that they consider that Miranda did not involve a construction of the Constitution. ^46

In his first year as a Supreme Court Justice, Chief Justice Rehnquist, authored the Court's opinion in Michigan v. Tucker: ^47

To supplement this new doctrine, ^48 and to help police of-

^40. Id. at 2333 n.3.
^41. Id. at 2334.
^42. Id. at 2334 n.5.
^43. Id. at 2334.
^44. Chief Justice Rehnquist and Justices Ginsburg, O'Connor, Souter and Stevens. Justice Scalia has also written in such terms.
^45. Justice Tom Clark, one of the Justices who decided Miranda, thought the decision was a constitutional one. Miranda v. Arizona, 384 U.S. 436, 500-03 (1966) (Clark, J., dissenting). He dissented because he thought the Court improperly invoked the Fifth Amendment in fashioning a "constitutional rule," and would have preferred that the decision turn on the Due Process Clause. Id.
^46. As pointed out in the brief filed by seventeen states and the Territory of the United States Virgin Islands, the solution of this issue is important in that if the Miranda warnings are not constitutional rights, law enforcement officers are not subject to liability under 42 U.S.C. § 1983 for failure to give such warnings. (Brief of Amici Curiae South Carolina et al. at 16, Dickerson v. United States, 120 S. Ct. 2326, 2329 (2000), available at 2000 WL 271989 [hereinafter "the States' Brief"]. Perhaps "may not" would have been more appropriate than "are not." See also Professor Alfredo Garcia, Criminal Law Symposium, Is Miranda Dead, Was It Overruled, or is it Irrelevant, 10 ST. THOMAS L. REV. 461, 485 (Spring 1998) (dealing with the topic of 42 U.S.C. § 1983 in this excellent article).
^48. He was referring to the Miranda Court's "for the first time, expressly declar[ing] that the Self-Incrimination Clause was applicable to state interrogations at a police station and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles." Id. at 443.
Officers conduct interrogations without facing a continued risk that valuable evidence would be lost, the Court in *Miranda* established a set of specific protective guidelines, now commonly referred to as the *Miranda* rules. The Court declared that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."^{49}

"The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."^{50}

In *Rawlings v. Rawlings*,^{51} Justice Rehnquist said that "[t]he *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered."^{52} In *Duckworth v. Eagan*,^{53} Chief Justice Rehnquist again referred to the *Miranda* warnings as "procedural safeguards,"^{54} categorized them as "prophylactic,"^{55} and noted that the *Miranda* Court recognized that they may be waived.^{56} So as to leave no doubt in the matter, Rehnquist wrote, "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself."^{57} In *Michigan v. Harvey*,^{58} he wrote that "[this] Court has held that *Miranda* establishes a prophylactic rule that 'sweeps more broadly than the Fifth Amendment itself.'^{59}

In *Ohio v. Robinette*,^{60} Justice Ginsburg said that in *Miranda* the Court announced a "minimal national requirement without suggesting that the text of the Federal Constitution required the pre-

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49. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).
50. *Id.* at 444 (referring to *Miranda*, 384 U.S. at 467).
51. 448 U.S. 98, 100 (1980).
52. *Id.* at 107. He said that the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement." *Id.*
54. *Id.* at 201.
55. *Id.* at 203.
56. *Id.* at 202.
57. *Id.* at 209.
59. *Id.* at 362 (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985)).
60. 519 U.S. 33, 35 (1996).
cise measures the Court's opinion sets forth." 61 In \textit{South Dakota v. Neville}, Justice O'Connor referred to "prophylactic Miranda warnings." 62 In \textit{Oregon v. Elstad}, 63 she wrote that the "prophylactic" Miranda warnings therefore are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." 64 In \textit{Davis v. United States}, 65 Justice O'Connor wrote that "the right to counsel established in \textit{Miranda} was one of a 'series of recommended 'procedural safeguards' ... [that] were not themselves protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." 66

In a concurring opinion to the majority's opinion in \textit{Duckworth v. Eagan}, 67 Justice O'Connor wrote: "[t]he \textit{Miranda} rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself. The \textit{Miranda} Court implicitly acknowledged as much when it indicate that procedures other than the warnings dictated by the Court's opinion might satisfy constitutional concerns." 68 In a dissenting opinion in \textit{Minnick v. Mississippi}, 69 Justice Scalia, (joined by Chief Justice Rehnquist), wrote:

In \textit{Miranda} this Court declared that a criminal suspect has a right to have counsel present during custodial interrogation, as a prophylactic assurance that the 'inherently compelling pressures' ... of such interrogation will not violate the Fifth Amendment. But \textit{Miranda} did not hold that these 'inherently compelling pressures' precluded a suspect from waiving his right to have counsel present." 70

\begin{footnotesize}
\begin{itemize}
  \item 61. \textit{Id.} at 43. "The \textit{Miranda} exclusionary rule sweeps ... more broadly than the Fifth Amendment itself." \textit{Id.} (quoting \textit{Oregon v. Elstad} 470 U.S. 298, 306 (1985)).
  \item 63. 470 U.S. 298 (1985).
  \item 65. 512 U.S. 452, 454 (1994).
  \item 67. 492 U.S. 195, 197 (1989).
  \item 68. \textit{Id.} at 209.
  \item 69. 498 U.S. 146, 147 (1990).
  \item 70. \textit{Id.} at 159 (quoting \textit{Miranda}, 384 U.S. at 467). He added, "[n]otwithstanding our acknowledgment that \textit{Miranda} rights are 'not themselves rights protected by the Constitution, but ... instead measures to insure that the
In *McNeil v. Wisconsin*, Justice Scalia said that “we established a second layer of prophylaxis for the *Miranda* right to counsel ....”

In *Withrow v. Williams*, Justice Souter wrote “[p]rophylactic though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards ‘a fundamental trial right.’” In *Davis v. United States*, Justice Souter, in a concurring opinion, rather than referring to the *Miranda* rules as a constitutional mandate to be applied without any constraint, said that “the justification for *Miranda* rules, intended to operate in the real world, ‘must be consistent with ... practical realities.’”

In *Arizona v. Roberson*, Justice Stevens referred to the “prophylactic” protections of *Miranda*. In *Evans v. United States*, he wrote that in *Miranda*, “this Court established a presumption of ‘inherently compelling’ pressures in the context of official custodial interrogation.”

The word “prophylactic,” which several of the Justices have used to describe the *Miranda* rules, has virtually become a term of art. Justice Brennan first used it in its usual meaning of being right against compulsory self-incrimination [is] protected.” *Id.* at 160 (quoting *Tucker*, 417 U.S. at 444). He referred to *Miranda*’s “prophylactic right to have counsel present.” *Id.* at 166.


72. *Id.* at 176 (referring to the Courts’ holding in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). He added, “In *Miranda* ... we established a number of prophylactic rights designed to counteract the ‘inherently compelling pressures’ of custodial interrogation, including the right to have counsel present. *Miranda* did not hold, however, that those rights could not be waived.” *McNeil*, 501 U.S. at 176.

In *Crandon v. United States*, 494 U.S. 152, 179 (1990), Justice Scalia, in a concurring opinion in which Justices Kennedy and O’Connor joined, said that “[i]t is of course absurd to interpret a criminal statute on the basis of one’s perception as to whether its ‘spirit’ has been violated; and doubly absurd to interpret a prophylactic measure on the basis of whether the evil against which the prophylaxis was directed in fact exists.” *Id.* (Scalia, J., concurring).


74. *Id.* at 691 (quoting U.S. v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)). He also wrote: “in *Malloy*, we recognized that the Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination, and thereby opened *Bram*’s doctrinal avenue for the analysis of state cases. So it was that two years later we held in *Miranda* that the privilege extended to state custodial arrangements.” *Id.* at 689. He was referring to *Malloy v. Hogan*, 378 U.S. 1, 2 (1964) and *Bram v. United States*, 168 U.S. 532 (1897).

75. 512 U.S. 452, 454 (1994).

76. Justice Souter was joined by Justices Blackmun, Ginsburg and Stevens.


something that prevents harm, in Kaufman v. United States, in which he wrote: "[t]he exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." The then Justice Rehnquist, in California v. LaRue, referred to the rules of a state agency as "prophylactic." Over the years, several Justices have used the word to describe rules of prevention in general and the Miranda rules in particular. Justice Stevens in his dissent in Michigan v. Harvey, took the majority to task for its use of the word "prophylactic" when he wrote:

Apparently as a means of identifying rules it disfavors, the Court repeatedly uses the term 'prophylactic rule' ... it is important to remember, however, that all rules are prophylactic ... An argument that a rule of law may be ignored, avoided, or manipulated simply because it is prophylactic is nothing more than an argument against the rule of law itself.

A comparison of prior pronouncements of five of the present Justices with their ruling in Dickerson, begs the question, can a rule be prophylactic and at the same time constitutional? The Court has not furnished us with an answer to that question. Justice Scalia, in his dissent, sees the Court as acknowledging its use of the appellation "prophylactic" (how could it do otherwise), but torturing

80. In Crandon v. United States, 494 U.S. 152, 165 (1990), Justice Stevens wrote, "Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing ...."
81. 394 U.S. 217 (1969). Actually the first time the word appeared in Supreme Court opinions was in Blau v. Lehman, 368 U.S. 403, 413-14 (1962), in an entirely different context.
82. Kaufman, 394 U.S. at 224.
that adjective into a license for the Court to "write a prophylactic, extraconstitutional constitution, binding on Congress and the States."\textsuperscript{87}

III. STARE DECISIS

As a make-weight reason for its decision to invalidate the statute, the Court asserts that the case it sought to overrule (\textit{Miranda}) should be saved by stare decisis. "Whether or not we would agree with \textit{Miranda}'s reasoning and its resulting rule, were we addressing the issue in the first instances, the principles of stare decisis weigh heavily against overruling it now."\textsuperscript{88}

The present Justices have written about stare decisis. Justice Kennedy, in \textit{Hohn v. United States},\textsuperscript{89} quoted with approval Justice Rehnquist's words in \textit{Payne v. Tennessee},\textsuperscript{90} that is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."\textsuperscript{91} He added, "[w]e have recognized, however, that stare decisis is a 'principle of policy' rather than an 'inexorable command.'"\textsuperscript{92} Its justification "must rest upon the Court's capacity and responsibility to acknowledge its missteps. It is our duty to face up to adverse, unintended consequences flowing from our own decisions."\textsuperscript{93} In the case of \textit{Hilton v. South Carolina Public Railways}, he wrote: "time and time again, this Court has recognized that 'the doctrine of stare decisis is of fundamental importance to the rule of law.'"\textsuperscript{94}

Justice O'Connor, in \textit{Flores}, referred to a certain case as a "recent one" and added: "[a]s such, it has not engendered the kind of reliance on its continued application that would militate against

\textsuperscript{88} Dickerson, 120 S. Ct. at 2336.
\textsuperscript{89} 524 U.S. 236 (1998).
\textsuperscript{91} \textit{Id.} at 827; \textit{Hohn}, 524 U.S. at 251.
overruling it." She added that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." 

Chief Justice Rehnquist, in *Payne v. Tennessee*, has observed that while it is not an "inexorable command," rather it is "a principle of policy and not a mechanical formula of adherence to the latest decision." In *Reno v. Bossier*, Justice Souter observed that Congress may supersede stare decisis with new legislation.

It is, of course true, that stare decisis is a respected, and often used principle of appellate law. In 1938, Justice Brandeis wrote in *Burnet v. Coronado Oil & Gas Co.* that "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Justice Scalia has recently opined that: "Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity." To say, however, that a statute should be declared unconstitutional because a case should be saved, is an unusual use of stare decisis.

Two subsidiary questions in connection with whether *Miranda* should be saved by stare decisis were not addressed by the Supreme Court. First, what is left of *Miranda* worth saving; and second, does *Miranda* fit within one of the exceptions to stare decisis that have been created by the Court? It is not an "inexorable command."

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96. *Id.* at 547 (quoting from Justice O'Connor's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995)).
98. *Id.* at 828.
100. 285 U.S. 393 (1938).
103. The Court peripherally considered the exceptions to *Miranda*, in connection with answering one of the contentions made by the Fourth Circuit, but it did not address that matter in connection with stare decisis. *Dickerson v. United*
Is Miranda Worth Saving?—My colleague, St. Thomas Law School Professor, Alfred Garcia, took the position in 1998, that *Miranda* was dead. He wrote, "[i]n the more than three decades since its genesis, the [*Miranda* decision has become] ... a relic of a bygone era."105 So as to leave no doubt as to his position, Professor Garcia concluded his article by saying: "I propose that we do away with *Miranda* altogether. In determining whether an incriminating statement or confession is voluntary, that is, the product of a free will and intellect, courts should apply the old voluntariness standard."106

IV. EXCEPTIONS TO *MIRANDA*

Even if *Miranda* were worth saving, would its ruling fall within one of the exceptions to stare decisis?

A. The Public Safety Exception

In *New York v. Quarles*,107 Justice Rehnquist wrote the opinion of the Court108 which found that the *Miranda* warnings need not be given when the immediate safety of the public is at stake.109 In *Illinois v. Perkins*,110 Justice Kennedy wrote the opinion of the Court,111 which found that the *Miranda* warnings are not necessary when the suspect is unaware that he is talking to the police or their agents.112

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104. *Infra* note 171 and accompanying text.  
105. Alfred Garcia, *Is Miranda Dead, Was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461, 461 (1998). This article was quoted with approval by the Fourth Circuit *Dickerson* majority. *Dickerson*, 166 F.3d at 691.  
106. Garcia, *supra* note 105, at 504. Professor Michael O'Neill thought that there was a good chance that the Court would save § 3501. O'Neill, *supra* note 7, at 149. One of his major tenets was that Congress accepted the Court's invitation in *Miranda*, and then made its own factual determination of what was needed to protect Fifth Amendment rights. *Id*. Whether or not one agrees with Professor O'Neill, it would seem that the Court might have considered his position sufficiently compelling to warrant consideration.  
108. *Id*. Justices Brennan, Marshall and Stevens dissented, but the remaining Justices (including Kennedy, O'Connor, and Scalia) joined. *Id*.  
109. *Id*. at 651, 653.  
111. *Id*. Justice Marshall dissented, but the remaining Justices (including O'Connor, Rehnquist, Scalia, and Stevens of the present Court) either joined or concurred.  
112. *Id*. at 294.
B. The Constitutional Exception To Stare Decisis

Stare decisis has only limited application in the field of constitutional law. This principle has been recognized by Chief Justice Rehnquist, and Justices Ginsburg, Kennedy, O'Connor, Scalia, Stevens, and Thomas. Justice Souter, however, concurring in Payne v. Tennessee, cautioned that "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." Justice Scalia, writing about the in-state service rule, said that "its validation is its pedigree," but Justice Stevens has cautioned that "pedigree does not ensure constitutionality."

C. The Procedural Exception To Stare Decisis

Justice Kennedy said in Hohn v. United States, "[t]he role of stare decisis ... is 'somewhat reduced ... in the case of a procedural rule ... which does not serve as a guide to lawful behavior.'"
D. The "More Recent, Better Reasoned Decision" Exception To Stare Decisis

A third exception has been applied where the principle under consideration has been contradicted by more recent, better reasoned authority. This principle has been recognized by Justices Ginsburg, Kennedy, Scalia, and Thomas.125

The Miranda decision is as famous as the Dred Scott decision.126 Westlaw reports that as of April 10, 2000 it had been cited in judicial decisions and in scholarly writings 27,677 times.127 Is that a sufficient reason to keep it under the doctrine of stare decisis?128 When the Court in Shaffer v. Heitner,129 overruled the venerable Pennoyer v. Neff,130 the rule that Pennoyer stood for had been in existence for one hundred years; so there is precedent for overruling long standing, often-cited, respected decisions.131 It should not be used, however, as a reason for declaring a statute unconstitutional.

E. Additional Issues

There are five issues which the Court either did not consider, or insufficiently considered: (1) Should the Court have declined to hear this matter as being moot?; (2) Is there a conflict between

126. McFarlane v. Scott, 512 U.S. 1256, 1261 (1994). Leslie A. Lunney in The Erosion of Miranda: Stare Decisis Consequences, 48 CATH. U. L. REV. 727, 795 (Spring 1999) wrote that "Miranda and its warnings have become one of the better known aspects of constitutional law, recited nightly in our living rooms as part of one televised crime drama or another." Id.
127. This represents an increase of 132 times in a month. By March 10, 2000, it had been cited 27,545 times.
128. The doctrine of stare decisis and the term of art "precedent" are apparently so well known that the Court has defined neither. In Camps Newfound/Owtonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 636 (1997), Justice Thomas, in a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined, noted that even though a case may be precedent it may not be entitled to stare decisis. "Precedent" refers to a prior holding of a court, (be it mandatory or persuasive) whereas stare decisis refers to a holding of a court in one's own jurisdiction, which, for various and sundry reasons, should be followed. Id.
130. 95 U.S. 714 (1877).
131. Cf. Lunney, supra note 126, at 791 n.28. Professor Lunney's appraisal to the effect that "a gradual evolution of constitutional doctrine would seem to be generally preferable to the Court's frank reversal of a prior constitutional decision." Id.
Miranda and the statute?; (3) Even if Congress had the authority to enact the statute, did it exceed that authority in doing so?; (4) Does the concept of federalism have any part in this decision; and (5) Does the Supremacy Clause have any part in this decision?

1. Should The Court Have Declined To Hear This Matter As Being Moot?

On its face, there was no contest. The defendant, Charles Thomas Dickerson, who filed the petition, submitted a brief asking that the judgment of the Fourth Circuit be reversed, but so did the United States, as Respondent. Only the Court-appointed amicus curiae asked that the Fourth Circuit be affirmed. Where no contest exists in a case, the courts usually dismiss it as moot. In Davis v. United States, the Supreme Court refused to consider a possible implementation of § 3501 because the Department of


133. Brief for Respondent at 50, Dickerson, available at 2000 WL 141075 (2000). Seven amicus filed briefs in opposition to the judgment. See also Brief of Amicus Curiae of Americans for Effective Law Enforcement, Inc., et al. at 14, available at 2000 WL 93449 (2000). This brief was in support of "neither party," but simply asked the Court to uphold the constitutionality of U.S.C. § 3501 "on the basis of [the Court's] post-Miranda precedents and sound judicial policy." Id.

134. Brief of Court-Appointed Amicus Curiae at 50, Dickerson, available at 2000 WL 272005 (2000). See Dickerson, 120 S. Ct. 2326, 2335. The Supreme Court, when it granted the writ of certiorari, invited University of Utah College of Law Professor Paul G. Cassell to brief and argue the case as amicus curiae in support of the judgment. Id. The Court's invitation was probably made because it realized that if amicus were not appointed to support the judgment, there might not have been a brief filed to that effect, the Department of Justice having taken the position that § 3501 was unconstitutional. In addition to the Court-appointed, fourteen other amicus filed briefs in support of the judgment.

135. In Preiser v. Newkirk, 422 U.S. 395, 401 (1974), the Supreme Court said that an "actual controversy must be extant at all stages of review ...." Id. See also Mills v. Green, 159 U.S. 651, 653 (1895). A formal judgment, which is simply an advisory opinion, will not be tolerated, and the Court will dismiss the appeal as moot. Id.


137. In that case Justice Scalia said that he wanted to hear argument on the applicability and constitutionality of the statute. He wrote:

I am entirely open to the argument that section 3501 does not mean what it appears to say; that it is inapplicable for some other reason; or even that it is unconstitutional. But I will no longer be open to the argument that this Court should continue to ignore the commands of sec-
Justice refused to take a position on its applicability.\textsuperscript{138} It would seem that the Court in \textit{Dickerson} would at least have commented upon the mootness point, and perhaps added to the exceptions to mootness.\textsuperscript{139}

2. \textit{Is There A Conflict Between Miranda And The Statute?}

Despite the position taken by the States,\textsuperscript{140} the Court said that there was “obvious conflict” between the case and the statute,\textsuperscript{141} without however, elucidating on the point. The question is important, for if there were no conflict between the statute and the case, both could remain intact. Elucidation on the point would have been helpful. Under brief analysis it would seem that the Court is correct in concluding that there is conflict.

The Court in \textit{Miranda} said that an accused has a Fifth Amendment right against being forced into incriminating himself. The opinion, written by Justice Berger, explicitly stated that “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination.”\textsuperscript{142}

The statute, on the other hand, returned to the law that was in effect before \textit{Miranda}, to wit: that a confession must be voluntarily given. It explicitly states that “[i]n any criminal prosecution

\textsuperscript{138} As to the Government’s failure to raise the issues, Justice Scalia said, “I agree with the Court that it is proper, given the Government’s failure to raise the point, to render judgment without taking account of section 3501. But refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary.” \textit{Id.} at 464.

\textsuperscript{139} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 2.7 (1997).

\textsuperscript{140} States’ Brief at 2, \textit{Dickerson}, available at 2000 WL 271989 (2000). The States’ Brief has taken the position that there is no conflict between \textit{Miranda} and the statute. “The holdings of \textit{Miranda} and the provisions of section 3501 may and should be read together harmoniously as creating a rule which expresses a strong preference for giving the \textit{Miranda} warnings but without automatically requiring the suppression of confessions which are voluntary but unwarned.” \textit{Id.}

\textsuperscript{141} \textit{Dickerson v. United States}, 120 S. Ct. 2326, 2332 (2000).

brought by the United States or by the district of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given.”

As securing the privilege against self incrimination, *Miranda*, stated:

As for the procedural safeguards to be employed, unless fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effec-
tuation of those rights, provided the waiver is made volun-
tarily, knowingly and intelligently.

The statute, conversely, takes into account “all the circumstances” of the case. It includes the “Miranda warnings,” but merely among several other factors to be utilized by the trial judge in de-
termining the issue of voluntariness. The statute provides as fol-

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances sur-
rounding the giving of the confession, including ... 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 ... whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel ....

The presence or absence of any of the above-mentioned fac-
tors to be taken into consideration by the judge need not be con-
clusive on the issue of voluntariness of the confession.

The specific applicability of the statute, however, tends to es-
\footnotesize{ establish a lack of conflict. The statute restricts its application to “any criminal prosecution brought by the United States or by the District of Columbia,” whereas the case is not so limited in its application; hence conflict is not apparent, unless one considers *Tafflin v.*

\begin{itemize}
\item \textbf{143.} 18 U.S.C. § 3501 (a) (1968).
\item \textbf{144.} *Miranda*, 384 U.S. at 444.
\item \textbf{145.} 18 U.S.C. § 3501 (b) (1968).
\item \textbf{146.} *Id.*
\end{itemize}
Justice O'Connor, writing for an unanimous court, noted that state courts have concurrent jurisdiction with federal courts over federal causes of action, unless Congress gives that jurisdiction exclusively to the federal courts, or there is a "clear incompatibility between state court jurisdiction and federal interests." The Court in Tafflin found no intent on the part of Congress to limit RICO civil suits to federal courts, even though the statute in question, provided for civil actions "in any appropriate United States district court." She added that "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction of a cause of action." Would an extrapolation of this principle cause the statute's rules to apply to state criminal actions as well as federal ones, making the conflict apparent? One might have expected that some of the Justices would call for further briefing before they resolved the conflict issue—but none of them did. Was this because the decision in the case would not have been different had conflict not been found, or because as Justice Scalia detected, the decision was an

148. Hence all present Justices, except Breyer and Ginsburg, agreed with Justice O'Connor's opinion.
149. Tafflin, 493 U.S. at 459-60.
151. Tafflin, 493 U.S. at 461.
152. One commentator has discovered a "Doctrine of Remand" among Supreme Court decisions. Nash E. Long, The "Constitutional Remand:" Judicial Review of Constitutionally Dubious Statutes, 14 J.L. & POL. 667, 710 (1998). In Califano v. Goldfarb, 430 U.S. 199, 223 n.9 (1977), Justice Stevens, in a footnote to his concurring opinion, wrote that he might have voted differently had Congress justified the manner in which it distinguished between men and women in the Social Security Act. Id. (Stevens, J., concurring.) In Thompson v. Oklahoma, 487 U.S. 815, 857 (1988), Justice O'Connor, in her concurring opinion, wrote that "the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty." Id. (O'Connor, J., concurring.) Such judicial positions demonstrate the need for clarity that only further legislative attention can produce. In City of Boerne v. Flores, 521 U.S. 507, 565-66 (1997), Justice Souter would have dismissed the writ of certiorari unless the case which prompted congressional action in passing the statute under review were further briefed. Id. (Souter, J., dissenting.) In that position he was joined by Justices Breyer and O'Connor. Id.
153. It would appear that conflict would be found to exist if Miranda were a constitutional decision, because in such event, whether the statute applied to federal proceedings only or to both federal and state proceedings, Miranda would reach both the federal and the state proceedings. If Miranda was found to be a non-constitutional decision and the statute was found to apply only to federal proceedings, conflict would exist at the federal level. If Miranda was found to be a
"agreed-upon result?" 154

3. **Even If Congress Had Authority To Enact The Statute, Did It Exceed That Authority In Doing So?**

Congress may have the power to enact legislation, yet exceed that power, resulting in the invalidity (unconstitutionality), of a statute. In *City of Boerne v. Flores*, 155 the Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA), 156 was unconstitutional since it exceeded Congress' power to enact it. The statute was passed by Congress in an attempt to overrule *Employment Division Department of Human Resources of Oregon v. Smith*, 157 not unlike Congress' passage of § 3105 in an attempt to overrule *Miranda*. Justice Kennedy, wrote the opinion of the Court, in which Chief Justice Rehnquist, Justices Ginsburg, Scalia, Stevens, and Thomas joined. 158 The object of the statute was to prohibit federal and state "[g]overnment[s] from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that ... interest.'" 159

The Court could find no authorization for the statute. Justice Kennedy made four salient points: (1) "Congress does not enforce non-constitutional decision, and the statute were found to apply to both federal and state proceedings, there would be only partial conflict, at the federal, but not at the state level.

157. 494 U.S. 872 (1990). That case held that the Free Exercise Clause did not prohibit Oregon from applying its drug laws to the ceremonial customs of employees and hence claimants were denied unemployment compensation for work-related misconduct based on the use of the drug. *Id.*
158. Justice Scalia did not join in Part III-A-1 of the opinion, which stated that "[t]he power to interpret the constitution in a case or controversy remains in the Judiciary." *Flores*, 521 U.S. at 524. Justice Scalia wrote a separate concurring opinion in which Justice Stevens joined, the purpose of which was to respond to Justice O'Connor's dissenting opinion which took the position that historical materials support a result contrary to the one reached in *Smith*. *Id.* Justice Stevens wrote a separate concurring opinion to the effect that in addition to its other defects, RFRA is a "law respecting an establishment of religion," that violated the First Amendment. *Id.* at 536-37.
159. *Flores*, 521 U.S. at 515-16 (quoting language from RFRA).
a constitutional right by changing what the right is;" 160 (2) the distinction between the remedying or prevention of unconstitutional actions and measures that make a substantive change in the governing law exist and must be observed; 161 (3) giving Congress the power to change the Constitution would violate the amendment process contained in Article V; 162 (4) "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the end to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." 163

Justice Kennedy concluded the Court's opinion with these words:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is ... When the political branches of the Government, act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat it precedents with the respect due them under settled principles, including stare decisis, 164 and contrary expectations must be disappointed. RFRA [the statute under review], was designed to control cases and controversies, such as the one before us; but as the provisions of federal statute here invoked are beyond congressional authority, it is this Court's precedent, not [the statute] which must control. 165

Under Flores, it would have been logical for the seven member majority in Dickerson to find that in § 3501 Congress changed the

160. Id. at 519.
161. Id. at 520.
162. Id. at 529.
163. Id. at 530. In a perfect example of a court recognizing that it has unconstitutionally exceeded its authority, see Anastasoff v. United States, No. 99-3917EM, 2000 WL 1182813 (8th Cir. Aug. 22, 2000) (recognizing that its Rule providing that unpublished opinions are not precedent is unconstitutional under Art. III because it purports to confer on the federal courts a power that goes beyond the "judicial").
164. Supra notes 103, 113-14, 118, 120, 126, 128, 152 and accompanying text.
165. Flores, 521 U.S. at 536 (citation omitted). Justice O'Connor said that she would have joined in the Court's opinion, had she not disagreed with the standard of Employment Division Department of Human Resources of Oregon v. Smith, which Congress had attempted to overrule by the statute under consideration. Id. at 545.
rights of the accused, rather than "remedied" a wrong, which was, in effect, an attempt to amend the Constitution. Furthermore, even if it could be found that Congress attempted to merely to remedy a wrong, there was no "congruence" between that wrong and its remedy.

Moreover, regardless of Flores, it would seem that any proponent of Miranda could argue that in Dickerson v. United States the Supreme Court, as the final arbiter of the constitutionality of Congressional attempts to modify one of its former decisions, is simply following the dictates of Marbury v. Madison.\[167\] The seven member majority, however, agreeing to an almost cryptic opinion by the Chief Justice, and not expanding upon it by concurring opinions, indicated a complete lack of interest in constitutional erudition.

4. Does Federalism Play Any Part In This Decision?

The Court in Garcia v. San Antonio Metropolitan Transit Author-ity has described federalism in the following words:

The essence of our federal system is that within the realm of authority left open to them under the constitution, the States must be equally free to engage in any activity that their courts choose for the common weal, no matter how unorthodox or unnecessary anyone else including the judici-ary deems state involvement to be.\[168\]

166. It should not be forgotten that in United States v. Lopez, the Gun-Free School Zones Act (18 U.S.C. § 922 (q)(1)(A) (1988 ed. Supp. V)), was held unconstitutional by the same five member majority which I think will invalidate § 3501 on the ground that any connection between the wrong to be remedied (guns in schools), and the asserted authority for the remedy (the Commerce Clause) was tenuous at best. 514 U.S. 549 (1995). The same four member minority dissented. Id.

167. 5 U.S. (1 Cranch) 137. This begs the question, not addressed in this paper, as to whether Congress has the power to restrict the jurisdiction of the Court to make its Miranda rulings in the first place. Erwin Chemerinsky pointed out that in response to Miranda

[a] Senate proposal would have denied the Supreme Court or any lower federal court the authority 'to review or reverse, vacate, modify, or disturb in any way, a rule of any trial court of any State in any criminal prosecution admitting into evidence as voluntarily made an admission or confession of any accused.

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 2.9 (1997). See also supra text accompanying notes 146-52 (concerning Supreme Court decisions limiting the rights of federal courts to the States in the matter of criminal law procedure).

Federalism provides that the states are free to follow their own dictates as to what is proper governance, unless that action is forbidden by the Constitution. The Fourteenth Amendment has particular relevance in connection with that constitutional limitation. The Court, in *Malloy v. Hogan*, 169 determined that the states are forbidden by the Fourteenth Amendment from promulgating any laws which would require an accused to incriminate himself. 170

The Court in *Dickerson* should have determined what, if any, effect *Printz v. United States* 171 has upon the above analysis. The issue in *Printz* was whether the Brady Act 172 was constitutional. Two state law enforcement officers challenged the Act on the grounds that they were being improperly pressed into the administration of a federally enacted regulatory scheme. 173 The statute was held unconstitutional in an opinion written by Justice Scalia, for himself, the Chief Justice (Rehnquist), Justices Kennedy, O'Connor, and Thomas. 174 The so-called "liberal" wing, Justices Breyer, Ginsburg, Souter, and Stevens, dissented. 175

Finding "no constitutional text speaking to this precise question," the majority opinion relied on "historical understanding and practice," "the structure of the constitution" and "the jurisprudence of this Court." 176 From these sources, Justice Scalia found that the Brady Act unconstitutionally "commandeered" state officials to carry out a federal statute and hence violated federalism. He said that "*Testa*" 177 stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the

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169. *378 U.S. 1 (1964).*
170. *Id.* The Court said: "[w]e hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." *Id.* at 7.
173. The Brady Act required the Attorney General to establish a national instant background check system by November 30, 1998, and immediately put into place interim provisions until that system became operative. The chief law enforcement officers of the states were required to take certain steps to promulgate the federal statute, which contained criminal penalties for its violation.
174. Justices O'Connor and Thomas wrote concurring opinions.
175. Justice Stevens wrote a dissenting opinion in which Justices Breyer, Ginsburg and Souter joined. Justice Breyer wrote a dissenting opinion in which Justice Stevens joined and Justice Souter wrote a separate dissenting opinion.
176. *Printz,* 521 U.S. at 905.
terms of the Supremacy Clause ... that says nothing about whether state executive officers must administer federal law." 178

Justice Stevens, in a dissent joined by Justices Breyer, Ginsburg, and Souter, wrote:

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by congress pursuant to an express delegation of power enumerated in Article I. 179

Does the statute considered here have the same constitutional deficiencies as the Brady Act? If it does, Printz should apply; if it does not, Printz should be distinguished. 180 Arguments can be made on both sides of the question. The statute does not require State police officers to give the Miranda warnings; in fact by its terms it applies only to the United States and the United States Territory of the Virgin Islands. Even if the statute does apply to the States, the arguments made by the four "liberal" members in Printz support a finding of no constitutional violation. Striking down a statute without any reference to federalism is curious, to say the least.

At least one commentator has strenuously argued that federalism "undermines" Miranda. 181 His thesis is twofold. First, Miranda, by applying to state as well as federal police officers, invades an area of traditional state concern. "[T]he Constitution has not granted our federal government, a government of only enumerated powers, the right to impose such an obligation on the states." 182 Second, "[t]he plain language of Printz states that the

178. Printz, 521 U.S. at 928.
179. Id. at 944. He added, that "not only the constitution, but every law enacted by Congress as well, establishes policy for the states just as firmly as do laws enacted by state legislatures." Id.
180. The whole concept of federalism is taken apart and denigrated by Professors Adler and Kreimer. See Matthew D. Adler & Seth F. Kreimer, The New Etiquette of Federalism: New York, Printz and Yesky, SUP. CT. REV. 71 (1998). They submit that the Supreme Court sees state autonomy as a "fundamental, constitutional value" and that it has developed that proposition in three recent cases: Pennsylvania Dep't of Corrections v. Yeskey: 524 U.S. 206 (1998); Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). Whether or not the authors are correct, there is sufficient doubt about the subject as to require a clarification by the Court.
182. Id. at 181.
'federal government' cannot compel state executive officials to administer federal regulatory programs .... The Court did not limit its holding to Congress and exclude itself absent a constitutional violation.\textsuperscript{183} In his opinion, \textit{Miranda} commandeers state executive officials, just as in \textit{Printz} the federal statute commandeered state officials. Mr. Hatcher wrote:

\textit{Miranda} sweeps broader than the Fifth Amendment, and in so doing, cannot be said to squarely protect a constitutional right. Because the \textit{Miranda} warnings are not required by the Constitution, they constitute a federal regulatory prescription that commandeers state police officers engaged in their duties of investigation of criminal conduct. The plain language and reasoning of \textit{Printz} demonstrate that \textit{Miranda}'s dictates to state police officers are no different from the congressional mandates at issue in \textit{Printz}.\textsuperscript{184}

Thus, it would seem that federalism would have offered Justices Scalia and Thomas a cudgel with which to hammer \textit{Miranda}; yet the dissenting opinion does not mention it \textit{per se}.

On the other hand, it would seem that the majority in \textit{Dickerson} had a perfect opportunity to harmonize \textit{Miranda} and federalism, but chose not to discuss the point. It could have been the position of the Court that \textit{Miranda} simply promulgated rules of conduct, not edicts of constitutional law. It is true that the \textit{Miranda} Court said that its decision in \textit{Malloy v. Hogan}\textsuperscript{185} "necessitates an examination of the scope of the privilege in state cases as well" as in federal cases.\textsuperscript{186} It is also true that the Court said that "unless we are shown other procedures which are at least as effective in apprising accused persons of their rights of silence and in assuring a continuous opportunity to exercise it, the following safeguards [referring to the rule promulgated], must be observed."\textsuperscript{187} In between those statements, however, was as conciliatory language as one can envision:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the states in the exercise of their creative

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{183} \textit{Id.} at 200.
\item \textsuperscript{184} \textit{Id.} at 205. Unanswered, however, is by what authority are states controlled if \textit{Miranda}'s warnings are not "required by the Constitution?"
\item \textsuperscript{185} 378 U.S. 1 (1964).
\item \textsuperscript{186} \textit{Miranda v. Arizona}, 384 U.S. 436, 463 (1966).
\item \textsuperscript{187} \textit{Id.} at 467.
\end{enumerate}
\end{footnotesize}
rule-making capacities. Therefore we cannot say that the constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, not is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

The Dickerson majority could easily have taken the position that had the Court wanted to impose its will on the states it would have used more imperative language than that quoted above. It would not have merely devised "prophylactic" rules seeking to safeguard the Constitution. It would have promulgated a constitutional edict that all courts, state and federal, would be required to follow, and moreover, that Congress could not change. Finding that Miranda did not violate federalism is harmonious with those cases which say that unless a constitutional violation is involved, the federal courts will not impose federal criminal law on the states, a thesis espoused in Dickerson. In Smith v. Phillips, Justice Rehnquist, joined by Justice O'Connor, wrote that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Justices Ginsburg, Kennedy, Scalia, Souter, and Stevens have acknowledged this principle of law. The Court could not, however, take the position

188. Id.
190. 455 U.S. 209, 221 (1982).
191. Rehnquist's majority opinions in Mu'Min v. Virginia, 500 U.S. 415, 422 (1991), and in United States v. Lopez, 514 U.S. 549, 561 n.3 (1995). He joined Justice Powell's opinion in Kelly v. Robinson, 479 U.S. 86, 47 (1986), which stated: "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." See Justice O'Connor's opinion in Heath v. Alabama, 474 U.S. 82, 92 (1985) (stating that "[i]t is axiomatic that '[i]n America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."). See also Moran v. Burbine, 475 U.S. 412, 425 (1986); Victor v. Nebraska, 511 U.S. 1, 17 (1986). Justice O'Connor joined Justice Powell's opinion in Kelly, 479 U.S. at 47, to the same effect.
192. Justice Ginsburg's concurring opinion in Victor, 511 U.S. at 27 (stating that "[t]he recognition that this Court has no supervisory powers over the state courts."); see also Justice Kennedy's concurrence with Justice O'Connor's opinion, which acknowledged the "limited power of federal habeas." Id. Justices Scalia and Souter
that *Miranda* did not violate federalism, without finding that the 1966 decision was a constitutional one.\(^{193}\) Having made that finding, it is curious that the Court did not discuss federalism.

5. *Does The Supremacy Clause Play A Part In This Decision?*

The Supremacy Clause provides, in pertinent part, that:

>This constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\(^ {194}\)

In *Testa v. Katt*,\(^ {195}\) the Supreme Court laid down a basic principle to the effect that state courts of appropriate jurisdiction generally may not decline to entertain a federal claim when they are required to do so by federal statute. This proposition was based on the theory that when Congress enacts a federal statute it speaks for all the people and all the states, just as though the statute had been enacted by the state legislatures.\(^ {196}\)

The Supremacy Clause may have been applied to invalidate § 3501 if the majority had followed the rationale of *Alden v. Maine*.\(^ {197}\) Justice Kennedy's majority opinion, and Justice Souter's dissent in that case constitute a virtual textbook on the Supremacy Clause. The five-to-four judgment of the Court\(^ {198}\) was that the Supremacy Clause of the Constitution bars an individual suit against a state to enforce a federal statutory right under the Fair Labor Standards

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193. Perhaps in this instance Justice Scalia is wrong in saying that "a majority of the Justices intent on reversing believes that incoherence is the lesser evil." *Dickerson*, 120 S. Ct. at 2343.
196. This was a principle announced by the Court in 1912 in *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912).
198. The majority consisted of Chief Justice Rehnquist, and Justices Kennedy, O'Connor, Scalia, and Thomas, while Justices Breyer, Ginsburg, Souter, and Stevens were in the minority. *Id.* I had predicted that the ruling of the Court in *Dickerson* would have been the same five-to-four split for holding the statute unconstitutional, but for entirely different reasons than asserted by the seven member majority.
Act of 1938, (FLSA), 199 when brought in a state’s court over the state’s objection. Justice Kennedy wrote:

As is evident from its text ... the Supremacy Clause enshrines as the supreme law of the land only those federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power. But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. 200

The Supremacy Clause does impose specific obligations on state judges. There can be no serious contention, however, that the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself. 201

That we have, during the first 210 years of our constitutional history found it unnecessary to decide the question presented here suggests a federal power to subject non-consenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law. 202

Alden established that its five member majority believed that the Supremacy Clause has its limitations. Only those “Laws” 203 that accord with the “constitutional design” rise to the level of being “supreme.” Applying that principle to the present case, it would not have been illogical for the majority to see § 3501 as not being in accord with any “constitutional design” within the meaning of that term as used in Alden. 204 If it had taken such a micro step, it would have saved itself the difficulty of converting a prophylactic rule into a constitutional one. The Court could have found that Congress enacted the statute in an attempt to overrule a case (Miranda), that by its own words, did not seek to interpret the Constitution, but which established a mere construct of proper procedures in order to meet constitutional demands.

Justice Souter, writing for the four member minority in Alden said that a flaw in the majority’s position is its reliance upon feder-
alism. He elucidated:

The State of Maine is not sovereign with respect to the national objective of the FLSA [the statute in question]. It is not the authority that promulgated the FLSA on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided [in a prior decision of the Court].

Maine has created state courts of general jurisdiction; once it has done so the Supremacy Clause of the Constitution Art. VI, cl. 2 which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action. A subsidiary question arose in Dickerson; i.e. does the Supremacy Clause apply where Congress has specifically limited the application of a statute to federal cases? The Court ignored this question, though its members have written about it in the past. Justice O'Connor writing the opinion of the Court in Tafflin v. Levitt, noted that state courts have concurrent jurisdiction with federal courts over federal causes of action unless Congress gives that jurisdiction exclusively to the federal courts, or there is a “clear incompatibility between state court jurisdiction and federal interests.” The Court in Tafflin found no intent on the part of Congress to limit RICO civil suits to federal courts, even though the statute in question, provided for civil actions “in any appropriate United States district court.” She added that “the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction of a cause of action.”

205. Justice Souter said that the same five member majority made a mistake in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 76 (1996), in holding that the Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in Federal court.
206. Alden, 527 U.S. at 800.
207. Id. at 801.
208. It will be recalled that § 3501 uses the wording “[i]n any criminal prosecution brought by the United States or by the District of Columbia.” 18 U.S.C. § 3501(a) (2000).
209. 493 U.S. 455 (1990). This was a unanimous opinion, hence all of the present Justices joined in it, except Justices Breyer and Ginsburg. Id.
210. Id. at 459-60.
212. Tafflin, 493 U.S. at 461.
natural extrapolation of that theory for the entire Court to have made is that if Congress intended to restrict § 3501 to the federal and District of Columbia jurisdictions that limitation would apply. While there may be no "clear incompatibility between state court jurisdiction and federal interests," the jurisdictional limitation appears in clear and unequivocal language.

The Court could have decided that even if Congress had the authority to enact § 3501, and it is not unconstitutional, § 3501 will not prevail under the Supremacy Clause, particularly where by its terms it is limited in application to United States and District of Columbia courts.

Without specifically mentioning the Supremacy Clause per se, Justice Scalia raised a Supremacy Clause argument in his dissent. He said the majority asserted that Miranda must be a "constitutional decision" because the Court, since the case’s inception, has applied it to the States. Discounting that assertion as being able to invoke stare decisis, he conjectured that perhaps the Court intended the assertion as "an appeal to logic." As such, he discounted it also:

Congress’s attempt to set aside Miranda, since it represents an assertion that violation of Miranda is not a violation of the constitution, also represents an assertion that the Court has no power to impose Miranda on the States. To answer this assertion—not by showing why violation of Miranda is a violation of the constitution—but by asserting that Miranda does apply against the States, is to assume precisely the point at issue. In my view, our continued application of the Miranda code to the States despite our consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of Miranda’s salvation but rather evidence of its ultimate illegitimacy.

The Court has held that the Supremacy Clause applies only to Congressional Acts and the functions of an agency "acting pursu-

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213. It must be remembered that all of the present Justices, except Justices Breyer and Ginsburg agreed with Justice O’Connor in Tafflin. See also supra note 148.

214. Section 3501 was enacted pursuant to Congress’ “power to prescribe rules of evidence in Federal courts,” and the authority to enact implicitly authorizes the establishment of limits of application. S. COMM. REP., reprinted in 1968 U.S.C.C.A.N. at 2137.

The Supreme Court in *Miranda* did not designate the courts which were to follow its dictates. The state courts, as well as federal tribunals have done so. The majority in *Dickerson* assigns this state adoption of the *Miranda* rules as a reason why the *Miranda* rules are constitutional, i.e., the Court could not impose "nonconstitutional" rules on the States. If the *Miranda* rules are "nonconstitutional," they would not be enforceable against the States, even though the States might opt to use them. The Court was presented with a perfect opportunity to discuss whether the rule announced in *Hillsborough County v. Automated Medical Laboratories, Inc.* is good law. Why could a valid argument not be made that an apt extension of *Testa* dictates that when the Supreme Court speaks, unless it restricts the application of its ruling, it speaks for all the people and all the states, making *Miranda* the governing "law" under the Supremacy Clause? Two recent pronouncements of Justices Scalia and Stevens on the Supremacy Clause demand clarification. Justice Scalia, concurring in *Tafflin v. Levitt*, wrote that the reason why state judges enforce federal law is:


218. *Dickerson*, 120 S. Ct. at 2326.


220. *Supra* text accompanying notes 28-70.

221. In *Smith v. Robbins*, 528 U.S. 259, 270 (2000), the five member majority there (Chief Justice Rehnquist, and Justices Kennedy, O'Connor, Scalia and Thomas), as I had predicted here, held that under the concept of federalism the Supreme Court is not allowed to impose a "straitjacket" on the State. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (citing the Court's admonition against "straitjackets").


224. *Clafflin v. Houseman*, 93 U.S. 130, 136 (1876) (stating the United States is the "paramount sovereignty").

[N]ot because ... their inherent power permits them to entertain transitory causes of action arising under the laws of foreign sovereigns [but because federal laws] are laws in the several States, and just as much binding on the citizens and courts thereof as the States laws are. The two together form one system of jurisdiction, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other.

Justice Stevens, in his dissent in Printz, said that the Supremacy Clause's mention of judges was nothing more than a choice-of-law rule. The Supreme Court would have done well to have expanded upon these two pronouncements.

V. CONCLUSION

The most serious criticism that can be lodged against the Dickerson decision is not that it was a race to judgment in order to save Miranda, but that the reason or reasons for that result are insufficiently developed. The Court gives in essence, only one reason, i.e. since Miranda was a constitutional decision, Congress had no authority to overrule it. As an additional, or "make-weight" reason, the Court said, in effect, that regardless of the worth of Miranda, demanded that it be saved. Rather than address the issue at hand, i.e., whether a statute is constitutional, the majority opinion attempts to justify its conclusion that a case should be saved.

From prior pronouncements of most of the seven Justices who constitute the Dickerson majority, one can only conclude that Miranda was just an announcement of some "prophylactic" rules, promulgated to safeguard Fifth Amendment rights. Had those Justices been consistent in their analysis of what Miranda stood for, the ruling of this Court would have been that Congress had the power to enact § 3501. Wanting to save Miranda, however, the Court would have had to find another ground for striking down the statute. Saving Miranda through stare decisis alone, would not have offered a solution to the dilemma, for having a case which should be preserved, and a valid statute which sought to overturn it, simultaneously extant, would present a dilemma of monumental proportions.

226. Id. at 469-70. Justice Scalia, in this passage drew heavily upon the Court's 1876 decision in Claflin. See also supra note 223.
228. Supra text accompanying notes 30-34.
The Court could have found that § 3501 was the result of an excess of power on the part of Congress, per City of Boerne v. Flores. The Court could have found the statute invalid, as violating federalism, per Printz v. United States. The Court could have found § 3501 invalid under the Supremacy Clause, per the case of Alden v. Maine. Any one of these reasons would have been sufficient ratio decidendi to strike down the statute, even though the case it sought to abolish lacked constitutional substance.

The Court chose what at first might appear to be the easy method of salvaging Miranda, i.e., find it to be a “constitutional” decision. If it were, then surely Congress could not overturn it. Upon closer analysis, however, the flaw in this approach becomes patent. What was for years considered nothing more than a decision announcing a “prophylactic” rule, suddenly became one of constitutional proportions. The Court made no attempt to harmonize pre-Dickerson Miranda with post-Dickerson Miranda. If there is a distinction between the two versions of Miranda, the Court made no attempt to explain how the metamorphosis came about. It would seem that when the Supreme Court is faced with the question of the constitutionality of a statute that seeks to overturn a prior Supreme Court decision, initially the case must be analyzed to determine whether it was of such constitutional proportions that Congress had no authority to overturn it. After that determination is made the case holds very little significance. The constitutionality of the statute on its own merits must be determined. Even if Congress were permitted to overturn a case because it was not of constitutional proportions, the statute it passed might itself have been constitutionally flawed. This was an inquiry with which the Court did not appear to concern itself. The Court seemed bound and determined to save Miranda, and having found a way satisfactory to itself, it devoted precious little time to the refinements of constitutional review. The end result of Dickerson, the salvage of Miranda, may be applauded by some, and condemned by others. The method of doing so, however, should be condemned by all who consider constitutional review an exacting science.

232. Supra Part II.