Do As I Say and Not As I Do: Dickerson, Constitutional Common Law and the Imperial Supreme Court

Kevin McNamee*

*Fordham University School of Law

Copyright ©2000 by the authors. Fordham Urban Law Journal is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ulj
Do As I Say and Not As I Do: Dickerson, Constitutional Common Law and the Imperial Supreme Court*

Kevin McNamee

Abstract

This Comment examines the Supreme Court’s Miranda jurisprudence through the lens of the “constitutional common law” theory, which suggests that the Supreme Court has crafted a large body of subconstitutional rules that are not compelled by the text of the Constitution but serve to protect values implicit in the text. As a result, such rules are subject to the limitations of modification and nullification by later courts. After presenting the characteristics of the constitutional common law theory and its relationship to federalism and separation of powers, the author suggests that the theory can explain the erosion of Miranda decision’s brightline rules over time. The Comment also discusses Congress’s direct response to Miranda - 18 U.S.C. §3501- and how it contradicts the directives of the Miranda decision. Next, The author examines Dickerson v. United States, in which the Supreme Court concluded that Miranda announced a constitutional decision that Congress could not supersede by statute. After evaluating the various arguments and counter-arguments posited in that case, the author concludes that the Dickerson decision may have gutted the assumptions on which the theory of constitutional common law is based. Finally, this Comment presents several recommendations for limiting the breadth of the Supreme Court’s interpretation of the constitution.

KEYWORDS: Miranda, confession, admissibility, constitutional common law, stare decisis

* J.D. Candidate, Fordham University School of Law, 2001; B.A., History, B.A. English, Literature & Rhetoric, summa cum laude, Binghamton University, 1997. I would like to thank several faculty members of Fordham Law School: Professor Martin Flaherty for valuable guidance and criticism in shaping this paper, Professor Edward Chikofsky for last minute criticism and suggestions, and Professors Daniel Capra and Hugh Hansen, whose fascinating courses in Criminal Procedure and Constitutional Law, respectively, first sparked my interest in Miranda and why judges rule the way they do. Thanks also to my colleagues and friends on the Editorial Board of the Fordham Urban Law Journal, and to the staff members of the Journal, for their invaluable comments and assistance. And finally, credit must be given where it is most due, and volumes of credit must go to the McNamee family for unconditional support, love, and, of course, a touch of humor.
Alberto Napoli: you're under arrest for the murder of Nicholas Lagrassa. You have the right to remain silent. Anything you say can be used against you in a trial.

You have a right to an attorney. If you cannot afford one, one will be appointed to you by a court of law. Do you understand these rights?¹

* * *

Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous.²

INTRODUCTION

On January 27, 1997, Charles T. Dickerson confessed to a series of bank robberies in Maryland and Virginia.³ In the subsequent prosecution, the U.S. Attorney's Office based its case in large part on evidence seized from Dickerson's automobile and on the confession federal agents elicited from the defendant—all evidence, Dickerson claimed, obtained in violation of the rights protected by

¹ Law & Order (NBC television broadcast, Feb. 25, 1998).
³ United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999).
the Fourth\textsuperscript{4} and Fifth Amendments\textsuperscript{5} to the United States Constitution.\textsuperscript{6}

At an evidentiary hearing,\textsuperscript{7} the United States District Court for the Eastern District of Virginia denied Dickerson's motion to suppress the evidence seized from his car\textsuperscript{8} and found that he voluntarily confessed to the federal agents.\textsuperscript{9} However, the District Court, believing the story recounted by the defendant, suppressed the confession he made at the FBI field office, because the federal

\begin{itemize}
\item \textsuperscript{4} U.S. Const. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ").
\item \textsuperscript{5} U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ").
\item \textsuperscript{6} Dickerson, 166 F.3d at 671.
\item \textsuperscript{7} The Court has recognized the necessity of the trial court holding pretrial evidentiary hearings to determine the admissibility of constitutionally suspect evidence, such as potentially involuntary confessions or illegally searched or seized evidence. \textit{E.g.}, Jackson v. Denno, 378 U.S. 368 (1964). The habeas corpus petitioner in \textit{Denno} argued that a New York procedure—which allowed the trial jury, where evidence presented a fair question as to the voluntariness of a confession, to make the ultimate conclusion as to both voluntariness and truthfulness—violated due process. The Court vacated the lower federal courts’ granting of the habeas writ, but ordered the case remanded to the New York state court, \textit{id.} at 396, stating that "[i]t is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence." \textit{id.} at 395.
\item \textsuperscript{8} United States v. Dickerson, 971 F. Supp. 1023, 1024 n.1 (E.D. Va. 1997). Dickerson claimed the search of his car was tainted as a "fruit of the poisonous tree" of his illegal confession. \textit{Id.} However, the District Court ruled that the automobile search was supported by eyewitness accounts and the inevitable discovery doctrine. \textit{Id.} (citing Nix v. Williams, 467 U.S. 431, 432 (1984) (excusing an otherwise unconstitutional search because the evidence obtained would have been discovered inevitably through means completely independent of the illegal activity)).
\item \textsuperscript{9} The Supreme Court has long recognized that involuntary confessions are inherently untrustworthy, and that the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment both work to prevent the presentation of involuntary confessions as evidence. \textit{E.g.}, Dickerson v. United States, 120 S. Ct. 2326, 2330 (2000). "We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily." \textit{Id.} at 2331; \textit{accord id.} at 2347 (Scalia, J. dissenting) (explaining that the requirement that a confession be voluntary remains the constitutional standard, governing the admissibility of confessions where: (1) the \textit{Miranda} rule does not apply, and (2) where law enforcement officials obtain an involuntary confession while otherwise complying with \textit{Miranda}’s technical rules).
agents did not give the so-called *Miranda* warnings before Dickerson confessed.\(^\text{10}\)

On interlocutory appeal, the United States Court of Appeals for the Fourth Circuit reversed, agreeing with the U.S. Attorney that the confession indeed was admissible in the prosecution's case-in-chief.\(^\text{12}\) One year after hearing arguments on the admissibility of the confession, the Fourth Circuit issued its bombshell holding—*Miranda v. Arizona* no longer governed the admissibility of station house confessions in federal courts, because Congress expressly had overruled *Miranda* by statute.\(^\text{13}\) The United States Supreme Court granted certiorari, setting the scene for a dramatic decision on the fate of the venerable *Miranda*, a landmark decision arguably on the scale of *Brown v. Board of Education*\(^\text{14}\) and *Roe v. Wade*,\(^\text{15}\)

\(^{10}\) *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966) (Warren, C.J.). “The warnings required [by this decision] and the waiver necessary... are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.” *Id.* at 476.

These warnings (which have come to be known colloquially as “*Miranda rights*”) are: a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

\(^{12}\) *Dickerson v. United States*, 120 S. Ct. 2326, 2331 (2000) (Rehnquist, C.J.). For a fuller discussion of both *Dickerson* and *Miranda*, see infra Parts II.A and III.

\(^{13}\) *Dickerson*, 971 F. Supp. at 1023.

\(^{14}\) *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (9-0 decision) (declaring that legally sanctioned racial segregation in public schools violates the Equal Protection Clause of the Fourteenth Amendment).

\(^{15}\) *Roe v. Wade*, 410 U.S. 113 (1973) (declaring a woman’s right to have an abortion a fundamental right with which the state may not unduly interfere).
and, symbolically, the pinnacle of the Warren Court’s judicial activism\textsuperscript{16} in the 1960s.

However, the fate of another, lesser-known doctrine also hinged on the Court’s determination of the constitutionality of Charles Dickerson’s station house confession. Much of “constitutional common law”\textsuperscript{17}—an academic theory positing that the Supreme Court has crafted a large body of subconstitutional rules that: (1) are not compelled by the text of the Constitution, but (2) serve to protect values implicit in the text\textsuperscript{18}—rested on judicial maxims tested, and perhaps greatly undermined, by the 7-2 majority opinion in \textit{Dickerson v. United States}\textsuperscript{19}.

Part I of this Comment will present the theory of constitutional common law, its central characteristics, and the ways it can be distinguished from “conventional” constitutional law\textsuperscript{20}—rules that are both derived from and compelled by the Constitution.\textsuperscript{21} In particular, Part I will discuss how the theory of constitutional common law

\textsuperscript{16} Judicial activism is a judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive or new social policies in ways not always consistent with the restraint expected of appellate judges. BLACK’S LAW DICTIONARY 847 (6th ed. 1990). Judicial opinions that result from judicial activism often intrude somewhat into legislative and executive matters. \textit{Id.} Scholars have dubbed the Supreme Court in both the early twentieth century and in the 1960s an “activist” Court. \textit{E.g.}, Michal R. Belknap, \textit{The Warren Court And The Vietnam War: The Limits Of Legal Liberalism}, 33 GA. L. REV. 65, 65 (1998) (“Both those who praise and those who condemn it characterize [Chief Justice Earl] Warren’s tenure ‘as an age of unrelieved judicial activism in which one ‘liberal’ principle after another was discovered in or written into the Constitution.’”); Harold A. McDougall, \textit{Lawyering And The Public Interest In The 1990s}, 60 FORDHAM L. REV. 1, 24 (1991) (indicating that the Supreme Court from the beginning of the twentieth century until the mid-1930s was a “conservative activist court” which struck down much state and federal economic regulation).

\textsuperscript{17} Henry P. Monaghan, \textit{Constitutional Common Law}, 89 HARV. L. REV. 1, 2-3 (1975) (calling constitutional common law a “substructure of substantive, procedural, and remedial rules . . . subject to amendment, modification, or even reversal by Congress”).

\textsuperscript{18} \textit{Id.} at 2-3.

\textsuperscript{19} 120 S. Ct. 2326 (2000).

\textsuperscript{20} Though this Comment was inspired in large part by, and is a response to, Professor Monaghan’s article, it does not to use the terminology “true constitutional law,” Monaghan’s label for what he called “Marbury-shielded constitutional exegesis,” as opposed to constitutional common law, which Monaghan referred to as “congressionally reversible constitutional law.” \textit{Id.} at 31. Calling some constitutional law “true” may imply that law outside that category is not true, and the change of terminology to the more neutral word “conventional” does not detract from the overall theory.

\textsuperscript{21} See, \textit{e.g.}, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (recognizing the need to draw clear lines regarding the evils the Establishment Clause seeks to guard against, and, thus, laying out a three-part test to determine whether a challenged governmental act violates the Establishment Clause).
co-exists with the constitutionally compelled doctrines of federalism\(^2\) and separation of powers,\(^3\) and how this theory may be necessary to justify many of the Court’s decisions during and since the Warren era.

Part II of this Comment will analyze the Supreme Court’s decision in *Miranda v. Arizona*, describe the “bright line rules”\(^4\) announced therein, and discuss the uncertainties of *Miranda’s* constitutional status created in the Court’s lengthy analysis.\(^5\) Part II will then survey the Supreme Court’s later *Miranda* cases, which largely backtracked on the *Miranda* holding and undermined it as a constitutional precedent of the Court.\(^6\) Part II next will discuss

The First Amendment directs that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I, cl. 1. The Supreme Court has long recognized that the prohibitions of the initial clause of the First Amendment, the Establishment Clause, apply to the states via the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); Bd. of Educ. v. Grumet, 512 U.S. 687, 690 (1994) (declaring that the state of New York, in setting up a special school district to specifically serve the Satmar Hasidim in the village of Kiryas Joel, violated the Establishment Clause, which binds the states through the Fourteenth Amendment).

22. Federalism is a doctrine concerned with maintaining the proper balance of power in the relationship between the states and the federal government as dual sovereigns in the federal system the Founders created in the Constitution. *E.g.*, United States v. Lopez, 514 U.S. 549 (1995). “As James Madison wrote: ‘The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.’” *Id.* at 552 (citing *The Federalist* No. 45, at 292-93 (Clinton Rossiter ed., 1961)).

23. Separation of powers is a doctrine concerned with maintaining the delicate balance of power that the Founders designed within the framework of the Constitution between the three co-equal branches of the federal government. *E.g.*, Metro. Wash. Airports Auth. v. Citizens For The Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991) (“If the power is executive, the Constitution does not permit an agent of Congress to exercise it.”).

24. Bright line rules are rules that courts feel are so sufficiently settled or are so necessary to guide conduct that they will apply them without looking to the specific facts of a given case. See *Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure* 243 (5th ed. 1996).

Some other examples of bright-line rules include the rules set forth in: (1) *United States v. Robinson*, 414 U.S. 218 (1973) (granting police an automatic right to search all arrestees incident to their lawful arrest); (2) *New York v. Belton*, 453 U.S. 454 (1981) (extending the *Robinson* arrest power rule to permit searches of the passenger compartments of all automobiles incident to the lawful arrest of an occupant); and (3) *United States v. Socony-Vacuum*, 310 U.S. 150 (1940) (declaring price fixing a per se violation of the Sherman Antitrust Act and refusing to entertain economic justifications for per se violations).


26. *E.g.*, *New York v. Quarles*, 467 U.S. 649, 651 (1984) (establishing a public safety exception to the giving of the *Miranda* warnings, whereby a confession obtained in violation of the *Miranda* rules will be admissible if eliciting the confession
how, in light of the language and holdings of the *Miranda* jurisprudence, the bright line rules announced in 1966 to regulate station house confessions were constitutional common law as per the theory formulated by Professor Henry P. Monaghan, and thus subject to the limitations of modification and nullification outlined in Part I. Part II will conclude with a brief presentation of the direct federal response to *Miranda*: Congress enacting 18 U.S.C. § 3501. This section will explain what § 3501 directs, and how it almost wholly contradicts the directives of the *Miranda* decision, all as an introduction to the large issues the Court faced in *Dickerson v. United States*.

Against the background of the *Miranda* jurisprudence and § 3501, Part III of this Comment will focus solely on the majority opinion in *Dickerson v. United States*. In particular, Part III will present Chief Justice Rehnquist’s conclusion that *Miranda v. Arizona* announced a constitutional decision of the Court that Congress could not supersede by statute, and, in turn, discuss each argument the Court presents to ground this conclusion. Part III will set forth counterarguments to, and critiques of, each argument as it is presented. Part III will conclude with a brief presentation of the *Dickerson* Court’s invocation of the doctrine of stare decisis, upon which *Miranda* rested in large part, and argue that a weak invocation of stare decisis cannot support the Court’s holding.

---

1. See infra Part I.D.3.


3. For a thorough analysis of whether § 3501 would pass constitutional muster conducted prior to the Court’s decision in *Dickerson*, see Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 Cornell L. Rev. 883 (2000). Prof. Kamisar published this article before the Supreme Court handed down the decision in *Dickerson*, but after the Court heard oral arguments in the case. However, the article is based on a speech preceding oral arguments in *Dickerson*. See id.

4. Stare decisis is a judicial policy directing that the holdings of previously decided cases should generally be followed in like cases. E.g., Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action By United States Courts of Appeals*, 51 Fordham L. Rev. 53, 54 (1982).

5. Professor Paulsen of the University of Minnesota Law School recently advanced a similar argument that *Roe v. Wade*, 410 U.S. 113 (1973), so lacks doctrinal footing that it rests entirely on the doctrine of stare decisis. Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove The Precedential Effect of*
Part IV will argue that, by elevating *Miranda* to the level of conventional constitutional law, the *Dickerson* majority may have gutted the assumptions on which the theory of constitutional common law is based and, in so doing, seriously infringed upon the very constitutional principles of federalism and separation of powers the Rehnquist Court has often trumpeted. In conclusion, Part IV will recommend ways the Court can place reasonable limits on the breadth of its constitutional interpretation, but suggest that whatever solution is imposed, it must originate from the Court itself.

I. CONSTITUTIONAL COMMON LAW

A. A Rational Basis in Historical Tradition

Critics of the Supreme Court as an institution often charge it with being a court of the “imperial judiciary,” the self-appointed

---

Roe *and* Casey?, 109 *Yale L.J.* 1535, 1542 (2000) (arguing that a carefully drawn statute abrogating the doctrine of stare decisis in some or all categories of constitutional law is within Congress’s power and should be upheld by the Court).

32. For an interesting debate on the separation of powers implications of the Fourth Circuit’s and the Supreme Court’s decisions in *Dickerson*, compare Erwin Chemerinsky, *Point/Counterpoint: The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States, 149 U. Pa. L. Rev. 287, 292* (2000) (“[T]he actions of the Fourth Circuit and the Supreme Court in considering the constitutionality of 3501 present[] a trifecta of separation of powers violations . . . . [T]he courts’ reaching the issue of the constitutionality of 3501 is gravely troubling.”), with Neal Devins, *Point/Counterpoint: Asking The Right Questions: How The Courts Honored the Separation of Powers By Reconsidering Miranda, 149 U. Pa. L. Rev. 251, 254* (2000) (“[C]ore separation of powers principles support the decisions . . . . [W]hile the line separating judicial activism from judicial restraint may be murky, the responsibility for each branch of government to independently interpret the law is clear.”).

33. See, e.g., *Printz v. United States, 521 U.S. 898* (1997) (Scalia, J.). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.


34. Planned Parenthood of Southeastern Pa. *v. Casey, 505 U.S. 833, 996* (1992) (Scalia, J., dissenting). “It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges . . . . with the somewhat more modest role envisioned for these lawyers by the Founders.” *Id.* (Scalia, J., dissenting). “[T]he notion that the
final arbiter of controversies in which it has no power or "place" to intervene.\textsuperscript{35} Without delving into the ultimate merits of these charges, it is worth noting that the vocal critics of the imperial judiciary are indeed correct in asserting that the federal courts of the United States are technically courts of limited jurisdiction marked out by the Constitution and Congress,\textsuperscript{36} as opposed to state courts, which are courts of general jurisdiction.\textsuperscript{37} As with the other branches of the national government, we must look to the Constitution for the grant of authority that gives the federal judiciary its power—in this case, Article III of the Constitution, which contains a positive grant of jurisdiction to the federal courts to hear cases involving controversies of a constitutional nature.\textsuperscript{38}


court must adhere to a decision for as long as the decision faces ‘great opposition’ and the Court is ‘under fire’ acquires a character of almost czarist arrogance.’ \textit{Id.} at 999 (Scalia, J., dissenting) (emphasis added); accord Margaret G. Farrell, \textit{Revisiting Roe v. Wade: Substance and Process in the Abortion Debate}, 68 Ind. L.J. 269, 307 (1993) (noting that “the resolution of questions of a fundamentally moral nature has [long] been considered a state prerogative,” and arguing that by federalizing abortion rights, the Court performed a “diminution of state and legislative authority by judicial pronouncement”).

Similar criticism has been leveled at judges of lower courts as well. Editorial, \textit{Yonkers in Bondage, Orange County (Cal.) Reg.}, Sept. 14, 1988, at B10 (calling Judge Leonard B. Sand of the United States District Court for the Southern District of New York a “tyrant” for ordering the New York City suburb of Yonkers to build low-income housing in a white, middle class section of the city to remedy segregation in housing despite a supposed lack of judicial power to order the building of housing of any kind).

\textsuperscript{35} E.g., \textit{Casey}, 505 U.S. at 1002 (Scalia, J., dissenting) (“We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”).

\textsuperscript{36} E.g., Rick Bragg, \textit{Florida Judge Upholds Jury’s $145 Billion Punitive Award in Tobacco Trial}, N.Y. Times, Nov. 7, 2000, at A18 (reporting that Judge Ursula Ungaro-Benegas of the United States District Court for the Southern District of Florida remanded a proceeding to state court because a union had never joined the litigation against cigarette manufacturers, therefore denying the federal court jurisdiction based on federal laws regarding labor unions).

\textsuperscript{37} E.g., \textit{Aldinger v. Howard}, 427 U.S. 1, 15 (1976) (Rehnquist, J.) (“[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.”).

\textsuperscript{38} U.S. Const. art. III, § 2, cl. 1; e.g., \textit{Johnson v. United States}, 120 S. Ct. 1795, 1800 (2000) (noting that the Court granted certiorari to determine whether application of a federal statute violated the Ex Post Facto clause). The Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, will prohibit a law “that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” \textit{Johnson}, 120 S. Ct. at 1800 (citing \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 390 (1798)).

Article III specifies the other areas to which the judicial power of the United States courts may extend:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambas-
The federal courts have long used this grant of judicial power to discern whether the acts of other branches of government, at both the state\textsuperscript{39} and federal level, comply with the requirements of the Constitution.\textsuperscript{40} This particular aspect of judicial authority is not one that law students are presented with as a matter of first impression in a constitutional law survey course. In fact, from a young

sadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

\textsuperscript{39} Although the states are dual sovereigns with the national government in the federal system, the Supremacy Clause of the Constitution, art. VI, cl. 2, declares the Constitution the supreme law of the United States. The Supreme Court long has held that it follows from the Supremacy Clause that the Court's rulings on the Constitution are binding on the states. \textit{E.g.}, Cooper v. Aaron, 358 U.S. 1 (1958).

In \textit{Cooper}, the unanimous Court held in sweeping language that its ruling in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), that legally mandated segregation denied people the equal protection of the laws guaranteed by the Fourteenth Amendment, bound Arkansas state officials not party to the \textit{Brown} suit:

\textit{Marbury v. Madison} \ldots declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the \textit{Brown} case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . . .

\textit{Cooper v. Aaron}, 358 U.S. 1, 18 (1958) (per curiam).

\textsuperscript{40} \textit{E.g.}, United States v. Lopez, 514 U.S. 549, 552 (1995) (striking the federal Gun Free School Zones Act of 1990, because it exceeded the authority granted to Congress under the Commerce Clause of the U.S. Constitution to regulate interstate commerce); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653-55 (1952) (Jackson, J., concurring) (striking down an act of President Truman via the Secretary of Commerce for encroaching on the powers of Congress); Chandler v. Miller, 520 U.S. 305, 309 (1997) (striking down, as an unreasonable and therefore unconstitutional search under the Fourth Amendment, a Georgia state law that mandated that candidates for certain public offices take a urine test to prove they were not drug users).

\textit{Chandler} was the latest case in a line of decisions that permitted compelled urine testing of certain public employees and public charges without a warrant and on a lower quanta of proof than the usual Fourth Amendment standards of reasonable suspicion or probable cause. \textit{E.g.}, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (upholding compelled urinalysis of certain U.S. Customs Service officials, because the testing served the special need beyond criminal law enforcement of ensuring that those charged with drug interdiction were drug-free); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding mandatory and suspicionless drug testing because of the demonstrated special need of keeping school-age athletes drug-free in a school where the athletes were known as the leaders of the "drug culture").
age, American students are taught in social studies and history textbooks that the Supreme Court will strike down government acts that violate specific constitutional provisions.\(^4\) Though this judicial power to review the acts of the legislative and executive branches is unwritten in the text of the Constitution,\(^4\) and therefore continues to be debated among academics,\(^4\) the judicial landmark of this power remains Chief Justice Marshall’s opinion for the Court in *Marbury v. Madison.*\(^4\) Marshall’s classic exposition on the power of the federal judiciary\(^4\) still resonates today, quoted even in the most conservative Supreme Court opinions de-

\(^{41}\) See, e.g., RICHARD HOFSTADTER ET AL., THE UNITED STATES 428 (3d ed. 1972) (noting that the Fourteenth Amendment provided legal grounds for the courts to “declare unconstitutional” state regulations of railroads); NORMAN A. GRAEBNER ET AL., A HISTORY OF THE AMERICAN PEOPLE 153 (2d ed. 1975) (teaching that the Constitution vests the Supreme Court with power to interpret the Constitution “with finality”); EDWARD L. AYERS ET AL., AMERICAN PASSAGES 655 (2000) (instructing that the conservative activist Court of the early twentieth century struck down much progressive legislation).

\(^{42}\) GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 15 (13th ed. 1997) (noting the contrast between the unwritten status of judicial review in the United States Constitution and the explicit grant of such power to the judiciary within most twentieth century constitutions of other nations).

\(^{43}\) Id. at 17 (discussing the so-called “Hand-Wechsler debate” of the late 1950s and early 1960s). The esteemed Judge Learned Hand of the United States Court of Appeals for the Second Circuit insisted that nothing in the Constitution gave the Court the power to review the acts of Congress, and that judicial review violated the separation of powers principles of the Constitution. However, Hand concluded that the practical need of providing checks on governmental power justified judicial review in situations in which the Court deemed it necessary. Id. at 17-18 (citing LEARNED HAND, THE BILL OF RIGHTS 1-30 (1958)). Professor Herbert Wechsler, on the other hand, argued that a fair reading of the Supremacy Clause of Article VI and the enumeration of the judicial powers in Article III indicates that judicial review is grounded in the Constitution, that *Marbury* was not an extra-constitutional detour from the text of the Constitution, and that broad discretion to abstain from reviewing acts violating the Constitution departs from the judicial obligation to the Constitution. GUNTHER & SULLIVAN, supra note 42, at 17-18 (citing HERBERT WECHSLER, TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW, IN PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 4-10 (1961)).

\(^{44}\) 5 U.S. (1 Cranch) 137 (1803) (striking down an act of Congress that expanded the Court’s jurisdiction, because it conflicted with the grant of judicial power in Article III of the Constitution); see also Monaghan, supra note 17, at 2-3 (indicating that but for the “mystique” of *Marbury v. Madison,* it might be easier to realize that what appears to be “authoritative constitutional ‘interpretation’” is actually constitutional common law subject to Congress’s power).

\(^{45}\) Though “classic” and firmly established in the federal judiciary, Marshall’s opinion does have its critics, who have called *Marbury* largely dicta, question-begging, and a vast usurpation of governmental power. E.g., GUNTHER & SULLIVAN, supra note 42, at 13-14 (citing LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932) (attacking the legitimacy of judicial review), and RAOUl BERGER, CONGRESS V. THE SUPREME COURT (1969) (defending the legitimacy of judicial review)).
crying the broad scope of federal judicial power.\textsuperscript{46} In his unanimous opinion for the Court, Marshall opined:

\begin{quote}
It is, \textit{emphatically}, the province and duty of the judicial department, to say what the law is.\ldots If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution \ldots the court must determine which of these conflicting rules governs the case. \textit{This is of the very essence of judicial duty.} If then, the courts are to regard the constitution, and the \textit{constitution is superior} to any ordinary act of the legislature, the constitution, and not such ordinary act, \textit{must} govern the case to which they both apply.\textsuperscript{47}
\end{quote}

Though Marshall later acknowledged that \textit{Marbury} perhaps swept too broadly in its discussion of the powers imbued in the federal courts under Article III,\textsuperscript{48} the Court never has sounded a full-scale retreat from the implications of \textit{Marbury}, so that today, the Supreme Court is regarded widely as the legitimate ultimate arbiter of whether actions by other branches of government conflict with the precepts of the Constitution.\textsuperscript{49}

\section*{B. What is Constitutional Law?}

A blanket statement that the Supreme Court's declarations of constitutional law are the supreme law of the land via the

\textsuperscript{46} E.g., Dickerson v. United States, 120 S. Ct. 2326, 2338 (2000) (Scalia, J., dissenting) ("The power we recognized in \textit{Marbury} will thus permit us, indeed \textit{require} us, to 'disregard[ ]' § 3501, a duly enacted statute governing the admissibility of evidence in the federal courts, only if it 'be in opposition to the constitution'—here, assertedly, the dictates of the Fifth Amendment.") (emphasis added).

\textsuperscript{47} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (emphasis added).

\textsuperscript{48} GUNTHER & SULLIVAN, \textit{supra} note 42, at 13 ("Marshall himself, in a \textit{rare} admission of error\ldots") (emphasis added) (citing Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 400-02 (1821)); "But in the reasoning of the court in support of [\textit{Marbury}], some expressions are used which go far beyond it." Cohens, 19 U.S. at 400.

In \textit{Cohens}, the State of Virginia argued had that the Court could not exercise appellate jurisdiction in the case, because Article III granted the Court only original jurisdiction over cases in which a state was a party. However, the \textit{Cohens} Court, in an opinion by Chief Justice Marshall, extended its analysis in \textit{Martin v. Hunter's Lessee}, 14 U.S. (1 Wheat) 304 (1816), to defend the legitimacy of review of state court judgments at the federal level. Marshall ultimately concluded that the judicial power of the federal courts "extends to all cases arising under the constitution or a law of the United States, whoever may be the parties." Cohens, 19 U.S. at 392; see also text accompanying \textit{infra} note 74.

\textsuperscript{49} GUNTHER & SULLIVAN, \textit{supra} note 42, at 25 (indicating that Cooper v. Aaron, 358 U.S. 1 (1958), is the major foundation in the Court's modern jurisprudence for the public's widely held view that the Court's interpretation of the Constitution is the supreme law of the land); see also text accompanying \textit{supra} note 39.
Supremacy Clause\textsuperscript{50} sheds little light on an even more basic question: what is considered \textit{constitutional law}? The answer to this question is of great import, for the Supreme Court’s dictates on the law it considers within the ambit of the Constitution remain the final authority on the subject, absent the long and difficult process of amending the Constitution,\textsuperscript{51} or a reversal by the Court itself.\textsuperscript{52} Outright reversal by the Court can be an uncertain prospect, given individual Justices’ stated reluctance\textsuperscript{53} to overturn even cases they previously criticized.\textsuperscript{54}

Given this finality of the Court’s constitutional dictates, we are left attempting to define, in a meaningful and satisfactory way, what is “constitutional law.” Are the Court’s inviolable constitutional dictates limited to its interpretations of the law as stated in the text of the Constitution—e.g., that imposition and carrying out of the death penalty, under the criminal justice systems that existed in the United States as of 1972, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?\textsuperscript{55} Or does the phrase “constitutional law” sweep within its scope Supreme Court precedent that protects values inherent in, though not necessarily explicitly set forth in, the text of the Constitution—e.g., the zone of personal privacy vindicated by the First Amendment right of free association, the Third Amendment prohibition of the quartering of soldiers, the Fourth Amendment prohibition of unreasonable searches and seizures, and the Fifth Amendment right

\textsuperscript{50} U.S. Const. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land.”).

\textsuperscript{51} Amending the Constitution requires: (1) a two-thirds vote of both Houses of Congress or the application of two-thirds of the state legislatures, in order to call for a Convention for proposing the amendment; and (2) ratification by the legislatures of three-quarters of the states, or by Conventions in three-quarters of the states. U.S. Const. art. V.

\textsuperscript{52} E.g., Agostini v. Felton, 521 U.S. 203, 235 (1997) (stating that stare decisis concerns are at their weakest when the Court interprets the Constitution, because overturning that interpretation requires constitutional amendment or a reversal by the Court) (citation omitted).

\textsuperscript{53} See, e.g., Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

\textsuperscript{54} See, e.g., Dickerson v. United States, 120 S. Ct. 2326, 2337 (2000) (Scalia, J., dissenting) (indicating that three Justices—Justices O’Connor and Kennedy and Chief Justice Rehnquist—whose votes were needed to compose the majority that held that \textit{Miranda} is a constitutional decision, are on record in the United States Reports as believing that a violation of \textit{Miranda} is \textit{not} a violation of the Constitution).

\textsuperscript{55} Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).
against self-incrimination? Furthermore, do the rules the Supreme Court has fashioned to secure underlying constitutional rights, though they admittedly are not compelled by the Constitution, rise to the level of inviolable (at least by the other branches of government) "constitutional law?" For example, the Court has stated that the Fourth Amendment's exclusionary rule—under which courts in both levels of the federal system generally must exclude evidence obtained by government agents by unconstitutional searches or seizures—is not compelled by the Constitution. Is the Fourth Amendment exclusionary rule, imposed by the Supreme Court on the states, "constitutional law?"

In his seminal article a quarter-century ago, Professor Henry P. Monaghan argued that the Court's great institutional prestige tended to prevent meaningful inquiry into whether every single Supreme Court decision implicating the Constitution deserved the same dignity as the document itself. Professor Monaghan argued that, indeed, much of what passes as constitutional dictate is actually constitutional common law (as opposed to conventional constitutional law), a "substructure of substantive, procedural, and remedial rules" inspired by—but not required by—the Constitution, and subject to amendment, modification, and outright reversal by Congress and the states.

However, Monaghan realized that a host of issues rendered the theory problematic, issues such as the doctrinal underpinnings of

---

56. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[These] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.") (citation omitted).

57. The exclusionary rule is not ironclad. The Court has fashioned exceptions to it based on a cost-benefit analysis—whether the benefits of the exclusionary rule (deterring future police misconduct) outweigh the societal cost (keeping probative evidence from the trier of fact). See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978) (declining to extend the benefits of the exclusionary rule to the defendant, the passenger of a vehicle that was illegally searched, because the Fourth Amendment rights of the defendant were not implicated by the illegal search of the property of the driver of the car).


59. The fate of the exclusionary rule announced in Miranda v. Arizona turned on the Supreme Court's resolution of much the same question. Despite language seemingly to the contrary in both Miranda and its progeny, the Supreme Court announced that the Miranda exclusionary rule was indeed constitutional in nature and therefore not within Congress's power to overturn by statute. Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000). For a more detailed discussion of Miranda and Dickerson, see infra Parts II.A-B. and III.

60. Monaghan, supra note 17, at 2.

61. Id. at 2-3.
federal common law, the validity of imposing subconstitutional law upon the states and Congress, and the establishment of meaningful distinctions between constitutional common law and conventional constitutional law, which is not subject to the whims of the other political branches under the Marbury tradition and the Supremacy Clause.

C. Constitutional Common Law as a Subset of Valid Federal Common Law

Though some scholars bristle at the suggestion that the federal system has a common law, citing the vocal rejection of the corpus of general federal common law by Justice Brandeis in Erie Railroad Co. v. Tompkins, others point out that denying completely the existence of some sort of federal common law is overbroad. Though the Erie Doctrine and the Rules of Decision Act limit the scope of federal common law by emphasizing the primacy of state common law in areas of state concern, a large body of interstitial decisional law has grown from the federal courts’ interpretation of federal statutory law. A cursory inspection of Supreme Court decisions reveals just that—the United States Reports currently has 531 volumes and grows by several editions with every term of the Court, thus buttressing the argument that some sort of federal common law must exist, albeit common law of a specialized

62. E.g., id. at 12-13.
63. E.g., id. at 23.
64. E.g., id. at 31-34.
65. Id. at 31.
66. U.S. Const. art. VI, cl. 2.
67. 304 U.S. 64 (1938) (rejecting the holding of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), and formulating the so-called “Erie Doctrine,” whereby federal courts hearing a case involving state law must apply the common law of the state and not federal common law principles). For example, federal courts in New York, in adjudicating a state-law negligence claim, must apply the rules governing duty and foreseeability announced by the New York Court of Appeals. E.g., Petition of Kinsman Transit Co., 338 F.2d 708, 721-22 (2d Cir. 1964) (citing Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (Cardozo, Ch. J.).
68. 28 U.S.C. § 1652 (1994) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).
69. For example, the Court’s October Term of 1996 filled volumes 519 through 521 of the United States Reports.
70. Some scholars have pointed out that there is simply too much law in those 531 volumes for the Court’s jurisprudence not to encompass large tracts of federal common law. See, e.g., Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 883, 883 (1986) (arguing that the Court has set no meaningful
sort. In an admittedly enthusiastic defense of *Erie* a generation after that case was decided, Judge Friendly of the United States Court of Appeals for the Second Circuit argued:

> Establishing a body of substantive law for federal courts in matters not otherwise of federal concern is *not* a legitimate end within the scope of the Constitution; thus to frustrate the ability of the states to make their laws fully effective in areas generally reserved to them would be inconsistent with the constitutional plan.

Judge Friendly observed that by restricting the scope of a "general" federal common law covering *all* areas of the law that the federal courts might hear in the exercise of federal question, diversity, and supplemental jurisdiction, the *Erie* Doctrine created a body of specialized federal common law. The upshot of the emergence

limits on judicial power to make federal law and that the bounds of federal common law are greater than realized).


72. *Id.* at 397 (emphasis added). Friendly also defended *Erie* against charges that it handicuffed federal courts from regulating procedure and the admission of evidence in diversity jurisdiction cases—"the inferior courts have been busily giving effect to the [Federal] Rules [of Civil Procedure], even in cases where in every realistic sense their application might produce a different result from what would have obtained in a state court 'a block away.'" *Id.* at 403. At the time Friendly wrote, the Federal Rules of Evidence had not yet been enacted, but Friendly urged that "evidence [was] not within the Erie Doctrine." *Id.* (citation omitted).

73. 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

74. *Id.* § 1332 (granting the federal district courts original jurisdiction of civil actions between citizens of different states where the amount in controversy exceeds $75,000). The fear that local triers of law and fact would not or could not be impartial to a citizen of another state animates the § 1332 diversity jurisdiction of the federal courts. *E.g.*, Northeast Nuclear Energy Co. v. Gen. Electric, 435 F. Supp. 344, 346 (D. Conn. 1977). This concern also permeated the Supreme Court's decisions to uphold federal appellate jurisdiction to review state court judgments resting on federal law in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821). Due to the importance the Constitution places on the independence of judges and the fact that state court judges depend on the state legislatures for their salaries and offices, the Marshall Court declined "to suppose that [the Constitution] intended to leave . . . constitutional questions to tribunals where this independence may not exist." *Cohens*, 19 U.S. at 387.


of this specialized federal common law, argued Friendly, is that Erie has left to the states "what ought be left to them,"77 while at the same time creating a uniform and predictable78 body of federal decisional law in areas of truly national concern.79

Erie also resulted in a sort of deferential give-and-take—just as the Erie Doctrine demanded that the federal courts conform to state law in areas of state concern, state courts also had to conform to federal decisions, because “having rid itself of subconscious guilt for federal poaching on state preserves, the Supreme Court became freer to insist on deference to federal decisions by the states where deference was due.”80

Writing only twenty-six years after Erie, Friendly concluded that the specialized federal common law “developed . . . fruitfully and will develop more.”81 The jurisprudence of the Sherman Antitrust Act82 provides a concrete illustration of the broad scope of modern specialized federal common law. Section one of the statute directs: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.”83 Contrast this unequivocal language with the decidedly different approach the Court has taken in its jurisprudence of § 1, as summarized in State Oil Co. v. Khan.84 In Khan, Justice O’Connor declared for the unanimous Court: “[T]his Court has long recognized that Congress intended only to outlaw unreasonable restraints.”85 What is the effect of the Court’s reading of the statute? At the very least, the Supreme Court has so emphasized the rich common law tradition of the Sherman Act that, arguably, the plain meaning of the statutory prohibition of all contracts, combinations, and conspiracies in restraint of free trade informs mod-

77. Id.
78. Judge Friendly argued that under the pre-Erie doctrine announced by the Court in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), federal judges, “governed by a needle so erratic as ‘a benign and prudent comity,’” had enormous discretion to follow state decisional law of which they approved, but could freely disregard state law with which they disagreed. Friendly, supra note 71, at 388 (quoting Justice Cardozo’s opinion in Mutual Life Ins. Co. v. Johnson, 293 U.S. 335, 339-40 (1934)).
79. Friendly, supra note 71, at 384, 405.
80. Id. at 407 (“[S]tate courts must conform to federal decisions in areas where Congress, acting within powers granted to it, has manifested . . . an intention to that end.”).
81. Id. at 384.
83. Id. § 1(a).
85. Id. at 10.
ern antitrust decisions in no meaningful way. At most, the fair implication of O'Connor's declaration is that the Court has co-opted the statute, placing the archetypal antitrust statute in a non-informative role at the periphery of the Court's antitrust jurisprudence—the plain meaning of the statute now is replaced by a judgment as to what Congress must have (albeit in the Court's mind) intended in passing the statute. Antitrust law, a supposed creature of statute, has morphed into a subcategory of specialized federal common law in an area of truly national concern, thus reinforcing the validity of federal common law as a theoretical concept.


Some scholars have proposed that the Supreme Court has a rich common law tradition in its constitutional interpretation, and that a theory of constitutional common law helps explain adequately the Court's constitutional law jurisprudence. In his article Constitutional Common Law, Professor Monaghan attempted to define the central characteristics that separate conventional constitutional law in the Marbury tradition from violable constitutional common law. Part of the difficulty in drawing such lines in the sand, argued Monaghan, is that no black-and-white distinction exists between the two—the difference is a matter of degree. Constitutional common law, therefore, ultimately remains an

86. E.g., id. at 10 (citation omitted). Most restraints on trade challenged as violations of § 1 of the Sherman Act are examined using the venerable "Rule of Reason" announced in Chicago Board of Trade v. United States, 246 U.S. 231 (1918) (Brandeis, J.):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

87. Monaghan, supra note 17, at 3.
88. Id. at 33.
89. Id. at 30-34 (discussing the proffered definitions and characteristics of constitutional common law and the problems inherent in each).
90. Id. at 33 (citing Paul M. Bator et al., Hart's & Wechsler's The Federal Courts and The Federal System 770 (2d ed. 1973)).
amorphous body of law. This is due in part to the Court's failure to recognize it explicitly as official doctrine, though a few defining characteristics can be culled from the law Monaghan identified as constitutional common law.

1. Constitutional Compulsion?

One characteristic shared by much of constitutional common law is the Court's insistence that the rule crafted is not technically compelled by the Constitution but exists to vindicate rights or values protected by the Constitution.\textsuperscript{91} Monaghan argued that the distinction between constitutional common law and conventional constitutional law is the degree to which the rule questioned is "perceived [by the individual Justices] to be related to the core policies underlying the constitutional provision."\textsuperscript{92} The jurisprudence of the Fourth Amendment exclusionary rule, which directs that evidence seized by the government in violation of the constitutional prohibition of unreasonable searches and seizures generally should not be admitted into evidence,\textsuperscript{93} provides a convincing example.

Maxim I of the exclusionary rule: \textit{Exclusion is not a personal right}. In its exclusionary rule cases, the Court has stated the rule is not a personal right guaranteeing that a new constitutional violation will not occur by the introduction of the illegal evidence at trial.\textsuperscript{94} Instead, the Court insists, exclusion is a judicially created and mandated \textit{remedy} designed to deter future police misconduct and to prevent the government from benefiting from unconstitutional acts.\textsuperscript{95} During the 1960s, the Warren Court declared that exclusion is a remedy \textit{essential} to and flowing from the right of privacy guaranteed by due process.\textsuperscript{96} However, later Courts under Chief Justices Burger and Rehnquist, in focusing increasingly on whether the principles underlying the rule justified its application

\begin{itemize}
  \item \textsuperscript{91} Monaghan, supra note 17, at 2-3.
  \item \textsuperscript{92} Id. at 33.
  \item \textsuperscript{93} \textit{E.g.}, Mapp v. Ohio, 367 U.S. 643 (1961) (binding the Fourth Amendment exclusionary rule on the states via the Fourteenth Amendment).
  \item \textsuperscript{94} United States v. Leon, 468 U.S. 897, 906 (1984).
  \item \textsuperscript{95} Id. at 906. The \textit{Leon} Court concluded that the exclusionary rule is not mandated by the Constitution because: (1) the rule is found nowhere in the text of the Fourth Amendment; (2) it does not retroactively cure the constitutional violation, which occurs singularly at the moment of the illegal search or seizure, and not again with the introduction of the evidence at trial; and (3) because it only operates as a judicially created safeguard of Fourth Amendment principles, as opposed to a vindicator of the constitutional rights of the aggrieved person. \textit{Id.} at 905-06 (citations omitted).
  \item \textsuperscript{96} \textit{E.g.}, \textit{Mapp}, 367 U.S. at 655-56.
\end{itemize}
in the proceeding at hand.97 arguably detached the rule entirely from the realm of personal rights, leaving it "simply a matter of remedial detail."98 In 1975, Monaghan based his conclusion that the Court had moved away from a personal rights theory on the Court's analysis in both United States v. Calandra99 and United States v. Peltier.100 The intervening years only have solidified the doctrinal shift—indeed, the exclusionary rule is now: (1) neither a necessary corollary of the Fourth Amendment,101 (2) nor intended or even able to cure the invasion of the defendant's rights,102 and (3) invoked only when its policy of deterrence is furthered.103

This shift away from a rights-based approach to the application of the exclusionary rule is problematic, for, absent its review of state court judgments for violations of the Constitution, the Supreme Court admittedly lacks supervisory power over state courts.104 Yet the Court mandates that the states comply with the various exclusionary rules105 in situations in which the Court has deemed exclusion applicable.106 Without allowing for the possibil-

---

97. United States v. Peltier, 422 U.S. 531 (1975). "[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." Id. at 538 (citing Desist v. United States, 394 U.S. 244, 254 n.24 (1969)).

98. Monaghan, supra note 17, at 3-4.


100. 422 U.S. 531 (1975).


102. Id. at 906; see also United States v. Ceccolini, 435 U.S. 268, 279-81 (1978) (indicating that, in a case in which the Court denied application of the exclusionary rule, the police officer did not commit the constitutional violation intentionally).

103. E.g., Ceccolini, 435 U.S. at 279-80.

104. E.g., Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) ("[I]n state courts . . . our authority is limited to enforcing the commands of the United States Constitution."); Aldinger v. Howard, 427 U.S. 1, 15 (1976) (Rehnquist, J.) ("[F]ederal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.")


106. E.g., Mapp, 367 U.S. at 655-56.
ity of constitutional common law, the Court corners itself into the untenable position of admitting that it compels state compliance with non-constitutional law in violation of the very federalism concerns the Court often unpopularly champions. In addition, the states are usually granted wide latitude inremedying “even federal primary rights.” Yet the Supreme Court has affixed its formulations of what will remedy a Fourth Amendment violation upon the states.

Maxim II of the exclusionary rule: Application turns on deterrence. The Court also has stated that the exclusionary rule, since it is grounded in a policy of deterrence, should be “restricted to those areas where its remedial objectives are thought most efficaciously served.” In accordance with this general guide, federal courts, after balancing the costs and benefits of the exclusionary rule, have refused to extend the exclusionary rule far beyond the context of the criminal trials, thus sanctioning the use of unconstitutionally searched-and-seized evidence in a variety of situations: grand jury proceedings, civil tax proceedings, civil deportation proceedings, habeas corpus proceedings, and sentencing hearings.

108. Monaghan, supra note 17, at 3 (citing Henry Paul Monaghan, First Amendment “Due Process,” 83 HARV. L. REV. 518, 547-51 (1970). Contra Monaghan, supra note 17, at 3 (“On the other hand, substantive constitutional guarantees can have important remedial dimensions, and it seems clear that state courts must, in the exercise of their general jurisdiction, provide remedies thought ‘indispensable’ to the underlying guarantee.”).
115. E.g., United States v. Tejada, 956 F.2d 1256 (2d Cir. 1992) (refusing to extend the benefits of the exclusionary rule to sentencing, because the government is deterred enough by its inability to use the illegally obtained evidence at trial, and because the need to deter police misconduct does not outweigh the policy of providing sentencing judges with as much information as possible). The Tejada court went beyond deterrence policy in holding that sentencing judges must consider illegally obtained evidence, thus greatly increasing the defendant’s sentence mandated by the Federal Sentencing Guidelines, which bases drug sentences in part on the quantity of drugs involved. E.g., U.S. SENTENCING GUIDELINES MANUAL § 2D1.1.(c) (2000) (set-
Standing in stark contrast to this jurisprudence is the Supreme Court's case law regarding involuntary and coerced confessions. The Court has held that notions of due process forbid the government from using an involuntary confession for any purpose. Use of such a tainted confession violates due process because it immutably impairs the truth-telling function of the proceeding. A side-by-side comparison is illustrative: The exclusionary rule, a remedy not compelled by the Constitution, does not forbid the government from impeaching a defendant's testimony on cross-examination using evidence obtained in violation of the Fourth Amendment. The Supreme Court has reasoned that after the defendant "opens the door" to the use of the evidence, exclusion is not required. The policy of deterrence is satisfied by the inability

...
of the government to use the evidence until such time as the defendant opens the door by giving untruthful testimony. In this context, deterring police misconduct via complete exclusion at trial is outweighed by the costs of this remedy—in essence, the truth-telling function of a hearing that is so critical to due process is actually impaired by permitting a lie to go uncontradicted by evidence culled in violation of the Fourth Amendment.\textsuperscript{120} However, due process, a right guaranteed by the Constitution,\textsuperscript{121} provides an absolute bar\textsuperscript{122} to the use of a coerced or involuntary confession to impeach the defendant's testimony. The reviewing courts, after conducting a harmless error inquiry,\textsuperscript{123} should refuse admission of this tainted evidence without regard to the policies of deterrence.\textsuperscript{124}

Thus, with exclusion of evidence under the Fourth Amendment, the Court fashioned a rule: (1) not compelled by the text of the Amendment, but (2) that the Court makes mandatory in state and federal courts, in order (3) to protect and vindicate the principles of privacy and human dignity implicit in the text by (4) deterring future misconduct. A fair reading of this jurisprudence indicates that the judicially created Fourth Amendment exclusionary rule fits snugly within the theory of constitutional common law.

2. Bright Line Rules

Much constitutional common law is framed in terms of bright line rules that do not look to the specifics of the case to see if the

\textsuperscript{120} Havens, 446 U.S. at 627.
\textsuperscript{121} U.S. Const. amend. V; U.S. Const. amend. XIV.
\textsuperscript{122} The effectiveness of this "absolute bar" in reality is doubtful, because post-Warren era federal courts have raised the bar considerably as to what types of confessions will offend due process. Compare Spano v. New York, 360 U.S. 315 (1959) (concluding that due process was offended because the suspect's will was overcome by official pressure, fatigue, and sympathy falsely aroused in a post-indictment setting), with Purvis v. Dugger, 932 F.2d 1413, 1422 (11th Cir. 1991) (holding that petitioner's confession was voluntary in a case in which the petitioner had a history of schizophrenia, was susceptible to authority figures, and had a childlike mentality, but where there was no evidence of police coercion), and United States v. Macklin, 900 F.2d 948, 950, 951 (6th Cir. 1990) (holding that the defendants' confessions were voluntary in a case in which one defendant was "mildly mentally retarded" and the other was "borderline mentally retarded," but where there was no evidence of police coercion).
\textsuperscript{123} Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (Rehnquist, C.J., writing for the Court on this holding).
\textsuperscript{124} Mincey v. Arizona, 437 U.S. 385, 398-01 (1978) (holding that due process was violated by the use of a confession obtained when the defendant, who had arrived at the hospital almost in a coma, was in intensive care, heavily medicated, and had a breathing tube down his throat).
questioned act actually violated the Constitution,\textsuperscript{125} as opposed to the more factually intensive totality of the circumstances\textsuperscript{126} inquiries often explicit in conventional constitutional law jurisprudence.\textsuperscript{127} Consider, for example, the bright line rules crafted by the Court in \textit{Roe v. Wade}\.\textsuperscript{128} In \textit{Roe}, the Court announced that the right of privacy recognized by various guarantees in the Constitution\textsuperscript{129} is broad enough to encompass the decision of a woman whether or not to terminate her pregnancy.\textsuperscript{130} Thus, the Court declared that abortion rights were constitutionally protected.\textsuperscript{131} To facilitate what the Court later called "\textit{Roe}'s essential holding"\textsuperscript{132}—that fetal viability marked the point in the pregnancy at which the state's interest in the life of the developing fetus became sufficient to overcome the woman's liberty interest in the abortion decision—the \textit{Roe} Court crafted a set of rules framed by the trimesters of the human gestation period.\textsuperscript{133} In particular, the Court announced:

\begin{itemize}
  \item \textsuperscript{125} For a discussion of bright line rules and some examples in the Court's constitutional and statutory interpretation jurisprudence, see \textit{supra} note 24.
  \item \textsuperscript{126} When a court conducts a "totality of the circumstances" inquiry, it looks to all the events surrounding a challenged act to determine, with no single factor dispositive, whether the law has been violated. Some examples of totality of the circumstances inquiries include a court's review of: (1) confessions under the Due Process Clauses of the Fifth and Fourteenth Amendments, \textit{e.g.}, \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 226 (1973); (2) the undue burden test for abortion regulations announced in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833, 876-77 (1992); and (3) the "Rule of Reason" of antitrust law discussed \textit{supra} note 86.
  \item \textsuperscript{127} On this point, this Comment diverges markedly from Professor Monaghan's conclusion that a satisfactory distinction cannot be drawn from a bright line–totality of the circumstances dichotomy. Monaghan, \textit{supra} note 17, at 32-33.
  \item \textsuperscript{128} \textit{Roe}, 410 U.S. 113 (1973).
  \item \textsuperscript{129} \textit{Griswold v. Connecticut}, 381 U.S. 479, 484 (1965) ("[These] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)).
  \item \textsuperscript{130} \textit{Roe}, 410 U.S. at 153.
  \item \textsuperscript{131} \textit{Roe}, 410 U.S. at 170 (Stewart, J., concurring). Interestingly, the constitutional right announced in \textit{Roe} is arguably constitutional common law itself, for it shares many of the central characteristics of constitutional common law. The liberty of a woman to decide to terminate her pregnancy is not a right expressed in the Constitution, but \textit{Roe} protects a value—the zone of privacy—implicit throughout the Constitution. See text accompanying \textit{supra} note 56. However, the Court, albeit by narrow margins, has consistently held that the right announced in \textit{Roe} is indeed compelled by the Constitution and has not invited Congress and the states to experiment with the right, therefore taking the right itself outside the scope of constitutional common law. See \textit{Casey}, 505 U.S. at 846-53 (discussing in length how the abortion right is grounded in the notion of liberty vindicated by the Due Process Clause of the Fourteenth Amendment).
  \item \textsuperscript{132} \textit{Casey}, 505 U.S. at 869.
  \item \textsuperscript{133} \textit{Roe}, 410 U.S. at 164-65.
\end{itemize}
(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.  

Thus, the Court framed and imposed on the state and federal governments a "rigid" set of bright line rules, which it justified as "consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." The trimester framework, as drawn by the Roe Court, defeated a more particularized inquiry. The Court also has done just this with conventional constitutional law, but this, perhaps, it is not problematic. For example, Professor Monaghan cites the Court's specific rules enumerated in its procedural due process cases. In this line of cases, the Court designed bright line rules to relieve the reviewing court from conducting an intensive analysis to determine whether the constitutional right to a fair hearing has been violated in the case at bar. However, the Court generally lays down bright line

---

134. Id. The Court, in a joint plurality opinion, later scrapped the trimester approach of Roe and substituted a more factually intensive inquiry that looked to whether a regulation placed an undue burden on the abortion right. Casey, 505 U.S. at 872.
135. Casey, 505 U.S. at 872.
136. Roe, 410 U.S. at 165.
137. Cf. Monaghan, supra note 17, at 32 (arguing that the Miranda rules are designed to thwart a more particularized inquiry, and citing also the specific rules in the Court's procedural due process cases and the per se rules in antitrust law). For a discussion of why the Court condemns certain restraints on trade per se, see text accompanying infra note 139.
138. Monaghan, supra note 17, at 32. "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1984) (discussing what due process compels in hearings pursuant to the termination of the employment of public employees). Once the Due Process Clause of either the Fifth or the Fourteenth Amendment is deemed to apply, "the question remains what process is due." Id. The Court has called the following some of
rules when the weight of experience informs it that the violation at hand is so egregious that a case-by-case assessment of the facts invariably will reveal a violation. At the time Roe was decided, there simply could not have been a weight of experience indicating that a case-by-case assessment of the effect of a state regulation on the woman’s protected liberty interest invariably would reveal that the type of regulation under review infringed on her liberty interest. That particular liberty interest had only just been recognized in Roe.

Also, there is no indication in the opinion why the Roe Court chose not to adopt the totality of the circumstances approach that is often characteristic of conventional constitutional law. For example, the Establishment Clause of the First Amendment directs that “Congress shall pass no law respecting the establishment of religion . . . .” The Court, in framing the contours of the Clause, has indicated that the right guaranteed by the Establishment Clause lies within the realm of personal rights, and has directed that government acts that have a religious aspect must: (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive government entanglement with religion.

Instead of crafting a catchall bright line rule that will strike down any entanglement of government with religion, the Court fashioned a rule to guard

---

the necessary elements of a constitutionally adequate hearing: notice of and opportunity for a hearing, notification of the evidence and witnesses against the person, and the ability to present the individual’s side of the story. Id. at 542-47 (citing Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1276 (1975)).


Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. . . . Per se treatment is appropriate “once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.”

Id. (citations omitted).

140. U.S. Const. amend. I, cl. 1 (prohibiting also laws restricting the free exercise of religion); see also text accompanying supra note 21.

141. Compare Flast v. Cohen, 392 U.S. 83, 102-03 (1968) (laying down a two-part test to determine if an individual has standing as a taxpayer to assert Establishment Clause claims), with Rakas v. Illinois, 439 U.S. 128 (1978) (declining to extend the benefits of the exclusionary rule to the defendant, the passenger of a vehicle that was illegally searched, because his Fourth Amendment rights were not violated by the illegal search of the property of a third party, the driver of the car), and Monaghan, supra note 17, at 4 (“The Court’s decisions in the last two Terms have cut the exclusionary rule entirely free from any personal right or necessary remedy approach, thereby removing the clearest authority for imposing the rule on the states.”).

against the evils the Establishment Clause was designed to prevent, without “throwing out the baby with the bathwater” by “stilted over-reaction” to any injection of the religious into public life. Thus, the federal courts have tolerated: the national motto “In God We Trust”, the phrase “One Nation under God” in the Pledge of Allegiance; the City of New York sending public school teachers into religious schools during regular school hours to provide remedial education; laws directing that stores close on Sunday; and the use of the Twelve Steps of the Alcoholics Anonymous program in state-funded facilities.

An analysis of the Court’s jurisprudence regarding government regulation of commercial speech reveals a similar pattern. Instead of crafting bright line rules universally upholding or condemning government regulation of commercial speech, the Court established a four-part test to apply to the particular facts of the case to determine whether the expression regulated is protected by the First Amendment:

[The questioned regulation] at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive

143. Id. at 612.
146. Allegheny, 492 U.S. at 602.
150. Id. at 287-88 (stating that the mere presence of Alcoholics Anonymous (“AA”) meetings in state-funded facilities does not, by itself, offend the Constitution. The AA cases revealed that the AA program constitutes religious activity/indoctrination for the purposes of the Establishment Clause, but that it is compulsion by the state to participate in AA that offends the Constitution. E.g., Warner v. Orange County Dept' of Probation, 115 F.3d 1068, 1075 (2d Cir. 1997) (declaring that holding out AA as a condition of probation is compulsory and therefore violates the Constitution); Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996) (holding that AA cannot be a condition of a prisoner’s right to family visits).

Shortly before the printing of this issue of the Fordham Urban Law Journal, the United States Court of Appeals for the Second Circuit reversed DeStefano in part and remanded the case to the District Court. The Circuit has added a second prong to the analysis: indoctrination. DeStefano v. Emergency Hous. Group, Inc., Docket No. 99-9146, 2001 U.S. App. LEXIS 7357 (2d Cir. Apr. 20, 2001). Therefore, holding AA meetings in state-funded facilities will not offend the Constitution unless state employees compel clients to attend AA or indoctrinate them into the AA program.
answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.\textsuperscript{151}

Contrast the three-part Establishment Clause test and the four-part commercial speech test (what Monaghan would label conventional constitutional law), with the trimester framework and the \textit{Wade-Gilbert} bright line rule\textsuperscript{152} that forbids corporeal, post-indictment line-ups of criminal defendants conducted in the absence of defense counsel.\textsuperscript{153} The former sets of rules determine, through a fact-intensive analysis of the particulars of the case, if rights announced in the Constitution—religious and free speech concerns—have been violated. The latter two sets of rules protect values implicit in the text (privacy), or safeguard underlying constitutional rights (effective representation of counsel), via rules ignoring the particulars of the given case. Whether the use of a line-up in violation of the bright line \textit{Wade-Gilbert} rule actually would deny the criminal defendant effective representation of counsel at trial is not a concern of a reviewing court; the absence of counsel at the line-up itself is enough to trigger the violation.\textsuperscript{154} However, the mere presence of a regulation stifling some aspect of commercial speech may not be sufficient to render the regulation a constitutional violation; the reviewing court must look to the specifics of the regulation, its purpose, the speech regulated, and its nature.\textsuperscript{155}

Although the Court later abandoned the trimester framework of \textit{Roe} in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}\textsuperscript{156} and replaced that rule with a totality of the circumstances,

\begin{itemize}
\item \textsuperscript{152} For a fuller discussion of the \textit{Wade-Gilbert} rule and its place within Monaghan’s theory, see infra Part I.D.3.
\item \textsuperscript{153} United States v. Wade, 388 U.S. 218, 236-37 (1967) (declaring that, in order for the Sixth Amendment right to counsel to remain effective, in-court identifications of criminal defendants would not be permitted if the defendant was presented to the witness prior to trial in the absence of defense counsel); Gilbert v. California, 388 U.S. 263, 273 (1967).
\item \textsuperscript{154} Gilbert, 388 U.S. at 273.
\item \textsuperscript{155} E.g., Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 70-71 (1976) (holding that the state may legitimately use the content of pornographic films as the basis for placing them in a different classification from other motion pictures). “But few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.” \textit{Id.} at 70. \textit{Contra id.} at 85-86 (Stewart, J., dissenting) (“[T]he Court rides roughshod over cardinal principles of First Amendment law, which require that time, place and manner regulations that affect protected expression be content neutral . . . .”).
\item \textsuperscript{156} 505 U.S. 833 (1992).
\end{itemize}
case-by-case assessment,\textsuperscript{157} the \textit{Roe} approach, and rules such as the \textit{Wade-Gilbert} rules, demonstrate this second key characteristic shared by much constitutional common law—a reliance on bright line rules.

3. \textit{Legislative Power to Overrule}

Another characteristic of constitutional common law is the power of legislatures at the state and federal levels to overrule the constitutional common law of the Supreme Court by statute.\textsuperscript{158} Though the Court has not often invited the legislatures to overrule its common law touching upon the Constitution, nor even indicated which portions of its opinion are subject to legislative reversal,\textsuperscript{159} a meaningful discussion can be gleaned from the cases indicating that there is a indeed "[a] line between the basic rights authoritatively declared to inhere in the Constitution and the formulation of their specific and admittedly variable components."	extsuperscript{160}

For example, in \textit{Gilbert v. California},\textsuperscript{161} Justice Brennan, writing for the Court, declared that, in addition to forbidding in-court identifications of criminal defendants if the defendant was exhibited to the witness before trial in the absence of defense counsel,\textsuperscript{162} the Court also would prevent identifications resulting from this type of defective line-up from themselves being introduced as evidence.\textsuperscript{163} As with Fourth Amendment violations, the Court crafted a judicially mandated remedy: per se exclusion.\textsuperscript{164}

\textsuperscript{157} \textit{Id.} at 874 (replacing the rigid trimester framework with a case-by-case assessment of whether an abortion regulation places an undue burden on the abortion right).

\textsuperscript{158} Monaghan, \textit{supra} note 17, at 2.

\textsuperscript{159} \textit{Id.} at 31.

\textsuperscript{160} \textit{Id.} at 20.

\textsuperscript{161} 388 U.S. 263 (1967).

\textsuperscript{162} United States v. Wade, 388 U.S. 218 (1967) (rejecting these in-court identifications unless proven to be derived from a source independent of the line-up tainted by the absence of defense counsel).

\textsuperscript{163} \textit{Gilbert}, 388 U.S. at 273.

\textsuperscript{164} \textit{Id.} at 273. "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." \textit{Id}. Thus, the \textit{Gilbert} rule shares the other characteristics of constitutional common law. It is a bright line rule that does not provide for an analysis of whether introduction of the tainted evidence will actually deny the defendant a fair trial. In addition, the \textit{Gilbert} rule serves as a judicially created safeguard grounded in deterring violations of the underlying Sixth Amendment right. \textit{Cf. supra} Part I.D.1.

In 1972, the Supreme Court limited the scope of the \textit{Wade-Gilbert} exclusionary rule by declining to extend its reach to identification testimony based on a suspect lineup that took place before the government indicted or charged the defendant with any
Professor Monaghan dubbed this framing of a prophylactic implementing rule "a traditional judicial function," which protected the civil liberties of the accused by providing clear guidance to those in the position to violate those liberties.\textsuperscript{165} Although this function is a traditional one, formulating this rule and justifying it does not explain: (1) why this bright line rule is compulsory on the states; (2) why it must supersede a case-by-case assessment of the fairness of introducing the identification evidence at trial; or (3) why the Court "may insist upon a particular form of a rule among the several that might provide protection for the underlying constitutional right."\textsuperscript{166}

Justice Brennan's \textit{Gilbert} opinion, however, implicitly invited the federal and state legislatures to substitute their judgments for the Court's rule: "In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence."\textsuperscript{167} For those jurisdictions that took up Justice Brennan on his "offer," the question thus remained: is the legislative substitution of the Court's judgment adequate to safeguard the underlying right that so concerned the \textit{Gilbert} Court?\textsuperscript{168}

Still, it is worth questioning the very invitation itself: why defer to the legislatures regarding a rule derived from the Constitution...
when the Court itself is the "singularity appropriate institution to fashion many of the details as well as the framework of the constitutional guarantees?" The answer seems to be that the Court, in placing a gloss on the right to counsel guaranteed by the Sixth Amendment, declined to treat the Gilbert rule as a necessary dimension of the underlying constitutional right that the rule was designed to safeguard. This may be contrasted with conventional constitutional law rules such as the limitation on the use of confessions running afoul of due process, which is an exclusion even the most conservative Justices feel is necessary to prevent a constitutional violation. In its line of cases excluding involuntary confessions under due process analysis, the Court never has invited the legislatures to supersede its judgment, because the Supreme Court is the ultimate arbiter of what comports with the Constitution, due to its appellate jurisdiction over federal and state court judgments. Thus, Justice Brennan's invitation in Gilbert seemingly stands at odds with the Marbury-Cooper tradition that the Supreme Court is "supreme in the exposition of the law of the Constitution." The way to reconcile Gilbert's invitation to the legislatures with the sweeping language in the expositions on federal judicial power contained in Marbury and Cooper is to recognize Gilbert for what it is: a prophylactic and subconstitutional rule, distinct perhaps only in degree from the constitutional exegesis of Marbury and Cooper—in other words, constitutional common law.

169. Monaghan, supra note 17, at 19.
170. Cf. id. at 22 (questioning whether the Court in Miranda, another case where the Court invited the states and Congress to substitute their adequate judgments for that of the Court, had the power to impose the rule on the states "where it [was] unwilling to treat the prophylactic implementing rule as a necessary dimension of an underlying constitutional right"); see also United States v. Leon, 468 U.S. 897, 905-06 (1984) (implying that the Fourth Amendment exclusionary rule is not a necessary corollary to the Amendment itself).
171. See Dickerson, 120 S. Ct. at 2347 (Scalia, J., dissenting).
173. See cases discussed supra notes 39, 48, and 74 and accompanying text.
174. Supra Part I.A.
175. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (per curiam).
E. Constitutional Common Law: Does It Square With Federalism and Separation of Powers?

The previous discussion raised the problem of reconciling constitutional common law with the constitutional doctrines of federalism and separation of powers. In essence, how can the Court genuinely police its constitutional common law precedent while insisting in one set of cases that the federal and state courts adhere to a rule of law not mandated by the Constitution, and in others instructing that the federal courts are courts of limited jurisdiction, non-supervisory, and powerless to act outside the scope of the powers articulated in Article III?

The theory of constitutional common law, as described by Professor Monaghan, contains, within its own formulations, limitations that blunt some of the criticism that constitutional common law is extraconstitutional law that violates wholesale both federalism and separation of powers principles.

1. Separation of Powers Concerns Vis-à-Vis Congress

Constitutional common law is least troublesome when Congress is the other federal branch considered in the separation of powers inquiry. Constitutional common law, by its very nature, is subject to alteration and outright reversal by Congress, as seen explicitly in Gilbert and implicitly in United States v. Leon. Should Congress deem the Supreme Court to have overstepped its authority in crafting a rule of law not mandated by the Constitution, then Congress, pursuant to its Article I power, and fully

178. See Monaghan, supra note 17, at 34.
179. Id.
180. Gilbert v. California, 388 U.S. 263, 273 (1967) (inviting state and federal legislatures to substitute their own regulations adequate to avoid jeopardizing the right to a fair trial inherent in conducting police line-ups without the presence of defense counsel).
181. Leon, 468 U.S. at 905-06 (implying that the opinions of the Court may have implied that the Fourth Amendment exclusionary rule is a necessary corollary of, and is required by, the text, but insisting that “[t]hese implications need not detain us long”).
182. U.S. Const. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States. . . .”).
consistent with the *Marbury* tradition, can substitute its own judgment for that of the nine Justices.\(^{183}\)

2. *Separation of Powers Concerns Vis-à-Vis the Executive Branch*

The collision of constitutional common law and separation of powers principles is more troublesome, however, when the Court is imposing its will upon the federal executive branch. As Professor Monaghan noted in 1975, our federal judiciary did not inherit the English tradition of constraining the executive branch by fashioning judicial rules subject to the ultimate authority of Parliament.\(^{184}\) Indeed, an unrestrained, general judicial power to pass judgment on the exact methods the executive uses to enforce the penal laws, for example, clearly would violate separation of powers principles.\(^{185}\) However, constitutional common law still can find a valid niche in the established constitutional order. Monaghan argued that constitutional common law exists as a form of limited judicial lawmaking power designed solely to vindicate existing constitutional rights, that “[v]indication of these rights has been a traditional function of judicial review,” and that constitutional common law, by its very nature, is law that protects rights and values derived from the text.\(^{186}\) Thus, Monaghan concluded, the theory faces some criticism in this area, but this criticism is not insurmountable, because constitutional common law does not imply a “free-wheeling power” of the federal judiciary to impose its will on the executive branch.\(^{187}\)

3. *Infringement on State Sovereignty: Federalism Concerns*

Constitutional common law faces a similar criticism for extraconstitutional judicial encroachment in that it presupposes that the federal judiciary may impose its will upon matters of state concern in violation of the *Erie* Doctrine’s reigning maxim that federal law has only limited power to displace state law.\(^{188}\) Much of constitutional common law goes beyond areas of *primary* national legisla-

---

183. Monaghan, *supra* note 17, at 34.
185. Monaghan, *supra* note 17, at 34; *cf.* Dickerson v. United States, 120 S. Ct. 2326, 2348 (Scalia, J., dissenting) (decrying the Court’s displacement of how Congress chose to regulate confessions in federal court).
187. Id.
188. Id.
tive competence, where the usual question is whether the federal displacement of state law survives preemption analysis—it delves into the reserved powers of the states and assumes for the Supreme Court the power to formulate its own implementing rules without regard to whether the displaced state law was "minimally adequate."189

There are several responses to the federalism concerns, one of which argues that the Court's power to fashion rules to protect an underlying constitutional right or value is a necessary corollary of the power granted by Article III and Marbury to decide ultimately what limits the Constitution places on the state and federal governments.190 According to this argument, if the Supreme Court is the ultimate authority on what types of government acts will render a confession involuntary under due process analysis,191 then it is also the most competent institution to "formulate a coherent, cohesive substructure of implementing rules,"192 including which pretrial acts (e.g., police line-ups in the absence of defense counsel193) by law enforcement will ultimately impair an accused's right to a fair trial.

In addition, Professor Monaghan suggested that the Court crafted a large part of its constitutional common law—its Fourth, Fifth, and Sixth Amendment implementing rules governing the exclusion of defective evidence,194 confessions,195 and line-up identifications196—because the states' legislatures had failed to enact their own adequate rules regulating searches, seizures, line-ups, and interrogation.197 When Professor Monaghan wrote Constitutional Common Law, the Court had not yet confronted a specific, clearly articulated state law displacing any part of this large subset of constitutional common law.198 In essence, the Court, in the legislative

189. Id.
190. Id. at 36.
192. Monaghan, supra note 17, at 36.
197. Monaghan, supra note 17, at 36; Miranda, 384 U.S. at 467-73, 476-77; Gilbert, 388 U.S. at 273.
198. Monaghan, supra note 17, at 36.
vacuum of the 1950s and 1960s, could not be faulted for “taking the reins” in developing its rules of exclusion. In addition, states aggrieved by any overreaching aspect of the Supreme Court’s constitutional common law have a forum in which to seek redress—Congress, which retains the power to amend or reverse constitutional common law.

Finally, the federalism concerns are muted by looking to the constitutional common law itself. The United States Constitution prescribes minimum guaranteed protections—states may exceed in their own laws the scope of the protections granted, but may not provide less protection. With constitutional common law, the Court sets the floor below which the states cannot go, in the hope that the states will adopt and implement the rule—ultimately, the Court prescribes “something that works,” while the states are left with the choice to decide what fulfills that minimum “something that works” standard. The Court, in reviewing such a state adoption/implementation can then adopt any state measure that goes beyond that bare minimum standard, which is wholly consistent with that oft-repeated principle of federalism that the states serve as the national laboratories for experimenting with individual rights.

199. For a fascinating example of a court acting, though very reluctantly, in response to the perceived complete derogation of responsibility by the state legislature, see Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [Mount Laurel I] (directing that developing municipalities have a presumptive obligation, via their land use regulations, to plan and provide for the reasonable opportunity for an appropriate variety and choice of housing, including low and moderate cost housing, to meet the needs, desires, and resources of all categories of peoples who may desire to live in the municipality). When the municipalities and state legislature in New Jersey essentially ignored Mount Laurel I, the state Supreme Court, in an expansive 216 page opinion, extended the Mount Laurel obligation to all municipalities in the state and created a special court to hear Mount Laurel claims to ensure not only that its will was followed, but followed uniformly. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [Mount Laurel II].

200. Monaghan, supra note 17, at 36-37.

201. See supra Part I.D.3.

202. E.g., Commonwealth v. Matos, 672 A.2d 769, 774 n.7 (Pa. 1996).

203. Monaghan, supra note 17, at 37.

204. Id. at 37-38.

205. Arizona v. Evans, 514 U.S. 1, 8 (1995) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (urging that the Court not impose federal constitutional restraints on the efforts of a State to “serve as a laboratory”)).
a. Federalism Concerns and Field Preemption

Constitutional common law also may draw considerable federalism fire when viewed as a subconstitutional body of law force-fed to the states in areas of both state and national concern, but where there remains no substantial conflict between federal and state law.\textsuperscript{206} Fully consistent with \textit{Erie}, and limited by the scope of the grant of power in Article I, Congress may displace completely state laws in areas of \textit{truly} national concern, so that state courts are prevented from asserting jurisdiction in the field.\textsuperscript{207} Although the Supreme Court is the ultimate arbiter of what comports with the Constitution, state courts are duty-bound to faithfully interpret the Constitution\textsuperscript{208} and to devise schemes for the protection of constitutional rights.\textsuperscript{209} Therefore, this type of "field" preemption should not apply to state court remedies for constitutional violations, because of the local as well as national concerns involved.

b. Federalism Concerns and Conflict Preemption

When the Court concludes that Congress did \textit{not} intend to occupy the entire field, the propriety of compelling application of a federal law that conflicts with a state law turns on the question of whether the purpose embodied in the federal statute requires state law to be subordinated.\textsuperscript{210} When the inquiry into the statute—looking to its legislative history, structure, and the need for a uniform national solution—indicates that application of a state law would frustrate congressional intent, the Court will subordinate the state law.\textsuperscript{211} The "conflict" preempts the state law in favor of the federal law.

This background of statutory preemption analysis may create problems for constitutional common law theory because of the

\textsuperscript{206} Monaghan, \textit{supra} note 17, at 11-14.
\textsuperscript{207} \textit{E.g.}, State v. McHorse, 517 P.2d 75, 79 (N.M. Ct. App. 1973) (rejecting a criminal defendant's assertions that federal postal and controlled substances laws preempted a state prosecution on drug distribution charges).
\textsuperscript{208} \textit{E.g.}, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346 (1816) ("[S]tate judges are bound by an oath to support the constitution of the United States . . . ").
\textsuperscript{209} \textit{Cf.} Miranda v. Arizona, 384 U.S. 436, 467 (1966) (inviting the states to substitute adequate safeguards to the remedies imposed, which the Court felt were necessary to vindicate the underlying Fifth Amendment right); Monaghan, \textit{supra} note 17, at 8. ("Even if the fourth amendment imposes a general obligation on the state to deter future fourth amendment violations, there appears to be no basis for the Court to impose its judgment to void . . . an attempt by the state legislature to provide a specific system for control of state officers.").
\textsuperscript{210} Monaghan, \textit{supra} note 17, at 12 (citation omitted).
\textsuperscript{211} \textit{Id.}
aforementioned mutable nature of constitutional common law. Congress and the states have the power to modify and overrule the Court's constitutional common law\(^{212}\)—the invitations to the legislatures in *Miranda*\(^{213}\) and *Gilbert*\(^{214}\) illustrate this point. Yet ordinarily, once federal law preempts state law, whether through field preemption or conflict preemption analysis, the state law has no effect because of the primacy of federal law under the Supremacy Clause.\(^{215}\) Thus, we are left with the unresolved question of why states are free to legislate in one particular area of primary federal competence (the dictates of the Constitution), but not in others, such as copyright protection.\(^{216}\)

The sting in this criticism of constitutional common law may not be as troublesome as it may appear. The analogy to statutory preemption analysis remains flawed, because the U.S. Constitution is a document different in kind from all lesser federal law, and, therefore, the analogy can never be wholly satisfactory. Although this "apples and oranges" argument may not convince the skeptics, another argument previously mentioned might blunt further these federalism concerns with respect to state abrogation of constitutional common law. Recall that when Monaghan wrote *Constitutional Common Law*, no case had yet presented the Supreme Court with a state law wholly conflicting with the Court's Fourth, Fifth, and Sixth Amendment implementing rules, and that the Court hardly could be faulted for acting in a legislative vacuum to protect the underlying constitutional rights.\(^{217}\) Ultimately, Professor Monaghan's theory of constitutional common law squares with the

\(^{212}\) Id. at 34 (noting Congress's power to supersede the Court's judgment in this area). “[T]he revisionary role of Congress provides a forum in which state interests may be recognized and the Court reversed . . .” Id. at 36.

\(^{213}\) For a fuller discussion of *Miranda v. Arizona* and Chief Justice Warren's invitation to the states and Congress to legislate in the area of police custodial interrogation, see supra Part II.A.

\(^{214}\) For a fuller discussion of *Gilbert*, its exclusionary rule, and Justice Brennan's implicit invitation to the states and Congress to regulate police lineup identifications, see supra Part I.D.3.

\(^{215}\) See, e.g., Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 260 (1985) (“Even if Congress has not expressly pre-empted state law in a given area, a state statute may nevertheless be invalid under the Supremacy Clause if it conflicts with federal law or ‘stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.’”) (citation omitted).

\(^{216}\) E.g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (“Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the [Copyright] Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation.”) (citing 17 U.S.C. § 301(a) (1994)).

\(^{217}\) See supra notes 198-199 and accompanying text.
doctrine of federalism because, if presented with a state court decision substituting substantial monetary compensation, for example, for the exclusionary rule the Court created to remedy a Fourth Amendment violation, the Court likely would uphold the state court judgment, or be forced to anchor exclusion closer to the Fourth Amendment itself. Either result is fully consistent with pre-emption analysis's refusal to displace state law that does not conflict with federal law.

II. You have the Right to Remain of an Indeterminate Constitutional Status: Miranda v. Arizona and Its Progeny

In 1966, Chief Justice Warren announced for the Court an opinion he deemed as going "to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the federal Constitution in prosecuting individuals for crime." Specifically, the Miranda Court addressed the propriety of admitting confessions given by criminal suspects within the confines of the police station house in light of the Fifth Amendment, which directs that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." 218

A. Miranda v. Arizona

Before Miranda, the Court had used the Sixth Amendment right to counsel as a basis for excluding tainted confessions, but the Sixth Amendment, by its terms, applies to criminal prosecutions, leaving unclear whether the Constitution regulated the investigational stage, during which most confessions actually occur. The Miranda Court was animated by the concern that the admission of a station house confession in court was tantamount to compelling a defendant to testify against himself.

---

218. Cf. Monaghan, supra note 17, at 6-8 (delivering a hypothetical opinion of a state high court refusing to exclude evidence because of an adequate alternative, and setting forth the author's doubts as to whether the Supreme Court on review could insist on exclusion). Contra Dickerson v. United States, 120 S. Ct. 2326 (2000) (striking down a federal law that attempted to supersede an exclusionary rule of the Court).


220. U.S. Const. amend. V.


222. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

223. Saltzburg & Capra, supra note 24, at 527.
1. A Simple Formula: Custody + Interrogation = Coercion

At the outset, the Miranda Court established precisely what it was attempting to regulate: “incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.”\(^{224}\)

To the Court, interrogations conducted in the privacy of the interrogation room, using psychological pressures like confidence of the suspect’s guilt\(^ {225}\) or outright hostility,\(^{226}\) exacted a heavy toll on individual liberties,\(^{227}\) thus persuading the Court to declare that the combination of police custody and interrogation is presumptively compulsive.\(^{228}\) Absent adequate protective devices to dispel the compulsion inherent in the custodial surrounding of the police station house, “no statement obtained from the defendant can truly be the product of his free choice,”\(^{229}\) from which the Court reasoned that such confessions must be per se inadmissible.

2. The “Miranda Rights”

Having declared these rules of per se coercion and exclusion, the Court then set forth the famous four warnings law enforcement officials must administer to overcome this newly established presumption. First, the suspect has to be informed unequivocally that he has a right to remain silent.\(^ {230}\) The Court established this warning as “an absolute prerequisite in overcoming the inherent pressures” of the custodial interrogation.\(^ {231}\) This first warning must be accompanied by a second warning that anything the suspect then chooses to say can be used against him in court.\(^ {232}\) Third, the Court imposed a warning regarding the right to have counsel present during the interrogation.\(^ {233}\) The Chief Justice insisted that the presence of counsel is indispensable to the protection of the Fifth Amendment privilege announced by the Court,\(^ {234}\) and therefore deemed both the giving of the warning and the knowing and effec-

\(^{224}\) Miranda, 384 U.S. at 445.
\(^{225}\) Id. at 450.
\(^{226}\) Id. at 452.
\(^{227}\) Id. at 455.
\(^{228}\) Id. at 461 (“An individual . . . cannot be otherwise than under compulsion to speak.”) (emphasis added).
\(^{229}\) Id. at 458.
\(^{230}\) Id. at 467-68.
\(^{231}\) Id. at 468.
\(^{232}\) Id. at 469.
\(^{233}\) Id.
\(^{234}\) Id.
tive waiver of the right contained therein absolute prerequisites to
the admissibility of the station house confession.\textsuperscript{235} Finally, the \textit{Miranda} Court imposed the rule that suspects have to be warned that
if they are indigent, counsel will be appointed for them.\textsuperscript{236}

However, in introducing the four warnings, the Chief Justice set
forth one of the more troubling parts of the opinion. After declar-
ing adequate protective devices an absolute necessity for overcom-
ing the presumption of compulsion, Warren continued: "It is
impossible for us to foresee the potential alternatives for protecting
the privilege which might be devised by Congress and the States in
the exercise of their creative rule-making capacities."\textsuperscript{237} Thus, \textit{Mi-
ran da} did not go so far as to preclude alternatives to the safeguards
then declared by the Court. In fact, the majority \textit{invited} intervention
by the states and Congress. However, until such time, law en-
forcement at both the state and federal levels had to comply with
the four warnings requirement or face per se exclusion of any sub-
sequent statement:

\begin{quote}
Our decision in no way creates a constitutional straitjacket which
will handicap sound efforts at reform, nor 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 en-
forcement of our criminal laws.\textsuperscript{238}
\end{quote}

However equivocal, this hedging of the constitutional nature of
the \textit{Miranda} warnings is of great import, for subsequent Courts
under Chief Justices Burger and Rehnquist often referred to this
very passage in their efforts to limit the breadth of the \textit{Miranda}
decision.\textsuperscript{239}

\textbf{B. Post-\textit{Miranda}: Backtracking on the Implications of the
Four Warnings Requirement}

The Supreme Court did not wait long before placing real limits
on the holding of \textit{Miranda}.

\textsuperscript{235} \textit{Id.} at 471.
\textsuperscript{236} \textit{Id.} at 472 ("The financial ability of the individual has no relationship to the
scope of the rights involved here. The privilege against self-incrimination secured by
the Constitution applies to all individuals.").
\textsuperscript{237} \textit{Id.} at 467.
\textsuperscript{238} \textit{Id.} (emphasis added).
\textsuperscript{239} \textit{E.g.}, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (citation omitted) ("The
suggested safeguards were not intended to 'create a constitutional straitjacket' . . . but
rather to provide practical reinforcement for the right against compulsory self-
incrimination.").
1. *Harris v. New York*\textsuperscript{240}

In *Harris v. New York*, Chief Justice Burger, writing for the Court, held that a confession obtained in violation of *Miranda*’s technical requirements could be used to impeach a defendant’s direct testimony.\textsuperscript{241} The *Harris* majority, in declaring that the *Miranda* safeguards are not required by the Constitution, stated:

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court’s holding and cannot be regarded as controlling . . . . Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.\textsuperscript{242}

Recall that around this same time in the early 1970s, the Supreme Court, in decisions such as *Peltier*\textsuperscript{243} and *Calandra*,\textsuperscript{244} began to rid the Fourth Amendment exclusionary rule of the personal rights approach underlying that rule in cases like *Mapp v. Ohio*.\textsuperscript{245} *Harris* shows the parallel track the Court started on regarding a personal rights approach to the *Miranda* exclusionary rule. Far from indicating an absolute bar to impeachment—as the Court later imposed for the use of confessions running afoul of the due process\textsuperscript{246}—the *Harris* Court began reining in considerably the scope of the *Miranda* exclusionary rule by shifting the focus from vindicating the rights of the criminal suspect to deterring police misconduct.\textsuperscript{247}

By permitting the admission of a *Miranda*-defective confession to impeach, *Harris* placed criminal defendants in a unenviable position: not testifying at all (and risking any negative inferences the jury may draw from this) or testifying and facing guaranteed impeachment with a *Miranda*-defective confession. Despite an instruction to the contrary, juries often use evidence offered to impeach as substantive proof beyond the impeachment value of the

\textsuperscript{240} 401 U.S. 222 (1971).
\textsuperscript{241} *Id.* at 226.
\textsuperscript{242} *Id.* at 224-25 (emphasis added).
\textsuperscript{243} 422 U.S. 531 (1975).
\textsuperscript{244} 414 U.S. 338 (1974).
\textsuperscript{245} 367 U.S. 643 (1961).
\textsuperscript{246} Mincey v. Arizona, 437 U.S. 385 (1978).
\textsuperscript{247} *Harris*, 401 U.S. at 225.
evidence.\textsuperscript{248} Instructing jurors to ignore the substantive value of the evidence merely draws attention to the evidence and keeps it in their minds, like "the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant."\textsuperscript{249} However, by beginning to focus its \textit{Miranda} analysis on policies of deterrence, the Court simply did not implicate the Constitution in the defendant's difficult choice.

Although the \textit{Miranda} decision may have left the rights therein enumerated in constitutional limbo, \textit{Harris} shows the Court shifting \textit{Miranda} down the spectrum from a necessary corollary to the underlying Fifth Amendment right to more of a prophylactic safeguard of that underlying right. Later Courts would rely heavily on \textit{Harris}'s reading of \textit{Miranda} to further constrain the scope of the remedial power announced in Chief Justice Warren's opinion.

2. \textit{Michigan v. Tucker}\textsuperscript{250}

Three years after \textit{Harris}, in \textit{Michigan v. Tucker}, the Burger Court indicated it intended to remain on the course set by \textit{Harris}—narrowing the scope of just what \textit{Miranda} protected and when. In \textit{Tucker}, the Court addressed the question of whether to admit evidence obtained by the government as a result of a \textit{Miranda}-defective confession.\textsuperscript{251} The \textit{Tucker} Court held that the then-familiar \textit{Miranda} directed that the defendant's confession itself must be excluded from the prosecution's case-in-chief, but that \textit{Miranda} would not necessarily act as a constitutional bar to the admission of the evidence obtained as the fruit of the defective confession.\textsuperscript{252}

Justice Rehnquist, writing for the Court, continued the hedging of \textit{Miranda} started in \textit{Harris}, and greatly undercut the constitutional status of the \textit{Miranda} rights by declaring them "not themselves rights protected by the Constitution."\textsuperscript{253} Instead, the warnings served as procedural safeguards, certain measures law enforcement should follow to insure adequate protection for the underlying right against compulsory self-incrimination.\textsuperscript{254} The \textit{Tucker}

\textsuperscript{248} Courts will often instruct jurors that they are limited to using the evidence only for the purpose for which it was offered—in \textit{Harris}'s case, to impeach his direct testimony. However, critics have charged that these limiting instructions only draw attention to the evidence. Cf. United States v. Antonelli Fireworks Co., 155 F.2d 631, 656 (2d Cir. 1946) (Frank, J., dissenting).

\textsuperscript{249} \textit{Id.}

\textsuperscript{250} 417 U.S. 433 (1974).

\textsuperscript{251} \textit{Id.} at 435.

\textsuperscript{252} \textit{Id.} at 452.

\textsuperscript{253} \textit{Id.} at 444.

\textsuperscript{254} \textit{Id.}
Court, relying on *Miranda*'s invitation to Congress and the states to substitute adequate alternatives for the warnings, declared that failure to give the four warnings did not alone violate the Constitution, but only departed from the Court's prophylactic standards. Justice Rehnquist's opinion grounded exclusion firmly in the policy of deterrence—balancing the need to deter egregious police misconduct with the need to have criminal adjudication based on all the relevant evidence. As it had concluded similarly in *Harris*, the Tucker Court held that sufficient deterrence flowed from the exclusion of the confession itself, with only minimal additional deterrence resulting from exclusion of the fruits of Tucker's confession.

3. New York v. Quarles

The Court continued its equivocation of the constitutional status of *Miranda* by fashioning another exception to the exclusion of unwarned confessions in *New York v. Quarles*. The Quarles Court, building on the foundations laid in *Harris* and *Tucker* that a violation of the *Miranda* holding did not necessarily equal a violation of the Constitution, declared a "'public safety' exception" to administering the *Miranda* warnings. "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." The Court thus extended the deterrence policies discussed in *Harris* and *Tucker*.

Both of those earlier cases stand for the proposition that failure to give the warnings itself is a "wrong," albeit not one rising to the level of a constitutional violation, but still a wrong that demands deterrence, which flows from the exclusion of the confession itself from the government's case-in-chief. *Quarles* went beyond this reasoning in holding that the very failure to provide the warnings itself may not even amount to a wrong if the exception applied. Thus, the Court again subverted the famous gloss on the privilege

255. Id. at 445-46.
256. Id.
257. Id. at 447-48.
258. Id. at 448.
260. See id. at 654.
261. Id. at 655-56.
262. Id. at 657.
263. For a fuller discussion of *Harris* and *Tucker*, see supra Parts II.B.1-2.
of self-incrimination to the needs of ordered society, which the Court previously had stated it would not do with truly involuntary confessions, the use of which are unconstitutional as violative of due process.264

4. Oregon v. Elstad265

In the later Burger years, the Court demonstrated little willingness to reverse its earlier reining in of Miranda, using broad language focusing on the mutable nature of the Miranda protections and the case's uncertain root in the Constitution. In Oregon v. Elstad, the Court extended its analysis in Tucker regarding the fruits of a Miranda-defective confession.266

Elstad addressed the admissibility of a confession that complied with Miranda's technical requirements but was one that resulted directly from a Miranda-defective confession.267 Rejecting the notion that the second, Miranda-compliant confession was tainted because "the cat was out of the bag,"268 the Elstad Court continued the undermining of the constitutional status of Miranda that Harris began in the early Burger years by succinctly stating, "Respondent's contention . . . assumes the existence of a constitutional violation."269 Justice O'Connor's opinion for the Court emphasized the procedural (as opposed to substantive) nature of the Miranda safeguards, and reasoned that since Miranda-defective confessions are only compulsory due to Miranda's per se presumption regarding custodial interrogation,270 some confessions obtained in violation of the prophylactic safeguards may be indeed voluntary, a product of free will.271 This, O'Connor reasoned, may provide a remedy for a defendant who has not suffered the very wrong the Fifth Amendment sought to prevent: compelled self-incrimination.272 Thus, the exclusionary rule formulated in Miranda "sweeps

264. Mincey v. Arizona, 437 U.S. 385, 398 (1978) (distinguishing Harris v. New York, 401 U.S. 222 (1971)). A concern that animated the Harris Court was that forbidding the use of Miranda-defective confessions to impeach a defendant's direct testimony on cross-examination would constitute an open invitation to perjury on a massive scale. Harris, 401 U.S. at 225-26.
266. Id.
267. Id.
268. Id. at 304.
269. Id. at 305.
270. Miranda v. Arizona, 384 U.S. 436, 461 (1966) ("An individual . . . cannot be otherwise than under compulsion to speak.").
272. Id.
more broadly than the Fifth Amendment itself," due to this rule mandating exclusion in the absence of a constitutional violation.273 Detached from a seeming constitutional mandate, the Court then proceeded to apply the balancing test discussed in Tucker, reaching the by-now familiar conclusion that the policy of deterrence that exclusion serves is not advanced so significantly by exclusion of the second confession to warrant extension of Miranda's exclusionary rule to the fruits of the first, defective confession.274

C. Miranda v. Arizona: If It Looks Like Constitutional
Common Law and Walks Like Constitutional
Common Law, Then . . .

A review of the factors delineating the differences between constitutional common law and conventional constitutional law reveals that the Miranda holding is paradigmatic constitutional common law.275 In fact, much of the original article, Constitutional Common Law, rested on this very conclusion.276 Although Professor Monaghan devised his theory before the Court decided both Elstad and Quarles, a review of Miranda against the background of all the cases constraining the scope of its protections vindicates both: (1) Monaghan's conclusion that Miranda announced a set of subconstitutional rules subject to alteration by Congress and the states; and (2) the conclusion that such a theory is necessary to explain adequately many modern decisions of the Supreme Court.

First, the Miranda warnings, like the Fourth Amendment exclusionary rule discussed supra, are not constitutionally compelled. The Miranda majority itself admitted this when it noted that the Justices were "in no way creat[ing] a constitutional straitjacket."277 In turn, the Miranda progeny consistently downshifted the Miranda rights into the realm of constitutional common law, calling the Miranda rights both "not . . . rights protected by the Constitution,"278 and mere "procedural safeguards,"279 in addition to noting that failure to administer the warnings did not necessarily violate

273. Id. at 306.
274. Id. at 318.
275. Supra Part I.D.
276. E.g., Monaghan, supra note 17, at 9 n.45 ("But even if the rules are so conceptualized, consideration should be given to the source of federal judicial authority to impose them.").
279. Tucker, 417 U.S. at 444.
the Constitution. Application of the *Miranda* exclusionary rule, like the Fourth Amendment exclusionary rule, devolved from a vindicator of personal rights to a judicially created remedy, the use of which turns *solely* on whether application in that category (e.g., impeachment of testimony) would further the goal of deterring police misconduct.

Second, the *Miranda* rules, like other examples constitutional common law, are bright line rules. As a matter of law, confessions scrutinized under *Miranda* are deemed compelled in the absence of the prescribed warnings. Consider the arrest of Sol Wachtler, the former Chief Judge of the New York Court of Appeals, which illustrates the reach of these bright line rules. Chief Judge Wachtler, who participated in the review of well over 100 cases involving *Miranda* claims during his tenure on New York State’s highest court, nonetheless was read the *Miranda* rights upon his arrest for blackmailing a former lover. Wachtler undoubtedly understood, as much as any arrestee before or since, the extent to which the Constitution afforded him protection. Yet *Miranda* directs that even Sol Wachtlers must be given the famous warnings. The *Miranda* decision, intended to thwart more particularized inquiry, did not leave room for analysis of whether, in the particular situation, the will of the individual, from the most powerful judge in New York State to the street drug peddler, was overborne.

---


283. Wachtler sat on the New York Court of Appeals from his election to that court in 1972, and elevation to the position of Chief Judge in 1985, until his resignation in 1992. Diana Jean Schemo, *A Prison Term of 15 Months For Wachtler*, N.Y. TIMES, Sept. 10, 1993, at B1. A review of the Shepard's© citation system reveals that the New York Court of Appeals cited *Miranda* 150 times during his twenty year tenure—interestingly, the U.S. Supreme Court heard far fewer *Miranda* cases than that number in the 34 years since the *Miranda* decision. Cf. Dickerson v. United States, 120 S. Ct. 2326, 2347 (2000) (Scalia, J., dissenting) (denying that the *Miranda* bright line rules have led to judicial efficiency by noting that the Court has had to hear more cases under *Miranda* than it ever had to hear using the totality of the circumstances test to analyze confessions under the Due Process Clause).


286. *See Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) (arguing that in a given case, a confession that is *de jure* involuntary under *Miranda* may, in fact, be voluntary in
In addition, like other species of constitutional common law, the 
*Miranda* rules were formulated subject to revision, amendment, or 
outright abrogation by the legislatures. In fact, much of the lan-
guage previously analyzed in the discussion of *Gilbert v. Califor-
nia* closely tracks the language of *Miranda*, decided one year 
prior. Both cases set a floor below which the states and Congress 
could not go, invited the legislatures to legislate in the area, and 
adopted a per se rule to govern the issues of admissibility 
until such time as the legislatures acted to protect the underlying 
rights to a fair trial and against self-incrimination.

The *Miranda* jurisprudence demonstrates that the warnings 
share the factors identified by Professor Monaghan as indicative of 
constitutional common law. Therefore, *Miranda* should be recog-
nized for what it is: a subconstitutional set of remedial rules not 
mandated by the Fifth Amendment, but created to safeguard the 
underlying right against self-incrimination, in other words, constit-
tutional common law.


Just two years after the divided Warren Court decided *Miranda 
v. Arizona*, the Senate Judiciary Committee sent to the Senate 
floor a bill denying all federal courts of the United States “jurisdic-
tion to review or to reverse, vacate, modify, or disturb in any way, a 
ruling of any trial court of any State in any criminal prosecution 
admitting in evidence as voluntarily made an admission or confes-
sion of an accused.” If passed as written, the bill would have 
gutted the protections the Court prescribed in *Miranda*. Though 
the bill died on the Senate floor, the law passed by Congress and 
signed by President Johnson, the Omnibus Crime Control and Safe 
Streets Act of 1968 (the “Crime Control Act”), contained a pro-
vision that addressed many of the Senate Judiciary Committee’s 

---

that the individual’s will may not have been overborne by the pressures of the sta-
tionhouse, the situation *Miranda* sought to avoid).

273 (1967).
291. S. 1194, 90th Cong. § 2 (1968), *reprinted in S. REP. No. 90-1097, at 54 (1968), 
available in 1968 WL 4956 [hereinafter SENATE REPORT].
concerns. In particular, this provision of the Crime Control Act, codified as 18 U.S.C. § 3501, stated that:

In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. . . . If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence.293

A subsequent subsection of § 3501 provided the factors the reviewing court should take into consideration when analyzing the circumstances surrounding the suspect’s confession. Section 3501(b) directed the trial court to consider the time lapse between the arrest and the arraignment; whether the suspect knew the nature of the crime charged; whether he was advised of his right to stay silent and that any statements he made could be used in court; whether law enforcement advised the suspect of his right to assistance of counsel; and whether the suspect in fact has assistance of counsel during his interrogation.294

A cursory glance at the statute will reveal that § 3501 is visibly at odds with large portions of the Miranda decision. Miranda presumes that custodial interrogation is coercive,295 whereas § 3501 instead looks to the totality of the circumstances. Miranda clearly articulates that two of its requirements—the right to remain silent, and the right to, and knowing and effective waiver of, counsel—are absolute prerequisites to overcoming the presumption of compulsion,296 whereas § 3501 lists them as only non-dispositive factors in the overall analysis.297

294. Id. § 3501(b). In particular, § 3501(b) provides:
   The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him; (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
   Id. § 3501(b).
Congress clearly knew of *Miranda* when it passed the Crime Control Act. The Senate Judiciary Committee drafted the bill to strip federal courts of jurisdiction to review state court adjudication of the admissibility of confessions with *Miranda* directly in its sights.\(^{298}\) In passing § 3501, Congress intended to abrogate the *Miranda* requirements and reestablish voluntariness as the standard governing the admission of confessions.\(^{299}\) Both the Court of Appeals and the Supreme Court in *Dickerson* acknowledged this.\(^{300}\)

However, as indicated by the Fourth Circuit's affirmative finding,\(^ {301}\) and by the fact that *Miranda* has had such a rich jurisprudence under the Burger and Rehnquist Courts, neither the Justice Department nor the Supreme Court ever seriously advocated § 3501 as the authority controlling the admissibility of confessions in federal courts.\(^ {302}\) Indeed, the Justice Department effectively blocked the individual U.S. Attorney Offices from arguing § 3501 in opposition to motions to suppress,\(^ {303}\) and former Attorney General Reno even praised the *Miranda* requirements during her tenure as the nation's top law enforcer.\(^ {304}\) In addition, a survey of state law indicates that the states hardly have embraced *Miranda*'s invitation to fashion alternate schemes for protecting the underlying Fifth Amendment right.\(^ {305}\) Thus, § 3501 remained the legislative response to *Miranda*, stifled in application for thirty years until the Fourth Circuit's decision in *United States v. Dickerson*.\(^ {306}\)

\(^{298}\) *Senate Report*, *supra* note 291, at 53.

\(^{299}\) *Saltzburg & Capra*, *supra* note 24, at 545; *Senate Report*, *supra* note 291, at 54.

\(^{300}\) *United States v. Dickerson*, 166 F.3d 667, 671 (4th Cir. 1999) (stating that Congress enacted § 3501 "with the express purpose" of overruling *Miranda*); *Dickerson v. United States*, 120 S. Ct. 2326, 2332 (2000) ("[C]ongress intended by its enactment to overrule *Miranda*.").

\(^{301}\) *Dickerson*, 166 F.3d at 695.


\(^{303}\) See *supra* text accompanying note 12.

\(^{304}\) Press Release, U.S. Dep't of Justice, Statement by Attorney General Janet Reno on Today's Decision Upholding *Miranda* Ruling (June 26, 2000) ("I am so pleased that the Supreme Court has reaffirmed a longstanding and workable practice of police officers advising those they arrest of their right to remain silent.").


\(^{306}\) *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).
III. The Citadel Under Siege: *Dickerson* and the Challenge to *Miranda*

When the Supreme Court granted certiorari to review the Fourth Circuit's conclusion that § 3501, and not *Miranda*, governed the admissibility of confessions in federal court, criminal justice scholars suggested the Court might decide the case based on the narrow issue of whether the statute comported with *Miranda*'s invitation to the legislatures to devise alternative devices at least as protective as the warnings imposed in the legislative vacuum of 1966. However, in a 7-2 majority (comprised of several Justices previously on the record declaring or joining opinions stating that *Miranda* was not a constitutional decision, or that the bright line requirements were not compelled by the Constitution), the Court held that Congress lacked even the power to pass 18 U.S.C. § 3501, because *Miranda* announced a constitutional rule inviolable under *Marbury*.

After acknowledging that Congress retains the power to modify or supersede judicially created rules of evidence or procedure not required by the Constitution, Chief Justice Rehnquist, writing for the Court, stated that the "but" of that power is that Congress cannot legislatively supersede the constitutional decisions of the Court. Thus, *Dickerson* recognized that the fate of *Miranda*, in fact, turned on the broader issue of whether the *Miranda* Court announced a constitutional rule or was "merely exerc[i]sing[ing] its supervisory authority to regulate evidence in the absence of congressional direction."

---


308. Telephone Interview with Daniel J. Capra, Reed Professor of Law, Fordham University School of Law (Nov. 20, 2000) (confirming remarks made by Professor Capra just before the Supreme Court heard oral arguments in *Dickerson*). Professor Capra is also co-author of the book cited supra note 24.


311. *Id.* at 2332.

312. Recall that Chief Justice Rehnquist wrote for the majority in both *Michigan* v. *Tucker* and *New York* v. *Quarles*, and joined in other opinions seeking to place limits on *Miranda*. See, e.g., case cited infra note 370 and accompanying text.

313. *Dickerson*, 120 S. Ct. at 2332.

314. *Id.* at 2333.
Turning to that issue, the Court first addressed the *Miranda* progeny\(^{315}\) that the Fourth Circuit relied heavily upon for its conclusion that *Miranda* was not a constitutional decision and thus subject to congressional revision.\(^{316}\) The Court admitted that it had previously characterized the *Miranda* rules as prophylactic,\(^{317}\) “not themselves rights protected by the Constitution,”\(^{318}\) and “not Constitutional in character,”\(^{319}\) but nonetheless concluded that the Fourth Circuit erred in its holding.\(^{320}\) The Court concluded that it had consistently applied *Miranda* to the states—indeed, the *Miranda* Court returned Ernesto Miranda’s case to the state court to apply the rule on remand.\(^{321}\) The Chief Justice argued that, given the Supreme Court’s lack of supervisory power over state courts,\(^{322}\) “except when necessary to assure compliance with the dictates of the Federal Constitution,”\(^{323}\) consistent imposition of the *Miranda* requirements on the states, along with decisions of the Court allowing habeas corpus review of *Miranda* claims, “obviously assumes that *Miranda* is of constitutional origin.”\(^{324}\)

Although the Chief Justice engages in classic circular reasoning on this point,\(^{325}\) he does contend that the majority opinion in *Miranda* is “replete with statements indicating that the majority

\(^{315}\) *See supra* Part II.B.1-4.

\(^{316}\) *Dickerson*, 120 S. Ct. at 2333.

\(^{317}\) *Id.* (citing New York v. Quarles, 467 U.S. 649, 653 (1984)).

\(^{318}\) *Dickerson*, 120 S. Ct. at 2333 (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

\(^{319}\) *Dickerson*, 120 S. Ct. at 2333 n.2 (citing Winthrow v. Williams, 507 U.S. 680, 690-91 (1993)).

\(^{320}\) *Dickerson*, 120 S. Ct. at 2333.

\(^{321}\) *Id.*


\(^{324}\) *Dickerson*, 120 S. Ct. at 2333 n.3 (noting that habeas review is limited to violations of federal law, and that since *Miranda* was not based on federal laws or treaties, it must have been based on the Constitution).

\(^{325}\) Circular reasoning, also known as “begging the question,” is a logical fallacy and is characterized by assuming the truth of the conclusion as a basis for drawing the conclusion. *E.g.*, DOUGLAS WALTON, ARGUMENTS FROM IGNORANCE 230-31 (1996). The arguer “is ‘begging the question’ in the sense that he is begging the respondent to accept, as a presumption (i.e., without proof), a proposition that he is obliged to prove.” *Id.* at 230. In essence, the *Dickerson* majority argues: *Miranda is constitutional law. Why? Because we have always applied it to the states. Why have we always applied it to the states? Because it is constitutional law. The fallacy exists because “the arguer asks to be granted, without having to prove it, a proposition he is supposed to be proving.” *Id.* at 231. Recall that *Marbury v. Madison* has also been criticized as being based on circular reasoning. *See* text accompanying *supra* note 45.

In addition, *Dickerson*’s logically flawed argument that *Miranda* announced a constitutional decision conflicts directly with the proposition—that *Miranda* did not an-
thought it was announcing a constitutional rule.” He points to the *Miranda* Court’s ultimate conclusion that the four unwarned confessions it reviewed “did not meet constitutional standards for protection of the privilege.” However, *Miranda*’s creation of a rule to protect an underlying right does not mean that the rule itself is of the same inviolable nature as the right it protects. Footnote five in *Dickerson* cites many of the cases that have referred to *Miranda*’s “constitutional underpinnings,” its role as a “safeguard” of a “fundamental trial right,” and its resting on the Fifth Amendment privilege itself. However, the Fourth Amendment exclusionary rule has constitutional underpinnings in its protection of the underlying Fourth Amendment rights against unreasonable searches and seizures. Yet it remains not a “necessary corollary of the Fourth Amendment” and not mandated by the Constitution itself, thus undercutting, by analogy, the strength of the majority’s analysis.

Chief Justice Rehnquist’s opinion then turns to the perceived waxing and waning of the *Miranda* protections via the expansions and exceptions to the *Miranda* rules created by later decisions. These cases, the Chief Justice urges, “illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable.”

That said, nor does this jurisprudence stand fully for the proposition that *Miranda* did announce a constitutional decision of the Court, and this is precisely the conclusion the Chief Justice must establish affirmatively in order to strike down § 3501 properly in accordance with the *Marbury* tradition. Arguing that the sum-total

---

326. *Dickerson*, 120 S. Ct. at 2334.
327. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 491 (1966)).
331. *Doyle v. Ohio*, 426 U.S. 610 (1976) (declaring that due process is offended by the government using the very invocation of the *Miranda* right to remain silent to impeach the testimony of the criminal defendant); *Arizona v. Roberson*, 486 U.S. 675 (1988) (holding that once the suspect invokes the right to counsel, police may not initiate an interrogation even about a crime different from that for which the suspect was arrested).
332. *See* cases discussed supra Part II.B.1-4.
of the *Miranda* jurisprudence does *not* indicate that *Miranda* did *not* announce a constitutional decision of the Court fails to bolster the proposition that *Miranda* *did* announce a constitutional decision of the Court.\(^3\) In other words, saying that your opponents are not correct does not mean that you are.

Lastly, the *Dickerson* majority grounds its decision to uphold *Miranda* in the policy of stare decisis. As it had stated in the past, the Court declared that "stare decisis is not an inexorable command,"\(^3\) adding also that this is especially true with regard to the constitutional decisions of the Court,\(^3\) for absent constitutional amendment or outright reversal by the Court, constitutional decisions are immutable.\(^3\) Throughout its stare decisis jurisprudence, the Court has identified five policies/factors used in the balancing test that governs the Court's decision whether to follow its own precedent.\(^3\) The Court generally will ask:

1. Has the past decision or line of decisions proven workable or unworkable?\(^3\)
2. Will overruling the questioned precedent frustrate reasonable reliance interests, both social and commercial?\(^3\)
3. Have subsequent developments in the Court's jurisprudence eroded the doctrinal underpinnings of the questioned precedent?\(^3\)

\(^3\) *Dickerson*, 120 S. Ct. at 2333 ("This case therefore turns on whether the *Miranda* Court announced a constitutional rule . . . .".


\(^3\) *Id.* at 2336.


\(^3\) *Paulsen*, *supra* note 31, at 1551; accord John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Fidelity*, 104 DICK. L. REV 1, 77-78 (citing the criteria discussed in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992) (joint plurality opinion) and calling them "suspiciously flexible" and at times "circular").

\(^3\) *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (declaring unworkable, and therefore overruling, the rule announced in *National League of Cities v. Usery*, 426 U.S. 833 (1976)); see also *Dickerson*, 120 S. Ct. at 2336 (noting how workable the *Miranda* rules are in practice).

\(^3\) *E.g.*, *United States v. Title Ins. & Trust*, 265 U.S. 472, 486 (1924), *cited by Casey*, 505 U.S. at 854-55. "The Constitution serves human values, and while the effects of reliance on *Roe* cannot exactly be measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." *Casey*, 505 U.S. at 856.

\(^3\) *E.g.*, *Agostini v. Felton*, 521 U.S. 203, 208 (1997) (stating that the rule established in *Aguilar v. Felton*, 473 U.S. 402 (1985) was inconsistent with intervening Establishment Clause jurisprudence and therefore overruled); *Casey*, 505 U.S. at 860.
(4) Have the facts or assumptions underlying the precedent changed?\(^{341}\)

(5) Will overturning the precedent undermine the American public's impressions of judicial integrity and political independence?\(^{342}\)

When the Court in *Planned Parenthood v. Casey*\(^ {343}\) addressed whether *Roe v. Wade*\(^ {344}\) should be upheld on stare decisis grounds, the Justices writing the joint plurality opinion used these factors to analyze *Roe* and its progeny extensively, ultimately filling more than fifteen pages of the *United States Reports* with reasons for retaining "the essential holding" of *Roe*.\(^ {345}\) The *Dickerson* Court devotes fewer than three pages to its stare decisis discussion.\(^ {346}\) Although pithy stare decisis analysis is the rule rather than the exception, because the *Miranda* jurisprudence left *Miranda* with a shaky constitutional foundation, and therefore resting largely on stare decisis, the *Dickerson* opinion deserved a *Casey*-style intensive analysis. That said, the stare decisis analysis the *Dickerson* Court does offer remains unconvincing.

At the outset of its stare decisis analysis, the *Dickerson* Court urges that the *Miranda* warnings have become part of our national culture and embedded in routine police practice.\(^ {347}\) However, the

\(^{341}\) [No erosion of principle going to liberty or personal autonomy has left *Roe*’s central holding a doctrinal remnant.].

\(^{342}\) E.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (Warren, C.J.) (rebutting the "separate but equal rule" announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that upheld legally proscribed racial segregation). "[T]he *Plessy* Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required." *Casey*, 505 U.S. at 863.

\(^{343}\) E.g., *Casey*, 505 U.S. at 864-67. "The legitimacy of the Court would fade with the frequency of its vacillation." *Id.* at 866. *Contra Dickerson*, 120 S. Ct. at 2347 (Scalia, J., dissenting) ("I see little harm in admitting that we made a mistake.").


\(^{345}\) 410 U.S. 113 (1973).

\(^{346}\) 3 Three pages in the *United States Reports* is the author’s estimation based on the length of the discussion as published in the *Supreme Court Reporter*. *Dickerson v. United States* will be published in volume 530 of the *United States Reports*, which was not yet available when this volume of the *Fordham Urban Law Journal* went to press.

\(^{347}\) *Dickerson*, 120 S. Ct. at 2336; accord *Casey*, 505 U.S. at 856 (indicating that in the two decades since *Roe v. Wade* legalized abortion, people in society had ordered their lives, organized their intimate relationships, and made defining personal decisions in reliance on the continued prospect of choosing an abortion should contraception fail). The author questions seriously whether the Court has entered on a troubling—and potentially dangerous—slippery slope in the past decade by referring to factors such as public consciousness, national culture, and its own public relations in its more contentious cases, such as *Dickerson*, *Casey*, and the 2000 Presidential
Court never has held as dispositive any of the factors discussed in its stare decisis analyses. In addition, this factor, although central to the Court's analysis in *Casey*, is of dubious value in light of the Court's celebrated decision in *Brown v. Board of Education*. The *Brown* Court overturned *Plessy v. Ferguson*, an opinion that was "on the books" for far more time than *Miranda* has been—1896 through 1954 for *Plessy* versus 1966 to the present for *Miranda*. The *Plessy* holding, permitting separate but equal accommodations for blacks and whites, had imbedded itself farther into the national consciousness than *Miranda* has, affecting not just the behavior and lives of law enforcement and criminal defendants, but forming the legal basis for the prevailing social order in the pre-Civil Rights era South. To paraphrase the *Casey* plurality, far more people had ordered their lives and modes of thinking around *Plessy*, which was unanimously overruled, than *Miranda*, which survives.

The stare decisis analysis then turned to *Miranda* as undermined precedent, concluding that subsequent developments had not actually eroded *Miranda*, but that the cases limiting its breadth merely reduced its impact on law enforcement, all while retaining its core premise. However, this result is inconsistent with previous stare decisis analyses of the Court—the Court has denied stare decisis effect to precedent undermined by less intervening case law than the Court faced in *Dickerson*.

Election cases cited infra note 378. If the Constitution truly is designed to protect all Americans from majoritarian excesses, then what "the people" think of the Court should not matter to the Court nearly as much as the question: "Are we being faithful to the Constitution?" While outside the scope of this Comment, it is certainly food for thought.

348. See, e.g., *Holder v. Hall*, 512 U.S. 874, 930 n.7 (1994) ("Determining whether to abandon prior decisions requires weighing a multitude of factors, one of the most important of which is the extent to which the decisions in question have proved unworkable.").
351. 163 U.S. 537 (1896).
352. The *Casey* plurality drew intense criticism from Justices White, Scalia, Thomas and Chief Justice Rehnquist in dissent, and one of their more pointed criticisms is of the plurality's invocation of *Brown*. To the dissenters, *Brown* stands as a case in which the Court ignored stare decisis principles to reach the correct result, as opposed to the *Casey* plurality, which invoked stare decisis to uphold *Roe* without regard to whether *Roe* was correct when decided. *Casey*, 505 U.S. at 982-83 (Scalia, J., dissenting).
353. *Dickerson*, 120 S. Ct. at 2336.
The *Dickerson* majority also emphasized workability—the bright line rule announced in *Miranda* is easier for both law enforcement officials and courts to apply than the totality of the circumstances review called for by due process concerns and § 3501. However, bright line rules are, by their very nature, designed to avoid a more intensive inquiry, so the bright line nature of the warnings alone cannot be a reason for upholding them as constitutional law on stare decisis grounds. In addition, the trimester framework set forth to insure the constitutional right protected by *Roe v. Wade* was a bright line rule, and yet the joint plurality in *Casey* replaced it with a more intensive totality of the circumstances approach.

In sum, the stare decisis analysis is not nearly as convincing as the Chief Justice’s opinion would appear, especially in light of the conclusion that the *Dickerson* opinion is so riddled with logical flaws and a misreading of precedent that the case must rest largely on the strength of its stare decisis analysis of *Miranda*. Assuming the Court incorrectly asserted that *Miranda* delivered a constitutional decision, and given that the Court has a constitutional duty under separation of powers principles to give effect to the acts of Congress, we are left with a related constitutional quandary: how can the judicially created policy of stare decisis supersede the will of Congress in enacting 18 U.S.C. § 3501 pursuant to its Article I powers?

### IV. THE FATE OF CONSTITUTIONAL COMMON LAW AFTER DICKERSON

The Supreme Court’s decision in *Dickerson v. United States*, although settling the lingering questions regarding the constitutional status of the venerable *Miranda* decision, still left open a number of issues. For example, *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986) that had so undermined the precedent in question so as to justify denying it stare decisis effect). *(Dickerson*, 120 S. Ct. at 2336.)*

355. *Dickerson*, 120 S. Ct. at 2336.  
356. See text accompanying *supra* note 24; Monaghan, *supra* note 17, at 32.  
357. *Casey*, 505 U.S. at 874 (directing that the appropriate test for assessing the constitutionality of abortion regulations is determining whether the questioned regulations place an “undue burden” on the right).  
358. Compare *Dickerson*, 120 S. Ct. at 2336 (Rehnquist, C.J.) (“Following the rule of stare decisis, we decline to overrule Miranda.”) (emphasis added), with *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (Rehnquist, C.J.) (“Stare decisis is not an inescapable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision. . . . This is particularly true in constitutional cases.”) (internal quotations and citations omitted).  
359. See *Paulsen*, *supra* note 31 and accompanying text.  
360. *Id*. 

and
of questions, including the continued vitality of the theory of constitutional common law.\textsuperscript{361}

\section{A. R.I.P. Constitutional Common Law?}

Recall that constitutional common law's proponents posit that the Court has crafted a large body of subconstitutional rules inspired by the Constitution and protecting values and rights explicit or implicit in the text.\textsuperscript{362} \textit{Miranda v. Arizona} is one of the cases that perhaps necessitated the crafting of the theory.\textsuperscript{363} According to Professor Monaghan, \textit{Miranda} presented a subconstitutional set of prophylactic rules not compelled by the Fifth Amendment but that protects the underlying privilege.\textsuperscript{364} The opinion of the Court in \textit{Dickerson} cuts far the other way—instead of setting forth a set of subconstitutional rules, it argues \textit{Miranda} announced an inviolable constitutional rule.\textsuperscript{365}

Constitutional common law theorists also contend that constitutional common law is subject to ratification, alteration, amendment, and outright reversal by Congress.\textsuperscript{366} \textit{Dickerson}, on the other hand, states that \textit{Miranda}, one of the cases upon which the theory of constitutional common law is founded, was not subject to Congress's interference, because it was a constitutional decision of the Court, made inviolable through the Supremacy Clause by way

\textsuperscript{361} Another large issue that \textit{Dickerson} did not settle concerns the continued vitality of those cases: permitting \textit{Miranda}-defective confessions to impeach the direct testimony of criminal defendants, admitting into evidence the fruits of \textit{Miranda}-defective confessions, and admitting confessions obtained pursuant to the public safety exception. \textit{See} discussion \textit{supra} Parts II.B.1-4. Although Chief Justice Rehnquist's opinion for the Court suggests that these cases remain vital, this Comment seriously questions this result. Those cases are grounded principally in the proposition that \textit{Miranda} was not a constitutional decision of the Court. \textit{See} discussion \textit{supra} Parts II.B.1-4. \textit{Harris, Tucker, Elstad}, and \textit{Quarles} simply cannot be correct any longer if \textit{Dickerson} is the definitive interpretation of \textit{Miranda}.

Additionally, it is difficult to reconcile the continued admission of \textit{Miranda}-defective confessions to impeach in light of \textit{Mincey}’s admonition that due process principles forbid the admission of involuntary confessions—arguably, since \textit{Miranda} announced a constitutional decision of the Court, part of which states that unwarned confessions are presumptively involuntary, due process will be offended by the admission \textit{for any purpose} of a confession that is defective for failing to meet \textit{Miranda}’s now-constitutional standards.

\textsuperscript{362} For a fuller discussion of the theory of constitutional common law, see \textit{supra} Part I.D.

\textsuperscript{363} Monaghan, \textit{supra} note 17, at 3 (“[A] theory of . . . constitutional common law is necessary to explain satisfactorily a number of 'constitutional' doctrines . . . .”).

\textsuperscript{364} \textit{See id.} at 20 (“\textit{Miranda v. Arizona}, for example, did not claim immutable constitutional status for its famous gloss on the privilege against self-incrimination . . . .”).

\textsuperscript{365} \textit{Dickerson v. United States}, 120 S. Ct. 2326, 2329, 2336 (2000).

\textsuperscript{366} \textit{Supra} Part I.E.1.
of *Marbury*. In essence, the Court pulled the carpet out from under the theory and the theorists, elevating *Miranda* to the level of conventional constitutional law, and abrogating the need to have a theory justifying *Miranda* in the first place.

**B. The Death Knell: Troubling Constitutional Implications**

However, the Court's rendering moot much of a twenty-five year old theory is not the alarming implication of the *Dickerson* analysis. Recall that the theory of constitutional common law includes recognizing that the violable nature of constitutional common law helps reconcile many Court decisions with the principles of federalism and separation of powers. Monaghan argued that by allowing the state and federal legislatures to overrule its constitutional common law dictates, the Court maintained a satisfactory role in the constitutional system vis-à-vis the states and the other branches of the national government. *Dickerson* proclaimed a constitutional decision resting largely on circular reasoning, a reading of precedent inconsistent with the plain language and reasoning of that precedent, and a thinly argued invocation of stare decisis. After *Dickerson*, we are faced with a Supreme Court that can pronounce, "We announced a constitutional decision of the Court because we said we announced a constitutional decision of the Court." This hypothetical pronouncement is not constitutional law but instead justice-by-fiat, thus invoking the title of this piece: is *Dickerson* the birth of "Do as I say (follow the Constitution, o ye Congress and states) and not as I do"-type constitutional adjudication?

The Court also entered the slipperiest of slopes in *Dickerson*: by elevating the gloss on the Fifth Amendment privilege to the status of inviolable constitutional law, the *Dickerson* reasoning allows for the possibility that the gloss on the gloss on the constitutional privilege will be raised to the status of inviolable constitutional law. Prior to his scathing dissent in *Dickerson*, Justice Scalia had this to say regarding that possibility:

The newest tower, according to the Court, is needed to avoid "inconsistent[cy] with [the] purpose" of Edwards' prophylactic rule, which was needed to protect *Miranda*'s prophylactic

---

367. For a short discussion of *Marbury* and its importance, see supra Part I.A.
368. Monaghan, supra note 17, at 34-38.
369. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) ("[W]hen an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made availa-
right to have counsel present, which was needed to protect the right against compelled self-incrimination found (at last!) in the Constitution.\textsuperscript{370}

Indeed, the question \textit{Dickerson} leaves us is: where does it end? How much will the Court read into the Constitution, and can the Justices draw a meaningful boundary as to the rights protected by the Constitution? A satisfying constitutional theory demands an answer to these unsettling and unresolved questions. The Supremacy Clause, which directs that the Constitution is the supreme law of the land—and not glosses upon glosses upon glosses—demands an answer. Reasonable people can disagree about the propriety of requiring police officers to apprise criminal suspects of their rights to remain silent and have counsel present during interrogation. \textit{Dickerson} arguably deserves praise for continuing to protect all people who might be subject to the inherently coercive nature of the station house interrogation. However, the means to the end are ultimately unsatisfactory. Despite Justice Brennan’s famous advice to the contrary,\textsuperscript{371} the label “constitutional law” should not affix to \textit{whatever} between five and nine Justices of the Supreme Court decide to affix that label to.\textsuperscript{372} If that indeed is the case, then Justice Scalia will be remembered for these parting words in \textit{Dickerson}:

In imposing its Court-made code upon the States, the original opinion [\textit{Miranda}] at least \textit{asserted} that it was demanded by the Constitution. Today’s decision does not pretend that it is—and yet \textit{still} asserts the right to impose it against the will of the people’s representatives in Congress. . . . [W]e cannot allow to remain on the books even a celebrated decision—\textit{especially} a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system

\textsuperscript{370} Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting). Chief Justice Rehnquist, who announced the opinion of the Court in \textit{Dickerson}, joined Justice Scalia in the \textit{Minnick} dissent. \textit{Id.} at 156.

\textsuperscript{371} Justice Anthony Kennedy, Address at Fordham University School of Law (Jan. 24, 2001) (relating a popular story that Justice Brennan would introduce his new clerks to the world of the Supreme Court by advising them that the most important number in the world is five, because it only takes five to form a Court majority).

that was established by the Framers, or that would be established by any sane supporter of government by the people.373

C. "Why Beholdest Thou The Mote That Is In Thy Brother's Eye, But Considerest Not The Beam That Is In Thine Own Eye?"374 and What the Court Should Do to Police Itself

Given the Court's recent willingness to strike down acts of Congress as exceeding the scope of its enumerated Article I powers, we are left wondering whether Dickerson created a double standard: that Congress is bound by federalism and separations of powers principles, but the Court is not. Though it remains doubtful that the three committed federalists (Chief Justice Rehnquist and Justices O'Connor and Kennedy) who joined the 7-2 Dickerson majority would agree that they helped created a double standard, there are workable solutions to avoid a future finding that Dickerson did just that.

1. Strip the Court of Jurisdiction?

When the Senate Judiciary Committee sent to the Senate floor the bill that eventually became 18 U.S.C. § 3501, the bill contained a provision stripping the federal courts of jurisdiction to review state court determinations of the admissibility of confessions.375 The Senate Report preemptively defended this move, grounding the Judiciary Committee's choice in Article III, which directs that "the supreme court shall have appellate jurisdiction . . . with such exceptions . . . as the Congress shall make,"376 and in the Court's own decision in Ex Parte McCardle.377 Therefore, stripping or limiting the Court's power to review Miranda claims remains a potential solution. However, any Congressional debates on removing even part of the Supreme Court's jurisdiction over any case—landmark or otherwise—likely would be a highly-charged political event. Such a dramatic confrontation also would tarnish the public's faith in the Court as an institution above the political fray to a degree far greater than did the perceived debacle of the state and federal judiciaries effectively deciding the 2000 presidential elec-

373. Id.
374. Matthew 7:3 (King James).
375. SENATE REPORT, supra note 291, at 54.
377. 74 U.S. (7 Wall.) 506 (1869).
tion, and do so in a manner not seen since the Court packing scheme of President Franklin Roosevelt.

Even if such a measure did pass through Congress, it is questionable if the president would affix a signature to such political dynamite. Recall that both Democratic and Republican administrations effectively blocked the implementation of 18 U.S.C. § 3501, preferring instead the relative ease of the bright line *Miranda* inquiry. Moreover, denying the Court jurisdiction to police its specific holding in *Miranda*, that the per se rule of exclusion governs the admissibility of confessions in state and federal courts, leaves undented the far more troubling implication of *Dickerson*: what Justice Scalia bitterly characterized as a freewheeling power of the Court to subvert the will of the duly elected representatives of the people to its own. The solution to this larger problem cannot come from Capitol Hill. The only tenable solution must come from the Supreme Court itself.

---

378. Compare Bush v. Gore, 121 S. Ct. 525, 542 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.")., with Gore v. Harris, No. SC00-2431, 2000 Fla. LEXIS 2373, at *57-58 (Fla. 2000) (Wells, Ch. J., dissenting).

[W]e run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters—not by judges. We must have the self-discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is "the right thing to do." Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by a court of last resort, *always has the potential of leading to a crisis* with the other branches of government and raises serious separation-of-powers concerns.

379. Just after his second inauguration in 1937, President Roosevelt proposed a plan, inspired by a series of Supreme Court decisions striking down New Deal legislation, under which the President would have the power to appoint additional Justices to the Supreme Court for every Justice who reached the age of seventy without retiring or resigning. *Gunther & Sullivan*, supra note 42, at 183. The Senate Judiciary Committee rejected the plan, declaring it "a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." *Senate Comm. on the Judiciary, Reorganization of the Federal Judiciary*, S. Rep. No. 75-711, at 23 (1937).


381. *Dickerson*, 120 S. Ct. at 2348 (Scalia, J., dissenting).
2. Court-Made Solution to the Court-Made Problem

First, the Court actually must realize the implication of Dickerson—that it can impose its will upon the states and Congress absent a constitutional mandate. In elevating Miranda to the ranks of conventional constitutional law and overruling Congress despite Chief Justice Warren’s invitation to Congress to legislate in this area, the Court comes dangerously close to returning to its repudiated Lochner Doctrine, effectively passing judgment on the wisdom, as opposed to the legality, of legislative acts. The Rehnquist Court has made some serious claims to being a Court devoted to principles of federalism and separation of powers, overturning seemingly beneficial laws despite the beneficial roles these laws might have played in the nation. United States v. Lopez, for example, involved a law passed to protect children. United States v. Morrison concerned a section of the Violence Against Women Act that created a civil cause of action in federal court for crimes motivated by gender. Yet the Court dubbed both of these beneficial laws unconstitutional invocations of Congress’s power to regulate interstate commerce. Dickerson, too, involved a beneficial law/judicially crafted remedy that protected secluded criminal suspects from the coercive and intimidating environs of the police station house. This alone, however, cannot sustain Miranda any more than the good intentions of Congress underlying the laws in Lopez and Morrison could carry those cases over the constitutional hurdle. Against the background of its recent cases redefining federal-

---

382. Lochner v. New York, 198 U.S. 45 (1905). The Lochner case has come to stand for the impropriety of the Supreme Court passing its judgment on the wisdom—rather than the true legality—of the acts of the other branches of government by invoking vague notions of liberty through substantive due process. See Ry. Express Agency v. New York, 336 U.S. 106, 109 (1949) (“We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom.”), cited by Paul E. McGreal, Alaska Equal Protection: Constitutional Law or Common Law, 15 ALASKA L. REV. 209, 241 (1998) (“The ghost of Lochner haunted the Court in Railway Express Agency. Before reaching the equal protection claim, the Court made clear that it was done with Lochner due process.”). Several years prior to the Railway Express case, the Supreme Court had repudiated the Lochner substantive due process approach to economic liberties shortly after the Court Packing crisis during the New Deal. United States v. Carolene Products Co., 304 U.S. 144 (1938).


384. 120 S. Ct. 1740 (2000).


387. Lopez, 514 U.S. at 567-68; Morrison, 120 S. Ct. at 1759.
ism vis-à-vis Congress, the Court must reassess its own approach to defining what constitutional law is, for it is only then that the Court can begin to place meaningful limits on it own power, and silence the critics who insist the Court is one of limited jurisdiction.

Whether that redefining should embrace the originalism preached by Justices Scalia\(^{388}\) and Thomas,\(^{389}\) or allow for a broader interpretation of what rights the Constitution encompasses, is not a conclusion this Comment ultimately wishes to draw. Whatever approach the Court does adopt, it should do so "in accordance with a comprehensive plan,"\(^{390}\) to borrow a phrase from, and to draw a parallel to, municipal planning. The parallels to municipal planning suggest why the Court would benefit from adopting a comprehensive plan for the limits of its constitutional interpretation—avoiding decisions filling temporal needs that lose sight of the "big picture," that the federal courts are courts of limited jurisdiction, bound, in the same way Congress and the states are, by the constitutional doctrines of federalism and separation of powers. A comprehensive plan for the methods of constitutional interpretation also will prevent the unreasonable and unexpected expansions of the Court's power that foster the impression that the Court bends constitutional law to the personal predilections of the individual Justices.\(^{391}\) Ideally, the Court will do for itself what

\(^{388}\) E.g., Antonin Scalia, Essay, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1184 (1989) ("For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.").

\(^{389}\) E.g., Lopez, 514 U.S. at 584 (Thomas, J., concurring) ("In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause."); Printz v. United States, 521 U.S. 898 (1997).

\(^{390}\) Cf. Moore v. City of East Cleveland, 431 U.S. 494, 513 (1977) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (declaring that the creation of municipal zoning ordinances is a valid exercise of the police power)). The requirement that municipalities enact zoning ordinances in accordance with a comprehensive plan provides an interesting point of comparison. In the municipal planning context, the comprehensive plan requirement: (1) prevents arbitrary exercise of conferred power, Mesoelle v. City of Providence, 439 A.2d 1370, 1374 (R.I. 1982); (2) compels the municipality to divine a plan for the future before acting on the temporal need for zoning, Rockhill v. Chesterfield Township, 128 A.2d 473 (N.J. 1956); and (3) helps to prevent the danger of spot zoning, zoning which singles out specific areas for different treatment, Jimmies, Inc. v. West Haven Planning & Zoning Comm'n, No. 373221, 1997 WL 149682, at *3 (Conn. Super. Ct. Mar. 18, 1997).


Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations . . . . Stare decisis seem-
Chief Justice Warren did for Congress and the states in *Miranda*—set a ground floor\(^392\) (of deriving inviolable rights from the Constitution below which the Court should not go) and demand (of itself) "something that works."\(^393\)

**Conclusion**

Justice Louis Brandeis once noted that the best intentions make for the worst law.\(^394\) The seven Justices forming the majority in *Dickerson v. United States* reached the objectively "correct" result by preserving the judicially crafted remedy of *Miranda*. This conclusion is especially cogent in light of the increasing difficulty criminal defendants face in availing themselves of general due process notions to attack the admissibility of involuntary confessions.\(^395\) However, the correct ends do not justify the wrong means—the Court upheld *Miranda* by largely misreading recent precedent, by elevating a formerly subconstitutional decision to the status of constitutional law, and by reaching beyond its own precedent into areas reserved to Congress and the states. Protecting the underlying right against self-incrimination guaranteed by the Fifth Amendment is hardly the "czarist arrogance"\(^396\) of "dictator[s] in black

\(^392\) Id. at 743; see also text accompanying infra note 397.


The federal Constitution provides a minimum of rights below which the states cannot go. Where our Court... finds that the police violated the defendant's federal constitutional rights, there is no reason for the Court to go further and address what additional protections the Pennsylvania Constitution might also provide.

Matos, 672 A.2d at 774 n.7 (citations omitted).


\(^396\) See cases cited and text accompanying supra note 122; see also Arizona v. Fulminante, 499 U.S. 279 (1991) (stating that, although it will be the rare case indeed, some involuntary and coerced confessions may be admissible despite being involuntary, if the government can prove beyond a reasonable doubt that the admission of the involuntary confession into evidence was harmless).

robes.” However, until the Court backs off the slippery slope and away from the full implication of its decision in Dickerson, the critics of the “imperial judiciary” may be vindicated in decrying the broad sweep of power the unelected federal judiciary has claimed for itself.


[E]lected officials lacked the courage to stand up to judges . . . for the gross usurpations of power in which federal courts have engaged since the Warren era. What is happening in Yonkers is an outrage. . . . A Harvard-educated dictator in black robes, elected by no one, is ordering the fourth-largest city in New York . . . to spend millions of tax dollars building public housing it doesn’t want or need, in areas Leonard Burke Sand alone shall determine. If Yonkers refuses, the judge will destroy the city financially and jail its elected officials. Will someone explain to me what exactly George III did to our forefathers to compare with that?

Id. (emphasis added). In the Yonkers litigation, Judge Sand of the Southern District of New York issued contempt sanctions against the City “starting at $100 on Day 1 and doubling in amount each day of continued noncompliance. The cumulative total of the fines against the City would exceed $10,000 by day 7, exceed $1 million by day 14, exceed $200 million by day 21, and exceed $26 billion by day 28.” United States v. City of Yonkers, 856 F.2d 444, 450 (2d Cir. 1988) (emphasis added). The Second Circuit affirmed the sanction as modified. Yonkers, 856 F.2d at 460.

Shortly before the completion of this Comment, Judge Sand issued the latest decision in this protracted twenty-year litigation. United States v. Yonkers, 80 Civ. 6761 (LBS), 2000 U.S. Dist. LEXIS 17313, at *2 (S.D.N.Y. Nov. 30, 2000); Mark Hamblett, Judge Refers Yonkers Case For Remedies, N.Y. L.J., Dec. 1, 2000, at 1 (“A federal appeals court told Southern District Judge Leonard Sand he had failed to support a finding that vestiges of segregation remained in the Yonkers school system in 1997. But yesterday, ruling on remand . . . a frustrated Judge Sand reiterated that vestiges of segregation still existed.”).
TENTH ANNUAL SYMPOSIUM ON
CONTEMPORARY URBAN CHALLENGES

REDEFINING THE PUBLIC SECTOR:
ACCOUNTABILITY AND DEMOCRACY IN
THE ERA OF PRIVATIZATION

Co-Sponsored by
THE FORDHAM URBAN LAW JOURNAL,
THE LOUIS STEIN CENTER FOR LAW AND ETHICS, AND
THE WILLIAM AND BURTON COOPER
CHAIR ON URBAN LEGAL ISSUES

1303
TENTH ANNUAL SYMPOSIUM ON CONTEMPORARY URBAN CHALLENGES

REDEFINING THE PUBLIC SECTOR: ACCOUNTABILITY AND DEMOCRACY IN THE ERA OF PRIVATIZATION

Co-Sponsored by
THE FORDHAM URBAN LAW JOURNAL,
THE LOUIS STEIN CENTER FOR LAW AND ETHICS, AND
THE WILLIAM AND BURTON COOPER CHAIR ON URBAN LEGAL ISSUES

LIST OF PARTICIPANTS

ALFRED C. AMAN JR.
Dean
Roscoe C. O'Byrne
Professor of Law
Indiana University School of Law

CATHLIN BAKER, M.A., M.Div.
Co-Director
The Employment Project

JACK M. BEERMANN
Professor of Law
Boston University School of Law

BARBARA L. BEZDEK
Associate Professor of Law
University of Maryland School of Law

JACQUELYN L. BOGGESS, ESQ.
Senior Policy Analyst
Center on Fathers, Families, and Public Policy

RICHARD BRIFFAULT
Vice Dean and Joseph P. Chamberlain Professor of Legislation
Columbia Law School

ANNA BURGER
International Executive Vice President
Service Employees International Union

SHERYLL D. CASHIN
Associate Professor of Law
Georgetown University Law Center

MATTHEW DILLER
Professor of Law
Associate Director
Louis Stein Center for Law and Ethics
Fordham University School of Law

JOHN D. DONAHUE
Raymond Vernon Lecturer in Public Policy
John F. Kennedy School of Government
Harvard University

HON. FLOYD Flake
President
Edison Charter Schools
EUGENE W. HARPER JR., ESQ.
Partner
Squire, Sanders & Dempsey LLP
* * *

WAYNE G. HAWLEY, ESQ.
Deputy Counsel
New York City
Conflicts of Interest Board
* * *

KERRY KORPI, M.A.
Director
Department of Research
& Collective Bargaining
American Federation of State,
County, and Municipal Employees
* * *

LIZ KRUEGER, M.P.P.
former Associate Director
Community Food Resource Center
* * *

JERRY L. MASHAW
Sterling Professor of Law
Yale Law School
* * *

DAVID V. MASTRAN, M.S., Sc.D.
Founder and CEO
MAXIMUS
* * *

GILLIAN E. METZGER, ESQ.
Staff Attorney
The Brennan Center for Justice
New York University

DAVID R. RIEMER, ESQ.
Director of Administration
City of Milwaukee
* * *

CHARLES F. SABEL
Professor of Law and Social Science
Columbia Law School
* * *

LESTER M. SALAMON, PH.D.
Professor and Director
Johns Hopkins Center for
Civil Society Studies
The Johns Hopkins University
* * *

E.S. SAVAS, PH.D.
Professor
School of Public Affairs
Baruch College
City University of New York
* * *

ELLIOTT D. SCLAR, PH.D.
Professor of Urban Planning
and Public Affairs
School of International
and Public Affairs
Columbia University
* * *

SUSAN STURM
Professor of Law
Columbia Law School
* * *

LOUISE G. TRUBEK
Clinical Professor
University of Wisconsin Law School