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Citation: 2000 Sup. Ct. Rev. 2000

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MICHAEL C. DORF
AND BARRY FRIEDMAN

SHARED CONSTITUTIONAL
INTERPRETATION

In *United States v Dickerson*,¹ the Supreme Court reaffirmed *Miranda v Arizona*,² stating that it was “a constitutional decision,” and thus not subject to congressional overruling.³ A contrary judgment would have had enormous symbolic significance, as *Miranda* is one of the best-known legacies of the Warren Court. In penning the opinion for a seven-two majority in *Dickerson*, Chief Justice Rehnquist reassured the legal community and the nation at large that this pillar of the Warren Court’s criminal procedure revolution would remain standing.⁴

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AUTHORS’ NOTE: We gratefully acknowledge the very useful comments and suggestions of Sherry Colb, Samuel Issacharoff, Yale Kamisar, Larry Kramer, Debra Livingston, Henry Monaghan, Gerald Neuman, Robert Post, George Thomas, and Richard Uviller. Research assistance was ably provided by Scott Chesin, Jason Cooper, and Jeremy Saks. Special thanks go to Lisa Mihajlovic and Geoffrey Stone.

¹ 120 S Ct 2326 (2000).

² 384 US 436 (1966).

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

⁴ This is not to say that current criminal procedure doctrine is in any way a straightforward extension of the rest of the Warren Court’s views. Although cases like *Miranda* and *Mapp v Ohio*, 367 US 643 (1961), have not been overruled, the Burger and Rehnquist Courts have undermined Warren Court legal doctrines through, inter alia, a variety of rules that reduce or eliminate the penalty that law enforcement must pay for violating suspects’ or defendants’ rights. See Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich L Rev 2466, 2469 (1996) (“The edifice constructed by the Warren Court governing investigative techniques . . . remains surprisingly intact. Rather than redrawing in any drastic fashion the line between constitutional and unconstitutional police conduct, the Supreme Court has revolutionized the consequences of deeming conduct unconstitutional.”)

Most of the legal community saw *Dickerson* as an important case about criminal procedure, but the decision's far greater significance may lie in its implications for the shared institutional process of determining constitutional meaning. Even as it prescribed the now-familiar warnings that must precede custodial interrogation, the *Miranda* Court abjured any intention to subject law enforcement to a "constitutional straightjacket,"⁵ and thus invited "Congress and the States to . . . search for . . . other procedures which are at least as effective [as the Court-prescribed warnings] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."⁶ On its face the *Dickerson* opinion appears a strong statement of judicial supremacy in constitutional interpretation, but the *Dickerson* Court nonetheless reiterated *Miranda*'s "invitation" to other constitutional actors to fashion equally effective safeguards for Fifth Amendment rights.⁷

Dickerson thus invites examination of the following question: What role might nonjudicial institutions and officials play in determining the meaning of the Constitution? Suppose that Congress or the states were to accept the invitation to devise alternatives to the warnings prescribed by the Court. Is the Supreme Court prepared to entertain such alternatives, and thus permit others to share in the task of interpreting the Constitution? And how should the *Miranda* Court's invitation to Congress and the states be understood in the light of recent decisions narrowing federal power in favor of state sovereignty?

Dickerson and the somewhat bewildering array of recent federalism decisions provide an appropriate opportunity to explore the relative roles of the Court, Congress, and the states in matters of constitutional interpretation. Although the Court of late has displayed a self-aggrandizing tendency, we believe there nonetheless is, within existing doctrine, substantial room for institutional dialogue about the meaning of the Constitution.⁸ We explore that constitutional space and how it might be employed as a model

⁵ *Miranda v Arizona*, 384 US 436, 467 (1966).

⁶ *Id.*

⁷ *Dickerson*, 120 S Ct at 2334.

⁸ See Barry Friedman, *Dialogue and Judicial Review*, 91 Mich L Rev 577 (1993) (envisioning creation of constitutional meaning as a dialogic process).

of shared constitutional interpretation. We emphasize two themes throughout: first, there is, and ought to be, considerable opportunity for shared constitutional interpretation; and second, this cooperative process can work only if all constitutional actors are sufficiently humble about their own conclusions and respectful of the pronouncements of the others.

We begin, necessarily, with the question of precisely what *Miranda* and *Dickerson* held. We say “necessarily” because it is apparent from *Dickerson* and other recent Supreme Court decisions that the Court will not tolerate tampering by other actors with what the Court views as constitutional bedrock. As the *Dickerson* Court said, “. . . Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”⁹ The important question after *Dickerson*—and in any case in which other constitutional actors seek to share with the Court the job of defining the scope of the Constitution—is where the freedom of action lies.¹⁰

Our concern here is not whether *Miranda* was correct as an original matter.¹¹ For all the ambiguity *Dickerson* leaves, it makes clear that *Miranda* is here to stay. With that starting point, we ask how *Miranda* and *Dickerson* are best understood. In our view, these cases stand for the proposition that suspects have a constitutional right to some procedures that are adequate to inform them of the right to remain silent in the face of custodial interrogation, and a consti-

⁹ 120 S Ct at 2332 (citing *City of Boerne v Flores*, 521 US 507 (1997)).

¹⁰ Of late, there has been a veritable flood of commentary disparaging judicial supremacy and urging that greater attention be paid to the role of nonjudicial actors in constitutional interpretation. For a representative sampling, see Akhil Reed Amar and Alan Hirsch, *For the People: What the Constitution Really Says About Your Rights* (1998); Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* (2d ed. 1996); Richard Parker, “Here, the People Rule”: *A Constitutional Populist Manifesto* (1994); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999). Although we have some sympathy for the notion of shared constitutional interpretation, see Michael C. Dorf, *Supreme Court 1997 Term, Foreword: The Limits of Socratic Deliberation*, 112 Harv L Rev 4, 60–73 (1998) (advocating “provisional adjudication” that expressly authorizes experimentation); Friedman, 91 Mich L Rev at 580 (cited in note 8) (“the everyday process of constitutional interpretation integrates all three branches of government”), we think some of this work sweeps too far in denying the Court’s supremacy with regard to constitutional interpretation.

¹¹ See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich L Rev 2625 (1996) (arguing against a right to silence on normative and historical grounds); Akhil Reed Amar and Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich L Rev 857 (1995) (same); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 Wm & Mary L Rev 15 (1981) (arguing for a right to silence only in the face of interrogation on slight suspicion).

tutional right to procedures that provide a continuous opportunity to exercise the right to remain silent.¹² The four particular warnings set forth in *Miranda* are not constitutionally required “in the sense that nothing else will suffice to satisfy constitutional requirements.”¹³ Equally effective procedures could be substituted for the warnings. However, *Dickerson* and *Miranda* hold that the Fifth Amendment requires some safeguard that is at least as effective. The federal statute at issue in *Dickerson*, 18 USC § 3501, did not satisfy that requirement because it essentially restored the status quo prior to *Miranda*. That is the basic, and basically sound, rationale of *Dickerson*.

This understanding of *Dickerson* as constitutional interpretation makes it possible to sidestep most of the academic debate about whether the Court has the authority to promulgate “prophylactic rules” or “constitutional common law”¹⁴—doctrines that are not required by the Constitution but crafted by the Court to protect underlying or core constitutional requirements.¹⁵ It is possible to

¹² Implicit in the right to be informed of a right to silence, of course, is a right to silence itself. That right appeared to receive explicit protection a year before *Miranda* in *Griffin v California*, 380 US 609 (1965) (prohibiting an inference of guilt from a suspect’s silence in the face of police questioning). Some post-*Miranda* cases appear to be inconsistent with a Fifth Amendment right to silence. See *Baxter v Palmigiano*, 425 US 308, 316–20 (1976) (in prison disciplinary proceeding, permitting adverse inference from silence); *Fletcher v Weir*, 455 US 603 (1982) (in criminal trial, permitting admission of post-arrest silence for impeachment purposes). These cases can probably be reconciled with *Miranda*, however. *Baxter* reflects the Court’s general unwillingness to apply the Fifth Amendment to civil proceedings, while *Fletcher*’s problems, whatever they may be, are of a piece with *Harris v New York*, 401 US 222 (1970), discussed below. See Part I.C.

¹³ *Dickerson*, 120 S Ct at 2335.

¹⁴ Compare Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv L Rev 1 (1975) (explaining how the Court might legitimately be seen to have the power to make law beyond what the Constitution requires); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv L Rev 883 (1986) (less tentatively, same); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum L Rev 247, 287–95 (1988) (same, also less tentatively); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190 (1988) (same, taking prophylaxis as paradigm rather than exception) with Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw U L Rev 100 (1985) (challenging the legitimacy of most common law and prophylaxis).

¹⁵ A typical example is David Huitema, *Miranda: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 Yale L & Policy Rev 261 (2000). In Huitema’s view, the Fifth Amendment touchstone is voluntariness, but the *Miranda* rule is nonetheless a justified prophylactic measure because courts cannot accurately distinguish voluntary from involuntary confessions. See id at 269–70. See also Lawrence Crocker, *Can the Exclusionary Rule Be Saved?* 84 J Crim L & Criminol 310, 312 (1993); John Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan L Rev 1027, 1029–30, 1055 (1974).

see why the academy and the Court both tried to understand *Miranda* in these subconstitutional terms, but the case can be explained equally effectively without raising the legitimacy concerns that prophylaxis and constitutional common law trigger: *Miranda* can be justified purely in terms of the Court's incontestable power to interpret the Constitution. Adequate safeguards for the right to remain silent during custodial interrogation are *constitutionally* required.

Hence, two principles frame the balance of this article as well as the process of shared constitutional interpretation. On the one hand, *Miranda* is a constitutional decision, and the Court has made clear repeatedly that neither Congress nor state officials can defy or repeal a judicial decision construing the Constitution.¹⁶ On the other hand, *Miranda* and *Dickerson* both explicitly invited Congress and the states to take action in response to those decisions. What is it we can learn about the process of cooperative interpretation from this invitation?

After tracing the tortured doctrinal path from *Miranda* to *Dickerson*, Part I poses this question by offering a hypothetical congressional response to the "invitation." Suppose Congress were to pass a statute governing all custodial interrogation by federal agents. The statute, which we dub the "Anti-Coercion and Effective Custodial Interrogation Act" ("ACECIA"), provides that: before custodial interrogation by federal authorities commences, the suspect must be informed of his right to remain silent; prior to the institution of adversarial proceedings, a suspect has no right to have an attorney present during federal custodial interrogation; all federal custodial interrogation must be videotaped; and no statement that results from federal custodial interrogation is admissible in a federal criminal trial unless the interrogation was videotaped and the statement was voluntary.

Although ACECIA departs substantially from the scheme set forth in *Miranda*, it is plausibly an alternative procedure that both informs the suspect of his right to remain silent and, through the videotaping requirement, ensures a continuous opportunity to exercise it. Part I uses this example to explore the questions of who

¹⁶ See *Boerne*, 521 US at 516–29 (1997) (equating the Constitution's meaning with the Court's doctrine); *Cooper v Aaron*, 358 US 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution.").

decides whether an alternative procedure is as effective as the default set by *Miranda* and according to what criteria. We conclude that there may be more than one way to safeguard constitutional rights, that if Congress wishes to be heard in this dialogue it must act sensibly in drafting alternatives, and that the Court ought then to consider such alternatives respectfully. The debate over the meaning of *Miranda* and the constitutionality of Section 3501 has not reflected mutual respect, but we can envision a dialogue about protecting Fifth Amendment rights that does.

Part II turns from the relative powers of Court and Congress to those of Congress and the states. Here we imagine that Congress goes further, affirmatively requiring the states to employ its favored safeguard, videotaping. Would such a “National Anti-Coercion Act” (“NACA”) be valid against the claim of a state that wished to adhere to the original *Miranda* warnings? Part II asks where Congress derives the authority to impose such an obligation on the states. The answer, we conclude, is Section 5 of the Fourteenth Amendment. After the recent decisions narrowly construing Section 5,¹⁷ adding constitutional safeguards at the Court’s express invitation would seem one of the few valid uses of that congressional power. We next use a variant of ACECIA and NACA (with yet another acronym) to clarify the sense in which Section 5 acts as a one-way ratchet.

Assuming that Congress has the affirmative power to impose a videotaping requirement on the states, we ask the further question whether doing so would violate the anticommandeering principle of *New York v United States*¹⁸ and *Printz v United States*.¹⁹ Perhaps, pursuant to *Reno v Condon*,²⁰ the videotaping requirement could be understood as preemptive regulation rather than as an affirmative command. But even if not, we conclude on Supremacy Clause grounds that if the obligation were phrased simply as a rule of substantive law applicable in state court, it would not violate the anticommandeering principle.

¹⁷ See *United States v Morrison*, 120 S Ct 1740, 1755–59 (2000); *Kimel v Florida Bd. of Regents*, 120 S Ct 631, 644–50 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 527 US 627, 636–47 (1999); *Boerne*, 521 US at 516–36 (1997).

¹⁸ 505 US 144 (1992).

¹⁹ 521 US 898 (1997).

²⁰ 120 S Ct 666 (2000).

Despite the power of Congress to impose rules of this nature on the states, Congress should hesitate to do so, for the same sort of reasons that the Court should take seriously congressional attempts to define “equally effective” constitutional safeguards. The whole point of the no-straightjacket language from *Miranda* is to encourage experimentation by a variety of jurisdictions. By imposing a uniform national rule, NACA would defeat the purpose of recognizing a zone of experimentation. Just as the Supreme Court ought to be respectful of procedures besides the ones it has devised for guaranteeing rights, Congress should hesitate to exercise its Section 5 power where doing so stifles state and local innovation.

Finally, suppose that a state were to pass its own ACECIA applicable to state actors. If the federal ACECIA is valid, as we suggest in Part I, is this valid as well? Part III concludes that because the key to upholding any set of procedures for safeguarding the right to remain silent is the conclusion that those safeguards are adequate, and not who envisioned or enforced those safeguards, then just as Congress may devise safeguards equal or superior to those devised by the Court, so can the states. But here too we return to the point about respect and humility. Rather than taking up *Miranda*'s “invitation,” most state officials did nothing, or attacked *Miranda* as outside the Court's power. The Supreme Court of late has created a very different environment for federalism as a laboratory for experimentation. Whether that experiment will succeed depends not so much upon the Court, but upon whether the states eschew the use of their autonomy to curtail individual rights (as has too often been the case in the past) and become serious partners in the process of governance and constitutional interpretation.

Ultimately this article is about shared constitutional experimentation, and the institutional humility and respect necessary to foster it. Because constitutional meaning is so wrapped up in broader questions of governance, constitutional interpretation should be a shared endeavor among (at the least) all the branches of the national, state, and local governments. Each branch brings to the process both a constitutional role and a set of institutional advantages (and vantages). For the process to work, however, each actor must display humility and treat the pronouncements of other actors respectfully, granting them the weight they deserve. The response to the *Miranda* invitation demonstrates this process at its

worst; the response to the *Dickerson* invitation that we envision here suggests a better alternative.

I. THE CONSTITUTION, THE SUPREME COURT, AND EVERYONE ELSE

In 1966, in *Miranda v Arizona*, the Supreme Court held that a criminal defendant's confession cannot be admitted in evidence unless interrogating officers follow certain procedures, including providing the suspect with the now-familiar *Miranda* warnings. In the years following, the *Miranda* decision was criticized continually,²¹ and its survival often appeared in doubt. *United States v Dickerson* reaffirmed *Miranda*, putting to rest, at least for the foreseeable future, the fate of this constitutional landmark.

Yet matters are not as simple as they seem, for *Dickerson* leaves us no more certain than did *Miranda* about precisely what the Constitution requires regarding a suspect's rights during police interrogation. Moreover, *Dickerson* does nothing to eliminate the confusion created by *Miranda's* invitation to other political actors to develop an alternative to the *Miranda* regime.

At issue in *Dickerson* was the constitutionality of Section 3501, a congressional statute enacted to replace *Miranda*. Section 3501 essentially imposed the "voluntariness" test as the sole standard for evaluating the constitutionality of confessions, while making the failure to provide warnings one factor in the determination whether, in any given case, a confession was unlawfully compelled.²² *Dickerson* invalidated Section 3501, but at the same time

²¹ See note 31.

²² 18 USC § 3501 provides:

Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) 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

restated *Miranda's* invitation to other political actors to provide a meaningful alternative to the *Miranda* regime.²³

After *Dickerson*, confusion lingers over what it means to say that *Miranda* formulated a “constitutional rule,” and what freedom that statement leaves other constitutional officials in responding to the decision. The Court in *Dickerson* repeatedly invoked the idea of a constitutional rule in explaining why Congress could not overturn *Miranda's* requirements. But if *Miranda* is a constitutional rule, and if Congress cannot overturn constitutional rules, then what does the *Miranda/Dickerson* “invitation” invite Congress and the states to do?

Ambiguity about the foundation of *Miranda* provided the basis upon which Justice Scalia's biting dissent took the *Dickerson* Court to task. The Supreme Court only has the power to decide cases based on the Constitution, Justice Scalia explained.²⁴ But *Miranda's* many progeny (and the many Justices who wrote those decisions)

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. The presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate [magistrate judge] or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term “confession” means any confession of guilt of any criminal offense or any selfincriminating statement made or given orally or in writing.

²³ See *Dickerson*, 120 S Ct at 2334.

²⁴ See *id* at 2338 (Scalia dissenting).

expressly denied the constitutional status of *Miranda*. If *Miranda* is constitutionally grounded, Justice Scalia insisted, then the many intervening decisions cannot be justified. If *Miranda* is not constitutionally compelled, then the Court should have upheld Section 3501 because it clearly complied with the core Fifth Amendment command that confessions not be “compelled.” As Justice Scalia saw it, one or the other must be true.²⁵

As we explain, we believe *Miranda can* be understood as a constitutional decision. Thus Justice Scalia is wrong in seeing the situation in binary terms. Justice Scalia would put the Court to a stark choice: overrule its intervening decisions or uphold Section 3501. But as we will make clear, Section 3501’s unconstitutionality does not necessarily doom the Court’s entire *Miranda* jurisprudence.

Where Justice Scalia is on firm ground, however, is in criticizing the Court’s frequent resort to *ipse dixit*. *Miranda* and its progeny reveal two sides of the modern Court. On the one hand, *Dickerson* is a relatively small step in the Court’s recent insistence on judicial hegemony with regard to constitutional interpretation.²⁶ On the other hand, *Miranda*’s progeny reveal a result-oriented Court that has too little care for the coherence of its own jurisprudence. Unfortunately, *Dickerson* continues this trend.

Dickerson was a devil of the Court’s own doing. *Miranda* was not an altogether popular decision, but it was a constitutional one, and cultural respect for the Constitution and the Court led to general adherence to the rule. The Justices themselves undermined the rule, in part by their eagerness to slice pieces off whenever possible, but worse by saying peculiar things like, “these procedural safeguards were not themselves rights protected by the Constitution”²⁷ and “the rule . . . is our rule, not a constitutional command.”²⁸ As we explain below, *Miranda* is best understood as guaranteeing adequate procedural safeguards rather than any particular set of safeguards, but that is a far more modest principle than the one the Court espoused in some post-*Miranda* cases: that nothing

²⁵ See *id* at 2342.

²⁶ See *Boerne*, 521 US at 516–29 (1997); *Seminole Tribe of Florida v Florida*, 517 US 44 (1996). See generally Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 Vand L Rev 407, 408–09 (1999) (noting the Court’s preference for its own power and disdain for Congress).

²⁷ *Michigan v Tucker*, 417 US 433, 444 (1974).

²⁸ *Arizona v Roberson*, 486 US 675, 688 (1988) (Kennedy dissenting).

Miranda required flowed from the Constitution itself. The Court took the tack it did because prevailing in individual cases assumed greater importance to some, sometimes a majority, of the Justices than maintaining its institutional role. And in doing so the Court diminished respect for its own decisions.²⁹

A. THE PUZZLE OF MIRANDA

As many have observed, *Miranda* reads more like a legislative edict than a judicial decision.³⁰ It begins by announcing a statute-like holding, then supports and fleshes it out in a committee report-like opinion. The decision was vilified instantly,³¹ and yet the *Miranda* warnings today are household words, appearing frequently in the popular media. The Court in *Dickerson* is right that *Miranda* is embedded in our culture.

But what is *Miranda*, and what did it hold? These questions hardly were posed by Section 3501's frontal attack on the rule. Prior to *Miranda* the constitutional test for a confession was whether it was voluntary under the totality of the circumstances. In enacting Section 3501, Congress seized on *Miranda*'s statement that the decision was not a "constitutional straightjacket" and that it would govern only in the absence of alternatives. However, Con-

²⁹ One particularly troubling manifestation of this disrespect is the practice of police officers questioning suspects "outside *Miranda*." In this practice, police officers intentionally ignore *Miranda*, knowing that any statement obtained can be used for impeachment purposes pursuant to *Harris v New York*, 401 US 222, 225 (1971), or for other purposes consistent with the *Miranda* exceptions the Court has fashioned. See Transcript of Deputy District Attorney Devallis Rutledge, in *Videotape: Questioning "Outside Miranda"* (Greg Gulen Productions 1990), excerpted in Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L Rev 109 at 189–92 (1998). There is simply no way to interpret *Miranda* as a decision permitting such questioning. To do so makes a mockery of the constitutional right at stake, but the Court's own treatment of *Miranda* has encouraged this sort of behavior. In addition to its general denigrations of *Miranda*, in *Oregon v Hass*, 420 US 714 (1975), the Court thought that questioning outside *Miranda* was a mere "speculative possibility." *Id.* at 723. Even if that were true in 1975, it no longer is. See Richard A. Leo and Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 Minn L Rev 397, 460 (1999) (noting that "[a]t least two state courts have held that even statements obtained after an interrogator's deliberate misrepresentation as to the admissibility of the suspect's statement may be introduced for the purpose of impeachment," although one state court has ruled such statements inadmissible as a due process violation).

³⁰ Louis Michael Seidman, *Brown and Miranda*, 80 Cal L Rev 672, 678 (1992).

³¹ For an instructive description, see Otis H. Stephens, Jr., *The Supreme Court and Confessions of Guilt* 165 (1973). See generally Fred P. Graham, *The Self-Inflicted Wound* 245 (1970).

gress simply returned to the original constitutional rule, and added the *Miranda* warnings as factors in determining voluntariness.³²

Thus, *Dickerson* was an easy case, because no matter what *Miranda* held, Section 3501 seemed to flout it. *Miranda* emphasized the compulsion inherent in custodial interrogation, and clearly stated that any alternative had to be “equally effective” in ameliorating this compulsion and safeguarding a suspect’s rights. Section 3501 provided no alternative, equally effective or otherwise. It was a slap at the Court,³³ and if any Court was likely to slap back, it was this one. For the Court that in recent years has given us *Seminole Tribe of Florida v Florida*,³⁴ *Plaut v Spendthrift Farm, Inc.*,³⁵ *City of Boerne v Flores*,³⁶ and other decisions favoring its own power at the expense of Congress, Section 3501 was a gnat that ran into the windshield of whatever it was that *Miranda* held.

Yet *Miranda*’s holding is elusive, and time has made it only more so. Some of the numerous post-*Miranda* decisions arguably have expanded upon *Miranda*’s safeguards, such as the rule in *Edwards v Arizona*³⁷ that once a suspect requests counsel, the police may not initiate any further questioning, even with regard to another offense.³⁸ But many more decisions have cut back on what might have seemed the constitutional core of *Miranda*. *Michigan v Tucker*³⁹ and *Oregon v Elstad*⁴⁰ held that the “fruits” of *Miranda* violations did not have to be excluded from evidence,⁴¹ *Harris v New York*⁴² held that statements taken in violation of *Miranda*

³² See Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?* 85 Cornell L Rev 883, passim (2000).

³³ See *id.* at 895.

³⁴ 517 US 44 (1996) (holding that the Indian Commerce Clause does not grant Congress power to abrogate state’s sovereign immunity).

³⁵ 514 US 211 (1995) (broadly construing the principle that Congress cannot retroactively change the law applicable to a litigated case).

³⁶ 521 US 507 (1997) (holding that Congress’s power under Section 5 of the Fourteenth Amendment is strictly remedial and preventative).

³⁷ 451 US 477 (1981).

³⁸ See *id.* at 484–85.

³⁹ 417 US 433 (1974).

⁴⁰ 470 US 298 (1985).

⁴¹ See *id.* at 308; *Tucker*, 417 US at 450.

⁴² 401 US 222 (1971).

could be used for impeachment purposes,⁴³ *New York v Quarles*⁴⁴ held that voluntary responses to interrogation without warnings were admissible if the interrogation was necessary to protect the public safety,⁴⁵ and so on.

What further complicated the meaning of *Miranda* was the Court's own constant rhetorical undermining of the decision. The Court consistently denied the constitutional basis of *Miranda*. *Miranda* came to be understood, in the Court's own words, as a "prophylactic."⁴⁶ The Constitution prohibited compelling statements from an accused, and admission of compelled statements would violate the core constitutional requirement, but in order to safeguard that right, the Court had adopted these broader rules. A violation of the particular rules themselves barred use of a statement so obtained, but only to the extent required by the Court's decisions. And for the most part, that area of limitation shrank over time.

B. THE "PROPHYLAXIS" APPROACH

The Court's post-*Miranda* decisions, and parallel developments with regard to the Fourth Amendment exclusionary rule, understandably led to exploration of the idea of a prophylactic rule.⁴⁷

⁴³ See *id.* at 226.

⁴⁴ 467 US 649 (1984).

⁴⁵ See *id.* at 655.

⁴⁶ See *Duckworth v Eagan*, 492 US 195, 203 (1989); *Connecticut v Barrett*, 479 US 523, 528 (1987); *Oregon v Elstad*, 470 US 298, 305 (1985); *New York v Quarles*, 467 US 649, 654 (1984).

⁴⁷ Most of the academic literature accepts the legitimacy of prophylaxis, with the debate focusing on how to justify it. See, e.g., Strauss, 550 Chi L Rev at 195 (cited in note 14) (equating prophylaxis with ordinary constitutional interpretation); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 Tenn L Rev 925, 949-63 (1999) (offering different justifications for different forms of prophylaxis); Monaghan, 89 Harv L Rev at 21 (cited in note 14) (viewing prophylaxis as a form of federal common law); Kamisar, 85 Cornell L Rev at 943 (cited in note 32) (accepting, *arguendo*, Monaghan's view, but distinguishing those aspects of *Miranda* that are constitutionally required); Huitema, 18 Yale L & Policy Rev at 265 (cited in note 15) (justifying prophylaxis addressed to risks of constitutional violations and activities that chill the exercise of constitutional rights). But see Grano, 80 Nw U L Rev 100 (cited in note 14) (rejecting the legitimacy of most prophylaxis); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulbofer*, 55 U Chi L Rev 174 (1988) (same).

Some commentators also distinguish between prophylactic rules and per se rules. See Wayne R. LaFare, Jerold H. Israel, and Nancy King, *Criminal Procedure* §§ 2.9(d), 2.9(e) (2d ed 1999); Archibald Cox, *The Role of Congress in Constitutional Determination*, 40 U Cin L Rev 199, 250-52 (1971).

For more than thirty years, the Court imposed *Miranda* on the states, but denied that it was a constitutional command. Similarly with regard to the Fourth Amendment, the Court frequently has denied that the exclusionary rule was compelled by the Constitution, giving it power to taper the remedy as it wished.⁴⁸ Yet, the remedies could not coherently be explained as an exercise of the Court's supervisory power over the federal courts because they applied to the states, despite their assertedly nonconstitutional nature. The Court's own explanation for this apparent anomaly was the notion of prophylactic rules. *Miranda* and the Fourth Amendment exclusionary principle were not constitutional commands, but prophylactic safeguards.

The first and perhaps still best attempt to understand the jurisprudence of prophylaxis was Henry Monaghan's *Harvard Law Review* foreword, "Constitutional Common Law."⁴⁹ Monaghan's central point was that much of what appears to be the Supreme Court's constitutional jurisprudence "is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."⁵⁰ In Monaghan's view, *Miranda* could be justified on utilitarian grounds as just this sort of constitutional common law. But key to Monaghan's entire understanding was that because these rules were not themselves constitutionally required, they were "subject to amendment, modification, or even reversal by Congress."⁵¹ In that light, Monaghan would have granted Congress wide (but not unlimited) authority over the contours of *Miranda*.

The subsequent scholarly literature of prophylaxis typically makes one of two common "moves." One, typified by David

⁴⁸ See *United States v Calandra*, 414 US 338, 348 (1974) (holding the exclusionary rule inapplicable to grand jury proceedings because it is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); *Stone v Powell*, 428 US 465 (1976) (for the same reason holding that habeas corpus relief is unavailable where state prisoner alleges that evidence was admitted in violation of the Fourth Amendment exclusionary rule); *United States v Leon*, 468 US 897 (1984) (for the same reason permitting admission of evidence obtained in good faith reliance on a defective warrant).

⁴⁹ See Monaghan, 89 Harv L Rev 1 (cited in note 14).

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 3.

Strauss's "The Ubiquity of Prophylactic Rules,"⁵² argues that the structure of the *Miranda* rule is not so different from many other areas of constitutional law because constitutional decisions frequently go beyond the core constitutional command.⁵³ The point of Strauss's move essentially is to normalize *Miranda*. He thus equates it, for example, with the Court's strict treatment of content regulation under the First Amendment, which Strauss understands as regulating beyond the bounds of what the amendment literally requires to avoid government violation of free speech guarantees.⁵⁴

A competing move subjects the idea of a prophylactic rule to harsh analysis, carving out a small realm where such prophylaxis might be acceptable, but for the most part deeming it illegitimate. Typical is Joseph Grano's "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy."⁵⁵ Grano contends that some rules that have been understood as prophylactic could be reconceptualized as constitutionally required, either as a matter of procedural due process⁵⁶ or some specific constitutional command.⁵⁷ This reconceptualization may solve the legitimacy problem in general, but Grano concludes that "any attempt to provide a constitutional foundation for [*Miranda* itself] would be strained and ultimately unconvincing."⁵⁸

Although scholarship since the Monaghan article has helped to clarify the propriety of certain judicial decisions, we think that the analytic value of the concept of prophylaxis is limited because ultimately it asks the wrong question.⁵⁹ Perhaps we may be accused of sidestepping an important discussion, but in our view the critical question is not how to justify judicial rulings that go beyond what

⁵² See Strauss, 55 U Chi L Rev 190 (cited in note 14).

⁵³ See generally *id.*

⁵⁴ See *id.* at 197.

⁵⁵ See Grano, 80 Nw U L Rev 100 (cited in note 14).

⁵⁶ See *id.* at 157–62.

⁵⁷ See *id.* at 162–63.

⁵⁸ *Id.* at 163.

⁵⁹ Compare Dorf, 112 Harv L Rev at 72 (cited in note 10) ("reflecting on the large role of doctrinal prophylaxis [in the Strauss approach] may lead us, by a seeming paradox, to discard the dichotomy of core versus prophylactic norms.").

the text and history of the Constitution strictly require. In a post-Realist world, there is no shortage of justifications for courts making law. In our view, analysis focuses most usefully on what steps nonjudicial actors may take in response to judicial decisions, however they are justified. This, incidentally, was the focus of Monaghan's original work. His Foreword was not so much an attempt to justify constitutional common law as an effort to explore its mutability. We believe this is the right approach.⁶⁰

C. A MORE TRADITIONAL SOLUTION: MIRANDA AND ITS PROGENY AS CONSTITUTIONAL LAW

Miranda can be explained without resort to prophylaxis,⁶¹ as an exercise of the Court's traditional authority to interpret the Constitution in the course of deciding cases. There are two ways of understanding *Miranda* as ordinary constitutional interpretation.

One understanding is that the entire procedure mandated by *Miranda* is part of the right embodied in the Fifth Amendment. Such an interpretation is unassailable from a legitimacy standpoint, except perhaps among originalists. We do not mean to say that this necessarily is a correct interpretation of the Constitution. We mean only that the Court regularly determines what the Constitution means, and it is not helpful to challenge *Miranda*'s legitimacy by pointing out that the "traditional" rule under the Fifth Amend-

⁶⁰ We would apply the same approach to an often equally bewildering problem, that of constitutional remedies. Indeed, sometimes it is difficult even to tell whether what is being discussed is a prophylactic rule or a constitutional remedy. Is exclusion of a confession based on a *Miranda* violation an application of the prophylactic rule, a remedy for an earlier violation of the *Miranda* right, or both? All that is clear is that commentators perceive similar problems of authority and scope. For a sampling of work on the relationship between rights and remedies, see William C. Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as Constitutional Remedy*, 88 Geo L J 799 (2000); Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1733 (1991); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S Cal L Rev 735 (1992); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857 (1999). For a more comprehensive catalogue, see Friedman, *supra*, at 736 n.4.

⁶¹ We do not address whether other categories of cases now understood in prophylactic terms could be reconceptualized. See, e.g., *Colter v Kentucky*, 407 US 104, 116 (1972) (treating as prophylactic the Court's decision in *North Carolina v Pearce*, 395 US 711 (1969), which established a presumption of vindictiveness in cases in which a trial judge imposed a harsher sentence upon resentencing after a reversal than in the first instance).

ment was voluntariness.⁶² Although the traditional rule under the Sixth Amendment implied no obligation on the state to provide counsel,⁶³ *Betts v Brady*⁶⁴ imposed such an obligation under special circumstances,⁶⁵ and that rule was in turn superseded by *Gideon v Wainwright*.⁶⁶ Constitutional rules evolve.⁶⁷ We do not observe many people claiming that *Gideon* was illegitimate, which perhaps suggests some connection between perceived correctness and perceived legitimacy.

There is some support for this understanding of *Miranda* both in the decision itself and in subsequent cases. *Miranda* establishes two fundamental propositions: first (as had seemed clear since *Bram v United States*⁶⁸), the Fifth Amendment applies in the sta-

⁶² Thus, Justice White, who dissented in *Miranda*, nonetheless forcefully defended its legitimacy in a speech before the chief justices of the state courts. See Justice Byron R. White, *Recent Developments in Criminal Law*, Address Before the Nineteenth Annual Meeting of the Conference of Chief Justices (Aug. 3, 1967), in Council of State Governments, *Proceedings of the Nineteenth Annual Meeting of the Conference of Chief Justices* (1967), quoted in Kamisar, 85 Cornell L Rev at 908–09 (cited in note 32).

⁶³ The first case in which the Court hinted at any obligation on the state to provide appointed counsel was *Powell v Alabama*, 287 US 45 (1932), and even there the defendants' ignorance, the capital charge, and the potential availability of retained counsel all suggest an extremely limited right.

⁶⁴ 316 US 455 (1942).

⁶⁵ Id at 473 (“while want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness, we cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”).

⁶⁶ 372 US 335 (1963). See also *Argersinger v Hamlin*, 407 US 25 (1972) (finding a right to counsel in misdemeanor and petty cases for which the defendant is imprisoned); *Scott v Illinois*, 440 US 367 (1979) (finding no right to counsel where state statute authorizes punishment of imprisonment but imprisonment is not imposed); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle* (manuscript on file with authors), at 30 (noting mere coincidence between the language of the Sixth Amendment and the rule of *Gideon v Wainwright*, 372 US 335 (1963)).

⁶⁷ A variety of theories exist that seek to legitimize the evolution of constitutional rules, but no matter what the relative merits of these theories, the fact of evolution is impossible to deny. For a sampling of the relevant theories, see Bruce Ackerman, 1 *We the People: Foundations* (1991) (constitutional moments); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo L J 1765 (1997) (pragmatic eclecticism); Barry Friedman and Scott B. Smith, *The Sedimentary Constitution*, 147 U Pa L Rev 1 (1998) (development through experience over time); Larry Kramer, *Fidelity to History—and Through It*, 65 Fordham L Rev 1627 (1997) (same); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan L Rev 395 (1995) (translation); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 884 (1996) (common law development).

⁶⁸ 168 US 532 (1897).

tionhouse; and second, custodial interrogation is inherently coercive. In light of these conclusions, *Miranda* held that something needs to be done to ensure that police custodial interrogation does not violate the Fifth Amendment, and that something was recognition of the panoply of “rights” identified in *Miranda*. Subsequent to *Miranda*, the Court has spoken of the Fifth Amendment “right” to counsel⁶⁹ and, more generally, has equated the full panoply of *Miranda* rights with the Fifth Amendment itself.⁷⁰

There are two problems with this interpretation. First, if the many elements of *Miranda* are all part of the Fifth Amendment right, then it is difficult to understand the meaning of *Miranda*’s invitation to develop “fully effective” alternative safeguards.⁷¹ Second, as Justice Scalia observed, this understanding of *Miranda* collides with subsequent decisions, such as *Michigan v. Tucker*,⁷² which are difficult to reconcile with the idea that *Miranda* is a constitutional rule.

But there is an alternative understanding of *Miranda* that makes sense of the “invitation.” Under this understanding, *Miranda* decided only what *Dickerson* identified as *Miranda*’s core holding: that the Fifth Amendment requires “apprising accused persons of their right of silence and . . . assuring a continuous opportunity to exercise it.”⁷³ Thus, what the Fifth Amendment requires is not every aspect of the *Miranda* procedure, but only that an accused learn of the right not to speak with the police, and that the interrogation take place in a manner that permits the suspect to exercise that right at any time.

This also is a plausible understanding of the Fifth Amendment. Whether one can be said to possess a right of which he is ignorant is a difficult question, and just because the Court has answered

⁶⁹ See, e.g., *Edwards v. Arizona*, 451 US 477, 481 (“*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation.”).

⁷⁰ See *Dickerson*, 120 S Ct at 2334 n 5 (citing *Withrow v. Williams*, 507 US 680, 691 (1993); *Illinois v. Perkins*, 496 US 292, 296 (1990); *Butler v. McKellar*, 494 US 407, 411 (1990); *Michigan v. Jackson*, 475 US 625, 629 (1986); *Moran v. Burbine*, 475 US 412, 427 (1986); *Edwards*, 451 US at 481–82).

⁷¹ *Miranda*, 384 US at 478–79.

⁷² 417 US 433 (1974). See also *Oregon v. Elstad*, 470 US 298, 308 (1985) (treating *Tucker* as holding that fruit of poisonous tree doctrine does not apply to *Miranda* violations).

⁷³ *Dickerson*, 120 S Ct at 2334 (quoting *Miranda*).

that question affirmatively in some areas (for example, consent to search under the Fourth Amendment)⁷⁴ does not mean it cannot be answered in the negative with regard to the Fifth Amendment right. Knowing and intelligent waiver is the standard for trial rights,⁷⁵ and the Court and commentators regularly draw the connection between what goes on during police questioning and the subsequent trial.

Nor is there anything especially odd about the right applying at the stationhouse. Indeed, by its terms the right should apply to any governmental conduct, no matter where it occurs. A confession that is a product of torture, for example, would plainly violate the Fifth Amendment (as well as Due Process) even if it took place in a home. Finally, it requires little to insist that the right remain effective throughout interrogation; whether or not custodial police interrogation carries with it quite the coercive effect the *Miranda* Court suggested, custodial interrogation undoubtedly places some substantial pressure on suspects to confess.

We favor this interpretation of *Miranda*, even though it too runs afoul of several post-*Miranda* decisions. This problem is not as large as Justice Scalia takes it to be, however, for solving it requires only that the Court retract some of its ill-considered dicta and rethink the rationales of several decisions. Whether the post-*Miranda* decisions are viable depends upon whether any given outcome can be explained by the interpretation we have offered of *Miranda*. This in turn requires of the Supreme Court only that it work on a case-by-case basis to justify its holdings in constitutional terms.⁷⁶

Under this approach, some post-*Miranda* decisions clearly are defensible.⁷⁷ On the other hand, some post-*Miranda* decisions

⁷⁴ See *Schneekloth v Bustamonte*, 412 US 218 (1973).

⁷⁵ See *Johnson v Zerbst*, 304 US 458, 464 (1938); see also *Schneekloth*, 412 US at 235 (distinguishing between waiver of trial rights and other situations in which a person may fail to invoke “a constitutional protection”).

⁷⁶ Donald Dripps engages in a similar endeavor, arguing that all of the cases relying on a “prophylactic” interpretation of *Miranda* can be squared with the decision itself. See Donald Dripps, *Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 Const Comm 19 (2000). While we are not persuaded that Dripps succeeds in squaring all of the cases with *Miranda*, his endeavor is the correct one.

⁷⁷ *New York v Quarles*, for example, held that a *Miranda* violation is excused if the public safety demands that a subject be questioned immediately without warnings. See 467 US 649 (1984). See *id.* at 656–57. Few rights are absolute, and all *Quarles* does is to acknowledge that some balancing is appropriate.

are more dubious,⁷⁸ and some will present difficult cases.⁷⁹ The Court will have to overrule, reconceptualize, or at least further justify some of its rights-expanding decisions as well as its rights-contracting ones.⁸⁰

⁷⁸ *Michigan v Tucker* is a good example. If *Miranda* is a constitutional rule, and if in fact it violates the Constitution to fail to warn a suspect of the right to remain silent, then it is difficult to see how we can avoid excluding the fruits of unwarned statements. To be sure, if one thought that unlawfully coercive interrogation completed a *Miranda* violation in the way that an illegal search completes a Fourth Amendment violation, one might also think that neither suppression of the confession nor its fruits is constitutionally required. A damages remedy might suffice. However, in assuming that *Miranda*'s core is a constitutional rule, we have been assuming that the core includes the right to suppression of a confession obtained in violation of *Miranda*. If that is so, there appears to be no good reason to distinguish the confession from its fruits.

One might question why it necessarily follows that the fruits of constitutional violations must be excluded, but the proper focus of attention is on the relationship between the violation and the fruit, not on some wholesale rule. The confession obtained from a tortured suspect is "just" the fruit of the violation. So is the witness discovered through that same torture, and the buried murder weapon (whether located from the suspect's testimony or from that of the witness the suspect identified). The Supreme Court's doctrine accounts for these distinctions by, *inter alia*, permitting the introduction of evidence if the causal chain between government misconduct and the evidence has been attenuated, see *Wong Sun v United States*, 371 US 471 (1963), or if the fruit is evidence likely to have been discovered anyway, see *Nix v Williams*, 467 US 431 (1984). We do not mean to endorse any particular decision regarding the fruit of the poisonous tree doctrine; our point is that those doctrines should be applied consistently when a constitutional violation is at stake.

⁷⁹ A good example is *Harris v New York*, which held that statements inadmissible in a case-in-chief because of a *Miranda* violation can nonetheless be admitted for impeachment purposes. See 401 US 222, 226 (1970). Whether a balancing of the interest in preventing perjury against the Fifth Amendment right justifies the rule most likely will have to be decided on a case-by-case basis if it applies at all. See *id.* at 225–26 (discussing competing value of excluding perjury). *Oregon v Elstad* presents another thorny problem. See 470 US 298 (1985). *Elstad* held that if a suspect made a statement in violation of *Miranda*, a subsequent statement made shortly thereafter is admissible if *Miranda* warnings are administered before the second statement and the first statement is not involuntary. See *id.* at 314. But that decision becomes difficult to justify in light of *Brown v Illinois*'s holding that the *Miranda* warnings are not talismanic. See *Brown v Illinois*, 422 US 590, 603 ("Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."). Given that the Fifth Amendment is in part about a concern for voluntariness, it is difficult to understand why administering the warnings would be talismanic for Fifth Amendment purposes, but not so for the Fourth Amendment. *Elstad* perhaps could be explained, but Justice O'Connor's opinion for the Court relies on the nonconstitutional understanding of *Miranda*, and that will not wash. See *Elstad*, 470 US at 306 (stating that the *Miranda* exclusionary rule "sweeps more broadly than the Fifth Amendment itself").

⁸⁰ One candidate for further explanation under the narrowed interpretation of *Miranda* is *Edwards v Arizona*, holding that once the Fifth Amendment "right" to counsel is invoked, the suspect cannot even be questioned following a second set of warnings by different officers as to a different offense. See 451 US 477, 484–45 (1981). Because the Fifth Amendment, like the Sixth Amendment, tends to be treated as offense-specific, some more reasoning is necessary to maintain the *Edwards* holding. Perhaps the Court could provide such an explanation, but it has not done so.

D. MIRANDA AFTER DICKERSON: SHARED CONSTITUTIONAL INTERPRETATION

This discussion still leaves unanswered how we should understand all the rules in *Miranda* that seem to go beyond this understanding of the decision. Was the Court entitled to speak about the “right” to counsel and insist that counsel be provided to indigents? Isn’t this the very sort of prophylaxis that we already have said is unnecessary to make sense of the case?

The answer to this question turns out to be related to what *Miranda*’s invitation meant, that is, what Congress and the states can do after *Dickerson*. What if Congress decided after *Dickerson*, or after *Miranda* for that matter, that it wanted to take the Court up on its invitation to try something different? As we have seen, if every aspect of *Miranda* is constitutionally required, the invitation seems empty. But even though *Dickerson* describes some aspects of *Miranda* as constitutionally required, it does not go this far. Rather, it treats the invitation as having meaning.

Suppose that in the aftermath of *Dickerson* Congress passed the “Anti-Coercion and Effective Custodial Interrogation Act” (“ACECIA”). The statute mandates that any suspect taken into custody by federal officers must be told of the right to remain silent before any interrogation commences, that any such interrogation must be videotaped from beginning to end, and that counsel may *not* attend the interrogation (except, of course, after the onset of adversarial criminal proceedings).⁸¹

ACECIA is but one of several possible responses Congress might offer to *Miranda/Dickerson*. Others are easily imagined, such as requiring that all interrogation take place before a magistrate, or dispensing with police-administered warnings altogether but forbidding any custodial interrogation without the presence of the suspect’s attorney. The point is that Congress could devise several ways of dealing with interrogations that do not accord the full panoply of *Miranda* guarantees, but address the twin concerns of informing a suspect of the right to remain silent and ensuring compliance with this right throughout the interrogation.⁸²

In order to determine what the Court might say about such a

⁸¹ See *Massiah v United States*, 377 US 201 (1964); *Brewer v Williams*, 430 US 387 (1977).

⁸² See Kamisar, 85 Cornell L Rev at 912 (cited in note 32).

congressional response, we need only return to *Miranda* itself. The Court's opinion is revealing in a way that has received little attention. For the opinion does not simply extend an "invitation," but also characterizes its approach not as a "rule," but as a "guideline."⁸³ The Court explains that it granted certiorari "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."⁸⁴ The Court sets out its "holding" at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation "unless it demonstrates the use of procedural safeguards effective to secure" the privilege.⁸⁵ And "[a]s for the procedural safeguards to be employed, *unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it*" the specific *Miranda* guidelines are required.⁸⁶ The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right.⁸⁷ At least twice more, the Court repeats the holding and re-extends the invitation.⁸⁸

In other words, the best way to understand *Miranda* is not as mandating specific procedures, but as laying down a right and creating a safe harbor for those charged with respecting it. According to *Miranda*, the Constitution requires the government to inform suspects of their right to remain silent and to safeguard that right throughout the interrogation. Other actors are then encouraged to develop alternative ways to achieve these goals.

From this discussion it ought to be apparent that the problem is not so much with *Miranda*, but with the way subsequent decisions have characterized *Miranda*, both under-enforcing and over-enforcing the guidelines. Indeed, *Miranda's* "invitation" serves only to make explicit what is always implicit—that it is always open to political actors to offer a competing vision of the requirements of the Constitution. After the Supreme Court held unconstitu-

⁸³ 384 US at 442.

⁸⁴ Id at 441–42 (emphasis added).

⁸⁵ Id at 444.

⁸⁶ Id at 444–45 (emphasis added).

⁸⁷ See id at 467.

⁸⁸ See id at 478–79, 490.

tional Texas's prosecution of a flag burner,⁸⁹ Congress was entitled to, in effect, urge the Court to reconsider that judgment, by enacting a federal law that attempted to prohibit burning the American flag,⁹⁰ just as the Court, in turn, was entitled to reject Congress's plea.⁹¹ There is, admittedly, a sensitive and difficult constitutional line between appropriate testing of constitutional bounds and defiance. That is the problem that was presented in *Cooper v Aaron*⁹² and some of the more extreme responses to *Roe v Wade*.⁹³ But generally a legislature passing laws subject to the ordinary process of judicial review will be on the permissible side of the line.

Of course, in the end the say is the Court's. The Court stated as much in *Miranda*, pointing out that "the issues presented are of constitutional dimensions and must be determined by the courts."⁹⁴ But this, standing alone, is nothing but the rule of *Marbury*, in its most modest form. In a case involving admission of a confession, a court must determine whether admission is consistent with constitutional commands.

In light of these familiar understandings, it becomes clearer what the Court should do with ACECIA. The Court should weigh ACECIA against the rule that *Dickerson* defines as the heart of *Miranda*. The Court should ask whether the ACECIA procedures are as effective as the *Miranda* warnings at informing suspects of their right to silence and ensuring a continuous opportunity to exercise that right. The procedures of ACECIA seem to measure up.⁹⁵ In-

⁸⁹ See *Texas v Johnson*, 491 US 397 (1989).

⁹⁰ See Flag Protection Act of 1989, 103 Stat 777, codified at 18 USCA § 700 (Supp 1990).

⁹¹ See *United States v Eichman*, 496 US 310 (1990).

⁹² 358 US 1 (1958).

⁹³ 410 US 113 (1973).

⁹⁴ 384 US at 490.

⁹⁵ While the videotaping of confessions will in the vast run of cases be enough to assure that both the *Miranda* and voluntariness components of the Fifth Amendment are met, there may be cases that require further elaboration of the statute or the constitutional rule. Perhaps the Court will find that a defendant subjected to hours and hours of interrogation could not have exercised free will. Perhaps the Court will conclude from a particular videotape that the process of interrogation so strained the suspect that he or she was not sufficiently of right mind to confess. Perhaps gaps in the videotape or the chronology from the time of arrest to the time of an incriminating statement will suggest that the police engaged in illegal practices when the machine was not recording. See *Stephan v State*, 711 P2d 1156, 1164 (Alaska 1985) (excluding the defendant's statement where "a police officer, in his own discretion, chose to turn the recorder on twenty minutes into the interview rather than at the beginning"); Wayne T. Westling and Vicki Waye, *Videotaping Police Interrogations: Les-*

forming the suspect of the right to silence is a key component of *Miranda/Dickerson*, and videotaping provides adequate protection of the right to continuous exercise of the privilege.⁹⁶

Note, however, that the ultimate answer will emerge in the context of specific cases addressing whether particular suspects were adequately informed of their right to silence and whether they were the beneficiaries of procedural safeguards adequate to ensure a continuous opportunity to exercise it.⁹⁷ This is as it should be, and perhaps where *Miranda* went wrong. The appropriate complaint about *Miranda* is not that it departed from the traditional involuntariness test, for as we have seen, rights evolve. But the *Miranda* Court could have worked itself through to its essential holding on a case-by-case basis. Whether or not this was a necessity—and recognizing, ironically, that the bright-line nature of the *Miranda* decision might have done law enforcement a favor—the Court would have been subjected to less criticism had it worked incrementally.⁹⁸

The most difficult part of ACECIA is the denial of counsel. This too might survive constitutional scrutiny after *Dickerson*, for most

sons from Australia, 25 Am J Crim L 493, 533–34 (1998) (describing the Australian experience).

⁹⁶ See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw U L Rev 387, 487 (1996) (“Videotaping interrogations would certainly be as effective as *Miranda* in preventing police coercion and probably more so.”). Of course, nothing in *Miranda* prevents federal or state officials from videotaping confessions in addition to providing counsel and all of the standard warnings. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw U L Rev 501, 556 (1996). By enacting ACECIA Congress would be making a judgment that videotaping should substitute for, rather than supplement, a right to counsel and the accompanying warnings. Compare Philip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 Am Crim L Rev 303, 306, 313 (1987) (proposing audiotaping or videotaping as a recommended measure, possibly to be made mandatory after a period of study).

⁹⁷ See generally Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 Pepperdine L Rev 855, 871–74 (1999) (discussing Supreme Court evaluation of a similar question—alternative remedies to exclusion under the Fourth Amendment—in the context of specific cases). Although the ultimate determination regarding any set of procedures would thus await concrete cases, declaratory relief should be liberally available to ensure that government officials do not engage in widespread illegal activity and to assure those same officials that a proposed set of alternative safeguards will not be ruled categorically inadequate. See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267, 462–64 (1998) (urging a variant on the latter to avoid stifling experimentation by governments fearful of judicial overturning of convictions).

⁹⁸ Compare Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L Rev 1185, 1198–1205 (1992) (making the same point with respect to *Roe*).

of the Court's decisions treat the right to counsel as existing only in the service of the Fifth Amendment's commands, not as a core part of that Amendment, and the videotaping requirement should achieve the central goal of providing counsel in this setting.⁹⁹

What is more interesting to us than any particular answer the Court might provide is how much room proper constitutional process should leave for other actors. *Miranda's* "invitation" was quite specific, but the Congress that enacted Section 3501 did not take it seriously. Congress simply denied the Court's interpretation of the Constitution. Thus, the Court's invalidation of the statute in *Dickerson* is not surprising. But a serious legislative effort along the lines of ACECIA would deserve serious consideration by the Court.

II. CONGRESS, THE STATES, AND CONSTITUTIONAL POWER

The controversy in *Dickerson* raised a question of separation of powers—a contest between Congress and the Court. In this part we consider the implications of *Dickerson* in the contest between the states and the federal government. We conclude that the power granted to Congress by *Dickerson* gives it substantial control over the states, but consistent with our themes of shared interpretation, experimentation, humility, and respect, we believe Congress should be reluctant to exercise its power in a manner that limits state choices. Inherent in that conclusion, of course, is our belief (discussed in Part III) that just as Congress has power after *Dickerson* to pass legislation altering *Miranda's* guidelines, so too do the states.

A. CONGRESSIONAL POWER TO SUPPLEMENT MIRANDA

Consider now a variant of ACECIA, the "National Anti-Coercion Act" ("NACA"). It states, "Absent a demonstration that videotaping was not possible in a particular case, no statement that

⁹⁹ Obviously the statutory rule would fail if the confession were taken after the Sixth Amendment right to counsel attached. And admittedly there is ambiguity in the case law—from *Escobedo v State of Illinois* if not before—as to whether there is an independent right to counsel in the custodial interrogation setting. See 378 US 478 (1964). Some of the continuing ambiguity arises from the fact "that *Miranda* did not build on the approach taken in *Escobedo* as much as it *displaced* it." Kamisar, 85 Cornell L Rev at 885 n 3 (cited in note 32) (emphasis in original).

is the product of custodial interrogation shall be admissible as evidence against the maker of that statement in any state or federal court unless the entire period of custodial interrogation, beginning with a warning that the suspect has the right to remain silent, was videotaped.”¹⁰⁰ Unlike ACECIA, which substitutes alternative procedures for three of the four *Miranda* warnings, NACA supplements the warnings. In addition, and more importantly for present purposes, whereas ACECIA applies only to the federal government, NACA applies to the states as well. Under NACA, states would be permitted to give the full *Miranda* warnings *in addition to* videotaping custodial interrogation, but could not refuse to use videotaping. Is this constitutional?

1. *The commerce power.* From 1937 through 1995, the Supreme Court took an expansive view of Congress’s power to regulate interstate commerce.¹⁰¹ Of particular note, the commerce power was used regularly to justify civil rights legislation.¹⁰² Most observers assumed that to sustain federal regulatory power over some activity it was necessary only to explain how that activity was connected to interstate commerce, and, of course, in a modern economy every activity is, in some measure, so connected. Accordingly, it came to be assumed that Congress could enact virtually any law under its commerce power.¹⁰³

Thus, until recently, one might have tried to justify NACA under the Commerce Clause. The argument might have gone something like this: By requiring the videotaping of custodial inter-

¹⁰⁰ Those readers who are skeptical that Congress would ever pass a statute that seems to extend a new right to suspects may wish to imagine further that NACA responds to some widely publicized police scandal or is packaged with other measures that crack down on crime.

¹⁰¹ In *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1 (1937), the Court upheld the National Labor Relations Act of 1935. As the four dissenters noted, in affirming Congress’s power to regulate manufacturing, the Court departed from a stricter view of the Commerce Clause that had prevailed earlier in the century. See *NLRB v Friedman-Harry Marks Clothing Co.*, 301 US 58, 78 (1937) (McReynolds dissenting from decisions in several cases) (objecting to federal regulation of “purely local industry beyond anything heretofore deemed permissible.”). The Court did not again strike down a law as beyond the scope of the Commerce Clause until its decision in *United States v Lopez*, 514 US 549 (1995).

¹⁰² See, e.g., *Katzenbach v McClung*, 379 US 294 (1964); *Heart of Atlanta Motel, Inc. v United States*, 379 US 241 (1964).

¹⁰³ See, e.g., Laurence H. Tribe, *American Constitutional Law* 313 (2d ed 1988) (“The doctrinal rules courts currently employ to determine whether federal legislation is affirmatively authorized under the commerce clause do not themselves effectively limit the power of Congress.”).

rogation, NACA increases the demand for videotape, for video recording devices, and for employees who operate video recording devices. The tape and the recording devices are articles of commerce that move in an interstate market, and some people will cross state lines to find work operating the video recording devices. Accordingly, the argument concludes, NACA regulates interstate commerce.

*United States v Lopez*¹⁰⁴ and *United States v Morrison*¹⁰⁵ make clear that this sort of argument no longer works. Whatever the outer boundaries of the Commerce Clause after these decisions, NACA is outside them.

Arguably, *Lopez* itself, which struck down the Gun Free School Zones Act, held merely that Commerce Clause legislation must in fact regulate something that has a “substantial effect” on interstate commerce,¹⁰⁶ and indicated that without such a requirement Congress’s powers may seem to be without limit. However, *Morrison*, which invalidated the civil remedy provision of the Violence Against Women Act (VAWA), restates the constitutional test formally. *Morrison* requires that if Congress regulates some activity because of its substantial effects on interstate commerce, the regulated activity must be “some sort of economic endeavor.”¹⁰⁷

The fact that NACA would have an effect on interstate commerce is thus irrelevant. The same was true of the Gun Free School Zones Act and VAWA. Like firearm possession and gender-motivated violence—the activities Congress sought to regulate in *Lopez* and *Morrison*, respectively—neither custodial interrogation nor the introduction of evidence at a criminal trial is likely to strike

¹⁰⁴ 514 US 549 (1995).

¹⁰⁵ 120 S Ct 1740 (2000).

¹⁰⁶ There are two other branches of the commerce power: the regulation of the “channels” and “instrumentalities” of interstate commerce, neither of which was applicable in *Lopez*, see *id.* at 559, and neither of which is applicable here.

¹⁰⁷ *United States v Morrison*, 120 S Ct 1740, 1750 (2000) (citing *Lopez*, 514 US at 559–60). *Lopez* may have made sense as an attempt to define the permissible boundaries of congressional regulation under its enumerated powers, but *Morrison*—at least as it was written—signals a regrettable return to pre-1937 formalism. Moreover, *Morrison* seems in some ways an attempt by the Chief Justice to resuscitate his opinion in 1976 in *National League of Cities v Usery*, 426 US 833 (1976). That would be unfortunate, given that the constitutional structure does seem to imply an attempt to define enumerated powers, whereas *National League of Cities*’ notion of a traditional state function, see *id.* at 849–52, finds no place in the Constitution. See Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 Supreme Court Review 85, 114 (1988).

the Court as “economic activity” or as having a “substantial effect” on interstate commerce. Accordingly, NACA presents a fairly easy case under current doctrine. It is not authorized by the Commerce Clause.

2. *The “Morgan” power.* Section 5 of the Fourteenth Amendment is a plausible source of congressional power to enact NACA. It authorizes Congress “to enforce, by appropriate legislation,” the substantive provisions of the Fourteenth Amendment. One of those substantive provisions is the Due Process Clause, which, through the incorporation doctrine, is the basis for applying the Fifth Amendment to the states.

*Katzenbach v Morgan*¹⁰⁸ was probably the high-water mark of the Section 5 power. In that case, the Court upheld a provision of the federal Voting Rights Act forbidding states to condition the vote of any person educated in a Puerto Rican Spanish-instruction school on English literacy, notwithstanding the fact that the Court had earlier upheld a state-imposed English literacy test.¹⁰⁹ The Court reasoned that Section 5 grants Congress the power to “enforce” the Fourteenth Amendment independent of any adjudicated violation of its terms,¹¹⁰ and Congress could reasonably have determined that proscribing English literacy tests was necessary to combat state-sponsored discrimination in voting. The Court was emphatic, however, that “§ 5 grants Congress no power to restrict, abrogate, or dilute the[] guarantees” of the Fourteenth Amendment,¹¹¹ even as it authorizes Congress to go beyond what the courts require. Section 5 was thus a “ratchet.”¹¹² Congress could add to but not subtract from the protection the Court itself afforded constitutional rights.

But what kind of ratchet is Section 5? Does it authorize Congress to define the content of the substantive provisions of the

¹⁰⁸ 384 US 641 (1966).

¹⁰⁹ See *id.* at 649 (distinguishing *Lassiter v Northampton Election Bd.*, 360 US 45 (1959)).

¹¹⁰ See *Morgan*, 384 US at 648–49.

¹¹¹ *Id.* at 651.

¹¹² See William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 *Stan L Rev* 603, 613 (1975); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 *Mont L Rev* 145, 152–69 (1995); Matt Pawa, *Comment: When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 *U Pa L Rev* 1029, 1062–69 (1993); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv L Rev* 1212, 1230 (1978).

Fourteenth Amendment independent of the Court's own jurisprudence, and then enact legislation designed to "enforce" the Congressional interpretation? The Court approved that approach with respect to Congress's power to enforce the Thirteenth Amendment in *Jones v Alfred H. Mayer Co.*,¹¹³ and parts of *Morgan* appeared to acknowledge a parallel enforcement power under the Fourteenth Amendment.¹¹⁴ Individual Justices strongly criticized this view of the Fourteenth Amendment, however, in two post-*Morgan* cases.¹¹⁵

The Rehnquist Court's interest in defending state sovereignty against what it considers congressional overreaching spelled doom for the substantive ratchet theory. After all, a substantive ratchet is inconsistent with the spirit, if not the letter, of the Court's insistence in *Lopez* that there are limits to Congress's affirmative powers. Virtually any law, indeed, any human action, can, on some rational understanding, be seen to deprive someone of life, liberty, property, or equality; thus, a congressional power to enforce Congress's own definition of the substantive provisions of the Fourteenth Amendment could well become the sort of plenary congressional power that the *Lopez* Court was at pains to reject under the Commerce Clause.

Unsurprisingly, just two years after *Lopez*, the Court formally renounced the substantive ratchet theory.¹¹⁶ *City of Boerne v Flores*¹¹⁷ held that Section 5 did not authorize the enactment of the Religious Freedom Restoration Act¹¹⁸ (RFRA), which required that laws of general applicability be subject to strict judicial scrutiny in those instances in which they imposed a substantial burden on religion. Because the Court had previously ruled that such generally applicable laws do not trigger heightened scrutiny,¹¹⁹ the Court

¹¹³ 392 US 409 (1968).

¹¹⁴ See *Katzenbach v Morgan*, 384 US 641, 653–56 (1966).

¹¹⁵ See *EEOC v Wyoming*, 460 US 226, 262 (1983) (Burger dissenting) ("Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government."); *Oregon v Mitchell*, 400 US 112, 205 (1970) (Harlan concurring in part and dissenting in part); id at 296 (Stewart concurring in part and dissenting in part).

¹¹⁶ See *Boerne*, 521 US at 519–29.

¹¹⁷ 521 US 507 (1997).

¹¹⁸ Pub L No 103-141, 107 Stat 1488 (1993), codified at 42 USC § 2000bb (1994).

¹¹⁹ See *Employment Div. v Smith*, 494 US 872 (1990).

deemed RFRA an impermissible effort to exercise a substantive ratchet power.

Boerne nonetheless recognized that Section 5 grants Congress a remedial ratchet power, that is, a power to enact remedial or preventative measures for what the Court itself would consider to be violations of the Fourteenth Amendment, even if the Court would not itself require the specific remedial or preventative measures.¹²⁰ That recognition was necessary to reconcile *Boerne* with *Morgan* and other cases, and more importantly, to avoid rendering Section 5 nugatory.

The Court's simultaneous disavowal of a substantive ratchet and recognition of a remedial ratchet in *Boerne* gave rise to an obvious difficulty: how to distinguish the two. In *Morgan*, for example, the Court characterized the challenged provision as either a remedy for official discrimination or an extension of substantive protection against voting discrimination beyond what the Court had required. The mechanism the Court used in *Boerne* for discerning permissible remedial measures from impermissible efforts to ratchet up substantive constitutional protection was a means/ends test. There must be a "congruence and proportionality" between what the Court would recognize as a constitutional violation and the means Congress chooses to remedy or prevent that violation,¹²¹ otherwise, the Court will assume that Congress is merely dressing a substantive ratchet in remedial garb.

Is NACA congruent and proportional to violations of the Fifth Amendment? That depends on how close a fit between means and ends is demanded. Even after *Lopez* and *Morrison*, the general standard for determining whether an Act falls within one of Congress's enumerated powers is the quite deferential necessary-and-proper test of *McCulloch v Maryland*.¹²² "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution,

¹²⁰ See *Boerne*, 521 US at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting *Fitzpatrick v Bitzer*, 427 US 445, 455 (1976)).

¹²¹ *Boerne*, 521 US at 519.

¹²² 17 US (4 Wheat) 316, 421 (1819).

are constitutional.”¹²³ The Court has applied the necessary-and-proper test quite deferentially when Congress has invoked its powers to enforce the Thirteenth and Fifteenth Amendments,¹²⁴ and one might therefore expect similar deference in the Fourteenth Amendment context.

However, in four recent cases the Court has held that federal laws were not justified under the Section 5 power.¹²⁵ This pattern suggests that congruence and proportionality is a demanding standard.¹²⁶ Nevertheless, NACA satisfies the standard the Court has applied in the recent Section 5 decisions.

¹²³ *Id.* at 421.

¹²⁴ See *Jones v Alfred H. Mayer Co.*, 392 US 409, 443–44 (1968) (Thirteenth Amendment); *South Carolina v Katzenbach*, 383 US 301, 326 (1966) (Fifteenth Amendment); *City of Rome v United States*, 446 US 156, 175 (1980) (Fifteenth Amendment).

¹²⁵ See *Morrison*, 120 S Ct 1740 (2000); *Kimel v Florida Bd. of Regents*, 120 S Ct 631 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v College Savings Bank*, 527 US 627 (1999); *Boerne*, 521 US 507.

¹²⁶ Contrasting *Boerne* with a Fifteenth Amendment case, *City of Rome v United States*, 446 US 156 (1980), suggests that congruence and proportionality is a stricter test than necessary and proper. In *Rome*, as in *Boerne*, Congress sought to substitute what could be described as a disparate impact test for a judicially mandated purposeful discrimination test. Applying the necessary-and-proper test, the Court deferred to Congress’s chosen means in *Rome*; applying the congruence and proportionality test, the Court invalidated Congress’s handiwork in *Boerne*. See Laurence H. Tribe, 1 *American Constitutional Law* 933–36 (3d ed 1999).

Is the Court justified in applying a stricter standard of review to legislation under Section 5 of the Fourteenth Amendment than under the other Civil War Amendments (not to mention Congress’s powers under Article I, Section 8)? One might reconcile the cases by noting that, unlike the Fourteenth Amendment Section 5 power, the power to enforce the Fifteenth Amendment does not pose a risk of becoming a plenary power. The Fifteenth Amendment is limited to a much narrower subject matter—race discrimination in voting—than the Fourteenth Amendment. Hence, it could be argued, the Court can afford to grant Congress greater deference under the Fifteenth Amendment than under the Fourteenth.

Although this line of argument may work for the Fifteenth Amendment, it does not work for the Thirteenth Amendment. Under *Jones*, “Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.” Tribe, 1 *American Constitutional Law* at 927 (cited above). And because the Thirteenth Amendment contains no state action requirement, this means that “Congress would possess nearly plenary authority under the Thirteenth amendment to protect all but the most trivial individual rights from both governmental and private invasion.” *Id.* Accordingly, the difference in wording and subject matter among the Thirteenth, Fourteenth, and Fifteenth Amendments does not justify the narrower approach that the Court has lately taken toward the Fourteenth.

Nonetheless, we do not mean to suggest that the Civil War Amendment cases are strictly irreconcilable with one another. For example, one could think that *Boerne* and *Rome* are both rightly decided. Given our nation’s long history of racial discrimination in voting, in 1965 (the date of passage of the Voting Rights Act), it was entirely plausible for Congress to conclude that many or most changes in voting rules that have a disparate racial impact are in fact motivated by official racial animus, even if specific proof of such animus is unavailable in particular cases. By contrast, in 1993 (the date of passage of the Religious

In *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*,¹²⁷ the most restrictive of the Section 5 decisions, the Court held that Section 5 did not authorize Congress to subject nonconsenting states to suit in federal court for violating patent rights. Although the Court accepted that patent rights are “property” within the meaning of the Fourteenth Amendment Due Process Clause,¹²⁸ the Court nonetheless found a lack of congruence and proportionality. Selectively citing procedural due process cases, the Court asserted that a patent violation by the state violates due process only if the state fails to provide an adequate remedy.¹²⁹ Because Congress had compiled what the Court considered insufficient evidence that states were failing to provide remedies for their own patent violations, the Court found a lack of congruence and proportionality.¹³⁰

Standing alone, *Florida Prepaid* is deeply troubling: it appears to abandon any notion that the Court and Congress are partners in enforcing the Constitution. Why was Congress’s Section 5 “preventative” power insufficient to justify the statute? The Court’s answer is that the remedy was not, in its view, necessary to protect constitutional rights.¹³¹ But necessity cannot be the touchstone under Section 5, for by hypothesis Congress may enact measures that

Freedom Restoration Act), Congress had no reason to believe that any but a tiny handful of the generally applicable laws that, from time to time, impose substantial burdens on the free exercise of religion were adopted out of religious animus. The *Boerne* Court itself appeared to endorse this distinction between race and religion. See, e.g., *Boerne*, 521 US at 531 (“In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.”). Thus, the different outcomes in *Rome* and *Boerne* could be taken to mean that the Court applied a consistent standard of review, which the Voting Rights Act satisfied and the Religious Freedom Restoration Act did not. The outcomes alone do not logically entail that the Court applied different standards.

¹²⁷ 527 US 627 (1999).

¹²⁸ See *id.* at 642.

¹²⁹ See *id.* at 642–43 (citing *Zinerman v Burch*, 494 US 113, 125 (1990); *Parratt v Taylor*, 451 US 527, 539–31 (1981); *Hudson v Palmer*, 468 US 517, 532–53 (1984); *id.* at 539 (O’Connor concurring). As the dissent observed, these cases only establish that negligent deprivations of property do not violate the Due Process Clause if there is an adequate state postdeprivation remedy; a willful deprivation is a completed Due Process violation at the moment it occurs. See *Florida Prepaid*, 527 US at 653 (Stevens dissenting) (citing *Daniels v Williams*, 474 US 327, 332–34 (1986)).

¹³⁰ See *id.* at 643–44.

¹³¹ See Tribe, 1 *American Constitutional Law* at 958 (cited in note 126).

go beyond what the Court itself deems necessary. In *Florida Prepaid* the Court appears to have forgotten the purpose of the congruence and proportionality test: to distinguish between legitimate and sham remedial or preventative measures. There was no serious argument in *Florida Prepaid* that Congress had, as in RFRA, attempted to redefine the substance of constitutional rights. Accordingly, the Court should have deferred to Congress. Instead, it apparently mandated “something between intermediate and strict scrutiny”¹³² of Congressional enactments pursuant to the Section 5 power.

Florida Prepaid is an aberration. The Court’s other recent Section 5 cases are not quite so constricting. In particular, last Term’s decision in *Kimel v Florida Board of Regents*¹³³ used the congruence and proportionality test for its original purpose: to smoke out a Congressional effort to exercise a substantive ratchet power.¹³⁴ It is striking that, despite the division within the Court over questions of federalism, none of the Justices have questioned the congruence and proportionality test in principle.¹³⁵ We believe this

¹³² Id at 959.

¹³³ 120 S Ct 631 (2000).

¹³⁴ In *Kimel* the Court held that the Age Discrimination in Employment Act (ADEA) could not be justified under the Section 5 power. Age discrimination, in the Court’s view, is unconstitutional only if irrational, and Congress had identified no pattern of age discrimination, much less a pattern of irrational age discrimination. See id at 649. In this respect, the ADEA was plausibly understood as an illicit attempt by Congress to treat age as a suspect classification in the face of judicial decisions holding that it is not. See *Gregory v Ashcroft*, 501 US 452, 473 (1991); *Vance v Bradley*, 440 US 93, 102–03 (1979); *Massachusetts Board of Retirement v Murgia*, 427 US 307, 317 (1976) (per curiam). To be sure, age discrimination, like most forms of discrimination, is subject to mere rational basis scrutiny out of deference to Congress and state legislatures. By reserving heightened scrutiny for the most invidious forms of discrimination, the Court leaves room for the operation of the democratic process. Arguably, a parallel principle of respect for a coordinate branch of government should mean that Congress is also entitled to deference when it determines that age discrimination is sufficiently invidious to warrant a legislative solution. But this argument leads ultimately to the very substantive ratchet theory that *Boerne* rejected, and thus it is not surprising that the *Kimel* Court (implicitly) rejected the argument.

¹³⁵ By contrast with *Florida Prepaid*, in neither *Kimel* nor *Boerne* was there any dissent from the application of the congruence and proportionality test itself. In *Boerne*, the dissenters objected to the Court’s interpretation of the Free Exercise Clause, rather than its insistence that Congress had gone beyond that interpretation. *Boerne*, 521 US at 544–45 (O’Connor dissenting); id at 565 (Souter dissenting); id at 566 (Breyer dissenting). In both *Florida Prepaid* and *Kimel*, Justices Stevens, Souter, Ginsburg, and Breyer objected to the doctrine, first announced in *Seminole Tribe*, that permits Congress to abrogate state sovereign immunity when acting pursuant to the Section 5 power but not when acting pursuant to its Article I powers. But only in *Florida Prepaid* did these same four Justices object further to the way in which the majority applied the congruence and proportionality test. In *Morrison v United States*, the Court held that Section 5 did not authorize the provision of the

agreement¹³⁶ stems from the fact that *Boerne*'s original judgment—that RFRA was an effort to expand substantive protection for free exercise rights rather than to remedy or prevent religious discrimination—was basically sound.

What implications do the recent cases have for Congress's power to supplement *Miranda*? If, as *Florida Prepaid* suggests, the Section 5 power may be exercised only if an act of Congress is, in the Court's view, necessary to remedy or prevent a recognized constitutional violation, NACA's requirement that all custodial interrogation be videotaped would be plainly unconstitutional, for *Miranda* and *Dickerson* make clear that the *Miranda* warnings are sufficient to satisfy the Constitution.

Moreover, both *Florida Prepaid* and *Morrison* criticize Congress for enacting statutes that apply nationwide when the underlying problem might have been restricted to particular states or regions.¹³⁷ To the extent that these criticisms state a constitutional requirement, NACA would need to be limited to those places for which there was evidence before Congress of a pattern of coerced confessions—and even that might not be sufficient for a targeted NACA, given the presumptive adequacy of the *Miranda* warnings.

Nonetheless, we think that NACA, even if applicable nationwide, would be valid under Section 5. As indicated above, *Florida Prepaid* is aberrational in the standard it applies. The Court's rulings in each of its other recent decisions rejecting Congress's efforts to use the Section 5 power are plausibly understood to rest

Violence Against Women Act that created a federal civil remedy for victims of gender-motivated violence. 120 S Ct 1740 (2000). The Court relied mainly on nineteenth-century precedents invalidating Acts of Congress that sought to regulate private conduct pursuant to Section 5. See *id.* at 1756 (discussing *United States v. Harris*, 106 US 629 (1883) and the Civil Rights Cases, 109 US 3 (1883)). The Court then rejected the claim that Congress had provided a right of action against private actors as the means by which persons who would otherwise face official discrimination in state courts could circumvent that constitutional wrong. See *id.* at 1758–59. Two of the dissenters did not reach the Section 5 question, as they would have sustained the law under the Commerce Clause. Justice Breyer, writing for himself and Justice Stevens, expressed doubt about the soundness of the Court's Section 5 analysis, see *id.* at 1778–80 (Breyer dissenting), although not about the congruence and proportionality test itself. See *id.* at 1779 (distinguishing *Boerne*).

¹³⁶ Accord Robert C. Post and Reva B. Siegel, *The Uncertain Future of Federal Antidiscrimination Law: Morrison, Kimel, and the Dismantling of Congressional Section 5 Powers 2* (draft on file with authors) (“This silence is remarkable.”).

¹³⁷ *Morrison*, 120 S Ct at 1759 (contrasting VAWA with statutes “directed only to the State where the evil found by Congress existed”); *Florida Prepaid*, 120 S Ct at 646–47 (“Congress did nothing to . . . confine the reach of the Act by . . . providing for suits only against States with questionable remedies or a high incidence of infringement.”).

on the view that Congress was attempting to exercise a substantive ratchet power it lacks: in *Boerne*, Congress expanded free exercise protection; in *Kimel*, it attempted to recognize a new suspect class; and in *Morrison*, it lifted the state action requirement. Thus, with the exception of *Florida Prepaid*, congruence and proportionality has been a test of congressional motivation—asking whether Congress was really enacting permissible remedial and preventative measures or illegitimately attempting to change the substantive meaning of the Constitution.

There can be little doubt that NACA is designed as a remedial and preventative provision. To be sure, one could characterize NACA as creating a substantive right to videotaping, but that characterization would not make sense in context. Presumably, Congress would enact NACA in order to implement the Fifth Amendment rights of suspects subject to custodial interrogation, not to establish videotaping as a right in itself.¹³⁸ Thus, if the congruence and proportionality test is applied properly, NACA should satisfy it.¹³⁹ For far from an effort to circumvent Court-set limits, NACA responds to the Court's direct invitation to Congress in *Miranda* to devise alternative safeguards.

To be clear, we are not saying that the *Miranda* invitation by itself authorizes NACA. It is possible to read that invitation as applying to Congress and the states, respectively, each in its own sphere. On this reading, the Court invited each state to devise its own alternative procedures, while Congress would devise alternative procedures only for federal agents. However, as even Justice

¹³⁸ Contrast RFRA, in which Congress thought that substantial burdens on religion imposed by generally applicable laws were (unconstitutional) harms in themselves.

¹³⁹ Furthermore, *Florida Prepaid* may be less of an obstacle than it at first appears. Notwithstanding the Court's acknowledgment that patents are property for purposes of the Due Process Clause, in *Florida Prepaid* as in the other recent Section 5 cases, one senses that the Court viewed Congress as attempting to evade limits the Court had set. A law granting remedies for patent infringement is, in some intuitive sense, most clearly an exercise of Congress's Article I powers, see US Const, Art I, § 8, cl 8, bearing at best a tangential relationship to the Civil War Amendments. Having decided (quite erroneously in our view) that Congress may abrogate state sovereign immunity when acting pursuant to its power to enforce the Civil War Amendments but not its Article I powers, see *Seminole Tribe*, the *Florida Prepaid* Court was understandably reluctant to permit Congress to treat what looked like an Article I matter as falling within the Section 5 power. On this view, the Court was right (within its own erroneous assumptions) to see the Patent Remedy Act as incongruent with and disproportionate to a Fourteenth Amendment violation, even if the Court—in a now all too familiar move—chose to explain why in a way that aggrandized its own power at the expense of Congress.

Scalia recognized in his *Dickerson* dissent, through Section 5, the Constitution grants Congress a “limited power to supplement its guarantees”¹⁴⁰ In our view, NACA would satisfy the congruence and proportionality requirement.¹⁴¹

B. COULD CONGRESS CONSTITUTIONALLY PROHIBIT DEFENSE ATTORNEYS FROM ATTENDING CUSTODIAL INTERROGATIONS OF THEIR CLIENTS?

Suppose Congress determined that videotaping custodial interrogation would solve only half of the problem, and that if states continued to provide a right to counsel at such interrogations some otherwise admissible confessions would be lost. We already have suggested that Congress could bar attorneys in federal cases, but could it bar them in state cases as well?

Let us imagine that Congress enacts the “National Anti-Coercion and Effective Custodial Interrogation Act.” “NACECIA” requires that all custodial interrogation be preceded by the warning that a suspect has the right to remain silent and requires that all custodial interrogation be videotaped. But NACECIA forbids state agents from delivering the other *Miranda* warnings and from allowing attorneys to be present during pre-indictment custodial interrogation.

Like NACA, NACECIA can only be sustained as an exercise of the Section 5 power,¹⁴² but viewed from that perspective, NACECIA is highly problematic. The effect of NACECIA would be to bar three of the four *Miranda* warnings and to bar attorneys

¹⁴⁰ *Dickerson*, 120 S Ct at 2345.

¹⁴¹ What other statutes would be authorized under the Court’s view of Section 5 remains an open question. For example, in *Zurcher v Stanford Daily*, 436 US 547 (1978), the Court held that neither the First Amendment nor the Fourth Amendment requires any heightened showing of need by law enforcement in order to obtain a warrant to search a newspaper’s premises for evidence of third-party wrongdoing. Congress responded by enacting the Privacy Protection Act of 1980, 42 USC § 2000aa, which affords the institutional media and their employees with protection against searches and seizures beyond what the Constitution (as interpreted in *Zurcher*) requires. As a regulation of law enforcement officials rather than the media, the Act may fall outside the scope of the Commerce Clause, and as an apparent attempt to expand the Court’s definition of the substantive right protected by the Fourth Amendment, the Act may likewise exceed the Section 5 power.

¹⁴² NACECIA would not pass muster under the Commerce Clause for the same basic reason that NACA would not: the regulated activity is not economic activity. Both *Lopez* and *Morrison* clearly reject the claim that a law designed to cut crime is, ipso facto, a regulation of interstate commerce.

from attending custodial interrogation. But if NACECIA reduces the level of protection to which suspects are entitled, in what sense is NACECIA an effort to “enforce” the Fourteenth Amendment? This looks very much like an attempt to “restrict, abrogate, or dilute” rights, a power that the Court in *Katzenbach v Morgan* insisted is not encompassed within Section 5.

Or does it? Section 5 authorizes enforcement measures. If, taken as a whole, NACECIA works as well as or better than the standard *Miranda* warnings, perhaps NACECIA can legitimately be said to enforce the Fifth Amendment (through the Fourteenth). On this view, the fact that NACECIA limits the supererogatory measures states might otherwise employ does not distinguish it from other federal laws that preempt contrary state practices. Comprehensive federal statutes routinely block state efforts to “over-enforce” the very policies that appear to underlie the federal statutes themselves.¹⁴³

What about the Court’s concern in *Morgan* about restriction, abrogation, or dilution? Section 5 gives Congress no power to *violate* the Fourteenth Amendment. For example, Congress could not, in the guise of enforcing the Equal Protection Clause, mandate racial segregation in public schools. That Congress lacks this power follows both from the fact that Congress lacks a substantive power to define the Fourteenth Amendment (per *Boerne*) and, more fundamentally, from the basic tenets of *Marbury v Madison*.

But to deny that Congress may authorize rights violations is not to say that the Section 5 power prevents Congress from eliminating remedies the Court has itself required. In our view, no such separate limit to Congress’s remedial Section 5 power exists. If some set of procedures is constitutionally required, then of course Congress cannot dispense with them. But as *Miranda* shows, the Court can declare some set of procedures (P₁) to be a constitutionally adequate response to some set of risks—a safe harbor—even though it would be prepared to uphold some other set of procedures (P₂). A proponent of NACECIA might thus contend that Congress should be permitted to conclude that P₂, understood

¹⁴³ See, e.g., *Crosby v National Foreign Trade Council*, 120 S Ct 2288 (2000) (economic sanctions for human rights abuses by foreign government); *United States v Locke*, 120 S Ct 1135 (2000) (oil tanker regulations); *City of Burbank v Lockheed Air Terminal, Inc.*, 411 US 624 (1973) (aircraft noise).

as a comprehensive remedial scheme, is preferable to P₁. Other than the *ipse dixit* in *Morgan*—which may be best understood as barring only Congress’s power to violate the Constitution—there is nothing in existing case law to rule out this understanding of the enforcement power. If it were accepted, NACECIA would fall within the Section 5 power so long as the NACECIA procedures themselves are as effective as the *Miranda* safeguards.

C. THE ANTICOMMANDEERING PRINCIPLE

Before concluding that Congress can constitutionally enact NACA (not to mention NACECIA)¹⁴⁴ we must consider the doctrine that prohibits Congress from “commandeering” state legislative and executive officials.¹⁴⁵ In another branch of its burgeoning federalism jurisprudence, the Court held in *New York v United States*¹⁴⁶ and *Printz v United States*¹⁴⁷ that Congress may not commandeer the agencies of state government to regulate on behalf of the federal government. By requiring state officials to videotape custodial interrogation, NACA appears to “direct the functioning of the state executive” in violation of *Printz*.¹⁴⁸ If Congress cannot direct state law enforcement officials to perform background checks on prospective handgun purchasers, as *Printz* holds, how can Congress direct state law enforcement officials to videotape custodial interrogations?

The proper approach appears to come from contrasting *Printz* with last Term’s unanimous decision in *Reno v Condon*.¹⁴⁹ In *Condon*, the Court upheld the Driver’s Privacy Protection Act,¹⁵⁰ notwithstanding the fact that compliance with the Act would “require time and effort on the part of state employees,”¹⁵¹ because the Act “‘regulated state activities,’ rather than ‘seeking to control or in-

¹⁴⁴ For simplicity, this section only considers NACA.

¹⁴⁵ See *New York v United States*, 505 US 144 (1992) (holding that Congress may not direct the states to enact legislation); *Printz v United States*, 521 US 898 (1997) (holding that Congress may not compel state executive officers to carry out federal law).

¹⁴⁶ 505 US 144 (1992).

¹⁴⁷ 521 US 898 (1997).

¹⁴⁸ *Id.* at 932.

¹⁴⁹ 120 S Ct 666 (2000).

¹⁵⁰ 18 USC §§ 2721–25.

¹⁵¹ *Reno v Condon*, 120 S Ct 666, 672 (2000).

fluence the manner in which states regulate private parties.’”¹⁵² The term “commandeering” implies that rather than doing its own work, the federal government is attempting to compel the states to do the federal work. As regulatory objects, by contrast, the states are subject to, rather than the agents of, a federal regulatory scheme.

In practice, however, the line between regulation of the states and impermissible commandeering may be difficult to draw. Both the background check requirement in *Printz* and the prohibition on the release of driver information in *Condon* take the form of commands to state actors, and both laws have a substantial regulatory impact on private parties: In *Printz* the effect is to delay or deny permission for a seller and purchaser of a handgun to complete their transaction; in *Condon* the effect is to prevent commercial advertisers and others from obtaining drivers’ private information.

One might understand the *Printz/Condon* distinction in terms of acts and omissions. The Brady Act forced state officials to take actions regarding third parties where they might have preferred to do nothing; the Driver’s Privacy Protection Act prohibited the state from acting with respect to third parties where they would have preferred to act (by selling driver information to commercial purchasers). But given all the complex ways in which the modern state interacts with its citizens, there may nonetheless be doubts whether the act/omission distinction can do the work that *Printz* and *Condon* seem to require.¹⁵³

Even if the *Printz/Condon* distinction is defensible, NACA presents a borderline case. On the one hand, videotaping suspects cannot reasonably be characterized as “regulation” of those suspects. NACA tells state actors what they must do; it does not tell state actors what they must tell private parties to do or not to do. Thus, in terms of *Condon*, NACA appears unobjectionable. On the other hand, if the *Printz/Condon* distinction is an act/omission distinction, NACA seems to fall on the wrong side of the line. It com-

¹⁵² Id (quoting *South Carolina v Baker*, 485 US 505, 514–15 (1988)).

¹⁵³ Indeed, the *Condon* Court itself recognized that the imposition of affirmative obligations on the states is “an inevitable consequence of regulating a state activity.” 120 S Ct at 672 (quoting *South Carolina v Baker*, 485 US 505, 514 (1988) (internal quotation marks omitted)). See also Matthew D. Adler and Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1988 Supreme Court Review 71, 95–102 (1998).

mands state officials to take an affirmative measure—videotaping custodial interrogation. We need not resolve this ambiguity, however, because Congress could impose the equivalent of NACA regardless of whether it falls on the *Printz* or the *Condon* side of the line.

NACA would be constitutional if Congress phrased it as a substantive rule of law governing confessions.¹⁵⁴ The rule would read something like this: “No statement made during custodial interrogation shall be admissible against the maker of the statement in a criminal trial in any state or federal court unless the custodial interrogation was videotaped.” This rule would not run afoul of the anticommandeering principle because so long as a federal law is within federal competence—as we concluded NACA would be under the Section 5 power—there is no constitutional obstacle to putting it in the form of a rule that state courts must abide.¹⁵⁵

Long before *Miranda*, it was settled that state courts could not utilize evidence obtained in violation of federal law. Thus, the predecessor rule to *Miranda*, which barred the admission into evidence of involuntary confessions, was routinely invoked to invalidate convictions that rested upon such confessions.¹⁵⁶ Applying broader substantive understandings, *Miranda* itself and the Fourth Amendment exclusionary rule have the same structure. Further, the principle is not limited to criminal proceedings. Under *New York Times v Sullivan*,¹⁵⁷ a public official can prevail in a defamation action only by proving the defendant’s reckless disregard for the truth.¹⁵⁸ If state law permits recovery on a showing of mere falsehood, *Sullivan* displaces the state standard.

¹⁵⁴ Current doctrine also suggests that Congress could impose NACA as a conditional exercise of the spending power, see *New York*, 505 US at 167 (distinguishing commandeering from conditional spending), although it remains to be seen whether this power will survive the *New York/Printz* line of cases. Compare *Printz*, 521 US at 918 (“We of course do not address [statutes that arguably utilize conditional spending]; it will be time enough to do so if and when their validity is challenged in a proper case.”).

¹⁵⁵ We do not contend that there is some general federal power to fashion rules of evidence or procedure for state courts. Our claim is far more limited: If a rule of law falls within the scope of one of Congress’s enumerated powers, requiring state courts to comply with it is not independently objectionable on federalism grounds.

¹⁵⁶ See, e.g., *Brown v Mississippi*, 297 US 278 (1936); *Chambers v Florida*, 309 US 227 (1940); *Ward v Texas*, 316 US 547 (1942).

¹⁵⁷ 376 US 254 (1964).

¹⁵⁸ See id at 279–80 (imposing “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

Nor is the supremacy of federal law in state court limited to constitutional as opposed to statutory law. Quite apart from the rule of *Testa v Katt*, requiring state courts to be open on a nondiscriminatory basis to federal causes of action,¹⁵⁹ the availability of federal law—whatever its source—as a shield against contrary state action is the very core of federal supremacy.

Thus, in the furtherance of its enumerated powers, Congress has not hesitated to enact substantive rules that are applicable in state court. For example, the Soldiers' and Sailors' Relief Act of 1940¹⁶⁰ requires state (as well as federal) courts¹⁶¹ to suspend various judicial proceedings by or against active duty members of the U.S. military. Congress's unquestioned power to provide for the national defense permits such a rule.

Similarly, Title III of the Omnibus Crime Control and Safe Streets Act of 1968¹⁶² mandates the remedy of exclusion from state (as well as federal) court proceedings for violations of the substantive terms of the Act,¹⁶³ which prohibit some conduct that the Fourth Amendment would allow. Most prominently, Title III applies to private actors.¹⁶⁴ Although some courts have declined to apply the exclusionary remedy to private violations of the Act,¹⁶⁵ that approach is not universal.¹⁶⁶ In any event, no court has ever suggested that an exclusionary remedy for private violations would be beyond Congress's power. Assuming the substantive provisions of Title III are authorized under the Commerce Clause or the Section 5 power, a statutory exclusionary rule is unobjectionable.

¹⁵⁹ 330 US 386 (1947). According to the *Printz* Court, *Testa* is consistent with the anti-commandeering rule because state courts differ from state executives and state legislatures in two crucial respects. First, the literal language of the Supremacy Clause binds state judges to federal law. See *Printz*, 521 US at 928–29. Second, the Madisonian compromise, under which Congress was free to create no lower federal courts, meant that the Framers contemplated assigning some federal tasks to state court judges. See *id.* at 907. We have doubts whether these points sufficiently distinguish *Testa* from *New York* and *Printz*, but as we explain in the text, that is irrelevant to the present discussion, as the validity of a federal rule of inadmissibility applicable in state court does not rest on the *Testa* power.

¹⁶⁰ 5 USC § App 501 et seq.

¹⁶¹ See 5 USC § App 511(4).

¹⁶² Pub L No 90-351, 82 Stat 212, codified at 18 USC §§ 2510–22 (1994 & Supp IV 1998).

¹⁶³ See 18 USC § 2515.

¹⁶⁴ See 18 USC § 2511.

¹⁶⁵ See, e.g., *United States v Liddy*, 354 F Supp 217 (DDC 1973).

¹⁶⁶ See, e.g., *United States v Grice*, 37 F Supp 2d 428 (D S Car 1998) (applying exclusionary remedy in accordance with the Act's plain language).

The same is true for NACA. So long as it is authorized by an affirmative power of Congress, there is no obstacle to Congress phrasing it as a rule of inadmissibility for the state courts.¹⁶⁷

D. CONGRESSIONAL HUMILITY AND STATE EXPERIMENTATION

To suggest that Congress *could* impose NACA (or NACECIA) on the states is not to suggest that it *should* do so. Congress should refrain from imposing such requirements on the states. Congress should respect the value of experimentation and hesitate to conclude that any one solution is correct.

With regard to NACECIA, the issue is whether states ought to be free to offer greater protection to individuals than the Constitution requires. There is a long tradition of such freedom, and recent years have seen an increase in the willingness of state courts to extend state constitutions beyond the bounds of the federal Constitution.¹⁶⁸ For example, the Supreme Court of Alaska has held “that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right

¹⁶⁷ NACECIA is a different story, however. There is no plausible way to phrase the attorney ban as an exclusionary rule.

¹⁶⁸ See, e.g., Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv L Rev 1131 (1999) (positive rights under state constitutions); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va L Rev 389 (1998) (examining justifications for independent state constitutional law); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich L Rev 761 (1992) (acknowledging the trend but criticizing its legitimacy). The trend was sparked in part by a plea from Justice Brennan, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489 (1977), who later applauded state courts’ willingness to protect civil liberties to a greater extent than the U.S. Supreme Court. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU L Rev 535, 550–52 (1986). See also Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, in 3 *Benjamin N. Cardozo Memorial Lectures* 1401, 1415 (1995). The movement has not been all in one direction, however. For example, the Florida Constitution protects against unreasonable searches and seizures as well as excessive punishments, but both provisions now contain express limitations that prevent the Florida courts from interpreting them more liberally than the U.S. Supreme Court interprets their federal counterparts. See Fla Const Art I, §§ 12, 17. See also Cal Const Art I, § 24 (“This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.”). As a matter of judicial practice, other states follow nearly the same course, see Gardner, 90 Mich L Rev at 788–90 (cited above) (discussing Massachusetts, Virginia, and Louisiana cases). For a defense of this “lockstep” approach, see Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 Annals Am Acad Pol & Soc Sci 98, 99 (1988).

to due process, under the Alaska Constitution.”¹⁶⁹ The Supreme Court of Minnesota reached the same conclusion in the exercise of its supervisory power.¹⁷⁰ States should be free to extend their protections for civil liberties beyond those mandated by the federal Constitution.

III. THE STATES’ INTERPRETIVE ROLE

In Part I we concluded that ACECIA would be constitutional, or at least that some Act of Congress that substitutes one or more procedures for one or more of the *Miranda* warnings must be constitutional. Suppose that a state were to adopt its own version of ACECIA. Would it be valid as well?

A state version of ACECIA plainly would be constitutional. After all, in *Miranda* itself, the Court invited “Congress and the States” to develop alternative safeguards. More important than this *ipse dixit*, however, are the premises behind that invitation. In the Court’s view, the Constitution requires an adequate safeguard to ensure the right to silence and the right to a continuous opportunity to exercise that right. If ACECIA or some other set of procedures satisfies the constitutional standard, it should make no difference whether those procedures are put in place by Congress or the states.¹⁷¹

Perhaps, however, ACECIA’s validity rests on a principle of deference to Congress in particular. The Court might conclude that the *Miranda* warnings are more effective than the safeguards set forth in ACECIA, but nonetheless uphold ACECIA out of respect for Congress’s superior ability to find facts. On this view, the Court might uphold a federal ACECIA but not a state or local ACECIA.¹⁷²

¹⁶⁹ *Stephan v State*, 711 P2d 1156, 1157 (Alaska 1985). This doctrine is not, strictly speaking, a response to the *Miranda* Court’s invitation to develop alternative safeguards, because Alaska does not treat videotaping as a substitute for the right to counsel. It treats videotaping as a wholly additional requirement under Alaska law. See *id.* at 1160.

¹⁷⁰ See *State v Scales*, 518 NW 2d 587, 592 (1994).

¹⁷¹ This same logic suggests that localities—including the major metropolitan police forces most involved in custodial interrogation—also ought to be free to devise their own alternative safeguards.

¹⁷² If the Court first upheld the federal ACECIA, a question would arise as to whether states, in enacting their own ACECIAs, would be permitted to ride piggy-back on that judgment. Compare *Richmond v J. A. Croson*, 488 US 469, 504–06 (1989) (finding Richmond’s invocation of Congressional findings with respect to the national market inadequate

We find this distinction unpersuasive. If *Miranda* and *Dickerson* hold that the Constitution guarantees procedures that are no less effective than the *Miranda* warnings, the Court should not approve procedures that, in *its* best constitutional judgment, fail to satisfy that standard. As recent Commerce Clause cases correctly establish, congressional findings can inform the Court's constitutional judgment; they cannot substitute for it.¹⁷³ And if Congress can adduce evidence that a federal ACECIA is constitutionally adequate, there is no reason why a state legislature or even a particular police department cannot adduce similar evidence in support of a state or local ACECIA.

More fundamentally, *Miranda's* invitation was a call for experimentation, and in our system of government, the states and their subdivisions are the quintessential "experimental laboratories."¹⁷⁴ Fifty states and thousands of smaller jurisdictions can attempt a wide variety of approaches without committing the nation as a whole to a single, potentially inadvisable path.¹⁷⁵ That states and localities provide an appropriate *situs* for experimentation seems especially true with respect to custodial interrogation, because the vast majority of law enforcement officials are state rather than federal actors.

Prior to the Warren Court's nearly full incorporation of the criminal procedure provisions of the Bill of Rights against the states, the Constitution was often interpreted to apply a stricter standard to the federal government than to the states.¹⁷⁶ In part

to support a local affirmative action program) with *id* at 546–48 (Marshall dissenting) (arguing that Richmond should have been permitted to rely on Congressional findings).

¹⁷³ See *Morrison*, 120 S Ct at 1752 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."); *Lopez*, 514 US at 557 n 2 (quoting *Hodel v Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, at 311 (1981) (Rehnquist concurring in judgment)) ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.").

¹⁷⁴ See *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). See also Barry Friedman, *Valuing Federalism*, 82 Minn L Rev 317, 397–401 (1997); Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485, 1499 (1994) (arguing that capital and taxpayers act as incentives for local governments to experiment); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484, 1498–1500 (1987) (book review) (exploring economic arguments underlying state innovation).

¹⁷⁵ See David L. Shapiro, *Federalism: A Dialogue* 85–88 (1995).

¹⁷⁶ See, e.g., *Wolf v Colorado*, 338 US 25 (1949); *Palko v Connecticut*, 302 US 319 (1937).

this difference was justified on textual grounds: the open-ended Due Process Clause was deemed consistent with a wider variety of procedures than the more detailed guarantees of the Fourth, Fifth, and Sixth Amendments. But the divergence was also based on principles of federalism. Although jot-for-jot incorporation means that states no longer have greater freedom than the federal government to experiment at the core of constitutional guarantees, the principles of federalism that animated the pre-Warren Court approach to criminal procedure retain their vitality. It would stand those principles on their head to say that Congress has a greater power to experiment than the states.¹⁷⁷

Having conceded the power of states and their subdivisions to enact their own versions of ACECIA, we conclude by recasting observations we have made earlier in other contexts. The Court's revival of federalism in recent years has met skepticism in some quarters. The basis for this skepticism is concern about the states' often appalling use of their constitutional powers to limit individual liberties. Unfortunately, the reaction of state officials to Warren Court initiatives, of which *Miranda* was no exception, easily leads one to wonder if federalism's invitation was simply to license such behavior.

States (and their subdivisions) can and should attempt to operate within the space of shared constitutional interpretation to innovate in ways that meet the twin goals of protecting constitutional liberty and fostering effective governance. These are not always easy goals

¹⁷⁷ The conclusion that a state ACECIA would be no less valid than a federal ACECIA may also vindicate our decision to sidestep the debate over the legitimacy of constitutional common law that envelopes so much academic discussion of *Miranda*; for that conclusion illustrates that the term "constitutional common law" is a misnomer when applied to describe the Court's requirement of the *Miranda* warnings. The term "common law" captures the idea of judge-made law that is subject to legislative revision. However, at least since *Erie R. Co. v. Tompkins*, 304 US 64 (1938), it has been understood that common law is the law of a particular jurisdiction. If constitutional common law were really common law in this sense, it would clearly be federal common law—in which case it would be revisable by Congress alone, for state legislatures have no power to create federal law. Yet, as we have seen, the *Miranda* warnings should be revisable by the states no less than by Congress. See Dorf and Sabel, 98 Colum L Rev at 454–55 (cited in note 97).

The term constitutional common law is misleading in a second way as well. True common law can be altered at will by the legislature. If, for example, a state high court recognizes a novel cause of action, the state legislature can wholly abolish that cause of action. But of course this is exactly what Congress attempted to do through 18 USC § 3501. The field of maneuver for Congress and the states authorized by *Miranda* and *Dickerson* is tightly circumscribed by the requirement that federal, state, and local law enforcement officials must observe some set of procedures as effective as the *Miranda* warnings.

to reconcile, and it is undeniable that state officials have in the past sometimes exercised excessive zeal in their efforts to eliminate crime. But there are limits under our constitutional system to how we accomplish these ends, and states therefore ought to respect fundamental constitutional concerns as well. That is the basis of sound partnering.

IV. CONCLUSION

Miranda establishes a *constitutional* right to procedures that are adequate to inform a suspect of his right to remain silent in the face of custodial interrogation and a *constitutional* right to procedures that provide a continuous opportunity to exercise the right to remain silent throughout custodial interrogation. Congress or the states can constitutionally enact substitute procedures for three of the four *Miranda* warnings, and arguably a videotaping requirement that dispenses with the right to counsel and the accompanying warnings qualifies as a satisfactory set of substitute procedures.

Notwithstanding the last decade of decisions narrowing the powers of Congress in favor of the states, Congress could mandate the videotaping of all custodial interrogation through a rule of inadmissibility applicable in state and federal courts. A federal statute barring attorneys from custodial interrogation by state officers might, if combined with the videotaping requirement, fall within the scope of Congress's power to enforce the Fourteenth Amendment, but even if it did, it might nonetheless be invalid as a violation of the anticommandeering rule.

Beyond these considerations of constitutionality lie deeper questions of policy. We do not purport to know whether videotaping or some other procedure would be an improvement over the *Miranda* warnings. Our primary aim has been to set forth the considerations relevant to allocating authority to decide what constitutes an adequate procedural safeguard.

How should Congress use the authority allocated it? In our view, even if Congress has the power to bar attorneys from interrogation by state officers, it should not exercise that power. There is a long tradition of states providing more protection for civil lib-

erties than the federal Constitution requires.¹⁷⁸ Congress should not lightly override that tradition.

A simple videotaping requirement presents a closer question. Like any uniform national approach, it would stifle experimentation. For that reason, we think that in the first instance Congress should impose such a requirement only on federal agents. If substantial experience under such a regime proves successful, it might then appropriately be extended to the states.

This last point has implications for the Court as well. Suppose experience shows that videotaping leads to fewer confessions that cause concern and more admissible ones. We put aside the difficult question of exactly how one measures these effects; let us assume that videotaping satisfies whatever standard of proof the Court might demand.¹⁷⁹ If videotaping is shown to be more effective than the *Miranda* warnings and no more burdensome to the legitimate needs of law enforcement, why should the *Miranda* warnings continue to constitute a safe harbor? In these circumstances, it would be appropriate for the Court to raise the bar and require videotaping or its equivalent as a constitutional minimum. In this way, the Court could show respect for the capacity of political actors to improve upon the Court's own judgment about what satisfies the constitutional standards it has announced.

¹⁷⁸ See note 171. The Framers' willingness to rely on state courts to protect individual rights was reflected in the Madisonian compromise. See note 162; *Atlantic Coast Line R.R. Co. v Brotherhood of Locomotive Engineers*, 398 US 281, 285 (1970) ("Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights.").

¹⁷⁹ We are also putting aside the question of how a jurisdiction would be able to accumulate sufficient experience to demonstrate the adequacy of a videotaping regime, given that any procedures other than the standard *Miranda* warnings could be subject to an immediate challenge. For a proposed solution to this problem, see Dorf and Sabel, 98 Colum L Rev at 462-65 (cited in note 97).

