

From: [Shelley K. Finlayson](#)
To: ["Berrios, Roberto C. EOP/WHO"](#)
Subject: RE: Huitema questionnaire (Contains CUI)
Date: Saturday, November 25, 2023 9:52:40 AM

Thanks so much for the quick reply. Really appreciate it.

From: Berrios, Roberto C. EOP/WHO <(b) (6)>
Sent: Saturday, November 25, 2023 9:51 AM
To: Shelley K. Finlayson <skfinlay@oge.gov>
Subject: Re: Huitema questionnaire (Contains CUI)

Hi Shelley,

OMB does not review or clear any materials for nominees. So you do not need to send the draft questionnaire, opening statement, or the pre/post hearing questions to OMB.

I am happy to review as much as you and the team are comfortable reviewing.

Sent from my iPhone

On Nov 25, 2023, at 9:44 AM, Shelley K. Finlayson <skfinlay@oge.gov> wrote:

Hi Roberto –

I hope you had a nice holiday.

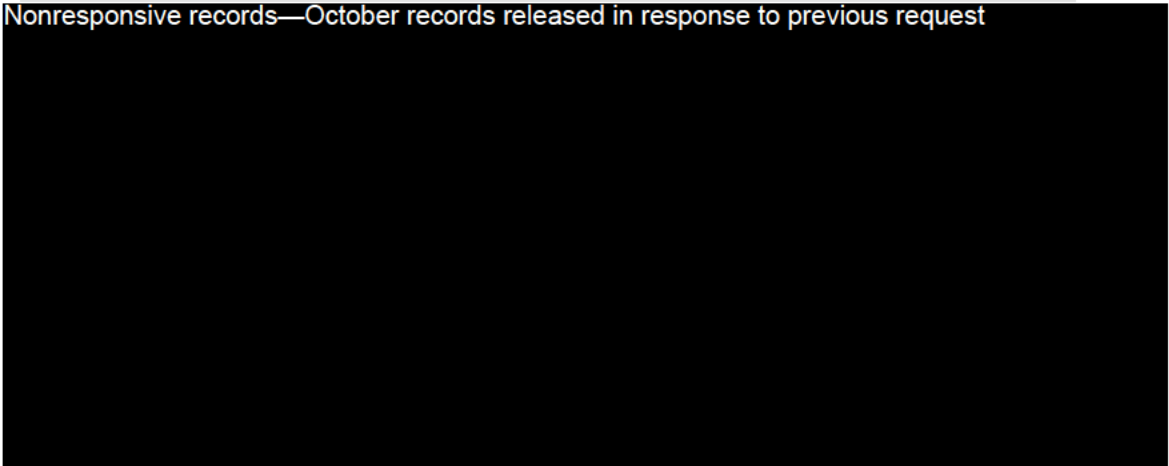
I appreciated our conversation about White House clearance, can you confirm that the flexibility on our nominee's written materials extends to the entire OMB clearance process?

We've experienced different expectations over the years and wanted to check in before sending written materials to the committee.

Thanks so much,

Shelley

Nonresponsive records—October records released in response to previous request



From: [Shelley K. Finlayson](#)
To: [Diana Veilleux](#); [Diana Veilleux](#)
Subject: FW: biographical questionnaire
Date: Thursday, November 2, 2023 1:26:33 PM
Attachments: [Huitema Biographical Questionnaire.pdf](#)
[HSGAC Nominee Biographical Questionnaire - Huitema.docx](#)

Attachments WIF/(b)(5) and (b)(6), 66 pages

From: David Huitema <(b)(6) - email address >

Sent: Thursday, November 2, 2023 9:44 AM

To: Shelley K. Finlayson <skfinlay@oge.gov>

Subject: Fwd: biographical questionnaire

Hi Shelley. Resending the biographical questionnaire. Thanks again for your help with this whole process.

David

----- Forwarded message -----

From: **David Huitema** <(b) (6) >

Date: Fri, Oct 27, 2023 at 10:09 AM

Subject: biographical questionnaire

To: Shelley K. Finlayson <skfinlay@oge.gov>

Hi Shelley. Attached are both a word version and a signed PDF of my biographical questionnaire. I'm happy to revise and tinker with it if you spot any concerns, or the signed version may be ready to send to the committee.

David

From: [Shelley K. Finlayson](#)
To: [Diana Veilleux](#)
Subject: FW: Huitema biographical questionnaire
Date: Wednesday, November 8, 2023 1:25:07 PM
Attachments: [Miranda - Legitimate Response to Contingent Requirements of the Fifth Amendment 12 18YaleL PolyRev261 1999 2000 .pdf](#)
[Huitema Biographical Questionnaire 11-8-2023.pdf](#) 2nd attachment WIF/(b)(6), 32 pages

From: David Huitema <(b) (6)>
Sent: Wednesday, November 8, 2023 12:05 PM
To: Shelley K. Finlayson <skfinlay@oge.gov>
Subject: Fwd: Huitema biographical questionnaire

Here you go Shelley. Here's the updated and signed biographical questionnaire, along with a PDF of my ancient law review article.

David

----- Forwarded message -----

From: Huitema, David P <(b) (6)>
Date: Wed, Nov 8, 2023 at 12:03 PM
Subject: Huitema biographical questionnaire
To: David Huitema <(b) (6)>

And article.

***Miranda*: Legitimate Response to Contingent Requirements of the Fifth Amendment**

David Huitema[†]

INTRODUCTION

In its 1966 *Miranda* decision, the Supreme Court announced that a criminal defendant's statement, if made during custodial interrogation, would not be admissible in state or federal court if the police failed to advise the defendant of her right to remain silent and have an attorney present during the questioning.¹ Two years later, Congress attempted to "legislatively overrule" *Miranda* as applied in federal court. Based on Congress's power to make the rules of evidence and procedure for the federal courts, Section 3501 of the Omnibus Crime Control Act of 1968 dictated that a defendant's statement to the police during custodial interrogation would be admissible as long as it was made voluntarily.² This had been the standard for admitting confessions before *Miranda*, and it required courts to determine by a totality of the evidence whether the police had "overborne" the defendant's "will."³

For thirty years this conflict between Supreme Court precedent and congressional statute has remained dormant. Scholars, public officials, and justices have occasionally raised the issue,⁴ but with the Justice Department consistently refusing to invoke Section 3501, federal courts have continued to apply *Miranda*.⁵ The conflict resurfaced this past year, however, when the Fourth

[†] Law clerk to the Honorable Phyllis Kravitch, United States Court of Appeals for the Eleventh Circuit, 1999-2000. The author would like to thank Professor Gerald Gunther for his support and constructive critiques of this Article in draft form. Thanks also to Richard Frankel of the *Yale Law & Policy Review*, whose careful attention, thoughtful questions, and plentiful suggestions helped me fill in some of the Article's loose ends and weak links.

1. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. See 18 U.S.C. § 3501 (1994); see also *infra* notes 179-185 and accompanying text.

3. See *infra* text accompanying notes 122-124.

4. See, e.g., *Davis v. United States*, 512 U.S. 452, 462-465 (1994) (Scalia, J., concurring); 3 WAYNE R. LAFAVE & JEROME H. ISRAEL, *CRIMINAL PROCEDURE* § 9.1, at 317-18 (2d ed. 1999) (discussing standing issues); Robert A. Burt, *Miranda and Title II: A Morgantic Marriage*, 1969 SUP. CT. REV. 81 (1969); Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation: 'Truth in Criminal Justice' Report No. 1 (Feb. 12, 1986), reprinted in 22 U. MICH. J.L. REFORM 437, 512-19 (1989).

5. See *Davis*, 512 U.S. at 463-64 (Scalia, J., concurring); cf. Office of Legal Policy, *supra* note 4, at 519-21. In the mid-1970s, the Tenth Circuit analyzed the *Miranda* line of cases and concluded that a district court "did not err in applying the guidelines of § 3501 in determining the issue of the voluntariness of [the defendant's] confession." See *United States v. Crocker*, 510 F.2d 1129, 1138 (10th Cir.

Circuit held, in *United States v. Dickerson*,⁶ that Congress had effectively overruled *Miranda* and that voluntariness determines the admissibility of confessions in federal court.⁷

Dickerson gives judicial validation to the persistent critics who question the wisdom and legitimacy of *Miranda*.⁸ The decision prompted a flurry of news reports and commentaries in both the general media and legal publications.⁹ *Dickerson* also caught the attention of the Supreme Court, which granted *certiorari* in the case.¹⁰ Oral arguments have already been held, and the Supreme Court should issue its decision this summer. Finally, *Dickerson* prompted this Article, which investigates both the Supreme Court's power to prescribe the prophylactic *Miranda* warnings and exclusionary rule, and Congress's power to reject or at least respond to the *Miranda* decision.

After reviewing the statutory language and legislative history, the Fourth Circuit in *Dickerson* concluded that "Congress enacted Section 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court."¹¹ Whether Congress has the power to do so, according to the court, turns on whether "the rule set forth in *Miranda* is required by the Constitution."¹² If so, Congress's hands are tied, because it cannot "supersede a Supreme Court decision construing the Constitution."¹³ On the other hand, if the *Miranda* warnings are not constitutionally compelled, then the decision simply provides a rule of evidence. And Congress has the power to overrule judicially created rules of evidence and

1975). The Court's conclusion can be read as dicta, however, because the court also held that the law enforcement officials had fully complied with *Miranda*. See *id.* The case has largely been ignored.

6. 166 F.3d 667 (4th Cir.), *cert. granted*, 120 S. Ct. 578 (1999).

7. The defendant, Charles Dickerson, confessed to being the getaway driver in a series of bank robberies after FBI agents brought him to a field office for questioning and told him that they were about to search his apartment. See *Dickerson*, 166 F.3d at 674. Dickerson claimed that he confessed before the FBI gave him his *Miranda* warnings. An FBI agent testified that he administered the warnings before Dickerson's confession, but the district court found Dickerson's testimony more credible. See *id.* at 675-76. The district court suppressed Dickerson's statement because of the *Miranda* violation, but specifically held that Dickerson gave the statement voluntarily. See *id.* at 676. The government did not argue to the Fourth Circuit that the confession was admissible under § 3501, but an *amicus curiae* briefed the issue. See *id.* at 695 (Michael, J., dissenting).

8. See, e.g., Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1986). This Article focuses on the issue of legitimacy—did the Court have the power to do as it did in *Miranda*? Of course, there are other reasons to criticize the decision, and they are discussed briefly in the Conclusion.

9. See *Don't Worry*, NAT'L L.J., Mar. 1, 1999, at A20; William Glaberson, *After 33 Years of Controversy, Miranda Ruling Faces Its Most Serious Challenge*, N.Y. TIMES, Feb. 11, 1999, at A24; Yale Kamisar, *The Miranda Warning Takes a Body Blow*, L.A. TIMES, Feb. 17, 1999, at B7; David E. Rovella, *Miranda Upheaval Unlikely*, NAT'L L.J., Mar. 1, 1999, at A1; Stephen J. Schulhofer, *Miranda Now on the Endangered Species List*, NAT'L L.J., Mar. 1, 1999, at A22.

10. See *Dickerson v. United States*, 120 S. Ct. 578 (1999).

11. *Dickerson*, 166 F.3d at 686.

12. *Id.* at 687.

13. *Id.* at 687 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

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procedure that are not required by the Constitution.¹⁴

As *Dickerson* points out, the *Miranda* decision does not identify the constitutional basis for its holding and expressly leaves Congress and the States some flexibility to develop their own safeguards for protecting the Fifth Amendment privilege.¹⁵ Reviewing the post-*Miranda* jurisprudence, *Dickerson* notes that the Supreme Court frequently refers to the *Miranda* warnings as prophylactic and has concluded that the exclusionary rule of *Miranda* may keep out some voluntary confessions that were obtained without violating the Fifth Amendment.¹⁶ To the *Dickerson* court, it is crystal clear that the rule excluding confessions obtained without *Miranda* warnings is not constitutionally required.¹⁷ The court's reasoning can be summarized succinctly: Because there is no Fifth Amendment right to *Miranda* warnings per se, States and the Congress are free to ignore *Miranda*.

By limiting its evaluation of *Miranda* to whether or not the specific warnings suggested by the Warren Court are required by the Constitution, however, the Fourth Circuit misses the broader constitutional message of *Miranda*, which can be described in the following terms. The Fifth Amendment demands that suspects have a true and continuous opportunity to exercise their privilege against self-incrimination. This requires that suspects be aware of their rights and that the inherently coercive aspects of police interrogation be mitigated to ensure that a suspect's decision is unfettered. Finally, courts cannot assume that the Fifth Amendment's demands have been met through fact-intensive analysis of interrogations; therefore bright line rules are necessary.

Critics of *Miranda* make the same mistake as the Fourth Circuit by focusing narrowly on the Court's proposed warnings. The critics believe that the resort to prophylactic rules is an illegitimate exercise in policymaking, and that *Miranda* "reads more like a legislative committee report with an accompanying statute."¹⁸ The federal courts lack the states' police power and the power to make or implement policy held by the other co-equal branches of government, the legislature and executive.¹⁹ Like the Fourth Circuit, this critique reflects an overly cramped view of *Miranda*'s holding. It also reflects an overly narrow view of the Supreme Court's power to protect constitutional rights more generally.

14. See *id.* at 687 (citing the following cases: *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959)).

15. See *id.* at 688-89.

16. See *id.* at 689-90 (citing *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985)).

17. See *id.* at 690 ("As a consequence, the irrebuttable presumption created by the Court in *Miranda*—that a confession obtained without the warnings is presumed involuntary—is a fortiori not required by the Constitution.").

18. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988).

19. Cf. Office of Legal Policy, *supra* note 4, at 543 (arguing that applying *Miranda* violates the constitutional separation of powers and basic principles of federalism).

Appreciating the legitimacy of *Miranda* requires an understanding of the Court's authority to make prophylactic rules. And assessing the legitimacy of Congress's response to *Miranda* requires an understanding of the flexibility that States and the Congress have in reacting to Court decisions that extend beyond defining a constitutional right.²⁰

A number of scholars have written about the Supreme Court's authority to proscribe state activity that does not definitively violate a constitutional right. John Kaplan first hinted at, and Lawrence Crocker later refined, a theory of contingent constitutional requirements.²¹ According to this theory, governmental actions that are not inherently or absolutely unconstitutional can nonetheless violate the Constitution if "particular institutional and empirical facts" or realities exist.²² Henry Monaghan claimed that the Supreme Court possesses a constitutional common law power that explains numerous cases creating a "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."²³ Joseph Grano has suggested that the judicial power includes the authority to do all that is "necessary and proper" to fulfill its responsibilities, and that many issues of constitutional law beyond defining the scope of rights pose federal questions that the courts may decide.²⁴ Finally, David Strauss offers not a theory but a description of Supreme Court adjudicatory techniques, noting that the use of overprotective rules is pervasive in the resolution of constitutional issues.²⁵ Another scholar, Robert Burt, focuses on a different branch, exploring Congress's power to elaborate on or further the purposes of the Fourteenth Amendment as interpreted by the Supreme Court.²⁶

Drawing on this previous scholarship, this Article suggests a way of categorizing the judiciary and the legislature's power to regulate the broad spectrum of governmental action.²⁷ The Supreme Court has the authority to define

20. While § 3501 only applies in federal courts, and the federal judiciary and Congress figure prominently in this Article, any theory justifying *Miranda* and concerning prophylactic rules more generally must apply to the states as well. After all, *Miranda* and other prophylactic rules apply to state as well as federal courts. Moreover, Congress has unlimited discretion to overturn any exercise of the supervisory power by the Supreme Court to manage the federal judiciary. Language in *Miranda* and other relevant cases indicates that the Supreme Court does not believe its prophylactic rules are so vulnerable. For the purposes of this Article it is irrelevant that § 3501 only applies to federal courts, and references to constitutional violations could refer to actions by federal or state officials.

21. See Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 312 (1993); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1029-30, 1055 (1974).

22. Crocker, *supra* note 21, at 322-26.

23. See Henry P. Monaghan, *The Supreme Court 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

24. See Grano, *supra* note 8, at 100.

25. See Strauss, *supra* note 18, at 190.

26. See Burt, *supra* note 4, at 81.

27. Particularly valuable are the contributions of Henry Monaghan and Lawrence Crocker. Monaghan's insight was placing the Supreme Court's constitutional adjudication into two categories: on the

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the scope of constitutional rights. The Court also has the authority to proscribe governmental action that does not itself definitively violate constitutional rights for one of two reasons. First, some activities pose a high risk of violating rights and are resistant to effective, accurate judicial scrutiny. Second, some activities chill the exercise of rights or render their exercise useless. Preventing government action of these sorts can be described as a “contingent requirement” of the constitutional right that the action endangers.²⁸ Congress may supersede the Court’s remedy for such situations, but it must be responsive to the Court’s constitutional concerns. Finally, the Court has no authority to extend protection against government activities that may affect rights, but that do not impinge their effective exercise. To do so, the Court would exceed its role as interpreter of the Constitution, defender of individual rights, and decider of cases. In this expanded role, the Court would, instead, interfere with the legislature’s power.

When *Miranda* is analyzed through this schema, it becomes clear that the Court was well within its power to require warnings by the police in the absence of an equally effective policy by the legislature.²⁹ The Fifth Amendment may not demand the formulaic recital of the famous *Miranda* warnings, but it does forbid coerced confessions. The compulsion inherent in custodial interrogation, however, has made it impossible to craft an effective test of voluntariness.³⁰ Furthermore, there are positive values associated with the exercise of the Fifth Amendment privilege.³¹ Allowing the police to launch into interrogations of suspects who are intimidated or unaware of their rights would “chill” their invocation, and a jailhouse confession renders the Fifth Amendment close to useless to an accused at trial.³²

Analyzing Section 3501 with the understanding that Congress must address the Court’s concerns when it supersedes a Court-created remedy reveals that

one hand, authoritative interpretation of integral or inherent aspects of the Constitution, and on the other hand, constitutional common law, which includes implementation of procedural rules inspired, but not required, by the Constitution. See Monaghan, *supra* note 23, at 2-3, 23. Monaghan believes that Congress has an unrestricted ability to modify or reject Supreme Court adjudication in the second category. See *id.* at 3. This view, however, is at odds with language common throughout the cases Monaghan cites as examples of constitutional common law, specifically the *Bivens* cases, and most importantly, *Miranda*. Those cases limit congressional modification or replacement of Court-created remedies to alternatives that offer comparable protection for constitutional rights. See *infra* notes 114-118 and accompanying text. Crocker, trying to save the exclusionary rule, suggests that some government action that may not inherently violate constitutional rights may do so “contingent upon certain institutional and empirical facts.” Crocker, *supra* note 21, at 322. This Article takes the best insights of both authors, drawing on Monaghan’s categorization of Supreme Court adjudication and Crocker’s theory of contingent constitutional violations.

28. This Article argues that Supreme Court case law is consistent with this categorization of judicial power and with the notion of contingent constitutional requirements more specifically. It should be noted, however, that the Court has not explicitly embraced the theory of contingent constitutional requirements. Nor is the Court likely to do so any time soon.

29. See *infra* text accompanying notes 119-178.

30. See *infra* text accompanying notes 127-136.

31. See *infra* text accompanying notes 160-172.

32. See *infra* text accompanying notes 173-176.

Congress exceeded its powers.³³ The committee reports for Section 3501 concentrate on the need for effective law enforcement, not solutions to the constitutional problems identified by the Court. Other passages in the legislative history deride the Supreme Court's *Miranda* decision and discuss the constitutionality of the bill. The statute itself is silent on ways to mitigate the coerciveness of police interrogation and aid the courts with the difficult task of identifying Fifth Amendment violations.

The organization of this Article mirrors that of the last three paragraphs. Part I categorizes the power of the judiciary and legislature to define constitutional rights and appropriate limits on state action. Particular care is taken to define contingent constitutional requirements. Part II focuses on the *Miranda* line of cases, showing that the Supreme Court identified contingent requirements of the Fifth Amendment and outlined the minimum procedural safeguards for satisfying those contingent requirements. Part III focuses on Section 3501, showing that its test for the admissibility of confessions fails to address the contingent constitutional requirements described in *Miranda*. The unavoidable conclusion is that the Fourth Circuit in the *Dickerson* decision and the scholarly critiques of *Miranda* are shortsighted.

By focusing on the prophylactic nature of the *Miranda* warnings, and by describing the case as establishing mere evidentiary rules, critics and the Fourth Circuit ignore the Court's central holding: that the judiciary was unable to safeguard the Fifth Amendment or adjudicate Fifth Amendment claims under the voluntariness standard, given the inherently coercive nature of custodial interrogation and the limited effectiveness of investigating the "totality of the circumstances". While the Fourth Circuit did not consider whether Section 3501 provides a solution for either of these concerns, the answer to this constitutionally central question is that it does not. Congress lacks the power to "overturn" *Miranda* and require less protection of a constitutional right than the Court would provide.

I. CATEGORIZING THE JUDICIARY AND CONGRESS'S POWERS TO DEFINE CONSTITUTIONAL RIGHTS AND TO REGULATE GOVERNMENT ACTION THAT AFFECTS CONSTITUTIONAL RIGHTS

A. Defining Constitutional Rights and Actions that Directly Subvert Them

The judiciary has the ultimate power to interpret the Constitution.³⁴ This

33. See *infra* text accompanying notes 179-202.

34. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (reaffirming that "the federal judiciary is supreme in the exposition of the law of the Constitution" when Arkansas state officials declared they were not bound by the Court's *Brown v. Board of Education* decision); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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entails defining what the rights and powers granted in the Constitution mean and determining whether particular acts are violative of or consistent with those rights and powers. Chief Justice Marshall confidently asserted in 1803 that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”³⁵ This statement from *Marbury v. Madison* appears in the middle of a discussion affirming the supremacy of the Constitution over statutory law, the invalidity of congressional acts “repugnant to the Constitution,” and the inability of Congress to bind the Court to enforce laws the Court found unconstitutional.³⁶

What role this leaves for Congress in defining constitutional rights and identifying violations of rights has become clearer in the last few years. The Court’s decision in *Katzenbach v. Morgan* seemed to leave open the possibility that Congress could expand, but not limit, the scope of individual rights.³⁷ *Morgan* held that, using its enforcement power granted by Section 5 of the Fourteenth Amendment, Congress could prevent New York from requiring English literacy as a condition of voting³⁸—despite that fact that the Supreme Court had held in an earlier case that literacy requirements *per se* did not violate the Fourteenth Amendment.³⁹ For the majority, Justice Brennan wrote:

A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the ‘majestic generalities’ of § 1 of the Amendment.⁴⁰

On the other hand, “§ 5 does not grant Congress power to exercise discretion in the other direction and to enact ‘statutes so as in effect to dilute equal protection and due process decisions of this Court. . . . § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees [of the Fourteenth Amendment].”⁴¹

The Supreme Court’s recent decision in *City of Boerne v. Flores*,⁴² however, foreclosed a reading of *Morgan* that would allow Congress to alter the Court’s definition of constitutional rights by giving the rights a broader, more

35. See *Marbury*, 5 U.S. at 177.

36. See *id.* at 176-80.

37. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

38. See *id.* at 643. More specifically, § 4(e) of the Voting Rights Act of 1965 provided that no one with a sixth grade education in a Puerto Rican accredited school could be denied the right to vote on account of an inability to read or write English.

39. See *Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45, 53-54 (1959).

40. *Morgan*, 384 U.S. at 648-49.

41. *Id.* at 651 n.10.

42. 521 U.S. 507 (1997).

expansive reading.⁴³ The case involved a challenge to the Religious Freedom Restoration Act (RFRA), which Congress passed in an attempt to “legislatively overrule” an earlier Supreme Court decision.⁴⁴ In *Employment Division, Department of Human Resources v. Smith*,⁴⁵ the Supreme Court held that neutral, generally applicable laws could substantially burden individuals’ religious practices without violating the Free Exercise Clause of the First Amendment. Through RFRA, Congress sought to impose a test for adjudicating Free Exercise claims that would offer greater protection for religious practice: laws that substantially burdened religious exercise would only be constitutional if they were narrowly tailored to further a compelling governmental interest.⁴⁶ The Supreme Court struck down RFRA as an illegitimate exercise of Section 5’s enforcement power.⁴⁷

City of Boerne made clear that Congress’s Section 5 power extends only to enforcing the provisions of the Fourteenth Amendment, which is to say, remedying violations of the Amendment. The power does not extend to “decree[ing] the substance of the Fourteenth Amendment’s restrictions on the States,” to “changing what the right is,” or to “determin[ing] what constitutes a constitutional violation.”⁴⁸ Giving Congress the power to define—or change the definition of—constitutional rights would reduce the Constitution to the level of statutes and would leave congressional power unchecked.⁴⁹

It must follow that Congress also lacks the power to eliminate remedies that the Supreme Court deems inherent in, or essential for, constitutional rights.⁵⁰ To do so would have the practical effect of changing the definition of

43. *See id.* at 527-28 (“There is language in our opinion in *Katzenbach v. Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.”).

44. *See id.* at 512-16.

45. 494 U.S. 872, 883-90 (1990).

46. *See City of Boerne*, 521 U.S. at 515-16.

47. *See id.* at 529-36. The Archbishop of San Antonio brought the suit, claiming that it violated RFRA to deny a permit for the expansion of a Catholic church in Boerne on account of an historic landmark ordinance.

48. *Id.* at 519.

49. *See id.* at 529.

50. For example, allowing protected speech is central to the First Amendment. Congress presumably could not allow a governmental body that had lost a prior restraints suit to continue the suppression of the plaintiff’s speech, no matter what alternative remedies are available. Similarly, excluding a defendant’s illegally obtained statements at trial may be required by the Fifth Amendment. Other remedies, however, are not as closely tied to the right that they vindicate. Examples include private damages actions in federal court for the violation of constitutional rights, *see infra* notes 115-118 and accompanying text, and the exclusionary rule as a remedy for illegal searches, *see United States v. Leon*, 468 U.S. 897, 905-06 (1984) (rejecting the notion that the exclusionary rule is “a necessary corollary of the Fourth Amendment”); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (stating that the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally . . . rather than a personal constitutional right of the party aggrieved”).

After describing the judiciary’s ability to infer remedies for constitutional violations, Walter Dellinger writes that Congress has some power to alter Court-created remedies that are not integrally tied up

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the right, and it would give Congress the power to gut constitutional protections by eliminating the means to vindicate them.⁵¹ In this limited sense, *Morgan's* "one way ratchet" is descriptively accurate. Congress *can* identify rights violations and, drawing on its wide-ranging powers to make policy, craft creative remedies that lie beyond what the Court has mandated, but which effectively protect the right as understood by the Supreme Court.⁵² Congress *cannot*, however, restrict essential remedies made available by the Supreme Court.⁵³

To summarize, if the Supreme Court has not faced a case in which it drew an outer limit on a right, Congress is free tentatively to draw the line where it will,⁵⁴ and Congress can identify state action that violates a right as defined by the Court. Congress can also create remedies for rights violations to supplement remedies created by the Supreme Court.

The Supreme Court's prescription of *Miranda* warnings, and Congress's

with the rights that they protect. See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1545-49 (1972). Dellinger believes, however, that the Supreme Court still has the ability to reject the congressional alterations. Dellinger suggests that the Court should defer as long as Congress's alternative remedy is equally effective and *the Court's remedy is no longer necessary to effectuate the Constitutional guarantee*. This section of the Article discusses only core definitions of constitutional rights, and remedies that are essential to give effect to the right. Dellinger's suggested formula for when the Court should defer to Congress proves helpful, however, in the next section of the Article.

51. The *City of Boerne* decision is animated by the realization that remedies can change the substantive meaning of a constitutional right. See *City of Boerne*, 521 U.S. at 519-20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed."). The Court determined that the new "remedies" created by RFRA crossed the line and expanded the substantive meaning of the First Amendment. See *id.* at 532 ("RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."). The opposite scenario is equally plausible: Congress could eliminate existing remedies with the effect of limiting the substantive meaning of a constitutional right.

It can be extremely difficult to disentangle the definition of a right and the remedies available for a violation—they are flip sides of a single coin. A theory that places ultimate authority over substantive rules in the hands of the Supreme Court, and ultimate authority over remedies in the hands of Congress, seems untenable and is avoided in this Article.

52. See *id.* at 517-19, 536 (noting that § 5 of the Fourteenth Amendment and the analogous § 2 of the Fifteenth Amendment give Congress a broad power to adopt legislation "appropriate" to deter or remedy constitutional violations, and noting the example of congressional voting rights legislation that suspended voting requirements deemed facially constitutional by the Court); Burt, *supra* note 4, at 113-14 (concluding that Congress's Fourteenth Amendment § 5 powers are based on the legislature's ability to draw lines, make choices, and effectuate remedies that courts are poorly situated to make).

53. *City of Boerne* acknowledges that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," but insists that "the distinction exists and must be observed." *City of Boerne*, 521 U.S. at 519-20. The Court suggested that remedies or preventative measures congruent and proportional to the injury they target would be an appropriate exercise of congressional power, while measures that sweep too broadly would cross the line. See *id.* at 520, 530-32.

54. See *id.* at 535 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

ability to modify or reject the warnings, however, are not governed by *Marbury* and *City of Boerne*. As the Court has clarified since the *Miranda* decision, there is no constitutional right to *Miranda* warnings as such.⁵⁵ The failure to give *Miranda* warnings does not itself infringe a suspect's constitutional rights, and it is conceivable that the *Miranda* exclusionary rule may benefit a defendant who has suffered no constitutional harm at all—that is to say, whose confession was voluntary despite the lack of warnings.⁵⁶ To understand the Court's ability to prescribe prophylactic warnings, and Congress's power to modify or reject them, we must look beyond the question of defining the scope of constitutional rights.

B. Contingent Constitutional Requirements

Some government activities that do not inherently, or always, subvert constitutional rights nonetheless have the practical effect in today's society of impermissibly burdening the exercise or limiting the protection of rights. The impermissible nature of the government action in such cases is contingent on some mutable or temporary condition. Examples include limited court or administrative competence or resources; power dynamics between authority figures and private citizens; and finally, social pressures, monetary costs, or other barriers limiting the exercise of constitutional rights. As long as the conditions exist that cause government actions to burden constitutional rights, the Constitution requires that the activities be regulated. These are contingent constitutional requirements.

Contingent constitutional requirements respond to social and institutional realities. Outlining the contours of contingent constitutional requirements is likely to be fuzzier and more complicated than defining the core scope of constitutional rights as described in Part I.A of this Article. The same holds true for remedies. The remedies for contingent constitutional violations are necessarily pragmatic in nature,⁵⁷ and they may have to be blunt instruments. Prohibiting government activities on account of contingent constitutional concerns may result in a degree of "overprotection"—preventing some state action that

55. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) ("The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.").

56. See *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) ("The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. . . . Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."); see also *New York v. Quarles*, 467 U.S. 649, 654-55 (1984) (stating that whether defendant's statements were compelled is an issue separate from the consequences of police failure to make available *Miranda* safeguards); *Tucker*, 417 U.S. at 444-45 (finding a voluntary confession in the absence of full *Miranda* procedural safeguards).

57. See *Crocker*, *supra* note 21, at 323 (quoting Kaplan, *supra* note 21, at 1029-30: "[T]he Constitution demands something that works—presumably at a reasonable social cost. The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a constitutional fiat.").

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does not directly violate a constitutional right. However, this protection is necessary to ensure the vitality and integrity of constitutional rights.

There are at least two categories of government actions that implicate contingent constitutional requirements. The first is action that is unsusceptible to clear judicial scrutiny, so that a court is unable to determine with confidence whether a rights violation has occurred. When the government is aggressive, operating at the edge of what is permissible, especially when the constitutional line is difficult to draw, the actions fall into this category. The second consists of government actions that inhibit the exercise of rights.⁵⁸ This is particularly problematic when the full benefit to society of the constitutional right depends not only on limiting the government's power, but on private individuals making vigorous use of the freedom guaranteed by the right. The next two sections of the Article define these two categories more fully, explaining why they trigger contingent constitutional requirements and providing examples from Supreme Court case law. A third section explains the possible sources of authority allowing the Supreme Court to identify and remedy contingent constitutional violations. A final section analyzes Congress's power to address contingent constitutional requirements.

1. Ensuring the integrity of court decisions and the full protection of constitutional rights: Making sure that courts do not "miss" constitutional violations because of limited factfinding competence

It is extremely difficult for courts to gauge with confidence and precision whether some government actions violate the Constitution. This difficulty persists, for example, when constitutionality turns on the subjective motive of the state actor.⁵⁹ It also occurs when constitutionality turns on subtle, contextual factors. Actions that the government engages in repeatedly, and that appear nearly identical, can violate the Constitution in some cases and not in others.⁶⁰

58. Widespread constitutional violations may be a contingency that requires a forceful, overbroad remedy. This Article, however, only focuses on the two categories of contingent constitutional requirements described in the text.

59. The Supreme Court has often tailored its jurisprudence to avoid having to determine the subjective motivation of state actors, or to minimize the importance of subjective motives. Instead of delving into whether the legislature engaged in unconstitutional political gerrymandering in *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court applied an ultra-strict "one person, one vote" requirement (stricter than the margin of error in the census) to find that the districting violated the Equal Protection Clause. See *id.* at 731-34. The Court has also de-emphasized the subjective prong of qualified immunity analysis in § 1983 actions against public officials for constitutional violations. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982).

60. Police searches and seizures provide the best example. Court evaluation of compliance with the Fourth Amendment is extremely fact intensive, with seemingly similar cases producing different results. See Audra A. Dial, Note, *Ad Hoc Adjudication: People v. Champion, Another Confusing Element in the Turmoil Following Minnesota v. Dickerson*, 39 WM. & MARY L. REV. 1003, 1021-28 (1998) (providing examples of seemingly inconsistent holdings and odd line drawing in "plain feel" cases). The difficulty of making such fact specific decisions with any consistency, and the awkward position in which fact specific litigation places police officers as they try to carry out their jobs, may help explain the pressure

The record of such government acts is likely to be ambiguous and indeterminate. Courts can engage in comprehensive, case-by-case analysis and investigation in such cases, but the results would be both uncertain and inconsistent. This reflects the limits of the courts' factfinding competence.

All Supreme Court constitutional adjudication is sensitive to the limits of judicial competence.⁶¹ When the judiciary's competence is strained and the Court believes it can "trust" the other branches to protect constitutional rights, the Court defers to the other branches.⁶² When the other branches cannot be "trusted," the Supreme Court responds with tough tests, bright line rules, or prophylactic measures.⁶³ The Court's response in these situations indicates that it is better to err on the safe side. Indeed, it may be a contingent constitutional requirement to do so.

2. Realizing the full benefits of constitutional rights by ensuring that citizens have the unfettered opportunity to exercise them

The benefits of some constitutional rights are only realized when they are affirmatively exercised by citizens. It is not enough for the government to refrain from denying or limiting such rights. The government must, if not encourage the exercise of the rights, at least leave enough space for their exercise to flourish. The Supreme Court prohibits government action which "chills" the exercise of such rights, or which renders their subsequent exercise useless, because it undermines the values and normative vision of the Constitution.

The First Amendment provides the best example of Court action to stop the government from inhibiting the exercise of constitutional rights.⁶⁴ The free and plentiful expression protected by the First Amendment serves a number of values: promoting knowledge and "truth," facilitating the exercise of representative democracy, and furthering personal autonomy and self-fulfillment.⁶⁵ The Court has struck down onerous libel laws, overly vague and expansive state

to create and then broaden bright line rules in Fourth Amendment law. It also demonstrates the wisdom of the Constitution's preference for warrants—a constitutionally required procedural safeguard. A second example is the Voting Rights Act's requirement that all changes to voting practices and procedures in covered jurisdictions receive pre-clearance from the Department of Justice or the D.C. Circuit Court of Appeals. Ferreting out unconstitutional purposes and effects in seemingly innocuous changes in voting practices requires an evaluation of local government history, politics, and personalities that are difficult for a court to discern.

61. See Strauss, *supra* note 18, at 192 (noting that courts can and do consider both constitutional values and courts' institutional limitations when fashioning rules).

62. See *id.* at 205-06 (giving examples of rational review applied to most economic and social legislation under equal protection doctrine).

63. See *id.* at 200, 204 (giving examples of strict scrutiny for content-based speech restrictions and suspect classifications in equal protection doctrine).

64. Strauss gives the First Amendment as another example of the Court crafting "overprotective" rules due to the difficulty involved in discerning whether a constitutional violation has occurred because so much turns on the motives of the state actors. See *id.* at 195-201.

65. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1025-28 (13th ed. 1997).

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regulations, and prior restraints on speech (such as licensing or permitting systems) in part because these government actions would discourage speech.

For example, false statements of fact are not protected by the First Amendment,⁶⁶ but the States can only sanction such statements about government figures' official conduct if they are made with "actual malice."⁶⁷ What animated the Court's decision in *New York Times v. Sullivan* was the need to protect against the self-censorship that could result if libel damages were imposed for negligently made false statements. Thus, the Court found Alabama's libel law unconstitutional because it failed to provide adequate "safeguards for freedom of speech."⁶⁸ "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism," wrote the Court, "is an atmosphere in which the First Amendment freedoms cannot survive."⁶⁹ The Court frankly acknowledged that it considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁷⁰

Sullivan and subsequent cases limit the ability of government to regulate one particular type of speech—false statements—for fear of chilling speech. The same rationale lies behind the more general First Amendment doctrines of overbreadth, vagueness, and prior restraints.⁷¹ The overbreadth doctrine simply holds that regulation of unprotected speech cannot sweep too broadly, proscribing or punishing protected speech.⁷² The vagueness doctrine requires that regulations provide sufficiently precise definitions of the proscribed conduct so that people can determine what they are and are not allowed to do.⁷³ The prior restraints doctrine disfavors requirements that speech be approved by the government before it is communicated to the public. Licensing schemes are presumed to violate the Constitution, and they are permitted only if the government observes specific procedural safeguards.⁷⁴

66. See *Gertz v. Welch*, 418 U.S. 323, 340 (1974) (noting that "there is no constitutional value in false statements of fact," and that "the erroneous statement of fact is not worthy of constitutional protection"); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942) (noting certain categories of speech, including libel, the prevention of which does not raise any constitutional problems).

67. See *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Actual malice is defined as either knowledge that a statement was false or that a statement was made with reckless disregard for its veracity.

68. *Sullivan*, 376 U.S. at 264.

69. *Id.* at 278.

70. *Id.* at 270.

71. See *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (identifying self-censorship by speakers to avoid licensing regimes as one risk associated with prior restraints); GUNTHER & SULLIVAN, *supra* note 65, at 1327, 1337 (preventing the "chilling" of protected speech is one justification for the overbreadth and vagueness doctrines).

72. See GUNTHER & SULLIVAN, *supra* note 65, at 1327.

73. See *id.* at 1337.

74. See *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965) (noting the heavy presumption against the constitutional validity of prior restraints, and requiring that licensing schemes place the burden on the state to prove that the speech is unprotected, process applications within a specified and brief period

First Amendment doctrine has a lot in common with *Miranda*. In both cases, the Supreme Court restricts government action to ensure that the government does not inhibit the exercise of constitutional rights. In both cases, the Court creates an overbroad, irrebuttable presumption that if specific procedural requirements are not satisfied, the government action is unconstitutional. And in practice, both provide defenses for people whose acts do not warrant constitutional protection.

3. *Supreme Court authority to identify and remedy contingent constitutional violations*

There are a number of possible explanations for the Supreme Court's power to define contingent constitutional requirements and ensure that they are satisfied. The most comprehensive and satisfying is that identifying and remedying contingent violations is simply a matter of traditional judicial review. Alternative explanations are that Article III of the Constitution includes an implied Necessary and Proper Clause for the judiciary, or that any issues closely related to constitutional adjudication pose federal questions that the Court can resolve.

Once the constitutional basis of contingent violations is appreciated, identifying and remedying violations are properly seen as straightforward matters of judicial review and constitutional interpretation as in *Marbury*. In some decisions that create prophylactic procedural rules or require "breathing space" for constitutional rights, the Court states that it is correcting or preventing violations of constitutional rights. Admittedly, in other cases the Court claims to be creating rules that are not actually required by the Constitution.⁷⁵ The discrepancy appears to be a matter of semantics.⁷⁶ The effects are the same, no matter how the Court couches its reasoning. In both scenarios the Court creates a firm rule that may benefit people whose rights have not been invaded, and the Court does so either to avoid chilling the exercise of a right or to make sure that courts do not under-protect rights when resolving cases.

A more sophisticated version of the "judicial review" basis for Court authority is that some constitutional amendments have an implicit enforcement clause.⁷⁷ According to this theory, amendments creating rights are also intended to secure their vitality; the amendments have "built in protections" to

of time, and provide for prompt judicial review).

75. *Compare, e.g.,* Lovell v. City of Griffin, 303 U.S. 444 (1938), with *Miranda v. Arizona*, 384 U.S. 436 (1966) (illustrating the Court's varying rationales for its holdings).

76. See Strauss, *supra* note 18, at 196.

77. See generally Crocker, *supra* note 21. Crocker is trying to find authority for the exclusionary rule, and concludes that some constitutional rights have an implicit enforcement clause. This, he argues, allows the Court to craft rules deterring future violations. While deterring future violations and preventing a "chilling" of rights are distinct objectives, they are analogous in this sense: Both are intended to preserve the fortitude of constitutional rights.

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ensure that the rights do not become a “mere form of words.”⁷⁸ Drawing on these implicit protections, the Court can, as a matter of judicial review and constitutional interpretation, make sure that people have every opportunity—and no governmentally imposed disincentives—to exercise their rights.⁷⁹ Similarly, the Supreme Court could adopt the procedural rules necessary to ensure its effective vindication of rights when deciding cases. The Supreme Court seemingly embraces an enforcement power in *Miranda* itself, justifying its decision on the ground that “[a]s courts have been presented with the need to enforce constitutional rights, they have found means of doing so.”⁸⁰

If one thinks that addressing contingent constitutional requirements is somehow distinct from remedying core constitutional rights claims, then it may be necessary to look beyond judicial review for a source of Court power. One possibility is federal question jurisdiction.⁸¹ This theory holds that any question with a significant relationship to a constitutional right is a federal question, which the federal judiciary can resolve.⁸² Grano uses the burden of proof required to show a constitutional violation and the standards for waiving constitutional rights as examples.⁸³ Another example might be the elaboration in *Chapman* of a federal standard for harmless constitutional error applicable to the states.⁸⁴

Another potential source of authority for the courts to address contingent constitutional requirements is a “necessary and proper” power for the judiciary,

78. Crocker, *supra* note 21, at 316, 327.

79. Similarly, the power to prevent constitutional rights from becoming “mere forms of words” allows the Court to create remedies for constitutional violations—including *offensive* remedies, such as a cause of action. See Dellinger, *supra* note 50, at 1532-45. The power to create a constitutional cause of action is limited to when a right has been violated. But like rules that deter rights violations or rules that leave space for the exercise of rights, inferring a cause of action looks beyond the case at hand to protect the vitality of constitutional rights.

80. *Miranda*, 384 U.S. at 490. The Court in *Miranda* saw itself as continuing the task, begun in *Escobedo v. State of Illinois*, 378 U.S. 478 (1964), of ensuring that the Fifth Amendment privilege against self-incrimination “not become but a ‘form of words’ . . . in the hands of government officials.” *Miranda*, 384 U.S. at 444 (citation omitted). Worried about the inherent compulsion of police interrogation, the goal of the procedural safeguards that the Court put in place was to ensure that suspects remain free at all times to decide for themselves whether to make a statement or to invoke their Fifth Amendment Privilege. See *id.* at 444, 457-58.

81. See Grano, *supra* note 8, at 147-53.

82. Normally, court resolution of federal questions can be altered by Congress in any way it pleases. See *id.* at 148 (“Because this argument finds it unnecessary to assume that these issues have constitutional answers, Congress presumably would retain authority to modify the answers that courts provide.”). At certain points, however, Grano suggests that resolving issues collateral to constitutional adjudication may be different than resolving issues related to statutes. See *id.* at 152-53 (“It is not clear . . . that the Court would abdicate in the face of a legislative override of the rules in these cases. The point, however, is that even if some of these rules are not viewed as constitutionally required, their promulgation by federal courts as a matter of federal law does not seem particularly troubling.”).

83. See *id.* at 147.

84. See *Chapman v. California*, 386 U.S. 18, 21-23 (1967) (concluding that fashioning an appropriate harmless error standard for constitutional violations posed a federal question, and, after reviewing California’s standard, determining that “[w]e prefer the approach of this Court in deciding what was harmless error”).

implied from Article III of the Constitution.⁸⁵ This power could allow the judiciary to adopt whatever rules and procedures are “necessary or proper” for deciding cases in a sound manner. More broadly, it could allow the judiciary to craft rules “necessary and proper” to protect the viability of constitutional rights.

The implied power has its roots in the venerable case of *McCulloch v. Maryland*.⁸⁶ That decision, upholding the constitutionality of the national bank, is based largely on an acceptance of implied powers within the Constitution.⁸⁷ The Court noted that in contrast to the Articles of Confederation, “there is no phrase in [the Constitution] which . . . excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.”⁸⁸ The Court went on to explain that implied powers are essential if the government is to exercise the powers explicitly granted in the Constitution. The Court concluded its discussion of implied powers assertively: “The government which has a right to do an act, and has imposed on it the duty of performing that act, must according to the dictates of reason, be allowed to select the means.”⁸⁹

Skeptics point out that the *McCulloch* case was about Congress’s powers, not the courts’.⁹⁰ This distinction is meaningful both because it calls into question the significance of the precedent for understanding the judiciary’s power, and because there is a textual basis for finding implied legislative powers in the Constitution. That basis is the Necessary and Proper Clause of Article I Section 8, and there is no analogue for the judiciary in Article III.

These critiques, however, are not convincing. Marshall did not locate the implied powers in the Necessary and Proper Clause.⁹¹ Furthermore, the *McCulloch* language concerning implied powers speaks generally about the “government,” not about any particular branch. Because Article III does not define the judicial power (in sharp contrast to Art. I Section 8 and Art. II), the power must extend beyond the limits of the constitutional text.⁹² Finally,

85. Joseph Grano developed this understanding of the judiciary’s power, and it is implicit in Lawrence Crocker’s theory of contingent constitutional requirements. See Crocker, *supra* note 21, at 313 (concluding that the Court may be able to craft overbroad rules as part of its judicial review authority as long as there is no effectively administrable narrower rule possible); Grano, *supra* note 8, at 137-45.

86. 17 U.S. (4 Wheat) 316 (1819).

87. See Grano, *supra* note 8, at 139.

88. *McCulloch*, 17 U.S. at 406.

89. *Id.* at 409.

90. See Grano, *supra* note 8, at 137-39; William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS. Spring 1976, at 102, 122-27 (arguing that the Necessary and Proper Clause plays an important role in making Congress “first among equals” in relation to the Executive and Judiciary branches, and that the Clause lodges the power to define any additional authority of the executive and the judiciary in Congress alone).

91. See Grano, *supra* note 8, at 139.

92. See *id.* at 139 (noting that, in fact, creating remedies and rules of procedure may be part of the

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McCulloch's language about government with the *duty* to act speaks most powerfully to the judiciary and the executive. Congress is under no obligation to legislate. The courts, on the other hand, are given jurisdiction, and cases and controversies are brought to them. With very limited exceptions, lower courts do not have the discretion to refrain from deciding cases properly before them.⁹³ Consistent with *McCulloch*, it seems essential that a branch of government have the flexibility to fulfill its obligations effectively.

In cases earlier this century, the Supreme Court expanded its power to create rules that would promote the search for truth and aid the efficiency of the judiciary.⁹⁴ Warren Court cases also seem to draw on an implied power of the judiciary to create rules that aid the effectiveness and integrity of its work. In *Chapman v. State of California*,⁹⁵ the Supreme Court imposed a uniform constitutional harmless error rule on the states. The Court never addressed the question of whether the California harmless error rule at issue in the case was unconstitutional. Instead, the Court simply decided that it "preferred" its own more demanding rule, which was less likely to allow constitutional errors to taint criminal proceedings than more permissive state rules.⁹⁶ Another example is the prophylactic rule in *North Carolina v. Pearce* to avoid vindictive sentencing.⁹⁷

Of course, recognizing an implied power within Article III only begs the question: how far does the power extend? The power is to make rules that help the accuracy, integrity, and smooth handling of cases and constitutional interpretation. Grano argues that the courts can only use the implied power to make procedural rules.⁹⁸ After all, substantive rules—rules required by the Constitution—are based on the Court's power to decide cases and interpret the Consti-

core judicial power, without needing to draw on any implied power).

93. See *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) ("The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it."); *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (holding that the federal judiciary has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution").

94. See *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (holding that federal courts can stay proceedings until the Supreme Court settles a point of law important to the case, because "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants" in mind); *Funk v. United States*, 290 U.S. 371, 381-82 (1933) (holding that, even absent congressional action, federal courts have power to alter common law rules of evidence).

95. 386 U.S. 18, 21 (1967).

96. See *id.* at 21, 23.

97. 395 U.S. 711, 726 (1969). *Pearce* held that after a defendant successfully appeals his conviction and obtains a retrial, a sentence greater than that imposed in the original trial will be overturned unless the trial judge (1) explains the longer sentence and (2) bases the sentence on objective information about the defendant's conduct that occurs after the original sentence was imposed. Unless those conditions are satisfied, the court of appeals will presume that retaliation motivated the more onerous sentence. See *id.* at 725.

98. See Grano, *supra* note 8, at 141, 144.

tution.⁹⁹ Grano further distinguishes between rebuttable presumptions, which are appropriate exercises of the implied power, and conclusive (or irrebuttable) presumptions, which Grano believes exceed the power because they "make irrelevant the constitutional issues federal courts are charged to decide."¹⁰⁰ However, the distinction between rebuttable and conclusive presumptions is one of degree, not kind.¹⁰¹ A bright line, conclusive presumption may serve the justifications for exercising the implied power—promoting accuracy, integrity, and administrability—better than a procedure that requires detailed, subjective fact-finding.¹⁰²

Lawrence Crocker suggests a limit on the courts' judicial review authority that could apply to the implied power in Article III as well. According to Grano, rules adopted pursuant to the judicial review authority may be legitimate only to the extent that no narrower effectively administrable rule is possible.¹⁰³ While logically sound, in practice it may be difficult to determine whether a rule is as narrow as practicably possible. Walter Dellinger proposes that the Court's implied power to create remedies for constitutional violations should permit not only remedies that are indispensable, but remedies that are merely helpful or appropriate for protecting the vitality of constitutional rights.¹⁰⁴ It would not be much of a leap to adopt this standard for the Court's implied power to recognize and remedy contingent constitutional violations.¹⁰⁵

4. Congress and Contingent Constitutional Requirements

Given the Supreme Court's power to act on contingent constitutional requirements, the question remains: What power does Congress have to respond to a perceived contingent constitutional requirement independently, to replace

99. See *id.* at 144.

100. *Id.* at 147. Grano's thinking runs as follows: Rules created pursuant to the implied power purport to not be interpretations of the Constitution. Because irrebuttable procedural rules are dispositive, they preclude courts from reaching constitutional issues that may be lurking in a case.

101. David Strauss gives as hypotheticals alternative rebuttable presumptions that the Court could have adopted in *Miranda*. See Strauss, *supra* note 18, at 191-92. One possibility is a presumption that confessions obtained in violation of *Miranda* will be excluded unless the prosecution can produce evidence "so strong as effectively to eliminate all doubt whatever that the statement was voluntary." *Id.* at 192. This meets Grano's requirement that presumptions be rebuttable, but it would not lead to different results than the existing *Miranda* exclusionary rule. The example also demonstrates that the rebuttable/conclusive distinction is baseless line drawing.

102. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 450 (1987) ("When an assessment is complex and often beyond the ken of judges or when proof of the circumstances crucial to a fact-bound judgment is largely within the control of one party . . . a conclusive presumption may be the best way, over the run of cases, to minimize adjudicatory error."); Strauss, *supra* note 18, at 190-95. If certain types of evidence are so powerful that they will always determine the outcome of a balancing test, no matter how it is phrased, then a conclusive presumption saves judicial resources and eliminates the chance that a lower court could "get it wrong."

103. See Crocker, *supra* note 21, at 313.

104. See Dellinger, *supra* note 50, at 1549-50.

105. Dellinger's standard seems like the most reasonable limit on the implied Article III power. In the end, however, this is not an issue that can be adequately explored in the context of this Article.

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judicial rules with its own policy solutions for contingent constitutional requirements, or to reject a court crafted rule (in effect “overturning” the judicial decision)? The best answer is that Congress can substitute its own judicial rule for the Court’s, but it must be responsive to the constitutional concerns identified by the Court.

Clearly, Congress is free to act without judicial prompting. The generous reading of the Necessary and Proper Clause in *McCulloch v. Maryland*,¹⁰⁶ coupled with Congress’s enforcement power under the Fourteenth Amendment,¹⁰⁷ gives it wide latitude to protect and vindicate constitutional rights. The trickier question is what latitude Congress enjoys when the Court has identified a contingent constitutional requirement and created a judicial rule in response. Robert Burt suggests that Congress’s power in such a situation is limited to enforcing the Court’s “value preferences, under the Fourteenth Amendment” rather than imposing its own.¹⁰⁸ Congress can act to address contingent constitutional concerns identified by the Court more effectively, but it cannot reject the Court’s constitutional concerns.¹⁰⁹

Section 5 of the Fourteenth Amendment is not the only source of congressional power, however. Congress has regulatory authority over the federal courts, including the power to make rules of evidence and procedure.¹¹⁰ This authority is implicit in its power to establish inferior federal courts, and it also derives from Congress’s power to make whatever laws are necessary and proper for the execution of all the powers vested in the federal government.¹¹¹

Scholars who have accepted the notion of contingent constitutional requirements assume that Congress’s power to make rules of evidence and pro-

106. 17 U.S. (4 Wheat) 316 (1819).

107. See U.S. CONST. amend. XIV, § 5; *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

108. Burt, *supra* note 4, at 114. Or, put another way, “the Court will set the basic terms. Congress can only fill in the blanks.” *Id.* at 118. Burt bases his rather circumscribed view of Congress’s § 5 power on the fact that “[t]he Court clearly retains its option to pass on any § 5 legislation that touches on ‘fundamental’—though not, as such, constitutional—rights. By this standard there is no exercise of ‘independent’ congressional authority under § 5 that is independent of the Court’s final arbitration.” *Id.* at 117. Burt in this passage is, in effect, talking about contingent constitutional requirements.

109. See *id.* at 121 (noting that the Court would approve of “reforms” that “reshaped Court doctrine to make it responsive to conflicting interests in a manner that the Court itself might not comfortably be able to reach,” but would approve of, while rejecting “restrictions” on Court doctrine). Burt’s article focuses on the history of the Fourteenth Amendment and the *Morgan* decision, but the author also writes that *Miranda*’s invitation to Congress and the states to come up with alternative policy solutions is the same as the invitation for Congress to act under its § 5 powers expressed in *Morgan*. See *id.* at 127. Burt concludes that unless the Court overrules its own restriction on congressional action expressed in footnote ten of the *Morgan* decision (which the Court has not done), then § 3501 is unconstitutional. See *id.* at 123-34.

110. See *Vance v. Terrazas*, 444 U.S. 252, 265 (1982) (noting “the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts” based on its Article I, § 8 power to create inferior federal courts); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959) (describing an example of Congress legislating rules of criminal procedure to supplant a Supreme Court decision).

111. See U.S. CONST. art. I, § 8.

cedure extends to this arena, even to the point of superceding rules created by the Supreme Court.¹¹² There is one significant caveat, however. Congress's rules must be as effective and efficient, or more so, than the Court's rules.¹¹³

The line of cases creating and defining a cause of action for money damages for constitutional violations supports this understanding of the relative powers of Congress and the courts in terms of contingent constitutional requirements. Recognizing that citizens had to have some way to remedy constitutional violations, the Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹¹⁴ determined that allowing private actions was appropriate. But, a private damages action is not a necessary remedy, indispensable for vindicating any particular constitutional right.¹¹⁵ The Supreme Court has acknowledged that *Bivens* actions would not be permitted if Congress were to establish a scheme both intended to substitute for a civil damages action and equally effective in remedying rights violations.¹¹⁶ Such a situation arose in *Bush v. Lucas*.¹¹⁷ The Court refused to allow a *Bivens* action by a federal employee demoted for criticizing the agency for which he worked. Congress had created an elaborate administrative appeal system for employees, and because the administrative system provided meaningful remedies, it provided an adequate replacement for court actions by employees.¹¹⁸

II. *MIRANDA* AS A LEGITIMATE RESPONSE TO CONTINGENT CONSTITUTIONAL REQUIREMENTS

Miranda does not define the scope of Fifth Amendment rights directly.¹¹⁹

112. See Crocker, *supra* note 21, at 331 (writing about Congress's ability to replace judicial measures, such as the exclusionary rule, to deter Fourth Amendment violations); Dellinger, *supra* note 50, at 1545-49 (writing about Congress's ability to replace court-created remedies for constitutional violations).

113. See Crocker, *supra* note 21, at 331; Dellinger, *supra* note 50, at 1548-49 (concluding that the Court should defer to Congress when (1) the alternative remedy is considered by Congress to be equally effective, and (2) in light of Congress's remedy, the Court's remedy is no longer necessary to effectuate the constitutional guarantee). Most of the academic literature focuses on Congress's exercise of its § 5 power. There is no reason to think, however, that Congress would have more authority to subvert constitutional rights using a different power, just because that power seems, at first blush, to be far removed from the arena of individual rights.

114. 403 U.S. 388 (1971).

115. See Craig Goldblatt, Note, *Harmless Error as Constitutional Common Law: Congress' Power To Reverse Arizona v. Fulminante*, 60 U. CHI. L. REV. 985, 1008 (1993). Walter Dellinger believes that the Court's power extends to creating appropriate or helpful remedies for constitutional violations, not just remedies that are indispensable. See Dellinger, *supra* note 50, at 1549-50.

116. See *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

117. 462 U.S. 367 (1983).

118. See *id.* at 386.

119. Prof. Schulhofer concludes that the *Miranda* decision did in fact define the scope of Fifth Amendment rights (namely, that informal compulsion in custodial interrogations violates the Fifth Amendment), which differ from the Due Process right (which requires only that confessions be given voluntarily). See Schulhofer, *supra* note 102, at 435-45. If true, then the consternation about the fact that un-Mirandized confessions can still be voluntary misses the point. It is possible to find the Fifth Amendment and Due Process tests described distinctly in the case law. See *Withrow v. Williams*, 507

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The Supreme Court has acknowledged that failure to administer *Miranda* warnings, in some circumstances, might not violate the Fifth Amendment.¹²⁰ *Miranda*'s safeguards are "not themselves rights protected by the Constitution,"¹²¹ and some Justices have gone so far as to say that the *Miranda* exclusionary rule is not constitutionally required.¹²² The question, therefore, is whether *Miranda* warnings or their equivalents are contingent requirements of the Fifth Amendment, or whether the decision is an example of illegitimate policy making by the Court.

The Court answered this question in the *Miranda* decision, declaring that "the issues presented are of constitutional dimensions . . ."¹²³ The concerns that animated the Court in *Miranda*, the Court's reasoning, and cases following *Miranda* confirm that the requirement of adequate warnings before interrogation fit both justifications for contingent constitutional requirements identified earlier in this Article: ensuring the integrity of court factfinding related to constitutional claims and ensuring that there are ample opportunities for exercising constitutional rights.

A. Ensuring the Integrity of Courts' Voluntariness Determinations

The landmark case *Brown v. Mississippi*¹²⁴ marked the start of a line of Due Process cases testing the admissibility of confessions by asking if they were given voluntarily. The Court settled on a "totality of the circumstances" analysis for determining the voluntariness of confessions.¹²⁵ Courts would weigh all the facts relating to the personal characteristics and background of the defendant and the police conduct during questioning to judge whether the defendant had given a confession freely, or whether the police had "overborne" the defendant's "will."¹²⁶

It has proven difficult, however, to determine the voluntariness of confes-

U.S. 680, 688-90 (1993). However, the post-*Miranda* cases do not carefully disaggregate the two rights or indicate which right they rely on, and other scholars see the tests for Fifth Amendment compulsion and Due Process voluntariness as identical. See JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 136-37 (1993); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 182-86 (1988); Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 114 & n.20 (1998).

120. See *Miranda*, 384 U.S. 436, 457 (1966).

121. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

122. See *Withrow*, 507 U.S. at 702 (O'Connor, J., dissenting).

123. *Miranda*, 384 U.S. at 490.

124. 297 U.S. 278 (1936).

125. In the cases following *Brown*, the Court vacillated between an older voluntariness test which focused on the reliability of confessions, and the due process approach, which looked at the circumstances of the interrogation. In time, the Court consolidated these two approaches. See Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal To Mirandize Miranda*, 100 HARV. L. REV. 1826, 1833 (1987).

126. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 624-25 (1996); Weisselberg, *supra* note 119, at 113-14.

sions with any confidence or consistency.¹²⁷ *Miranda*'s bright line rule compensates for the inadequacies of the voluntariness test, giving courts an easily administrable test, making the analysis of interrogations consistent, and eliminating the dangers of under-enforcement of the Fifth Amendment privilege resulting from subtle forms of compulsion in interrogations.

The shortcomings of the voluntariness test were evident before the *Miranda* decision. Because the "totality of the circumstances" test was so flexible, value-laden, and fact specific, trial courts had no clear standards to go by, and appellate courts faced the burden of case by case review.¹²⁸ As attention shifted from brute physical coercion to subtler, psychological interrogation tactics, the task of weighing voluntariness became even more difficult.¹²⁹ Further complicating matters was the fact that the Supreme Court's Due Process doctrine for confessions was complicated and inconsistent. Shifting definitions of coercion, varied theories of what Due Process was meant to protect in the area of confessions, and numerous tests and rules all played a role in the Court's jurisprudence.¹³⁰

Passages in the *Miranda* decision reflect the realization that the "totality of the circumstances" test was inadequate both in terms of protecting the Fifth Amendment privilege generally and in terms of accurately gauging the degree of coercion in particular cases. The Court frankly acknowledged that "[p]rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."¹³¹ The Court also noted that assessments of a defendant's understanding of his rights "can never be more than speculation," even if courts consider a myriad of factors such as age, education, intelligence, and prior experience with the police.¹³²

Cases following *Miranda* reiterate that clarity is one of the major benefits of the decision's bright line exclusionary rule.¹³³ In *Fare v. Michael*, for example, the Court wrote that *Miranda*'s "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue

127. See LAFAYE & ISRAEL, *supra* note 4, at 299 (noting that the totality of the circumstances standard "impaired the effectiveness and legitimacy of judicial review" by failing to provide judges with adequate guidance, allowing judges to give weight to their own biases, and relying on unverifiable testimony. LaFave and Israel conclude that *Miranda* was a response to these circumstances. See *id.*).

128. See Ogletree, *supra* note 125, at 1833-37; Schulhofer, *supra* note 102, at 451; Weisselberg, *supra* note 119, at 113-15. Ogletree gives examples from the early 1960s of lower courts failing to exclude confessions extracted through obviously abusive tactics. See Ogletree, *supra* note 125, at 1835.

129. See Weisselberg, *supra* note 119, at 115.

130. See Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2197-2203, 2236-37 (1996).

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

132. See *id.* at 468-69.

133. See *New York v. Quarles*, 467 U.S. 649, 658 (1984) (Rehnquist, J., delivering the opinion of the court), 663-64 (O'Connor, J., concurring in part and dissenting in part), 679 (Marshall, J., dissenting) (acknowledging in each opinion that creating a public safety exception to *Miranda*'s exclusionary rule lessens its "desirable clarity," and pointing out that the Court has been careful to preserve the clarity in cases following *Miranda*).

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of . . . informing courts under what circumstances statements obtained during . . . interrogation are not admissible.”¹³⁴ A recent case reaffirming the constitutional basis of *Miranda* offers a distinct but similar justification for its exclusionary rule, suggesting that it protects against the use of unreliable statements at trial.¹³⁵ Indeed, courts continue to apply the “totality of the circumstances” test for voluntariness with great confusion.¹³⁶

Of course, the Court has not completely rejected the voluntariness test, and still uses it to determine Fifth Amendment violations when *Miranda* does not apply.¹³⁷ The Court has limited the application of the “fruit of the tainted tree” doctrine in the *Miranda* context, allowing prosecutors to use evidence procured as a result of confessions obtained in violation of *Miranda*.¹³⁸ The Court has also allowed the use of confessions obtained in violation of *Miranda* to impeach witnesses.¹³⁹ Finally, the Court has recognized a public safety exception to *Miranda*’s requirements.¹⁴⁰ To admit a confession taken without *Miranda* protections at trial, either to impeach a defendant or under the public safety ex-

134. *Fare v. Michael*, 442 U.S. 707, 718 (1979) (refusing to take a broad, flexible view of *Miranda* in holding that asking to see a probation officer is not a per se invocation of suspect’s Fifth Amendment rights).

135. See *Withrow v. Williams*, 507 U.S. 680, 692 (1993). *Withrow* held that state prisoners could bring federal habeas claims that their convictions rested on statements obtained in violation of *Miranda*, even if the prisoners had a full and fair opportunity to litigate their *Miranda* claims in state proceedings. *Id.* at 683. The *Withrow* majority purported to accept “petitioner’s premise for the purpose of this case” that *Miranda*’s safeguards are not constitutional in character, but merely ‘prophylactic. . . .’” *Withrow*, 507 U.S. at 690. The Court concluded that federal courts must remain open to *Miranda* habeas claims, however, because “in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards ‘a fundamental trial right.’” *Id.* at 691. The decision also raises the question, if *Miranda*’s exclusionary rule is not constitutional, how can the Supreme Court enforce it against the states?

136. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 472 tbl.B1 (1998) (reporting study of false confessions in which 48% of the false confessions resulted in convictions, showing that with the current doctrines, judges often fail to exclude unreliable evidence); Paul Marcus, *A Return to the “Bright Line Rule” of Miranda*, 35 WM. & MARY L. REV. 93, 101, 109 (1993); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 12 (1986) (“Even in quite recent times, lower courts have ruled confessions admissible under the voluntariness standard despite the presence of factors that seem to be extraordinarily coercive.”).

Some Justices, however, continue to express faith in the efficacy of the voluntariness test. See *Withrow*, 507 U.S. at 703-04 (O’Connor, J., concurring in part and dissenting in part) (“To the extent *Miranda* ensures the exclusion of involuntary statements, that task can be performed more accurately by adjudicating the voluntariness question directly.”); *Oregon v. Hass*, 420 U.S. 714, 723 (1974) (allowing the use of statements made in violation of *Miranda* for impeachment purposes and asserting that police abuse could “be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness”).

137. See Marcus, *supra* note 136, at 101 (noting that the voluntariness test is still used, although only in extreme cases).

138. See *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (holding that initial *Miranda* violation does not require exclusion of second statement obtained from defendant after he was properly warned); *Michigan v. Tucker*, 417 U.S. 433, 451-52 (1974) (holding admissible the testimony of witness discovered through questioning of defendant without full *Miranda* warnings).

139. See *Harris v. New York*, 401 U.S. 222, 226 (1971).

140. See *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

ception, prosecutors must still show that the confession was given voluntarily using the "totality of the circumstances" test.¹⁴¹ The Court's general unwillingness to extend the application of *Miranda* reflects the fact that some of the current Justices believe that the "totality of the circumstances" test is an administrable, effective test for assessing Fifth Amendment violations.¹⁴²

The Court's willingness to use the voluntariness test at times calls into question the argument that *Miranda*'s prophylactic requirements are essential to ensure the integrity of courts' assessment of compulsion and coercion in interrogations, but it is not dispositive for two reasons. First, the Court's endorsement of the voluntariness test should not be overstated. The Court did not directly face the adequacy of the voluntariness test in any of the cases limiting *Miranda*'s exclusionary rule, because none of the defendants claimed that their confessions were involuntary.¹⁴³

Second, it makes sense that the remedies available for violating contingent constitutional requirements might be more limited, or at least different, than the remedies available for a violation of core constitutional rights. The Supreme Court has the power to infer remedies for constitutional rights violations, but few are conclusively required by the import of the constitutional text. The Fifth Amendment may in fact demand the exclusion of a defendant's compelled confession from the prosecution's case in chief. But in general, determining what remedies to make available is a flexible and creative task driven by a searching analysis of the values promoted by a constitutional right and the character of the government actions that may impinge that right.

Limiting *Miranda* to allow the use of confessions for impeachment purposes illustrates this point. The Court's stated reason for the impeachment exception in *Harris* emphasizes *Miranda*'s goal of deterring police misconduct, concluding that exclusion of confessions from the case in chief has a sufficient deterrent effect.¹⁴⁴ The Court also points out that impeachment serves as a necessary check on perjury.¹⁴⁵ It could also be argued that impeaching a defendant

141. See *id.* at 655 n.5; *Hass*, 420 U.S. at 722-24.

142. See *supra* note 136. O'Connor writes:

[t]he totality of the circumstances approach. . . permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous.

Withrow, 507 U.S. at 711-12; see also Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?* 10 ST. THOMAS L. REV. 461, 477 (1998) (noting that decisions after *Miranda* have touted the virtues of the voluntariness test).

143. See *Quarles*, 467 U.S. at 654; *Hass*, 420 U.S. at 722; *Tucker*, 417 U.S. at 437-39 (describing the claim as asserting only a violation of the *Miranda* prophylactic rule, but proceeding to evaluate whether the defendant's statements were voluntary anyway) *Harris*, 401 U.S. at 224; Garcia, *supra* note 142, at 483, 490-93 (discussing *Quarles*); Weisselberg, *supra* note 119, at 127 (discussing impeachment cases).

144. See *Harris*, 401 U.S. at 225.

145. See *Quarles*, 467 U.S. at 645-46.

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with his confession does not significantly implicate Fifth Amendment interests; the defendant's prior statements are not offered to prove any element of a crime, but merely to raise doubts about credibility, and the choice of whether to testify and what to testify about remain in the defendant's hands.¹⁴⁶ The Supreme Court has refused to allow the use of evidence obtained unconstitutionally from the defendant to impeach other witnesses, because it would "frustrate rather than further the purposes underlying the exclusionary rule."¹⁴⁷ In such a case, Fifth Amendment interests are implicated, because if the defendant wants to mount a defense with witnesses, his previous words could be used against him.¹⁴⁸ Allowing such a sweeping use of the defendant's statements would also weaken the deterrent effect of the exclusionary rule on police.¹⁴⁹

The public safety exception to *Miranda* does not limit the remedies available for the violation of a contingent constitutional requirement, but instead limits the scope of the contingent requirement itself. The Supreme Court held in *New York v. Quarles* that police do not have to give a suspect *Miranda* warnings before asking "questions reasonably prompted by a concern for the public safety."¹⁵⁰ The facts of the case do not seriously implicate *Miranda*'s constitutional concerns.¹⁵¹ In *Quarles*, police officers chased down a rape suspect in a grocery store. The suspect reportedly had a gun, but he was empty-handed when the police cornered him. The police asked the defendant where the gun was after they handcuffed him, and he told them where he had hidden it. The public safety exception to *Miranda* is not broad. It only applies when there is some "exigency requiring immediate action by the officers [to protect the police or public] beyond the normal need expeditiously to solve a serious crime."¹⁵² The *Quarles* Court emphasized the "kaleidoscopic" nature of the situation, "where spontaneity rather than adherence to a police manual is nec-

146. If the defendant is credible, the difference between his story when confessing and when testifying could aid the court in determining whether the confession was compelled using the totality of the circumstances voluntariness test. The change in the defendant's story could be evidence of overbearing coercion that either forced the defendant to say something (anything!) or that frightened and confused the defendant to the point that he could not remember or relate facts accurately. If this is the case, enforcing the *Miranda*'s exclusionary rule is not as necessary as usual for ensuring the integrity of the courts' Fifth Amendment adjudication.

147. *James v. Illinois*, 493 U.S. 307, 314 (1990). The constitutional defect in the case was actually a Fourth Amendment violation, a warrantless search without probable cause, but the evidence in question was a statement by the defendant following the search. The Court drew substantially on the *Miranda* line of cases in the decision.

148. *See id.* at 314-16. The Court was worried that impeachment of other witnesses could "chill some defendants from presenting their best defense." *Id.* Defendants have much less control over the content of other witness's testimony than over their own testimony. A defendant's ability to respond to the impeachment of witnesses is also limited, unless the defendant takes the stand.

149. *See id.* at 317-18.

150. *Quarles*, 467 U.S. at 656.

151. *See id.* at 651-52.

152. *Id.* at 659 n.8 (distinguishing another case, *Orozco v. Texas*, 394 U.S. 324 (1969), in which un-*Mirandized* questioning about the location of a gun was "clearly investigatory").

essarily the order of the day.”¹⁵³

Two factors unique to the circumstances of a *Quarles* type situation undercut the need to err on the safe side when evaluating whether the custodial interrogation was overly coercive. First, when the officer’s questions are “reasonably prompted by a concern for the public safety,”¹⁵⁴ there is no risk of an untoward government motive or a cynical strategic approach to overbearing interrogation. Second, the questioning is likely to take place in public, as it did in *Quarles*. The *Miranda* opinion emphasized the closed-off station house environment of most custodial interrogations, both because it adds to the coercive atmosphere, and because it limits a court’s ability to determine what actually happened during an interrogation.¹⁵⁵ While *Miranda* requirements generally apply outside of the station house, interrogation in a public place mitigates concerns about a court’s ability to evaluate the voluntariness of a confession.

In other decisions, the Court has rejected an overly technical, formal application of *Miranda* when defining “in custody” and “custodial interrogation,” asking instead whether the “concerns that powered the decision are implicated.”¹⁵⁶ In *Illinois v. Perkins*, for example, the Court held that *Miranda* warnings are not required when an undercover agent impersonating a prisoner speaks with a suspect in jail.¹⁵⁷ Even though the suspect was technically in custody and speaking with a government agent, “the essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.”¹⁵⁸ Therefore, the conversation with the undercover agent did not “implicate the concerns underlying *Miranda*.”¹⁵⁹

B. Ensuring a Meaningful Ability to Exercise the Fifth Amendment Privilege

The Fifth Amendment privilege against self-incrimination reinforces a

153. *Id.* at 656. Later in the decision, the Court wrote, “We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.”

Id. at 657-58.

154. *Id.* at 656.

155. See *Miranda v. Arizona*, 384 U.S. 436, 445, 448, 449-50, 455 (1966).

156. *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) (holding that the defendant, whose car was stopped on suspicion of drunk driving, was not “in custody” for *Miranda* purposes because there were no coercive conditions that could cause a reasonable person to believe that he was in a situation fairly characterized as the functional equivalent of an arrest).

157. See *Illinois v. Perkins*, 496 U.S. 292, 300 (1990).

158. *Id.* at 296.

159. *Id.*

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number of values important to our society.¹⁶⁰ We are better off when our criminal justice system does not rely on confessions.¹⁶¹ Recognizing this, the Supreme Court created the prophylactic rules in *Miranda* to “permit a full opportunity to exercise the privilege against self-incrimination.”¹⁶² The Court believed that the *Miranda* warnings would further that goal both by ensuring that suspects have a real understanding of the Fifth Amendment privilege and by showing the suspect “that his interrogators are prepared to recognize his privilege should he choose to exercise it.”¹⁶³ An understanding of the privilege is a necessary prerequisite for exercising it intelligently.¹⁶⁴ Trusting that the police will honor the invocation of the privilege mitigates the coercive pressure to talk during interrogation by limiting the suspect’s concern that he will be punished in some way for remaining silent.¹⁶⁵

The *Miranda* Court declared that the privilege against self-incrimination is “the essential mainstay of our adversary system.”¹⁶⁶ Historically, the privilege has its roots in the opposition to the inquisitorial procedures of the ecclesiastical courts and the horrors of the Star Chamber.¹⁶⁷ By placing the burden of investigation and prosecution on the government, the accusatorial system helps preserve an appropriate balance between individual freedom and government power.¹⁶⁸ Related to this point and to the historical roots of the privilege is the concern that the State will use cruel and inhumane methods to extract confessions if they form the basis of the criminal justice system.¹⁶⁹ The accusatorial system, and by extension the privilege against self-incrimination, also reflect “the respect a government . . . must accord to the dignity and integrity of its citizens.”¹⁷⁰ This includes respect for individual autonomy—the ability to choose whether and when to speak or remain silent.¹⁷¹ Finally, invoking the privilege against self-incrimination promotes the quality of courts’ factfinding and, ultimately, the integrity of courts’ criminal verdicts. Confessions may not

160. See *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964).

161. See *Escobedo v. Illinois*, 378 U.S. 478, 488-90 (1964).

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

163. *Id.* at 468.

164. See *id.* at 468-69.

165. See *id.*

166. *Miranda*, 384 U.S. at 460; see also Weisselberg, *supra* note 119, at 141-45 (arguing that the history of the privilege against self-incrimination demonstrates that it is bound up with other important features of the accusatorial criminal justice system).

167. See *Michigan v. Tucker*, 417 U.S. 433, 440 (1973); Leo, *supra* note 126, at 629.

168. See *Miranda*, 384 U.S. at 460.

169. See *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

170. *Miranda*, 384 U.S. at 460.

171. See *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (“[T]he fundamental purpose of the Court’s decision in *Miranda* was ‘to assure that the individual’s right to choose between speech and silence remains unfettered throughout the interrogation process.’” (quoting *Miranda*, 384 U.S. at 469) (alteration in original)); Weisselberg, *supra* note 119, at 145-48 (“It is difficult to overstate the extent to which our criminal system relies upon respect for autonomy.” *Id.* at 146.).

be as trustworthy as other types of evidence.¹⁷²

Many of these justifications for a strong privilege against self-incrimination apply whenever an individual is being investigated by the State, not just at trial.¹⁷³ But even if the heart of the Fifth Amendment privilege remains the defendant's right to not testify, speaking with the police earlier undermines the utility of invoking the Fifth Amendment at trial.¹⁷⁴ If ignorance of his rights or the subtle pressures of interrogation lead a suspect to speak with the police, then the ability to remain silent at trial, once he has a lawyer and has prepared a defense, will do him no good. This is why the *Withrow* Court declared that "prophylactic" though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'¹⁷⁵ And this is why *Miranda* refers repeatedly to ensuring a "continuous opportunity to exercise" the Fifth Amendment privilege so that it does not become a mere form of words.¹⁷⁶

C. Satisfying the Contingent Requirements of the Fifth Amendment

The *Miranda* decision identifies concerns of "constitutional dimension,"¹⁷⁷ namely that the inherently coercive and largely hidden nature of police interrogation makes it difficult for courts to assess whether the Fifth Amendment has been violated and leads to under-utilization of the Fifth Amendment privilege. These concerns bring to light contingent constitutional requirements, as defined in this Article: ensuring that suspects are aware of their Fifth Amendment rights and have the unfettered opportunity to invoke them at any time. The Court's response to the constitutional concerns it identified in *Miranda* is consistent with the understanding of contingent constitutional requirements and of the power and authority of the Court and Congress, expressed in this Article. The Court outlined what it would take to address adequately the contingent constitutional requirements, offered one solution that would satisfy its concerns, and invited the states and Congress to come up with alternatives that

172. See *Withrow*, 507 U.S. at 692; *Tucker*, 417 U.S. at 448-49. In fact, concerns about the reliability of confessions were the justification for the common law voluntariness requirement. See *Leo*, *supra* note 126, at 625.

173. *Miranda* made clear for the first time that the Fifth Amendment applied outside of formal criminal judicial proceedings. See *Miranda*, 384 U.S. at 467.

174. See *Tucker*, 417 U.S. at 440-41 ("The natural concern which underlies [the *Miranda* line of cases] is that an inability to protect the [Fifth Amendment] right at one stage of a proceeding may make its invocation useless at a later stage."); see also *Miranda*, 384 U.S. at 466 ("Without the protections flowing from adequate warning and the rights of counsel, 'all the careful safeguards erected around the giving of testimony . . . would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J. dissenting))).

175. *Withrow*, 507 U.S. at 691 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (alteration in original)).

176. *Miranda*, 384 U.S. at 444, 467; see *id.* at 479.

177. *Id.* at 490.

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would be “at least as effective.”¹⁷⁸ If proffered alternatives did not satisfy the contingent constitutional requirements, the Court stated that it would have to apply its own exclusionary rule. The remaining question is whether Congress did in fact create an alternative with Section 3501 that addressed the constitutional concerns identified in *Miranda* as effectively as the Court’s own warning requirement and exclusionary rule.

III. WHERE DOES THIS LEAVE CONGRESS? SECTION 3501 IS UNCONSTITUTIONAL

Congress passed Section 3501 as part of the Omnibus Crime Control and Safe Streets Act of 1968,¹⁷⁹ at a time when crime and the Supreme Court’s active enforcement of civil rights were hot political issues. Section 3501’s language and legislative history make clear that it does not replace *Miranda*’s prescriptions with alternative procedural safeguards to ensure suspects’ knowledge of, or opportunity to exercise, their Fifth Amendment rights. The statute simply rolls back the clock, restoring the old voluntariness test. The statute fails to satisfy *Miranda*’s admonition—which is the requirement for legislative responses to contingent constitutional requirements generally—that alternative policy solutions must satisfy the constitutional concerns as effectively as the Court’s proposed remedy.

A. The Statute and Legislative History

Title II of the Omnibus Crime Control and Safe Streets Act of 1968¹⁸⁰ takes direct aim at a number of Supreme Court criminal procedure decisions.¹⁸¹ Sec-

178. *Id.* at 467; *see id.* at 444. The Court wrote:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

Id. at 467. The Court then described the *Miranda* warnings and exclusionary rule, and explained why they satisfactorily protected the Fifth Amendment privilege. *See id.* at 467-76.

179. *See* 18 U.S.C. §§ 3501-02 (1994).

180. *See id.* §§ 3501-02

181. Section 3501(c) is intended to replace the Court’s rule in *Mallory v. United States*, 354 U.S. 449 (1957), which excludes confessions obtained before a defendant is arraigned when there was an unnecessary delay before the arraignment. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.A.N. 2112, 2215-16 (minority views of Senators Tydings, Dodd, Hart, Long of Missouri, Kennedy of Massachusetts, Burdick, and Fong). Section 3503 allows eyewitness testimony at trial, even if the witness identified the defendant at a line-up that did not satisfy the requirements of *United States v. Wade*, 388 U.S. 293 (1967). *See id.* at 2216-18. Sections of the bill that did not pass would have re-

tion 3501(a) seeks to repeal *Miranda*. The statute states that in federal criminal trials, "a confession . . . shall be admissible in evidence if it is voluntarily given."¹⁸² The statute goes on to list five factors that the judge should consider when determining whether a defendant confessed voluntarily. The *Miranda* warnings make an appearance in the list of factors,¹⁸³ but they are not required. As in the traditional "totality of the circumstances" voluntariness test, the statute states that the judge should "take into consideration all the circumstances surrounding the giving of the confession."¹⁸⁴ And as with the traditional voluntariness test, the statute states that no factor is necessarily conclusive.¹⁸⁵

Nothing in the statute would limit or compensate for the inherent coerciveness of custodial interrogation. Nothing in the statute would enhance a suspect's ability to invoke the Fifth Amendment privilege. And nothing in the statute makes the judge's task of determining voluntariness any easier.

It is also helpful to look at what is—and what is not—included in the legislative history of the Omnibus Crime Control and Safe Streets Act. The major justification offered in the Senate Judiciary Report on the statute is that confessions play a crucial role in law enforcement, and that the *Miranda* decision has dramatically curtailed the number of confessions given to police throughout the country. The Senate Report recounts statistics and anecdotal testimony from police departments, documenting the declining incidence of confessions.¹⁸⁶ Nothing in the Senate Report suggests that Section 3501 will aid the integrity of courts' Fifth Amendment determinations or ensure that suspects have a continuous and unburdened opportunity to invoke their Fifth Amendment privilege. These concerns are never mentioned in the report. Indeed, the "right" invoked most often is the "traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants"¹⁸⁷

The Senate Report devotes substantial energy toward building the case for its authority to overturn *Miranda*. The Judiciary Committee emphasizes institutional competence, concluding that "Congress is better able to cope with the problem of confessions than is the Court."¹⁸⁸ The Report notes that the

stricted the federal courts' ability to address criminal procedure in the future by limiting the appellate jurisdiction of the federal courts and the writ of habeas corpus. See *id.* at 2139-40, 2150-53 (majority report); Burt, *supra* note 4, at 123-24, 131.

182. 18 U.S.C. § 3501(a).

183. See *id.* § 3501(b). Two of the factors mentioned in the statute are "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," and "whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel." *Id.*

184. *Id.*

185. See *id.*

186. See S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2128-32.

187. *Id.* at 2123.

188. *Id.* at 2132.

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Miranda decision itself invited Congress to pass legislation concerning confessions,¹⁸⁹ but the carefully cropped quotation from *Miranda* omits the requirement that any congressional solution be as effective as the Court's.¹⁹⁰ The power to prescribe rules of evidence in the federal courts, according to the Senate, allows Congress to replace the Supreme Court's *Miranda* exclusionary rule.¹⁹¹

Other passages in the legislative history, however, indicate that Congress—perhaps aware that its ability to overturn *Miranda* was tenuous at best—intended to send a message or to educate the Supreme Court through Section 3501 with the hope that the Court itself would overturn *Miranda*.¹⁹² “After all,” the Judiciary Committee notes, “the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself.”¹⁹³ At another point, the Committee urges approval of the statute on the grounds that “[p]assage of this bill with all of its legislative history . . . will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices.”¹⁹⁴ One Senator remarked that “[I]f the Court will not exert self-discipline, then it is the role of the legislative branch to express its concern. . . .”¹⁹⁵ The legislative history contains as much angry rhetoric as it does information to educate the Court.¹⁹⁶ Much of the language decries the

189. *See id.*

190. *See id.* at 2132, 2137. The Senate Report includes the following lengthy excerpt from the *Miranda* decision:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Id. at 2137 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). The very next sentence, which completes the paragraph in the majority opinion, reads: “However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following procedures must be observed.” *Miranda*, 384 U.S. at 467

191. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137.

192. This view is echoed to a more limited degree in the individual comments of Senator Bayh. The Senator noted that the legislation would probably be held unconstitutional because it did not satisfy the Court's requirement that congressional policy responses be as effective as the Court's prescription. Senator Bayh went on to say, however, that the legislation “could serve . . . as an admonition to the Court that strong sentiment and cause exists against the further extension of the doctrine pronounced in *Miranda*.” *Id.* at 2247 (individual comments of Senator Bayh).

193. *Id.* at 2138.

194. *Id.* at 2133. Congress may have been exaggerating its own accomplishments here; one scholar writing soon after the passage of § 3501 critiqued the factfinding that preceded passage of the bill. *See* Burt, *supra* note 4, at 126 (“As a general matter, it can be said that entire congressional debate on all sides of Title II was notably devoid of anything but the most speculative assertion of facts.”).

195. S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2261 (individual comments of Senator Scott).

196. *See* Burt, *supra* note 4, at 127.

perceived epidemic of crime sweeping the nation, and the Court's apparent indifference.¹⁹⁷ The Judiciary Committee describes *Miranda* as a "most disastrous blow to the cause of law enforcement,"¹⁹⁸ and as "unreasonable, unrealistic, and extremely harmful."¹⁹⁹

Persuading the Court to change its mind was clearly a second best solution, for the Judiciary Committee Report's section on *Miranda* concludes not with a call for reversal by the Supreme Court, but with a confident assertion that Section 3501 and its substantive provisions would be upheld in court.²⁰⁰ The legislative history clearly states Congress's conclusion that the Supreme Court misconstrued the Constitution in *Miranda*,²⁰¹ and that Section 3501 is meant to "offset the harmful effects of the Court decisions" by restoring the test for admissibility of confessions in use before *Miranda*.²⁰²

B. The Problems Section 3501 Poses

As the text and legislative history of Section 3501 show, the statute's single goal is to aid the prosecution of criminals. The test for admission of confessions supplied by Congress does not help courts faced with the difficult task of evaluating custodial interrogations, and it does not force the police to give suspects every opportunity to invoke their Fifth Amendment privilege. Because Congress's test for the admission of confessions does not satisfactorily address the constitutional concerns raised in *Miranda*, it cannot supersede the Court's own test.

Ineffective legislative responses to contingent constitutional requirements can pose separation-of-powers problems, and Congress's imposition of the voluntariness test as the sole measure of admissibility for confessions does so in two ways. First, it undermines the judiciary's ability to satisfy its constitutional obligations to decide cases and identify constitutional violations. Second,

197. See S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2260 (individual comments of Senator Scott). In a joint statement, Senators Dirksen, Hruska, Scott, and Thurmond warned:

The spectre of American society—the greatest in the history of the world—plunging into chaos as the national fabric unravels into lawlessness is alarming. . . . No honest and conscientious effort to restore effective law enforcement and fair criminal justice—no matter how many dollars are spent or wires tapped or guns controlled—can hope for success without dealing with the technical problems of admissibility of evidence and appellate review of criminal cases.

Id. at 2281-82.

198. *Id.* at 2127.

199. *Id.* at 2132.

200. See *id.* at 2138.

201. See *id.* at 2136.

202. *Id.* at 2127. Senator Hugh Scott noted that § 3501 "would restore the test which had been in use and considered constitutional until recent Supreme Court decisions, most notably *Miranda v. Arizona*." *Id.* at 2261. See also Garcia, *supra* note 142, at 478, for a brief discussion of Congress's possible goals in enacting § 3501.

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it substitutes Congress's understanding of what the Constitution requires for that of the courts.

History has shown that courts cannot apply the voluntariness test for confessions with consistency or precision. By forcing the federal courts to use an evidentiary rule that is ill-suited for protecting Fifth Amendment rights, Section 3501 undermines courts' ability to decide cases and identify constitutional violations. With Section 3501, Congress limits another branch's ability to carry out its essential functions. The Supreme Court has struck down statutes affecting the jurisdiction and procedural rules of the federal courts before on the ground that "substantial inroads into functions that have traditionally been performed by the judiciary . . . [are] unwarranted encroachments upon the judicial power" ²⁰³ At least one Supreme Court Justice has acknowledged that rules of procedure or evidence passed by Congress could pose separation-of-powers concerns, potentially constituting "legislative interference with a court's inherent authority [that] would run afoul of Article III" ²⁰⁴

Congress did not attempt to redefine the Fifth Amendment privilege with Section 3501. Both Congress and the Supreme Court agree that the privilege against self-incrimination means that only voluntary confessions can be used against a defendant in the prosecution's case in chief. Section 3501, however, does reflect an understanding of what the privilege requires, given the police interrogation and limits on court factfinding, that is at odds with the Supreme Court's understanding. The statute undermines a suspect's ability to invoke the Fifth Amendment, and it allows the vagaries of imprecise court factfinding to miss Fifth Amendment violations. The statute works in only one direction—to erode, in practical terms, the effective limits that the Fifth Amendment places on the police and prosecutors.

This is the scenario that *City of Boerne* addresses: a statute that has the practical effect of changing the protections offered by a constitutional right. ²⁰⁵

203. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982). *Northern Pipeline* dealt with Congress's ability to establish Article I bankruptcy courts, a subject far removed from the Fifth Amendment exclusionary rule. Nonetheless, the Court's language is instructive:

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicatory tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress'[s] power to define the right it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the judiciary cannot be characterized merely as incidental extensions of Congress's power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

Id. at 83-84.

204. *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Souter, J., concurring).

205. See *City of Boerne v. Flores*, 521 U.S. 507, at 519-20, 534-35 (1997). Contrast this situation with that posited in *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), and presented in *Bush v. Lucas*, 462

It makes no difference that in the case of RFRA Congress expanded the protections of the First Amendment while in Section 3501 Congress restricted the practical protections of the Fifth Amendment.²⁰⁶ There is also no basis for distinguishing congressional action under its Fourteenth Amendment Section 5 power from action under the power to make the rules of evidence and procedure for the federal courts.²⁰⁷

CONCLUSION

In *Dickerson*, the Fourth Circuit failed to notice the deficiencies of the Omnibus Crime Control and Safe Streets Act because it failed to appreciate contingent constitutional requirements.²⁰⁸ The court asked whether every confession given without the warnings prescribed by *Miranda* is involuntary, and looking to the Supreme Court's post-*Miranda* jurisprudence, correctly deduced that the answer is "no."²⁰⁹ The Fourth Circuit then concluded that Congress could do away with any protections offered by *Miranda* that swept beyond the core, inherent requirements of the Fifth Amendment right to avoid self-incrimination.²¹⁰ The court acknowledged that its interpretation of *Miranda* raised concerns about the Supreme Court's authority to require *Miranda* warnings, especially in state criminal proceedings.²¹¹ The Fourth Circuit side-stepped the issue, however, stating it was for academics to address.²¹²

It is a shame the Fourth Circuit did not expect more of Congress. Recognizing that the Supreme Court has the power to identify, and craft rules responsive to, "issues . . . of constitutional dimension"²¹³ stemming from the practical realities of the court system in today's society still leaves a role for the legislature. In fact, it may be time for Congress to revisit the subject of police interrogation.

Numerous scholars have questioned the practical efficacy of *Miranda*

U.S. 367, 368 (1983). Constitutional tort actions are not available to remedy rights violations if Congress has created an effective alternative remedial scheme, because the practical protections or benefits of the constitutional right are roughly the same under the legislature's system.

206. *Katzenbach v. Morgan* made clear that Congress could not pass laws that "in effect . . . restrict, abrogate, or dilute" constitutional protections. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

207. The two powers simply provide alternate routes to invade the Court's sphere of authority. If anything, congressional authority would be more limited under its power to prescribe rules of evidence and procedure for the courts; at least the Fourteenth Amendment, Section 5 power is aimed at remedying constitutional violations.

208. To the Fourth Circuit, *Miranda*'s conclusive presumptions are either dictated by the Constitution or by "convenience." *Dickerson*, 166 F.3d 663, 690-91 n.20 (4th Cir. 1999).

209. *See id.* at 688-91.

210. *See id.* at 691-92.

211. *See id.* at 691 n.21.

212. *See id.* (acknowledging that the Supreme Court's application of *Miranda*'s exclusionary rule was "an interesting academic question," but concluding that it had no bearing on the court's determination that "*Miranda*'s presumptive conclusion is not required by the Constitution").

213. *Miranda v. Arizona*, 384 U.S. 436, 490 (1966).

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warnings and the exclusionary rule in addressing the constitutional concerns identified in the decision.²¹⁴ One writer claims that the decision's preoccupation with the status of the suspect and, consequently, with the waiver of the suspect's rights has shifted attention away from a more direct, central, and constructive question: what police interrogation practices should we permit?²¹⁵ Seizing on this observation, one scholar suggests that *Miranda* actually makes it harder for defendants to exclude coerced confessions, because courts and defense lawyers focus so heavily on the bright line question of whether the police gave adequate warnings.²¹⁶ Another scholar claims that *Miranda* does not adequately protect the Fifth Amendment values that underlie the decision, because the warnings do not effectively communicate the meaning or significance of the Fifth Amendment privilege to suspects, and because they do not effectively deter police trickery.²¹⁷

On the other side of the debate are critics who claim that *Miranda* has seriously damaged the ability of the police to fight crime by limiting confessions.²¹⁸ Placed in the context of contingent constitutional requirements, this argument goes as follows: Because a number of remedies might effectively address the constitutional concerns raised in *Miranda*, it is important to weigh the policy implications of each possible remedy. *Miranda*'s warning requirement and exclusionary rule come at too great a cost to society, so a different remedy is required. Related to this point is frustration over the fact that, despite inviting experimentation by Congress and the states, *Miranda* has had the effect of stifling innovation in techniques for safeguarding the Fifth Amendment and im-

214. There are other areas of scholarly attention as well. Some critics have questioned the strength of the foundation the Warren majority laid for its holding in *Miranda*. See Office of Legal Policy, *supra* note 4, at 497-99. They challenge the significance of instructional materials for interrogation as evidence of what really happens in the police station. See Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1446 (1985). They point out that the decision rests on skimpy precedent. See *id.* And, of course, they contend that the decision misconstrues earlier Fifth Amendment case law. See Office of Legal Policy, *supra* note 4, at 451 (concluding that "the *Miranda* rules are inconsistent with the original understanding of the right against self-incrimination, and with the Supreme Court's resolution of the same issues in its pre-*Miranda* case law"). Finally, one critic worries that the *Miranda* decision is based on a novel vision of the relationship between the suspect and the police—a vision that fosters a view of criminal suspects as victims and underdogs, a vision that is morally vacuous and that undermines respect for the law. See Caplan, *supra*, at 1419 (concluding that *Miranda* "sent our jurisprudence on a hazardous detour by introducing novel conceptions of the proper relationship between the suspect and authority. It accentuated just those features of our system that manifest the least regard for truthseeking, that imagine the criminal trial as a game of chance in which the offender should always have some prospect of victory, and that ultimately reflect doubt on the rectitude of our laws and institutions. . . . With this focus, the offender became the victim."). See also *id.* at 1450, 1472 (noting that *Miranda* turns criminals into victims).

215. See Andrew L. Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731, 734-36 (1981).

216. See Garcia, *supra* note 142, at 489-90.

217. See Ogletree, *supra* note 125, at 1826-27, 1830.

218. See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1060, 1126, 1132 (1998).

proving the effectiveness of police interrogation.²¹⁹

These criticisms of *Miranda* may have merit. Perhaps Congress could explore some of the policy options proposed by *Miranda*'s critics, such as videotaping interrogations to help courts determine whether they were overly coercive, or questioning suspects in the presence of a magistrate.²²⁰ Or it may be time for the Supreme Court to revisit the constitutional concerns implicated by custodial interrogation or to refashion its own remedy for custodial interrogation's contingent constitutional requirements.

Contingent constitutional requirements give the Supreme Court and Congress the chance to develop a productive relationship.²²¹ Together, the branches can draw on their institutional strengths and powers to vindicate constitutional rights more effectively and at less cost to government and society than either branch could on its own. In the *Miranda* context, Congress may be able to regulate federal agents' conduct and craft procedural rules for the federal courts in a way that improves the courts' factfinding ability in the area of custodial interrogation, mitigates the pressure on suspects to waive Fifth Amendment rights, and frees law enforcement from *Miranda*'s rigid rules.

Until Congress or the Court readdress police interrogation, however, *Miranda* remains binding constitutional law. The Court acted within its powers to identify and remedy contingent constitutional violations stemming from the closed-off and inherently coercive nature of police questioning. Because Section 3501 does not offer an effective alternative for satisfying the contingent requirements of the Fifth Amendment, the Court's remedy must stand.

219. See *id.* at 1129-30; Office of Legal Policy, *supra* note 4, at 506-10.

220. See Cassell & Fowles, *supra* note 218, at 1130-31.

221. See Monaghan, *supra* note 23, at 34 (arguing that congressional legislation concerning confessions would not disrupt a productive Court-Congress relationship).