How do you think the Court will react to an attempt by Congress to overrule *Miranda*? We are going to spend some time with this case because of all that it teaches, mainly through the prism of a Scalia dissent. I don't seek your agreement with him, but his thinking (in contrast to that of the majority) points out several significant features about this task of constitutional interpretation. Enjoy!

DICKERSON v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
530 U.S. 428
June 26, 2000
[7 – 2]

OPINION: Rehnquist/Stevens/O'Connor/Kennedy/Souter/Ginsburg/Breyer…In *Miranda v. Arizona*[1], we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. §3501 which in essence laid down a rule that the admissibility of such statements should turn **only** on whether or not they were voluntarily made. **We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that**

[1] Case 5A-SI-2 on this website.

***Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.**

Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence…Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion to suppress…The Court of Appeals …reversed the District Court's suppression order. It agreed with the District Court's conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that §3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case. **It then concluded that our decision in *Miranda* was not a constitutional holding, and that therefore Congress could by statute have the final say on the question of admissibility**…We granted certiorari and now reverse.

…Prior to *Miranda*, we evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy…Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment…

The due process test takes into consideration "the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation."…We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy* and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. We decided *Miranda* on the heels of *Malloy*.

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion…We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment - not to be compelled to incriminate himself." **Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow."** Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "*Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

As you may recall, the majority in *Miranda* felt that police coercion was so rampant that these "Miranda warnings" were necessary to help insure that constitutional rights of the accused would be upheld, regardless of whether or not the facts supported the conclusion that a confession had in fact been "compelled." Do not forget that the Fifth Amendment says: "no person shall be **compelled** in a criminal case to be a witness against himself." Prior to *Miranda*, courts determined whether or not a confession had been compelled by looking to the facts. After *Miranda*, they still look to determine "compulsion," with the exception that compulsion is assumed if the *Miranda* warnings were not given. In other words, if *Miranda* warnings are not given, a confession is not admissible into evidence regardless of whether, in fact, the confession was "compelled."

Two years after *Miranda* was decided, Congress enacted §3501…[which provides]:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, **a confession - shall be admissible in evidence if it is voluntarily given…**If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession…

So, Congress is saying, "Let's look at all of the factors over which *Miranda* expressed concern in determining compulsion, but let's not let the guilty go free if it is concluded that, in spite of some *Miranda* oversight, their confessions were not in fact "compelled." After all, the constitution itself speaks to that very issue – compulsion!

Given §3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that **Congress intended by its enactment to overrule *Miranda***… Because of the obvious conflict between our decision in *Miranda* and §3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If ongress has such authority,

§3501's totality-of-the-circumstances approach must prevail over *Miranda's* requirement of warnings; if not, that section must yield to *Miranda's* more specific requirements.

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. However, the power to judicially create and enforce non-constitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." **Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.**

It is very important for you to see how this is shaping up. (1) The Supreme Court establishes rules of evidence and procedure for the federal courts. However, (2) Congress has the right, over and above the Supreme Court, to establish rules of evidence and procedure. And, (3) all of the foregoing is true unless a "rule of evidence" has been established by the Supreme Court in a manner that is founded upon the constitution. For example, the Supreme Court could make a rule that a losing party has 35 days to file an appeal. Congress may prefer to give a party 60 days to do so. Unless the "timeliness of the filing of an appeal" involves constitutional issues, Congress prevails. But, if such a deadline had been interpreted by the Supreme Court as being founded upon constitutional principles, the Supreme Court would prevail.

Therefore, it is critical in this case to determine whether the warnings established by the *Miranda* Court were merely ordinary rules of evidence (in which event, §3501 would prevail) or whether the Court meant the warnings to take on constitutional parameters (in which event, §3501 would be struck down as unconstitutional).

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. Recognizing this point, the Court of Appeals…concluded that the protections announced in *Miranda* are not constitutionally required.

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side - that *Miranda* is a constitutional decision - is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts - to wit, Arizona, California, and New York. Since that time, we have consistently applied *Miranda's* rule to prosecutions arising in state courts. It is beyond dispute that…with respect to proceedings in state courts, our "authority is limited to enforcing the commands of the United States Constitution."…

In other words, the only power the Supreme Court has over the States' criminal evidence rules must be based upon the warranted reach of the Constitution. If, for example, a State Supreme Court interpreted a provision of its State's statutes one way, but the interpretation had nothing to do with the United States Constitution, even if the Supremes thought the State Supreme Court's interpretation of its own statutes was wrong, they would be powerless to reverse.

The *Miranda* opinion itself begins by stating that the Court granted certiorari "to explore some facets of the problems of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete **constitutional guidelines** for law enforcement agencies and courts to follow." In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule. Indeed, the Court's ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege."

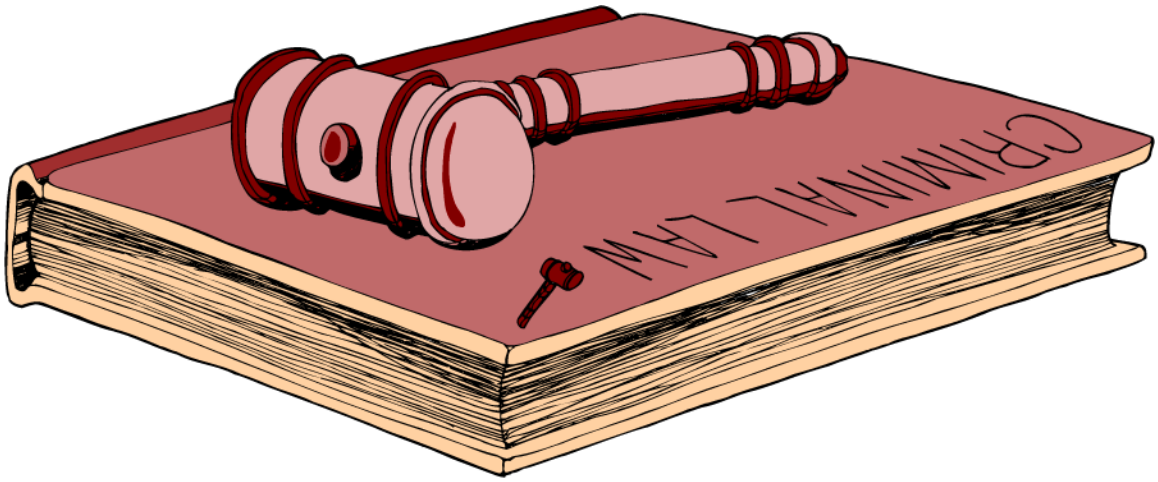
Additional support for our conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination. After discussing the "compelling pressures" inherent in custodial police interrogation, the *Miranda* Court concluded that, "in order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored." However, the Court emphasized that it could not foresee "the potential alternatives for protecting the privilege which might be devised by Congress or the States," and it accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "**at least as effective** in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."

The Court of Appeals also relied on the fact that we have, after our *Miranda* decision, made exceptions from its rule in cases such as *New York v. Quarles* and *Harris v. New York*. But we have also broadened the application of the *Miranda* doctrine in cases such as *Doyle v. Ohio* and *Arizona v. Roberson*. These decisions illustrate the principle - not that *Miranda* is not a constitutional rule - but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision…

As for *New York v. Quarles, Harris v. New York, Doyle v. Ohio,* and *Arizona v. Roberson,* see Justice Scalia's dissent in this case, below.

Miranda requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. As discussed above, §3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. The additional remedies cited by amicus do not, in our

view, render them, together with §3501 an adequate substitute for the warnings required by *Miranda*.



The dissent argues that it is judicial overreaching for this Court to hold §3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements. But we need not go farther than *Miranda* to decide this case. In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary. As discussed above, §3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if *Miranda* is to remain the law.

Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now…While "stare decisis is not an inexorable command," particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his "rights," may nonetheless be excluded and a guilty defendant go free as a result.

How can that be? Take the most ludicrous example. A criminal defense lawyer is charged with murdering a client. He most certainly "knows his rights"; yet, if he confessed, it could be excluded from evidence if he was not first *Mirandized*! And, if the State had no other way to prove him guilty, he skates! Does anyone think that should be the law besides five of nine Supreme Court justices?

But experience suggests that the totality-of-the-circumstances test which §3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner…The requirement that *Miranda* warnings be given does not…dispense

with the voluntariness inquiry. But as we said in *Berkemer v. McCarty*, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of stare decisis, we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals is therefore Reversed.

DISSENT: Scalia/Thomas…*Marbury v. Madison* held that an Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution of the United States. That was the basis on which *Miranda* was decided. **One will search today's opinion in vain, however, for a statement (surely simple enough to make) that what §3501 prescribes - the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given - violates the Constitution.** The reason the statement does not appear is not only (and perhaps not so much) that it would be absurd, inasmuch as §3501 excludes from trial precisely what the Constitution excludes from trial, viz., **compelled confessions**; but also that Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is not a violation of the Constitution…And so, to justify today's agreed-upon result, the Court must adopt a significant new, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that "announced a constitutional rule." As I shall discuss in some detail, **the only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful "prophylactic" restrictions upon Congress and the States. That is an immense and frightening anti-democratic power, and it does not exist.**

Prophylactic : preventive. As in, "the *Miranda* rules serve to prevent the admission of compelled confessions – they are prophylactic rules."

It takes only a small step to bring today's opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only go beyond its carefully couched iterations that "*Miranda* is a constitutional decision" that "*Miranda* is constitutionally based" that *Miranda* has "constitutional underpinnings" and come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent **violates the Constitution of the United States**." **It cannot say that, because a majority of the Court does not believe it. The Court therefore acts in plain violation of the Constitution when it denies effect to this Act of Congress.**

OK, so Justice Scalia is saying that even the majority does not believe that the failure to give the Miranda warnings is a violation of the Constitution because they cannot bring themselves to say it. Strong words! Can he prove it? We shall see.

Early in this Nation's history, this Court established the sound proposition that constitutional government in a system of separated powers requires judges to regard as inoperative any

legislative act, even of Congress itself, that is "repugnant to the Constitution." "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case." *Marbury v Madison*[2].

In *Marbury v. Madison*, Justice John Marshall was using the term "law" in the foregoing sentence to mean "legislation" or "statute." To wit: "So if a [statute] be in opposition to the constitution; if both the [statute] and the constitution apply to a particular case, so that the court must either decide that case conformably to the [statute], disregarding the constitution; or conformably to the constitution, disregarding the [statute]; the court must determine which of these conflicting rules governs the case." And, therefore, if any piece of legislation is repugnant to the Constitution (if they conflict), the Constitution prevails and the statute falls. The Justices are in agreement on these points.

The power we recognized in *Marbury* will thus permit us, indeed require us, to "disregard" §3501, a duly enacted statute governing the admissibility of evidence in the federal courts, **only if it "be in opposition to the constitution"** - here, assertedly, the dictates of the **Fifth Amendment**.

It was once possible to characterize the so-called *Miranda* rule as resting (however implausibly) upon the proposition that what the statute here before us permits - the admission at trial of un-*Mirandized* confessions - violates the Constitution. That is the fairest reading of the *Miranda* case itself. The Court began by announcing that the Fifth Amendment privilege against self-incrimination applied in the context of **extrajudicial** custodial interrogation - itself a doubtful proposition as a matter both of history and precedent…

The term "extrajudicial" means interrogation by detectives or police or government in a setting other than on the witness stand or in a deposition or any some setting that is controlled by a judge in an actual lawsuit. Justice Scalia is saying that applying the privilege against self-incrimination to statements made outside the context of litigation was not the likely intent of the Framers.

Having extended the privilege into the confines of the station house, the Court liberally sprinkled throughout its sprawling 60-page opinion suggestions that, because of the compulsion inherent in custodial interrogation, the privilege was violated by any statement thus obtained that did not conform to the rules set forth in *Miranda*, or some functional equivalent [of the *Miranda* rules]…

The dissenters, for their part, also understood *Miranda's* holding to be based on the "premise that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings." (White, J., dissenting) ("It has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very

[2] Case 6-2 on this website.

first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will")…

So understood, *Miranda* was objectionable for innumerable reasons, not least the fact that **cases spanning more than 70 years had rejected its core premise** that, absent the warnings and an effective waiver of the right to remain silent and of the (thitherto unknown) right to have an attorney present, a statement obtained pursuant to custodial interrogation was necessarily the product of compulsion. See *Crooker v. California* (confession not involuntary despite denial of access to counsel); *Powers v. United States* (lack of warnings and counsel did not render statement before United States Commisioner involuntary)…Moreover, **history and precedent aside, the decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous. There is, for example, simply no basis in reason for concluding that a response to the very first question asked, by a suspect who already knows all of the rights described in the *Miranda* warning, is anything other than a volitional act.**

Assume Joe already knows all of his rights as set forth in the *Miranda* rules. Let's say he is a lawyer or he has been arrested so many times that he can recite the *Miranda* warnings front and back or that he has seen enough accurate TV to know the warnings verbatim and in response to the question, "What is your name?" (before any *Miranda* warnings are given), he says, "I know I have the right to a lawyer, but why bother, I did it." Justice Scalia is saying that it is ludicrous to suggest that the *Miranda* rules really do set forth what the Constitution requires (in the face of the Fifth Amendment's dictate that only compelled statements are to be excluded from evidence) because such an admission was clearly not compelled.

In other words, he is saying, "How can the *Miranda* rules be constitutionally required so as to exclude voluntary admissions when the Fifth Amendment only speaks to compelled admissions?

And even if one assumes that the elimination of compulsion absolutely requires informing even the most knowledgeable suspect of his right to remain silent, it cannot conceivably require the right to have counsel present. **There is a world of difference, which the Court recognized under the traditional voluntariness test but ignored in *Miranda*, between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord.** Only the latter (which is not required by the Constitution) could explain the Court's inclusion of a right to counsel and the requirement that it, too, be knowingly and intelligently waived. Counsel's presence is not required to tell the suspect that he need not speak; the interrogators can do that. **The only good reason for having counsel there is that he can be counted on to advise the suspect that he should not speak.** *Watts v. Indiana* (Jackson, J.,…"Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances").

Looks like my hunch was right!

Preventing foolish (rather than compelled) confessions is likewise the only conceivable basis for the rules (suggested in *Miranda*), that courts must exclude any confession elicited by questioning conducted, without interruption, after the suspect has indicated a desire to stand on his right to remain silent or initiated by police after the suspect has expressed a desire to have counsel present. Non-threatening attempts to persuade the suspect to reconsider that initial decision are not, without more, enough to render a change of heart the product of anything other than the suspect's free will. Thus, what is most remarkable about the *Miranda* decision - and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* tradition - is its **palpable hostility toward the act of confession per se, rather than toward what the Constitution abhors, compelled confession**. See *United States v. Washington* ("Far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"). **The Constitution is not, unlike the *Miranda* majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity.**

I do not know how anyone can honestly deny the foregoing statement.

…Any conclusion that a violation of the *Miranda* rules necessarily amounts to a violation of the privilege against compelled self-incrimination can claim no support in history, precedent, or common sense, and as a result would at least presumptively be worth reconsidering even at this late date. But that is unnecessary, since the Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda's* rules is itself a violation of the Constitution.

So, he says that the majority does not even believe the failure to comply with Miranda is unconstitutional. Can he go further and prove what he means?

As the Court today acknowledges, since *Miranda* we have explicitly, and repeatedly, interpreted that decision as having announced, not the circumstances in which custodial interrogation runs afoul of the Fifth or Fourteenth Amendment, but rather only "prophylactic" rules that go beyond the right against compelled self-incrimination. Of course the seeds of this "prophylactic" interpretation of *Miranda* were present in the decision itself. See *Miranda* (discussing the "necessity for procedures which assure that the suspect is accorded his privilege"); ("unless a proper limitation upon custodial interrogation is achieved - such as these decisions will advance - there can be no assurance that practices of this nature will be eradicated"); ("in these cases, we might not find the defendants' statements to have been involuntary in traditional terms"); (noting "concern for adequate safeguards to protect precious Fifth Amendment rights" and the "potentiality for compulsion" in Ernesto Miranda's interrogation). In subsequent cases, the seeds have sprouted and borne fruit: **The Court has squarely concluded that it is possible - indeed not uncommon - for the police to violate *Miranda* without also violating the Constitution.**

Hmmm! If that is true, then it would indeed appear that the Miranda rules are merely rules that are not constitutionally required. A 60 m.p.h. speed limit is a rule – it is not constitutionally required – the constitution does not say what a speed limit should be. If the Miranda rules are simply rules that are not constitutionally required, Congress can supersede them. Are you getting the picture?

Michigan v. Tucker (1974), an opinion for the Court written by then-Justice Rehnquist, rejected the true-to-*Marbury* failure-to-warn-as-constitutional-violation interpretation of *Miranda*. It held that exclusion of the "fruits" of a *Miranda* violation - the statement of a witness whose identity the defendant had revealed while in custody - was not required. The opinion explained that the question whether the "police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination" was a "separate question" from "whether it instead violated only the prophylactic rules developed to protect that right." **The "procedural safeguards" adopted in *Miranda*, the Court said, "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected" and to "provide practical reinforcement for the right."** Comparing the particular facts of the custodial interrogation with the "historical circumstances under-lying the privilege," the Court concluded, unequivocally, that the defendant's statement could not be termed "involuntary as that term has been defined in the decisions of this Court" and thus that there had been no constitutional violation, notwithstanding the clear violation of the "procedural rules later established in *Miranda*." Lest there be any confusion on the point, the Court reiterated that the "police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." It is clear from our cases, of course, that if the statement in *Tucker* had been obtained in violation of the Fifth Amendment, the statement and its fruits would have been excluded. See *Nix v. Williams* (1984).

The next year, in *Oregon v. Hass* (1975), the Court held that a defendant's statement taken in violation of *Miranda* that was nonetheless voluntary could be used at trial for impeachment purposes. This holding turned upon the recognition that violation of *Miranda* is not unconstitutional compulsion, since statements obtained in actual violation of the privilege against compelled self-incrimination, "as opposed to taken in violation of *Miranda*," quite simply "may not be put to any testimonial use whatever against the defendant in a criminal trial," including as impeachment evidence. *New Jersey v. Portash.* See also *Mincey v. Arizona* (holding that while statements obtained in violation of *Miranda* may be used for impeachment if otherwise trustworthy, the Constitution prohibits "any criminal trial use against a defendant of his involuntary statement").

If a defendant takes the witness stand in his own defense and testifies contrary to a statement given previously, that statement is admissible in spite of a *Miranda* violation per *Oregon v. Hass.*

Nearly a decade later, in *New York v. Quarles*, the Court relied upon the fact that "the prophylactic *Miranda* warnings - are not themselves rights protected by the Constitution," to create a "public safety" exception. In that case, police apprehended, after a chase in a grocery store, a rape suspect known to be carrying a gun. After handcuffing and searching him (and

finding no gun) - but before reading him his *Miranda* warnings - the police demanded to know where the gun was. The defendant nodded in the direction of some empty cartons and responded that "the gun is over there." The Court held that both the unwarned statement - "the gun is over there" - and the recovered weapon were admissible in the prosecution's case in chief under a "public safety exception" to the "prophylactic rules enunciated in *Miranda*." **It explicitly acknowledged that if the *Miranda* warnings were an imperative of the Fifth Amendment itself, such an exigency exception would be impossible, since the Fifth Amendment's bar on compelled self-incrimination is absolute, and its "strictures, unlike the Fourth's are not removed by showing reasonableness."** (For the latter reason, the Court found it necessary to note that respondent did not "claim that his statements were actually compelled by police conduct which overcame his will to resist.")

The next year, the Court again declined to apply the "fruit of the poisonous tree" doctrine to a *Miranda* violation, this time allowing the admission of a suspect's properly warned statement even though it had been preceded (and, arguably, induced) by an earlier inculpatory statement taken in violation of *Miranda*. *Oregon v. Elstad*. As in *Tucker*, the Court distinguished the case from those holding that a confession obtained as a result of an unconstitutional search is inadmissible, on the ground that the violation of *Miranda* does not involve an "actual infringement of the suspect's constitutional rights." *Miranda*, the Court explained, "sweeps more broadly than the Fifth Amendment itself," and "*Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." "Errors that are made by law enforcement officers in administering the prophylactic *Miranda* procedures - should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."

In light of these cases, and our statements to the same effect in others, it is simply no longer possible for the Court to conclude, even if it wanted to, that a violation of *Miranda's* rules is a violation of the Constitution. But as I explained at the outset, that is what is required before the Court may disregard a law of Congress governing the admissibility of evidence in federal court. The Court today insists that the decision in *Miranda* is a "constitutional" one; that it has "constitutional underpinnings, a "constitutional basis" and a "constitutional origin;" that it was "constitutionally based" and that it announced a "constitutional rule." **It is fine to play these word games; but what makes a decision "constitutional" in the only sense relevant here - in the sense that renders it impervious to supersession by congressional legislation such as §3501 - is the determination that the Constitution requires the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people…**

I cannot exaggerate the importance of Justice Scalia's foregoing statement. In my opinion, we have a Majority of the Court who frequently (at least in my lifetime) exceeds its power. Trouble is afoot in a democracy such as ours when the branch of government with the final word exceeds its own power and the "People" are so disengaged that they are clueless as to the ramifications. How many everyday citizens are aware of this decision and its far-reaching implications? Next to no one but the "legal elite" and, now, ELLians!

The Court seeks to avoid this conclusion in two ways: First, by misdescribing these post-*Miranda* cases as mere dicta. The Court concedes only "that there language in some of our opinions that supports the view" that Miranda's protections are not "constitutionally required." **It is not a matter of language; it is a matter of holdings.** The proposition that failure to comply with *Miranda's* rules does not establish a constitutional violation was central to the holdings of *Tucker*, *Hass*, *Quarles,* and *Elstad*.

The second way the Court seeks to avoid the impact of these cases is simply to disclaim responsibility for reasoned decisionmaking. It says:

> "These decisions illustrate the principle - not that *Miranda* is not a constitutional rule - but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision."

The issue, however, is not whether court rules are "mutable"; they assuredly are.

Mutable : changeable.

It is not whether, in the light of "various circumstances," they can be "modified"; they assuredly can. **The issue is whether, as mutated and modified, they must make sense. The requirement that they do so is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy. And if confessions procured in violation of *Miranda* are confessions "compelled" in violation of the Constitution, the post-*Miranda* decisions I have discussed do not make sense. The only reasoned basis for their outcome was that a violation of *Miranda* is not a violation of the Constitution.** If, for example, as the Court acknowledges was the holding of *Elstad*, "the traditional 'fruits' doctrine developed in Fourth Amendment cases" (that the fruits of evidence obtained unconstitutionally must be excluded from trial) does not apply to the fruits of *Miranda* violations; and if the reason for the difference is not that *Miranda* violations are not constitutional violations (which is plainly and flatly what *Elstad* said); then the Court must come up with some other explanation for the difference. (That will take quite a bit of doing, by the way, since it is not clear on the face of the Fourth Amendment that evidence obtained in violation of that guarantee must be excluded from trial, whereas it is clear on the face of the Fifth Amendment that unconstitutionally compelled confessions cannot be used.) To say simply that "unreasonable searches under the Fourth

Amendment are different from unwarned interrogation under the Fifth Amendment," is true but supremely unhelpful.

Finally, the Court asserts that *Miranda* must be a "constitutional decision" announcing a "constitutional rule," and thus immune to congressional modification, because we have since its inception applied it to the States. If this argument is meant as an invocation of stare decisis, it fails because, though it is true that our cases applying *Miranda* against the States must be reconsidered if *Miranda* is not required by the Constitution, it is likewise true that our cases (discussed above) based on the principle that *Miranda* is not required by the Constitution will have to be reconsidered if it is. So the stare decisis argument is a wash. If, on the other hand, the argument is meant as an appeal to logic rather than stare decisis, it is a classic example of begging the question: Congress's attempt to set aside *Miranda*, since it represents an assertion that violation of *Miranda* is not a violation of the Constitution, also represents an assertion that the Court has no power to impose *Miranda* on the States. To answer this assertion - not by showing why violation of *Miranda* is a violation of the Constitution - but by asserting that *Miranda* does apply against the States, is to assume precisely the point at issue. **In my view, our continued application of the *Miranda* code to the States despite our consistent statements that running afoul of its dictates does not necessarily - or even usually - result in an actual constitutional violation, represents not the source of *Miranda's* salvation but rather evidence of its ultimate illegitimacy.** As Justice Stevens has elsewhere explained, "this Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power." Quite so.[3]

There was available to the Court a means of reconciling the established proposition that a violation of *Miranda* does not itself offend the Fifth Amendment with the Court's assertion of a right to ignore the present statute. That means of reconciliation was argued strenuously by both petitioner and the United States, who were evidently more concerned than the Court is with maintaining the coherence of our jurisprudence. It is not mentioned in the Court's opinion because, I assume, a majority of the Justices intent on reversing believes that incoherence is the lesser evil. They may be right.

Petitioner and the United States contend that there is nothing at all exceptional, much less unconstitutional, about the Court's adopting prophylactic rules to buttress constitutional rights, and enforcing them against Congress and the States. Indeed, the United States argues that "prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication." That statement is not wholly inaccurate, if by "many years" one means **since the mid-1960's**. However, in their zeal to validate what is in my view a **lawless practice**, the United States and petitioner greatly overstate the frequency with which we have engaged in it. For instance, petitioner cites several cases in which the Court quite simply exercised its traditional judicial power to define the scope of constitutional protections and, relatedly, the circumstances in which they are violated…

[3] What do you know? I actually agree with Justice Stevens on that point!

Where the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so. See Amdt. 14, §5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"). The power with which the Court would endow itself under a "prophylactic" justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of that text. Whereas we have insisted that congressional action under §5 of the Fourteenth Amendment must be "congruent" with, and "proportional" to, a constitutional violation, the *Miranda* non-textual power to embellish confers authority to prescribe preventive measures against not only constitutionally prohibited compelled confessions, but also (as discussed earlier) foolhardy ones.

I applaud, therefore, the refusal of the Justices in the majority to enunciate this boundless doctrine of judicial empowerment as a means of rendering today's decision rational. In nonetheless joining the Court's judgment, however, they overlook two truisms: that **actions speak louder than silence**, and that (in judge-made law at least) **logic will out**. **Since there is in fact no other principle that can reconcile today's judgment with the post-*Miranda* cases that the Court refuses to abandon, what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extra-constitutional Constitution, binding on Congress and the States…**

Finally, I am not convinced by petitioner's argument that *Miranda* should be preserved because the decision occupies a special place in the "public's conscious-ness." <u>As far as I am aware, the public is not under the illusion that we are infallible</u>. I see little harm in admitting that we made a mistake in taking away from the people the ability to decide for themselves what protections (beyond those required by the Constitution) are reasonably affordable in the criminal investiga-tory process. And <u>I see much to be gained by reaffirming for the people the wonder-ful reality that they govern themselves</u> - which means that "the powers not delegated to the United States by the Constitution" that the people adopted, "nor prohibited - to the States" by that Constitution, "are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10.

Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of <u>judicial arrogance</u>. In imposing its Court-made code upon the States, the original opinion at least asserted that it was demanded by the Constitution. Today's decision does not pretend that it is - and yet still asserts the right to impose it against the will of the people's representatives in Congress. Far from believing that stare decisis compels this result, I believe we cannot allow to remain on the books even a celebrated decision - especially a celebrated decision - that has come to stand for the proposition that the Supreme Court has power to impose extra-constitutional constraints upon Congress and the States. <u>This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people</u>.

Some find fault with Justice Scalia for his "tone." Quite the contrary, if a Justice of the Supreme Court cannot vent his/her frustration over matters this serious with the passion they feel, this democracy will ultimately fail. I find any Justice's passion for his/her position to be refreshing in this time of political correctness. Of course, Justice Scalia feels so strongly about this that he is literally labeling the Justices of the Majority (seven in number) as being "<u>other than</u> a sane supporter of government by the people."

I dissent from today's decision, and, until §3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary.