CONSTITUTIONALLY REQUIRED, IN PART: *MIRANDA* AFTER *VEGA V. TEKOH*

*Tim Wang**

At issue in the recently decided Vega v. Tekoh case was whether a defendant who was denied his Miranda rights had a cause of action in § 1983. In holding that he did not, the Court declared decisively that Miranda warnings are not in fact a constitutional right. If that is true, then what basis does the Court have to overturn, as it did in Dickerson v. United States, a legislative attempt to supersede Miranda? This article articulates a reading of Miranda that both dispels the potential constitutional impropriety of Dickerson and comports with Vega.

I. INTRODUCTION

"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."

–Justice Antonin Scalia.[1]

Miranda v. Arizona[2] is iconic. It is also constitutionally confusing. More than fifty years after the Supreme Court issued the opinion, the Justices still find themselves attempting to explain *Miranda*'s confounding constitutional status. In the 2021 Term, the Court decided *Vega v. Tekoh*,[3] which held that a suspect's right to *Miranda* warnings is not a "right secured by the Constitution" under 42 U.S.C. § 1983. To be sure, *Vega* is not academic—it "injure[d] the [*Miranda*] right by denying the remedy"[4] and adversely impacts criminal defendants. Yet the opinion also clarified that the *Miranda* warnings are not themselves part of a constitutional right but are rather "prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-

* Law Clerk, Cravath, Swaine & Moore LLP. I thank Chief Judge Debra Livingston for introducing me to this topic in her wonderful Criminal Investigations course. I am also grateful to Professors Fred Davis, Jim Liebman, and Dan Richman for helpful conversations and feedback. All views and errors are mine alone.

1. Dickerson v. United States, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting).
2. 384 U.S. 436 (1966).
3. 142 S. Ct. 2095 (2022).
4. *Id.* at 2111 (Kagan, J., dissenting).

incrimination."[5] While the Court has said this in the past, *Vega* is the first time it has done so in a majority opinion since *Dickerson v. United States*.[6] There, the Court had declared that *Miranda* was a "constitutional decision" that "may not be in effect overruled by an Act of Congress."[7] *Vega*, however, discounts this and other similar language, finding that the "obvious point of these formulations was to avoid saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right."[8]

If, as *Vega* seems to make clear, *Miranda* is not constitutionally required, then what authority did the Court have in *Dickerson* to overrule § 3501, a duly enacted statute passed by Congress? *Vega* showed palpable appetite for addressing this question in the future, calling *Dickerson* a "bold and controversial"[9] decision. So is *Dickerson* inevitably on the chopping block? Not if there is a way to reconcile *Dickerson* and *Vega*, the task of this article. Part II provides a brief description of the evolving line of post-*Miranda* case law. Part III offers a conception of *Miranda*'s holdings—as half constitutional, half prophylactic—that both dispels the potential constitutional incongruity of *Dickerson* and comports with *Vega.* It then considers future implications.

II. *MIRANDA*'S CONSTITUTIONAL STATUS

A. Constitutional or Prophylactic?

Miranda v. Arizona[10] needs little introduction. In one of the most famous opinions the Supreme Court has penned, the Court held that during a custodial interrogation law enforcement officers must inform a suspect that

> "he 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."[11]

These *Miranda* warnings were designed to safeguard a suspect's Fifth Amendment privilege against self-incrimination.[12]

Chief Justice Warren, writing for the Court, further suggested that the *Miranda* warnings are not only protectors of the Constitution but are also part of the constitutional right itself. The Court asserted that "the issues presented are of constitutional dimensions and must be determined by the courts."[13]

5. *Id.* at 2106 (majority opinion).
6. 530 U.S. 428 (2000).
7. *Id.* at 432.
8. *Vega*, 142 S. Ct. at 2105.
9. *Id.* at 2106.
10. 384 U.S. 436 (1966).
11. *Id.* at 479.
12. *Id.* at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").
13. *Id.* at 490.

Simultaneously, however, the Court recognized that the Constitution did not require "adherence to any particular solution" and that the decision "in no way creates a constitutional straitjacket."[14] Chief Justice Warren also "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting" the Fifth Amendment right but demanded that they must be "at least as effective" as the *Miranda* warnings.[15] Despite the mixed signals, Professor Yale Kamisar, the leading scholar and advocate for *Miranda* of his day,[16] concluded that "*at the time* the *Miranda* opinion was handed down almost everyone who read it (including the dissenting Justices) understood that it was a constitutional decision – an *interpretation* of the Fifth Amendment privilege against self-incrimination."[17]

Not long after the Burger Court era began, however, did it start carving away at *Miranda*, and in the process recast the decision as "prophylactic" rather than constitutional.[18] What does that mean? A decision is prophylactic if it creates a "rule that can be violated without violating the Constitution itself"[19] and "that functions as a preventive safeguard to insure that constitutional violations will not occur."[20] In other words, a prophylactic rule is not a constituent part of any constitutional right and is therefore not constitutionally required—it is *sub-constitutional*.[21]

Though earlier cases hinted at this conception of *Miranda*, the Court articulated it clearly for the first time in *Michigan v. Tucker*.[22] There, the newly appointed Justice Rehnquist labeled the *Miranda* warnings mere "prophylactic" standards that "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[23] Since then, the Court has repeatedly called *Miranda* "prophylactic" in no less than twenty opinions.[24]

14. *Id.* at 467.

15. *Id.*

16. Professor Kamisar passed away on January 30, 2022. Clay Risen, *Yale Kamisar, Known as the 'Father' of the* Miranda *Rule, Dies at 92*, N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/yale-kamisar-dead.html [https://perma.cc/LAE3-5XVV].

17. Yale Kamisar, *Foreword: From* Miranda *to § 3501 to* Dickerson *to* . . ., 99 MICH. L. REV. 879, 883 (2001) (emphasis added) [hereinafter Kamisar, *Foreword*]; *see also* Dickerson v. United States, 530 U.S. 428, 447 (2000) (Scalia, J., dissenting) (agreeing this was "the fairest reading of the *Miranda* case itself").

18. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 439 (1974).

19. Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 177 (1988).

20. Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 & n.23 (1985).

21. *See id.* at 106 n.29.

22. 417 U.S. 433 (holding that the "fruit-of-the-poisonous-tree" doctrine does not apply to *Miranda* violations).

23. *Id.* at 439, 444.

24. *See* Vega v. Tekoh, 142 S. Ct. 2095, 2102 (2022) (listing cases where the Court has described the *Miranda* warnings as "prophylactic").

The Court came closest to deconstitutionalizing *Miranda* in *Oregon v. Elstad*,[25] where it emphasized that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation."[26] Thus, it concluded, "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[27] Less than two decades after *Miranda*, the Court's explanation of its constitutional underpinnings had dramatically shifted course.

B. Constitutional Crossroads

At the turn of the century, though, the Court would detour away from this trajectory. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act.[28] Among its provisions was 18 U.S.C. § 3501, which overruled *Miranda* by legislation and reverted back to the pre-*Miranda* "totality-of-circumstances" test for the admissibility of confessions in federal prosecutions.[29] The Department of Justice, however, "steadfastly refused to enforce the provision"[30] and even argued that § 3501 was unconstitutional.[31] The Court therefore did not have an occasion to opine on the constitutionality of § 3501 until a Fourth Circuit panel dusted off and applied § 3501 *sua sponte* in *United States v. Dickerson*, more than thirty years after its enactment. Once the Supreme Court granted certiorari to the case, the fate of *Miranda* seemed to come to a crossroads between revitalized constitutionality and outright overruling.

To the surprise of many, the Court eked out a third path. In a 7-2 opinion authored by now-Chief Justice Rehnquist—longtime critic of *Miranda* and the author of *Tucker*—the Court upheld *Miranda* and struck down § 3501, announcing that *Miranda*, "being a *constitutional decision* of this Court, may not be in effect overruled by an Act of Congress."[32] *Miranda* backers applauded the

25. 470 U.S. 298, 303 (1985) (holding that a confession "made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant" does not need to be suppressed).

26. *Id.* at 306.

27. *Id.* at 307.

28. Kamisar, *Foreword*, *supra* note 17, at 879.

29. *Id.* at 879–80.

30. United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). *Contra* Brief of Amici Curiae Former Attorneys General of the United States William P. Barr and Edwin Meese III Supporting Affirmance at 3, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525) (contending that during their tenures as Attorney Generals from 1985 to 1988 (Meese) and 1991 to 1993 (Barr), they took the official position that Section 3501 was "fully constitutional" and "[f]ederal prosecutors were free to raise the statute in response to suppression motions in federal court during [their] tenure"); Brief of Federal Bureau of Investigations Agents Association As Amicus Curiae in Support of the United States Court of Appeals for the Fourth Circuit at 3, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525) (stating that the FBIAA, which included 75 percent of then-current FBI agents, supported the application of Section 3501 and "strongly disagree[d] with" the suggestion that "the law enforcement community uniformly approves of the current *Miranda* rules").

31. *Dickerson*, 166 F.3d at 671; *see also* Brief for the United States, Dickerson v. United States, 530 U.S. 428, 454 (2000) (No. 99-5525) (arguing the same).

32. 530 U.S. 428, 432 (2000) (emphasis added).

outcome, and scholars called *Dickerson* "very possibly the single most important constitutional decision in a generation."[33] Yet supporters and critics of *Miranda* alike perceived that the Court had arrived at its holding via "judicial fiat."[34]

Representative of this view is Professor Susan Klein's assessment that the opinion was "in a word, terrible"—the Court "breached its duty to provide a justification for *Miranda* or *Dickerson* and squandered an opportunity to rationalize contradictory case law regarding *Miranda*'s exceptions."[35] Indeed, though the word "constitutional" is "liberally sprinkled"[36] throughout the opinion,[37] the Court never utters the magical incantations that *Miranda* provided a constitutional *right* or was constitutionally *required* (perhaps, as Justice Scalia opined, "because a majority of the Court does not believe it"[38]). It therefore adjudged § 3501 unconstitutional because it violated a "constitutional decision"[39] (*Miranda*), not because it violated any part of the Constitution.[40] The opinion also made little attempt to reconcile itself with the *Tucker-Elstad* line of cases. Thus, the Court failed to explain how it could call *Miranda* at once a "constitutional" rule and also a "prophylactic" – *i.e.*, subconstitutional – rule.

Further, Justice Scalia's robust dissent was met mainly with the majority's abashed silence. He charged that if *Miranda* does not provide a constitutional right, then the Court "acts in plain violation of the Constitution when it denies effect to this Act of Congress."[41] In fact, Justice Scalia was so certain of *Dickerson*'s impropriety he declared that "until § 3501 is repealed [by Congress], [I] will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary."[42] Even such a forceful statement could not elicit any meaningful rejoinder from Chief Justice Rehnquist.

One plausible reading of *Dickerson* responsive to Justice Scalia's dissent is that despite the Court's reticence, it did in fact "reconstitutionalize" *Miranda*—that is, a violation of *Miranda is* a violation of the Fifth Amendment after all.[43]

33. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 13 (2004).

34. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071 (2001).

35. *Id.*; *see also* Kamisar, *Foreword*, *supra* note 17, at 895–96 (acknowledging widespread criticism of the *Dickerson* opinion).

36. *Dickerson*, 530 U.S. at 447 (Scalia, J., dissenting).

37. Vega v. Tekoh, 142 S. Ct. 2095, 2109 (2022) (Kagan, J., dissenting) ("*Dickerson* tells us again and again that *Miranda* is a 'constitutional rule.' It is a 'constitutional decision' that sets forth '"concrete constitutional guidelines."' *Miranda* 'is constitutionally based'; or again, it has a 'constitutional basis.' It is 'of constitutional origin'; it has 'constitutional underpinnings.' And—one more—*Miranda* sets a 'constitutional minimum.'") (citations omitted).

38. *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting).

39. *Id.* at 432 (majority opinion).

40. *Id.* at 442 (claiming that the Court "need not go further than *Miranda* to decide this case").

41. *Id.* at 446 (Scalia, J., dissenting).

42. *Id.* at 465.

43. *See* Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 408 (2001) ("I do not believe that anyone who studies the *Dickerson* majority opinion can come away with any doubt that what the Court told us is, to quote Justice Scalia, that 'what 18 U.S.C. § 3501 prescribes . . . violates the Constitution.'") [hereinafter Kamisar, *Thirty-Five Years*].

The Ninth Circuit adopted this reading in *Tekoh v. County of Los Angeles*.[44] Citing *Dickerson*, the panel concluded that "where the un-*Mirandized* statement has been used against the defendant . . . the defendant has been deprived of his Fifth Amendment right against self-incrimination."[45] This interpretation of *Dickerson*, however, would be short-lived.

C. Prophylaxis After All

In the 2021 Term, Justice Alito, writing for a 6-3 majority, opined in *Vega v. Tekoh* that *Miranda* did not provide a "right secured by the Constitution" and therefore its violation is not a basis for a § 1983 claim.[46] In so holding, the Court rejected the Ninth Circuit's reading of *Dickerson* and reaffirmed the understanding of *Miranda* as a prophylactic rule, not a constitutional right. Having clarified *Miranda*'s subconstitutional status, the Court set its sights on *Dickerson*. Gesturing to *Dickerson*'s holding that a prophylactic rule "cannot be altered by ordinary legislation," the *Vega* majority branded it "a bold and controversial claim of authority."[47] The Court thus signaled both an inclination to revisit *Dickerson* and an endorsement of Justice Scalia's dissenting positions.

Is the logical extension of *Vega* then the demise of *Dickerson*? Not necessarily. The following section provides a theory of *Miranda* that would save *Dickerson*'s core holding, though it may in doing so raise questions as to other parts of the opinion.

III. *DICKERSON*'S FUTURE

A. Dubious Authority?

Before considering *Dickerson*'s fate, it should be briefly noted that *Vega* has little implication for the constitutional rectitude of the *Miranda* decision itself. Despite *Dickerson* breathing new life into the possibility that *Miranda* warnings are constitutionally required, the majority view in both academia and the Court had already moved away from that perception. As Justice Scalia surmised, "the Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*'s rules is itself a violation of the Constitution."[48] And even in her *Vega* dissent, Justice Kagan does not espouse a view of *Miranda* rights as encompassed within the Fifth Amendment privilege. So while *Vega* might have rendered *Miranda*'s "prophylactic" status permanent, that label is neither novel nor rare.

44. 985 F.3d 713 (2021), *cert. granted sub nom.* Vega v. Tekoh, 142 S. Ct. 858 (2022), *and rev'd and remanded sub nom.* Vega v. Tekoh, 142 S. Ct. 2095 (2022).

45. *Id.* at 715.

46. 142 S. Ct. 2095 (2022).

47. *Id.* at 2106.

48. Dickerson v. United States, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting).

Indeed, much ink has been spilled over theorizing the Court's power to issue prophylactic rules generally.[49] While *Vega* highlighted this debate, it acknowledged "that is what the Court did in *Miranda*, and we do not disturb that decision in any way."[50] This article similarly does not wade into that particular debate and only notes that prophylactic rules are "ubiquitous" across the gamut of the Court's constitutional opinions and are probably "the norm, not the exception."[51]

Turning back to *Dickerson*—what of Justice Scalia's accusation that "[b]y disregarding congressional action that concededly does not violate the Constitution, the Court . . . arrogates to itself prerogatives reserved to the representatives of the people"?[52] Justice Scalia did not believe that Article III gave the Court any authority to issue prophylactic rules of the *Miranda* variety.[53] Even accepting the premise that the Court has such authority, it does not follow that it also has the power to reject a congressional or state legislative override. While some scholars have theorized that the Court should have the last word on any legislative alternatives,[54] the *Vega* majority is plainly skeptical of that power.

Without a proper constitutional foundation, such power is in tension with both national separation of powers and federalism. By creating the prophylactic rule in the first place, the Court already invades a portion of Congress's lawmaking prerogatives.[55] The Court's discretionary rejection of legislative alternatives further usurps legislative power for itself. Relatedly, the power also poses concerns for federalism because state legislatures are equally limited in ability to legislate in an arena it traditionally governs.[56] Each state may have local needs that require local solutions, not a judicially created national uniform standard. The Court's close scrutiny of state alternatives suppresses the experimentation with the proper balance between "the need for police questioning as a tool for effective enforcement of criminal laws" and the need to *overprotect* custodial suspects from "constitutionally impermissible compulsion"[57] required to achieve a state's unique and legitimate (and, of course, constitutional) law enforcement goals.

49. *Compare* Henry P. Monaghan, *The Supreme Court 1974 Term Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975), David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988), *and* Klein, *supra* note 34, *with* Grano, *supra* note 19, *Dickerson*, 530 U.S. at 457–61 (Scalia, J., dissenting), *and* Oregon v. Elstad, 470 U.S. 298, 370–71 (1985) (Stevens, J., dissenting).

50. *Vega*, 142 S. Ct. at 2106 n.5.

51. Strauss, *supra* note 48, at 195.

52. *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting).

53. *Id.* at 446 (calling the Court's imposition of prophylactic rules an "immense and frightening antidemocratic power" that "does not exist").

54. Klein, *supra* note 34, at 1054 ("the Court will, of course, have the final say as to whether alternative prophylactic rules and rights provided by legislators . . . sufficiently protect the Bill of Rights in a manner the Court can effectively oversee."). *But see* Grano, *supra* note 19, at 102 (noting "the possibility that such rules, even if legitimate, may be subject to legislative modification and even legislative overruling").

55. *See* Grano, *supra* note 19, at 123–24.

56. *Id.*

57. Moran v. Burbine, 475 U.S. 412, 426 (1986) (citations omitted).

Dickerson was not insensitive to these concerns, acknowledging that "Congress has ultimate authority to modify or set aside any such rules that are not constitutionally *required*."[58] *Vega* seems to confirm that *Miranda* is not constitutionally required. Does it follow that legislatures *can* set aside *Miranda*?

B. Partly Constitutional

The way to escape this syllogism is to read *Miranda* as *partly* constitutionally required. The *Dickerson* and *Vega* opinions largely discuss *Miranda* as if it had a single holding, "obscur[ing] the fact that *Miranda* contains not one holding but a complex series of holdings."[59] The *Miranda* warnings are better understood as deriving from two distinct holdings: (1) a mandate that *some* prophylaxis is required to safeguard the Fifth Amendment right, and (2) a determination of what that prophylaxis should be (*i.e.*, the *Miranda* warnings). The first holding is a constitutional one; the second, which receives more focus, is not.

The first holding is constitutional because it can be rooted, as Professor Joseph Grano has suggested, in a defendant's Fifth and Fourteenth Amendment rights to due process.[60] Due process provides, among other important procedural rights, a "right to a meaningful opportunity to show that the constitutional provisions that govern the judicial process have been violated in his case."[61] When a Court demands some sort of prophylactic rule to protect a constitutional right, it has made a "judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right."[62] Put another way, the Court determined that without a protective shield around the right, the courts are institutionally incapable of adequately adjudicating the defendants' constitutional violation claims. To cure this procedural defect, the Due Process Clause constitutionally *requires* some prophylactic safeguard. This, in Justice Kagan's words, is the holding of *Miranda* that "is set in constitutional stone."[63] Thus, Professor Kamisar was right in speculating that

> "[i]f the *Miranda* Court had not prescribed the four warnings, but simply left it up to Congress and the States to devise acceptable procedural safeguards, critics of *Miranda* would not have had the prophylactic *Miranda* warnings to kick around anymore. In that event, I doubt that anybody would seriously argue that Congress could overturn *Miranda* by simple legislation."[64]

58. *Dickerson*, 530 U.S. at 428 (emphasis added).

59. Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, 85 CORNELL L. REV 883, 942 (2000) [hereinafter Kamisar, *Overrule*] (quoting Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 436 (1987).

60. Grano, *supra* note 19, at 157.

61. *Id.*

62. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 950 (1999).

63. Vega v. Tekoh, 142 S. Ct. 2095, 2109 (2022) (Kagan, J., dissenting).

64. Kamisar, *Overrule*, *supra* note 59, at 942.

The second holding is the more familiar one and is what *Tucker*, *Elstad*, and *Vega* deemed to be "prophylactic," or subconstitutional. It is unlikely that the Due Process Clause requires any particular prophylactic rule,[65] and the Court has said as much. *Miranda* settled on its four warnings after balancing "society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights."[66] *Miranda* disclaimed that this judicial balance creates a "constitutional straitjacket" and welcomed equally effective legislative alternatives to displace the *Miranda* warnings.[67] To summarize the obvious, the Court takes the first cut at fashioning a default prophylactic rule, which can be superseded or modified by any viable legislative alternatives. Because any prophylactic rule would stand on roughly equal footing as federal and state statutes, they are necessarily subconstitutional.

The *Dickerson* decision, scrutinized closely, reads *Miranda* in the same way. In a footnote, the Court reasons that *Miranda*'s no-"constitutional straitjacket"[68] disclaimer "was intended to indicate that the Constitution does not require police to administer the *particular Miranda* warnings, not that the Constitution does not require *a* procedure that is effective in securing Fifth Amendment rights."[69] *Dickerson* therefore intimates that the Constitution requires *a* safeguard (the constitutional first holding), but not any *particular* safeguard (the subconstitutional second holding).

Viewed this way, the *Dickerson* Court was correct to overrule § 3501 because it violated the first, not the second, holding. In passing § 3501, Congress intended to overrule *Miranda* in its entirety, failing to fashion any prophylactic protection and instead rolling the clock back to the pre-*Miranda* totality of the circumstances voluntariness inquiry.[70] It devolved back to a system that the Court had already declared—though not explicitly—violated the Due Process Clause. Justice Scalia, therefore, was incorrect in assessing that § 3501 "concededly does not violate the Constitution"[71]—it violated the part of *Miranda* that was constitutionally required.

C. Implications Beyond Dickerson

To be sure, this reading of *Miranda* may not address all of the *Vega* majority's potential concerns. It does not explain why the Court can demand that legislative alternatives must be "at least as effective"[72] as the *Miranda* warnings. Why can't a statute be less protective than *Miranda*'s "constitutional

65. *Cf.* Grano, *supra* note 19, at 160–61 (arguing that though "procedural due process cannot justify the conclusive presumption in *Miranda*," it might justify a "rebuttable presumption").

66. Moran v. Burbine, 475 U.S. 412, 424 (1986).

67. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

68. *Id.* at 467.

69. Dickerson v. United States, 530 U.S. 428, 440 n.6 (2000) (emphasis added).

70. Kamisar, *Overrule*, *supra* note 59, at 929.

71. *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting).

72. *Miranda*, 384 U.S. at 467; *see also* Vega v. Tekoh, 142 S. Ct. 2095, 2109 (2022) (Kagan, J., dissenting) (reading *Dickerson* to instruct that "no statute may provide lesser protection than [*Miranda*'s] baseline").

minimum"[73] so long as it provides some measure of prophylactic protection (unlike § 3501)? One answer may be that the Due Process Clause mandates that level of effectiveness. This potential response requires a deeper analysis of the Due Process Clause than this article has room for. On the other end of the spectrum, a maximalist Court that disagreed could simply overrule this portion of *Miranda*.

A middle-ground way to dispose of this dilemma may be to focus on the proper interpretation of the phrase. "At least as effective" does not mean "as overprotective as" the *Miranda* warnings, but rather "as effective at safeguarding the Fifth Amendment privilege." What's the difference? Suppose a legislature passes a statute providing that a failure to give *Miranda* warnings only creates a rebuttable presumption of coercion. That is clearly not as overprotective as what *Miranda* requires, which is a conclusive presumption of coercion. But it is not immediately apparent that such a statute would not be just as effective at protecting the core privilege against self-incrimination. A legislature might find facts—by collecting empirical data and hearing expert testimony—to conclude in good faith that both are equally effective at excluding unconstitutionally coerced testimony from trial.[74] This may be especially true today because custodial suspects know their custodial rights much better than in 1966 thanks to the popularization of *Miranda* warnings, and "there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided."[75] Courts—particularly those concerned that closely scrutinizing these statutes would infringe on legislative functions and inhibit state experimentation—could review the legislative findings deferentially.

IV. CONCLUSION

Scholars have made these points in the past; this article simply restructures those points into a dual-holding framework—one part constitutional, one part subconstitutional—which offers more analytical clarity and a cogent harmonization of *Dickerson* with *Tucker*, *Elstad*, and *Vega*. In the end, however, resolving such legal niceties may be little more than an academic exercise. It is unclear that there is any interest in altering the *Miranda* rights as they currently exist. Police have lived with *Miranda* just fine because the Court's "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."[76] And at fifty-six years old, the *Miranda* warnings are indelibly intertwined with not only our legal but also cultural fabric such that any attempt to legislatively override them today may come with significant political peril. Thus, a legal vehicle to reconsider *Dickerson* may never arrive at the Court's doorstep.

73. *Dickerson*, 530 U.S. at 442.

74. *See* Grano, *supra* note 19, at 161 (suggesting that "[f]rom a practical perspective," the results of an irrebuttable presumption and a rebuttable presumption "may be the same").

75. *Dickerson*, 530 U.S. at 442 (citing Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (applying Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971))).

76. *Id.* at 443.