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Nearly Forgotten Supervisory Power: The Wrench to Retaining the Miranda Warnings, The

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Comment

The Nearly Forgotten Supervisory Power: The Wrench to Retaining the *Miranda* Warnings

I. INTRODUCTION

For more than fifty years, the United States Supreme Court has relied on its inherent supervisory power to oversee the administration of justice.[1] This supervisory power provides the Court with a flexible, independent means to correct injustices that existing doctrines are inadequate to serve.[2] However, the Court has become progressively less apt to invoke its supervisory power, choosing instead to constitutionalize principles originally promulgated under this power.[3] The Court's constitutionalization of these principles has distorted traditional constitutional doctrines in an attempt to reach desired outcomes.[4] This practice was adopted by the Rehnquist Court in its attempt to preserve the *Miranda* warnings as the appropriate standard governing the admissibility of custodial confessions.[5] The Court held that the *Miranda* warnings were rights required by the Constitution, and, therefore, Congress did not have authority to overrule them by enacting 18 U.S.C. § 3501.[6] Yet, the Court never stated the logical effect of its holding: failing to issue *Miranda* warnings violates the Constitution.[7]

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1. *See* McNabb v. United States, 318 U.S. 332, 341 (1942).

2. *See, e.g.*, Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1078 (1965) [hereinafter Note, *Judge-Made Supervisory Power*] (noting that the supervisory power is beneficial to American jurisprudence because it provides the Court with a flexible device to deal with unforseen situations on a case-by-case basis in its administration of justice).

3. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 782 n.251 (2001).

4. *See, e.g.*, Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 431-32 (1982) (noting that the Court has declined to rely on its supervisory power as an independent basis for decision, but, rather, it has expanded defendants' constitutionally-based guarantees); *see also* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1078 (stating with reference to preventing injustices: "In many cases, the problem could have been solved without resort to supervisory power but frequently only by distorting traditional legal doctrines.").

5. *See* Dickerson v. United States, 530 U.S. 428 (2000).

6. *See id.* at 431-32, 443; *see also* 18 U.S.C. § 3501 (1994).

7. *See Dickerson*, 530 U.S. at 445-46 (Scalia, J., dissenting). Justice Scalia argued that the Court "antidemocratic[ally]" extended the Constitution, "imposing what [the Court] regards as useful 'prophylactic' restrictions upon Congress and the States." *Id.*

This Comment addresses the supervisory power generally, and it specifically focuses on how the existence of the Court's supervisory power jurisprudence created a conundrum for the Rehnquist Court's attempt to preserve the *Miranda* warnings. Part II traces the history and development of the supervisory power as an independent basis for decision and the alleged sources of this power. Part III analyzes the Court's decision in *Dickerson v. United States*,[8] including Justice Scalia's dissent, within the context of *Miranda* and § 3501. Finally, Part IV discusses why the Court chose to constitutionalize the *Miranda* warnings, instead of invoking its supervisory power, to maintain *Miranda* as the proper standard governing the admissibility of custodial confessions.

II. THE SUPERVISORY POWER

The term "supervisory power" neither has been distinctly defined, nor have its contours and source definitively been clarified by the Supreme Court.[9] For these reasons, the appropriate situations in which this power should be applied remain unclear. Nevertheless, the Court has invoked and applied this power in a variety of situations and contexts.[10] "Generally, [the supervisory power] refers to the courts' inherent power to oversee their own operations in order to preserve the integrity of judicial processes."[11] Numerous rationales, set forth by courts and scholars, provide a foundation for the supervisory power.[12] The following are

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at 446 (Scalia, J., dissenting). However, the majority never stated that 18 U.S.C. § 3501 (1994) violated the Constitution or that custodial interrogations, not preceded by *Miranda* warnings or their equivalents, are unconstitutional. *Id.* (Scalia, J., dissenting).

8. 530 U.S. 428 (2000).

9. Brady, *supra* note 4, at 428.

10. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (noting that the opened-ended language of "supervisory power" has prompted courts to apply this power freely and in a broad array of contexts); *see, e.g.*, Elkins v. United States, 364 U.S. 206, 223 (1960) (The federal court excluded illegally obtained evidence seized by state officials.); Marshall v. United States, 360 U.S. 310, 312 (1959) (The Court remanded the case for a new trial when jurors were tainted by reading a newspaper containing prejudicial and inadmissible evidence.); Rea v. United States, 350 U.S. 214, 218 (1956) (The Court invoked its supervisory power to enjoin federal officers from transferring illegally seized drugs to state officials in violation of federal law.).

11. Brady, *supra* note 4, at 427 n.2.

12. *See, e.g.*, Beale, *supra* note 10, at 1455 (stating the supervisory power has been invoked "to regulate procedure in the lower federal courts, in order to promote the search for the truth, to protect the integrity of the courts, to remedy violations of individuals' rights, and to impose sanctions against governmental misconduct"); *see also* Mesarosh

three important rationales justify the supervisory power: (1) maintaining the integrity of the judicial system; (2) providing criminal defendants with heightened procedural protections; and (3) deterring police misconduct.[13] While some argue these rationales no longer provide a solid foundation for the invocation of the supervisory power,[14] the power enables the Supreme Court to "raise the standards of fairness in the administration of justice in advance of the relatively slow pace acceptable in the constitutional area."[15]

A. Development of the Supervisory Power

Some scholars argue that the supervisory power is firmly rooted in the judicial system because it was transferred from the courts of England.[16] However, no separation of powers existed under the English system, which undermines the legitimacy of the supervisory power in the United States.[17] Nevertheless, pure separation of powers would favor the Court invoking its supervisory power to regulate the judicial branch because the legislative and executive branches would not act outside of their independent spheres.[18] Because pure separation of powers does not exist in the United States system,[19] "separation of powers [should not be]

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v. United States, 352 U.S. 1, 14 (1956) (Courts must "see that the waters of justice are not polluted."); Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956) ("[F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."); Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (stating that the exclusion of evidence "preserve[d] the judicial process from contamination"); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 203 (1969).

13. Brady, *supra* note 4, at 430-31.

14. *See* Brady, *supra* note 4, at 436-40.

15. Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666-67 (1963).

16. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1053, 1056.

17. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1053-54.

18. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1054.

19. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1054. For example, the American system blurs pure separation of powers when regulatory agencies of the executive branch "perform both rule-making and adjudicative functions in carrying out congressional mandates." *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1054. Justice Chase stated:

> The general principles contained in the constitution are not to be regarded as rules to fetter and controul [sic]; but as matter merely declaratory and directory: for, even in the constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers should be kept separate and distinct.

a constitutional straight-jacket" to the Court's use of its supervisory power, even though the power might encroach on the executive or legislative branches from time to time.[20] While analogizing the American judicial system to the English system is problematic, it is arguable that the Court's supervisory power to regulate the judiciary has existed since the inception of the nation.[21]

One of the first decisions to discuss the Court's supervisory power was *Olmstead v. United States*.[22] *Olmstead* dealt with whether Fourth and Fifth Amendment rights were violated when private telephone conversations were intercepted and used against conspirators to prove a violation of the National Prohibition Act.[23] The Court primarily focused on the Fourth Amendment, concluding that the federal officers' wiretap did not constitute an illegal search or seizure.[24] The Court further found these intercepted communications admissible against the conspirators because "the admissibility of evidence is not affected by the illegality of the means by which it [is] obtained."[25] Writing for the majority, Chief Justice Taft rejected the notion that courts have discretion to exclude evidence merely because it is obtained by unethical means.[26] Instead, Taft opined that no authority existed to support such a proposition and, therefore, all evidence should be considered in criminal cases to prevent guilty persons from going free.[27]

The dissents, written by Justice Holmes and Justice Brandeis, illustrate a desire to invoke the Court's supervisory power to exclude the illegally intercepted communications from evidence.[28] Justice Holmes urged that the Court should not

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Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 18-19 (1800).

20. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1054. Professor Wigmore professed that "if the Constitution demands absolute separation of the legislative, executive and judicial functions, with each giving wholly and exclusively to its corresponding branch of government, then the power to regulate procedure is exclusively judicial and any legislative attempt at judicial rule making is constitutionally void." Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1054 (citing John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928)).

21. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1053, 1056.

22. 277 U.S. 438 (1928).

23. *See id.* at 455-56.

24. *See id.* at 464-65. "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Court stated that the language of the Fourth Amendment could not be extended to cover telephone wires and communications over those telephone wires intercepted via wiretaps. *Olmstead*, 277 U.S. at 465.

25. *Id.* at 467.

26. *See id.*

27. *See id.* at 467-68.

28. *See id.* at 469, 471 (Holmes, J., dissenting & Brandeis, J., dissenting).

be bound by precedent and that it should invoke logic to hold that evidence obtained by a criminal act should not be used as evidence.[29] He stated that "no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."[30] Justice Brandeis emphasized the importance of public respect for the laws and how this respect would be undermined if the Court ratified the criminal behavior of federal agents by allowing their illegally intercepted communications to be used as evidence.[31] He argued that courts should not become lawbreakers through accepting the fruits of criminal acts by federal agents because "[c]rime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."[32] For this reason, Brandeis reasoned that courts must protect themselves from unclean hands in order to "maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination."[33] The ideas and views expressed by these dissenting Justices in *Olmstead* established the foundation for the Court's later invocation of its supervisory power.

The landmark case solidifying the Court's supervisory power, as an independent basis for decision, is *McNabb v. United States*.[34] However, *McNabb* failed to ground the supervisory power on any constitutional or statutory basis.[35] Federal officers arrested the McNabbs for murdering an Alcohol Tax Unit agent, who was shot during an undercover investigation, while attempting to apprehend

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29. *Id.* at 469-71 (Holmes, J., dissenting).

30. *Id.* at 470 (Holmes, J., dissenting) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)).

31. *Id.* at 484-85 (Brandeis, J., dissenting); *see also* Beale, *supra* note 10, at 1443 (noting that "[i]n Justice Brandeis' view, if the government used illegally obtained evidence, it ratified the illegal acts of its officers and itself became a 'lawbreaker'").

32. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

33. *Id.* at 484-85 (Brandeis, J., dissenting). According to Justice Brandeis:

> The governing principle . . . is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

Id. at 483-84 (Brandeis, J., dissenting).

34. 318 U.S. 332 (1943); *see* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1050.

35. *See generally* McNabb v. United States, 318 U.S. 332 (1943).

the McNabbs for illegally selling alcohol.[36] Following their arrest, the McNabbs were held in a detention room for two days, instead of being taken in front of a United States Commissioner or judge before preliminary examinations were conducted, as required by federal law.[37] During these two days, agents interrogated the McNabbs, and, ultimately, each confessed to his role in the crime.[38] The Supreme Court considered the issue whether the trial court properly permitted these confessions to be used by the government in prosecuting the McNabbs, considering the circumstances under which their confessions were obtained.[39]

The Court, invoking its supervisory power, held the confessions should not have been used against the McNabbs because their interrogation conditions violated the "'fundamental principles of liberty and justice.'"[40] However, the Court failed to reach the constitutional issue whether such interrogation conditions violated the Fifth Amendment.[41] Rather, the Court based its decision independently on its supervisory power stating:

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36. *Id.* at 333-34. An informant told government officials that the McNabbs, a clan of Tennessee mountaineers, planned to sell whiskey without paying federal taxes. *Id.* at 333. The federal officers wanted to catch the McNabbs in the act of the illegal sale, so they staked-out the rendezvous point and attempted to apprehend the McNabbs, who fled. *Id.* at 333-34. During the search and apprehension of the McNabbs, one of the McNabbs shot and killed Officer Leeper. *Id.* at 334.

37. *Id.* at 334-35; *see* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1062. The federal statute governing the action of the federal officers at the time *McNabb* was decided was 18 U.S.C. § 595 (1940). Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1062 n.62. This statute was superseded by Rule 5(a) of the Federal Rules of Criminal Procedure, requiring law enforcement officials to take an arrested person before a commissioner "without unnecessary delay." Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1062 n.62; *see* FED. R. CRIM. P. 5(a).

38. *See McNabb*, 318 U.S. at 334-38. During this interrogation period, the McNabbs were not given anything to sit or lie down on, except the floor, and they were questioned, with at least six different officers present, both together and separately. *Id.* at 334-36. Only after their confessions were they taken in front of a commissioner for their preliminary examination. *Id.* The district court found the confessions were not coerced and, therefore, admitted the confessions. *Id.* at 339 n.5.

39. *See id.* at 338. The confessions made by the McNabbs were the basis for the government's successful prosecution; without the confessions, the convictions could not have been sustained. *Id.*

40. *See id.* at 340-41 (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

41. *See id.* at 340-41. "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded." *Id.* at 341.

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence . . . . In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.[42]

On behalf of the *McNabb* majority, Justice Frankfurter asserted the general authority of the Court to establish "civilized standards of procedure and evidence" for the federal courts, without citing a specific source for such authority.[43]

The Court predicated its supervisory power on two propositions:

> (1) that if the federal courts admit illegally obtained evidence they will themselves become "accomplices in willful disobedience of the law," and (2) that the Supreme Court has both the right and the duty to prevent such corruption of the federal judiciary by forbidding the lower federal courts [from] accept[ing] the fruits of official lawlessness.[44]

McNabb ultimately concretely set forth the supervisory power as an independent ground for judicial decision, without expressly identifying the source or scope of this power.[45] In other words, the supervisory power now formally existed as a tool for courts to decide cases, but no instructions were given on how and when this tool should be utilized.

Another decision that emphasized a deterrence rationale for invoking the supervisory power was *Elkins v. United States*.[46] In *Elkins*, state officers seized tape and wire recordings from the Elkins's home and turned them over to federal authorities.[47] Both the United States District Court for the District of Oregon and

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42. *Id.* at 340-41. The Court declared that it was "not limited to the strict canons of evidentiary relevance," but it was guided by considerations of justice in its administration of criminal justice over the federal courts. *Id.* at 341.

43. *Id.* at 340; *see also* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1063.

44. Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1064 (quoting *McNabb*, 318 U.S. at 345).

45. *See* Brady, *supra* note 4, at 427.

46. 364 U.S. 206 (1960). The *Elkins* Court based its application of the supervisory power not only on protecting the integrity of the judicial system (as in *McNabb*), but also on the deterrence of future police misconduct. *See* Brady, *supra* note 4, at 431.

47. *See Elkins*, 364 U.S. at 206-07. A district court judge found that this search and seizure would have violated the Elkins's Fourth Amendment rights if the search and seizure had been conducted by federal officers. *Id.* at 207. *Elkins* was decided after *Wolf*,

the United States Court of Appeals for the Ninth Circuit permitted federal agents to use the seized items to prosecute Elkins for intercepting and divulging telephone communications and for conspiring to do so in violation of federal law.[48] The issue facing the Court was whether federal courts should be able to use such illegally seized evidence under the "silver platter" doctrine.[49] Once again, the Court invoked its supervisory power to overrule the "silver platter" doctrine, citing the dissents of Justice Holmes and Justice Brandeis in *Olmstead*.[50] The Court declared that the exclusionary rule was "calculated to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[51] The Court further stated that principles of common

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which held that the Due Process Clause of the Fourteenth Amendment did not require state courts to adopt the exclusionary rule excluding evidence secured by state officers through unreasonable searches and seizures, but, rather, the Fourteenth Amendment only prohibited state officials from conducting unreasonable searches and seizures. *Id.* at 213 (discussing Wolf v. Colorado, 338 U.S. 25 (1949)); *see also* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1065-66.

48. *Elkins*, 364 U.S. at 206, 208. This case is an example of the "silver platter" doctrine, which permits federal courts to receive evidence illegally seized by state officers and officials, so long as the federal authorities have nothing to do with the illegal acts of the state officials. *See* Beale, *supra* note 10, at 1452.

49. *Elkins*, 364 U.S. at 208; *see* 29 AM. JUR. 2D *Evidence* § 608 (1994). The phrase "silver platter" doctrine has been used to describe the situation where state officials obtain evidence through illegal searches and seizures (and, thus, cannot use such evidence in their state court proceedings) and turn the evidence obtained over to federal officials for use in federal proceedings. 29 AM. JUR. 2D *Evidence* § 608 (1994) (citing Lustig v. United States, 338 U.S. 74, 78-79 (1949)). The *Elkins* Court expressly overruled the "silver platter" doctrine. *See id.*; *see also Elkins*, 364 U.S. at 208 ("For the reasons that follow we conclude that [the silver platter doctrine] can no longer be accepted."). "Articles obtained as a result of an unreasonable search and seizure by state officers may not be introduced into evidence against a defendant over his timely objection in a federal criminal trial, even though the search was conducted without the involvement of federal officers." 29 AM. JUR. 2D *Evidence* § 608 (1994) (citing *Elkins*, 364 U.S. at 206).

50. *See Elkins*, 364 U.S. at 222-23 (quoting Olmstead v. United States, 277 U.S. 438, 469, 471 (1928) (Holmes, J., dissenting & Brandeis, J., dissenting)).

51. *Id.* at 217. The Court emphasized that there are many unreasonable searches and seizures committed that invade the privacy of innocent people but that turn up no incriminating evidence; remedies and redress are never made available to those people for such intrusions because they are never brought to court. *See id.* at 217-18. For this reason, "[c]ourts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Id.* at 218 (quoting Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting)). The Court's position on the exclusionary rule was further summarized by Professor Wigmore:

law, reason, and experience compelled the invalidation of such convictions built upon the "flagrant disregard" of procedure because the Court would violate the Constitution by becoming an "accomplice in [the] willful disobedience of law" if such convictions were not abrogated.[52] The *Elkins* Court broadened the scope of the supervisory power by invoking it to deter future misconduct, as well as to protect the integrity of the judicial system.[53] It further solidified the dissenting positions taken by Justice Holmes and Justice Brandeis in *Olmstead*, stating that the Court should not allow illegally obtained evidence to be used at trial.[54]

As these cases illustrate, the Supreme Court has recognized the supervisory power as an independent basis for deciding cases to promote fairness in the administration of justice. The supervisory power had been invoked in numerous contexts and appeared to be thriving.[55] However, the Court placed limits on its supervisory power in *Palermo v. United States*[56] and *United States v. Payner*.[57] *Palermo* dealt with a defendant's right to receive contemporaneous statements containing potential testimony of a governmental witness prior to trial.[58] The

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> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.

Elkins, 364 U.S. at 217 (quoting 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2184, at 40 (3d ed. 1940)).

52. *Id.* at 216, 223 (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).

53. *See* Brady, *supra* note 4, at 431.

54. *See* Beale, *supra* note 10, at 1452; *see also Elkins*, 364 U.S. at 223; Olmstead v. United States, 277 U.S. 438, 469, 471 (1928).

55. *See* Beale, *supra* note 10, at 1456-60 (citing numerous cases). Most of the cases cited involve misconduct by government investigators or prosecutors but "do not involve enforcement of the federal Constitution, statutes, or rules." Pushaw, *supra* note 3, at 781 n.246; *see, e.g.*, Beale, *supra* note 10, at 1460-62.

56. 360 U.S. 343 (1959).

57. 447 U.S. 727 (1980).

58. *See Palermo*, 360 U.S. at 344-45. Anthony Palermo "was convicted of knowingly and willfully evading the payment of income taxes for the years 1950, 1951 and 1952" due, in large part, to his failure to report dividend income. *Id.* at 343-44. The factual dispute in this case revolved around when Arthur R. Sanfilippo, the accountant who filed Palermo's tax returns for these years, received a handwritten record detailing the amount of Palermo's 1951-52 dividends. *Id.* at 344. During an interrogation by Internal Revenue Service ("IRS") agents prior to trial, Sanfilippo could not recall exactly when his accounting firm received Palermo's dividend record. *Id.* However,

Court previously had addressed this issue in *Jencks v. United States*,[59] in which it exercised its supervisory power to hold "that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses."[60] However, *Jencks* prompted a national security uproar, which resulted in Congress enacting 18 U.S.C. § 3500[61] to limit the Court's holding.[62] Regarding the relationship between the authority of Congress and that of the Court to promulgate nonconstitutional rules, the Court held that: "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."[63] Because Congress exercised its "ultimate authority" by enacting § 3500, the *Palermo* Court declared that § 3500, not *Jencks*, governed which governmental witness statements a defendant is entitled to receive prior to trial.[64]

Payner involved the search and seizure of a third party's briefcase yielding evidence that implicated Jack Payner for falsifying his 1972 federal income tax return.[65] The United States District Court for the Northern District of Ohio

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approximately one month later, Sanfilippo changed his testimony, stating that he then remembered his firm had not received Palermo's dividend record until after the IRS began investigating Palermo. *Id.* Various documents were created at this second meeting involving Sanfilippo and IRS agents, and the request for production of these documents by Palermo's attorneys prompted the court action. *Id.* at 344-45.

59. 353 U.S. 657 (1957). *Jencks* held that such statements were to be turned over at the time of cross-examination if the defense had made a demand for such statements and if the statements related to the subject matter of the witness's direct testimony. *Palermo*, 360 U.S. at 345-46. The trial judge was not to examine the requested statements prior to determining whether the defense had a right to possess them. *Id.* at 346.

60. *See id.* at 345. The *Palermo* Court noted that the Court in *Jencks* exercised its supervisory power "to prescribe procedures for the administration of justice in the federal courts" because Congress had failed to enact a statutory provision covering the issue. *Id.*

61. For the pertinent text of 18 U.S.C. § 3500 (1957), see *Palermo*, 360 U.S. at 348 n.4.

62. *See Palermo*, 360 U.S. at 346-48.

63. Dickerson v. United States, 530 U.S. 428, 437 (2000) (citing *Palermo*, 360 U.S. at 345-48). The Court stated that "Congress had determined to exercise its power to define the rules that should govern in this particular area in the trial of criminal cases instead of leaving the matter to the lawmaiking [sic] of the courts." *Palermo*, 360 U.S. at 347-48. "Congress has the power to prescribe rules of procedure for the federal courts" and the Court's supervisory power "to prescribe rules of procedure and evidence . . . exists only in the absence of a relevant Act of Congress." *Id.* at 353 n.11 (citing Funk v. United States, 290 U.S. 371, 382 (1933)).

64. *See id.* at 350-51.

65. *See* United States v. Payner, 447 U.S. 727, 728-30 (1980). Payner was charged

invoked the supervisory power and excluded the illegally seized documents because it disapproved of the government's "knowing and purposeful bad faith hostility to . . . fundamental constitutional rights."[66] The United States Court of Appeals for the Sixth Circuit affirmed.[67]

The Supreme Court held that the supervisory power did not extend so far as "to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court."[68] The Court weighed the effect that suppressing this type of evidence would have on the truth-finding ability of the Court against the aims promoted by the supervisory power.[69] In so doing, the Court found that, in the Fourth Amendment context, "the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices."[70] Based on this holding, scholars have noted that *Payner* "recognized both the judicial integrity and deterrence rationales for the supervisory power, but implied that these rationales furnished no broader basis for exclusion under the supervisory power than under the [F]ourth [A]mendment."[71] This holding in *Payner* appears to limit the invocation of the supervisory power only to statutory violations.[72]

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with violating 18 U.S.C. § 1001, which provides in pertinent part: "[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statements or representations, . . . shall be fined under this title or imprisoned not more than 5 years, or both." 18 U.S.C. § 1001 (1994 & Supp. V 1999). This case revolved around an "Operation Trade Winds" government scheme to find out about Americans' financial activities in the Bahamas, due to a suspicion that a narcotics trafficker had an account at Castle Bank in the Bahamas. *See Payner*, 447 U.S. at 729. Payner was implicated because documents were illegally seized by federal agents from the briefcase of Michael Wolstencroft, the vice president of Castle Bank, indicating that Payner had an account at the bank. *See id.* at 729-30.

66. *Id.* at 731 (quoting United States v. Payner, 434 F. Supp. 113, 129 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980)).

67. *Id.*

68. *Id.* at 735. The Court emphasized that the supervisory power has never been invoked to suppress evidence obtained from third parties in violation of the Constitution, statute, or rule. *Id.* at 735 n.7. "The supervisory power merely permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." *Id.* (quoting McNabb v. United States, 318 U.S. 332, 340 (1943)).

69. *Id.* at 734-35.

70. *Id.* "The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *Id.* at 734.

71. Brady, *supra* note 4, at 434.

72. *See* Brady, *supra* note 4, at 435.

Justice Marshall, with Justices Brennan and Blackmun, dissented in *Payner*, stating that federal courts should be able to invoke their supervisory power to protect the integrity of the judicial system from the intentional, lawless conduct of the government.[73] The main thrust of the dissent was that, if the Court permits illegally seized evidence to be considered, then the government is rewarded for its intentional violation of one person's constitutional rights because it can prosecute another.[74] If the Court ratifies the use of such illegally-obtained evidence, then the Court "does indeed become the accomplice of the government lawbreaker, an accessory after the fact, . . . [and] [s]uch a pollution of the federal courts should not be permitted."[75] The dissent also argued that the Court's decision makes the supervisory power superfluous because "to establish the suppression of evidence under the supervisory power . . . the Court would . . . require Payner to establish a violation of his Fourth or Fifth Amendment rights, in which case suppression would flow directly from the Constitution."[76] Finally, the dissent cited a passage written by Justice Powell, the author of the majority opinion in *Payner*, stating: "'The fact that there is sometimes no sharply defined standard against which to make these judgments [of fundamental fairness to decide when to invoke the supervisory power] is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances.'"[77] For all of these reasons, the dissent would have affirmed the district court's application of the supervisory power in order to suppress the illegal evidence that was intentionally obtained by the government in direct violation of Wolstencroft's constitutional rights.[78]

Based on the Supreme Court's recent jurisprudence, the continued viability of the supervisory power, as an independent basis for decisionmaking, is

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73. *See Payner*, 447 U.S. at 738 (Marshall, J., dissenting). These three Justices believed the majority's decision permitted the government to use the standing requirement of the Fourth Amendment as a sword intentionally to violate the Fourth Amendment rights of third parties to obtain evidence to prosecute another individual or party. *Id.* (Marshall, J., dissenting).

74. *See id.* at 746-48 (Marshall, J., dissenting). "If the federal court permits such evidence, the intended product of deliberately illegal Government action, to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own integrity." *Id.* at 746 (Marshall, J., dissenting).

75. *Id.* at 747-48 (Marshall, J., dissenting).

76. *Id.* at 748-49 (Marshall, J., dissenting); *see also* Brady, *supra* note 4, at 434 ("Justice Marshall dissented, arguing that supervisory power analysis should turn on 'protecting the integrity of the court,' rather than on protecting the defendant's constitutional rights." (quoting *Payner*, 447 U.S. at 747 (Marshall, J., dissenting))).

77. *Payner*, 447 U.S. at 751 (Marshall, J., dissenting) (quoting Hampton v. United States, 425 U.S. 484, 495 n.6 (1976) (Powell, J., concurring)).

78. *See id.* (Marshall, J., dissenting).

questionable. Nevertheless, the Court has referenced its supervisory power in several recent cases,[79] including *Dickerson.*[80] More specifically, in its desire to maintain the *Miranda* warnings, which the Warren Court arguably created under the guise of its supervisory power, the *Dickerson* Court was forced to constitutionalize the *Miranda* warnings rather than to uphold them under its supervisory power. This shift ultimately distorted traditional constitutional doctrine.

B. Sources of Authority for the Supervisory Power

The Supreme Court has never disclosed the origin of its supervisory power.[81] However, most courts describe the supervisory power as an implied or inherent power,[82] while scholars have provided several other plausible sources.[83] "Inherent power has been defined as that which 'is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court....'"[84] One rationale supporting the theory that the Court has an implied or inherent supervisory power stems from the notion that the judicial branch must have authority to protect its integrity in the exercise of its judicial functions.[85] This rationale is based on the premise that, for the judicial process to function

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79. *See, e.g.*, Degen v. United States, 517 U.S. 820, 824 (1996) (acknowledging that the Court can invoke its supervisory power to dismiss a criminal case, if a party becomes a fugitive while the case is pending); Thomas v. Arn, 474 U.S. 140, 148 (1985) (noting that the supervisory power cannot be used if it conflicts with the Constitution or a statute); United States v. Hasting, 461 U.S. 499, 512 (1983) (reversing the Seventh Circuit's application of the supervisory power because it deemed the district court's constitutional error at trial to be harmless error); *see also* Pushaw, *supra* note 3, at 781 n.249 (collecting cases).

80. Dickerson v. United States, 530 U.S. 428, 437-38 (2000). "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." *Id.* at 437. "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." *Id.*

81. *See* Brady, *supra* note 4, at 428.

82. *See* Beale, *supra* note 10, at 1464. "[N]o . . . statutory basis has been identified, and most courts and commentators have characterized supervisory power as an implied or inherent power." *See* Beale, *supra* note 10, at 1464.

83. *See* Beale, *supra* note 10, at 1464-77; *see also* Brady, *supra* note 4, at 436-40, 442-45.

84. *See* Note, *Judge-Made Supervisory Power*, *supra* note 2, at 1052 (quoting Henry M. Dowling, *Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 636 (1935)).

85. *See* Beale, *supra* note 10, at 1464.

appropriately, its rulings must have the respect of the public.[86] However, public confidence is undermined when courts ratify illegal conduct employed by investigators to secure tainted and contaminated evidence.[87] To promote and justify public respect for the judiciary, courts must possess the authority to exclude contaminated evidence from their proceedings pursuant to the administration of justice.[88]

Three legal developments, in the early part of the twentieth century, led the Court to promulgate its supervisory power in *McNabb*.[89] Congress authorized the Court to develop Federal Rules of Civil Procedure, which were adopted in 1938, to replace the prior federal laws that provided little coherence and fostered confusion.[90] Satisfied with the Federal Rules of Civil Procedure, Congress also authorized the Court to promulgate Federal Rules of Criminal Procedure, which were enacted three years before the *McNabb* decision.[91] Finally, during this same period, the Court took the initiative to create new Federal Rules of Evidence to replace the traditional rules because Congress had failed to take any action in this changing field.[92] Due to Congress's deference to the Court's law-making function in these areas, the Court inferred its authority to exercise an inherent, supervisory power in *McNabb*.[93]

Supreme Court supervisory power decisions suggest that the Court's supervisory power arises from an implied ancillary or incidental judicial power

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86. *See supra* notes 31-33 and accompanying text.

87. *See* Beale, *supra* note 10, at 1507; *see, e.g.*, Olmstead v. United States, 277 U.S. 438, 481-86 (1928) (Brandeis, J., dissenting); Casey v. United States, 276 U.S. 413, 423-25 (1928) (Brandeis, J., dissenting) (rejecting the ratification of lawless conduct by officials in the entrapment context to preserve the integrity of the judicial process); Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting) (noting the need to recognize the Court's supervisory power to prevent the contamination of the judicial process).

88. *See* Beale, *supra* note 10, at 1507.

89. Beale, *supra* note 10, at 1439.

90. *See* Beale, *supra* note 10, at 1439.

91. *See* Beale, *supra* note 10, at 1440.

92. *See* Beale, *supra* note 10, at 1440; *see also* Pushaw, *supra* note 3, at 782 n.251. Professor Pushaw argued that one reason courts decreasingly have invoked their supervisory power is:

> Congress granted the Court express authority to promulgate and amend Federal Rules of Criminal Procedure (which took effect in 1946) and Federal Rules of Evidence (which became operative in 1975). Hence, the Court has had less need to invoke its supervisory power as an independent legal basis for formulating such rules.

Pushaw, *supra* note 3, at 148 n.251 (internal citations omitted).

93. *See generally* McNabb v. United States, 318 U.S. 332, 340-41 (1943).

delegated to the judicial branch under Article III of the Constitution.[94] "The Supreme Court has consistently recognized that every constitutional grant of authority implicitly includes at least the incidental or ancillary authority that is absolutely necessary to permit the exercise of the expressly granted powers."[95] Sara Sun Beale, professor of law at Duke University, analogized the ancillary power of the judicial branch to the implied powers under Article II bestowed upon the President by the Court's precedent and also to the power granted to Congress under the Necessary and Proper Clause of Article I of the Constitution.[96] Beale argued that because Article II and Article III are not distinctly limited in the power granted, as is Article I, a Necessary and Proper Clause was not required to effect the broadly granted authority of Articles II and III.[97] Therefore, the judicial power granted by Article III should be construed broadly to include the supervisory power of the Court to preserve its judicial integrity, deter police misconduct, and provide justice.[98]

Additional sources of the Court's supervisory power include the constitutional separation of powers and the system of checks and balances that restrain the three branches of government.[99] "The principle of checks and balances embodies the notion that power can be checked only if it is shared; each branch has the right, if not the affirmative duty, to curb the excesses of the others."[100] In order for the judiciary to ensure that the executive and the legislative branches do not exceed their authority, the judicial branch necessarily must have an independent supervisory authority.[101] As established by *Marbury v.*

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94. *See* Beale, *supra* note 10, at 1468. Article III provides in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court .... the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States ...." U.S. CONST. art. III, §§ 1-2.

95. Beale, *supra* note 10, at 1468 (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225 (1821)); *see also* Beale, *supra* note 10, at 1468 n.228 ("recognizing ancillary or auxiliary powers even though the genius and spirit of our institutions are hostile to the exercise of implied powers" (internal quotation marks omitted)).

96. *See* Beale, *supra* note 10, at 1470-73.

97. Beale, *supra* note 10, at 1471. Beale argued that, because Article I is specifically limited to the enumerated powers listed, the Necessary and Proper Clause was necessary to ensure that the legislative powers vested under Article I would not be interpreted "hypertechnically." Beale, *supra* note 10, at 1471.

98. *See* Beale, *supra* note 10, at 1471.

99. *See* Beale, *supra* note 10, at 1510-11; Brady, *supra* note 4, at 443-47.

100. Brady, *supra* note 4, at 443-44 (citing ARTHUR T. VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 97-144 (1953)).

101. *See, e.g.*, Beale, *supra* note 10, at 1510-11; Brady, *supra* note 4, at 444-45 (noting that the courts must use their "supervisory power to maintain both their

Madison,[102] federal courts are required to assess whether the conduct of the coordinate branches violates the Constitution or any other federal law in all justiciable cases and controversies.[103] As the ultimate interpreter of the Constitution, the judicial branch has the unique duty and authority to monitor the actions of all the coordinate branches.[104] This power comprises the Court's supervisory power.

III. *DICKERSON V. UNITED STATES*

One of the most recent and controversial cases acknowledging the Court's supervisory power is *Dickerson*. In *Dickerson*, the Court determined the appropriate standard governing the admissibility of custodial confessions: the *Miranda* warnings[105] versus 18 U.S.C. § 3501.[106] Charles T. Dickerson of

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institutional integrity and the institutional power of all three branches of government").

102. 5 U.S. (1 Cranch) 137 (1803).

103. *See id.* at 177-78.

104. *See supra* notes 88-95 and accompanying text.

105. Dickerson v. United States, 530 U.S. 428, 431 (2000). According to *Miranda*, before a suspect's custodial confession can be admitted into evidence, that individual must be apprised of four things: (1) his or her right to remain silent; (2) the fact that anything he or she says can and will be used against him or her in a court of law; (3) that he or she has a right to have an attorney present at the interrogation; and (4) if he or she cannot afford an attorney, then one will be appointed for him or her by the court. Miranda v. Arizona, 384 U.S. 436, 467-74 (1966).

106. *See Dickerson*, 530 U.S. at 431-32. Section 3501 provides that a court is to look at the totality of the circumstances to determine whether the confession was voluntarily given. 18 U.S.C. § 3501(a) (1994). Section 3501 further gives a non-exhaustive list of factors that a trial judge is to consider when determining the voluntariness of a confession:

> [A]ll 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 giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b) (1994).

Takoma Park, Maryland, was indicted for violating certain provisions of Title 18 of the United States Code, due to his involvement in several bank robberies.[107] On January 24, 1997, a witness saw an individual rob the First Virginia Bank and jump into a white Oldsmobile Ciera belonging to Dickerson.[108] Upon questioning by the Federal Bureau of Investigation ("FBI"), Dickerson admitted to driving the getaway car in a series of bank robberies, including the First Virginia Bank robbery, and identified Jimmy Rochester as the bank robber—but only after agents told him that his apartment was about to be searched.[109]

Dickerson filed a motion to suppress the statements made to the FBI on the grounds that he was not issued his *Miranda* warnings prior to confessing.[110] After a suppression hearing, the United States District Court for the Eastern District of Virginia granted Dickerson's motion to suppress because he was interrogated, while in police custody, and "was not advised of his *Miranda* rights until after he had completed his statement to the government."[111] The government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit,

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107. *See* United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). Dickerson was indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C. § 371 (1994 & Supp. V 1999), three counts of bank robbery in violation of 18 U.S.C. § 2113(a) & (d) (1994), and three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (1994 & Supp. V 1999). *Dickerson*, 166 F.3d at 671.

108. *See id.* at 673. On January 27, 1997, approximately ten Federal Bureau of Investigation ("FBI") agents went to Dickerson's address pursuant to the robbery investigation. *Id.* Although the parties dispute whether the agents had consent to enter Dickerson's apartment, there is no dispute that several agents did, in fact, enter. *Id.* Dickerson accompanied the officers to the FBI office, but he was never placed under formal arrest or handcuffed. *Id.*

109. *See id.* at 674. Special Agent Lawlor obtained a telephonic warrant to search Dickerson's apartment from United States Magistrate Judge James E. Kenkel. *Id.* at 673-74. Agent Lawlor described the circumstances of the robbery through sworn testimony, and Judge Kenkel determined that probable cause existed that evidence of the bank robbery might be found at Dickerson's residence. *Id.* Subsequently, Dickerson provided the FBI agents with the details of the January 24, 1997, robbery and was placed under arrest following his statements. *Id.*

110. *See id.*

111. *Id.* at 675-76. At the suppression hearing, a dispute arose as to when Dickerson was issued his *Miranda* warnings. *Id.* at 675. Agent Lawlor testified that Dickerson was issued and waived his *Miranda* warnings prior to making his confession, while Dickerson claimed he confessed before being given *Miranda* warnings, which he said were given about thirty minutes after he was informed that agents were going to search his apartment pursuant to a warrant. *Id.* Ultimately, the district court found Dickerson to be more credible because Agent Lawlor was contradicted by the time at which the warrant was issued. *See id.* at 675-76.

which reversed the suppression order, holding that § 3501 was the appropriate standard governing the admissibility of custodial confessions.[112] Due to these conflicting decisions, the Supreme Court granted certiorari to decide whether Congress had the constitutional authority to enact § 3501 to supercede *Miranda*.[113]

A. The Law of Custodial Confessions

"At early common law, confessions were admissible at trial without restrictions."[114] As the eighteenth century progressed, courts became skeptical of the trustworthiness of custodial confessions; as a result, the admissibility of such confessions began to turn on the voluntariness of the suspect's statement.[115] In *Hopt v. Utah*,[116] "the Supreme Court specifically adopted the common law rule that a confession was reliable, and therefore, admissible, if it was made voluntarily."[117] As more cases considered the admissibility of custodial confessions, the voluntariness requirement became grounded on two constitutional

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112. Dickerson v. United States, 530 U.S. 428, 433 (2000). The court of appeals agreed that Dickerson was not given his *Miranda* warnings prior to making his confession, but it held that § 3501 was the proper standard governing the admissibility of custodial confessions. *Id.*; *see also* United States v. Dickerson, 166 F.3d 667, 692 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000) ("[W]e have no difficulty holding that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*."). The Fourth Circuit stated that *Miranda* was not a constitutional holding, and, therefore, it could be overruled by an Act of Congress. *See Dickerson*, 530 U.S. at 432.

113. *See id.* at 431, 437. The Court stated that, if Congress was found to have the constitutional authority to supercede *Miranda*, then "§ 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." *Id.* at 437.

114. *Dickerson*, 166 F.3d at 684 (quoting *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954 (1966)).

115. *Dickerson*, 530 U.S. at 433. English common law and later American law both recognized the inherent untrustworthiness of coerced confessions, which provided the rationale for the voluntariness test. *Id.*; *see, e.g.*, King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B. 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore, it is rejected."); Regina v. Baldry, 169 Eng. Rep. 568 (Crim. App. 1852); Regina v. Garner, 169 Eng. Rep. 267 (Crim. App. 1848).

116. 110 U.S. 574 (1884) (holding that a confession was voluntarily given if not induced by threat or promise).

117. *Dickerson*, 166 F.3d at 684 (citing *Hopt*, 110 U.S. at 584-85).

principles:[118] (1) the right against self-incrimination protected by the Fifth Amendment;[119] and (2) the Due Process Clause of the Fourteenth Amendment.[120] During the middle third of the twentieth century, the Due Process Clause was the primary vehicle for excluding coerced confessions.[121] The Court also began applying the due process voluntariness test to the states through *Malloy v. Hogan*.[122] In sum, "prior to *Miranda*, the rule governing the admissibility of confessions in federal court . . . remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily."[123]

In 1966, the Warren Court rejected the existing voluntariness test as the proper standard governing the admissibility of custodial confessions in favor of a new "bright-line" standard: the issuance of *Miranda* warnings[124] prior to

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118. *Dickerson*, 530 U.S. at 433.

119. *Id.* (citing Bram v. United States, 168 U.S. 532, 542 (1897), which declared the voluntariness test "is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself'"); *see also Dickerson*, 166 F.3d at 684 ("[a]ccording to the [*Bram*] Court, the Fifth Amendment privilege against self-incrimination 'was but a crystallization' of the common law rule that only voluntary confessions are admissible as evidence" (quoting *Bram*, 168 U.S. at 542)).

120. *Dickerson*, 530 U.S. at 433 (citing Brown v. Mississippi, 297 U.S. 278, 287 (1936), which reversed a criminal conviction based on the Due Process Clause of the Fourteenth Amendment because the conviction was secured by using a physically coerced confession); *see also Dickerson*, 166 F.3d at 684 (noting that after *Brown*, 297 U.S. at 285-86, "a confession was admissible only if voluntary within the meaning of the Due Process Clause").

121. *Dickerson*, 530 U.S. at 433-34. The cases applying the due process voluntariness test "refined the test into an inquiry that examines whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (internal quotation marks omitted) (noting also that this due process voluntariness test considers "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation"); *see also* Haynes v. Washington, 373 U.S. 503, 513 (1963); Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944); Chambers v. Florida, 309 U.S. 227, 239-40 (1940).

122. *Dickerson*, 530 U.S. at 434 (citing Malloy v. Hogan, 378 U.S. 1, 6-11 (1964), which applied the Self-Incrimination Clause of the Fifth Amendment to the states because it is incorporated into the Due Process Clause of the Fourteenth Amendment).

123. *Dickerson*, 166 F.3d at 684-85 ("noting that prior to *Miranda*, 'voluntariness *vel non* was the touchstone of admissibility of confessions'" (quoting Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring))).

124. For a discussion of *Miranda* warnings, see *supra* note 105 and accompanying text.

custodial interrogation.[125] Due to the nature of custodial interrogations[126] and the important values protected by the privilege against self-incrimination,[127] the Court believed "adequate protective devices" were necessary "to dispel the compulsion inherent in custodial surroundings."[128] However, the Court never identified the precise source of the *Miranda* warnings. Justice Warren stated that the guarantees secured by the *Miranda* warnings "are precious rights [] fixed in our Constitution only after centuries of persecution and struggle" and "were secured 'for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it.'"[129] The Court further declared that the rights protected by the *Miranda* warnings are "the essential mainstay of our adversary system . . . founded on a complex of values" based on a strong constitutional foundation.[130] Yet, in the same breath, the Court stated that "the Constitution [does not] necessarily require adherence to any particular solution" to protect an individual's Fifth Amendment right against self-incrimination.[131] In addition, the

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125. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*; *see also Dickerson*, 166 F.3d at 684, 685 (noting that confessions made by a suspect in custody are now presumed to be involuntary, unless preceded by the four enumerated *Miranda* warnings).

126. *See Miranda*, 384 U.S. at 445-58, 467-75. Many custodial interrogations involve isolating the suspect from the public, constant questioning of the suspect for extended periods of time by many different officers, police brutality, and any other mechanisms that will break down the suspect's free will. *Id.*

127. *See id.* at 457-60. The privilege against self-incrimination is "one of our Nation's most cherished principles." *Id.* at 457-58. "[T]he privilege against self-incrimination [is] the essential mainstay of our adversary system . . . ." *Id.* at 460.

128. *Id.* at 458. "In order to combat these pressures [inherent in custodial interrogations] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467.

129. *Id.* at 442 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821) (Marshall, C.J.)).

130. *See id.* at 460.

131. *Id.* at 467. The Court stated:

> [W]e 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 straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective

Court's subsequent jurisprudence, interpreting the foundation of *Miranda*, declared these warnings to be "prophylactic"[132] and "not themselves rights protected by the Constitution,"[133] but instead measures to ensure that the right against compulsory self-incrimination is protected.[134] This failure to enunciate clearly whether the Constitution required the *Miranda* warnings or whether they were a product of the Court's supervisory power, created the enigma of *Dickerson*.[135]

The final piece of the custodial confession jurisprudence was the enactment of § 3501,[136] just two years after the Supreme Court handed down *Miranda*.[137] Section 3501 attempted to reinstate the pre-*Miranda* voluntariness test to govern the admissibility of custodial confessions.[138] However, the United States Department of Justice neither invoked § 3501 nor allowed any United States Attorney to invoke or brief its applicability.[139] Section 3501 was finally subjected to judicial scrutiny when the United States Court of Appeals for the Fourth Circuit exercised its discretion and considered the applicability of § 3501 to Dickerson's

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> in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [*Miranda* warnings] must be observed.

Id.

132. Dickerson v. United States, 530 U.S. 428, 437-38 (2000) (quoting New York v. Quarles, 467 U.S. 649, 653 (1984)).

133. *Id.* at 438 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

134. *Id.* at 451; *see also* Withrow v. Williams, 507 U.S. 680, 690-91 (1993) ("*Miranda*'s safeguards are not constitutional in character.").

135. *See generally* Dickerson v. United States, 530 U.S. 428 (2000).

136. For the text of 18 U.S.C. § 3501, see *supra* note 106.

137. United States v. Dickerson, 166 F.3d 667, 685 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

138. *See* 18 U.S.C. § 3501(a)-(b) (1994); *see also Dickerson*, 166 F.3d at 686 ("Based upon the statutory language, it is perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court." (citing STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 545 (5th ed. 1996))). "[T]he Senate Report accompanying § 3501 specifically stated that: '[t]he intent of the bill is to reverse the holding of *Miranda*.'" *Dickerson*, 166 F.3d at 686 (quoting S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2141).

139. *See id.* at 681 n.14; *see, e.g.*, Davis v. United States, 512 U.S. 452, 457 n.1 (1994) (The Department of Justice declined to take a position on § 3501.); United States v. Sullivan, 138 F.3d 126, 134 n.1 (4th Cir. 1998) (The Department of Justice ordered the United States Attorneys' Office to withdraw its brief attempting to invoke § 3501.); United States v. Leong, 116 F.3d 1474 (4th Cir. 1997) (unpublished) (Attorney General Janet Reno told Congress that the Department of Justice would not defend the constitutionality of § 3501 pursuant to court order.).

custodial confession, obtained in violation of his *Miranda* rights.[140] This exercise of judicial discretion forced the Supreme Court to decide "whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[141]

B. The Rehnquist Court's Rationale for Maintaining the Miranda *Warnings*

The Supreme Court conceded that Congress intended to supercede *Miranda* by enacting § 3501.[142] Therefore, the disposition of the case turned on whether Congress had the constitutional authority to do so.[143] As previously mentioned, the Court may invoke its supervisory power to announce binding rules of evidence and procedures that aim to further the administration of justice in federal courts.[144] However, the invocation of the supervisory power is limited to situations in which Congress has failed to act.[145] Thus, Congress possesses the authority to supercede or modify rules of evidence and procedure previously established by the Court

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140. *See Dickerson*, 166 F.3d at 682. "Even where the parties abdicate their responsibility to call relevant authority to this Court's attention, they cannot prevent the governing law simply by refusing to argue it." *Id.* (citing U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 445-48 (1993)). The Court further noted that because a suppression ruling was being appealed, it was free to consider the applicability of § 3501 as it is "free to address . . . any legal theory that would bear on the issue under appeal." *Id.* at 682 n.17 (citing Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 275 n.1 (4th Cir. 1997)).

141. Dickerson v. United States, 530 U.S. 428, 437 (2000).

142. *See id.* at 436. The Court stated:

> 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*.

Id.

143. *See id.* at 437. "If Congress 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." *Id.*

144. *See id.* ("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." (citing Carlisle v. United States, 517 U.S. 416, 426 (1996))).

145. *Id.*; *see* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) (The use of the Court's supervisory power to create nonconstitutional rules can only be invoked "in the absence of a relevant Act of Congress."); *see also supra* notes 55-64 and accompanying text.

under its supervisory power.[146] However, Congress does *not* have the constitutional authority to supercede or modify constitutional rules—"decisions interpreting and applying the Constitution."[147]

The Rehnquist majority began its opinion by tracing the rationale employed by the Fourth Circuit to hold that *Miranda* is not constitutionally required;[148] the Court then disagreed.[149] Specifically, the Court argued by analogy that *Miranda* is a constitutional decision because it has been applied to state court proceedings[150] and because federal prisoners have been permitted to allege *Miranda* violations in habeas corpus proceedings.[151] The Court then quoted numerous passages from *Miranda*, claiming that the language of these passages illustrated the Warren Court's belief that *Miranda* announced a constitutional rule.[152] The Court also cited several cases referring to "*Miranda*'s constitutional

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146. *Dickerson*, 530 U.S. at 437 (citing *Palmero*, 360 U.S. at 345-48).

147. *Id.* (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997)).

148. *See id.* at 437-38. The court of appeals based its decision "on the fact that [the Supreme Court has] created several exceptions to *Miranda*'s warnings requirement and that [it has] repeatedly referred to the *Miranda* warnings as 'prophylactic', and 'not themselves rights protected by the Constitution.'" *Id.* (internal citations omitted).

149. *See id.* at 438.

150. *See id.* By analogy, the Court argued that its authority over state courts "'is limited to enforcing the commands of the United States Constitution'" and that, because its supervisory power has never been extended to cover state court proceedings, the *Miranda* warnings had to be a constitutional rule because they apply in state court proceedings. *Id.* (quoting Mu'Min v. Virginia, 500 U.S. 415, 422 (1991)); *see also* Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

151. *See Dickerson*, 530 U.S. at 439 n.3 ("Habeas corpus proceedings are available only for claims that a person 'is in custody in violation of the Constitution or law or treaties of the United States.'" (quoting 28 U.S.C. § 2254(a) (1994))). "Since the *Miranda* rule is clearly not based on federal laws or treaties, our decision allowing habeas review for *Miranda* claims obviously assumes that *Miranda* is of constitutional origin." *Id.*

152. *See id.* at 439-40. The Court emphasized language at the beginning of the *Miranda* opinion—"[T]he 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'"—and language at the end of the *Miranda* opinion—"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.'" *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 441-42, 491 (1966)); *see also id.* at 440 n.4 (setting forth numerous other passages throughout the *Miranda* opinion illustrating the Warren Court's

underpinnings."[153] The Court then proceeded to justify why the *Miranda* Court chose to invite Congress and the states to promulgate procedural safeguards "'at least as effective [as the *Miranda* warnings] in apprising accused persons of their right of silence . . . .'"[154] The Court stated that § 3501 is not "an adequate substitute for the warnings required by *Miranda*."[155] Finally, the Court relied heavily on the principle of stare decisis to maintain the *Miranda* warnings, reasoning that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[156] For these reasons, the Court concluded that "*Miranda* announced a constitutional rule that Congress may not supercede legislatively" and, therefore, remains the appropriate standard governing the admissibility of custodial confessions.[157]

C. Justice Scalia's Dissent

Justice Scalia blasted the majority for power-judging through its "antidemocratic" extension of the Court's judicial power to apply and expand the Constitution, "imposing what [the Court] regards as useful 'prophylactic' restrictions upon Congress and the States."[158] Scalia began his opinion by setting

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belief that it was setting forth a constitutional rule).

153. *Id.* at 440 n.5 (citing numerous Supreme Court cases referencing *Miranda*'s constitutional foundation).

154. *See id.* at 440-42 (quoting *Miranda*, 384 U.S. at 467). The invitation by the *Miranda* Court for Congress and the states to set forth alternatives "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." *Id.* at 440 n.6. The Court also stressed that the *Miranda* Court believed the voluntariness test, which looked to the totality of the circumstances, posed an unacceptable risk to the confessor's liberty, and, therefore, the Court replaced that test with the *Miranda* warnings. *Id.* at 441-42. Section 3501 merely reinstates the voluntariness test that the Court disapproved of in *Miranda*. *See id.* at 442-43.

155. *See id.* at 440-42 (quoting *Miranda*, 384 U.S. at 467); *see also supra* note 154 and accompanying text.

156. *Dickerson*, 530 U.S. at 443 ("[T]he fact that a rule has found 'wide acceptance in the legal culture' is 'adequate reason not to overrule' it." (quoting Mitchell v. United States, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting))). "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." *Id.* (internal citations and quotation marks omitted). The Court found no such special justification existed to justify a departure from *Miranda*. *Id.*

157. *Id.* at 444.

158. *Id.* at 446 (Scalia, J., dissenting). Justice Scalia argued:

forth the core proposition of judicial review: "[A]n Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution of the United States."[159] Scalia then argued that, because the Court neither declared § 3501 unconstitutional nor held that a custodial interrogation "not preceded by *Miranda* warnings or their equivalent violates the Constitution," the Court itself violated the Constitution by not adhering to separation of powers.[160]

Scalia further declared that *Miranda* has been objectionable since its inception because its fairest reading promotes holding § 3501 unconstitutional because it permits an "un-Mirandized confession" to be admitted at trial.[161] According to Scalia, the Constitution only prohibits compelled confessions, not all confessions.[162] However, he submitted that the "bright-line" rule of *Miranda*

> [T]o 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."

Id. at 445 (Scalia, J., dissenting).

159. *Id.* (Scalia, J., dissenting) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

160. *Id.* at 446 (Scalia, J., dissenting). The Court has constitutional authority to "disregar[d] § 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." *Id.* at 446-47 (Scalia, J., dissenting) (internal quotation marks omitted). "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." *Id.* at 454 (Scalia, J., dissenting).

161. *Id.* at 447 (Scalia, J., dissenting). "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." *Id.* (Scalia, J., dissenting). Scalia cited *Orozco v. Texas* to support his proposition that many believed *Miranda* to be a constitutional guarantee. *Id.* at 448 (Scalia, J., dissenting) ("'[T]he use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*.'" (quoting Orozco v. Texas, 394 U.S. 324, 326 (1969))).
For a list of cases that rejected the premise that the *Miranda* warnings were rights guaranteed by the Constitution, see also *id.* (Scalia, J., dissenting).

162. *See id.* at 449-50 (Scalia, J., dissenting). "[W]hat 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

extends this constitutional protection to all confessions, even those not compelled, so long as the confession is given prior to receiving *Miranda* warnings.[163] For this reason, Scalia claimed that the Court's subsequent jurisprudence "abandoned the notion that failure to comply with *Miranda*'s rule is itself a violation of the Constitution."[164] He then proceeded to trace this subsequent jurisprudence, which refers to the *Miranda* warnings as mere "prophylactic rules,"[165] and ultimately concluded that, "[i]n 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."[166]

Scalia then refuted most of the majority's rationale[167] by citing numerous post-*Miranda* cases, holding a "failure to comply with *Miranda*'s rules does not establish a constitutional violation."[168] Scalia stated that these cases would not make sense if *Miranda* were truly a constitutional rule.[169] Along these same lines,

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confession." *Id.* (Scalia, J., dissenting) (citing United States v. Washington, 431 U.S. 181, 187 (1977), which stated that confessions that are not coerced are beneficial).

163. *See id.* at 450 (Scalia, J., dissenting). "The Constitution is not, unlike the *Miranda* majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity." *Id.* (Scalia, J., dissenting).

164. *Id.* (Scalia, J., dissenting). "[A]ny 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 . . . ." *Id.* (Scalia, J., dissenting).

165. *Id.* at 451-54. (Scalia, J., dissenting). "The Court has squarely concluded that it is possible—indeed not uncommon—for the police to violate *Miranda* without also violating the Constitution." *Id.* at 451 (Scalia, J., dissenting); *see, e.g.*, New York v. Quarles, 467 U.S. 649, 655 (1984) (creating a public safety exception to *Miranda*); Oregon v. Hass, 420 U.S. 714, 723-24 (1975) (holding a defendant's statement taken in violation of *Miranda* that was nonetheless voluntary could be used at trial for impeachment purposes); Michigan v. Tucker, 417 U.S. 433, 445-51 (1974) (where Rehnquist, writing for the majority, 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).

166. *Dickerson*, 530 U.S. at 453-54 (Scalia, J., dissenting) (internal citations omitted).

167. *See id.* at 454-55 (Scalia, J., dissenting). "The Court seeks to avoid this conclusion [that the Constitution does not require adherence to the *Miranda* warnings] in two ways: First, by misdescribing these post-*Miranda* cases as mere dicta . . . [and] second . . . simply to disclaim responsibility for reasoned decisionmaking." *Id.* at 454 (Scalia, J., dissenting).

168. *Id.* (Scalia, J., dissenting) (citing Oregon v. Elstad, 470 U.S. 298, 307 (1985); *Quarles*, 467 U.S. at 649; *Hass*, 420 U.S. at 714; and *Tucker*, 417 U.S. at 433, for this essential holding).

169. *See id.* at 455 (Scalia, J., dissenting). "[I]f confessions procured in violation

Scalia labeled the majority's stare decisis argument a "wash" because, if *Miranda* is deemed a constitutional decision, all the cases mentioned by Scalia would have to be re-evaluated, just as the cases applying *Miranda* to the states now have to be re-evaluated under the majority's decision.[170]

Justice Scalia did acknowledge the existence of a dangerous theory, upon which the Court could have relied, to maintain *Miranda* as the appropriate standard governing custodial confessions without deeming it a constitutional requirement.[171] To achieve this result, Scalia maintained that the Court would have had to declare its authority to adopt "prophylactic rules to buttress constitutional rights, and enforc[e] them against Congress and the States."[172] However, Scalia disapproved of this theory because "[t]he 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 [Section 5 of the Fourteenth Amendment]."[173]

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of *Miranda* are confessions 'compelled' in violation of the Constitution, the post-*Miranda* decisions . . . do not make sense. The only reasoned basis for their outcome was that a violation of *Miranda* is not a violation of the Constitution." *Id.* (Scalia, J., dissenting).

170. *Id.* at 456 (Scalia, J., dissenting). Justice Scalia stated:

> [T]hough 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.

Id. (Scalia, J., dissenting).

171. *See id.* at 457-61 (Scalia, J., dissenting). Scalia stated that the petitioner and the United States vehemently argued this theory to the Court, but the majority failed to even mention this argument in its opinion. *Id.* at 457 (Scalia, J., dissenting).

172. *Id.* (Scalia, J., dissenting). The petitioner and the United States argued that prophylactic rules have been a feature of the Court's constitutional jurisprudence for years. *Id.* (Scalia, J., dissenting). They cited numerous cases in which the Court "exercised its traditional judicial power to define the scope of constitutional protections." *Id.* (Scalia, J., dissenting); *see, e.g.*, Maine v. Moulton, 474 U.S. 159, 176 (1985) (holding that a "Sixth Amendment right to the assistance of counsel is actually violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent" (internal quotation marks omitted)); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) ("holding that a permanent physical occupation constitutes a *per se* taking"); North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969), *overruled by* Alabama v. Smith, 490 U.S. 794 (1989) (holding "that due process would be offended were a judge vindictively to resentence with added severity a defendant who had successfully appealed to his original conviction").

173. *Dickerson*, 530 U.S. at 461 (Scalia, J., dissenting); *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

Finally, Justice Scalia concluded that the Court's opinion stands for the proposition that the Supreme Court now has the power "to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States."[174] In sum, Scalia argued that the majority was incorrect in its holding because: (1) the Court's later jurisprudence undermines *Miranda*'s constitutional foundation;[175] (2) *Miranda*'s "bright-line" rule is no more workable than a totality-of-the-circumstances test;[176] (3) both *Miranda* and the voluntariness test are still frequently exercised;[177] and (4) the Court does not have the right to invoke *Miranda* against the will of the people.[178] "Today's judgment converts *Miranda*

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174. *Dickerson*, 530 U.S. at 461 (Scalia, J., dissenting).

175. *Id.* at 461-62 (Scalia, J., dissenting). "Despite the Court's Orwellian assertion to the contrary, it is undeniable that later cases (discussed above) have undermined *Miranda*'s doctrinal underpinnings, denying constitutional violation and thus stripping the holding of its only constitutionally legitimate support." *Id.* (Scalia, J., dissenting) (internal quotation marks and citations omitted).

176. *Id.* at 463 (Scalia, J., dissenting). Scalia stated that "in the 34 years since *Miranda* was decided, this Court has been called upon to decide nearly 60 cases involving a host of *Miranda* issues." *Id.* (Scalia, J., dissenting). In *Withrow v. Williams*, Justice O'Connor stated:

> *Miranda*, for all its alleged brightness, is not without its difficulties; and voluntariness is not without its strengths. . . . *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in custody has proved to be a slippery one. And the supposedly bright lines that separate interrogation from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined. Yet *Miranda* requires those lines to be drawn with precision in each case. The totality-of-the-circumstances approach, on the other hand, 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 v. Williams, 507 U.S. 680, 711-12 (1993) (O'Connor, J., concurring in part and dissenting in part) (internal quotation marks and citations omitted).

177. *See Dickerson*, 530 U.S. at 464 (Scalia, J., dissenting). "[B]ecause . . . voluntariness remains the constitutional standard, and as such continues to govern the admissibility for impeachment purposes of statements taken in violation of *Miranda*, the admissibility of the fruits of such statements, and the admissibility of statements challenged as unconstitutionally obtained despite the interrogator's compliance with *Miranda*," *Miranda* has not completely superceded the voluntariness test. *Id.* (Scalia, J., dissenting) (internal quotation marks omitted).

178. *Id.* at 464-65 (Scalia, J., dissenting). Justice Scalia stated:

> 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

from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[179]

IV. COMMENT

Since 1943, the Supreme Court has relied on its supervisory power to announce binding rules of evidence and procedures to aid federal courts in the administration of justice,[180] without directly stating the source or precisely defining the contours of this power.[181] Yet, the Court failed to exercise this inherent power once during the first 150 years of its existence, which undermines its legitimacy.[182] Today, the Court has become less willing to invoke its supervisory power to reach its desired outcomes, due, in large part, to limitations created by its own jurisprudence.[183]

It is arguable, however, that the Warren Court invoked what remained of its supervisory power after *Palermo* (1959) to set forth the *Miranda* warnings[184] because it believed a higher standard was needed to protect the individual liberty interests of suspects being interrogated in police custody. Throughout its 109-page *Miranda* opinion, the Warren Court never identified the exact source of the *Miranda* warnings.[185] While it stated that it was setting forth "concrete

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> required by the Constitution) are reasonably affordable in the criminal investigatory process. And I see much to be gained by reaffirming for the people the wonderful reality that they govern themselves—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.

Id. at 464 (Scalia, J., dissenting) (internal quotation marks and citation omitted).

179. *Id.* at 465 (Scalia, J., dissenting).

180. *See supra* notes 42-43 and accompanying text.

181. *See supra* notes 81-104 and accompanying text; *see also Dickerson*, 530 U.S. at 437; Pushaw, *supra* note 3, at 148-49 ("[The supervisory power's] legal source remains unexplained.").

182. Pushaw, *supra* note 3, at 233.

183. *See supra* notes 65-78 and accompanying text (discussing United States v. Payner, 447 U.S. 727 (1980)); *supra* notes 56-64 and accompanying text (discussing Palermo v. United States, 360 U.S. 343 (1959)).

184. *See* Miranda v. Arizona, 384 U.S. 436, 444-45 (1966); *see also supra* notes 128-35 and accompanying text (noting that the Warren Court failed to enunciate clearly whether *Miranda* was a constitutional rule or a product of the supervisory power).

185. *See Miranda*, 384 U.S. at 436-445; *see also Dickerson*, 530 U.S. at 448 (Scalia, J., dissenting) ("the decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous").

constitutional guidelines"[186] dealing with issues "of constitutional dimensions"[187] "grounded in . . . the Fifth Amendment of the Constitution,"[188] it never declared that the Constitution requires the issuance of *Miranda* warnings or their equivalents.[189] The most logical explanation as to why the Warren Court failed to declare that the Constitution requires *Miranda* warnings is because nowhere in the text of the Constitution is there any enunciation that *Miranda* warnings are the proper procedural safeguard for the privilege against self-incrimination.[190] Additionally in 1966, Congress had yet to set forth a statute governing the admissibility of custodial confessions so as to prevent the Court from invoking its supervisory power under its current jurisprudence.[191] These two scenarios bolster the argument that the Warren Court promulgated the *Miranda* warnings under the guise of its supervisory power. Finally, upon examining the pre-*Miranda* cases invoking the supervisory power,[192] the Court tended to invoke its supervisory power to prevent manifest injustices by the government and government officials against the criminally accused.[193] These inequities were the exact concern of the Warren Court and the rationale underlying the promulgation of the *Miranda* warnings:

> 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. In order to combat these pressures . . . the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.[194]

Based on these reasons, it appears that the Warren Court, in an attempt to more effectively protect individual liberties, invoked its supervisory power to create a

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186. *Miranda*, 384 U.S. at 441-42.

187. *Id.* at 490.

188. *Id.* at 489.

189. *See Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting).

190. *See generally* U.S. CONST.

191. *See* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts [via the supervisory power] exists only in the absence of a relevant Act of Congress." (citing Funk v. United States, 290 U.S. 371, 381-82 (1933))).

192. *See supra* notes 22-55 and accompanying text.

193. *See* Pushaw, *supra* note 3, at 865 (noting that the Court invokes its supervisory power to overturn "convictions that resulted from what it believed to be unfair or abusive conduct by federal law enforcement officials").

194. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

higher standard to govern the admission of custodial confessions against an accused.

Two years after *Miranda*, Congress took legislative action to supercede the *Miranda* warnings by enacting § 3501.[195] Thus, subsequent congressional action sought to overturn a rule created under the Court's supervisory power,[196] similar to *Palermo*.[197] But what distinguishes this situation from *Palermo* is that the Department of Justice chose not to invoke § 3501 and prohibited all United States Attorneys from applying it, as well.[198] Due largely to this strong stance taken by the Department of Justice, the Court never considered the legitimacy of the statute prior to *Dickerson*. Over the course of these thirty-two years, the *Miranda* warnings became "part of [the] national culture" because the police were issuing these warnings to suspects in the field and courts were interpreting and developing *Miranda* jurisprudence.[199] Due to the strong position taken by the Department of Justice and the resulting thirty-two-year "lag" period, the Rehnquist Court made the policy decision to keep the *Miranda* warnings.[200] However, it was the legal reasoning, employed by the Rehnquist majority to maintain these warnings, that prompted Justice Scalia's sharp dissent.[201]

The Rehnquist majority in *Dickerson* was in a no-win situation in finding a legal theory upon which to maintain the *Miranda* warnings. It could no longer rely on its supervisory power to maintain the warnings because there now existed a relevant Act of Congress (§ 3501).[202] This subsequent action by Congress left the Court no other alternative but to declare the *Miranda* warnings constitutional rights.[203] In effect, the Court made itself a traveling constitutional convention by amending the Constitution to include *Miranda* warnings, without adhering to the amendment process detailed in Article V of the Constitution.[204] While the

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195. *See* Dickerson v. United States, 530 U.S. 428, 445 (2000) ("Congress intended by its enactment [of § 3501] to overrule *Miranda*.").

196. *See id.* at 435-36.

197. *See generally* Palermo v. United States, 360 U.S. 343 (1959); *see also supra* notes 56-64 and accompanying text.

198. *See* United States v. Dickerson, 166 F.3d 667, 680-82 (4th Cir. 1999) (describing the Department of Justice's affirmative impediment to the enforcement of § 3501), *rev'd*, 530 U.S. 428 (2000).

199. *See Dickerson*, 530 U.S. at 443.

200. *See generally id.*

201. *See id.* at 444-46 (Scalia, J., dissenting).

202. *See supra* notes 195-97 and accompanying text.

203. *See Dickerson*, 530 U.S. at 444 ("[W]e conclude that *Miranda* announced a constitutional rule that Congress may not supercede legislatively.").

204. *See* U.S. CONST. art. V. This Article states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the

majority likely understood the dangers posed by such judicial activism, it must have concluded that the benefits of maintaining the *Miranda* warnings outweighed the burdens of implementing a new standard for custodial confessions. Because the Warren Court had the supervisory power upon which to base its *Miranda* decision, it was unnecessary to enunciate *Miranda* as a constitutional rule. Yet, the Court's supervisory power jurisprudence disabled the Rehnquist Court from also hanging its hat on the supervisory power; instead, it forced the Court to impermissibly amend the Constitution to effectuate its "consideration[s] of justice."[205]

V. CONCLUSION

This Comment discusses the supervisory power of the Supreme Court generally and how the Court most likely created the *Miranda* warnings through the use of this inherent supervisory power. However, in *Dickerson*, the Court was forced to declare these *Miranda* warnings to be constitutional rights (i.e., rights that could not be overruled or superceded by Congress) because it no longer could uphold *Miranda* under its supervisory power. In other words, the Court was forced to speak with a "forked tongue." In effect, by making the *Miranda* warnings constitutional rights, the Court amended the Constitution impermissibly. Justice Scalia, in dissent, made a mockery of the majority's flawed logic—or rather—lack of logic and warned of the dangers posed when decisions are made based on custom, not legal principles. The Court could not invoke its inherent supervisory power to keep the *Miranda* warnings, so it had to distort traditional constitutional doctrine to effectuate its desired outcome.

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> Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

Id.; *see also Dickerson*, 530 U.S. at 464-65 (Scalia, J., dissenting) (The framers intended to give the people the right to amend the Constitution of the United States, not the Supreme Court. The Court's job is to apply the law, not rewrite the Constitution.).

205. *See* Pushaw, *supra* note 3, at 780.