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**MIRANDA, DICKERSON, AND JEWISH LEGAL THEORY: THE  
CONSTITUTIONAL RULE IN A COMPARATIVE  
ANALYTICAL FRAMEWORK**

SAMUEL J. LEVINE\*

This Essay briefly explores *Dickerson v. United States*,<sup>1</sup> the important 2000 decision in which a divided United States Supreme Court held that the standard established in *Miranda v. Arizona*<sup>2</sup> continues to govern the admissibility of confessions, notwithstanding a federal statute enacted subsequent to *Miranda* that provided an alternative standard.<sup>3</sup> Rather than focusing on substantive issues of the Fifth Amendment and self-incrimination,<sup>4</sup> this Essay addresses broader theoretical implications of the approaches adopted by the majority and dissenting opinions in *Dickerson*. The majority of the Court concluded that *Miranda* set forth a “constitutional rule,” and therefore could not be superseded by a legislative act of Congress.<sup>5</sup> The dissent argued that in establishing such a “rule,” which is prophylactic in nature and subject to exceptions and modifications, the Court impermissibly took on the role of a legislature rather than the role of interpreter of the Constitution.<sup>6</sup>

Drawing a parallel to the interpretation of the Torah in Jewish legal theory,<sup>7</sup> this Essay proposes a comparative framework for analyz-

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\* Professor of Law, Pepperdine University. I thank Mark Graber and the Editors of the *Maryland Law Review* for inviting me to participate in the 2009 Maryland Constitutional Law Schmooze. I thank Fraida Liba, Yehudah, Aryeh, Rachel, and Shira for continued encouragement.

1. 530 U.S. 428 (2000).

2. 384 U.S. 436 (1966).

3. See 18 U.S.C. § 3501 (2006) (establishing that the admissibility of a confession depends upon whether the confession was “voluntarily given”), *invalidated by* *Dickerson v. United States*, 530 U.S. 428 (2000).

4. For a substantive discussion of self-incrimination in Jewish law and American law, see Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT’L & COMP. L. REV. 257 (2006).

5. *Dickerson*, 530 U.S. at 444.

6. *Id.* at 450–61 (Scalia, J., dissenting).

7. This framework relies, in part, on my previous work. See, e.g., Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997) [hereinafter Levine, *Jewish Legal Theory*] (developing a conceptual framework by which to apply the notion of “rules and standards” in Jewish law to address contemporary constitutional issues); Samuel J. Levine, *Of Inkblots and Omnisignificance: Conceptualizing Secondary and Symbolic Functions of the Ninth Amendment, in a Compara-*

ing the division between the majority and dissent over the concept and status of a “constitutional rule.” This Essay finds a similar debate among medieval legal authorities over the status of a rule in the Jewish legal system that appears to function in a manner ordinarily reserved for legislation.<sup>8</sup> Some authorities categorize the rule as rabbinic legislation, while others understand the rule as a biblical law with quasi-legislative characteristics.<sup>9</sup> Taking the conceptual comparison a step further, this Essay considers ways in which Jewish legal theory might elucidate the nature of the “constitutional rule” delineated in *Miranda*.<sup>10</sup>

## I. MIRANDA, DICKERSON, AND THE “CONSTITUTIONAL RULE”

### A. Miranda

In the landmark 1966 case, *Miranda v. Arizona*,<sup>11</sup> the United States Supreme Court considered the applicability of the Fifth

*tive Hermeneutic Framework*, 2009 MICH. ST. L. REV. (forthcoming) (looking to the case of the “stubborn and rebellious son” in *Deuteronomy* 21:18–21, which prescribes a capital penalty for an unlikely offense, as a means by which to understand the apparent superfluity of the Ninth Amendment); Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998) (exploring a similarity in biblical and constitutional interpretation, through which unenumerated rights and principles emerge by reference to enumerated rights and principles). This framework also builds upon the work of a number of legal scholars. See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (developing a normative conception of the legal world by reference to biblical text); David R. Dow, *Constitutional Midrash: The Rabbis’ Solution to Professor Bickel’s Problem*, 29 HOUS. L. REV. 543 (1992) (drawing parallels between biblical and constitutional interpretation while highlighting common interpretive principles and the analogous roles of judge and rabbi); Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985) (discussing, at length, common hermeneutic principles applied in biblical, literary, and legal scholarship); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (analogizing the conflict between “textualists” and “supplementers” in constitutional interpretation to the conflict between Protestant and Catholic biblical interpretation); Gregory A. Kalscheur, *Christian Scripture and American Scripture: An Instructive Analogy?*, 21 J.L. & RELIGION 101 (2005–2006) (reviewing JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004)); Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 SUP. CT. REV. 123 (identifying similarities between conflicts over constitutional interpretation and conflicts over scriptural interpretations between the Catholic and Protestant churches); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551, 557–64 (1985) (analogizing certain forms of constitutional interpretation to the interpretation of sacred texts by religious communities); see generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (exploring the effects of sanctifying the Constitution by placing it at the center of American political life).

8. See *infra* Part II.B.

9. See *infra* Part II.B.

10. See *infra* Part II.B–C.

11. 384 U.S. 436 (1966).

Amendment privilege against self-incrimination<sup>12</sup> in the context of custodial police interrogation. The Court declared unequivocally that “there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.”<sup>13</sup> Moreover, the Court emphasized that “without proper safeguards the process of in-custody interrogation . . . 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.”<sup>14</sup> The Court held that “[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.”<sup>15</sup>

Strikingly, in contrast to the Court’s forceful affirmation of the applicability of Fifth Amendment rights during police interrogation, the Court was unwilling to conclude that “the Constitution necessarily requires adherence to any particular solution” as a means of protecting those rights.<sup>16</sup> In fact, the Court encouraged Congress and the States to “exercise . . . their creative rule-making capacities” to formulate effective methods of protecting the rights of individuals interrogated by the police.<sup>17</sup> The Court, however, prescribed its own set of safeguards, thus establishing the procedures that would constitute the *Miranda* warnings.<sup>18</sup> Notably, notwithstanding the Court’s insistence that the Constitution does not require a particular solution, the Court stated that “unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in

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12. See U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”).

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

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See *id.* at 479. The Court explained the following:

[An individual in police custody] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . . [U]nless and until such warnings and waiver [of those rights] are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

*Id.*

assuring a continuous opportunity to exercise it, the [*Miranda* warnings] must be observed.”<sup>19</sup>

The majority opinion in *Miranda* faced considerable criticism on a number of grounds, including the argument that the Court’s methodology was “not constitutional interpretation . . . but legislation from the bench.”<sup>20</sup> Even defenders of *Miranda* acknowledged that the opinion “does not even look like an ordinary opinion,” but instead “reads more like a legislative committee report with an accompanying statute.”<sup>21</sup> Among other unusual characteristics of the opinion, critics of *Miranda* pointed to the apparently “prophylactic” nature of the *Miranda* requirements<sup>22</sup> as more akin to legislation than judicial interpretation of the Constitution. Indeed, the language and logic employed in a number of subsequent United States Supreme Court decisions reinforce the impression that *Miranda* established “prophylactic standards” beyond the protections provided by the Constitution<sup>23</sup> and thus “sweeps more broadly than the Fifth Amendment itself.”<sup>24</sup> Likewise, the process through which the Court adopted various exceptions to *Miranda* arguably resembles legislative modification rather than constitutional interpretation.<sup>25</sup>

19. *Id.* at 467.

20. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 19 & n.57 (2004) (citing Justice Harlan’s *Miranda* dissent as well as a number of “especially prominent assaults” leveled on *Miranda* by legal scholars).

21. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); see also Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson*, 45 N.Y.L. SCH. L. REV. 119, 122 (2000–2001) (“Even on the surface, *Miranda*’s insistence on detailed warnings looks legislative.”).

22. See, e.g., Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 106–11 (1985) (explaining how the *Miranda* holding is prophylactic).

23. E.g., *Michigan v. Tucker*, 417 U.S. 433, 445–46 (1974).

24. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); see also Richard H.W. Maloy, *Can a Rule Be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2471–74 (2001) (noting that five members of the seven Justice majority in *Dickerson* had authored opinions indicating that *Miranda* was not a “constitutional” decision).

25. See *Dickerson v. United States*, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting). Justice Scalia explained the following:

[I]f confessions procured in violation of *Miranda* are confessions “compelled” in violation of the Constitution, the post-*Miranda* decisions I have discussed [that did not require suppression of such confessions] 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.* (emphasis in original).

In addition to the criticisms leveled against *Miranda* by Justices and scholars alike, a federal statute<sup>26</sup> enacted just two years after the *Miranda* decision presented a more direct challenge by providing an alternative standard for the admissibility of statements obtained through custodial interrogation. In place of the *Miranda* requirements, the statute proposed that the admissibility of a confession should turn on the issue of “voluntariness,” which is to be determined through “consideration [of] all the circumstances surrounding the giving of the confession.”<sup>27</sup> On one level, the statute may simply have represented Congress’s attempt to comply with the Court’s suggestion that legislatures develop effective procedures to protect suspects’ Fifth Amendment rights during police interrogation.<sup>28</sup> More significantly, however, the statutory response to *Miranda* would lead the Court to carefully re-examine the precise nature of the *Miranda* requirements and their relationship to the Constitution.<sup>29</sup>

### B. Dickerson

In 2000, more than three decades after the enactment of the federal statute, the United States Supreme Court decided *Dickerson v. United States*,<sup>30</sup> thus finally addressing the competing standards for the admissibility of custodial confessions. The majority opinion presented the issue in stark and ostensibly clear terms. As a threshold matter, notwithstanding the Court’s “supervisory authority . . . to prescribe rules of evidence and procedure” in federal courts, “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.”<sup>31</sup> At the same time, “Congress may not legislatively supersede [the Court’s] decisions interpreting and applying the Constitution.”<sup>32</sup> Therefore, the case turned on the basic question: “[W]hether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.”<sup>33</sup>

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26. See 18 U.S.C. § 3501 (2006) (establishing that a confession shall be admissible in evidence if “voluntarily given”), *invalidated by* *Dickerson v. United States*, 530 U.S. 428 (2000).

27. *Id.*

28. See *supra* text accompanying note 17.

29. See *infra* Part I.B.

30. 530 U.S. 428 (2000).

31. *Id.* at 437.

32. *Id.*

33. *Id.*

As the Court acknowledged in *Dickerson*, however, the seemingly straightforward articulation of this question belied the complex and somewhat elusive nature of its answer. After all, in decisions subsequent to *Miranda*, the United States Supreme Court had carved out “several exceptions” to *Miranda*’s requirements and had “repeatedly referred to the *Miranda* warnings as ‘prophylactic’ and ‘not themselves rights protected by the Constitution.’”<sup>34</sup> As the Court conceded, the language in some of these cases supported the conclusion of the Court of Appeals in *Dickerson* that “the protections announced in *Miranda* are not constitutionally required.”<sup>35</sup>

Nevertheless, the Supreme Court rejected this approach, instead characterizing *Miranda* as a “constitutional decision.”<sup>36</sup> The Court emphasized that the *Miranda* opinion “is replete with statements indicating that the [*Miranda*] majority thought it was announcing a constitutional rule.”<sup>37</sup> As for subsequent United States Supreme Court decisions modifying the *Miranda* rule, the Court explained that “[t]hese decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable.”<sup>38</sup> In this light, “the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.”<sup>39</sup>

In a stinging dissent, Justice Scalia questioned the notion that *Miranda* set forth a “constitutional rule.” In a careful reading of the majority opinion, Justice Scalia observed that the Court limited its depiction of *Miranda* to “‘a constitutional decision’” that is “‘constitutionally based’” and that has “‘constitutional underpinnings.’”<sup>40</sup> Significantly, he noted, the Court did not directly state that “‘custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States.’”<sup>41</sup>

In addition, Justice Scalia found the prophylactic qualities of *Miranda* and the later modifications of *Miranda* inconsistent with the notion that *Miranda* delineated constitutional protections.<sup>42</sup> Instead, he insisted, these cases demonstrate that “a violation of *Miranda* is *not* a

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34. *Id.* at 437–38 (internal citations omitted); *see id.* at 438 n.2 (citing cases).

35. *Id.* at 438 (citing *United States v. Dickerson*, 166 F.3d 667, 687–90 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000)).

36. *Id.*

37. *Id.* at 439.

38. *Id.* at 441.

39. *Id.*

40. *Id.* at 446 (Scalia, J., dissenting) (quoting *id.* at 438, 440 & n.5 (majority opinion)).

41. *Id.*

42. *Id.* at 450–54.

violation of the Constitution.”<sup>43</sup> Quoting approvingly from a dissenting opinion in the 1969 case *North Carolina v. Pearce*,<sup>44</sup> Justice Scalia wrote that “Justice Black surely had the right idea when he derided [the *Pearce* majority’s similarly prophylactic rule] as ‘pure legislation if there ever was legislation.’”<sup>45</sup> Justice Scalia took this critique even further in *Dickerson*, arguing that “*Pearce*’s ruling pales as a legislative achievement when compared to the detailed code promulgated in *Miranda*.”<sup>46</sup> In short, Justice Scalia rejected the majority’s conception of *Miranda* as judicial interpretation of the Constitution.

Justice Scalia’s dissatisfaction with the majority opinion in *Dickerson* was shared by a wide range of scholars, including many who supported the outcome of the case.<sup>47</sup> In turn, scholars have offered a variety of responses to the Court’s ruling, providing both theories to justify the majority’s decision and further grounds for criticism.<sup>48</sup>

The next section of this Essay aims to provide a conceptual framework for understanding the division between the majority and dissenting opinions in *Dickerson*. Turning to Jewish legal theory, this Essay draws a parallel to a dispute in the Jewish legal system regarding the status of laws that, similar to *Miranda* warnings, operate in a manner that resembles legislation, but that, according to some authorities, are derived through a form of judicial decisionmaking rather than a legislative process.

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43. *Id.* at 455 (emphasis in original).

44. 395 U.S. 711 (1969).

45. *Dickerson*, 530 U.S. at 460 (quoting *Pearce*, 395 U.S. at 741 (Black, J., dissenting)).

46. *Id.*

47. See, e.g., Berman, *supra* note 20, at 26 & n.94 (stating that “[u]nfortunately, the majority did not engage Justice Scalia’s attack” and noting that “[t]his is a wholly unoriginal observation, one frequently expressed by those who applaud, as well as by those who decry, the outcome in *Dickerson*” and citing sources); Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 5 (2001) (referring to *Dickerson*’s “lack of intellectual coherence, or at least candor” and stating that in the majority opinion, Chief Justice Rehnquist “certainly made little effort to square the decision with the Court’s (and his) repeated disparagement of *Miranda* as articulating merely a prophylactic rule not required by the Fifth Amendment”); Fallon, *supra* note 21, at 126 (“Frustratingly, the Court in *Dickerson* never faced up to the challenge posed by the dissent . . .”).

Paul Cassell, whose scholarship and legal arguments were instrumental throughout the course of the *Dickerson* litigation, recalled his immediate reaction to the decision: “Where’s the rest of the opinion?” Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898, 898 (2001).

48. See, e.g., Symposium, *Miranda After Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001) (including eleven articles discussing the status of *Miranda* following the *Dickerson* decision); Berman, *supra* note 20 (suggesting how the *Dickerson* majority could have responded to the complex doctrine announced by the *Miranda* Court); Caminker, *supra* note 47 (using both *Miranda* and *Dickerson* as a means of defending the legitimacy of prophylactic doctrinal rules); Fallon, *supra* note 21 (arguing that the *Dickerson* opinion is a legitimate one).



## II. THE JEWISH LEGAL MODEL

### A. *The Torah, Biblical Interpretation, and Rabbinic Legislation: A Brief Introduction*

In Jewish legal theory, the Torah, consisting of the Five Books of Moses, serves as the foundational source of the legal system and carries the authority of supreme law.<sup>49</sup> In the words of a leading contemporary scholar, the Torah is the “written ‘constitution’ of Jewish law.”<sup>50</sup> Somewhat parallel to principles of American constitutional doctrine, biblical authority extends not only to laws that are delineated in the text of the Torah, but also to those derived from the text through methods of interpretation.<sup>51</sup> Laws that are based in the biblical text and its interpretation thus have the status of *d’oraita*, a Talmudic term drawing upon the Aramaic translation of “Torah.”<sup>52</sup> An additional category of laws, enacted by legal authorities through a legislative process, has the subordinate status of *d’rabbanan*, Aramaic for “rabbinic.”<sup>53</sup>

A helpful illustration of the different legal categories may be found in the Torah’s instruction not to engage in *melacha* on the Sabbath.<sup>54</sup> Although *melacha* is sometimes translated as “work,” a more accurate legal definition of this term denotes a variety of ritually prohibited activities.<sup>55</sup> Specifically, while the text of the Torah enumerates but a few examples,<sup>56</sup> through textual exegesis, the Talmud delineates thirty-nine principal categories of *melacha*, which are in turn divided into further sub-categories.<sup>57</sup> Because these laws are derived through interpretation of the biblical text, these categories and

49. Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916, 919 (1999) [hereinafter Levine, *Introduction*] (citing 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 479, 481 (Bernard Auerbach & Melvin J. Sikes trans., 1994)).

50. 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 479 (Bernard Auerbach & Melvin J. Sykes trans., 1994).

51. E.g., Levine, *Introduction*, *supra* note 49, at 919 & n.19; Levine, *Jewish Legal Theory*, *supra* note 7, at 445–46 & n.26.

52. Levine, *Introduction*, *supra* note 49, at 919.

53. *Id.* at 920.

54. See, e.g., Exodus 20:10; Exodus 35:2; Leviticus 23:3; Deuteronomy 5:14.

55. See, e.g., Levine, *Introduction*, *supra* note 49, at 922 & n.36 (explaining that *melacha* or *melakha* denotes a broad range of activity categorized ritually as “work”) (citation omitted); Levine, *Jewish Legal Theory*, *supra* note 7, at 445–46, 456 (same); see also ARYEH KAPLAN, *Sabbath: Day of Eternity*, in II THE ARYEH KAPLAN ANTHOLOGY 107, 128 (1998) (“[T]he prohibition is not against actual labor as much as against ritual work.”).

56. See Exodus 16:29 (“let no man leave his place”); Exodus 35:3 (“kindle no fire”); Numbers 15:32–36 (“gathering wood”).

57. See TALMUD BAVLI, *Shabbath*, *passim*. Most of the literature on Jewish law is written in Hebrew. For helpful depictions of the categories of *melacha* that are written in English,

sub-categories of *melacha* all have the status of *d'oraita* laws.<sup>58</sup> To supplement the categories of biblically prohibited *melacha*, legal authorities enacted rabbinic legislation prohibiting various other activities as well.<sup>59</sup>

The relative status of laws that are *d'oraita* and *d'rabbanan*, respectively, is expressed in functional differences premised largely on fundamental distinctions in the purpose of the laws.<sup>60</sup> Under Jewish legal theory, biblical laws are of Divine origin and command, and thus are inherently justified as a manifestation of Divine will.<sup>61</sup> Rabbinic legislation, in contrast, serves the express prophylactic purpose of safeguarding compliance with biblical laws.<sup>62</sup> Accordingly, in the context of *melacha* on the Sabbath, rabbinic legislation functions primarily as a means of protecting against violations of biblically prohibited activities.<sup>63</sup>

In addition to the laws of the Sabbath, the Torah also proscribes *melacha* on a number of holidays that take place at various times throughout the year.<sup>64</sup> Although the range of activities prohibited on these holidays is somewhat more limited and violations are not quite as consequential,<sup>65</sup> most of these laws are derived from the text and interpretation of the Torah, and thus likewise have the status of *d'oraita*.

see, for example, KAPLAN, *supra* note 55, at 133–44; BARUCH CHAIT, THE 39 AVOTH MELACHA OF SHABBATH (1992) (illustrated book with scholarly commentary).

58. See *supra* text accompanying note 52.

59. E.g., KAPLAN, *supra* note 55, at 132; Levine, *Introduction*, *supra* note 49, at 923.

60. See Levine, *Introduction*, *supra* note 49, at 927–31 (explaining limitations on rabbinic legislative authority); see also CHAIT, *supra* note 57, at 13 (“Some of the differences between a d’Oraysa and a d’Rabbanan prohibition are: 1. the type of punishment issued for the transgression[;] 2. the requirements necessary which permit a Jew to ask a non-Jew to perform a Melacha. For example, a non-Jew may be requested to do a Melacha d’Rabbanan in order to prevent a Jew from suffering a great financial loss or to enable a Jew to perform a Mitzvah.”).

61. See Levine, *Jewish Legal Theory*, *supra* note 7, at 458–61 (describing the general rule that rabbinical authorities may not place limitations upon the applicability of a commandment on the basis of the commandment’s ostensible rationale).

62. See Levine, *Introduction*, *supra* note 49, at 926 (“[T]he Talmud identifies a Biblical source for the authority of negative rabbinic legislation, such as the protective measures implemented to prevent violation of the Biblical laws of the Sabbath or Biblical prohibitions . . .”). For a discussion of positive rabbinic legislation, which mandates rather than prohibits certain activities, see *id.* at 920–21.

63. For a more detailed and nuanced discussion of different functions and sub-categories of rabbinic legislation related to the Sabbath, see *id.* at 922–25.

64. See, e.g., *Leviticus* 23:4–44 (listing sacred days on which work is prohibited); *Numbers* 28:16–31, 29:1–39 (same).

65. See generally TALMUD BAVLI, *Beitza* (delineating the contours of the prohibition of *melacha* on holidays).

B. *Melacha on Chol Ha-Moed: A Comparative Conceptual Framework*

A more complex question surrounds the status of the prohibition of *melacha on chol ha-moed*,<sup>66</sup> the relatively less sacred days that comprise the intermediate portion of lengthier holiday periods.<sup>67</sup> Noting that *melacha* is permitted on *chol ha-moed* in a variety of circumstances, including when necessary to prevent substantial monetary loss or in deference to other needs of the day,<sup>68</sup> a number of medieval legal authorities argued that such exceptions to a legal rule are indications of a legislative enactment rather than textual interpretation. Therefore, they concluded, unlike the laws of the Sabbath and other holidays, the prohibition of *melacha on chol ha-moed* has the status of *d'rabbanan* law rather than *d'oraita* law.<sup>69</sup> Moreover, based on a Talmudic statement that “they prohibited” *melacha on chol ha-moed* to encourage activities more consistent with the spirit of the holiday, such as the study of the Torah,<sup>70</sup> these authorities inferred that the prohibition was derived through prophylactic rabbinic legislation, to protect the sanctity of the day, and not through biblical interpretation.<sup>71</sup>

This analysis seems to correlate with Justice Scalia's arguments in *Dickerson*. Justice Scalia similarly cited exceptions to *Miranda* requirements as indicating that *Miranda* operated as a form of legislation and not as constitutional law.<sup>72</sup> Likewise, as Justice Scalia emphasized and as the majority in *Dickerson* conceded, several United States Supreme

66. Discussions of this issue, originating in the Talmud, have produced a substantial body of literature. See, e.g., YOSEF BABAD, MINCHAS CHINUCH (commenting on SEFER HA-CHINUCH, Commandment 323) (author's translation); ARYEH LOEB BEN ASHER, TUREI EVEN (commenting on TALMUD BAVLI, *Chagiga* 18a) (author's translation); JOSEPH B. SOLOVEITCHIK, SHIUREI HA-GRI'D AL INYANEI TEFILLIN, KETIVAT STA'M V'TZIT 75–77 (Menachem Kahn ed., 2004) (author's translation). For a brief discussion in English, see DOVID ZUCKER & MOSHE FRANCIS, CHOL HAMOED 5–10 (1981).

67. See *Leviticus* 23:4–8, 33–38 (discussing the “Feast of Unleavened Bread” (Passover) and the “Feast of Booths” (Sukkot)).

68. ZUCKER & FRANCIS, *supra* note 66, at 6.

69. See, e.g., TOSAFOTH (commenting on TALMUD BAVLI, *Chagiga* 18a) (author's translation); RABBENU ASHER, *Introduction to TALMUD BAVLI, Moed Katan* (author's translation).

70. TALMUD YERUSHALMI, *Moed Katan* 2:3.

71. See, e.g., TOSAFOTH (commenting on TALMUD BAVLI, *Chagiga* 18a) (author's translation); RABBENU ASHER, *Introduction to TALMUD BAVLI, Moed Katan* (author's translation).

72. See *supra* text accompanying notes 42–46. It should be noted, however, that Justice Scalia's analysis was aimed at demonstrating that *Miranda* was an illegitimate exercise of legislative authority by the Court, which, in the American legal system, is charged with interpreting the law. In the Jewish legal system, the high court had the authority both to interpret the biblical text and to legislate. See generally Levine, *Introduction, supra* note 49; Levine, *Jewish Legal Theory, supra* note 7. Thus, the debate among medieval legal authorities revolved around which of these legitimate functions the rabbinic decisionmakers exercised in instituting the prohibition of *melacha on chol ha-moed*.

Court decisions point to the prophylactic role that *Miranda* warnings play in safeguarding a suspect's Fifth Amendment rights.<sup>73</sup> In Justice Scalia's view, references to the prophylactic purpose demonstrate that *Miranda* embodied legislative decisionmaking rather than constitutional interpretation.<sup>74</sup>

In contrast to these approaches, however, other medieval legal authorities adopted an alternative position regarding the status of the prohibition of *melacha* on *chol ha-moed*.<sup>75</sup> Citing the Talmud's apparent reliance on methods of biblical exegesis to derive the prohibition of *melacha* on *chol ha-moed*,<sup>76</sup> these authorities concluded that the prohibition is based on the text of the Torah, and therefore has the status of *d'oraita* law.<sup>77</sup> As to characteristics of the prohibition that resemble rabbinic legislation, including the broad range of exceptions to the rule and the ostensibly prophylactic purpose of the law, they turned to another Talmudic statement: "*lo m'saran ha'katuv ella l'chachamim*"—the Torah granted to rabbinic decisionmakers the authority to determine the precise contours of the law.<sup>78</sup> Thus, these commentators explained, the prohibition of *melacha* on *chol ha-moed* represents an instance in which a law has the status of *d'oraita*, but the details of the law are subject to methods of decisionmaking more commonly associated with rabbinic legislation.

Perhaps a similar analytical framework would provide a response to Justice Scalia's objections in *Dickerson*. Under this framework, the *Miranda* requirements are based on the Fifth Amendment, but they are instituted through an unusual form of constitutional adjudication—a "constitutional rule"—which is derived through a process that more closely resembles judicial legislation. Accordingly, the law includes exceptions and prophylactic purposes, which are qualities more commonly reserved for legislative enactments.<sup>79</sup>

73. See *supra* text accompanying notes 34–35, 42–43.

74. See *supra* text accompanying notes 42–46.

75. See RASHI (commenting on TALMUD BAVLI, *Moed Katan* 11b) (author's translation); RAMBAM, MISHNE TORAH, LAWS OF YOM TOV (7:1) (author's translation).

76. See TALMUD BAVLI, *Chagiga* 18a (citing Scripture to support the prohibition of *melacha* on *chol ha-moed*).

77. Legal authorities advocating the opposing view understand this exegesis as a homiletic reading of the biblical text offered as a basis for rabbinic legislation, rather than as a genuine instance of biblical interpretation. See, e.g., TOSAFOTH (commenting on TALMUD BAVLI, *Chagiga* 18a) (author's translation); RABBENU ASHER, *Introduction* to TALMUD BAVLI, *Moed Katan* (author's translation).

78. TALMUD BAVLI, *Chagiga* 18a; see also *id.* (commentary of Zevi Hirsch Chajes).

79. It should be noted that some leading scholars reject the notion that prophylactic rules are either unusual or illegitimate in constitutional adjudication. See, e.g., Caminker, *supra* note 47, at 25–28 (finding *Miranda*'s "prophylactic" rule to be indistinguishable from "run-of-the-mill" judicial doctrine applied to First Amendment, equal protection, and in-

C. *Further Theoretical Applications to Miranda and Dickerson*

In addition to providing a conceptual framework for responding to Justice Scalia's arguments, the analogue to the prohibition of *melacha* on *chol ha-moed* may help further elucidate the majority position in *Dickerson*. Some scholars have employed a close reading of the biblical text to explain the view that the prohibition of *melacha* on *chol ha-moed* is *d'oraita* law with legislative characteristics.<sup>80</sup> Specifically, unlike the biblical prohibitions on the Sabbath and other holidays, which are stated expressly,<sup>81</sup> the prohibition of *melacha* on *chol ha-moed* is drawn from the Torah's command that these days be observed as "holy."<sup>82</sup> Thus, under the terms of the biblical text, refraining from *melacha* on *chol ha-moed* serves a primarily prophylactic function of safeguarding the sanctity of *chol ha-moed* by distinguishing it from an ordinary weekday.<sup>83</sup> Accordingly, in contrast to the contours of the prohibition of *melacha* on the Sabbath and other holidays, which are derived through standard forms of biblical interpretation, the precise details of the prohibition on *chol ha-moed* are subject to quasi-legislative determinations of rabbinic decisionmakers aimed at promoting the purpose of biblical law.<sup>84</sup>

A similar reasoning may shed light on the majority opinion in *Dickerson*. The Fifth Amendment states the following: "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."<sup>85</sup> Although the constitutional text refers specifically to testimonial settings, without mention of police interrogation, the *Miranda* opinion emphasized the Court's understanding that Fifth Amendment protections against compelled self-incrimination extend beyond the courtroom.<sup>86</sup> Accordingly, the majority in *Dickerson* may have concluded that in place of standard methods of constitutional analysis, the *Miranda* Court found it necessary to employ a prophylactic interpretive approach to protect against the compulsion inherent in the interrogation process. In short, similar to the prohibition of

terstate commerce questions); Strauss, *supra* note 21, at 195–207 (arguing that prophylactic rules are not "of questionable legitimacy," but rather "are a central and necessary feature of constitutional law"). Likewise, some suggest that it may not be unusual for biblical laws to have prophylactic characteristics. See, e.g., YOSEF ENGEL, SEFER LEKACH TOV 167–80 (author's translation).

80. See SOLOVEITCHIK, *supra* note 66, at 75–76 (author's translation).

81. See *supra* notes 54, 64 and accompanying text.

82. *Leviticus* 23:37. This reading of the biblical text represents one view in the Talmud. See TALMUD BAVLI, *Chagiga* 18a ("'Holy' implies the prohibition of work.").

83. See SOLOVEITCHIK, *supra* note 66, at 75–76 (author's translation).

84. See *id.* (author's translation).

85. U.S. CONST. amend. V.

86. See *supra* text accompanying notes 13–15.

*melacha* on *chol ha-moed*, *Miranda* warnings serve as a constitutionally required rule that functions to safeguard Fifth Amendment rights.<sup>87</sup> Therefore, the details of the rule are likewise established through quasi-legislative determinations of the Court.

Finally, comparisons to the prohibition of *melacha* on *chol ha-moed* may have procedural ramifications as well. Under Jewish legal theory, in the realm of biblical interpretation, courts generally have the license to rule on the basis of their own interpretive reasoning, rather than deferring to previous interpretations.<sup>88</sup> When exercising their legislative capacity, however, courts are far more limited in their authority to abrogate previous legislation.<sup>89</sup> In the context of biblical laws that are delineated through quasi-legislative rabbinic determinations, some scholars have suggested that the interpretive authority of later courts would be subject to the more extensive constraints that ordinarily govern legislative action.<sup>90</sup>

Applying these principles to *Dickerson* may offer support for the majority's adherence to the validity of *Miranda*. The majority declared that, notwithstanding the merits of arguments questioning the Court's holding and reasoning in *Miranda*, "the principles of *stare decisis* weigh heavily against overruling it."<sup>91</sup> In response, Justice Scalia quoted from a United States Supreme Court case: "Where . . . changes have removed or weakened the conceptual underpinnings from the prior

87. Cf. Berman, *supra* note 20, at 154 (distinguishing between "judge-interpreted constitutional meaning and constitutional decision rules" and conceptualizing *Miranda* as a "constitutional decision rule . . . adopted to *optimally* enforce constitutional meaning," and therefore arguing that *Miranda* is not an instance of illegitimate prophylactic rule-making, because "it does not *overenforce* constitutional meaning as measured against the appropriate baseline") (emphasis in original).

88. Levine, *Jewish Legal Theory*, *supra* note 7, at 475–77; see also HERSHEL SCHACHTER, GINAS EGOZ 157–58 (2007) [hereinafter SCHACHTER, GINAS EGOZ] (author's translation); YITZCHAK ZEEV HA-LEVI SOLOVEITCHIK, CHIDUSHEI MARAN RI'Z HA-LEVI AL HA-TORAH 116–17 (2003) (commenting on *Ruth* 4:6) (author's translation). It should be noted, however, that in the course of Jewish history, legal authorities have often found it necessary to defer to the interpretations of earlier authorities. Levine, *Jewish Legal Theory*, *supra* note 7, at 476–77; see also HERSHEL SCHACHTER, B'IKVEI HA-TZON 243–44 (1997) [hereinafter SCHACHTER, B'IKVEI HA-TZON] (author's translation); JOSEPH B. SOLOVEITCHIK, SHIURIM L'ZECHER ABBA MARI Z'L 241–61 (2002) [hereinafter SOLOVEITCHIK, SHIURIM L'ZECHER ABBA MARI Z'L] (author's translation); ELCHANAN WASSERMAN, KOBETZ HE'AROS 115 (Elazar Wasserman ed., 2003) (author's translation).

89. See Levine, *Introduction*, *supra* note 49, at 932–34 (describing briefly the complex rules restricting the power of a later court to modify earlier rabbinic legislation); see also SCHACHTER, B'IKVEI HA-TZON, *supra* note 88, at 243–44 (author's translation); SOLOVEITCHIK, SHIURIM L'ZECHER ABBA MARI Z'L, *supra* note 88, at 241–61 (author's translation).

90. See SCHACHTER, GINAS EGOZ, *supra* note 88, at 7 (author's translation).

91. *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, . . . the Court has not hesitated to overrule an earlier decision.’”<sup>92</sup> As per Justice Scalia’s analysis, to the extent that it represented constitutional adjudication, *Miranda*’s reasoning was no longer viable. Thus, he argued, *stare decisis* should not preclude overruling *Miranda* through the standard process of constitutional interpretation.<sup>93</sup>

Perhaps the majority’s abiding reliance on *stare decisis* to uphold *Miranda* can be premised on an alternative conception of *Miranda* as an instance of the United States Supreme Court’s quasi-legislative constitutional decisionmaking. In this perspective, parallel to the status of biblical laws derived by courts through quasi-legislation—and contrary to Justice Scalia’s analysis—*Miranda* warnings represent a constitutional law that is not susceptible to abrogation through the ordinary process of constitutional interpretation. Instead, the United States Supreme Court would be more limited in its authority to overrule *Miranda*, perhaps requiring a more formal quasi-legislative decision expressly overturning its earlier holding.<sup>94</sup> Accordingly, the majority in *Dickerson* may have concluded that, short of such a decision by the Court, *Miranda* stands as a constitutional rule.

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92. *Id.* at 462–63 (Scalia, J., dissenting) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). Moreover, he added, this quotation referred to overruling “statutory cases,” while “the standard for constitutional decisions is somewhat more lenient.” *Id.* at 462.

93. For an elaboration on Justice Scalia’s argument in this regard, see Berman, *supra* note 20, at 27–28 n.101.

94. *Cf. id.* at 28 n.101 (“[E]ven were the majority to concede that *Miranda* is most fairly read as conceiving of itself as engaged in constitutional interpretation, it is not at all obvious why it should not frankly construe *Miranda* as announcing a prophylactic rule and then afford it *stare decisis* deference on *that* rationale.”) (emphasis in original).