Indeed, the Sixth Circuit has already concluded that *Nelson* "has not provided . . . any reason . . . to revisit our past precedents."[101]

Finally, the lack of an established right to informational privacy does not make *Nelson*'s reasoning incoherent. *Nelson*'s holding hinges on the Court's conclusion that narrow tailoring was not appropriate for evaluating information collection from government employees.[102] This approach differs from that in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[103] cited by Justice Scalia in his concurrence,[104] where the Court, without defining a precise standard for when a judicial decision can constitute a taking under the Fifth Amendment, held that the plaintiffs failed to state such a claim.[105] *Stop the Beach* makes factual distinctions within a loosely defined standard; *Nelson* makes a legal distinction *between* standards. While the two approaches may use similar logic, the latter deals with legal frameworks that exist outside the specific right at issue and at a more useful level of generality.[106]

Nelson's primary attribute is its limited impact, and that should also be its legacy. The majority's reluctance to definitively establish an informational privacy right should not represent new doubts about informational privacy, but rather a tacit acceptance of the right's continued existence in lower courts, at least while the ways we share and safeguard sensitive information continue to evolve.

C. Fifth Amendment

Self-Incrimination Clause. — The Self-Incrimination Clause of the Fifth Amendment provides simply that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[1] In *Miranda v. Arizona*,[2] however, the Supreme Court created a set of familiar cautionary measures designed to protect this right: if a person is in custody, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against

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tum. *Nelson*'s failure to reaffirm it should not deprive *Whalen* of persuasive authority even to the extent that *Nelson* abrogates previous circuit interpretations of *Whalen*'s privacy language.

101 Lee v. City of Columbus, 636 F.3d 245, 260 n.8 (6th Cir. 2011).

102 *See Nelson*, 131 S. Ct. at 758 (majority opinion) (citing Connick v. Myers, 461 U.S. 138 (1983)).

103 130 S. Ct. 2592 (2010).

104 *Nelson*, 131 S. Ct. at 767 (Scalia, J., concurring in the judgment).

105 *Stop the Beach*, 130 S. Ct. at 2613 (Kennedy, J., concurring in part and concurring in the judgment).

106 Both Justice Scalia and Justice Alito recognized the distinction as a relevant one. Justice Alito joined Justice Scalia's opinion in *Stop the Beach*, which distinguished the case from others where there had been "competing standards." *Id.* at 2604 (plurality opinion).

1 U.S. CONST. amend. V. The Supreme Court incorporated the Self-Incrimination Clause against the states in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

2 384 U.S. 436 (1966).

him, and that he has a right to the presence of an attorney" prior to being questioned.[3] *Miranda* provided this "set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation."[4] The two broad questions in *Miranda* cases ask whether the person was in custody[5] and if so, whether the person waived his *Miranda* rights "voluntarily, knowingly and intelligently."[6] The waiver inquiry depends on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[7] The custody analysis, by contrast, is an objective one: to determine whether a person was placed under formal arrest or was physically restrained to the same degree as during a formal arrest, the courts ask if a reasonable person would have felt free to end the interrogation and leave, given the circumstances of the interrogation.[8]

Last Term, in *J.D.B. v. North Carolina*,[9] the Supreme Court held that a minor's age must be considered as a relevant circumstance in a *Miranda* custody analysis, assuming that the police officer knew the child's age at the time of questioning or that a reasonable officer would have considered the child's age apparent.[10] *J.D.B.* exacerbates several of *Miranda*'s inherent weaknesses because it ignores the costs of its decision, departs from the Fifth Amendment standard, and limits states' power. Further, *J.D.B.* dilutes *Miranda*'s primary benefit — its clarity[11] — which suggests that the Court should consider returning to its traditional Fifth Amendment jurisprudence focused only on the voluntariness of a suspect's statement.[12]

After seeing J.D.B., a thirteen-year-old seventh grader, in a neighborhood where two home break-ins had recently occurred, the police stopped and questioned him but made no arrest.[13] Five days later, a police investigator went to J.D.B.'s school, where he asked school administrators to verify J.D.B.'s date of birth and contact information.[14] The investigator, the school resource officer, and two school adminis-

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[3] *Id.* at 444; *see also* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("[T]he warnings have become part of our national culture.").

[4] Maryland v. Shatzer, 130 S. Ct. 1213, 1219 (2010) (quoting *Miranda*, 384 U.S. at 467).

[5] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 494–95 (1977).

[6] *Miranda*, 384 U.S. at 444.

[7] North Carolina v. Butler, 441 U.S. 369, 374–75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) (internal quotation marks omitted).

[8] Thompson v. Keohane, 516 U.S. 99, 112 (1995).

[9] 131 S. Ct. 2394 (2011).

[10] *Id.* at 2406.

[11] *See* Moran v. Burbine, 475 U.S. 412, 425 (1986).

[12] For an example of the traditional Fifth Amendment inquiry, see *Haynes v. Washington*, 373 U.S. 503, 513–14 (1963).

[13] *J.D.B.*, 131 S. Ct. at 2399.

[14] *Id.*

trators questioned J.D.B. in a conference room for between thirty and forty-five minutes.[15] The investigator asked J.D.B. about the break-ins, and J.D.B. denied participating in either one.[16] The investigator explained to J.D.B. that he could send J.D.B. to juvenile detention before any court appearance.[17]

J.D.B. then confessed that he and a friend had broken into the homes.[18] At that point, the investigator told J.D.B. that he could decline to answer any questions and could leave the interview if he wished.[19] J.D.B. provided further details regarding the break-ins, including the location of the stolen items, and he wrote a statement at the investigator's prompting.[20] At the end of the school day, J.D.B. left to ride the bus home.[21] The state of North Carolina filed two juvenile petitions against J.D.B.[22] His attorney moved to suppress the statements made by J.D.B. in the school conference room and the evidence derived from them, claiming that J.D.B. was questioned while in custody without being afforded *Miranda* warnings and that his statements were involuntary.[23]

The trial court denied J.D.B.'s motion to suppress.[24] J.D.B. entered a transcript of admission and the court found him delinquent, but J.D.B. renewed his objection to the denial of his motion to suppress.[25] The trial court concluded that J.D.B. was not in custody at any point during the interview at school,[26] and a divided North Carolina Court of Appeals affirmed.[27] The court held that "a reasonable person in J.D.B.'s position would not have believed himself to be in custody or deprived of his freedom of action in some significant way," taking into account "all of the circumstances surrounding J.D.B.'s interactions with officers."[28] Notably, the court refused to use J.D.B.'s age as a relevant circumstance because "consideration of a suspect's individual characteristics — including age — could be viewed as creat-

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15 *Id.*
16 *Id.*
17 *Id.* at 2400.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *In re* J.B., Juvenile, No. COA06-662, 2007 WL 1412457, at *2 (N.C. Ct. App. May 15, 2007).
25 *Id.* at *3. J.D.B. appealed, and the North Carolina Court of Appeals remanded for the trial court to enter findings of fact in support of its denial of J.D.B.'s suppression motion. *Id.* at *1.
26 Joint Appendix at 97a–102a, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121), 2010 WL 5178047.
27 *In re* J.D.B. Juvenile, 674 S.E.2d 795, 800–01 (N.C. Ct. App. 2009).
28 *Id.* at 800.

ing a subjective inquiry."[29] The North Carolina Supreme Court affirmed.[30] The majority held that J.D.B. was not in custody and that the objective test for custody should not "include consideration of the age and academic standing of an individual subjected to questioning by police."[31]

The Supreme Court reversed and remanded.[32] Writing for the Court, Justice Sotomayor[33] held that a child's age must inform the *Miranda* custody analysis if the questioning officer knew the child's age at the time of questioning or if the age "would have been objectively apparent to a reasonable officer."[34] Justice Sotomayor explained that the "Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination" because the Court "[r]ecogniz[ed] that the inherently coercive nature of custodial interrogation 'blurs the line between voluntary and involuntary statements.'"[35] To determine whether a person is in custody, the Court has provided for "an objective inquiry."[36] Because a reasonable child would feel more pressure to agree to questioning by the police than would a reasonable adult,[37] the inclusion of a youth's age "in the custody analysis is consistent with the objective nature of that test."[38]

To support the idea "that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them,"[39] Justice Sotomayor described the treatment of children in other areas of law. For example, she listed the various "disqualifications placed on children as a class," including "limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent."[40] In negligence suits, "'a person's childhood is a relevant circumstance' to be considered" when using the reasonable person standard.[41] And in a variety of other contexts, the Court has held that children "'are

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[29] *Id.* (quoting Yarborough v. Alvarado, 541 U.S. 652, 668 (2004)) (internal quotation marks omitted).

[30] *In re* J.D.B., 686 S.E.2d 135, 140 (N.C. 2009).

[31] *Id.* The dissenters argued that age should be considered in the custody analysis because "[t]he perceptions, cognitive abilities, and moral development of juveniles are different from those of adults." *Id.* at 142 (Brady, J., dissenting); *see id.* at 149–50 (Hudson, J., dissenting).

[32] *J.D.B.*, 131 S. Ct. at 2408.

[33] Justice Sotomayor was joined by Justices Kennedy, Ginsburg, Breyer, and Kagan.

[34] *J.D.B.*, 131 S. Ct. at 2406.

[35] *Id.* at 2401 (quoting Dickerson v. United States, 530 U.S. 428, 435 (2000)).

[36] *Id.* at 2402.

[37] *Id.* at 2403.

[38] *Id.* at 2406.

[39] *Id.* at 2403.

[40] *Id.*

[41] *Id.* at 2404 (quoting RESTATEMENT (THIRD) OF TORTS § 10 cmt. b (2005)).

more vulnerable or susceptible to . . . outside pressures' than adults."[42] Though she considered "citation to social science and cognitive science authorities . . . unnecessary to establish these commonsense propositions," Justice Sotomayor argued that "the literature confirms what experience bears out."[43]

Though Justice Sotomayor recognized that an objective custody inquiry "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect,"[44] she contended that courts could account for the frailty of children "without doing any damage to the objective nature of the custody analysis."[45] To include age in the custody analysis, law enforcement and courts would not need imaginative abilities or scientific training, but rather would "simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."[46] Ignoring age would lead to a "nonsensical" custody inquiry in cases like J.D.B.'s, for it would be impossible for the police or courts to determine how a reasonable adult would behave in such a schoolhouse situation or in other "objective circumstances that, by their nature, are specific to children."[47] Responding to the state's argument that age has only an internal effect and is not an objective circumstance, Justice Sotomayor wrote that "[b]ecause the *Miranda* custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an 'internal' or 'psychological' impact on perception."[48] Justice Sotomayor distinguished the child's age from other personal characteristics such as a person's prior interrogation history because age has an "objectively discernible relationship to a reasonable person's understanding of his freedom of action."[49] Therefore, the Court remanded the case for the state courts to perform a custody inquiry that included J.D.B.'s age as a relevant circumstance.[50]

Justice Alito dissented.[51] Arguing that "[s]afeguarding the constitutional rights of minors does not require the extreme makeover of *Miranda* that [the Court's] decision may portend,"[52] Justice Alito wrote that considering age in the custody analysis undermined "one of *Mi-*

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[42] *Id.* at 2403 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).
[43] *Id.* at 2403 n.5 (citing Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)).
[44] *Id.* at 2402.
[45] *Id.* at 2403; *see id.* at 2404–05.
[46] *Id.* at 2407.
[47] *Id.* at 2405.
[48] *Id.* at 2407.
[49] *Id.* at 2404; *see id.* at 2405.
[50] *Id.* at 2408.
[51] Justice Alito was joined by Chief Justice Roberts and Justices Scalia and Thomas.
[52] *J.D.B.*, 131 S. Ct. at 2410 (Alito, J., dissenting).

randa's principal strengths — 'the ease and clarity of its application' by law enforcement officials and courts."[53] He emphasized that *Miranda* embodied a bright-line rule that brought both rigidity and clarity to law enforcement and courts.[54] Justice Alito conceded that "many suspects who are under 18 will be more susceptible to police pressure than the average adult."[55] Still, he wrote, "it has always been the case under *Miranda* that the unusually meek or compliant are subject to . . . the same custody requirement[] as those who are unusually resistant to police pressure."[56]

Justice Alito made several practical criticisms of the Court's holding. In response to the Court's decision to require consideration of a child's age when it was known to the officer at the time of the questioning or would have been apparent to a reasonable officer, Justice Alito argued that the former issue mandates an inquiry into the officer's subjective views, while the latter issue "will generate time-consuming satellite litigation over a reasonable officer's perceptions."[57] Another problematic issue for courts considering age is how a "60-year-old judge," regardless of his common sense, can "determine whether the differences between a typical 16 1/2-year-old and a typical 18-year-old with respect to susceptibility to the pressures of interrogation are sufficient to change the outcome of the custody determination."[58] Justice Alito wrote that the decision would add little protection for minors to *Miranda*'s regime because most juvenile offenders are near age eighteen, the courts can already consider the schoolhouse environment, and age factors into *Miranda*'s voluntariness inquiry.[59] More broadly, Justice Alito argued that the Court's opinion would either result in a "fundamental transformation"[60] of the custody inquiry into one that considers many personal characteristics or force the Court to draw arbitrary lines of distinction between age and other characteristics such as intelligence, cultural background, and education.[61]

Justice Alito is surely correct that *J.D.B.* portends a transformation of *Miranda* law, and it could be a transformation that spells the end of

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[53] *Id.* at 2409 (quoting Moran v. Burbine, 475 U.S. 412, 425 (1986)).

[54] *Id.* at 2411.

[55] *Id.* at 2413.

[56] *Id.* (citing Berkemer v. McCarty, 468 U.S. 420, 442 & n.35 (1984)).

[57] *Id.* at 2415.

[58] *Id.* at 2416. Justice Alito distinguished the tort examples and prior cases cited by the majority in support of the idea that courts frequently and easily take into account age, noting that those applications "do not require on-the-spot judgments by the police." *Id.* at 2417; *see id.* at 2416.

[59] *Id.* at 2417–18. The voluntariness inquiry considers "the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation" to "determin[e] whether a defendant's will was overborne." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[60] *J.D.B.*, 131 S. Ct. at 2409 (Alito, J., dissenting).

[61] *Id.* at 2414–15.

Miranda itself. *Miranda*, after all, contained several inherent problems: The rule imposes substantial social costs[62] that may outweigh its putative benefits.[63] It is an imperfect approximation of the Fifth Amendment right it is designed to protect.[64] And it forecloses state and local policymaking on basic matters of criminal procedure.[65] The Court justified these disadvantages largely on the basis that its rule would increase the clarity and simplicity of self-incrimination determinations,[66] though *Miranda*'s success in that regard has been dubious. *J.D.B.* both heightened the problems inherent in *Miranda* and further limited its primary benefit. As a result, to the extent that *Miranda* was ever sound as a matter of either constitutional law[67] or prophylaxis, *J.D.B.* makes it even less defensible.

Miranda has always risked placing costs on society disproportionate to its benefits,[68] and *J.D.B.* exacerbates this risk in two ways. The Court has explained that "[w]hen th[e] Court creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs."[69] In the past, the Court has considered the costs of modifying *Miranda* in its decisions.[70] *J.D.B.*, by contrast, disavowed any concern for the cost of its rule, arguing that such considerations were irrelevant to the ques-

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[62] *See* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 303–10 (1996).

[63] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 463 (2000) (Scalia, J., dissenting) ("It is not immediately apparent, however, that the judicial burden has been eased by the 'bright-line' rules adopted in *Miranda*."); Withrow v. Williams, 507 U.S. 680, 711 (1993) (O'Connor, J., concurring in part and dissenting in part) ("*Miranda* creates as many close questions as it resolves.").

[64] *See* Fare v. Michael C., 442 U.S. 707, 718 (1979) ("[*Miranda*] requir[es] the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.").

[65] *See Dickerson*, 530 U.S. at 464–65 (Scalia, J., dissenting).

[66] *See* Moran v. Burbine, 475 U.S. 412, 425 (1986) (emphasizing the "ease and clarity of [*Miranda*'s] application"); *see also* Fare v. Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, J., opinion in chambers) (calling *Miranda*'s "precise" rule its "core virtue").

[67] It is "a doubtful proposition as a matter both of history and precedent" "that the Fifth Amendment privilege against self-incrimination applie[s] in the context of extrajudicial custodial interrogation." *Dickerson*, 530 U.S. at 447 (Scalia, J., dissenting); *see also* Miranda v. Arizona, 384 U.S. 436, 510–11 (1966) (Harlan, J., dissenting). *See generally* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION 3–41 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437, 453–90 (1989).

[68] *See* Cassell, *supra* note 62, at 303–10.

[69] Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009). If *Miranda*'s concept of rights in extrajudicial custody was a constitutional command, the cost-benefit analysis would be irrelevant. The Supreme Court has explained that *Miranda*'s "procedural safeguards [a]re not themselves rights protected by the Constitution but [a]re instead measures to insure that the right against compulsory self-incrimination [i]s protected." Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[70] *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 434 (1984) ("Adherence to the principle that *all* suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes."); *id.* at 441.

tion at hand.[71] The *J.D.B.* Court's refusal to consider the cost of its rules is likely to increase the costs of *Miranda*, since it reduces the likelihood that the Court will calibrate *Miranda* protections to maximize society's welfare.

The second way that *J.D.B.* worsens the cost problems inherent in *Miranda* is by setting a low standard for cost-benefit analysis of *Miranda* rules. The majority, after implying that costs should be ignored, provided a limited and nonrigorous accounting of the costs of adding age to the custody inquiry.[72] The majority baldly asserted that "a child's age, when known or apparent, is hardly an obscure factor to assess,"[73] which ignores the difficulties faced by law enforcement and judges in considering gradations of ages.[74] If law enforcement is unsure of how to apply the custody analysis with age, valuable confessions "essential to society's compelling interest in finding, convicting, and punishing those who violate the law"[75] could be lost by unnecessarily Mirandizing suspects.[76] In short, whether the prophylactic custody inquiry should be a clear rule or a flexible standard is purely a cost-benefit question, but it is a question that the majority implies is irrelevant and then declines to answer fully, instead appealing to "common sense."[77] Such cost-benefit "analysis" threatens to sow costly rules that reap little benefit for society.

Another inherent weakness of *Miranda* is that its rules are both over- and underinclusive relative to the Fifth Amendment's right against self-incrimination,[78] and *J.D.B.* puts further space between court rule and constitutional principle. *Miranda* considered whether an individual was in custody on the premise that a custodial interrogation is "inherently compelling" and therefore likely to make an indi-

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[71] *See J.D.B.*, 131 S. Ct. at 2407 (calling "a fundamental flaw" in the dissent's concern with cost-benefit analysis the alleged fact that "[n]ot once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial 'brighter'").

[72] *See id.* at 2416–17 (Alito, J., dissenting).

[73] *Id.* at 2407 (majority opinion).

[74] *See id.* at 2415–16 (Alito, J., dissenting).

[75] Moran v. Burbine, 475 U.S. 412, 426 (1986).

[76] *See* Cassell, *supra* note 62, at 304. At oral argument in *J.D.B.*, Justice Breyer facetiously referred to the danger of over-Mirandizing as "the terrible thing, the awful thing that has to happen if the officer isn't sure whether this individual thinks he's in custody or not." Transcript of Oral Argument at 37, 131 S. Ct. 2394 (No. 09-11121), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-11121.pdf. He argued that adding age would simply be "err[ing] somewhat on the safe side." *Id.* at 49. But there is no such "safe side." As Justice White wrote in dissent in *Miranda*, "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him." Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting). A "safe side" for suspects is nothing more than a lion's den for victims.

[77] *J.D.B.*, 131 S. Ct. at 2407.

[78] *Id.* at 2413–14 (Alito, J., dissenting).

vidual's confession coerced.[79] Yet *J.D.B.* introduced into the custody analysis a question that has no bearing on the individual's sense of coercion: whether an officer knew or should reasonably have known a suspect's age.[80] The Court insisted on this condition because it felt it was necessary to make the test administrable for officers.[81] But in doing so it opened even greater distance between *Miranda* and the Fifth Amendment principle it is designed to protect, and thus violated the Court's own admonition "to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it."[82] Because *J.D.B.*'s test would ignore a suspect's age even when it makes him more likely to feel coerced simply because he reasonably looks like an adult, the Court's decision provides yet another rough, prophylactic rule that fails to tightly fit the constitutional protections in the Fifth Amendment. *J.D.B.*'s addition of the officer's knowledge to the custody inquiry is the most recent example "of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement"[83] and upon the people.

Indeed, the *J.D.B.* majority, without discussion of the Constitution, now forces all fifty states to adopt a certain rule in all criminal investigations.[84] Regardless of the soundness of the majority's rule, where the Constitution mandates no particular rule, rulemaking should be left to "the genius of legislation rather than the everlasting aye or nay of constitutional decision" delivered "by the casting vote of one or two respected men in a stately building in Washington."[85] The Constitu-

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[79] *Miranda*, 384 U.S. at 467.

[80] *J.D.B.*, 131 S. Ct. at 2406. The Court itself has previously emphasized that the officer's knowledge is irrelevant. *See, e.g.*, Stansbury v. California, 511 U.S. 318, 323 (1994) ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.").

[81] *See J.D.B.*, 131 S. Ct. at 2406 n.8.

[82] United States v. Patane, 542 U.S. 630, 643 (2004) (plurality opinion).

[83] Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting).

[84] The "Constitution[] and the Laws of the United States which shall be made in Pursuance thereof" are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Yet the majority does not discuss the constitutional basis for its rule, which sets nationwide policy. The majority's only *mention* of any constitutional provision comes in a generic description of *Miranda*: "this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination." *J.D.B.*, 131 S. Ct. at 2401.

[85] Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 930 (1965) (footnote omitted). It is true that the legislature can mitigate court-mandated criminal rules through its control over criminal definitions, sentencing, and funding. *See* Frank H. Easterbrook, *Bill of Rights and Regression to the Mean*, 15 HARV. J.L. & PUB. POL'Y 71, 80 (1992); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7–12 (1997). But this fact does not mean that those rules are more constitutionally grounded, and court rules still increase costs because they remove a range of policies from the legislature's options.

tion is "the supreme Law of the Land,"[86] and the Tenth Amendment reserves all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States . . . to the States respectively, or to the people."[87] It would be one thing for the Court to provide the *Miranda* baseline and then allow states to supplement it.[88] After all, several states had passed legislation requiring consideration of age in the custody inquiry.[89] But it is another thing for the Court to require the states to adopt *Miranda*'s prophylactic rule and then require them to change their rules on its every whim. *Miranda* constrained state power over criminal procedure and police practices, and *J.D.B.* constrains it further by eliminating an area of state policymaking regarding custody protections for children. State legislatures are in a better position than the courts to weigh the costs and benefits of incorporating various proxies for susceptibility, including age, into the custody analysis.[90] Societal expectations about age may change over time, and those norms can affect legislative policymaking far more easily than judicial interpretation. More fundamentally, a vibrant federal system "enhances freedom . . . by protecting the integrity of the governments themselves, and . . . by protecting the people, from whom all governmental powers are derived."[91]

J.D.B. thus increases several of *Miranda*'s costs and undermines its supposed primary benefit of making self-incrimination inquiries simple and predictable. As Justice Alito noted, the Court introduced an individualized question into its inquiry that is logically indistinguishable from many other individualized questions.[92] Continuing on this path

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[86] U.S. CONST. art. VI, cl. 2.

[87] *Id.* amend. X. Until the second half of the twentieth century, the states mostly retained control over criminal law. *See* THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."); THE FEDERALIST NO. 17 (Alexander Hamilton), *supra*, at 115; Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1137–39, 1144–45 (1995).

[88] *But see* Dickerson v. United States, 530 U.S. 428, 456 (2000) (Scalia, J., dissenting) ("[O]ur continued application of the *Miranda* code to the States . . . represents . . . evidence of its ultimate illegitimacy.").

[89] Brief for Juvenile Law Center, et al. as Amici Curiae in Support of Petitioner, *J.D.B.*, 131 S. Ct 2394 (No. 09-11121), 2010 WL 5535752, at *25–30.

[90] *Cf.* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1596–99 (2008) (discussing the benefits of legislative rulemaking in place of *Miranda*).

[91] Bond v. United States, 131 S. Ct. 2355, 2364 (2011). *See generally* Brickey, *supra* note 87, at 1146–74 (describing how the "federal government's assumption of a major responsibility for maintaining local law and order is not only harmful to the federal justice system . . . [but] is also harmful to the states," *id.* at 1172).

[92] *J.D.B.*, 131 S. Ct. at 2414–15 (Alito, J., dissenting). In a feat of circularity, the majority responded that "a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." *Id.* at 2404 (majority opinion). Thus, according to the majority, "age . . . is

will require the Court to conduct essentially two tests in *Miranda* cases: a totality of the circumstances custody inquiry[93] and a totality of the circumstances voluntariness test. In doing so, the Court will make *Miranda* at least as complicated as the test it sought to replace.[94] Taken together with the various weaknesses that *J.D.B.* exacerbates, this problem undermines the rationale for the *Miranda* test.[95] If the Court follows this path, then it may need to consider a more efficient alternative: abandoning *Miranda* entirely and returning to the Court's traditional Fifth Amendment jurisprudence centered on voluntariness.[96] By exposing and aggravating *Miranda*'s inherent faults, *J.D.B.* could ultimately be a beneficial development, leading to the abandonment of an expensive test with dubious constitutional grounding.

D. Sixth Amendment

Confrontation Clause. — The Sixth Amendment's Confrontation Clause guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him."[1] In *Crawford v. Washington*,[2] the Supreme Court changed the inquiry used to determine when the confrontation right arises, requiring the opportunity for confrontation when the prosecution introduces a testimonial statement at trial unless the witness is unavailable and the accused had a prior opportunity to cross-examine the witness.[3] The *Crawford* Court left a number of issues unresolved, however, including the definition of "testimonial" and the question of whom the prosecution must call as a witness, if anyone, when introducing laboratory reports into evidence. Last Term, in

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different," *id.*, because it is relevant and some other, undefined characteristics are not. The entire question is how age differs from a range of characteristics that *do* bear an "objectively discernible relationship to a reasonable person's understanding," not how it differs from, say, a person's favorite *Star Wars* character.

[93] *See id.* at 2415 (Alito, J., dissenting). Indeed, in the past, at least two members of the *J.D.B.* majority have supported such a test, which would consider all "objective circumstances that are known to both the officer and the suspect and that are likely relevant to the way a person would understand his situation." Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting, joined by Ginsburg, J.); *see also* Transcript of Oral Argument, *supra* note 76, at 7–8.

[94] Justice Kagan's statement at oral argument that *Miranda* "is already an incredibly complicated test," Transcript of Oral Argument, *supra* note 76, at 36, was likely intended to support a broader custody inquiry, but it also calls into question *Miranda*'s supposed primary benefit: "the ease and clarity of its application." Moran v. Burbine, 475 U.S. 412, 425 (1986).

[95] *Cf.* Weisselberg, *supra* note 90, at 1563 ("The extent to which courts make extensive, individualized assessments undermines the utility of a system that purports to give bright-line rules to police.").

[96] *See* Transcript of Oral Argument, *supra* note 76, at 43; Weisselberg, *supra* note 90, at 1592–94, 1599–1600. For a description of the traditional voluntariness test, see *supra* note 59.

[1] U.S. CONST. amend. VI.

[2] 541 U.S. 36 (2004).

[3] *Id.* at 68.