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SAFEGUARDING CONSTITUTIONAL RIGHTS: THE USES AND LIMITS OF PROPHYLACTIC RULES

BRIAN K. LANDSBERG

You shall safeguard my charge . . . .¹

See that you observe everything that I command you: you must not add anything to it, nor take anything away from it.²

I. INTRODUCTION

A. The Issue Posed by Prophylactic Rules in Constitutional Law

These two biblical commandments frame the modern issue of prophylactic rules. May the Supreme Court, the institution charged by the Constitution with enforcing core rules,³ protect against the violation of constitutional rights by adopting measures designed to minimize the risk of such violations, even when those measures are not specifically authorized by the Constitution? Or will the adoption of such prophylactic rules in fact subvert the Constitution by unduly enlarging the powers of the rule enforcer?

The Supreme Court has adopted prophylactic rules to safeguard rights such as the freedom of speech under the First Amendment, the Fifth Amendment right to be free from compulsion to testify against oneself, and the right to be free from racial discrimination. Scholars have debated the legitimacy of these decisions. In at least one instance, Congress has legislatively attempted to repeal a judicially fashioned prophylactic rule.⁴ Congress may not legislatively repeal constitutionally protected rights, but the legislature may have the power

¹ Leviticus 18:30 (Tanach, Mesorah Publ. 1996). This verse "is understood to require legal authorities to insure adherence to the laws by instituting preventive safeguards." Samuel J. Levine, Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts, 24 HASTINGS CONST. L.Q. 441, 450 n.50 (1997) (citing TALMUD BAVLI, Yevanoth 21a).

² Deuteronomy 12:32 (New English Bible 1970). In Jewish Bibles, this verse is placed at Deuteronomy 13:1 (Torah).

³ Congress, the courts, the executive, and the states all play roles in enforcing constitutional rights. This article primarily addresses the role of the courts.

to alter prophylactic rules, which play a narrower role than core constitutional rules. Therefore, it is important to understand the difference, if any exists, between prophylactic rules and core constitutional rules. Attacks on judicially adopted prophylactic rules suggest that the Constitution does not authorize them, that they resemble legislation more than judicial doctrine, and that they displace state authority. Only a clear articulation of principles to guide the Court in formulating and adopting prophylactic rules can answer these criticisms.

In this article I survey case law and constitutional scholarship in an effort to answer three questions. First, are the federal courts empowered to fashion prophylactic rules? If so, what principles, if any, constrain the exercise of that power? Finally, may Congress or the states modify or rescind judicially fashioned prophylactic rules?

My review of the case law reveals a long history of judicial creation of prophylactic rules, but a lack of self-conscious judicial examination of their legitimacy. The scholarship concentrates primarily on the judicial power to fashion prophylactic rules, with much of the debate centering on whether such rules are legitimate manifestations of constitutional common law. This is an old issue that the Talmud addressed many centuries ago. I believe the Talmudic sources help show the way to understand the basis for prophylactic rules. These rules inhere in the nature of any constitutive document designed to advance normative values. And they inhere in the function of courts.

Once one understands the bases for prophylactic rules, it becomes possible to define the boundaries between legitimate and illegitimate judicial prophylactic action. Necessity is the basis for fashioning a prophylactic rule. However, a court should base the content of the rule on a balancing that takes into account not only necessity, but also federalism, the separation of powers, and three predictive difficulties: predicting the need for the rule, its efficacy, and its unintended consequences. Finally, Congress and the states have some leeway in modifying prophylactic rules, so long as the modification effectively safeguards constitutional rights. Congress may also review the factual predicate of the finding of necessity and, upon a sufficient showing, substitute legislative fact-finding for that of the Court.

B. Terminology

I use the term “prophylactic rules” to refer to those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules. They are directed against the risk of noncompliance with a

5. I also briefly review a few Talmudic sources and draw some parallels between the enforcement of Biblical and constitutional commands.

6. This is in accord with the terminology in DAVID E. ENGDAL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 234 (2d ed. 1987). See also JOSEPH D. GRANO, PROPHYLACTIC RULES.
constitutional norm. To paraphrase the Talmud, prophylactic rules build a fence around the Constitution. For example, in City of Rome v. United States, the Supreme Court upheld the application of section 5 of the Voting Rights Act of 1965 to disapprove seemingly nondiscriminatory practices of a municipality. Although the municipality’s voting practices were held nondiscriminatory, the Court upheld this application of the statute because section 5 reasonably addressed the risk of discrimination. Conversely, some of the cases in which the Court has stricken affirmative action plans have referred to the risk of their misuse or the risk that they would stigmatize some groups.

The Supreme Court has used the term “prophylactic” to apply to a broader spectrum of cases and as a synonym for a term the Court seldom uses: “instrumental.” Indeed, Justice Stevens has written: “It is important to remember . . . that all rules of law are prophylactic. Speed limits are an example; they are designed to prevent accidents.” The Court has called rules prophylactic when their mission was to prevent specific behavior and the rule encompassed “more than the core activity prohibited.” Used in that sense, prophylactic rules do not necessarily protect constitutional norms, and may even operate to impinge on constitutional rights. For example, in the free speech arena, the Court has said that “[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.”

The primary issue at the federal level is the power of a branch of the federal government to impose prophylactic rules. This power issue does not exist at the state level. The states have plenary power over matters not delegated to the

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7. See infra notes 189-207 and accompanying text.
8. 446 U.S. 156 (1980).
9. Section 5 forbids jurisdictions covered under § 4 of the Act to change voting practices until they have convinced either the Attorney General or the United States District Court for the District of Columbia that the proposed practice does not have the purpose and will not have the effect of discriminating in voting based on race. 42 U.S.C. § 1973c (1994).
13. NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted); see also Reno v. ACLU, 521 U.S. 844 (1997) (holding that the Communications Decency Act, which prohibits the knowing transmission to minors of “indecent” or certain “patently offensive” communications, abridges free speech protected by the First Amendment).
United States or prohibited to the states,\textsuperscript{14} so the \textit{constitutionality} of state legislation directed at risk does not depend on any federally enumerated power. However, risk may become a factor in a constitutional challenge to state deprivations of individual rights. For example, Wisconsin unsuccessfully sought to justify an exception to the normal Fourth Amendment “knock and announce” rule as protecting against the risk to police officers in executing felony drug search warrants.\textsuperscript{15}

Defining “prophylactic” to encompass all risk-avoidance rules sweeps so broadly as to drain the term of useful meaning. It is more helpful to conceive of prophylactic rules as a subset of risk-avoidance rules. I therefore suggest that only rights-protective risk-avoidance rules be called “prophylactic rules.” Other kinds of risk-avoidance rules, such as tort rules or rules protecting against risk to the government, may raise issues similar to those raised by prophylactic rules. However, where a risk-avoidance rule impinges on individual rights, it is the antithesis of a prophylactic rule designed to protect individual rights.

My terminology avoids labeling as prophylactic those rules which are simply overinclusive means to achieving legitimate ends. For example, in \textit{City Council v. Taxpayers for Vincent},\textsuperscript{16} the Supreme Court characterized an ordinance prohibiting distribution of handbills as an overreaching prophylactic rule, although the city attempted to justify the ordinance as a protection against littering. The Court said that the ordinance “could have addressed the substantive evil without prohibiting expressive activity.”\textsuperscript{17} The ordinance is not prophylactic because it is not aimed at achieving compliance with the constitutional norm.

My definition also excludes rules that are logical extensions of the core rules. For example, in \textit{Swann v. Charlotte-Mecklenburg Board of Education},\textsuperscript{18} the Court held that school districts that had operated racially dual school systems in violation of the equal protection clause were charged with an affirmative obligation to abolish the dual system and eradicate its effects.\textsuperscript{19} While other aspects of \textit{Swann} reflected prophylactic concerns,\textsuperscript{20} this remedial principle is simply a logical outgrowth of the core ban on racial discrimination. The rule holds that the effects of past discrimination are themselves discriminatory.

\textit{Prophylactic rules} differ from rules of deterrence. Rules of deterrence are direct correlatives of the underlying behavior that we seek to prevent. The

\begin{itemize}
\item \textsuperscript{14} U.S. Const. amend. X.
\item \textsuperscript{15} Richards v. Wisconsin, 520 U.S. 385, 395 (1997).
\item \textsuperscript{16} 466 U.S. 789 (1984).
\item \textsuperscript{17} \textit{Id.} at 810 (distinguishing the overreaching “prophylactic rule” of the ordinance involved in \textit{Schneider v. New Jersey}, 308 U.S. 147 (1939)).
\item \textsuperscript{18} 402 U.S. 1 (1971)
\item \textsuperscript{19} \textit{Id.} at 2-4.
\item \textsuperscript{20} See infra notes 65-68 and accompanying text.
\end{itemize}
threat of punishment for a crime is thought to have a deterrent effect. The creation of a crime, such as prohibiting sales of guns to former felons, may also stem from a risk-avoidance reason, namely to lessen the likelihood of violent use of guns.

Similarly, risk may be an element of the constitutional rule itself, as in an early case deciding that a police officer does not offend the Fourth Amendment when, in the course of a traffic stop, the officer orders passengers to exit the vehicle.\textsuperscript{21} The Court held that “the inordinate risk confronting an officer as he approaches a person seated in an automobile” made it permissible for the state to follow a policy of routinely ordering drivers out of their cars whenever they were stopped for a traffic violation.\textsuperscript{22}

No bright line exists between prophylactic rules and risk as an element of core constitutional rules. When \textit{Miranda v. Arizona}\textsuperscript{23} was first decided, it was unclear which kind of rule it was. Only later did the Court identify the \textit{Miranda} holding as a prophylactic rule.\textsuperscript{24} The Court has not clearly placed the application of strict scrutiny to race-based affirmative action into either category. This constitutional or prophylactic rule is based at least in part on contested legislative facts, such as the risk that affirmative action would have a stigmatic effect. Indeed, heightened scrutiny of suspect classifications is generally risk-based. For example, the Court subjects sex-based classifications to heightened scrutiny because “of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of ‘archaic and overbroad’ generalizations about gender, or based on ‘outdated misconceptions concerning the role of females in the home rather than in the “marketplace and world of ideas.”’\textsuperscript{25}

Both prophylactic and risk-avoidance rules are designed to correct for the ineffectiveness of more direct prohibitions. That ineffectiveness stems in part from the human tendency to stretch compliance with core rules and in part from the difficulties of detecting and punishing violations of many core rules. The authors of the Constitution knew that “[s]ome degree of abuse is inseparable from the proper use of every thing.”\textsuperscript{26} People tend to take advantage of ambiguity, the difficulty of detecting a violation of the law, or weakness of enforcement. Avoidance, evasion, and clear violation of rules are

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 110. However, the Court has discounted the risk that the police might take undue advantage of the \textit{Mimms} rule. \textit{See} Whren v. United States, 517 U.S. 806, 816-17 (1996).
\item \textsuperscript{23} 384 U.S. 436 (1966).
\item \textsuperscript{24} \textit{See} Michigan v. Payne, 412 U.S. 47, 53 (1973) (“[T]he prophylactic rules in \textit{Pearce} and \textit{Miranda} are similar in that each was designed to preserve the integrity of a phase of the criminal process.”).
\item \textsuperscript{25} J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135 (1994) (citations omitted).
\end{itemize}
all commonplace. This is as true of governmental actors as of private citizens, especially where the actor is not personally committed to the core rules.

A classic risk-avoidance case is the Prohibition-era decision upholding Congress's power to prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes.\textsuperscript{27} The statute at issue responded to the risk that physicians might prescribe such liquors for beverage purposes banned by the Eighteenth Amendment.\textsuperscript{28} The risks to which these rules respond vary in kind and in degree. Some rules are based on concrete proof of past experience and future threat. Others rely on prophecies that we derive from a generalized understanding of human nature.

Because the principles relating to prophylactic rules, rules of deterrence, and nonprophylactic risk-avoidance rules may overlap, I have not confined the discussion that follows to pure prophylactic rules. However, the three kinds of rules are not identical. Some principles may support one type of rule and not the others. Therefore, I have maintained the terminological distinctions between the judicially fashioned prophylactic rules that are the primary topic of this article and their cousins, rules of deterrence and nonprophylactic risk-avoidance rules.

C. The Issue Restated

Prophylactic rules may be attractive for several reasons. They may provide a maximal remedy in cases where simple prohibitory rules are likely to fail. Some prophylactic rules may be less intrusive than alternative remedies, such as heavy damage awards. They may prove the most effective means to achieving ends within the enumerated powers of the legislative branch. They may simplify enforcement. At the very least, they provide another mechanism for enforcing constitutional values. For all these reasons, prophylactic rules have become increasingly popular with the judicial and legislative branches.

However, one may also catalog disadvantages and dangers of prophylactic rules. They are potentially open-ended, conferring vast discretion on courts and legislatures. They may facilitate governmental expansion well beyond enumerated powers. While they may be justified as a means to achieve an

\textsuperscript{27} James Everard's Breweries v. Day, 265 U.S. 545 (1924) (upholding a law forbidding physicians to prescribe intoxicating malt liquors for medicinal purposes.) The Court did not rely on the Commerce Clause to uphold the statute, but upon the Eighteenth Amendment, which prohibited the sale of intoxicating liquors for beverage purposes but did not prohibit their sale for medicinal purposes. \textit{id.} at 558. The Court applied an ends-means test to uphold the legislation. \textit{id.} at 559 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). The Court noted the difficulties in enforcing prohibition and the risk that medical uses of liquor could "open[ ] many doors to clandestine traffic," concluding that it "cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective." \textit{id.} at 632-33.

\textsuperscript{28} \textit{id.} at 561.
enumerate end, they may in fact be adopted to achieve a nonenumerated end. Their origin as prophylactic rules may be forgotten, so that they become regarded as core constitutional rules. Indeed, recognition of the two categories—core constitutional rules and prophylactic measures—creates difficult issues of categorization. Moreover, prophylactic measures may be used to intrude on rights protected by the Constitution, to upset the balance of power between federal and state governments, or to disrupt the balance between the judicial and legislative branches. Thus, in the name of enforcing the Constitution, unlimited authorization of prophylactic rules could destroy the structure of rights and powers created by the Constitution.

Without prophylactic rules, we face undercompliance with the law. With them, we run the danger of rigid compliance efforts that ignore the values of the underlying rule and tread on other important values. One response to this dilemma would apply a cost-benefit analysis to the question of whether to risk undercompliance or overenforcement. Another approach would seek to develop principles that would enable us to enjoy the benefits of prophylactic rules while avoiding their dangers. The Supreme Court has neither engaged in the cost-benefit analysis nor attempted to develop balancing principles. Instead, the Court has imposed, approved, or rejected prophylactic measures on a case-by-case basis without analysis of their underlying foundations.

II. JUDICIAL DEVELOPMENT OF PROPHYLACTIC RULES

A. Early Examples

Prophylactic reasoning in fashioning constitutional rules had its modern beginning in 1938, with footnote four of *United States v. Carolene Products, Inc.* However, more than thirty years earlier in *Lochner v. New York*, the Supreme Court had arguably engaged in prophylactic scrutiny of state legislation that impinged on individual autonomy. The *Lochner* Court referred to "the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives." Therefore, the Court relied on the effect, rather than the stated purpose of the statute, to decide whether the statute was constitutional. The risk of duplicity, the *Lochner* Court reasoned, warranted close review of statutes that impinged on individual autonomy. Along with this close review, the Court also adopted social theory

29. In the words of then-Justice Rehnquist, levels of judicial scrutiny "may all too readily become facile abstractions used to justify a result." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).
30. 304 U.S. 144, 152 n.4 (1938); *see also infra* notes 35-37 and accompanying text.
31. 198 U.S. 45 (1905).
32. *Id.* at 64.
33. *Id.*
as a constitutional principle, holding that “the real object and purpose” of the statute under review “were simply to regulate the hours of labor between the master and his employees,” a purpose the Court held violated the Constitution. 34

However, in 1938, the Court held in Carolene Products that legislation should be upheld as constitutional if some rational basis can be found to uphold it. 35 In footnote four, the Court suggested an exception to this general rule. More searching scrutiny might apply to laws that “restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or that the government directs at particular religious or racial groups for whom “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” 36 It was thus the risk of a breakdown in the political process that the Court thought warranted strict scrutiny. This suggests that the Court has located strict scrutiny on the border between core constitutional rules and prophylactic rules. Strict scrutiny is simply a test for unjustified deprivations of free expression, equal protection, or fundamental due process rights. 37 The Court has based strict scrutiny on the importance of the right and on the risk of unwarranted deprivation. While the test’s prophylactic characteristics suggest that it is not the right itself, strict scrutiny has become embedded in our consciousness as a core constitutional rule.

The main holding of Carolene Products represented a rejection of the prior reign of Lochner-type prophylactic rules that led to judicial activism. Arguably, the holding calls into doubt the legitimacy of judicially-drawn prophylactic rules like those in footnote four. Nonetheless, later Courts fastened onto the footnote four reasoning and not the main holding as they fashioned prophylactic rules.

B. The Warren and Burger Courts

Prophylactic measures—court-fashioned rules, injunctions, and federal legislation—were widely applied by the Warren and Burger Courts. Those Courts created prophylactic rules in cases like Miranda, 38 New York Times v. Sullivan, 39 and Swann. 40 They approved prophylactic injunctions in school

34. Id.
35. Carolene Products, 304 U.S. at 152.
36. Id. at n.4.
37. “[The level of scrutiny strategy] is designed to identify types of legislation that by their nature involve either so high a risk of invidious discrimination that invidiousness should be nearly irrevocably presumed or so low a risk that its possibility should be nearly irrevocably dismissed.” Ronald Dworkin, Is Affirmative Action Doomed?, N.Y. REV. BOOKS, Nov. 5, 1998, at 56, 57.
desegregation, prisoner rights, and fair employment cases. These Courts also upheld federal prophylactic legislation in the trilogy of cases that upheld prophylactic provisions of the Voting Rights Act of 1965: South Carolina v. Katzenbach, Katzenbach v. Morgan, and City of Rome v. United States.

1. Court-Fashioned Prophylactic Rules of General Application

a. Miranda v. Arizona

Despite their ubiquity, prophylactic rules attracted little scholarly attention until the Court decided Miranda. The Miranda Court held: "[T]he prosecution may not use statements ... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court then spelled out the minimally acceptable safeguards. The Court relied on prior judicial opinions and reports of government agencies to conclude that "[u]nless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that [coercive custodial] practices ... will be eradicated in the foreseeable future." Thus, even though "we might not find the defendants' statements to have been involuntary in traditional terms," the Court reversed petitioners' convictions because the interrogation had not followed minimally acceptable safeguards. After surveying recommendations for the interrogation of suspects in various police manuals, the Court determined: "From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning." The Court acknowledged that "we 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," and invited Congress and the states to devise effective protections.

The <i>Miranda</i> Court did not simply explain the problem and then impose the

42. 383 U.S. 301 (1966).
44. 446 U.S. 156 (1980).
46. <i>Miranda</i>, 384 U.S. at 444.
47. Id. at 444-45.
48. Id. at 447.
49. Id. at 457.
50. Id. at 499.
51. Id. at 458.
52. Id. at 467.
rule. Rather, it explained at length the reasons underlying each element of the rule, by reference to the specific evils each element addressed. The Court also relied on the experience of the Federal Bureau of Investigation and of police in other countries as evidence that Miranda warnings would not unduly interfere with law enforcement. The opinion took as a given that the Court legitimately could fashion a rule that might foreclose some constitutionally permissible interrogations in order to ensure against those that were unconstitutional. The Court therefore did not discuss the issue of the legitimacy of judicially fashioned prophylactic rules of general applicability. The case was initially viewed, and some continue to view it, as stating not just a prophylactic rule designed to assure compliance with the Constitution, but a rule of constitutional law. However, the Court has since characterized the rule as one which "sweeps more broadly than the Fifth Amendment itself," noting that "in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."

When the Court first described Miranda as nonconstitutional in Michigan v. Tucker, Justice Rehnquist wrote an opinion that "deprived Miranda of a constitutional basis but did not explain what other basis for it there might be." Justice Douglas's dissent complained: "The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis."


The Court has not explicitly characterized the rule of New York Times v. Sullivan as prophylactic, but the reasoning of the case and subsequent applications of its rule at least imply that false publications do not fall within the core protections of the First Amendment. Rather, it is necessary to protect

53. Id. at 467-77.
54. Id. at 483-90.
57. Id. at 307.
60. Tucker, 417 U.S. at 462 (Douglas, J., dissenting).
61. 376 U.S. 254 (1964). The Court went on to state: The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id. at 279-80.
them in order to avoid "the pall of fear and timidity imposed upon those who would give voice to public criticism" that would be the result of punishment for mistaken but nonmalicious publications about public figures.\footnote{62} After observing that the "Court... set out to craft doctrine that would ensure 'breathing space' for First Amendment freedoms," Richard H. Fallon, Jr. listed a host of delicate predictive factual determinations the Court must make in order to achieve the proper balance.\footnote{63}

Professor Fallon's description seems accurate, but submerges some important questions. Does the Court have the tools to make such predictive judgments? What is to be the fate of doctrine when those judgments change? May the state adopt some alternative means of ensuring that defamation law does not unduly chill speech directed at public officials?\footnote{64} In any event, the case demonstrates that the line between prophylactic and core protections is not always sharply drawn.

c. \textit{Swann v. Charlotte-Mecklenburg Board of Education}

In \textit{Swann}, the Court combined re reparative and prophylactic principles when it said:

\begin{quote}
[[In a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.\footnote{65}]
\end{quote}

The Court based this presumption on the history of resistance to compliance with \textit{Brown v. Board of Education}\footnote{66} (\textit{Brown II}) in states that had required

\begin{footnotes}
62. \textit{Id.} at 278.


Fallon noted:

As thus conceived, the Court's task was not only to balance, in an abstract way, the First Amendment interest in promoting the free flow of critical comment against the states' interest in protecting reputations. The Court also had to make more concrete, empirical, and predictive assessments about the relative proclivity of the press to engage in self-censorship under alternative liability regimes; about the proportion of truthful and untruthful assertions that would be chilled by such regimes; about the harms that would be done by false speech and the benefits of truthful speech that would be forgone under various imaginable rules; and about the practical competence of the courts to administer particular liability standards fairly.

\textit{Id.}


racial segregation of public schools. The presumption is prophylactic because it is based on the risk—amply supported by past experience—that school authorities would continue to manipulate policies to maximize racial separation. It is also reparative because it serves “to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation.”

2. Injunctions

The Warren-Burger era also saw the rise of the prophylactic injunction as a tool to ensure against deprivations of constitutional rights. All injunctions are aimed at risk, but early injunctions simply forbade conduct that would invade the core right. Prophylactic commands became a central feature of what some came to call the structural injunction. The lower courts have been accorded a high degree of discretion in designing injunctions to remedy structural violations of the Constitution, such as systemic segregation of the public schools and systemic imposition of cruel and unusual punishment in prisons. Such decrees typically combine reparative measures with prophylactic ones.

The reparative notion is firmly grounded in the Constitution and in Marbury v. Madison, which insists that there must be a remedy for constitutional wrongs. The prophylactic injunction is grounded in equity, which the Supreme Court noted “has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.” The prophylactic injunctions came to include reporting and record-keeping provisions, special masters, and affirmative

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68. Id. at 28.
70. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979) [hereinafter Fiss, The Forms of Justice].
71. 5 U.S. (1 Cranch) 137 (1803).
72. Id. at 163.
74. See, e.g., Louisiana v. United States, 380 U.S. 145, 155-56 (1965) (upholding reporting requirement adopted “in order that the court might be informed as to whether the old discriminatory practices really had been abandoned in good faith”).
75. See, e.g., Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), amended in part and vacated in part, 688 F.2d 266 (5th Cir. 1982) (holding that the appointment of special masters was proper to supervise compliance of the Texas Department of Corrections with a court order to abolish unconstitutional conditions of confinement).
action programs, all without any claim that such provisions were constitutionally required. Rather, the claim was that some remedy was required and the remedy imposed properly balanced the competing interests in the case.

The Supreme Court approved a prophylactic injunction, for example, in Hutto v. Finney. A federal district court had entered sweeping relief against the imposition of cruel and unusual punishment on inmates of Arkansas prisons. The state challenged two aspects of that relief: a thirty day cap on confinement in punitive isolation and an award of attorney’s fees to the plaintiffs. The Constitution places no particular temporal cap on punitive isolation, nor does it provide for attorney’s fees. Nonetheless, the Court upheld both provisions as prophylactic measures, holding that “taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.”

The cap on days in isolation served as “a mechanical—and therefore an easily enforced—method of minimizing overcrowding.” Justice Rehnquist, dissenting, protested that the cap was “a prophylactic rule” and “not remedial in the sense that it ‘restore[s] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’” Rehnquist argued that the rule went further than was necessary to eliminate the consequences of the past violations. The district court designed the attorney’s fee award to deter the defendants from future violations of the Eighth Amendment, and the Supreme Court saw “no reason to distinguish this award from any other penalty imposed to enforce a prospective injunction.”

77. 437 U.S. 678 (1978).
78. Id. at 680.
79. Id.
80. Id. at 687.
81. Id. at 688 n.11.
82. Id. at 712 (Rehnquist, J., dissenting) (citing Milliken v. Bradley, 418 U.S. 717, 746 (1974)).
83. The authors of a recent study of prison reform litigation observe:
In one sense, Justice Rehnquist was correct in Hutto v. Finney when he dissented on the ground that [United States District] Judge Henley’s bureaucratizing remedy went beyond the limits of the rights that the Constitution specified. But in a deeper sense, Rehnquist was less sincere than Henley. It was clear to Henley, as it must have been to Rehnquist, that the old regime in Arkansas could not possibly recognize the rights of prisoners, that any judicial decision granting rights would be nothing more than markings on a piece of paper unless it was accompanied by major structural reform.
84. Hutto, 437 U.S. at 685.
85. Id. at 691-92.
remedies were imposed only after a lengthy history of official intransigence. 86

3. Prophylactic Legislation

Finally, the Warren and Burger courts recognized broad congressional power to enact prophylactic legislation under the enforcement clauses of the Reconstruction Amendments to the Constitution. David E. Engdahl has pointed out that Congress’s power under the enforcement clauses is both similar to and different from its power under the Necessary and Proper Clause. 87 The difference is “that the enforcement clauses deal with effectuating rights . . . while the necessary and proper clause deals with effectuating the federal government’s power to act.” 88 The two clauses are similar in authorizing Congress to enact legislation so long as it bears a “telic relation” (i.e., an ends-means relation) “to some end the reviewing judiciary considers within the substantive scope of the relevant amendment.” 89 Engdahl concludes that the enforcement clauses

enable Congress (1) to outlaw practices, themselves not unconstitutional, as a means to eliminate or prevent practices which are, or (2) to impose requirements which it otherwise would lack power to impose, so long as they are imposed as means to implement the substantive provisions of one of these amendments. 90

In *South Carolina v. Katzenbach,* 91 the Court upheld prophylactic provisions of the Voting Rights Act of 1965. The Court noted the existence of overwhelming evidence that “case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered” in litigation under earlier civil rights acts. 92 The Court ruled that “[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.” 93

The Court then turned to the question of “whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil.” 94 In short, the issue was not whether the Constitution prescribed the remedial shift of the advantage of time and inertia; it did not. Rather, the Court followed the

86. *Id.* at 683.
87. ENGDAHL, *supra* note 6, at 234.
88. *Id.*
89. *Id.* at 235.
90. *Id.* at 236.
91. 383 U.S. 301 (1966).
92. *Id.* at 328.
93. *Id.*
94. *Id.*
ends-means analysis of *McCulloch v. Maryland*. One might characterize some of the Act’s provisions—the suspension of tests or devices as prerequisites for voting in covered jurisdictions, for example—as reparative rather than prophylactic. However, section 5 of the Act, requiring preclearance of changes in voting laws in covered jurisdictions, was based on Congress’s knowledge that “some covered [jurisdictions] had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.”

Therefore, “Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.” The Court applied similar reasoning to uphold the Act’s authorization of the appointment of federal examiners to list qualified applicants who are thereafter entitled to vote.

**C. Transition to the Rehnquist Court**

Case law in more recent terms has continued to uphold prophylactic rules, injunctions, and statutes. In *Batson v. Kentucky*, the Burger Court ruled, contrary to *Swain v. Alabama*, that a defendant could raise an equal protection challenge to the racially discriminatory use of peremptory challenges to exclude jurors of the defendant’s race. *Batson* relied on both prophylactic third party standing (to protect the rights of the stricken jurors) and direct remedial reasons (to protect the equal protection rights of the defendant). In *Powers v. Ohio*, the Rehnquist Court extended *Batson* to a case in which the defendant was white and the excluded jurors were African-American. The only equal protection rights at stake were those of the excluded jurors, not those of the defendant. Therefore, one could not say that the Constitution demanded that the defendant have standing to challenge the discrimination. Nonetheless, the Court recognized third party standing based solely on the need to safeguard the rights of the excluded jurors. Even though excluded jurors have the right to sue on their own behalf, the Court relied on the practicality that “the barriers to a suit by an excluded juror are daunting.” The Court reached this conclusion based on the inherent nature of this type of litigation, rather than

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95. *Id.* at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).
96. *Id.* at 335.
97. *Id.*
98. *Id.* at 335-37.
100. 380 U.S. 202 (1965).
102. *Id.* at 97-98.
104. *Id.* at 409.
105. *Id.* at 415.
106. *Id.* at 414.
concrete evidence of barriers.  

In Withrow v. Williams, the Rehnquist Court allowed a prisoner to raise the prophylactic rule of Miranda via a habeas corpus claim. Although Stone v. Powell had refused federal habeas corpus jurisdiction over Fourth Amendment claims based on the exclusionary rule of Mapp v. Ohio, the Withrow Court held that federal habeas corpus jurisdiction should be applied to claims under Miranda. While agreeing that the Miranda rights were prophylactic, the Withrow Court said “calling the Miranda safeguards ‘prophylactic,’ however, is a far cry from putting Miranda on all fours with Mapp, or from rendering Miranda subject to Stone.” Unlike Mapp, the Court said, Miranda safeguards “a fundamental trial right” by serving to guard against the use of unreliable evidence, and the application of the Stone rule would not significantly lighten the burdens on federal courts.

Similarly, in United States v. Paradise, the Court upheld a lower court injunction imposing “a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety.” The Court approved this “race-conscious remedy because the defendants had thwarted race-neutral remedies that might otherwise have been effective.”

The Rehnquist Court also suggested that in some circumstances, state and local governments may undertake affirmative action to ensure against the risk of racial discrimination. The Court’s opinion in Freeman v. Pitts acknowledged:

[The potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control

107. Id. at 414-15.
109. Id. at 683.
113. Id. at 691.
114. Id. at 691-94. But see Michigan v. Harvey, 494 U.S. 344 (1990) (refusing to extend the prophylactic rule of Michigan v. Jackson, 475 U.S. 625 (1986), to exclude the use of the defendant’s statement to police for impeachment purposes). Under Jackson, the statement would have been inadmissible because the defendant had first requested counsel and then waived counsel. Jackson, 475 U.S. at 636. The Harvey Court said Jackson’s prophylactic rule should not be extended to shield perjury. Harvey, 494 U.S. at 353.
116. Id. at 153 (plurality opinion).
the policies of its school systems.\textsuperscript{119}

As to the courts' role, Justice Blackmun's concurrence added: "[T]o determine [the defendant school system's] possible role in encouraging the residential segregation, the court must examine the situation with special care."\textsuperscript{120}

While approving some forms of affirmative action, the Rehnquist Court extended the prophylactic rule articulated in footnote four of \textit{Carolene Products} to situations involving discrimination against white persons and even to race-based governmental action that lacked a discriminatory effect.\textsuperscript{121} The plurality opinion in \textit{City of Richmond v. J. A. Croson Co.}\textsuperscript{122} argued that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."\textsuperscript{123} The plurality referred to the danger that race-based governmental decisions would cause stigmatic harm and that it would be difficult to determine whether such decisions were benign, remedial, or illegitimate.\textsuperscript{124} The Court adopted this reasoning in \textit{Adarand Constructors, Inc. v. Pena},\textsuperscript{125} where it applied the \textit{Croson} test to federal legislation.\textsuperscript{126} The Court said that strict scrutiny of federal race-based legislation would "ensure that the personal right to equal protection of the laws has not been infringed."\textsuperscript{127} Similarly, in \textit{Shaw v. Reno},\textsuperscript{128} the Court adopted a rule forbidding race-based voting districts that lacked sufficient justification, even where the districting plan did not dilute the vote of any racial group.\textsuperscript{129} The Court, citing no evidence in support, reasoned that the rule was necessary because such

\begin{itemize}
  \item \textsuperscript{119} Id. at 490.
  \item \textsuperscript{120} Id. at 513 (Blackmun, J., concurring in the judgment).
  \item \textsuperscript{122} 488 U.S. 469 (1989).
  \item \textsuperscript{123} Id. at 493 (plurality opinion). However, Justice O'Connor's plurality opinion recognized that Congress's "power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." Id. at 490 (plurality opinion).
  \item \textsuperscript{124} Paul Brest had already anticipated this argument and rejoined: [W]here the objective and immediate effect are to benefit minority persons, it seems inappropriate to subject the practice to the demanding criteria of the suspect classification standard. It should suffice for a policymaker to conclude that the probable benefits outweigh the harms, that the benefits cannot readily be gained by other than race-dependent means, and that the program is designed to minimize its possible adverse consequences.
  \item \textsuperscript{125} 515 U.S. 200 (1995).
  \item \textsuperscript{126} Id. at 237-40.
  \item \textsuperscript{127} Id. at 226.
  \item \textsuperscript{128} 509 U.S. 630 (1993).
  \item \textsuperscript{129} Id. at 658.
\end{itemize}
reapportionment legislation "reinforces racial stereotypes and threatens to undermine our system of representative democracy." Thus, the cases that undermine affirmative action seem to draw much of their force from prophylactic reasoning related to risks of improper motives and the related risk of stereotyping individuals.

D. The October 1996 and 1997 Terms

In the October 1996 and 1997 Terms, the Rehnquist Court seemed to undertake a substantial rethinking of prophylactic rules. The Court reviewed twelve cases involving prophylactic measures the government had designed to ensure rights under the Bill of Rights or the Fourteenth Amendment. It approved the prophylactic measures in only three of them, and in two of those cases the approval was only partial. The Court reviewed three other cases involving what one might consider prophylactic protections against the risk of undermining structural protections in the Constitution. It approved the prophylactic measures in one of those cases. Finally, the Court reviewed several cases involving risk-avoidance measures, approving them in three cases and disapproving them in two.

Several possible explanations might exist for the pattern of rejection of prophylactic measures in the 1996 and 1997 Terms. The decisions may reflect the beginning of the decline of prophylactic rules, injunctions, and statutes. Conversely, the decisions may simply be an aberration from the normal pattern of approving many prophylactic measures while disapproving few. The cases may reflect the operation of a dialectic: the Court first approves prophylactic measures; advocates, lower courts, and Congress stretch the boundaries of...
those measures; and the Court then draws sharper lines to contain the concept. The decisions may tell us little about prophylactic measures and instead may demonstrate the reaction of an activist Court to measures that threaten the majority’s visions of federalism and congressional power. In this article I will focus primarily on three of these cases.

1. Description of Recent Cases

In Schenck v. Pro-Choice Network, the Court disapproved a prophylactic injunction that imposed a floating buffer zone between abortion protesters and people entering and leaving an abortion clinic. The protesters’ past abusive conduct created a risk of future intimidation of patients and employees of the clinic. Nevertheless, the Court pointed out that it would be difficult for the protesters to know how to remain in compliance. It concluded: “This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits.” Thus, one prophylactic reason—the risk of interference with the abortion right—led to entry of the injunction. Another prophylactic concern—the risk of abridging protected speech—led the Supreme Court to disapprove the original protective order. However, the Court upheld fixed buffer zones around the doorways, driveways, and driveway entrances where the protesters’ past conduct suggested a future risk that these areas would be blocked. The Court added: “[B]ecause defendants’ harassment of police hampered the ability of the police to respond quickly to a problem, a prophylactic measure was even more appropriate.” The Court supported this ruling by citing a case that upheld a legislatively imposed buffer zone around polling places, in which campaigning was not allowed. The standard the Schenck Court applied had been fashioned in Madsen v. Women’s Health Center, Inc. and was also predicated on prophylactic considerations. The Madsen Court said that “somewhat more stringent application of general First Amendment principles” should be applied to injunctions than to ordinances because “[o]rdinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risks of censorship

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137. Schenck, 519 U.S. at 377.
138. Id.
139. Id. at 362-63.
140. Id. at 378.
141. Id. at 377.
142. Id. at 380-81.
143. Id. at 382.
and discriminatory application than do general ordinances." 146 In his dissent, Justice Scalia argued that these and other reasons required application of strict scrutiny. 147 Justice Scalia noted the risk of placing the right of free speech within the control of judges who have "often . . . been chagrined by prior disobedience of their orders." 148

*Schenck* can be read as expanding rather than contracting prophylactic doctrine. 149 What has changed is the locus or type of risk. In *Schenck* and *Madsen*, the risk that the lower court will overreach leads to prophylactic heightened scrutiny. Note that a similar distrust of the lower courts was at work in *Mazurek v. Armstrong*, 150 where the Court worried about the prospect that lower courts might enter multiple erroneous injunctions against enforcement of state abortion laws. 151

*Schenck* reflects a distrust of particular prophylactic measures—possibly

146. *Id.* at 764. The Court expressed similar prophylactic concerns as to legislation in *Board of Education v. Grumet*, 512 U.S. 687, 703 (1994):
The anomalously case-specific nature of the legislature’s exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding [the] principle . . . that government should not prefer one religion to another, or religion to irreligion.


148. *Id.* at 793 (Scalia, J., dissenting). In another case, Justice Scalia reiterated prophylactic concerns based on mistrust of lower courts and called for close scrutiny of a decision "when the grounds are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand." *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133, 1133 (1997) (Scalia, J., dissenting from denial of certiorari).

In contrast to his concern about the individuated nature of the injunction in *Madsen*, in *Grumet* Scalia argued:

Making law (and making exceptions) one case at a time, whether through adjudication or through highly particularized rulemaking or legislation, violates, *ex ante*, no principle of fairness, equal protection, or neutrality, simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of.

*Grumet*, 512 U.S. at 748 (Scalia, J., dissenting). In yet another case, Justice Scalia saw greater risk of unfairness in a local ordinance than in federal legislation. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring in the judgment) (stating that objectivity and flexibility, "political qualities already to be doubted in a national legislature[,] . . . are substantially less likely to exist at the state or local level").

149. See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). *Schenck* applied heightened scrutiny to a district court injunction imposing a floating buffer zone between anti-abortion protesters and persons entering and leaving an abortion clinic. *Id.*


151. In *Mazurek*, the Court overturned a preliminary injunction against a state statute forbidding physician assistants to perform abortions. *Id.* at 974. The Court was concerned with the threat to other state statutes and the absence of proof of improper legislative purpose. *Id.* at 972-73. See also *Abrams v. Johnson*, 521 U.S. 74 (1997) (evaluating a perceived risk that the Department of Justice might have applied an inappropriate race-based standard in evaluating the reapportionment plans).
overbroad injunctions and race-based reapportionment plans—but not a general rejection of the prophylactic concept. Instead, *Schenck* employs prophylactic reasoning to reject portions of the injunction. One can see the case as suggesting that the disapproved portions of the *Schenck* injunction were not prophylactic in the sense of protecting individual rights. The district court had initially based the injunction at issue in *Schenck* in part on prophylactic protection of federal rights. However, after the Supreme Court’s decision in *Bray v. Alexandria Women’s Health Clinic*, the district court reaffirmed its injunction based solely on state law grounds. As a formal matter, the injunction no longer protected Fourteenth Amendment rights. *Schenck*, therefore, may simply stand for the proposition that courts will judge measures designed to avoid risk in light of the nature of that risk. The Court did not view the risks as relating to constitutional rights; they simply represented policy judgments. So read, *Schenck* is not a case of one prophylactic rule overpowering another, but of a prophylactic rule overpowering a non-prophylactic risk-avoidance measure. The decision has little to do with concerns about federalism or congressional power. Although *Schenck* reviewed a federal court injunction, the Court applied the same standard as it had previously applied to the state court injunction in *Madsen*.

In *Agostini v. Felton*, the Court markedly changed its prior emphasis on risk as an element in Establishment Clause doctrine. Previous cases had held that placement of public school teachers in parochial schools posed “a substantial risk” that they “may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect.” The Court did not rely on evidence to reach this conclusion, instead treating this risk as self-evident. This risk led to the need to monitor the behavior of the public school teachers, which the Court held led in turn to excessive entanglement of the school system with religion.

In *Agostini*, the Court ruled that intervening cases had “abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and

152. 506 U.S. 263 (1993) (holding that women seeking an abortion are not a protected class under 42 U.S.C. § 1985(3)).
154. Federalism concerns also would have led to a different result in *Abrams*—deferring to the state legislature’s reapportionment plan rather than assuming that it might be tarnished by improper racial motivations.
The Court found "no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and embark on religious indoctrination" and further found no evidence of such behavior. Essentially, an unexplained shift to the plaintiffs of the burden of demonstrating risk replaced the early case law's equally unexplained placement on the school authorities of the burden of negating risk.

In *Turner Broadcasting System, Inc. v. FCC,* the Court rejected a First Amendment challenge to the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. Congress, fearing that the failure of cable television systems to carry less popular broadcast stations would lead to a reduction in the number of broadcast stations available to individuals who did not subscribe to cable, imposed requirements to carry broadcast stations on the cable systems. Cable system operators filed suit to challenge the constitutionality of the must-carry provisions under the First Amendment. In reviewing the First Amendment challenge, the Court said:

> Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Risk played three roles in the test the Court applied. The Court began by declaring that content-neutral statutes that regulate expression pose less risk to free speech than content-based statutes. Therefore, the Court applies "less rigorous analysis" to content-neutral statutes. The Court seemed to soften the scrutiny further because Congress had found a counter-risk and searching scrutiny poses the risk of the Court assuming a legislative role. The Court found that extensive evidence presented to Congress provided "a substantial basis to support Congress' conclusion that a real threat justified enactment of the must-carry provisions." The dissenting opinion of four Justices argued that the majority exhibited "an extraordinary and unwarranted deference for congressional judgments." However, the Court parsed in unusual detail the evidence of the cable companies' power, their past exclusion of some broadcast stations.

158. *Agostini,* 521 U.S. at 223.
159. *Id.* at 226.
161. *Id.* at 224.
162. *Id.* at 190.
163. *Id.* at 185-86.
164. *Id.* at 196.
165. *Id.* at 213.
166. *Id.* at 196.
167. *Id.* at 258 (O'Connor, J., dissenting).
channels, the tenuous financial condition of many broadcast channels, the impact of must-carry rules on cable carriers, and the shortcomings of alternative proposals to protect broadcasters. In short, the Court viewed this not as a case of unsupported congressional predictions of risk, but a case in which past events provided persuasive credibility to those predictions.

2. Contradictions in Recent Cases

The Court has recently displayed a schizophrenic attitude toward prophylactic measures. It has manifested distrust of judges, worrying that they might go too far in fashioning prophylactic rules and injunctions, but it has also upheld prophylactic injunctions as proper exercises of judicial discretion and has itself created numerous prophylactic rules. It has emphasized the need for deference to prophylactic rulemaking by Congress and the states, but has withheld that deference where the rule offended the Court's own prophylactic understanding. The Court has used the term "prophylactic" as an epithet and as a term of virtue. Some prophylactic measures have been rejected as insufficiently grounded in facts, while others have been adopted based on the Court's factual assumptions. It may be true that "the policy-oriented, instrumental character of law [has become] our dominant conception." But that "dominant conception" does not rule out the desirability or possibility of the Court developing—as it has not yet done—a consistent, coherent approach to prophylactic measures.

III. DEVELOPING A COHERENT APPROACH TO PROPHYLACTIC RULES

A coherent approach to prophylactic rules first requires precision of terminology. It makes no sense to use the same term to describe measures

168. Id. at 196-212.
172. E.g., Gray v. Maryland, 523 U.S. 185 (1998) (assuming that the introduction of a codefendant's confession with the defendant's name redacted and replaced by "blank" is so prejudicial that limiting instructions cannot work); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (adopting strict scrutiny of congressionally adopted racial preferences).
173. FEELEY & RUBIN, supra note 83, at 22.
174. "Words are our tools, and, as a minimum we should use clean tools: we should know what we mean and what we do not, and we must forearm ourselves against the traps that language sets us." J.L. Austin, A Plea For Excuses, in FREEDOM AND RESPONSIBILITY 9
designed to protect against risks to constitutionally protected rights and risks to the core rights themselves or risks to ordinary police power measures. This indiscriminate use of the term leads to striking down some provisions because they are merely “prophylactics” (addressing risk to some police power concern) while upholding others because they are prophylactic (protecting against risks to constitutionally protected rights). In a similar vein, one should be able to differentiate between measures that forbid deprivation of a core right and measures directed at the risk of such deprivation. Core rights should be less susceptible to congressional tinkering or judicial reconsideration.

A clearer understanding of whether and when it is appropriate to impose prophylactic measures is more important than terminology. The question is not so much whether prophylactic measures are a good idea, but how they fit into the constitutional structure of federalism and separation of powers. Does the Constitution permit the federal courts to impose prophylactic rules or injunctions on the states or federal entities? To what extent does it permit Congress to impose prophylactic rules? Is there a clear delineation between prophylactic and core constitutional rules?

Prophylactic rules in constitutional law arise in a variety of ways. Reference to the ends-means analysis of McCulloch v. Maryland justifies prophylactic rules Congress has adopted. Prophylactic injunctions are based


175. Not all agree that such precision is helpful or possible. Michael C. Dorf and Charles F. Sabel argue: “The fact that the Court’s Fifth Amendment jurisprudence is labeled prophylactic while its jurisprudence of the First Amendment is not, at best imperfectly reflects the Court’s view about the relative importance of these rights, but it reflects no deep reality.” Michael C. Dorf and Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 COLUM. L. REV. 267, 456 (1998). They refer to a similar point made by Strauss, Ubiquity, supra note 45, at 204-07. On the other hand, Dorf and Sabel give their own definition in the next paragraph: “Wherever judicially established rules comprise an effort to give effect to more deeply established but vaguer legal norms, the judicial doctrine may be regarded as prophylactic.” Dorf & Sabel, supra, at 457. Henry P. Monaghan argues that “the distinction between true constitutional rules and constitutional common law [including prophylactic rules] lies in the clarity with which the former is perceived to be related to the core policies underlying the constitutional provision.” Henry P. Monaghan, Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 33 (1975). However, Thomas S. Schrock and Robert C. Welsh argue that “Monaghan fails to provide workable criteria” for distinguishing the two. Thomas S. Schrock and Robert C. Welsh, Reconsidering the Constitutional Common Law, 91 HARV. L. REV. 1117, 1146 (1978).


177. See Grano, Prophylactic Rules, supra note 6, at 124.

on equitable doctrine.179 Judicially fashioned prophylactic rules have a murkier origin. By definition, they are not rules found in the Constitution. They are instrumental rules designed to assure compliance with the Constitution. Since the three kinds of prophylactic rules—injunctive rules, judicial rules of general application, and statutory rules—are separately grounded, one must take care in transferring principles regarding one variety to cases involving a different variety of prophylactic rule.

A. Justifications for Judicially Created Prophylactic Rules

Judicially created prophylactic rules of general applicability are the most problematic.180 They most resemble legislation; they may intrude on state prerogatives; and yet, they lack clear textual warrant in the Constitution.181

179. See supra notes 69-76 and accompanying text.
180. See Dorf & Sabel, supra note 175, at 452-64 (arguing that prophylactic rules are justified, not as constitutional common law, but as prototypes of constitutional jurisprudence). Compare Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 892 n.42 (1986) (prophylactic rules, whether compelled by the Constitution or inspired by it, constitute federal common law), and Monaghan, supra note 175 (prophylactic rules justified as constitutional common law), with Grano, Prophylactic Rules, supra note 6, at 129-36 (prophylactic rules not justifiable as constitutional common law), and Schrock & Welsh, supra note 175 (constitutional common law is illegitimate and may be pernicious).
181. This argument has been taken up by Joseph D. Grano, who maintains that the Constitution does not grant the Supreme Court the kind of prophylactic power exercised in Miranda. Joseph D. Grano, Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U. CHI. L. REV. 174 (1988) [hereinafter Grano, Reply]. Professor Grano argues that a “prophylactic rule in the constitutional context is a court-created rule that can be violated without violating the Constitution itself.” Id. at 176-77 (citing Michigan v. Payne, 412 U.S. 47, 53 (1973)). Grano argues that Article III of the Constitution does not authorize the Supreme Court to reverse a state court conviction when the Constitution has not been violated. Id. at 178. Since the Fifth Amendment forbids only compelled self-incrimination, it follows, according to Grano, that Miranda, which would require reversal in some cases where the defendant has voluntarily inculminated herself, exercises power beyond those granted by Article III. Id. at 177-78.

David A. Strauss, in response, observes that prophylactic rules are ubiquitous in constitutional litigation and are used to “attempt to minimize the sum of error costs and administrative costs.” Strauss, Ubiquity, supra note 45, at 193. His prime example comes from First Amendment law. Professor Strauss argues that the rule of Lovell v. Griffin, 303 U.S. 444 (1938) (allowing a person to challenge the validity of a city ordinance even though he had not sought and been denied the requisite permission to distribute literature), was a prophylactic rule typical of those in subsequent First Amendment cases. Strauss, Ubiquity, supra note 45, at 196. Professor Grano denies, however, that the rule of Lovell was prophylactic. In his view, it is a case of an actual violation of the First Amendment. Grano, Reply, supra at 189. Presumably, Grano would take the same position regarding Strauss’s argument that the Court’s more stringent review of content discrimination also is a
Nonetheless, the nature of our constitution, the nature of courts, and analogy to other prophylactic measures that are more clearly legitimate all tend to support the judicial imposition of prophylactic general rules. Ultimately, prophylactic rules of general application fall into Justice Jackson’s “zone of twilight in which [the Court] and Congress may have concurrent authority, or in which its distribution is uncertain.”

The Supreme Court has emerged as the final arbiter of constitutional law, but Congress and the states are considered the final arbiters of statutory law, so long as it complies with the Constitution. The difficulty with judicially created prophylactic rules is that they are neither strictly applications of the Constitution nor are they strictly legislative actions. They are best characterized as hybrid rules. They are based on the Constitution because they are predicated on a judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right. In reaching that judgment, the Court does what courts traditionally have done in the Anglo-American system of common law and equity. However, there may be myriad ways to reach the objective of safeguarding constitutional rights. The Court acts in a legislative fashion when it chooses a particular method. The Constitution may demand imposition of a prophylactic rule, but it does not demand a particular one. In this respect, prophylactic rules resemble rules of evidence, remedy, procedure, and common law. One may characterize all of these rules as judicial legislation, all of which are subject to revision by the legislative branch.

Prophylactic rules also bear a family resemblance to bright-line core prophylactic rule designed more to protect the First Amendment rather than to enforce it. Strauss also points to the opinion of three justices in Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that U.S. Const. amend. V, § 5 empowers Congress to hold a state statute violative of equal protection, regardless of rational basis review) as deferring to Congress’s exercise of prophylactic review of state statutes. Strauss, Ubiquity, supra note 45, at 206. Strauss argues that this is an appropriate use of prophylactic rules, because “in deciding constitutional cases, the courts constantly consider institutional capacities and propensities . . . courts create constitutional doctrine by taking into account both the principles and values reflected in the relevant constitutional provisions and institutional realities.” Id. at 207. However, Strauss provides no limiting principle for the use of prophylactic measures other than the broad balancing test he employs in his formulation.

182. I do not address the “supervisory power” of the federal courts in federal criminal prosecutions because this power poses somewhat different issues. See 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, 1455 (1984) (surveying the sources of the “supervisory power” to conclude that “the concept of supervisory power should be abandoned in favor of identifying more specifically the constitutional or statutory power being employed”).

183. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Jackson added: “In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” Id. (footnote omitted).
constitutional rules. Lillian R. Bevier has pointed out that public forum analysis under the free speech guarantees of the First Amendment "is rule-based and categorical." 184 Forum analysis shows more faith in judgments by local governments than by courts. Forum analysis is a judicial construct not found in the Constitution, but because the Court has treated it as somehow being part of the core meaning of the First Amendment, it is not a prophylactic rule. Yet, like a prophylactic measure, a bright-line rule "captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness." 185 If core constitutional rules are legitimate despite being over- or under-inclusive, we should not hold prophylactic rules illegitimate simply because they may be over-inclusive.

Although the text of the Constitution does not directly support prophylactic rules, the Preamble does state that one of its objectives is to "secure the Blessings of Liberty to ourselves and our Posterity." 186 In a sense, the Constitution itself is a set of prophylactic rules. The objective is government without tyranny. The original mechanisms for achieving the objective were not bans on tyranny, but the structural protections of federalism, checks and balances, and separation of powers. Chief Justice Marshall used prophylactic reasoning in Marbury, broadly suggesting that judicial review was needed to guard against the risk that Congress might enact laws that conflict with the Constitution. 187 So, too, the First Amendment is in part a prophylactic rule guaranteeing the public the right to expose governmental error. One could take the prophylactic aspect of the Constitution as providing support by analogy for the creation of prophylactic rules. One might also argue that the structural protections were meant to be exclusive, thus negating the creation of prophylactic rules. However, nothing in the constitutional text or debates suggests that this is the case. 188

The framers were aware of the tendency of government toward tyranny and the consequent need to guard against erosion of fundamental liberties. Risk-avoidance rules provide a logical and traditional means of protecting against such erosion. Indeed, the notion of risk-avoidance rules designed to ensure compliance with core rules in a written text predates our Constitution. It can be traced at least to biblical times. A body of ancient Jewish law regarding risk begins with Leviticus and God’s command to Moses: "You shall safeguard my

185. Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 58 (1992). Sullivan does not refer to bright-line rules, but her definition of "rule" is a legal directive that "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." Id. (footnote omitted).
186. U.S. CONST. preamble.
187. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).
188. For example, Madison referred to "the extent and proper structure of the Union" as "a republican remedy," not the sole remedy. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).
The "charge" to which Leviticus refers is not about rights in the modern sense, but about obligations. To the devout, safeguarding God's charge is of overriding importance, and that charge encompasses analogues to modern rights, such as welfare and equal treatment.

The Talmud expands on the Levitical principle: "[M]ake a hedge for the Torah." One authority defines the fence as "preventive rabbinic injunctions enacted to safeguard the observance of biblical commandments" and explains: "The 'fence' consisted of a stringent intensification of the law to safeguard the original commandments." For example, in Exodus, Jews are enjoined that during Passover nothing fermented and no leaven shall be seen throughout their territory. This commandment requires one to draw a line between those items that are fermented or leavened and those that are not. The steps that rabbinic tradition imposes to ensure that this commandment is kept go well beyond the literal text. For example, the ban on the use during Passover of plates and utensils that are used during the rest of the year does not appear in the biblical text, but has been added to guard against any possibility of violating the commandment. Similarly, although the commandment to eat the meat of a sacrifice could theoretically be fulfilled up until dawn, the Sages said that this commandment could be performed only until midnight, "in order to distance a person from sin."

Justice Scalia, writing for the Court in *Plaut v. Spendthrift Farm, Inc.*, adopted the Talmudic metaphor. Commenting on the structural safeguards of the Constitution's separation of powers, Scalia said: "[I]t is a prophylactic

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190. See, e.g., *id.* 19:9-10 (leaving crops for gleaners); *id.* 19:15 (equal justice for rich and poor).
192. THE ENCYCLOPEDIA OF THE JEWISH RELIGION, supra note 191, at 143.
193. *Id.* at 144.
194. See Exodus 13:8 (Torah).
195. *2 Talmud Bavli, Mei E'imeasai* 2a (Mesorah Publ., 2d ed 1997) (footnote omitted); see also THE ENCYCLOPEDIA OF THE JEWISH RELIGION, supra note 191, at 144 (referring to "the prohibition against eating the paschal sacrifices after midnight, although according to biblical law they may be eaten until morning"). Levine, supra note 1, also mentions this example: In the case of the paschal lamb, the Torah not only mandates eating meat, but adds a prohibition against leaving over the meat until morning. Thus, to guard against violation of this prohibition, the Sages advised that the meat be eaten before midnight, far in advance of the morning hour.
197. *Id.* at 239.
device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. 198 Scalia continued, citing "a distinctively American poet: Good fences make good neighbors." 199

The Talmudic rules depend on slippery slope reasoning, the inclination of human beings to cut corners, and the conflict in each person’s mind between good and evil. Rabbi Akiba explained: "Laughter and levity accustom a man to immorality. Tradition is a fence for Torah. Tithes are a fence for riches. Vows are a fence for saintliness. A fence for wisdom is silence." 200 However, not every conceivable danger warranted a risk-avoidance rule: "The Sanhedrin only had an obligation to enact legislation to enact safeguards to prevent likely violations. Safeguards were not enacted to protect against the unlikely." 201

Talmudic approval of risk avoidance rules might seem to violate another biblical admonition: "See that you observe everything that I command you; you must not add anything to it, nor take anything away from it." 202 Moses Maimonides treats the admonition as based on avoidance of risk, saying that adding to or detracting from the Torah "might have led to the corruption of the rules of the Law and to the belief that the latter did not come from God." 203 Thus, it appears that the risk of corrupting the law is invoked to forbid adding further risk avoidance rules. However, one must distinguish the core commandment from measures aimed at eliminating the risk of violating it. Maimonides reconciled the notion of a hedge and the ban on adding to the law by noting that the hedge neither adds to nor detracts from the core commandment. Rather, the hedge is simply a means to ensure the commandment’s observance. 204 The hedge does not change the commandment, but tends to enforce it. Maimonides explained that this admonition "permit[s] the men of knowledge of every period, I refer to the Great Court of Law, to take precautions with a view to consolidating the ordinances of the Law by means of regulations in which they innovate with a view to repairing fissures, and to perpetuate these precautionary measures." 205

A later chapter of Deuteronomy employs parallel language to underscore the courts’ authority and to command compliance with judicial decisions: "Act

198. Id.
199. Id. Justice Breyer, concurring, riposted that Robert Frost also wrote, "Something there is that doesn’t love a wall," as well as, "Before I built a wall I’d ask to know/What I was walling in or walling out." Id. at 1466 (Breyer, J., concurring) (quoting Robert Frost, Mending Wall, in THE NEW OXFORD BOOK OF AMERICAN VERSE 395-96 (Richard Ellmann ed., 1976)).
200. Pirke Aboth, supra note 191, III.17, at 85.
201. Kaplan, supra note 191, at 224.
204. See id.
205. Id.
on the instruction which they give you, or on the precedent that they cite; do not swerve from what they tell you, either to right or to left.”\textsuperscript{206} If prophylactic rules inherently flow from the creation of written core rules, it follows that the courts are a natural source for framing prophylactic rules.

The Talmudic interpretations of the Bible help explain why it may be legitimate for the Court to adopt rules safeguarding the Constitution. Scholars who believed in the sanctity and immutability of the Biblical text nonetheless saw the need to expand upon that text. They were advantaged by the existence of the two commandments with which I began this article, alternately requiring Talmudic scholars to safeguard God’s charge and forbidding them to add to or subtract from it.\textsuperscript{207} The Talmudic scholars were forced to reconcile these two seemingly contradictory messages. The language of the Constitution, of course, contains neither of these Biblical commandments. Its text neither forbids judicial addition or subtraction nor requires judicial safeguarding. Interpretations over the years have led to general acceptance of the notion that the Court lacks authority to add to or subtract from the core constitutional rules. Yet, one may still recognize this unwritten rule and not foreclose the Court from recognizing that it also has an obligation to safeguard core constitutional rights. The two implicit constitutional rules may coexist just as the two explicit biblical rules have successfully coexisted. This possibility becomes readily apparent when one examines \textit{Marbury v. Madison}.\textsuperscript{208}

The \textit{Marbury} Court reasoned that the power of judicial review inhered in the nature of the Article III “judicial Power.”\textsuperscript{209} Courts decide cases by applying the law. If two laws conflict, they must choose which law to apply. Because the Constitution is the supreme law of the land, the Court must determine whether a conflict exists between the Constitution and the challenged law. If the Court finds a conflict, it must apply the Constitution.\textsuperscript{210} This theory of \textit{Marbury}, however, does not extend directly to judicially created rules that build a “fence” around the Constitution.\textsuperscript{211} Any support \textit{Marbury} might lend to prophylactic rules is indirect, stemming from the Court’s reliance on the

\begin{itemize}
\item \textsuperscript{206} \textit{Deuteronomy} 17:11 (New English Bible 1970).
\item \textsuperscript{207} \textit{Leviticus} 18:30 (Tanach, Mesorah Publ. 1996); \textit{Deuteronomy} 12:32 (New English Bible 1970).
\item \textsuperscript{208} 5 U.S. (1 Cranch) 137 (1803).
\item \textsuperscript{209} “The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” \textit{U.S. Const. art. III, § 1; see also id. art. III, § 2, cl.1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.”)}.
\item \textsuperscript{210} Alexander Hamilton made much the same argument some 15 years earlier. \textit{See The Federalist No. 78} (Alexander Hamilton).
\item \textsuperscript{211} Indeed, Professor Grano contends that prophylactic rules are inconsistent with \textit{Marbury}: “Under \textit{Marbury}, the Court does not assume the role of special guardian of constitutional liberties. Rather, the Court invalidates legislation or official conduct only because it must decide cases brought under the Constitution, which has priority over other law.” Grano, \textit{Prophylactic Rules}, supra note 6, at 136.
\end{itemize}
nature of the judicial power. One argument asserts that because Article III confers the judicial power on the federal courts to decide cases, to do so they must fashion rules to govern the result of each case. Those rules should safeguard the Constitution, and through the system of precedent, these rules will apply to similar future cases. As a result, prophylactic rules become part of both the constitution-enforcing and common-law processes.

In *Bivens v. Six Unknown Named Federal Agents*, the Court looked to the common law functions of federal courts in allowing a private suit in federal court for damages arising from a deprivation of Fourth Amendment rights. Justice Harlan, concurring, argued that "the range of policy considerations [the Court] may take into account are at least as broad as those a legislature would consider with respect to an express statutory authorization of a traditional remedy." Later, in *Davis v. Passman*, the Court noted that "the judiciary is clearly discernible as the primary means through which these [constitutional] rights may be enforced." It was through the common law of torts that principles of risk-avoidance, such as negligence and strict liability, evolved. According to one view, the tort system serves economic core values by "a kind

212. Hamilton stressed "that there ought always to be a constitutional method of giving efficacy to constitutional provisions." *The Federalist No. 80*, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696, 768-69 (1998) (arguing that the history of Article III reflects that its focus was "the quality of [t]he judicial Power to decide any given appeal so as effectively to superintend the state judicial check on state law").

213. Beale, supra note 182, at 1468-77 (explaining what Beale calls the "ancillary authority" of federal courts under Article III to establish procedural rules). Though Beale carefully limits her argument to apply only to narrowly defined procedural rules, she concludes that implicit in the grant of judicial power is a "grant of incidental authority comparable to the necessary and proper clause." *Id.* at 1471. Beale's conclusion may appear to support judicially created prophylactic rules, so long as Congress is given "the final say." *Id.* at 1472. Indeed, she classifies remedial measures, procedural rules, and some prophylactic rules as "constitutional common law." *Id.* at 1514. However, she concludes by suggesting that *Miranda* is constitutionally unsupportable in federal prosecutions: "In the absence of any constitutional violation, the exclusion of evidence or the dismissal of a prosecution infringes on the authority of Congress to enact substantive criminal laws and the authority of the executive branch to enforce those laws by investigation and prosecution." *Id.* at 1515-16. Presumably, Beale would reach the same conclusion as to state court prosecutions on federalism grounds.

215. *Id.* at 395-97.
216. *Id.* at 407 (Harlan, J., concurring).
217. 442 U.S. 228 (1979).
218. *Id.* at 241; see also David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 919-21 (1996) (giving examples of other instances of common-law constitutional interpretation). Strauss concludes: "American constitutionalism, over the years, has . . . taken on the character of a common law system." *Id.* at 934.
of balancing of potential harms.” 219 “Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.” 220 A common-law perspective of prophylactic measures supports incremental, empirically-based rules that build on previously recognized legal principles. 221

Article III confers on federal courts jurisdiction over specified types of cases in law and equity. 222 On the role of federal equity jurisdiction, Alexander Hamilton wrote that “the great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules.” 223 Hamilton admitted in a footnote: “[T]he principles by which that relief is governed are now reduced to a regular system.” 224 As I will show, the framing of prophylactic decrees is strongly rooted in equitable doctrine. Some prophylactic rules simply make the constraints of prophylactic decrees generally applicable. This is the kind of reasoning that justified the Fifth Circuit’s fashioning of uniform school desegregation decrees in the mid-1960s. 225 This rationale is less convincing in a case like Miranda because courts of equity would not normally intervene against individual police abuses. 226

Article III also confers jurisdiction on federal courts to hear cases arising under the Constitution. 227 Is it in the nature of constitutional adjudication that “the Supreme Court must sometimes frame doctrinal tests that cannot be linked directly, by ordinary interpretive means, to the meaning of the norms that those


221. Risk avoidance rules are, to use Professor Strauss’s phrase, “ubiquitous throughout the law.” Strauss, Ubiquity, supra note 45. For example, “legal rules such as the parole evidence requirement, the requirement that wills be signed, or presumptions of fraud in debtor-creditor law . . . seem aimed at intentional misbehavior but must often be overinclusive.” Theodore Eisenberg, Civil Rights Legislation 839 (4th ed. 1996). An unsigned will, for example, may or may not express the putative testator’s intent, but the risk that it does not leads the court to reject all unsigned wills.


224. Id.

225. See, e.g., United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), modified, 380 F.2d 385 (5th Cir.) (en banc), cert. denied, 389 U.S. 840 (1967). Similarly, the Swann Court’s statement of a prophylactic rule came in the context of a decision holding that the district court’s decree was “within that court’s power to provide equitable relief.” Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971).


tests implement"228 If so, it becomes easy to accept the legitimacy of prophylactic tests. Risk-avoidance rules protecting federalism229 and separation of powers230 are commonplace. These doctrines influenced the ruling in Schenck, where both the majority and Justice Scalia seemed to opine that federal court injunctions posed a greater risk to free speech than would be posed by state legislation.231 Similarly, in Turner Broadcasting System, the Court sought to avoid the risk of infringing "on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."232

Prophylactic rules are a subset of risk-avoidance rules. If the Court may legitimately fashion risk-avoidance rules to protect the structural provisions of the Constitution, it would follow that the Court may also fashion prophylactic rules to ensure individual rights. Both are designed to vindicate constitutional commands. Both involve judgments as to the "institutional propensities and limitations" of government actors.233 Moreover, "when judicial enforcement seems practically necessary, and a bright-line prophylactic rule will work most effectively at relatively low cost, not every doctrine that 'over-enforces' constitutional norms reflects a constitutional betrayal."234

A related argument posits that the courts must find and enforce public values.235 Prophylactic rules are a natural product of value enforcement. Indeed, the framers of the Constitution considered the courts an essential element of the document's prophylactic structure. Thus, Hamilton argued that

228. Fallon, supra note 63, at 66.

229. The Court has adopted rules of statutory construction designed "to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 546 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).


231. See also Williams v. Planned Parenthood Shasta-Diablo, Inc., 520 U.S. 1133, 1133 (1997) (Scalia, J., dissenting) (calling for heightened scrutiny of a lower court decision, based on concerns about the risk that the court might be trying to "evade the consequences" of a prior Supreme Court remand).


233. See Strauss, Ubiquity, supra note 45, at 208 ("Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases.").

234. Fallon, supra note 63, at 66.

235. See Fiss, The Forms of Justice, supra note 70, at 29 ("To my mind courts exist to give meaning to our public values, not to resolve disputes.").
the independence of the judiciary was required
to guard the Constitution and the rights of individuals from the effects of	hose ill humors which the arts of designing men, or the influence of
particular conjunctures, sometimes disseminate among the people
themselves, and which, though they speedily give place to better
information, and more deliberate reflection, have a tendency, in the
meantime, to occasion dangerous innovations in the government, and
serious oppressions of the minor party in the community. 236

Doubts as to the effectiveness of the structural protections led to the adoption
of the Bill of Rights, which the courts enforce. Therefore, judicial enforcement
of core values is well grounded in the Constitution. The core rule and its logical
extensions reflect those values, but the prophylactic rule is more expansive.
Does the Constitution's failure explicitly or implicitly to mandate the
prophylactic rule limit the Court's authority to impose the rule?

While *Marbury* leads naturally to the judicial power to define the rights the
Constitution protects, does the case also justify the judicial creation of
prophylactic rules of constitutional law? The creation of tests inheres in the
definition of legal norms. Chief Justice Marshall observed of the Constitution:
"[O]nly its great outlines should be marked ... and the minor ingredients which
compose [its important] objects [should] be deduced from the nature of the
objects themselves." 237 The test must advance the normative values of the
Constitution, and the prophylactic rule is based on the belief that those values
will not be vindicated by simply reiterating that no state shall deny any person
the equal protection of the laws or that no state shall engage in unjustified racial
discrimination. The rule of *Carolene Products*'s note four relies in part on
structural analysis and partly on factual and historical evidence of risk. Those
risks are closely linked to the emerging prophylactic rule, which is designed to
assure practical and not just theoretical protection of rights. Thus, as Paul
Brest observed, *Korematsu v. United States* 238 declared racial classifications
"suspect" because "our history and traditions provide strong reasons to suspect
that racial classifications ultimately rest on assumptions of the differential
worth of racial groups." 239

One might argue that *Marbury* supports only those rules necessary to the
decision of a particular case and does not support the use of judicial opinions
as vehicles to establish rules of general applicability. For example, critics of
*Roe v. Wade* 240 maintain that the Court's establishment of the trimester system
exceeds the legitimate judicial role and arrogates to the Court legislative
power. 241 That is also one possible reading of the Court's subsequent rejection

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238. 323 U.S. 214 (1944).
241. See, e.g., ROBERT H. BORK, *The Tempting of America: The Political Seduction
of the trimester system in Planned Parenthood v. Casey. Still, the Court has not treated Marbury as a barrier to fashioning prophylactic rules any more than it has treated the case as a mandate to enforce constitutional rights in all cases. Instead, the Court’s tendency (beginning with Chief Justice Warren’s term of office) to articulate sweeping rules in cases such as Brown II, Miranda, and Reynolds v. Sims also marks the beginning of a period of judicial expansion of the role of prophylactic rules. Former Attorney General Meese’s suggestion that the Court’s decisions “[do] not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore” would apply equally to all judicial statements of constitutional rules, whether core or prophylactic. Conversely, the generally accepted legitimacy of the Court’s fashioning of core constitutional rules may lend support to its fashioning of prophylactic rules as well.

Prophylactic rules perform a utilitarian function by providing guidance to lower courts and government officials wishing to comply with core rules. If prophylactic rules may be legislatively replaced with equally effective statutes, they do not raise the same counter-majoritarian difficulties as decisions that overturn legislation because of some new-found constitutional value. This justification applies to prophylactic rules governing executive, judicial, and state legislative action, but does not authorize rules that supplant Congressional action.

I have already noted Congress’s extensive power to enact prophylactic and other risk-avoidance legislation, recognized in cases such as Everard’s Breweries, South Carolina v. Katzenbach, and City of Rome. When Congress’s authority to enact this legislation is challenged, the Court applies the ends-means test of McCulloch to such statutes. If Congress reasonably could have thought that the prophylactic statute would advance, for example,

242. 505 U.S. 833, 872 (1992) (plurality opinion) (O’Connor, Kennedy, & Souter, JJ.) (treating the trimester system as a prophylactic rule that has not stood the test of time). The three Justices explained: “The trimester framework [exists] ... to ensure that the woman’s right to choose not become so subordinate to the State’s interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective.” Id. (plurality opinion).

243. See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978) (pointing out that various doctrines, such as standing, result in some constitutional norms not being fully enforced). Sager recognizes that valid reasons may sometimes lead to their underenforcement.

244. 377 U.S. 533 (1964) (rejecting three plans for apportionment of seats in the Alabama Legislature under the Equal Protection Clause because the apportionment was not on a population basis and was completely lacking in rationality).

245. See supra Section II.B.


Fourteenth Amendment rights, the Court will uphold the law as within Congress's power. Does the theory of *McCulloch* support judicially imposed prophylactic rules as well?

The *McCulloch* Court held that Congress’s powers necessarily exceeded those that the Constitution enumerates, and that Congress “must also be entrusted with ample means for their execution.” The framers could not, Chief Justice Marshall insisted, have intended “to clog and embarrass [the Constitution’s] execution by withholding the most appropriate means.” Similarly, “the powers given to the government imply the ordinary means of execution.” Congress’s enumerated powers are much more extensive than those of the federal courts. The latter powers are simply to decide cases or controversies, including those arising under the Constitution. But if prophylactic rules are an ordinary means of executing the judicial power, the reasoning of *McCulloch* supports the courts’ authority to fashion and impose such rules.

Thus, one may view implied judicial power to protect rights as a corollary to implied congressional power to pursue constitutionally enumerated ends. This does not mean, however, that the Court should be as free in creating prophylactic rules as in approving congressional prophylactic rules. The Court upholds prophylactic legislation to enforce section 5 of the Fourteenth Amendment so long as the Court is “able to perceive a basis upon which Congress might resolve the conflict as it did.” That is not the standard the Court traditionally has applied to judicially developed prophylactic rules. There, the Court has required a strong showing of necessity.

In one area—injunctions—the courts’ prophylactic authority is well established. All injunctions are based on perceived risk, for injunctive relief is available only for imminent irreparable injury. In every case the court must decide whether the facts reveal a strong threat of such injury. Douglas Laycock characterizes a prophylactic injunction as one issued because of "risk of a

251. *Id.*
252. *Id.* at 409.
253. Professor Grano argues that *McCulloch* authorizes "procedural prophylactic rules" that assist federal courts “in accurately resolving constitutional questions before them,” but not other overprotective prophylactic rules. Grano, *Prophylactic Rules*, supra note 6, at 145. Grano would allow federal courts “to promulgate certain rebuttable presumptions in state cases while denying them the authority to create conclusive presumptions.” *Id.* at 147. Grano concludes that "prophylactic rules are illegitimate only when employed to relieve federal courts of the task the Constitution has assigned them." *Id.*
255. See infra Section III.B.2.
256. FISS & RENDLEMAN, supra note 69, at 59.
future violation” but forbidding “conduct that is not itself a violation of anything.” 257 The courts base such an injunction on an ends-means test. David S. Schoenbrod explains:

The injunction’s aim must be the plaintiff’s rightful position, but to achieve that aim, its terms may impose conditions on the defendant that require actions going beyond the plaintiff’s rightful position. . . . The injunction’s terms, therefore, may have to go beyond the plaintiff’s rightful position to avoid falling short of that position. 258

As Laycock points out, this distinction between the aim and the terms of the injunction is “readily subject to manipulation,” requiring appellate review to test the closeness of the nexus between the terms and the aim of the injunction, as well as the proportionality of the terms and the aim. 259 This problem of “the indeterminacy of the norms that guide [the] drafting” 260 of injunctions exists with prophylactic rules as well. However, the possibility of legislative revision of prophylactic rules ameliorates the difficulty of indeterminate standards.

In Hutto v. Finney, 261 Justice Rehnquist objected that the lower court had entered an “injunction against a prison practice which has not been shown to violate the Constitution.” 262 Rehnquist noted that the injunction’s thirty day limit on punitive isolation “in no way relates to any condition found offensive to the Constitution. It is, when stripped of descriptive verbiage, a prophylactic rule, doubtless well designed to assure a more humane prison system in Arkansas, but not complying with” limits on the court’s remedial authority. 263 Rehnquist added that “[t]he only ground for the injunction . . . is the prophylactic one of assuring that no unconstitutional conduct will occur in the future.” 264 However, the opinion of the Court, joined on this point by eight Justices, dismissively concluded that “taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive

257. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 272 (2d ed. 1994).
259. LAYCOCK, supra note 257, at 273.
262. Id. at 710 (Rehnquist, J., dissenting). This is an overbreadth argument, yet Chief Justice Rehnquist recently argued for qualified immunity for government officials charged with motive-based constitutional torts even though, as was “perhaps true,” the qualified immunity rule might “mean that some meritorious claims will go unreaddressed.” Crawford-EI v. Britton, 118 S. Ct. 1584, 1600 (1998) (Rehnquist, C.J., dissenting). The reason for Rehnquist’s admittedly overbroad immunity was “that the societal benefit [it] confer[s] outweighs whatever cost [it] create[s] in terms of unremedied meritorious claims.” Id. at 1601.
263. Hutto, 437 U.S. at 712 (Rehnquist, J., dissenting).
264. Id. at 714 (Rehnquist, J., dissenting).
order to insure against the risk of inadequate compliance." Even Rehnquist was not absolute in his opposition to prophylactic decrees. Rehnquist noted that he "reserve[d] judgment on whether such a precautionary order would be justified where state officials have been shown to have violated previous remedial orders." Three years after Miranda, the Court in Carter v. Jury Commission declined to adopt a prophylactic rule designed to counter the risk that the "key man" system would lead to racial discrimination in the formation of jury venires. The petitioners presented extensive proof that the key man system had led to racial discrimination in the past because of "its decentralized, highly discretionary character." Still, the Court demurred that if the system led to discrimination, the federal courts could "fashion detailed and stringent injunctive relief" as a remedy. The availability of a prophylactic injunction thus ruled out what the Court felt was the more intrusive measure of fashioning a general prophylactic rule. Injunctions are based on individuated showings of threatened deprivations of rights. Prophylactic rules are based on more generalized showings of threats to rights. The Court has occasionally been troubled that some prophylactic injunctions, especially those that curb expression, "carry greater risks of censorship and discriminatory application than do general ordinances." Do these injunctions not also carry greater risks than judicially imposed

265. Id. at 687.
266. Id. at 714 n.2 (Rehnquist, J., dissenting).
268. Id. at 335-36. The key man system allowed court clerks to use subjective criteria, such as estimations of integrity and good character, when compiling lists of eligible jurors.
271. Randall Kennedy has argued that the Carter Court was wrong, because "[a]t a certain point, a procedure becomes so subject to corruption and so expensive to monitor that it should be adjudged incompatible with federal constitutional requirements." KENNEDY, supra note 269, at 184. Kennedy concluded: "Just as the Court has invalidated overly vague licensing arrangements that permitted local authorities to indulge their personal whims in deciding whom to permit to parade, so too should it have invalidated the key-man system." Id. (footnotes omitted).
272. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 (1994); see also id. at 793 (Scalia, J., dissenting) ("[A]n injunction . . . lends itself . . . to the targeted suppression of particular ideas," is entered by a single judge who may be "chagrined by prior disobedience" of her order, and is more chilling than a general rule because the injunction's invalidity provides no defense to contempt prosecutions). Owen M. Fiss convincingly argues that Justice Scalia has overstated the danger and "overlooks a judge's capacity for impartiality." Owen M. Fiss, The Unruly Character of Politics, 29 MCGEORGE L. REV. 1, 10 (1997). Fiss adds that to treat injunctions as presumptively more suspect than statutes "slights the genuine advantages to First Amendment values that come from allowing the government to regulate through injunctions as opposed to criminal statutes." Id.
prophylactic rules of general applicability? If the federal courts may legitimately issue prophylactic injunctions with their attendant risks, some prophylactic rules should carry less risk of unfairness. 273

Finally, one must reflect on the consequences of denying courts the authority to create prophylactic rules. Inevitably, the same considerations that lead courts to fashion prophylactic rules would encourage courts to discover that the Constitution requires particular rules. One must remember that some Justices thought Miranda was a rule of constitutional law, not a prophylactic rule. Of course, the Court might simply abandon some prophylactic rules. The Court may also transform some prophylactic rules into constitutional requirements. The change in labels would carry with it severe consequences. In the name of judicial restraint, this transformation would deprive courts, Congress, and the states of the flexibility that is inherent in judicially fashioned prophylactic rules.

It is no answer simply to say that the courts should resist the pressure to safeguard the Constitution. The demise of prophylactic rules would create something that nature abhors—a vacuum. Had the Court deemed it illegitimate to fashion prophylactic rules in Miranda, Swann, and New York Times v. Sullivan, it still would have been faced with the facts reflecting substantial risks to constitutional rights. Many of the Justices would have imposed rules that they could more directly link to the Constitution. Rather than adopting a doctrine that invites strained expansion of constitutional rules, it seems far preferable to fashion principles for the creation of prophylactic rules. Of course, one must take into account both the generic shortcomings of prophylactic rules and the legitimate need to safeguard the Constitution. The courts should not be placed in the position where "any judicial decision granting rights would be nothing more than markings on a piece of paper." 274

B. Principles Governing the Creation of Prophylactic Rules

Despite the scholarly debate over the legitimacy of judicially created prophylactic measures in constitutional law, the Supreme Court has not developed a set of explicit principles to govern them. The Court’s discussion of prophylactic rules has consisted of rumblings in dissents, stray off-hand references, and random comments in opinions. Nonetheless, one may extract guiding principles from two sources. One may look to the underlying justifications, described above, for devising such rules, and one may look to the cases in which the Court either adopted or rejected prophylactic measures. These sources suggest the following conclusions.

273. On the other hand, in Clinton v. Jones, 520 U.S. 681 (1997), the Court preferred individuated treatment of the risks that subjecting a sitting president to a civil suit for pre-presidential conduct entailed.

274. Feeley & Rubin, supra note 83, at 281.
1. Protection of a Clear Constitutional Right

The first prerequisite for creating a prophylactic rule is to design the rule to protect a clear constitutional right. For example, while endorsing Congress's power to adopt prophylactic rules in City of Boerne v. Flores, the Court disapproved the Religious Freedom Restoration Act because “Congress does not enforce a constitutional right by changing what the right is.” If such a limit confines Congress’s power, a fortiori, it also confines the Court’s power to fashion prophylactic rules. One must distinguish the prophylactic rule from the desired end state. The analysis begins with a clear understanding of the end sought: what is the precise constitutional right to be protected? Dean Gerald M. Caplan criticizes Miranda as promoting assertion of the privilege against self-incrimination rather than protecting the suspect from unconstitutional coercion. Since a suspect may waive the privilege, the rule is not designed to protect a clear constitutional right. However, the Court viewed the case differently, treating the Miranda warnings as necessary to guard against coercion.

A corollary follows from the precept that prophylactic rules must protect constitutional rights: The legitimacy of proposed prophylactic rules diminishes as the distance from constitutional rights grows. This concept helps explain the many cases that fashion exceptions to Miranda or decline to extend the rule of the case. Courts disfavor prophylactic rules to safeguard prophylactic rules because they are too remote from the original right the rule protects.

275. 521 U.S. 507 (1997). “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the states.’” Id. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

276. Id.


278. “[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.” Miranda v. Arizona, 384 U.S. 436, 478 (1966). Myron Moskovitz argues that the policy against coercion is not a clear constitutional right, and that Miranda responded to the doctrinal uncertainties of prior decisions by formulating a bright-line rule. See Myron Moskovitz, Cases & Problems in Criminal Procedure: The Police 440-43 (2d ed. 1998).

279. See Grano, Prophylactic Rules, supra note 6, at 110-11.
2. Evidence of Need

A prophylactic rule should be based on evidence of need. To borrow from another area of the law in which risk is relevant, the issue becomes the gravity, immediacy, and probability of the feared deprivation of rights: "In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The evidence needed to support a prophylactic rule differs from the grounds required for a prophylactic injunction. The rule must respond to evidence of a widespread need, while the injunction relies on individuated facts. For example, the Court’s rejection of the prophylactic rule proposed in Ohio v. Robinette may be explained in part by the local (and therefore individuated) nature of the evidence supporting it. Similarly, the Court’s reversal of Aguilar v. Felton and the prophylactic rule against use of public school employees in parochial schools stems from Aguilar’s speculative presumption of risk.

One may object that assessment of need contains a normative element. Indeed, today’s Court is quick to see a risk that affirmative action programs improperly discriminate, but has abandoned suspicion of state laws governing abortion. One cure would be to return to the thorough assessment of need.

282. The Court reversed the Ohio Supreme Court’s fashioning of a prophylactic rule to govern searches during traffic stops. As Justice Ginsburg’s concurrence explained, the Ohio court had found “that traffic stops in the State were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity.” Id. at 40 (Ginsburg, J., concurring). The Ohio court had established “a bright-line prerequisite for consensual interrogation under these circumstances,” requiring the officer making the stop to advise a lawfully seized defendant that “he is ‘free to go’ before his consent to search will be recognized as voluntary.” Id. at 35 (Rehnquist, C.J.). The Supreme Court rejected this prophylactic rule, because “we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry” under the Fourth Amendment. Id. at 38. The factual predicate consisted of individuated information about Ohio, so this may account for the Court’s summary rejection of the state court’s rationale for imposing the rule.
284. See infra notes 326-29 and accompanying text.
285. For example, in Mazurek v. Armstrong, 520 U.S. 968 (1997), the Court upheld a district court ruling that denied a motion for preliminary injunction against enforcement of Montana’s statute forbidding physician assistants to perform abortions. Id. at 976. The Ninth Circuit held that the district court had erred in failing to hold that the plaintiffs had shown a fair chance of success on the merits. Armstrong v. Mazurek, 94 F.3d 566, 568 (9th Cir. 1996). The Ninth Circuit thought that the district court had failed to consider “the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute in fact can be regarded as serving a legitimate health function.” Id. at 567 (citing Shaw v. Hunt, 517 U.S.
that the *Miranda* Court employed. But, as Justice Cardozo observed, judges can never completely extirpate their own normative approach from their judging.286

The usual fact scenario demonstrating need begins when the Court defines some core constitutional right, such as the freedom from official compulsion to confess, the freedom from state-imposed racial segregation, the freedom from specified conditions of confinement in prison, the freedom of speech, or the freedom of a woman to choose to have an abortion. The evidence of need normally consists of a pattern of official violations of the right, like the patterns described in *Miranda, Swann, Hutto,* and *Madsen.* Conversely, the absence of any clear pattern of official violations led to the result in *Agostini.*

### 3. Proportionality

**How does the proposed prophylactic rule protect the right? Is the rule more intrusive than necessary?**287 The Court recently articulated the need for

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899, 901-06 (1996), and *Miller v. Johnson,* 515 U.S. 900, 915 (1995), two Supreme Court decisions regarding race-based congressional districts. The Supreme Court responded that "since the record does not support a conclusion that 'the legislature's predominant motive' . . . was to create a 'substantial obstacle' to abortion, it is quite unnecessary to address 'whether the Court of Appeals misread this Court's opinions'" in those cases. *Mazurek,* 520 U.S. at 974 n.2 (citations omitted); cf. *Palmer v. Thompson,* 403 U.S. 217, 225 (1971) ("It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."). The Supreme Court, however, pointed to the Ninth Circuit's failure to identify evidence of improper legislative purpose. The Court took the unusual step of granting certiorari and reversing and remanding the case even though no final judgment had yet been entered. The Court justified this with the Ninth Circuit's clear error and the "real threat" that similar statutes in several Ninth Circuit states would be placed under preliminary injunctions against enforcement. *Mazurek,* 520 U.S. at 974. The Court apparently believed that the risk of erroneously enjoining the enforcement of state statutes outweighed the risk of unduly burdening the right to an abortion.

286. "There is in each of us a stream of tendency . . . which gives coherence and direction to thought and action. . . . [Judges] may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." **BENJAMIN N. CARDOZO,** *THE NATURE OF THE JUDICIAL PROCESS* 12-13 (1921) (footnote omitted). A later (and less restrained) observer opined:

> The idea that a human being, by a conscious act of will, can rid his mind of the preferences and prejudices and political slants or values that his whole past life has accumulated in him, and so manage to think in the rarefied atmosphere of simon-pure objectivity, is simply a psychological absurdity.

**FRED RODELL,** *NINE MEN* 29-30 (1955).

287. Peter M. Shane's comments frame one argument against over-intrusiveness:

> I believe the most plausible stance for a "rule of law" judge is this: the judge should feel obligated to intervene as much as, but no more than, is necessary to create a justifiable confidence that the defendant institution will, henceforth, be responsive to the plaintiff's claims of right. That is, the judge should regard plaintiffs as entitled to a fair expectation
“proportionality” in prophylactic legislation, and it previously made a similar point as to injunctive relief. It follows that the same restriction applies to judicially imposed prophylactic rules. The legitimacy of a prophylactic rule flows from finding a risk to a core right. The problem is that there may be many possible ways to guard against that risk. The Miranda warnings could have used different verbal formulations, or might be supplanted by the taping of suspect interviews. The issues of New York Times v. Sullivan might have been resolved by limits on damages awards in defamation cases. Within this range of choice in devising prophylactic rules, the courts’ actions most resemble legislation, and the counter-majoritarian concern takes on its greatest legitimacy. Similarly, a prophylactic rule compatible with the desired end state seems preferable to one that is not. Perhaps prophylactic rules that are incompatible with the desired end state require a higher standard of justification. But a showing of necessity may justify even such incompatible rules. For example, the Court has never repudiated Justice Blackmun’s aphorism in Regents of University of California v. Bakke that “to get beyond racism, we must first take account of race. There is no other way.”

Prophylactic rules of constitutional law depend on the rulemaker’s conclusion that the rule’s absence creates a risk of noncompliance with the Constitution. Since the very existence of a rule in the Constitution creates some risk of noncompliance, risk as the only justification would authorize a seemingly unlimited class of prophylactic rules. The Court has implicitly recognized that possibility and has tended to base its approval or imposition of prophylactic rules on the substantial support of legislative or adjudicative facts. The Miranda Court dwelt on past cases and studies showing police abuses. The Batson Court turned its back on Swain v. Alabama because intervening years had revealed patterns of racial discrimination in peremptory challenges. The Swann Court referred to past failures to desegregate as justifying imposition of “criteria of sufficient specificity” to ensure future compliance. The City of Rome Court relied on the substantial showing of risk that Congress had developed before fashioning and extending the Voting Rights Act. The
record in the case arguably contradicted that showing, but there were some facts suggesting risk. 295 If so, City of Rome would stand for the proposition that prophylactic measures are permissible even if over-inclusive. Justice Rehnquist, dissenting in City of Rome, would require greater evidence of risk. 296 Although it is not possible to specify the precise quantum of risk that would justify a prophylactic rule, surely the words of Justice Frankfurter, written in a somewhat different context, apply here: "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." 297

4. Impact on Other Branches and Levels of Government

What is the impact of the prophylactic rule on other branches or levels of government? Many post-Miranda cases stress the value of a bright-line rule that provides "clear and unequivocal" guidelines to the law enforcement profession. 298 The Court explained: "This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in Miranda imposes on law enforcement agencies and the courts." 299 On the other hand, every prophylactic rule fetters the freedom of the states or Congress to act. Whether the adverse impact is "too much" inescapably brings normative values back into judicial judgment. Although the Rehnquist Court has generally been highly supportive of state autonomy, the Court drew no distinction between state and federal courts when it fashioned and applied prophylactic injunctions aimed at abortion clinic protesters. 300 To Justice Scalia, partially dissenting, the dangers of a content-based judicial order made the facially neutral state court injunction "at least as deserving of strict scrutiny as a statutory, content-based restriction." 301

5. Other Factors

Risk is often accompanied by counter-risk. For example, the risk of overenforcement mirrors the risk of underenforcement. The risk of

295. Id.
296. Id. at 219 (Rehnquist, J., dissenting).
299. Id. In his dissent, Justice Kennedy, joined by Chief Justice Rehnquist, did not claim that prophylactic rules are improper. Rather, he argued that "the majority does not have a convincing case" that the rule was "consistent with the practical realities of suspects' rights and police investigations." Id. at 688 (Kennedy, J., dissenting).
301. Madsen, 521 U.S. at 792.
discrimination against African-Americans is theoretically matched by the risk of discrimination against other groups, such as whites. Seldom, if ever, does the law attain an ideal balance, where measures directed at one risk do not accentuate another. The law’s fallibility, however, is not a sufficient ground for failing to address risk. Rather, this fallibility cautions us to weigh the risks and the probable consequences of prophylactic measures. As Justice Kennedy has argued, “[b]alance is essential when the Court fashions rules which are preventative and do not themselves stem from violations of a constitutional right.” For example, the history of race in America, coupled with the current relative positions of the races, suggests that the practical risk to society from racial discrimination against African-Americans far outweighs any theoretical risk of discrimination against white persons.

Prophylactic rules are over-inclusive because they require conduct that goes beyond what is strictly necessary to achieve their underlying objectives. The rule against prior restraints treats the risk of violating the freedom of speech as a concern that normally outweighs counter-risks. Because the consequences of speech are usually speculative, the state ordinarily may not forbid particular speech simply because it fears adverse consequences. Justice Brennan, concurring in *New York Times Co. v. United States*, wrote that “the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.” In the same case, Justice Stewart disapproved a prior restraint for lack of a showing that publication would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”

Risk is heightened by rules that turn on legislative intent. *Washington v. Davis* requires a party attacking a facially neutral law as racially discriminatory to prove that the legislature adopted the law with discriminatory intent. The difficulties of the rule are well known; legislators may mask their invidious intent behind neutral justifications, they may harbor unconscious invidious intent, and some legislators may act on discriminatory intent while others act from benign motives. The risk of legislation based on discriminatory intent may be sufficiently troublesome to warrant prophylactic protections. The Court has fashioned prophylactic measures when innocent reasons seemed unlikely or where it believed risk of improper motives was “heightened.” Yet,
the Court has more often followed the rule of Washington v. Davis, which the Court adopted in order to avoid the counter-risk that requiring the government to justify the disparate impact of facially neutral statutes "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes." Even in the face of a statistical study that ruled out nonracial explanations for disparate imposition of the death penalty, the Court declined to find "a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process." Conversely, the Court has adopted a prophylactic rule to guard against jury bias at the sentencing phase of a capital case. In Turner v. Murray, the Court held that the risk of racial prejudice infecting the jury in

Blackmun objected that the Court had issued "sweeping new rules to decide such a narrow case." Id. at 1036 (Blackmun, J., dissenting). Justice Stevens agreed "that the risks of such singling out are of central concern in takings law," but argued that "such risks do not justify a per se rule for total regulatory takings" because a regulation "may deprive [a property owner] of all of his property without singling him out." Id. at 1067 (Stevens, J., dissenting).

310. Davis, 426 U.S. at 248.

311. McCleskey v. Kemp, 481 U.S. 279, 313 (1987). The apparent problem in McCleskey was the inability to identify the discriminatory state actor. The Court noted: "Even a sophisticated multiple-regression analysis such as [the study in evidence] can only demonstrate a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." Id. at 291 n.7. Of course, the Court could have concluded in Miranda that failure to give the Miranda warning could only demonstrate a risk that some confessions were involuntary and a lesser risk that coercion led to any particular confession. The difference between the two cases may lie in the ease of fashioning a prophylactic remedy in Miranda without sacrificing criminal law enforcement and the difficulty of fashioning prophylactic relief in McCleskey without simply invalidating the death penalty. Perhaps the difference is that the McCleskey Court examined the statistical evidence of risk not as possibly requiring a prophylactic rule, but as claimed proof of a constitutional violation. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1975) (plurality opinion) (creating a prophylactic rule to ensure that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

The core constitutional rule flowing from the Eighth Amendment forbids arbitrary and capricious death sentences. Gregg held that the Georgia procedures adequately guarded against that risk; in so holding, the Court defined the prophylactic measures that one must take. The McCleskey Court believed that Gregg and cases like Batson v. Kentucky, 476 U.S. 79 (1986), had reached the limits of judicial ability to fashion appropriate rules to minimize the risk that racial prejudice would play a role in death penalty cases. The Court rejected Justice Stevens's suggestion that narrowing the class of death-eligible defendants would ameliorate the risk of racial discrimination as "speculative." McCleskey, 481 U.S. at 319 n.45. The Court also was concerned that "there is no limiting principle to the type of challenge brought by McCleskey." Id.; cf Strickland v. Washington, 466 U.S. 668, 716 (1984) (Marshall, J., dissenting) ("The importance to the process of counsel's efforts, combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes 'effective assistance' be applied especially stringently in capital sentencing proceedings.").

an interracial crime ‘entitled [a capital defendant] to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.’\textsuperscript{313} Where the rule is not facially neutral, but is explicitly based on race, however, the risk of invidious discrimination becomes intolerable and any counter-risk becomes minimal. The legislature no longer carries a presumption of fairness, and the risk that the rule is invidious leads to the application of strict scrutiny.

Predictive judgments may rest on intuitive sense, on pure speculation, on a solid factual record, on judicial notice of how the world works, or on some combination of these bases. The Court sometimes, as in \textit{Miranda}, explains its factual predicate at length. In the First Amendment context, the Court sometimes speculates on the “chilling effect” of a rule, as in \textit{New York Times v. Sullivan}. In \textit{Wisconsin v. Mitchell},\textsuperscript{314} the Court found the argument that enhanced sentences for race-based crimes would have a chilling effect on speech “too speculative a hypothesis.”\textsuperscript{315} The Court characterized the purported chill as “far more attenuated and unlikely than that contemplated in traditional ‘overbreadth’ cases.”\textsuperscript{316} Yet, in \textit{Cohen v. California},\textsuperscript{317} the Court rejected “the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”\textsuperscript{318} “Indeed,” the Court continued, “governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”\textsuperscript{319}

The search for a general theory of prophylactic rules must recognize that the rules are not all alike. Some prophylactic measures come closer to being core constitutional rules. There is a substantial difference between the exclusionary rule of \textit{Mapp v. Ohio} and the exclusionary rule of \textit{Miranda}. \textit{Mapp} excludes unconstitutionally obtained evidence, while \textit{Miranda} excludes statements obtained absent the requisite warning, even when there has been no violation of the Fifth Amendment privilege against self-incrimination. It is more plausible that \textit{Mapp}'s exclusionary rule is required by the Constitution than that the mandate of \textit{Miranda} is.\textsuperscript{320}

An argument in favor of \textit{Miranda} could focus on the Court’s power to set evidentiary standards in constitutional cases. Surely, the Court could have announced that it would presume that statements given after a \textit{Miranda} warning were voluntary. Conversely, the Court legitimately could have decided that statements given without a warning are presumptively coerced because it is so

\begin{itemize}
  \item \textsuperscript{313} \textit{Id.} at 36-37.
  \item \textsuperscript{314} 508 U.S. 476 (1993).
  \item \textsuperscript{315} \textit{Id.} at 489.
  \item \textsuperscript{316} \textit{Id.} at 488.
  \item \textsuperscript{317} 403 U.S. 15 (1971).
  \item \textsuperscript{318} \textit{Id.} at 26.
  \item \textsuperscript{319} \textit{Id.}
  \item \textsuperscript{320} See generally Thomas S. Schrock & Robert C. Welsh, \textit{Up from Calandra: The Exclusionary Rule as a Constitutional Requirement}, 59 MINN. L. REV. 251 (1974) (arguing that \textit{Mapp} is a rule of constitutional, rather than “subconstitutional,” law).\end{itemize}
obviously against the interests of a suspect to talk to the police in a secret interrogation. Swann represents yet another scenario, in which a prophylactic rule of evidence blended with a reparative rule rooted in the equal protection clause—that the Constitution required the states to disestablish racially dual school systems.

What all three cases share is their adoption of a rule the Court directs at risk to a core right. In each case the Court thought that some rule should exist to safeguard the right. A variety of rules might do the job, but if the Court has the authority to safeguard the right, it must have the authority to choose an effective rule. The primary issue becomes what prophylactic rule the Court should adopt, thus placing on the Court the arguably legislative function of rule formulation and selection. However, the Court traditionally has fashioned rules in many contexts. Here the context is the judicial function of enforcing core rules enforcement. An all-or-nothing bright-line rule validating or invalidating judicially imposed prophylactic rules is inappropriate. The Court must evaluate each prophylactic rule separately.

In the end, the judicial fashioning and imposition of prophylactic rules should be guided by sensitivity to a congeries of factors that often compete. How compelling is the evidence of risk? What is the nature of the risk? What counter-risks are raised by imposition of the prophylactic rule? On what values does the prophylactic rule impinge—state autonomy, separation of powers, or lower court discretion? Is the Court competent to fashion a workable rule that bears a close link to the constitutional right being protected? Are the consequences of the rule predictable?

C. Modifying or Terminating Prophylactic Rules

1. Judicial Modification or Termination

As with any rule, the Supreme Court’s adoption of a prophylactic rule does not forever preclude the Court from considering the rule’s wisdom or appropriateness. Lower courts are bound by the rule, but the high Court is free to modify or terminate the prophylactic measure. Indeed, the nature of prophylactic rules may suggest how to approach stare decisis and the modification or termination of case law precedent. The most obvious reason to change the prophylactic rule is if a change has occurred in the content of the core rule it is protecting. Beyond that, the features of prophylactic rules that bear most directly on the modification issue are the perils of prediction, the relative efficacy of the rule, and the impact of the rule on other values.

Risks may change over time. A prediction founded on prevailing social

321. The phrase “perils of prediction” is a chapter heading in Fiss & Rendleman, supra note 69, at 109. See also Owen M. Fiss, The Civil Rights Injunction 80 (1978) (discussing “the difficulty of prophesying”).
attitudes becomes unreliable as those attitudes evolve.\textsuperscript{322} For example, the Court seems to believe that a long period of compliance with school desegregation orders attenuates the risk of perpetuating the effects of past discrimination.\textsuperscript{323} Changes in technology and police practices could alter the risks that \textit{Miranda} addressed. Would videotaping all interrogations minimize the risk of coercion?\textsuperscript{324} Although the answer to that question may be unclear at present, an affirmative answer could lead the Court to re-evaluate \textit{Miranda}.\textsuperscript{325}

If the original prophylactic rule was based on assumptions rather than evidence of risk, changed assumptions may lead to abandonment of the rule. This is essentially the scenario that led the Court to overrule \textit{Aguilar v. Felton},\textsuperscript{326} a case that generally forbade the use of public school teachers to educate low income children in parochial schools. \textit{Aguilar} relied on a groundless assumption that the danger that such use would advance religion would lead to excessive entanglement because of the need to monitor the public school teachers.\textsuperscript{327} Twelve years later the Court overturned this prophylactic ruling in \textit{Agostini v. Felton},\textsuperscript{328} holding that there was no reason to assume that the teachers would advance religion; hence, there was no reason to fear the threatened entanglement.\textsuperscript{329}

A prophylactic rule could prove ineffectual or much more costly than predicted, especially as compared with other potential rules designed to guard against deprivation of rights. Moreover, empirical evidence could undermine the initial finding of risk. For example, the argument has been made (and persuasively rebutted) that evidence reveals both that coerced confessions are less prevalent than the \textit{Miranda} Court thought and that \textit{Miranda} has proven

\textsuperscript{322} Discussing \textit{Withrow v. Williams}, 507 U.S. 680 (1993), Akhil Reed Amar suggests that "[i]f the facts change over time—if, say, police are now generally more sensitive to Fourth Amendment issues than they were in 1961—a legislature is free without embarrassment to change the law." \textit{AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE} 151 (1997).

\textsuperscript{323} \textit{Freeman v. Pitts}, 503 U.S. 467, 496 (1992).


\textsuperscript{326} 473 U.S. 402 (1985).

\textsuperscript{327} Id. at 409.

\textsuperscript{328} 521 U.S. 203 (1997).

\textsuperscript{329} Id.
much more costly than initially predicted.\textsuperscript{330}

2. Congressional Modification or Termination

Congress's power to change its own prophylactic legislation, such as the Voting Rights Act, seems beyond challenge. Congress's power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution should include the limited authority to change judicially adopted prophylactic rules. Congress's powers under Article I, section 8 may also authorize the legislature to change judicially adopted prophylactic rules. However, the authority to legislate on a subject remains limited by the constitutional protection of rights. The extent of Congress's revisionary power is determined by the hybrid nature of judicially adopted prophylactic rules. While Congress lacks authority to add to or to detract from the core constitutional rights,\textsuperscript{331} the \textit{Miranda} decision emphasized: "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as [the \textit{Miranda} procedures] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."\textsuperscript{332} The Court did not say that the \textit{Miranda} procedures could be replaced by procedures that failed either to inform the accused of the right of silence or to afford a continuous opportunity to exercise it. But if the \textit{Miranda} procedures are prophylactic, rather than a constitutional right, Congress and the states arguably possess the power to replace them with any procedure that effectively protects the core right of silence. As Walter Dellinger argued in a related context, Congress's revisionary power depends "upon the relationship of the remedy created to its substantive constitutional predicate."\textsuperscript{333}

The \textit{Miranda} Court had, of course, rejected case-by-case determinations of voluntariness as ineffective protections of the Fifth Amendment.\textsuperscript{334} Nonetheless, Congress adopted 18 U.S.C. § 3501, a post-\textit{Miranda} statute governing federal criminal trials. The statute purports to return the law to its pre-\textit{Miranda} status by excluding a confession only if the court determines the statement was involuntary.\textsuperscript{335} Two courts have ruled that since \textit{Miranda} is a prophylactic measure, Congress has unlimited power to change it and therefore § 3501 is constitutional.\textsuperscript{336} Congress does have the power to change judicially

\textsuperscript{330} Cassell, \textit{supra} note 325, at 476-78, 484. \textit{But see generally} Schulhofer, \textit{supra} note 55.


\textsuperscript{334} \textit{Miranda}, 384 U.S. at 477.


adopted prophylactic rules, but that power is limited.

Congress's revisionary power derives in most cases from the enforcement clauses of the Reconstruction Amendments and should be based on criteria similar to those that govern judicial revision. Since § 3501 affects only federal criminal trials, Congress's power to enact the statute must rest on some other basis, such as the Article III power to "constitute tribunals inferior to the Supreme Court," 337 the spending power, 338 or the Necessary and Proper Clause 339 coupled with the Fifth Amendment. However, Congress's power under these provisions is not unlimited. Both the legislative and judicial branches derive their prophylactic power from the constitutional mandate to enforce rights that the Constitution creates. Because those criteria rely primarily on legislative facts regarding risk, cost, and relative effectiveness, Congress may employ its superior ability to investigate and find legislative facts regarding those criteria. 340 But any change in the judicial rule should afford "comparable vindication of the constitutional provision involved." 341 That is, if Congress should so find and the Court should uphold the finding, Congress's revision should be upheld. 342 Prophylactic rules are not, as the courts upholding § 3501 imply, based on mere "supervisory" powers. Prophylactic measures find their origin in the courts' duty to enforce the Constitution and in judicial determinations of seriously threatened deprivations of constitutional rights. The difficult issue, which the lower courts ignored, is whether Congress's action is based on proper findings that the legislative standard sufficiently safeguards the

337. U.S. CONST. art. I, § 8, cl. 9; see also id. art. III, § 1 (granting Congress the power to ordain and establish inferior courts).
338. Id. art. I, § 8, cl. 1.
339. Id. cl. 18.
340. In The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1 (1985), Thomas W. Merrill makes a similar point, though he does not discuss the special characteristics of prophylactic rules. Following Monaghan, Professor Merrill classifies cases like Miranda as constitutional common law that cannot be overturned by mere congressional disapproval. The federal judiciary, not Congress, is the ultimate interpreter of the specific intentions of the framers of the Constitution and thus has the final say in determining what policies are reflected in that document. Nevertheless, congressional override should be permissible when Congress enacts a statute that affords an adequate substitute for the constitutional common law rule. Since necessity is the foundation of preemptive lawmaking, the disappearance of necessity eliminates the foundation for the rule. Thus, Congress may override preemptive lawmaking based on the Constitution, but only if the federal courts independently conclude that Congress has enacted a statute that provides roughly the same degree of protection for constitutional policies as the federal common law rule.
Id. at 57-58.
341. Dellinger, supra note 333, at 1548. Similarly, Professor Schulhofer argues that Withrow shows the "constitutional grounding of the 'prophylactic' rules." Schulhofer, supra note 325, at 554. Schulhofer concludes that those rules "cannot simply be abrogated. They can be replaced only by other rules, likewise 'prophylactic.'" Id. at 555.
342. Dellinger, supra note 333, at 1549.
IV. CONCLUSION

The Constitution contains no explicit repetition of either the mandate to "safeguard my charge" or the prohibition "you must not add anything to it, nor take anything away from it." Are prophylactic rules sometimes required to safeguard the Constitution? Do prophylactic rules improperly add to the Constitution by violating the early judicial inference that the federal government’s powers are limited to those which the Constitution enumerates?

Doubtless, the debate over the legitimacy of judicially created prophylactic rules will continue. The controversy has been cast as a debate between formalism and values-oriented interpretation. The discussion is more than that. A more complete list includes not only formalism and values but also a particular view of structural concerns—both federalism and separation of powers—and pragmatism. Moreover, each school of thought provides some support to each side of the debate.

While formalists may point out that the Constitution contains no explicit authorization of judicial prophylactic rules, neither does the Constitution explicitly bar such rules. While prophylactic rules do impinge on state prerogatives, they do so in furtherance of constitutional restrictions on state action. While the Court is engaging in rule-making, Congress is free to alter prophylactic rules so long as the legislature properly addresses risks to constitutional rights. Certain values may support safeguarding constitutional rights, but they also warn against judicial tyranny. Pragmatically, prophylactic rules may be necessary to ensure the observance of constitutional rights, but the Court’s ability to predict risk and to fashion workable rules of general application may often be inferior to that of Congress or the states.

All of these factors enter into the modern cases. The Rehnquist Court has preserved prophylactic rule making, but has recognized limitations on the process. The Court has never developed an open and self-conscious set of principles governing the creation, content, revision, or retraction of judicially created prophylactic rules. Yet, once we recognize the competing constitutional considerations, we will possess the tools that will enable us to create these principles.


344. See Leviticus 18:30 (Tanach, Mesorah Publ. 1996); Deuteronomy 12:32 (New English Bible 1970); see also supra notes 1-2 and accompanying text.