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UNDERSTANDING PROPHYLACTIC REMEDIES THROUGH THE LOOKING GLASS OF *BUSH V. GORE*

Tracy A. Thomas*

Using the context of Bush v. Gore as a vehicle for discussion, Professor Thomas examines the use and legitimacy of prophylactic remedies. In this Article, Professor Thomas advances the argument that the broad prophylactic remedy provided by the U.S. Supreme Court in Bush v. Gore may be viewed as contrary to the law of remedies in that it operated to negate, rather than enforce, legal rights. In particular, prophylactic remedies which are untailored and unachievable, as in Bush v. Gore, threaten the legitimacy of prophylaxis. Professor Thomas argues that the use of prophylactic remedies itself is not problematic, but concludes that misuse of prophylactic powers can lead to the use of arbitrary and unbounded equitable judicial power.

* * *

"There's no use trying," she said: "one can't believe impossible things."

"I daresay you haven't had much practice," said the Queen. "When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."'¹

Examining *Bush v. Gore*² through the looking glass of remedies law reveals an unusual array of seemingly-impossible legal creatures: Prophylaxis, Unfettered Equity, Ratcheted Relief, and the Mirage of Prophylactic Effects. This Article explores these remedial concepts in order to advance a new understanding of prophylactic remedies and their legitimate use by the courts. Prophylactic remedies,

* Associate Professor, The University of Akron School of Law. This Article began as a presentation at *The Final Arbiter Conference* co-sponsored by The University of Akron School of Law and The Bliss Institute for Political Studies at The University of Akron. A paper based on my remarks at the conference appears as *Bush v. Gore and the Distortion of Common Law Remedies*, in *THE FINAL ARBITER: LONG-TERM CONSEQUENCES OF BUSH V. GORE IN LAW AND POLITICS* (forthcoming SUNY Press). Thank you to The University of Akron School of Law for its summer research assistance, and to Stephen Funk, Brant Lee, Stewart Moritz, Molly O'Brien and Elizabeth Reilly for their comments and suggestions on the paper. A special thanks to Stuart Baker and Edward Ebling for their excellent research assistance.

¹ LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS* 177 (Roger Lancelyn Green ed., Oxford Univ. Press 1982) (1872).

² 531 U.S. 98 (2000) (per curiam).

which impose additional measures on defendants beyond a mere proscription against further harm, are often criticized as illegitimate judicial rulemaking. However, as this Article will demonstrate, prophylactics are remedies and not rules, and thus, fall within the court's accepted power to remedy legal harms. Prophylactic remedies properly used provide the courts with alternative means to enforce important constitutional and statutory rights.

The Supreme Court's decision in *Bush v. Gore* facilitates this understanding of prophylactic remedies by demonstrating their legitimacy as well as their potential misuse. Commentators have quickly dismissed the remedial decision in *Bush v. Gore* as impossible under the law³ and instead have explained the outcome by other ulterior legal or political motives.⁴ Rather than focusing on what the Supreme Court should or could have done, this Article examines the actual text of the decision and the validity of its remedial analysis. Because the platform of remedies law enabled the Court to achieve consensus in this highly-charged dispute, it is the remedial decision that may have long-term impact upon the law.⁵ Like Alice at the end of the

³ Ward Farnsworth, "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness, 86 MINN. L. REV. 227, 227 (2001) (concluding that the Court's remedial decision was "lawless" in that it "lacked an adequate legal foundation by traditional standards"); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHIC. L. REV. 657, 674 (2001) (finding the Court's remedial decision "troubling" and incorrect as a matter of law); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 48 (arguing the equal protection remedy had a "gotcha!" flavor of nailing the Florida court but providing no relief to Florida voters); David A. Strauss, *What Were They Thinking?*, in THE VOTE: BUSH, GORE & THE SUPREME COURT 184, 187 (Cass R. Sunstein & Richard A. Epstein eds., 2001) ("What does seem indefensible is the Court's remedy"); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 767 (2001) (calling the *Bush v. Gore* remedy a "blunder," as well as the most difficult part of the Court's opinion to defend on conventional legal grounds). *But see* Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1270-76 (2002) (defending the controversial remedial decision of the *Bush* Court).

⁴ ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 110, 121-72 (2001) (suggesting the decision was motivated by personal political agendas of individual Supreme Court Justices); Farnsworth, *supra* note 3, at 230 (suggesting the decision was motivated by structural inter-branch policy concerns); Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L. J. 2087 (2002) (suggesting the decision was motivated by the subjective moral commitments of individual Justices to a particular result rather than stare decisis); Spencer Overton, *Rules, Standards and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65 (2002) (suggesting the decision was motivated by jurisprudential choice between rules and standards); Strauss, *supra* note 3, at 187 (suggesting the decision was motivated by a perceived need to curtail the partisanship of the Florida Supreme Court).

⁵ Thus, as Professor Mark Tushnet has suggested, this Article seeks to renormalize the post-*Bush v. Gore* law by working out the doctrinal implications of the Court's innovations rather than simply dismissing the case as a political anomaly. Mark Tushnet, *Renormalizing*

dream, lawyers will awaken and realize that *Bush v. Gore* provides important principles of law to guide them in future adventures in the legal wonderland.⁶

As the Article will explain, *Bush v. Gore* represents an unprecedented use of a broad prophylactic remedy designed to prevent future harm by imposing required precautions addressing conduct ancillary to the proven harm. In response to the Florida court's arbitrary treatment of voters in the manual recount, the *Bush* Court imposed numerous mandatory standards and procedures ancillary to any further recount.⁷ This use of a prophylactic remedy by the *Bush* Court is not in itself problematic. Prophylaxis has unfairly become the miscreant of judicial action.⁸ But contrary to common perception, prophylaxis is simply one type of remedy legitimately imposed by a court to redress a proven harm.

Courts, however, can misuse prophylactic remedies. The *Bush* Court's imposition of a prophylactic remedy that was unachievable, untailored, and unnecessary is such an example of the misuse of the remedy. The Court's decision to impose the prophylactic remedy arbitrarily departed from previously-existing standards constraining the use of this powerful remedy. Perhaps for the first time, the Supreme Court used its flexible equity power, ostensibly designed to achieve justice and fairness, to do harm rather than good. By prohibiting all recounts that did not comply with the new complex system, the Supreme Court nullified the state right to a voting remedy and created further equal protection harm by denying relief to those Florida voters who cast a legal vote which was not counted.⁹ The Court's application of the prophylactic remedy in the context of the voting dispute thus worked to bar rather than provide effective relief for the constitutional and state law violations. This was the fundamental failing of the remedial decision in *Bush v. Gore* because the law of remedies should be used to enforce rather than negate legal rights.

Part I of this Article discusses the decision in *Bush v. Gore* under the microscope of remedies law. It reveals how the Court's decision to impose

Bush v. Gore: An Anticipatory Intellectual History, 90 GEO. L.J. 113, 118–19 (2001).

⁶ "So I wasn't dreaming, after all," she said to herself, "unless — unless we're all part of the same dream. Only I do hope it's my dream, and not the Red King's! I don't like belonging to another person's dream," she went on in a rather complaining tone: "I've a great mind to go and wake him, and see what happens!"

CARROLL, *supra* note 1, at 209.

⁷ *Bush v. Gore*, 531 U.S. at 109–10 (requiring the adoption of statewide standards, procedures to implement them, and judicial review).

⁸ See *infra* notes 125–39 and accompanying text. Prophylactic relief is claimed to be illegitimate because it is judicial regulation of conduct that itself does not violate the law. Accordingly, it is argued that prophylaxis is an abuse of judicial power that overprotects legal rights. But as this Article will explain, both of these criticisms are unfounded.

⁹ See *infra* notes 108–10, 326 and accompanying text.

prophylactic relief for the Florida court's violation of equal protection was an unusual application of prophylaxis that ordered too much, rather than too little, relief. Part II explains the legitimacy and precedential effect of prophylactic remedies. By highlighting the remedial rather than rule-like nature of prophylaxis, the Article demonstrates that prophylactic remedies are an important and acceptable use of judicial power. However, as discussed in Part III, prophylactic remedies can be misused when imposed unnecessarily and crafted inappropriately. This Article illustrates how the *Bush* Court misused the prophylactic remedy and thereby endorsed the use of arbitrary and unbounded equitable judicial power. This result, which one would have expected to be impossible from the current Court, given its reputation as both conservative and committed to the concept of judicial restraint, is one that will keep remedies law in wonderland for the near future.

I. THE REMEDIAL DECISION OF *BUSH V. GORE*

The *Bush v. Gore* decision has been mistakenly characterized as an anomalous voting case. However, the decision's true focus and actual content center on the law of remedies. The question presented in *Bush v. Gore* was the constitutionality of the recount remedy ordered by the Florida Supreme Court to rectify the violations of state law caused by the exclusion of legal votes from the tabulation. In a tripartite remedial decision, the *Bush* Court invalidated the state remedy, imposed its own prophylactic remedy, and prohibited the effectuation of *any* remedy.

The *Bush* Court began its decision by holding that the Florida recount remedy for the tabulation error violated equal protection.¹⁰ Seven Justices agreed with the determination that the Florida remedy violated equal protection; however, only five Justices agreed with the two remedial decisions that followed.¹¹ Rather than simply prohibiting the unconstitutional recount, the majority of five held that the necessary remedy to cure the unconstitutional state action was an injunction requiring the Florida state court to adopt additional standards and procedures for a recount.¹² Then, the Court held that state law required that any appropriate recount remedy be completed by the safe harbor date of December 12.¹³ Since the Court issued its remedial decision on December 12, the injunction could not possibly have been implemented by the Florida court. As a result, the Court's imposition of a prophylactic remedy effectively denied any relief for either the state election law

¹⁰ *Bush v. Gore*, 530 U.S. at 105–09.

¹¹ *Id.* at 111.

¹² *Id.* at 109–10.

¹³ *Id.* at 110. Federal election law establishes a “safe harbor date” that provides that all state electoral votes submitted to Congress by that date will be unchallenged. 3 U.S.C. § 5 (2000).

or federal constitutional violations by ratcheting up the remedy to a level impossible to achieve due to time and complexity. Each of these three aspects of the Court's remedial decision is examined more fully in the following discussion.

A. The State Remedy Violates Equal Protection

The United States Supreme Court first concluded that the Florida recount remedy violated equal protection. The Florida Supreme Court found a violation of the contest provision of its state election law¹⁴ based on the failure of several counties to count "a number of legal votes sufficient to change or place in doubt the result of the election."¹⁵ To remedy this tabulation error, the Florida Supreme Court issued an injunction including the vote totals from previous protest recounts and ordering a statewide manual recount in all other counties with undervotes, which was to be supervised by one trial judge.¹⁶ The Florida Supreme Court determined that the recounts would be governed by the standard for determining a "legal vote" established by the state legislature, which was that a vote shall be counted as legal "if there is a clear indication of the intent of the voter."¹⁷ The U.S. Supreme Court found that this state injunction violated equal protection because it failed to adopt specific uniform standards for the recount.¹⁸ The Supreme Court held that the

¹⁴ FLA. STAT. ANN. § 102.168 (West 2000) (amended 2001).

¹⁵ *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla.) (quoting FLA. STAT. ANN. § 102.168(3)(c) (West 2000) (amended 2001)), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*).

¹⁶ *Id.* at 1262. Florida law provided two time frames and processes by which to challenge the validity of vote tabulation. A "protest" claim was to be brought before the county canvassing boards and occurred prior to certification of the electoral votes by the Secretary of State. FLA. STAT. ANN. § 102.166 (West 2000) (amended 2001). The "contest" phase occurred in court after the certification. FLA. STAT. ANN. § 102.168 (West 2000) (amended 2001). Gore raised claims in both of these phases. The protest challenge resulted in the *Bush v. Palm Beach County Canvassing Board* decisions in the Florida and United States Supreme Courts and the *Siegel v. LePore* decisions in the federal courts. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla.) (*per curiam*), *vacated per curiam sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, *per curiam on remand*, 772 So. 2d 1273 (Fla. 2000); *Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla.), *aff'd per curiam*, 234 F.3d 1163 (11th Cir. 2000). The contest litigation resulted in the *Gore v. Harris* decisions. *Gore v. Harris*, 772 So. 2d 1243 (Fla.) (*per curiam*), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98, *relief denied per curiam on remand*, 773 So. 2d 524 (Fla. 2000).

¹⁷ *Gore*, 772 So. 2d at 1256 (quoting FLA. STAT. ANN. § 101.5614(5) (West 2000) (amended 2001)).

¹⁸ Ironically, the equal protection issue had been presented to the Supreme Court several times by Bush in his petitions for certiorari in the protest litigation in *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000) (*per curiam*), and *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (Fla.) (*per curiam*), *vacated per curiam sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). Bush argued that the Florida statutes

Florida remedy endorsed and authorized the use of arbitrary standards in the county-by-county recount process because, for example, a hanging chad was counted in one county as a legal vote, but excluded in another.¹⁹ Justice Stevens disagreed, arguing that the appointment of the single trial judge to oversee the recount process sufficed to ensure uniform standards,²⁰ but the majority held that specific standards should have been ordered by the Florida court.²¹

The U.S. Supreme Court's foray into the validity of a state remedy for a state law violation is unusual in and of itself. Indeed, there are few cases in which the Supreme Court has reviewed the constitutionality of state court remedies for state law violations. One rare example is *Mitchum v. Foster*,²² in which the Supreme Court invalidated on First Amendment grounds an injunction issued by a Florida state court closing down an obscene bookstore for violating state nuisance law.²³ While the Supreme Court has reviewed state court remedies for violations of federal rights²⁴ and federal court remedies for violations of state rights related to federal claims,²⁵ it has rarely examined the conduct of state courts issuing remedies for state law violations.²⁶ And that is all that was present in the initial case. *Bush v. Gore* began simply as a case of a state court issuing a remedy for a state election law violation caused by technical vote tabulation errors.²⁷

permitting protest manual recounts violated equal protection and due process, in part, because they failed to include specific uniform standards for initiating and conducting manual recounts. The Court, however, declined to address the equal protection issue until it was raised again as an afterthought in *Bush v. Gore*. The equal protection claim is the last of three claims raised by Bush in his petition for certiorari in *Bush v. Gore* and his merits brief devotes only six of fifty pages to the issue. See Brief for Petitioners at 40–45, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (focusing equal protection argument primarily on selectivity claim, *i.e.*, that it was unconstitutional to permit recounts in only selective counties).

¹⁹ *Bush v. Gore*, 531 U.S. 98, 106 (2000) (per curiam).

²⁰ *Id.* at 123–29 (Stevens, J., dissenting).

²¹ *Id.* at 106–07.

²² 407 U.S. 225 (1972).

²³ *Id.*

²⁴ *E.g.*, *McKesson Corp. v. Div. of Alcoholic Bev.*, 496 U.S. 18 (1990) (reviewing injunction issued by Florida state court prohibiting state beverage tax that violated federal Commerce Clause). For a discussion of *McKesson*, see *infra* notes 98–101 and accompanying text.

²⁵ *E.g.*, *Schenck v. Pro-Choice Network*, 519 U.S. 357, 367–68 (1997) (reviewing federal court injunction restricting place and manner of abortion protests issued to prevent violations of 42 U.S.C. § 1985, N.Y. Civ. Rights Law § 40-c, and state trespass law).

²⁶ *Cf.*, *Fortson v. Morris*, 385 U.S. 231, 242 (1967) (reversing federal court remedy for alleged federal constitutional violation caused by a state constitutional provision allowing legislature to choose the governor in the absence of an electoral majority).

²⁷ *Siegel v. LePore*, 234 F.3d 1163, 1187 (11th Cir. 2000) (Anderson, J., concurring); see also *Gold v. Feinberg*, 101 F.3d 796, 802 (2d Cir. 1996) (holding that human errors resulting

Indeed, Supreme Court examination of state court remedies generally is futile because the Court lacks the power under the Anti-Injunction Act²⁸ to order any change in the state court. The Anti-Injunction Act, originally enacted in 1793,²⁹ prohibits any federal court, including the Supreme Court, from granting an injunction to stay proceedings in a state court, including all remedial and enforcement proceedings.³⁰ The Supreme Court has repeatedly emphasized that the Act is not a mere discretionary principle of comity or abstention,³¹ but rather is an absolute prohibition against federal equitable intervention in a pending state court proceeding, regardless of how extraordinary the particular circumstances may be.³² One of the narrow statutory exceptions to this absolute ban is when Congress has expressly authorized the injunction, as for example with 42 U.S.C. § 1983 authorizing injunctive relief to redress constitutional harms committed by state actors.³³ Arguably, this exception may have permitted the Supreme Court's intervention in *Bush v. Gore* as it did in *Mitchum* where the claim was made that a state judicial actor violated the Constitution.³⁴ However, unlike past cases where

in the miscounting of votes and other voting errors presented only an issue of state law for which adequate state remedies existed); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (holding that voting errors in federal congressional primary did not present issue of federal law).

²⁸ 28 U.S.C. § 2283 (2000).

²⁹ Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 335.

³⁰ 28 U.S.C. § 2283; *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

³¹ There are also abstention principles that guide a federal court's discretion as to when it should avoid interpreting state law. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (holding that federal court should not intervene in complex state administrative processes involving state law with substantial public policy implications); *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941) (holding that federal court will defer to state court resolution of underlying issues of state law where state law issue is unsettled and dispositive in the case). The United States Court of Appeals for the Eleventh Circuit held in *Siegel v. LePore* that neither of these abstention doctrines precluded the federal court from considering issues of Florida state law regarding manual recounts. *Siegel*, 234 F.3d at 1173.

³² *Mitchum v. Foster*, 407 U.S. 225 (1972).

³³ 28 U.S.C. § 2283; *Mitchum*, 407 U.S. at 242-43.

³⁴ *Mitchum*, 407 U.S. at 227; see also *Roudebush v. Hartke*, 405 U.S. 15 (1972) (holding that the Anti-Injunction Act did not bar federal court from enjoining Indiana statutory recount procedure administered by state court in congressional election because the court was performing a nonjudicial function under state law); *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (holding that a federal court had the power to issue an injunction preventing compliance with a state court remedy ordering inclusion of votes from erroneous absentee ballots where the remedy violated federal constitutional rights). Additionally, even where federal intervention is not prohibited, the Court will generally abstain from enjoining state court proceedings in a civil case absent some great and immediate irreparable harm or flagrant violation of the Constitution by the state, both of which arguably were satisfied in the *Bush v. Gore* case. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611-12 (1975). However, *Bush's* petition for certiorari does not mention § 1983, and the Court has held that the

the Court has authorized an exception to the Anti-Injunction Act, the *Bush* Court did not engage in any detailed discussion justifying its intervention. Rather, it ignored the issue altogether.³⁵

B. The Prophylactic Remedy for the Constitutional Violation

After making the unusual decision to review the state court remedy, the Supreme Court then took a second novel step of insisting that only broad injunctive relief would remedy the equal protection violation and protect against future violations. The *Bush* Court ordered myriad standards and procedures as constitutionally necessary for any recount to protect against further arbitrary treatment.³⁶ A majority of five Justices expressly held a “recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work” that builds in the constitutionally “necessary safeguards” to protect the right to vote.³⁷ The inability to comply with these measures was a foregone conclusion. Thus, contrary to popular opinion, the Court in *Bush v. Gore* did not order too little relief, but rather too much.

The Court’s decision created a process for designing and implementing a manual recount.³⁸ The additional constitutionally required safeguards according to the *Bush* majority were:

1. “[T]he adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote”;³⁹
2. “[P]racticable procedures to implement [the standards]”;⁴⁰
3. “[O]rderly judicial review of any disputed matters that might arise”;⁴¹ and
4. Evaluation of the accuracy of vote tabulation equipment by the Florida Secretary of State.⁴²

The Court also acknowledged concerns over the identity and qualification of those designated to recount, implying that some of the mandated practical procedures should address the issue of the persons in charge of the recount.⁴³ Additionally, the

congressional authorization exception to the Anti-Injunction Act is not satisfied when the complaint fails to rely upon or mention § 1983 even where it alleges constitutional violations. *County of Imperial v. Munoz*, 449 U.S. 54, 60 n.4 (1980).

³⁵ Gore also failed to raise the Anti-Injunction issue in his briefs. See Brief of Respondent Albert Gore, Jr., *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

³⁶ See *infra* notes 38–44 and accompanying text.

³⁷ *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 109 (noting additional concerns raised by the Florida court’s order, as it failed to specify who would recount the ballots, prohibited observers from objecting during the

Court suggested that a proper recount should include overvotes, those ballots indicating a vote for two persons, as well as undervotes, those in which no vote for President was mechanically recorded.⁴⁴

This type of court order proscribing a code of conduct tangential to the illegal conduct is called a prophylactic injunction.⁴⁵ The addition of tangential, precautionary measures is the defining characteristic of prophylactic relief, which distinguishes it from other injunctions that simply prohibit further illegal action or repair the consequences of the past harm.⁴⁶ The term itself derives from the Greek word *prophylaktikos* meaning “to take precautions against” or “to keep guard before.”⁴⁷ It is used in medicine to mean supplemental measures such as vaccinations or prescriptions given to prevent disease or other untoward results.⁴⁸

recount, and forced county canvassing boards to pull together ad hoc teams of judges with no previous training in handling and interpreting ballots); *see also* Lund, *supra* note 3 (providing an excellent discussion and explanation of case facts and holding in Florida and federal courts).

⁴⁴ *Bush v. Gore*, 531 U.S. at 110.

⁴⁵ DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 272 (2d ed. 1994) (defining prophylactic relief as a type of reparative relief ordering additional precautions designed to prevent future harm or the future consequences of past harm); ELAINE W. SHOBN & WILLIAM MURRAY TABB, *REMEDIES: CASES AND PROBLEMS* 246 (2d ed. 1995) (“[A] prophylactic injunction seeks to safeguard the plaintiff’s rights by directing the defendant’s behavior so as to minimize the chance that wrongs might recur in the future.”).

⁴⁶ DAVID SCHOENBROD ET AL., *REMEDIES: PUBLIC AND PRIVATE* 131–34 (3d ed. 2002); SHOBN & TABB, *supra* note 45, at 246 (“[V]iolation of a prophylactic injunction is not necessarily a legal wrong in itself, except that the injunction makes it so”); David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 678–79 (1988) (describing special type of injunction that “aims for 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.”). Understanding that prophylactic modifies the noun injunction by expanding its meaning answers critics who avoid defining prophylactic as a preventive remedy. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 927 n.6 (1999) (stating that prophylactic “measures have also been called ‘preventive remedial,’ but that phrase seems too limited because it sounds like ordinary preventive relief, aimed directly at the core violation rather than at risk”).

⁴⁷ AMERICAN HERITAGE DICTIONARY 1406 (4th ed. 2000); XII OXFORD ENGLISH DICTIONARY 644 (2d ed. 1989).

⁴⁸ DORLAND’S MEDICAL DICTIONARY 1364 (28th ed. 1994) (defining “prophylactic” as “an agent that tends to ward off disease”); MERRIAM-WEBSTER’S MEDICAL DESK DICTIONARY (1993) (defining “prophylactic” as “guarding from or preventing the spread or occurrence of disease or infection”); MOSBY’S DICTIONARY 1284 (4th ed. 1994) (defining “prophylactic” as a biologic, chemical, or mechanical agent that prevents the spread of disease). For example, patients with artificial hips are given prophylactic antibiotics prior to an invasive surgery such as dental surgery to prevent an infection in the artificial joint. *See* THE MERCK MANUAL 748 (17th ed. 1999). And of course the word is commonly used in the

Similarly, prophylactic measures in law describe measures ordered as supplements to the defendant's normal conduct to avoid future legal harm. These measures, now mandated by the court, convert previously legal conduct into prohibited conduct by virtue of the injunctive remedy backed by the court's contempt power.⁴⁹ In this way, it is commonly said that prophylactic relief "sweeps broadly to require additional measures that are not themselves illegal."⁵⁰

A classic example of prophylactic relief is the injunction issued in sexual harassment cases.⁵¹ These orders typically include enumerated measures ordering the creation of new employment policies, requiring employee training, and mandating grievance procedures for future incidents.⁵² Such an injunction sweeps wide to include within its mandate legitimate activity of employment policies and procedures as preventive measures to protect against future illegal harassment and remedy the past harm.⁵³ The policies and procedures themselves are not required by law, but are included in the prophylactic remedy as supplemental measures to protect against future harassment that is difficult to eradicate by simply ordering: "Do not harass."⁵⁴

vernacular to mean a device to prevent an undesired pregnancy. AMERICAN HERITAGE DICTIONARY 1406 (4th ed. 2000). I would like to thank Dr. Fred Thomas, M.D., and Dr. Paula Renker, Ph.D., R.N., for their assistance and medical insights as to the medical use of the term "prophylactic."

⁴⁹ SHOBEN & TABB, *supra* note 45, at 246.

⁵⁰ SCHOENBROD, *supra* note 46, at 131; *see also* City of Boerne v. Flores, 521 U.S. 507 (1997).

⁵¹ *See* LAYCOCK, *supra* note 45; SHOBEN & TABB, *supra* note 45, at 246.

⁵² *E.g.*, EEOC v. Gurnee Inn Corp., 914 F.2d 815, 817 (7th Cir. 1991) (upholding injunctive relief ordering creation of anti-harassment policy and grievance procedure to prevent against the possibility of future harm); Women Prisoners v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994) (ordering creation of new anti-harassment policy, training for employees and prisoners, adoption of grievance procedures, and appointment of special master to investigate complaints), *rev'd in part*, 93 F.3d 910 (D.C. Cir. 1996) (overturning order appointing special master), *cert. denied*, 520 U.S. 1196 (1997); Neal v. Dir., D.C. Dep't of Corr., 1995 WL 517244, at *2 (D.D.C. 1995) (establishing a new, independent office to be responsible for investigation and resolution of complaints, training, and other issues related to sexual harassment and retaliation); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1080 (M.D. Ala. 1990) (remedying sexual harassment by ordering the creation of an anti-harassment policy, grievance procedures, and an education program); Bundy v. Jackson, 641 F.2d 934, 948 (D.D. C. 1981) (ordering anti-harassment policy and grievance procedures); Lynch v. City of Des Moines, 454 N.W.2d 827, 835 (Iowa 1990) (affirming court's order that city develop police department-wide education and training in prevention and correction of sexual harassment).

⁵³ Schoenbrod, *supra* note 46, at 678-79.

⁵⁴ Neal, 1995 WL 517244, at *2 (imposing expansive prophylactic measures because mandatory prohibition of sexual harassment of female guards ordered fourteen years earlier had failed to prevent harassment); Sims, 766 F. Supp. at 1080 (imposing an order prohibiting further sexual harassment against female officers, but recognizing that a prohibitory

The Supreme Court has imposed prophylactic relief in a variety of cases.⁵⁵ For example, in *Hutto v. Finney*,⁵⁶ the Supreme Court prohibited an Arkansas prison from imposing punitive isolation upon prisoners beyond thirty days, even though it found that the isolation itself did not violate the Eighth Amendment.⁵⁷ The majority found that lengthy isolation contributed to other problems that did violate the Constitution and thus restricted the contributing cause as a prophylactic remedy.⁵⁸ In his dissent, Justice Rehnquist correctly, albeit pejoratively, labeled this action prophylactic because the Court was imposing an additional measure upon the defendants beyond the actual law.⁵⁹ In another example, *Madsen v. Women's Health Center*,⁶⁰ the Supreme Court upheld an injunction prohibiting

injunction is inadequate to address the sexual harassment in the department, and therefore further requiring the defendant to "take affirmative steps to rid the department of its current sexually hostile atmosphere").

⁵⁵ E.g., *Smith v. Robbins*, 528 U.S. 259, 273 (2000) ("[T]he *Anders* procedure is not 'an independent constitutional command,' but rather is just 'a prophylactic framework' that we established to vindicate the constitutional right to appellate counsel announced in *Douglas*."); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 464 (1978) (upholding prohibitions of attorney solicitation as "prophylactic measures whose objective is the prevention of harm before it occurs"); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (requiring prison authorities to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law" to protect right of access to courts) (citation omitted); *Louisiana v. United States*, 380 U.S. 145, 155–56 (1965) (upholding a reporting requirement so "that the court might be informed as to whether the old discriminatory practices really had been abandoned"); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 192 (1963) (affirming a "mild" prophylactic injunction of requiring a fiduciary to disclose to clients his own dealings in recommended securities before and after the issuance of recommendations in order to prevent securities fraud). For examples of prophylactic remedies imposed by lower federal courts, see *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (upholding a decree containing prophylactic measures requiring a prison to: file reports on the number of inmates and space per inmate; reduce its overall inmate population; provide each inmate confined in a dormitory with forty square feet of space; preserve a verbatim record of all disciplinary hearings; give inmates in administrative segregation the opportunity for regular exercise; and allow inmates access to courts, counsel, and public officials); *Women Prisoners v. District of Columbia*, 968 F. Supp. 744, 745–46 (D.D.C. 1997) (imposing prophylactic measures to prevent sexual harassment and assaults of women inmates).

⁵⁶ 437 U.S. 678 (1978).

⁵⁷ *Id.* at 687.

⁵⁸ *Id.* at 686–88 (holding that lengthy time in punitive isolation where inmates were subjected to violence, severe overcrowding and inadequate diet of "grue" would be unconstitutional).

⁵⁹ *Id.* at 712 (Rehnquist, J., dissenting). Justice Rehnquist argued that the prophylactic action was inappropriate because it was "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.'" *Id.* (alteration in original).

⁶⁰ 512 U.S. 753 (1994).

abortion protestors from standing within thirty-six feet of the clinic and restricting the noise level of the protests.⁶¹ While standing close to the clinic and making loud noise were not illegal, the Court prohibited these actions as additional remedial measures to prevent future violations of constitutional and state rights.⁶² In several desegregation cases, the Court imposed additional requirements of teacher training, busing, and increased taxes in order to prevent future racial discrimination in schools.⁶³ The Court has also imposed a variety of prophylactic measures in the criminal context to protect against future violations of the right to counsel and the right against self-incrimination.⁶⁴ In all of these cases, the Supreme Court has required practical, tangible action by the defendants as an extra precaution designed to prevent the recurrence of harm.

The Supreme Court also has used the term prophylactic to describe legislative or administrative action regulating conduct that is tangentially connected to illegal action.⁶⁵ In particular, the Court has utilized this same definition of prophylactic to describe Congress's remedial power under Section 5 of the Fourteenth Amendment.⁶⁶ Section 5 grants Congress the power to enforce constitutional rights

⁶¹ *Id.* at 764–65; *see also* *Schenck v. Pro-Choice Network*, 519 U.S. 357, 361 (1997) (upholding a prophylactic injunction ordering a fixed buffer zone around an abortion clinic in which protests were prohibited).

⁶² *Madsen*, 512 U.S. at 765.

⁶³ *E.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995) (ordering remedial education, teacher training, and increased taxes for schools to remedy future effects of racial segregation in education); *Missouri v. Jenkins*, 495 U.S. 33, 57–58 (1990) (upholding federal court's remedial power to require a school district to levy taxes to fund school desegregation); *Milliken v. Bradley*, 433 U.S. 267, 287–88 (1977) (ordering remedial education, teacher training, and student counseling to remedy future effects of past racial discrimination); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding a remedy for racial segregation that included quotas, zoning, and busing in order to address contributing causes of residential segregation).

⁶⁴ *North Carolina v. Pearce*, 395 U.S. 711 (1969) (mandating process to avoid a harsher sentence on resentencing after a successful appeal); *Anders v. California*, 386 U.S. 738 (1967) (adopting procedure governing withdrawal of counsel to protect a defendant's right to counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police warnings to protect against a criminal suspect's right against self-incrimination).

⁶⁵ *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 307 (2001) (describing administrative regulations that provide measures to eliminate workplace discrimination as “prophylactic”); *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (describing the “prophylactic” approach of a Colorado statute designed to protect against future harm); *United States v. O'Hagan*, 521 U.S. 642, 672–73 (1997) (upholding securities regulation as valid “prophylactic” measure enacted pursuant to SEC's statutory authority to use “means reasonably designed to prevent” fraudulent trading).

⁶⁶ Thus, Justice Scalia is incorrect in his assertion that the Court's power under a prophylactic justification goes far beyond what it has permitted Congress to do under the authority of Section 5. *Dickerson v. United States*, 530 U.S. 428, 460 (2000); *cf.* Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898, 916 (2001) (“[T]he most glaring deficiency is the latitude that the Court has given itself

by appropriate action.⁶⁷ As I discussed at length in *Congress' Section 5 Power and Remedial Rights*, the Court, beginning with *City of Boerne v. Flores*, has interpreted Congress's Section 5 power as authorizing prophylactic remedies for constitutional violations.⁶⁸ In explaining prophylactic relief, the Court stated "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."⁶⁹ Thus, in the Section 5 context, the Supreme Court has applied the definition of a prophylactic judicial remedy to circumscribe the legislative remedial power.⁷⁰

This same concept of prophylactic relief describes the remedy imposed by the Court in *Bush v. Gore*.⁷¹ Ordinarily, the remedy for an equal protection violation would be an injunction prohibiting arbitrary treatment or requiring uniform treatment.⁷² However, in *Bush v. Gore*, the Court determined that the only

in promulgating constitutional 'rules' as opposed to the constraints it has imposed on Congress, an ostensibly co-equal branch of government.").

⁶⁷ U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

⁶⁸ Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 722-33 (2001).

⁶⁹ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); see also *City of Boerne v. Flores*, 521 U.S. 507, 518 (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.'" (citation omitted); *City of Rome v. United States*, 446 U.S. 156, 213 (1980) (Rehnquist, J., dissenting):

These decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is "appropriate" legislation "to enforce" the Civil War Amendments if that prohibition is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit.

⁷⁰ Thomas, *supra* note 68, at 722-28; Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). But see Evan H. Caminker, "Appropriate" Means-Ends Constrains on Section 5 Powers, 53 STAN. L. REV. 1127 (2001) (arguing that the scope of Section 5 power should be defined in the same way as other legislative powers which are "necessary and proper"); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 134 n.105 (questioning why legislative power should be defined by reference to judicial power).

⁷¹ 531 U.S. 98 (2000) (per curiam).

⁷² See Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1363 (2001); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1360 (1991) (noting that traditionally the negative injunction has been the remedy of choice and that courts derive the content of the injunction from the wrongful conduct that is the basis for the defendants' liability).

appropriate remedy to prevent future constitutional violations from vote recounts was a prophylactic injunction that mandated a system of standards, procedures, and review to protect the right to vote.⁷³ It rejected the four dissenting Justices' arguments that a simple injunction either prohibiting arbitrary recounts or mandating uniform recounts would suffice.⁷⁴ The actual measures adopted by the Court ratcheted up the required remedy for the constitutional violation to a level that was impractical, if not impossible, to achieve.

First, the prophylactic remedy was impossible to effectuate because the Florida court was required to adopt a uniform standard of a legal vote that it may have been without authority to define. While the *Bush* majority expressly stated that it was not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme to define a legal vote, Justice Rehnquist argued in his concurrence that Article II precluded such judicial definition.⁷⁵ Section 1 of Article II of the U.S. Constitution provides that each state shall appoint electors for President "in such Manner as the Legislature thereof may direct,"⁷⁶ and Rehnquist argued that it prevented the Florida court from defining the standard of a "legal vote" differently from the legislature or the executive agencies to whom the legislature had statutorily delegated such responsibility.⁷⁷ This same caution to the Florida court against changing or redefining state election law as provided by the legislature was intimated by a unanimous Supreme Court in its opinion in *Bush v. Palm Beach County Canvassing Board*, which presented the question of whether the state court impermissibly changed the state laws in the protest litigation in violation of due process or Article II.⁷⁸ Accordingly, the Florida Supreme Court followed this command not to change Florida election law by conforming its recount order to the existing statutory definition of the "intent of the voter."⁷⁹ The contrary action ordered by the U.S. Supreme Court in its prophylactic remedy thus potentially ordered the Florida courts to violate federal law.

⁷³ *Bush v. Gore*, 531 U.S. at 110.

⁷⁴ See *id.* at 134–35 (Souter, J., dissenting) (arguing in favor of remand to courts of Florida with instructions to establish uniform standards for evaluating several types of ballots that have prompted different treatments to be applied within and among counties); *id.* at 146–47 (Breyer, J., dissenting) (stating that the "Court crafts a remedy out of proportion to the asserted harm," whereas the appropriate remedy is remand to recount all undervotes with a single uniform standard); *id.* at 126–27 (Stevens, J., dissenting) (arguing that, assuming a constitutional violation, "the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established").

⁷⁵ *Id.* at 105, 118–19 (Rehnquist, J., concurring).

⁷⁶ U.S. CONST. art. II, § 1, cl. 2.

⁷⁷ *Bush v. Gore*, 531 U.S. at 114, 118.

⁷⁸ *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam).

⁷⁹ *Gore v. Harris*, 772 So. 2d 1243, 1256–57, 1262 (Fla.) (per curiam), *rev'd per curiam* sub nom. *Bush v. Gore*, 531 U.S. 98 (2000).

Furthermore, the Supreme Court created an impossible remedy by mandating the involvement of multiple actors in the creation of a judicial recount remedy.⁸⁰ This significantly increased the transaction costs of imposing the remedy and directly contravened the Florida legislature's decision to provide the state judiciary with the sole discretion to redress and prevent election violations.⁸¹ Moreover, the imposition of a complex series of legislative-type procedures of notice and comment and expert agency input, combined with the time constraints of any election much less a presidential election, made it unlikely that any such recount remedy could be implemented. The Supreme Court thus created too much relief by imposing a series of procedures and mandates that could not practically be accomplished.

As Judge Shaw of the Florida Supreme Court stated in the subsequent decision dismissing the state case:

I am not convinced that additional safeguards could have been formulated that would have satisfied the United States Supreme Court. Given the tenor of the opinion in *Bush v. Gore* . . . I do not believe that the Florida Supreme Court could have crafted a remedy under these circumstances that would have met the due process, equal protection, and other concerns of the United States Supreme Court.⁸²

Perhaps, as Judge Shaw suggests, the Supreme Court engaged in a disingenuous attempt to provide meaningful relief for the constitutional violation by ordering this ratcheted-up relief to preclude manual recounts. It is clear, however, that the Supreme Court used prophylactic relief in an unprecedented way in this case. The Court used the prophylactic measures as burdensome impediments to bar actual relief rather than as protective measures providing additional relief for the harm.

C. Using the Remedy to Nullify Rights

The final problematic aspect of the Court's remedial decision in *Bush v. Gore* was that it interpreted state law to preclude any attempt to effectuate the ordered prophylactic measures.⁸³ In this third part of the remedial decision, the Court

⁸⁰ The recount standards and procedures ordered by the *Bush* Court seems to contemplate participation by the parties, their lawyers, all interested parties, the state executive, the counties, the judicial hierarchy, political parties, and technical experts. See *Bush v. Gore*, 531 U.S. at 108–11.

⁸¹ See FLA. STAT. ANN. § 102.168(8) (2000) (amended 2001). The Florida legislature has since deleted this provision granting the court such discretion to determine the appropriate relief to cure the election harm. Florida Election Reform Act of 2001, 2001 Fla. Sess. Law Serv. 2001-40, § 44 (West) (amending FLA. STAT. ANN. § 102.168) (effective Jan. 1, 2002).

⁸² *Gore v. Harris*, 773 So. 2d 524, 529 (Fla. 2000) (Shaw, J., concurring).

⁸³ *Bush v. Gore*, 531 U.S. at 110–11.

concluded that Florida law required any recount remedy to be completed by December 12, the safe harbor date established by 3 U.S.C. § 5 for a state to submit its electoral votes to Congress without challenge.⁸⁴ Since Florida could not accomplish a recount with all of the required prophylactic measures by the deadline (the very day of the Supreme Court's decision), the Court prohibited any recount from proceeding.⁸⁵ As a result, there was no remedy for the state election violation and no remedy for the violation of equal protection.

In *Bush v. Gore*, the majority made the unprecedented move of rendering its own interpretation of state law, which proved to be the death knell for any meaningful remedy. Section 102.168(8) of the Florida election law authorized the state court to "fashion such orders as he or she deems necessary . . . to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances."⁸⁶ The U.S. Supreme Court boldly concluded that "appropriate" relief under this state law could not include votes counted after December 12.⁸⁷ The Court supported its conclusion by arguing that the Florida Supreme Court previously stated that the safe harbor date of December 12 established by federal law must be met and that any later action contemplated a violation of the Florida Election Code.⁸⁸

However, nothing in the Florida election statutes mandates compliance with the safe harbor provision.⁸⁹ While the Florida court indicated in its opinion addressing the protest recounts that the Secretary had discretion to ignore amended recount returns not submitted in time for the December 12 deadline,⁹⁰ it did not consider the relative priority of the December 12 goal as compared to the goal of concluding a thorough contest recount in its decision ordering the statewide recount.⁹¹ Only two

⁸⁴ *Id.* at 110.

⁸⁵ *Id.*

⁸⁶ FLA. STAT. ANN. § 102.168(8) (2000) (amended 2001).

⁸⁷ *Bush v. Gore*, 531 U.S. at 110.

⁸⁸ *Id.* at 110–11.

⁸⁹ Jeb Rubinfeld, *Not as Bad as Plessy. Worse., in BUSH V. GORE: THE QUESTION OF LEGITIMACY* 25–26 (Bruce Ackerman ed., 2002) (explaining that the December 12 deadline was not established by Florida statutory or case law and that the *Bush* majority simply made it up).

⁹⁰ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1239–40 (Fla.) (per curiam), *vacated per curiam sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *see also* Lund, *supra* note 3, at 1274 n.172 (noting that West Publishing Co. provided an incorrect citation, leading some to mistakenly believe the Supreme Court offered a nonsensical citation for an important proposition in its opinion).

⁹¹ Farnsworth, *supra* note 3, at 231; Strauss, *supra* note 3, at 188. Moreover, the Florida Supreme Court in *Gore v. Harris*, the subsequent case addressing the contest recount, seemed to reject the use of a deadline to resolve the dispute. *See Gore v. Harris*, 772 So. 2d 1243, 1261 (Fla.) (per curiam) (noting that, "although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included

dissenting Florida judges suggested that December 12 was a mandatory deadline for the contest conclusion.⁹² Moreover, two other Florida judges rejected December 12 as a deadline, and they, as well as several U.S. Supreme Court Justices, suggested December 18 or even January 6 as operative dates.⁹³ The deadline is significant because a later date might have allowed the recount remedy to be implemented even under the U.S. Supreme Court's ratcheted-up standard.⁹⁴ The *Bush* majority's foray into state law, however, precluded the imposition of any recount remedy determined by the state court to be necessary to remedying the harm.

More fundamentally, the Supreme Court's ruling on the safe harbor date violates a bedrock principle that the Court does not have authority to render opinions solely on the basis of state law.⁹⁵ For over one hundred and twenty-five years, the Supreme Court has steadfastly held that it cannot interpret issues of state

in the final election results") (citation omitted), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000); *id.* at 1261 n.21:

The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law.

See also Sunstein, *supra* note 3, at 767 (suggesting that the Florida court's prior opinions indicated a choice of inclusion of votes over the safe harbor date).

⁹² Justice Wells assumed that the majority would recognize a need to protect the votes of Florida's presidential electors under 3 U.S.C. § 5, and that therefore, all recounts must be completed by December 12. *Gore*, 772 So. 2d at 1243, 1268 (Wells, J., dissenting). Justice Harding argued that the Florida Supreme Court, "in its prior [protest] opinion, and all of the parties agree that election controversies and contests must be finally and conclusively determined by December 12, 2000." *Id.* at 1272 (Harding, J., dissenting).

⁹³ *Bush v. Gore*, 531 U.S. at 143–44 (Ginsburg, J., dissenting) (stating that none of the dates of December 12, 18, or 27 has ultimate significance in light of Congress' detailed provisions for determining the validity of electoral votes on January 6); *id.* at 127 (Stevens, J., dissenting) (suggesting a date as late as January 4 based on Hawaii's electoral dispute of 1960); *id.* at 135 (Souter, J., dissenting) (suggesting the deadline for recount was the meeting of electors on December 18); *Gore v. Harris*, 773 So. 2d 524, 528–29 (Fla. 2000) (Shaw, J., concurring) (questioning "whether any date prior to January 6 is a drop-dead date under the Florida election scheme"); *id.* at 530 n.14 (Pariente, J., concurring) (questioning whether the December 12 deadline was "realistic or reasonable").

⁹⁴ *See* RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 133 (2001); Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 269 (2001).

⁹⁵ *Bush v. Gore*, 531 U.S. at 135–42 (Ginsburg, J., dissenting); Farnsworth, *supra* note 3, at 230.

law.⁹⁶ Thus, what is "appropriate" relief under Florida law for a Florida statutory violation is not a question the U.S. Supreme Court has power to decide. The only exception to this prohibition is that the Court may interpret state law where a federal issue is implicated.⁹⁷ Take for example the case of an unconstitutional tax in *McKesson Corp. v. Division of Alcoholic Beverages*.⁹⁸ In *McKesson*, the Florida state court determined that a state beverage tax violated the federal Commerce Clause and ordered a prospective remedy prohibiting the continued application of the tax.⁹⁹ The Supreme Court intervened to review the state remedy because the federal interest of vindicating the Commerce Clause and due process was involved.¹⁰⁰ The Court held that the state remedy for a federal law violation failed to provide the plaintiffs with meaningful relief by denying them retrospective relief, that is, damages for past harm.¹⁰¹ Meaningful relief for unconstitutional deprivations, the *McKesson* Court held, is required by due process.¹⁰² Thus, the Court may intervene in cases where the state remedy for a federal right is inadequate.

Justice Rehnquist in his concurrence in *Bush v. Gore* tried to fit the decision into this exception justifying federal court intervention into state law.¹⁰³ He argued that Florida's failure to recognize the safe harbor date violated Article II of the Constitution.¹⁰⁴ Basing the decision upon the Article II grounds would have made the issue of the safe harbor date a federal issue and explained the Court's meddling into state law.¹⁰⁵ However, only three Justices agreed with this argument. The issue of whether Florida law requires compliance with the safe harbor date does not implicate a federal law. Thus, the absence of a federal interest with respect to the safe harbor date should have precluded the Court from rendering its own decision on state law.¹⁰⁶ The bottom line, as Justice Ginsburg acknowledged in her dissent

⁹⁶ See, e.g., *Murdock v. City of Memphis*, 87 U.S. 590, 608 (1874).

⁹⁷ See *Williams v. Kaiser*, 323 U.S. 471, 473 (1945).

⁹⁸ 496 U.S. 18 (1990).

⁹⁹ *Id.* at 25.

¹⁰⁰ *Id.* at 22.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Bush v. Gore*, 531 U.S. 98, 113–14 (2000) (Rehnquist, J., concurring).

¹⁰⁴ *Id.* at 113.

¹⁰⁵ POSNER, *supra* note 94, at 151–52 (stating that the vulnerability of the Supreme Court's remedy arises from its reliance on equal protection rather than Article II); Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY*, *supra* note 89, at 16 & n.11 (preferring the Article II argument made in Bush's brief over the vulnerable remedial basis of the Court's actual decision); Posner, *supra* note 3, at 48 (basing the legitimacy of the *Bush v. Gore* decision upon the Article II concurrence). *Contra* Lund, *supra* note 3, at 1265–67 (pointing out four analytical difficulties of Justice Rehnquist's Article II analysis).

¹⁰⁶ Farnsworth, *supra* note 3, at 231.

in *Bush v. Gore*, is that the decision creates a new basis for the Court to opine on issues of state law in contravention of 175 years of settled law.¹⁰⁷

As demonstrated by the *Bush v. Gore* decision, a federal court's ability to substitute its own interpretation of state law on an issue of remedies allows it to nullify state rights. Nullification of a right is accomplished by the denial of a remedy. A remedy is a necessary component to every right required to make the right tangible and meaningful.¹⁰⁸ If no remedy is imposed for the violation of state law, then the state right is not vindicated, and it is relegated to mere normative value. For example, the law against trespass consists of the descriptive norm prohibiting interference with another's property and the remedy of damages requiring a trespasser to pay for the harm she has caused by the interference. Without a remedy of damages to redress the harm or injunctive relief to prevent the harm, the law of trespass is nothing more than a moral expectation that cannot be enforced in real life.¹⁰⁹ This is precisely the result of *Bush v. Gore* where the Supreme Court crafted an impractical prophylactic remedy and imposed an impossible deadline that operated to deny meaningful relief for the state election right, thereby nullifying that right.¹¹⁰

Part of the blame for nullification may belong to the Florida Supreme Court for its failure to craft some alternative relief that would have addressed the wrong. The Supreme Court mandated only that a statewide recount be conducted with certain standards and procedures and that it be done by December 12. But several other remedial options were possible. The Florida court could have ordered preventive relief to prevent harm in future elections by requiring counties to use the same voting equipment, prohibiting punch card machines¹¹¹ or prohibiting butterfly ballots.¹¹² It could have ordered reparative relief designed to cure the continuing effects of the past election harm by excluding the total votes from suspect counties or by prohibiting the Secretary from sending the electoral votes to Congress.¹¹³ Or it could have ordered structural relief to change the state election system by

¹⁰⁷ *Bush v. Gore*, 531 U.S. at 142 (Ginsburg, J., dissenting).

¹⁰⁸ Thomas, *supra* note 68, at 689.

¹⁰⁹ E.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997) (awarding nominal damages of \$1 and punitive damages of \$100,000 for intentional trespass because "a right is hollow if the legal system provides insufficient means to protect it").

¹¹⁰ See Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY*, *supra* note 89, at 118 (concluding that when the Supreme Court stopped the recount it deprived state citizens of rights under state law by federal judicial fiat).

¹¹¹ See *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002).

¹¹² SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000*, at 140 (2001).

¹¹³ *Id.* at 126; see also *In re Protest of Election Results*, 707 So. 2d 1170 (Fla. Ct. App. 1998) (voiding all absentee ballots in election rather than holding new election).

requiring the election board to redesign vote tabulation procedures or requiring the commission to establish uniform standards for recounts.¹¹⁴ However, the Florida Supreme Court merely opted out of the case after the *Bush v. Gore* decision, stating "we hold appellants can be afforded no relief."¹¹⁵

The Supreme Court's unprecedented use of the prophylactic remedy in *Bush v. Gore* triggers some of the old concerns about prophylactic remedies existing since the advent of *Miranda* and its prophylactic warnings.¹¹⁶ Prophylactics have been attacked as judicial rulemaking that constitute an illegitimate exercise of judicial power.¹¹⁷ Prophylactics have also been falsely defamed as overbroad, excessive reactions to legal problems, again outside the confines of appropriate judicial action.¹¹⁸ The following discussion addresses each of these criticisms in turn. The Article concludes in Part II that the *Bush* Court's use of this type of prophylactic remedy was not in itself problematic. Rather, it was the untailored and inappropriate use of the prophylactic remedy that produced the suspect result as discussed in Part III.

II. UNDERSTANDING PROPHYLACTICS AS REMEDIES

In *Bush v. Gore*, the Supreme Court ordered Florida to adopt four necessary safeguards in order to prevent future constitutional violations in recounts.¹¹⁹ Similar phraseology mandating necessary protective safeguards was used by the Court in *Miranda* to characterize the newly-created warnings imposed to protect against future constitutional violations.¹²⁰ In the aftermath of both cases, critics attacked the safeguards as rules of conduct illegitimately created by the Court.¹²¹ Incorrect definitions of prophylactic have miscast the remedy as a mere rule of lesser status than the "real" right.¹²² These rules are claimed to be illegitimate exercises of the

¹¹⁴ ISSACHAROFF ET AL., *supra* note 112, at 140.

¹¹⁵ *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000) (per curiam).

¹¹⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁷ See *infra* text accompanying notes 121 & 122, and notes 130–39 and accompanying text.

¹¹⁸ See *infra* notes 271–72 and accompanying text.

¹¹⁹ *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

¹²⁰ See *Miranda v. Arizona*, 384 U.S. 436, 444, 457, 477, 511–12 (1966).

¹²¹ Paula Alexander Becker & Richard J. Hunter, Jr., *A Review of the Supreme Court's 2000 Term: Is There a Consistent Theme?* 38 HOUS. L. REV. 1463, 1465 (2002) ("The decision of the United States Supreme Court [in *Bush v. Gore*] seemed to many to be the height of judicial activism."); *id.* at 1465 n.14 ("Activism is the charge that judges go beyond their appropriate limited powers and engage in making laws or in forging public policy . . .") (emphasis deleted); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101 (1985) (criticizing the prophylactic rules of *Miranda*).

¹²² See *Dickerson v. United States*, 530 U.S. 428, 444, 454 (2001) (Scalia, J., dissenting).

Court's judicial power because they do not derive from the right itself, but instead constitute new rights that the judiciary is not empowered to create.¹²³

The allegations of illegitimacy, however, stem from a misunderstanding of the term "prophylactic" and its legal effect. Prophylactics are not rules; they are remedies. A remedy is an intrinsic component of every legal "right."¹²⁴ As remedies, they are legitimate exercises of the courts' accepted power to impose an adequate remedy to enforce the legal right. The remedy functions to enforce the legal value and defines the scope of that value. The normal precedential effect of a remedy is to create a decisional rule of law that directs judicial discretion in future cases. This precedential effect distracted courts and academics and derailed the discussion about prophylactics. Clarifying prophylactics as remedies with precedential effects legitimizes prophylaxis as part of the courts' normal remedial powers.

A. Dismissing Prophylactic Rules as Illegitimate

The term "prophylactic" has become a judicial epithet used to identify illegitimate judicial action.¹²⁵ Indeed, Professor Evan Caminker has called for the abandonment of the term "prophylactic" because it inappropriately raises concerns of legitimacy where none should exist.¹²⁶ However, it is not the term, but rather its haphazard use and murky conceptualization by the courts and commentators that have created the illusion of illegitimate court action.

(arguing that the prophylactic of *Miranda* is illegitimate because the constitutional right does not require that rule); *Ohio v. Robinette*, 519 U.S. 33, 43 (1996) (Ginsburg, J., concurring) ("The first-tell-then-ask rule seems to be a prophylactic measure not so much extracted from the text of any constitutional provision as crafted by the Ohio Supreme Court to reduce the number of violations of textually guaranteed rights."); *Michigan v. Payne*, 412 U.S. 47, 53 (1973) ("It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce*, that their . . . application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation.").

¹²³ *Dickerson*, 530 U.S. at 454, 456, 465 (Scalia, J., dissenting); Cassell, *supra* note 66, at 898; Grano, *supra* note 121, at 101.

¹²⁴ Thomas, *supra* note 68, at 694–95.

¹²⁵ *Michigan v. Harvey*, 494 U.S. 344, 368 (1990) (Stevens, J., dissenting) ("Apparently as a means of identifying rules that it disfavors, the Court repeatedly uses the term 'prophylactic rule.'"); Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 25 (2001); Landsberg, *supra* note 46, at 947 ("The Court has used the term 'prophylactic' as an epithet and as a term of virtue.") (citation omitted); *see, e.g., Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting); Brief of Court-Appointed Amicus Curie Urging Affirmance of the Judgment Below, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) [hereinafter Cassell Brief] (submitted by Professor Paul G. Cassell, Court-Appointed Amicus).

¹²⁶ Caminker, *supra* note 125, at 25.

The hallmark of a prophylactic rule as currently understood in the scholarship is its ability to be enforced in the absence of a violation of the related substantive right.¹²⁷ In one of the earliest definitions, Professor Grano described a prophylactic rule as a “preventive safeguard” that creates the possibility that violating the prophylactic rule will not actually violate the Constitution.¹²⁸ He argued that nothing is added by referring to a rule as prophylactic unless this actionable characteristic is included.¹²⁹ Thus, prophylactic has come to be used to characterize judicial rules that seemingly create independently actionable rights.

The main criticism of prophylactic rules that has dominated the scholarship since their origin has been that the rules are unauthorized exercises of the federal courts’ Article III power, and as such, they threaten to invade the powers of other federal and state branches of government.¹³⁰ The first argument is that Article III, which grants courts judicial power to decide cases and interpret law, does not authorize the judicial creation of new rights via prophylactic rules.¹³¹ Secondly, prophylactic rules have been criticized as violative of separation of powers principles because the judicial rules intrude upon Congress’s prerogative to legislate and create new rights.¹³² And finally, the allegation is that prophylactic rules that

¹²⁷ Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001) (defining “prophylactic rule” as a legal requirement that “may be ‘triggered’ by less than a showing that the explicit [or true federal constitutional] rule was violated”); Landsberg, *supra* note 46, at 926 (distinguishing prophylactic rules from remedies and defining them as “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”).

¹²⁸ Grano, *supra* note 121, at 101–02, 105–06. “What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution. A decision that promulgates or employs a prophylactic rule will not attempt to demonstrate an actual violation of the defendant’s constitutional rights in the case under review.” *Id.* at 105 (footnotes omitted).

¹²⁹ *Id.* at 105 n.23.

¹³⁰ JOSEPH GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 173–98 (1993); Grano, *supra* note 121, at 124–56; Landsberg, *supra* note 46, at 925; Thomas Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118 (1978) (failing to treat prophylactic rules as a necessary dimension of a constitutional right raises acute questions of legitimacy and constitutional authority).

¹³¹ *Dickerson*, 530 U.S. at 460 (Scalia, J., dissenting); *North Carolina v. Pearce*, 395 U.S. 711, 741 (1969) (Black, J., concurring in part and dissenting in part) (criticizing prophylactic rule of *Pearce* as “pure legislation if there ever was legislation”); Grano, *supra* note 121, at 123–24; Schrock & Welsh, *supra* note 130, at 1127 (stating that *Marbury* type judicial review does not authorize subconstitutional prophylactic rules). *But see* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (recognizing the Court’s “authority to imply a new constitutional tort . . . anchored in [its] general jurisdiction to decide all cases ‘arising under the Constitution, laws or treaties of the United States.’”) (quoting 28 U.S.C. § 1331).

¹³² *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting) (arguing that adopting prophylactic

control conduct at the state level intrude upon the states' power to act for the general welfare in violation of federalism principles.¹³³

This debate over the legitimacy of prophylactics formed the heart of the dispute in *Dickerson v. United States* in which the Court reaffirmed the constitutionally binding nature of *Miranda* warnings.¹³⁴ Writing for the majority, Justice Rehnquist avoided the challenge presented to address the general question of the legitimacy of prophylactic rules.¹³⁵ He avoided labeling the *Miranda* warnings "prophylactic" despite past precedent to the contrary and instead referred to the warnings as a "constitutional rule" and as guidelines with "constitutional underpinnings."¹³⁶ Justice Scalia, one of two dissenting Justices, was incensed by Rehnquist's evasiveness,¹³⁷ for he believed that the Court's reticence to engage the prophylactic

rules as a constitutional rule that cannot be altered by Congress "flagrantly offends fundamental principles of separation of powers, and arrogates to [the Court] prerogatives reserved to the representatives of the people"); Schrock & Welsh, *supra* note 130, at 1127–29 (identifying problems with prophylactic rulemaking that invades congressional power to legislate and executive powers to define law enforcement methods); *see also* Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson*, 45 N.Y.L. SCH. L. REV. 119, 126–27 (2000) (describing Justice Scalia's position that prophylactic rulemaking violates separation of powers).

¹³³ *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting); Michael D. Hatcher, *Printz Policy: Federalism Undermines Miranda*, 88 GEO. L.J. 177 (1999); Schrock & Welsh, *supra* note 130, at 1129–30 (asserting that prophylactic rules violate limits upon federal judicial power to displace state law); *see also* Brief for the States of South Carolina et al. as Amici Curiae Urging Affirmance at 17, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525):

Because this Court has held that the warnings are merely prophylactic, the requirements should be regarded as, at most, interim procedures which protect constitutional rights only until other procedures can be adopted by state bodies with the power to set such rules for the courts of the States. Any suggestion that the States cannot alter prophylactic rules, or that such rules may only be altered by federal authorities, creates a risk to our federal system of government, under which the "primary authority for defining and enforcing the criminal law" rests with the States.

¹³⁴ *Dickerson v. United States*, 530 U.S. 428 (2000).

¹³⁵ *Id.* at 437–40.

¹³⁶ *Id.* (acknowledging the Court's prior opinions that refer to the *Miranda* warnings as prophylactic, but disagreeing that such protections are not constitutionally required). The Supreme Court has repeatedly referred to the *Miranda* warnings as "prophylactic" rules. *E.g.*, *Davis v. United States*, 512 U.S. 452, 457–58 (1994) (*per curiam*) (quoting *Smith v. Williams*, 469 U.S. 91, 95); *Withrow v. Williams*, 507 U.S. 680, 690–91 (1993); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); *New York v. Quarles*, 467 U.S. 649, 653 (1984). However, the original *Miranda* decision never used that term and instead referred to the warnings as "procedural safeguards." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

¹³⁷ Fallon, *supra* note 132, at 126, 139–40 (describing Rehnquist's frustrating failure in *Dickerson* to face up to the challenge posed by the dissent and calling the majority opinion "painfully cryptic," "[d]eliberately opaque," "shallow," "question-begging," "elusive" and

debate proved that it had overreached.¹³⁸ He therefore concluded that prophylactic rules created by the Court constituted a “lawless practice” in that the Court endorsed a “power, not merely to apply the Constitution but to expand it, imposing what it regards as useful ‘prophylactic’ restrictions upon Congress and the States. That is an immense and frightening antidemocratic power, and it does not exist.”¹³⁹

Commentators have superficially attempted to legitimize prophylactic rules by comparing them to other interpretive or implementing rules.¹⁴⁰ Professor Monaghan was the first to defend prophylactics in the context of constitutional law by arguing they were a type of subconstitutional implementing rule drawing their inspiration from, but not required by, the constitutional right.¹⁴¹ Monaghan, and later Professor Fallon, argued that the ubiquity of such implementing rules demonstrated their legitimacy.¹⁴² Other commentators have categorized prophylactics as regular interpretive rules well within the judicial power.¹⁴³ The Court’s references to

lacking “full candor”); Richard H.W. Maloy, *Can a Rule be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2498 (2001) (criticizing the Court in *Dickerson* for failing to explain the basis of its decision upholding *Miranda* as a constitutional rule).

¹³⁸ Fallon, *supra* note 132, at 120.

¹³⁹ *Dickerson*, 530 U.S. at 446, 457 (Scalia, J., dissenting).

¹⁴⁰ Caminker, *supra* note 125; Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 S. CT. REV. 61, 73 n.47 (“Most of the academic literature accepts the legitimacy of prophylaxis, with the debate focusing on how to justify it.”); Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1605 (2000) (discussing overprotective prophylactic rules including examples from First Amendment, equal protection and redistricting law); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 203–05 (1988) [hereinafter Strauss, *Ubiquity*]; David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 963 (2001).

¹⁴¹ Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (describing prophylactic rules as part of the “constitutional common law” consisting of a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions, which could be superseded by Congress); *see also* Fallon, *supra* note 132, at 128–31 (characterizing prophylactic rules as part of the judicial rules used to implement the Constitution such as standards of review and rules of stare decisis); Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 482–87 (1994) (agreeing with Monaghan’s theory of constitutional common law but finding that such law is temporarily required by the Constitution in some instances).

¹⁴² Fallon, *supra* note 132, at 131, 137 (“Prophylactic rules stand among a cluster of well-established doctrines and practices justified by the requirements of reasonably successful constitutional implementation.”); Monaghan, *supra* note 141 (arguing that the commonality of prophylactic rules explains common creation of constitutional common law that federal courts may impose upon states via the Supremacy Clause).

¹⁴³ Caminker, *supra* note 125; Klein, *supra* note 127, at 1031–33 (defining a

prophylactic measures as "bright-line,"¹⁴⁴ "conclusive,"¹⁴⁵ or generally "protective"¹⁴⁶ rules seem to support this view of prophylactics as regular doctrinal rules. Thus, Professors Caminker and Strauss have argued that prophylactic rules, and in particular *Miranda* warnings, are simply rules used to detect constitutional violations akin to protective, strict scrutiny rules or bright-line content-based First Amendment rules.¹⁴⁷ Such interpretive doctrines, they argue, are straightforward exercises of legitimate judicial power to interpret rights.¹⁴⁸

These theories, however, fail to explain the legitimacy of prophylactics.¹⁴⁹ They all touch on the surface of the issue and use terms that explain some effects of prophylactics.¹⁵⁰ However, these facile descriptions do not suffice to answer critics

"constitutional prophylactic rule" as a "judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or 'true' federal constitutional rule is applicable"); Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1174-75 (1998) (asserting that prophylactic rules are legitimate exercises of the Court's power to formulate doctrinal rules interpreting the Constitution); Strauss, *Ubiquity*, *supra* note 140.

¹⁴⁴ *Hill v. Colorado*, 530 U.S. 703, 729 (2000) ("A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 474 (1995) ("The Government's only argument against a general nexus limitation is that a wholesale prophylactic rule is easier to enforce than one that requires individual nexus determinations."); *Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (characterizing the prophylactic rule of *Michigan v. Jackson* as a "bright-line rule" for deciding whether an accused who has asserted his Sixth Amendment right to counsel subsequently waived that right).

¹⁴⁵ *Harvey*, 494 U.S. at 349 (describing prophylactic rule of *Miranda* as establishing a "presumption" of invalidity for "some waivers that would be considered voluntary . . . under the traditional case-by-case inquiry"); *Wasman v. United States*, 468 U.S. 559 (1984) (interpreting prophylactic rule of *North Carolina v. Pearce* as requiring trial judges to clearly justify any sentence increased on remand with new objective information to rebut a "presumption" of judicial vindictiveness).

¹⁴⁶ *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (stating that the primary objective of Title VII and its prohibition of sexual harassment is a "prophylactic one" that aims not at redressing but rather at avoiding harm); *City of Chicago v. Morales*, 527 U.S. 41, 73 (1999) (Scalia, J., dissenting) (endorsing Chicago's "prophylactic measure" of prohibiting loitering in the presence of a known gang member in the absence of a legitimate purpose in order to prevent crime); *Withrow v. Wilson*, 507 U.S. 680, 691 (1993) ("'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a 'fundamental trial right'") (citations omitted); *Harvey*, 494 U.S. at 368-69 (Stevens, J. dissenting) (stating that "all rules of law are prophylactic" because they are designed to prevent harm).

¹⁴⁷ Caminker, *supra* note 125, at 2, 7; Strauss, *Ubiquity*, *supra* note 140, at 204-05.

¹⁴⁸ Caminker, *supra* note 125, at 22; Strauss, *Ubiquity*, *supra* note 140, at 208.

¹⁴⁹ Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 178 (1988).

¹⁵⁰ See *infra* notes 166-83 and accompanying text.

of prophylactics like Justice Scalia. The theory of implementing rules is flawed to the extent it is based upon the judicial supervisory power to make internal procedural rules for the federal courts.¹⁵¹ As academics have previously established, the supervisory power cannot explain how prophylactics have applied in state courts or trumped congressional action.¹⁵² Thus, this theory was expressly rejected as a foundation for prophylactics by the Supreme Court in *Dickerson*.¹⁵³ The interpretation rule theory is also flawed because it does not describe how additional measures, such as police warnings or recount standards, “interpret” the Constitution. Prophylactic measures operate as external directives rather than internal standards for courts, and thus, as Professor Grano, the most prominent critic of prophylactics has argued, prophylactics are different from run-of-the-mill doctrinal rules.¹⁵⁴ It is the legitimacy of these externally binding types of rules and not the legitimacy of other types of substantive or procedural doctrinal rules that is in question.¹⁵⁵

The analytical detour for these supporters of prophylactics has been the conceptualization of prophylactics as rules. The uniform thread running through this mishmash of legal commentary is that prophylactics are rules, secondary in importance to “real” legal rights.¹⁵⁶ The real “rights,” it is argued, exist in the text

¹⁵¹ See Schrock & Welsh, *supra* note 130, at 1142 (stating that Monaghan’s theory of constitutional common law “seems indistinguishable from the supervisory power”); Monaghan, *supra* note 141, at 18 (discussing the rulemaking authority of federal courts).

¹⁵² Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (“Supervisory power rulings . . . by definition . . . apply only in federal proceedings”); Schrock & Welsh, *supra* note 130, at 1141 (emphasizing that the Supreme Court has no “general supervisory power over the state courts”); see also Maloy, *supra* note 137, at 2470–71 (describing *Dickerson* as having rejected supervisory power as basis for prophylactic rules).

¹⁵³ *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

¹⁵⁴ Grano, *supra* note 149; Grano, *supra* note 121, at 103, 115–23 (discussing cases improperly categorized as prophylactic rules that do not raise legitimacy questions because they exemplify the traditional judicial review that *Marbury v. Madison* authorized); see also *Dickerson*, 530 U.S. at 457 (Scalia, J., dissenting) (explaining several cases of alleged legitimate prophylactic rules identified by the petitioner as nothing more than regular cases “in which the Court quite simply exercised its traditional judicial power to define the scope of constitutional protections and, relatedly, the circumstances in which they are violated”).

¹⁵⁵ Grano, *supra* note 149, at 177.

¹⁵⁶ *Dickerson*, 530 U.S. at 451–54 (Scalia, J., dissenting); *Dickerson v. United States*, 166 F.3d 667, 672 (4th Cir. 1999) (“[W]hether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. Clearly it is not. At no point did the Supreme Court in *Miranda* refer to the warnings as constitutional rights.”), *rev’d*, 530 U.S. 428 (2000); Grano, *supra* note 121, at 115–23; Monaghan, *supra* note 141.

of the constitutional or statutory codification.¹⁵⁷ Rules are conceptualized as judicial directives created to guide the court internally in its resolution of the case.¹⁵⁸ They address “technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process.”¹⁵⁹ For example, rules like the three-part test for an equal protection violation are used by the court internally to interpret the extent of constitutional protections and to detect violations.¹⁶⁰ Interpretive rules are also used to direct the courts in the issuance of remedies, as in the case of the irreparable injury rule that directs a court to award injunctive relief only if legal remedies are inadequate.¹⁶¹ In yet another example, implementing rules, such as standards of review or rules of evidence, direct the court in the process of reaching its decision.¹⁶² All of these substantive and procedural rules are simply internal guidelines for the courts; they are not actual rights. Thus, prophylactic decisions that appear to apply such rules externally as mandatory legal requirements are pejoratively labeled “judicial legislation” by which the court illegitimately directs the conduct of others.¹⁶³

¹⁵⁷ *Dickerson*, 530 U.S. at 451–54 (Scalia, J., dissenting).

¹⁵⁸ Beale, *supra* note 152, at 1465; *see also* Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (authorizing the federal courts to establish “all necessary rules for the orderly conducting [of] business”); John Harrison, *The Power of Congress over Rules of Precedent*, 50 DUKE L.J. 503, 512 (2000) (explaining that rules of stare decisis and precedent are internal rules of judicial reasoning). Rules are often distinguished from standards as the more mechanical, inflexible directives guiding the judicial decision maker in her resolution of the dispute. Overton, *supra* note 4, at 66; Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

¹⁵⁹ Beale, *supra* note 152, at 1465.

¹⁶⁰ Caminker, *supra* note 125, at 26 (using the Court’s rules for the Equal Protection Clause as an example of the judicial use of doctrinal rules to screen out unconstitutional conduct); Strauss, *Ubiquity*, *supra* note 140, at 204–05 (citing the Equal Protection Clause as a “relatively obvious example” of the development of judicial rules to find constitutional violations); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 232 (“[T]he Court is naturally drawn to phrasing the doctrine as a three-part test, focusing on governmental ends, the statute’s relationship to achieving benefits, and the statute’s burden on individuals.”).

¹⁶¹ DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 228–30 (2d ed. 1993); *see also* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990) (arguing that the ancient rule no longer operates to preclude injunctive relief).

¹⁶² Harrison, *supra* note 158, at 512–13 (comparing rules of precedent and stare decisis to rules of evidence as both are internal rules of judicial reasoning). *But cf.* *Michigan v. Payne*, 412 U.S. 47, 52 (1973) (finding the prophylactic rules in *Pearce* and *Miranda* to be similar in that each was designed to preserve the integrity of a phase of the criminal process).

¹⁶³ Schrock & Welsh, *supra* note 130, at 1132, 1155 (referring to prophylactic rules as judicial legislation); Strauss, *Ubiquity*, *supra* note 140, at 190 (describing the *Miranda*

The existing rule-based scholarship therefore has failed to answer the allegations of judicial illegitimacy because it has taken a micro rather than macro approach to the issue. This micro approach focuses on isolated effects appearing to emanate from the prophylaxis such as the creation of a new actionable right, the establishment of a conclusive presumption, and the creation of a detection standard.¹⁶⁴ What is needed, however, is a macro analysis that places all of the effects into context and answers the claims of illegitimacy. The theory that easily connects these analytical dots is one that conceptualizes prophylactics as remedies. This distinction between remedies and rules is not one of mere semantics,¹⁶⁵ for the recharacterization finally provides an answer validating prophylactics.

B. Prophylactics as Remedies

The key point is that prophylactics are remedies, and remedies are legitimate judicial actions that have continuing precedential effects in future cases. Scholars have danced around this point, recognizing parallels between prophylactic rules and remedies but failing to take the critical step of acknowledging that prophylaxis is in fact a remedy.¹⁶⁶ Indeed, few remedies scholars have comprehended the import of this remedy¹⁶⁷ despite the judicial use of it for the past thirty-five years.¹⁶⁸ The

decision as one that "reads more like a legislative committee report with an accompanying statute") (footnote omitted).

¹⁶⁴ Cassell Brief, *supra* note 125; Grano, *supra* note 121, at 105; Klein, *supra* note 127, at 1031-32, 1037-38.

¹⁶⁵ David Huitema, Miranda: *Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261, 274 (2000) (stating that the discrepancy in the Court's language sometimes calling prophylactics remedies and sometimes calling them rules is a matter of semantics because "the effects are the same no matter how the Court couches its reasoning"); Strauss, *Ubiquity*, *supra* note 140, at 196.

¹⁶⁶ See Beale, *supra* note 152, at 1495 ("This section considers only remedies, not related issues of prophylactic rulings that do not rest on a finding that federal law has been violated."); Klein, *supra* note 127, at 1033 (describing as an "incidental right" the remedial effect of failure to comply with prophylactic rule, but distinguishing that incidental right from a true prophylactic rule); Klein, *supra* note 141, at 481 (arguing that "some remedy or procedure is necessary to safeguard a constitutional provision"); Landsberg, *supra* note 46, at 964 (arguing that a requisite standard for the imposition of a prophylactic rule is that it be designed to protect a clear constitutional right).

¹⁶⁷ For example, the leading remedies treatises and most remedies textbooks contain no discussion of prophylactic remedies. See, e.g., DOBBS, *supra* note 161; FISS & RENDLEMAN, INJUNCTIONS (2d ed. 1984); LEAVELL ET AL., CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION, AND DAMAGES (6th ed. 1994); RUSSELL WEAVER ET AL., MODERN REMEDIES (2000). Only Professors Laycock, Schoenbrod, and Shoben have embraced such a concept and briefly explained it in their respective case books. LAYCOCK, *supra* note 45, at 272; SCHOENBROD, *supra* note 46, at 131-34; SHOBN & TABB, *supra* note 45, at 246.

¹⁶⁸ Landsberg, *supra* note 46, at 926 (stating that review of the case law reveals a long

muddled scholarship has created a false debate over the legitimacy of prophylactic "rules" by its failure to recognize the remedial nature of the prophylactics and its failure to understand remedies are not secondary rules inferior to and separate from the real right.¹⁶⁹

Recent scholarship, including my own, has challenged the long-held theory of remedies as a secondary right and instead has argued that a remedy is an intrinsic part of every substantive right.¹⁷⁰ What I have called "the unified right theory" posits that rights are comprised of two key components: the inert skeletal matter of the substantive guarantee and the operative lifeblood of the remedy.¹⁷¹ Both guarantee and remedy are needed to create a legal right. Thus, remedies are not secondary rules of procedure or other inferior mechanisms that are detached from the real right.¹⁷² A remedy does function as an instrument to effectuate or enforce a guarantee.¹⁷³ However, it does much more through its power to define the scope and shape of the right.¹⁷⁴ As Professor Levinson carefully detailed in his work entitled *Rights Essentialism and Remedial Equilibration*, a remedy defines a legal right by providing specific examples that interpret the meaning and scope of an otherwise amorphous, abstract value such as "equal protection."¹⁷⁵ For example,

history of judicial creation of prophylactic rules but a lack of self-conscious judicial examination of the rules); Strauss, *Ubiquity*, *supra* note 140, at 196 ("[W]hether a doctrine should be viewed as prophylactic depends not on how the Court happens to have written its opinions but on how the relevant constitutional provision is most plausibly interpreted.").

¹⁶⁹ See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999) (describing the common legal misunderstanding, including Monaghan's theory of constitutional common law, of thinking of remedies as segregated rules distinct from the superior pure right).

¹⁷⁰ Thomas, *supra* note 68, at 679–95; *see also* Huitema, *supra* note 165, at 269 n.51 ("It can be extremely difficult to disentangle the definition of a right and the remedies available for a violation — they are flip sides of a single coin."); Levinson, *supra* note 169, at 857 ("[R]ights and remedies in constitutional law are interdependent and inextricably intertwined."); Donald Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 69 (2001) ("Rights, rights of action, and remedies are inextricably related; one cannot make a decision about one of them without necessarily affecting the other.").

¹⁷¹ Thomas, *supra* note 68, at 688.

¹⁷² Thomas, *supra* note 68, at 687; *see also* Levinson, *supra* note 169, at 857.

¹⁷³ Michael L. Wells, *Section 1983, The First Amendment, And Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 939–40 (2001) ("Constitutional rights do not exist in a vacuum, hermetically sealed from the rest of the legal universe. Their value depends in large measure on the remedial vehicles available for redressing violations"); *see also* Landsberg, *supra* note 46, at 927 (explaining that the Supreme Court has used the term prophylactic synonymously with the term "instrumental").

¹⁷⁴ Thus I disagree with Professor Klein that prophylactic rules and their related effect of creating incidental rights are "purely instrumental" and "have no utility outside of that function." Klein, *supra* note 127, at 1033–34.

¹⁷⁵ Levinson, *supra* note 169, at 885–87; *see also* Beale, *supra* note 152, at 1475

the Court imposed a variety of remedies in the desegregation cases, including some which reached the economic or social causes and consequences of desegregation.¹⁷⁶ These consequential remedies thus redefined the right against racial discrimination to include de facto rather than simply de jure segregation.¹⁷⁷ Since the guarantee and remedy are unified into one right, a judicial decision about the remedy necessarily is a decision about the right. A decision about a prophylactic remedy like *Miranda* or *Bush*, therefore, is also a decision about the attendant constitutional right.

Rehnquist's opinion in *Dickerson* upholding the *Miranda* prophylactic remedy as a "constitutional rule" implicitly adopts this unified right theory.¹⁷⁸ While he does not identify the warnings as prophylactic remedies, Rehnquist reaches the same result by concluding that the *Miranda* "rules" are in fact part of the Court's interpretation of the constitutional right.¹⁷⁹ The unified right theory explains this result. The guidelines comprise a prophylactic remedy that is needed to adequately enforce the constitutional right against self-incrimination because, as the *Miranda* Court initially found, violations can easily go undetected by an injunction simply prohibiting coerced confessions due to the secretive nature of interrogations.¹⁸⁰ Thus, the *Miranda* remedy performs an instrumental function in enforcing the constitutional right against self-incrimination. However, the *Miranda* remedy also defines the guarantee against "self-incrimination" by redefining the constitutional value to prohibit uninformed self-incrimination.¹⁸¹ Thus, a decision about the attendant remedy for a constitutional guarantee is a "constitutional decision" that is "constitutionally based" as the Court held in *Dickerson*.¹⁸²

Conceptually, Rehnquist got it right in *Dickerson*; he just demonstrated the

(describing rules regarding the nature and extent of remedies as substantive because they define the right).

¹⁷⁶ See *supra* note 63.

¹⁷⁷ Levinson, *supra* note 169, at 876 ("[E]very jurisdiction that had ever engaged in de jure segregation . . . had an affirmative obligation to achieve racial integration, which required remedying not just de jure but also de facto segregation.").

¹⁷⁸ *Dickerson v. United States*, 530 U.S. 428 (2000).

¹⁷⁹ *Id.* at 444 ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

¹⁸⁰ *Miranda v. Arizona*, 384 U.S. 436, 463 (1966) (recognizing the "dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself").

¹⁸¹ See Levinson, *supra* note 169, at 901, 908–09.

¹⁸² *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 369 (1998) (Stevens, J., dissenting) (arguing that the remedy of the exclusionary rule is "constitutionally required, not as a 'right' explicitly incorporated in the fourth amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact.") (quoting Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983)).

same definitional aversion as many scholars, attributing a negative connotation to the label “prophylactic.”¹⁸³ Understanding prophylactics as remedies, however, answers the legitimacy critics like those in *Dickerson* that such measures are outside a court’s power. A remedial characterization justifies the external proscription of prophylactic measures, because individualized injunctive remedies force parties to comply with court directives. The remedial power is generally well-accepted as a legitimate exercise of judicial power. Moreover, viewing prophylactics as remedies explains the consequential rule-like effects that have confounded commentators.

1. A Distinct Type of Individualized Remedy

A prophylactic remedy properly understood is a specific subset of injunctive relief. It is distinguished from other remedies by its hallmark imposition of additional proscriptions of otherwise legal conduct. As an injunction, a prophylactic remedy operates as a personal command against the defendant requiring certain conduct.¹⁸⁴ This judicial command is enforced by the power of contempt for which a defendant can be fined or imprisoned for failing to obey the court’s order.¹⁸⁵ In this way, the prophylactic measures convert the innocuous conduct into required law.¹⁸⁶ Prophylactic measures thereby become mandatory enforceable rights with respect to the particular individuals in the case.

A prophylactic measure is imposed by a court only as a reaction to a proven violation of law.¹⁸⁷ This reactive origination of prophylactics reveals their remedial rather than rule-like nature. Indeed, in the absence of a violation, the Supreme

¹⁸³ Rehnquist’s avoidance of the prophylactic debate is all the more curious as he seems to be the one Justice who clearly understands the concept of prophylactic. In *Michigan v. Tucker*, 417 U.S. 433 (1974), he first characterized *Miranda* as a “prophylactic rule[.]” *Id.* at 439. It was he who used the term to describe the Court’s actions in *Hutto v. Finney*, 437 U.S. 678 (1978), ordering injunctive relief containing measures addressing conduct that did not violate the Constitution. *Id.* at 712. He used the same definition of prophylactic to circumscribe Congress’ legislative powers under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). And it was he who in *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994), clearly endorsed the use of prophylactic measures. *Id.* at 753.

¹⁸⁴ See DOBBS, *supra* note 161, at 162 (discussing injunctive relief generally).

¹⁸⁵ *Id.* at 130.

¹⁸⁶ SHOEN & TABB, *supra* note 45, at 246.

¹⁸⁷ Landsberg, *supra* note 46, at 964 (suggesting the principle that a prophylactic rule may only be imposed to protect a clear constitutional right); cf. Thomas, *supra* note 68, at 714 (arguing that the legislative remedial power under Section 5 like the judicial remedial power must be reactive to an established or likely violation). *Contra* Huitema, *supra* note 165, at 274 (arguing that the Court has the implied power to create not only indispensable remedies, but also “contingent constitutional requirements”).

Court has refused to impose prophylactic rules. Thus, in *Rizzo v. Goode*,¹⁸⁸ the Court refused to impose prophylactic measures of new manuals, procedures, and a civilian complaint system for the police department where no violation was found by the court.¹⁸⁹ Similarly, in *Lewis v. Casey*,¹⁹⁰ the Court refused to impose prophylactic standards dictating measures for a prison library where no constitutional violation arose out of the library itself.¹⁹¹ Prophylactics are not examples of independent judicial rulemaking. Rather, they are remedial measures employed by the court in reaction to proven harm in order to prevent further harm in the future.

Prophylactic relief is a term of art that should not be used carelessly, as it has been, to describe other types of remedies.¹⁹² In particular, so-called "deterrent" remedies such as the exclusionary rule and automatic dismissal rule of criminal procedure should not be called "prophylactic"¹⁹³ despite the Court's use of the term to describe these criminal sanctions.¹⁹⁴ The judicial confusion seems to have begun

¹⁸⁸ 423 U.S. 362 (1976).

¹⁸⁹ *Id.* at 376–77 (distinguishing *Swann* and its imposition of prophylactic relief because such broad equitable relief is available only once a violation of a constitutional right is shown).

¹⁹⁰ 518 U.S. 343 (1996).

¹⁹¹ *Id.* at 362–63.

¹⁹² For example, it should not be used to describe constitutional damages that may be generally protective of rights, as used by Justice Harlan in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to describe the compensatory damages awarded. *Id.* at 408 n.8 (Harlan, J., concurring); see also *United States v. Capps*, 29 F.3d 1187, 1193 (7th Cir. 1994) (equating a prophylactic rule and a *Bivens* remedy). Compensatory damages that provide money for a plaintiff's loss share none of the remedial attributes and purposes of a prophylactic measure. Nor should the term prophylactic be used to describe structural injunctions that are characterized by their alteration of public and private structures that systematically have violated the law. See Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorney Generals*, 88 COLUM. L. REV. 247 (1988) (comparing prophylactic and structural remedies). Examples of structural injunctions include dividing Microsoft's monopolistic business structure into two companies or integrating Topeka Schools to restructure the segregated education.

¹⁹³ Grano, *supra* note 121, at 103–04 (criticizing Professor Monaghan for lumping together prophylactic rules and deterrent remedies, such as the Fourth Amendment exclusionary rule, which are not identical); Klein, *supra* note 127, at 1048–49 (distinguishing prophylactic rules and the exclusionary rule but failing to recognize the prophylactic remedy); see also Meltzer, *supra* note 192, at 249 (defining deterrent remedies as those in which the litigant obtains more than he is entitled to, measured against the harm to his rights that he has suffered or is likely to suffer in the future).

¹⁹⁴ *Vasquez v. Hillary*, 474 U.S. 254, 260–62 (1985) (labeling the automatic reversal remedy for racial discrimination in jury selection as "prophylactic"); *Stone v. Powell*, 428 U.S. 465, 479 (1976) (describing the exclusionary rule of the Fourth Amendment as a "prophylactic device"). To the extent that I may have suggested that the *Vasquez* rule was

with *Miranda*, which involved two remedies: a prophylactic injunction proscribing future warnings and a reparative injunction excluding the confession. Yet *Miranda* was simply an example of the common occurrence of multiple remedies being awarded in a single case.

Deterrent remedies like the exclusionary rule are distinct in purpose and form from prophylactic remedies.¹⁹⁵ First, deterrent remedies are intended to penalize wrongdoers and/or restore victims of past harm.¹⁹⁶ The purpose of a prophylactic remedy, by contrast, is to enhance protection against future harm. Exclusionary remedies are preventive only in the sense that all remedies can be said to prevent or deter illegal action by establishing consequences that potential wrongdoers wish to avoid.¹⁹⁷ Second, deterrent remedies defensively shield the plaintiff against prior illegality, whereas prophylactic remedies offensively fight against future harm.¹⁹⁸

a prophylactic remedy, I too have been careless. See Thomas, *supra* note 68, at 725.

¹⁹⁵ Tracy A. Thomas, *Remedies Forum: Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 101 1063 (2003) (suggesting that the availability of statutory remedies should be determined by remedial purpose rather than pleading form).

¹⁹⁶ See Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 261 (1998) (arguing that the exclusionary rule is justified "because it puts both the State and the accused in the positions they would have been in had the Constitution not been violated"); William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 655 (1983) ("[T]he preoccupation of fourth amendment analysis obscures the compensatory function of exclusion."). It should be noted, however, that the remedial nature of the exclusionary rule has not yet reached consensus as the academy is still debating such rules along the same path as the debate over prophylactics. As in the case of prophylactics, the Court and commentators have disagreed about the character and legitimacy of the exclusionary rule. Compare Norton, *supra* (stating that the exclusionary rule is an individual restorative remedy), with Meltzer, *supra* note 192 (endorsing the Court's statements that the exclusionary rule is not an individual remedy but a deterrent remedy in which the litigant serves as a private attorney general), and William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L. J. 799, 802 (2000) (arguing that the exclusionary rule is a disgorgement remedy rather than a reparative or deterrent remedy). At times the rule has been described as a right, *United States v. Weeks*, 232 U.S. 383, 392 (1914), a remedy, *Stone v. Powell*, 428 U.S. 465, 486 (1976), a deterrent, *United States v. Calandra*, 414 U.S. 338, 347 (1974), and most recently as a "prudential rule," *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 362 (1998). The exclusionary rule debate, like that of the prophylactic rule, has focused on whether the Constitution requires the imposition of the rule. See *Scott*, 524 U.S. at 362.

¹⁹⁷ See, e.g., Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 151 (1995) ("Damages based on harm engender theoretically sufficient deterrence by ensuring that no breach of contract or other risk-causing activity is undertaken where the defendant's expected damages exceeds [sic] the expected gains.")

¹⁹⁸ See Grano, *supra* note 121, at 104 (distinguishing prophylactic rules that are intended to prevent future harms from deterrent remedies like the exclusionary rule that apply only after an actual violation has occurred); Meltzer, *supra* note 192, at 251 (describing the

And finally, deterrent remedies are simple prohibitions excluding evidence or dismissing cases. Prophylactic remedies, by contrast, are complex orders consisting of multiple, detailed requirements. Thus, grouping deterrent remedies with prophylactic remedies further obfuscates the law.

Fundamentally, the legitimacy of prophylactic remedies is based upon the legitimacy of judicial remedies. Understanding the true nature of prophylactics as remedies rather than rules eliminates the legitimacy concerns associated with otherwise random judicial rulemaking.¹⁹⁹ Remedies are an inherent part of the unified right and thus are legitimate exercises of the *Marbury*-type judicial power.²⁰⁰

2. Judicial Remedial Power

It is well-accepted that federal courts possess the implicit structural power to provide a remedy for a wrong.²⁰¹ This remedial authority is inherent in the "judicial power" extended to the federal courts by Article III of the Constitution.²⁰²

defensive exclusionary rule and offensive structural injunctions); *see, e.g.*, *Bullock v. Md. Casualty Co.*, 102 Cal. Rptr. 2d 804, 811 (Ct. App. 2001) (distinguishing prophylactic costs, not covered by insurance, applied to repair expenses as those prospective measures intended to avert future harm rather than compensate for past conduct).

¹⁹⁹ *See* Dorf & Friedman, *supra* note 140, at 64 ("This understanding of *Dickerson* as constitutional interpretation makes it possible to sidestep most of the academic debate about whether the Court has the authority to promulgate 'prophylactic rules' or 'constitutional common law.'"); Grano, *supra* note 121, at 157 (justifying prophylactic rules as constitutionally required avoids illegitimacy); Norton, *supra* note 196, at 283 ("Put most directly, when the exclusionary rule is viewed as a legal remedy designed to protect a private legal right, the recognition of that remedy is solidly within the power of the judiciary under long-recognized principles of Anglo-American law.")

²⁰⁰ David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYUL REV. 75, 170 ("Surely 'remedy' is the most fundamental and essential element of judicial power [as recognized by Chief Justice Marshall in *Marbury v. Madison*].").

²⁰¹ RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (stating that the Supreme Court has two functions: primarily, to interpret the Constitution, and secondly, to implement the Constitution through the imposition of remedies and other judicial practices); Beale, *supra* note 152, at 1495 (stating that the courts' power to fashion appropriate nonstatutory remedies for violations of federal law is equally as well established as the Article III power to interpret federal law); *see also* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

²⁰² Engdahl, *supra* note 200, at 170; *see also* Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541 (1972) (locating the source of the Supreme Court's remedial power in Article III); *cf.* *Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("I assume for purposes of this case that the remedial authority of the federal courts is inherent in the 'judicial power,' as there is no general equitable remedial power expressly granted by the Constitution or by statute."); Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 346-47

Alexander Hamilton discussed the extent of the federal courts' role in *The Federalist Papers*:

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government No man of sense will believe, that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.²⁰³

In other words, Hamilton's discourse embodied the common law maxim of *ubi jus, ibi remedium* — where there is a right, there must be a remedy.²⁰⁴ For without a remedy, federal rights become mere words that prescribe limits but declare "that those limits may be passed at pleasure."²⁰⁵ *Marbury v. Madison* adopted this historical notion that courts have the duty to impose a remedy in order to enforce

(1993):

Redressing the injuries of litigants is traditionally within the power of courts in the common law tradition. It does not follow from that fact that it is within the Article III judicial power. It is, however, not an extravagant proposition that such authority was within the judicial power or that it was granted by Congress along with the authority to decide federal question cases. To have the power to decide cases is to have the power to provide at least some reasonable menu of remedies to litigants.

²⁰³ THE FEDERALIST NO. 80, at 515–16 (Alexander Hamilton) (photo. reprint 2000) (1788).

²⁰⁴ See 3 WILLIAM BLACKSTONE, COMMENTARIES *109 ("[I]t is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury its proper redress."); Norton, *supra* note 196, at 262 ("The principle that for every right there is a remedy — *ubi jus, ibi remedium* — was a rule at English Common Law which the Supreme Court recognized as being central to American constitutional law beginning with *Marbury v. Madison*."); Zeigler, *supra* note 170, at 71–82 (tracing the "ancient and venerable" principle that rights must have remedies).

²⁰⁵ Meltzer, *supra* note 192, at 282 (noting that experience has shown the critical need for attention to realistic enforcement mechanisms for constitutional rights that can transform rights proclaimed on paper into practical protections) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 173 (1803)); Klein, *supra* note 141, at 460–61 (recognizing natural human tendency to assume that if there is no remedy, officers do not have to honor *Miranda* warnings or the prohibitions of the Fifth Amendment).

the laws which they interpret.²⁰⁶ Moreover, the lawyer Hamilton's reference to the remedial terms "restrain or correct" suggests that equitable injunctive remedies were in fact the preferred remedial option identified by the framers to enforce federal rights.²⁰⁷

The Court's inherent power to remedy wrongs includes the power to select the appropriate remedy from among the remedial options.²⁰⁸ A common objection to prophylactic remedies, like *Miranda* warnings, is that they are inappropriate because they are not required by the Constitution.²⁰⁹ But of course, the Constitution does not require any particular remedy, except perhaps just compensation in the event of a taking.²¹⁰ The selection of the appropriate remedy is the Court's

²⁰⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); Fallon, *supra* note 132, at 128 (arguing that the Supreme Court has two "entrenched functions": to interpret the Constitution and specify its meaning and to implement the Constitution through the crafting of rules and remedies).

²⁰⁷ THE FEDERALIST NO. 80 (Alexander Hamilton). This preference for injunctive rather than compensatory remedies follows the Supreme Court's recent Eleventh Amendment jurisprudence, which has upheld the continued viability of *Ex parte Young* type injunctions for federal law violations even when restricting the availability of damages. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); Pamela S. Karlan, *The Irony Of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001).

²⁰⁸ *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964) (holding that federal courts have a duty to "be alert to provide such remedies as are necessary to make effective the congressional purpose" of the federal law); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); Grano, *supra* note 121, at 101 ("When the Court holds that certain conduct violates the Constitution or that the Constitution requires a particular remedy, we may disagree strongly with the Court's interpretation of the Constitution, but we may not challenge the legitimacy of its authority. *Marbury* settled this legitimacy issue."); Klein, *supra* note 141, at 482 (arguing that "some remedy or procedure is necessary to safeguard a constitutional provision, but the Constitution itself does not specify which remedies or procedures to utilize," and thus it is the Court's obligation under the Constitution to create the body of law necessary to provide the appropriate remedy).

²⁰⁹ *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting) ("What makes a decision constitutional . . . is the determination that the Constitution *requires* the result.").

²¹⁰ *United States v. Fifty Acres of Land*, 469 U.S. 24 (1984) (holding that the Fifth Amendment Takings Clause requires general measure of compensatory damages to remedy unconstitutional taking); Fallon, *supra* note 132, at 129 (noting that "[t]he Constitution includes virtually no express provisions establishing remedies for constitutional violations," yet the Court has claimed authority to devise a broad range of remedies as are appropriate to promote constitutionally grounded interests); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 (2000) ("The eminent domain clause of the Constitution prohibits government from taking private property for public use without just compensation — in effect mandating a "remedy" of compensation for interference with certain constitutionally protected property rights.").

prerogative. Indeed, the Court has an obligation to provide adequate relief that is effective to give meaning to the legal guarantee.²¹¹ Thus, in *Bivens v. Six Unknown Named Agents*,²¹² the Court explained that it had the power to determine and impose the appropriate remedy to provide adequate relief. Even in cases of statutory rights, the Court has reiterated its power and prerogative to select the appropriate remedy when it is not statutorily prescribed.²¹³ Thus, the choice of a prophylactic remedy instead of a simple preventive or reparative injunction is part of the Court's legitimate exercise of remedial power.

There are, however, those critics who challenge the legitimacy of federally imposed, broad injunctions mandating affirmative conduct.²¹⁴ The attacks primarily upon structural relief parallel those on the legitimacy of prophylactic rules, which argue that broad injunctive relief exceeds the courts' Article III power in violation of federalism and separation of powers principles because it impermissibly legislates conduct.²¹⁵ Critics argue that federal courts have no (or only extraordinarily limited) power to issue affirmative proscriptions of conduct because such equitable remedies were not available at common law and because the Framers rejected this notion of unfettered equitable discretion.²¹⁶ Instead, they argue, federal

²¹¹ Thomas, *supra* note 68, at 758.

²¹² 403 U.S. 388 (1971).

²¹³ See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). Statutory rights are slightly different in that Congress may dictate the remedy where it has created the right. In contrast, Congress may not dictate the remedy for a right, such as a constitutional right, that it has not created. Thomas, *supra* note 68, at 701.

²¹⁴ *Lewis v. Casey*, 518 U.S. 343, 364 (1996) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (Thomas, J., concurring); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 103–06 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 648–49 (1982); Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 685–86 (1985); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CAL. L. REV. 1121, 1123 (1996).

²¹⁵ *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) (arguing that permitting the federal courts to exercise virtually unlimited equitable remedial powers has "trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm."); Sturm, *supra* note 72, at 1403 (summarizing the critics' charge that the court's role in imposing broad public remedies like structural and prophylactic relief exceeds the boundaries of judicial authority in contravention of federalism and the limits of equity power); Yoo, *supra* note 214, at 1123–24.

²¹⁶ *Jenkins*, 515 U.S. at 124–34 (Thomas, J., concurring); Yoo, *supra* note 214, at 1141–66.

courts are limited to issuing negative injunctions that simply prohibit conduct, affirmative remedies should be the responsibility of the executive and legislative branches, which are more competent to make policy decisions.²¹⁷

However, the historic dearth of broad injunctions proscribing the conduct of public institutions at common law may simply reflect the fact that such remedies evolved in more recent times as necessary remedies to address complex problems of constitutional violations unknown to English chancery courts.²¹⁸ More importantly, the critics are mistaken with respect to their historical understanding of equity. As John Kroger carefully detailed in his work, *Supreme Court Equity, 1789–1835, and the History of American Judging*, the type of equity power existing in the English chancery courts and the American colonial courts in the years leading up to the time of the Constitutional Convention was a broad, unbounded type of equitable power.²¹⁹ Traditional equity up until 1760 was defined as judicial power based on the individual chancellor's notion of fairness and justice emanating from natural law unconstrained by precedent or procedure.²²⁰ This was the type of equity power the Anti-Federalists feared because it would be unconstrained by rules of decision interpreting the Constitution.²²¹ Hamilton allayed the fears of the Anti-

²¹⁷ DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977) (questioning the courts' competency and ability to make social policy decisions inherent in structural relief); Sturm, *supra* note 72, at 1406–08 (summarizing the competency criticisms of broad injunctive relief in public law litigation); Yoo, *supra* note 214, at 1137–38 (arguing that courts are structurally worse off than other arms of government at developing intellectually coherent solutions to social problems because they must conduct social fact-finding and address the political, economic, and social factors that may have created the unconstitutional condition).

²¹⁸ For a view that structural injunctions are not in fact new, see Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that judicial supervision of complex enterprises has historic roots in probate, trust, and bankruptcy law).

²¹⁹ John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 Hous. L. Rev. 1425, 1434–38 (1998); see also PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE* 47 (1990) (describing the unbounded use of equity by American colonial courts).

²²⁰ Kroger, *supra* note 219, at 1434–35.

²²¹ "Brutus" XI, *The Supreme Court: They Will Mould the Government Into Almost Any Shape They Please*, N.Y.J., Jan. 31, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION 129, 132 (Bernard Bailyn ed., 1993) ("[I]n their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."); "Brutus" XII, *On the Power of the Supreme Court: Nothing Can Stand Before It*, N.Y.J., Feb. 7 & 14, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* at 171, 173 (arguing that the Constitution's grant of jurisdiction to federal courts over cases in "law and equity" empowered courts "to give the constitution a construction according to its spirit and reason, and not to confine themselves to its letter"); see also Yoo, *supra* note 214, at 1152–53 (discussing the early American historical debate over equity). Interestingly, however, this traditional type of unbounded equity power pervaded the U.S. Supreme Court during its first decade. Kroger, *supra* note 219, at

Federalists by subscribing to the modern equitable tradition advocated by Blackstone, in which traditional equity would be constrained by precedent and procedure.²²² Hamilton, however, did not view equity as limited, but rather as encompassing virtually any case: "There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud, accident, trust or hardship*, which would render the matter an object of equitable than of legal jurisdiction"²²³ Thus, the Framers did not eliminate the ability of judges to respond to violations of law with flexible and broad equitable remedies but merely incorporated such equitable power into the normal judicial decisionmaking process.

Thus, prophylactic remedies like those in *Miranda* and *Bush v. Gore* are legitimate uses of a court's judicial power to effectuate and interpret legal rights. The remedial nature of the prophylactic answers questions of judicial authority to impose prophylactics. For while it is generally the role of the legislative and executive branches to manage institutions and prescribe rules of behavior, that role becomes judicial when the court is acting in a remedial posture to correct derelictions of those responsibilities by the political branches resulting in a violation of law.²²⁴ Justice Scalia himself acknowledged this role transference: "Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm."²²⁵ What may still be unclear, however, is how such individualized relief appears to impact individuals and

1440-46.

²²² THE FEDERALIST NO. 78, *supra* note 203, at 502, 510 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"); THE FEDERALIST NO. 83, *supra* note 203, at 538, 549 (Alexander Hamilton) ("The great and primary use of a court of equity is to give relief in extraordinary cases"); *id.* at 549 n.* ("[T]he principles by which that relief is governed are now reduced to a regular system"); see also *Missouri v. Jenkins*, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (noting that Hamilton argued, as had Blackstone, that equity should be limited by rules and established judicial practices); 3 WILLIAM BLACKSTONE, COMMENTARIES *432 ("[E]quity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection."); Kroger, *supra* note 219, at 1436 (describing the modern reform of traditional equity as that which began to "legalize" equity by standardizing procedure and adopting stare decisis in place of discretionary and natural law-based adjudication).

²²³ THE FEDERALIST NO. 80, *supra* note 203, at 520 (Alexander Hamilton).

²²⁴ Sturm, *supra* note 72, at 1406 (arguing that the critique of structural remedies as being an abuse of judicial power "fails to account for the widely accepted judicial role of providing remedies for legal wrongs").

²²⁵ *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

institutions outside the litigation. A complete acceptance of the legitimacy of prophylactic remedies therefore necessitates an understanding that prophylactics, like other judicial actions, have precedential effects.

3. The Mirage of Prophylactic Effects

The confusion surrounding prophylactic remedies and their legitimacy stems from the misunderstood legal effects of remedies. It is argued that prophylactics create new actionable rights and establish irrebutable evidentiary burdens.²²⁶ Yet the mirage of judicial rights and rules is simply the normal resulting effect of a judicial remedial decision.²²⁷ For after the imposition of a remedy in the individual case, that remedy becomes a rule of law with precedential value as with all judicial decisions.²²⁸ It is this precedential value and its operational effects that have distracted the courts and commentators from a firm understanding of prophylactics. And thus, it is important to understand how prophylactics can in fact portray these right and rule-like attributes.

A remedy evolves through the case law from an individual binding law into a guide for subsequent cases. The prophylactic remedy begins as a new requirement that binds a particular individual because it is an equitable order that acts in personam upon the defendant.²²⁹ In this way, the prophylactic measures can fairly be said to impose a new code of conduct upon the particular defendants. The conduct is enforceable by the individual plaintiffs through the contempt power or other enforcement actions.²³⁰

In subsequent cases, the court's prior imposition of a remedy becomes a rule or legal principle directing the internal decisional process of the court. If it encounters similar violations, such as race discrimination akin to that in the initial case, *stare decisis* dictates that the court use the prior remedy as a precedent to direct it to impose the same remedy, such as busing, in the case before it. Of course, *stare decisis* also allows a court to deviate from the prior legal principles based upon

²²⁶ Cassell Brief, *supra* note 125; Grano, *supra* note 121, at 105.

²²⁷ Thomas, *supra* note 68, at 749 ("A prophylactic remedy is a rule of decision regarding the remedial component of a definitional constitutional guarantee.").

²²⁸ Rule of law means a legal principle of general application sanctioned by the recognition of authorities. It is called a "rule," because in doubtful or unforeseen cases it is a guide for judicial decisions. BLACK'S LAW DICTIONARY 1196 (5th ed. 1979).

²²⁹ LAYCOCK, *supra* note 45.

²³⁰ Plaintiffs are able to seek criminal or civil contempt remedies for violations. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). Where civil compensatory remedies are not available, a plaintiff may bring a new action for damages to compensate for losses stemming from the defendant's failure to comply with the new mandated conduct. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 147 (2d ed. Supp. 1999).

different facts or other policy decisions.²³¹ Thus, courts do not always require uniform conformance to prior prophylactic remedies issued in unrelated cases; rather, they permit political bodies to provide equally effective substitute measures.²³² However, the prophylactic remedy may provide a shorthand way of assessing violations because it provides concrete measures of otherwise abstract principles. In this way, prophylactic remedies in subsequent cases may operate as safe harbors insulating defendants from liability²³³ or as detection standards to uncover illegality.²³⁴

The important point is that, contrary to the current understanding, the prophylactic remedy itself never becomes an actionable right. There is a clear distinction between the remedy and what has been called the “right” or the substantive guarantee. The guarantee establishes the legal duty or principle that may be sued upon in a legal action. The remedy is the judicial policy response to a finding of a violation of the guarantee. While the right/remedy or principle/policy connection is unified, the two components are still distinct matter.²³⁵ Thus, a cause of action must always be based upon injury caused by a denial of a right, not due to failure to comply with prophylactic measures.²³⁶

There are numerous cases exemplifying the precedential effects of the prophylactic remedy. One of the earliest examples comes from the desegregation

²³¹ Cf. Klein, *supra* note 141, at 482–83 (recognizing that necessary or appropriate remedies for constitutional violations, like prophylactic remedies, may change with circumstances).

²³² See *infra* notes 255–56 and accompanying text and text accompanying note 263.

²³³ Klein, *supra* note 127, at 1033, 1044 (defining a “safe harbor rule” as a judicially created procedure that if properly followed by the government actor insulates the government from argument that the constitutional right was violated); e.g., *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526 (1999) (establishing a safe harbor for employers against imposition of punitive damages for sexual harassment by complying with prophylactic measures of adopting anti-harassment policies); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (stating that employer has an affirmative defense to claim of vicarious liability for sexual harassment where the employer has promulgated an anti-harassment policy with a complaint procedure thereby demonstrating that it took reasonable care to prevent sexual harassment).

²³⁴ Caminker, *supra* note 125; Klein, *supra* note 127, at 1037.

²³⁵ Thomas, *supra* note 68, at 688–89; see also Levinson, *supra* note 169, at 872 (stating that Ronald Dworkin’s famous distinction between principle and policy roughly equates with the difference between right and remedy).

²³⁶ *Alexander v. Sandoval*, 532 U.S. 275 (2001) (denying an action brought for failure to comply with an administrative agency’s prophylactic remedial measure rather than for injury to federal right against discrimination); *Smith v. Robbins*, 528 U.S. 259 (2000) (denying a claim based upon failure to comply with the prophylactic remedy of an *Anders* brief where there was no constitutional injury); *Lewis v. Casey*, 518 U.S. 343 (1996) (denying a claim based on failure to provide prison law library because a library was not a freestanding right but rather a prophylactic remedy issued in a prior case).

cases. In *Swann v. Charlotte-Mecklenburg Board of Education*,²³⁷ the Court initially imposed busing as a required remedial measure for the racially segregated schools. The Court found busing necessary as a protective measure to prevent future segregation in the schools that might continue even after the cessation of mandatory segregation due to the residential segregation.²³⁸ In this way, the Court could be said to create a new right to busing for students in that county as the county's failure to bus would be actionable.²³⁹ Subsequent courts then used the remedial precedent of *Swann* and its busing remedy to guide them in crafting similar transportation remedies for like constitutional violations caused by segregated schools.²⁴⁰ In this way, the busing remedies that addressed the social and economic causes of educational segregation redefined the scope of the equal protection guarantee into a de facto rather than a de jure right.²⁴¹ However, busing itself did not become a new right.²⁴²

A second example of the effects of a prophylactic remedy is found in the prison law library cases. In *Bounds v. Smith*,²⁴³ the Supreme Court ordered North Carolina to provide adequate prison law libraries to prevent the denial of the prisoners' right to meaningful access to the courts.²⁴⁴ The Court explicitly stated that, while law libraries are one acceptable method to assure the right to access the courts, their permissibility does not foreclose alternative measures such as legal assistance to the prisoners from lawyers, law students, or other trained inmates.²⁴⁵ In other words,

²³⁷ 402 U.S. 1 (1971).

²³⁸ *Id.* at 30.

²³⁹ See *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (invalidating North Carolina's Anti-Busing Law prohibiting student busing for racial integration because the law prevented implementation of busing determined to be required for Charlotte-Mecklenberg schools under the Fourteenth Amendment).

²⁴⁰ E.g., *United States v. Bd. of Sch. Comm'rs*, 506 F. Supp. 657 (S.D. Ind. 1979), *aff'd in relevant part*, 637 F.2d 1101 (7th Cir. 1980); *Mims v. Duval County Sch. Bd.*, 329 F. Supp. 123, 130-31 (M.D. Fla. 1971).

²⁴¹ Levinson, *supra* note 169, at 875-78.

²⁴² *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 492 (1982) (Powell, J., dissenting) ("Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a [constitutional] violation."); *Crawford v. Bd. of Educ.*, 551 P.2d 28, 47 (Cal. 1976) (citations omitted):

While critics have sometimes attempted to obscure the issue, court decisions time and time again emphasized that "busing" is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field [I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its "costs," both in financial and educational terms, will render its use inadvisable.

²⁴³ 430 U.S. 817 (1977).

²⁴⁴ *Id.* at 828.

²⁴⁵ *Id.* at 830-32.

states and legislatures are free to provide substitute measures that equally protect the right to access the courts.²⁴⁶ Twenty years later in *Lewis v. Casey*,²⁴⁷ prisoners attempted to sue Arizona for its failure to provide an adequate law library.²⁴⁸ The Court took this opportunity to clarify the difference between a remedy and a right. It stated that a remedial means for ensuring a right, like the prison law library, does not convert into a freestanding actionable right.²⁴⁹ Thus, a cause of action must be based on actual injury to the established right to access the court, not failure to comply with remedial measures imposed against a third-party.²⁵⁰ The *Lewis* Court thus reigned in the attempt to elevate the prophylactic remedy of the law library to the status of a judicial right.

In yet another example, the Supreme Court in *Smith v. Robbins*²⁵¹ did not require strict compliance with its prophylactic measures established thirty years earlier in *Anders v. California*²⁵² requiring an attorney to file a brief detailing the absence of meritorious claims before withdrawing from representation.²⁵³ The *Smith* Court expressly stated that the *Anders* procedure was a prophylactic measure to protect against harm, not a right in and of itself.²⁵⁴ Thus, the Court could distinguish the remedial precedent based upon the facts of the case. In the *Smith* case, counsel had complied with California's own withdrawal procedures, which the Court found to be equally effective at protecting against constitutional harm.²⁵⁵ The Court emphasized how it as a court could not impose a single rule upon the states to prevent the denial of counsel, and that instead, it encouraged the states to experiment with solutions to difficult questions of policy.²⁵⁶

The penultimate example of the evolutionary effects of a prophylactic remedy is the mysterious *Miranda* that has confounded critics and their analysis of prophylaxis. *Miranda* is often used as an example of how prophylactics create new rights.²⁵⁷ However, the mirage that failure to comply with the warnings triggers liability is simply the operation of the precedential effect of the *Miranda* decision. The Court initially imposed the four required warnings to protect against further constitutional violations by the named police departments.²⁵⁸ These particular

²⁴⁶ See *id.*

²⁴⁷ 518 U.S. 343 (1996).

²⁴⁸ *Id.* at 346.

²⁴⁹ *Id.* at 351.

²⁵⁰ *Id.* at 349–59.

²⁵¹ 528 U.S. 259 (2000).

²⁵² 386 U.S. 738 (1967).

²⁵³ *Smith*, 528 U.S. at 265.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 286–87.

²⁵⁶ *Id.* at 272–74.

²⁵⁷ E.g., Grano, *supra* note 121, at 100–05.

²⁵⁸ *Miranda v. Arizona*, 384 U.S. 436, 476–78 (1966).

departments were then bound to comply with these warnings. In subsequent cases, the Court used this remedial decision to guide its resolution of the disputes. Since detection of coerced confessions is difficult to prove, the Court used the police's failure to comply with the prescribed preventive measures as evidence of a violation. The failure of the police to comply with the protections dictated by prior cases to avoid coercion becomes strong, almost conclusive evidence that the constitutional violation was not avoided.²⁵⁹ Thus, as commentators have noted, the prophylactic remedy of *Miranda* can sometimes operate as a detection standard or evidentiary rule.²⁶⁰

However, as the Court has repeatedly stated, *Miranda* rights are "not themselves rights protected by the Constitution."²⁶¹ Accordingly, the Court has not always required that defendants comply with the warnings as in the cases approving the use of non-Mirandized confessions in impeachment or as justified by public safety.²⁶² And it has invited state and federal lawmakers to provide equally effective substitutes for its prophylactic remedy.²⁶³ Such distinctions are simply the normal evolution of a remedial precedent; the continued use and binding effect of a remedy are based upon case-by-case analysis in accordance with the usual judicial decisionmaking.

This same remedial evolution is likely to be seen with respect to the prophylactic remedy of *Bush v. Gore*. Despite the Court's attempt to limit its decision to the unique facts of the case, the decision will operate in the normal precedential manner to require the same such protective measures in future recounts by other actors.²⁶⁴ There are two different directions in which this remedial

²⁵⁹ E.g., *Oregon v. Elstad*, 470 U.S. 298, 307 ("*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."). And this circumstantial evidence may also prove insufficient to find a constitutional violation in the absence of other evidence of the involuntariness of the confession and in the face of countervailing concerns.

²⁶⁰ Cassell Brief, *supra* note 125; Caminker, *supra* 125; Klein, *supra* note 127.

²⁶¹ *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); see also Steve D. Clymer, *Are Police Free to Disregard Miranda*, 112 YALE L.J. 447 (2002) ("This understanding, . . . has received scant attention in the extensive *Miranda* literature Police disregard of *Miranda* is not a constitutional wrong.").

²⁶² *Quarles*, 467 U.S. at 653 (recognizing a public safety exception to compliance with *Miranda* warnings); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (holding that evidence obtained in violation of *Miranda* is admissible for impeachment); see also *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975) (holding that a violation of *Miranda* does not require suppression of evidence obtained as result of that confession).

²⁶³ *Miranda*, 384 U.S. at 442, 44-45, 467; Dorf & Friedman, *supra* note 140, at 61 (arguing that after *Dickerson* there is still a role for Congress and the States to share in the constitutional interpretation if Congress provides procedural safeguards adequate to ensure the constitutional right).

²⁶⁴ The Court's attempt to eliminate the precedential value of the case by limiting it to the unique facts before it is meaningless as every case technically is limited to the specific facts

precedent could impact the law. First, the precedent may bind future election cases mandating that similar steps be followed in any state recount. The *Bush* Court used language that these four steps were minimally necessary to protect against arbitrary treatment.²⁶⁵ Thus, like *Miranda*, but unlike *Anders*, the *Bush* recount measures may provide a minimum flooring required in all recounts to avoid equal protection violations.²⁶⁶ Already, there have been concerns that these minimum safeguards are too burdensome and may practically eliminate the use of election recounts.²⁶⁷ The second potential precedential effect of the remedial decision in *Bush v. Gore* is that it may direct the Supreme Court to impose similar prophylactic relief rather than a simple preventive order in similar cases of arbitrary treatment. Thus, *Bush v. Gore* may stand for the proposition that more rather than less relief is required in instances of constitutional violations.²⁶⁸

III. ABUSE OF THE PROPHYLACTIC REMEDY

The remedial decision in *Bush v. Gore* therefore is not illegitimate or extraordinary simply because it imposed a prophylactic remedy to redress a constitutional violation. The remedial decision is suspect, however, because of the Court's choice of this powerful remedy in this particular case. The Court abused its power to impose a prophylactic remedy in this case in two ways. First, the prophylaxis was unnecessary and inappropriately tailored under the Court's guiding standards for issuing such extraordinary relief. Second, the *Bush* Court used its

before it, but the rule of law will be applied to similar cases in the future.

²⁶⁵ *Bush v. Gore*, 531 U.S. 98, 109–10 (per curiam):

[T]here must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. . . . The State has not shown that its procedures include the necessary safeguards. . . . [T]he recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.

²⁶⁶ *Id.* at 110.

²⁶⁷ See *Gore v. Harris*, 773 So. 2d 524, 529, 531 (Fla. 2000); Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEO. MASON L. REV. 215 (2001).

²⁶⁸ Thus, in contrast to what Professor Karlan has argued, *Bush v. Gore* does not represent a case of the so-called leveling down of constitutional rights in which the desired benefit is denied to all rather than extended to the excluded class. Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT*, *supra* note 3, at 85 (2001). The classic leveling down case is that in which the city of Jackson, Mississippi closed down its public pools for all citizens rather than granting access to African-American citizens. Karlan, *supra* at 89. In contrast, the prophylactic remedy in *Bush v. Gore* extends the recount benefits to all voters equally. It was only the Court's imposition of the safe harbor deadline purportedly mandated by state law that operated to deny the recount benefit to voters.

remedial equity power to preclude rather than ensure relief. It created a remedial facade that was never meant to prevent or redress harm and which actually created further harm of the same type for which it chastised the Florida court.²⁶⁹ For by denying all recounts, the Supreme Court arbitrarily denied the fundamental right to vote of Florida voters who cast a legal vote not counted by the tabulation systems.²⁷⁰ It was this harm to voters, not to a particular candidate, that the Florida court initially set out to correct, but which the U.S. Supreme Court exacerbated by its inappropriate use of the prophylactic remedy. Such an arbitrary use of equity power by the Supreme Court, and indeed by some of the most vocal judicial opponents of equitable remedies, casts suspicion upon the legitimacy of the remedy while at the same time providing potential ammunition for the use of these powerful prophylactic remedies in future cases.

A. The Unnecessary and Untailored Remedy of Bush v. Gore

In addition to accusations of illegitimacy, prophylactic remedies are often criticized as overprotecting legal rights.²⁷¹ Critics assert that prophylactics

²⁶⁹ As Professor Karlan has explained:

In the end, the decision to stop the recount had virtually nothing to do with equal protection. It vindicated no identifiable voter's interests. The form of equality it created was empty: it treated all voters whose ballots had not already been tabulated the same, by denying *any* of them the ability to have his ballot counted. And its remedy perpetuated other forms of inequality that were far more severe: between voters whose ballots were counted by the machine count and voters whose ballots were not, and even between voters in counties that performed timely manual recounts (like Volusia and Broward) and voters in other counties.

Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587, 600 (2001) (footnotes omitted); *see also* Posner, *supra* note 3, at 48 (arguing that by terminating the recount the Supreme Court provided no relief to voters whose votes had not been counted, thereby denying equal protection to voters in the same way it had just invalidated); Radin, *supra* note 110, at 118 (criticizing the deplorable way in which the Supreme Court created the very kind of harm it purported to find by denying equal treatment to voters whose intent would have been clear in a recount).

²⁷⁰ *E.g.*, Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002) (upholding on summary judgment a claim that punch card machines violate equal protection); *see also* Joyce Baugh, *Bush v. Gore and Equal Protection: A Unique Case?*, in THE FINAL ARBITER: LONG-TERM CONSEQUENCES OF BUSH V. GORE IN LAW AND POLITICS (forthcoming SUNY Press) (discussing four voting cases brought in the aftermath of *Bush v. Gore* alleging equal protection violations from faulty voting systems); B.J. Palermo, *Suits Push 3 States to End Punch Card Voting*, NAT'L L. J., Mar. 4, 2002, at A1 (discussing equal protection cases brought by voters in California, Florida, Georgia, and Illinois).

²⁷¹ Robinson v. Borg, 918 F.2d 1387, 1403 (9th Cir. 1990) (Trott, J., dissenting) ("Like all prophylactic rules, the *Miranda* rule 'overprotects' the value at stake."), *cert. denied*, 502 U.S. 868 (1991); Cassell, *supra* note 66, at 905 (arguing that *Miranda*'s automatic rule "overprotects" a constitutional right: "Overprotection means protection beyond what the

"overprotect" rights by giving greater protection to individuals than the rights, as abstractly understood, would seem to require.²⁷² But as Professor Schoenbrod explained nearly thirty years ago, prophylactic relief does not overprotect, but rather, it precisely protects legal rights.²⁷³ The right level of protection commonly accepted for injunctive remedies is the return of the plaintiff to her rightful position, that is, the position she would have been in but for the wrong.²⁷⁴ The prophylactic remedy aims at precisely this rightful position but adopts broader measures in order to accomplish this same purpose.²⁷⁵ These broader measures are used when necessary to achieve the requisite level of protection because other narrower remedies are ineffective due, for example, to the inability to craft an injunction to address the harm or the defendant's ability to evade a simple prohibition.²⁷⁶

Thus, it is not true that every prophylactic remedy is inherently excessive

Constitution requires."); Klein, *supra* note 127, at 1033 (distinguishing prophylactic rules as those which overprotect constitutional rights); Landsberg, *supra* note 46, at 969.

²⁷² Caminker, *supra* note 125, at 28 n.91 (stating that constitutional law scholars have long observed that many doctrinal rules deemed to be prophylactic rules, established by courts to protect constitutional rights, seem to overprotect those rights, but arguing that this common pejorative characterization of prophylactic rules should end because it wrongly assumes some natural baseline of lesser protection); Lansberg, *supra* note 46, at 969. For example, the Prison Litigation Reform Act of 1997 reacted to this perception of overprotection from remedies in prison litigation by limiting courts in cases about prison conditions to imposing only that prospective relief which is the minimum necessary to correct the legal violation. 18 U.S.C. § 3626(a)(1).

²⁷³ SCHOENBROD *supra* note 46, at 131; Schoenbrod, *supra* note 46, at 678–79.

²⁷⁴ There seems to be consensus that the rightful position is one proper goal of equitable relief. See *United States v. Virginia*, 518 U.S. 515 (1996); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974). In addition, there is a second judicial goal of equitable discretion that the court has articulated as a permissible goal to achieve overall fairness beyond the plaintiff's rightful position. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). The prophylactic remedy is even more defensible as not overprotective under this remedial goal. See LAYCOCK, *supra* note 45 (arguing that an equitable discretion case could be justified as an adoption of prophylactic remedy); Lansberg, *supra* note 46, at 936 (stating that the prophylactic injunction is grounded in equity which the Supreme Court described in *Brown v. Board of Education* as "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs").

²⁷⁵ Schoenbrod, *supra* note 46, at 678–79; see also Thomas, *supra* note 68, at 723.

²⁷⁶ Schoenbrod, *supra* note 46, at 679–80; see also Landsberg, *supra* note 46, at 929 (stating that prophylactics are designed to correct for the ineffectiveness of more direct prohibitions that stems from the human tendency to stretch compliance with core rules and from the difficulties of detecting and punishing violations of core rights); Sturm, *supra* note 72, at 1362–63 ("Courts correctly perceive, either initially or after years of noncompliance that the underlying causes of the legal violation disable the defendants from complying with a general directive to cease violating the law.") (footnote omitted).

simply due to its breadth. However, prophylactic remedies may be improper when they are crafted in an untailored manner that exceeds the boundaries of the court's remedial authority.²⁷⁷ For if the judicial decision imposing required conduct is not tailored to the legal violation, then the court is not performing its judicial function of reacting to prevent or correct harm, but rather it is prescribing new codes of conduct and rights. Such judicial action leads directly back to the old claim of the illegitimacy of prophylactics.²⁷⁸

The use of prophylactic remedies in the First Amendment arena demonstrates the concern with properly tailoring the prophylactic measures.²⁷⁹ A common mantra in First Amendment jurisprudence is that "[b]road prophylactic rules in the area of free expression are suspect."²⁸⁰ This mantra does not identify an inherent legitimacy problem with prophylactic remedies but rather signifies a tailoring problem created by an improperly designed prophylactic.²⁸¹ As previously discussed, prophylactic remedies proscribe conduct that is not illegal. In the area of First Amendment law, prophylactic relief encompasses not only legal conduct, but also special constitutionally protected conduct. Thus, the lesser-cited second

²⁷⁷ Thomas, *supra* note 68, at 727–28; e.g., *Lewis v. Casey*, 518 U.S. 343 (1996) (finding prophylactic measures addressing the prison library not tailored to the harm).

²⁷⁸ *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 444 (1980) (Powell, J., dissenting from denial of writ of certiorari) ("The constitutional deprivation must be identified accurately, and the remedy must be related closely to that deprivation. Otherwise, a desegregation order may exceed both the power and the competence of courts."); Sturm, *supra* note 72, at 1408–09 (summarizing the argument that broad injunctive remedies constitute an abuse of judicial power where there is no demonstrable relationship between the legal violation and the remedy imposed); Thomas, *supra* note 68, at 734 (stating that commentators have argued that divergence of a remedy from its proper proportionality would violate an inherent limitation upon judicial power by engaging in legislation); cf. *Lewis*, 518 U.S. at 357 (stating that failure to restrict the judicial remedy to the inadequacy that produced the established injury in fact would not serve the purpose of preventing courts from undertaking tasks assigned to the political branches).

²⁷⁹ See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (describing a prophylactic theory of First Amendment overbreadth in which the issue is not the permissibility of the prophylaxis but rather its desirability and shape); cf. Daniel P. Tokaji, *Political Equality After Bush v. Gore: A First Amendment Approach to Voting Rights*, in *THE FINAL ARBITER: LONG-TERM CONSEQUENCES OF BUSH V. GORE IN LAW AND POLITICS* (forthcoming SUNY Press) (arguing that the political equality holding of *Bush v. Gore* as to merits, standing, and remedy can be best understood in the light of First Amendment doctrine).

²⁸⁰ *NAACP v. Button*, 371 U.S. 415, 438 (1963); see also *Hill v. Colorado*, 530 U.S. 703, 759–62 (2000) (Scalia, J., dissenting) (berating the Colorado criminal law prohibiting approaching another person within eight feet of a healthcare facility as a "prophylactic measure" whose constitutional infirmity was its overbreadth).

²⁸¹ *Hill*, 530 U.S. at 762 (Scalia, J., dissenting) ("Prophylaxis is the antithesis of narrow tailoring . . .").

part of the infamous mantra is that “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”²⁸² Precision is a requirement because prophylactic relief that is excessive poses a counter-risk of violating the defendant’s rights.²⁸³ For example, a total ban on protests outside of abortion clinics would violate the protestor’s freedom of political speech, whereas a ban on protests within thirty-six feet of the clinic is a tailored remedy that accommodates the defendant’s First Amendment rights.²⁸⁴

The *Bush v. Gore* remedy exemplifies an improper remedy that is not tailored to the violation. The Supreme Court’s prior decisions reveal several important factors that have guided its use of remedial discretion to impose prophylactic remedies,²⁸⁵ yet none of these factors dictate the application of that remedy in the context of *Bush v. Gore*. A properly tailored injunction, the Supreme Court has held, is one whose nature and scope are proportional to the nature and scope of the violation.²⁸⁶ With respect to prophylactic relief, the Court has found that the broad nature of the prophylaxis is appropriate where (1) the legal harm is egregious, and (2) other remedies are ineffective to prevent or correct that harm.²⁸⁷ In addition, the Court has found the scope of prophylactic measures to be properly tailored where those measures (3) address conduct causally connected to the proven harm, and (4) balance the defendants’ competing interests.²⁸⁸ Virtually all of these four required factors are missing in the *Bush v. Gore* case, thereby casting suspicion upon the validity of the ratcheted-up remedy.

Egregious Harm: First, the Court has utilized the powerfully broad prophylactic remedy only to address egregious types of harm. Such harms are usually more than a mere violation of a constitutional right and include threats of personal assault or restriction of personal freedom through imprisonment.²⁸⁹ In the

²⁸² *Button*, 371 U.S. at 438.

²⁸³ Landsberg, *supra* note 46, at 968–69.

²⁸⁴ *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994) (upholding a 36-foot buffer zone around abortion clinic in which protests were prohibited but striking down a 300-foot buffer zone around staff residences); *see also* *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (allowing a 15-foot buffer zone).

²⁸⁵ *See* Landsberg, *supra* note 46, at 963–72 (proposing principles for prophylactic rules).

²⁸⁶ *United States v. Virginia*, 518 U.S. 515 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Milliken v. Bradley*, 418 U.S. 717, 744–47 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16 (1971).

²⁸⁷ *E.g.*, *Madsen*, 512 U.S. at 753; *Swann*, 402 U.S. at 14.

²⁸⁸ *E.g.*, *Milliken*, 433 U.S. at 280–81 (1977) (holding that federal remedies must “take into account the interests of state and local authorities in managing their own affairs” and that remedy may include conditions which are a consequence of a constitutional violation); *Swann*, 402 U.S. at 16 (“In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy . . .”).

²⁸⁹ *Madsen*, 512 U.S. at 759, 767–68 (issuing a prophylactic remedy to protect health and safety of women and to protect against personal assault); *Schenck*, 519 U.S. at 357; *Women*

related context of prophylactic remedial measures crafted by the legislature, the Court has said: "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."²⁹⁰ What is the egregious harm in *Bush v. Gore*? Perhaps it is the impending constitutional crisis over the failure to elect a president.²⁹¹ However, that was not the legal harm presented to the Court that the Court was empowered to correct. Indeed, that type of political crisis is intended to be resolved through the political rather than the legal process.²⁹²

So perhaps, as has been suggested, the egregious harm is the wildly partisan behavior of the Florida Supreme Court that the U.S. Supreme Court needed to harshly curtail.²⁹³ However, the Florida Court did nothing out of the ordinary. In fact, it acted quite conservatively in closely following the dictates of its recently-enacted state law.²⁹⁴ In *Bush v. Palm Beach County Canvassing Board*, the U.S. Supreme Court admonished the Florida Court that Article II requires that the state electors be determined as the legislators intended and that it was prohibited from altering that process.²⁹⁵ Acting cautiously in light of this admonition, the Florida

Prisoners v. Dist. of Columbia, 968 F. Supp. 744 (D.D.C. 1994) (imposing prophylactic measures to prevent repeated sexual assaults and rapes of female inmates); *cf.* Landsberg, *supra* note 46, at 965 (advocating a principle for establishing prophylactic rules based upon evidence of need).

²⁹⁰ *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (citations omitted); *see also* Kirmel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Thomas, *supra* note 68, at 733 (stating that the Family Medical Leave Act exemplifies that Section 5's grant of prophylactic remedial power is quite broad and empowers Congress to enact strong responses to persistent constitutional problems).

²⁹¹ Posner, *supra* note 3, at 46. *But see* Farnsworth, *supra* note 3, at 245–46 (disagreeing that there was a "constitutional crisis" or dispute between coequal branches of the government, and finding that there was merely a dispute that would have been resolved by legislative and statutory means).

²⁹² Elizabeth Garrett, *Leaving the Decision to Congress*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT*, *supra* note 3, at 38.

²⁹³ Lund, *supra* note 3, at 1272 (claiming that the Florida Supreme Court grossly violated the law and "proved to be highly aggressive and irresponsible in dealing with federal law"); Posner, *supra* note 3, at 48 ("[T]he remedy decreed by the five-Justice majority has a 'gotcha!' flavor, as if the U.S. Supreme Court had outsmarted the Florida supreme court . . ."). *But see* *Bush v. Gore*, 531 U.S. 98, 135–36 (2000) (Ginsburg, J., dissenting) (disagreeing with Chief Justice Rehnquist that the Florida Supreme Court had "veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging" and arguing that "[t]here is no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office'").

²⁹⁴ *Gore v. Harris*, 772 So. 2d 1243, 1248–50 (Fla.) (per curiam) (discussing recent revisions to Florida election law made by legislature in 1999), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

²⁹⁵ *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam).

Supreme Court adhered to Florida statutory law in crafting its recount remedy in the contest phase.²⁹⁶ The Florida legislature granted to the state courts the sole discretion to decide remedies for contest violations.²⁹⁷ In assuming this responsibility, the court adopted a manual recount remedy akin to the recount remedy expressly provided by state law as a protest remedy.²⁹⁸ The Florida Supreme Court then used the legislature's own recount standard of the voter's intent.²⁹⁹

It is ironic that the Florida court has been accused of illicit behavior and unseemly motives simply for conforming its actions to state law. Indeed, it was the statutory law itself that initially was alleged to be the constitutional infirmity. In *Siegel v. LePore* and *Bush v. Palm Beach County Canvassing Board*, Governor Bush argued that the selective nature of the protest recounts and the lack of a uniform legal vote standard rendered the legislative enactments unconstitutional.³⁰⁰ Thus, the Florida Supreme Court's adherence to this problematic statutory law may then have been incorrect, but it cannot be said to be egregiously unethical or partisan as has been claimed.

Inadequacy of Other Remedies: Second, the Court has used prophylactics when other remedies are inadequate because the alternatives cannot effectively prevent the harm.³⁰¹ For example, narrower preventive remedies like "Do not harass" may

²⁹⁶ *Gore*, 772 So. 2d at 1248 ("This case today is controlled by the language set forth by the Legislature.").

²⁹⁷ FLA. STAT. ANN. § 102.168(8) (2000) (amended 2001); *Gore*, 772 So. 2d at 1254 ("Through this statute, the Legislature has granted trial courts broad authority to resolve election disputes and fashion appropriate relief.").

²⁹⁸ FLA. STAT. ANN. § 102.166(5)(c) (2000) (amended 2001).

²⁹⁹ *Gore*, 772 So. 2d at 1262 (citing FLA. STAT. ANN. § 101.5614(5)). Indeed, fourteen other states use this same standard of the "intent of the voter" for ballot recounts. *Bush v. Gore*, 531 U.S. 98, 141 (2000) (Stevens, J., dissenting) (identifying Arizona, Connecticut, Indiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Texas, Utah, Vermont, Virginia, Washington, Wyoming as using the "intent" standard).

³⁰⁰ Petition for Writ of Certiorari, *Siegel v. LePore*, 531 U.S. 1005 (2000) (mem.) (No. 00-837) (presenting the sole question of whether the use of selective, arbitrary and standardless manual recounts violated equal protection, due process, and the First Amendment); Petition for Writ of Certiorari, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836) (presenting the same question as last of three questions presented). The U.S. Supreme Court, however, denied certiorari on the equal protection issue the first time Bush raised the issue. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam).

³⁰¹ *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 770 (1994) (finding broader prophylactic remedy necessary due to failure of defendants to obey prior prohibitory order); *Hutto v. Finney*, 437 U.S. 678, 714 n.2 (1978) (Rehnquist, J., dissenting) (disapproving prophylactic remedy approved by Court but suggesting that such a remedy might be justified where state officials have been shown to have violated previous remedial orders); *Miranda v. Arizona*, 384 U.S. 436 (1966) (prophylactic warnings needed because police could easily

be ineffective if the defendants have previously disobeyed these orders or if they can easily evade detection for violation of the order.³⁰² However, there was no evidence in *Bush v. Gore* that other more narrow remedies would have been inadequate to prevent the constitutional harm. Indeed, as the dissenting U.S. Supreme Court Justices argued, a simple prohibition against the arbitrary recount would have sufficed.³⁰³ Or if a more affirmative injunction was preferable, the Court could have required the Florida Court to adopt a uniform standard for the recount. The case exhibited none of the evidence presented in previous cases in which the prior default of the defendants of simple prohibitions mandated secondary remedies of broader prophylactics.³⁰⁴ Nor did the *Bush v. Gore* case present a chance that the Florida Court would evade detection for violating a simple prohibition against the arbitrary recount because the entire nation and the media were focused on every move of the state court. The absence of other ineffective remedies should have directed the Court away from the broad prophylactic as advocated by the four dissenters.

Causally Connected Measures: Third, the Court has approved as properly tailored only those prophylactics that incorporate measures that are causally

evade a simple order prohibiting coerced confessions); SCHOENBROD *supra* note 46, at 131 (indicating that broader prophylactic remedies are needed when other narrower injunctions are inadequate due to the inability to craft a precise prohibition or the ability of the defendant to evade detection for violating the injunction).

³⁰² *E.g., Madsen*, 512 U.S. at 770, 776 (upholding prophylactic injunction after failure of simple injunction prohibiting and blockading and assaults); *Neal v. Dir., D.C. Dep't of Corr.*, 1995 WL 517244, at *2 (D.D.C. 1995):

The need for extensive mandatory relief is even greater here because the Department has been subject to an injunction prohibiting sexual harassment for 14 years . . . and has nonetheless openly and wantonly continued to engage in a widespread pattern of sexual harassment and retaliation. Nor has the defendants' record of compliance with orders of this court barring retaliation against the named plaintiffs and other witnesses been any better. Accordingly, the strongest measures to address sexual harassment and retaliation at the Department of Corrections are needed here.

See also Missouri v. Jenkins, 515 U.S. 70, 125 (1995) (Thomas, J., concurring) ("Our impatience with the pace of desegregation and with the lack of a good-faith effort on the part of school boards led us to approve such extraordinary remedial measures."); Sturm, *supra* note 72, at 1361-62 (stating that courts have generally viewed the negative injunction simply prohibiting illegal conduct as inadequate for most public law violations, providing the example of a general order prohibiting unequal treatment of black and white school children, which provided no indication of how to rectify the social conditions, behavioral patterns, and organizational dynamics causing the harm).

³⁰³ *See supra* text accompanying note 74.

³⁰⁴ *See, e.g., Madsen*, 512 U.S. at 770; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14 (discussing dilatory tactics of many school authorities in complying with obligation to end racial segregation as justifying broader equitable remedies).

connected to the harm.³⁰⁵ For example, in *Lewis v. Casey*, the Court struck down a prophylactic injunction that adopted onerous measures regulating every aspect of Arizona's prison law libraries because it addressed facets such as noise, lighting, and employee training that were not causally related to the denial of access to the courts to two illiterate prisoners.³⁰⁶ The Court in *Hutto v. Finney*, on the other hand, upheld the prophylactic measure prohibiting punitive isolation in a state prison because it found that the isolation causally contributed to Eighth Amendment violations such as the denial of food to prisoners.³⁰⁷

By contrast, the Supreme Court in *Bush v. Gore* ordered a variety of recount measures that are causally disconnected from the harm of the arbitrary recount standard. The equal protection violation found by seven Justices was the lack of a uniform standard for determining a legal vote.³⁰⁸ Only part of the first ordered remedial measure vaguely addresses this harm by requiring the adoption of "adequate statewide standards for determining what is a legal vote."³⁰⁹ Indeed, the measure itself does not even mandate a uniform standard, but rather an "adequate" one. Several of the other ordered measures impose procedural requirements involving inputs and review from multiple actors akin to a legislative or administrative process.³¹⁰ In other words, the Supreme Court seemed to mandate that recount standards during the contest phase come from the political rather than the judicial branches, despite the Florida legislature's contrary determination. Such procedural measures are valid as a prophylactic remedy only if a cause of the constitutional violation included the lack of political involvement. But the converse is true. As discussed above, there was recent political involvement by the Florida legislature which created the arbitrary legal vote standard and delegated the remedial responsibility to the courts.³¹¹ In addition, the *Bush* Court curiously mandated executive review of tabulation software used to identify undervotes for recount.³¹² This executive certification, however, is already provided for by Florida law and nothing in the record demonstrated that the lack of certification contributed

³⁰⁵ Thomas, *supra* note 68, at 723 (stating that prophylactic relief may be directed at ancillary conduct on either side of the violation including contributing causes and continuing effects); cf. Landsberg, *supra* note 46, at 964 (explaining that courts disfavor prophylactic rules that are too remote from the original right the rule protects).

³⁰⁶ *Lewis v. Casey*, 518 U.S. 343, 361, 392 (1996).

³⁰⁷ *Hutto v. Finney*, 437 U.S. 678 (1978).

³⁰⁸ *Bush v. Gore*, 531 U.S. 98, 110–11 (2000) (per curiam).

³⁰⁹ *Id.* at 110.

³¹⁰ *Id.* at 109–110.

³¹¹ See *supra* text accompanying notes 294–99.

³¹² *Bush v. Gore*, 531 U.S. at 110.

to the constitutional violation.³¹³ Furthermore, the Supreme Court suggests that overvotes should be included in the recount, even though Gore never alleged that overvotes were part of the election harm.³¹⁴ While there are a variety of features that might be preferable in a perfectly designed recount process, those desirable features are not the proper subject for prophylactic measures.³¹⁵ As many members of the Supreme Court have vociferously noted in the prison and desegregation cases, the courts should not be in the business of designing ideal public systems because they lack the competency and authority to make such decisions of policy.³¹⁶ Rather, courts should be restricted to remedying causes and consequences of proven harms.

Competing Interests: Finally, the Court routinely considers the competing interests of the defendants and the public when imposing prophylactic remedies.³¹⁷ Because the prophylactic reaches legal conduct, the courts must ensure that proper respect is given to intrusions upon conduct that has not violated the law. Thus, the Court focuses on the counter-risks to the defendants and others in regulating ancillary conduct by considering infringements on the defendants' rights, comity for state actors,³¹⁸ and the opportunity for initial remediation.³¹⁹ In *Lewis v. Casey*, for

³¹³ FLA. STAT. ANN. § 102.166(5)(b) (2000) (amended 2001) (providing that if the manual recount in the protest phase indicates error in vote tabulation, the county canvassing board has an option to request the Department of State to verify the tabulation software).

³¹⁴ *Bush v. Gore*, 531 U.S. at 145 (Breyer, J., dissenting) (criticizing the Court's restriction of overvotes that were not a part of the inadequacy causing the tabulation or equal protection harm); *id.* at 134 (Souter, J., dissenting) (agreeing with Justice Breyer regarding the requirement of counting overvotes); Transcript of Oral Argument at *62-*63, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (statement of David Boies, attorney for Vice President Gore) (arguing that there is no legal basis for counting overvotes). *But see* McConnell, *supra* note 3, at 657-58 (suggesting that the richest source of additional votes for Gore might have been the "overvotes" in Republican-dominated counties using optical scanning vote systems).

³¹⁵ So for example, in *Harris v. Conradi*, 675 F.2d 1212 (11th Cir. 1982), the court denied the request for prophylactic measures designed to prevent election fraud, such as the appointment of poll watchers and bipartisan election officials, where those measures were not addressing any cause or consequence of the proven harm. *Id.* at 1216 n.10 ("The institution of prophylactic measures . . . is a matter for consideration by state legislatures. We simply hold that the Constitution does not require the states to take steps to remedy a constitutional infirmity which does not exist.").

³¹⁶ *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 385-88 (1996) (Thomas, J., concurring); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

³¹⁷ *See Missouri v. Jenkins*, 495 U.S. 33, 51 (1990).

³¹⁸ *See id.* at 51 ("[A]lthough the 'remedial powers of an equity court must be adequate to the task, . . . they are not unlimited [O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)).

³¹⁹ *See Lewis*, 518 U.S. at 361-62 (declaring a prophylactic remedy invalid because the district court failed to give adequate deference to the judgment of prison authorities regarding

example, the trial court improperly tailored the prophylactic remedy by failing to give the state prison administration the first opportunity to propose remedial action and failing to give deference to its policy decisions on prison management and security.³²⁰

The *Bush* Court neglected to consider any of the relevant competing interests implicated by its imposition of a broad prophylactic remedy. First, it restricted the ability of the Florida state court to perform its judicial duty of enforcing and remedying state rights. The U.S. Supreme Court tied the state court's hands and prevented it from crafting any relief for the violation of state law it had found. Instead, the Court could have simply negated the unconstitutional recount and remanded to the Florida court to permit it to fulfill its remedial obligation. Second, the Court failed to consider the infringement its remedy created upon those Florida voters who did not have their vote counted due to tabulation error.³²¹ Indeed, it was this very concern of unequal treatment of voters that led the Florida Supreme Court to impose a recount and to impose it statewide.³²² Finally, the nullification of state rights resulting from the federal remedy certainly does not exhibit the comity and

security and failed to provide a process required by comity for the states that gave the prison authority the first opportunity to correct its own errors); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (stating that all injunctions "should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs" and holding that prophylactic injunctions inappropriately intruded upon defendants' free speech rights); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (stating "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests"); *Milliken v. Bradley*, 418 U.S. 717 (1974) (finding that a prophylactic busing remedy improperly ordered innocent third-party suburbs to participate in the remedy); cf. Landsberg, *supra* note 47, at 968–69 (advocating a principle for establishing prophylactic rules that takes into account the risks to and interests of defendants and third parties).

³²⁰ *Lewis*, 518 U.S. at 361–62.

³²¹ *Radin*, *supra* 110, at 120 (stating that equally deplorable to providing no remedy for the constitutional harm was the way the Supreme Court created the very kind of harm it purported to find by denying equal treatment to voters whose intent would have been clear in a recount).

³²² *Gore v. Harris*, 772 So. 2d 1243, 1254–55 (Fla. 2000) ("Relief would not be 'appropriate under [the] circumstances' if it failed to address the 'otherwise valid exercise of the right of a citizen to vote' of all those citizens of this State who, being similarly situated, have had their legal votes rejected.") (alteration in original); *id.* at 1253 ("[I]t is absolutely essential . . . that a manual recount be conducted for all legal votes in this State . . . in all Florida counties where there was an undervote, and hence a concern that not every citizen's vote was counted."); *id.* at 1261 (holding that, because it is a statewide election, statewide remedies are called for); see also Intervenor Matt Butler's Response to Plaintiff's Memorandum Opposition to Motion to Intervene at 2–3, *Gore v. Harris*, Dec. 1, 2000 (arguing that selective recount rather than statewide recount violates equal protection), available at <http://www.election2000.stanford.edu>.

respect for state actors that the Court has found paramount in crafting injunctions against state actors.³²³ Moreover, the Supreme Court failed to adopt the process it seemingly mandated in prior prophylactic cases of permitting the state court to have the first opportunity to correct the constitutional infirmity.³²⁴ Again, a simple order prohibiting the arbitrary recount would have given the state court the first opportunity to fix the constitutional infirmity, thereby giving proper respect to the state court's function and the state's election laws.

Thus, the U.S. Supreme Court's failure to tailor its prophylactic recount remedy to the constitutional harm found reveals the invalidity of such a remedy. The Court adopted a broad remedy without consideration of any of the factors it has previously found necessary to properly choosing and designing such relief. The unprincipled use of such an equitable remedy thus casts suspicion upon the Court's decision and lends support to those who criticize the decision for deviating from the rule of law.

B. Misusing Equity

More fundamentally, the unguided and unprecedented adoption of the prophylactic remedy in *Bush v. Gore* demonstrates an abuse of the Court's equitable power. The prophylactic remedy in *Bush v. Gore* does not protect, much less overprotect rights, because at the end of the day, no protective measures are implemented. Indeed, the Court never intended the measures to become effective since it also held in its decision that the safe harbor date precluded such practical change.³²⁵ The prophylactic remedy, in contravention of its intended equitable purpose, actually denies relief and thus weakens the definitional protections of the voting and equal protection guarantees. The Court denies the right to vote to Florida citizens whose votes were not tabulated due to error thereby creating the very kind of harm it purported to find.³²⁶ It also denies the state right to redress for such tabulation errors. The *Bush* decision's bottom line was that Florida was not just prohibited from conducting an arbitrary recount; it was prohibited from conducting any recount whatsoever.³²⁷ This judicial use of a prophylactic remedy establishing a remedial facade with the purpose of barring rather than providing relief constitutes a misuse of remedial power.

Ironically, claims of judicial excess usually accompany broad injunctions that

³²³ See *Harris v. Conradi*, 675 F.2d 1212, 1216 (11th Cir. 1982) (denying the requested prophylactic relief in an election case in part because "state has a substantial interest in the management of its elections, and the procedure utilized in holding elections may not be altered by federal courts unless state laws or practices violate federal statutes or the Constitution.").

³²⁴ See *supra* notes 288-89 and accompanying text.

³²⁵ See *supra* text accompanying notes 84-85.

³²⁶ Cf. *Radin*, *supra* note 110, at 120.

³²⁷ *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

restrict a variety of conduct in order to accomplish some ultimate goal of fairness or justice. For example, broad injunctions mandating the integration of the races or the humane treatment of prisoners have been criticized as social engineering or judicial legislation.³²⁸ In contrast, the judicial excess in *Bush v. Gore* is used to accomplish no larger social good or moral justice.³²⁹ Instead it is used to punish the state court and prohibit the functioning of state law and judicial redress.

This unguided use of equity applied simply upon the whim of the judge is reminiscent of the earliest notions of traditional equity at common law that the Anti-Federalists feared in the establishment of one federal Supreme Court.³³⁰ The Anti-Federalists were concerned that granting the federal courts equity power, rather than constraining them as common law courts, would enable the Court to use its equitable power to reinterpret constitutional rights and impose its will upon the states, irrespective of the rule of law or precedent interpreting those constitutional rights.³³¹

This fear has been realized in *Bush v. Gore*. The Supreme Court acted with unfettered power under the guise of equity. The early chancery courts of England utilized this type of unfettered equity characterized by the use of the judges' individualized opinion, unconstrained by precedent or procedure.³³² The *Bush* decision is a classic example of this unfettered equity. It imposed its equitable prophylactic remedy unconstrained by the precedent and the guiding factors that would have determined that broad remedy to be inappropriate. It acted without regard to proper procedure, granting standing to Bush, a third-party, to challenge a remedy imposed against the Florida executive at Gore's request.³³³ It depended

³²⁸ See James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases As Badges Of Slavery*, 39 HOW. L.J. 633, 652 (1996) ("The underlying assumption on both sides of the familiar post-Brown debate over judicial activism versus judicial restraint and the rise of the 'social issue' is that the Warren Court did undertake a wide-ranging project of social engineering."); Mary Cornelia Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 3, 17-18 (Mary Cornelia Porter & G. Alan Tarr eds., 1982) ("[A] directive from the Supreme Court to redistrict or to bus children to achieve racial balance in schools or a federal judge's assumption of responsibility to operate schools or prisons gives rise to cries of 'judicial legislation.'"); Yoo, *supra* note 215.

³²⁹ Cf. Rubinfeld, *supra* note 89, at 35-36 (arguing that the *Bush v. Gore* decision is worse than *Plessy v. Ferguson*'s upholding of racial segregation because *Bush v. Gore* is not based even on an important constitutional principle or larger important issue).

³³⁰ See *supra* text accompanying notes 220-21.

³³¹ See *id.*

³³² Kroger, *supra* 219, at 1435-38.

³³³ See Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001) (arguing that Bush lacked standing to raise the claims of Florida voters who were denied equal protection by the counting of votes without standards); Karlan, *supra* note 268, at 85 (noting that Bush was an unlikely candidate to have third-party standing to challenge the equal protection violation of the excluded voters). But see Tokaji, *supra* note

solely upon the individualized views of five Justices who simply announced their own disdain of recount procedures isolated from any goal of justice or fairness. This unguided use of equity is what makes *Bush v. Gore* a dangerous precedent.

Even more interesting is that, for perhaps the first time, the two most ardent critics of broader equitable relief, Justices Scalia and Thomas, readily join in an unconstrained use of such equitable power. In the past, Justice Thomas has written extensive concurring opinions in which he has articulated his view that judicial equitable power does not extend to such broad relief.³³⁴ Thomas argued that the "extravagant uses of judicial power" seen in the Court's desegregation cases and other precedent "are at odds with the history and tradition of the equity power and the Framers' design."³³⁵ He argued that equity must be constrained narrowly by precedent and principle as advocated by Blackstone and promised by the Founding Fathers: "I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured."³³⁶

Justice Scalia has been more direct in his attacks on prophylactic relief in particular.³³⁷ In *Lewis v. Casey*, he took the opportunity as the writer of the majority opinion to hold that equitable remedies should be narrowly tailored to address only the actual injury proven in the case.³³⁸ A remedial limitation to only the actual injury, rather than ancillary causes or effects of the legal injury, would seem to exclude prophylactic measures.³³⁹ Indeed that is what Scalia has advocated, resurrecting the academic criticisms discussed in this Article that prophylactic remedies are inherently illegitimate and overly broad.³⁴⁰ Yet both Justices in *Bush*

279 (arguing that problematic standing of Bush and Cheney representing disenfranchised voters can be better explained by the liberal standing principles of First Amendment jurisprudence).

³³⁴ See *Lewis v. Casey*, 518 U.S. 343, 364–65 (1996) (Thomas, J., concurring) (arguing that the federal judiciary, since the time of the first desegregation cases, "has been exercising 'equitable' powers and issuing structural decrees entirely out of line with its constitutional mandate"); *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (criticizing the Court's precedent that has permitted federal courts to exercise virtually unlimited equitable powers to remedy desegregation because such authority tramples upon principles of federalism and separation of powers and "has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm").

³³⁵ *Jenkins*, 515 U.S. at 126 (Thomas, J., concurring).

³³⁶ *Id.* at 133 (Thomas, J., concurring).

³³⁷ See *Hill v. Colorado*, 530 U.S. 703, 729 (2000); *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (Scalia, J., dissenting); *Lewis v. Casey*, 518 U.S. 343 (1996).

³³⁸ *Lewis*, 518 U.S. at 348, 357.

³³⁹ Cf. Thomas, *supra* note 68, at 723.

³⁴⁰ *Hill*, 530 U.S. at 749 (arguing that prophylactic measures are inherently overbroad); *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting) (arguing that prophylactic measures are

v. Gore are silent in their acceptance of the broad, untailored equitable relief and readily endorse the Court's use of unconstrained equity power. The only consistency between the vote of these Justices in *Bush* and their prior admonitions of equity is the common result of barring, rather than facilitating, meaningful relief. Thus, not only does *Bush v. Gore* exemplify the use of unfettered equitable discretion to do harm, but it also represents a departure for at least two Justices from strong principles seemingly rejecting such arbitrary judicial action.

CONCLUSION

Despite the attempt of commentators and the Court itself to discount the case,³⁴¹ the remedial decision in *Bush v. Gore* contains powerful precedent that can be used as a weapon for a variety of arguments in the arenas of constitutional, remedial, and election law. The decision can be used to support the use of broad prophylactic relief for constitutional violations. It can be used to support an expansive use of judicial remedial power and to counter legal criticisms from those like Justices Scalia and Thomas against such broad relief. It may even be used to invalidate the U.S. Supreme Court's own remedial decisions. For example, in *Costo v. United States*,³⁴² the dissenting judge argued that the classification crafted by the U.S. Supreme Court creating different tort remedies for military and civilian personnel violated equal protection under the principles of *Bush v. Gore*.³⁴³ The *Bush v. Gore* decision, standing as Supreme Court precedent on constitutional and remedial issues, simply cannot be constrained to the isolated circumstances of the 2000 Election. Unlike the Queen in Alice's Wonderland, the Supreme Court cannot simply announce that: "The rule is jam tomorrow, and jam yesterday — but never jam today."³⁴⁴

illegitimate judicial actions that violate separation of powers and federalism principles).

³⁴¹ *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); Tushnet, *supra* note 5 (recommending the case be ignored as anomalous); Lund, *supra* note 3, at 1267 ("[T]here is something initially troubling about the *Bush v. Gore* majority's narrow statement of its holding."); Nathaniel Hernandez, *Trial Lawyers And Profs Issue Split Opinion On Federal Election Ruling*, 24 CHI. LAW. 8 (2001) ("I'm not sure the ruling sets any precedent because it might never happen again. It was such a unique case that I don't think it will set any kind of precedent at all — it's all over, behind us.") (quoting former federal judge Frank McGarr).

³⁴² 248 F.3d 863 (9th Cir. 2001).

³⁴³ *Id.* at 869 (Ferguson, J., dissenting).

³⁴⁴ CARROLL, *supra* note 1, at 174; see Krotoszynski, *supra* note 4, at 2092–93 (accusing the Court in *Bush v. Gore* and other recent cases of adopting a "jurisprudence du jour" or "jurisprudence of Oprah!" in which the personal feelings of individual Justices prevail over any adherence to stare decisis).