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**PUTTING MEAT ON CONSTITUTIONAL BONES:  
THE AUTHORITY OF STATE COURTS TO CRAFT  
CONSTITUTIONAL PROPHYLACTIC RULES  
UNDER THE FEDERAL CONSTITUTION**

**HON. CHASE T. ROGERS\***

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“[S]earches and seizures must not be unreasonable, interrogations must not be coercive, and lineups must not be unreliable. But the trick lies in putting meat on these constitutional bones.”<sup>1</sup>

INTRODUCTION

This Article addresses the scope of state courts’ authority to craft constitutional prophylactic rules under the U.S. Constitution. This issue came before the Connecticut Supreme Court recently in *State v. Dickson*,<sup>2</sup> in which the court considered whether an in-court identification of a defendant by an eyewitness who had not previously identified the defendant in a nonsuggestive out-of-court identification procedure violated the requirement for a fair trial under the Due Process Clause of the Fourteenth Amendment.<sup>3</sup> In an opinion that I authored, a majority of the court concluded that, for all of the reasons that an unnecessarily suggestive out-of-court identification may deprive a

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\* Chief Justice, Retired, Connecticut Supreme Court. I would like to thank Elizabeth Haynes, Executive Assistant to the Connecticut Supreme Court, for her invaluable assistance in researching and drafting this Article, her ability and willingness to consider all sides of a legal issue, and, most importantly, her friendship over the last decade. I am also grateful to Paul Bailin, Hilary DeCrisantis, and Alma Nunley for their helpful comments and suggestions.

<sup>1</sup> Wayne R. LaFare, *Constitutional Rules for Police: A Matter of Style*, 41 SYRACUSE L. REV. 849, 852 (1990).

<sup>2</sup> 141 A.3d 810, 817 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017).

<sup>3</sup> U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

defendant of the constitutional right to due process,<sup>4</sup> first time in-court identifications also implicate due process principles.<sup>5</sup> The *Dickson* majority further concluded that because there is a significant risk that an eyewitness who is going to be asked to identify a defendant for the first time in court would not be able to do so in a nonsuggestive procedure, our trial courts ordinarily should not permit an in-court identification unless the witness has successfully identified the defendant in a prior nonsuggestive out-of-court procedure.<sup>6</sup> Because this bright-line requirement barred first time in-court identifications even in those cases in which there would be no constitutional violation—that is, cases in which the eyewitness would have been able to identify the defendant in a nonsuggestive proceeding—the majority characterized the requirement as a constitutional prophylactic rule.<sup>7</sup> The majority concluded that it had the same authority as the Supreme Court to announce rules that protect rights under the U.S. Constitution, and that this authority includes the power to adopt prophylactic rules that are designed to reduce the significant risk of constitutional violations.<sup>8</sup> In their concurring opinions, Justices Peter Zarella and Carmen Espinosa questioned whether state courts have such authority.<sup>9</sup> In this Article, I argue that the *Dickson* majority correctly concluded that they do.

In Part I of this Article, I discuss our decision in *Dickson* and the constitutional problem that it raised in greater detail. In Part II, I discuss various attempts by courts and legal scholars to define constitutional prophylactic rules and provide some examples. In Part III, I discuss the various justifications for prophylactic rules that courts and commentators have put forth. In Part IV, I address the problem of legitimacy, focusing primarily on the authority of the Supreme Court to create constitutional rules that seem to go beyond pure constitutional interpretation. I ultimately conclude that the authority to interpret the Constitution on a case-by-case basis necessarily includes the (limited) authority to promulgate prophylactic rules that are designed to prevent the significant risk of constitutional violations. In Part V, I argue that state courts have the same authority to adopt constitutional prophylactic rules as the Supreme Court. Finally, in Part VI, I re-examine our decision in *Dickson* to determine whether the constitutional prophylactic rule that we adopted was within the court's authority. I conclude that it was.

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<sup>4</sup> See *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

<sup>5</sup> *Dickson*, 141 A.3d at 824.

<sup>6</sup> *Id.* at 835-37. The *Dickson* majority also held that there is an exception to this rule if the ability of the witness to identify the defendant is not in dispute because, for example, the defendant is well known to the witness. *Id.* at 835-36. In such cases, there is no bar to a first time identification in court. *Id.*

<sup>7</sup> *Id.* at 824 n.11.

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* at 849 (Zarella, J., concurring); *id.* at 862 (Espinosa, J., concurring).

I. *STATE V. DICKSON*: “WHAT EXACTLY ARE WE DOING HERE?”

The defendant in *Dickson*, Andrew Dickson, was charged with a variety of criminal offenses in connection with the attempted robbery and shooting of Albert Weibel.<sup>10</sup> Approximately one year after the shooting, Weibel viewed a police photographic array that included a photograph of the defendant, but he was unable to identify the defendant as his assailant.<sup>11</sup> After the defendant was arrested and charged in connection with the incident, he filed a motion in limine in which he contended that Weibel’s in-court identification of him “would be so highly and unnecessarily suggestive and conducive to an irreparable misidentification of [him] as to violate [his] due process rights under article first, § 8, of the Connecticut constitution.”<sup>12</sup> The trial court denied the motion.<sup>13</sup> At trial, the prosecutor asked Weibel if he could identify the person who had shot him.<sup>14</sup> Weibel then identified the defendant, who was sitting next to counsel at the defense table, and who was the only African-American male in the courtroom except for a uniformed judicial marshal.<sup>15</sup> The jury found the defendant guilty of assault in the first degree and conspiracy to commit robbery in the first degree.<sup>16</sup>

After the Connecticut Appellate Court affirmed the judgment of conviction, the defendant appealed to the Connecticut Supreme Court.<sup>17</sup> The defendant claimed that Weibel’s in-court identification of him as the perpetrator triggered due process protections under the Fifth and Fourteenth Amendments to the U.S. Constitution because it was inherently suggestive and the result of state action.<sup>18</sup> He contended that in-court identifications should be subject to prescreening by the trial court for the same reasons that the Supreme Court has required prescreening when an out-of-court identification is the result of unduly suggestive procedures.<sup>19</sup> A majority of our court agreed with the

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<sup>10</sup> *Id.* at 818 (majority opinion).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also CONN. CONST. art. I, § 8 (“No person shall . . . be deprived of life, liberty or property without due process of law . . .”).

<sup>13</sup> *Id.* at 818.

<sup>14</sup> *Dickson*, 141 A.3d at 818.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *State v. Dickson*, 91 A.3d 958 (Conn. App. Ct. 2014), *cert. granted*, 100 A.3d 404 (Conn. 2014); see also U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>18</sup> *Dickson*, 141 A.3d at 819.

<sup>19</sup> *Id.* at 822; see also *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977) (holding that out-of-court identification that is result of unduly suggestive identification procedure must be excluded unless trial court determines that identification was reliable despite taint of

defendant.<sup>20</sup> We concluded that there could hardly be a more suggestive procedure than putting a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he is able to identify the person who committed the crime.<sup>21</sup> There simply was no principle under which we could distinguish unduly suggestive in-court identifications from unduly suggestive out-of-court identifications for due process purposes.<sup>22</sup> Accordingly, we concluded that in cases in which the identity of the perpetrator of the crime is an issue, our trial courts ordinarily should not permit an in-court identification unless the witness has successfully identified the defendant in a prior nonsuggestive out-of-court procedure.<sup>23</sup> Applying these newly adopted principles to the circumstances of *Dickson*, we concluded that the trial court should not have allowed Weibel to identify the defendant in court.<sup>24</sup>

As I was drafting the majority opinion in *Dickson*, however, it became clear to me that a first time in-court identification will always involve a potential violation of due process, because there is never any way of knowing whether a witness would have been able to identify the defendant in a fair procedure without actually conducting that procedure.<sup>25</sup> If the witness would have been able to identify the defendant in a fair procedure, allowing a first time in-court identification would not present due process concerns.<sup>26</sup> This realization caused me to wonder, "What exactly am I suggesting that the court do here? Does the court's undisputed authority under *Marbury v. Madison*<sup>27</sup> to 'say

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suggestiveness); *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (same); *United States v. Domina*, 784 F.2d 1361, 1367 (9th Cir. 1986) (noting that unduly suggestive identification procedures "may also preclude a later in-court identification that was tainted by the earlier suggestive procedures").

<sup>20</sup> *Dickson*, 141 A.3d at 822.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 824.

<sup>23</sup> *Id.* at 835-36.

<sup>24</sup> *Id.* at 840. We further concluded that although Weibel's in-court identification potentially violated the defendant's due process rights under the U.S. Constitution, any such violation was harmless because it was clear beyond a reasonable doubt that the jury would have convicted the defendant even without the in-court identification. *Id.* at 843.

<sup>25</sup> In *Dickson*, we defined "first time in-court procedure" to include in-court identifications by a witness who had made a prior unsuccessful attempt to identify the perpetrator in a fair procedure. *Id.* at 817 n.3. Of course, in that situation, a subsequent in-court identification would ordinarily be actually, and not merely potentially, unreliable. Accordingly, we concluded in *Dickson* that, unless the state could provide a good reason why a second out-of-court identification procedure should be allowed, the *Dickson* rule would not apply and the court should simply bar the in-court identification. *Id.* at 836-37. For purposes of the present discussion, I refer to in-court identification procedures that were not preceded by any out-of-court attempts to identify the perpetrator.

<sup>26</sup> *Id.* at 824 n.11.

<sup>27</sup> 5 U.S. (1 Cranch) 137 (1803).

what the law is<sup>28</sup> and to determine whether the government actions are in conformity with our fundamental law<sup>29</sup> include the authority to prevent merely potential constitutional violations, or does the court have authority only to determine on a case-by-case basis whether the Constitution actually has been violated?”

Ultimately, I concluded that the rule I was proposing that the court adopt in *Dickson* was properly characterized as a prophylactic constitutional rule—that is, a rule designed to prevent the significant risk of a constitutional violation.<sup>30</sup> I further concluded that the court’s “power to take steps to prevent . . . constitutional violations is an inherent aspect of [its] basic constitutional function of interpreting the law” under *Marbury*.<sup>31</sup> Indeed, “to stand back and permit prosecutors and trial courts to engage in a practice that creates a significant risk that defendants will be deprived of their constitutional right to a fair trial would be an abdication of [the court’s] constitutional duty.”<sup>32</sup> A majority of the court ultimately agreed with me. The concurring justices expressed doubts, however, as to whether the authority of the court to interpret the U.S. Constitution on a case-by-case basis to determine whether a party’s constitutional rights have been violated includes the authority to adopt prophylactic constitutional rules, and they suggested that the majority had offered an inadequate explanation for its conclusion that it does.<sup>33</sup>

The intent of this Article is to expand on the explanation that I proposed, and that the majority ultimately adopted, in *Dickson*.<sup>34</sup> It is appropriate to warn the reader at the outset, however, that my primary goal here is to provide practical guidance to attorneys and state courts confronted with difficulties similar to the one that arose in *Dickson*, not to propose any final resolution of the many theoretical and philosophical conundrums that have arisen as legal

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<sup>28</sup> *Id.* at 177.

<sup>29</sup> *Id.* at 178.

<sup>30</sup> *Dickson*, 141 A.3d at 824 n.11.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 849 (Zarella, J., concurring) (“I question [the] court’s authority to adopt prophylactic rules under the United States constitution. The majority has not cited a case, statute, or constitutional provision that bestows on *this court*—a state court established by a state constitution—the power it today has opted to exercise.”); *id.* at 862 (Espinosa, J., concurring) (“I particularly note my agreement with [Justice Zarella] that the majority lacks authority to announce a prophylactic rule predicated on federal constitutional law. If any court has that authority—an issue I need not resolve as it is not implicated in this appeal—it is the United States Supreme Court.”). Although Justices Zarella and Espinosa disagreed with the constitutional rule set forth in *Dickson*, they concurred in the judgment affirming the defendant’s conviction on the ground that the trial court’s failure to follow the procedures that the majority adopted was harmless. *See id.* at 861 (Zarella, J., concurring); *id.* (Espinosa, J., concurring).

<sup>34</sup> I emphasize that I speak only for myself in this Article, not for the other members of the *Dickson* majority.

scholars have attempted to identify, define, justify, and legitimize (or delegitimize) constitutional prophylactic rules. Although I discuss these conundrums at some length, I do so in the spirit of offering “a tour of perplexities,”<sup>35</sup> such a tour being necessary in order to understand why constitutional prophylactic rules are problematic, not with any pretense of eliminating those perplexities. Indeed, I have no reason to believe that they can be eliminated. Accordingly, although it understandably may be somewhat unsatisfying to the theoretical purists among us,<sup>36</sup> I ultimately conclude that the practical need for transparent and workable rules requires us simply to cut these theoretical Gordian knots.

## II. DEFINITIONS AND EXAMPLES

I begin with the definitional problem. As many commentators have observed, coming up with a definitive description of constitutional prophylactic rules has proved an elusive task.<sup>37</sup> Constitutional prophylactic rules have been described by the Supreme Court as “procedural safeguards [that are] not themselves rights protected by the Constitution, but [are] instead measures to insure that [a specific constitutional right is] protected”;<sup>38</sup> safeguards that “provide practical reinforcement” for a specific constitutional right;<sup>39</sup> and rules that “sweep[] more broadly” than the specific constitutional provision that is being applied.<sup>40</sup> Various scholars have described them as “measures designed to minimize the risk of . . . violations [of a specific constitutional provision], even when those measures are not specifically authorized by the Constitution”;<sup>41</sup> “hybrid rules,” that are “predicated on a

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<sup>35</sup> JUDITH N. SHKLAR, *ORDINARY VICES* 226 (1984) (“This has been a tour of perplexities, not a guide for the perplexed.”).

<sup>36</sup> Paul Bailin, for example.

<sup>37</sup> See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30 (2004) (“[C]ommentators have proposed a wealth of sometimes widely divergent definitions.”); *id.* at 31 n.115 (collecting definitions); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1146 (1978) (discussing “problem of definition” and difficulty of “providing criteria by which to distinguish between irreversible constitutional exegesis and congressionally reversible constitutional common law”); *id.* at 1152 (noting “definitional obscurity in which Chief Justice Warren left the status of” prophylactic rule adopted in *Miranda v. Arizona*); see also Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 33 (1975) (stating that “[n]o clear discontinuity separates what are, at best, necessarily differences of degree” between true constitutional interpretations and constitutional common law, or prophylactic rules).

<sup>38</sup> *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

<sup>39</sup> *Id.*

<sup>40</sup> *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

<sup>41</sup> Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 925 (1999); *id.* at 926 (defining prophylactic

judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right,” but which require the court to act “in a legislative fashion when it chooses a particular method”;<sup>42</sup> rules that contain “a pragmatic decision rather than a constitutional fiat”;<sup>43</sup> “judicially-created doctrinal rule[s] or legal requirement[s] determined by the Court as appropriate for deciding whether an explicit or ‘true’ federal constitutional rule is applicable”;<sup>44</sup> “substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions”;<sup>45</sup> rules that function “as a preventive safeguard to insure that constitutional violations will not occur”;<sup>46</sup> “procedural safeguards to protect a certain constitutional interest, even though that interest is not inevitably compromised when the prescribed procedure is absent”;<sup>47</sup> rules that “overenforce judge-determined constitutional meaning”;<sup>48</sup> “specific measures directing . . . legal conduct affiliated with the proven wrong to prevent future harm”;<sup>49</sup> and rules that are “intended to protect values established in the Constitution, rather than being ‘in’ the Constitution itself.”<sup>50</sup>

Thus, there is no clear consensus on the defining characteristics of prophylactic constitutional rules. Nevertheless, many of these definitions do seem to share a family resemblance: they suggest that constitutionally-based rules that are forward looking and either sanction future government conduct that is not expressly prohibited by the applicable constitutional provision or require future government conduct that the constitutional provision does not expressly mandate in order to prevent the significant risk of a constitutional violation are properly characterized as prophylactic.<sup>51</sup> Such rules have been

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rules as “those risk-avoidance rules that are not directly sanctioned or required by the Constitution”).

<sup>42</sup> *Id.* at 950 (“The Constitution may demand imposition of a prophylactic rule, but it does not demand a *particular* one.”).

<sup>43</sup> John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974).

<sup>44</sup> Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidents Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001).

<sup>45</sup> Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101 (1985) (quoting Monaghan, *supra* note 37, at 2-3).

<sup>46</sup> *Id.* at 105.

<sup>47</sup> LaFave, *supra* note 1, at 856.

<sup>48</sup> Berman, *supra* note 37, at 42.

<sup>49</sup> Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 302 (2004).

<sup>50</sup> Kaplan, *supra* note 43, at 1055.

<sup>51</sup> Some commentators have distinguished prophylactic constitutional rules from judicially created remedies for actual constitutional violations that are not expressly required by the Constitution. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84

distinguished from case-specific rulings that interpret a constitutional provision to determine the constitutionality of a particular statute or state action, which more obviously come within the tradition of *Marbury v. Madison*.<sup>52</sup>

A clearer picture of the nature of prophylactic constitutional rules may emerge if we consider some examples. The Supreme Court's holding in *Miranda v. Arizona*,<sup>53</sup> that custodial confessions that are not preceded by the now-famous warnings are inadmissible at trial, is widely considered to be the paradigmatic example of a constitutional prophylactic rule.<sup>54</sup> This is because the *Miranda* rule may exclude an unwarned confession from the government's case even if the confession was not actually coerced in violation of the Self-Incrimination Clause of the Fifth Amendment.<sup>55</sup> Other constitutional rules that

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COLUM. L. REV. 1433, 1495-97 (1984) (distinguishing prophylactic rules from rules providing remedies for actual constitutional violations); Grano, *supra* note 45, at 105 ("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."). Under this view, the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), for example, would not be a prophylactic rule, notwithstanding the fact that the rule is not expressly required by the Fourth Amendment, because the rule applies only when the government actually has violated the defendant's Fourth Amendment rights. Compare *infra* note 56 and accompanying text, with *infra* note 57 and accompanying text. I need not determine in this Article, however, the precise contours of the class of constitutional rules that properly may be categorized as prophylactic.

<sup>52</sup> See Grano, *supra* note 45, at 101 ("In exercising judicial review of the classic *Marbury v. Madison* variety, the United States Supreme Court decides whether legislative or official action violates the U.S. Constitution. While such judicial review accounts for most of the Court's constitutional decisions, it does not account for them all. As Professor Henry Monaghan observed a decade ago and as seems even more evident today . . . the Supreme Court has developed 'a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.'" (quoting Monaghan, *supra* note 37, at 2-3)); *id.* at 102 ("A legitimacy issue not addressed in *Marbury* is raised, however, when the Court invalidates official conduct without finding an actual constitutional violation.").

<sup>53</sup> 384 U.S. 436 (1966).

<sup>54</sup> *Id.* at 444; see also *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("[T]his prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose."); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (characterizing *Miranda* as "prophylactic"); Grano, *supra* note 45, at 106 (characterizing *Miranda* as prophylactic because it can be violated without violating the Constitution).

<sup>55</sup> See, e.g., *Elstad*, 470 U.S. at 307 ("[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional



have been described as prophylactic include the Supreme Court's decisions in *Mapp v. Ohio*,<sup>56</sup> holding that states cannot use evidence seized in violation of the Fourth Amendment at trial;<sup>57</sup> *South Dakota v. Opperman*,<sup>58</sup> holding that any automobile inventory search that is not carried out in accordance with standard procedures adopted by the local police department is per se unreasonable under the Fourth Amendment;<sup>59</sup> *Anders v. California*,<sup>60</sup> holding that, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, appointed appellate counsel who wants to withdraw from representing an indigent defendant must advise the court that an appeal would be wholly frivolous, request permission to withdraw, and file a brief identifying anything in the record that might arguably support the appeal;<sup>61</sup>

harm.”). It is important to note, however, that this is not the only possible interpretation of *Miranda*. Professor Klein, for example, contends that a plausible argument can be made that the original intent of *Miranda* was to hold that “all statements taken during custodial interrogation in the absence of *Miranda* warnings are always ‘compelled’ within in [sic] the meaning of the Fifth Amendment’s Self-Incrimination Clause.” Klein, *supra* note 44, at 1071-72.

<sup>56</sup> 367 U.S. 643 (1961).

<sup>57</sup> *Id.* at 655; *see also* *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (“[T]he *Mapp* rule ‘is not a personal constitutional right,’ but serves to deter future constitutional violations . . .” (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976))); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he [*Mapp*] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”); Klein, *supra* note 44, at 1052 (characterizing *Mapp* as prophylactic in part because Fourth Amendment does not expressly call for exclusion of illegally seized evidence); Monaghan, *supra* note 37, at 3-4 (characterizing *Mapp* exclusionary rule as “simply a matter of remedial detail” rather than personal constitutional right guaranteed). *But see supra* note 51 (noting scholarly debate between prophylactic constitutional rules and judicially created remedies for constitutional violations not expressly constitutionally required).

<sup>58</sup> 428 U.S. 364 (1976).

<sup>59</sup> *Id.* at 376; *see also* Klein, *supra* note 44, at 1037-38 (“The automobile inventory search exception to the Fourth Amendment’s per se warrant requirement contains a prophylactic rule. . . . The prophylactic rule declares ‘unreasonable’ any inventory search that is not carried out in accordance with standard procedures in the local police department.”).

<sup>60</sup> 386 U.S. 738 (1967).

<sup>61</sup> *Id.* at 744; *see also* Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 367, 412-13 (2001) (noting that *Anders* procedures established what Supreme Court later called “prophylactic framework”); Klein, *supra* note 44, at 1043 (explaining that *Anders* procedures “are prophylactic because the procedures are not required by the text of the constitutional clauses at issue, nor are they inherently valuable, nor do they embody the values underlying the constitutional clause they are designed to protect”).

*North Carolina v. Pearce*,<sup>62</sup> holding that, under the Due Process Clause, when a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for the sentence must appear on the record, and the sentence must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the original sentencing proceeding;<sup>63</sup> *Jackson v. Denno*,<sup>64</sup> holding that a violation of the Due Process Clause occurs where the same jury determines the voluntariness of the defendant's confession and the defendant's guilt, even when the jury is instructed that it must disregard the confession if it finds that it was coerced;<sup>65</sup> *Batson v. Kentucky*,<sup>66</sup> holding that, under the Equal Protection Clause, a defendant can establish a prima facie case of purposeful discrimination in the selection of a petit jury based solely on evidence that the prosecutor has exercised peremptory challenges against jurors of the defendant's race and the circumstances raise an inference that they were removed because of their race;<sup>67</sup> *United States v. Wade*,<sup>68</sup> holding that the Sixth Amendment right to counsel applies during a post-indictment lineup and an identification without the presence of counsel is inadmissible;<sup>69</sup>

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<sup>62</sup> 395 U.S. 711 (1969), *overruled in part on other grounds by* *Alabama v. Smith*, 490 U.S. 794 (1989).

<sup>63</sup> *Id.* at 726; *see also* *Colten v. Kentucky*, 407 U.S. 104, 116 (1972) (characterizing *Pearce* as having held that "untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule to ensure 'that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence he receives after a new trial'" (quoting *Pearce*, 395 U.S. at 725)); Kamisar, *supra* note 61, at 417-20 (arguing that *Pearce* was prophylactic because not all increases in sentences after second trial are vindictive).

<sup>64</sup> 378 U.S. 368 (1964).

<sup>65</sup> *Id.* at 377; *see also* Klein, *supra* note 44, at 1044 (arguing that *Jackson* is prophylactic because it reverses convictions "that might not have suffered a constitutional infirmity, and invalidate[s] . . . state procedural rule[s] that, at least in some instances, would not run afoul of the Constitution").

<sup>66</sup> 476 U.S. 79 (1986).

<sup>67</sup> *Id.* at 96; *see also* Klein, *supra* note 44, at 1043 ("[T]he *Batson* rule is prophylactic because it does not directly embody the value of the Equal Protection Clause, which protects against intentional discrimination. It is simply one method of determining discrimination, a method that may well result in reversals of convictions where the prosecutor did not intentionally discriminate in her use of peremptory challenges, but was simply unable to marshal the evidence to rebut the defendant's prima facie case.").

<sup>68</sup> 388 U.S. 218 (1967).

<sup>69</sup> *Id.* at 236-37; *see also* Klein, *supra* note 44, at 1040 (characterizing *Wade* as prophylactic because "not every post-indictment lineup in the absence of counsel is suggestive and thus violative of the Sixth Amendment and Due Process Clause"); Monaghan, *supra* note 37, at 20 (arguing that *Wade* was prophylactic because Court "took pains to declare that those rules were required only in the absence of other devices to protect the underlying constitutional right to a fair trial" and "[t]he point of the rules . . . [was] to guide primary behavior [of government actors] when existing procedures have failed

*Cuyler v. Sullivan*,<sup>70</sup> holding that a violation of the Sixth Amendment right to effective assistance of counsel will be conclusively presumed whenever the defendant's attorney had an actual conflict of interest due to multiple representations that adversely affected the attorney's performance;<sup>71</sup> *Bruton v. United States*,<sup>72</sup> holding that the admission of a codefendant's confession as evidence violates the Confrontation Clause of the Sixth Amendment, even when the jury has received a cautionary instruction that the confession was admissible only against the confessing party;<sup>73</sup> and *Missouri v. Hunter*,<sup>74</sup> holding that, under the Double Jeopardy Clause of the Fifth Amendment, two statutes proscribing the same offense are construed not to authorize cumulative punishments in the absence of clearly expressed legislative intent to the contrary.<sup>75</sup>

In addition to these cases, it is arguable that the Court's decisions in *Neil v. Biggers*<sup>76</sup> and *Manson v. Brathwaite*,<sup>77</sup> were prophylactic.<sup>78</sup> Ordinarily, it is for the jury to determine the weight to be given unreliable evidence and due

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adequately to protect individual rights," as distinct from defining consequences of constitutional violation). *But see* Grano, *supra* note 45, at 119-21 (arguing that *Wade* was not prophylactic because it "decreed what the Constitution actually requires, at least in present circumstances," where lineups are conducted under conditions that make counsel's presence critical). For a more detailed analysis of Grano's position on *Wade*, see *infra* note 128.

<sup>70</sup> 446 U.S. 335 (1980).

<sup>71</sup> *Id.* at 350; *see also* Klein, *supra* note 44, at 1041-42 ("The *Cuyler* rule is a prophylactic one because it does not embody the text of the constitutional clause at issue, in that the defendant had 'the assistance of counsel.' Nor does the rule embody the value underlying the Sixth Amendment, as counsel may have been competent, the trial may have been a fair one, and the defendant may well have been convicted despite multiple representation.").

<sup>72</sup> 391 U.S. 123 (1968).

<sup>73</sup> *Id.* at 125; *see also* Klein, *supra* note 44, at 1041 (arguing that *Bruton* rule is prophylactic because it "will require reversing convictions where the jury was able or would have been able to heed the cautionary instruction, and the striking of state procedures that are not, in all instances, unconstitutional").

<sup>74</sup> 459 U.S. 359 (1983).

<sup>75</sup> *Id.* at 366; *see also* Klein, *supra* note 44, at 1040 ("The [*Hunter*] rule is a prophylactic one because it does not precisely track the underlying purpose of the Double Jeopardy Clause in a single trial situation—preventing the sentencing court from prescribing greater punishment than the legislature intended. Rather, it is instrumental, it is a method by which we divine legislative intent and ensure that the Clause is not violated.").

<sup>76</sup> 409 U.S. 188, 200 (1972) (holding that when unnecessarily suggestive identification procedure has irreparably tainted out-of-court identification, such identification must be excluded).

<sup>77</sup> 432 U.S. 98, 117 (1977) (echoing holding in *Biggers*).

<sup>78</sup> *Manson*, 432 U.S. at 114 ("[R]eliability is the linchpin in determining the admissibility of identification testimony . . . . The factors to be considered are set out in *Biggers*.").

process requires exclusion only if the evidence “is so extremely unfair that its admission violates fundamental conceptions of justice.”<sup>79</sup> Because not all identifications that are tainted by an unnecessarily suggestive identification procedure meet this standard, *Manson* and *Biggers* exclude some evidence that would be admissible under ordinary due process principles.<sup>80</sup>

As this uncomprehensive list suggests, prophylactic rules are prolific. Indeed, Professor David Strauss has contended that “[p]rophylactic rules’ are, in an important sense, the norm, not the exception. Constitutional law is filled with rules that are justified in ways that are analytically indistinguishable from the justifications for the *Miranda* rules.”<sup>81</sup> In the next Part, I examine the nature of those justifications.

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<sup>79</sup> *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)); see also *id.* (“The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.”).

<sup>80</sup> This point was emphasized by the *Perry* Court. See 565 U.S. at 228. In that case, the Court concluded that *Manson* and *Biggers* do not require the exclusion of identifications that are tainted by private conduct, regardless of how suggestive that conduct was. *Id.* at 240-41. Rather, such identifications are governed by ordinary due process principles. *Id.* at 245. The Court reasoned that it was not primarily the unreliability of evidence that is tainted by a suggestive identification procedure that underlay the Court’s decision in *Brathwaite*. *Id.* at 241. Rather, “[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.” *Id.* Thus, the Court implicitly recognized that some identifications that would be sufficiently reliable to be admissible under ordinary due process principles would be excluded under *Biggers* and *Brathwaite* in order to deter improper conduct by the police.

<sup>81</sup> David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195-204 (1988) (discussing judicially created prophylactic rules enforcing First Amendment); *id.* at 204-05 (arguing that strict scrutiny standard for racial classifications is prophylactic rule because it overenforces Equal Protection Clause); see also *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting) (“[T]he Court has not discovered or found the law in making today’s decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.” (footnote omitted)); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1305 (2006) (“It is routine, not anomalous, for the Court to fashion tests that do not perfectly capture the Constitution’s meaning, and sometimes overenforce underlying norms, but possess other important virtues prominently including judicial manageability.”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 900 (1999) (“[C]onstitutional rights so routinely include prophylactic components that attempting to distinguish the ‘real’ right from its ‘remedial’ ingredients is both hopeless and pointless.”). But see *Dickerson v.*

III. JUSTIFICATIONS<sup>82</sup>

A review of the scholarly literature reveals two paired sets of justifications for the judicial creation of prophylactic constitutional rules. First, by creating bright lines, such rules facilitate compliance with constitutional provisions by both government officials who interact with citizens in the field and the courts that must determine the constitutionality of particular state actions. Second, by providing remedies for constitutional violations, such rules deter misconduct by government officials and protect the integrity of the courts. Both sets of justifications derive from one simple notion: “[constitutional] rights are designed to work in the real world, which means that their shape will always be influenced by pragmatic concerns about implementation and enforcement.”<sup>83</sup>

The first pair of justifications focuses on a pragmatic need for “ease and clarity of [a rule’s] application.”<sup>84</sup> As one commentator has stated, “[c]onstitutional protections like the Fifth Amendment’s privilege against compelled self-incrimination or the Fourth Amendment’s requirement that searches and seizures be reasonable are not by their terms readily applicable in the field . . . .”<sup>85</sup> It is simply ineffective to instruct police and prosecutors, “Don’t violate the Fifth Amendment prohibition on coerced confessions,” and then expect them to review hundreds of hair-splitting judicial decisions to determine on which side of the blurry line between impermissible coercion and permissible interrogation their conduct lies.<sup>86</sup> By providing clear guidelines for

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United States, 530 U.S. 428, 457-61 (2000) (Scalia, J., dissenting) (disputing parties’ joint contention that prophylactic constitutional rules are ubiquitous and arguing that “what the court did in *Miranda* . . . is in fact extraordinary”).

<sup>82</sup> In this discussion of the justifications for the judicial creation of prophylactic constitutional rules, I focus on the reasons why courts have felt compelled, rightly or wrongly, to adopt such rules rather than on the source of courts’ legal authority to adopt them, which I address in Part IV. Readers who are ultimately unpersuaded by my arguments in Part IV that courts have such authority may believe that this Part should more properly be titled “Excuses.”

<sup>83</sup> Levinson, *supra* note 81, at 926.

<sup>84</sup> *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 425 (1986)); *see also id.* at 681-82 (“[T]he ‘relatively rigid [*Miranda*] requirement that interrogation must cease upon the accused’s request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts . . . .” (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979))).

<sup>85</sup> Arthur Leavens, *Prophylactic Rules and State Constitutionalism*, 44 SUFFOLK U. L. REV. 415, 422 (2011).

<sup>86</sup> *See Dickerson*, 530 U.S. at 435; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1295 (1976) (“[S]imple prohibitory orders are

official conduct, “prophylactic rules build a fence around the Constitution.”<sup>87</sup> To mix metaphors, specific prophylactic rules put meat on the bare bones of general prohibitory rules.

Just as prophylactic constitutional rules provide clear guidance to government officials in the field, they fill the need for judicially manageable standards.<sup>88</sup> Before *Miranda*, for example:

[C]ourts had struggled to determine whether confessions were voluntary or whether, instead, “a defendant’s will was overborne.” The *Miranda* rule, which is the epitome of a judicially manageable standard, solved with a single stroke the problems of analytical adequacy, strain on the judiciary’s empirical capacities, and predictability of judicial outcomes.<sup>89</sup>

Thus, some legal scholars have contended that constitutional rulings can be divided into two distinct types: rulings that determine the meaning of a constitutional provision, or “operative propositions,” and rulings that direct courts on how to decide whether the constitutional provision, as interpreted by the court, has been violated, or “constitutional decision rules.” The latter are sometimes characterized as prophylactic.<sup>90</sup> Under this view, the “operative proposition” of *Miranda* would be the general prohibition on the use of coerced confessions under the Fifth Amendment and the “constitutional

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inadequate to provide relief.”); Klein, *supra* note 44, at 1053 (asserting that when Supreme Court creates prophylactic rules, it “is responding to the fact that its own case law is too confusing for a nonlawyer police to learn or follow, or the factual circumstances confronted by the state actors are too varied for a standard (rather than a bright-line rule) to provide sufficient guidance”); Thomas, *supra* note 49, at 323 (“The ability of [the prophylactic] remedy to use specificity and precision to hone in on affiliated conduct is what makes this remedy effective at redressing the whole of the legal problem. Other remedies are often inadequate to provide the necessary holistic solution to a complex legal problem.” (footnotes omitted)).

<sup>87</sup> Landsberg, *supra* note 41, at 927; *see also* *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (“By prohibiting further interrogation after the invocation of these rights [under *Miranda*], we erect an auxiliary barrier against police coercion.”).

<sup>88</sup> *See* Fallon, *supra* note 81, at 1305.

<sup>89</sup> *Id.* at 1305-06 (quoting *Dickerson*, 530 U.S. at 434).

<sup>90</sup> *See* Berman, *supra* note 37, at 57 (“[C]ourt-announced constitutional doctrine can consist of two analytically distinct outputs.”); *id.* (arguing that line may be drawn “between judicial determinations of the meaning of a constitutional provision and announcements of the rule courts should apply when called upon to decide whether the judicially interpreted meaning is complied with”). Professor Berman calls a judicial determination of constitutional meaning a “constitutional operative proposition” and calls a judicially created rule on how to decide whether an operative proposition has been complied with a “constitutional decision rule.” *Id.* at 58. Similarly, Professor Fallon distinguishes between rights “associated with constitutional meaning,” which he calls “background rights,” and rights associated with judicial “implementing doctrines,” which he calls “doctrinal rights.” Fallon, *supra* note 81, at 1322-23.

decision rule” would be the judicial presumption that all unwarned confessions are coerced.

Under another view, there can be no distinction between rules that express constitutional meaning and constitutional decision rules, because constitutional decision rules define constitutional meaning.<sup>91</sup> In other words, “if practical considerations such as judicial manageability influence adjudication, as they do, then they are sources of meaning fully as much as constitutional text and history.”<sup>92</sup> For purposes of this Article, however, there is no need to decide which of these theories is correct—that is, whether constitutional meaning exists distinct from doctrinal decision rules or, instead, decision rules create constitutional meaning. It is sufficient simply to note that when a court is required to choose between competing constitutional standards, the judicial manageability of the standards is and must be an important consideration.<sup>93</sup>

The second pair of justifications for prophylactic constitutional rules focuses on the practical need to preserve the integrity of the courts and to shape the conduct of government officials. When the Constitution itself does not provide a remedy for a constitutional violation and the political branches have not acted to provide one, the Supreme Court must create one in order to prevent courts from becoming accomplices to illegality.<sup>94</sup> The flip side of this coin is

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<sup>91</sup> See Fallon, *supra* note 81, at 1313-14 (discussing views of “school of constitutional pragmatists [that] denies that any useful distinction exists between constitutional rights (or meaning) and the doctrinal tests that courts apply”); Levinson, *supra* note 81, at 926 (“[T]he notion that rights and remedies exist in entirely separate spheres cannot survive the examples of remedial deterrence and incorporation that show how rights are perpetually influenced by, and in important respects inseparable from, remedies.”).

<sup>92</sup> Fallon, *supra* note 81, at 1313.

<sup>93</sup> See Strauss, *supra* note 81, at 207.

<sup>94</sup> See *United States v. Peltier*, 422 U.S. 531, 536 (1975) (“Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to the ‘imperative of judicial integrity’ . . . .” (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960))); *id.* at 537 (“Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of the Laws of the United States, laws by which the Judges in every State [are] bound . . . .” (internal quotations omitted) (quoting *Lee v. Florida*, 392 U.S. 378, 386-87 (1968))); *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”); *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (“The court’s aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant’s wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.” (footnotes omitted)); see also Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 254-60 (1974) (comparing “fragmentary” model of government, under which judiciary is not deemed responsible for wrongdoings of police or prosecution, with “unitary” model, under which police and prosecutor are deemed to be government agents and

the oft-cited deterrence rationale: “By refusing to admit evidence gained as a result of [illegal] conduct, the courts hope to instill in [government officials] a greater degree of care toward the rights of an accused.”<sup>95</sup> Thus, prophylactic rules provide the courts both with a carrot—the promise of easy application—and a stick—the threat of sanctions if the rule is not followed—in aid of their efforts to ensure governmental compliance with constitutional provisions.

Finally, I would argue that, in addition to these justifications, there is yet another justification for prophylactic constitutional rules that has received little attention in the scholarly literature on this topic: the need to address the widespread skepticism in our society regarding the basic fairness and legitimacy of the criminal justice system, particularly within minority communities.<sup>96</sup> Prophylactic rules may be less susceptible to manipulation (whether conscious or unconscious), than more finely tuned<sup>97</sup> rules, by government officials and judges who may want, or who may be under pressure, to reach a particular result, leading to greater transparency, predictability, and evenhandedness in the enforcement of constitutional protections. Moreover, rules that are designed to be more readily understood and applied by government officials and judges can also be more readily

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government as whole, including judiciary, is deemed responsible for use of evidence that is wrongfully obtained); *id.* at 257 (under unitary model, Fourth Amendment exclusionary rule “is the only appropriate and timely method the court has to show its respect for the rule of law”).

<sup>95</sup> *Peltier*, 422 U.S. at 539 (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)); *see also id.* at 538 (“This approach to the ‘imperative of judicial integrity’ does not differ markedly from the analysis the Court has utilized in determining whether the deterrence rationale undergirding the exclusionary rule would be furthered by retroactive application of new constitutional doctrines.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 432 (1974) (“If [a court] receives the products of . . . searches and seizures without regard to their constitutionality and uses them as the means of convicting people whom the officer conceives it to be his job to get convicted, it is not merely tolerating but inducing unconstitutional searches and seizures.”).

<sup>96</sup> *See* NAT’L CTR. FOR STATE COURTS, THE ACCESS AND FAIRNESS CAMPAIGN: 2017-2019, at 1 (“Less than a third of African-Americans believe courts provide equal justice.”); *id.* at 5 (“Public perceptions of unequal treatment by courts and the sense that the poor and minorities are treated differently are growing.”); *see also* CONFERENCE OF STATE COURT ADM’RS, POSITION PAPER ON STATE COURTS’ RESPONSIBILITY TO ADDRESS ISSUES OF RACIAL AND ETHNIC FAIRNESS 1 (2001) (arguing that recent events and media scrutiny “reveal not just evidence of actual prejudice but the perception of many Americans that prejudice and bias pervade many of our institutions, including the entire justice system”); *id.* at 2 (“[A] 1999 survey conducted by the National Center for State Courts . . . revealed that African-Americans ‘consistently’ voiced the most negative opinions about the courts, with almost 70 percent believing that they, as a group, receive ‘somewhat’ or ‘far’ worse treatment from the courts than other citizens . . . .”); Kary L. Moss & Daniel S. Korobkin, *Destination Justice*, 80 MICH. B.J. 36, 40 (2001) (“Cynicism pervades communities of color that perceive that the criminal justice system . . . does not and will not hear their complaints.”).

<sup>97</sup> *See infra* note 120.



understood by the people whose lives, liberty, and property they are intended to protect. Thus, they may restore confidence in our governmental institutions by ensuring not only that justice is done, but also that it is clearly seen to be done.<sup>98</sup>

#### IV. LEGITIMACY

Of course, establishing the practicality and utility of prophylactic constitutional rules does not, ipso facto, establish that the Supreme Court has legitimate authority to create them. Professor Grano has aptly described the legitimacy problem:

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. "Mistake" remains possible, of course, because we cannot expect the Court to be infallible in exercising legitimate authority. A legitimacy issue not addressed in *Marbury* is raised, however, when the Court invalidates official conduct without finding an actual constitutional violation.<sup>99</sup>

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<sup>98</sup> See *Utah v. Strieff*, 136 S. Ct. 2056, 2069-71 (2016) (Sotomayor, J., dissenting) (arguing that narrow interpretation of Fourth Amendment exclusionary rule contributes to general erosion of trust in justice system); *id.* at 2070 (arguing that rule allowing introduction of evidence seized after suspicionless police stop disproportionately affects people of color); CONFERENCE OF STATE COURT ADM'RS, *supra* note 96, at 3 ("[P]recisely because the public looks to the courts above all for fairness and equal treatment, the courts should take the lead role in addressing the issue of racial and ethnic bias throughout the justice system, as well as do everything possible to ensure fairness and eliminate injustices within the courts themselves.").

<sup>99</sup> Grano, *supra* note 45, at 101-02 (footnotes omitted); Schrock & Welsh, *supra* note 37, at 1127 ("The strict *Marbury* proponent would deny to the courts any subconstitutional powers over other branches, claiming instead that the Supreme Court has no business imposing, say, the *Miranda* warning rules unless the failure by police departments to provide such warnings violates the fifth amendment."); see also *Oregon v. Elstad*, 470 U.S. 298, 370-71 (1985) (Stevens, J., dissenting) (arguing that, if violation of *Miranda* is not necessarily violation of Constitution, Court "must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power"); *Michigan v. Tucker*, 417 U.S. 433, 462 (1974) (Douglas, J., dissenting) ("The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis."); *North Carolina v. Pearce*, 395 U.S. 711, 741 (1969) (Black, J., concurring and dissenting) (agreeing that due process prohibits imposition of harsher sentence on defendant who successfully appeals from his conviction and who is again convicted after new trial merely to punish defendant for taking appeal, but arguing that courts are "not vested with any general power to prescribe particular devices[, such as requiring the sentencing judge to state the reasons for the more severe punishment on the record] '[i]n order to assure the absence of such a motivation' . . . [and that] [t]his is

Grano has identified three reasons to question the Court's legitimacy when it acts in this way:

First, the Court may violate the separation of powers doctrine by invading an area left to Congress or to the Executive under the Constitution. Second, the Court may violate the principle of federalism, embodied in the tenth amendment . . . . Third, the Court may do both of the above by invading an area in which the states have final authority until Congress chooses to enter the field pursuant to article I or some other delegation of authority.<sup>100</sup>

At the time that Grano wrote these words, the Supreme Court had not yet squarely addressed this legitimacy issue.<sup>101</sup> Although the Court still has not explained the theoretical underpinnings of its authority to create prophylactic constitutional rules, in *Dickerson v. United States*,<sup>102</sup> the Court held that it has such authority.<sup>103</sup> Specifically, the Court held that, despite numerous previous cases in which it had stated that a government official who violates the *Miranda* rules does not thereby violate a personal constitutional right of the interrogated subject, and that Congress and the states were free to substitute other procedural safeguards for the *Miranda* rules,<sup>104</sup> the Court's decision in *Miranda* was "a constitutional decision" and was binding on Congress and the

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pure legislation if there ever was legislation" (second alteration in original)), *overruled in part on other grounds by* *Alabama v. Smith*, 490 U.S. 794 (1989).

<sup>100</sup> Grano, *supra* note 45, at 124 (footnotes omitted); *id.* at 136 ("Under *Marbury*, the Court does not assume the role of special guardian of constitutional liberties. Rather, the Court invalidates legislation or official conduct only because it must decide cases brought under the Constitution, which has priority over other law. The Court's task, and the task of other federal courts, is simply to decide cases, not to supervise state courts or state officials." (footnotes omitted)); *see also* *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting) ("[W]hat makes a decision 'constitutional' in the only sense relevant here—in the sense that renders it impervious to supersession by congressional legislation . . . —is the determination that the Constitution *requires* the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.").

<sup>101</sup> Grano, *supra* note 45, at 101 (stating that "the [Supreme] Court has ignored the issue" of legitimacy of prophylactic rules).

<sup>102</sup> 530 U.S. 428 (2000).

<sup>103</sup> *See id.* at 437. Chief Justice Rehnquist authored the majority opinion in *Dickerson* in which Justices Breyer, Ginsburg, Kennedy, O'Connor, Souter, and Stevens joined. *Id.* at 430.

<sup>104</sup> *See id.* at 450-55 (Scalia, J., dissenting) (citing several post-*Miranda* cases).

states.<sup>105</sup> Accordingly, the Court invalidated Congress's legislative attempt to overrule *Miranda* and reinstate the totality of the circumstances test.<sup>106</sup>

Justice Scalia authored a forceful dissent in *Dickerson*, which Justice Thomas joined.<sup>107</sup> Justice Scalia argued that, in light of the Court's many cases holding that *Miranda* sweeps more broadly than the Constitution,<sup>108</sup> "it is simply no longer possible for the Court to conclude . . . that a violation of *Miranda*'s rules is a violation of the Constitution. But . . . that is what is required before the Court may disregard a law of Congress governing the admissibility of evidence in federal court."<sup>109</sup> Justice Scalia also contended that, "as an appeal to logic," the majority's argument that *Miranda* must be a constitutional rule because it has been applied to the states

is a classic example of begging the question: Congress's attempt to set aside *Miranda*, since it represents an assertion that violation of *Miranda* is not a violation of the Constitution, *also* represents an assertion that the Court has no power to impose *Miranda* on the States. To answer this assertion . . . by asserting that *Miranda* *does* apply against the States, is to assume precisely the point at issue.<sup>110</sup>

Finally, Justice Scalia rejected the argument by both parties in *Dickerson* that the Court had the authority to adopt prophylactic constitutional rules that sweep more broadly than the Constitution, and that it had previously done so in many cases.<sup>111</sup> He contended that, to the contrary, "what the Court did in

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<sup>105</sup> *Id.* at 438 (majority opinion); *see also id.* at 437 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

<sup>106</sup> *Id.* at 442. The *Dickerson* majority observed that the *Miranda* Court had rejected the traditional totality of the circumstances test as creating an unacceptably great risk that an involuntary confession would be found voluntary. *Id.* Because the federal statute with which Congress had attempted to overrule *Miranda* merely reinstated that test, the Court concluded that the statute was insufficient to meet the "constitutional minimum." *Id.* Thus, *Dickerson* left open the question of whether other attempts by Congress or the states to replace the *Miranda* rules with equally protective measures might be successful. *See infra* note 136.

<sup>107</sup> *Dickerson*, 530 U.S. at 444 (Scalia, J., dissenting).

<sup>108</sup> *See id.* at 451-54 (citing several post-*Miranda* cases).

<sup>109</sup> *Id.* at 454.

<sup>110</sup> *Id.* at 456.

<sup>111</sup> *Id.* at 457-61. Justice Scalia argued, for example, that the Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968), which concluded that the Confrontation Clause forbids the admission of a non-testifying codefendant's incriminating confession in a joint trial, even where the jury has been instructed that the confession is admissible only against the confessing defendant, did not create a prophylactic rule. *Dickerson*, 530 U.S. at 458 (Scalia, J., dissenting). *Contra supra* notes 72-73 and accompanying text (arguing *Bruton* rule is prophylactic). Justice Scalia contended that *Bruton* was merely based "upon the self-evident proposition that the inability to cross-examine an available witness whose damaging out-of-court testimony is introduced violates the Confrontation Clause, combined with the conclusion that in these circumstances a mere jury instruction can never be relied

*Miranda* . . . is in fact, extraordinary. That the Court has, on rare and recent occasion, repeated the mistake does not transform error into truth, but illustrates the potential for future mischief that the error entails.”<sup>112</sup>

The reasoning of the majority decision in *Dickerson* also has been widely criticized in the scholarly literature for its failure to provide a principled defense of the Supreme Court’s authority to create prophylactic constitutional rules.<sup>113</sup> Nevertheless, as a purely legal matter, the issue is now settled. Accordingly, readers who are satisfied to know that there is binding legal precedent supporting the authority of the Court to create prophylactic

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upon to prevent the testimony from being damaging.” *Dickerson*, 530 U.S. at 458 (Scalia, J., dissenting). Surely, however, it cannot be the case that juries will *never* follow a limiting jury instruction, and, in cases in which they do, the Confrontation Clause is not violated. Thus, the Court’s decision in *Bruton* clearly was premised on its belief that the admission of a codefendant’s confession creates a *significant risk* of a constitutional violation, not that it constitutes a constitutional violation per se.

<sup>112</sup> *Dickerson*, 530 U.S. at 460 (Scalia, J., dissenting).

<sup>113</sup> See, e.g., Berman, *supra* note 37, at 28-29 (asserting that failure of *Dickerson* majority “to address whether *Miranda* engaged in a legitimate exercise of judicial power in the first instance is profoundly frustrating”); George M. Dery III, *The “Illegitimate Exercise of Raw Judicial Power:” The Supreme Court’s Turf Battle in Dickerson v. United States*, 40 BRANDEIS L.J. 47, 77 (2001) (referring to *Dickerson*’s “dismally weak arguments that deteriorate into bald bootstrapping”); Kamisar, *supra* note 61, at 397 (“[N]ot infrequently, the clarity and general quality of a ‘compromise opinion’ leaves a good deal to be desired. *Dickerson* marks one of those times.”); Klein, *supra* note 44, at 1071 (contending that majority opinion in *Dickerson* “was, in a word, terrible”); Richard H.W. Maloy, *Can a Rule Be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2498 (2001) (contending that Court’s method in *Dickerson* “should be condemned by all who consider constitutional review an exacting science”). Kamisar qualifies his criticism somewhat by stating that,

[i]n fairness to Chief Justice Rehnquist, it was quite an accomplishment to get six members of the Court with differing views on the subject to join his opinion. And it is hard to see how the Chief Justice could have held all six Justices if he had written at any length about the constitutional status of prophylactic rules in general or the *Miranda* rules in particular.

Kamisar, *supra* note 61, at 398. Moreover, although the reasoning of the *Dickerson* majority has been widely disparaged, its conclusion has not. Indeed, four out of five of the above commentators thought that there were good reasons for the Court in *Dickerson* to uphold *Miranda* and to strike down the federal statute that the Court simply failed to address. See Berman, *supra* note 37, at 168 (“[T]he operative proposition/decision rule distinction has helped make clear how the *Dickerson* majority could have better replied to Justice Scalia’s overblown attack on *Miranda*’s legitimacy . . . .”); Kamisar, *supra* note 61, at 426 (“[T]here is nothing inappropriate or illegitimate about prophylactic rules generally or the *Miranda* warnings in particular.”); Klein, *supra* note 44, at 1071-77 (discussing justifications that *Dickerson* Court could have given for upholding *Miranda* as constitutional rule); Maloy, *supra*, at 2497 (“The most serious criticism that can be lodged against the *Dickerson* decision is not that it was a race to judgment in order to save *Miranda*, but that the reason or reasons for that result are insufficiently developed.”).

constitutional rules and who are not interested in considering whether *Dickerson* has any theoretical support can skip the rest of this Section and proceed directly to Part V.

For those who wish to persevere, there are two schools of thought among those commentators who have considered the legitimacy of constitutional rules that are commonly characterized as prophylactic. The first school believes that the Court has the authority to create prophylactic rules because such rules are necessary.<sup>114</sup> The second school contends that, while the Court lacks authority to create constitutional prophylactic rules,<sup>115</sup> if a constitutional rule is necessary to effectuate constitutional rights, it simply should not be characterized as prophylactic.<sup>116</sup>

Professor Susan Klein is representative of the first school. Klein contends that “generating constitutional prophylactic rules and incidental rights to protect constitutional values is a beneficial and necessary function of the judiciary,” and “[t]he *Miranda* decision is a perfect example of this.”<sup>117</sup> She explains that, in light of the unworkability of the pre-*Miranda* totality of the circumstances rule, both for government officials in the field and for courts,<sup>118</sup> the *Miranda* Court

did not have the option of precisely adhering to the constitutional clause at issue; rather, it was forced either to under- or overprotect the constitutional right. Without the *Miranda* warnings, the Court will inadvertently admit some confessions that are compelled. With the *Miranda* warnings, the Court will exclude some confessions that were not compelled.<sup>119</sup>

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<sup>114</sup> See, e.g., Landsberg, *supra* note 41, at 926 (“Necessity is the basis for fashioning a prophylactic rule.”).

<sup>115</sup> See, e.g., Schrock & Welsh, *supra* note 37, at 1175 n.288 (“[J]udicial legislation undermines that authority [to engage in *Marbury*-type judicial review] not only by being cavalier about constitutional sources for particular subconstitutional rules but also, and more damagingly, by obscuring the boundaries of judicial review—and by showing a willingness to dissipate its identity as a court by casually donning a legislative hat.”).

<sup>116</sup> See, e.g., Berman, *supra* note 37, at 154 (arguing that *Dickerson* could have been justified on ground that constitutional decision rules, such as *Miranda*, “are ineliminable, [and] hence cannot be categorically illegitimate,” and that *Miranda* “is not a ‘prophylactic’ rule in the Grano-Scalia sense because [*Miranda*] does not *overenforce* constitutional meaning as measured against the appropriate baseline; rather, it was adopted to *optimally* enforce constitutional meaning”); Schrock & Welsh, *supra* note 37, at 1135-36 (arguing that Court has authority to adopt remedy that is not expressly mandated by Constitution as constitutional rule when remedy is required to prevent constitutional provision from becoming “the merest ‘form of words’”).

<sup>117</sup> Klein, *supra* note 44, at 1035.

<sup>118</sup> See *supra* Part II.

<sup>119</sup> Klein, *supra* note 44, at 1036.

In Klein's view, "[t]here is no principled reason to believe that when a judicially enforceable rule of constitutional law cannot perfectly map the constitutional right at issue, the Constitution favors judicial underprotection over judicial overprotection."<sup>120</sup> In short, although prophylactic rules may occasionally result in the invalidation of a state action that did not violate the Constitution, "[t]he Court cannot perform miracles; if a constitutional theory requires the Court to do the impossible, [that is, to create a decision rule that perfectly maps the underlying operational rule,] there is something wrong with the theory, not with the Court."<sup>121</sup>

Under the second school of thought, many rules that are commonly characterized as prophylactic because they appear to "sweep[] more broadly"<sup>122</sup> than the constitutional provisions that they implement are not, in fact, prophylactic rules, but are mandated by the Constitution. For example, Professors Thomas Schrock and Robert Welsh contend that, contrary to Professor Henry Monaghan's characterization of the Supreme Court's holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>123</sup> that an invasion of Fourth Amendment rights by federal officials gives rise to a cause of action for damages as a rule going beyond the requirements of the

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<sup>120</sup> *Id.*; see also *id.* at 1051 ("The charge that prophylactic rules and incidental rights are constitutionally illegitimate, because the Court has no authority to provide greater protection than mandated by the U.S. Constitution, seems to me merely a policy preference in favor of under-enforcement rather than over-enforcement of individual liberties."); Monaghan, *supra* note 37, at 21 ("A prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice. This may happen where, for example, there is a substantial danger that a more finely tuned rule may be subverted in its administration by unsympathetic courts, juries, or public officials."). In this context, the "more finely tuned rule" would be a general prohibitory rule. For example, under the totality of the circumstances rule that was in place before *Miranda*, courts would simply consider on a case-by-case basis whether the Fifth Amendment prohibition on coerced confessions had been violated, with the absence of warnings being one of the many circumstances considered. That rule is more "finely tuned" than the *Miranda* rule in the sense that minor variations in the circumstances of the interrogation could affect the outcome of the case. Many of those subtle variations in circumstances may be well-nigh invisible to reviewing courts, thereby creating the risk that a court will erroneously conclude that there was no violation. See *Miranda v. Arizona*, 384 U.S. 436, 468-69 ("Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact."); Fallon, *supra* note 81, at 1305-06 (noting strain that totality of circumstances test placed on "empirical capacities" of courts); *supra* notes 85-86 and accompanying text.

<sup>121</sup> Klein, *supra* note 44, at 1035; Strauss, *supra* note 81, at 208 ("Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases.").

<sup>122</sup> *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

<sup>123</sup> 403 U.S. 388 (1971).

Constitution,<sup>124</sup> *Bivens* was actually “a constitutional decision . . . because it prevents the fourth amendment from being rendered a ‘mere form of words.’”<sup>125</sup> Similarly, Professors Schrock and Welsh contend that if the use of illegally seized evidence at trial is treated as merely the completion of a single governmental transaction, that use itself must be unconstitutional.<sup>126</sup> Accordingly, the *Mapp* exclusionary rule does not go “beyond” the Constitution merely because it provides a remedy that the Constitution does not expressly mandate and is not a prophylactic constitutional rule. In a slightly different vein, Professor Mitchell Berman argues that *Miranda* is not a prophylactic rule because it merely provides a “decision rule” designed to minimize adjudicatory error.<sup>127</sup> Therefore, it does not overenforce constitutional meaning, but rather “optimally” enforces constitutional meaning.<sup>128</sup>

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<sup>124</sup> See Monaghan, *supra* note 37, at 24 (“[U]nless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee, [*Bivens*] is not constitutional interpretation, but common law.”).

<sup>125</sup> Schrock & Welsh, *supra* note 37, at 1135-36.

<sup>126</sup> Schrock & Welsh, *supra* note 94, at 299 (“Given the concept of evidence and the notion of an evidentiary transaction, and given the assumption that the evidentiary transaction is a special concern of the amendment, and given the further assumption that the amendment is coherent, the use of evidence in the evidentiary transaction falls under the amendment’s proscription along with the invasion, and therefore the courts are, like the executive, under a direct and immediate fourth amendment duty.”).

<sup>127</sup> Berman, *supra* note 37, at 154.

<sup>128</sup> *Id.* It is unclear to me whether a “decision rule” designed to minimize constitutional errors can be meaningfully distinguished from an irrebuttable presumption that a constitutional violation exists upon proof of a particular fact, and the legitimacy of irrebuttable presumptions in this context has been questioned. Specifically, Grano argues that, for purposes of *Miranda*, “actual coercion and an irrebuttable presumption of coercion are quite different with respect to the existence of an actual constitutional violation.” Grano, *supra* note 45, at 111 n.57; see also Joseph D. Grano, *Miranda’s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 179-80 (1988) (arguing that rule that conclusively presumes existence of constitutional violation, such as coerced confession, upon proof of conduct that itself does not violate Constitution, such as failure to provide *Miranda* warnings, has effectively, and illegitimately, rendered existence of actual constitutional violation “legally immaterial”). Grano also contends, however, that the Supreme Court’s decision in *United States v. Wade*, holding that the Sixth Amendment right to counsel applies at post-indictment lineups, is not a prophylactic rule, because “lineups as they are presently conducted” actually jeopardize the fairness of the trial and, therefore, a lineup is a critical stage of the prosecution. See Grano, *supra* note 45, at 121; see also *supra* note 69 and accompanying text. Presumably, however, not *all* post-indictment lineups conducted in the absence of counsel at the time that *Wade* was decided were unduly suggestive, resulting in an unfair trial. If Grano believes that the mere fact that there is a significant risk that the absence of counsel at a lineup would result in an unfair trial gives rise to a constitutional requirement that any identification at a lineup where counsel was not present be excluded, even if an unnecessarily suggestive lineup procedure is not proved, see,

Thus, one school of thought contends that judicially adopted constitutional prophylactic rules are legitimate when they are necessary to meaningfully safeguard individual rights and the legislature has failed or refused to act, while another contends that, if such a rule is necessary to prevent a constitutional provision from being a mere form of words, there is no legitimacy issue because the rule cannot be regarded as prophylactic. This academic distinction, however, has little practical consequence. Whether we say that prophylactic constitutional rules are legitimate when they are necessary or we say that necessary constitutional rules cannot be prophylactic and, therefore, their legitimacy cannot be in question, the bottom line is that some constitutional rules that are necessary to give meaning to the Constitution may “sweep more broadly”<sup>129</sup> than the “operative proposition”<sup>130</sup> that is derived from interpreting the text of the Constitution. Because such rules are simply “ineliminable”<sup>131</sup> if the Constitution is to have any practical force, we have no choice but to accept them.<sup>132</sup>

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*e.g.*, *Gilbert v. California*, 388 U.S. 263, 273 (1967) (stating that under *Wade*, “[o]nly a per se exclusionary rule as to . . . testimony [regarding an uncounseled out-of-court post-indictment identification] can be an effective sanction to assure that law enforcement authorities will respect the accused’s constitutional right to the presence of his counsel at the critical lineup”), it is difficult to understand why he rejects the argument that the significant risk of a coerced confession in the absence of the *Miranda* warnings gives rise to a constitutional requirement that all unwarned confessions be excluded, even if actual coercion is not proved. *Cf.* Strauss, *supra* note 81, at 194 (“If it is legitimate for a court to create a rebuttable presumption or burden of proof rule, why is it illegitimate for a court to decide that the sum of error costs and administrative costs will be minimized by making certain evidence legally immaterial?”).

Grano might respond that the Sixth Amendment guarantees the right to counsel at all critical stages of the prosecution and the *Wade/Gilbert* exclusionary rule is required to keep that provision from being a mere form of words, while the Self-Incrimination Clause does not require *Miranda* warnings, and the warnings are not required to prevent that provision from being a mere form of words. The requirement that a defendant be represented at all critical stages of the prosecution, however, may *itself* be characterized as a prophylactic rule. Instead of identifying critical stages of the prosecution at which the presence of counsel is always required, the Court could have simply required defendants to show on a case-by-case basis that the absence of counsel at a particular proceeding deprived the defendant of a meaningful defense. I do not contend that that would be a *good* rule, but it would not be inconsistent with the facial requirements of the Sixth Amendment. *See United States v. Wade*, 388 U.S. 218, 225 (1967) (“The plain wording of [the Sixth Amendment] encompasses counsel’s assistance whenever necessary to assure a meaningful ‘defence.’”).

<sup>129</sup> *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

<sup>130</sup> *See Berman*, *supra* note 37, at 57-58.

<sup>131</sup> *Id.* at 154.

<sup>132</sup> *See, e.g., LaFave*, *supra* note 1, at 859 (stating that to reject legitimacy of *Miranda* because not all unwarned confessions are coerced “is nothing more than a call for judicial impotence in the protection of constitutional rights”).



What this discussion regarding legitimacy reinforces, however, is that the authority of the Court to create prophylactic rules is not without limits. To the contrary, there is general agreement that the Court should use this authority cautiously and rules should be as narrowly tailored as possible to accomplish their purpose.<sup>133</sup> This is a corollary of the notion that the legitimacy of prophylactic constitutional rules derives from their necessity. Similarly, “the courts should intervene [only] in areas where they are competent and the legislatures are institutionally likely to go wrong,”<sup>134</sup> or where legislatures and government officials have resisted measures to protect individual constitutional rights.<sup>135</sup> The Court should not expand a constitutional protection beyond the provision’s underlying “operative proposition” based on policy determinations that are more properly within the legislative function.<sup>136</sup>

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<sup>133</sup> See *United States v. Patane*, 542 U.S. 630, 640–41 (2004) (“[N]othing in *Dickerson* calls into question our continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.”); Fallon, *supra* note 81, at 1310 (“[T]he judicially manageable standard that most closely approximates the Constitution’s meaning would be that which would produce the greatest possible proportion of correct outcomes (as measured by reference to background constitutional norms) over the total range of cases to be decided by courts.”); Klein, *supra* note 44, at 1068 (“Caution requires that the Court generate prophylactic rules . . . only when absolutely necessary.”); Leavens, *supra* note 85, at 439–40 (“The closer a decision rule is to the operative proposition that underlies it, or in other words, the tighter the correspondence between the two, the more its adjustment would seem to be the legitimate prerogative of the court—the institution vested with the authority to interpret the constitution.”).

<sup>134</sup> Strauss, *supra* note 81, at 208–09.

<sup>135</sup> See *United States v. Wade*, 388 U.S. 218, 239 (1967) (“Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as ‘critical.’ But neither Congress nor the federal authorities have seen fit to provide a solution.”); Klein, *supra* note 44, at 1068 (“[B]efore acting the Court should clearly warn the other branches of the federal and state governments in the appropriate cases that they must act to prevent a Court-imposed rule or right. This warning should be coupled with patience, such that action is taken only after long-term failure by the coequal branches.”).

<sup>136</sup> See Leavens, *supra* note 85, at 439 (“[T]o the extent that the expansion of a decision rule is justified by a principled, integral connection to its underlying operative proposition, it seems legitimate as a judicial decision; to the extent that such expansion is driven by policy based in empiricism, it seems more properly a legislative function.”). Indeed, as several commentators have observed, the fact that *Miranda* is a “constitutional rule” does not necessarily mean that Congress and state legislatures have no role in crafting rules to protect the constitutional privilege against self-incrimination during custodial interrogations. See, e.g., David A. Strauss, *Miranda, The Constitution, and Congress*, 99 MICH. L. REV. 958, 960 (2001) (“The common idea is that decisions by the Supreme Court are either ‘interpretations of the Constitution’ or ‘decisions that Congress can modify.’ (Decisions in the latter category are sometimes called ‘constitutional common law.’) The mistake is in not recognizing that a decision may be *both* an interpretation of the Constitution *and* a principle

In summary, there is general agreement that the Supreme Court lacks the authority to adopt broad prophylactic rules that would completely eliminate all incorrect determinations that there was no constitutional violation when a violation in fact occurred<sup>137</sup> or to create remedies that are not necessary to prevent the constitutional provision at issue from becoming a mere form of words.<sup>138</sup> I can perceive no reason, however, why the Court should be required to adopt rules that are so narrow that they would completely eliminate the potential for an incorrect determination that there was a constitutional violation when, in fact, no violation occurred, or be prohibited from adopting necessary remedies for which the Constitution does not expressly provide.<sup>139</sup> Rather, I believe that the Court has a duty to adopt both necessary remedies and rules that prevent an incorrect determination of constitutional compliance, while at the same time attempting to minimize the risk of incorrect determinations that a constitutional violation occurred.<sup>140</sup>

In light of the widespread skepticism regarding the basic fairness and legitimacy of the criminal justice system, particularly within minority communities,<sup>141</sup> a small risk of overprotecting constitutional rights is, in my view, outweighed by the need for clear, practical rules that inspire confidence

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that Congress may modify.”); *id.* at 973 (discussing circumstances under which Court may give deference to congressional judgments about what is needed to protect constitutional rights); *id.* at 974 (“*United States v. Dickerson*, which is on the surface a ringing reaffirmation of judicial supremacy, contains the seeds of a more full acknowledgement that both the courts and Congress play a legitimate role in the interpretation of the Constitution.”).

<sup>137</sup> An example of such an extreme rule would be one completely excluding the use of confessions at trial to prevent the risk of using a coerced confession.

<sup>138</sup> An example of such a rule would be one allowing a damages action for the violation of the Fifth Amendment prohibition on coerced confessions in addition to the suppression of such confessions.

<sup>139</sup> An example of such a rule would be one requiring the defendant to prove by clear and convincing evidence that his confession was coerced by physical violence or other actions intended to break his will before the confession could be excluded at trial.

<sup>140</sup> Indeed, it would appear that was what the *Miranda* Court believed it was doing when it made the empirical determination that the failure to provide warnings creates a significant risk that a statement by the accused during interrogation would be the result of coercion and that providing warnings would significantly decrease that risk. *See* Strauss, *supra* note 81, at 208 (stating *Miranda* Court “realized that a case-by-case review of voluntariness was severely testing its capacities, and those of the lower courts”). If the failure to give a warning results in coercion most of the time, and if the determination of voluntariness under the totality of the circumstances test is always a difficult task, a rule that excludes all unwarned confessions will arrive at the right result more often than not and will always be significantly easier to apply than case-by-case adjudication. Although it is arguable that the Court’s empirical determination might have been *wrong*—an issue on which I express no opinion—having made that determination, adopting a rule that was narrowly tailored to prevent that risk was not outside its authority.

<sup>141</sup> *See supra* note 96 and accompanying text.

in our governmental institutions. Accordingly, I believe that the Supreme Court's core function of interpreting the Constitution on a case-by-case basis, which, as was recognized in *Marbury v. Madison*,<sup>142</sup> includes the power to determine whether the actions of the executive and legislative branches are in compliance with its provisions, must include the power to adopt constitutional prophylactic rules that are necessary to ensure that those provisions are applied predictably and evenhandedly and to prevent them from becoming "a mere form of words."<sup>143</sup>

#### V. AUTHORITY OF STATE COURTS TO ADOPT PROPHYLACTIC RULES

Having concluded that the Supreme Court has the authority to adopt prophylactic rules to implement rights protected by the U.S. Constitution, I next consider whether state courts also have such authority. As I indicated in the introductory portion of this Article, a majority of the Connecticut Supreme Court, in an opinion I authored, concluded that they do.<sup>144</sup> In his concurring opinion, however, Justice Zarella questioned this authority, arguing that the majority had "not cited a case, statute, or constitutional provision that bestows on *this court*—a state court established by a state constitution—the power it today has opted to exercise."<sup>145</sup> He contended that "the power to craft prophylactic rules under the federal constitution rests solely with the United

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<sup>142</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>143</sup> Schrock & Welsh, *supra* note 37, at 1135-36. The relationship between case-by-case adjudication and judicial rulemaking has been the object of wide study. *See, e.g.*, Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 360 n.177 (1997) ("The extant literature relating to the common law method, analogical legal reasoning, stare decisis, and the like would of course fill a library."). This relationship is beyond the scope of this Article. For present purposes, it is sufficient to observe that, in a system governed by principles of stare decisis, there is little to distinguish the judicial power to decide what the Constitution requires in individual cases from the power to adopt constitutional rules. *See id.* at 360-61 ("Court decisions, we know, can become rules of sorts. What we call 'the common law method' means that cases are decided by analogy, by comparison of their facts to the facts of previously decided cases and conformity of their results to the results of those past cases. To the extent a court purposely conforms its decision to that of a previous court in this way, the parties are bound by the decision in the previous case; that decision has become a rule governing the outcome of the subsequent case. And this rule is likely to persist not merely as a rule of decision—to be followed by courts in deciding subsequent cases—but as a rule of conduct as well, to be followed by individuals and entities rationally conducting their everyday affairs in ways they believe least likely to result in court-imposed penalties or most likely to result in court-bestowed gains. Court decisions thus can serve as rules in much the same way that statutes do, encouraging and discouraging certain kinds of conduct with the promise that such conduct will bear particular legal consequences.").

<sup>144</sup> *State v. Dickson*, 141 A.3d 810, 824 n.11 (Conn. 2016).

<sup>145</sup> *Id.* at 849 (Zarella, J., concurring).

States Congress<sup>146</sup> . . . or with the Supreme Court or other federal courts.”<sup>147</sup> Justice Espinosa, who also concurred in the result, agreed with Justice Zarella’s contentions.<sup>148</sup> For the reasons that follow, I continue to believe that the *Dickson* majority correctly concluded that state courts have the authority to adopt prophylactic rules to implement rights protected by the U.S. Constitution.

It is, of course, well established that state courts have the power to interpret the U.S. Constitution to determine whether it has been violated on a case-by-case basis in the tradition of *Marbury v. Madison*.<sup>149</sup> This power is implicit in the “Madisonian Compromise,” embodied in Article III, Section 1 of the Constitution,<sup>150</sup> under which Congress has the power to create lower federal courts, but is not required to do so.<sup>151</sup> If Congress had declined to exercise this

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<sup>146</sup> See *id.* (first citing U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); then quoting *Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation [that] deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power [under § 5 of the Fourteenth Amendment] even if in the process it prohibits conduct which is not itself unconstitutional . . .”).

<sup>147</sup> See *id.* (citing *Ohio v. Robinette*, 519 U.S. 33, 43 (1996) (Ginsburg, J., concurring)). According to Justice Zarella, Justice Ginsberg’s concurring opinion in *Robinette* suggested that the Supreme Court may craft prophylactic measures to safeguard federal constitutional rights, but that state high courts are permitted to craft such rules only under state constitutions. See *id.* at 850-51. I address this argument below. See *infra* note 162.

<sup>148</sup> *Dickson*, 141 A.3d at 862 (Espinosa, J., concurring).

<sup>149</sup> See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816) (finding it “plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts” and, “[f]rom the very nature of their judicial duties,” state courts “were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—‘the supreme law of the land’”); *Bowling v. Parker*, 882 F. Supp. 2d 891, 895 (E.D. Ky. 2012) (“[S]tate courts are capable interpreters of federal constitutional law.”).

<sup>150</sup> U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

<sup>151</sup> See *Haywood v. Drown*, 556 U.S. 729, 745-47 (2009) (Thomas, J., dissenting) (“[The] so-called Madisonian Compromise bridged the divide ‘between those who thought that the establishment of lower federal courts should be constitutionally mandatory and those who thought there should be no federal courts at all except for a Supreme Court . . .’ The assumption that state courts would continue to exercise concurrent jurisdiction over federal claims is essential to this compromise. . . . In light of that historical understanding, this Court has held that, absent an Act of Congress providing for exclusive jurisdiction in the lower federal courts, the ‘state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.’” (citations omitted)); *Bowling*, 882 F. Supp. 2d at 895; see also *Printz v. United States*, 521 U.S. 898, 907 (1997) (noting that obligation of state courts to enforce federal law is implicit

power, or if it were to abolish federal district courts tomorrow, “state courts would be the only forum where litigants could bring constitutional claims.”<sup>152</sup> In fact, until 1875, when Congress first conferred general federal question jurisdiction on lower federal courts, “state courts were the primary forum for litigating federal constitutional rights.”<sup>153</sup>

Moreover, until the early twentieth century, many state court decisions involving the interpretation of the U.S. Constitution were unreviewable. This was because the Supreme Court had only limited appellate powers under the Judiciary Act of 1789.<sup>154</sup> The Court could review a decision of a state’s highest court in a case involving a title, right, privilege, or exemption protected by the U.S. Constitution only if the state court denied the constitutional claim.<sup>155</sup> Similarly, in cases in which a state law was challenged on federal constitutional grounds, the Supreme Court could review the state court decision only if the state court rejected the constitutional claim.<sup>156</sup> As a result, state courts “could impose more stringent constitutional requirements on state governments than the Supreme Court elected to impose.”<sup>157</sup> It was not until 1914 that Congress conferred statutory authority on the Supreme Court to review state court decisions upholding federal constitutional claims against a state government and, even then, such review was discretionary.<sup>158</sup> It is clear, therefore, that for an extended period in our nation’s history state courts were the primary, and frequently the only, fora in which federal constitutional claims could be litigated.<sup>159</sup>

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in Madisonian Compromise and is made explicit in article VI, clause 2, of Constitution, which provides that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”); *Atain Specialty Ins. v. Dwyer Concrete Lifting of Lexington, Inc.*, 12-cv-00021, 2012 WL 2119407, at \*1 (E.D. Ky. June 11, 2012) (“The Madisonian Compromise has been the foundation of our system of judicial federalism for more than two hundred years.”); *id.* (noting “implicit assumption” of Madisonian Compromise is “that state courts, not federal district courts, are the bedrock forum for citizens to exercise their legal claims” (citing *Printz*, 521 U.S. at 907)).

<sup>152</sup> *Bowling*, 882 F. Supp. 2d at 895 (citing *Hunter’s Lessee*, 14 U.S. (1 Wheat.) at 339-41).

<sup>153</sup> *Id.* at 896.

<sup>154</sup> See Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 982-83 (2010).

<sup>155</sup> See *id.* at 983.

<sup>156</sup> See *id.*

<sup>157</sup> *Id.* at 987.

<sup>158</sup> See *id.* at 984.

<sup>159</sup> Indeed, even today, state courts “have the exclusive power to adjudicate some types of federal constitutional claims.” *Bowling v. Parker*, 882 F. Supp. 2d 891, 896 (E.D. Ky. 2012) (citing *Allen v. McCurry*, 449 U.S. 90 (1980) (finding collateral estoppel applicable for state court judgments of 42 U.S.C. § 1983 suits)); see also *Stone v. Powell*, 428 U.S. 465, 494-95 (1976) (denying federal habeas claims when State provided opportunity to litigate Fourth Amendment claim); *Younger v. Harris*, 401 U.S. 37, 53-54 (1971) (deciding

In light of this legal and historical background, it seems clear to me that, if the authority of the Supreme Court to adopt prophylactic rules implementing the U.S. Constitution is a necessary component of the Court's essential judicial function of interpreting the law on a case-by-case basis in the tradition of *Marbury*—which I believe it is—state courts must also have that authority. I can see no reason why the undisputed authority of state courts to interpret and apply the U.S. Constitution in individual cases should be less extensive than the authority of the Supreme Court. Of course, the decisions of a state's highest court interpreting the U.S. Constitution are subject to review by the Supreme Court.<sup>160</sup> Obviously, however, it does not follow from that fact that state courts lack authority to adopt prophylactic constitutional rules in the first instance, any more than it follows that state courts cannot interpret the U.S. Constitution on a case-by-case basis because the Supreme Court can overturn those interpretations.<sup>161</sup> Accordingly, although, as I have discussed, there are reasons

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there was no occasion for federal intervention in pending state criminal prosecutions); Leavens, *supra* note 85, at 425 n.50 (explaining that “[e]ven after the Court’s jurisdiction was extended to permit review of such state decisions, the Court generally declined” to review decisions striking down governmental actions as violative of Constitution); Mazzone, *supra* note 154, at 994-1007 (explaining why, as practical matter, state courts’ interpretations of U.S. Constitution frequently are not subject to review by Supreme Court).

<sup>160</sup> See 28 U.S.C. § 1257(a) (2012) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . .”).

<sup>161</sup> A number of commentators who have assumed that state courts must have authority to adopt prophylactic constitutional rules under the U.S. Constitution have made the interesting argument that state courts should be permitted to adopt rules that are more protective than those adopted by the Supreme Court to reflect unique local conditions without being subject to review by the Court. See Mazzone, *supra* note 154, at 1045 (“[F]ederalism allows local governments to develop and implement rules that best suit their own conditions. In the antebellum era, for example, state courts were free to apply federal constitutional protections against state government more stringently in light of local needs.”); *id.* at 1030-41 (discussing opinions authored by Supreme Court Justice John Paul Stevens in which he urged Court to end its practice of reviewing state court decisions upholding claims under U.S. Constitution); see also Leavens, *supra* note 85, at 431 (“[I]f pragmatism justifies the Supreme Court’s contextual adjustments to *Miranda*’s constitutional decision rule, [state courts] should be similarly free to consider further pragmatic adjustments as long as these rule expansions are more protective of the underlying privilege and do not intrude on the Supreme Court’s authority to interpret the Fifth Amendment’s meaning.”). This proposal appears to be inconsistent with the decision in *Oregon v. Hass*, where the Court held that “a State may not impose . . . greater restrictions [on the government] as a matter of federal constitutional law when this Court specifically refrains from imposing them.” 420 U.S. 714, 719 (1975) (citing *Smayda v. United States*, 352 F.2d 251, 253 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *Aftanase v. Econ. Baler Co.*, 343 F.2d 187, 193 (8th Cir. 1965)). For a similar statement

why both the Supreme Court and state courts should proceed cautiously in adopting prophylactic constitutional rules, I can see no reason why the authority of state courts to craft such rules should not be coextensive with the Supreme Court's.<sup>162</sup>

from the Supreme Court made more recently, see *Kansas v. Marsh*, 548 U.S. 163, 184 (2006) (Scalia, J., concurring) (“When a federal constitutional interdict against the duly expressed will of the people of a State is erroneously pronounced by a State’s highest court, no authority in the State—not even a referendum agreed to by all its citizens—can undo the error. Thus, a general presumption against such review displays not respect for the States, but a complacent willingness to allow judges to strip the people of the power to govern themselves. When we correct a state court’s federal errors, *we return power to the State, and to its people.*” (emphasis added)). On the other hand, it is arguable that the Supreme Court itself has the authority to craft constitutionally required remedial rules that apply only in localities with a history of noncompliance, in which case it would be difficult to understand why state courts would not have the same authority (although it is less clear why such rules should not be subject to review). See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5-6 (1971) (outlining requirements for practical implementation of constitutional prohibition on racially segregated school systems contained in *Brown v. Board of Education*, 347 U.S. 483 (1954), in “[s]tates having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils . . . on the basis of race”). Thus, it is arguable that *Hass* applies only to operative propositions adopted by the Supreme Court. See Leavens, *supra* note 85, at 454 (“Whether the decision rule is expanded [by a state court] as a matter of federal law or state law, the operative proposition remains unchanged.”). I need not, however, attempt to resolve this question here.

<sup>162</sup> In his concurring opinion in *State v. Dickson*, Justice Zarella contended that Justice Ginsburg’s concurring opinion in *Ohio v. Robinette* supported his contention that state courts lack the authority to adopt prophylactic rules implementing the U.S. Constitution. See *State v. Dickson*, 141 A.3d 810, 849-50 n.9 (Conn. 2016) (Zarella, J., concurring), *cert. denied*, 137 S. Ct. 2263 (2017) (citing *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (Ginsburg, J., concurring)). Justice Ginsburg wrote in *Robinette* that the rule under review in that case seem[ed] 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. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court announced a similarly motivated rule as a minimal national requirement without suggesting that the text of the Federal Constitution required the precise measures the Court’s opinion set forth. Although all parts of the United States fall within this Court’s domain, the Ohio Supreme Court is not similarly situated. That court can declare prophylactic rules governing the conduct of officials in Ohio, but it cannot command the police forces of sister States.

*Robinette*, 519 U.S. at 43 (Ginsburg, J., concurring) (citations omitted). The *Dickson* majority rejected Justice Zarella’s argument that Justice Ginsburg had denied the authority of state courts to adopt prophylactic rules implementing the U.S. Constitution, stating that it appears to us that Justice Ginsburg may have incorrectly assumed both that prophylactic rules, like the one adopted in *Miranda*, are adopted pursuant to a court’s supervisory powers and that supervisory rules adopted by the United States Supreme court are binding on the states. Although our decisions announcing federal constitutional rules are, for reasons of *federalism*, not binding on other state courts, it is

Moreover, there are reasons why state courts should, under certain circumstances, adopt prophylactic constitutional rules under the U.S. Constitution instead of exercising their authority to interpret their respective state constitutions or exercising their supervisory authority. First, the parties may not have raised any claims under the state constitution or invoked the court's supervisory powers, and courts ordinarily should not address claims that the parties have not raised.<sup>163</sup> Indeed, there may be cases in which the parties could not raise a state constitutional claim, because not all state constitutions protect every right that is protected under the U.S. Constitution.<sup>164</sup> Second, the parties and the general public may have more confidence in a rule that is subject to correction by the Supreme Court than in a state constitutional or supervisory rule that is insulated from all review. Third, for a variety of reasons, state courts may be the only fora in which many federal constitutional issues are ever addressed.<sup>165</sup> Although the decisions of a state's highest court on an issue of constitutional law are theoretically reviewable by the Supreme Court,<sup>166</sup> given that court's extremely limited docket,<sup>167</sup> important constitutional issues may not come before the Supreme Court for years after they emerge, if ever. Accordingly, if state courts decline

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beyond dispute that this court has the authority to announce federal constitutional rules that, in our opinion, have force in all jurisdictions . . . .

*Dickson*, 141 A.3d at 825 n.11 (citing *Giaimo v. New Haven*, 778 A.2d 33 (Conn. 2001)); see also *Dickerson v. United States*, 530 U.S. 428, 437-38 (2000) (noting that *Miranda* is binding on state courts, which would not be true if *Miranda* rule were merely supervisory). I continue to believe that Justice Ginsburg's opinion cannot be read as denying the authority of state courts to adopt prophylactic rules implementing the U.S. Constitution. The mere fact that such rules would not be binding on other jurisdictions and can be overruled by the Supreme Court does not mean that state courts lack the authority to adopt them, any more than the fact that a state court's decision in a particular case that the U.S. Constitution has been violated is not binding on other jurisdictions and may be overruled means that state courts cannot interpret the U.S. Constitution on a case-by-case basis.

<sup>163</sup> See *Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc.*, 84 A.3d 840, 867-68 (Conn. 2014) (holding that, to preserve autonomy of parties and adversarial character of litigation in this country, courts should not address claims that were not raised by parties except in exceptional circumstances).

<sup>164</sup> See, e.g., *State v. Michael J.*, 875 A.2d 510, 529 (Conn. 2005) (explaining that Connecticut Constitution has never contained double jeopardy clause and that delegates to latest constitutional convention expressly declined to adopt one because "the addition of such a clause might be perceived as a change in Connecticut law which historically afforded defendants far less protection against double jeopardy than the federal constitution" (citation omitted)).

<sup>165</sup> See *supra* note 159.

<sup>166</sup> See *supra* note 160 and accompanying text.

<sup>167</sup> See *The Justices' Caseload*, SUPREME COURT OF THE U.S. (last visited Feb. 17, 2018), <https://www.supremecourt.gov/about/justicecaseload.aspx> [https://perma.cc/Z423-GQET] (explaining that seven to eight thousand cases are filed in Court each year and plenary review with oral argument is granted in approximately eighty of those cases).



to adopt prophylactic constitutional rules under the U.S. Constitution, important rights may be underenforced, and large areas of constitutional law may never be developed, to the loss of both state courts and, ultimately, the Supreme Court.<sup>168</sup>

#### VI. WAS *DICKSON* A PROPER EXERCISE OF AUTHORITY?

Finally, I consider whether it was within the authority of the Connecticut Supreme Court in *State v. Dickson* to adopt the prophylactic constitutional rule barring trial courts from permitting an in-court identification unless the witness has successfully identified the defendant in a prior nonsuggestive out-of-court procedure. As I have indicated, there are three relevant considerations in making this determination. First, whether the rule prevents the significant risk that courts will find no constitutional violation when there actually was one, while at the same time minimizing the risk that courts will determine that there was a constitutional violation when there was not.<sup>169</sup> Second, whether the rule applies in an area of law in which courts are competent or in which the legislature is institutionally likely either to go wrong or to avoid acting.<sup>170</sup> Third, whether state actors have resisted measures to protect the right at issue.<sup>171</sup>

With respect to the first consideration, the rule that the Connecticut Supreme Court adopted in *Dickson*—that, in cases in which identity is an issue, a witness must successfully identify the defendant in a nonsuggestive out-of-court procedure before the prosecutor may ask the witness to identify the defendant in court—clearly prevents a significant risk that the witness will make an unreliable identification, while simultaneously minimizing the risk that courts will exclude reliable identifications. In *Manson v. Brathwaite*, the Supreme Court concluded that, when the state has conducted an unduly suggestive out-of-court identification procedure and the trial court has concluded that the witness would not have been able to identify the defendant in a fair procedure, an in-court identification must be presumed to be the exclusive result of the suggestiveness of the procedure and, therefore, must be excluded as violative of due process principles.<sup>172</sup> Thus, under *Manson*, due

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<sup>168</sup> See Scott Woodward, *The Remedy for a “Nollan/Dolan Unconstitutional Conditions Violation,”* 38 VT. L. REV. 701, 713 n.75 (2014) (“State courts have been the incubators for what later becomes incorporated into the Federal Constitution.”). I recognize that rules adopted under state constitutions and pursuant to supervisory powers also may provide guidance to the Supreme Court when it is attempting to devise a practical prophylactic constitutional rule under the U.S. Constitution. When state courts have adopted a rule with an eye toward the U.S. Constitution, however, the Court may find the analysis more useful.

<sup>169</sup> See *supra* note 140 and accompanying text.

<sup>170</sup> See *supra* note 136 and accompanying text.

<sup>171</sup> See *supra* note 135 and accompanying text.

<sup>172</sup> 432 U.S. 98, 112-14, 117 (holding that out-of-court identification that is result of unduly suggestive identification procedure must be excluded unless trial court makes

process principles are violated when a court allows an in-court identification that, as far as the court is able to determine, would be purely the result of an unduly suggestive identification procedure.

As we stated in *Dickson*, there hardly could be a more suggestive identification procedure than placing a witness on the stand in the full glare of public scrutiny and then asking them if the person who the state has accused of the crime, who is sitting with counsel at the defense table, is the person who committed the crime.<sup>173</sup> Indeed, *Dickson* itself perfectly illustrates the problem. The witness in that case was “unable to identify the defendant in a photographic array, but had absolutely no difficulty” identifying him in court, where he was sitting with counsel at the defense table and “was one of only two African-American males in the [court]room,”<sup>174</sup> and the only African-American not wearing the uniform of a judicial marshal.<sup>175</sup> As we also discussed in *Dickson*, the traditional checks on the unreliability of a first time in-court identification—cross-examination of the witness, argument by counsel, and jury instructions—are unlikely to be effective at countering its extreme suggestiveness.<sup>176</sup> Thus, by disallowing all first time in-court identifications, *Dickson* prevents the significant risk that such an identification will be purely the result of the inherent suggestiveness of that procedure, in violation of *Manson*.

Moreover, the specific procedures that the court adopted in *Dickson* are well tailored to accomplish their purpose. Having concluded that cross-examination, argument, and jury instructions were inadequate protections, the *Dickson* court had two options: allow first time in-court identifications only if the trial court first determined that, pursuant to the reliability factors discussed in *Manson*,<sup>177</sup> it was likely that the witness could identify the defendant in a nonsuggestive procedure,<sup>178</sup> or require the state to conduct a nonsuggestive out-of-court

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determination that identification was reliable despite taint of suggestiveness); see also *United States v. Domina*, 784 F.2d 1361, 1367 (9th Cir. 1986) (noting Supreme Court’s finding in numerous cases that unduly suggestive identification procedures “may also preclude a later in-court identification that was tainted by the earlier suggestive procedures”).

<sup>173</sup> See *State v. Dickson*, 141 A.3d 810, 822 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017).

<sup>174</sup> See *id.* at 823.

<sup>175</sup> See *id.* at 819.

<sup>176</sup> See *id.* at 832 n.22.

<sup>177</sup> See *Manson*, 432 U.S. at 114 (holding that factors for determining reliability of identification resulting from unnecessarily suggestive identification procedure include “witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation”).

<sup>178</sup> See *Dickson*, 141 A.3d at 836 n.29 (addressing defendant’s suggestion that initial in-court identification may be allowed when trial court determines that identification would be reliable under *Manson* factors).

identification procedure before allowing an in-court identification. The superiority of the second option as an optimal “decision rule”<sup>179</sup> is obvious. It would make little sense to require the trial court to conduct an evidentiary hearing to make the difficult determination under *Manson* as to whether the witness could reliably identify the defendant when that determination can easily be made with perfect accuracy by simply conducting a fair identification procedure.<sup>180</sup>

At the same time that the *Dickson* rule reduces the significant risk that a witness will make an unreliable identification in court, it creates little risk that a reliable identification will be excluded. When a witness is actually unable to identify the defendant in a fair procedure, it may reasonably be inferred that a subsequent identification during a highly suggestive in-court procedure is the result of the suggestiveness and, therefore, the admission of the identification violates due process principles under *Manson*. Therefore, only constitutionally inadmissible identifications will be excluded. Of course, if the state declines to seek an out-of-court identification in a fair procedure, thereby precluding it from seeking an in-court identification, there is no sure way of knowing whether the witness reliably could identify the defendant. In that case, however, the preclusion would be the result of the state’s choice, presumably based on a judgment that the witness would not be able to identify the defendant in a nonsuggestive procedure, and not the result of judicial overreach.

The second consideration in making the determination as to whether a court has the authority to adopt a prophylactic constitutional rule—whether the rule applies in an area of law in which courts are competent or in which the legislature is institutionally likely either to go wrong or to avoid acting—also supports the court’s decision in *Dickson*. The *Dickson* rule is primarily concerned with the reliability of evidence presented at criminal trials, a question clearly within an area of judicial concern and competence.<sup>181</sup> In addition, this is an area in which it was reasonable for the court to conclude that the legislature would not act. Although the Connecticut Legislature had evinced serious concerns with the reliability of eyewitness identifications when it enacted section 54-1p of the Connecticut General Statutes,<sup>182</sup> which requires the police to follow certain procedures when seeking an eyewitness identification in order to avoid the taint of suggestiveness, those procedures do not apply to in-court identifications, and there was no indication when *Dickson* was decided that the legislature intended to address that issue any time in the

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<sup>179</sup> See *supra* note 90.

<sup>180</sup> See *Dickson*, 141 A.3d at 836 n.29.

<sup>181</sup> See *State v. DeJesus*, 953 A.2d 45, 66 (Conn. 2008) (referring to Connecticut Supreme Court’s “long-standing inherent common-law adjudicative authority over evidentiary law”).

<sup>182</sup> CONN. GEN. STAT. § 54-1p (2017). This statute was enacted in 2011. See 2011 Conn. Acts 2430 (Reg. Sess.).

future. Thus, while the *Dickson* court had every reason to believe that the rule it adopted was consistent with legislative policy,<sup>183</sup> there was no reason for the court to believe that it should await legislative action on the issue.

Finally, the third consideration—whether state actors have resisted measures to protect the right at issue—also supports the *Dickson* rule. The state expressly represented to the *Dickson* court that government actors were increasingly frustrated by judicial efforts to reduce the suggestiveness of out-of-court identification procedures and, as a result, were reducing the use of such procedures and resorting more frequently to first time in-court identifications that were not subject to those constraints.<sup>184</sup> Thus, state actors were responding to the limitations that *Manson* placed on the use of eyewitness identifications following unduly suggestive procedures by using the most suggestive identification procedure.<sup>185</sup> In making this observation, I do not intend to minimize the difficulties faced by police in their efforts to conduct nonsuggestive identification procedures, nor do I question the genuineness of those efforts. That there is a growing scientific and legal consensus that eyewitness identifications can be irreducibly unreliable—both because of factors affecting the reliability of the witnesses' initial observations at the time of the crime and factors affecting the suggestiveness of the subsequent identification procedure (including subconscious prompts by government actors)<sup>186</sup>—is no justification, however, for allowing highly suggestive initial in-court identifications. All three considerations, therefore, support the authority of the *Dickson* court to adopt the prophylactic constitutional rule that

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<sup>183</sup> See *Dickson*, 141 A.3d at 823 n.10. (“[Section 54-1p of the Connecticut General Statutes] demonstrates a clear legislative concern that suggestive identification procedures are a significant cause of erroneous convictions and should be eliminated to the extent possible.”).

<sup>184</sup> See *id.* at 831 n.21 (“The state . . . contends in its supplemental brief that ‘[p]olice have largely *stopped using* live lineups because of the practical obstacles, and, even more importantly, because the criteria for nonsuggestiveness have tightened so much that live lineups can rarely satisfy them.’”).

<sup>185</sup> See *id.* (“[I]f police have stopped using live lineups, it may be because they know that, under [State v. Smith, 512 A.2d 189 (Conn. 1986), *overruled in part by Dickson*, 141 A.3d 801 (Conn. 2016)], a suggestive lineup may result in the *exclusion* of both the out-of-court and the in-court identification, while, if there is *no* pretrial lineup, the witness can be asked to identify the defendant for the first time in the highly suggestive courtroom setting.”).

<sup>186</sup> See, e.g., State v. Guilbert, 49 A.3d 705, 721 n.11 (Conn. 2012) (discussing estimator variables, factors that affect reliability of witness' observations at time of crime, and system variables, factors that affect suggestiveness of identification procedures); State v. Marquez, 967 A.2d 56, 64 (Conn. 2009) (referring to risk, when identification procedure is not “double blind,” of misidentification “due to conscious or unconscious bias by a highly interested person administering the procedure” (quoting State v. Marquez, No. CR03576603T, 2006 WL 224324, at \*9 (Conn. Super. Ct. Jan. 4, 2006), *aff'd*, 967 A.2d 56 (Conn. 2009))).

prosecutors may not ask a witness to identify the defendant in court if the witness has not previously been able to identify the defendant in a nonsuggestive procedure.

#### CONCLUSION

There is, perhaps not without some reason, widespread uneasiness over the judicial adoption of prophylactic constitutional rules that appear to “sweep more broadly”<sup>187</sup> than the underlying constitutional provision. Such rules are sometimes necessary, however, to ensure that constitutional provisions can be applied predictably and evenhandedly by both government officials and the courts, and that essential constitutional protections do not become “a mere form of words.”<sup>188</sup> Accordingly, as long as the rule is crafted as narrowly as possible to avoid the risk of significant overenforcement and with due regard for the respective capabilities and responsibilities of the three branches of government, the authority of the courts to adopt such rules is inherent in their authority to interpret the Constitution on a case-by-case basis in the tradition of *Marbury v. Madison*. This authority belongs to state courts no less than to the Supreme Court and was properly exercised by the Connecticut Supreme Court in *State v. Dickson* when we concluded that, under the Due Process Clause of the Fourteenth Amendment, prosecutors may not ask a witness who has not successfully identified the defendant in a nonsuggestive identification procedure to identify the defendant in court.<sup>189</sup>

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<sup>187</sup> *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

<sup>188</sup> Schrock & Welsh, *supra* note 37, at 1135-36.

<sup>189</sup> 141 A.3d 810, 825 (Conn. 2016).