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The Ubiquity of Prophylactic Rules

David A. Strauss

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The Supreme Court's opinion in *Miranda v. Arizona*[1] does not even look like an ordinary opinion. As many critics have commented, it reads more like a legislative committee report with an accompanying statute.[2] As if that were not enough, the Court has, since *Miranda*, repeatedly said that the *Miranda* rules are not required by the self-incrimination clause of the fifth amendment but are judge-made rules designed to implement that provision.[3] Against this background, it is not surprising to find *Miranda* under attack not just as wrong but as "illegitimate." Professor Grano, for example, argues that "prophylactic rules" like *Miranda*'s always raise questions of legitimacy; and that even if prophylactic rules are sometimes legitimate, *Miranda*'s prophylactic rule is not.[4]

I want first to suggest that Professor Grano is mistaken in his argument that what the Court did in *Miranda* is different from, and less legitimate than, what it does when it prescribes the kind of prophylactic rules that he finds legitimate. Then I will make a broader argument—that "prophylactic" rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law. Indeed, constitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate, but that have the same "prophylactic" character as the *Miranda* rule.[5]

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[1] 384 U.S. 436 (1966).

[2] See, for example, Henry J. Friendly, A Postscript on Miranda, in Benchmarks 266-84 (1967).

[3] See, for example, Oregon v. Elstad, 470 U.S. 298, 306 (1985); New York v. Quarles, 467 U.S. 649, 657 (1984); Michigan v. Tucker, 417 U.S. 433, 444-45 (1974).

[4] See Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw.U.L.Rev. 100 (1985); Joseph D. Grano, *Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U.Chi.L.Rev. 174 (1988)("Reply").

[5] Professor Schulhofer's initial article defended *Miranda* on two grounds. The first is that all custodial interrogation is "inherently compelling within the meaning of the fifth amendment," whenever it "brings psychological pressure to bear for the specific purpose of overcoming the suspect's unwillingness to talk." Stephen J. Schulhofer, Reconsidering *Miranda*, 54 U.Chi.L.Rev. 435, 446 (1987). This argument of Professor Schulhofer's appears to

I.

Professor Grano's attack on the legitimacy of *Miranda* is quite narrow. He objects to *Miranda*'s legitimacy only because *Miranda* established an irrebuttable presumption: statements obtained in violation of *Miranda* are, in certain contexts, conclusively presumed to be "compelled" within the meaning of the Fifth Amendment, even if other evidence strongly suggests that those statements were not compelled.[6] Professor Grano would not call *Miranda* illegitimate if it had established only a rebuttable presumption. He would call the decision erroneous—the violation of the *Miranda* requirements, he might say, is not sufficiently strong evidence of compulsion to warrant even a rebuttable presumption—but he would not say that it was illegitimate.[7]

Rebuttable presumptions are legitimate, according to Professor Grano, because the federal courts' authority to interpret the Constitution "arguably" carries with it "implied authority to make procedural rulings that aid them in performing this task."[8] Rebuttable evidentiary presumptions, harmless error rules, rules that ensure that the court will have an adequate record to review, and rules allocating the burden of proof are all legitimate procedural rules.[9]

But *Miranda*'s conclusive presumption is illegitimate, according to Professor Grano, because "[c]onclusive presumptions differ in kind, not simply degree, from rebuttable presumptions. . . . [C]onclusive presumptions are not evidentiary or adjudicatory devices at all but rather substantive rules of law."[10] This last asser-

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constitute a complete defense of *Miranda*, since it is unlikely that any custodial interrogation does not bring pressure to bear, or that interrogation (as defined in Rhode Island v. Innis, 446 U.S. 291, 301 (1980)) is ever conducted without the purpose of inducing the suspect to talk.

This defense of *Miranda*, therefore, is unrelated to any questions about the legitimacy of using presumptions or prophylactic rules. I will not address this aspect of Professor Schulhofer's article, to which Professor Grano also replies. See Grano, Reply, 55 U.Chi.L.Rev. at 182 (cited in note 4). I will be concerned only with the question whether *Miranda* can be justified as a conclusive presumption or a prophylactic rule. See Schulhofer, 54 U.Chi.L.Rev. at 446-53; Grano, 55 U.Chi.L.Rev. at 175-181 (cited in note 4).

[6] Grano, 55 U.Chi.L.Rev. at 177-178 (cited in note 4).

[7] Grano, 80 Nw.U.L.Rev. at 141 n.271, 145 (cited in note 4).

[8] Id. at 141 (footnote omitted) (cited in note 4).

[9] Id. at 141, 142-4, 148, 156.

[10] Grano, 55 U.Chi.L.Rev. at 179 (cited in note 4).

Professor Grano does not say whether he would find conclusive presumptions illegitimate if they produced outcomes *less* favorable to suspects than a case-by-case inquiry would. Professor Schulhofer argues that New York v. Belton, 453 U.S. 454 (1981) is an example of such a conclusive presumption. Schulhofer, 54 U.Chi.L.Rev. at 449 (cited in note

tion—that rebuttable and conclusive presumptions differ in kind, not just in degree—rings false, and upon analysis it proves false, at least in the form in which Professor Grano states it.

One can devise hypothetical examples that help confound Professor Grano's claim. Suppose, for example, that the Court were to hold that failure to comply with the requirements of *Miranda* creates a presumption of compulsion that can be overcome only by evidence demonstrating beyond a reasonable doubt that the statements were not compelled. Or suppose the Court were to say that the presumption could be overcome only by evidence "so strong as effectively to eliminate all doubt whatever that the statement was voluntary"—a standard that might allow the statement to be used only if it were given by an experienced suspect who blurted out a confession in response to a single, benign question asked moments after the arrest. These would be rebuttable presumptions, and while Professor Grano would attack them as erroneous, he apparently would not consider them illegitimate.[11] Yet there is no sensible reason to distinguish between such a barely rebuttable presumption and the explicitly conclusive presumption of *Miranda*.

On a more analytical level, the point is this. When courts do the things that Professor Grano concedes are legitimate, they consider not only the constitutional values at stake, but also the institutional difficulties that courts face in advancing those values. A court deciding whether to reject the traditional "totality of the circumstances" approach to the voluntariness of confessions in favor of a rebuttable version of the *Miranda* presumption—a version that Professor Grano concedes to be legitimate—would ask questions like the following: In view of the difficulty of applying the traditional approach, how often does that approach result in the admission of confessions that are actually coerced? How many of those confessions would the presumption exclude? On the other

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5). (*Belton* held that police officers may search a closed container inside the passenger compartment of a car incident to the arrest of an occupant of the car.) Professor Grano does not discuss *Belton*. He does seem to suggest that a rule like *Belton*'s is not a conclusive presumption but a "per se rule" 55 U.Chi.L.Rev. at 180 n.34. But he does not explain why that is so, especially in light of the language of *Belton*: the Court explicitly and at some length explained that it was relying on a "generalization" that was "not inevitably" true in order to establish a "workable rule" that would give clearer guidance to police officers. 453 U.S. at 460; see id. at 458-60.

One difference between *Belton* and *Miranda* is that *Belton* under-enforces constitutional rights and gives greater leeway to the government than a case-by-case approach would; *Miranda* has the opposite effect. On page 207 below, I explain why this difference (on which Professor Grano does not seem to rely) is irrelevant to the question of legitimacy.

[11] See Grano, 80 Nw.U.L.Rev. at 145, 147, 154 (cited in note 4).

hand, how many voluntary confessions will the presumption exclude that would have been admitted under the traditional approach? If we adopt the presumption, to what extent will law enforcement officers modify their behavior in a way that reduces the number of undetected involuntary confessions? To what extent will they modify their behavior in a way that reduces the number of voluntary confessions? Will the presumption bring about savings in the resources spent—by courts, parties, witnesses, and law enforcement agencies—in administering the criminal justice system?

The court will try to strike the optimal balance among these considerations. One customary way to put the point is that the court will attempt to minimize the sum of error costs and administrative costs.[12] This is misleading to the extent it suggests that all of these interests can be reduced to a single currency, or that distributional concerns are irrelevant, but it is a useful shorthand. As Professor Grano has said, it is clearly legitimate for courts to engage in this practice; they do so whenever they prescribe a rule governing the burden of proof, a rule designed to ensure the adequacy of the record, or a rebuttable presumption.[13] If such a device minimized the "sum" of error costs and administrative costs, Professor Grano would not object to a court's adopting it.[14]

It is obviously possible that an irrebuttable presumption might minimize this sum, that is, might strike the optimal balance among the various considerations. Part of Professor Schulhofer's argument is, in effect, that *Miranda*'s conclusive presumption does just that.[15] Professor Grano disagrees about which approach strikes the optimal balance. But he has no basis for saying that the Court has acted legitimately if it decides that a rebuttable presumption strikes the optimal balance, but illegitimately if it decides that a conclusive presumption does so.

Professor Grano suggests that the problem with conclusive presumptions is that they make certain evidence—in the case of *Miranda*, any evidence tending to show that the confession was

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[12] See, for example, Richard A. Posner, Economic Analysis of Law 517-18 (3d ed. 1986). The error costs would be the costs of violating or overprotecting constitutonal rights, discounted by the respective probabilities of those errors; the administrative costs would be the costs to the courts, parties, witnesses, etc. of operating under the rule in question.

[13] Grano, 80 Nw.U.L.Rev. at 156 (cited in note 4).

[14] Id.

[15] Schulhofer, 54 U.Chi.L.Rev. at 448-53 (cited in note 5). See also Albert W. Alschuler, Bright Line Fever and the Fourth Amendment, 45 U.Pitt.L.Rev. 227, 241-42 (1984).

voluntary—"legally immaterial."[16] But it is unclear why this should matter. 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? Moreover, there is a sense in which a rebuttable presumption makes certain evidence immaterial as well—in the case of a rebuttable version of *Miranda*, any evidence that tends to show that a confession was voluntary, but that is not quite enough to overcome the presumption.[17] Professor Grano does not explain how it can be legitimate for a court to decide that evidence of voluntariness is immaterial in some cases (in any case in which that evidence is insufficient to overcome a rebuttable presumption) but illegitimate for a court to extend that approach to all cases.

My sense is that Professor Grano does not really object to conclusive presumptions per se. What he really objects to—or, in any event, what he ought to object to—are conclusive presumptions that are not adopted in the same way that the procedural rules he endorses—burdens of proof, rebuttable presumptions, and the like—are adopted. Specifically, Professor Grano may suspect that *Miranda* reflects not a genuine effort to minimize the sum of administrative costs and error costs but only a judgment by the Court that the world would be a better place if law enforcement officers were required to comply with *Miranda*.

If that is what *Miranda* reflects, then it does indeed have a legitimacy problem. Judges do not have a general authority to implement their visions of the best world, unless, of course, those visions are validated by the Constitution. But judges do, necessarily, consider institutional concerns when they apply the Constitution in specific cases. This means that the critics of *Miranda* must meet it on its own terms; they must show that the constitutional and

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[16] Grano, 55 U.Chi.L.Rev. at 179 (cited in note 4) (citation omitted).

[17] Arguably such evidence is not technically "immaterial" but merely ineffective. One accepted definition of materiality is that evidence is immaterial if offered to prove a proposition that is not at issue in the case. See Edward W. Cleary, McCormick on Evidence 541 (3d ed. 1984). Under this definition, evidence that tends to show that a rebuttable presumption is false in a particular case is technically material, even if it is insufficient to overcome the presumption, whereas evidence that tends to show a conclusive presumption is false in a particular case is immaterial.

This is, however, only a semantic point. Whatever definition of materiality is used, the substantive point remains: both rebuttable and irrebuttable presumptions sometimes require a court to give certain evidence less weight than it would have in the absence of the presumption. For this reason, there is no difference in principle between rebuttable and irrebuttable presumptions.

institutional values at stake do not justify the conclusive presumption that *Miranda* established. They cannot say that it is illegitimate just because it established a conclusive presumption.

II.

More interesting, perhaps, than Professor Grano's specific argument about *Miranda* is his premise that "prophylactic rules" in general raise questions of legitimacy. By "prophylactic rule," Professor Grano appears to mean a rule that imposes additional requirements beyond those of the Constitution itself.[18] Not only critics like Professor Grano, but many defenders of *Miranda*'s legitimacy proceed from the premise that there is something extraordinary about a decision to depart from the "real" self-incrimination clause and to adopt a set of "judge-made rules" that go beyond the requirements of the clause.[19]

That premise is essentially incorrect. "Prophylactic" 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. I will try to illustrate this point with examples from the first amendment—first with a peripheral first amendment doctrine, then with a central feature of first amendment law. Then I will try to show how the point holds for constitutional law generally.

A.

Consider first the principle announced in *Lovell v. Griffin*.[20] Lovell was convicted under a city ordinance that prohibited any person from distributing literature without the written permission of the City Manager. The Supreme Court reversed, holding that Lovell's conviction violated the first amendment. The Court did not hold that the City Manager had denied permission for an improper reason; indeed, Lovell had not even sought permission from the City Manager. Nor did the Court consider whether the City

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[18] See, for example, Grano, 80 Nw.U.L.Rev. at 102, 105-06 (cited in note 4) (citations omitted):

> What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution. A decision that promulgates or employs a prophylactic rule will not attempt to demonstrate an actual violation of the defendant's constitutional rights in the case under review.

[19] See, for example, Henry Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv.L.Rev. 1, 21-23 (1975).

[20] 303 U.S. 444 (1938).

Manager could have denied Lovell a permit under a well-drafted statute. Instead, the Court declared the ordinance unconstitutional on its face because it specified no standards to guide the City Manager in exercising his discretion.

The rationale of the *Lovell* rule is not entirely clear, but it must be something along the following lines:[21] if there are no standards to guide an official's discretion, the official is too likely to deny a permit for an impermissible reason. Relatively clear standards do not eliminate the danger that an official will deny permission for an improper reason, but at least they reduce that danger. Moreover, clear standards make it easier for a court reviewing the official's action to determine if it was influenced by an impermissible consideration.

These justifications for *Lovell* parallel the justifications for the *Miranda* prophylactic rule. In both the *Lovell* situation and the *Miranda* situation, the absence of relatively clear rules creates a danger of impermissible official action and makes it more difficult for a reviewing court to detect such action. Just as there might be ways to achieve the objectives of *Miranda* without imposing the *Miranda* requirements, so there might be other ways to achieve the objectives of *Lovell.* One might imagine, at least theoretically, a system in which decisions on permits are based on applications that do not reveal anything about the views of the speakers or about any other facts that might trigger impermissible bias by the official. In such a system, there would be no need for the *Lovell* principle.

The principal difference between *Lovell* and *Miranda* is that the Court did not characterize *Lovell* as a prophylactic rule that exceeded the requirements of the first amendment. But as Professor Grano suggests, whether a doctrine should be viewed as prophylactic depends not on how the Court happens to have written its opinions but on how the relevant constitutional provision is most plausibly interpreted.[22] The most natural interpretation of the first amendment is that all it requires is that persons not be prohibited from distributing leaflets for improper reasons. So long as the authorities are not, in fact, acting out of an impermissible purpose, why does the guarantee of "freedom of speech" require that they announce clear standards?

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[21] See, for example, Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, Constitutional Law 1048 (1986); Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844, 876-82 (1970).

[22] Grano, 55 U.Chi.L.Rev. at 181 (cited in note 4).

The only plausible reason is that the requirement of clear standards reduces the danger that speech will be suppressed unlawfully. The requirement is thus a prophylactic measure. To put the point another way, the connection between freedom of speech and clear standards, in the *Lovell* context, is of the same nature as the connection between the prohibition against self-incrimination and the *Miranda* rules. If anything, the *Lovell* connection is more contingent and indirect. Under the most plausible interpretation of the first amendment, therefore, *Lovell* is a judge-made prophylactic rule designed to implement the purposes of the first amendment.[23]

Under this interpretation, many of those whose convictions are reversed under the *Lovell* rule may have had no first amendment right to speak, because the authorities might have had legitimate reasons for denying them permission to speak. There is a direct parallel between this overprotected speech and the confessions that are inadmissible under *Miranda* even though they are not compelled. In some cases decided under *Lovell*, the authorities could have prevented the speech if they had complied with the *Lovell* prophylactic rule by announcing standards to guide their discretion—just as, in some *Miranda* cases, the confession would have been admissible if the authorities had bothered to give the warnings and secure a waiver. But in *Lovell*, as in *Miranda*, the Court declined to inquire into the particular facts of the case; instead it insisted that the law enforcement authorities comply with a prophylactic rule.

Perhaps the justifications for the *Lovell* rule are not precisely parallel to the justifications of *Miranda*, but they seem unmistakable similar. Yet the Court has reaffirmed the principle of *Lovell* on several occasions;[24] no Justice has called for it to be overruled; and so far as I know no one has argued that *Lovell* is an illegitimate exercise of the judicial power.

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[23] There is another arguable difference between the *Lovell* and *Miranda* prophylactic rules: in *Lovell*, the Court simply required that governments provide some standards; it did not specify the standards that must control discretionary licensing in the area of free speech. By contrast, in *Miranda*, of course, the Court specified the warnings that police officers must give. But this difference does not affect the essential similarity between *Lovell* and *Miranda*; in both, the Court imposed a requirement that "went beyond" the underlying constitutional provision, if that provision is interpreted in the most plausible fashion. Moreover, the Court in *Miranda* did invite Congress and the states to propose alternative ways of dispelling the inherent coercion of stationhouse interrogation. See Miranda, 384 U.S. at 467.

[24] See Shuttlesworth v. Birmingham, 394 U.S. 147, 150-1 (1969); Staub v. City of Baxley, 355 U.S. 313, 322-24 (1958); Kunz v. New York, 340 U.S. 290, 294 (1951); Saia v. New York, 334 U.S. 558, 560 (1948).

B.

Lovell reveals something about the entire structure of first amendment doctrine. Not just arguably peripheral doctrines like *Lovell* but the most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the "real" first amendment.

Perhaps the most central feature of first amendment law is the distinction between restrictions based on the content of expression and restrictions that are not based on content.[25] When the Court is determining the constitutionality of a restriction that is not based on content, it uses some form of balancing test.[26] Content-based restrictions, by contrast, are judged by a more strict categorical approach: if a content-based measure does not fall within one of several relatively narrow categories—such as obscenity, fighting words, defamation, commercial speech, or incitement—there is a nearly conclusive presumption against its constitutionality.[27]

This especially strict treatment of content-based restrictions is the product, at least in part, of institutional concerns parallel to those that are the basis of *Lovell* and *Miranda*. Many cases can be used to illustrate this; the contrast between *Grayned v. Rockford*,[28] and *Police Department v. Mosley*,[29] is especially dramatic. In *Grayned* the Court upheld a conviction for demonstrating on

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[25] See, for example, Widmar v. Vincent, 454 U.S. 263, 269-70, 277 (1981); Carey v. Brown, 447 U.S. 455, 460-6 (1980); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L.Rev. 189, 189 (1983) (the "distinction between content-based and content-neutral restrictions on expression . . . is, today, the most pervasively employed doctrine in the jurisprudence of free expression"); Paul B. Stephan III, The First Amendment and Content Discrimination, 68 Va.L.Rev. 203, 214-31 (1982).

[26] See, for example, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 67-76 (1981); Melville B. Nimmer, Nimmer on Freedom of Speech § 2.03 (1984); Stone, 25 Wm. & Mary L.Rev. at 190 (cited in note 25). See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U.Chi.L.Rev. 46 (1987); John Hart Ely, Flag Desecration: A Case Study of the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv.L.Rev. 1482, 1484-90 (1975).

[27] See, for example, Stone, 54 U.Chi.L.Rev. at 47-48 and n.6 (cited in note 26).

In his reply to Professor Schulhofer, Professor Grano concentrates his attack on conclusive presumptions. The Supreme Court's approach to content-based restrictions is not a conclusive presumption; content-based restrictions are sometimes constitutional. But I am here concerned not with Professor Grano's objection to conclusive presumptions in particular, but with his more fundamental premise that *all* prophylactic rules—even those that he might ultimately find justifiable—raise legitimacy problems and require special justification. My suggestion is that this premise is incorrect because there is no difference between prophylactic rules and ordinary constitutional doctrine of the kind that everyone considers legitimate.

[28] 408 U.S. 104 (1972).

[29] 408 U.S. 92 (1972).

school grounds; in *Mosely* the Court reversed the conviction of a person who had engaged in very similar activity. The difference between the cases was that the municipal ordinance involved in *Grayned* was not based on content—it forbade any person near a school from creating a disturbance—while the ordinance at issue in *Mosely* forbade picketing near schools except for "peaceful picketing of any school involved in a labor dispute."[30] The Court in *Mosely* rejected the city's argument that labor picketing qualified for an exemption because it tended to be more peaceful than other kinds of picketing; the court said the such judgments were not to be made on the basis of the content of expression.[31]

The Court has not made fully clear the reason for its hostility to content-based regulation, and many factors play a role.[32] For example, content-based restrictions present a greater danger of undermining democratic government by distorting "the thinking process of the community."[33] Also, content-based restrictions may violate the principle that the government must not seek to suppress expression on the ground that it will prove too persuasive to those who hear it.[34] But neither of these rationales fully explains the way in which the Court approaches content-based restrictions. Many unlawful content-based restrictions—like that in *Mosely*—are based on concerns wholly distinct from any fear that the speech in question will be too persuasive.[35] And a restriction of the kind involved in *Mosley* has such a small effect on the overall quantity and nature of speech that it cannot realistically be said to risk distorting the community's deliberative processes.[36] In any event, content-neutral restrictions may also have the effect of distorting the nature and amount of information available to the community, but they are judged by a balancing test. If the Court's only concern about content-based restrictions were that they may distort the community's deliberations, it would be sufficient to judge those restrictions, as well, according to a balancing test, taking into account any possible distorting effect. The strict categorical approach

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[30] Id. at 93.

[31] Id. at 100-01.

[32] See Stone, 25 Wm. & Mary L.Rev. at 197-233 (cited in note 25).

[33] Alexander Meiklejohn, Political Freedom 27 (1960).

[34] See, for example, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 97 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976); Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis concurring).

[35] See, for example, Edwards v. South Carolina, 372 U.S. 229 (1963); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

[36] See Stone, 25 Wm. & Mary L.Rev. at 200 (cited in note 25).

would not be necessary.

At least part of the justification for the stringent treatment of content-based restrictions is the Court's assessment of the institutional capacities of the actors involved: the legislatures and the courts. A content-based measure is viewed with suspicion because it is too likely to have been influenced by the legislature's hostility to the speech in question. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' "[37] Moreover, it is very difficult for a court to ascertain whether such an impermissible motive was at work; that is why the Court views all content-based measures with suspicion, without inquiring into whether each one was prompted by hostility to the point of view in question. Finally, if a court is permitted to balance the benefits of a content-based measure against its costs, it is too likely that the court will be influenced by its own reaction to the point of view expressed; that is why the Supreme Court uses relatively rigid categories instead of balancing in each case.[38]

These justifications, too, are parallel to those of *Miranda*. Some of the similarities are manifest: this aspect of first amendment doctrine, like *Miranda*, considers both the government's propensity to act unlawfully unless it is tightly restrained, and the difficulties the courts face in detecting unlawful government conduct. Both the categorical approach to content-based restrictions and the *Miranda* rules are relatively rigid doctrines designed to reduce the likelihood that the authorities (generally legislatures in the case of the first amendment, the police in the case of *Miranda*) will violate the law, and designed to improve a reviewing court's chances of identifying violations where they occur.

Professor Grano might respond that there are two crucial differences between first amendment doctrine and *Miranda*. First, the Court has left open the possibility that it might accept a legislative modification of *Miranda*;[39] it has not done that with the first amendment.[40] This difference is real enough, but it is difficult to

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[37] Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980), quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter concurring).

[38] See, for example, Stone, 25 Wm. & Mary L.Rev. at 232-33 (cited in note 25); John Hart Ely, Democracy and Distrust 107-12 (1980); Ely, 88 Harv.L.Rev. at 1501 (cited in note 26); T.M. Scanlon, Jr., Freedom of Expression and Categories of Expression, 40 U.Pitt.L.Rev. 519, 534-35 (1979).

[39] See 384 U.S. at 467.

[40] See also Monaghan, 89 Harv.L.Rev. at 21-22 & n.112 (cited in note 19).

see how it undermines *Miranda*'s legitimacy. If anything, the Court's willingness to entertain alternative ways of dealing with police interrogation makes *Miranda* less, not more, of an act of judicial imperialism. Otherwise, *Miranda*'s opponents would be in the paradoxical position of saying that the Court would transgress less on the other branches' prerogatives if it imposed stricter restraints on them.

In fact, the probable reason for this difference between *Miranda* and first amendment doctrine is immaterial to the legitimacy of either. *Miranda* is directed principally to the actions of administrative officers; it therefore makes some sense for the Court to hope to enlist the legislature in its effort. The strict scrutiny of content-based distinctions is aimed principally at legislatures; it is premised in large measure on the legislature's own limitations. There is, accordingly, no reason for the Court to contemplate deferring to a legislative attempt to deal with the problem.

In any event, it is a commonplace that a legislative judgment that a statute is constitutional is generally entitled to some deference from a court, especially when that judgment is made after detailed consideration of the constitutional question.[41] The *Miranda* Court's willingness to consider legislative alternatives to the *Miranda* rules is no different in principle from this traditional canon of deference. It amounts to a statement that the Court will consider carefully, and may defer to, a legislative effort to strike the balance that the relevant constitutional and institutional concerns require.

The second difference between *Miranda* and the treatment of content-based restrictions seems much more important. The categorical approach to content-based restrictions, one is inclined to say, is part of the "real" first amendment. It is derived directly from an interpretation of the first amendment itself. By contrast, *Miranda* is not part of the "real" fifth amendment; the Court concedes that *Miranda* is a judge-made rule that goes beyond the fifth amendment.

At first glance this distinction seems important. But why is it so clear that the categorical approach to content-based restrictions is part of the "real" first amendment? What prevents us from characterizing it as a judge-made prophylactic rule that exceeds the requirements of the real first amendment?

In particular, the following understanding of the "real" first

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[41] See, for example, Rostker v. Goldberg, 453 U.S. 57, 64 (1981); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973).

amendment seems as plausible as any alternative. The first amendment prohibits the government from acting out of hostility to particular points of view. But that is the only prescription derived from the first amendment that is implicated in a case like *Mosely*.[42] Therefore, if the city was telling the truth in *Mosely*—if it really made a good faith judgment that labor-related speech is less prone to violence—then the real first amendment was not violated. It is perfectly consistent with the freedom of speech for a city to try to limit disruptive demonstrations. As long as the city is not acting out of hostility to a point of view, why should the city be disabled from using the most precise definition of the least disruptive class of demonstrators, even if that definition refers to the content of the speech in question?

To put the point another way, suppose there were a foolproof fact-finding mechanism that enabled a court to determine whether the government was influenced by hostility or favoritism toward certain kinds of speech. Surely we would use that mechanism, at least in some cases, instead of automatically invalidating a classification like that found in *Mosley*. One could plausibly say, therefore, that the first amendment itself does not require as restrictive an approach to content-based measures as the Court has adopted. That approach is a judge-made rule designed to deal with the danger that the government will violate the first amendment by acting out of hostility to a particular point of view.

If this interpretation of the first amendment is correct, it follows that if the Court were enforcing only the "real" first amendment, it would make a case-by-case inquiry to see if an impermissible motive is at work. Instead of doing that, the Justices have devised a prophylactic rule—content-based restrictions are almost conclusively presumed invalid, unless they fall within one of a few categories. Like the *Miranda* rule, the categorical approach to content-based distinctions is based on an assessment of the propensities of the authorities and the limitations of the courts. And like the *Miranda* rule, it forbids some government actions—content-based regulation that is not the product of hostility toward a point of view—that the "real" Constitution permits.

Why is this account not essentially correct? The Court does not analyze the problem in this way, but that may be only because

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[42] As I noted above (see pp. 199-200 above) the Court's hostility to content-based restrictions may be based on other considerations, but none of those justifications seems to explain the strong presumption against content-based regulation that the Court uses in cases like *Mosely*.

it would serve no purpose to analyze the problem in this way. The Court distinguishes between *Miranda* and the real fifth amendment for two reasons: because it has left open the possibility that legislatures might be able to modify *Miranda* (a point I addressed above), and because it had decided that the *Miranda* rules do not strike the optimal balance in all cases. The Court has decided, for example, that when dealing with impeachment evidence the optimal balance is struck by using the "totality of the circumstances" voluntariness test.[43] By contrast, the Court apparently has concluded that categorical approach to content-based distinctions strikes the optimal balance in all contexts.

But this difference between *Miranda* and the first amendment doctrine does not cast doubt on *Miranda*'s legitimacy. It happens that the costs of using the *Miranda* prophylactic rule outweigh the benefits in certain contexts, whereas the costs of using the categorical approach to content-based restrictions never outweigh the benefits, or so the Court apparently thinks. But why should that contingent circumstance make *Miranda* less legitimate? If, hypothetically, there were in some category of cases a foolproof way of determining whether legislators acted out of hostility to certain ideas, the Court might decide not to apply the categorical approach in those cases. The Court would then have to distinguish between the real first amendment and the prophylactic categorical approach. The possibility that the Court would make such a distinction does not make the categorical approach less legitimate. In the case of *Miranda* the analogous possibility has, according to the Court, become a reality; but that provides no additional reason to doubt the legitimacy of *Miranda*.

Finally, it might be objected that the Court's approach to content-based restrictions has the several possible justifications that I described above. The justification that takes into account institutional limitations and propensities—that is, the "prophylactic" justification that parallels *Miranda*—is only one of the bases of the doctrine in this area. For that reason, it might be argued, this doctrine rests on a firmer footing than *Miranda* does.

There are two answers. First, as I have argued, the strong hostility to content-based restrictions that the Court showed in *Mosley* cannot plausibly be justified in any way other than as a prophylactic rule designed to minimize the possibility that improperly-motivated legislation will be upheld. The other possible

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[43] Oregon v. Hass, 420 U.S. 714, 721-24 (1975); Harris v. New York, 401 U.S. 222, 224 (1971).

justifications for content-based regulation do not support *Mosley*. Second and more important, no one raises even the slightest question about the legitimacy of the doctrine that content-based restrictions are generally unconstitutional. No one suggests that that doctrine is illegitimate to the extent that it rests on an assessment of the institutional propensities and abilities of the courts and legislatures. In the first amendment area, this prophylactic approach is accepted—as it should be—as a normal part of constitutional law. The same approach should not become questionable when applied in *Miranda*.

C.

This same analysis extends beyond the first amendment; it is true of constitutional law in general.[44] The equal protection clause is another relatively obvious example, although I will discuss it only briefly. Under well-established equal protection doctrine, certain classifications, especially those based on race, will be upheld only if necessary to promote a compelling state interest.[45] One of the principal justifications for this strict scrutiny is that racial (and certain other) classifications are likely to reflect prejudiced or excessively stereotyped judgments by the legislature, and it will be difficult for courts to identify prejudiced judgments on a case-by-case basis. That warrants the use of a strict rule of presumptive (in race cases, nearly conclusive) invalidity.[46]

These justifications, too, are parallel to *Miranda*. Strict scru-

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[44] For similar arguments that the constitutional doctrine propounded by the Supreme Court often does not correspond to the norms established by the constitutional provisions themselves, see Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex.L.Rev. 959 (1985); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv.L.Rev. 1212 (1978).

[45] See, for example, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). In practice, the standard is even stricter; it seems clear that racial classifications that discriminate against minorities will be upheld only in the most extraordinary circumstances. See generally, Washington v. Lee, 390 U.S. 333, 334 (1968) (Black, Harlan, and Stewart concurring); Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1090 (1962).

[46] See, for example, Ely, Democracy and Distrust 156-60 (cited in note 38). See also Cass R. Sunstein, Naked Preferences and the Constitution, 84 Col.L.Rev. 1689, 1711-13 (1984); Cass R. Sunstein, Public Values, Private Interests, and the Equal Protection Clause, 1982 S.Ct.Rev. 127.

I have argued elsewhere that this theory is not the best explanation of why racial classifications are unacceptable. See David A. Strauss, The Myth of Colorblindness, 1986 S.Ct.Rev. 99, 118-26. But that argument concerns the substantive correctness of this theory, not the legitimacy of the courts' acting on it.

tiny, like *Miranda*, is a relatively rigid rule adopted on the ground that the government is likely to act unlawfully and the courts will have a difficult time detecting its unlawful conduct. If a court could accurately determine the facts of each case, it would very likely discover some racial classifications that are not based on prejudice. Under strict scrutiny, however, most of those classifications will not survive. Those classifications are analogous to the voluntary confessions that are excluded from evidence under *Miranda*; one might say that such classifications would be upheld under the "real" equal protection clause, because what the clause forbids is classifications based on prejudice. Strict scrutiny therefore goes beyond the "real" equal protection clause. But the Court has determined that it is worth paying this price in order to avoid both the costs of a case-by-case approach and the risk that such an approach would lead to erroneous decisions upholding classifications based on prejudice. In Professor Grano's terms, this feature of equal protection doctrine, whether or not it is substantively correct, is a prophylactic rule. But no one seriously questions its legitimacy; it is mainstream constitutional law.

The equal protection doctrine that governs the review of most social and economic legislation may be similar, although the matter is less clear. Most legislation is reviewed by courts under a very lenient standard. The courts are to defer to any legislative determination if it has a " 'reasonable basis,' " even if it " 'is not made with mathematical nicety.' "[47] The Court has sometimes said that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[48]

To some extent, this doctrine—rational basis review—is also analytically indistinguishable from a prophylactic rule.[49] One of the principal justifications for rational basis review is that the legislature is best able to assess the complex factual issues underlying social and economic legislation; courts, lacking the legislature's fact-finding capacities, are ill-equipped to second-guess its judgments.[50] If rational basis review is justified in this way, then it, too,

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[47] Dandridge v. Williams, 397 U.S. 471, 485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[48] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[49] For a comprehensive argument that the Supreme Court's equal protection doctrine underenforces the norms established by the equal protection clause, see Stephen F. Ross, Legislative Enforcement of Equal Protection, 72 Minn.L.Rev. 311, 321-26 (1987).

[50] See Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584-86 (1935); Oregon v. Mitchell, 400 U.S. 112, 247-48 (1970) (opinion of Brennan, White, and Marshall). See also Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 94-95 (1961);

is a prophylactic rule. This justification presupposes that an omniscient court—or even a court that conducted an exhaustive factual investigation in each case—would invalidate many statutes that survive rational basis review. Such a court would find that the factual basis necessary to support the statute, while conceivable, does not actually exist. The "real" equal protection clause requires invalidation of such statutes. Rational basis review deviates from the "real" equal protection clause by upholding such statutes; the justification for doing so is that detailed factual investigation would be too costly and error-prone. In this way, rational basis review parallels *Miranda*.

In *Oregon v. Mitchell*,[51] three Justices followed the logic of this justification of rational basis review by concluding that Congress, acting under § 5 of the fourteenth amendment, can determine that a state statute violates the equal protection clause even when that statute satisfies rational basis review.[52] They reasoned that Congress, unlike the courts, is institutionally capable of making complex factual determinations; therefore Congress need not give the same degree of deference to state statutes.[53]

This reasoning confirms that the "real" equal protection clause—in this instance, the version of the clause enforced by Congress, which does not labor under the courts' institutional limitations—does not itself mandate that state legislation be upheld if it satisfies rational basis review. Rather, that lenient approach to state legislation, which deviates from the requirements of the "real" equal protection clause, is—like *Miranda*—a rule devised by

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U.S. v. Carolene Products Co., 304 U.S. 144, 154 (1938); Powell v. Pennsylvania, 127 U.S. 678, 685 (1888); Munn v. Illinois, 94 U.S. 113, 132 (1876).

[51] 400 U.S. 112 (1970).

[52] See Ross, 72 Minn.L.Rev. at 321-26 (cited in note 49).

[53] 400 U.S. 112, 246-48 (1970) (opinion of Brennan, White, and Marshall). The Justices reasoned as follows:

> When a state legislative classification is subjected to judicial challenge as violating the Equal Protection Clause, it comes before the courts cloaked by the presumption that the legislature has, as it should, acted within constitutional limitations. . . .
>
> But, as we have consistently held, this limitation on judicial review of state legislative classifications is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review. . . . The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. . . .
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> Limitations stemming from the nature of the judicial process, however, have no application to Congress. . . . Should Congress . . . undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. . . . Congress [may] make its own determination on the matter.

judges to take into account the institutional capacities and limitations of the courts and the other branches.

In this case—unlike both *Miranda* and the other examples I have discussed—the prophylactic rule operates in reverse;[54] its effect is to uphold legislation that the "real" Constitution would invalidate. But it is difficult to see why this should make a difference to the legitimacy of the Court's action. Professor Grano is concerned about cases in which the Court's departures from the "real" Constitution have limited the power of the other branches and the states to govern. When the Court applies rational basis review, it arguably upholds government regulation of individuals who should not be regulated under the "real" Constitution. But enforcing rights against the government is as much a part of the Court's task as is carrying out lawful government actions. If it is illegitimate for the Court to limit the other branches on the basis of a prophylactic rule, then it should also be illegitimate for the Court to refuse to uphold rights against the government on the basis of a prophylactic rule.

To be sure, there are other justifications for rational basis review; under those justifications, rational basis review no longer parallels *Miranda*. For example, the Court often justifies rational basis review on the ground that the equal protection clause leaves legislatures nearly complete freedom to make the value choices involved in social and economic legislation.[55] But again, no one suggests that the justifications that rest on the court's institutional limitations create a problem of legitimacy; no one would seriously argue that rational basis review is illegimate to the extent that it is justified by reference to the difficulties courts face in reviewing factual determinations.

III.

The fundamental point, of course, is that in deciding constitutional cases, the courts constantly consider institutional capacities and propensities. That is, to a large extent, what constitutional law consists of: courts create constitutional doctrine by taking into account *both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities.

As a theoretical exercise, one could try to identify what the

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[54] See Schulhofer, 54 U.Chi.L.Rev. at 449 (cited in note 5).

[55] See, for example, Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

real, noumenal Constitution would require if governments had different tendencies or the courts had different capacities. But usually that would be a pointless task. Why should we care what doctrines would govern if courts could always accurately assess legislators' motives, or the facts underlying legislation? Courts cannot always make those determinations with accuracy, and it is obviously legitimate for them to take that fact about their own limitations into account.

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. It is true that the relevant constitutional provisions—the first, fifth, and fourteenth amendments, for example—do not explicitly instruct the courts to take institutional realities into account. That is why, whenever courts take institutional propensities and limitations into account, someone can assert—as Professor Grano does about *Miranda*—that the court has established a "judge-made prophylactic rule" that departs from the "real" Constitution. But it makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that those realities be ignored.

There is an irony in the suggestion that *Miranda* and other prophylactic rules are of questionable legitimacy, and may invade the prerogatives of the other branches, because they openly reflect the courts' institutional limitations as well as the underlying constitutional values. The advocates of judicial self-restraint have consistently emphasized the limits on courts' institutional competence; they stress that the courts should be modest in assessing their own institutional capacities.[56] In a sense, the *Miranda* Court took this lesson to heart. It realized that a case-by-case review of voluntariness was severely testing its capacites, and those of the lower courts. The *Carolene Products* rationale of judicial review—a widely-accepted rationale that was designed to be consistent with the premises of the New Deal era arguments for judicial restraint, and that is seldom criticized as illegitimate judicial usurpation—also rests on an assessment of comparative institutional competence: the courts should intervene in areas where they are

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[56] See, for example, Learned Hand, The Bill of Rights 66-67 (1958); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv.L.Rev. 129, 144 (1893). See generally Archibald Cox, The Role of Congress in Constitutional Determinations, 40 U.Cin.L.Rev. 199, 206-11 (1971).

competent and the legislatures are institutionally likely to go wrong.[57]

Miranda applied this approach—a realistic assessment of the abilities and propensities of the different branches—to a different set of problems. Much of constitutional law deals with the institutional shortcomings and propensities of legislatures; *Miranda* dealt with the police. Traditional constitutional theory calls for courts to admit that they are not very good at finding the facts that bear on large-scale social problems; *Miranda* made essentially that admission about the facts of a certain category of particular cases. Of course, the *Miranda* Court then decided that these institutional realities warrant a doctrine more favorable to the suspect, and less favorable to the authorities, than the previous law had been. But there is no basis for saying that that judgment undermined the legitimacy of what the Court did. Whether or not that judgment was correct, it reflected, at bottom, a traditional approach to the interpretation of the Constitution.

[57] See Carolene Products, 304 U.S. at 152 n.4; Ely, Democracy and Distrust (cited in note 38), especially 102-03; Bruce A. Ackerman, Beyond *Carolene Products*, 98 Harv.L.Rev. 713, 714-15 (1985).