DOCTRINE AND DEEP QUESTIONS

Garrick B. Pursley

Abstract

This brief essay responds to Brannon P. Denning & Michael B. Kent, Anti-Evasion Doctrines in Constitutional Law, 2012 UTAH L. REV. 1773. I assess Denning and Kent’s contribution to the growing metadoctrinal strand of constitutional theory and their contention that Anti-Evasion Doctrines—doctrinal rules, tests, and standards that help courts implement constitutional norms in concrete cases by patching up gaps in previously announced implementing doctrines—are a conceptually distinct category of constitutional decision rule. While I conclude that this claim is questionable, I also argue that Denning and Kent’s contribution to metadoctrinal theory is nevertheless significant: They identify a previously understudied set of reasons that bear on the process of doctrinal formulation. These anticircumvention considerations—considerations of the extent to which existing constitutional doctrines fail to capture some set of constitutional violations—are relevant in a broad array of doctrinal contexts and understanding them adds to our general account of how courts formulate constitutional doctrine.

I. INTRODUCTION

Professors Denning and Kent’s fascinating article Anti-Evasion Doctrines in Constitutional Law,1 to which this essay responds, advances two core claims. First, Denning and Kent argue that there exist certain constitutional decision rules—namely, anti-evasion doctrines (AEDs)—that are conceptually distinct from standard constitutional decision rules in one or more of the following senses: logical priority (AEDs are logically subsequent to some standard decision rules); function (AEDs supplement standard decision rules but do not replace them); or justification (AEDs are adopted for reasons distinct from the instrumental considerations of how best to implement constitutional operative propositions that support adopting primary decision rules, which reasons include perhaps the desire to prevent circumvention of constitutional norms or decision rules).2 Call this the distinctiveness thesis (DT). Second, Denning and Kent argue that identifying

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2 See id. 1776–79.
AEDs as a conceptually distinct category of constitutional decision rules yields theoretical benefits beyond the merely taxonomical—beyond merely adding another more or less correct bit of nuance to our positive account of constitutional doctrine on the metadoctrinal model.\(^3\) Call this the value thesis (VT).

Professors Denning and Kent’s identification of AEDs in a variety of doctrinal contexts is a contribution to the “metadoctrinal” research program in constitutional theory, a research program that treats transsubstantive doctrinal analysis as an important office.\(^4\) Metadoctrinal theorists have developed several central theses. First, and most important, is the “two-output thesis,” that is “that there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of constitutional adjudication,” namely judge-interpreted constitutional meaning [or constitutional operative propositions] and judge-crafted tests bearing an instrumental relationship to that meaning [or constitutional decision rules].”\(^5\) Second is the instrumental reasoning thesis, which proposes that decision rules are instrumentally related to operative propositions—that the former implement the latter and typically do so in a manner determined in large part by pragmatic considerations bearing on the process of constitutional adjudication.\(^6\) Relevant instrumental considerations relate to the administrability of a decision rule, collateral consequences of its adoption or application (e.g., interbranch friction), and other issues that bear on the mechanics of the task of constitutional implementation.\(^7\) Third, the necessity thesis holds that because courts will face some degree of epistemic uncertainty regarding the existence of a constitutional violation in every case, constitutional adjudication always requires a decision rule.\(^8\)

Denning and Kent’s DT—that AEDs are distinct from other forms of constitutional doctrine\(^9\)—might mean several things. To read DT as a contribution to metadoctrinal theory, we might say it is the claim that AEDs as a form of constitutional doctrine are conceptually distinct from constitutional operative propositions and constitutional decision rules, the two categories of doctrine identified by current metadoctrinal taxonomy.\(^10\) Now one and a half decades

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\(^3\) Id. at 1778, 1796–1804.

\(^4\) See id. at 1777–79.


\(^7\) See Pursley, supra note 6, at 507.

\(^8\) See Berman, supra note 5, at 221.

\(^9\) Denning & Kent, Jr., supra note 1, at 1775–76.

old—and with still older analytical precursors—metadoctrinalism is a mature branch of constitutional theory in the sense that its methodology and objectives have been thoroughly explored and defended. But it is also a field in which much work remains to be done, and it is thus worth assessing Denning and Kent’s contribution as it relates to the broader methods and aims of the research program. In Part II, I assess DT by exploring what, exactly, Denning and Kent have identified that is new or previously underexamined in the literature. Because the truth of DT is a premise of VT, if DT is in some sense true, then VT may be true. I leave it to others, however, to evaluate VT in greater detail. In Part III, I very briefly examine some deeper questions raised by the AED identification project and evaluate metadoctrinal theory’s capacity to generate answers. It turns out that another of Denning and Kent’s contributions is to highlight some of metadoctrinalism’s limits.

II. AEDS’ DISTINCTIVENESS

The goal of metadoctrinalism’s taxonomic project is to develop a full account of “the conceptual structure[] of constitutional doctrine;” thus our question should be whether Denning and Kent have identified a doctrinal phenomenon that is conceptually distinct from those that have already been described in the literature. Denning and Kent define AEDs as rules of constitutional doctrine of the following form: action $X$ violates constitutional requirement $\Theta$ even though $X$ satisfies doctrinal rule, test, or standard $Y$ that identifies some violations of $\Theta$. While mapping doctrinal content is an important positive project, it appears at first blush as though the authors have contributed little more to the metadoctrinal theory than a catalogue of decision rules whose conceptual structure is already well understood.
Metadoctrinalism’s core theses together establish the properties of two conceptual types of constitutional doctrine: operative propositions and decision rules. They also suggest that AEDs have all the essential properties of decision rules. AEDs are designed to implement constitutional operative propositions and are shaped by instrumental considerations.\textsuperscript{16} For example, as the authors emphasize, AEDs often seem supported by calculations about the potential rate of adjudicatory errors in the form of false negatives, meaning holdings that a challenged action is constitutionally permissible where the action actually violates the relevant operative proposition but is not identified as a violation by imprecise decision rules.\textsuperscript{17} Denning and Kent draw from the risk regulation literature to contend that courts do and should strive for optimal, not maximal, enforcement of constitutional operative propositions in making doctrine; this suggests that they believe courts may choose to adopt AEDs for instrumental reasons, consistent with the instrumental reasoning thesis.\textsuperscript{18} And as AEDs do not appear to be propositional statements of constitutional meaning, they are likely not mislabeled operative propositions. The authors stress that AEDs take a variety of forms—including purpose tests and effects tests—and tend to be more standard-like (that is, more flexible and responsive to the particular circumstances of application from case to case) than rule-like (that is, crisp and unyielding across varying circumstances).\textsuperscript{19} This does not distinguish them conceptually from other decision rules. The point of metadoctrinal taxonomy is to categorize doctrines by their structure, not their content; and the standard decision rules category includes all manner of bright-line rules, balancing tests, levels of scrutiny, and so forth.\textsuperscript{20} They are all decision rules because they implement operative propositions and are shaped by instrumental concerns related to that implementation.

Denning and Kent claim that AEDs stand not only in the typical implementation relationship with operative propositions, but also in a relationship of supplementation with other decision rules.\textsuperscript{21} For this to amount to a structural distinction, however, we would need an argument to establish that standard decision rules do not supplement other decision rules, at least not in the ordinary case. But it would not be incoherent to characterize, for example, the virtually per se antidiscrimination rule and the \textit{Pike}\textsuperscript{22} balancing test from the dormant Commerce Clause doctrine, as a pair of coequal decision rules—both of which implement the underlying constitutional operative proposition in different ways and complement each other in the sense that each identifies violations of the

\begin{itemize}
  \item \textsuperscript{16}See id. at 1776, 1793.
  \item \textsuperscript{17}See id. at 1793.
  \item \textsuperscript{18}See id. at 1797–1804, 1814–15.
  \item \textsuperscript{19}Id. at 1779–93, 1797–1804.
  \item \textsuperscript{20}Cf. Richard H. Fallon, Jr., \textit{Implementing the Constitution} 77–79 (2001) (calling his own doctrinal list of constitutional tests “a hodgepodge”).
  \item \textsuperscript{21}Denning & Kent, Jr., \textit{supra} note 1, at 1776, 1808–09.
  \item \textsuperscript{22}Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
\end{itemize}
operative proposition that the other does not.\textsuperscript{23} After all, what Denning and Kent characterize as the primary dormant Commerce Clause decision rules—including the virtually per se invalidity rule—focus on discriminatory actions;\textsuperscript{24} the \textit{Pike} test identifies unduly burdensome but nondiscriminatory actions.\textsuperscript{25} So, too, a later-formulated decision rule instructing courts to defer to Congress in a certain subset of, say, Equal Protection Clause disputes in which the Court typically applies a stringent standard of review—an exception likely to produce more false negatives—would supplement the primary decision rule in precisely the way Denning and Kent have in mind (changing the number and kind of violations the relevant \textit{set} of decision rules identify). But Denning and Kent would not call our hypothetical Equal Protection supplement an AED if it is not formulated or treated as a revision or qualification of the primary decision rule. There is nothing conceptually distinctive, then, about decision rules that are paired with other decision rules to implement constitutional operative propositions as a \textit{system} of rules.

Much the same line refutes other proffered grounds for distinction. AEDs’ temporal relationship to primary decision rules—some AEDs are adopted after the primaries—is a historical accident that Denning and Kent concede cannot be significant as a conceptually distinguishing feature.\textsuperscript{26} Consider again the Equal Protection example—adding a decision rule that decreases the stringency of judicial enforcement of the relevant norm, even if it was adopted long after the primary decision rule, would not make it an AED. It would just be a second \textit{decision rule}. So, too, the claim that AEDs tend to be standard-like while the primary decision rules that they supplement tend to be more rule-like does not distinguish AEDs from other decision rules, because the category of decision rules includes both rule-like and standard-like doctrines.\textsuperscript{27}

While scholars sometimes for the sake of contrast characterize doctrine in binary terms—deferential or nondeferential, rule-like or standard-like, and so forth—few would deny that many decision rules have characteristics that resist

\textsuperscript{23} See City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) (establishing the virtually per se invalidity doctrine); \textit{Pike}, 397 U.S. at 142 (establishing a balancing standard); Denning & Kent, Jr., \textit{supra} note 1, at 1822 (characterizing the \textit{Pike} test as an AED); Pursley, \textit{supra} note 6, at 538–44 (discussing these decision rules).

\textsuperscript{24} See Denning & Kent, Jr., \textit{supra} note 1, at 1789–90 (discussing the dormant Commerce Clause doctrine as centered on discrimination); \textit{id.} at 1810 (noting that “the Court enforces the core of the DCCD with an antidiscrimination rule”).

\textsuperscript{25} See \textit{Pike}, 397 U.S. at 142 (holding that nondiscriminatory state laws are invalid if their burdens on interstate commerce are “clearly excessive in relation to the putative local benefits”); Pursley, \textit{supra} note 6, at 539–40 (discussing \textit{Pike}).

\textsuperscript{26} Denning & Kent, Jr., \textit{supra} note 1, at 1779 n.34 (“[I]t may not always be the case that the ‘other’ rules to which AEDs respond were developed prior to the AED itself . . . [and] we think that our analysis is the same regardless [of the chronological facts].”).

\textsuperscript{27} See \textit{id.} at 1801–02.
such simple division.\footnote{28 See id. at 1776.} And Denning and Kent’s characterization is in some instances backward: think, for example, of the Miranda doctrine—a rule-like primary decision rule\footnote{29 See Miranda v. Arizona, 384 U.S. 436, 444–45 (1966); Berman, supra note 10, at 116–24 (discussing Miranda).}—and the “substantial effects” prong of the modern Commerce Clause doctrine—clearly a standard-like primary decision rule.\footnote{30 See, e.g., United States v. Lopez, 514 U.S. 549 (1995).} AEDs surely exist in some contexts, and drawing correct generalizations concerning their form and functions certainly improves our understanding of constitutional practice. It just does not add a conceptually distinct category to our metadoctrinal taxonomy.\footnote{31 See Berman, supra note 10, at 6–7 (distinguishing doctrine’s logical structure from its content).}

III. DEEP QUESTIONS

To salvage DT, Denning and Kent should be read to suggest not that AEDs themselves are conceptually distinct from the primary decision rules that they supplement, but that examining decision rules that take the form of AEDs illuminates an important and underexamined category of reasons that judges may rely upon in doctrinal formulation. So far, theorists have focused for the most part on a standard set of instrumental considerations that bear on how a constitutional norm (or operative proposition), $\Theta$, may best be implemented. Here, determining the best implementation strategy requires more than simply designing decision rules that will reliably identify violations of $\Theta$; it involves considering, for example, things like how to minimize interbranch friction, adjudicatory error, and decision costs.\footnote{32 Pursley, supra note 6, at 506–12.} But Denning and Kent draw our attention to another set of considerations that become salient upon asking a slightly different question: How can we improve the constitutional decision rules that we have put in place (or are planning to adopt) to implement $\Theta$? Their exploration of AEDs highlights the wide variety of contexts in which this kind of reasoning might be at work in doctrinal formulation. This is certainly something new.

One fundamental concern in the formulation of decision rules is “fit”—or how to craft rules that will identify a large percentage of violations of $\Theta$. Denning and Kent have thus highlighted a particular kind of fit consideration associated with crafting decision rules that preclude cleverly crafted evasions of $\Theta$ under the guise of formal compliance.\footnote{33 See Denning & Kent, Jr., supra note 1, at 1778–80.} Drawing attention to these anticircumvention considerations is important—without them, standard instrumental reasoning does not always clearly favor adopting the decision rules that the authors identify as AEDs. Grafting a standard-like supplement onto an existing rule-like test will seem in some contexts inconsistent with the relevant instrumental factors—it is likely to
increase the rate of adjudicatory error, as standards often do; it may increase decision costs because of the increased fact sensitivity of the hybrid rule; and it may require courts to weigh factors that are at the outer limits of judicial competence, as with the assessment of state action's burden on interstate commerce required by the Pike standard. Denning and Kent's notion of anticircumvention thus corresponds to an underappreciated set of considerations that might justify adopting a standard-like AED despite other instrumental deficits. Those considerations are themselves instrumental; in addition to their similarity to the basic "fit" concern, anticircumvention concerns are aimed at a particular kind of adjudicatory error that allows "constitutional principles to be undermined by subterfuge and artifice."

But fit is not necessarily the central concern. Reasoning in doctrinal formulation is hardly ever limited to fit; other instrumental considerations are almost always on the table and often will take precedence. If, for example, an existing decision rule does a fairly good job of identifying instances in which Congress has violated \( \Theta \), but also invites such heavy judicial scrutiny of legislative motives that it causes significant interbranch friction, the latter characteristic of the rule could well be the one that motivates revision. Our hypothetical court might adopt a supplementary rule requiring deference where certain legislative process conditions have been satisfied (indicia of heightened deliberation on some issue, for example). Concerns about fit or circumvention need not always be the driving force. We must be careful not to assign priority to any particular instrumental consideration without justification. Still, thorough examination of the instrumental considerations bearing on doctrinal formulation advances the literature.

Even more interesting are the deeper questions Denning and Kent's work provokes—questions about the nature of constitutional doctrine and the limits of metadoctrinal theory. Though there are many questions, and space does not permit thorough exploration of them, I will briefly mention two that are framed by asking whether we can be certain that the decision rules Denning and Kent highlight are, in fact, AEDs. Methods for assessing the reliability of classifications, based on the authors' definition of an AED, include a test of function (i.e., a decision rule is an AED if it implements the operative proposition by identifying as unconstitutional actions that formally comply with primary decision rules but nevertheless violate the operative proposition); and a test of cause (i.e., a decision rule is an AED if adopted for anticircumvention reasons).

These tests quickly and clearly run up against two of the deepest and most intractable questions in constitutional theory—the question of the exact nature and

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34 See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Pursley, supra note 6, at 506–12 ( canvassing instrumental factors); Denning & Kent, Jr., supra note 1, at 1804–13 (acknowledging problems with standards).

35 Denning & Kent, Jr., supra note 1, at 1804, 1808.

content of the constitutional norms that we have and the question of the real reasons for judicial decisions. Denning and Kent rely on assumed operative propositions and inferred accounts of the courts’ reasons for decision in making AED designations. But alternative accounts are possible—in the dormant Commerce Clause context, for example, I have elsewhere hypothesized both a different operative proposition and different instrumental justifications for the dormant Commerce Clause decision rules that Denning and Kent characterize as AEDs. Until we have established criteria for selecting among these competing accounts, any classification of any given decision rule as an AED is at best provisional.

IV. CONCLUSION

Metadoctrinal theory does not answer these deep questions—it is interpretively inert and thus provides no direct guidance on the actual content of operative propositions, and the instrumental reasoning thesis provides a host of possible reasons for adopting decision rules without specifying the actual reasons relied upon in any particular case. But by highlighting the relationship between operative propositions and decision rules, metadoctrinal theory does provide a new way of getting at the answers. To move beyond taxonomy without descending into the morass of debates over interpretive method or judicial motivation, we might test competing accounts as explanatory hypotheses. Denning and Kent must test either the assumed operative propositions on which they base their AED designations against conventional accounts of the relevant operative propositions and other plausible hypotheses or their account of the anticircumvention reasons for adopting certain decision rules against other accounts—or both. The hypotheses could be assessed on theoretical desiderata of simplicity, consilience, and conservatism familiar from the philosophy of science. Metadoctrinal theory sets the stage for building a rigorous explanation, but it takes more work to complete.

37 See Pursley, supra note 6, at 538–44.
38 Berman, supra note 10, at 58 n.192.
39 See, e.g., Pursley, supra note 6, at 530–32.