

Popular Metadoctrinalism: The Next Frontier?

Micah W. J. Smith*

Three years ago, Professor Mitchell Berman observed that constitutional scholars have recently begun to turn their attention away from constitutional “meaning” to what he loosely called “constitutional doctrine”—that is, the rules courts craft in order to implement constitutional meaning.¹ This increasingly popular genre of “doctrinal” scholarship²—which has its modern roots in the work of Henry Monaghan and Larry Sager³—is not directly concerned with developing and critiquing methods of constitutional *interpretation*, but rather with “the potentialities and challenges that arise from the existence of *doctrine*, conceived as a category of judicial work product”⁴ And given that works of this type concern themselves “with the *fact* of doctrine but not with its particular *content*,” Professor Berman felicitously labeled the genre “metadoctrinalism.”⁵

The move in current constitutional scholarship toward metadoctrinalism comes at a time when theories of popular constitutionalism have taken center stage.⁶ While popular constitutionalism (much like metadoctrinalism)

* Law Clerk, Hon. Guido Calabresi, United States Court of Appeals for the Second Circuit; J.D., Harvard Law School, 2006.

¹ Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3 (2004). To be precise, Professor Berman has argued that “constitutional doctrine” can be further divided into two distinct parts: (1) statements of judicial interpretations of constitutional meaning (which he calls “constitutional operative propositions”), and (2) the actual doctrinal rules that courts lay out to determine whether those court-defined meanings have been satisfied or violated (which he labels “constitutional decision rules”). For ease of presentation, this Essay does not employ Professor Berman’s more nuanced terminology, but instead uses the term “doctrine”—which is used interchangeably with “doctrinal rule” and “doctrinal test”—in its more commonly understood sense: “rules that judges create to implement [constitutional] meaning” KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 5 (2006).

² See ROOSEVELT, *supra* note 1, at 36 (“The basic idea that there is a significant difference between doctrine and meaning is fairly widely accepted among legal scholars.”); see also RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001). But see Roderick M. Hills, Jr., *The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (objecting to the claim that “a gap exists between ‘pure’ constitutional meaning and implementing doctrine” on the grounds that “pragmatically speaking, the meaning of a constitutional provision is its implementation”).

³ See, e.g., Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

⁴ Berman *supra* note 1, at 4 (emphasis added).

⁵ *Id.* (emphasis added).

⁶ See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 719–21 (2006); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 898 (2005) (“A growing body of scholarship has coalesced around the concept of ‘popular constitutionalism.’”; “And . . . ‘the People’ have

covers a broad array of divergent and even incompatible approaches, popular constitutionalists generally converge in their desire to promote—in varying degrees, and by many different means—“popular” control over the development and articulation of constitutional meaning.

Against this backdrop, metadoctrinalism might be understood—if cynically—as offering constitutional scholarship a bastion against popular control, an autonomous realm of technical, “legal” reasoning largely inaccessible to those unschooled in the art of doctrinal craftsmanship. On this view, it would seem that metadoctrinalism promises to preserve, in a sense, the “mystery of law.”⁷ For if constitutional litigation is truly about technical legal rules and doctrines—and not about the often-intuitive meaning(s) of constitutional norms and provisions—then perhaps we should, as they say, leave criticism of constitutional litigation to the pros.

This cynical view is wrong. Metadoctrinalism and popular constitutionalism are not wholly incompatible approaches to constitutional law, but rather are, in an important sense, complementary. Specifically, once the conceptual distinction between constitutional meaning and doctrine is drawn, it becomes possible to appreciate that there are two distinct ways in which popular values might influence constitutional adjudication: (1) democratic values might play a role in the interpretation of constitutional meaning,⁸ and, less commonly acknowledged, (2) such values might also influence the way in which courts craft and articulate doctrinal rules. The second of these possibilities—which is brought fully to light once the meaning/doctrine distinction is recognized, and which we might dare to call “popular metadoctrinalism”—is what I set out to explore here.

This Essay unfolds as follows. Part I begins with the meaning/doctrine distinction, and then turns to a discussion of what “doctrine” is. It explains the role of doctrine and lays out the factors that courts generally consider in crafting it. Part II briefly assesses popular constitutionalism’s commitment to the view that the Constitution is principally “focused upon democratic self-government.”⁹ It then identifies a foundational feature of democratic decision making—institutional openness and accessibility—that courts might, through purposeful articulation of doctrinal rules, be capable of furthering. Part III considers the possibilities for popular metadoctrinalism. In particular, it offers a taxonomy of the three principal ways in

become constitutional theory’s hottest fashion.”).

⁷ See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE’S COMMENTARIES* 25 (Univ. of Chi. Press 1996) (1941) (describing Blackstone’s view that “[t]here must also be a Mystery of Law, a decent veil to protect ultimate values from the devouring gaze of Reason”).

⁸ With respect to constitutional meaning, “popular” values might be promoted by encouraging courts to pay more attention to them, see, for example, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005), or by having courts play less of a role, see, for example, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

⁹ BREYER, *supra* note 8, at 32.

which courts¹⁰ might promote institutional openness and accessibility through the crafting of its doctrinal rules. The Essay concludes, in Part IV, with a brief discussion of two related challenges that a popular meta-doctrinalist approach must face: on the one hand, courts have disincentives to promote popular values precisely in those situations in which such promotion would be most valuable; on the other, there is a risk that overzealous pursuit of popular metadoctrinalism will undermine decisions intended to benefit or protect politically weak groups or individuals.

I. METADOCTRINALISM

Why do courts need constitutional doctrine? In short, it is because, often, “plain meaning does not get us all the way to a decision” in concrete cases.¹¹ Of course, Article I, Section 3 certainly “means” that you cannot be a Senator if you are twenty-nine years old. And Article II, Section 1 “means” that one cannot become President if, among other things, one has not been a resident of the United States for fourteen years. With respect to these sorts of constitutional provisions, “meaning” alone is enough to decide all but the most unusual of cases. But these crystal clear provisions are exceptions to the rule. Most constitutional words and phrases have a clear meaning only at such a high level of generality that, to paraphrase Holmes, their meaning alone cannot decide concrete cases.¹² As Professor Roosevelt bluntly puts it, “direct enforcement” of the plain meaning of the Constitution “turns out to be a fantasy.”¹³

And that is where doctrine steps in:

Doctrine is the nitty-gritty of constitutional adjudication. It is the set of rules that the Supreme Court creates to take it from the grand language of the Constitution to the actual outcomes of particular cases. In deciding cases, the Court does not ask whether the governmental act it reviews is consistent with the meaning of the Constitution; it asks whether the act is consistent with the Court’s doctrine.¹⁴

¹⁰ It is important to emphasize that while the U.S. Supreme Court may have the last say, it often plays a far less important role than lower federal courts and state courts in the development and articulation of legal doctrine. See, e.g., Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. (forthcoming 2007) (discussing the “bottom-up decentralized evolution of Fourth Amendment rules”).

¹¹ ROOSEVELT, *supra* note 1, at 18.

¹² *Id.* (citing *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). Or in the words of Robert Bork, “[t]he text of the Constitution, as anyone experienced with words might expect, is least precise where it is the most important.” Robert Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 138, 141.

¹³ ROOSEVELT, *supra* note 1, at 19.

¹⁴ *Id.* at 19–20.

Professor Fallon has provided a useful catalogue of the kinds of doctrinal tests courts typically employ.¹⁵ First, courts might employ a “forbidden-content” test, which “identif[ies] statutes, regulations, or policies as absolutely unconstitutional based on their content.” Second, courts might instead use a “suspect-content” test, which identifies laws as “presumptively, but not necessarily, unconstitutional.” Third, courts might, moving in the direction of deference, adopt a “nonsuspect content” test, which presumes of constitutionality. Fourth, courts might decline to grant a presumption in either direction, and instead employ a balancing test, which would require courts to weigh independently the competing constitutional and governmental interests. Fifth, courts might adopt a test that inquires into whether laws have a certain kind of effect or purpose. And finally, courts might look at whether the government official in question undertook a sufficiently careful deliberation before taking action—that is, they might look at “the nature of the deliberative process from which a challenged statute or policy resulted.”¹⁶

How do courts go about deciding what kind of doctrine is appropriate for a given case? Here, Professor Roosevelt proves to be a reliable guide. In his insightful and concise book, *The Myth of Judicial Activism*,¹⁷ Professor Roosevelt identifies the factors that typically influence courts’ selection of doctrinal rules. First, courts take relative institutional competence into account. When a court believes a government actor in a different branch is better positioned to determine whether a particular action comports with the Constitution, the court is more likely to defer to that actor’s judgments. Second, courts consider the “lessons of history”; if, for example, there has been a history of discrimination against a particular group, courts may be less inclined to defer to legislation implicating the interests of that disadvantaged group. And third, courts often consider whether there are “defects in democracy,” that is, “structural problems” that make it likely that the legislature will fail to exercise its constitutional judgment appropriately. These first three factors influence the extent to which courts will defer; they might lead a court to adopt, on the one extreme, a forbidden or suspect content test; or, at the other extreme, the factors might push in favor of a non-suspect test.

Professor Roosevelt identifies two additional factors that courts typically consider in crafting doctrinal rules. First, courts weigh what the “cost of error” would be if a judgment turned out to be wrong in one direction or the other. And finally, courts consider whether, in the circumstances at issue, a standard would be preferable to a clear rule.

¹⁵ Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 56 (1997).

¹⁶ *Id.* at 67–71.

¹⁷ ROOSEVELT, *supra* note 1.

Professors Fallon and Roosevelt offer a clear, and accurate, view of the basic types of doctrinal rules at courts' disposal, and the factors that drive a court to select one kind of rule over another. I highlight this process of doctrinal-rule *selection* to contrast it with—and then explore its relationship with—the focus of this Essay, popular metadoctrinalism, which operates on a somewhat different, but not unrelated, plane.

As indicated earlier, the concern of this Essay is to map out the different ways in which doctrinal rules, once selected, might be articulated and framed to consciously promote a vision of popular constitutionalism. With this purpose in mind, the following Part will discuss popular constitutionalism's normative commitment to democratic values, and explore one particular kind of democratic value that might successfully be promoted through the purposeful crafting of doctrinal rules. Then, Part III will discuss three specific ways in which this particular democratic value might be advanced, and in doing so will draw on the doctrinal-rule selection model described above, both to situate and to clarify the popular metadoctrinalist approach.

II. THE CONSTITUTION AND DEMOCRACY

Is our Constitution democratic? Although it falls well short of being ideally democratic—and some have argued that it is in fact *undemocratic* when taken as a whole¹⁸—there is little doubt that one of the Constitution's basic aims was to bring into operation a system of government dependent upon “the capacity of mankind for self-government.”¹⁹ In the words of Justice Breyer, “the original document sowed the democratic seed.”²⁰ Though not without controversy, it is entirely “reasonable . . . to view the Constitution as centrally focused upon . . . the right of individuals to participate in democratic self-government.”²¹ And this is the view that popular constitutionalism adopts.

Of course, “democracy” is what scholars would call an “essentially contested concept,”²² the meaning of which largely depends on one's point of view. In order to talk about popular metadoctrinalism in a meaningful manner, it is necessary to pin down an approach to understanding democratic participation that might plausibly be advanced through doctrinal craftsmanship.

The democratic value that this Essay will focus on is the value of institutional openness and accessibility. In any society founded upon prin-

¹⁸ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); see also ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001).

¹⁹ BREYER, *supra* note 8, at 33 (quoting Federalist No. 39 (James Madison)).

²⁰ *Id.*

²¹ *Id.* at 21.

²² LEVINSON, *supra* note 17, at 6.

ciples of self-governance, transparency of governmental institutions is a paramount concern. This, at least in principle, is not a controversial point. Institutional openness is properly understood, in non-instrumental terms, as a good in and of itself; a culture of transparency is one of the most basic marks of a democratic community. Of course, such transparency also produces substantial benefits. It leads to a more informed, engaged citizenry; or, at least, a citizenry in a position to become engaged if and when it so chooses.²³

Relatedly, openness becomes an all-important check on arbitrary power. Justice Breyer has written, for example, on how it is important for courts to be candid about the way they decide cases:

A decision that [candidly lays out the factors it has considered] . . . has the added value of exposing underlying judicial motivations, specifying the points of doubt for all to read. This is particularly important because transparency of rationale permits informed public criticism of opinions; and that criticism, in a democracy, plays an important role in checking abuse of judicial power.²⁴

Professor Roosevelt, after pointing out the importance of “helping citizens to understand and evaluate the work of the Supreme Court,”²⁵ echoes Justice Breyer’s statements about the importance of clear judicial work product, but in light of a different concern: that, when judicial opinions are not accessible, the general public is easily misled as to what the Court is really doing:

Sadly, the Court frequently writes opinions that are accessible only to specialists. It is that inaccessibility that allows partisans to paint the decisions as nothing more than reflections of the justices’ political preferences. But the Constitution does not belong to judges, as a mystery intelligible only to a priestly caste, and it does not belong to political activists, as a set of incendiary talking points. It belongs to the people. It is our responsibility to judge the Court²⁶

²³ See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

²⁴ BREYER, *supra* note 8, at 127.

²⁵ ROOSEVELT, *supra* note 1, at 6.

²⁶ *Id.* at 7. Our body of legal principles itself benefits from such popular scrutiny. As Charles Wyzanski wrote, “[t]he strength of the law is not in its mystery, but in its capacity to withstand social criticism and intellectual combat.” Charles E. Wyzanski, Jr., *Introduction* to *LEARNED HAND, THE BILL OF RIGHTS* xi (8th ed. 1986).

Of course, the point about transparency should not be overstated. Frankly, most law is not interesting to non-lawyers, and not all law can be made more interesting; as Judge McConnell has all too accurately commented, “[t]he work of the federal courts generally blunders along unnoticed except by legal professionals and the immediately interested parties [because while] [t]he judiciary may not be the least dangerous branch, . . . it is usually the most boring.”²⁷ Moreover, as Professor Fred Schauer has explained, courts—including the Supreme Court—generally “operate[] overwhelmingly in areas of low public salience,” by which he means that courts generally rule on issues that, relatively speaking, simultaneously are less likely to occupy people’s attention and are not considered to be of significant importance.²⁸

Can we meaningfully talk about the promotion of institutional openness and accessibility without stumbling upon the fact of widespread rational—and, perhaps, irrational—ignorance?²⁹ Certainly. We begin with an acknowledgement of the fact that “transparency of rationale *permits* informed public criticism of opinions”³⁰ The more accessible to lay audiences a judicial opinion is, the greater the *opportunity* for scrutiny by the general public. That possibility standing alone constitutes an important democratic value—and one which, the next Part will contend, popular metadoctrinalism can promote. And, this Essay has argued, the non-instrumental value of a society in which governmental deliberations are transparent is promoted regardless of whether individuals choose to make actual use of such transparency.

Thus, we have pinned down a specific sense of “democracy” which—as has thus far been simply assumed—popular metadoctrinalism does or can advance. But before we turn to an analysis of the precise ways in which this democratic value might be promoted through the crafting of doctrine, we should ask whether institutional openness and accessibility is a democratic value that underpins popular constitutionalist thought. For it is true that this intra-institutional value will appear far too modest, or even insignificant, for some popular constitutionalist scholars. And, in one sense, it is, because it does not take any decisionmaking power away from the courts. Nonetheless, this value, while moderate, is one that has the potential to encourage the kind of popular engagement and empowerment that popular constitutionalists advocate, *within* the institutional arrangements

²⁷ Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2387 (2006) (reviewing BREYER, *supra* note 8).

²⁸ Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 11 (2006).

²⁹ Gerwirtzman, *supra* note 6, at 934 (“[M]any Americans simply want nothing to do with constitutional culture. Moreover, to the extent the Court is engaging the People in a dialogue about constitutional aspirations, the People are not doing a particularly good job of holding up their end of the conversation. Apathy, disengagement, and low levels of political knowledge are enduring forces in modern political culture”).

³⁰ BREYER, *supra* note 8, at 127 (emphasis added).

that now (and for the foreseeable future will) prevail. Thus, the link between institutional openness and accessibility and popular constitutionalism—especially in light of the now well-acknowledged inability of courts to resist persisting public opinion³¹—is a meaningful one.

III. POPULAR METADOCTRINALISM EXPLORED

A. *Popular? Yes. Metadoctrinal? No.*

In seeking to understand what popular metadoctrinalism entails, it is instructive first to consider what it does not. Exhibit One is Chief Justice Warren's decision to de-emphasize doctrine in his opinion in *Brown v. Board of Education* in favor of having it "be short, [and] readable by the lay public"³² Whatever the merits of Warren's approach—and there is some reason to believe that it was, in ever-so-perfect hindsight, not the best way to handle the case³³—it was certainly an example of the Court being conscious of the need to make its decision and reasoning accessible and transparent to the general public. Should this not count as a particularly dramatic example of popular metadoctrinalism at work?

The answer is "no," although in order to understand why, it becomes necessary to return briefly to the wellspring of popular metadoctrinalism: the meaning/doctrine distinction. Popular metadoctrinalism, as we know, arises out of the intersection of (1) principles of self-government and (2) doctrine, once it is understood as a judicial work product distinct from meaning. Popular metadoctrinalism, therefore, asks whether "popular" values might influence the way in which the Court crafts doctrine.

Now consider Chief Justice Warren's approach to *Brown*. Although Warren clearly sought to advance the democratic value of institutional openness and accessibility—which, as Part II contended, is an important value regardless of whether the public actually takes advantage of that transparency—he did not, at least on Kluger's account, aim to do so by crafting doctrine in a particular way. Rather, it might be said that Chief Justice

³¹ See, e.g., JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* xii (2006) ("[T]he historical claim that courts have tended, over time, to reflect the will of the majority rather than thwarting it is hardly novel; on the contrary, it has become a kind of underground conventional wisdom among [various] political scientists and legal scholars"); Lucas A. (Scot) Powe, Jr., *The Supreme Court and Election Returns*, in *THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE* 423–45 (Christopher Tomlins ed., 2005).

³² RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 699 (rev. ed. 2004).

³³ See *id.* at 714 ("[T]here were early signs . . . that Warren's opinion, for all its moderation and caution, lacked the depth and persuasiveness ideal to withstand the criticism that would be directed at it even by those who strongly approved of its purpose [The qualities that Warren sought to advance by writing the short opinion] were admirable qualities to bring to the delicate task. The price paid for them, however, was a loss of persuasiveness and judicial authority.").

Warren subordinated doctrine in order to emphasize the simple justice of *Brown's* outcome. Although this example presents interesting questions about the ability of the Court to deliver a moral message about a case, and thereby seek to sway public opinion (or perhaps conversely, the ability of the Court to insulate itself from public scrutiny by over-emphasizing doctrine in cases in which the outcome is morally suspect), these questions do not directly implicate popular metadoctrinalism.

B. Three Approaches to Popular Metadoctrinalism.

What are the ways, then, in which courts might promote institutional accessibility and openness through the manipulation of doctrinal rules? I will identify three.

1. "Superficial" Simplicity

The first way in which courts might promote popular metadoctrinalism is by clothing their doctrinal rules in popular metaphors and appealing rhetoric. Professor Robert Tsai has studied the prevalence and power of what he calls "democracy's handmaid": constitutional metaphors that transform basic rules and norms into "bite-size units of constitutional knowledge."³⁴ Metaphors, Professor Tsai observes, are "uniquely accessible to average citizens," and have the power to "enhance political accountability in the law."³⁵ Through conscious use of constitutional metaphors as doctrinal rules, then, courts can promote the democratic value of transparency and accessibility.

Notice an important feature of this "superficial" form of popular metadoctrinalism: popular metaphors and appealing rhetoric need not be intended to alter the outcomes courts would otherwise have reached anyway; it is the very formulation of a rule that, in itself, promotes the democratic value. This is not to say such metaphors and rhetoric *don't* have such an effect; metaphors and rhetoric have a life of their own and tend to operate and develop in ways a court could scarcely have predicted beforehand. But it is not the purpose of the approach to affect substantive outcomes. In this specific, purposive sense, such an approach to popular metadoctrinalism is at least capable of being "outcome-neutral."

2. Rule Simplicity

Second, courts might consciously adopt rules that are themselves pithy or simple slogans.³⁶ This approach need not always affect a court's proc-

³⁴ Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 30 (2006).

³⁵ *Id.* at 29.

³⁶ *See, e.g.*, *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct.

ess of *selecting* a doctrinal rule (that is, the Fallon-Roosevelt process discussed earlier). This is because, as Professor Philip Bobbit has insightfully written, “the surest expressions of law are the clearest,” so that “[i]t is [often] not necessary to ‘simplify’ or to distort the law in order to bring it into line with our deepest convictions of common sense.”³⁷

Alternately—and equally modestly—popular metadoctrinalism might serve as a kind of tie-breaker, leading a court to the most desirable rule when several options are available. Thus, a court that is sensitive to the value of popular metadoctrinalism, whenever faced with two rules that are, in substance, equally preferable, would choose the rule that can be stated in a popularly accessible way.

But often times “simplification” will require a court meaningfully to alter its choice of legal rules. And this may result in the adoption of a rule that is substantively less attractive, which choice can carry serious social costs.³⁸ All this shows, however, is that the promotion of institutional transparency is but one factor to be considered. In selecting the appropriate doctrinal rule, a popular metadoctrinalist court would be well-advised to weigh the democratic value of transparency and openness against the various other rule-selection criteria identified by Professor Roosevelt.

3. *Intuitive Operative Concepts*

Third, and finally, courts might adopt tests that propose to decide cases on the basis of concepts and judgments that are especially accessible to the general public—as, for example, the “reasonable observer” standard in the context of the Establishment Clause,³⁹ or the potentially⁴⁰ commonsensical notion of “consent” in the Fourth Amendment context. By adopting such rules whenever they are available and workable and in a purposively outcome-neutral way, courts would promote accessibility. This approach would also make it more likely that, if the general public ultimately disagrees with a court’s decisions on a systemic level, those deci-

2594, 2611 (2006) (applying the “one person, one vote” rule); *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Thomas Jefferson’s letter to the Danbury Baptist Association, which advocated a “wall of separation between church and state”).

³⁷ Philip Chase Bobbit, *Foreword* to CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED* xvi (1997).

³⁸ See Guido Calabresi, *Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class*, in *ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES* 171, 187 (Mauro Cappelletti & Bryant Garth eds. 1979) (discussing the societal costs of rule simplification, as well as the possibilities of promoting equality through such efforts, and concluding that, while “I wish I could believe that . . . a move toward total simplification could resolve our problems[,] [u]nfortunately, it cannot.”).

³⁹ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

⁴⁰ This is not to say that the consent search doctrine, in practice, operates in a way that resonates with popular understandings and judgments. It does not. See Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2191–93 & n.36 (2006) (discussing the extent to which consent in the Fourth Amendment context has become a legal fiction).

sions can be more meaningfully scrutinized by lay audiences. Once again, it is the *possibility* of more meaningful scrutiny that makes a decision more democratically legitimate.

IV. TWO CHALLENGES

I have little doubt that courts do in fact take popular metadoctrinalist approaches into account on some occasions. But given courts' incentive structures, their employment of these approaches is likely to be either too narrow or too broad—or perhaps both.

First, it is clear that courts do sometimes employ popular metaphors and rhetoric, select appealing slogans as rules, and adopt intuitive operative bases to get their point across. The principal problem here is one of narrowness. Courts have a strong incentive to have their rulings be accepted, but very little interest in encouraging, or even provoking, scrutiny of their opinions. Thus, the problem is that courts are likely to employ popular metadoctrinalism in those circumstances when it is least important—i.e., when there is near-unanimous agreement, and so the importance of transparency and clarity is at its lowest. By comparison, courts are likely to shy from embracing popular metadoctrinalism when they believe their opinions are vulnerable—i.e., in those situations in which transparency and accessibility turn out to be the most important. The courts' institutional incentives, then, would lead them to take too narrow an approach to the furtherance of popular metadoctrinalist values.

Second, and at the other extreme, courts may, if and when they apply these approaches, do so single-mindedly, in a way that proves to be too broad. Specifically, there is a meaningful concern that, if courts make more accessible and transparent their decisions protecting or benefiting politically weak individuals or groups, there is a chance that those decisions will not survive the heightened criticism to which popular metadoctrinalism might subject them. In this situation, courts would arguably be applying popular metadoctrinalist lessons too broadly.

V. CONCLUSION

In one sense, the kind of popular metadoctrinalism I discussed in this Essay is standard fare. We would obviously prefer judicial opinions to be clearer, and careful articulation of doctrinal rules is undoubtedly an important component of such clarity. The connection between judicial opinions and societal scrutiny is also well-recognized in the literature. In this sense, it is unfair to call popular metadoctrinalism the “next” frontier. We're already there, and long have been.

But on a more fundamental level, our intuition has been so unsystematic as to be useless as a form of criticism. Aside from the occasional praise of an especially articulate jurist,⁴¹ commentators have become largely fatalistic when it comes to the articulation and framing of doctrinal rules—we take clarity when we get it, and deal with messiness (or undertake to offer our own views of what judges *really* intended) when we don't.⁴²

This Essay has sought to push the metadoctrinalist and the popular constitutionalist toward a joint effort at more systematic and conscious scrutiny of doctrinal clarity. It has offered a taxonomy with which to consider what kinds of clarity a court has employed, as well as a description of the most significant challenges popular metadoctrinalism faces. And, if one small step is enough to incite a journey, then perhaps a sustained, self-aware popular metadoctrinalist scholarship truly will be the next frontier.

⁴¹ See, e.g., Elena Kagan, Commentaries, *Richard Posner, The Judge*, 120 HARV. L. REV. 1121, 1122 (2007) (“Love them, hate them, agree or disagree with them, Judge Posner’s opinions make people think—about what the law is doing, about what the law should be doing, about why it all matters.”).

⁴² To be sure, there is some value in being unclear. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).